
(1973) 08 OHC CK 0029
In the Orissa High Court
Case No : Second Appeal No. 493 of 1969

Union of India (UOI)	Vs	APPELLANT
Sankar Store and Another		RESPONDENT

Date of Decision : 24-08-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, 80, 9
Sales of Goods Act, 1930 — Section 23

Citation : AIR 1974 Ori 85 : (1973) 39 CLT 1043

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : B.K. Pal and B. Pal, for the Appellant; L.K. Dasgupta, for the Respondent

Final Decision : Allowed

Judgement

S.K. Ray, J.—The appellant is the defendant in a suit for recovery of Rs. 2904.50 p. on the following averments:--

Plaintiff No. 2 carries on business in cloth at Nayasark, Cuttack in the name and style of Sankar Store, which is plain-tiff No. 1. Plaintiff No. 1 is neither a partnership firm nor a company. Plaintiff No. 2 on behalf of plaintiff No. 1 placed orders with Shewdayal Mohanlal of 15, Noormal Lohia Lane, Calcutta for one bale of cloth price of which has been stated in the Schedule of the plaint as amounting to Rs. 2887.50 p. The goods were sent by the seller through the South Eastern Railway by booking the same at Howrah Railway Station under P.W.B. (Parcel Way Bill) No. 156923 dated 19-7-63 (Ex. 2), for delivery at Cuttack. This Ex. 2 shows the seller, Shewdayal Mohanlal of Calcutta, to be the sender and plaintiff No. 1, to be the consignee. The entire bale of cloth was lost in transit and could not be delivered to the plaintiffs. It is alleged by the plaintiffs that this non-delivery was on account of gross negligence and misconduct of the employees of the defendant. The plaintiff served notice on the defendant u/s 80, C.P.C. and u/s 78-B of the Indian Railways Act on 9-10-63 demanding payment

of the amount in claim in the suit. As the notices were not complied with by the defendant, the present suit has been filed.

2. The main defence contentions, inter alia, are that the suit is not maintainable as there was no proper and valid notice u/s 80, C.P.C. and further, that the plaintiffs as mere consignees, have no right of suit specially when title to the consignment has not passed to them.

3. The trial court dismissed the suit holding that title in the goods had not passed to the plaintiffs by the time of consignment of the same to the Railways and, as such, they could not maintain the suit as mere consignees. He, however, found that the loss of the consignment was on account of negligence and misconduct of the Railway servants.

4. The lower appellate court reversed the decision on finding that the plaintiffs had title to the goods as their agent had paid the price thereof to the consignor and, as such, their suit was maintainable. He confirmed the findings of the trial court that the loss of the consignment was due to the negligence of the Railways. He decreed the suit, relying on the Section 27 of the Sale of Goods Act. He held that since the plaintiffs had acquired title to the suit consignment their suit is maintainable in law.

5. Mr. Pal, learned counsel for the appellant has raised three contentions, namely:--

(1) The statutory notice u/s 80, C.P.C. is invalid.

(2) The plaintiffs being in position of mere consignees have no right of suit, because the contract of carriage between the consignor and the Railway Administration gives the right of suit to the consignor alone.

(3) The other basis on which the plaintiffs could sue would be on the basis of their title to the consignment, but in the present case the evidence does not disclose passing of title in the goods or consignment from the consignor to the consignee. The lower appellate court's finding that the plaintiffs had title to the goods is one of reversal and is founded upon inadmissible evidence.

6. I will now advert to the first contention of invalidity of notice u/s 80, C.P.C. Section 80 lays down the matters which the notice thereunder must contain. If the notice is not in full compliance with the requirement of Section 80, C.P.C. it becomes invalid. The position then would be as if no notice u/s 80, C.P.C. had at all been issued and consequently, the suit is bound to fail. The requirements of this Section inter alia are that (a) there must be identity of the person who issues the notice with the person who institutes the suit, and (b) it must show on its face the cause of action the name, description and place of residence of the plaintiffs and the reliefs which he claims.

As to the requirement (a) the Supreme Court has said in the case of S.N. Dutt Vs. Union of India (UOI), .

"Section 80, according to its plain meaning requires that there should be identity of the person who issues the notice with the person who brings the suit. Where an individual carries on business in some name and style the notice has to be given by the individual in his own name, for the suit can only be filed in the name of the individual."

