
(1975) 01 CAL CK 0023
In the Calcutta High Court
Case No : A.F.A.D. No. 49 of 1963

Suraj Nath Prosad Kedarnath

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 29-01-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Evidence Act, 1872 — Section 114, 14, 18
Limitation Act, 1908 — Section 14(1)
Railways Act, 1890 — Section 72, 72A, 75

Citation : AIR 1975 Cal 203

Hon'ble Judges : R. Bhattacharya, J; K.J. Sen Gupta, J

Bench : Division Bench

Advocate : A.D. Mukherjee and N.K. Ganguli, for the Appellant; S.K. Roy Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

Sen Gupta, J.—This appeal arises out of a suit to recover Rs. 9, 875 as compensation for goods and consigned by the plaintiff for carriage by railway which were not delivered to him.

2. The damage for non-delivery of goods entrusted to the railway for carriage was claimed under the following circumstances :--

On the 26th July, 1947 the plaintiff delivered to the East Indian Railway at Howrah Station two bars of silver bearing Nos. 10196 and 259 weighing 1 md. 31 seers for carriage to Balia Station on Oudh and Tirhut Railway now North-Eastern Railways and for delivery of the same to the consignee thereof. The East Indian Railway now Eastern Railway administration accepted the said goods to be carried and delivered as per receipt No. C-003343 granted on that account. The plaintiff made a declaration of the conditions and value of the consignment prior to acceptance of the articles by the railway administration for carriage. On repeated demands the railway administration did not deliver to the plaintiff the

said goods or any part thereof, value whereof on or about the date was Rs. 9,875 including the incidental charges and railway freight etc. The notices u/s 77 of the Indian Railways Act and u/s 80 of CPC were thereafter served upon the defendants. It was alleged" that the defendant wrongfully detained the goods or otherwise converted the same to their own use and have wrongfully deprived the plaintiff of those articles; the plaintiff then filed the suit being Suit No. 3056 of 1948 in the Original Side of the High Court on the 6th September, 1948. The said suit was disposed of on November 25, 1958 and the same was dismissed on the ground of want of territorial jurisdiction of the High Court. This suit was filed in the Court of Subordinate Judge at Howrah on 10-12-58. The plaintiff contends that the period during which the suit was proceeding in the Hon"ble High Court should be deducted for counting period of limitation.

3. The defence taken was that the suit as filed by the plaintiff was hit by the provisions of Section 75 of the Indian Railways Act. According to the defence, the consignment being excepted articles was liable, to be insured u/s 75 of the Indian Railways Act (hereinafter referred to as the Act) and that the consignor was required to pay a percentage on the value of the consignment as insurance charge. As the consignor elected not to pay the insurance charge and executed a risk note in form "X" wherein the railway administration was absolved from all the responsibility for loss of the consignment arising from any cause whatsoever. Their further defence was that the suit was barred by limitation as according to them the provisions of Section 14 of the Limitation Act was not attracted to the instant case as the plaintiff failed to prosecute the suit in the Hon"ble High Court with good faith and with due diligence.

4. The Court of first instance allowed the claim of the plaintiff. The Court of appeal below, however, dismissed the claim of the plaintiff altogether. The plaintiff has appealed to this Court.

5. Mr. Mitter has challenged the finding of the learned Additional District Judge. Howrah on the ground that the learned Judge wrongfully used the statement made by the defendants in the written statement as a substantive piece of evidence. According to Mr. Mitter, the learned Judge has also failed to consider the question of onus in such cases. The finding of the learned Court of appeal below that the suit was barred by limitation and the plaintiff was not entitled to get the benefit of Section 14(1) of the Limitation Act, has also seriously been challenged in this appeal.

6. I shall take up the first point urged by Mr. Mitter, first. To understand the said point it is better to quote the relevant portion of the provisions of Section 75 of the Act which stood as follows :--

"75 (1) When any articles mentioned in Schedule 2 are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds three hundred rupees, the railway administration shall not be responsible for the loss, destruction or

deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk

(2)"

The above section clearly provides that the railway administration would not be responsible for the loss, destruction or deterioration of the parcel unless the person sending the parcel has declared the value of the goods at the time of the delivery of the parcel for carriage by railway and has paid or engaged to pay a percentage on the value so declared, if required to do so by the administration. Unless both these conditions were complied with, no responsibility was fixed to the railway administration for the loss of the parcel.

