

(1969) 10 PAT CK 0007
In the Patna High Court
Case No : A.F.A.D. No. 58 of 1965

Union of India (UOI)

APPELLANT

Vs

Jogendra Chandra Naha and Others

RESPONDENT

Date of Decision : 04-10-1969

Acts Referred:

Limitation Act, 1908 — Article 30, 31
Railways Act, 1890 — Section 72

Citation : AIR 1971 Patna 24

Hon'ble Judges : N.L. Untwalia, J; Anwar Ahmad, J

Bench : Division Bench

Advocate : P.K. Bose, for the Appellant; Sunil Kumar Choudhury, for the Respondent

Final Decision : Partly Allowed

Judgement

Untwalia, J.—This is a defendant's second appeal and arises out of a suit for compensation filed by the plaintiff respondent, for short delivery of 121 pairs of shoes and some damage to 15 pairs out of the consignment of shoes contained in four cases. The total number of pairs packed in the four cases was 163. The consignment was booked on the 12th July, 1956 from Armanian Ghat to Argora, both despatching and the destination stations being on the Railway line of the South Eastern Railway. The consignment arrived at Argora on the 18th July, 1956. When the respondent went to take delivery of the consignment, he found the cases in a pilfered condition. He, therefore, asked for open delivery of the consignment, which was granted by the appellant on the 3rd August, 1956.

The suit was filed on the 30th October, 1957, claiming 1,945 as the price of 121 pairs of shoes delivered short, Rs. 23/9/- on account of the damage to the 15 pairs, the damage assessed at the time of open delivery being 10% of the total value of the said 15 pairs, Rs. 25 on account of packing charges and Rs. 199/6/- on account of loss of profit at 10% on the total value of Rs. 1,993/9/-. The total claim in the suit was for a sum of Rs. 2192/15/-. The suit has been decreed in

full by the trial court. The appeal preferred by the Union of India has been dismissed by the appellate court. Therefore, it has come to this court in second appeal.

2. Only two points were urged by Mr. P. K. Bose, Learned Counsel for the appellant, in support of the appeal (i) that the suit was barred by limitation and the courts below have committed an error in holding it otherwise, and (ii) that in any view of the matter a decree for the loss of profit at 10% ought not to have been granted, that is to say, a sum of Rs. 199/6/- should not have been included in the amount of compensation decreed.

3. It is to be pointed out at the outset that it is not a case of non-delivery, either of the whole of the consignment or of a part of the consignment in the sense of nondelivery of one or more full packages or cases; it is a case of short delivery which at times in some of the decisions has been characterised as non-delivery of a part of the consignment. In the instant case four cases were delivered, no doubt, but the full contents despatched in the four cases were not delivered. There was a short delivery of 121 pairs and 15 pairs were delivered in a deteriorated condition. In the situation, a question arises as to whether it is a case which should be governed by Article 30 of the Limitation Act 1908, with which we are concerned in this case or it would be a case which would be governed by Article 31. In either view of the matter, what would be the starting point of limitation.

4. Under Article 31, the starting point or a period of one year is "when the goods ought to have been delivered", provided it is a suit for compensation against a carrier for non-delivery of goods; while, under Article 30 the starting point for the same would be when the loss or injury occurs in a suit for compensation against a carrier for losing or injuring goods.

There is no difficulty in taking the view that, in so far as the amount claimed by way of compensation for injury to the 15 pairs of shoes is concerned, the starting point would be the 3rd August, 1956 when the injury became known to the plaintiff and that would be so in absence of any fact pleaded or proved by the defendant to show that the injury had occurred prior to the date. This is the view which has been expressed by the Supreme Court in *Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others*, . Following this decision in regard to the case of deterioration in the value of the goods, the same view has been taken by a Bench of this Court in *Union of India v. Gauri Shankar Badri Narain*, 1968 BLJR 568. The question, however, arises as to whether in a case of short delivery, the shortage being detected when open delivery was given and the short delivery not being the short delivery of whole of the package forming part of the consignment, for the purposes of the law of limitation, it would be a case of compensation for non-delivery of goods or whether it will be a case of compensation for losing goods. In some previous decisions, this point has not been clearly brought about. Even in the case decided by the Supreme Court in *Union of India (UOI) Vs. Amar Singh*, , which decision was followed later by the

Supreme Court in the case of Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others, referred to above, in a case of short delivery, the argument put forward on behalf of the Union of India was that Article 30 would apply, while on behalf of the consignee the argument was that Article 31 would apply.

Assuming in favour of the Union of India that Article 30 would apply, it was held that-

"The burden is upon the defendant who seeks to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit. The proposition is self-evident and no citation is called for."

