

**(1975) 11 DEL CK 0006**

**In the Delhi High Court**

**Case No : Second Appeal No. 81 of 1969**

Union of India

APPELLANT

Vs

B. Prahlad and Co.

RESPONDENT

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**Date of Decision :** 14-11-1975

**Acts Referred:**

**Citation :** AIR 1976 Delhi 236 : (1976) RLR 278

**Hon'ble Judges :** A.B. Rohtagi, J

**Bench :** Single Bench

**Advocate :** H.S. Dhir, for the Appellant; Madan Bhatia, for the Respondent

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## **Judgement**

1. Long years ago the Indian Railways Act (Act IX of 1890) was enacted. It raised problems of complexity some of which have not been solved even this day. This appeal raised one such question though the amount involved is small. The question it involves is: who has the right to sue the Railway -the consignor or the consignee ? Judicial opinion is divided. Eminent judges are ranged on opposing sides.

2. The plaintiffs respondents who are commission agents brought a suit for the recovery of Rs. 2,000/- against the Union of India on account of damages for deterioration of a consignment of loose raw and fresh plantains loaded in a wagon from Savda railway station for delivery to the plaintiffs at New Delhi railway station. The plaintiff's suit was dismissed by the trial Court. On appeal the Additional District Judge decreed the suit with costs by his order dated November 30, 1968. Now there is an appeal to this court by the Union of India.

3. Mr. H. S. Dhir on behalf of the appellant has raised three arguments. Firstly, he maintained that the plaintiff has no locus standi to sue, he being a mere commission agent. Secondly, he argued that the plaintiff has not proved that there was misconduct or negligence on the part of the railways. Thirdly, it was submitted that the plaintiff has not adduced proof with regard to compensation to which he claims to be entitled. I will take these three arguments one by one.

4. The plaintiffs are a firm of commission agents. Their principal is in Savda. He dispatches daily raw and fresh plantains from there for sale in Delhi. The plaintiffs get 7 per cent commission on sale of goods. They make advances to the principal from time to time. Then accounts are taken after sale. The principal gets the price of goods. The commission agent gets his commission. This is the arrangement between the parties. This arrangement is proved by the plaintiff's witness Lal Chand.

5. Has the commission agent a right to sue ? This is the question to be decided. In *Union of India (UOI) Vs. West Punjab Factories Ltd.*, the Supreme Court has laid down the following proposition:

"..... Ordinarily, it is the consignor who can sue if there is damage to the consignment, because the contract of carriage is between the consignor and the railway administration. Where, however, the property in the goods carried has passed from the consignor to consignee, the latter may be able to sue..... The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee will have to be decided on other evidence....."

6. The test, Therefore, is: Has the title to goods passed to the consignee ? If it has he can sue. It is quite possible for the consignor to retain title in the goods himself while the consignment is booked in the name of another person. The Supreme Court gives the following illustration:

".....Take a simple case where a consignment is booked by the owner and the consignee is the owner's servant, the intention being that the servant will take delivery at the place of destination. In such a case the title to the goods would not pass from the owner to the consignee and would still remain with the owner, the consignee being merely a servant or agent of the owner or consignor for purposes of taking delivery at the place of destination. It cannot, Therefore, be accepted simply because a consignee in a railway receipt is different from a consignor that the consignee must be held to be the owner of the goods and he alone can sue and not the consignor . ...."

7. Applying this principle to the facts of the present case the answer is plain beyond question. The commission agent is not a servant. Nor is he an ordinary agent. The commission agent occupies an important place in the world of commerce. He plays a leading role in mercantile transactions as in this case: See *Ram Dev Jai Dev v. Kaku*, Air 1950 EP 92 and *Shivnarayan Kabra Vs. The State of Madras*, .

