

(1968) 09 GAU CK 0002
In the Gauhati High Court
Case No : First Appeal No. 36 of 1964

The Union of India (UOI)

APPELLANT

Vs

Kutharf Trading Co. Ltd.

RESPONDENT

Date of Decision : 20-09-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1989 — Section 77

Citation : (1968) 09 GAU CK 0002

Hon'ble Judges : P.K. Goswami, J; M.C. Pathak, J

Bench : Division Bench

Advocate : R.K. Goswami, for the Appellant; J.P. Bhattacharjee and S.N. Medhi, for the Respondent

Judgement

M.C. Pathak, J.—The Defendant in M.S. No. 15/57 has preferred this appeal against the judgment and decree passed by the learned Subordinate Judge, L. A. D. Now undelivered gong-camp at Tezpur, by which he above, decreed the Plaintiffs Respondent's suit for Rs. 1410, made up of Rs. 6238 being the marked value of the goods not delivered at the rate of Rs. 2-2-per maund; Rs. 219 as freight claimed for one consignment in which goods of one wagon were delivered out of two wagons and Rs. 953 as special damages . for the loss suffered due to stoppage of the Plaintiff mill for want of coal which was caused due to the non-delivery of the coal by the Defendant.

2. The Plaintiffs case is that they are the owners of Kalyan Rice and Oil Mills at Tezpur. For running the mill, the Plaintiffs indented on various dates Assam coal from Margherita, Ledo and Naginimora Railway stations under the North-Eastern Railway, as it was then called, under the invoice and Railway Receipts as follows:

1. One wagon No. 15285 of 11 tons (300 maunds) under Invoice No. 9, R/R No. 485322 dated 7th August 1956.

2. One wagon No. 15696 of 11 tons (300 maunds) under Invoice No. 10, R/R No.

485340 dated 16th August 1956.

3. One wagon No. 80445 of 14 tons 381 maunds) under Invoice No. 2, R/R o. 485340 dated 30th October 1956.

4. One wagon No. 15313 of 300 maunds under Invoice No. 5, R/R No. 081584 dated 18th March 1957.

5. One wagon No. 22599 of 18 tons (490 maunds) under Invoice No. 3, R/R No. 020020 dated 30th November 1956.

6. Two wagons Nos. 16497 and 177216 of 12 tons and 18% tons respectively desached under Invoice No. 30 R/R No. 1852 acted 13th March 1957.

The total value of the coal in consignments Nos. 1 and 2 above is Rs. 1650 at Tezpur market rate at the relevant time. The market values of coal in consignments in items Nos. 3, 4, 5 and 6 are Rs. 1048, Rs. 825, Rs. 1348 and Rs. 1367 respectively. The Plaintiffs paid the price of the goods to the consignor coal Co. in advance and thus they are the owners thereof. The goods of the above consignments were not delivered to the Plaintiffs-consignees and therefore they serve notices u/s 77 of the Indian Railways Act and u/s 80, CPC on the Defendant. Accordingly they brought the suit for recovery of Rupees 6238 as the market value of the goods not delivered and Rs. 1905 for loss suffered due to stoppage of the mill for want of coal and Rs. 219 as the freight realised for the goods of Invoice No. 30 in Item 6 above

Market Special Freight

YftIUQ damages

Rs. Rs. Rs.

For the goods of wagona Nos. 15285 and 15686 1650 500

?30445 1048 300

?22599 1348 425

?15313 825 250

?177261 1367 480 219

3. The Defendant raised various contentions in the written statement, such as, non-service of valid and proper statutory notices, that there was no cause of action for the suit, that the Plaintiffs have no right to sue, that the suit was barred by limitation, that the claim was highly excessive and that the Plaintiffs were not entitled to remote damages and so on.

4. A number of issues .were framed in the case. The Plaintiffs examined four witnesses and Defendants examined one witness. Roth the parties filed certain documents which were marked as exhibits in the case. The. learned Subordinate Judge decreed the suit for Rs. 7410 as stated above.

5. Mr. R.K. Goswami, the learned Counsel appearing for the Defendant-Appellant, has raised mainly two points which require consideration in this appeal. His first contention is that no legally valid notice u/s 80, CPC was served in the instant case and as such the suit is not maintainable. On this point, he has drawn our attention to Ext. 7, and Ext 10 which are the two composite notices u/s 77, Indian Railways Act and u/s 80, Code of Civil Ext. 7 is a composite notice in respect of (i) invoice No. 9, R/R No. 485322 under wagon No. 15285 NEKC dated 7th August 1956, and (ii) invoice No. 10, R/R 485340 under wagon No. 15696 NEKC dated 16th August 1956. It may be observed that in this notice the value of the goods has been stated to be Rs. 571-10-0 and the amount of loss sustained by the Plaintiffs has been estimated at Rs. 150 and the total claim as value and compensation for the goods of the above two consignments not delivered is Rupees 721-10-0 and this notice is dated 29th September, 1950 addressed to the Regional Superintendent, N. E. Railway, Pandu (Assam) and it was given by the Attorney of Messrs. Kalyan Rice and Oil Mills, Proprietor: Messrs. Kuthari Trading Co.

