
(1959) 10 OHC CK 0001
In the Orissa High Court
Case No : Second Appeal No. 218 of 1957

Sheikh Makbul	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 30-10-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1
Evidence Act, 1872 — Section 115
Limitation Act, 1908 — Section 3
Railways Act, 1890 — Section 72, 74C

Citation : AIR 1960 Ori 146

Hon'ble Judges : S. Barman, J

Bench : Single Bench

Advocate : H. Sen, for the Appellant; B.K. Pal, for the Respondent

Final Decision : Dismissed

Judgement

S. Barman, J.—This is plaintiff's second appeal from a reversing decision of the learned Subordinate Judge, Balasore in Appeal No. 8 of 1956, whereby he set aside the decision of the learned Munsif and dismissed the plaintiff's suit against the Union of India, representing the appropriate Railway Administration mentioned in the plaint for alleged damages to a certain consignment of potatoes from Kanpur Central Station on the Northern Railway to Bhadrak Railway Station on the South Eastern Railway.

2. The facts shortly stated are these: On 5-7-1953, 251 baskets of potatoes were consigned from Kanpur for delivery at Bhadrak. The consignment was carried by the defendant Railway from Kanpur to Bhadrak. On 19-7-1953 the goods were delivered at Bhadrak in rotten condition as alleged. On arrival of the wagon containing the said consignment it was found, as alleged to be emitting foul and obnoxious smell and some watery substance was coming out from the crevices of the doors. On opening the baskets the potatoes were found deformed, rotten and unfit for human consumption.

The plaintiff took the consignment delivery which was granted by the A. D. C. I. (Assistant District Commercial Inspector) of Cuttack in the presence of the Station staff at Bhadrak. The percentage of damage as mentioned in the damage certificate is stated to be much less than the actual loss. On 10-8-1953 the plaintiff gave notice of his claim u/s 77 of the Railways Act. Upon the Chief Commercial Superintendent by his letter dated May 8/12 1954 repudiating the plaintiff's alleged claim, the plaintiff gave notice u/s 80 of the CPC to the appropriate authorities of the said two defendant Railway Administrations who, while having acknowledged the receipt of the said notices, did not however settle the plaintiff's alleged claim.

Thereafter on 29-9-1954 the suit was filed by the plaintiff against the defendants for recovery of Rs. 3,659-10-0 as alleged damages. The defendants filed their written statement in which they took the defence that the suit was barred by limitation; there was no delay in delivery; and that the goods having been consigned at owner's risk the defendants were not liable for the alleged damage. The learned Munsif decreed the suit in part for a sum of Rs. 1,923-4-0 against both the defendants who were jointly and severally liable to pay the decretal dues. In appeal, the learned Subordinate Judge in reversal of the said decision, dismissed the plaintiff's suit. Hence, this second appeal.

3. Mr. H. Sen, learned counsel for the plaintiff, contended that the Railway Administrations were negligent in having loaded the goods in a leaking wagon which was responsible for the damage caused to the goods. On this point the learned counsel relied on the Forwarding Note (Ext. A) which, according to him, showed that the goods were to be loaded in iron floor wagon at owner's risk to which effect there was an endorsement on the body of Ext. A. It appears, however, that there was another endorsement on Ext. A to the effect that the goods could be loaded in non-watertight wagon at owner's risk which was marked Ext. A-1.

The plaintiff challenged the genuineness of the last mentioned endorsement in Ext. A-1. It was commented that the Ext. A-1 was a subsequent interpolation on the Forwarding Note while it was in the custody of the Railway Administration concerned. The insinuation was that this subsequent interpolation was made on the document in order to absolve the railway from liability for loading the goods in non-watertight wagons, because it was in evidence that the alleged damage to the consignment of potatoes was caused by the leakage of water in the wagon which carried the goods. It was contended on behalf of the plaintiff that unless there was anything mentioned to the contrary the wagon must be water-tight.

In support of this contention the learned counsel relied on a decision of the Nagpur High Court in *Dominion of India v. Rupchand Heerachand* AIR 1953 Nag 169 where it was held that the employees of a Railway Administration are guilty of misconduct if they do not provide proper type of wagons for the carriage of goods and cause unnecessary delay in transit. In the judgment the Nagpur High Court relied on a decision of the Patna High Court in *Jamunadas Ramji v. East*

India Railway Co. Ltd. AIR 1933 Pat 630. The facts in the Patna case were that a consignment of "ata", "sooji" and "basen" was damaged by rain water forcing itself into the wagon.

