
(1967) 12 PAT CK 0001
In the Patna High Court
Case No : F.A. No. 488 of 1962

Union of India

APPELLANT

Vs

The New India Sugar Mills Ltd.

RESPONDENT

Date of Decision : 13-12-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299, 299(1)
Contract Act, 1872 — Section 15, 72
Government of India Act, 1935 — Section 175(3)

Citation : (1967) 12 PAT CK 0001

Hon'ble Judges : Tarkeshwar Nath, J; K.B.N. Singh, J

Bench : Division Bench

Advocate : P.K. Bose, for the Appellant; S.K. Jha, for the Respondent

Final Decision : Allowed

Judgement

Tarkeshwar Nath, J.—This appeal by the defendant arises out of a money suit for recovery of Rs. 13,159.25 paise as principal and interest. The facts giving rise to this litigation are these. The plaintiff is a limited concern and owns a sugar mill at Hassanpur Road for crushing canes during the cane crushing seasons. The canes are supplied to the factory on the gate of the said mill as well as from many other stations in railway wagons during the said seasons. In the cane crushing seasons of 1949-50 to 1954-55 the plaintiff had to pay a heavy sum to the North Eastern Railway by way of demurrage as demanded without any proper accounting out of fear so that the supply of wagons to it at the out-stations might not be stopped during those seasons. There was an understanding as well that if any amount was paid in excess by the plaintiff, the same would be refunded to it on final accounting. The plaintiff protested against the order for payment of heavy demurrage to the railway authorities concerned and in the end there was a final accounting between the representative of the plaintiff and the railway authority and the latter agreed that a sum of Rs. 5702/15/- would be refunded to the plaintiff on account of the excess demurrage paid by it to the

railway administration during the cane crushing season of 1949-50, 1951-52, 1952-53 and 1953-54. Similarly, there was an agreement that a sum of Rs. 3575/12/- would be refunded to the plaintiff on the same score which was paid in excess during the cane crushing season of 1950-51. There was still a further accounting between the same parties and it was settled that a sum of Rs. 1949/5/- would be refunded to the plaintiff by the railway administration out of the demurrage paid by the plaintiff during the cane crushing seasons of 1951-52, 1952-53, 1953-54 and 1954-55. In other words, the result of all these accountings was that a total sum of Rs. 11,228/- was found to have been paid in excess and this amount was to be refunded to the plaintiff by the railway administration. The Regional Superintendent of North Eastern Railway at Muzaffarpur sent a letter no. T/303/II/6/HPO dated 4.1.1958 to the Chief Commercial Superintendent, North Eastern Railway, Gorakhpur acknowledging the claim of the plaintiff for immediate refund of a sum of Rs. 11,228/- and he forwarded a copy of the said letter to the plaintiff on the same date. There was a further correspondence between the plaintiff and the railway authorities concerned with regard to the refund of the excess amount paid as demurrage. The plaintiff made a demand for the refund of the aforesaid sum and ultimately served a notice u/s 80 of the CPC on the General Manager, North Eastern Railway, Gorakhpur for the payment of the said amount, but the attempt of the plaintiff to get back the amount was futile and the railway authorities were not willing to pay the said amount. The plaintiff sent letters dated 29.7.1959, 18.5.1960 and 29.6.1960 to the Deputy Chief Commercial Superintendent, Chief Commercial Superintendent and the General Manager of the North Eastern Railway for refund of the aforesaid amount which had been acknowledged by those railway authorities in their letters dated 7.8.1959, 24.5.1960 and 7.7.1960 respectively, but even then no payment was made to the plaintiff. The plaintiff was entitled to interest on the said sum of Rs. 11,228/- at the rate of 6 per cent per annum by way of damages from 4-1-1958 till the date of realisation. The amount of interest came to Rs. 1,931.25 Paise and thus the total claim was for Rs. 13,159.25 Paise for the realisation of which the plaintiff filed this suit on 2.12.1960.

2. The sole defendant, the Union of India representing the North Eastern Railway contested the suit on the grounds inter alia that it was barred by limitation as well as u/s 77 of the Indian Railways Act. The other plea was that the notice u/s 80 of the CPC was not valid and the plaintiff's case that a heavy sum was paid as demurrage on account of fear without proper accounting was not at all correct. The defendant did not admit that there was any accounting and that it was agreed to refund either the sum of Rs. 5702/15/- or Rs. 3575/12/- or Rs. 1949/5/-. The plaintiff not having stated either the names or the designations of the officers of the railway administration, who gave any undertaking, if at all, to the plaintiff for the refund, it was not possible to ascertain as to whether those officers were competent to act on behalf of the railway administration and make any promise for the refund of any amount. In other words, the allegations of the

plaintiff were vague and ambiguous. The Regional Superintendent of the North Eastern Railway at Muzaffarpur did not acknowledge the claim of the plaintiff and the letter referred to by the plaintiff did not bear the signature of the said officer. The plaintiff could not count a fresh period of limitation from the 4th of January, 1958 and in any event, the period of limitation for the present suit had already expired before the said date and the said letter could not amount to an acknowledgment of the claim of the plaintiff. The plaintiff was neither entitled to refund of any sum nor interest by way of damages.

3. The first issue was with regard to the maintainability of the suit as framed and the second one was to whether the plaintiff had any cause of action or right to sue? The third one was with regard to the bar of limitation and fourth one dealt with the validity of the notices u/s 77 of the Indian Railways Act and Section 80 of the Civil Procedure Code. The fifth issue was as to whether the plaintiff was entitled to a decree for the amount as prayed for? The last issue was in general terms about the other relief or reliefs to which the plaintiff was entitled.

4. The learned Additional Subordinate Judge held that the notice u/s 80 of the CPC was valid and the suit was not barred for want of a valid notice u/s 77 of the Indian Railways Act. This suit according to him was maintainable and the plaintiff had a valid cause of action, but he held that the claim of Rs. 3376/9/- for the year 1949-50 and Rs. 3575/12/- for the year 1950-51 was barred by time and was not saved by joint note (Ext. 3) dated 3.4.1955 which was being used as an acknowledgment. In other words, the plaintiff was not entitled to a decree for Rs. 6,952/5/- which was barred by limitation, but it was entitled to a decree for the remaining sum of Rs. 4275/11/- (which was not barred by limitation) out of the total claim of Rs. 11,228/-. He did not allow any interest, as there was no stipulation for the payment of it. Accordingly, he decreed the suit in part on contest for Rs. 4,275/11/- with proportionate costs and pleader's fee Rs. 16/-. Being aggrieved by this decree, the defendant has filed this appeal whereas the plaintiff has filed a cross-objection. The appeal and the cross-objection have been heard together and they will be governed by this judgment.

5. Learned counsel for the appellant submitted in the first instance that the plaintiff had not stated in the plaint either the date of any of the accountings or the names or designations of the railway officers who were alleged to have been parties to the accountings and unless the plaintiff established that those officers were competent to acknowledge the claim on behalf of the railway administration, the plaintiff was not entitled to any decree. In other words, the details of the accounting, if any, were not at all given in the plaint and the alleged agreement could not bind the railway administration. Before dealing with this contention it will be proper to refer to the view taken by the court below. Learned Additional Subordinate Judge while considering the claim of the plaintiff for the refund of overcharge in respect of the demurrage referred to the three documents, namely, the joint note (Ext. 3) dated 3.4.1955, a letter (Ext. 2/b) dated 3.5.1955 and another letter (Ext. 2) dated 4.1.1958. The first one, that is,

the joint note was signed by the Cane Manager of the plaintiff and the Regional Cane Inspector of the North Eastern Railway. This was in connection with the sugarcane demurrage due against the factory of the plaintiff and refund claimed on account of demurrage. It gives a summary of the claim of the factory for refund and that of the railway in respect of the demurrage payable by the said factory. It mentions the names of the various railway stations, the different dates and the amounts which were recommended to be refunded in respect of the excess amount of demurrage paid during the seasons 1949-50, 1951-52, 1952-53 and 1953-54. The total amount recommended to be refunded for the year 1949-50 was Rs. 3375/9/-, for the year 1951-52 Rs. 825/15/- for the year 1952-53 Rs. 1376/1/- and for the year 1953-54 Rs. 124/6. The total came to Rs. 5702/15/-. It has been further mentioned that as regards the claim for the year 1950-51, a sum of Rs. 3575/12/- had been approved by the R.T.S. Muzaffarpur vide his letter dated 27.8.1954 (Ext. 2/a). The plaintiff has relied on his joint note in respect of the claim for 5702/15/- and Rs. 3575/12/-. The letter (Ext. 2/b) dated 3.5.1955 was sent by the Regional Traffic Superintendent, North Eastern Railway, Muzaffarpur to the Factory Manager, of the plaintiff. The plaintiff relies on the following passage occurring in this letter:--

