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In the Andhra Pradesh High Court

Case No : Appeal No''s. 47, 97 and 98 of 1959 and C.M.P. No''s. 1869, 1870 and 1871 of 1959

Union of India, Railway Administration, Madras and Others — APPELLANT

Vs

Eastern Match Co., Tirumangalam — RESPONDENT

Date of Decision : 20-02-1963

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 2, 60, 79, 80
Evidence Act, 1872 — Section 115
Railways Act, 1890 — Section 74C, 74D, 74E, 77, 80
Red Tariff Rules, 1954 — Rule 76, 83

Citation : AIR 1964 AP 172

Hon'ble Judges : P. Chandra Reddy, C.J;Venkatesam, J

Bench : Division Bench

Advocate : K. Krishnamurty, in A.S. No. 47/59 and N. Bapiraju and N.V. Suryanarayana Murthy, in A.S. Nos. 97 and 98 of 1959, for the Appellant; K. Krishnamurty in A.S. Nos. 97 and 98 of 1959 N. Bapiraju and N.V. Suryanarayana Murthy, in A.S. No. 47/59, for the Respondent

Final Decision : Allowed

Judgement

Venkatesam, J.—These three appeals arise out of three suits disposed of by a common judgment by the District Judge, of West Godavari at Eluru, in O.S. Nos. 48 and 36 of 1957 and O.S. No. 17 of 1958, respectively. These suits arose out of claims against the South-Eastern Railway, Calcutta, in O. S. No. 36 or 1957, and the Southern Railways. Madras, in the other two cases, claiming compensation for loss of goods in a fire accident, which took place in the railway goods-shed at Eluru.

2. The relevant fact? in A. S. 47 of 1950 may be stated thus:

The plaintiff Eastern Match Company, Tirumangalam, in Madurai District, delivered at Tirumangalam Railway Station, within the Southern Railway Administration, on 11-10-1956 two consignments of safety matches consisting of

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56 bundles for being forwarded to Eluru Railway Station on the same railway, and obtained from the railway authorities two Railway Receipts, Nos. G/283748, Invoice No. 1. Goods Forwarding Note No. 21, and G/283749, Invoice No. 2, Goods Forwarding Note No. 22, for the sums of Rs. 205-2-0 and Rs. 181-15-0 paid towards freight. The goods were loaded in good condition, and the Railway Receipts were made in the owner''s risk note form, as is customary in regard to the carriage of safety matches, for which a lower terminal was applied on that account, and they bore the endorsement that the Certificate of Packing Conditions had been obtained, and that the loading and unloading had to be done by the owner. The plaintiff-company, in the usual course, drew two hundies for Rs. 5,400/- and Rs. 4,400/- on their depot manager, one Vydula Narasingarao, at Eluru for the amount approximately equal to the value of the goods, viz., Rs. 10,270/-, and discounted the bills with their bankers M/s. Pandyan Bank Ltd., at Tirumangalam, delivering to them the Railway Receipts as well as the hundies for collection through the Central Bank of India at Eluru. The plaintiff was informed on 26-10-1956 by the depot manager at Eluru that the consignments were damaged by fire resulting in a total loss, and hence were not taken delivery of, and the concerned hundies were net honoured by him on that account.

3. Subsequently, the plaintiff-company learnt that the consignment in question reached Eluru on 22-10-1956, and that the Railway authorities, without waiting for the owner to unload the goods or giving him reasonable time to unload the same on their own responsibility and contrary to the conditions of the contract and the Railway regulations, unloaded the goods on the very date of arrival of the wagon, and stacked them in someplace along with crackers and other explosive materials, without taking proper precautions against fire risks, and were mostly destroyed by fire. Such of the goods as had not been fully burnt were drenched by water used for extinguishing the fire, and had become totally unfit for sale or consumption, and thus the two consignments became totally lost. The Railway Receipts were returned by the Bank to the plaintiff-company as the hundies were not honoured, and the plaintiff could not take delivery of the goods for the reasons stated above. A claim was made to the Chief Commercial Superintendent, Southern Railway, Madras, on 22-11-1956, demanding payment of Rs. 10,270/-. But after a prolonged correspondence, the railway administration disclaimed its liability, and refused to pay by its letter dated 31-7-1957. The loss by fire was directly due to the negligence and misconduct of the servants of the railway administration, and it was not accidental.

4. The railway administration filed a written statement, resisting the suit claim, and putting the plaintiff to strict proof all the allegations not expressly admitted by it. The goods were booked at owner''s risk rate, and the Railway Receipts were issued with the endorsements "Certificate ot packing conditions obtained, loading and unloading by owner". Both the consignments were booked on 11-10-1956, and loaded in CJ. 12423, and dispatched from Tirumaugalam by train No. 3506 at 13-55 hours, on 11-10-1956. They were received at Eluru in

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NRCG. 6128 with seals of AJJ (i.e., Arkonam), and were unloaded on 22-10-1956. The consignor did not take delivery of the consignments within the free time allowed for the same. On 26-10-1956, at 4 A.M., fire and smoke were found emanating from the North end of the goods shed roofing, which was opposite to the station building. Immediately, the Fire Service and the Police were informed, and the electric supply to the goods-shed was switched off. The goods-shed was opened immediately, and the Fire Service, who arrived at 4-12 A.M. brought the fire under control at 5-30 A.M. The staff on duty, including the Railway Protection Force, stated that the doors of the goods-shed were locked only after a complete check, that they did not detect anything wrong before the closing of the goods-shed, and that no definite conclusion could be arrived at regarding the actual cause for the file. The railway administration is not responsible for the fire, or for consequent damage, as it is accidental and beyond their control. There is no misconduct or negligence on the part of the servants or officials of the railway administration. They acted diligently, and took all care and caution in dealing with the consignments as a bailee, and the administration is not liable for any damage caused to them. The owner of the consignments, who had to unload them, had not done so, and had not taken delivery of them within the free time, and as such the administration is not liable in respect of their loss. The defendant is not liable either for the suit claim or interest.

5. The learned District Judge framed the relevant issues. He found that the defendant is liable for the loss of the consignment by fire, on the ground that there was negligence on the part of the administration and granted a decree as prayed for.

6. Aggrieved by this decision, the defendant has preferred this appeal.

7. Sri K. Krishnamurthy, the learned counsel on behalf of the railway administration, assailed the decision on the following grounds;

(1) Under Rule 31 (2) of the General Rules for acceptance, carriage and delivery of goods, No. 28 of the Indian Railway Conference Association (called "Goods Tariff") the railway administration is not liable for loss or destruction of the goods in question; and

(2) The goods were carried at owner''s risk rate and there being no negligence or misconduct on the part of the defendant, it is not liable.

8. Rule 31 of the Goods Tariff reads as follows:

"Responsibility of the Railway for goods:- The railway administration hereby give public notice -

(i) That they are nor accountable for any articles unless the same are booked and a receipt for them given by their clerk or agent, and that when the articles are so accepted for conveyance, the responsibility of the railway for the loss, destruction or deterioration of the articles is subject to the provisions of Section 72 and Section 74A of the Indian Railways Act, IX of 1890.

