Jetmull Bhojraj

Vs

The Darjeeling Himalayan Railway Co. Ltd. and Others

Civil Appeal No. 402 of 1959

(A. K. Sarkar, K. Subha Rao, J. M. Mudholkar JJ)

02.05.1962

JUDGMENT

SARKAR, J. –

This appeal arises out of a suit for recovery of damages in respect of 90 bales out of 259 bales of cloth delivered on May 10, 1946, at Wadi Bunder station on the Great Indian Peninsula Railway, hereafter called the G.I.P. Railway, to be carried from there to Giellekhola a station on the Darjeeling Himalayan Railway, hereafter called the D.H. Railway. In order to reach Giellekhola the goods had to be carried over four railways, namely, the G.I.P. Railway, East Indian Railway, hereafter called the E.I. Railway, the Bengal Assam Railway, hereafter called the B.A. Railway and the D.H. Railway. The goods had been booked through to be carried over all these railways. At all material times the railways other than the D.H. Railway, were owned by the Government of India, the D.H. Railway being owned by a private company. At some stage of the litigation the D.H. Railway Company went into liquidation and the liquidators were brought on the record.

On June, 7, 1946, 169 bales were delivered to the appellant to whom the Railway Receipt had been endorsed. Various correspondence thereafter ensued as to the remaining 90 bales with which alone the present litigation is concerned. About September 1946, the wagon containing the 90 bales was traced at a station called Gadkhali on the B.A. Railway. Further correspondence ensued and the 90 bales actually arrived at Giellekhola shortly prior to December 21, 1946, on which date, having found the consignment in a very damaged condition, the appellant requested the D.H. Railway to give open delivery. Thereafter on February 12, 1947, open delivery of the contents of the 90 bales was given to the appellant. At that time the damage done to the goods was assessed by agreement between the appellant, the B.A. Railway and the D.H. Railway at Rs. 27,920-13-6. The appellant thereafter on January 29, 1948, sent a notice under s. 80 of the Code of Civil Procedure to the Secretary of the Railway Department, Government of India, making a demand of Rs. 34,192 for damage suffered by it as a result of the negligences of the railways in carrying the goods. This sum was made up of the aforesaid sum of Rs. 27,920-13-6 and certain other sums on account of the difference between the ex-mill price and the retail price of the goods and of the refund of the railway freight. A demand for a similar sum was made on the D.H. Railway. This demand was repudiated by the railways. This appellant, therefore, on April 9, 1948, filed the suit for damages.

The Suit was decreed against the D.H. Railway only by the trial Court for Rs. 27,920-13-6. The D.H. Railway preferred an appeal against the judgment of the trial Court to the High Court at Calcutta. The appellant also filed a cross objection contending that the suit should have been decreed against all the railways and the decree should have been for the full amount claimed by it. The High Court allowed the appeal and dismissed the cross-objection. Hence the present appeal.

It seems to me that there are two reasons why this appeal should fail. The first is that the suit was barred by limitation. This case is governed by Art. 30 of the Limitation Act which provides for a suit against a carrier for compensation for injuring goods, a period of one year from the date when the injury occurs. Now it seems to me that on the evidence produced in this case and the plaint it has to be held that the damage to the goods occurred before December 21, 1946. In the plaint the appellant stated, "Before the receipt of those bales at Giellekhola in December 1946 it was not possible for the plaintiff to know about the aforesaid damaged condition of those bales, but no sooner the same arrived the fact that the same arrived in hopelessly damaged condition was brought to the notice of the railway authorities concerned." On the same date, the appellant wrote to the Political Officer of Sikkim for whom it had purchased the cloth, stating, "we have been advised by our Tista Bridge agent that the consignment of 90 bales has now arrived at Geillekhola but the same has reached in a very damaged condition." Thirdly, there is a letter written sometime prior to January 29, 1947, by the appellant to the Political Officer of Sikkim, the precise date of which does not appear in the record, in which it stated, "It has been nearly one month the cloth arrived at Giellekhola in a hopeless condition and no further step is being taken by the railway. We beg therefore to request that steps may very kindly be taken to expedite the settlement of the same."

