(1993) 10 MAD CK 0038

In the Madras High Court

Union of India (UOI) APPELLANT

Vs

United Tractors and Another RESPONDENT

Date of Decision : 05-10-1993

Acts Referred:
Railways Act, 1890 — Section 78B

Citation : (1994) 1 MLJ 590

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The defendant, who has suffered a decree for a sum of Rs. 92,628.76 in the trial court, has preferred this appeal. The

defendant is Union of India, owning the Southern Railway, represented by its General Manager. The respondents filed the suit O.S. No. 153 of

1980 making the following claim. Twelve consignments, each consisting of 3 Nos. M.F.1035 Tractor, were entrusted to the railway administration

between April and December, 1977 at Madras by M/s. Tractors and Farm Equipments Limited, Madras (TAFE Ltd.), the consignor for safe

carriage by rail to Gorakpur. The 1st respondent/1st plaintiff is the consignee. The consignments were delivered to the 1st plaintiff in a damaged

condition resulting in damage and shortage to each consignment. The 1st plaintiff has suffered a loss of Rs. 92,628.76 in all. The details are set out

in the plaint. On demand, the railway effected open delivery noting the damage and shortage at the time of delivery. The loss occurred only due to

the negligence and/or misconduct on the part of the employees of the railway administration and the defendant is, therefore, liable in law to make

good the loss suffered by the 1st plaintiff. In spite of notice u/s 80, C.P.C., the defendant has failed to comply with the demand. The 2nd plaintiff is insurer of the consignments and it has settled the claim with the 1st plaintiff. Thus, the 2nd plaintiff has subrogated to the rights of the 1st plaintiff.

The suit is, however, filed by both the plaintiffs in order to avoid any technical defence which may be taken by the defendant. Thus the plaintiffs

have claimed a decree for a sum of Rs. 92,628.76 with interest at 6% per annum from the date of plaint.

2. In the written statement, the defendant raised the following pleas. The suit is not maintainable. 11 is denied that the 1st plaintiff is a firm

registered under the provisions of law and the plaintiffs should strictly prove the same. Right and title of the 2nd plaintiff is denied. M/s. TAFE Ltd.,

consigned three tractors under different invoice numbers and the fittings were not packed separately as expressly declared by the consignor in the

Forwarding Note executed by it. The following remark is made in the Forwarding Note:

Detachable parts not packed separately.

The consignor, who is a party to contract, accepted the railway receipt with the above remark without demur. The tractors were taken with all

care and caution in the same wagon to the destination without any delay or handing by the railway staff. At the destination they were unloaded by

the consignee. There was no negligence or misconduct on the part of the railway administration. The consignor, who is a party to the contract, can

alone maintain the suit and it is not open to the plaintiffs to file the suit. Valid claims were not made u/s 78(b) read with Section 140 of the Indian

Railways Act. Notice u/s 80, C.P.C. is not valid. The suit claim is without any basis, highly exaggerated the inadmissible. Hence, the suit should be

dismissed.

3. The plaintiffs filed as many as 72 documents and examined two witnesses. The first witness is the employee of the Insurance Company, the 2nd

plaintiff. The second witness is a supervisor in the consignor company, viz. TAFE Ltd. The defendant filed 24 documents comprising of forward

notes and railway receipts. The defendant has not examined any witness. The trial court found all issues in favour of the plaintiffs and negatived the

contentions of the defendant. Consequently, a decree was granted to the plaintiffs by the trial court after deducting a sum of Rs. 600 from the claim

made in the plaint.

4. In this appeal, learned Counsel for the appellant has raised seven contentions. We will deal with them in seriatim. The first contention is that the

1st plaintiff has not proved that it is a registered partnership firm and that the person who signed the plaint is a partner. Whose name has been

entered in the register. Reliance is placed on the judgments of the Nagpur High Court in Kapurchand Bhagaji Firm v. Laxman Trimbak and Ors.