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(2) That in respect of goods not removed from railway premises at station of destination within, a reasonable time, the railway is not liable in any respect for any loss, destruction, deterioration of or damage to such goods, arising from whatever cause notwithstanding that the railway may have warehouse or otherwise kept the goods and notwithstanding that the railway shall be entitled to be paid the authorised charges for goods so left on their premises. Normally, the free time allowed for demurrage and wharfage on railways should) be considered as reasonable time for this purpose.

(3) ....."

It is not disputed that the wagon containing the goods arrived at Eluru station on 22-10-1956 at 1-30 A.M. that the wagon was put in possession at 7 A.M. the same day, and that it was unloaded at 11 A.M. The fact of arrival of the goods was, admittedly, known to P. W. 2, V. Narasinga Rao, the plaintiff''s Depot Manager at Eluru, even on the evening of 22nd or the morning of 23rd. He admitted in his evidence that he knew even on the 22nd that the goods were stored in the goods-shed, but that he did not take steps to take-delivery. He also stated that he was informed of the fire accident by his clerk, that he went to the goods-shed on the 4th or 5th day, and that lie did not attempt to take delivery as the good were not of any use.

9. Rule 1 of the Rules for warehousing and retention of goods u/s 47(1)(f) of the Act, lays down (vide items (ii) and (iii) in the-tabular form) that in ease of goods available for delivery and goods not removed after delivery, the free time allowed is from the time of arrival till closing time of the day following that on which consignments are made available for delivery and that goods will be warehoused either under cover or in the open as space may be available, and that the railway administration is entitled to collect at the rate of one anna per maund or part of a maund per day or part of a day in excess of the free time. According to Rule 10 of the same Rules, the Railway administration is entitled to collect demurrage. In the case of loaded vehicles waiting to be unloaded by the consignee, the free time allowed is six hours of day light from time at which vehicles are placed in position for unloading. In the remarks column it is stated that in cases in which the unloading of consignment is required to be done by the consignee and (a) the consignee fails to perform the unloading of wagon within the free time allowed, or (b) the railway considers that earlier release of wagons wilt be secured by itself performing the work of unloading the wagons within the free time allowed, then in either event it shall be optional for the railway to undertake the work of unloading and to charge the consignee for doing so, and also to charge wharfage on the contents under rule. It is also noted that day light hours are as notified by each railway from time to time, arid demurrage will be charged for every hour, day or night, in excess of the free time.

10. The evidence on behalf of the defendant is to the effect that the unloading was done by one Jagannadha Raju, who is the person generally employed by P. W. 2 for unloading goods. The evidence of the Assistant Goods Clerk, D. W. 13

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reveals that the wagon was brought for unloading at 7 A.M. that he was present at that time, and that the unloading was completed by 11 A.M. by the Hundekar Jagannadha Raju with the help of coolies arranged by him, that he brought a chit containing the wagon number, that he did not preserve the chit, that he thought that that Raju was the party proper, and that as the party wanted to keep the goods in the shed, he permitted him to do so. D. W. 13 also deposed that within live hours the wagon has to be unloaded, otherwise demurrage is payable, that if the party fails to unload, the railway will wait for seventy-two hours, or a reasonable time, and that if the goods are not unloaded within five hours when the wagon is put in position, demurrage will be charged depending on tonnage, and if the goods are not cleared within forty-eight hours from the shed, wharfage also has to be paid, and that at the time of delivery, all the dues will be collected, He stated that the records do not show that the unloading was done by Raju, or that Raju is the agent of the consignee.

11. In the plaint, it is alleged that on 22-10-1956 the railway authorities, without waiting for the owner to unload the goods or give a reasonable time, themselves unloaded on their own responsibility. In the written statement it is admitted that the goods were received at Eluru, and were unloaded on 22-10-1956, and that the consignor did not take delivery of the consignments within the free time allowed. In this state of the pleadings, we cannot say that the railway administration denied the plaintiff''s averment that the goods were unloaded by the railway itself. It is, no doubt, true that D. W. 13 in the witness-box deposed that the unloading was done by Raju as an agent of the consignee, but his evidence does not warrant a finding that the delivery was done by him on behalf of the consignee, as the chit brought by Raju was not preserved, and there is no other evidence to prove that fact. We, therefore, proceed on the assumption that the unloading was done by the railway administration itself.

12. Even so, according to the Rules quoted above, if the unloading is not done within six hours, and the goods are not removed within twenty-four hours, the consignor will be liable to pay wharfage as well as demurrage. According to the evidence of D. W. 13, the reasonable time allowed is three days. Even that was admittedly exceeded by the consignee, as he did not make any attempt to take delivery of the goods till after the fire accident. We, therefore, hold that the goods were damaged or destroyed by fire after the expiry of the free time that is allowed for unloading and removal of the goods from the railway premises.

13. The contention on behalf of the railway administration is that since the goods were not removed from the railway premises within the reasonable time, the railway is not liable in respect of their loss, destruction, deterioration or damage from whatever cause. The learned counsel for the railway administration, however, admitted that notwithstanding Rule 31 (2), the ad- ministration will be liable if it is proved to be negligent.

14. Regarding the second contention, the submission of the learned counsel for the railway administration is that, when goods are carried at owner''s risk rate,

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the railway administration would be liable only upon proof of negligence of misconduct on its part, or of any of its servants.

15. In deciding these contentions, the relevant provisions of the Railways Act may usefully be noted.

16. Section 74-6 of the Act, omitting unnecessary words, lays down that, when any goods are tendered to a railway administration for carriage by railway, and the administration provides for the carriage of such goods either at the ordinary tariff rate (called the railway risk rate), or in the alternative at a special reduced rate (called the owner''s risk rate), the goods shall be deemed to have been tendered to be carried at the owner''s risk rate, unless the sender or his agent elects in writing to pay the railway risk rate. When the goods are carried or deemed to be carried at the owner''s risk rate, a railway administration shall not be responsible for any loss, destruction or deterioration of or damage to such goods from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the railway administration, or of any of its servants.

