

(1963) 06 GAU CK 0003
In the Gauhati High Court
Case No : Second Appeal No. 118 of 1961

Union of India (UOI)

APPELLANT

Vs

Probhat Marketing Co. Ltd.

RESPONDENT

Date of Decision : 27-06-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 20
Limitation Act, 1963 — Article 113, 114, 115, 116, 20

Citation : AIR 1963 Guw 190

Hon'ble Judges : C. Sanjeevarao Naidu, J

Bench : Single Bench

Advocate : D.N. Medhi, for the Appellant; J.P. Bhattacharjee and D.K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Nayudu, J.—This second appeal is directed against the judgment and decree of the Subordinate Judge, upper Assam Districts, Jorhat, dated 14-3-1961 in Money Appeal No. 10 of 1960 on the file of the said Court confirming the judgment and decree of the Munsif of Jorhat.

2. The only point of law that has been urged before me in this second appeal is whether the suit, out of which this second appeal has arisen, was barred by limitation. In order to understand and appreciate the respective contentions of the parties on that point, it would be necessary to briefly notice the salient facts as found by the Courts below.

3. The Plaintiff, the contesting Respondent in this appeal, filed a suit, out of which this appeal has arisen, for recovering the value of 24 maunds 36 seers of sugar which was found deficient. A consignment of sugar in bags was booked by the consignor, who was impleaded as the fourth Defendant to the suit, at Bagaha on 8-9-1957 in favour of the Plaintiff, who was the consignee. On 7-10-1957 the goods in question were delivered to the Plaintiff, the consignee, at Jorhat by the railway authorities. At the time of taking delivery of the 110 bags of sugar, it was

found by the Plaintiff that 99 bags of sugar were intact, but that the remaining 11 bags were in a cut condition, and accordingly, these bags were weighed and a shortage of 24 maunds and 363/4 seers of sugar was noticed. While taking delivery of the consignment surrendering his railway receipt, which entitled him to receive the consignment, the Plaintiff demanded and the railway authorities issued accordingly a short certificate indicating that the consignment was short in weight by 24 maunds 363/4 seers. This quantity, which was found to be short, had been valued at Rs, 861/- by the Plaintiff and that value had been accepted by both the Courts below.

Subsequently the Plaintiff submitted a claim to the Chief Commercial Superintendent (Claims) of N.E. Railway, Corakhpur, on 11-10-1957, and in reply to this, the Regional Superintendent (Claim), Pandu, had informed the plaintiff on 15-1-1958 that the original railway receipt surrendered by the Plaintiff to the railway authorities at the time of taking delivery of the consignment was found missing and not traceable, and the Plaintiff was accordingly requested to execute a security bond counter-signed by the Station Master concerned undertaking to refund any money paid to the Plaintiff in the event of it being found that he was not entitled to receive the amount. Accordingly, the Plaintiff had executed the security bond as furnished by the railway authorities duly counter-signed by the Station Master and sealed with the Station Master's seal, and had dispatched the same to the Regional Superintendent, N. E. Railway, Pandu, with a covering letter dated 7-3-1958. But, it would appear that as no satisfaction of the claim was made to the Plaintiff by the railway authorities, he issued notices u/s 20 of the Code of CPC to the General Managers of the N. E. and N. F. Railways, which were served on them on 11-12-1958 and 3-12-1958, respectively, to which the Plaintiff received a reply that the security bond sent by him was not received.

The Plaintiff accordingly filed the suit for the failure of the railway authorities to deliver the goods consigned to him in full, in addition to other reliefs, such as, the railway freight and loss of profit by way of compensation etc. The Plaintiff also claimed relief against the first Defendant, the Union of India, apparently by way of representing the two Railways, the Defendants 2 and 3, which, according to the Plaintiff, were responsible for the short delivery of the goods. In addition, the Plaintiff impleaded the fourth Defendant, the consignor of the goods, primarily as a proforma Defendant, but, nevertheless, claiming that if the fourth Defendant were to contest the claim of the Plaintiff, he should be treated also as one of the main Defendants, and the suit proceeded against him accordingly. In the prayer, portion of the plaint, the Plaintiff prayed that "the suit be; decreed against the Defendants 1, 2 and 3 with costs, and also against Defendant No. 4 if he contested the claim of the Plaintiff. There was also a claim for future interest at the rate of 6 per cent, apparently, per annum.