Amount of Rs. 5702/15- recommended to be foregone in the joint note of the Regional Cane Inspector, Muzaffarpur and the Cane Manager, New India Sugar Mills, Hassanpur Road dated 3.4.55 in connection with cane demurrage of out standings already paid by you through various R/Rs. Invoices detailed in the Joint Note is approved by me. The amount viz. Rs. 5702/15/- and 3575/12/- out of the Railway Station (HPO) demurrage amount of Rs. 6802/- for Season 1950-51 already paid by your factory will be refunded as agreed to. For this necessary actions are being taken to refer the matter to the Chief Commercial Superintendent, Gorakhpur for issue of refund orders for these amounts.

6. The copy of letter dated 4.1.1958 sent by the Regional Superintendent, North Eastern Railway, Muzaffarpur to the Chief Commercial Superintendent, North Eastern Railway, Gorakhpur has been marked Ext. 2. This letter would be quoted in some details at a later stage, but for the present it is relevant to mention only this much that the Regional Superintendent requested the Chief Commercial Superintendent in the last paragraph of this letter to expedite the matter so that the factory might get refund of Rs. 11,228/-. The learned Additional Subordinate Judge took the view that from these documents, it was clear that the officers who wrote these documents had acknowledged the liability of the railway to refund the amounts of demurrage mentioned in those documents. He further held that these officers were competent to acknowledge the claim of the plaintiff on behalf of the railway. He then considered as to what was the effect of these acknowledgments and took the view that the joint note (Ext. 3) dated 3.4.1955 did not save limitation in respect of the claim for the years 1949-50 and 1950-51 as the acknowledgment was made after the expiration of the period of limitation. He thus held that the claim for those years amounting to Rs. 3375/9/- and Rs. 3575/12/- respectively was barred by time. The suit has, however, been decreed

in part on the basis of the letter dated the 4th January, 1958 (Ext. 2) treating it as a valid acknowledgment in respect of a portion of the claim of the plaintiff.

7. Learned counsel for the appellant submitted that the railway officer who signed either the joint note (Ext. 3) or the other officers who sent the letters (Ext. 2/b and 2) were not at all competent to enter into any agreement or a contract with the plaintiff and the said contract was not valid in law on account of the non-compliance with the provisions of Article 299 (1) of the Constitution of India. In other words, the said contracts were not expressed to have been made by the President and the provisions of Article 299 (1) being mandatory in character, a contract in order to be binding and enforceable against the Union" Government had to be made in strict conformity with the formalities prescribed by that Article. He contended that for the non-compliance with those formalities, those contracts were void and not enforceable against the Union of India. In support of it he referred to a case, (1) Dominion of India Vs. Raj Bahadur Seth Bikhraj Jaipuria, . The provisions of Section 175 (3) of the Government of India Act and those of Article 299 (1) of the Constitution of India were considered and the essential requisites of a valid contract and assurance on behalf of the Government under the Government of India Act were laid down. It was pointed out that Article 299 reproduced those essential conditions laid down in Section 175 (3), with this difference that in respect of the Union all contracts and assurances had to be expressed to be made by the President. It was held that the contracts which did not conform to the provisions of Article 299 (1) or, for the matter of that, Section 175 (3) of the Government of India Act were wholly unenforceable against the Union of India or the Government of India. There was an appeal against this decision of the High Court, but it was affirmed by the Supreme Court (2) (see Seth Bikhraj Jaipuria Vs. Union of India (UOI),) and their Lordships held that the State should not be saddled with liability for an unauthorised contract and the purpose of enacting the provisions contained in Section 175 (3) was that the contracts must show on their face that they were made on behalf of the State, that is, by the head of the State and executed on his behalf and in the manner prescribed by the person authorised. The three documents referred to above were not in the form prescribed by Article 299 (1) of the Constitution of India and, therefore, the alleged contracts suffered from a serious infirmity. This position could not be assailed by learned counsel for the plaintiff respondent. But in order to get rid of this difficulty, he relied on the provisions of Section 72 of the Contract Act and submitted that there was a statutory liability on the Union of India to refund the excess amount of demurrage which had been paid to the railway administration on account of coercion.

8. Learned counsel for the plaintiff respondent developed his argument with regard to Section 72 in the following manner: This Section reads as follows:--

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

He conceded fairly that the amount of demurrage was not paid by mistake to the railway administration, but he pressed that the said amount was paid to the railway administration under coercion, in other words, the plaintiff was not willing to pay the heavy amount of demurrage voluntarily and it paid it only when it was coerced to do so. This threat or coercion according to him was that if the amount of demurrage as demanded was not paid, then the sugarcane would not be delivered or the supply of wagons at the out-stations would be stopped during the cane-crushing seasons. In these circumstances, the plaintiff had to pay the heavy amount of demurrage for taking delivery of the sugarcane on different dates during the various seasons and the Union of India was bound to return the excess amount realised from the plaintiff. In support of it he relied on (3) *Seth Kanhaya Lal Versus The National Bank of India, Limited* (XL I.A., 56). The plaintiff there had alleged that he was the sole proprietor of certain cotton mills and the other properties contained therein, but the defendants having a money decree against a limited company attached the mills premises and the properties of the plaintiff and took wrongful possession of them to satisfy their decree. The plaintiff was prevented from working the mills and he was compelled to pay to the defendants under protest the sum of Rs. 83,005/-, the balance due to the defendants under their decree against the limited company. The plaintiff then sued the defendants to recover the said amount besides Rs. 10,000/- as damages. It was held that the plaintiff was entitled to get back the refund of the amount paid by him in accordance with the provisions of Section 72 of the Indian Contract Act and the word "coercion" in Section 72 was used in its general and ordinary sense as an English word and its meaning was not controlled by the definition of "coercion" in Section 15 of the said Act and on the facts alleged by the plaintiff he had a good cause of action. He then referred to (4) *Maskell Versus Horner* [(1915) 3 K.B., 105]. The defendant as owner of the market had demanded tolls from the plaintiff who was carrying on business as a dealer in that market and under threat of seizure of the goods of the plaintiff, the plaintiff had to pay tolls to the defendants under protest. Subsequently, the plaintiff made a claim for the recovery of the sums paid by him as tolls. A question arose as to whether the plaintiff had made those payments in such circumstances as entitled him to recover them from the defendant in an action at law for money paid and received. The claim was put on two grounds. The first one was that the plaintiff paid the sums under a mistake of fact and the second one was that he had paid them not voluntarily but under the pressure of seizure of his goods. It was held that if a person paid money, which he was not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he could recover it as money paid and received. Although the money was paid not under duress in the strict sense of the term, as that implies duress of person, yet it was paid under the pressure of seizure or detention of goods which was analogous to that duress. The payment in that case was made for the purpose of averting a threatened evil, and was made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand. It is essential,

however, to keep in view that in both the cases relied upon by learned counsel there were compelling circumstances in which the payments were made. In the first case there was the warrant of attachment and in the second case there was actual seizure or threat of seizure and to avert a threatened evil the plaintiff paid the tolls. In order to bring the case of the plaintiff within the principles laid down by their Lordships learned counsel relied on the statement made in Paragraph 4 of the plaint in which the plaintiff has alleged that the heavy sum was paid as demurrage without any proper accounting out of fear, so that the supply of wagons to the plaintiff at the outstations might not be stopped during the cane crushing seasons. The word "coercion" was not mentioned anywhere in the plaint, but he submitted that the words "out of fear" were equivalent to the word "coercion".