AIR 1952 Nag. 57 and Delhi High Court in Shankar Housing Corporation v. Smt. Mohan Devi and Ors. AIR 1978 Del. 255, for the purpose of

contending that the person who is filing the suit must be shown as a partner in the register of firms. There is no merit in this contention. Ex. A-72 is

the photostat copy of the registration certificate of the 1st plaintiff firm. That proves that the 1st plaintiff firm has been registered and the person

who has signed the plaint on behalf of the 1st plaintiff firm is a partner thereof. The plaint has been signed by Sri Amar Pal Singh. The said person

is shown as a partner of the 1st plaintiff firm in Ex. A-72. Hence the contention of the appellant in this regard is rejected.

5. The second contention is that the suit can be maintained only by the consignor as the contract is only with the consignor and the consignee

cannot maintain the suit. In paragraph 8 of the written statement it is stated that the consignor who was a party to the contract of carriage alone is

entitled to file the suit against the defendant for recovery of damages, if any. It is contended that there is no evidence at all before the court to show

that the consignor has become the owner of the goods and that it could maintain the suit on the basis of such ownership. Learned Counsel submits

that the claim bills (Exs. A-48 to A-59) do not make out a case of ownership being with the consignee, the 1st plaintiff. Our attention is drawn to

the judgment of the Supreme Court in Union of India (UOI) Vs. West Punjab Factories Ltd., . The Supreme Court said in that case, ""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 will have to be decided on other evidence. It is quite possible for the consignor to retain title in

the goods himself while the consignment is booked in the name of another person."" In the present case, Ex. A-1, Ex. A-3, Ex. A-5, Ex. A-7, Ex.

A-9, Ex. A-11, Ex. A-13, Ex. A-15, Ex. A-17, Ex. A-19, Ex. A-21 and Ex. A-23 are invoices issued by the consignor to the 1st plaintiff. They contain the endorsement that the goods are sold and on the top of the each invoice, the following expression is found.

Sold to Union Tractors, Gorakpur.

That is more than sufficient to show that the goods have been sold and the title has passed to the consignee, the 1st plaintiff. Learned Counsel for

the respondents invites our attention to Section 57 of the Indian Railways Act, 1890. Under that section, where any goods or sale proceeds in the

possession of a railway administration are claimed by two or more persons, or the ticket or receipt given for the goods is not forthcoming, the

railway administration may withhold delivery of the goods or sale proceeds until the person entitled in its opinion to receive them has given an

indemnity to the satisfaction of the railway administration against the claims of any other person with respect to the goods or sale-proceeds.

Learned Counsel submits that all the railway receipts have been produced in the present case by the 1st plaintiff. Hence, the railway administration

is bound to deliver goods to the 1st plaintiff. As a matter of fact, the goods were delivered to the 1st plaintiff under open delivery certificates.

Hence, there is no merit in the contention that the title in the goods has not passed to the consignee, the 1st plaintiff.

6. There is also no substance in the contention that it is only the contracting party who can maintain the suit. If a suit is based on the contract, then it

has to be filed by the person who entered into the contract. But a suit can be based on the tort also. In the case of damage to or loss of goods,

there can be two kinds of suits, one based on contract and the other on tort. In Kalasami Nadar v. Ponnuswami Mudaliar and Ors. AIR 1962

Mad. 44 : (1961) 74 L.W. 495 : ILR 1961 Mad. 1091, a Division Bench of this Court said, ""the claim is made by the consignor himself, who

entered into a contract with the appellant for the carriage of the goods from Koilpatti to Coimbatore which having regard to the nature of the

business of the appellant implied a safe carriage of the goods. A breach of that obligation would be a breach of contract. It may be, that by virtue

of the public employment of the appellant and the nature of his obligations, he would be liable in tort. That would only mean that so far as the

consignor is concerned, he can at his option sue on contract or on tort. But where the claim is made by the consignee, the position might be different as he not being a party to the contract of carriage made by the consignor, will not be able to enforce a contractual obligation but can only

sue on tort."" In the present case, we have no doubt that the plaint is based on tort. The 1st plaintiff having obtained the ownership of the goods is

entitled to sue on tort for the damage caused to it as against the defendant. Consequently, the suit filed by the plaintiffs herein is maintainable.

