
(1982) 07 CAL CK 0036
In the Calcutta High Court
Case No : Suit No. 831 of 1968

Traders Syndicate

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-07-1982

Acts Referred:

Evidence Act, 1872 — Section 137, 138, 66
Limitation Act, 1963 — Article 11
Railways Act, 1890 — Section 78B, 80

Citation : AIR 1983 Cal 337

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : Ranjan Dutt and P. Chatterjee, for the Appellant; T.K. Bose and Shome, for the Respondent

Judgement

Pratibha Bonnerjea, J.—The plaintiff sued the defendant on two contracts of carriage of goods for recovery of compensation for non-delivery of the consignments.

2. On 28-6-64, the plaintiff a Duttapukur delivered to the Eastern Railway 6 rolls of galvanized wire netting 19,200 sq. ft. for carrying the same a Railway's risk to Mal junction through N.F. Rly. and the defendant issued R/R No. A 116018 dated 28-6-64 in respect to the same. The goods were to be delivered to the consignee. Sub-Divisional Officer (P.W.D.) Mal Construction Sub-division. The defendant failed to deliver the goods at the destination. A claim was duly lodged with the Chief Commercial Superintendent (Claim) N. F. Railway to the extent of Rs. 7207.68 but the defendant failed to pay the said sum or any part thereof. The defendant in the written statement alleged that these goods were duly delivered at Nasrakata on 22-7-64 against a clear receipt dated 25-7-64 and the plaintiff was duly informed about the same by letter dated 20-8-65.

3. On 13-6-66, the plaintiff again delivered to the Eastern Railway Administration at Duttapukur another 6 rolls of galvanized wire netting containing 19,200 sq. ft.

valued at Rs. 7221.12 to be delivered at Dalgaon to the consignee Sub-divisional Officer (P.W.D.) Gairkata Sub-division under relevant R/R No. 049390 dated 13-6-66. The defendant failed to deliver the goods and the plaintiff duly lodged a claim for the said sum with the Chief Commercial Manager (Claim) N. F. Rly. but the defendant failed and neglected to pay the said amount or any portion thereof. In the written statement the defendant disputed the plaintiff's title over the said goods and also the quantity or value thereof. It was alleged that the suit was bad for non-compliance of the provisions of Section 78B of the Railways Act 1890 and the plaintiff's claim was barred by limitation. The following issues were raised for decision:

1. Is the plaintiff owner of the goods covered by Railway Receipt No. A 116018 dated 28th June 1964 and Railway Receipt No. A 049390 dated 13th June 1966 as alleged in the plaint?

2. Did the defendant take all due and reasonable care and precaution for the carriage and the transit of consignments in question as a man of ordinary prudence would take under the similar circumstances for the same as alleged in paras 6 and 10 of the written statement?

3. Did the defendant deliver the goods covered by Railway receipts dated 28th June 1964 and 13th June 1966 to the consignee, Sub-Divisional Officer, P.W.D., Mal Construction Sub-Division?

4. (a) Did the plaintiff serve notice u/s 80 of the Civil P. C. dated 7th Feb. 1968 to the General Manager. Eastern Railway Administration as well as the General Manager. N. F. Railway claiming Rs. 14,428.80 as alleged in para 10 of the plaint?

(b) Were the notices u/s 80 of Civil P. C. legal or valid?

5. Is the suit barred by limitation?

6. Is the suit not maintainable by reason of non-compliance with the provisions of Section 78B of the Railways Act, 1890?

7. To what relief, if any, is the plaintiff entitled?

4. The plaintiff examined two witnesses. The defendant did not adduce any oral evidence. The booking of 6 rolls of galvanized wire nesting on 28th June 1964 is proved by R/R No. A 116018 being Ext. "A" in the suit which is a common document. None on behalf of the defendant came forward to tell the court how the defendant had dealt with these goods during transit. According to the plaintiff those goods were not delivered at the destination. It appears from Ext. "E" dated 4-12-64 that the plaintiff had lodged a claim with the Chief Commercial Superintendent (Claims) of N. F. Railway to the extent of Rs. 7,207.68 for non-delivery of the goods covered by R/R No. A 116018 and a copy thereof was sent to the Sub-divisional Officer, P. W. D., Mal Construction, Sub-division the consignee thereof. The onus to prove safe delivery of the goods at the destination is on the defendant, but the defendant failed to discharge this onus.