9. Learned counsel for the appellant refuted the contention made with regard to the provisions of Section 72 of the Indian Contract Act and submitted that the case of "coercion" was neither pleaded nor there was any evidence in support of that case. In other words, according to him there was nothing to indicate that the railway authorities had refused to deliver the goods (sugarcane) to the plaintiff without payment of the amount of demurrage and the plaintiff had not adduced any evidence on that point. It is thus necessary to consider the provisions of Section 72. It is true that the word "coercion" was not used in the restricted sense in which it was defined for another purpose in Section 15 of the Indian Contract Act and the said word has to be used in its normal sense. But illustration (b) of Section 72 is relevant and it reads thus:

"A railway company refuses to deliver up certain goods to the consignee except upon the payment of illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive". This illustration indicates that there was a refusal by the railway company to deliver up the goods except upon payment of illegal charge and in those circumstances the consignee had paid the sum charged. The important question in such a case is to consider the situation of the parties as to whether their situation was unequal. The word "coercion" even according to the normal meaning implies some kind of pressure, compulsion or force. Examining the statements contained in Paragraph 4 of the plaint in this light, there is nothing in that paragraph to indicate that the plaintiff was either forced or compelled to pay the excess amount of demurrage. These statements in Paragraph 4 have been denied by the defendant in Paragraph 7 of the written statement. Turning to the oral evidence adduced by the plaintiff, it appears that Raja Jha (P.W. 1) was a formal witness who came to prove the notice (Ext. 1) u/s 80 of the Civil Procedure Code. Raja Ram Jain (P.W. 2) was the Cane Manager and an employee of the plaintiff. His evidence is that the plaintiff used to pay demurrage which used to be charged by the railway, on an understanding that amounts paid in excess would be refunded after proper accounting and this payment was made so that the siding facility and booking facility might not be stopped by the railway. In cross-examination he stated that daily account of the

amount paid as demurrage was maintained and such payments were made under written protest notes. Thereafter, he deposed that the entire amount demanded as demurrage was being paid from time to time and later on objections were raised regarding the excess or improper amount charged and the railway used to allow those objections. His evidence does not indicate that there was either compulsion or any kind of pressure or threat by the railway authorities for the payment of the excess amount of demurrage. P.W. 3 did not depose anything on this point. The position thus is that neither the plaint nor the evidence of the plaintiff makes out a case of "coercion" in order to attract the provisions of Section 72 of the Indian Contract Act.

10. Learned counsel for the appellant contended that the sugarcane in question could have been delivered to the plaintiff even without payment of the amount of demurrage and it was open to the railway administration to realise the dues later on in respect of the demurrage by filing a suit. The word "demurrage" according to Section 46-C of the Indian Railways Act means "the charge levied after the expiry of the free time allowed for loading or unloading a wagon". In exercise of the power conferred by Section 47, Sub-section 3 of the Indian Railways Act, the Governor-General in Council was pleased to sanction certain rules for regulating the terms and conditions on which the railway administrations would ware-house or retain goods at any station or depot on behalf of the consignee or owner. This sanction was accorded by Notification No. 231 dated the 3rd July, 1902. Rule 6 laid down the rate at which demurrage could be charged. Section 55 (1) of the said Act provides as follows:--

If a person fails to pay on demand made by or on behalf of a railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or, if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession.

This section gives the railway administration right to realise its dues and charges from the consignee or the owner by detaining the goods and selling them under Sub-section 2. In other words, the railway administration has a general lien. Sub-section 5, however, provides as follows:--

"Notwithstanding anything in the foregoing Sub-sections, the railway administration may recover by suit any such rate, terminal or other charge as aforesaid or balance thereof". This sub-section, therefore, expressly gives the railways right of suit to recover the charges due to them. So u/s 55(1) the very goods consigned may be detained before the delivery unless the sum due to the railway is paid or in case of their removal, any other animals or goods of that consignee coming into the possession of the railway could be detained. Independent of those rights, Sub-section 5, gives a right of suit to the railway to recover the sums due in respect of any rate, terminal or other charges. Learned counsel for the appellant submitted that the sugarcane of the plaintiff used to be

received for delivery almost in every season and there being regular transactions between the plaintiff on one hand and the railway administration on the other, the latter could have delivered the sugarcane ever without payment of the amount of demurrage, and the railway administration could claim the sum due in a suit to be instituted later on. I have already indicated the various rights given to the railway administration by the Statute and the consideration of these rights is relevant in the present appeal only for the purpose of determining as to whether there was any coercion by the railway authorities. On a consideration of all these factors, I am of the view that on account of the lack of proper material either in the plaint or in the evidence, the plaintiff has not been able to establish that the excess amount of demurrage was paid under coercion as envisaged in Section 72 of the Indian Contract Act. There is thus no statutory liability on the Union of India to repay or return the said amount of demurrage to the plaintiff.

11. The plaintiff has alleged in the same Paragraph 4 of the plaint that there was an understanding that if any amount was paid in excess the same would be refunded on final accounting. The result of the final accounting has been indicated in Paragraph 5 and the various sums which were to be refunded have been mentioned therein. These statements have been denied by the defendant in Paragraph 8 of the written statement. I have already referred to the joint note (Ext. 3) and the two letters (Exts. 2/b and 2), but they were not in the form prescribed by Article 299 (1) of the Constitution of India and as such the plaintiff cannot enforce those contracts or agreements, even if they are within the period of limitation, against the Union of India. The plaintiff has referred to three other letters dated 7.8.1959, 24.5.1960 and 7.7.1960 in Paragraph 8 of the plaint. I have already referred to the letter dated 4.1.1958 (Ext. 2). Proceeding chronologically it appears that the Cane Manager of the plaintiff sent a letter dated 29.7.1959 (Ext. 4/m) to the Chief Commercial Superintendent, North Eastern Railway, Gorakhpur requesting him to expedite the refund of Rs. 11,228/-. In answer to this, the Chief Commercial Superintendent sent the letter dated 6.8.1959, Ext. 2/e (without prejudice to the rights of the railway) to the plaintiff informing it that the matter was receiving his special attention. This letter is dated 6.8.1959 (as printed in the paper book) and it seems that the plaintiff has referred to this letter in Paragraph 8 of the plaint as being dated 7.8.1959. On 13.11.1959 the Cane Manager of the plaintiff sent another letter (Ext. 4/j) to the Chief Commercial Superintendent for expediting the refund and there was another letter to the same effect on 26.3.1960 (Ext. 4/o), but the Chief Commercial Superintendent wrote to the plaintiff on 2.5.1960 (Ext. 2/f) asking it to send copies of certain relevant records. On 18.5.1960 there was another letter (Ext. 4/1) addressed to the Chief Commercial Superintendent, North Eastern Railway, Gorakhpur requesting him to refund Rs. 11,228/- to the plaintiff at any early date. On 24.5.1960 the Chief Commercial Superintendent sent a letter (Ext. 2/d) in reply to the Cane Manager of the plaintiff that "without prejudice" to the rights of the railway the matter was receiving attention. On 29.6.1960 the Cane Manager of the plaintiff sent a letter (Ext. 4/k) to the

