

(1987) 05 OHC CK 0012
In the Orissa High Court
Case No : First Appeal No. 185 of 1976

Union of India (UOI)

APPELLANT

Vs

Ashok Kumar Rasiklal and Co. and Another

RESPONDENT

Date of Decision : 12-05-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 3
Limitation Act, 1963 — Section 21
Railways Act, 1890 — Section 73

Citation : AIR 1987 Ori 264

Hon'ble Judges : H.L. Agrawal, C.J.; S.C. Mohapatra, J

Bench : Division Bench

Advocate : B. Pal, for the Appellant; G. Rath, (for No. 1), for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agrawal, C.J.—This is an appeal by the defendant, Union of India representing the South Eastern Railway, against the decree of the trial court for a sum of Rs. 79,556.40 passed as damages for nondelivery of certain Mohua flower consignments, raising some interesting questions of law.

2. The facts :

The plaintiff despatched nine consignments of Mohua flower from Khariar Road Railway iStation to Seoni under nine separate railway receipts in the month of May, 1970. Each consignment was loaded in one full wagon-load consisting of 321 bags, each weighing 224.70 quintals. The consignments were booked to "self and, according to the plaintiffs case, they were despatched under sale orders to M/s. Jaiswal Trading Corporation, Seoni, subsequently added as defendant No. 2, "Rs. 8,839.60 p. per wagon. The relative documents including the railway receipts were accordingly sent through the Bank for collection of the money from the concerned party. The defendant-Railway Administration, however, delivered all the consignments to defendant No. 2 on the basis of indemnity bonds without presentation of the railway receipts. Since defendant

No. 2 did not retire the documents from the Bank, the Bank returned them to the plaintiff. The plaintiff claimed damages from the defendant-Railway Administration on the ground that the delivery of the consignments to defendant No. 2 was entirely illegal and, therefore, the defendant was liable to compensate the loss in question to the plaintiff.

It may be mentioned that originally the suit was filed only against the General Manager, S. E. Railway. But after filing of the written statement, the plaint was amended impleading defendant No. 2 and also amending the description of defendant No. 1 by adding "Union of India through" before the description of the original defendant.

3. Since long arguments have been made regarding the effect of the amendment, I shall discuss the same at the appropriate stage, but the order allowing the amendment which was passed on 27-2-1974 stated that "as the amendment is a formal one, and as no objection is raised from the other side, it is allowed".

4. The suit was contested only by defendant No. 1 and although the basic facts that the plaintiff was the consigner and the delivery of the consignments was given to i defendant No. 2 on the basis of the indemnity bonds were not disputed, the main pleas of defence which were also urged in this Court on behalf of the appellant were as follows : --

(1) The plaintiff having already sold the ; goods before the delivery was effected to defendant No. 2, it had no right to sue.

(2) The suit was barred by limitation.

(3) The plaintiff must satisfactorily prove the particulars of the consignments and in any event the claim of the plaintiff was highly exaggerated.

5. In support of its case, the plaintiff examined four witnesses and two witnesses were examined on behalf of the defendants.

P. W. 1 was the Goods Clerk of the Booking Station who proved the fact of the consignments in question being loaded after proper checking and weighment. He stated that the weights in the railway receipts were mentioned thereafter.

P.W. 2 is a partner of the plaintiffs firm. He was the main witness examined by the plaintiff to prove the entire case of the plaintiff. He stated that the consignments in question were loaded in the wagons in the presence of the Goods Clerk after proper weighment and verification and that the purchaser of the consignments (defendant No. 2) was to retire the documents from the bank on full payment of the amount mentioned in the Hundies. He also denied the suggestion put to him in the cross-examination, that a sum of Rs. 50,000/- paid by defendant No. 2 to the plaintiff was on account of the consignments in question. According to his evidence, this payment was towards some other transactions. He further stated that the railway receipts in question were

endorsed in favour of M/s. Laxmi Chand Paramananda and M/s. Ram Chand Kisanlal of Raipur on receipt of the amounts mentioned in the Hundies who in their turn had endorsed the documents in favour of the Punjab National Bank for delivery to defendant No. 2. And it is on this evidence that vehement argument was made by Mr. B. Pal, learned counsel appearing for the appellant, that the plaintiff having lost its title in the goods was not competent to maintain the suit. I shall, however, separately address myself to this argument, but at this stage I notice the further evidence of P.W. 2 which is equally important, namely, that when the railway receipts were not retired by defendant No. 2, the same were returned to the two firms of Raipur who cancelled the endorsements and returned the Hundies to the plaintiff on full payment.

P.Ws. 3 and 4 are two businessmen of Khariar Road dealing in Mohua flower and were examined to corroborate P.W. 2 regarding the market rate at the relevant time at the destination.