5. Another 6 rolls of galvanized wire netting containing 19,200 sq. ft. were despatched by the plaintiff from Duttapukur Railway Station to Dalgaon on 13-6-66 to be delivered to the consignee the Subdivisional Officer (P.W.D.), Gairkata Subdivision. The relevant R/R No. 049390 is admitted in para 7 of the written statement. A copy of this R/R was sought to be tendered by the plaintiff which was objected to by the defendant's counsel. The defendant disclosed the original R/R being item No. 5 of its affidavit-of-document affirmed on 19-8-75 by one Radhika Ranjan Ghosal whereas the plaintiff disclosed a copy thereof. This is a common document being P. D. 15/DD 5 and the original of which is admittedly in possession of the defendant. Hence the objection is overruled. This document is Ext. "H" in the suit. The despatch of the goods is further proved by the forwarding note No. 559 dated 29-4-66 being Ext. 7. By letter dated 19-8-66 the consignee informed the defendant that the goods did not arrive (Ext. EE). A reminder was sent to the defendant about non-delivery on 11-11-66 (Ext. FF). According to the plaintiff, the defendant failed to deliver the goods. The defendant also did not prove delivery. It appears that the consignee lodged a claim with the Chief Commercial Manager (Claims) N. F. Rly. for compensation of Rs. 7,221.12 and forwarded a copy thereof to the plaintiff. Objection was taken by the defendant's counsel against tendering this copy of the claim on the ground that it was a secondary evidence. The original claim is in possession of the defendant. The copy will be admissible u/s 66. Proviso (2) of the Evidence Act without service of notice to produce on the defendant. Hence the objection cannot be sustained. This claim in respect of the second consignment is Ext. "I" in the suit. According to the plaintiff this claim was made by the consignee on behalf of the plaintiff at plaintiff's request and direction (Kundu Qs 90-91, 93-97 and 159-162). From the correspondence disclosed it appears that the consignee kept on informing the plaintiff about the developments in the claim case (Exts. CC and II). Finally, having failed to realise the compensation money, the consignee asked the plaintiff to take step in the matter directly (Ext. HH). There is no cross-examination of the plaintiff's witness on his evidence on this point. No suggestion was put to Kundu that the claim was not lodged on behalf of the plaintiff which was a must. Without such a suggestion, the defendant's counsel was not entitled to argue that no claim in respect of the second consignment was made by the plaintiff and Kundu's evidence on this point should be rejected. A.E.G. Carapiet Vs. A.Y. Derderian, is an authority on this point. In para 10 of this report at p. 362 it was held:--

"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witness. It has been stated on

high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witness in turn, so much of his own case as concerns that particular witness or in which that witness has any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety."

6. If the defendant wanted to argue that the plaintiff did not put forward any claim in respect of the 2nd consignment and there was no notice u/s 78B of the Act in respect of this claim, it was the bounden duty of the defendant's counsel to cross-examine Kundu on this point and put his case to him that the plaintiff never made any claim in respect of the second consignment. In absence of such cross-examination and suggestion. I am bound to hold that the defendant had accepted plaintiff's case on this point in its entirety.

7. The first consignment is dated 28-6-64 and the claim in respect thereof was lodged by the plaintiff on 4-12-64 (Ext. E). The second consignment is dt. 13-6-66 and the claim for non-delivery of these goods was lodged on 14-11-66 (Ext. I). In the premises I hold that due and valid notices u/s 78B of the Railways Act were given to the defendant in respect of both the claims. Service of such a notice on one of the two Railway administrations is sufficient u/s 78B of the Act.

8. Before institution of the suit, the plaintiff served two notices u/s 80 of the Civil P. C. on both the General Managers of Eastern Railway and N. F. Rly. which were duly received by the defendant. Although the defendant challenged the validity of the said two notices in the written statement and raised an issue thereon, the same was not pressed at the time of hearing.

9. In the plaint, the plaintiff claimed to be the owner of the goods consigned but the defendant disputed the same in the written statement. Both the plaintiff's witnesses Kundu and Bose in their respective oral testimony said that the goods belonged to the plaintiff. No documentary evidence on this point was disclosed by the plaintiff. The defendant's counsel submitted that the plaintiff was not the owner of the said goods and as such it could not institute the suit. He further submitted that the relevant R/Rs were endorsed in favour of the consignee and it is the consignee who had the right to bring the action. I am unable to accept these submissions of the defendant's counsel. The plaintiff was a party to both the contracts of carriage evidenced by the two R/Rs and it was the plaintiff who was entitled to sue the defendant for compensation for committing breaches of these contracts by non-delivery of the goods. *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, is an authority in this point, it was held in para 40 (i) (a):--

"Where the action is founded on contract, the right to maintain an action on the contract belongs to the person who entered into the contract. Ordinarily that person is the consignor."