General Manager, North Eastern Railway, Gorakhpur for passing necessary orders for the refund of Rs. 11,228/- at an early date. On 7.7.1960 the Chief Commercial Superintendent wrote again vide letter (Ext. 2/j) to the plaintiff that without prejudice to the rights of the railway the matter was receiving attention. None of these letters sent by one or the other railway official fulfils the essential conditions prescribed in Article 299 (1) of the Constitution of India and thus the plaintiff cannot enforce its claim against the Union of India. Later on, the plaintiff served the notice (Ext. 1) dated 31.8.1960 u/s 80 of the CPC and thereafter instituted the suit on 2.12.1960 which has given rise to this appeal. One thing is more noticeable that these letters were sent by the railway authorities without prejudice to the rights of the railway administration. Learned counsel for the appellant submitted that the words "without prejudice" sufficiently indicated that no liability was undertaken to pay any portion of the sum claimed by the plaintiff. In support of it he relied on the decision dated the 25th October, 1962 of this Court in Second Appeal No. 1294 of 1958, (5) Firm Mahinder Singh Ram Chandra Singh Versus the Union of India. The following observations are relevant:--

"The relevant question that falls for determination is whether the correspondence disclosed any acknowledgment of liability by the carrier. We have been taken through the correspondence and there is nothing to show that, by this correspondence, the Railway Administration ever accepted the liability to compensate the plaintiff. In fact, in none of the letters, there is any mention of any liability of the Railway Administration. Apart from this, what is of greater significance in this case is, that all these letters have been marked "without prejudice". Therefore, even if by some stretch of language, an interpretation of acknowledgment of liability on the part of the carrier be likely, yet it will have no legal effect, because of the letters being addressed without prejudice to the claims of the parties. In this case, therefore, the question of acknowledgment of liability does not arise". This passage was quoted with approval by another Division Bench of this court in Second Appeal No. 588 of 1962, (6) Union of India Versus Hari Nagar Sugar Mills Ltd., decided on the 5th of July, 1967 and their Lordships held that the use of the words "without prejudice", which were to be found in a letter (Ext. 3/h) of the Chief Commercial Superintendent re-enforced their conclusion that he never accepted any liability in respect of the plaintiff's claim in that case. These letters relied upon by the plaintiff in the present case are in similar terms meaning thereby that the officials who wrote these letters mentioned the words "without prejudice" indicating thereby that the railway administration was not accepting any liability merely on the ground that one or the other officer was considering the claim of the plaintiff.

12. The next question of importance in the present case is as to whether the suit of the plaintiff was instituted within the period of limitation and this point arises for determination in both the appeal and the cross-objection. The question of limitation arose in the trial court as well and the plaintiff urged that the provisions of Article 96 of the Indian Limitation Act were applicable and thereafter it relied on the acknowledgment according to Section 19 of the said

Act. The defendant, on the other hand, relied on the provisions of Article 62 for urging that the suit was barred by limitation. The trial court took the view that whether Article 62 or 96 was applicable, period of limitation was three years in either case and even if it was assumed to the advantage of the plaintiff that Article 96 was applicable, then three years was to be counted from the date when the mistake became known to the plaintiff. It then observed that the period of limitation would run from the dates of payments of the demurrage, but these dates were not given and since the claim related to the demurrage paid during the years 1949-50, to 1954-55, the dates of payments must necessarily be within those years. The further observation was that assuming that the last payment was made on 31st March 1955, the suit should have been filed under Article 96 within three years from that date, i.e. by 31st March, 1958, but it having been really filed on 2.12.1960 was obviously time barred. Later on, the court is relied on the acknowledgment of the claim in the letter dated 4th January, 1958 (Ext. 2) for decreeing a part of the claim. Learned counsel for the plaintiff-respondent approached the question of limitation in entirely different manner and he contended that neither Article 62 nor Article 96 would apply and, on the other hand, the provisions of Article 120 would apply to the facts and the circumstances of the present case giving the plaintiff a period of six years for instituting the present suit. Learned counsel for the appellant, on the other hand, submitted that the provisions of Article 62 were fully attracted. Article 96 provides a period of limitation when relief is sought for on the ground of mistake, but in the present case "mistake" was not the foundation for the claim of the plaintiff. In this view of the matter, Article 96 must be excluded from consideration. Article 120, no doubt, provides a period of six years, but this has to be computed from the date when the right to sue accrued. This article is a residually one and the provisions of this article should not be applied unless it is absolutely clear that the case is not covered any other article. The excess amount demurrage according to the plaintiff was mostly paid prior to six years before the institution of the suit and, therefore, on the very face of the provisions of Article 120, the claim of the plaintiff is barred by time, as the right to sue accrued on the date of each payment and the period of six years has to be computed from those respective dates. Only such claims would be within time which were within six years of the date of the institution of the suit, i.e., 2-12-1960. In other words, payment of excess demurrage prior to the 2nd of December, 1954 could not be recovered. Even the joint note (Ext. 3) or any other document does not indicate as to on which dates the excess amount of demurrage was paid in the crushing season of the year 1954-55. The season for the crushing of the sugarcane commenced sometime in November and it came to an end by the end of March each year. The payments of excess amount of demurrage even, if any, must, therefore, have been in that year between November, 1954 and March, 1955, but the details and the dates of payments between that relevant period have not been stated either in the plaint or in the oral evidence or in the documentary evidence. The plaintiff is thus not able to show as to which portion of the claim is within six years from the date of the

suit. In order to get rid of this difficulty learned counsel for the plaintiff submitted that the period of six years provided in Article 120 should be counted from the date of the various accounting and not from the various dates of payments. In this connection, he referred once again to the joint note (Ext. 3) dated the 3rd of April, 1955 and submitted that it was learnt only on that date (3-4-1955) that excess demurrage was paid as mentioned therein the years 1949-50, 1951-52, 1952-53 and 1953-54. In other words, according to him, the period of six years as provided in Article 120 should be counted from the 3rd of April, 1955. As regards the claim for the year 1950-51, there was a mention in this joint note that Rs. 3575/12/- had been approved by the letter dated 27-8-1954 (and not 2-8-1954 as printed at page 71 of the paper book). That letter dated 27-8-1954 is Ext. 2/a. But if the period of six years is counted even from 27-8-1954, the present suit is barred by time, as it was instituted on the 2nd of December, 1960. Learned counsel then relied on the acknowledgment of the claim contained in the letter (Ext. 2) dated 4-1-1958. The question as to whether there was an acknowledgment will be dealt with separately. As regards the claim for the year 1954-55, learned counsel referred to the letter (Ext. 4/p) dated 14-1-1957 which contains inter alia the following lines:--

As for the amount of Rs. 1949/5/- already recommended by the Cane Inspector on 26.9.1956 as shown above may please be refunded to us at an early date.

This was the letter sent on behalf of the plaintiff to the Regional Superintendent, North Eastern Railway, Muzaffarpur and a reference has been made in it to the recommendation of the Cane Inspector made on 26.9.1956, but that letter has not been produced.

13. The question arises as to from which date the period of six years under Article 120 has to be computed. In other words, what would be the starting point for limitation. The time under Article 120 runs from the date when the "right to sue" accrues. These words "right to sue" mean a right to seek relief or in other words, a right to prosecute any legal proceeding or to obtain relief by means of legal procedure. A right to sue accrues when a cause of action arises. "There must be first an accrual of a right asserted in a suit and then its infringement. If these facts are proved, then a person gets a right to sue. The question as to when a right to sue accrues depends upon the facts and circumstances of each case (7) [(See The State of Bihar Vs. Thawardas Pherumal, at page 230)]". The starting point would depend on facts and relief sought for in each case. The case of the plaintiff itself is that a heavy sum was paid as demurrage from the very beginning without any proper accounting and the plaintiff knew full well at the time of payments that excess amount was being paid. The rates at which demurrage has to be paid are already fixed. Besides these, the plaintiff could very well ascertain as to when the wagons in question containing sugarcane had arrived and for how long they had to be unnecessarily detained on account of not unloading them in proper time. I am, therefore, of the view that the right to sue accrued to the plaintiff from the date of the payment of the excess amount of

demurrage and the starting point could not be deferred till the accounting. Supposing there was no accounting at all and there would have been no letter of one or the other railway official with regard to the claim made by the plaintiff, could it be said that right to sue did not accrue at all or would never accrue in future? If the contentions of the learned counsel for the respondent were to be accepted, the answer to the question posed by me would be in the negative, but it is extremely difficult to accept that answer. The right to sue cannot be postponed until the date or dates of the accounting. It was the responsibility of the plaintiff to make a claim and institute a suit and it could not defer it till the accounting. The words "right to sue" cannot be construed in the manner suggested by learned counsel for the respondent. This is one aspect of the contention of learned counsel for the respondent to bring the case of the plaintiff within the four corners of Article 120 which has to be overruled.