P.W. 1 was the Goods Clerk who proved the indemnity bonds in question executed by defendant No. 2 for taking delivery. D.W. 2 was the Station Master who had effected delivery of the consignments in question to defendant No. 2. He could not give any satisfactory explanation in his cross-examination as to why the consignments were delivered to defendant No. 2 on indemnity bonds when no case of loss of the railway receipts was shown.

6. The trial court framed a number of issues including the question of limitation, the right of the plaintiff to institute the suit and the amount for which the decree could be passed, and on the materials on record decided all the issues in favour of the plaintiff and decreed the suit almost for the entire claim.

7. Mr. B. Pal who appeared on behalf of the defendant-appellant raised the following contentions in support of the appeal: --

- (1) The suit was barred by limitation;
- (2) The plaintiff having parted with title in the consignments had no right to sue; and
- (3) There was no reliable evidence to prove the measure of damage claimed by the plaintiff and, therefore, the suit must fail.

Contention No. 1 : (Limitation)

8. Let us take up for consideration the question of limitation which was considered by the trial court under additional Issue No. 4. This question arises on account of the provisions of Section 79 of the Civil P.C. according to which a suit against the Central Government has to be filed in the name of the Union of- India.

According to the plaintiffs case, the cause of action for the suit arose on 19-6-1970 and the suit was filed on 19-8-1971 against the General Manager of the South Eastern Railway. Subsequently a petition for amendment of the plaint was filed on 16-2-1974 which was allowed by the trial court without any

objection being raised by the defendant. The plaintiff had prayed in the amendment petition that due to mistake defendant No. 1 had been "improperly described" and that in order to describe it correctly, the words "Union of India through" may be added before the description of the defendant as existing. The trial court has also mentioned in the judgment that from the very beginning it was the Union Government who had appeared in the suit on 15-10-1971 so much so that the Vakalatnama was executed by the Deputy Chief Commercial Superintendent on behalf of the Union of India. No fresh Vakalatnama was filed by the Union of India after the amendment of the plaint. The Union of India also adopted the same written statement and only a few paragraphs were added in the original written statement thereafter.

Mr. Pal, however, referred to Section 21 of the Limitation Act which provides that "Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party". The following Proviso has been added in the new Act: --

"Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date."

The legislative intendment for adding the Proviso is not to deprive a plaintiff of his rights on account of an omission to implead a person owing to a bona fide mistake if the court is satisfied in that behalf. It may be mentioned that the Proviso is in consonance with Section 17(1)(c) of the Act which makes a bona fide mistake a good ground for extending the period of limitation.

9. The submission of Mr. Gangadhar Rath appearing for the plaintiff-respondent on the other hand is that apart from the fact that the amendment of the plaintiff would not amount to addition of a new defendant, or, for the v matter of that, his substitution, it was only a correction of a misdescription of the defendant. In order to supplement his submission, counsel referred to some paragraphs of the plaint to show that all the relevant allegations in the plaint were essentially made against the railway administration of the Union of India and not against the General Manager as such. I may usefully refer to some portions of paragraph 15:

"That the defendant Railway Administration is thus liable to compensate the plaintiff for each of the consignments.....

The Railway Administration is also liable to pay interest....."

10. Misdescription of parties and correction of the misdescription are not unknown to law. Where it is clear from the facts as to who is the person who intends to sue or is intended to be sued but is described wrongly, it is a case of misdescription of parties which can be corrected by the court any time.

The Supreme Court in the case of Purushottam Umedbhai and Co. Vs. Manilal and Sons, dealt with a somewhat ", similar question where the suit was

instituted in the name of the firm and the partners were "substituted later in its place.

11. However, reference was made by Mr. Pal to the case of East Indian Railway Co. Vs. Ram Lakhan Ram, where , although the principle : --

"Where there is a misdescription of the defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time, for in case of misdescription the Court will not have any difficulty in coming to the conclusion that the defendant had been substantially sued though under a wrong name. There is all the difference in the world between misdescribing a party intended to be sued and suing a wrong party".

was accepted, on appreciation of the facts of the case that a personal decree was sought against the agent, East Indian Railway Co., and that there was no suggestion in the plaint that it was sought to bind the Railway Company, it was held that it was not a case of misdescription. This case, therefore, instead of supporting Mr. Pal, would go against him. Mr. Pal next referred to the case of Agent, Bengal Nagpur Ry. Vs. Behari Lal Dutt, . There, the suit was against the Railway for non-delivery of certain goods. In that case, the defendant was "Agent of the Bengal-Nagpur Railway Saheb Bahadur". The Agent (Mr. Young) appeared and took the objection regarding the defect in the frame of the suit and no amendment of any nature was sought for. In that circumstance, the Calcutta High Court held, and in my Opinion was essentially directed against the Agent and not against the railway administration. This case is, therefore, apparently distinguishable.