7. Mr. Roy Chowdhury appearing for the Union of India has contended that those conditions were not fulfilled by the plaintiff. It is no doubt admitted that the declaration of the value of the goods consigned was made by the plaintiff but being required to pay a certain percentage on the value so declared as the charge of insurance, the plaintiff failed to comply with the same. As such, it is submitted that the plaintiff's suit was hit by the provisions of Section 75 of the Act.

8. In the instant case virtually there is no difference in opinion as to the declaration required to be made u/s 75 of the Act. There is no denial that the plaintiff filed the declaration as required. The plaintiff also did not deny the fact that the charges required to pay for insurance were not paid. In this background it has got to be seen whether the plaintiff can realise the damage for non-delivery of the goods as claimed.

9. The most important point which is raised in this appeal is as to the meaning of "loss" as appears in Section 75. It is contended by Mr. Mitter that Section 75 of the Railways Act absolved the defendant from liability only in case the defendant proved that the parcel has been lost not only to the plaintiff but also to the railway administration. Mr. Roy Chowdhury has drawn our attention to paragraph 7 of the written statement where the defendant wanted to suggest that loss was due to the misconduct of the railway employees who were entrusted with the duty of delivery of the disputed goods to the consignee and that those railway employees must have misconducted themselves for some ulterior motive in delivering the said goods to one M/s. Jogendranath and Ranendra Nath without production of any railway receipt or furnishing any indemnity bond.

10. On the pleading, however, it is seen the consignment was received by the receiving station. Other part of the statement made by the defendant in the written statement might be an admission on their part that those goods were handed over to other persons and that too without taking any receipt

whatsoever. It may, however, be noted that there is no evidence to prove this part of the story as set up by the defendant. A person making any admission in his pleading cannot take an advantage of the same; the party in whose favour the admission is made may get benefit of the same. In the instant case the defendant made some statement making certain allegations against the railway employees. That part of the statement has not been admitted by the plaintiff anywhere. The goods were handed over to the railway administration for carriage to its destination. Under the law, in case of non-delivery of the consignment, the railway administration is bound to make a disclosure showing how the goods or the consignment was dealt with at different stages as the same : is within the special knowledge of the railway administration. In case of failure to make such a disclosure by the railway administration an adverse inference can be made against them u/s 114(g) of the Indian Evidence Act. The goods are admitted to have been received by the destination station. The records of the same, if produced, would have shown that the goods were still lying in the same railway station. The production of such a document could have easily dispelled the truth of the statement made by the defendant in the written statement, that those goods were handed over to other person as alleged therein. The onus in such cases is undoubtedly on the railway administration to prove the loss of the goods as alleged by them. Mere assertion in the written statement is no proof of the same. Curiously enough in the instant case not a single witness has been examined, nor a single document has been produced by and on behalf of the railway administration in support of the contention, made by them.

11. Mr. Roy Chowdhury has, however, contended that the "loss" should be inferred to have been established by the admission of the plaintiff that the consignment was not delivered to him. The said contention of Mr. Roy Chowdhury is not acceptable inasmuch as that non-delivery or mis-delivery of goods may be due to loss or may be due to other causes. There might be cases in which goods might be kept in godown of the railway administration without making any serious efforts to find them out. The goods remaining in custody of the railway administration can under no stretch of imagination be said to have been lost. There might be various other circumstances under which the goods might remain in the custody of the railway administration, which may not be delivered to the consignor. I should not endeavour to exhaust enumerating the instances of such cases. It is enough to say that non-delivery by itself does not indicate loss of the goods. In such cases the railway administration cannot rely upon the provision of the risk note which prima facie exempt it from liability unless evidence has been adduced which satisfies the court that loss, in fact, has occurred. Such a point was raised though in context in risk note form "B" and in Chapter VII of the Railways Act (IX of 1890). The point was considered by Suhrawardy and Page JJ. in the case- of East Indian Railway Co. Vs. Jogpat Singh, . The observation of their Lordships clinches the issue and as such it may be narrated here.