6. Ext. 10 is a composite notice given on behalf of Kalyan Rice and Oil Mills, Proprietor; Kuthari Trading Co. (Private) Ltd., and addressed to the General Manager, North Eastern Railway, Gorokhpur. In this notice, the Plaintiffs have mentioned all the above-mentioned six consignments, the goods of which were not delivered, including the wagons mentioned in Ext. 7. In Ext. 10, the Plaintiffs have claimed as follows:

The total claim of the Plaintiff in the notice is Rs. 8362 (Rs. 6238 as the market value of the goods, Rs. 1905 as special damages and Rs. 219 as refund for freight paid), which is the claim in the suit also.

7. Mr. R.K. Goswami's objection to these notices is that Ext. 7 is not addressed to the proper authorities as required u/s 80, CPC In Ext. 10 it has been stated that M/s. Kalyan Rice and Oil Milk will sue as the Plaintiffs or the complainants. But the suit has been filed by Kuthari Trading Co. (Private) Ltd., and as such neither Ext. Z nor Ext. 10 fulfils the requirements of Section 80. CPC and therefore the suit must be dismissed. In this connection, he has relied on the decision of S.N. Dutt Vs. Union of India (UOI), In the said decision, the Supreme Court has considered its decision reported in Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI), wherein at page 281, the following observations occur:

The Privy Council no doubt laid" down In 54 Ind App 338 = AIR 1927 176 (Privy Council) that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinized in a pedantic manner by in a manner completely divorced from commonsense. As was stated by Pollock C.B. in Tones v. Micholls, ((1844) 153 EH 149 , at p. 150). "We must import a little commonsense into notices of the kind. Beaumont, C. J., also observed in Chandulal Vadilal Vs. Government of The Province of Bombay, "One must construe Section 80 with some regard to commonsense and to the

object with which it appears to have been passed.

The Supreme Court also in *S.N. Dutt Vs. Union of India (UOI)*, considered its decision reported in *The State of Madras Vs. C.P. Agencies and Another*, After considering the above decisions, the Supreme Court held at p. 1451 as follows:

It must however be remembered that the defect with which this Court was dealing in these cases was in the matter of cause of action and relief, and this Court pointed out that it was necessary to use a little commonsense in such circumstances. Where the matter (for example) concerns the relief or the cause of action, it may be necessary to use commonsense to find out whether Section 80 has been complied with. But where it is a question of the name of the Plaintiff, there is in our opinion little scope for the Patties of commonsense, for either the name of the person suing is there in the notice or it is not. No amount of commonsense will put the name of the Plaintiff there, if it is not there.

The law laid down by the Supreme Court may be summarised as follows: Section 80, CPC is express, explicit and mandatory and admits of no implications or exceptions. Section 80 peremptorily requires that no suit shall be filed against the Government or a public officer in respect of anything done in his official capacity until after the expiry of two months from the service of a notice in the manner therein prescribed stating the cause of action, the name, description and place of residence of the Plaintiff and the reliefs which he claims! Though the terms of this section are to be strictly complied with, that does not mean that the terms of the notice should be semitized in a pedantic manner or in a manner completely divorced from common sense. A little common sense must be imported in the notice u/s 80. But the question of using a little common sense arises when the Court deals with the question of cause of action and reliefs, but there is little scope for the use of common sense where the Court is to consider the question of the name of the Plaintiff.

8. In the instant case the notice Ext 10 was issued by the Kalyan Rice and Oil Mills, P. O. Tezpur, Assam, Pro: Kuthari Trading Co. (Private) Ltd., and in the plaint the description of the Plaintiff is in these terms:

Messrs. Kuthari Trading Co. Limited carrying on business with their Registered Office at 4 Raja Woodmunt Street, Calcutta 1, owners of the Kalyan Rice and Oil Mills at Tezpur, which is carrying on business at Tezpur, Mouza Mohabhairab in District Darrang in Assam"

So it appears that the notice u/s 80, CPC was issued by M/s. Kalyan Rice and Oil Mills, P.O. Tezpur, Assam, of which Messrs. Kuthari Trading Co. (Private) Ltd., are the Proprietors, and the suit has been filed by Messrs. Kuthari Trading Co. (Private) Ltd., who are the owners of Kalyan Rice and Oil Mills, Tezpur. On a perusal of the notice and the plaint, we are of the opinion that there is identity of the person who has issued the notice with the person who has brought the suit. In the circumstances, we hold that Ext. 10 fulfils the requirements, of the notice u/s 80, CPC in the instant case.