14. The contention of learned counsel for the respondent with regard to the applicability of the provisions of Article 120 has to be rejected for another reason and it is this. If there is any other article which governs the case, then resort cannot be had to this residuary Article 120. This proposition has not been disputed by him. But he relied on (8) Gooroo Das Pyne Versus Ram Narain Sahoo (XI I.A., 59), Article 118 of the Limitation Act-No. IX of 1871. The plaintiffs there had at first instituted a suit against Madhoosoodan Pyne and another for the conversion of the timbers, and a decree was obtained in the year 1868 for the sum of Rs. 25,200/- in favour of the plaintiffs. That litigation went upto the Privy Council and ultimately the decree obtained by the plaintiff was affirmed by the highest Court, but meanwhile Madhoosoodan had died and the decree of the Privy Council was against his widow, as his representative. Subsequently, an application was made in the district court at Midnapore to execute that decree and certain property was attached which the appellant there claimed as his separate property. Only a very small portion of it was held liable for the decree and the rest was ordered to be given up. Then the suit giving rise to the appeal was instituted for the purpose of trying whether the plaintiffs had not a right to execute their decree against the properties mentioned in the attachment, and which had been ordered to be given up. The plaintiffs had made a further allegation that Gooroo Das Pyne, the defendant appellant was benefited by the aforesaid timber taken by Madhoosoodan and, after the death of Madhoosoodan, himself sold the aforesaid timber, and appropriated the money obtained by the sale of the aforesaid timber. A question of limitation arose in the appeal before the Judicial Committee and the contention on behalf of the defendant appellant was that the provisions of either Article 48 or Article 60 of the Second Schedule of 1871 (Limitation Act) were applicable. The contention about the applicability of the provisions of Article 48 was overruled on the ground that there was no dishonest misappropriation or conversion in that case. Article 60 of the then Limitation Act corresponds to Article 62 of the Limitation Act IX of 1908. Article 60 provided the period of limitation for recovery of money payable by the defendant to the plaintiff; for money received by the defendant for the plaintiffs"

use. The contention there was that money in that case was received for the plaintiffs' use when the defendant sold the timber in May, 1870. But this contention was repelled, and it was pointed out that defendant had sold the timber as the agent of Moti Dasi, and he received the money on her behalf. The suit there was to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount. Hence, that suit did not attract either the provisions of Article 60 or Article 48, but came within the purview of Article 118, as "a suit for which no period of limitation is provided elsewhere in this schedule", and it was held that for suits of that nature a period of six years was the limitation. Their Lordships held that the plaintiffs had a right at any time within six years from the time when the defendant received the money to hold him responsible to them for the amount as long as it remained in his hands. It is quite clear that the defendant there had sold the timber and received the money. He did all that not for the plaintiffs, but on behalf of Moti Dasi. In those circumstances, it could not be held that the defendant had received the money for the use of the plaintiffs. The facts of that case clearly excluded the provisions of Article 60 which corresponds to Article 62 of the Limitation Act of the year 1908. The case of the plaintiffs there not having been covered by any specific article of the Limitation Act, it was held that the residuary Article 118 governed that case so far Limitation was concerned. For these reasons, this decision is of no assistance to the plaintiff in the present appeal.

15. The first column of Article 62 reads thus:--

"For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." The three years' limitation runs under this article from the time the money is received by the defendant. There may be various circumstances under which money received by the defendant could be deemed, under the law, to have been received by him for the use of the plaintiff and in such cases a suit for the recovery of the money from the defendant has to be instituted within three years of the date when the money was received by the defendant. There can be, no doubt, that in the present case the plaintiff had paid money to the defendant and the plaintiff is trying to recover that money (the excess amount of demurrage). These two conditions necessary for the applicability of this Article have been undoubtedly fulfilled, but the question remains as to whether the third condition, namely, whether the money was received by the defendant "for the plaintiffs' use" has been fulfilled. The test for determining whether the money was received by the defendant for the use of the plaintiff is to ascertain whether, under the law, the money could be treated as so received. In other words, this article would apply only where at the time of the receipt of the money by the defendant, it is received for the use of the plaintiff. Learned counsel for the appellant relied on the case (9) The Rajputana Malwa Railway Co-operative Stores Ltd. Vs. The Ajmere Municipal Board, , in support of his contention that the provisions of Article 62 were applicable. In that case the plaintiff company had sued the Municipal Board of Ajmere for refund of Rs.

81/7/- alleged to have been wrongly charged by the said Board as octroi duty for goods imported by the Company into India by sea between the 20th of January, 1899 and the 24th of April 1899, and also to recover another sum of money alleged to have been an excess charge as an octroi duty on imports made subsequently. Both the courts of first instance and the court of appeal at Ajmere dismissed the suit as barred by limitation under Article 2, Schedule II of the Indian Limitation Act, XV of 1877. But on the application of the plaintiff company the Judicial Commissioner and District Judge of Ajmere-Merwara referred this for a ruling by the Hon"ble High Court. On reference a question arose as to whether the case was governed by Article 2 of Schedule II of the Limitation Act XV of 1877, or Article 61 or 62 or 120. It was held that Articles 61 and 120 did not apply, but the claim of the plaintiff clearly came within Article 62. Their Lordships held that the claim of the plaintiff was for specific sums which were received by the defendant Municipality for the plaintiff Company, and, as such the provisions of Article 62 were attracted. I would refer to a decision of the Supreme Court in (10) A. Venkata Subba Rao Vs. State of Andhra Pradesh, on this point in which the view taken by the Allahabad High Court in the above case reported in The Rajputana Malwa Railway Co-operative Stores Ltd. Vs. The Ajmere Municipal Board, has been approved. In that case the claim was for recovery of sums illegally collected. Their Lordships quoted the following passage from the judgment of Mookerjee, J. in Mahomed Wahib Versus Mahomed Ameer (ILR 32 Calcutta, 527) and approved it:--

The Article, when it speaks of a suit for money received by the defendant for the plaintiff's use, points to the well-known English action in that form; consequently the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff.

Their Lordships interpreted this observation to mean that it was not necessary in order to attract Article 62 that at the time of the receipt the defendant should have actually intended to receive it for the use of the plaintiff and that it was sufficient if the receipt was in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded. In Paragraph 60 their Lordships observed thus:--

Having considered the matter carefully we are inclined to prefer the interpretation of the Article by Mookerjee, J. in Mahomed Wahib's case, ILR 32 Cal. 527. What we are solely concerned with the meaning of the words employed in the first column of the Article which specifies the nature of the suit dealt with. That they were derived and adopted from the terminology employed in the English action for money had and received is not disputed. The Courts in India being Courts administering both law and equity, no doubt we are not concerned with the technicalities of the English forms of action which originated at a time before the Judicature Acts when law and equity were administered by different Courts. But that is only as regards the merits of a claim and its maintainability in

a Court.

In Paragraph 62 their Lordships said as follows:

.....it would be convenient to clarify the position as regards certain circumstances in which the Article would be applicable without making any exhaustive list. Where the defendant occupies a fiduciary relationship towards the plaintiff it is clear that Art. 62 is inapplicable. Next even if the claim could have been comprehended under the omnibus caption of the English "action for money had and received", still if there are other more specific articles in the Limitation Act vide, e.g., Art. 96 (mistake), Art. 97 (consideration which fails) Art. 62 would be inapplicable. Lastly, if the right to refund does not arise by reason of facts transpiring subsequently, Art. 62 cannot apply, for it proceeds on the basis that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt.