In that case notice u/s 80, C.P.C. was given by M/s. S.N. Dutta and Co., but the suit was filed by S.N. Dutta as the sole proprietor of the business carried on under the name and style of S.N. Dutt & Co. The Supreme Court held that the person giving the notice was not the same as the person suing and that, therefore, the notice was invalid. In this case similar is the situation. It appears from the notice u/s 80, C.P.C. (Ex. 3) that it was purported to have been issued on behalf of M/s. Sri Sankar Store, Nayasark, Town Cuttack, while the suit is really by the plaintiff No. 2, Gourisankar Lal Moda alone, since plaintiff No. 1 being neither a Company nor a partnership firm has no juristic entity and associating it with plaintiff No. 2 will not alter the nature of the suit being by plaintiff No. 1, who is the proprietor of Sankar Store only. So apparently, there is no identity of the person issuing the notice with the person instituting the suit.

With regard to the requirement (b) it must be admitted that the notice u/s 80, C.P.C. is not a pleading and need not be a verbatim copy of the plaint, but having regard to the object for which Section 80 is enacted, it must contain such details of facts which will be sufficient to inform the parties regarding the nature and basis of the claim and the relief sought. So, it is now to be seen whether in the notice there is substantial information conveyed on the basis of which the defendant could consider the claim of the would be plaintiff and avoid the suit. If there is substantial variance between the basis of the claim made in the notice and the basis of the claim in the plaint, the notice must be held to be invalid for non-compliance of the mandatory requirement of Section 80, C.P.C. The substance of the notice Ex. 3 is that "one bale of cloth was booked from How-rah to Cuttack consignor being Shewdayal Mohanlal, 15, Noormal Lohia Lane, Calcutta and consignee being Sri Sankar Store, Cuttack, under P.W. No. 156923 dated 19-7-63 which was carried through Railway Administration" and that in spite of repeated demands of the consignee the consignment has not yet been delivered to him and due to gross negligence and misconduct on the part of the employees of the Railway Administration, the consignment has not reached the destination for which the plaintiffs have sustained loss to the tune of Rs. 2904.50 p. as set out in the schedule of the notice. The essential allegations in the plaint are that the plaintiff No. 2 placed order with Shewdayal Mohanlal 15, Noormal Lohia Lane, Calcutta who sent one bale of cloth, price of which is mentioned in the schedule of the plaint, from Howrah to Cuttack. The consignment was sent through South Eastern Railway Administration under P.W.B. No. 156923 dated 19-7-63, to be delivered at Cuttack. The averment in the plaint that the plaintiff No. 2 on behalf of the plaintiff No. 1 had placed an order for one bale of cloth with the consignor constitutes part of the cause of action for the suit and was not stated in the notice. For the aforesaid reasons, I am satisfied that the notice u/s

80, C.P.C. is invalid, and the suit is bound to fail on that account.

To counter this, it is argued on behalf of the plaintiffs-respondents that the defendant has waived this plea of invalidity of notice u/s 80, C.P.C. and points to the judgment of the trial court where the issue regarding maintainability of the suit has been shown as not pressed. It is true that the mandatory nature of the section is not a bar to the waiver of the notice, but in the instant case an issue having been framed obviously on the basis of the written statement that the suit is bound to fail for want of valid notice u/s 80, C.P.C., the theory of waiver would not apply. Waiver is contractual and to constitute waiver, there must be an intentional or voluntary relinquishment of a known right or privilege. No such relinquishment can be spelt out in this case from not pressing the issue regarding maintainability, because a specific defence regarding invalidity of notice u/s 80, C.P.C. had been taken in the written statement. There was factually no waiver of notice. Once an issue has been framed and all material facts relevant to the full determination of that issue are on record, it is open to the court, even to the appellate court to take notice of that issue and determine the same even though at one stage of litigation that issue may not have been pressed erroneously. For the determination of the issue in question the relevant documents are the notice u/s 80, C.P.C. which has been proved by the plaintiffs in this case as Ex. 3 and the plaint. If this issue was not pressed in the trial court, the defendant will not be estopped from raising that plea here, because there is no estoppel against law.

In net result, notice u/s 80, C.P.C. is invalid in law, and, as already stated, the suit must, on this ground alone, fail.