7. The third contention is that the forward notices contain an endorsement that detachable parts are not packed separately. It is seen from Ex. B-1,

Ex. B-3, Ex. B-9etc. that such endorsement is made on each forward note. The contention is that the goods have been booked at owner''s risk

rate. The consignor has not booked the goods at the railway risk rate, but has availed of the concessional rate, i.e. owner''s risk rate. It is therefore

contended that as per the Railway Goods Tariff, if such parts are missing, the railway administration is not responsible in cases of goods which are

being carried at owner''s risk rate. The goods Tariff No. 33, which was in force from 1.2.1971, contains relevant rule at page Nos. 319 and 320.

The article referred to therein is Motor tractors. As per column 1, it includes motor tractors in knocked down condition. The note at the bottom

reads thus:

Railways accept no liability for detachable fittings such as rubber mats, spare lyres, lamps, inflators, tools, bells, etc. unless they are securely

packed in cases and entered on the railway receipt. Detachable fittings in cases will be carried in the same truck as the motor tractors, no charge

being levied provided they form part of the motor tractor or tractors with which they are loaded, and the total weight of detachable fittings and the

motor tractor or tractors does not exceed the prescribed minimum weight for charge laid down above.

In the Goods Tariff No. 35, which was in force from 1st September, 1976, a similar entry is found at page Nos. 119 and 200 and there is no

difference whatever in the language and hence it is not necessary to repeat the same. However, in the Goods Tariff No. 36, which came into force

from 1st November, 1980, a change is introduced in the note at page No. 203. The note includes batteries, dynamos, cut-outs in addition to

rubber mats, spare tyres, lamps, inflators, tools, bells, etc. which were already mentioned in the previous tariffs. In the Goods Tariff No. 37, which came into force from 1st July, 1982 the entry is similar to the one found in Goods Tariff No. 36. Relying on the goods Tariff Nos. 36 and 37 of

1980 and 1982, learned Counsel for the appellant contends that dynamos, cut-outs and batteries are also detachable fittings and they were

detachable throughout and it is not as if they became detachable only in 1980 for the first time. According to him, the parts which were mentioned

in Goods Tariffs of the years 1971 and 1976 should be deemed to include dynamos, cutouts and batteries even though they are not expressly

mentioned. It is argued that the items mentioned therein are only illustrative and not exhaustive. Learned Counsel contends that the railway

administration cannot be made liable for the missing parts, viz. dynamos, cut-outs and batteries. It is contended by him that the express

endorsement made on the forward notes that detachable parts are not packed separately would clearly show that the railway cannot be made

liable for loss of such parts. If the consignor wanted the railway administration to be accountable for the loss of such parts, he ought to have

packed them separately and got them entered in the railway receipt. In the absence of such entry in the railway receipt, it is not open to the

consignor or the consignee to make a claim for the loss of such part. Thus according to him the liability for the loss or damage to such parts is

excluded expressly by the contract itself. We are unable to accept this contention. As pointed out already, the goods tariffs, which came into force

in 1971 and 1976 did not include batteries, dynamos and cut-outs. For the first time they were included only in 1980 and continued in 1982. We

are considering in the present case consignments of 1977 when the tariff of 1976 was in force. When the railway administration has chosen to omit

those items in the earlier tariffs, they cannot now contend that they have no liability with regard to those items even for the prior consignments. The

liability was excluded if at all only from the year 1980 and later on and not for the earlier periods.

8. It is also rightly pointed out by learned Counsel for the respondents that the expression used in the tariff is ''fittings'' and not ''parts''. It is argued

that in the present case the parts which are missing are essential parts of the tractors, without which a tractor cannot be called a tractor at all. The

tractors cannot be used unless those parts are fitted in the tractors. Our attention is also drawn to the definition of the word ''fittings'' in Webster''s

New Twentieth Century Dictionary, 2nd Edition at page No. 694, wherein it is defined as ""the fixtures, furnishings or decorations of a house,

office, automobile, etc."" In Black''s Law Dictionary, 6th Edtn. at page 1117 the word ''part'' is defined as ""an integral portion, something essentially

belonging to a larger whole; that which together with another or others make up a whole."" The tariff has deliberately used the expression ''fittings''

and not the expression ''parts''. Hence the contention that dynamos, cut-outs and batteries could be treated as fittings and not as parts for the

purpose of the tariff cannot be accepted. That is why the railway administration has chosen to include them specifically in Goods Tariff 1980 as

they would not by themselves be treated as fillings.