8. In this case the plaintiffs' firm are a commission agent of the consignor of the goods. They have a right to commission on sale. Further the goods were consigned in their name. They were the named consignee in the railway receipt. They were able to give a complete discharge. Therefore, they had title to the goods. They had a right to sell the goods to third persons. The plaintiff firm has

considerable interest in the proceeds of the sale. They paid Rs. 6,000/- to their principal by way of advance as the evidence shows.

9. If goods are lost or damaged during transit, the question arises who can sue the carrier for breach of the contract of carriage. Who is in a position to proceed against the carrier for default in the carriage of goods ? The general rule is that the owner of the goods is the proper person to sue as he is the person with whom the contract of carriage is made.

10. If, as is very frequently the case, goods are being carried because they have been sold, the owner of the goods will usually be the consignee, and if such is the case, he is the proper person to sue. The difficulty that he does not appear to a party to the contract of carriage was eventually met by denying the consignor to contract with the carrier as agent for the consignee (See *Cork Distilleries Co. v. G. S. & W. Rly.*, (1874) 7 Hl 269. Of course there may be cases in which the consignor remains owner despite delivery of the goods to the carrier. For instance the sale may be on approval. In such an exceptional case the consignor is the proper person to sue. So if the property in the goods has never passed to the consignee, the consignor should sue for any loss or damage.

11. Ordinarily the consignee presumed to be the owner of the goods. Such a presumption is, however, rebuttable, ( *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, . As is said in Halsbury's Laws of England (Hailsham's 4th Edition, Volume 5, Para. 452 p. 334).

"Whenever goods are sent by a seller to a buyer by a carrier, to whom the consignee's name is made known, the ordinary inference is that the contract of carriage is between the carrier and the consignee, and that the consignor is merely the agent of the consignee to make the contract." (See the leading case of *Dunlop v. Lambert*. (1838) 49 Rr 143.

12. In our case the objection can well be raised that the commission agent is not the buyer of goods. He is an agent The general principle that the owner is the proper person to sue may be varied by special agreement between the consignor and the consignee (e.g., that the risk is to remain with the former) or between the consignor and the carrier. In Halsbury it is said:

"The general principle that the owner is the proper person to sue may be varied by special agreement between the parties. Thus by agreement between the consignor and the consignee the risk of the goods may remain with the consignor until delivery ....."

"Further, if the consignor has made a special contract with the carrier for the carriage of goods, or if the consignor has delivered them to the carrier as agent for the consignee, the consignee is the person to sue, even though the property in the goods has not passed to him; and this may be the case even though the consignor has paid the carrier, for, in the absence of any arrangement to the contrary, the consignor is always liable to pay the carrier." (Laws of England (4th

Ed.) Vol. 5, para. 454, p. 235) .

13. The present case appears to be a case of special agreement between the consignor and the consignee. Until delivery the risk of the goods remained with the consignor. It appears from the evidence that the plaintiff firm debited the entire expense of litigation and amount of loss to the principal. Even though the property in the goods did not pass to the consignee, he is the proper person to sue as the consignor delivered the goods to the carrier as agent for the consignee.

14. Prof. Kahn-Freund succinctly summarises the law in these words:

"In most cases the object of carrying goods from one place to another is to transfer possession from a seller of goods to a buyer. In such cases the consignor, when delivering the goods to the carrier, is still the owner of the property, but the very act of delivery to the carrier usually makes the consignee the owner of the property. Though the contract in such a case has the appearance of having been made by the consignor, it is in fact made by him on behalf of, and as agent for, the consignee as owner, and it does not matter what arrangements have been made between seller and buyer with regard to the payment of the freight, i.e., whether it is included in the price and has to be borne by the seller, or whether the buyer has undertaken to pay it out of his own pocket. Therefore, if goods are sold and delivered to the Railways Board or to a road haulier for carriage to the buyer, and they are lost or damaged during transit in circumstances involving liability on the part of the carrier, damages must be paid to the consignee, not to the consignor. The law regards this as the normal case, and gives the carrier a right to assume that, if goods are entrusted to him for carriage, this is done of a contract of sale. It is not the carrier's duty to inquire into the internal relationship between the consignor and consignee. Unless he has been made familiar with circumstances justifying the conclusion that the case has not the normal features of a contract of sale, he is safe if he pays damages to the consignee, while he pays the consignor at the risk of having to compensate the consignee all over again. Since the consignor is deemed to act as agent for the consignee, the latter is bound by all the conditions of the contract, but is not bound by any private arrangement between the consignor and the carrier which is not incorporated in a printed or written contract. If the consignor makes a special contract with the carrier by which the carrier expressly undertakes to compensate him in cases of loss or injury whether he be the owner or not, the consignor has the right to claim damages without proving his ownership. Such contracts are extremely rare."