It was held that this was due to the misconduct of the employees of the Railway Administration since it was their duty to provide against such ordinary contingency. It was further held that the fact that the rain water did enter the wagon and caused damage to the consignment was itself sufficient to hold that proper and requisite precautions were not taken by the Railway Administration to provide against such contingency. The learned counsel for the plaintiff also relied on the position that under the Tariff Rules potatoes have to be despatched in wooden floor and covered wagons with ventilators and the wagons are to be marked "perishable" so that they should have priority of movement. Instead, when ordinary covered wagons were used it was all the more necessary, according to the plaintiff, for the Railway Administration to have taken particular care of prompt movement.

The consignor is alleged to have presumably booked his goods evidently on the assumption that the goods would be carried within a reasonable time according to the Tariff Regulations and that wagons of right type would be provided. If the endorsement in the Forwarding Note Ext. A-1, permitting the railway to load the goods in non-watertight wagons, is found to be not genuine, then the Railway, is not protected because the evidence is that the goods got drenched in rain and it was the railway's risk not to have the goods loaded in watertight wagons. On this point the learned counsel drew my attention to the aspect that, as appears from order No. 26 dated February 21, 1956, the learned Munsif referred to the Railway Rules Goods Tariff Rules, No. 29, the Tariff Manual which initially had not been produced before him during the trial. Accordingly the trial was reopened to be heard on further materials as appears from the said order. Mr. H. Sen urged that the learned Munsif's finding, on the basis of the materials before him, should not have been disturbed by the lower appellate Court. As regards the selection of the wagon in which the goods were to be carried, the wagon must not be defective or leaky.

The plaintiff alleged that the selection of wagon was due to the gross negligence and carelessness on the part of the employees of the Railway Administration, as it was found that the roof of the wagon was leaky and rain water trickled down through the leaky roof on the upper part of the baskets which were found moistened. A point was taken in the plaint that the wagon selected by the railway was quite unfit for carriage of goods of perishable nature in the monsoon season.

4. Mr. B.K. Pal, learned counsel for the defendant-railway Administrations, contended that the Forwarding Note is only a statement by the consignor as appears from Sections 58 and 72-A of the Railways Act. Accordingly every such statement need not be mentioned in the railway receipt Ext. B. Section 72-A requires that the person delivering only shall execute the Forwarding Note and once the Forwarding Note is executed by such person it will limit the

responsibility of the Railway Administration qua everybody. I have carefully considered the question of alleged interpolation on the Forwarding Note and the aspect of non-mention, in the Railway Receipt Ext. B, of the endorsement on the Forwarding Note Ext. A-1 permitting the railway to load in non-watertight wagon at owner's risk. It seems to me that the finding of the lower appellate court, -- that no interpolation can be interred from the fact that there is no mention of the non-watertight wagon in the Railway Receipt, Ext. B, -- is correct.

That apart, assuming that the Forwarding Note was not genuine and that there was some interpolation in the document with the consequence that it has to be kept out of consideration altogether in determining the rights and liabilities of the parties, even so it is clear from the Railway Receipt Ext. B that the goods were agreed to be carried at owner's risk. In fact P. W. 1 himself admitted in cross-examination that the goods were carried at owner's risk. Section 74-C provides that when any animals or goods are carried or are deemed to be carried at owner's risk rate the Railway Administration shall not be responsible for any loss, destruction or deterioration of or damage to such goods, from any cause whatsoever except upon proof that such loss, destruction or deterioration or damage was due to negligence or misconduct on the part of the Railway Administration or any of its servants. Sub-section (1) of Section 74-C provides that the goods shall be deemed to have been tendered to be carried at owner's risk rate unless the sender or his agent elects in writing to pay the Railway Risk rate. Sub-section (2) provides that where the sender or his agent elects in writing to pay the railway risk rate under Sub-section (1), the Railway Administration shall issue a certificate to the owner to that effect.

Under the new Section 74 the obligation of the Railway in regard to carriage of goods has now become a statutory obligation instead of contractual obligation. The old Risk Notes which constituted the agreement forms purporting to limit the liability of the Railway Administration for loss, destruction deterioration of animals or goods delivered to be transported by the Railway have now been replaced by Forwarding Notes from August 1, 1950. In the present case, therefore, if the Forwarding Note is discarded and is treated as not existing then the question of liability is to be determined by the terms as contained in the Railway receipt as aforesaid.