4. The first Defendant filed a written statement on behalf of itself as well as Defendants 2 and 3, the railways,, in which a plea of limitation was raised, besides some other pleas, which are not required to be noticed in this second

appeal. But "an additional written statement had been filed by the first" Defendant, in which it was pleaded that the consignment in question was booked under the condition of loading and unloading by the consignor and consignee respectively, and the same was loaded in the wagon by the consignor without the supervision of any Railway employee that the said wagon after having been revitted and sealed, in the presence of the consignor, reached the destination with forwarding station seals intact without any intervention by any Railway employee on route, and that hence no liability is attached to the Defendants 1 to 3. It was further pleaded that the Plaintiff's allegation that there was a shortage of 24 maunds 36J seers of sugar was not true; that any apparent shortage noticed at the destination must be due to the fact that there was short loading by the consignor in the wagon, to that extent and consequently the weight fell short by 24 maunds 363/4 seers of the weight shown as actually loaded. In other words, the contention was that this quantity of sugar, which was found short at the time of taking delivery at Jorhat Railway Station, was not a result of any negligence or shortage during transit but because that quantity of sugar had not been loaded at all into the wagon by the consignor. In other words, the contesting Defendants denied that there was any loss or short delivery.

5. On these pleadings, a number of issues were framed-by the Trial Court, the Munsif of Jorhat, but when the matter actually came to be heard, it would appear from a note made in paragraph 5 of. the judgment of the learned Munsif, that: the learned advocate for the Defendants did not press on Issues Nos. 1, 2, 4, 5, 6 and 7 which issues related to the various other contentions raised by the main Defendants. The learned Trial Court found that there was shortage as evidenced by the short certificate (Ext. 1) issued by the railway authorities at the time of taking delivery; that the suit was not barred by limitation for the reasons set out in the judgment.

6. Aggrieved by the decision of the learned Munsif, the first Defendant took the matter up in appeal on behalf of itself and Defendants 2 and 3 to the Subordinate Judge's Court, Upper Assam Districts at Jorhat. Even on appeal, it appears from a note made by the learned Subordinate Judge in his judgment, that Issues Nos. 1, 2, 4, 5, 6 and 7 were not pressed before the learned Munsif and that they were also apparently not pressed before him. The learned Subordinate Judge accordingly took up for consideration the only material issue arising for determination In the appeal, namely, the issue relating to limitation. The learned Subordinate Judge held that there was no limitation as there was an acknowledgment by the railway authorities of their liability for the shortage of sugar noticed at the time of delivery, as noted by them in Ext. 1. He accordingly dismissed the appeal, and hence the present second appeal.

7. The only point that calls for determination In this second appeal is, whether the suit is barred by limitation. Mr. D.N. Medhi, the learned Counsel for the Appellant, made a faint attempt to revive and argue the points covered by the issues which had boon given up in the Courts below. But, in the absence of any

affidavit by the counsel appearing for the Defendants in the Courts below to the effect that the issues were not given up, there is no material before this Court to come to a conclusion that what has been noted by the Courts below in their respective judgments - that issues Nos. 1, 2, 4, 5, 6 and 7 were not pressed - is wrong. It must, therefore, be taken for the purpose of this appeal that the issues which had not been pressed in the Courts below, had, in fact, not been pressed, and there is no question of urging those issues in this second appeal.

8. This, therefore, leaves us with the issue of limitation. It is contended by Mr. Medhi, the learned Counsel for the Appellant, that Article 30 of the Limitation Act applied to the case; that the period of limitation was, according to that article, one year from the date of delivery of the consignment, namely, 7-10-1957, and that as the suit was brought on 23-2-1959, more than one year after that date, the suit is tarred by limitation and ought to have been dismissed by the Court's below. A number of decisions have been cited before me relating to cases arising under Article 31 of the limitation Act and to which Article 31 was held to apply, and as it is the case of the Appellant that Article 30 applied to the instant case, it is completely unnecessary for me to examine those cases.

9. Against this, it is contended by Mr. Bhattacharjee for Mr. Sen, that as the suit is simplicities a suit based on a breach of contract, Article 115 of the Limitation Act applied to the present case, and as under that Article the period of limitation is three years, the suit is well within time and cannot be regarded as having been barred by limitation. He also further supported himself by contending that even if Article 30 were to apply, the suit could not be regarded as tarred by limitation for two reasons, - firstly that as the Defendants, who set up the plea of limitation, did not admit the loss or damage, and, in fact, denied that there was any loss or damage at all, there is no question of Article 30 applying to the case, and, secondly, that the lower Appellate Court was correct in holding that the letters written by the railway authorities and requesting the Plaintiff to forward a security bond to enable them to progress the matter, acknowledged and accepted the claim of the Plaintiff, and consequently, there was no question of limitation.