17. Section 74D, which is in the nature of a rider to Section 74C, provides that where the whole of a consignment of goods is not delivered to the consignee, and such non-delivery is not proved by the railway administration to have been due to any accident, the burden of proving such negligence or misconduct shall lie on the consignee,

18. The effect of these provisions, may be stated thus. Sections 74-0 and 74-D have been inserted by Section 10 of the Indian Railways (Amendment) Act,'' LVI of 1949, and they came into force on the first day of August, 1950. Sections 74-C, 74-D, read with 74-E replace the risk note forms "B" and "Z". One important change, it may be noticed is that the immunity enjoyed by the railway administration under risk note "B" in respect of goods carried at owner''s risk rate is reduced u/s 74-C, inasmuch as the railway administration is responsible, under this section, not only upon proof of misconduct, but also upon proof of negligence of the administration or its servants. u/s 74-D, the railway administration is bound to disclose to the consignor how the consignment was dealt with while it was in its possession or control. But where the whole of a consignment of goods, or the whole or any package forming part of a consignment carried at owner''s risk is not delivered due to fire, the railway administration is not bound to disclose to the consignor u/s 74-D how the consignment was dealt with while it was in its possession or control. If, therefore, the misconduct on the part of the railway administration or its servants could be inferred from the evidence u/s 74-D relating to the manner in which the consignment or package was dealt with throughout the time it was in the possession or control of the railway administration, the consignor need not prove anything further. But, if from that evidence misconduct or negligence cannot be inferred, the burden of proving it will be upon the consignor. But, if the railway administration is able to prove that the non-delivery is due to fire, it need not

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prove how the consignment or package was handled when it was under its control. The result, therefore, is that in such a case of nondelivery, the burden of proving negligence or misconduct will be only upon the consignor.

19. The decision bearing on the question now be noticed.

20. In Janendra Kumar Jain Vs. Union of India (UOI), , Ahmed, J., held that, as Sections 74-6 and 74-D use the word "negligence" along with the word "misconduct", the quantum of evidence necessary to attract liability of the railway for loss of part of the consignment is only that much as may be sufficient to lead to the inference of negligence, and not of misconduct on the part of the railway administration or its servants. It was also held that negligence is something less than misconduct, and that it consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances and in omitting to do some act which such a person would do under the circumstances. In other words, the test to be applied is the care taken by a prudent man.

21. In another decision of the Patna High Court in Sarjug Prasad Ishwar Purbey Vs. Union of India (UOI), it was held that in a case governed by Section 74-C it is erroneous to hold that the loss or damage to goods is prima facie proof of negligence on the part of the railway administration, and that when the statute requires proof of negligence, misconduct, etc., for the liability for the loss, destruction, deterioration, etc., to hold that the loss of damage is prima facie proof of negligence is to make the entire effect of Sections 74-A and 74-C nugatory. Thus, where no evidence has been adduced by the consignee-firm to show that the deterioration of the goods was due to any negligence on the part of the railway administration, nor is there any proof that the consignment was booked at railway risk, there is no liability on the railway administration as a carrier.

22. In the instant case, it is proved by the administration, and also admitted by the respondent, that the goods were carried at the owner''s risk rate, and that the loss of goods is due to fire. It, therefore, follows that the burden of proving negligence or misconduct lies upon the consignor. It is well-settled that when both the parties have adduced all available evidence, burden of proof assumes little or no importance. The question, therefore, for consideration is, whether on the evidence adduced it has been proved that the railway administration is guilty of negligence or misconduct:

(23-39) (His Lordship then referred to the evidence in the case and continued as under:-) The evidence of P. W. 2 does not make out any negligence or misconduct on the part of the railway administration or its servants. The evidence of P. W. 1 is that the administration should be made liable because the railway authorities them- selves unloaded the goods. He also expressed an opinion that there was no scope for the fire accident had the railway servants been diligent. That evidence is only begging the question. He, however, said that

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Depavali fire-works were also in the shed, and that the goods in question should have been stored on the platform covered by Tarapauline, and that there has been a violation of the Regulations. The contention, whether these goods were in fact kept near the Deepavali fire-works, and if that constituted negligence or misconduct, shall be examined later, while considering the evidence on behalf of the railway administration. The other two contentions viz., whether the unloading of the goods amounted to a contravention of the rules, or whether keeping them in the railway goods-shed instead of keeping them on the platform covered by a tarpauline is a violation of any rules or regulations, may now be considered.

30. Rule 10 of the Goods Tariff already referred to lays down that even in cases in which unloading of the consignment is required to be done by the consignee, if the railway considers that the earlier release of wagons will be secured by itself performing the work of unloading the wagons within the free time" allowed, it shall be optional for the railway to undertake the work of unloading and to charge the consignee for doing so, and also to charge the wharfage on the contents under the rules. In order to meet the exigencies and the demand for wagons, the railway administration is empowered to unload the wagons themselves, even in cases where the obligation to do so is upon the consignee. That by itself cannot therefore be said to constitute a violation of any rule, much less negligence or misconduct.

31. Rule 1 of the Goods Tariff already noticed lays down that after the goods are available for delivery of the goods, and they are not removed after delivery, they will be warehoused either under cover or in the open as space may be available. The discretion is, therefore, left with the railway administration. In the instant case, considering the fact that the goods are safety matches, which cannot be exposed to rain and damp weather, which is not unusual in the month of October, they were kept in the goods-Shed, a pucca structure with a zinc sheet roof, and in doing that the railway administration exercised the care of a prudent man. This again cannot be deemed to be a violation of the rules.

32. The complaint that the goods were kept along with fireworks seems to be based on some of the rules found in what is generally called Red Tariff No. 17, containing the rules and rates for the conveyance by rail of explosive and other dangerous goods, framed by the Indian Railway Conference Association. The rules referred to are in force from 1st April 1954, and intended to be used in local booking over Indian Government Railways, and in through booking over all Railways party to the Association. It is mentioned that the rules in this Tariff are to be worked as executive instructions, and for purposes of legal proceeding, actions must be based on the Indian Explosives Act, 1884, and the Rules framed thereunder, and the other Acts dealing with inflammable liquids, and dangerous, corrosive, and poisonous chemicals etc. Rule 2 of the Red Tariff lays down that the rules, rates and other conditions as laid down in the Indian Railway Conference Association Goods Tariff are also applicable to the carriage of explosives and other dangerous goods mentioned in the Red Tariff. Reading these

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Rules together, it is manifest that the rules in the Red Tariff do not over-ride the provisions of the Goods Tariff, that the rules and conditions laid down therein equally apply to the carriage of explosive and other dangerous goods, and that the rules in the Red Tariff are executive instructions. Evidently they are intended to be observed by the Railway servants, not only in the interests of the consignors, but also in the interests of the railway administration itself in order to protect its property from being damaged.

33. According to the scheme of these rules, they are applicable to explosives (described in Schedule I), and the general regulations are applicable to other dangerous goods, viz., inflammable liquids (described in Schedule II), dangerous, corrosive and poisonous chemicals (described in Schedule III), compressed or liquified gasses in cylinders (described in Schedule IV), and miscellaneous dangerous articles (described in Schedule V).

34. Rules 61 to 84 are general regulations applicable to "other dangerous goods" only. Rule 61 lays down that in addition to explosive, as defined in Section 4 of the Indian Explosive Act, 1884, goods mentioned therein shall be deemed to be dangerous goods for the purpose of Indian Railways Act, and in the list miscellaneous dangerous goods, specified in Schedule V are included. Rule 63 provides that the dangerous goods specified in Schedules II, III, IV and V and Special, shall only be accepted for conveyance by rail or be conveyed by rail subject to regulations and in accordance with the conditions set forth therein against each specified class of goods. Rule 64 further states that the Schedules referred to in Rule 63 lays down the General Classification, Packing Conditions, and Conditions of Carriage against each class of goods specified therein. It is, therefore, clear that the General Classification, Packing Conditions, and Conditions of Carriage relating to each class of dangerous goods must be found in the appropriate schedule, and they override these general rules where they are different from the general regulations.

