
(1991) 10 BOM CK 0052
In the Bombay High Court
Case No : F.A. No. 491 of 1983

Union of India (UOI)

APPELLANT

Vs

Jagdish Oil Mills

RESPONDENT

Date of Decision : 04-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Contract Act, 1872 — Section 73

Citation : (1993) ACJ 719

Hon'ble Judges : H.W. Dhabe, J;D.J. Moharir, J

Bench : Division Bench

Advocate : S.G. Mandrekar, for the Appellant; Y.Z. Kankaria, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is defendant Railways" appeal against the decree for damages in the sum of Rs. 80,000/- with interest at the rate of 6 per cent per annum from the date of suit till realisation passed against it on 29.1.1983 by the learned Civil Judge, Senior Division, Nasik, in Special Civil Suit No. 67 of 1981.

2. The plaintiff is a registered partnership firm carrying on business of groundnut oil at Nasik. The plaintiff firm used to purchase the groundnut seeds for the use of its oil mill from various places outside Nasik. One Satyanarayan Traders of Kothapet, District Chittoor (A.P.), despatched to the plaintiff firm as per its order dated 12th May, 1980, 280 bags of groundnut seeds of the best quality, each bag containing 80 kg. of groundnut seeds from Sullurpeta under invoice No. 1, wagon No. NRC 30456 to Nasik Road Railway Station. The railway receipt was endorsed in the name of the plaintiff firm. The consignor, i-re., Satyanarayan Traders referred to above drew a hundi for Rs. 96,290/- and sent the same along with the railway receipt. The plaintiff firm honoured the said hundi on 12th June, 1980 and received the railway receipt through bank on payment of Rs. 98,021.45. According to the plaintiff firm, after honouring the hundi it became the owner of the aforesaid groundnut seeds sent under invoice No. 1 of wagon No. NRC

30456, the railway receipt having been endorsed to it.

3. It appears that during the transit, for the reasons best known to the Railways, there was a change of wagon at Arkonam and the groundnut seeds in question were transferred to wagon No. SE 37842. According to the plaintiff firm, the goods should have normally reached the destination Nasik Road Railway Station within 15-20 days after they were despatched on 12th May, 1980, i.e., near about the end of May, 1980. However, they reached the destination, i.e., Nasik Road Railway Station after a period of about five months on 6th October, 1980.

4. According to the plaintiff, when the groundnut seeds in question did not reach the destination in 15 or 20 days time, it made anxious enquiries with the consignor as well as with the Railways and had also informed them that the said goods were perishable and would be damaged by reason of delay in reaching the destination. However, the said realistic enquiries were without any effect upon the Railways and as already stated the groundnut seeds in question arrived at Nasik Road Railway Station after an inordinate delay of 5 months on 6.10.1980.

5. The further facts in the instant case show that on arrival of the groundnut seeds at Nasik Road Railway Station on 6th October, 1980, the plaintiff was informed by the Railways by their letter dated 9th October, 1980, Exh. 115, that the plaintiff should immediately take the delivery of the groundnut seeds in question failing which it would be liable to pay demurrage charges. On arrival of the groundnut seeds in question the plaintiff found that they were in badly damaged condition, wet condition and were emitting dirty odour and had also turned black in colour. According to the plaintiff, almost all the groundnut seeds had become unfit for human consumption.

6. On seeing the condition of the groundnut seeds, it is the case of the plaintiff firm that it insisted upon the Railways to take their samples and to get the same examined by a chemical analyser before it is asked to take delivery of the same. In fact, even prior to the date when the said goods arrived at Nasik Road Railway Station, the plaintiff firm had by its letter dated 8th September, 1980, Exh. 85, informed the Station Master, Goods Shed, Nasik Road, that when the said wagon would arrive the goods therein would not be fit for human consumption and, therefore, it should be ascertained whether they were or were not fit for human consumption, by making arrangement to issue a certificate after their analysis was done and till the report of the analyser was received the responsibility of the expenses, freight, demurrage, etc , would be upon the Railways. After the arrival of the goods, the defendant Railways informed the plaintiff firm that it is not the responsibility of the Railways to take samples and obtain the report of the chemical analyser about the condition of the goods and, therefore, within seven days of their arrival the plaintiff firm should take the delivery of the goods.