10. When a point of limitation is raised, it is necessary to consider and examine the nature and scope of the plea so made in the light of the pleadings and the facts. In the plaint it is averred that the railway authorities failed to deliver, as per contract of carriage, all the goods apparently set out in the railway receipt and that that accordingly granted a short certificate, and, therefore, he was entitled under the order of consignment to recover the value of the sugar which according to the Plaintiff was loaded into the wagon at the place of consignment and which was found short at destination. The other portion of the claim regarding the railway freight and loss of profit in the plaint had been negative by the Courts below and as there is no appeal brought against the judgment of the learned Trial Court in this regard, it is unnecessary to consider this aspect of the matter.

Prima facie, therefore, the claim of the Plaintiff is based on a breach of contract, that is the breach of fulfilment of the terms of the contract, namely that the Goods as consigned should be delivered at the destination intact. That apart, to the suit the fourth Defendant was made a party and a conditional claim was also made against him. Hence, on the basis of the claim that is made, the suit cannot be regarded as a suit in tort for compensation against a carrier either for losing or for injuring the goods consigned for carriage. On the other hand, it would fall directly within the scope of Article 115 of the Limitation Act, namely a suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for. In some cases it was urged that Article 30 of the Limitation Act is a particular article vis-a-vis Article 115, which is a residuary article. This argument, with great respect it must be stated, overlooks the important circumstance that Article 30 occurs in the midst of the articles which deal with suits based on tort, for instance, Article 19 deals with suits for compensation for false imprisonment, Articles 20 and 21 deal with suits by executors, administrators or representatives under the Legal Representatives' Suits Act, 12 of 1855 and the Indian Fatal Accidents Act, 13 of 1855, respectively, in respect of certain wrongs committed or in respect of the death which resulted under the latter Act. Article 22 deals with suits for compensation for any other injury to the person. Article 23 deals with suits for compensation for malicious prosecution. Article 24 covers suits for compensation for libel and Article 25 for slander. Article 26 refers to suits for compensation for loss of service occasioned by the seduction of the Plaintiff's servant or daughter. Article 27 refers to suits for compensation for inducing a person to break a contract with the Plaintiff. Article 28 refers to suits for compensation for an illegal, irregular or excessive distress and Article 29 for wrongful seizure of moveable property under legal process, and then occurs Article 30 which refers to suits for compensation against a carrier for losing or injuring goods. Then we have Article 31 for the failure of the carrier to deliver the goods or delaying delivery of the goods. Article 32 deals with suits against a person who having a right to use property for specific purposes, perverts it to other purposes. Articles 33 to 35 deal with various wrongs complained against and Article 36 covers suits for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.

It may thus be seen that all these articles relate to suits based on tort or tortious acts, or what we commonly understand as wrongs in law. Advisedly, therefore, a shorter period of limitation is prescribed in many cases. These articles obviously do not deal with any liability for compensation arising under contract, for which we have got to go further and look into Articles 113 to 116. Article 113 deals with suits for specific performance of a contract; Article 114 deals with suits for the rescission of a contract, Article 116 deals with suits for compensation for the breach of a contract in writing registered, whereas Article 115 deals with suits for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, that is no

other article deal with rights arising from contracts. In my considered opinion, it would, therefore, be wrong to confuse suits falling under Article 30 and other allied articles with the suits based on breach of contract which are covered by the appropriate article of the Limitation Act. As in the instant case, the suit is one for compensation resulting from the failure of the railway authorities to fulfill the terms of the contract of carriage incorporated in the railway receipt, under which the goods were consigned to the consignee intact and the compensation claimed is in respect of the loss sustained by the Plaintiff, the consignee, as a result of the breach of the contract, the suit clearly is one falling under Article 115 of the Limitation Act and not under Article 30 of the Limitation Act, and, hence, in my opinion, there can be no question of the suit being barred by limitation.