On this point, however, there is a Bench decision of the Rajasthan High Court in the v. Union of India AIR 1955 Raj 57 where the suit was brought against Mr. Rawlins, General Manager, Jodhpur Railway. Mr. Rawlins appeared and in his written statement took the objection that the suit against him was not proper as he was not the owner of the Jodhpur Railway. While dealing with the question of limitation, the following observation made in paragraphs 8 and 9 of the judgment deserves to be quoted : --

".....We are of the view that if the suit is filed against the Manager or agent of the railway, and if it appears that the intention was to sue the railway and to get a relief against the railway, it may be possible in an appropriate case to hold that the name of the defendant originally put down was merely a misdescription.

(9) But the present case is of a different nature altogether. Here the suit was not against the Manager of the Jodhpur Railway. The suit was against Mr. Rawlins who was described as the Manager, Jodhpur Railway."

The above observation clearly supports" the stand of Mr. Rath. I

Let us see a few cases under some other Statutes. The Andhra Pradesh State Electricity Board and Others Vs. Patel and Patel and Others, was a case where the suit was originally filed against four officers of the Andhra Pradesh State

Electricity Board Later on, the plaintiff was allowed to amend the cause title of the plaint by addition of the words "Andhra Pradesh State Electricity Board, represented by" so as to read that the Board was represented by those four officers. No other amendments were made either in the body of the plaint or in the relied portion. It was held that from a reading of the pleadings and the antecedent circumstances it was the Board that was intended to be sued and the suit as against the Board must be taken to have been instituted from the date when the suit was originally instituted.

Similar was the situation in the case of *Chairman, Bihar State Electricity Board v. Hind Agricultural Farm* AIR 1978 NOC 301 : 1978 BLJ 511 (Pat). There also the suit was instituted against the Chairman of the Bihar State Electricity Board and later, on amendment, the description was allowed to be corrected and the plea of limitation was rejected.

I shall now close the citations on this point after referring to the case of *Kurapati Venkata Mallayya and Another Vs. Thondepu Ramaswami and Co. and Another*, where a receiver appointed by the court to collect debts due to a firm had instituted the suit in his own name, but later on, he amended the cause title so as to indicate that it was the firm who was the real plaintiff and the firm was suing through him. It was held that the amendment was merely a case of misdescription which could be corrected any time for the purpose of showing the correct description of the plaintiff and that the question of limitation would not arise in such a case.

12. I have shown the nature of the basic allegations made in the plaint, the conduct of the defendant-Union of India in treating the suit to have been instituted against it, the mode and the manner of the amendment of the plaint applied for and the order of the court, and on a circumspection of the various authorities noticed above, I come to the irresistible conclusion that it is a case of misdescription of the defendant and that the amendment of the cause title of the plaint did not attract the mischief of Section 21 of the Limitation Act. The suit, therefore, must be deemed to have been instituted against the Union of India right from the date of its institution which obviously was within the period of limitation. Although no arguments were advanced on the basis of the proviso to Section 21 excerpted above, I am equally convinced that even taking the worst view of the matter, it is a fit case where the proviso to Section 21 can also be applied to the rescue of the plaintiff.

Contention No. 2 : (Right to sue)

13. Undisputed the plaintiff sent the goods by the railway receipts made to self. The buyer was M/s. Jaiswal Trading Corporation, defendant No. 2. Evidently, the property in the goods did not pass to the buyer on delivery of the goods to the Railway Administration as carrier. Law is not in doubt that where the railway receipt is handed over on payment of the price of the goods, there is clearly an absolute transfer both of the goods and of the right to take delivery under the

contract. The transfer can be made even by endorsement in blank coupled with delivery of the document to the transferee, provided the intention is to make an absolute delivery carrying with it a right to the goods. There are, however, some divergent opinions as to whether a commission agent deriving no title to the goods can maintain a suit. A consigner until he retains his title in the goods can always maintain a suit for damages notwithstanding any circumstance, but the railway receipt being negotiable after endorsement, the right to take delivery would pass on from the consigner to the endorsee for valuable consideration and the consigner will cease to have any right. The railway receipt may be handed over or can also be endorsed for a limited purpose. It is unnecessary to dilate in the judgment dealing with the law of "endorsement in blank" and other aspects as well as the relevant principles embodied in the Sale of Goods Act or the Transfer of Property Act as the point on the facts found does not create much complexity. The trial court on consideration of the ex parte evidence of the parties has recorded a finding with which I find myself in complete agreement with the finding that defendant No. 2 had not paid any consideration to the plaintiff for the consignments in question and that the two firms, namely, M/s. Laxmi Chand Paramananda and M/s. Ram Chand Kisanlal, in whose favour the railway receipts were endorsed after return of the documents by the Bank had cancelled the endorsements in their favour and having received back the money had handed over the documents to the plaintiff. In that view of the matter, the ownership in the goods continued with the plaintiff.