35. Rule 67 provides that dangerous goods shall be carefully handled and shall not be stored in any of the Railway Administration''s enclosed sheds or warehouses. Rule 76 reads thus:

"It shall be the duty of even officer in charge of a station to cause every package of dangerous goods, which it is proposed to despatch by rail or which has been received at any station for transhipment or delivery to the consignee, to be stored, at a safe distance from the station buildings, either in a covered vehicle or completely covered with tarpaulines or such other suitable material so that it may not be exposed to the sun and if necessary to be protected by a police guard."

The object of this rule is evident, viz., that the place of storage must be at a safe distance so that the station buildings may not be damaged in the event of any accident. The reason for their being kept in a covered vehicle, or covered by tarpauline or other suitable material is to prevent exposure to the sun, and

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possible ignition on account of the heat. The protection by police guard is not compulsory.

36. Rule 83 lays down as follows: "If, upon the arrival of any dangerous goods at their destination, the consignees do not take delivery of and remove the same within the time notified by the Railway Administration, they may be kept in the vehicle in which they were carried until delivery is effected, or until they are disposed of under the provisions of Section 56 of the Indian Railways Act, IX of 1890, or otherwise''''.

37. Schedule V deals with Miscellaneous Dangerous Goods. Matches, safety, is included under the General Classification R.R. 15 and O.R. 14. Matches, non-safety, is included under R.R. 15. It is noted that matches which ignite by simple friction and are liable to spontaneous combustion, should be considered as coming within the class "Matches, non-safety" and that matches which require to be rubbed on the prepared surface of the box which contains them to be ignited, and provided the consignor furnishes a signed certificate that the matches are packed in welt made match boxes, should be considered as coming within the class "Matches, safety". In the instant case, it is admitted by both parties that the goods are matches safety. Column 3 of the schedule gives the general packing regulations separately in the case of matches, safety, and matches, non-safety. In column 4, supplementary packing transport, loading and unloading regulations, it is mentioned that sample parcels of matches, safety, may be carried in the rear brake-van of mixed, or passenger trains under certain conditions. It is also noted that matches, non-safety, must not be stored in any of the railways enclosed sheds or warehouses. It is very significant that Schedule V provides that matches, non-safety, must not be stored in any of the railways enclosed sheds or warehouses, but there is no such prohibition in the case of matches safety. The general regulation that the dangerous goods shall not be stored in the railway goods-shed or warehouse is, therefore, not applicable to matches, safety. We, therefore, hold that none of the rules of the Red Tariff have been violated apart from the fact that those rules have no statutory force, and are simply executive instructions.

38-45. (His Lordship then considered the evidence given on behalf of the Railway Administration and proceeded thus:) The evidence of these witnesses makes it clear that the fire works referred to are sparklers which are not at all dangerous, and that there was considerable distance between them and the matches. According to the evidence of D.W. 11 (District Fire Officer) the order in which the goods were arranged in the goods-shed in the South Eastern Corner where the fire broke out was, waste paper, tobacco, bag of utensils, match-boxes, and between the match boxes and sparklers there was a distance of about ten yards. According to D.W. 13 (Asst. Goods Clerk.) the distance between the matches and the sparklers is about 5 to 6 yards. The evidence of D. W. 15 (Asst. Station Master) is that the fire-works consisted only of sparklers, which are analogous to safety matches. It is common knowledge that sparklers cannot be ignited unless

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actually kept in a flame for sometime. It is not elicited that besides sparklers there were any other variety of crackers or fireworks. In these circumstances, it cannot be said that storing of safety matches along with other goods described in Ex. B.11 constituted negligence.

46. From the evidence of the railway staff it is clear that all possible precautions were taken before the shed was locked. The opinion of the Fire Officer is that the fire would not have started with the crackers, nor was it aggravated by their presence. His opinion that the fire might have started on account of a lighted cigar or cigarette end being thrown, is just a surmise, and cannot be accepted as proof. The Station Master arrived at the scene according to the evidence of D. W. 15 within a few minutes. The evidence is not very definite, whether the lock was opened in addition to the breaking open of a zinc sheet, but that does not warrant our holding that the delay in the Station Master arriving at the scene with the key had contributed to the damage. Though in the remarks column in Ex. B-3 it is stated that the fire would have lastly started 4 or 5 hours before it was noticed, i.e., by about 11 P.M. or la mid-night, in the column relating to particulars of fire it was stated that the approximate out-break of fire was 2-30 A.M. That appears to be more probable, as, if the fire was allowed to rage for 4 to 5 hours as stated in column 13 of Ex. 3.3, the damage should have been far more serious and disastrous. We are, therefore, unable to hold that any negligence or misconduct on the part of the railway administration has been made out. On the other hand, the fire occurred in spite of reasonable care on the part of the administration.

47. The learned District Judge came to the conclusion that the railway administration was not absolved from liability on the ground that the goods were not stored as per the directions in Rule 76 of the Red Tariff, that it ought not to have allowed the bundles of safety matches to be stored in a portion of the goods-shed, that Rule 31(2) of the Goods Tariff cannot have application to the facts of this case, and that by virtue of the rules in the Red Tariff different considerations, applied. He based his conclusion on the fact that the railway servants have acted contrary to the rules in the Red Tariff. We have already explained that the rules in the Red Tariff are only executive instructions, that Rules 76 and 83 relate only to dangerous goods, but not miscellaneous dangerous goods, and that the rules not having statutory force, no negligence can be inferred from the mere fact of their non-observance, even assuming they have any application to safety matches. Further, as already pointed out, there has been no violation of the rules. Under Rules 31(2) of the Goods Tariff, the administration can be made liable only if it is proved that they are guilty of negligence, or misconduct, which has not been established. The circumstances relied Upon by the learned Judge, viz., that D. W. 9 was the only person employed to keep watch, that the keys of the goods-shed reached half-an-hour after the arrival of the fire brigade, and that the fire should have started even at 10-30 P.M., are not circumstances pointing to negligence. The non-examination of the Chief Goods Clerk is of no consequence, as the Assistant Goods Clerk who

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actually checked the goods-shed before locking it has been examined. The learned District Judge was carried away by the fact of non-examination of the Chief Goods Clerk, on the ground that he was the custodian of the goods-shed. No reasons were assigned by him for disbelieving the evidence of D.Ws. 13 and 14, which, in our opinion, ought to be accepted. The reasoning that if really the shed was checked it would not have been possible to throw a lighted cigar or cigarette which, according to D. W. 11, was the cause of the fire, cannot be accepted. As already stated, it is only his opinion, and cannot be taken as proof. On the evidence, it cannot be said that the cause of the fire was made out or established. The learned District Judge also ignored the fact that the fire works in this case are only sparklers which cannot be put on the same footing as other varieties of fire-works. On the other hand, they stand on a footing analogous to safety matches. The keeping of sparklers at a considerable distance from the safety matches cannot, in our opinion, amount to a failure to take the necessary precautions. The finding of the learned District Judge that because it is proved by Ex. B.11 that some fire-works were also damaged, the out-break of fire must be due to the negligence of the railway servants in allowing them to be kept in the same shed, is a finding not based upon any evidence. Since we have already found that the fire could not have started four or five hours before it was discovered, but could have started only within two hours, it cannot be said that there was any negligence on the part of D. W. 9, as the shed was locked, and fire could not have been noticed by anybody till it reached the height of the roof. The finding of the learned District Judge which is based upon the above reasons cannot, therefore, be sustained.