(The Law of Carriage by Inland Transport 4th Ed. (1965), pp. 209-210).

15. This then is the position in English Law. It is no different in India in performance I now turn to some of the important Indian decisions on this question.

16. The true principle of law was enunciated by Shah, J., when he said:

"Two propositions appear to be well settled. The right of action to recover compensation for loss or damage to the goods ordinarily vests in the consignor. Where the goods lost or damaged in transit are the subject-matter of a contract of sale, the owner of the goods may in the absence of a contract to the contrary sue the railway administration. Therefore, a consignee who is in possession of a railway receipt duly endorsed by the consignor may maintain an action for compensation for loss of the goods covered thereby, but he can do so not because he is the consignee but because he is the owner of the goods. A consignor may sue for compensation for loss relying upon the breach of contract of consignment. An owner of goods covered by a railway receipt may sue for compensation relying upon his title, and the loss of goods by misconduct of the railway administration. But a bare consignee, who is not a party to the contract of consignment and who is not the owner of the goods, cannot maintain a suit for compensation for loss or damage to the goods. He has no cause of action *ex contractu* nor *ex delicto*. ( *Chhangamal Harpaldas and Another Vs. Dominion of India and Another*, .)

17. The rule Therefore is that in the absence of special circumstances, the carrier's contract is with the person in whom the property in the goods is vested; or, as Baron Parke put it, "the person whose property the goods are is *prima facie* the party with whom the contract is made". (*Mullinson v. Carver*, (1843) 1 Lt 59 . But if the property in the goods passed to the consignee at the time of the delivery of the goods to the railway (as indeed it often can happen u/s 23 of the Indian Sale of Goods Act), the consignee would be deemed to be the person who had entered into the contract of carriage with the railway company. In such a case, the consignee is the proper party to sue. ( *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, ). In this Calcutta decision the propositions laid down by Shah, J., in *Chhangamal Harpaldas and Another Vs. Dominion of India and Another*, , were accepted as laying down correct law.

18. The plaintiffs' firm B. Prahlad and Co. (now the respondent in the appeal) is the consignee in our case. They are a firm of commission agent. They have sufficient interest in the goods and in the proceeds of their sale. This is the finding of the first appellate court on evidence. I agree with this finding. It cannot be said that they are bare consignees and have no interest in the goods.

19. A Division Bench of the Bombay High Court held in *Dolatram Dwarkadas v. B. B. & C. I. Railway*, (1914) 38 Bom 659 = AIR 1914 Bom 178, that:

"A railway receipt is a mercantile document of title and the endorsee of the receipt has sufficient interest in the goods covered by it to maintain an action against the Railway Company for damages in respect of, the goods covered by the receipt."

20. In that case the goods were consigned by one Sukhdin Ramlal at a railway station in the United Provinces to Ahmedabad. The goods were consigned to self

but the consignor endorsed the railway receipt asking the railway administration to deliver the goods to one Narandas Lakshmandas. The receipt was endorsed by Narandas in favor of the plaintiff Dolatram Dwarkadas. At Ahmedabad the plaintiff paid the freight and the railway administration delivered to the plaintiff a part of the goods on payment of demurrage which was due and payable as the goods had not been taken delivery of within the period allowed for delivery free of demurrage. The plaintiff then filed a suit against the railway administration for the value of certain bags of wheat which had been damaged during transit and for demurrage which, he alleged, had been illegally recovered from him.