9. Mr. J.P. Bhattacharjee, the learned Counsel appearing for the Respondents, has raised a preliminary point that the Appellant in this appeal is debarred from raising the question of the legality of the notice u/s 80, CPC inasmuch as issue No. 4 which deals with the validity of the notice u/s 77, Indian Railways Act, and u/s 80, CPC was not pressed before the learned Subordinate [fudge. In paragraph 5 of the written statement, the Defendant challenged the validity and propriety of the notice u/s 80, CPC and accordingly an issue was framed to the following effect;

Whether any valid notices u/s 735 Indian Railways Act and u/s 80, CPC were served? If not; whether the suit is bad and not maintain-able The Defendant specifically raised the question of the validity and propriety of the notice u/s 80, CPC and because the issue was not pressed at the time of hearing by the lawyer of the Defendant that would not, in our opinion, debar the Defendant from raising the question of the validity of the notice in a First Appeal. Considering all the facts and circumstances of the {case, we hold that in this appeal the Defendant is not debarred from raising the question-of the validity of the notice u/s 80, CPC but we have already held that the notice in question is not bad in law.

10. The" next point urged by Mr. R.K. Goswami, the learned Counsel for the Appellant, ""is that if the market value of the goods at the relevant time and place is to be accepted as the measure of compensation in this case, then the railway freight for carrying the goods to the destination station, if not already paid, and the handling charges necessary for carrying the goods from the station to the market must be deducted from the market value because it is admitted that the market value is determined by taking into consideration the cost price, the railway freight and the handling and transport charges. Mr. Goswami has referred to the definition of damages in paragraph 383 at page 216, Halsbury's Laws of England, Third Edition, Volume II, which reads as follows:

Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him.

In paragraph 404 of the same volume, the following passage occurs:

Damages normally limited to actual loss: The measure of damages will normally permit the recovery of damages in respect of damage, injury or loss which arises naturally and directly from the act or omission complained of, but this is to be regarded as establishing a maximum. Where damages are capable of computation in money, and the damage actually suffered is less than such as might naturally have arisen from the act or omission complained of, only such damages as have actually accrued can be awarded.

In the light of the above, Mr. Goswami has argued that a person is entitled for no

delivery of goods only to such damages as have actually accrued to him.

11. It is proved and admitted in the instant case that the goods in question were booked in the railway to the consignee and the goods have not been delivered to the consignee. In a suit brought against a common carrier for the loss, damages or non delivery of goods entrusted to him for carrying it is not necessary for the Plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proof of absence of negligence is thrown upon the common carrier, on the theory that the loss or damage to the goods is prima facie due to negligence of the common carrier. In the instant case, the Defendant has not adduced any evidence to prove that there was no negligence on his part. In the circumstances, the Defendant must be held liable to compensate the Plaintiffs for the loss sustained by them due to non delivery of the goods in question.

12. The next point to be considered is how to determine the quantum of compensation where goods are lost in transit and not delivered to the consignee by the Railways or the common carrier. The quantum of damages in such cases may be estimated by two methods: (i) by taking the cost price of the goods and adding a reasonable amount to it by way of loss of profit suffered for non-receipt of the goods; (ii) by taking the market value of the goods at the time and place of destination. When the damages are assessed according to the market value, the amount which would have caused to get them to the place of delivery must be deducted. In other words, the measure of damages is the value of the goods at the place of destination in the condition in which the carrier undertook to deliver them at the time when they should have been delivered less the proper charges of transportation and delivery, if these have not been paid by the consignor. The natural and probable consequence of the failure of the carrier to deliver the goods at the time and place they should have been delivered is prima facie a loss to the owner amounting to the value of the goods at that point. These views are supported by the decisions in *India General Navigation and Railway Co. Ltd. Vs. The Eastern Assam Company Ltd.*, and *Bala Prasad Agiwai Vs. The Union of India (UOI)*,

13. It has been admitted by P.W. 1, Jethmal Bengani, attorney of Kalyan Rice and Oil Mills, that the market price of goods are fixed by calculating the actual cost price, the commission, freight, handling charges, shortage plus a reasonable profit. This statement is in consonance with the common practice and we accept the same.