48. The decree of the Court below is, therefore, set aside. The appeal is allowed, and the suit (O.S. 48 of 1957) is dismissed. But in the circumstances of the case, we make no order as to costs.

Appeals Nos. 97 and 98 of 1959.

49. In O. S. No. 36 of 1957, two plaintiffs, Sankabathula Chandraya and Suda Venkateswarlu, are the consignor and consignee. They filed the suit against the General Manager, South Eastern Railway, Calcutta. Their case is that the first plaintiff sold to the second plaintiff thirty-six bundles of tobacco, and the same was entrusted to the railway administration at Eluru in two consignments of 26 bundles and ten bundles for being sent to Salurti within the limits of South-Eastern Railway, and obtained the railway receipts, R.R. No. 095546, Invoice No. 5 dated 25-10-1956, and R. R. No. 095547. Invoice No. 6 dated 25-10-1956, respectively. The Railway Receipts which were taken "Self", were transferred to the second plaintiff by endorsement, and sent to him by registered post. On 8-11-1956, the Station Master, Eluru, sent a communication to the first plaintiff, by his letter dated 5-11-1956, that the two consignments were involved in a fire in the Eluru Goods-shed on the night of 25-10-1956, and were partly damaged, and that he awaited instructions about their disposal. The first plaintiff sent a reply on 9-11-1956, and inspected the goods along with the second plaintiff on

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10-11-1956 in the presence of the Station Master, Eluru. Instead of the bundles, he only found some tobacco in two heaps badly burnt, and mixed up with ash, and flooded with water, evidently from the fire engine. The tobacco was utterly useless for human consumption or otherwise, and the first plaintiff informed the Station Master that he had no objection for the goods being sold in public auction so as to mitigate the -damages due from the railway administration. The first plaintiff preferred his claim to the Chief Commercial Superintendent, Southern Railway, for the loss caused, who informed the first plaintiff that the Chief Commercial Superintendent, South Eastern Railway, Calcutta, is the proper authority to deal with the matter, as Salur is under his control. Thereafter the first plaintiff carried on correspondence with that office. The Station Master, Salur, informed the first plaintiff by means of Ex. A.1 dated 17-1-1957 that the two consignments were lying undelivered at Salnr since 4-12-1957, and that, if not taken delivery of within fifteen days, they would be disposed of under Sections 55 and 56 of the Indian Railways Act. The first plaintiff replied on 28-1-1957 that they may be sold by the Administration in public auction. The Chief Commercial Superintendent, Calcutta, by subsequent letter, Ex. A.51, dated 22-1-1957, required the first plaintiff to make a claim, whereupon he submitted his claim, without prejudice, to the Station Master, Salur, for Rs. 9,443-6-0 on 4-2-1957. As the amount was not paid, the first plaintiff sent a registered notice to the Chief Commercial Superintendent, Calcutta, who, after a long delay, sent a reply, Ex. A.55 dated 11-4-1957, demanding the plaintiff to pay all the railway dues, and take delivery of the tobacco, and stating that in default action would be taken under Sections 55 and 56 of the Railways Act. The first plaintiff again sent a registered notice, Ex. A.58, dated 13-6-1957, to which no reply was received till 21-10-1957 when the suit was filed. The first plaintiff also complained by means of a lawyer''s notice, Ex. A.56 dated 24-4-57, that when the Chief Commercial Superintendent and the Station Master were informed on 19-12-1956 that the tobacco was utterly useless for human consumption, there was no justification for its being despatched to Salur, and that a sum of Rs. 9,252-14-0 should, be paid to him. The plaintiffs contention was that the loss and damage were due to the, negligence and misconduct of the defendant''s servants, and the defendant was, therefore, liable.

50. The defendant resisted the claim, denying the plaint allegations, and putting the plain- tiffs to strict proof. It contended that the defendant is not properly described, and in the absence of the proper party on record, viz., the Union of India, owning tie South-Eastern Railway, represented by the General Manager, the suit is liable to be dismissed. It further contended that the plaintiffs are put to strict proof of service of a proper and valid notice u/s 80, C.P.C. The case of the railway administration is that the railway servants acted diligently and efficiently in keeping the goods, and putting out the fire, which was accidental, and beyond the control of the railway administration. The allegation that the goods were utterly useless for human consumption, and did not appear to command any value at all, was denied. The goods were received at Salur on

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4-7-1957, and as the first plaintiff did not take delivery, they were sold in public auction after intimation. It was further contended that the plaintiff had no privity of contract with the defendant, and the suit was not maintainable. The defendant also contended that the fire accident occurred on the Southern Railway, and the suit against the defendant was not maintainable u/s 80 of the Indian Railways Act, and that the suit is bad for the non-joinder of the contracting railway viz., the Southern railway.

51. The allegations and the contentions in O. S. 17 of 1958 are also similar, with this difference, that in that case the goods were booked from Eluru to Hubli, both of which are within the limits of the Southern Railway. The goods in question, viz., tobacco, were involved in the same fire accident. The notice u/s 77 of the Railways Act was given to the Chief Commercial Superintendent, Southern Railway, Madras, only on behalf of the first plaintiff. The notice u/s 80, Civil Procedure Code, Ex. A.79 dated 19-7-1957, was given only by the ''first plaintiff to the General Manager, Southern Railway, Madras, to which a copy of the plaint was appended. To this notice, the C.C.S. sent a reply Ex. A.81 dated 30-7-1957, stating that he was unable to entertain the claim on the ground that he was not responsible for the accidental fire. The suit was however, filed by both the consignors (seller) and the consignee (buyer) for recovery of Rs. 3,952-81 nP.

52. The suit was resisted on the ground that the Union of India was not impleaded, and also on the ground that the notice u/s 80, C.P.C. was given only on behalf of the first plaintiff, but not on behalf of both of them. Their liability was also denied.