10. Therefore the question whether the plaintiff was the owner of the goods or not was not relevant for the purpose of this suit. I do not think there is any

substance in the argument of the defendant's counsel that, on account of the endorsement of the R/Rs in favour of the consignee, it is the consignee who has the right to bring the action. *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, also lays down that mere endorsement or delivery of R/R does not transfer the contract contained in or evidenced by the railway receipt to the transferee. An endorsee of a railway receipt cannot sue the railway on the contract of carriage not being a party to the contract even if the property in the goods covered by the R/R has been transferred to the endorsee. In such a case, the endorsee, as the owner of the goods, can sue the railway in his own name for conversion or negligence only. A mere endorsee, whether he is the consignee or someone else, only has the right to receive delivery of the goods but has no right to bring an action on the contract of carriage. *Union of India (UOI) Vs. West Punjab Factories Ltd.*, *Penu Balakrishna Iyer and Others Vs. Ariya M. Ramaswami Iyer and Others*, and *I.S.P. Trading Co. Vs. Union of India (UOI)*, also support this view. I, however, accept the evidence of the plaintiff's witnesses regarding the plaintiff's ownership over the goods consigned. There is no reason for disbelieving them on this point.

11. It was submitted by the defendant's counsel that so far as the first consignment is concerned, the plaintiff's claim is barred by limitation. The goods were despatched on 28-6-64 and suit was instituted on 3-4-68. Article 11 of the Limitation Act 1963 (old Article 31) will govern the case. On behalf of the defendant reliance was placed on AIR 1952 SC 1716. In this case, the Supreme Court while dealing with the old Article 31 of the Limitation Act held that time would run from the date "when the goods ought to have been delivered" and could not be postponed on the basis of subsequent conduct of the parties. "When the goods ought to have been delivered" will mean that time would begin to run after a reasonable period has elapsed on the expiry of which the goods should have been or ought to have been delivered. What will be the reasonable time will depend upon the facts and circumstances of each case. If the correspondence disclosed any special circumstances for delay or threw light on the Question of determining the reasonable time for the carriage of the goods from the place of despatch to the place of destination, then it would be open to the court to take into account the facts mentioned in the correspondence. The Supreme Court further held in para 12 at page 1721:

"..... in the absence of any special circumstance the reasonable time would practically be the same between two stations as would normally or usually or ordinarily be taken for the carriage of goods from the one station to the other."

12. In the present case no special circumstances appear from the correspondence, disclosed in the suit or from the oral testimony of the plaintiff's witnesses. It was admitted by the witness Bose that normal time taken for carriage of goods from Duttapukur to Mal Junction would be about 6 to 10 days (Bose Qs. 234. 237). In absence of any special circumstances the normal time taken for delivery of goods despatched from Duttapukur on 28-6-64 to Mal

Junction cannot be more than the middle of July 1964. The suit was instituted on 3-4-68, long after expiry of three years from the time when delivery of goods ought to have been given. The plaintiffs claim in respect of the first consignment is, therefore, barred by limitation. I am also fortified on this point by Union of India (UOI) Vs. Bararashi Lal Agarwalla, relied on the defendant's counsel. There is no question of limitation in respect of the second consignment.

13. So far as the price of the goods under second consignment is concerned, no issue has been raised, no argument advanced and there is no dispute about the same. The issues are, therefore, answered as follows:--

Issue No. 1-- Yes.

Issues Nos. 2 & 3-- The defendant did not adduce any evidence and failed to discharge the onus.

Issue No. 4 (a)-- Yes.

Issue No. 4 (b)-- Yes.

Issue No. 5-- Claim in respect of the first consignment dated 28-6-64 is barred by limitation but not the claim in respect of consignment dated 13-6-66.

Issue No. 6-- The notice u/s 78-B was duly served and the suit is maintainable.

14. In the premises, there will be a decree for Rs. 7,221.12 in favour of the plaintiff against the defendant. The plaintiff will be entitled to interim interest on the aforesaid sum at the rate of 9% per annum, interest on judgment at the rate of 6% per annum and costs. Certified for two counsel. The defendant is directed to pay the said sum within 3 months from date, in default the plaintiff will be entitled to execute this decree.