Such liability is that of a bailee u/s 151 of the Contract Act. Rule 30 of the "General Rules for Acceptance, carriage and delivery of Goods" provides that in all cases where the owners of goods are required to do loading and unloading, as the case may be, the risks attending these operations shall be borne by the owners (Sanjiva Row's "The Indian Railways Act" -- 3rd Edition, Vol. II, page 1188). The law also requires the owner to indent (choose) the wagon. Once the wagon is indented the Railway's responsibility ceases. In the present case P. W. 1 states in evidence that the wagon was indented. Thus the liability of the Railway ceased upon the plaintiff having chosen the wagon for consignment of the goods.

5. On the question of alleged delay in delivery of the goods Mr. H. Sen, learned counsel on behalf of the plaintiff contended that the Railway Administration made a delay by six days. The goods were despatched from Kanpur on July 5, 1953 and they were delivered to the plaintiff on July 19, 1953. Thus it took 14 days for delivery whereas, as the plaintiff's case is, the usual time for such delivery from Kanpur to Bhadrak was 7 to 8 days. P. W. 1 deposed to that effect. D.W. 2 the A. D. C. I. and D. W. 4 the Goods Clerk witnesses for the Railway Administrations deposed regarding the time taken for the goods to reach Bhadrak from Kanpur.

Therefore, admittedly there was delay of at least five days which, it was contended on behalf of the plaintiff, could not be explained by the defendant Railway Administrations and accordingly the plaintiff claimed the benefit of presumption against the Railway. In this context, the learned Counsel relied on a decision of this Court in *Damodar Debota v. Union of India* 22 Cut LT 512: (AIR 1956 Ori 222) where on the fact of delay of only two days the delivery of the goods consigned it was held that the goods being perishable in nature came directly under Rule 163, which provides that perishable goods shall be despatched by the first available means and particularly with regard to potatoes, that wagon containing potatoes shall be despatched by Fast Goods or Mixed trains -- the despatching Station shall wire to all junctions and engine-changing station, on route to push the wagon on by connecting trains (Sanjiva Row's "The Indian Railways Act" 3rd Edition, Vol. II, page 1275); and hence it would amount to negligence on the part of the Railway Administration if it was not delivered in due time without any reasonable cause.

This Court found that the plaintiff on evidence had successfully shown that there had been a delay of two days in delivering the consignment of mangoes, in that particular case, without any reasonable cause and that no explanation whatsoever came forth from the Railway Administration as to the cause of the delay and further that the Railway Administration having failed to show as to how the consignment was dealt with during the time it was in their possession or how the delay had occurred, the only legal inference that could be drawn was that there was misconduct on the part of the Railway Staff and accordingly the plaintiff was entitled to a decree. Accordingly, the learned Counsel for the plaintiff in the present case while relying on the said Rule 163 urged that by reason of delay of five days in delivering the consignment of potatoes, which were perishable in nature, the goods were damaged as aforesaid for which the Railway Administrations were liable.

6. Mr. B.K. Pal, learned counsel for the defendant Railway Administrations, on the point of delay, contended that in the present case the delay was irrelevant. According to him the plaintiff must prove that the damage was caused by the delay of five days. It had to be shown that the potatoes could bear 8 or 9 days delay which was admittedly the usual time for the carriage of the goods from Kanpur to Bhadrak but it could not bear 13 days delay. In the case of 22 Cut LT 512: (AIR 1956 Ori 222), cited above where even on the ground of two days

delay this High Court found that there was misconduct on the part of the railway staff and the plaintiff was held to be entitled to a decree, it must be noticed however that in the particular case, at the time of actual hearing in the Court below it was not seriously disputed that there was some delay in transit. That apart, the railway in that particular case did not give any explanation of the alleged delay of two days.

It is clear from paragraph 5 of the judgment in that case that no explanation whatsoever was coming forth from the Railway administrations as to the cause of the said delay. In the present case in view of the long distance from Kanpur to Bhadrak where three Railway Administrations were concerned, it cannot be said that five days delay was unreasonable. It was also in evidence that the goods-train had to be detained at junction stations. In fact, D. W. 4 the Goods clerk at Bhadrak deposed that there was a little delay in the arrival of the train as it had travelled through two railways and through several junctions. The Railway is also protected by Rule 8 of the General Rules for acceptance, carriage and delivery of goods (Goods Tariff No. 29 in force from 1st June 1954), which provides that railways do not guarantee the despatch of goods by any particular train nor will they be responsible for the arrival of goods at any stations within any definite time. (Sanjiwa Rao's "The Indian Railways" Act 3rd Edition, Volume II, page 1182).