I think that these letters clearly establish that the damage had occurred prior to December 21, 1946. On this part of the case, the trial Court held that the damaged condition referred to in the correspondence "could only refer to the outward aspect and could in no sense refer to the real internal damage which certainly could not be ascertained unless the bales were opened and open delivery was given." It seems to me that the trial Court overlooked the fact that it was not the ascertainment of the damage by the appellant that is relevant for the purpose of deciding the question of limitation. What is relevant for that purpose is the fact of the happening of the damage. It has to be observed that this is not a case where it is alleged that the railways fraudulently concealed the damaged condition of the goods. The trial Court also overlooked the fact that in the plaint the appellant made the case that the damage had occurred prior to December, 1946. Lastly, the trial Court did not notice that in one of the letters to which I have referred in the preceding paragraph, the appellant expressly stated that the cloth, that is, the goods themselves, had been damaged in December, 1946. The open delivery was demanded by the appellant only to assess the quantum of the damage. That appears from the appellant's letter of December 21, 1946, to the Political Officer of Sikkim where it is stated, "We beg, therefore, to request you to kindly instruct the General Manager, D.H. Railway, Kurseong, telegraphically to give open delivery of the consignment and to give a reception for any loss the or damage." There is further nothing to show that any damage had occurred after December 21, 1946, and February 12, 1947, when open delivery was given to the appellant. It would be idle to contended that only the "outward aspect" of the bales had been damaged without their contents being damaged. Then it has to be remembered that the case made in the plaint is that the appellant came to know of the damaged condition of the bales on December 21, 1946. If it came to know of the damage then, the damage must have occurred before that date. The suit should, therefore, have been filed within the period of one year of the date when the damage occurred as provided in Art. 30 of the Limitation Act and a further period of two months, being the time requisite for the notice under s. 80 of the Code of Civil Procedure the benefit of which the appellant was entitled under s. 15(2) of the Limitation Act. As the damage must have occurred prior to December 21, 1946, the suit which was filed on April 9, 1948, was therefore, clearly out of time.

The other reason why the appeal should fail is that no notice under s. 77 of the Railways Act 1890, had been given. That section so far as material is in these terms.

S. 77. A person shall not be entitled.....to compensation for the loss, destruction or deterioration of .....goods delivered to be.....carried, unless his claim to the compensation has been preferred in writing by him or on his behalf to the railway administration, within six months from the date of the delivery of the.....goods for carriage by the railway.

The section requires a claim for compensation for the loss, destruction or deterioration of goods to be preferred to the railway administration within six months of the delivery of the railway for carriage. It is well settled that the section is mandatory. If a claim is not preferred within the time mentioned, it cannot be recovered from the railway, a suit for such recovery must be dismissed.

Now I do not find that any claim was preferred by the appellant on any of the railways at all within the prescribed period. There are no doubt certain letters written by the appellant to some of the railways including the D.H. Railway within that period but all that these letters did was to ask that an enquiry should be made by the railway administration to trace the missing 90 bales and that their delivery should be expedited. Not one of them contained any claim to compensation for deterioration of any goods. A request to trace goods and expedite their delivery is certainly not a claim to compensation in respect of them. The section requires such a claim to be preferred. I am unable to hold that a letter asking that a search for the goods be made and they be delivered is a compliance with s. 77. Such a letter would not only not be in terms of the section nor serve the purpose of the section. The object of the section is to prevent stale claims : see Governor-General in Council v. Musaddi Lal [(1961) 3 S.C.R. 647]. Now if no claim is made within the prescribed time, that object is not served. The letters in this case do not expressly contain any claim against the railway administration nor can they be said to amount to any claim by necessary implication. The view that I have taken appears to have been taken by some of the High Courts. In Salem Dayal Bagh Stores Ltd. v. The Governor-General in Council [[1947] 1 M.L.J. 152] Happell, J., said, "In my opinion, Ex. P 3 cannot be regarded as a notice satisfying the requirement of section 77. It makes no claim for compensation at all, and is merely a letter stating that the goods had not arrived and asking that enquires might be made." In Mardab Ali v. Union of India [(1953) 56 Bom. L.R. 150] it was observed that a letter intimating that nothing was known about the goods and requesting the railway administration to locate then was held not to satisfy s. 77. It was there observed that, "what is fatal to the argument is that in none of these letters there is an demand for compensation. A notification of a claim under s. 77 must of necessity contain a demand for compensation." No case taking a contrary view has been brought to our notice.

But it was said that in the present case it was impossible to prefer any claim foe damages for deterioration of goods within the period mentioned in s. 77 for the appellant had no knowledge that the goods had deteriorated till that period had expired. It was therefore contended that the maxim lex non cogit ad impossibilia aut iniutlia applied and the performance of the condition mentioned in the section should be dispensed with on account of impossibility of such performance. Reference was made to Maxwell on Interpretation of Statutes (10th ed.) p. 385 in support of this contention. Hence it was said that the claim in the present suit was maintainable though no claim might have been preferred to the railway administration as required by s. 77.