21. The Court of Small Causes at Ahmedabad, which tried the suit, held that the suit filed by the plaintiff was not maintainable as the plaintiff was a commission agent and had no interest in the goods delivered to him. A revision application was filed against that decision and the Bombay High Court reversed the decision and held that a railway receipt being a mercantile document of title the endorsee of such a receipt had sufficient interest in the goods covered by it to maintain an action of the nature filed by the plaintiff. This view appears to have been accepted in a large number of decisions of the courts of India.

22. Therefore, even a commission agent to whom a railway receipt is endorsed has sufficient interest to maintain a suit against the railway administration for compensation for loss of goods and there is nothing in the decision in AIR 1947 169 (Bom.) , which is inconsistent with the earlier decision in Dolatram's case AIR 1914 Bom. 178 . This is the view of Shah J. which he expressed in another case decided by him sitting with Vyas, J., The Union of India (UOI) Vs. Taherali Isaji, . Shah, J., there approvingly referred to the East Punjab decision in Jalan & Sons v. Governor-General in Council, Air 1949 EP 190 which was a case of an endorsee. The plaintiff firm in the present case stands on a much higher footing. They are the named consignee having an interest in the goods.

23. There is a Full Bench decision of the Allahabad High Court ( Dominion of India as owner of G.I.P. Rly. and Another Vs. Gaya Pershad Gopal Narain, ) which though ordinarily should have been entitled to great respect has been the subject of adverse criticism and disapproval in subsequent decisions. There it was held that a consignee, who is not the owner of the goods, but to whom the goods are consigned for the purpose of sale on commission basis is entitled to maintain a suit for loss in respect of damage caused to the goods in transit.

24. In Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another, , A. K. Mukherjea, J., speaking of the Full Bench of Allahabad observed that "the whole decision is full of observations and arguments which cannot be supported either by precedent or authority or on general principles" (P. 315). In Union of India (UOI) Vs. Dayabhai Laxman, Rajkot, , Raju, J., differed from the Full Bench. Miabhoy and Mehta, JJ., in Ibrahim Isaphai Vs. Union of India (UOI) and Another, refused to follow the Allahabad Full Bench.

25. Indian Law like the English Law does not recognise a contract made for the

benefit of a third party, so that if A makes a contract with B for the benefit of C, only A and B are the parties to the contract and C acquires no rights under it even though it was made for his benefit. The learned Judges of Allahabad High Court have on the other hand held that "in India not only can parties to a contract sue upon it but also who are entitled to a benefit under it or to whom the rights created by it are transferred". This certainly does not seem to be correct.

26. One other decision of importance remains to be noticed. In *Mulji Deoji v. Union of India*, Air 1957 Nag 31 one of the questions raised was whether the plaintiff as a bare endorsee of the railway receipt could maintain an action for damages against the railway. On a difference of opinion between Kaushalendra Rao, J. and Hidayatullah, C. J., the matter was referred to the third Judge, viz., Tambe, J. Tambe J., agreed with Hidayatullah, C. J. In *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, , A. K. Mukherjea, J., disagreed with the majority judgment of Hidayatullah. C. J. and Tambe, J. The other Judge Bachawat, J., in the Calcutta case also disagreed with the view taken in Nagpur decision that benefit under the contract of carriage passes to the endorsee of the railway receipt by reason of endorsement (p. 321), This decision need not detain me as I am not concerned in this case with an endorsee. I am concerned with the consignee. But one thing seems certain. The endorsee of a railway receipt for valuable consideration, as pledgee or assignee can sue the railway for loss or damage to the goods: See *The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI)*, .

The railway receipt is a document of title to goods. (See Section 2(4), Sale of Goods Act). An endorsee has sufficient interest in the goods covered by it to maintain an action for their loss. Sixty years ago the Privy Council held this in *Ramdas Vithaldas v. Amar Chand and Co.*, Air 1916 Pc 7.