In a recent case decided by this High Court in Nanda Kishore Chiranjilal and Another Vs. Union of India (UOI), the plaintiffs alleged to have suffered damages of their articles consigned from Faraqbad to Bhadrak. The plaintiff's version was that a consignment of 273 baskets of potatoes was despatched on May 27, 1952 from Faraqbad on East Indian Railway at the time when the consignment was made; and the consignment reached Bhadrak the place of destination on June 8, 1952 and the plaintiffs when taking delivery of the goods on June 9, 1952 found that all the baskets had suffered damages to the extent as stated in the judgment. The plaintiffs averred that the damages were on account of delay and negligence on the part of the railways employees. The defence was that there was no negligence or delay in the transit of goods; on the contrary the plaintiffs paid a lower rate and acknowledged that the transit was to be at the owner's risk; the damages were suffered in due course of transit even though there was no negligence on the part of the railway authorities and therefore the railway is not liable.

On these facts Mr. Justice Mohapatra found that there was no material on record to show that the railway administration had guaranteed the period of transit and held that it is usually the case with the railway administration that it never takes the responsibility of giving any guarantee about the time to be taken during transit. In that particular case, the courts below had found that the consignment reached the destination within a reasonable time. In second appeal the High Court held that the point taken on behalf of the plaintiffs, that there was considerable delay during the transit which caused damage to the consignment,

had no substance. In *Bengal and North Western Railway Co. Ltd. Vs. Sobrati Mia and Others*, the plaintiff obtained from the lower Court, damages with regard to certain consignment of fish which arrived from Mokamah Chat station at their destination at Asansole eight hours late. The delay was due to the fact that it was detained for 33 minutes at an earlier station in order to attach a saloon in which His Highness the Maharaja of Nepal was travelling.

Even so the connecting train had not left Mokamah Ghat; but these consignments of fish were not put on board it and they were actually sent by the next train which arrived eight hours later. In this context, the, Calcutta High Court held that it was necessary for the plaintiff to prove that the damage to the fish was due to the delay at Mokamah Ghat Station. It was also commented in the Judgment that the plain fact of the matter in that particular case was that the plaintiff was really trying to make out a case of *res ipsa loquitur* (the thing speaks for itself) which the High Court observed was quite hopeless and dismissed the plaintiff's suit for damages. In the present case, it was nobody's case that no time was required for delivery of the consignment of potatoes from Kanpur to Bhadrak. Certainly the usual time is admittedly 8 to 9 days. Having regard to the perishable nature of goods, the plaintiff had to satisfy that the potatoes would not have been damaged during 8/9 days time and that the consignment suffered damages because of the delay of five days beyond the usual time of 8/9 days.

In another case in *Madras and Southern Mahratta Ry. Co. Ltd. Vs. Ravi Shing Deepsing and Co.*, the Calcutta High Court held that delay on the part of the railway to carry consignment which is not unreasonable is no indication of misconduct. In the light of these authorities cited above and having regard to the facts and circumstances of this case I hold that there was no unreasonable delay during transit which caused damage to the consignment and that the Railway Administrations are not responsible for the damage to the goods.

7. Lastly, there is a point of limitation which the defendants raised in the written statement but did not press it as an issue before the learned Munsif. The learned Subordinate Judge in appeal however found that the suit was barred by limitation. Mr. H. Sen, learned counsel for the plaintiff, contended that the defendants not having pressed the issue as to limitation before the learned Munsif, it was not open to the lower appellate Court to have gone into the question and given his decision thereon. In support of his contention the learned counsel cited several decisions. In *U. Kotayya v. N. Sreeramulu* AIR 1928 Mad 900, it was held that a pleader's general powers in the conduct of an appeal include, in ordinary cases, the abandonment of an issue which in his discretion he thinks inadvisable to press and therefore an issue of fact abandoned by him in the lower appellate Court cannot be challenged in second appeal.