9. Learned Counsel for the respondents relies on the judgments in Jalim Singh Katary v. The Secretary of Slate of India in Council ILR 31 Cal.

951 : 8 C.W.N. 725 and Ramachandra Natha v. The Great Indian Peninsular Railway ILR 39 Bom. 485 and contends that the tariff cannot

override the statutory provisions of the Railways Act and if there is a provision in the tariff exempting the Railways from liability for loss of such

goods, the said provision will be invalid in law. It is not necessary for us to consider that aspect of the matter. On the facts of this case we hold that

the parts which are lost in transil cannot be considered to be detachable fittings within the expression used in the tariff.

10. There is no substance in the contention that these parts ought to have been packed separately and kept in the tractors. It is in evidence that the

tractors were driven to the railway yard before they were loaded into the wagon. Hence, the tractors were in running condition and the consignor

did not want to remove the essential parts thereof. Obviously, the consignor wanted the tractors to be delivered at the place of destination in

running condition and hence the tractors were left intact inside the wagon and that will not absolve the railway from their liability to pay for the loss

or damage caused.

11. The next contention urged by learned Counsel is that onus is on the plaintiffs to prove negligence on the part of the railway administration.

According to him, in the present case, there is absolutely no evidence to prove such negligence. It is contended that the open delivery certificates

issued by the railways and produced by the plaintiffs will not prove any negligence on the part of the railway. Reliance is placed on Section 74 of

the Railway Act. Sub-section (3) of Section 74 is the relevant provision for this case. It reads thus:

When any goods are deemed to have been tendered to be carried, or are carried, at the owner''s risk rate, then, notwithstanding anything

contained in Section 73, the railway administration shall not be responsible for any loss, destruction, damage, deterioration or non delivery in

transit, of such goods from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non delivery was due to

negligence or misconduct on the part of the railway administration or of any of its servants.

It is contended that in the present case the burden has not been discharged by the plaintiffs and the railway administration cannot be made liable.

12. Section 74(3) must be taken along with Section 73 and Section 76(f) of the Act for the purpose of construction. Section 73 is a general

section, which speaks about the general responsibility of the railway administration as a carrier of animal and goods. According to the provisions of

Section 73, the railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, arising from

any cause except the causes set out therein. Nine causes have been set out in that section and they are the only exceptions. If the loss, destruction,

damage, deterioration or non-delivery is occasioned on account of any other cause other than those mentioned in Section 73, the railway

administration will be liable. There is, however, a proviso to Section 73, according to which, even where such loss, destruction, damage,

determination or non-delivery is proved to have arisen from any one or more of the aforesaid causes, i.e. causes set out in Section 73, the railway

administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration

further proves that it has used reasonable foresight and care in the carriage of the animals or goods. Thus, the burden is thrown on the railway

administration to prove that it has exercised reasonable foresight and care in carrying the goods. Section 74(3) is a sort of exception to Section 73.

In the present case, the goods were carried at owners'' risk rate and therefore, the burden is on the plaintiffs to prove that there has been negligence or misconduct on the part of the railway administration. But Section 76(f) brings in a further exception to Section 74. That Section reads

as follows:

76-F Burden of proving miscounduct in case of non-delivery or pilferage in transit of goods carried at owner''s risk rate. - Notwithstanding

anything contained in Section 74-

(a) Where the whole of a consignment of goods, or the whole of any package forming part of a consignment, carried at owner''s risk rate is not

delivered to the consignee and such non-delivery is not proved by the railway administration to have been due to fire or to any accident to the train,

or

(b) Where, in respect of any consignment of goods or of any package which had been covered or protected that the covering or protection was

not readily removable by hand, it is pointed out to the railway administration on or before delivery that any part of such consignment or package

had been pilfered in transit,

the railway administration shall be bound to disclose to the consignor how the consignment or the package was dealt with throughout the time it

was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly

inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor.