16. On the case of the plaintiff itself that it had paid excess amount of demurrage, it is quite clear that the defendant had received those sums with an obligation to retain them for the use of the plaintiff and refund them to it when demanded. In other words, the excess amount of demurrage received by the defendant belonged to the plaintiff in justice and equity and the defendant was liable to refund it. The receipt of those sums must, therefore, be held for the use of the plaintiff. The decision of the Supreme Court referred to above, leaves no room for doubt that on the facts and circumstances of the present case, the provisions of Article 62 are applicable and it was incumbent on the plaintiff to institute its suit within three years of the receipt of the excess amount of demurrage by the defendant.

17. The next question for consideration is as to whether the plaintiff is entitled to a decree in respect of whole or any portion of the claim applying the provisions of Article 62 of the Indian Limitation Act. The suit was instituted on 2.12.1960. There was no payment of the excess amount of demurrage within three years of the institution of the suit, but the plaintiff has relied on the acknowledgments of the claims and Paragraph 12 of the plaint mentions specifically that the cause of action arose on 4.1.1958, the date on which the claim for refund of the excess demurrage was acknowledged by the Regional Superintendent at Muzaffarpur. Learned Additional Subordinate Judge took the view that the joint note (Ext. 3) dated 3.4.1955 could not save the limitation in respect of the claim for 1949-50 and 1950-51, as the acknowledgment was made after the expiration of their period of limitation. In that view of the matter, he disallowed the claim for Rs. 3376/9/- and Rs. 3575/12/- for those years respectively. This joint note refers even to the claim in respect of Rs. 825/15/- for the year 1951-52, Rs. 1376/1/- for 1952-53 and Rs. 124/6/- for the year 1953-54, but the suit was not instituted within three years of the execution of the joint note and accordingly, this note is not of any assistance to the plaintiff for urging that the claims for the years 1951-52, 1952-53 and 1953-54 were not barred by limitation. As regards the claim for the year 1954-55, it appears from the letter dated 14.1.1957 (Ext. 4/

p.) that a sum of Rs. 1265/14 was recommended to be refunded to the plaintiff, but the suit was not within three years from 14.1.1957 and thus this letter (Ext. 4/p) cannot save the limitation. Learned counsel for the plaintiff respondent placed great stress on the copy of the letter dated 4.1.1958 (Ext. 2) sent by the Regional Superintendent, North Eastern Railway, Muzaffarpur to the Chief Commercial Superintendent of the same Railway at Gorakhpur and submitted that the claim to the tune of Rs. 11,228/- was definitely acknowledged in that letter. There is a considerable difficulty in accepting his contention that this letter would save the limitation, inasmuch as, as acknowledgment of liability u/s 19(1) of the Indian Limitation Act (IX of 1908) has to be made before the expiry of the period of limitation prescribed for a suit or application. This Sub-section provides as follows:

Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

The claims for the years 1949 to 1954 were definitely barred by time on the 4th of January, 1958 when the letter in question was sent. The plaintiff has made a claim in respect of the excess demurrage paid even during the year 1954-55. In other words, some payment is alleged to have been made till the end of the crushing season, that is, upto 31st March, 1955. To put it briefly excess payments made between the 4th of January, 1955 and 31st of March, 1955 could be said to be covered by the alleged acknowledgment contained in the letter dated 4.1.1958. But the difficulty is that the plaintiff has not given a detailed account and the various dates of payments during that period. The letter (Ext. 4/p) mentions only the total sum Rs. 1275/14/- in respect of the year 1954-55. It is thus not possible to ascertain as to which amount out of this sum was paid during the relevant period (January to March, 1955). On account of this infirmity, this letter dated 4.1.1958 is of no avail to the plaintiff in support of the claim even for the year 1954-55, inasmuch as, the crushing season used to begin in November and payments must have been made even in November and December, 1954.

18. The defendant alleged in the written statement that the copy of the letter dated 4.1.1958 alleged to have been forwarded to the plaintiff was not under the signature or authority of the then Regional Superintendent, but P.W. 2 deposed that the said copy was signed by S.N. Ganguli, A.T.S. for the R.T.S. and then it was marked Ext. 2. P.W. 3 stated at the trial that S.N. Ganguli, the Regional Assistant Transport Superintendent had authority to sign for the Regional Transport Superintendent on the letters. The solitary witness for the defendant also, who was the Chief Clerk in the Regional Superintendent's Office, Muzaffarpur from February, 1953 to 15th January, 1958 admitted that the letters

(Exts. 2 to 2/c) were issued by the Regional Superintendent's Office. He further stated that S.N. Ganguli was Assistant Transport Superintendent (Regional) from the year 1958. There can be thus no doubt that Ext. 2 is a copy of the letter sent by the Regional Superintendent to the Chief Commercial Superintendent.

19. Learned counsel for the appellant submitted that even if the Regional Superintendent had sent the letter dated 4.1.1958 to the Chief Commercial Superintendent, there was no acknowledgment of the claim, as envisaged in Section 19 of the Indian Limitation Act and the Regional Superintendent had no authority to acknowledge the claim on behalf of the Union of India. The copy of the letter dated 4.1.1958 (Ext. 2) reads thus:

On further scrutiny it has been gathered that the relative R/Rs are not available. In view of this the General Manager may please be approached to make ex-gratia payment as we have already committed for refund to the factory. Out of the total amount of Rs. 9278/11/- agreed to for refund by us to the factory, Rs. 5702/15/- is the part amount arrived at after joint scrutiny of a sum of Rs. 12616/5/- on account of Factory's claim (?) against out-station demurrage pertaining to years 1949-50, 1951-52, 1952-53, 1953-54 and the balance amount Rs. 3575/12/- for the season 1950-51 as the factory paid the entire amount of Rs. 6802/- as billed for the season 1950-51, since the same was reviewed by Mr. Summers, the then RTS/Muzaffarpur and the sum of Rs. 3575/12/- as recommended by RCI/MFP to be foregone on account of breakdown in Factory was accepted by him and as such this amount was due to be refunded to the Factory.

In this connection please find detailed notes on P.P. 10 to P.P. 12 of the relative file sent herewith for your perusal.

Out of Rs. 12616/5/- a sum of Rs. 4031/8/- was left over for consideration on account of factory's claim for refund on account of outstanding demurrage for the seasons 1951-52, 1952-53, 1953-54, 1954-55. RCI/Muzaffarpur after further scrutiny recommended a sum of Rs. 1949/5/- which may also be refunded to the Factory after further verification at your end.

As the case has been long delayed I would request you to expedite the matter from your end so that the factory may get refund of the amount in question i.e. Rs. 9278/11/-, Rs. 1949/5/- or total Rs. 11228/-. This is issued as per approval of R.S.

20. In view of my finding that copy of the letter (Ext. 2) was of no avail to the plaintiff for getting a decree in respect of even a portion of the claim made by it. The question as to whether there was any acknowledgment of the claim in that letter hardly arises, but since learned counsel for the parties have pressed their different points of view on the basis of this letter, it will be better to deal with them. An acknowledgment of liability u/s 19 (1) means an admission of the truth of one's own liability and it may be either express or implied. In Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prosad Chamaria and Others, their Lordships

held that acknowledgment as prescribed by Section 19 merely renewed the debt; it did not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statement made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far fetched process of reasoning. The question as to whether an acknowledgment has been made in writing has to be decided on the words used in a particular document and the effect of those words would depend upon the context in which those words were used.