14. On a consideration of the law and the judicial pronouncements on the point, it is clear that in the instant case the Plaintiffs are entitled to get the market value of the coal at the relevant time at Temptress the freight charges and handling charges. The evidence on the point of market value at the relevant time is that of P.W. 3 only who stated that in August 1956 to December 1956 and in January 1957 to April 1952 the selling rate of Assam Coal was Us. 2-11-6 par maund at Tezpur. There is no evidence on the side of the Defendant contradicting

ft and as such be hold that the market price of coal at the relevant time at Tezpur was Us. 2-11-6 per maund and the Plaintiffs will be entitled" to the compensation at this rate. There is no evidence on either side as to what would be the approximate handling charges for unloading and carrying the coal from the station to the market. In the circumstances, no handling charges can be deducted from the market price in the present case. On the facts and circumstances of the case, we hold that the Plaintiffs are entitled to get damages at the rate of Rs. 2-11-6 per maund for the goods not delivered less the railway freight that would have to be paid for carrying the goods to the place of destination.

15. From Ext. 7, it appears that for the goods booked under invoice No. 9, R/R No. 485322 under wagon No. 15285 NEKC and invoice No. 10, R/R No. 485340 under wagon No. 15696 NEKC dated 7th August 1956 and 16th August 1956, respectively, the Plaintiffs claimed the value of the goods at Rs. 571-10-0 and the loss or damage for non-delivery of the goods was estimated at Rs. 150 and the Plaintiff"s total claim for value and compensation was Rs. 721-10-0. For the goods of these two wagons, therefore, the Plaintiffs are not legally entitled to get more than what they claimed in their notice, Ext. 7 and for the non-delivery of the goods of these two wagons, we allow Rs. 721-10-0 as total compensation to the Plaintiffs.

16. Regarding the remaining wagons, the total quantity or goods not delivered is 1,867.8 maunds and at the rate of Rs. 2-11-6 per maund, the market value comes to Rs. 4,535. The total freight required to be paid for these wagons is Rs. 736-7-0. So the Plaintiffs are entitled to get Rs. 3,798-9-0 Only for the goods of these wagons and for the goods of all the six wagons the Plaintiffs are entitled to Rs. 4,520-3-0.

17. Next we are to consider the question of special damages. The Plaintiffs Plained special damages of Rs. 1,905 which ""they alleged they suffered due to closure of mills for want of supply of coal. On a consideration of the evidence on record, the learned Subordinate Judge has found that IS no definite data before the Court the Plaintiffs" side to show how many lays the mills were stopped, what was the act loss suffered and whether there was stock of coal or not. We have cons the evidence on record and we agree the said finding of the learned Sub-Judge. In India General Navigation and Railway Co. Ltd. Vs. The Eastern Assam Company Ltd., the _ High Court held that "the aggra of the normal consequences are not taken into account in the assessment damages, except so far as the circum-to which they are due were the ordinary probable circumstances which might before hand be expected to attend or follow upon the breach of obligation. This is subject to the exception that if the party, who has broken the contract, entered into it, in contemplation of special circumstances which would affect the consequences of a breach and accepted those circumstances as condition under which the contract was to be performed, he is liable for any special loss which may have resulted. The Knowledge must be

brought home, to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. A person cannot consequently be allowed compensation for losses which might have been reasonably avoided."

We are in respectful agreement with the principle laid down in this decision. In the instant case there is nothing in evidence to show that the Railways at the time of accepting the consignments knew that the goods in question would be used for running the Plaintiff's mills after they arrived at Tezpur and that they entered into the contract of carrying the goods in contemplation of such special circumstances affecting the consequences of the breach of the contract, if and when caused, and that they accepted those circumstances as a condition under which they contracted to perform the contract. On the other hand, in Ext. 7, there is no claim for such special damages due to stoppage of running of the mills and there is no reliable evidence on the point also, as we have already observed. In the circumstances, we hold that the Plaintiffs are not entitled to any special damages in the instant case and the finding of the learned Subordinate Judge decreeing the special damages of Rs. 953 is set aside.

18. The Defendant-Railway realised Rupees 803-7-0 as freight for goods under wagons Nos. 16479 and 177216. But the goods of wagon No. 16479 only was delivered and on this ground the Plaintiffs have claimed refund of Rs. 219, which was realised for the freight of goods which were not delivered. In assessing the market value of the goods of the four wagons, we have not deducted the sum of Rs. 219 as freight as it was already paid; hence the Plaintiffs are not entitled to further refund of this sum. In the circumstances, the plaintiffs are entitled to a decree for Rs. 4,520-3-0 or Rs. 4,520-19 p. (rupees four thousand five hundred twenty and paise nine teen only) against the Defendant. The amount of Rs. 7,410 decreed by the learned Subordinate Judge is reduced to Rs. 4,520-19 p.

19. In the result, the judgment and decree of the learned Subordinate Judge are modified to the extent indicated above. The appeal is partly allowed with proportionate costs.

P.K. Goswami, J.

20. I agree.