13. Under Clause (b) of Section 76-F, if in respect of any consignment of goods or of any package which had been covered or protected in such

a way that the covering or protection is not readily removable by hand, the railway administration shall be bound to disclose to the consignor how

the consignment or the package was dealt with throughout the time it was in its possession or control in the event of pilferage in transit. In the

present case, the evidence shows that the tractors were packed properly with wooden planks and they cannot be removed easily by hand. At the

place of destination, the consignment was found in a pilfered and damaged condition. Ex. A-2, Ex. A-4, Ex. A-6, etc. which are open delivery

certificates clearly show that the tractors, when they reached the place of destination, were found in pilfered and parts missing condition. Thus,

Clause (b) of Section 76-F would automatically come into play in the present case. Hence, it is necessary for the railways to disclose to the

consignor how the consignment or the package was dealt with throughout the time it was in its possession or control. Learned Counsel for the

appellant contends that the present suit has been filed only by the consignee and not by the consignor and, therefore, Section 76-F would not

apply. There is no substance in this contention. Section 76-F does not contemplate the filing of the suit. The question will arise as soon as the

packages are found in a pilfered condition. In all such cases the railway administration shall be bound to disclose to the consignor how the

consignment or the package was dealt with.

14. Learned Counsel refers to the judgment of the Supreme Court in Union of India (UOI) Vs. Mahadeolal Prabhudayal, . It is held in that case

that the disclosure before the filing of the suit has to be made only when there is a demand by the consignor. But once the suit is filed, the disclosure

has to be made in the written statement or in the evidence. If it is not made then it is for the court to consider whether inference should be drawn

from the evidence on record. The judgment of the Supreme Court in Union of India (UOI) Vs. Mahadeolal Prabhudayal, has been followed in

Firm Kesrimal Ratanlal Sarda and Co. Vs. Union of India (UOI), , in which also it is stated that a demand should be made before the disclosure is

called for. But both the cases cited supra refer to the disclosure prior to the filing of the suit. In Union of India (UOI) Vs. Mahadeolal Prabhudayal,

, the Supreme Court has pointed out that once the suit is filed either by the consignor or by the consignee, it is for the railway administration in the

first instance to substantiate the disclosure which might have been made before the litigation or which might have been made in the written

statement in reply to the plaint. In that case, it is said, ""when the railway administration has given its evidence in proof of the disclosure and the

plaintiff is not satisfied with the disclosure made in the evidence, the plaintiff is entitled to ask the court to call upon the railway to fulfil its obligation

under the contract and the railway should then have the opportunity of meeting the demands of the plaintiff before its case is closed. Thus, in

addition to the evidence that the railway may adduce on its own (and in doing so the railway has necessarily to keep in mind the provisions of

Section 14 of the Indian Evidence Act) the plaintiff can and should draw the attention of the court if he feels that full disclosure has not been made.

In that case he can ask the court to require the railway to make further disclosure and should tell the court what further disclosure he wants. It is

then for the court to decide whether the further disclosure desired by the plaintiff should be made by the railway, and if the court decides that such

further disclosure should be made the railway has to make such further disclosure as the court orders it to make on the request of the plaintiff. If the

railway fails to take the opportunity so given to satisfy the demands of the plaintiff, endorsed by the court, the railway would be in breach of its

contractual obligation of disclosure. It is at this stage, therefore, that the railway can be truly said to be in breach of its contractual obligation of

disclosure and that breach arises because the railway failed to disclose matters which the court on the request of the plaintiff asks it to disclose.

15. In the present case, the appellant has not chosen to make a disclosure either before the filing of the suit or in the written statement. Nor has it

adduced any evidence whatever at the time of trial to disclose how it dealt with the goods. Hence the initial burden, which is on the appellant u/s

76-F of the Act, has not been discharged by the appellant. If the appellant had disclosed how it dealt with the goods then the question would be

whether negligence or misconduct could be inferred fairly from such disclosure. When the appellant failed to make such disclosure, it goes without

saying that inference of negligence or misconduct can be drawn as against the appellant.