The context in which the Madras High Court gave the above finding was in connection with an issue of pure fact, namely, whether the plaintiff is entitled to the property. The Vakil had not argued before the lower appellate Court the

question covered by the said issue stating that a finding in his favour on the other issue would be quite enough for his client. In *Venkata Narsimha Naidu v. Bhasyakarlu Naidu* ILR Mad 367 (PC) on the facts that in a partition suit between brothers, relating to a zamindari at the hearing, after the other issues had been settled, the defendant asked to be allowed to raise an issue as to limitation on the ground that he had been in possession adversely to the plaintiff for more than 12 years but the Judge refused to allow the issue to be raised, it was held that no question of limitation necessarily arose on the pleadings and it was not obligatory on the Judge to direct an issue on that point.

Furthermore in the context that one of the issues as to whether the zamindari was impartible or not, was abandoned by the Vakils for the defendant; it was held that the Vakil's powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press. All these cases cited above, related to questions of either pure fact or question of law dependent on finding of fact, which, -- on materials available before the court without further evidence, --could not be given for deciding the issue. Where however issues such as jurisdiction and limitation,--as questions of pure law, -- are involved, I do not think that the right to raise an issue can be treated to have been waived.

Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the Courts themselves : *Kunclo Mal v. Daulat Ram Vidya Parkash Firm* AIR 1940 Lah 75. The Patna High Court in *Pallakdhari Thakur and Others Vs. Bankey Thakur and Others*, where the question as to limitation was raised in the written statement and an issue was framed but it was not pressed in the trial court, held that the defendants respondents were entitled to press that point on appeal. It is thus open to the parties to raise it at subsequent stage. That apart, when such issue cuts at the very root of a litigation and if the court's attention is drawn to it, it must take cognizance of the same and give its decision thereon. Mr. H. Sen however contended that the issue of limitation in the present case being a mixed question of law and fact, the defendants should not be allowed to raise it at a late stage as alleged.

The learned counsel relied on a decision of the Calcutta High Court in *Bejoy Kumar Bhattacharjee and Another Vs. (Firm) Satish Chandra Nandi, Jnanendra Nath Nandi, Dharendra Nath Nandi and Others*, where it was held that no doubt the plea of limitation can be urged at any stage having regard to Section 3 of the Limitation Act but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence, it is difficult for the Court sitting in appeal to give effect to the defence contention and the court is justified in rejecting it. In *Secretary of State v. Ananda Mohan* 34 C LT 205: (AIR 1921 Cal 661) which was also relied on by the plaintiff, it was held that the general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon a question of fact; points of

limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on evidence; if limitation is urged as bar, the facts on which it is barred must be proved after an issue has been framed.

In both the two particular Calcutta cases cited above, limitation was a mixed question of law and fact where it was necessary for the party to produce evidence. But that is not the case here. In the present case, on the materials as available, this court is in a position to give a finding on limitation. It is not necessary for the party to produce fresh materials as in the Calcutta cases cited above. The present case is clearly governed by Article 30 or Article 31 of the Limitation Act. Article 30 provides a period of one year limitation from the time when the alleged loss or injury occurred. Article 31 provides for the same period one year limitation from the time when the goods ought to be delivered. In the present case, the goods were delivered on July 19, 1953, alleged to be in rotten condition as aforesaid. The suit was filed not until September 29 1954. In either view whether it was under Article 30 or 31, the suit is clearly barred by limitation. Section 3 of the Limitation Act is imperative. It provides that every suit filed after the period of limitation shall be dismissed although limitation has not been set up as a defence. The point of limitation was taken as a ground as ground No. 9 before the lower appellate Court. The plaint itself shows that on the date of the institution of the suit the claim was barred by limitation. Paragraph 4 of the plaint states that potatoes were found damaged on opening of the baskets. Admittedly the delivery was taken on July 19, 1953 when the potatoes were found damaged. Therefore, one year period of limitation expired on July 19, 1954. Accordingly the suit having been filed on September 29, 1954 it was clearly out of time. Furthermore, the damage certificate Ext. C dated July 19, 1953 also supports the point of limitation raised on behalf of the defendants. The materials available to the Court are sufficient for giving a decision on the point of limitation. It is not necessary for the party to produce any further evidence on the point. I do not, therefore, accept the contention of the learned Counsel For the plaintiff on this point to be tenable in law. I uphold the finding of the lower appellate Court that the suit was barred by limitation.

8. The result, therefore, is that the decision of the lower appellate Court is upheld. The appeal is accordingly dismissed with costs throughout.