In this context it would be useful to refer to a few decisions cited-by the learned Counsel for the contesting Respondent. In *British India Steam Navigation Co. Ltd. v. Hajee Mahomed Esack and Co.*, ILR Mad 107, the appel-Jairr were the owners of a fleet of steamships plying periodically along the coasts of British India, by which they undertook to convey for freight parcels of goods for all persons indifferently from and to specified ports. The Respondent made several shipments of goods in the steamers of the Appellants, to be carried from Calcutta to the port of Madras and to be there delivered. It was a condition of the bills of lading that the Company should have the option through its agents or commanders of "landing goods direct at the consignees". risk and expense." It was also a condition of the bills of lading that any claim for short delivery of goods should be made at the port of Calcutta and at no other port, and that no claim for short delivery would be entertained unless made within one month after the delivery of any portion of the goods entered in the bills of lading respectively. The Respondents complained that these contracts had been broken by the failure of the Appellants to make full delivery of the goods received by them and they sued to recover the value. It was pleaded inter alia in that case by the Appellants that the suit was barred by limitation. It was contended that the suit fell under Clause 30 of the Limitation Act in that it was a suit against a carrier to recover compensation for the loss of goods.

On the other hand, it was argued that the Defendants were not carriers within the meaning of that clause; that their character of carriers ceased when the goods were landed, and they became ordinary bailers in the position of warehousemen holding the goods till payment of the hire for carriage and landing; and that the suit was governed either by Clause 63 or Clause 115. When dealing with the question of limitation, it was observed in that case as follows:

Looking to the terms of Clause 30 and the place in which it is found in the schedule, we understand It to apply to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance, or nonfeasance in dependent of contract. There may no doubt be reasons for prescribing a short period of limitation for suits against carriers, but the principle has not apparently been adopted.

The present suit is clearly a suit for breaches of the contracts to deliver, and there being no special provision for compensation for the breach of such contract, the suit is governed by Clause 115.

To a similar effect is the decision reported in *Mohan-singh Chawan v. Henry Conder*, ILR 7 Bom 478 and *Danmull v. British India Steam Navigation Co.*, ILR 12 Cal 477. In ILR 7 Bom 478, it was held that "mere non-delivery of the bags was no proof of their loss, the onus of proving which as an affirmative fact lay on the Defendants before they could claim the benefit of the special limitation of two years provided in Article 30 of the Limitation Act, and that on the particular facts of that case, the learned Judges held that the suit was not barred by limitation. In ILR Cal 477, it was held as follows, by Garth, C. J.:

In the present case the Plaintiff sues for the non-delivery of his goods: he does not sue for their loss; he knows not whether the goods have been lost or not. His case is, that the Defendants contracted with him to deliver the goods at Rangoon, and that they have failed to complete their contract; and he claims his right to bring a suit for the breach of contract within three years of the time when the goods ought to have been delivered.

It may be that the goods were lost; it may be that the Defendants may have been guilty of some other misconduct, with reference to them, of which the Plaintiff was not aware; but I do not see why the Defendants have a right to take advantage of their own wrong, in order to change the nature of the Plaintiff's suit, for the purpose of bringing themselves within the protection of the two years' limitation.

The Plaintiff's suit is no less a suit on contract, because, the Defendants may have been guilty of a tort, of which the Plaintiff was not aware.

It was accordingly held that the suit was not barred by limitation as it applied to a breach of the contract. It is unnecessary to multiply decisions in this regard, as I am fully satisfied that the suit is based on a breach of contract and the direct article that applies is Article 115 and not any other.

11. Taking up the alternative contention of Mr. Bhatta-charjee that even assuming that Article 30 is held to apply, it cannot be applied to the facts of the present case, as it is the Defendant who raised a plea of limitation claiming that there was no loss or damage. The reasoning in this regard adopted by the learned Judges in both ILR 7 Bom 48 and ILR Cal 477, would seem to apply to the facts of the present case.

12. As regards the contention that there was no acknowledgment of liability by the railway authorities, the learned lower Appellate Court found that there was such an acknowledgment, and this being a finding of fact is binding on me, and even if it is regarded as a mixed question of fact and law, I do not find any reason to disagree with that finding reached by the lower Appellate Court. I am not satisfied, therefore, that there is anything wrong with the judgment under

appeal or that there Is anything in which calls for interference by this Court in the exercise of its limited jurisdiction u/s 100 of the Code of Civil Procedure. The second appeal therefore, fails and is dismissed with costs.

13. The leave prayed for is refused.