"It does not, therefore, necessarily follow that by proving the non-delivery of such goods the "loss" of the goods is also proved, for non-delivery or mis-

delivery of goods may be due to "loss" or may be due to other causes."

Their Lordships further held that :

"Except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the risk note which pro tanto exempts it from liability unless and until the evidence has been adduced which satisfies the court that a loss has occurred."

12. The above observation is applicable with all its force in the instant case. In the absence of proof of loss of the goods so consigned by the railway administration the claim of the plaintiff becomes simpliciter a claim for damage for non-delivery of the goods. The railway administration having failed to discharge the onus which lies heavily on them to prove the loss of the goods booked, there is no escape from the liability for non-delivery of the goods so booked.

13. Our attention has been drawn to certain observation of Kajiji, J. made in the case of Ramchandra Jagannath v. G. I. P. Rly. Co. reported in AIR 1918 Bom 148 wherein it has been observed by his Lordship :

"Negligent misdelivery of goods to a person other than the owner is not such a loss as is contemplated by Section 75."

I may mention here that in the background of the facts and evidence of this case I do not enter into the discussion to find out the circumstances, and to exhaust the same, where "loss" can be said to have been occurred as required u/s 75 of the Act. The same may be considered if and when occasion arises. In the instant case, however, as already noted there is absolutely no evidence to prove the parting with the goods by the railway administration at any stage. For the reasons stated I need not enter, into the discussion what happens if the railway employees remove the same or somebody commits theft of the same while the goods were in the custody of the railway administration. Neither I am prepared to enter into discussion to consider a case where the goods are delivered by the railway employees through mistake to a person not entitled to receive the same.

14. In this connection I may refer to the judgment delivered by Lahiri, J. in case of Union of India Vs. D.N. Mondal, , wherein it has been held that

"where railway administration has failed to prove the loss, destruction or deterioration of the consignment by sufficient evidence, Section 75 of the Indian Railways Act would not be attracted."

I most respectfully agree with the same and the reason for my acceptance of the said principle has already been ascribed by me.

15. Similar point was raised in the case of The Banarsi Stores Vs. President of the Union of Indian Republic for India and Others, . The principle laid down by their Lordships as to the burden of proof is the same which I have already held. It has been observed in the above mentioned decision that the burden of proof in

the case u/s 75 lies on the administration to prove it. In the case cited above the railway administration established by evidence that loss, in fact, took place. Accordingly, I hold that the onus to prove the loss lies on the railway administration. In the instant case, however, the said onus has not been discharged. Mr. Roy Chowdhury wanted to rely on the case noted above. But the fact disclosed clearly established that the railway administration took the responsibility to prove the same and in fact was able to satisfy the court that the loss of the goods so consigned actually took place. The fact of the said case stands on a different footing, rather the principle laid down therein may, however, be applicable in the instant case to show the question of onus which has in an unambiguous term been held to lay heavily on the railway administration to prove the same. Our attention has also been drawn by the learned Advocate for appellant to the case of Governor-General in Council Vs. Lala Debi Sahai, . That is a judgment of Division Bench of Allahabad High Court. The principle enunciated therein may be noted here which supports the finding made by me. The relevant portion is being quoted here :

"Where, in a suit to recover damages for non-delivery of a parcel consigned to a railway the defendant claims protection under the provisions of Section 75 of the Railways Act, and the plaintiff proves non-delivery it is incumbent upon the defendant to show that the parcel had been lost or destroyed. The defendant must show that everything possible had been done to trace the missing articles, that the whereabouts of the article were not known or must adduce some other evidence from which it can be inferred that the parcel had been lost before the Court can hold in his favour that the parcel had been lost."

My finding in this respect gets support by the abovementioned decision.