7. However, the plaintiff did not take delivery of the goods within seven days and continuously insisted upon the defendant Railways to examine the goods by taking their samples and by sending them to the chemical analyser. Ultimately,

on 1st December, 1980, the Chief Claims Officer, Central Railway, Bombay V.T., requested the Superintendence Company of India (Pvt.) Ltd. to inspect the goods in question and submit their survey report in respect of the same. Eight samples were, therefore, taken of the groundnut seeds in question on 1st December, 1980, out of which four samples were handed over to the plaintiff firm. After survey of the groundnut seeds in question and after the report of the chemical analyser, the said company, i.e., Superintendence Company of India (Pvt.) Ltd. gave its survey report, Exh. 108, to the defendant Railways on 30th December, 1980.

8. It may, however, be stated that before this report about the assessment of damages made by the aforesaid company was received, the Railways had itself issued its own certificate of assessment of damages made on 6th October, 1980, to the plaintiff firm which is at Exh. 119. Before filing the instant suit or even before the wagon had arrived at the Nasik Road Railway Station the plaintiff had given notice to the defendant u/s 78-B of the Indian Railways Act on 8.9.1980, claiming damages in the sum of Rs. 1,02,454.45, Exh. 29. However, after the wagon had arrived, a fresh notice u/s 78-B of the Indian Railways Act and u/s 80, CPC was given to the defendant on 6th November, 1980, Exh. 33, making the claim in the sum of Rs. 1,22,881.75 for damages payable by the defendant Railways.

9. The defendant Railways gave reply to the notice of the plaintiff firm u/s 80 of the Code of Civil Procedure, Exh. 33, by its letter dated 10th February, 1981, addressed to the plaintiff firm, Exh. 45. By the said letter the defendant Railways requested the plaintiff firm not to precipitate the matter further for some time as discreet enquiries were being made in the matter by the defendant Railways. Since no further reply was received from the defendant Railways, the plaintiff has preferred the instant suit against it for damages valued at Rs. 1,09,869.60.

10. Perusal of the plaint would show that after taking delivery of the groundnut seeds in damaged condition on 9th December, 1980, the plaintiff had extracted non-edible oil from the said seeds and also had the cakes made which it sold to the shopkeepers. It also sold the cakes. From both it realised an amount of Rs. 21,295.40. As regards the residue of the goods after extracting oil which could be used as fertiliser, the plaintiff realised Rs. 950/- as the value for the same. Thus, the total value received by the plaintiff from the suit consignment was Rs. 22,245.40 from which after deducting an amount of Rs. 1,000/- towards the expenses incurred for crushing the groundnut seeds, the plaintiff showed in its plaint that it had realised an amount of Rs. 21,245.40 from the suit consignment.

11. As regards the claim for damages made in the plaint, the plaintiff claimed the damages at the rate of Rs. 412/- per bag of 80 kg., which, according to the plaintiff, was the market rate prevalent on 31st May, 1980. As per the said rate, the damages were calculated by it at Rs. 1,15,360/- for 280 bags of groundnut seeds under the suit consignment. It calculated the interest upon the amount of Rs. 98,021.45 which was locked in the bank towards the value of 280 bags of

groundnut seeds as Rs. 15,235/- at the rate of 18 per cent per annum from 31.5.1980 to 10.4.1981 by way of damages. After claiming certain miscellaneous expenses on account of notice, etc., the total claim for damages made by the plaintiff for the suit consignment was in the sum of Rs. 1,31,115/-. After deducting the amount of Rs. 21,245.40 realised by the plaintiff from the sale of non-edible oil, cake and fertiliser which was the value extracted by the plaintiff from the damages of goods as shown above, the claim for damages for the loss suffered by the plaintiff was valued at Rs. 1,09,869.60.

12. The defendants filed their written statement denying the claim made by the plaintiff. It was submitted in particular that it was the responsibility of" the plaintiff to take delivery of the goods immediately on their arrival at the destination, i.e., Nasik Road Railway Station on 6th October, 1980 and that it was not the responsibility of the Railways to get the goods in question examined through the chemical analyser to determine whether they were fit for human consumption or not. It is thus submitted by the Railways in their written statement that seven days after the termination of transit the Railways were not responsible for any loss caused to the plaintiff due to damage to the goods in question.

13. Parties led evidence oral as well as documentary in the suit. The plaintiff examined its partner Sunderlal, PW 1, and one more witness in support of its claim. The defendant Railways examined Anant Kumar Gupta, DW 1, who is in the service of the Superintendence Company of India/(Pvt.) Ltd. as a Chief Chemist to prove the survey report of the said company, Exh. 108.