53. On these contentions, the learned Subordinate Judge, Eluru, framed the appropriate issues, and dismissed O. S. 36 bf 1957 on the ground that the suit is not maintainable by reason of the proper party, viz., the Union of India, not having been impleaded. But he found that the notice u/s 80, C.P.C., is proper and valid. He also found that the plaintiffs had no cause of action against the South-Eastern Railway, and dismissed the suit. In the other suit (O.S. 17 of 1958), the learned Subordinate Judge held that notice u/s 80, C.P.C. was proper but found that the proper party viz., the Union of India, was not impleaded, and hence dismissed the suit.

54. Aggrieved by these decrees and judgments, the plaintiffs preferred these two appeals, A. S. Nos. 97 and 98 of 1959.

55. Sri N. Bapi Raju, the learned counsel on behalf of the appellants, contended that the Union Government was not an absolutely necessary party, that in O.S. 36 of 1957 the first plaintiff was advised by the C.C.S. Madras that the claim should be made to the C.C.S. Calcutta, and the suit filed against the General Manager, Southern Railway, cannot therefore, be held to be not maintainable. He also invoked the doctrine of estoppel.

56. In A.S. 97 of 1959 (arising out of O. S. 36 of 1957) the appellants filed C.M.P. 1870 of 1959 under Order 1, Rule 10, C.P.C. for adding the Union of India,

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represented by the General Manager, Southern Railway, Madras as the second defendant, and C.M.P. 1869 of 1959 for amendment of the-cause title in the suit C.M.P. 1871 of 1959 was also filed in A.S. 98 of 1959 (arising from O.S. 17 of 1958) for amending the description of the defendant in that suit as the Union of India by the General Manager, Southern Railway, and the appellants in both the appeals prayed that the defects may be rectified.

57. The learned counsel for the respondents, Sri Krishnamurthy, contended that the application could not be granted, as the Administration took those objections in the trial Court and yet no steps were taken for rectifying them, and that the suit O.S. 36 of 1957 was dismissed on the ground of non-joinder of the Union of India, and also on the ground that the plaintiff had no cause of action against the South-Eastern Railway. He also contended that the appellants cannot now be permitted to fill up the lacuna due to their latches. The Union of India not being before the Court, the cause title cannot be amended, and notice u/s 80, C.P.C., should be given to the Union of India before it can be impleaded, argued the learned counsel. He also contended that notice u/s 80, C.P.C. should have been given to the Union of India represented by the General Manager, Southern Railway, as each railway is a separate entity in the eye of law, and the suit should be filed within one year from the date of the loss. This not having been done, and the suit is barred by limitation, and the application ought not to be granted.

58. C.M.P. No. 1871 of 1959 was also opposed on the ground that the objection was taken in the trial Court that the Union of India was not impleaded, and owing to the latches of the plaintiffs the defect was not rectified. It was urged that the plaintiffs cannot be permitted to do so now, as the Union of India is not before the Court, and that notice u/s 80, C.P.C., ought to have been served on the Union of India before the amendment can be allowed.

59. In order to appreciate the force of these contentions, the relevant statutory provisions may be noticed. Section 77 of the Indian Railways Act (hereinafter referred to as "the Act"), enacts as follows:

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction damage deterioration or nondelivery of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf (a) to the railway administration..... within six months from the date of the delivery of the animals or goods for carriage by railway."

Section 80 lays down:

"Notwithstanding anything in any agreement purporting to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation..... for loss, destruction or deterioration of animals or goods where..... the animals or goods were booked through over the railways of two or more railway administrations, may be brought either

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against the railway administration..... to which the animals or goods were delivered by the consignor thereof..... or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred." Section 140 of the Act provides thus:

"Any notice or other document required or authorised by this Act to be served on a railway administration may be served, in the cases of a railway administered by the Government..... or the Manager....."

It is obvious that the object of Section 77 is to prevent stale and dishonest claims for loss, when owing to delay it may not be possible to trace the transaction or verify the truth of the allegations made on account of the necessary evidence being no longer available. Notice under this Section is necessary before a plaintiff can sue a Railway administration for loss, destruction or deterioration. According to Sub-section (6) of Section 3 of the Act,

"railway administration'' or ''administration'' in the case of a railway administered by the Government means the manager of the railway and includes the Government, and, in the case of a railway administered by a railway company, means the railway company".

Thus, the word "Manager" according to Section 3(6) includes the word "Government", and if a suit is instituted against a railway owned by the Government, the operation of Section 80 is at once attracted, and notice under that section becomes indispensable. The period of six months prescribed in Section 77 of the Act is by way of a bar of limitation, and is not like the period prescribed in Section 80 C.P.C., which has to be excluded from computation u/s 15(2) of the Indian Limitation Act.

60. Section 77 of the Act was recently interpreted by the Supreme Court in Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others, . It was laid down by their Lordships that the intention of the legislature enacting Section 77 must have been to afford only a protection to the railway administration against fraud, and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the railways. Bearing in mind the object of the section, it was held, notice u/s 77 should be liberally construed. It was also held in that case that, where within six months of booking the consignment, the consignor brought to the notice of the railway administration by a letter that part of the consignment had not reached the destination, and requested the General Manager of the Railway to make a search for the goods without delay, it amounted to a sufficient notice for the purpose of Section 77, and that the claim must be deemed to be implied in that notice, It was further laid down that on the language of Section 77, as it stood before the amendment in 1961, notice thereunder must be given to every railway administration against whom the suit is eventually filed. Their Lordships also laid "down that where the plaintiff is claiming compensation for the damage to goods

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which were eventually delivered, the appropriate article applicable would be Article 30, but not Article 31 of the Limitation Act. It was further held that u/s 80 of the Act it is for the consignor to establish if he wants to sue a railway administration other than the one which booked the consignment, that the damage had occurred on its system.

61.In a judgment of this Court, on whose behalf my Lord, the Chief Justice, spoke, viz., Kondapalli Virraju Vs. Union of India (UOI) and Others, after reviewing the case law on the subject, it was held that Section 77 of the Railways Act lays down the condition that the claim for refund of compensation should be preferred in writing within six months from the date of delivery as a condition precedent to the institution of any suit for any of the reliefs mentioned therein. It was also laid down that it is clear from Section 80 of the Act that only two of the railway administrations are liable for damages or compensation, i.e., the railway administration with which the consignor entered into a contract for carriage of the goods, or the railway over whose lives the loss occurred. It was further laid down that the section treats each of the railway administrations as a separate entity with separate existence and personality. Section 80, it is said, creates a liability on the part of the railways in regard to the loss caused to a party. At 405 (of Andh WR): (at pp. 595-96 of AIR) it was observed thus :

"It contains the law relating to the liability of different railways mentioned therein. The section gives an option to the aggrieved party to sue either the railway system with which he has entered into a contract of carriage or the railway administration over whose lines damages were caused to the goods.

It is true that Section 80 was enacted at a time when the different railway systems belonged to different owners and therefore, such a provision was necessary. But, then if any alteration was contemplated, Parliament would have amended that section suitably. The section, as it stands, points to the conclusion that the individuality of each of the railway administration continued. Thus Section 80 furnishes a clue to the interpretation of Section 77."