27. The rule (condition No. 3) Framed for the railways and printed on the back of the railway receipt under the heading "notice to consignors" contemplates delivery to the consignee. It provides:

"That the railway receipt given by the railway company for the articles delivered for conveyance, must be given up at destination by the consignee to the railway company, otherwise the railway may refuse to deliver and that signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced, the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company."

28. It is said that the consignee is not a party to the contract and, Therefore, cannot sue. As Dr. John Morris in *Chitty on Contracts* (23rd Ed.) page 269 says:

"The difficulty that he (the consignee) does not appear to be a party to the contract of carriage was eventually met by deeming the consignor to contract with the carrier as agent for the consignee."

29. This was settled in England by the House of Lords as long ago as 1874. (See *Cork Distilleries Co. v. G. S. & W. Rly.*, (1874) 7 HL 269. This being so there is no difficulty for the consignee to maintain a suit in his own name. It must be remembered that living law is to be found not so much in the pages of the law reports as in the contractual terms by which carriers define the conditions on which they are prepared to carry goods, passenger and luggage. Any account of the modern law which ignored these contractual terms, many of which have become standard forms of contract, would give a most misleading impression.

30. Paradoxical though it may seem it is true that the consignee in the instant case is the agent of the principal at Savda (the consignor). The principal himself (the consignor) will be deemed to have acted as the agent of the consignee at the time of making the contract with the carrier. For the purposes of the Contract Act and the Sale of Goods Act the consignee is the agent in this case. For the purposes of the Indian Railways Act the consignee is the principal for whom the consignor will be deemed to have acted as agent at the time of booking the goods with the railway. The consignee can, Therefore, enforce the contract against the railway.

31. At least this much must be conceded to the learned Judges of the Allahabad Full Bench that they did take into consideration this important aspect of the contractual terms. On the whole it seems to me that their conclusion on the locus standi of commission agent to sue is right though one may find it difficult to agree with all their reasoning.

32. That the right of a commission agent to sue was upheld as early as 1914 in the Bombay case, *Firm of Dolatram Dwarkadas v. B. B. and C. I. Rly. Co.*, 2nd 38 Bom. 659 = AIR 1914 Bom 178. This decision was followed by a strong bench of the Punjab High Court in *Jalan and Sons v. Governor General in Council*, AIR 1949 EP 190. (Mahajan and Teja Singh JJ). The judges in the Punjab case disapproved the judgment of Bhagwati, J., in AIR 1947 169 (Bom.). It is somewhat curious that the bench decision of his own Court was not brought to the notice of Bhagwati, J., and was not even referred to in the judgment.

33. *Firm of Dolatram Dwarkadas v. B. B. & C. I.*, 2nd 38 Bom 659 = AIR 1914 Bom 178 was also followed by Shah, J., in the bench decision of *The Union of India (UOI) Vs. Taherali Isaji*, . In that case *Jalan & Sons v. Governor General in Council*, AIR 1949 EP 190 was also approvingly referred .

34. It is true that both these decisions - *Firms of Dolatram Dwarkadas* AIR 1914 Bom 178 as well as *Jalan & Sons*, AIR 1949 Ep 190 (supra) - were adversely criticised by A. K. Mukherjea, J., in his exhaustive survey of decided cases in the *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, . But it seems to me that criticism is not well founded. Too much has



been dismissed too lightly.

For the case of Dolatram Dwarkadas (supra) the learned Judge ought to have referred to the complete report of the case in 2nd 38 Bom 659 = AIR 1914 Bom 178 where fuller facts are given instead of the equivalent in Air 1914 Bom 178 to which he refers where only the judgment has been reproduced. Dolatram Dwarkadas is itself based on another bench decision of that court: Amar Chand & Co. v. Ramdas Vithaldas, 2nd 38 Bom 255 = AIR 1914 Bom 290 which was affirmed on appeal by the Privy Council.