14. The learned trial court, on the basis of the evidence on record, held that the plaintiff firm had after payment made in the State Bank of India for the hundi drawn by the consignor Satyanarayan Traders become the owner of the goods in question and had received the railway receipt for the same. It was, therefore, entitled to lodge a claim for damages against the Railways.

15. The learned trial court further held that the groundnut seed was a perishable commodity and it was not fit for human consumption when after five months the wagon containing the groundnut seeds in question arrived at the Nasik Road Railway Station on 6th October, 1980. It was not in dispute that the goods were booked at the railway risk rate and that there was abnormal delay in the transit of the goods in question. It may be seen that the said delay was not explained by the Railways by leading any evidence in the instant suit in that regard.

16. Although the learned trial court held that it was necessary for the plaintiff to take the delivery of the goods on its arrival at the destination within seven days from the date of termination of the transit and had negatived the contention raised on behalf of the plaintiff in this behalf that the provisions of Food Adulteration Act prevented it from doing so unless the groundnut seeds in question were certified to be fit for human consumption, the learned trial court still held on the basis of the evidence on record that when the wagon arrived on

6th October, 1980, at Nasik Road Railway Station the groundnut seeds in question were in damaged condition and were not fit for human consumption.

17. As regards the survey report of the Superintendence Company of India (Pvt.) Ltd., Exh. 108, the learned trial court did not accept its assessment of damage of 29 per cent of the invoice value. In determining the damages, the learned trial court also did not accept the claim of the plaintiff firm for damages at the market rate of Rs. 412/- per bag on 31.5.1980 on the ground that the plaintiff had failed to prove the same by satisfactory evidence. While determining the question of mitigation of damages, the learned trial court accepted the evidence led by the plaintiff that it had realised an amount of Rs. 21,245.40 after putting to use the damaged groundnut seeds by extracting non-edible oil from them, by selling oil cakes and by disposing of the residue as fertiliser.

18. The learned trial court further held that although the plaintiff was not entitled to damages at the market rate of Rs. 412/- per bag on 31.5.1980, it was entitled to damages by allowing interest on the amount paid by it in the bank for honouring the hundi as the said amount was blocked till the delivery of the goods in question could be given to the plaintiff. Accordingly, the learned trial court allowed interest on Rs. 96,733.35 paid by the plaintiff towards the hundi drawn on it for the period from 1.6.1980 to 9.10.1980 on which date the book delivery was effected in the name of the plaintiff which was then in a position to lift the goods in question and to sell the same for the purpose of crushing them for extracting oil for non-edible purpose. This amount by way of interest was nearabout Rs. 4,126/- for the above period.

19. Adding the above amount of interest to invoice value of the goods, i.e., Rs. 96,733.35 the total amount payable to the plaintiff on 9.12.1980 was calculated by the learned trial court at Rs. 1,09,869.45 from which after deducting the amount of Rs. 21,245.40 realised by the plaintiff by putting to use the damaged goods in question, the plaintiff was held entitled to damages in the sum of Rs. 79,614.05 (Sic). After considering the miscellaneous claims made by the plaintiff for notice charges, etc., the learned trial court decreed the claim of damages in favour of the plaintiff in the sum of Rs. 80,000/- with proportionate costs of the suit and future interest on the sum found due at the rate of 6 per cent per annum from the date of the suit till realisation.

20. Feeling aggrieved by the above judgment and decree of the learned trial court, the defendant Railways has preferred the instant appeal in this court.

Friday, 4th October, 1991

21. The learned counsel appealing for the defendant Railways has principally urged before us that the defendant Railways is not liable for any damage caused seven days after the termination of transit of the goods in question. In support of the above submission, the learned counsel for the defendant Railways has placed reliance upon the provisions of Section 77 (2) of the Indian Railways Act, 1890. He has also urged that, if at all, the damage was caused to the plaintiff

approximately to the extent of 29 per cent of the invoice value of the groundnut seeds in question as certified by the Superintendence Company of India (Pvt.) Ltd. in its survey report dated 30.12.1980, Exh. 108 and calculated accordingly the compensation payable to the plaintiff would be approximately Rs. 25,000/-. In any case, it is urged that the plaintiff itself has assessed the damage at about Rs. 50,000/- only as per its letter dated 8.10.1980, Exh. 116, and, therefore, it is not entitled to claim anything more than the aforesaid amount. The learned counsel appearing for the respondent-plaintiff has controverted the above contentions raised on behalf of the appellant.