7. I will now proceed to deal with the second and third contentions which are interconnected. The plaintiff No. 1 is a bare consignee having a Railway Receipt (Ex. 1) in his hand. It is also the admitted case that the consignment was booked at Howrah Railway Station by the consignor, which brought into existence a contract of carriage between the consignor and the South Eastern Railway Administration. In such circumstances, if the consignment is damaged or lost due to misconduct or negligence of the employees of the Railway Administration, the latter becomes responsible for the loss and damage. The principles as to who can sue the Railway Administration for the loss or damage and what is the value of a railway receipt has been laid down by the Supreme Court in the case of Union of India (UOI) Vs. West Punjab Factories Ltd., . I will extract the relevant passage from the headnote which runs as follows:--

"From the mere fact that a railway receipt is a document of title to goods covered by it, it does not follow, where the consignor and consignee are different, that the consignee is necessarily the owner of goods and the consignor can never be the owner of the goods. The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee has to be decided on other evidence. Ordinarily, it is the consignor who can sue if

there is damage to the consignment, because the contract of carriage is between the consignor and the railway administration. Where, however, the property in the goods carried has passed from the consignor to consignee, the latter may be able to sue. Whether title to goods has passed from the consignor to the consignee depends on the facts of each case."

In the instant case under the ordinary rule, it is the consignor who is to sue for the consignment lost in transit. The plaintiffs can maintain their suit only if they proved their title to the goods in transit. Here the consignor and the consignees being different the plaintiffs are not necessarily the owners of the goods merely because they hold the railway receipt (Ex. 1). Thus, the second contention of Mr. Pal must be upheld by holding that the plaintiffs under the ordinary rule have no right to sue the Railway Administration, such right having resided with the consignor under the contract of carriage.

8. It is next to be seen if the plaintiffs are the owners of the consignment. On a perusal of the plaint, it is clear that there is not a single line in assertion of their title to the consignment. The plaintiffs have, however, led evidence in the case to the effect that their agent had been to Calcutta and paid the price of the consignment to the consignor. On the basis of such evidence the lower appellate court has reached a finding as to the existence of the title in the goods with the plaintiffs. Such evidence on behalf of the plaintiffs should not have been admitted at all. As already stated, the plaintiffs absolutely made no case of purchase of goods before its booking. I think, it is well settled that where a party has failed to set up a case in his pleadings he is debarred from leading evidence in its support at the stage of trial. Thus the plaintiffs having omitted to plead a case that they obtained title to the goods at Calcutta on paying full price for it, through their agent, to the consignor, evidence in that regard should not have been allowed to be led and if led should not have been considered. If that part of evidence is discarded the finding of the lower appellate court that the plaintiffs have title to the goods cannot stand. Even if such evidence, though inadmissible is accepted, I, on perusal of the same, am in entire agreement with the trial court that the plaintiffs have failed to prove their title to the goods. The trial court disbelieved the payment of price on the ground, inter alia, that the story of payment was never set forth either in Section 80 notice or in the plaint. The finding of the trial Court in that respect is a likely finding which a reasonable man could reach on the evidence on record, and in such circumstances, it was not open to the appellate court to reverse it merely because another finding is possible and that he has the jurisdiction to scan the evidence like that of a trial court and that he is inclined to take a different view of evidence. The appellate court will be entitled to reverse a finding of fact of the trial court in case he is of opinion that the dealing with the evidence of the trial court is either wholly untenable or perverse or is vitiated by manifest errors.

9. Alternatively, the plaintiffs fall back on Section 23 of the Indian Sale of Goods Act in support of their title to the goods. Sub-section (1) of Section 23 of the

Sale of Goods Act runs as follows:--

"Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are conditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

For application of the provision of law various factual elements comprised therein must be established. Far from proving those elements, they have not even been averred in the plaint. It is also settled law that in absence of pleadings or issues regarding passing of title u/s 23 of the Sale of Goods Act, such a case cannot be decided. For the aforesaid reasons, I am of opinion that the plaintiffs have failed to prove their title to the goods and as such they have no right to sue the Railways.

10. In the result, therefore, the appeal is allowed, decision of the lower appellate court is set aside and that of the trial court restored. The defendant is entitled to cost throughout.