

CALCUTTA HIGH COURT

Jainarain

Vs.

Governor-General of India

Civil Revn. Case No. 1217 of 1948

(Chakravartti, J.)

18.01.1949

JUDGMENT

Chakravartti, J.

1. The complaint in this rule is that the Cts. below have wrongly thrown out the pltfs. suit on the ground of limitation. The facts are extremely simple and are as follows:

2. On 6-5-1944, the petitioner handed over a bundle of cloth at the Burrabazar Booking Office of the B and A. Ely. for carriage from Calcutta to a station called Jogbani. The bundle was never delivered. Some correspondence followed in the course of which by a letter dated 12-3-1945, the Rly. informed the petitioner that one bundle belonging to his consignment was lying undelivered at the destination and that he must make arrangements for taking delivery within a certain time. The letter reads as follows :

"Dear Sir,

Sub : Calcutta Burra Bazar to Jogbani

P. W. B. 963712 of 6.5.44. one bundle of cloth.

With reference to your letter No. nil dated 2/8/44, I beg to inform you that one bundle of cloth belonging to the above consignment is lying undelivered at destination at your sole risk and responsibility and incurring wharfage daily.

Will you please arrange to take delivery of the same at an early date ?

If delivery is not taken or instructions received as be its disposal within 15 days from the date of this better, the bundle will be disposed of under Sections 55 and 56, Railways Act IX [9] of 1890 to defray the charges due to the Rly."

The letter was signed by someone who described himself as the Chief Commercial Manager.

3. The petitioner on receipt of this letter, went to examine the bundle but found that it did not belong to him at all. Thereafter, some further correspondence followed but nothing in particular resulted. Ultimately, on 22-8-1945, the present suit was brought by which the petitioner asked for a decree for Rs. 1465/7/- that according to him being the price of the contents of the bundle. In the body of his plaint he stated that the deft. had failed and neglected to deliver the consignment and that he was entitled to the sum claimed either as damages for breach of contract or as damages for wrongful conversion or as damages suffered by him on account of negligence and misconduct of the Rly.

4. Inevitably, limitation was pleaded in de-fence. But the Rly. also stated that the goods had been lost in transit.

5. As the Ct. below has been disposed of the case on the sole ground of limitation, it is not necessary to refer to the further pleas on the merits.

6. The trial Ct. decreed the suit. It overruled the plea of limitation in the view that the Art. applicable was Article 30, Limitation Act, under which the starting point was "when the loss or injury occurs." As, according to the learned Judge, it lay on the deft. Rly. to prove when the loss had occurred and they had not proved that it had occurred on a date beyond one year from the institution of the suit, the learned Judge held, was not barred by limitation. Acting on that view of limitation, the learned Judge passed a decree for the whole amount claimed.

7. Thereafter, the opposite party applied for a new trial which was granted and a F. B. constituted, as the practice is, of the Chief Judge and the trial Judge himself, was formed. The F. B. took the view that not Article 30 but Article 31, Limitation Act applied. The learned Judges referred to a statement made by the pleader for the petitioner that the goods ought to have been delivered on 16-5 1944.

8. The starting point of limitation under Article 81 is "when the goods ought to be delivered." The learned Judges accordingly held that since, on the pltf's. own admission, the goods ought to have been delivered on 16-5-1944, and the suit had not been brought till 22-8-1945, it was plainly barred under Section 31, Limitation Act.

9. It was contended before the learned Judges that the letter which deft. Rly. had written on 12-3-1945, amounted to an acknowledgment of liability within the meaning of Section 19, Limitation Act. The learned Judges overruled that contention somewhat summarily by saying that the letter could not be said to contain an acknowledgment of the liability in question "by any stretch of imagination." Accordingly, the learned Judges set aside the decision of the trial Judge and dismissed the petnr's suit. Against that decision the petitioner moved this Ct. and obtained the present Rule.