22. It is first necessary to consider whether there was any damage caused to the groundnut seeds in question during their transit and, if so, what the extent of the damage was on the date the wagon carrying the groundnut seeds in question reached the destination, i.e., Nasik Road Railway Station on 6th October, 1980. It is pertinent to see in this regard that the defendant Railways has not chosen to lead any evidence on this question.

23. It may be seen that u/s 73 of the Railways Act the railway administration is responsible for the loss, destruction, damage, deterioration or non-delivery, in transit of animals or goods delivered to the administration to be carried by railway, arising from any cause except those mentioned in the said section. It is not the case of the Railways that if there is any deterioration or damage to the goods in question it was because of any of the causes mentioned in that section. Section 73 of the Railways Act thus casts a primary responsibility upon the Railways for any loss or damage to the goods in transit entrusted to the Railways for carriage.

24. It is necessary to see that the goods in question in the instant case were despatched at the railway risk rate admittedly and if there was any delay or detention in transit the responsibility for any loss, destruction, damage or deterioration of the goods in question was of the Railways as provided in Section 76 of the Act unless it was proved that the delay or detention arose without negligence or misconduct on the part of the railway administration or any of its officers. It is clear from the perusal of Sections 73, 74 and 76 that the burden of proof that the goods had reached the destination intact, i.e., in the same condition in which they were handed over to the Railways is upon the Railways which the defendant Railways has failed to discharge in the instant case as no evidence is led in that regard by it.

25. At any rate, even according to the Railways, as per the certificate of assessment of damages issued by it on 6th October, 1980, Exh. 119, the goods in question were not received at the Nasik Road Railway Station in the same condition in which they were despatched. The said certificate shows that out of 280 bags 6.5 bags were partly damaged, 20 bags were completely damaged and there was loose content from some other bags found in the wagon. According to the Railways, only 187 bags were found to be intact.

26. Turning to the evidence of the plaintiff, it is clear from para 3 of the evidence of its partner Sunderlal, PW 1, that the groundnut seeds in question were despatched on 12th May, 1980, at the railway risk rate. The said goods were of perishable category. Further, according to his evidence, it would take about 15 or 20 days for the wagon to reach the Nasik Road Railway Station for which the said goods were booked from Sullurpeta. What is important to be seen from para 3 of his evidence is that, according to him, the groundnut seeds can remain in their original quality in the wagon for about one month provided the wagon is in fit condition. Para 4 of his evidence, however, shows that the entire wagon in which the goods in question were carried was in damaged condition and the goods had become wet and the colour was changed to black.

27. Para 5 of the evidence of Sunderlal, PW 1, examined on behalf of the plaintiff shows that the goods were transferred from the original wagon to a different wagon which was not leak-proof. It is for this reason that, according to the plaintiff, it took book delivery only of the groundnut seeds in question on 9th October, 1980, by payment of freight charges but it did not take their physical delivery. Further, according to his evidence it insisted upon the concerned authorities of the Railways that the goods should be examined by the chemical analyser by taking out their suitable samples and that the plaintiff would take the delivery of the goods only after the certificate in that regard was issued.

28. The plaintiff's witness Sunderlal, PW 1, was cross-examined on behalf of the defendant on the question whether the groundnut seeds in question was a perishable commodity. In para 19 of his deposition he has stated that what he meant by the perishable nature of the commodity was that they would get damaged after 1 1/2 months. He denied the suggestion given on behalf of the defendant Railways that the groundnut seeds would remain in good condition for a period of six months to a year. He further denied a suggestion that the goods sent had inherent defect and were of low quality and were spoiled ones.

29. In our view, in the absence of any positive evidence being led on behalf of the defendant Railways on the question as to how much time it would take for deterioration or damage to the groundnut seeds in question so that they would not be fit for human consumption, the positive evidence led on behalf of the plaintiff has to be accepted. There is also no evidence led on behalf of the defendant Railways to show that when the groundnut seeds in question were despatched from Sullurpeta they were not in good condition. The documents of the consignor show that the groundnut seeds were of the best quality despatched to the consignee.