21. Learned counsel for the appellant submitted that the officer who wrote the letter dated 4.1.1958 had only made a recommendation for the refund of a certain sum to the plaintiff and he had in no event acknowledged any liability. There are certain expressions in this letter which lead to the conclusion that one or the other officer had acknowledged the liability. Those expressions are the following:

- (1) We have already committed for refund to the factory.
- (2) Out of the total amount of Rs. 9278/11/- agreed to for refund by us to the factory.....
- (3)since the case was reviewed by Mr. Summers the then RTS/Muzaffarpur and the sum of Rs. 3575/12/- as recommended by RCI/MFP to be foregone on account of breakdown in Factory was accepted by him and as such this amount was due to be refunded to Factory.

Besides these, the Regional Superintendent himself suggested in the last Paragraph that the factory should get refund to the tune of Rs. 11,228/- at an early date. These expressions undoubtedly indicate that the RTS/Muzaffarpur,

RCI/MFP and the Regional Superintendent, Muzaffarpur were of the view after the scrutiny of the accounts that the claims of the plaintiff for refund to the extent indicated in that letter was justified and the amount mentioned therein should be refunded to it. I am, therefore, of the view that these officers had acknowledged the claim of the plaintiff and then they made a recommendation to the Chief Commercial Superintendent for refunding the amount in question.

22. The next question for consideration by us to what was the effect of the acknowledgment of the claims by those officers. This acknowledgment in question was undoubtedly in writing and was signed. Explanations (ii) of Section 19 provides that "for the purpose of this section "signed" means signed either personally or by an agent duly authorised in this behalf". The authority of the agent to make an acknowledgment on behalf of another may be either in express terms or it may be implied. It can be even presumed from the attendant circumstances. Learned counsel for the respondent referred to (11) AIR 1929 297 (Privy Council) in support of his contention that no formal authorisation of the agent was required. On the facts of that case it was held that there was an implied authority from the first respondent to Bishambhar to pay the interest on his behalf as it became due and that payment was held to be effective to save limitation against the first respondent. He relied on (12) Mohesh Lal Vs. Busunt Kumaree, as well. It was argued in that case that certain letters were not proved to have been written either by Kali Pershad himself or by his agent generally or specially authorised on that behalf. On this point, the defendants' dewan Shital Lal was called as a witness by the plaintiff. He and his father before him had been the dewans of Kali Pershad for many years, and since Kali Pershad's death he had been the dewan of the defendants and he was still in their service. On a consideration of the evidence of Shital Lal their Lordships held that Kali Pershad never wrote letters to the plaintiff himself, but authorised them to be written by his dewan, whose ordinary duty was to carry on a correspondence of that kind, and in those circumstances the letter written by Shital Lal's father as the dewan of Kali Pershad was written by him as his agent generally authorised for that purpose. It has to be ascertained now as to whether the railway officers, who acknowledges the liability had the authority to do so. P.W. 2 deposed in his examination-in-chief that the railway officials who had held discussion or written letters acknowledging our claim had authority to do so. He stated in cross-examination as follows:

I had occasion to see the authority of the railway officials. I have got these (authority letters).

This witness cannot ordinarily be expected to be in possession of those letters of authority and either this statement does not seem to be correct or there may be some mistake in recording of this statement by omission of the word "not" in the last line. In any event any letter showing an authority has not been produced. He further said that in other cases R.T.S. or Chief Commercial Superintendent used to refund. He had not seen any letter authorising S.N. Ganguli to act for the

R.T.S. P.W. 3, however has said that S.N. Ganguli, Regional A.T.S. had authority to sign for the R.T.S. on the letters. According to him, both S.N. Ganguli and R.T.S. had authority to settle claims. It appears from his cross-examination that the Chief Commercial Superintendent had authorised them to settle the claims. The evidence of D.W. 1, on the other hand, was that the R.S. or A.T.S. of R.S. office or Regional Cane Inspector had no authority to make admission or commitment or acknowledgment of liability on behalf of the railway and they had power only to negotiate and recommend. According to him H.A.N. Summers, T.N. Parthasarathi, S.N. Ganguli and B. Smart had no authority to acknowledge claim on behalf of the railway. It appears from his cross-examination that one office of the Regional Transport Superintendent was at Lucknow and the other at Muzaffarpur. Those offices were independent, but for refunds and claim they were dependent on the General Manager and Chief Commercial Superintendent. This witness disclosed that the Head office had prepared the schedule of powers of the Regional Transport Superintendent and those powers were mentioned in a book. His evidence further was that claims, refunds and non-delivery used to be referred to the Chief Commercial Superintendent and the Regional Transport Superintendent or the office of the Regional Transport Superintendent did not deal with a single case of refund of demurrage overcharged, of any one had filed a claim case. Such case used to be sent to the head office without any comment for being dealt with. It was open to the defendant to produce the schedule of power contained in a book and this book could be easily available in the office of the railway. The evidence of P.W. 2 in general terms that the railway officials who had held discussion or written letters acknowledging the claim had authority to do so cannot be safely relied upon and by way of illustration I would refer to the joint note (Ext. 3) itself which was signed by the Regional Cane Inspector of the North Eastern Railway, Muzaffarpur. If the evidence of this witness were to be believed in toto, it would mean that even the Regional Cane Inspector had the authority to acknowledge the claim apart from the other officers who happened to write one letter or the other in connection with the claim of the plaintiff. The suit of the plaintiff was prima-facie barred by time, but the plaintiff wanted to rely on the acknowledgment alleged to have been made by the Regional Superintendent in the letter dated 4.1.1958. The onus in these circumstances was on the plaintiff to prove by definite evidence that the said officers had the authority to acknowledge the liability. That letter itself is of some assistance in determining as to whether the Regional Superintendent had the authority to acknowledge the claim, There can be no doubt that he had acknowledged (as already hold by me), but the last paragraph of that letter contains a request to the chief Commercial Superintendent to expedite the matter from his "end". In other words, after acknowledgment of the liability he made a recommendation to the higher authority to dispose of the matter as soon as possible. The Cane Manager of the plaintiff himself referred to this recommendation of the Regional Superintendent in the letter dated 13.11.1959 (Ext. 4/j) sent to the Chief Commerce Superintendent and later on the Cane Manager addressed a letter (Ext. 4/k) to the General Manager on 29.6.1960 in this connection. On the

materials available, it is difficult to accept the case of the plaintiff that either the Cane Inspector or the Regional Superintendent had the authority to acknowledge the claim in question. I am, therefore, of the view that the said officer cannot be deemed to be the agents duly authorised to acknowledge the liability.

23. Learned counsel for the appellant further submitted that the suit of the plaintiff was barred u/s 77 of the Indian Railways Act, as the requisite notice was not given to the proper authority and within the proper time. This question also is not material in view of my finding that the plaintiff's claim cannot succeed on account of the bar of limitation. But in view of the respective contentions, it would be proper to deal with this point. The learned Additional Subordinate Judge found against the defendant on this point, but that finding has been challenged. Learned counsel for the respondent, on the other hand, submitted that the provisions of the Section 77 were not at all applicable as the present suit was not for refund of an overcharge in respect of animals or goods carried by railway. He referred to the definition of "demurrage" as contained in Clause (d) of Section 46-C of the Indian Railways Act. The argument was that comparing that definition with the words of Section 77 it should be held that the provisions of Section 77 were not applicable. According to him, the question of refund of an overcharge or payment of demurrage arises if two conditions are fulfilled. First one is that animals or goods must be carried by railway. The second is that there should be delay (after the expiry of the free time) in unloading a wagon. On fulfillment of these conditions the provisions of Section 77 would apply. But if animals or goods were not carried by railway still demurrage could be charged for the unnecessary delay in the loading of the wagon. In this illustration, the provisions of Section 11 were not applicable for the simple reason that animals or goods had not been carried. He has urged that it would be anomalous to hold the provisions of Section 77 related to a claim for refund of the excess amount of demurrage in respect of the unloading of a wagon, but did not relate to such a claim in respect of the loading of a wagon, and on this ground alone the provisions of Section 77 should be held to be not applicable at all in case of a claim or refund of the excess amount of demurrage. Section 77 contains the words "over-charge" and the word "demurrage" is not mentioned in Section 77. The word "over-charge" has to be understood in its natural and ordinary sense as a charge in excess of what was prescribed or permitted by law. "Demurrage" also means a charge, but charge of a particular kind. The case of the plaintiff was that it had paid excess amount of demurrage meaning thereby a charge in excess of that which was prescribed or permitted by law. The position thus is that the suit of the plaintiff is for the refund of the excess amount of charge alleged to have been realised by the defendant and in this view of the matter, the provisions of Section 77 of the Indian Railways Act must apply.