The contention proceeds on the basis of the impossibility of preferring the claim within the time mentioned in s. 77. But I think this is a misreading of the section. It does seem to me that its terms can ever be impossible of compliance. It requires that a claim to compensation for loss, destruction or deterioration of goods must be preferred within six months of the date of delivery of the goods to the railway. A claim has to be preferred within this period whether the person entitled to the goods is then aware that the goods have been lost, destroyed or damaged or not. If he is aware, there is, of

course, no impossibility of performance. If he is not aware, then also he must prefer a claim for if he does not, the section prevents him from recovering anything later. If it were not so, the section, which contains a mandatory provision for the protection of the railway administration would be rendered absolutely nugatory. Suppose the contention of the appellant was right. Then it might legitimately say in case of non-delivery of goods it was impossible for it to have made claim for their loss or destruction within the period of six months for it was not then aware that the goods had been lost or destroyed and would never be delivered to it. It seems to me impossible that the section intended such result. The section clearly contemplates than knowledge, a claim must be preferred within the time mentioned in it. If this is so in the case of loss or destruction of goods, it must equally be so in the case of damage to goods. Want of knowledge is irrelevant and does not make it impossible to prefer a claim. It is not as if that in the case of damage to goods a claim for any specific sum be made. The section does not require that. It would be enough if a claim for damages generally is preferred. So knowledge of the damage is not essential for compliance with the terms of the section. Indeed it seems to me that a claim for loss or destruction of goods would cover a claim for damage to goods if they were later delivered in a damaged condition. The greater would include the lesser.

The view that I have taken seems to me to serve the object of the section. As I have already said the object is to prevent stale claims. Its object, therefore, is that a claim should be made within the time prescribed so that the railway administration might make the necessary enquiries promptly and before the evidence concerning the claim was lost. It is not permissible to put such an interpretation on the section would defeat this object and that is what would happen if the appellant's contention was accepted.

Therefore, in my opinion, the appellant should have preferred a claim in this case in terms of s. 77. As it had not done so, its suit must fail.

For these reasons I would dismiss the appeal with costs.

MUDHOLKAR, J. –

This is an appeal upon a certificate granted by the High Court of Calcutta under Art. 133(1)(a) of the Constitution from its judgment reversing a decree for damages passed in favour of the appellant firm by the Subordinate Judge, Darjeeling.

The admitted fact are briefly these. The appellant had consigned 259 bales of cloth from Wadi-Bunder, a station on the Great Indian Peninsular Railway (now the Central Railway) to Geillekhola, a station on the Darjeeling Himalayan Railway (now in liquidation) on May 10, 1946. Out of these bales 169 reached the destination on or about June 7, 1946. As the remaining bales had not reached the destination the appellant sent a telegram on July 1, 1946, to the General Manager of the D.H. Railway requesting him to give early delivery of those bales. By a letter dated July 9, 1946, the appellant confirmed the telegram and requested the General Manager to see that the remaining bales reached the destination immediately. Thereafter some correspondence followed between the appellant and the Political Officer, Sikkim, to whom the bales were to be delivered by the appellant, and also between the Political Officer and the D.H. Railway administration. It is, however, not necessary to refer to this correspondence and to certain other correspondence which has been referred to in the statement of the case except to the letter dated December 21, 1946, addressed by the appellant to the D.H. Railway stating that they have come to know that the consignment had arrived at Giellekhola in "a very damaged condition" and requesting that open delivery of the

consignment be given immediately. Open delivery was given to the appellant's assistant manager, Tulsi Ram, P.W. 1, on February 12, 1947, by the Commercial Inspector, D.H. Railway. The damage was jointly assessed by the Commercial Inspector, D.H. Railway, and the Claims Inspector, Bengal Assam Railway, at Rs. 27,920-13-6 and the assessment list was signed by them as well as by Tulsi Ram. By a letter dated June 26, 1947, Mr. A.C. Chatterjee, Advocate, made a claim of Rs. 34,192 against the Manager of the B.A. Railway, the General Manager of the D.H. Railway and Messrs. Gillander Arbuthnot & Co., Managing Agents for D.H. Railway. On the same day Mr. Chatterjee sent a similar letter to the G.I.P. Railway administration. But the Superintendent of Claims of that Administration at Bombay repudiated the claim on the ground that it had not been preferred within six months from the date of booking as required by s. 77 of the Indian Railways Act, 1890 (Act IX of 1890). It may be mentioned that the consignment had to pass over the railway systems of G.I.P. Railway, East Indian Railway, Bengal Assam Railway, and Darjeeling Himalayan Railway. It does not appear that any notice was given to the E.I. Railway. As the appellant's claim was not settled, he instituted a suit in the court of Subordinate Judge, Darjeeling, on April 9, 1948. To that suit the Dominion of India, presumably as representing the G.I.P. Railway, E.I. Railway and the B.A. Railway was made defendant No. 1, the second defendant being the D.H. Railway.