16. Mr. Roy Chowdhury has drawn our attention to a decision of the Privy Council in the case of J. Ullman and Co. v. Cesar Leubac reported in (1909) 13 CWIN 82. Our attention has been drawn to certain observations made by their Lordships at p. 87. Mr. Roy Chowdhury's contention is that the averment in the pleading may be looked into to consider whether the onus has been discharged. In the abovementioned case their Lordships' observation was "But on the pleadings, the appellants expressly stated that they did not admit the averments of title and then lay by. In such a situation a plaintiff if he ignores the question, does so at his peril for the defence puts him to prove his title."

The above observation of their Lordships shows that the title of the plaintiff, if denied by the defendant, has got to be established by him. It is well-established principle of law that the plaintiff in order to get declaration of his title is bound to prove his title, more so when it is not admitted by the defendant. The above observations of their Lordships, therefore, do not support the contention of Mr. Roy Chowdhury that mere pleading in the written statement may be used as a piece of substantive evidence. That regulates only the mode of proof and the evidence if required. For the reasons stated the decision cited above does not help Mr. Roy Chowdhury in any way.

17. For the reasons stated the first point raised by Mr. Mitter prevails, and the contrary finding of the learned court of appeal below that the goods were lost to the railway administration cannot be upheld.

18. This leads us to another point which has been urged before us. The question next arises whether the suit can be said to have been barred by limitation. Mr. Roy Chowdhury has contended in the light of the observation made by the learned court of appeal below that the suit as framed and filed by the plaintiff was barred by limitation. As already noted, the consignment was entrusted to the railway station at Howrah on 26-7-1947 to be carried to Ballia Station on Oudh and Tirhut Railway; the suit was filed in the Original Side of the High Court on 6-9-48 and the same was dismissed on 25-11-58 and the same was re-filed in the Howrah Subordinate Judge's Court on 10-12-58. It is, however, admitted by Mr. Mitter, the learned counsel for the plaintiff, that the suit of the plaintiff would be barred if the provision of Section 14 of the Limitation Act is held not to be applicable in this case, but Mr. Mitter's contention is that the plaintiff instituted the suit in the Original Side of the High Court in good faith and prosecuted the same with due diligence, as such provision of Section 14 of the Limitation Act is attracted in this case. Previous to the filing of that suit there was a view that service of notice formed a part of cause of action, which was approved by a Bench decision of this Court reported in the case of *Dominion of India Vs. Gopal Chandra Tapadar and Others*, . It was held therein that the service of notice was a part of cause of action. It is, therefore, seen that the plaintiff was justified in filing the suit in that Court That does not show want of bona fide on his part, as the law as stood at that time, justified him in filing the suit in the High Court. In the meantime, however, a similar point was raised in other suits as to the cause of action after the service of notice u/s 77 of the Act. The learned Judges of the Division Bench could not agree with the said view as expressed by their Lordships in the case referred to above. As such the same was referred to the Full Bench which was considered and decided by their Lordships (Haries C. J., Das, J. and Banerjee, J.) in the case of *Bansi and Others Vs. Governor-General of India in Council*, . Their Lordships were of the view that the case reported in *Dominion of India Vs. Gopal Chandra Tapadar and Others*, was not correctly decided. Mr. Roy Chowdhury contends that immediately after that decision the plaintiff ought to have withdrawn the suit to re-file the same in the Howrah Subordinate Judge's Court. I am sorry I cannot agree with the said contention of Mr. Roy Chowdhury. It is too much to expect of a litigant to act like that. Rather to me it seems that the plaintiff rightly awaited to have decision in his case in that suit which he already instituted in the Hon"ble High Court without taking the risk of his own judgment. In order to get a benefit of the provisions of Section 14 the court must be satisfied that the person acted in good faith, and proceeded with the case with due diligence. Mere filing a suit in a wrong court does not prima facie show want of good faith. If the plaintiff proceeds honestly the question of want of good faith does not arise, even if he acts negligently. If a person files a suit in a court in the belief that the said court has got jurisdiction

to entertain the same without evil intention but honestly to have his remedy, it cannot be said that the suit was not filed in good faith. If, however, a person with ulterior motive to put the defendant in a difficult position and to harass him files the said suit in that court then, of course, the question of mala fides comes in. The said question, therefore, depends upon the facts of each individual case; in the absence of evil intention or any such designs the institution of the suit by the plaintiff in a wrong court cannot prima facie show want of bona fides. In the instant case, however, the facts and circumstances already stated would indicate that the plaintiff very rightly proceeded with the suit in the Hon'ble High Court and prosecuted the same with due diligence till it was dismissed by the said court.