14. Mr. Pal has referred to the following decisions on the question, namely (1) Chhangamal Harpaldas and Another Vs. Dominion of India and Another, , (2) Union of India (UOI) Vs. West Punjab Factories Ltd., , and (3) Md. Jaffer Haji Ebrahim Vs. The Union of India (UOI) and Others, ,

In Chhangamal's case, the question was as to whether a consignee could sue. It was observed that a consigner may sue upon the breach of a contract of consignment and an owner of goods covered by a railway receipt may sue upon his title. But a bare consignee, who is not a party to the contract of consignment and who is not the owner of the goods, cannot maintain a suit for compensation for loss or damage to the goods. He has no cause of action ex contractu or ex delicto.

The Supreme Court also laid down the same principle, namely,

"Ordinarily, it is the consignor who can sue if there is damage to the consignment, because the contract of carriage is between the consignor and the railway administration."

Haji Ebrahim's case also does not take the matter any farther. It was simply reiterated in the case that the consignee had no right to maintain a suit against the Railways until the transfer of ownership right in the goods had passed on to him.

15. Before the Madhya Pradesh High Court in Union of India (UOI) and Others

Vs. Gangaji Kalyanji, relied upon by Mr. Rath, the situation was very much similar to the case in hand. There also the consigner) had endorsed the railway receipt in favour of another, but it was returned to him by the endorsee. The right of the consigner to maintain the suit was upheld on his larger right to sue based on the privity of contract with himself.

16. Taking into consideration, therefore, the relevant law governing the right of the plaintiff, who was not only the consignor and the consignee both, but also the bolder of the railway receipts for valuable consideration, I do not have any hesitation in my mind that he was fully entitled to institute the suit for recovery of the damages.

Contention No. 3 : (Measure of damages)

17. Let us now take up the third point, namely, the measure of damages. We have already seen the relevant evidence on the question of value of the consignments. The evidence of the P.Ws. on this question, is almost ex parte. The evidence of D. W. 2, the Station Master, that he was informed by the Goods Clerk (D.W. 1), deputed by him to ascertain the market rate, that the rate of Mohua flower was only Rs. 8/- per quintal, apart from being in the nature of hearsay, cannot outweigh the cogent evidence adduced on behalf of the plaintiff in this regard. There has been not only an assertion by the plaintiffs partner (P. W. 2), but two dealers in the trade (P.Ws. 3 and 4) have also fully supported the case of the plaintiff on this point by bringing on the record the documentary evidence of actual transactions vide Ext. 11 series. In the case of Union of India (UOI) Vs. West Punjab Factories Ltd., itself it has been observed that the market price at the time of the damage is the correct measure of damages to be awarded. The claim of the plaintiff for the loss of the goods has been rightly held by the trial court to be well established and does not call for any interference by this Court.

18. When the hearing of the appeal was concluded on 23-4-1987 and the judgment was reseryed, a further point was sought to be raised for the first time in this Court on behalf of the defendant-appellant that the suit was also bad on account of mis-joinder of the causes of action for bringing only one suit for all the nine consignments which had been booked separately under separate railway receipts.

19. There is no merit in this part of the argument as well. No objection as to the misjoinder of the causes of action was taken in the written statement. Rule 7 of Order 2 of the Civil P.C. specifically provides that all objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. Rule 3 of Order 2 entitles the plaintiff to unite in a same suit several causes of action against the same defendant. Therefore, the plaintiff in this case was entitled to join the causes of

action in question when the nature of the allegation was similar and the parties were the same. That apart, the plaintiff had already issued one notice u/s 78-B of the Railways Act for all the nine consignments and, therefore, the present suit for recovery of damages for wrong delivery of all the consignments was maintainable. In support of this view, we also find a Bench decision of the Patna High Court in the case of E.I. Railway Co. Vs. Ahmadi Khan, . In that case, the plaintiff had issued only one consolidated notice to the defendant-Railway Company in respect of 30 consignments of different dates. It was held that the notice being a part of the cause of action, separate suits did not lie.

20. For all the above reasons, the appeal must fail and is hereby dismissed. However, we relieve the appellant from the burden of costs of this Court.

S.C. Mohapatra, J.

21. I agree.