The appellant's claim was denied by both the defendants. Two written statements were, however, filed by the Dominion of India, one as representing the G.I.P. Railway and the other as representing the E.I. Railway. The only contention in these written statements to which reference need be made is non-compliance with the provisions of the s. 77 of the Indian Railways Act.

The main contesting defendant was the D.H. Railway. We will refer to only those contentions raised by it which bear on the arguments advanced by it. The first of these contentions is that no notice as required by s. 77 of the Indian Railways Act claiming compensation for the damage to the 90 bales was given by the appellant to it within six months of the delivery of the consignment to the G.I.P. Railway. The second contention is that the suits was barred by limitation, having been instituted more than twelve months of the date of which damage had occurred.

The learned Subordinates Judge dismissed the suit in so far as the Dominion of India was concerned on the ground that no notice under s. 77 was given to the G.I.P. Railway administration the E.I. Railway administration or the B.A. Railway administration. He, however, held that the telegram dated July 1, 1946, and the letter dated July 9, 1946, addressed to the Manager of D.H. Railway amounted to sufficient compliance with the requirements of s. 77. He further held that the limitation for the suit is that prescribe by Art. 30 of the Limitation Act. According to his a suit instituted within one year from the date on which the loss was discovered by the plaintiff would be within time. On this finding the learned Subordinate Judge passed for a decree Rs. 26,920-13-6 against the second defendant and dismissed the suit against the first defendant.

The second defendant preferred an appeal before the High Court but shortly thereafter went into liquidation. Thereupon the liquidators were added as appellants. The plaintiff preferred cross-objection with respect to that part of claim which was dismissed. Eventually the plaintiff amended the cross-objection and sough a decree in the alternative against the G.I.P. Railway or the E.I. Railway.

The High Court allowed the appeal and dismissed the cross-objection upon the view that the provisions of s. 77 have not been complied with and that the suit which falls under Art. 31 of the Limitation Act was barred by time.

The first question to which we address ourselves is whether the appellant had complied with the requirements of s. 77 of the Railways Act. The relevant portion of that section reads thus :

> "A person shall not be entitled.....to compensation for the loss, destruction or deterioration of.....goods delivered to be so carried unless his claim to.....compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the.....goods for carriage by railway."

The High Courts in India have taken the view that the object of service of notice under this provision is essentially to enable the railway administration to make an enquiry and investigation as to whether the loss, destruction or deterioration was due to the consignor's laches or to the wilful neglect of the railway administration and its servants and further to prevent stale and possibly dishonest claims being made when owing to delay it may be practically impossible to trace the transaction or check the allegations made by the consignor. In this connection we may refer to a few of the decisions. They are Shamsul Huq v. Secretary of State [(1930) I.L.R. 57, Cal. 1286] Mahadeva Ayyar v. S.I. Railway Co. [(1921) I.L.R. 45, Mad. 135] Governor-General in Council v. G.S. Mills Ltd. [(1449) I.L.R. 28, Pat. 178], Meghaji Hirajee & Co., v. B.N. Railway Co. Ltd. [A.I.R. 1939 Nag. 141]. Bearing in mind the object of the section it has also been held by several High Courts that a notice under s. 77 should be liberally construed. In our opinion that would be the proper way of construing a notice under that section. In enacting the section the intention of the legislature must have been to afford only a protection to the railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the railways.

Bearing in mind these consideration we think that the letter of July 9, 1946 (Ex. 1 (y) which was sent within six months of booking the consignment amounts to a sufficient notice for the purpose of s. 77. The relevant portion of that letter reads thus :

> "We confirm our telegram sent to you reading as under on Ist inst. Invoice 5 tenth May, Wadi Bunder Geka part ninety bales not reached. Please reach urgently" and regret very much to inform you that we have as yet heard nothing in response thereto nor the part ninety bales haves reached destination. Will you, therefore, please take necessary action to cause the part consignment to reach destination immediately."