For the reasons stated both the findings of the learned Court of appeal below are not acceptable to me. In the result, the appeal is allowed. The judgment and decree passed by the first appellate court is set aside and the judgment and decree of the learned Subordinate Judge is restored.

In the result, the appeal is allowed with cost. The suit is decreed on contest with costs of both the courts. Hearing fee is assessed at 10 Gold Mohurs. The defendant, Union of India will deposit the decretal amount in lower court within three months from the date of signing of the decree by this Court, failing which the plaintiff will be at liberty to execute the same.

R. Bhattacharya, J.

19. I agree with my learned brother that the appeal should be allowed. But I want to make some additions.

20. Mr. Mitra, the learned Advocate appearing on behalf of the plaintiff-appellant has urged two points. The first point is that the learned first appellate Court has been wrong to hold that there has been any evidence of loss of the articles consigned and that the Railways were not responsible for such loss due to the risk note in form "X" executed at the time of consignment. The second point urged is that the first appellate Court below failed to appreciate the proper interpretation of Section 14 of the Limitation Act and that the finding that there was no good faith in prosecuting the first case before the High Court was erroneous.

21. With regard to the first point urged, the plaintiff's simple case is that two bars of silver were delivered by the plaintiff to the East Indian Railway at Howrah Station for their carriage to Balia Station on Oudh and Tirhut Railway, now North Eastern Railway and for delivery of the same to the consignee thereof. The plaintiff made a declaration of the contents and the value thereof but did not pay any special fees or rates for the goods to be insured u/s 75 of the Indian Railways Act. It was sent on execution of a risk note "X". It has been alleged that the defendants wrongfully detained the said goods or otherwise converted the same to their own use and had wrongfully deprived the plaintiff of the articles booked. As no delivery of the goods consigned was made, the claim was laid at Rs. 9,875 including incidental charges and railway freight. The defendants

contended in their written statement with regard to the consignment that as the plaintiff did not pay extra charges as required u/s 75 of the Indian Railways Act, he could not claim any damages specially in view of the fact that a risk note was executed. It has been further stated in the written statement that the loss of the consignment was due to the misconduct of the railway employees who were entrusted with their duties of delivery of the goods to the consignee and that the said employees delivered the goods to a third party for their own benefit without production of the railway receipt. The learned Munsif who tried the suit, allowed a decree in favour of the plaintiff holding that the plaintiff was prosecuting with due diligence and good faith the first suit which was dismissed for want of jurisdiction and that the plaintiff was entitled to get protection u/s 14 of the Limitation Act in the matter of computation of the period of limitation. It has been further held that there was no loss of consignment during transit as mentioned in risk note "X" and that the Railways were liable for the goods not delivered to the plaintiff due to the misconduct on the part of the railway employees.

22. The first appellate Court in an appeal preferred by the Union of India representing the Railways held that Section 14 of the Limitation Act was not applicable as according to him no case of good faith has been proved by the plaintiff and that there was the loss of the articles consigned by the plaintiff as the said goods were wrongly delivered by the railway employees at Balia to a wrong person.