It was further observed that, unless the railway system, which is sought to be mulcted with damages has notice of it, it would not be in a position to enquire into the matter, and the notice issued to another railway administration would be of no help whatsoever in regard to the matter indicated in that section, and that there is no scope creating a fiction that service of notice on one of the railway administration is service on all the railway administrations. His Lordship further observed that Section 140 of the Act also reinforces the conclusion that each railway administration is having a separate existence, and, therefore, should be informed of any claim if any person proposes to make within the time mentioned in Section 77.

62. In answer to this contention the appellants relied on Section 74-E of the Act. It enacts that where the goods tendered for carriage by a railway have been booked through over the railways of two or more railway administrations, or over

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one or more railway administrations, the persons tendering the goods shall be deemed to have contracted with each of the railway administrations, as the case may be, that the provisions of Sections 73, 74-A, 74-B, 74-D, and 75 shall apply, so far as may be, in relation to the carriage of such goods in the same manner and to the same extent as they would have applied if the goods have been carried over only one railway administration. It was argued that by reason of this section, the Southern Railway could be made liable, and that the scope of Section 74-E was not considered in Kondapalli Virraju Vs. Union of India (UOI) and Others, . We are of opinion that there is no force in this contention. This section has reproduced some of the principles of the risk note form A to the effect that the agreement embodied in the risk note should be deemed to be made separately with all railway administrations who should be carriers for any portion of the transit so as to make the risk note equally operative over all the railways by which the consignment was carried. But the section cannot be construed as whittling down the effect of Section 80 of the Act. Section So is not prohibitory, but an enabling section, and under it no suit will lie against a railway company to whom goods were not entrusted, unless it be proved that the loss occurred while the goods were in their custody. Hence the decision in Kondapalli Virraju Vs. Union of India (UOI) and Others, , applies to this case.

63. Sections 79 and 80 of the CPC may now be noted. Section 79 lays down as follows:

"In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may, shall be:

(a) in the case of a suit by or against the Government, the Union of India, and

(b) in the case of a suit by or against a State Government, the State."

This section declares the rule of procedure enacted in Article 300(1) of the Constitution, and lays down that the authority to be named as plaintiff or defendant in a suit against the Central Government shall be the Union of India. Since the railways are owned by the Union Government, it follows that any claim against any railway administration must be against the Union of India.

64. Section 80, C. P. C. enacts thus: "No suit shall be instituted against the Government or against a public officer in respect of any act, purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of:

(a) .....

(b) in the case of a suit against the Central Government, where it relates to a Railway, the General Manager of that Railway;

(c) .....

and,.....

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stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

It is well-established by the pronouncements of the highest tribunals that the terms of this Section are imperative, and admit of no exceptions or implications, and that a suit not complying with its provisions cannot be entertained by any Court, and, if instituted, must be rejected under Order VII, Rule 11, C.P.C. Even where the Government was only a proforma defendant, it was held that a notice under this Section is necessary. The notice must substantially fulfil the object in informing the parties concerned generally of the nature of the suit intended to be filed, and it is essential, having regard to the language of Section So, that notice should state the names, descriptions and places of residence of all the plaintiffs.

65. It was laid down in Government of the Province of Bombay v. Pestonji Ardeshir, AIR 1949 PC 143: 1949-2 Mad LJ 161 by the Privy Council, that the provisions of Section 80 are imperative, and must be strictly complied with and that there is no provision in the Code enabling the trustees to sue in the name of the Trust, as members of a firm may sue in the name of the firm. It was also held that in the case of a trust, the plaintiffs are bound to be the trustees and not the trust, and that where no notice has been served u/s 80, specifying the names and addresses of all the trustees, the provisions of the section have not been complied with, and the suit is incompetent. In that case, a notice was served intimating that the trustees intended to institute a suit against the Government. One of the trustees died subsequent to the notice, and later the suit was instituted by the surviving trustee, whose name had been included in the notice, and two others appointed in place of the-deceased trustee. It was held that no notice having been served on behalf of the plaintiffs 2 and 3, the suit against the Government was not competent.

66. Following this decision, it was held in S.N. Dutt Vs. Union of India (UOI), that where an individual carries on business on some names and style, notice has to be given by the individual in his own name, for the suit can only be filed in the name of the individual. It was held that the suit is analogous to the case of trustees where the suit cannot be filed in the name of the trust, but it can only be filed by the trustees, and the notice therefore has also to be given in the name of all the trustees who have to file the suit. S.N. Dutt and Co., not being a partnership firm, but merely the name and style in which S. N. Dutt carried on trade, the person giving the notice is not the same as the person suing, and it was held that the suit failed on the ground of non-compliance with Section 80, C.P.C. The Supreme Court followed the decision of the Privy Council in Bhagchand Dagdusa v. Secy. of State, 54 Ind App 338: (AIR 1927 PC 176), AIR 1949 PC 143: (1949) 2 Mad LJ 161 and Vellayan Chettiar v. Government of the Province of Madras, ILR (1948) Mad 214: (AIR 1947 PC 197). In the last case, a suit was brought by two plaintiffs but the notice was given by only one of them and the Privy Council held :

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"Section 80, according to its plain meaning, I requires that there should be identity of the per- I son who issues the notice with the person who brings the suit."

Their Lordships (in) S.N. Dutt Vs. Union of India (UOI), distinguished the decision of the Supreme Court in Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI), and in The State of Madras Vs. C.P. Agencies and Another, , relied on for the contention that the Court must import a little common sense into notices u/s 80, C.P.C. and observed:

"Where the matter (for example) concerns the relief or the cause of action, it may be necessary to use common sense to find out whether Section 80 has been complied with. But where it is a question of the name of the plaintiff, there is in our opinion little scope for the use of common sense, for either the name of the person, suing is there in the notice or it is not. No amount of common sense will put the name of the plaintiff there, if it is not there."