10. It was contended by Mr. Sen, who appeared in support of the Rule, that the F. B. of Small

Causes Ct. had erred in holding that the letter of 12-3-1945, did not amount to an acknowledgment of liability. At the first blush, the language in which Section 19, Limitation Act is expressed suggest that the acknowledgment must be an acknowledgment of the particular liability which is sought to be enforced by the suit, for example on the facts of the present case, acknowledgment of liability to pay compensation. A wider meaning, however, has been put upon the language of the section by the P. C. and the H. Cs. in India, in view particularly of Explan. 1 attached to it. The substance of the decisions appears to be that it is not necessary that there should be a specific and direct acknowledgment of the particular liability which is sought to be enforced, but if there is an admission of facts of which the liability in question is a necessary consequence, there would be an acknowledgment within the meaning of Section 19. Thus, in the case of *Sukhamoni v. Ishan Chunder*¹, the Judicial Committee held that admission of the existence of a joint debt was an acknowledgment of a liability for contribution, in case the portion payable by the maker of the statement was paid by another of the joint debtors, and that for the purpose of a suit for contribution against him, such an admission would operate to enlarge the period of limitation under Section 19, Limitation Act. It is not necessary for me to refer to other decisions where the principle laid down by the Judicial Committee has been elaborated and applied. It is quite clear that in the case before the Judicial Committee, in spite of the admission of the existence of a joint debt, there might be defenses open to the maker of the admission against a claim for contribution. The P. C. however, held that the admission would still operate as an acknowledgment of a liability for contribution. Applying that principle to the facts of the present case, it appears to me that the letter of 12-3 1945, contains three admissions. The Rly. admits that the bundle of cloth was received for carriage; it admits that it was under an obligation to carry the bundle and to deliver it; it admits further that it has not yet delivered the bundle and I may add, admits that it is still liable to make delivery. In these circumstances, it seems to me, the receipt of the bundle for carriage and its non-delivery being both admitted, the liability for compensation on account of non-delivery was, under the wide meaning attributed by the P. C. to section 19, Limitation Act, acknowledged by the Rly.

11. In my view, therefore, the petitioner is entitled to rely upon the letter of 12th March as constituting an acknowledgment of the liability in question and to claim the benefit of a fresh start of limitation from the date of the letter. The view taken by the F. B. on the plea of acknowledgment was, in my opinion, erroneous.

12. This is sufficient to dispose of the rule but it seems to me that from whatever point of view the present suit may be looked at it cannot be held to be time-barred, even though the petitioner be held not entitled to call in aid letter of 12-3-1945. It cannot be disputed that the suit being one against a carrier as a carrier, the only two articles applicable are Articles 30 and 31. The Rly. in its written statement, stated that the goods had been lost in transit. If so, this was a case of loss and it seems to me that Article 30 which applies to a suit for compensation for losing or injuring goods, would apply to the present case. If it does apply, then the starting point would be "when the loss or injury occurs." It has been established by a series of decisions of the highest authority

that the loss contemplated in col. 3 of Article 30 is loss by the Rly. and not loss caused to the consignor, that is to say, the relevant point of time is when the Ely. actually lost the goods and not the date on which the consignor came to know that he had suffered loss. To this main proposition is attached another, which is that since the date of the loss is a matter peculiarly within the knowledge of the party who suffered the loss, namely, the Ely. the onus of proving that date lay on the deft. and if the deft. wanted to establish a plea of limitation, it lay on him to prove that the loss had occurred at a point of time beyond one year from the date of the institution of the suit.

13. The learned trial Judge applied this principle, although for the purposes of citation he chose a rather inconspicuous authority. It has not been proved in the present case by the Ely. when the loss occurred, and that being so, it cannot be said that if Article 30 applies the suit is barred by limitation.

¹25 Cal. 844: (25 I. A. 95 P. C.)