16. The responsibility of the railways is that of a bailee and it has to discharge its duties as a bailee. If it fails to do so, it has to be made liable for

the loss of or damage to goods. This question was considered under the provisions of the old Railways Act in Ramakrishna Ramnath Shop v.

Union of India AIR 1960 Bom. 344 and the court said, ""in cases to which Section 74-C of the Railways Act is applicable the burden of proving

misconduct or negligence is of course on the plaintiff, but as observed by the Privy Council in Dwarkanath v. Rivers Steam Navigation Co. (1917)

20 Bom.L.R. 735 : AIR 1917 P.C. 173 u/s 106 of the Indian Evidence Act the bailee should call all the material witnesses to prove the facts

which were within the special knowledge of the bailee. As observed in Union of India v. Parikh Shankarlal Jethalal AIR 1956 Nag. 255, the law does not cast any burden upon the Administration to establish positively how the loss or damage occurred, and to prove an absence of negligence

on their part. But a duty is cast on the administration to lay all the materials concerning the occurrence before the court; but even so it remains for

the consignee to satisfy the court that the true inference from the materials is that the carrier''s servants have not shown due care, skill and nerve.

17. As observed in Asaram Gangaram v. Union of India New Delhi AIR 1957 Nag. 59:

It is no doubt true that if is always for the plaintiff to prove that the loss was caused by the neglect or negligence of the railway administration. But

when the court has the evidence that the goods had deteriorated while in the custody of the Railway Administration there is & prima facie case of

negligence for the railway administration to answer. Under Sec 106 of the Evidence Act, the special facts and circumstances under which the

consignment was handled are only known to the railway administration, and therefore, it is for them to place that material before the court for

forming its opinion on the question whether it had taken as much care of the goods as is required of them. The railway administration should place

material before the court from which it could be inferred how the consignment was dealt with, in order to ascertain whether the railway

administration took as much care as is required of them, being bailes of the goods under Sections 151, 152 and 161 of the Contract Act

18. In Union of India v. Radhakisan Ramnath AIR 1969 Bom. 7, Sections 74(A) and 74(C) were considered and the Court observed as follows:

The learned Counsel then contended that the plaintiff had not discharged the burden of proof laid upon him by Sections 74-A and 74-C.

According to him the forwarding note had an endorsement with regard to the nature of the packing and that endorsement showed that it was a

gunny bag packing and that the goods were to be transported at the risk of the consignor. There is no evidence in this case even to indicate that the

damage in respect of which the plaintiff has sued the railway administration has resulted from a defective packing. As I have already stated before,

if the railway administration wants to take protection u/s 74-A of the act, it must be shown that the goods were liable to deterioration, leakage,

wastage or damage in transit as a result of the defective packing. In other words, it is only when the damage complained of has resulted from a defective packing and in addition to this such defective packing is recorded by a sender in the forwarding note then only it is the duty of the plain

tiff to show that the railway administration is guilty of negligence or misconduct. But if in a given case the damage is not in any way related to or is

not a consequence of the defective packing, obviously the condition necessary for the operation of Section 74-A is not fulfilled. In the instant case,

therefore, even assuming that the alleged endorsement in the forwarding note amounts to an admission of the consignor that the packing was a

defective packing, it is not the defendant''s case, or it is at least not proved, that but for such a defective packing the goods would not have been

damaged. On the other hand the plea of the defendant railway administration is that the water which damaged the consignment must have gone

through the door flaps. In this case, the damage is caused by an external agency. It is not the case of the defendants that any defective packing was

the cause of the damage caused to the consignment. It is not established in this case that the damage to the consignment was a result of any

defective packing and in my view the instant case is not at all governed by the provisions of Section 74-A of the Act.