This letter clearly brings to the notice of the administration that 90 bales not of the consignment of 259 bales had not reached their destination. More than that by this letter the appellant requested the General Manager of the D.H. Railway to take appropriate action without delay. It is true that a claim for compensation has not been made by the appellant in this notice. In our view however such a claim must be deemed to be implied in the notice. The reason is obvious. Where a person says that his consignment has not been delivered as it should have been delivered according to the contract between him and the railway administration he must be regarded as making it clear the he would be holding the railway administration its contractual engagement which necessarily involves the payment of damages for breach of that engagement. In our opinion, therefore, not only the object underline s. 77 is satisfied by the letter dated July 9, 1946 but also a claim for compensation is implied in that letter.

Upon the language of s. 77 it would appear that a notice thereunder must be given to every railway administration against whom a suit is eventually filed. No such notice was given by the appellant to

the G.I.P. Railway administration or the E.I. Railway administration or the B.A. Railway administration within six months of booking the consignment and, therefore, in so far as they are concerned the suit must be held to have been rightly dismissed. That, however, would not held the second defendant. For, so far as this defendant is concerned as we have already held, a notice under s. 77 was given within six months from the date of booking.

The next question is with regard to limitation. According to the High Court Art. 31 applies to a suit of present nature. The first column of Art. 31 reads thus :

> "against a carrier for compensation for non-delivery of, or delay in delivering, goods."

Column 3 reads thus :

> "When the goods ought to be delivered." According to test learned Subordinate Judge the proper article is Art. 30, the first column of which reads thus :
>
> "Against a carrier for compensation for losing or injuring goods."

The third column reads thus :

> "When the loss or injury occurs."

It seems to us that the appropriate article would be Art. 30 and not Art. 31 because that the appellant is claiming is compensation for the damage to the goods which were eventually delivered. Even so, the question is what is the starting point of limitation. According to col. 3 the starting point would be the date of the loss or injury to the goods. Now when goods are consigned by a consignor he would not be in a position to know the precise date on which the loss or injury has occurred. In Union of India v. Amar Singh [[1960] 2 S.C.R. 75, 88] this Court has held that the burden would be on the railway administration who want to non-suit the plaintiff on the ground of limitation to establish plaintiff on the ground of limitation to establish that the loss or injury occurred more than the year before the institution of the suit. No attempt has been made on behalf of the D.H. Railway to show that the damage in fact occurred more than one year before the suit was instituted. All that is said on their behalf is that the appellant knew in December, 1946, that the consignment appeared to be damaged. In this connection reliance is placed on Ex. B which is a letter addressed by the appellant to the D.H. Railway on December 21, 1946. What is stated there is that the consignment has arrived at Giellekhole in "a very damaged condition." This has reference to the outer covering or the package and not to the contents. Moreover, delivery was given nearly two months after this and it is not possible to say whether the damage which was noticed at that time had already been caused before December 21, 1946, or was caused thereafter. The D.H. Railway which had the custody of the goods could alone have been in a position to say if at all, as to when the damage was caused. Upon the material before us it is not possible to say that the suit was instituted beyond one year of the accrual of the cause of action. It is, therefore, not barred by time.

There is, however, one more question which needs to be considered and that is whether the damage was caused on the D.H. Railway. In their written statement they have contended that the consignment of 90 bales was received by them at Silguri from the B.A. Railway and that it was transhipped by them to Giellekhole in the same condition. No evidence, however, was led by them in support of this contention. Under s. 80 of the Railway Act it is for the consignor to establish, if he wants to sue a railway administration other than the one which booked the consignment, that the

damage had occurred on its system. The contention seems to us to be correct. But where a consignor receives his consignment in a damaged condition from the delivering railway the burden would shift to the delivering railway the burden would shift to eye delivering railway to show that the damage had not occurred on its railway. The burden could be discharged by showing that the consignment was already damaged before it was received by that railway, Here, no evidence having been given on behalf of the D.H. Railway on the point we hold that the presumption has not been rebutted.

Upon this view we must allow the appeal against the D.H. Railway. The claim made for Rs. 5,500 odd by the appellant in the cross-objection has not been pressed before us. We, therefore, allow the appeal in part, set aside the decree of the High Court in so far as the D.H. Railway is concerned and restore that of the trial court. The appellant would be entitled to his proportionate costs against the D.H. Railway.

BY COURT : In view of the majority opinion the Court allowed the appeal in part, set aside the decree of the High Court in so far as the D.H. Railway is concerned and restored that of the trial Court. The appellant would be entitled to his proportionate costs against the D.H. Railway.

Appeal allowed.

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