Applying these principles to the cases on hand, let us examine the position. By means of Ex. A.45 dated 12-11-1956, the first plaintiff in O.S. 36 of 1957 sent a notice to the Chief Commercial Superintendent, Southern Railway at Madras, with a copy to the South-Eastern Railway, Calcutta, claiming Es. 9,443-6-0 as the amount due to him from the purchaser on the quantity of tobacco mentioned therein, including the profit which the purchaser would have realised. To that letter, he received a reply, Ex. A.47, from the Chief Commercial Superintendent, Madras, stating that the Chief Commercial Superintendent, South-Eastern Railway, Calcutta, is the proper authority to deal with the matter for disposal and reply, as the station delivering the traffic is under his control, and that the first plaintiff should communicate with him further. Notice u/s 80 C.P.C., Ex. A.60 dated 19-7-1957, was issued by a lawyer, but only on behalf of the first plaint, Sankabathula Chandraiah. In the body of the notice also reference was only to the first plaintiff, and it was slated that he will be obliged to file a suit as per the draft plaint enclosed to it, if his claim was not satisfied. To this notice, a copy of the plaint, now numbered as O. S. No. 36 of 1957 was enclosed. The learned District Judge, no doubt, referred to the decision of the Privy Council in ILR (1948) Mad 214: (AIR 1947 PC 197) and the decision of the Madras High Court Venkata Rangiah v. Secy. of State, AIR 1931 Mad 175, but distinguished them on the ground that the requirements of Section 80 have been substantially complied with, as the object of legislature in enacting that section was to afford the defendant an opportunity to re-consider his position with regard to the claim made, and make amends or settle the claim without recourse to litigation and that opportunity was afforded by the plaintiff amending the draft plaint. In view of the clear language of Section 80, C.P.C., that the name, description and place of residence of the plaintiff should be stated in the notice, and the clear and authoritative pronouncement of the Supreme Court in S.N. Dutt Vs. Union of India (UOI), . It is futile to contend that in respect of the name of the plaintiff the principle of substantial compliance has any application. The fact that in the plaint

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the names of both the plaintiffs are mentioned, and that both of them sued for the claim would not warrant our holding that Section 80 has been complied with, when the notice was in fact sent only on behalf of the first plaintiff. We must, therefore, hold that the requirements of Section 80, C.P.C.. have not been complied with.

67. Then, coming to the other objection, viz., whether there is any cause of action against the defendant named in the plaint (the General Manager, South-Eastern Railway, Calcutta), it is clear from Section 79, C.P.C., referred to supra and Article 300(1) of the Constitution, that in a suit against the Central Government, the defendant shall be the Union of India, and, according to Section 80 C.P.C., the notice against the Central Government where it relates to the Railway should be delivered to the General Manager of that Railway. It, therefore, follows that the defendant in a suit against the Railway should be the Union Government, and the notice u/s 80 should be served upon the General Manager of that particular railway administration which is sought to be made liable. According to Sections 77 and 80 of the Railways Act, it is the General Manager of the Railway administration to which the goods were delivered for carriage or the general manager of the railway administration on whose railway the loss occurred that should be served with the notice u/s 80, C.P.C. He is also the authority on whom notice should be served u/s 77 of the Railways Act. In this case, it is not denied that the loss occurred when the goods were lying in the goods shed at Eluru, which is within the limits of the Southern Railway. The defendant, as already stated, is the General Manager, South-Eastern Railway, Calcutta.

When, even according to the plaintiffs, the total loss occurred at Eluru within the limits of the Southern Railway, and not at Salur within the limits of the South-Eastern Railway, it was incumbent upon the plaintiffs to have sent the notice u/s So C.P.C., and sued the Union of India represented by the General Manager, Southern Railway, Madras. According to Section 80 of the Railways Act, it is the General Manager, Southern Railway, Madras on whom the notice u/s 77 of the Act should have been served. The suit could have been filed only after a notice u/s 80 C.P.C., is issued to the Union of India, and served upon the General Manager of the Southern Railways. In the instant case, the notice served u/s 80, C, P. C. even on behalf of the 1st plaintiff was served only upon the General Manager, South-Eastern Railways, Calcutta. Under these circumstances, we cannot but hold that the suit is not properly framed, that it is not maintainable against the defendant who is sued, and that as against him there is no cause of action. The decision of the Supreme Court in Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others, already cited would not be of any assistance to the appellant, as the object of Section 77 is different from the object of Section 80, C.P.C., and both the sections must be complied with. We are, therefore, of the opinion that there is no cause of action against the General Manager, South-Eastern Railway, Calcutta.

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68. These objections as to the non-maintainability of the suit and the absence of a cause of action against the defendant were raised in the written statement, and yet the plaintiffs, for reasons best known to themselves, had not taken any steps to have them rectified in the trial Court, but took the stand that the suit as framed was maintained, and failed in that contention. The suit is also barred by limitation on the date the application for amendment is filed. We hold, that for the reasons stated above, no case is made out for our allowing the petition for addition of the party, or for amendment of the cause title.

69. Sri Bapi Raju, the learned counsel for the appellants contended that correspondence revealed that the Chief Commercial Superintendent, Madras, to whom the notice was sent in the first instance, directed him to carry on the correspondence with the Chief Commercial Superintendent, South-Eastern Railways, Calcutta, and that was the reason why the subsequent correspondence as well as the notice u/s 80, C.P.C., were addressed only to that railway, and the suit was also instituted against the General Manager of that railway. None of the requirements of Section 115 of the Evidence Act are satisfied in this case. There is no declaration, act or omission by which the Southern Railway caused or permitted the plaintiffs to believe that they are not liable, or that the liability is only that of the South-eastern Railway, Calcutta. In Ex. A.47 dated 29-11-1956 it is stated that the Chief Commercial Superintendent, South-Eastern Railways, Calcutta, is the proper authority to deal with the matter for disposal and reply, as the station delivering the traffic is under the control of that office, and that the further communication may be made to him. For the sake of administrator- live convenience, it might be that the claim was investigated and examined by the Chief Commercial Superintendent, South-Eastern Railway, Calcutta, but that cannot have the effect of abrogating the statutory provisions cited above, nor creating an estoppel. It is well known that there can be no estoppel against a statute. This contention of the learned counsel, therefore, fails.

70. We may incidentally add that the suit fails not merely on these grounds, as we have held in our Judgment in A.S. 47 of 1959 that there is no negligence on the part of the railway authorities in the fire accident which occurred at Eluru on 25-10-1956, in which the goods in question, as well as the goods in A. S. 98 of 1959, were destroyed. Even on merits, we have no doubt that the plaintiffs'' claim is unsustainable.

71. In the result, C. M. Ps. 1869 and 1870 of 1959 are dismissed, but without costs. A. S. No. 97 of 1959 (arises out of O. S. No. 36 of 1957) is dismissed, and we make no order as to costs.

72. In O. S. No. 17 of 1958, the goods were booked at Eluru, and the destination was Hubli, which is also within the limits of the Southern Railway. In this case/ therefore, the railway administration which booked the goods, and on whose line the loss occurred are the same, and it has been sued. But the plaint suffers from the other defects as in O.S. 36 of 1937, viz., (i) Union of India is not made the defendant; (2) there is no cause of action against the defendant described in the

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plaint; (3) proper notice u/s 80 C.P.C., has not been served on the Union of India, represented by the General Manager, Southern Railway, Madras and (4) notice u/s 80 C.P.C., was sent only on behalf of the first plaintiff, but not the other plaintiff. For the reasons already given, these are all objections fatal to the suit. Even on merits, the administration of the Southern Railway cannot be made liable for negligence.

73. For all these reasons, the appeal A. S. No. 98 of 1959 fails, and is dismissed. But, in the circumstances, we make no order as to costs. C. M. P. No. 1871 of 1959 for amendment of the cause title is also dismissed for the same reasons as in C. M. P. Nos. 1869 and 1870 of 1959, but without costs.

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