23. With regard to the loss or otherwise of the consigned goods referred to in the first point taken by Mr. Mitra, the admitted fact is that the consigned goods were not delivered to the plaintiff at Balia. It is further admitted and there is no dispute that the plaintiff though required to pay higher charges for the silver bars consigned u/s 75 of the Railways Act, did not pay the excess percentage on the value declared by the plaintiff but he executed a risk note in form "X". According to the risk note in form "X" the condition was that as no enhanced rate was paid as ordinary rates for carriage was charged, the consignor agreed and undertook to hold relevant railway administration free from all responsibilities for any loss, destruction or deterioration of, or damage to, the consignment in question from any cause whatsoever before, during and after transit for the carriage of the - whole or any part of the said consignment. The question, therefore, arises whether there has been a case of loss referred to in the risk note duly proved to absolve the Railways from liabilities. In this connection several case laws have been referred to us. I like to mention some of them which are relevant for the purpose of decision of the instant case. There has been some difference of opinion as to the meaning of the word "loss". Some of the High Courts have held that "loss" of consignment means loss to the consignor. But the general trend of the decisions of our High Court is that the "loss" relevant for the purpose of consideration of the risk note and Section 75 of the Indian Railways Act, must be the loss to the Railways accruing during period starting from the time of delivery of the goods to the Railways for carriage to the time when the same is delivered

to the consignor or consignee as the case may be at the destination. The case of East Indian Railway Co. Vs. Jogpat Singh, is well known. This is a decision of a Division Bench of this Court constituted by Suhrawardy and Page, JJ. There the meaning of the term "loss" as used in the risk note and u/s 72 of the Railways Act was considered and in the judgment delivered by Page, J. it was held :--

"In my opinion the term "loss" as used in the risk note, and in Chapter VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use, or enjoyment thereof, but means loss of the goods by the Railway Company while in transit and such "loss" occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them."

A similar question came to be considered in a subsequent case Gopiram Behariram Vs. Agent, East Indian Railway and Agent, Oudh and Rohilkhand Railway, . This was again a Division Bench decision. Here also it was held that in case of risk note consigned by the consignor, the loss is to be proved by the Railways. The onus is on the railway administration to prove loss. The meaning of loss as contemplated u/s 72 of the Indian Railways Act is the loss of the goods to the Railways while in their custody before delivery. This loss is not loss to the consignor and therefore, the Railways are to prove the loss. In this case also the case reported in East Indian Railway Co. Vs. Jogpat Singh, was referred to and relied upon.

24. In a case like the present one before us, involving non-delivery of consignment, it is the duty of the Railway Administration to disclose how consignment was dealt with throughout the time it was in their possession or control and it is their duty also to produce materials showing how the consignment was handled. This is the initial onus upon the defendant. If the defendant withholds any important and material evidence, the Railways must suffer due to the presumption u/s 114 (g) of the Evidence Act. The onus is completely upon the Railways to prove loss even when the consignor executes a risk note in form "X". In the present case, the defendant has not adduced any evidence whatsoever to show how the consignment was dealt with after its delivery for transit. No witness has been examined. No document has been produced in Court to show any loss of the consignment at any stage while it was in their custody. The simple statement in the written statement that the consignment was misdelivered to any other person or that it was misappropriated or misdirected by the employees of the Railways for their own benefit will not be sufficient. That cannot be taken as evidence. The learned first appellate Court committed a great error in assuming that consignment was delivered to a third party as stated in the written statement without having any evidence or material on record to that effect. Loss of any consignment implies that the said consignment is irrecoverable. In case of loss, either whereabouts of the goods are unknown or the goods cannot be got back. The "loss" referred to

in the risk note implies a bona fide case of loss. If there be a loss due to the deliberate action of the Railway Administration or their employees in course of their duties in order to defraud the consignor or the consignee, or if there be any other mala fide case of loss, that cannot come under the purview of the risk note "X". No party can reap the harvest of his own fraud or illegal action to his own advantage. This is one of the principles of natural justice and such a case has not been contemplated in the provision of Section 75 of the Indian Railways Act or in the agreement in risk note "X". In the present case, as My Lord has already stated, there has been no evidence of loss of consignment from the custody of the Railways and the Railways have deliberately, it can be presumed, withheld relevant evidence which they ought to have disclosed in the instant case. Even if it is assumed that the consignment has been misdelivered or wrongly delivered to a third party by the authorised employees of the Railways due to the negligence or lack of diligence, that will not, in my view be a case of loss because that delivery to the third party was made deliberately by the employees of the Railways in course of their duties. The employees themselves were responsible for parting with the consignment. It was not a case of loss of consignment. There may, however, be a case of loss when the consignment might have been by force and against the will of the Railway servants taken away by some miscreants and the whereabouts of the said consignment are not known or the same could not be recovered. However, the case of loss will be determined by the facts and circumstances appearing in each case. In the present case, therefore, I should hold that in the absence of any proof of loss of the consignment from the custody of the Railway Administration, both the courts ought to have held that the plaintiff had been able to prove his case for recovery of the damages claimed in the absence of any loss or destruction of the silver bars in question delivered to the Railways for transit. The defendant was not entitled to get any protection under any of the conditions contained in risk note "X".