30. Since the evidence of Sunderlal, PW 1, who is the partner of the plaintiff firm has gone unchallenged and since there is no material defect pointed out in his evidence, his evidence deserves to be accepted. If his evidence is accepted, it would mean that the groundnut seeds in question were of the best quality, that they were perishable within 1 1/2 months, that the wagon in which they were carried was not leak-proof and, therefore, when the said goods reached their

destination, viz., Nasik Road Railway Station, after long time on 6.10.1980, i.e., nearly 5 months after they were despatched on 13.5.1980, they were not fit for human consumption. Moreover, as deposed to by the plaintiffs witness Sunderlal, PW 1, the wagon in which the said goods were despatched was not leak-proof, was wet and not in good condition which would also show the negligence on the part of the Railways in carrying the goods in question particularly when there is no explanation as to why the wagon was changed at Arkonam and the goods in question were transferred to wagon No. SE 37842 which was not leak-proof.

31. It is, however, strenuously urged on behalf of the defendant Railways that the groundnut seeds had not deteriorated when they reached the Nasik Road Railway Station on 6.10.1980 or during the period of seven days after termination of transit during which period the responsibility of the defendant Railways continued as a bailee u/s 77 (1) of the Railways Act but there was deterioration thereafter when the groundnut seeds lay in the railway shed since the plaintiff did not take their delivery either immediately on their arrival or at any rate within 7 days after the termination of transit. At any rate it is urged that in the absence of any evidence being led by the plaintiff to show the extent of deterioration in the groundnut seeds in question during the period they lay in the railway shed till the plaintiff took their actual delivery on 11.12.1980 for which the responsibility was entirely of the plaintiff as stated above, the actual extent of deterioration if any during the transit or when the groundnut seeds arrived at Nasik Road Railway Station on 6.10.1980 cannot be determined.

32. It is submitted on behalf of the defendant Railways in this regard that in the survey report of the Superintendence Company of India (Pvt.) Ltd. issued on 30th December, 1980, Exh. 108, the condition of the groundnut seeds in question is described by it as on 1.12.1980 when its Chief Chemist had inspected the same. It is urged that for the deterioration in the condition of the groundnut seeds as on 1.12.1980 as per the above survey report, Exh. 108, it is solely the plaintiff who is responsible for its failure to take the delivery of the groundnut seeds in question immediately on their arrival at Nasik Road Railway Station on 6.10.1980. Alternatively it is urged that even assuming that the defendant Railways is responsible for the deterioration in the condition of the groundnut seeds in question, the claim for damages on the basis of the said survey report, Exh. 108, is to the extent of 29 per cent of the invoice value which comes to approximately Rs. 25,000/-.

33. In examining the above submissions made on behalf of the defendant Railways, it is necessary to see what the responsibility of the Railways is after the goods arrive at the destination. We have already pointed out that as per Sections 73, 74 and 76 of the Railways Act during the transit the responsibility of the Railways is that of a common carrier as provided u/s 72 of the said Act. After the goods arrive at the destination, Section 77 provides that the railway administration shall be responsible as a bailee for the loss, destruction, damage, deterioration or non-delivery of the goods carried by Railways within a period of

seven days after the termination of the transit if the goods are carried at railway risk rate. It is made clear in Section 77 (2) of the Railways Act that the railway administration shall not be responsible in any case for the loss, destruction, damage, deterioration or nondelivery of goods carried by railway, arising after the expiry of the period of seven days after the termination of transit.

34. Heavy reliance is placed on behalf of the defendant Railways on Sub-section (2) of Section 77 of the Railways Act in support of the submission that since the groundnut seeds in question were allowed to remain in the railway shed by the plaintiff beyond the period of seven days after the termination of transit, the defendant Railways was not responsible for any loss or damage caused to the groundnut seeds in question after the said period. In support of the above submission, the learned counsel for the defendant Railways has relied upon the judgment of the Madhya Pradesh High Court in the case of Punjab National Bank v. Beniprasad Maheshwari 1981 ACJ 431.

35. It is clear from a bare perusal of Sub-sections (1) and (2) of Section 77 of the Railways Act that if the goods are carried by the Railways at the railway risk rate, there is responsibility of the Railways as bailee for any loss, destruction, damage, deterioration or non-delivery of goods carried by it till seven days after the termination of transit but thereafter as provided in Sub-section (2) of Section 77 of the said Act the railway administration is not responsible for any such loss, destruction, damage, deterioration or non-delivery of the goods, and, therefore, if the groundnut seeds in question were allowed to lie in the railway yard or railway godown, or railway goods shed, they would be at the risk of the owner.