In Jalan & Sons an endorsee was held entitled to maintain the suit. The right of an endorsee for valuable consideration to sue has now been recognised by the Supreme Court in The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI), .

In this court a division bench followed Jalan & Sons" case in Union of India v. Ghamandi Lai Naresh Chand Jain, (RFA 18-D of 1958 decided on 1-3-1967) (Delhi). In the Circuit Bench of the Punjab High Court at Delhi Jalan"s case as well as Dominion of India as owner of G.I.P. Rly. and Another Vs. Gaya Pershad Gopal Narain, , were followed by a Division Bench (See Latto Mal Nanu Ram v. Union of India, Rfa 106-D/54 decided on December 31, 1963) (Punj).

After traversing this weary path in a welter of conflicting decisions where do we stand ? Is there a sign post or a landmark to guide our steps? In The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI), the Supreme Court noticed the conflict of opinion in Indian decisions but did not resolve the difference. Now in Union of India (UOI) Vs. West Punjab Factories Ltd., , the Supreme Court has said:

".....Ordinarily, the consignor is the person who has contracted with the railway for the carriage of goods and he can sue; and it is only where title to the goods has passed that the consignee may be able to sue. Whether title to goods has passed from the consignor to the consignee will depend upon the facts of each case . ...."

35. I think the Supreme Court in Union of India (UOI) Vs. West Punjab Factories Ltd., , has set its seal of approval on those decisions which take the view that a bare consignee cannot sue. One such decision is Chhangamal Harpaldas and Another Vs. Dominion of India and Another, . A consignee in whom the property in the goods has passed can sue. As Shah, J., tersely put it:

"A consignee can maintain an action not because he is the consignee but because he is the owner of the goods."

36. A commission agent or a "pucca adatia" cannot institute a suit against the railway administration unless he is able to show that the goods represented by the railway receipt had been transferred to him or any interest therein had been created in his favor. See Ibrahim Isaphai Vs. Union of India (UOI) and Another, .

37. To sum up in the law of carriage this is important to note who are the parties to the contract because the law presumes that the contract of carriage of goods is made between the carrier and the owner of the goods and it often happens that the person who consigns the goods is not himself the owner. Let us consider the following four sets of circumstances:

(a) Where the consignor is the owner of the goods both before and after carriage. (This might happen for example where goods are sent on approval or under a contract of sale on the condition that ownership is not to pass to the buyer until the goods are paid for).

In this case no problems arise. The parties to the contract are clearly the consignor and the carrier. Only the consignor can sue.

(b) Where the consignor is not the owner of goods but has been entrusted with the possession of them by their real owner, he is said to be a bailee of the goods and, as such, is entitled to make a contract in his own right. This is illustrated by the old case of *Freeman v. Birch*, (1843) 3 Qb 492=114 Er 596 (often known as the *Laundress case*). In that case a laundress was in the habit of collecting linen from her customers, washing it and returning it by carrier. Some of the linen was lost and it was held that she was entitled to sue the carrier because, being a bailee of the goods, she had made the contract in her own right.

(c) Where the consignee is the owner of the goods both before and after carriage. The consignor is deemed to have acted as the consignee's agent in entrusting the goods to the carrier. In this case the consignee can sue.

(d) Where ownership in the goods passes on delivery to the carrier.

This would be the normal state of affairs when goods are, consigned under a contract of sale, for the Sale of Goods Act 1930 (see Sections 23 and 39) expressly stipulates that in such circumstances delivery to the carrier is deemed to be sufficient delivery to the buyer for the purpose of passing the ownership of the goods. In such a case the consignor is again deemed to be the agent of the consignee for the purpose of making the contract. In this case the consignee can sue the carrier.

