

(1965) 10 PAT CK 0007
In the Patna High Court
Case No : A.F.A.D. No. 348 of 1963

Union of India (UOI)

APPELLANT

Vs

Pradip Lamp Works and Another

RESPONDENT

Date of Decision : 18-10-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, 100, 101
Limitation Act, 1908 — Article 31
Limitation Act, 1963 — Article 11

Citation : AIR 1967 Patna 93

Hon'ble Judges : U.N. Sinha, J

Bench : Single Bench

Advocate : P.K. Bose, for the Appellant; Rajeshwari Prasad and Chunni Lal, for the Respondent

Final Decision : Allowed

Judgement

U.N. Sinha, J.—This appeal has been filed by the Union of India, as owner of Eastern Railway Administration, the defendant in the suit instituted by the plaintiff-respondent No. 1. The litigation has had a chequered career and the appeal is directed against the decree passed by the Court of appeal below after a remand by this Court in Second Appeal No. 396 of 1961, by Judgment dated the 26th November, 1962.

2. The facts are as follows. The Plaintiff-respondent filed a suit on the 27th February, 1969, claiming Rs. 3,600, which Included the price of a consignment of goods valued at Rs. 3,500 despatched by rail. According to the plaintiff, Messrs. J. C. Banerjee and Sons of Calcutta had booked 16 cases of glass tubings from the Kidderpore Dock to Patna City on the 24th July, 1957. It was alleged in the plaint that this consignment had not been delivered to the plaintiff due to gross negligence, misadministration etc. The plaintiff is said to have served notice u/s 77 of the Indian Railways Act and Section 80 of the Code of Civil Procedure, and because the Railway had not paid the plaintiff compensation, this suit had to be

instituted. It was mentioned in the plaint that the cause of action had arisen on the 24th July, 1957 and on or about the 24th August, 1957, when the consignment ought to have been delivered to the plaintiff. It was also mentioned that the cause of action had finally arisen on the 22nd July, 1958, when the plaintiff's claim had been refused by the Railway authorities.

The defendant-appellant resisted the plaintiff's claim on several grounds, the principal ground being that the plaintiff's consignment had been damaged by an explosion, which had occurred in wagon No. NR 34790. The plaintiff's goods were being carried in wagon No. ER 63132. According to the contesting defendant, all possible steps had been taken for protecting the plaintiff's consignment, but the consignment could not be saved fully. The plaintiff's goods were salvaged to whatever extent possible and they were sent to the destination, i.e., Patna City. [These salvaged goods had reached Patna City on the 12 January 1958. It was further pleaded that in view of Section 75 of the old Indian Railways Act, read with schedule 2, no liability fell on the Railway administration, because the plaintiff's consignment had contained goods falling within Schedule 2, for which no declaration had been made in accordance with Section 75.

3. On trial, the first Court held that the plaintiff's consignment had been destroyed as a result of fire which had broken out in wagon No. NR 34790, which was beyond the control of the Railway administration and its employees. Thus the contesting defendant was exonerated from liability and the plaintiff's suit was dismissed. On appeal to the Court of appeal below, the decree was affirmed and the suit stood dismissed. Then, the plaintiff came up to this Court in Second Appeal No. 396 of 1961. It appears from the Judgment of this Court that the substantial point that was argued here was that the finding of the Court of appeal below to the effect that the plaintiff's goods in wagon No. ER 53132 had been destroyed as a result of fire, which had broken out in wagon No. NR 84790 was vitiated by non-consideration of the relevant materials on record, and this point was accepted by this Court.

The appeal was remanded to the Court of appeal below for re-consideration of the appeal with the following directions:

"I, therefore, remand the case to the lower appellate Court for a fresh hearing in the light of the criticisms stated above. If the Court of appeal comes to the conclusion that there is evidence on the record to support the case of the railways that the fire which caught wagon No. NR 34790 spread to the wagon No. ER 53132 as well, and that as a result thereof the consignment in suit was destroyed, the matter ends there and the suit has to be dismissed. But if the Court of appeal below comes to the conclusion that there is no evidence on the record to establish conclusively that the fire which broke in wagon No. NR 34790 also spread to the other wagons, including wagon No. ER 53132, wherein the consignment in suit was loaded, it will have to be found out whether the obligation imposed on the railway as provided in the aforesaid Section 74-D of the Indian Railways Act has been here discharged by them or not, and if not, it

will have to draw an adverse inference against the railway for the non-disclosure of the facts as required under that section.

"Accordingly, the appeal is allowed, the judgment and decree of the lower appellate Court are set aside and the case is remanded back to it for a fresh hearing on the materials already on the record. The Court of appeal below in hearing the case afresh, will keep in view the criticisms as stated above. But in the circumstances of the case, there will be no order for costs of this Court."

After remand, the following points were formulated by the learned Additional Subordinate Judge for consideration, namely:

1. Whether the consignment in question was destroyed as a result of serious fire accident?
- 2 Whether the plaintiff's claim was time-barred ?
3. Whether the plaintiff-appellant was entitled to get a decree for the amount claimed by him?