24. The other contention with regard to the provisions of Section 77 was that there was no compliance with these provisions. Learned counsel for the respondent referred to (13) Shamsul Huq Vs. Secy. of State, where it was pointed out that the intention of this Section was to prevent stale and possibly

dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made, and when the evidence necessary to rebut a dishonest claim might no longer be available. It was intended as a weapon of defence against fraud and not as means to enable the railway authorities to deprive their customers of their just dues. He realised on (14) *Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others*, in which the view taken by the Calcutta High Court in the case of (13) *Shamsul Huq Vs. Secy. of State*, has been approved. Learned counsel for the respondent submitted that in the present case notices were sent to the various officers and from the course of conduct and attendant circumstances, it should be held that the railway officers concerned were competent to receive the notices. It was held in (15) *Governor-General in Council Vs. Gouri Shankar Mills Ltd.*, that the requirements of Section 77 read with Section 140 of the Railways Act were satisfied by serving a notice within the prescribed period on the Chief Commercial Manager or any other subordinate officer of a railway company owned by the Government provided it was established as a fact that the railway company by its course of business or the terms of the contract between the parties had held out a particular official as competent to deal with the claim on receipt of notice to him.

25. The notice u/s 77 of the Indian Railways Act has to be given within six months from the date of the delivery of the animals or goods for carriage by railway. Relying on this provision learned counsel for the appellant contended that the letters, assuming them even to be notices were not sent to the authorities within the prescribed time. Proceeding with this contention it appears that the letter dated 9th July, 1951 (Ext. 4/c) was sent by the Cane Manager of the plaintiff to the Traffic Manager, Gorakhpur for the claim in respect of the demurrage paid during the season 1949/50. This letter indicates that in the months of May and June, 1950 a claim was made before the Railway Cane Inspector in respect of the amount of demurrage paid in that season, but there is no written proof of that claim having been made at that time. This letter was not sent within the requisite time in respect of the claim for 1949/50, but apart from it learned counsel for the appellant has pointed out that the Traffic Manager could not ordinarily be regarded as an officer competent to deal with such claim. In support of it, he relied on a decision dated the 16th March, 1954 of this court in (16) *Rai Bahadur Ramlochan Saran, proprietor, Baidehi Brothers, Laheriasarai Versus The Dominion of India* (S.A. No. 1174 of 1949). It was held in that case that the onus was on the plaintiff to show that according to the course of the business carried on by the railway administration, the Traffic Manager was competent to deal with the claims and in absence of any evidence that the Traffic Manager was put forward by the railway administration as the person who was competent to deal with the claim, the notice to him could not be valid. A similar view was taken in another decision of this court dated the 29th April, 1954 in (17) *C.R. No. 1544 of 1953 (Banshidhar Dhandhanias & Co. and another Versus The Union of India and another)*. In the plaint of the present suit there was no

averment at all as to when and on whom the notice u/s 77 was served. The defendant had, however, taken the objection in the written statement that the suit was barred u/s 77. The oral evidence adduced by the plaintiff does not indicate specifically that the Traffic Manager was competent to deal with such claims. On the same date (9.7.1951) there was another letter by the Cane Manager of the plaintiff to the District Traffic Superintendent in respect of the amount of demurrage paid during the season 1950/51. A reference was made in this letter to an earlier letter dated the 4th April, 1951, but that letter has not been produced. A refund of Rs. 4408/1/- was asked for in the letter dated 9th July, 1951, (Ext. 4/g). This claim was within time for the excess amount of demurrage paid within six months from the 9th of July, 1951, but not during the period prior to that. On 11.11.1951 there was another letter (Ext. 4/h) by the plaintiff's Cane Manager to the District Traffic Superintendent by way of reminder to him in respect of the said claim of Rs. 4408/1/-. On 23.8.1952 the Cane Manager of the plaintiff wrote a letter (Ext. 4/b) to the Traffic Manager in respect of the refund of the overcharge paid during the season 1951-52. This letter was in time so far the claim within the period of six months from this date was concerned, but it was made before the Traffic Manager, who was not competent to deal with the claim. On 11.6.1953 the plaintiff's Cane Manager sent a letter (Ext. 4/a) to the Chief Operating Superintendent for the refund of Rs. 4566/12/- paid during the season 1952/53. This letter was sent in time so far the refund in respect of the sums paid within six months of this date was concerned. On the same date there was another letter (Ext. 4/i) to the same officer in respect of the claim for the seasons 1949/50, 1950/51 and 1951/52. On 16.7.1953 the plaintiff's Cane Manager sent a letter (Ext. 4/c) to the Chief Operative Superintendent by way of reminder drawing his attention to the earlier letter dated 11th June, 1953. On 20.7.1953 the Cane Manager of the plaintiff sent a letter (Ext. 4/q) to the Chief Commercial Superintendent for the refund of certain sums, the details of which were furnished earlier either to the Traffic Manager or to the Railway Cane Inspector. On 27.6.1954 there was a letter (Ext. 4/n) on behalf of the plaintiff to the Regional Traffic Superintendent giving details of the various claims for refund. On 14.9.1955 the plaintiff's Cane Manager sent a letter (Ext. 4) to the Regional Traffic Superintendent in respect of the claim for demurrage paid during the season 1954/55. The details of the amount paid during that season are not available and thus it is not possible to ascertain as to whether this claim was made within the requisite time. On 14.1.1957 the plaintiff's Cane Manager sent a letter (Ext. 4/p) to the Regional Superintendent as regards the amounts to be refunded in respect of the period 1949 to 1955, and this seems to be by way of a reminder. On 29.7.1959 the plaintiff's Cane Manager sent a letter (Ext. 4/m) to the Chief Commercial Superintendent for the refund of the amounts as recommended by the then Regional Superintendent. This also appears to be a reminder to a superior authority. On 13.11.1959 the plaintiff's Cane Manager sent another letter (Ext. r/j) to the Chief Commercial Superintendent for expediting the refund of the sums already recommended. Learned counsel for the appellant conceded that Chief Commercial

Superintendent was the proper authority to deal with the claim, but he contended that the claim to him was made beyond the period of six months. On 18.5.1960 a reminder was sent (Ext. 4/i) to the Chief Commercial Superintendent and there was a similar reminder on 26.3.1960 by letter (Ext. 4/o) to the Chief Commercial Superintendent for expediting the refund. Lastly, on 29.6.1950 the plaintiff's Cane Manager sent a letter (Ext. 4/k) to the General Manager requesting him to pass final orders for the refund of Rs. 11,228/-. Some of the letters sent on behalf of the plaintiff were replied by the Regional Traffic Superintendent and the Regional Superintendent, vide Exts. 2/b and 2/c. The Chief Commercial Superintendent also sent some letters (Exts. 2/e and 2/f) to the plaintiff. It thus appears from the course of conduct that these officers were entertaining the claims of the plaintiff and the notices sent to them are valid except those which were sent to the Traffic Manager, but there is an infirmity that the claims were not made within the requisite time in respect of the entire sum, as indicated above. The suit of the plaintiff must, however, fail on the ground of limitation and for the other reasons, indicated above. In the result, the appeal is allowed and the cross objection is dismissed. The judgment and decree of the trial court are set aside and the suit of the plaintiff is dismissed, but in the circumstances of the present case, the parties will bear their own costs throughout.