38. Why is it important to the carrier to know who the other party to the contract is? Obviously because this is the person to whom the carrier should look for payment of his charges and to whom he should pay compensation in the event of the goods being lost or damaged. The law allows him to presume in the absence of evidence to the contrary that the consignee is the real owner of the goods. This means that if the goods are lost or damaged and the carrier pays the consignee, he is safe in all cases. If he pays the consignor, he may have pay the consignee all over again.

39. This then is my conclusion. The plaintiff as commission agent has sufficient interest in the goods and is entitled to sue. To hold to the contrary "would be a retrograde step and would paralyse the entire mechanism of finance of our

internal trade. In this vast country where goods are carried by railway over long distances and remain in transit for long periods of time, the railway receipt is regarded as a symbol of the goods for all purposes". ( The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI), .

40. The second question is about proof of misconduct. The plaintiff's case is that there was delay in delivery at Delhi and this has resulted in the deterioration of the goods. Plantains are perishable by nature. It is said to be their inherent vice. The plaintiff says that usually the goods can be carried from Savda to New Delhi in three day's time. He gave ten such instances in evidence where goods reached Delhi within three days. Out of these ten instances, seven were admitted by the railway. In this case the railway took four days. It is said that delay of one day was not because of the misconduct or negligence of the railway. The railway gave 15 instances where the goods arrived in Delhi sometimes in four days and sometimes in five.

41. Counsel for the plaintiffs argues that the instances given by the railway cannot be of assistance as they are instances which were given to show the maximum period taken in the arrival of the goods. There is much truth in what he says. It appears to me that if in seven cases goods can arrive within three days then I should think that is the normal time. If more than three days are taken by the railway in bringing plantains to Delhi they must show how and in what circumstances the goods reached on the fourth day as in this case. How did the railway deal with the goods in transit? This is a matter within their special knowledge. (Section 106, Evidence Act). They have to explain. They have to prove. In this case no such evidence was given by the railway. The court is entitled to draw an adverse presumption against them u/s 114(g) of , Evidence Act. (See Union of India v Delhi Cloth and General Mills Co. Ltd., Air 1964 Pun 147. The appellate Court has reached the conclusion that there was delay in delivery. What is a reasonable time in each particular case is a question of fact. (See Explanation to Section 46, Contract Act). Whether there is a delay or not in a particular set of circumstances is essentially a question of fact and cannot be reagitated in this court in second appeal.

42. The plaintiff's goods were dispatched from Savda on coaching tariff basis rates and it was expected of the railway that they will bring the goods by a fast train because the goods are perishable by nature. That the railway took care to bring the goods as early as possible is a matter which the railway had to prove when once the plaintiff had shown that in as many as seven cases the usual time taken was three days.

43. The goods were booked on October 13, 1963 at Savda but they were dispatched on October 14, 1963 at 2.45 hours. This shows a detention of 10 hours for dispatch. Then there is delay in transit. The movement of the train from the starting station to New Delhi will be clear from the following chart:

Station Departure & Detention Time & Arrival Time at Station Detention in transit

Savda Departure 21:45Hrs. 4.10.63 Time 2.45hs 286 km Arrival 11.16 Hrs Itarsi  
15.10.63 Time 0.30hrs Departure 26.34 Hrs. 15.10.63 Time 11.46 Hrs 382Km  
Arrival 5.10 Hrs Jhansi 16.10.63 Time 14.20 Hrs Departure 12.20 Hrs 16.10.63  
Time 19.30 Hrs 216 Km Arrival 17.10.63 Agra Time 4.00 Hrs Canteen 7.50 Hrs.  
Departure 17.10.66 Time 11.50 Hrs 194Km. Arrival 9.40 Hrs New 17.10.63 Delhi  
Time 21.30 Hrs

44. It appears that sometimes the train was detained at a station for as many as 11 hours as at Itarsi. Then the train covered a distance of 382 Km from Itarsi to Jhansi in 26.34 Hrs. From Agra to New Delhi the distance is 194 KM. The train took 9.40 Hrs. The result of all this is that the goods booked on 13-10-1963 reached New Delhi on October 17, 1963 at 21.30 hrs. in the night. If the day of booking is included it took the goods five days to reach the destination, otherwise four.

