

(1960) 04 PAT CK 0010
In the Patna High Court
Case No : A.F.A.D. No. 1396 of 1956

Thakur Prasad

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 06-04-1960

Acts Referred:

Railways Act, 1890 — Section 77

Citation : AIR 1960 Patna 419

Hon'ble Judges : V. Ramaswami, C.J; R.K. Choudhary, J

Bench : Division Bench

Advocate : Ramanugrah Prasad, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Allowed

Judgement

1. In the suit out of which this appeal arises the plaintiff claimed a sum of Rs. 316/- and odd from the defendants for non-delivery of a consignment of betel leaves. The suit was decreed by the trial court to the extent of Rs. 175/-, but the lower appellate court has dismissed the suit altogether on the ground that the plaintiff as a consignor had no title to sue and also because notice u/s 77 of the Indian Railways Act was not served.

2. Against the judgment of the lower appellate court the plaintiff has filed a second appeal. It was objected on behalf of the respondents that a second appeal is not maintainable in view of Section 102 of the Code of Civil Procedure. We think there is substance in this preliminary objection raised on behalf of the defendants. Learned Counsel for the appellant thereupon said that this second appeal may be treated as an application in revision. We, therefore, proceed to deal with this second appeal as an application in revision.

3. The first point taken on behalf of the plaintiff is that the lower appellate court was wrong in holding that the plaintiff was not entitled to sue because he was neither the consignee nor the person to whom the railway receipt had been endorsed. We think that the lower appellate court has fallen into an error of law

on this point. The finding of the trial court is that the defendant second party, who was the consignee, was a mere commission agent, and the plaintiff retained the ownership of the goods. It appears that the defendant second party was examined in this case and he supported the case of the plaintiff on this point.

The lower appellate court has not reversed the finding of the trial court. The finding of the lower appellate court appears to be that even if the plaintiff had title or ownership of the goods he was not competent to bring the suit because he was neither the consignee nor the person to whom the railway receipt had been endorsed. In our opinion this view of law is erroneous. Since the ownership of the goods was still with the plaintiff, he was entitled to bring the present suit for nondelivery of the consignment to the defendant second party who was a mere commission agent.

This view is borne out by a decision of a Division Bench of this High Court in *Union of India v. Firm Harchand Rai Bansidhar*, First Appeal No. 532 of 1954, decided by Rai and U. N. Sinha, JJ., on the 19th August, 1959. We are, therefore, of opinion that in the circumstances of the present case the plaintiff was entitled to bring the suit against the railway authorities,

4. The second point taken on behalf of the plaintiff is that no notice u/s 77 of the Indian Railways Act was necessary in this case. We think that this argument is well founded and must be accepted as correct. The case of the plaintiff in paragraph 3 of the plaint is that "the consignment did not reach the place of destination "on account of the wilful neglect and misconduct of the Railway". In paragraph 2 of the plaint it is also stated that in spite of the fact that the consignment was made over to the Railway, it did not reach the place of destination nor was it delivered to the plaintiff's Arhatia at the place of destination,"

The case of the plaintiff is, therefore, based upon non-delivery and not upon "loss" within the meaning of Section 77 of the Indian Railways Act, and no notice under that section was, therefore, necessary in the present case. This view is borne out by a Division Bench decision of this High Court in *The Governor-General in Council Vs. Kasiram Marwari*, . In my opinion the view taken by the lower appellate court on this point was erroneous and must be overruled.

5. The third question raised on behalf of the plaintiff is as to what is the quantum of damages. It was contended on behalf of the plaintiff that the finding of the lower appellate court on this point is arbitrary and not based upon evidence. Having gone through the judgment of the lower appellate court and of the trial court we do not consider that the finding of the lower appellate court is totally unsupported by any evidence or is vitiated by any error of law. The lower appellate court has observed that there is admission of P.W. 1 that one Dholi of betel weighs 1 to 1 1/4 seers, and the railway receipt (Ext. A) showed that the weight of the consignment was 65 seers.

Taking the price of one dholi of betel to be Re. 1/-, the lower appellate court has

calculated the damages to be awarded to the plaintiff at Rs. 65/- as the price of goods and Rs. 8/- as the cost of notices. In our opinion, the plaintiff is entitled to this amount of damages, namely, to a sum of Rs. 73/-, from the defendant.

6. We accordingly allow this appeal, set aside the judgment of the lower appellate court and grant a decree to the plaintiff for a sum of Rs. 73/- with proportionate costs throughout.