14. It was however contended by Mr. Bose that the petnr, had called no evidence and the case made in his plaint, so far as the allegations of fact went, was one of non-delivery. He accordingly contended that it was not possible to import into this case the fact of a loss and on that basis apply Article 30. This argument is not without the merit of plausibility and I may add that it may not be proper to draw upon facts stated by the deft. for the purpose of determining a question of limitation. Assuming, therefore, that Article 30 did not apply but Article 31 did, even then it appears to me that the suit is not barred by limitation, even granting that the letter of 12-3-1945 did not amount to an acknowledgment of liability. The starting point under Article 31 is "when the goods ought to be delivered." The F. B. of the Small Causes Ct. has taken the view that the time 'when the goods ought to be delivered' within the meaning of the article is the time when they ought to be delivered in the normal course. As I have already stated, they relied upon the admission made by the petnr's. pleader that in the normal course the goods ought to have been delivered on 16-5-1944. It has however been held in a series of cases, both of this Ct. and other H. Cs. that where no time is fixed for delivery and where after the discovery of non-delivery, correspondence ensues between the consignor and the Rly. authorities in the course of which the Rly. goes on promising enquires and never denying any liability, limitation does not begin to run till the correspondence ends either fruitlessly or with a final statement by the Rly. of its inability to deliver or a final repudiation of the consigner's claim. Reference in this connection may be made to a decision of the Allahabad H. C. reported in the case of *Jugal Kishore v. G. I. P. Rly. Co.*², where the following passage occurs :

"Article 30 applies to suits for compensation for losing or injuring goods, and the period is one year from, the date when the loss or injury occurs. It is obvious that the Article refers to losing or injuring goods by the carrier and not by the pltf., that is to say, time begins to run from the time when the carrier lost or injured the goods and not from the time when the consignee may be said to have suffered loss.... We agree with his (Ratigan J.) view that the words "against a carrier for losing or injuring goods" obviously suggest not a mere loss of the goods to the owner, which might be caused by misdelivery but an

actual losing of goods by the carrier himself.... The burden of proving when the goods were lost was decidedly on the companies, and it not being proved that the goods were lost by them more than one year before the institution of the suit, the claim is not barred by Article 30.

Article 31 fixes one year from the date when the goods ought to have been delivered and applies to suits to recover compensation for non-delivery. It is to be noted that in the present case no time was fixed for the delivery of goods, and the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver, up to well within a year of the suit. In the circumstances of the case, we are unable to hold that the suit was instituted more than a year from the expiry of a reasonable time within which the goods should have been delivered."

15. It will be seen that the passage above quoted covers the principles applicable both to a case under Article 30 and a case under Article 31. These principles were accepted and applied by a decision of Mukherji J. in the case of *Rivers. Steam Navigation Co. Ltd. v.*

²⁴⁵ ALL. 43: AIR 1923 All 22

*Bisweswar Kundu*³, His Lordship referred to the decision of the Allahabad H. C. *Jugal Kishore v. G. I. P. Rly. Co.*⁴, as also to certain English cases and text books and stated the law practically in the same language as was used in the passage which I have quoted.

16. A single Judge of the Madras H. C. in the case of *Palanichami v. Governor-General in Council*⁵, also applied the same principle so far as Article 31 is concerned it held that in a case where the Rly. Co. after making enquiries for a long time, finally informs the consignor or consignee that the undelivered articles are not traceable, time under Article 31, Limitation Act, runs from after a definite refusal or a declaration of inability to deliver the lost goods. To the same effect is a decision of Gentle J., sitting on the Original Side of this Ct. and reported in *Raigarh Jute Mills Ltd. v. Commrs. for the Port of Calcutta*⁶, His Lordship held that where a pltf. brings a suit for damages for non-delivery of a part of a consignment, the time under Article 31 begins to run from after a definite refusal or declaration of inability to deliver and the cause of action arises when the owner of the goods is made aware that there will be no further delivery of the undelivered part of the consignment.

