

(1958) 08 CAL CK 0023
In the Calcutta High Court
Case No : Civil Revision No. 12 of 1957

Rameshwarlal Lachminarain	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 19-08-1958

Acts Referred:

Railways Act, 1989 — Section 72, 77

Citation : (1959) 2 ILR (Cal) 507

Hon'ble Judges : Banerjee, J

Bench : Single Bench

Advocate : Gopinath Nandi, for the Appellant; Ajoy Kumar Basu, for opposite party No. 1(b), for the Respondent

Judgement

Banerjee, J.—This Rule is directed against an order, passed on new trial by the Full Bench of the Court of Small Causes, Calcutta, dismissing Petitioners' suit for non-delivery of one bale of staple fibre yarn, out of a consignment of seven bales which had been booked at Devannagore, a railway station on the Southern Railway, for carriage to Shalimar, a station on the Eastern Railway, at the material time, but now on the South East em Railway. The Plaintiff Petitioners valued their claim at Rs. 764.

2. Plaintiff Petitioners were themselves consignees of the goods. After it was found that only six out of the seven bales had arrived at the destination, the Plaintiffs obtained delivery of the six bales and also obtained from the Eastern Railway a short certificate, dated August 5, 1953, in respect of non-delivery of one bale.

3. The goods were insured against loss with the Great American Insurance Company Limited. Plaintiffs obtained the insured value of the non-delivered goods from the insurance company. Thereupon the insurance company caused a notice u/s 77 of the Railways Act to be served on the General Manager of the Eastern Railway, on November 16, 1953. The material portion from the aforesaid notice is quoted below:

The abovementioned consignee having received the value of the non-delivered bale from my clients has issued a letter of authority to the railway administration advising them to make payment, in respect of the claim arising out of the non delivery as aforesaid, to my clients abovenamed.

4. The insurance company, however, did not institute the suit but the consignee Plaintiff who is the Petitioner before this Court, did.

5. The non-delivered goods were not traced up to September 22, 1954, when the suit out of which this Rule arises was filed. After the filing of the suit, however, the missing bale was traced and offered to the Plaintiff's but they refused to accept the same.

6. The main defence was that the Plaintiffs could not get any relief because there had been no valid service of notice u/s 77 of the Railways Act, the notice caused to be sent at the instance of the insurance company was, it was urged, not a notice by a person entitled to compensation for non-delivery of the goods. The suit was not filed by the insurance company, in exercise of any right of subrogation. The consignee Plaintiffs, who filed the suit, did not themselves send any notice u/s 77 of the Railways Act.

7. The Plaintiff Petitioners tried to escape from the situation thus created by arguing in the first place, that the notice sent at the instance of the insurance company was really a notice on behalf of the Plaintiffs, the insurance company being merely their agent under a power of attorney (Ex. 5) executed in favour of the insurance company. The Plaintiff Petitioners made an alternative attempt to wriggle out of the situation by arguing that in case of non-delivery of goods, it was not necessary to send any notice u/s 77 of the Railways Act.

8. The court below overruled both the contentions. The findings by the court below are challenged in this Rule.

9. I have gone through the notice u/s 77 of the Railways Act, sent at the instance of the insurance company. That notice is not a notice sent at the instance of an agent of the Plaintiffs under a power of attorney. The notice contemplated u/s 77 of the Railways Act must be given by or at the instance of or on behalf of the Plaintiff claiming damages. That was not done in the instant case. Therefore, the Plaintiffs are not entitled to the benefit of the notice, sent at the instance of the insurance company, which company ultimately decided not to pursue the matter. The next question is whether a notice u/s 77 of the Railways Act was at all necessary in the instant case, the claim for compensation being based upon a story of non-delivery.

10. On this point the decisions in this Court are not uniform.

11. In the case of *Srithidhar Mandal Vs. Governor-General in Council, Henderson, J.*, observed as follows:

The first contention made on behalf of the Petitioner is that Section 77 has no

application to claims to compensation for non-delivery. The decisions are conflicting. That is perhaps not surprising, because reasons can be put forward in support of either view. I am, however, satisfied that at any rate in this Court the weight of authority is to the effect that the section does apply to claims to compensation for non-delivery.

12. That may be so, in spite of the conflicting decisions on the point, when non-delivery is related to causes other than loss. But if non-delivery is due to the fact that the railways administration lost possession of goods on account of the goods being mislaid or misdelivered or on account of inability on the part of the railway administration to trace the goods, then, in my opinion, notice u/s 77 would be necessary, even in cases of such non-delivery.

13. In this view I am fortified by a judgment of a Division Bench of this Court in the case of Union of India (UOI) Vs. Meghraj Agarwalla and Another, in which Das Gupta, J., observed as follows:

The mere fact that something was not delivered in this case a part of the consignment is not sufficient to show that there was loss within the meaning of Section 77. In East Indian Railway Co. Vs. Jogpat Singh, , this Court held that the word "loss" in Section 72 of the Indian Railways Act does not mean pecuniary or other loss suffered by the owner of the goods though being wrongly deprived of the possession, use or enjoyment thereof, but means loss of the goods while in transit and such loss occurs whenever the railway company, to which the goods have been consigned for conveyance, in voluntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them. This view has been constantly followed. It seems to me to be very clear that this interpretation of the word "loss" as used in Section 72 must be applied to the word as used in Section 77, as both these sections form part of the scheme of the legislature as regard the liability of the railway administration as carriers. The position in law, in my opinion, is that if the non-delivery of a portion of the consignment in this case was due to the fact that the railway involuntarily or through inadvertence lost possession of the goods and was unable to trace them it would be a case of loss within the meaning of Section 77 of the Indian Railways Act.

14. Mr. Gopinath Nandi, the learned advocate for the Petitioner, strongly relied upon certain observations by Mitter, J., in an unreported Division Bench decision of this Court, Alliance Assurance Company Ltd v. Union of India Unreported, which observations are hereinbelow quoted:

It is clear that the word "loss" in Section 77 must mean loss to the railway and not loss to the customer. If the word "loss" meant loss to the customer, the word "deterioration" would have been redundant. There is a conflict of decisions as to the meaning of the word "loss" but on a plain reading of the section we take the view that a suit for non-delivery of goods is outside the purview of Section 77. Non-delivery may, however, be shown to be due to loss to the railway or to

destruction or deterioration, in which event notice u/s 77 would be required.

15. I do not understand how those observations help Mr. Nandi. Mitter, J., made it clear that if non-delivery was due to loss notice u/s 77 would be required. I am of opinion that the effect of the decision of Mitter, J., in *Alliance Assurance Company Ltd. v. Union of India* Unreported decision of Mitter, J., in Civil Revision, No. 1531 of 1954 is the same as the decision reported in *Union of India v. Meghraj Agarwalla* (Supra) referred to above

16. In the instance case, it appears that non-delivery of one bale, out of the consignment of seven bales, was due to temporary loss thereof by the railway administration. The missing bale was found out and offered to the Petitioner after the institution of the suit. The Petitioner, however, refused to accept the same. In these circumstances, notice u/s 77 of the Indian Railways Act was a prerequisite to the success of the claim. Having failed to give such notice, the Plaintiff Petitioners' claim is bound to fail.

17. I, therefore, affirm the judgment of the court below and discharge this Rule with costs. Hearing fee in this Rule is assessed at two gold mohurs.