25. The next question which requires attention is the question of limitation set up by the defendant. In this connection Mr. Mitra wanted to distinguish good faith referred to in Section 14 of the Limitation Act from that mentioned in General Clauses Act and for this purpose the case of *Madhavrao Narayanrao Patwardhan Vs. Ramkrishna Govind Bhanu and Others*, has been referred to. There is no doubt that the distinction is there. In a case u/s 14 of the Limitation Act, the material question is not whether the plaintiff was dishonest or his acts or omissions were mala fide. The real question is whether given due care and attention the plaintiff could have acted otherwise than as he did. Of course the onus is upon the plaintiff to prove his case. For this purpose the case already referred to is relevant. An unintentional or bona fide mistake in filing a case in a wrong Court can be taken as having been made in good faith. Mere filing of a case in a wrong Court cannot by itself be any evidence of mala fides. Similarly mere presence of a legal decision in any case cannot be any evidence of any bad faith/or want of diligence. In the present case, the suit was originally filed by the plaintiff in the Original Side of the High Court on 7-9-1948 and after 10 years the

suit was dismissed on the ground of want of territorial jurisdiction. Immediately without any unnecessary delay, the present suit was filed on the same allegations on 10-12-1958. There is no dispute before us that this filing would be within time if benefit of Section 14 of the Limitation Act can be availed of by the plaintiff. The suit was filed originally in the Original Side of the High Court at Calcutta on the ground that within its jurisdiction the notice u/s 80 CPC was served upon the defendant. The learned Additional District Judge however, in the present case, has held that during the pendency of the suit, there was a decision of this Court which held that mere service of notice u/s 80, CPC need not form part of any cause of action giving jurisdiction to the local Court and therefore the plaintiff ought to have withdrawn the case or called for a decision from the High Court then and there on the question of jurisdiction. According to him as the plaintiff failed to do the same, there was no good faith in him in prosecuting a suit in the Original Side of the High Court. There is no doubt that there was a conflict of decision in this Court as to whether a notice u/s 80, CPC would give jurisdiction to the Court and would form part of the cause of action. It will appear from the decision in the case of Niranjana Agarwalla Vs. Union of India (UOI), that even in January, 1960 the point arose before the Division Bench of this Court whether the service of notice u/s 80, Civil P. C. was at all a part of the cause of action and P. B. Mookherjee and Bose, JJ. (as they then were) discussed that point at length. Of course before that decision, the case of the plaintiff before us was dismissed in 1958 in the Original Side of the High Court and the present suit had already been filed thereafter. Clearly, therefore, the question as to whether the service of notice u/s 80, Civil P. C. could form part of cause of action in a suit was still being agitated by the learned lawyers and the Court was deciding that issue. In this view of the fact, it cannot be imagined that the plaintiff did not act in good faith simply because he did not withdraw the former suit when there was a decision during the pendency of the suit that the service of notice u/s 80, Civil P. C. did not form part of the cause of action in a suit. Mere decision in any case is no proof that it is decided for all. But a view of the Court may be varied or changed subsequently by the Court having proper jurisdiction. The view the learned Addl. District Judge took about the plaintiff's not acting in good faith is unacceptable. The said decision is unreasonable and perverse. The facts and circumstances as also the evidence clearly show that the plaintiff has been acting with due diligence and in good faith to get his redress all through from the time of institution of the first suit in the Original Side of the High Court. The second point urged by Mr. Mitra also succeeds. The plaintiff's suit should be decreed and the appeal be allowed as already stated.