36. The learned counsel appearing for the plaintiff has, however, sought to urge before us that even seven days after termination of transit the responsibility of the Railways as a bailee continues. In support, he has relied upon the judgment of the Allahabad High Court in the case of Niranjana Lal Vs. Union of India (UOI), , and in particular para 8 thereof. It is urged on the basis of the said para 8 of the judgment that if loss, destruction, damage, deterioration or nondelivery of goods is alleged to have arisen before the termination of transit, the provisions of Section 77 are not attracted.

37. Perusal of the above judgment of the Allahabad High Court shows that what is held in the said judgment is that although the responsibility of the Railways as the carrier of goods comes to an end on termination of transit, its responsibility as that of the warehouse owner continues even thereafter till it comes to an end in the manner provided by Section 55 or Section 56 of the Railways Act. It may be seen that Section 55 is in relation to the lien of the Railways for its rates and other charges whereas Section 56 is in relation to the disposal of the unclaimed goods. Perusal of the facts in the said case would show that the main question canvassed in the said case was whether the sale by public auction of the goods in that case was in accordance with the mandatory provisions of Section 55 (2) of the Railways Act. It is in the context of the said question that some observations as regards the meaning of Section 77 are made in that case. The said

observations cannot, therefore, be considered as its ratio decidendi. However, it is clear from para 7 of the said judgment itself that the rules of the Railways permit the consignee to ask for damages before taking delivery which he must take within a reasonable time after giving notice to the concerned railway authorities showing damage or shortage of the goods.

38. The learned counsel for the plaintiff next relied upon the case of Firm Naraindas Pitamchand Vs. Firm Shanker Lal Mohandas and Others, . It is held in the said case that the railway administration has to take the same amount of care of the goods in question not only during the period of transit of the goods but for a period of 30 days after the termination of transit also. It may be seen that before amendment the period after the termination of transit contemplated by Section 77 of the Railways Act was 30 days and not seven days.

39. There cannot be any dispute about the proposition laid down in the said case that in view of the provisions in Section 77 (1) of the Railways Act, the burden is upon the Railways to show how they have dealt with the goods during the transit and 30 days (7 days after amendment) after the termination of the transit because Sections 73 and 77 (1) cast an obligation upon them to take the care of the goods during the said period. However, there cannot be any doubt that if there is any loss, damage or deterioration in the condition of the goods arising after the expiry of seven days after the termination of transit, the responsibility would be that of the owner and not of the Railways as is clearly provided in Section 77 (2) of the Railways Act.

40. The question, however, in the instant case is whether there is deterioration or damage to the groundnut seeds in question in the instant case during the transit as noticed on the date when the wagon carrying them reached the destination, i.e., Nasik Road Railway Station on 6.10.1980. In this regard, the principal submission on behalf of the defendant Railways as already noticed is that the deterioration in the condition of the groundnut seeds has occurred after 6th October, 1980, i.e., the date when they arrived at Nasik Road Railway Station and the extent of the said deterioration or damage during the period the groundnut seeds in question were lying in the railway shed at the plaintiff's risk is not explained by it. The submission, therefore, is that the plaintiff has failed to prove the damages to which it is entitled.

41. We have already shown that the evidence of the plaintiff's witness Sunderlal, PW 1, has gone unchallenged as the defendant Railways has not chosen to lead any evidence to show what care it has taken of the groundnut seeds in question during the transit and that there was no damage caused to it during the transit or that the damage was only slight although the burden of proof in that regard was upon the defendant Railways. Accepting, therefore, the evidence of the plaintiff's witness Sunderlal, PW 1, in this regard, it has to be held that the groundnut seed is perishable commodity and that if the wagon is in a fit condition, it can remain in proper condition for a period of one and half months but thereafter it is not fit for human consumption. He has also deposed that the

wagon in which the groundnut seeds were carried by Railways was not leak-proof and was wet because of which also the groundnut seeds in question were damaged and were unfit for human consumption after their arrival at Nasik Road Railway Station on 6.10.1980 after a long period of about five months.

