

(1987) 05 OHC CK 0008
In the Orissa High Court
Case No : First Appeal No. 99 of 1976

Union of India (UOI)

APPELLANT

Vs

B.D. Jhunjhunwala

RESPONDENT

Date of Decision : 14-05-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 73, 78B

Citation : AIR 1988 Ori 267

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : B. Pal, for the Appellant; R.B. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—The Union of India through the Chief Commercial Superintendent (Claims), S.E. Rly. who is the defendant in the court below is in appeal against the decree passed against it in a suit claiming compensation on account of loss of 21,760 liters of furnace oil.

2. The plaintiff-respondent brought the suit on the pleadings that he had purchased the amount of furnace oil from the Indian Oil Corporation, Visakhapatnam wherefrom it was despatched to the Barang railway station. The consignment having never reached Barang, he sustained the loss for which he claimed the compensation. It was also pleaded that the plaintiff had issued notice to the Railways u/s 78-B read with Section 140 of the Railways Act as also u/s 80, Civil, P.C. which were received by the defendant on 10-10-1972, but however since there was jno redressal of his grievance, he was compelled to file the suit.

3. The suit was contested by the appellant denying all the plaint averments and contending that the suit was not maintainable since firstly, the Union of India had not been represented in accordance with law; secondly, no notice as contemplated u/s 80, C.P.C., had been served upon the appellant and lastly,

there had been no proof of actual entrustment of the furnace oil to the care of the Railways and hence there could not be any liability for payment of compensation.

4. Taking up the question first, it is seen that admittedly Section 80, C.P.C. notice was sent to the Union of India as represented by the Chief Commercial Superintendent (Claims) Calcutta. Section 80, C.P.C. makes categorical provision that in a suit against the Railways notice to the Central Government shall be sent to the General Manager of the railways. It is too well settled in law that notice u/s 80, C.P.C. is mandatory and admits of no exception or implication and where a notice as required under that section has not been given, the suit is bound to fail on such account. Notice to the Central Government relating to Railways, if not given through the General Manager of the concerned Railway is no notice under the section and hence it is to be regarded as there having been no compliance with the requirements of Section 80, C.P.C. As such, the suit is bound, to fail on such account.

5. Even though the question of bar of the institution of the suit due to want of notice u/s 80, C.P.C. was raised in the written statement, yet no issue has been raised in the case on such fact and the learned Subordinate Judge also did not address himself to it. Instead, he proceeded only on the basis as to whether notice as required u/s 78-B of the Indian Railways Act had been issued or not and holding that there was compliance under that section, came to the conclusion of the suit being maintainable. The fact of the notice u/s 80, C.P.C. having not been delivered is apparent on the record itself and Mr. R.B. Mohapatra, the learned counsel appearing for the respondent is not able to controvert such fact. He instead urged that a notice u/s 78-B of the Act if properly given, as has been found in this case, would tantamount to a notice u/s 80, C.P.C. and hence the suit should not be dismissed for such reason. The submission has no merit since the scope of Section 78-B of the Indian Railways Act and Section 80, C.P.C. are completely different from each other and one is not alternative of the other. While Section 78-B of the Indian Railways Act concerns itself only with refund of an over charge for animal or goods carried or compensation for the loss etc. or compensation for non-delivery of animal or goods, Section 80, C.P.C. is of a general nature and applies also in respect of all suits against the Railways where the Union Government is impleaded as a party. Delivery of notice u/s 78-B of the Indian Railways Act would not be dispensed with the requirement u/s 80, C.P.C. where cause of action is pressed against the Central Government. I am supported in this view by a decision of the Kerala High Court in Dahyabhai Patel and Co. Vs. Union of India (UOI), where it was held that a notice served on the Chief Commercial Superintendent u/s 78-B inserted by the Indian Railways (Amendment) Act, 1961) cannot be treated as notice u/s 80, C.P.C. on the General Manager of the Railways. The contention raised by Mr. Mohapatra must accordingly fail.

6. The second objection taken by Mr. Pal is also well founded. It is the admitted

case in the plaint that consignment was booked at the Indian Oil Corporation Siding at Visakhapatnam and Ext. 1, the R.R. also shows the same. Ext. 2 which is the notice sent by the respondent to the Chief Commercial Superintendent (Claims) S.E. Railways also shows that the consignment was booked from the Indian Oil Corporation Siding, Visakhapatnam to Barang in the S.E. Railways and was despatched from there. The Indian Oil Corporation Siding is undoubtedly a private siding. The R.R. also shows that the consignment was a self consignment. There is no proof adduced by the respondent of the actual delivery of the furnace oil to the care of the Railways for despatch. Though u/s 73 of the Indian Railways Act it is the responsibility of the Railways when any loss occurs on occasions in course of the transit, yet before such liability can be attached to the Railways the primary fact must be established that the goods in question were entrusted to its care for carriage. Unless such basic fact is established, the onus would not shift to the railways to discharge. The matter has been dealt with in various decisions of this court reported in Union of India (UOI) Vs. Aluminium Industries Limited, , and Orient Paper Mills Ltd. Vs. Union of India (UOI), . In a case reported in Radheshyam Agarwal Vs. Union of India (UOI) and Others, it was held :

"In The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI), it was held relying on earlier Privy Council decisions, that a railway receipt is a document of title to the goods covered by it and transfer of the said document for consideration affects a constructive delivery of the goods with the result that the endorsee of the railway receipt will have the same remedies as owner of the goods would have for deprivation of the said goods or injury to them. It follows from this decision that the endorsee of the railways receipt, therefore, steps into the shoes of the consignor of the goods having the same rights and nothing more. The rights of the consignor of the goods under the railway receipt are only that which flow from the contract of carriage evidenced by the railway receipt. If it is shown that no real contract of carriage resulted notwithstanding the issue of the railway receipt, on account of want of delivery of goods by the consignor to the railway administration for carriage by rail, then the right to claim return of the goods does not arise since there has been in effect no such contract of carriage created. It was also observed in the minority judgment of this , case, with which the majority did not disagree, that a railway receipt is not like a negotiable instrument unless there be a trade or usage to that effect. No such trade or usage having been pleaded or proved in the present case, it must be held that the character of the railway receipt was merely of a document of title as held by their Lordships and not like that of a negotiable instrument. The position, therefore, is the same as indicated earlier that the railway administration cannot be held liable as carrier of the goods unless actual delivery of the goods to it by the consignor for carriage by rail has been proved.

The above position which emerges from the statutory provisions contained in the Railways Act is the same as that under the general law relating to a common carrier or a bailee, as shown hereafter."

As such, there having been no proof that 31,760 litres of furnace oil had been actually delivered to the Railways, the question of loss having been caused of the same due to the negligence of the Railways does not arise and no compensation could have been decreed against the appellant.

7. In the result, the appeal is allowed, judgment and decree of the court below are set aside and the suit is dismissed with costs.