I am of opinion that the suit for compensation for non-delivery of the whole of the consignment or non-delivery of one or more full packages forming part of the consignment may be said to be a case of non-delivery governed by Article, or may become a case under Article 30 if it is proved that the loss to the consignment occurred at a date earlier than the time when the goods were made available for delivery, a contingency with which we are not concerned, in this case. But if the suit is for compensation for the alleged non-delivery or short delivery of the part of consignment forming part of the contents in one or more packages, the suit will always be governed by Article 30 of the Limitation Act, 1908. I see no reason in principle to make a distinction between injury to the goods and loss of goods resulting in short delivery being short in the sense of part delivery out of the contents of one or more packages. That being so, the loss to the consignment or of the quantity which was not delivered to the plaintiff could have only been known when open delivery was given. I must hasten to add, that yet it was open to the defendant to show that loss had occurred at a date prior to the date when open delivery was given. But in absence of such pleading or proof, the principle of law laid down by the Supreme Court, which has been followed by several decisions of this Court as also of the other High Courts, has got to be given effect to, and in case of short delivery of the kind, which we are concerned in this appeal it has got to be held that in absence of proof by Railway as to when loss to the consignment occurred, the starting date would be the 3rd of August, 1958 when open delivery of the consignment was given in this case.

In the case of Union of India v. Chotelal Sheonath Rai, Second Appeal No. 645 of 1964, D/- 2-9-1968 (Pat) by a Bench of this Court, of which my learned brother was a member, the facts were that 660 tins of groundnut oil were booked to Tatanagar. When the consignment reached the destination station, it was detected on the 2nd January, 1961 that some of the tins containing the oil had been cut and so open delivery was asked for. It was given on 5th March, 1961. The result was that there was a shortage of 2082 Kilograms of oil. The question before the Bench in that case was whether the suit was barred by limitation. In this connection two points were raised, namely, whether the case was governed by Article 80 of the Limitation Act, 1908 or whether it would be governed by

Article 31; and, what would be the starting point of limitation. It was held by the Bench that Article 30 would govern the case and the starting point would be 5-3-1961 when open delivery was given and not 2-1-1961 when the consignment reached the destination. My learned Brother, if I may say so with respect, referred in his judgment many decisions of the Supreme Court as also of this Court and other High Courts, and he arrived at the conclusion just stated.

As I have said above, if a case of nondelivery of the total consignment or nondelivery of full package or more than one full package is there, the point may require reconsideration as to whether Article 80 would apply or Article 31 would apply. Some of the passages in the judgment of the Supreme Court in *Bootamal Vs. Union of India (UOI)*, may indicate that in such a situation Article 31, perhaps, may apply and a short delivery of that kind may be taken as non-delivery as against the view expressed by Ross, J. in *Rameshwar Dass Mali Ram Vs. The East Indian Railway Company, Ltd.* . But, we are, not concerned with such a situation in this case. The facts of the instant case are identical to those of the case of *S. A. No. 645 of 1964, D/- 2-9-1968 (Pat)*, referred to above and the decision of the Bench of this Court to which my Learned Brother was a party, applies on all fours to this case.

3. Mr. Bose drew our attention to a decision given by me sitting singly in *Mukhlal Prasad v. Union of India 1964 BLJR 882* where, under a similar situation, I had taken a different view. That was also a case of short delivery similar to the one with which we are concerned in this appeal, and I held that the starting point would be when the goods were made available for delivery on the earlier date and not the date when open delivery was given. Following this decision, *Mahapatra, J.* has taken an identical view in the case of *Union of India(UOI) Vs. New India Assurance Co. Ltd. and Others*, . On a reconsideration of the matter in light of the decisions referred to above, I have come to the conclusion that in cases of short delivery of a kind, with which we are concerned in this appeal, strictly speaking, it does not remain a case of non-delivery within the meaning of Article 31 of the Limitation Act; it becomes a case of loss of goods within the meaning of Article 30. And, generally and ordinarily, the loss would be detected when open delivery is given. That being so unless contrary facts, are pleaded and proved by the defendants, the starting point of limitation would be when open delivery is given by the defendants.

6. Mr. Bose drew our attention to the unreported decision of this Court in *Union of India v. Swastik Mica Co., C. R. No. 203 of 1960, D/- 27-11-1962 (Pat)*, by a Bench of this Court, to which I was a party, and the decision of another Bench, to which again I was a party, in the *Union of India v. Gopal Ram Ram Das, F. A. 464 of 1951, D/- 2-7-1958 (Pat)*. But in none of these decisions, the point which falls for decision in this appeal was either expressly canvassed or decided, I, therefore, hold that the Courts below have rightly held that the suit is not barred by limitation.

7. The submission of Learned Counsel for the appellant on the second point is

well founded and must be accepted. Learned Counsel for the respondent did not seriously combat this point. I may only add that the compensation to which the plaintiff was entitled was the market value of the goods, which were not delivered and damages on account of deterioration to a part of the consignment. The plaintiff was not entitled to the loss of profit on the said value.

8. In the result, the appeal is allowed in part. The judgment and decree of the Courts below are modified only to this extent that the plaintiff shall not get the sum of Rs. 199.37 paise claimed by him or account of loss of profit at 10%. In other respects, the judgment and decree of the Courts below are affirmed. Since the appellant has substantially failed in this appeal, the respondent must have his proportionate cost of the appeal for the amount in respect of which the decrees of the Courts below have been affirmed.

Anwar Ahmad, J.

9. I agree