42. It is true that the Chief Chemist of the Superintendence Company of India (Pvt.) Ltd. examined the bags of groundnut seeds in question on 1.12.1980 and the inspection report dated 30th December, 1980, Exh. 108, is as on that date the finding in relation to the samples of all the bags including 187 intact bags given in the said report, Exh. 108, that the groundnut seeds in question were not suitable for edible purposes and for human consumption is also as on that date, i.e., 1.12.1980. However, in our view, if the said report, Exh. 108, is read with the evidence of the plaintiff's witness Sunderlal, PW 1, it would mean that as on the date of the arrival of the groundnut seeds themselves, i.e., on 6.10.1980 the groundnut seeds were unfit for human consumption.

43. It may be seen that the plaintiff has not accepted the survey report of the Superintendence Company of India (Pvt.) Ltd. dated 30th December, 1980, Exh. 108. It may further be seen that what the plaintiff has claimed was that the sample of groundnut seeds in question should be taken and the report of the chemical analyser should be obtained in that regard. He had not asked for any assessment of damages by any authority in that regard. It is the Railways which, it appeal's, entrusted the work to the Superintendence Company of India (Pvt.) Ltd. from whom, apart from the report about the condition of the groundnut seeds in question, the assessment of damages was also asked for.

44. In these, circumstances, the assessment of the damages made by the said Superintendence Company of India (Pvt.) Ltd. in its survey report, Exh. 108, cannot be held to be binding upon the plaintiff. There is no presumption about the said report, Exh. 108, and, therefore, the said report has to be considered on its own merits along with the other evidence on record.

45. Perusal of the assessment of damages by the Superintendence Company of India (Pvt.) Ltd., as per its survey report dated 30th December, 1980, Exh. 108, which is heavily relied upon by the defendant Railways, would show that no basis or principles are spelt out therein upon which the assessment of damages is made by it. In regard to 187 bags, although the opinion is given that they were unfit for human consumption it is not pointed out on what basis the extent of damages approximately of 10 per cent of invoice value was calculated by the said company. Similarly, as regards 65 bags and 28 bags, no basis or principle is given for calculating the extent of approximate damage at 47 per cent and 44 per cent respectively. It is further difficult to see how the overall extent of damage is arrived at 29 per cent of the invoice value by the said company.

46. It is material to notice in this regard that Anant Kumar Gupta, DW 1, the Chief Chemist of the company, is examined by the defendant Railways as its witness to prove its case. The said Chief Chemist, DW 1, is not asked any

question in this regard by the defendant Railways although in the notice given u/s 80 of the CPC as well as in the plaint filed in the instant case, the plaintiff had made its case clear about the damages claimed by it. It had also stated that it had used the groundnut seeds in question in damaged condition for extracting oil from them for non-edible use, for making cakes, and the residue being utilised as manure. In fact for mitigating the damages, the plaintiff had given allowance for the value of the oil extracted for non-edible use and the oil cakes and manure sold by it. In the absence of any basis or principles being spelt out for the extent of damages ascertained by the said company in its report, Exh. 108, it is not possible for us to accept the extent of damages valued by the said company.

47. Now, in regard to the question of deterioration after 6th October, 1980, if any, what has to be seen is that as on 6th October, 1980, the goods in question were unfit for human consumption as held by us. If there was any further deterioration in the condition of the groundnut seeds in question, it was necessary for the Railways to show that even for the use for non-edible purposes or other uses, there were different qualities of groundnut seeds for which there were different prices. No such evidence is led on behalf of the defendant Railways. The reason is obvious because as deposed to by the plaintiffs witness Sunderlal, PW 1, even if there is any deterioration from 9.10.1980 to 9.12.1980 that deterioration could only be very slight or marginal.

48. Looking at the above question from another angle, the question of further deterioration has in fact bearing on the question of determination of damages once it is held that the groundnut seeds were unfit for human consumption when they arrived at the Nasik Road Railway Station on 6.10.1980. In other words, it would mean that by putting to use the damaged goods and securing their value the allowance would have to be made by the plaintiff in its claim for damages of the groundnut seeds in question which were damaged during the transit and for which the Railways was liable u/s 73 of the Railways Act. As already pointed out, the plaintiff has put to use the damaged groundnut seeds and had given allowance for their value in mitigating of its claim for damages. For all these reasons, the contention that the plaintiff has failed to prove the extent of damages to the groundnut seeds in question during the period from the date they arrived at Nasik Road Railway Station till the date their delivery was taken and, therefore, has failed to prove damages as on the date of arrival of the groundnut seeds in question at Nasik Road Railway Station on 6.10.1980 deserves to be rejected.