19. Section 74-D of the old Act came up for consideration before the Supreme Court in Union of India (UOI) Vs. Brijlal Purshottamdas, . The

court observed that ""Section 74-D envisages a disclosure in the form of a precise statement of how the consignment was dealt with by the

administration followed by evidence at the trial in proof of the statement. The section clearly contemplates that on this matter the administration

should submit its evidence first at the trial, and it is only when negligence or misconduct cannot fairly be inferred from such evidence that the burden

of proving the negligence or misconduct shifts to the consignor."" Section 74-D of the old Act corresponds to Section 76-F of the present Act. It is

also said that ""if the written statement filed by the administration discloses facts which show that in the common course of events the loss would not

have happened if proper care had been taken, a presumption of negligence is raised and it is for the administration to rebut it by contrary evidence.

In the absence of such evidence the court may draw the inference that the loss was caused by the negligence of the administration.

20. In Firm of T. Muddu Veerappa Sons and K.H. Veeranna Setty v. Union of India and Anr. the court considered Section 73 and Section 77-C

of the Act. The relevant part of the judgment reads thus;

To begin with, let us look at Section 77-C of the Act. It refers to two circumstances, one of which is a defective condition of the goods and

another as defective or improper packing as a consequence of which they are liable to damage, deterioration, leakage or wastage. The tact of such

defective packing must be recorded by the sender or his agent in the forwarding note. Then, in a such a case, notwithstanding anything contained in

the provisions of Chapter VII, the railway administration shall not be responsible for any damage, deterioration, leakage or wastage, except upon

proof of negligence or misconduct on the part of the railway administration or any of the servants. But the plaintiff claims compensation for the loss

due to pilferage. Can such a loss be brought within the meaning of the expression damage, deterioration, leakage or wastage? Can a loss due to

pilferage be directly attributable to any defective or improper packing? Can a defective packing of the goods, protect the railways against its

liability for loss due to pilferage? I think not. It seems to me that the said section was obviously intended to cover the cases of damage,

deterioration, leakage or wasting either due to the defective condition of the goods or due to its defective or improper this defective or improper

packing. It cannot cover loss due to pilferage. Pilferage meant stealing in small quantities. The loss or shortage resulting by such stealing in my

judgment, cannot be said to be a damage or deterioration, leakage or wastage of the goods.

In Union of India (UOI) Vs. Laduram Fakirchand, , a similar ruling was given u/s 77-C of the Act.

21. As already stated in the present case, the appellant has not chosen to disclose the facts in the written statement. For has it adduced any

evidence whatever at the time of trial. Thus it has not discharged the burden cast on it by Section 76-F. Therefore, the only inference that can be

drawn by the court is that the appellant is guilty of negligence and misconduct due to which loss and damage have occurred.

22. The next contention of learned Counsel for the appellant is that there is no proof whatever of the entrustment of the parts which are missing.

According to learned Counsel if the parts had been separately packed and entered in the railway receipts that would have been evidence of such entrustment. It is contended that in the present case there is no evidence of such entrustment. There is no merit in this condition. The railway

receipts show that the tractors as a whole were entrusted to the railways for carriage. If any parts had been kept loosely they should have been

described. But in the present case, admittedly no part was kept loosely and the tractors were in running condition at the time of entrustment. P.W.

2 has given evidence that the tractors were in running condition and they were driven to the railway yard for the purpose of loading into the wagon.

Hence all the parts were intact in the tractors at the time they were booked for carriage. Hence, it cannot be contended that there is no separate

proof of entrustment of the parts. Reliance is placed by learned Counsel for the appellant on the judgment of Justice Shanmukham in North Bengal

Tractors and Farm Machinery and Anr. v. Union of India owning Southern Railway represented by its General Manager, C.S. No. 264 of 1980

dated 28.3.1980, a perusal of the said judgment shows that it was decided on the facts of that case. It cannot be utilised for the present case to

support the contention of the appellant that there is no proof of entrustment. Once the tractors were entrusted to the railway administration in

running condition, it is presumed in the normal course that the tractors were intact. If the tractors were in knocked-down condition at the time of

entrustment for carriage that should have been noted in the railway receipts. In the absence of such entry in the railway receipts, it has to be

inferred that tractors were entrusted to the railway administration in running condition with all its parts in tact and there is no necessity for proof of

separate entrustment of the parts.