17. This impressive array of authorities seems to me to establish beyond doubt that the time 'when the goods ought to be delivered' within the meaning of Col. 3 of Article 31 is not the time when they should have been delivered in the normal course, at least in a case where there is no time fixed for delivery, but the time when they ought to be delivered according to the subsequent promises by the Rly. which informs the parties that it is carrying on enquiries. If I may say so with respect, that seems to be the only reasonable way of construing the Article. Had the view taken by the F. B. of the Small Causes Ct. been the true view, the position would be that even in a case where the parties were carrying on correspondence with the Rly. and the Rly. had been conducting enquiries and it had not yet been ascertained definitely that the goods had been lost

nor had the Rly. disclaimed liability or expressed its inability to deliver, the consignor or the consignee would nevertheless have to file a plaint in order to avoid the bar of limitation.

18. It appears to me that a construction of a provision of the Limitation Act which involves that result ought not to be adopted if a more sensible construction is warranted by the language used. As I read Col. 3 of Article 31, it is capable of the construction put upon it by the decisions I have cited, with which I respectfully agree.

19. Coming to the facts of the present case, I have already stated that even on 12-3-1945, the Rly. were stating that the bundle consigned by the Petitioners was lying at a certain place and in fact insisting on the petitioner taking delivery by a certain date on pain of being made liable for demurrage. It could therefore never be said that the time 'when the goods ought to be delivered' had passed before 12-3-1945 or, I may add, even till a considerable time later. There was no time fixed for delivery in the present case. Accordingly, I am clearly of opinion that whether the letter of the 12th March does amount to an acknowledgment of liability or not, having regard to the state of facts prevailing up to within one year of the date of the institution of the suit, when the matter seems to have been at large, and delivery having been not yet refused it cannot be said that the suit, brought on 22-8-1945, was barred by limitation.

³ AIR 1928 Cal 371 at pp. 375 and 376 : (116 I. C. 148) ⁵ AIR 1946 Mad 133 : (224 I. C. 436)

⁴ 45 ALL. 43 : (AIR 1923 All 22)

⁶ AIR 1947 Cal 98

20. On the question of acknowledgment, I have omitted to refer to two decisions cited at the bar. Mr. Sen relied upon a decision of the Bombay H. C, namely, the case of *Haji Ajam v. Bombay and Persia Steam Navigation Co*⁷., The facts are more or less similar and it appears that certain letters written by the company admitting short delivery and containing an offer to settle the dispute were treated as constituting an admission of a liability. A decision in the contrary sense by the Allahabad H. C. was relied upon by Mr. Bose. It is the case of *Mutsaddi Lal v. B.B. and C. I. Rly. Co*⁸., There, a letter was relied upon as constituting an acknowledgment but the terms of the letter are not set out in the report. Sufficient indication, however, is given in the judgment of the contents of the letter and their Lordships say that the Rly. only informed the pltf. of the fact that the bundle consigned by him was lying at a certain place and his instructions as to its disposal were being awaited and that by making that statement, the Rly. did not acknowledge any liability. This decision undoubtedly supports the view taken by the F. B. and contended for by Mr. Bose, but having regard to the decision of the P. C. to which I have already referred, I think the view takot: by the Bombay H. C. ought to be preferred.

21. But, as I have stated, even without the aid of the letter as constituting an acknowledgment, the present suit must be held to be within time, whether it be regarded as a suit governed by Article 30 or as a suit governed by Article 31. The decision of the F. B. must accordingly be set aside.

22. In the result, the rule is made absolute. The judgment and the decree of the F. B. are set aside. As, however, the trial Judge had decreed the petnr's claim on the merits and the P. B. reversed his

decision only on the question of limitation, it follows that there is nothing left, for the trial of which the suit ought to be sent back to the Ct. below. There will, therefore, be an order restoring the decree of the trial Judge. In view of the difficulty of the question of limitation involved, I would make no order for costs in this rule.

Rule made absolute.

⁷26 Bom. 562 : (4 Bom. L. R. 447)

⁸42 ALL. 390 : (AIR 1920 All 157)