49. We, therefore, hold that the plaintiff's case deserves to be accepted that after taking delivery of the damaged goods it extracted oil from it to the extent possible for non-edible use and it sold the said oil to the soap factory and that it also sold the oil cakes and the residue which was used as manure and fodder. All the sale proceeds from the above transactions were taken into consideration in mitigation of damages claimed by the plaintiff in the suit.

50. As regards the question that the plaintiff should have taken delivery of the

goods in question immediately or at any rate within seven days from the date of termination of the transit, i.e., 6th October, 1980 and that it had no right to insist upon the certificate of the chemical analyser about the condition of the groundnut seeds in question, before getting the assessment of damages, the facts in the instant case show that although the defendant Railways gave notice to take delivery immediately failing which it would be charged with demurrage charges, the defendant Railways had in fact not imposed any demurrage charges but on the contrary, considered the request of the plaintiff for taking samples of the groundnut seeds in question and for obtaining the report of the chemical analyser which is clear from the fact that the railway authorities ultimately accepted the said request and entrusted the said work to the Superintendence Company of India (Pvt.) Ltd. The above conduct of the railway authorities concerned would indicate that they also felt that there was substance in the grievance made by the plaintiff that the groundnut seeds in question were not fit for human consumption.

51. Apart from this, if the plaintiff had not taken the delivery of the groundnut seeds in question on their arrival at the destination, it was open to the defendant Railways u/s 56-C of the Railways Act to dispose of the groundnut seeds in question by public auction in which case it would have shown what value they would have fetched which could have been taken into consideration in mitigation of damages payable to the plaintiff. Having not done so, the only rational method was as adopted by the plaintiff who has given allowance for the sale proceeds of oil for non-edible use extracted from the damaged groundnut seeds and the sale proceeds of the oil cakes and the manure from the residue of such damaged groundnut seeds in question. Even otherwise as shown above not taking the delivery immediately after arrival of the groundnut seeds at Nasik Road Railway Station has not affected the question of damages because the plaintiff has amply proved in the instant case that the groundnut seeds in question were damaged during the transit and were unfit for human consumption when they arrived at Road Railway Station.

52. It is needless to say that while considering the question of damages payable to the plaintiff on account of breach of contract, Section 73 of the Contract Act requires the plaintiff to show what steps it had taken in mitigation of the damages claimed by it. The plaintiff has shown such steps taken by it by the use of the damaged groundnut seeds in question by extracting oil from them for non-edible use and selling the same and the oil cakes and by disposing of the residue as manure and for fodder and by deducting from its claim for damages the sale proceeds on account of their sale.

53. As regards the actual computation of damages by the learned trial court by granting interest by way of damages to the plaintiff on the invoice value of the groundnut seeds in question for the period from 1.1.1980 to 9.10.1980 when the book delivery was effected in favour of the plaintiff, no exception is taken on behalf of the defendant Railways to the said mode of computation of interest.

The finding rendered by the learned trial court in regard to the damages payable to the plaintiff for the suit consignment, therefore, does not call for any interference.

54. Lastly, it is urged that the plaintiff itself has assessed the damages at about Rs. 50,000/- only as per its letter dated 8.10.1980, Exh. 116, and, therefore, it is not entitled to claim anything more than the aforesaid amount. There is no merit in the above contention raised on behalf of the defendant Railways. Perusal of the letter dated 8.10.1980, Exh. 116, would show that plaintiff was insisting in the said letter upon the authorities of the defendant Railways to take samples of the damaged groundnut seeds in question and to obtain the report in regard to the same from the chemical analyser. The damages of Rs. 50,000/- estimated by the plaintiff in the said letter dated 8.10.1980, Exh. 116, are approximate damages and are tentative in nature as they are estimated merely on seeing the damaged groundnut seeds in question. However, the plaintiff has finally set out its claim for damages in its notice dated 6.11.1980, Exh. 33, issued to the defendant Railways u/s 78-B of the Railways Act and u/s 80 of the Code of Civil Procedure. The above contention raised on behalf of the defendant Railways, therefore, deserves to be rejected.

55. In the result, the instant appeal fails and is dismissed. However, in the circumstances, there would be no order as to costs in this appeal.