23. Next contention is there is no evidence of the value of the missing goods. Learned Counsel submits that the relevant bills have not been

produced and no acceptable evidence is adduced before the court to show parts which are missing were of such value. Exs. A-48 to A-59 are the

claim bills sent by the plaintiffs to which copies of Exs. A-60 to A-71 have been attached. Exs. A-60 to A-71 are the price-lists to prove the value

of the parts. The claim bills are connected with the railway receipts. The trial court has considered this aspect of the matter in great detail in

paragraphs 15 to 27. With regard to each item, the trial court has referred to various documents produced on the side of the plaintiffs and the evidence in connection therewith. In view of the fact that the trial court discussed the same in detail, we do not think it necessary to repeat it here.

However, we will advert to one item/by way of illustration. Learned Counsel for the appellant drew our attention to Ex. A-60 and submitted that

Ex. A-60 is said to be a price-list. But it does not contain the date or the railway receipt number. According to him it is not connected with the

parts which are said to be missing as shown in the open delivery certificate. There is no merit in this contention. Ex. A-60 is connected with Ex. A-

57. Ex. A-57 is the claim bill made by the plaintiffs on 21.12.1977. That has been forwarded to the defendant under Ex. A-36. A copy of Ex. A-

60 is attached to Ex. A-57. That shows clearly the number of the missing parts, the description of the parts and the various marks of identification.

It also gives the rate and the net value of the parts. For example, dynamo assembly bears the No. 22741. The total quantity is 3. The value is Rs.

1,220.64. The bill refers to railway receipt number as No. 5/999836 dated 16.11.1977. Thus Ex. A-60 if taken along with Ex. A-57 would make

out clearly that the parts which are missing are of the specific value mentioned therein. The parts are identifiable from the two documents and their

prices are clearly given. There is no substance in the contention of the appellant that the manufacturers have not gone into the box to give evidence

as to when exactly those parts were manufactured or whether the parts were imported or indigenous. As said already the learned trial Judge has

taken pains to refer to the documents relating to each of the items and we do not find any necessity to repeat them. A perusal of paragraphs 15 to

27 of the trial court judgment convince us that the trial Judge has taken the correct view in regard to the value of the goods. Hence we hold that the

plaintiffs have adduced sufficient evidence and conclusively proved the value of the parts which are lost or missing.

24. The last contention of learned Counsel for the appellant is that no claim was made as required by Section 78-B of the Railways Act within six

months from the date of delivery of the goods for carriage by railway. This contention is applicable only with regard to items 7,8 and 11. The

contention is that with regard to all the items, the plaintiffs have produced Exs. A-30 to A-38. The replies issued to them by the railways are

marked as Exs. A-39 to A-47. There is no reply to Ex. A-33, Ex. A-34 and Ex. A-37. It is therefore argued that if such claim had been made, the railways would have sent replies. In the absence of any proof produced by the plaintiffs that claims were sent to the railways and they reached

them, it should be held that no such claim was made by the plaintiffs. We are unable to accept this contention. We find from the documents, Exs.

A-27 to A-38, that with regard to each consignment claims have been made immediately by the 1st plaintiff and in reply thereto the railways have

been sending their replies. Just because replies with regard to three of the claims are not available to be produced before court, it does not mean

that no such claim was made. Apart from this P.W. 1 has given evidence that Exs. A-27 to A-38 were forwarded to the defendants. There is no

suggestion in the cross-examination that the claims under Ex. A-33, Ex. A-34 and Ex. A-37 were not sent to the defendant. There is no question in

the cross-examination with regard to the same. As pointed out already the defendant has not chosen to let in any evidence on its side. Hence, in the

absence of any evidence on the side of the defendant, the court is entitled to accept the evidence of P.W. 1 and hold that claims have been made

u/s 78-B of the Act within the prescribed time. As contended by the plaintiffs the trial court has rightly accepted the case of the plaintiffs and held

that Section 78-B of the Act has been complied with in the present case. We have no hesitation to affirm the said finding and to hold that the

requirements of Section 78-B of the Act have been fulfilled in the present case.

25. For the above reasons, all the contentions urged by learned Counsel for the appellant are negatived. The appeal fails and it is dismissed with

costs.