45. Delay is prima facie proof of misconduct and negligence. The train took unusual time. It was for the railway to explain it properly. The plaintiffs' instances show that the goods can arrive in three days. The instances given by the railway cannot be accepted. They were selective. These were not taken at random from record. They were chosen to illustrate the maximum time. What about instances where on this very route the train journey was covered in three days ? In agreement with the first appellate Court I would Therefore hold that there was misconduct on the part of the railways makes them liable in damages.

46. The third argument was on the measure of damages. In total loss the measure of the carrier's liability will be the value of the goods. But what is meant by value ? A person may put a very high value on something that has little intrinsic worth, but the carrier cannot be held responsible for this, as it is not reasonably foreseeable. The test must be objective, and the standard the law adopts is the market value of the goods at the time and place at which they should have been delivered. This will normally include the cost of freight, and if the carrier's charges have not in fact been paid, he may deduct these from the damages payable. The consignor may include in his claim any profit he might reasonably have expected to make from a sale of the goods at their market price, but if he had contracted to sell the goods at an exaggerated price, he cannot claim for the abnormal profit he would have made thereby - unless of course this fact was known to the carrier.

47. In damage to the goods the measure of the plaintiff's loss will be the amount by which the value of the goods has diminished, e.g., the market value of the goods minus their value in their damaged state. The plaintiff must do all that he reasonably can to mitigate his loss, and if, for example, the damaged goods are still saleable, though at a lower price, the measure of damages will be the market price of the goods minus what they would have fetched in their damaged state if the plaintiff had sold them.

48. The counsel for the railway says that there is no reliable evidence of the

plaintiff to prove what was the market value of the goods on the day of dispatch and the day of arrival. I cannot accept this submission. The measure of damages in such a case as this will be the difference in the value of the goods having regard to the condition of the goods in which they ought to have been delivered and the condition in which they were actually delivered. If at the starting station the plantains were fresh, raw and green and if at arrival at Delhi they had greatly deteriorated in quality and could not fetch on sale the price which goods in better condition would have fetched that is the amount of damages to which the plaintiff is entitled. There is evidence on the record that the value of this wagon of plantains was Rs. 4,900/-. The plaintiffs' books of account show the value. When the goods arrived at Delhi the plaintiffs took delivery on October 18, 1963, and sold them the same day for Rs. 2,568.69. This resulted in a loss of Rs. 2,431/- to the plaintiffs. They have claimed only Rs. 2,000/-. To this compensation they are clearly entitled. The first appellate Court has believed this evidence of the plaintiffs. I cannot disturb this finding on second appeal. The quantum of damages is essentially a question of fact if right principles governing the measure of damages are followed.

49. At the time of delivery of the goods the railway issued a certificate to the plaintiffs that the goods had gone bad to the extent of 40 per cent. This clearly shows that the claim for Rs. 2,000/- is not inflated.

50. The counsel for the railway argues that the certificate cannot be looked into as it was issued "without prejudice". He bases himself on Section 23, Evidence Act. I do not agree. The certificate was issued certainly "without prejudice". It only meant without prejudice to railway's liability. At the time the certificate was issued the railway did not admit their liability. In fact they have denied their liability all through. The case had to be fought in court. The plaintiff had to establish liability. But if liability is once established the court is not precluded from looking into the certificate which is the evidence of the measure of damages. If 40 per cent. of the goods worth Rs. 4,900/- had gone bad, I cannot say that the first appellate Court was wrong in granting a decree for Rs. 2,000/- to the plaintiffs. The railway certificate itself proves the quantum of compensation to which the plaintiff is entitled.

51. At the conclusion of the hearing of the appeal I pronounced the judgment. I dismissed the appeal with costs throughout. I have now given my reasons.

52. For these reasons I would dismiss the appeal. The respondent will be entitled to costs throughout

53. Appeal dismissed.