Under point No. 1 a finding has been given In favour of the plaintiff. It has been held that there is no reliable evidence to hold that the fire which had commenced in wagon No. NR 34790 had also spread to wagon No. ER 53132. Point No. 2 has also been decided in the plaintiff's favour and it has been held that the suit instituted on 27-2-1959 was within one year from a letter sent by the Railway administration, dated the 22nd July, 1958 (Exhibit 3) on which day the Railway authorities had pleaded their inability to entertain the plaintiff's claim. It appears that under these three points the contesting defendant had also urged that the suit must fail in view of Section 75 read with schedule 2 of the old Indian Railways Act. The learned Subordinate Judge has decided this point in favour of the plaintiff. Thus, the suit has been fully decreed after remand, including the plaintiff's claim of Interest and cost of notice claimed in the plaint. Before I mention the contentions raised on behalf of the appellant, I may mention a point raised by learned counsel for respondent No. 2, which matter is not a controversial one. Respondent No. 2, Port Commissioner, Kidderpore Dock, Calcutta, has been described as defendant No. 2 and a respondent in the Court of appeal below. But it is clear from the plaint that there was only one defendant in the suit, which was Union of India as owner of the Indian Railways, New Delhi. The plaintiff had only mentioned that summons was to be served through:

- (1) The General Manager, Eastern Railway, Calcutta,
- (2) Port Commissioner, Kidderpore Dock, Calcutta, Defendants.

It does not appear that the plaintiff had made any allegation against the Port Commissioners and the learned counsel for the plaintiff-respondent agrees that if the suit is decreed, the decree will have to be passed only against the Union of India as owner of the Indian Railways. No claim is made against the Port Commissioners of the Kidderpore Dock, Calcutta.

4. The substantial point argued by learned counsel for the appellant is based on Article 31 of the old Limitation Act and it is contended that the plaintiff's suit was barred by limitation. According to the learned counsel, the plaintiff had itself mentioned in the plaint that the consignment booked by the plaintiff ought to have been delivered on or about the 24th August, 1957, and, therefore, the suit instituted more than one year after the 24th August, 1957 must be held to be barred by limitation under Article 31. According to the learned counsel for the plaintiff-respondent, the Court of appeal below has correctly held that the limitation for the suit would commence from the 22nd July, 1958, because correspondence between the parties was going on, and the plaintiff would have naturally expected that its claim would be settled. It is argued that the plaintiff was justified in instituting the suit after receiving the letter dated the 22nd July, 1958 (Exhibit 3) sent to the plaintiff, as has been held by the Court of appeal below.

Learned counsel for the plaintiff-respondent has also argued that it is too late for the contesting defendant to raise the bar of limitation, because the only point which the Court of appeal below had been directed to decide by this Court by its Judgment dated the 26th November, 1962, was a question of fact, as to whether the plaintiff's goods had been destroyed by the fire which had commenced in wagon No. NR 34790. According to the learned counsel for the plaintiff-respondent, when the finding of the Court of appeal on this point is adverse to the contesting defendant, no question of limitation can be raised in this appeal. Having heard learned counsel for the parties. I am of the opinion that it is still open to the appellant to raise the question of limitation, as there is no conclusive direction by this Court in its order of remand, that the plaintiff's suit must be decreed, if the final Court of fact came to the conclusion that the fire in wagon No. NR 34790 was lot responsible for the damage to the plaintiff's goods in wagon No. ER 63132.

Apparently, the question of limitation had not been agitated before his Court at the earlier stage, because the final decision on the point given by their Lordships of the Supreme Court had then been recently given. In the case of Bootamal Vs. Union of India (UOI), , the Supreme Court had held by its judgment dated the 27th March, 1962, that mere correspondence between the parties cannot extend the period of limitation laid down by Article 31, as was the view of some Courts previously. It appears that the point had received publicity by the time that the appeal was before the Court of appeal below and that is why the question of limitation was raised there. This question was argued in full before the Court of appeal below and the matter has been dealt with in detail in paragraph 15 of the Judgment after remand. But, in my opinion, the question has been wrongly decided. The Court of appeal below has itself stated that by Ex. 3 the Railway authorities had pleaded their inability to entertain the plaintiff's claim and unless this letter sent to the plaintiff had amounted to an acknowledgment of liability, no relief can be given to the plaintiff on this score. Neither was it argued in the Court of appeal below that Exhibit 3, or for the matter of that, any Letter from

the Railway administration to the plaintiff had amounted to acknowledgment of any liability, nor is there any letter in the correspondence between the parties which amounts to an acknowledgment of liability. Therefore, prima facie, the goods ought to have been delivered, as the plaintiff stated in the plaint, on or about the 24th August, 1957.

At some stage, learned counsel for the plaintiff-respondent stated that some of the salvaged goods had arrived at Patna City on the 12th January, 1958. But, even from that point of time the suit had been instituted beyond limitation. Therefore, clearly that suit was barred by limitation and the plaintiff's suit must fail on this ground alone. Learned counsel for the appellant has then argued that the plaintiff's suit must fail in view of Section 75 of the old Indian Railways Act, read with schedule 2. On this point, learned counsel for the plaintiff-respondent has relied upon the conclusion of the Court of appeal below to the effect that the value of each of the 16 cases sent to the plaintiff was not more than Rs. 300. It is argued that this finding is a finding of fact and therefore, it cannot be interfered with in this second appeal. This contention raised by learned counsel for the plaintiff-respondent is not without force, although, in my opinion the reasons given by the learned Judge on appeal do not appear to be very sound. However, the plaintiff's suit fails on the question of limitation alone. The last point argued on behalf of the appellant is that the plaintiff has been granted interest and cost of notice wrongly. This point, urged on behalf of the appellant, is also valid, but, as the appeal succeeds and the plaintiff's suit fails on the question of limitation, the matter may rest there.

5. For the reasons given above, it must be held that the plaintiff's suit fails. The appeal, therefore, succeeds and it is allowed and the plaintiff's suit dismissed. Under the circumstances, however, parties must bear their own costs throughout.