CALCUTTA HIGH COURT

Union of India

Vs.

Meghraj Agarwalla

A.F.A.D. No. 1559 of 1953

(K.C. Das Gupta and U.C. Law, JJ.)

11.02.1958

JUDGMENT

K.C. Das Gupta, J.

1. The respondent, Meghraj Agarwalla, brought the present suit for recovery of damages for non-delivery in respect of portions of two separate consignments of bidi tobacco. The first consignment was booked on 28-6-1928 and it is said that while on 20-9-1948, a portion of this consignment was duly delivered, four bags out of the thirteen bags were not delivered. The plaintiff assessed the damages in respect of this non delivery at Rs. 1202/2/-. The second consignment was booked on 8-11-1948. The plaintiffs case is that only a portion of this was delivered to him, the remainder 4 maunds, 30 seers of bidi tobacco was not delivered. The plaintiff assessed the damages in respect of this consignment at the sum of Rs. 1138/-. The suit was brought on the total claim of Rs. 2340/2/-.

2. In the body of the plaint, the plaintiff averred that notice under Section 77 of the Indian Railways Act had been duly served. The defendant, the present appellant before us. denied the validity of the notice under Section 77 and also pleaded that both the consignments were duly and correctly made over to the Eastern Bengal Railway Administration under clear receipt. Another plea was that the suit was barred by limitation.

3. At the trial, the bar of limitation appears to have been pleaded only as regards the first consignment, it being urged that Article 31 of the Indian Limitation Act applied and the suit had been brought more than one year from the time when delivery ought to have been made. It was urged that the notice under Section 77 of the Indian Railways Act having been served more than six months after the date of booking, the notice that was served purporting to be under Section 77 was invalid in law and so the provisions of Section 77 stood in the way of the plaintiff getting any relief as regards the first consignment.

4. As regards the second consignment, the only plea urged by the defendant at the trial appears to have been that the plaintiff had failed to show that a portion of the second consignment was not delivered to him.

5. On all these points, the trial court rejected the defence contention and found in favour of the plaintiff and decreed the suit in part of a sum of rs. 2108/11/9, this reduction being based on the finding as regards the price and the packing charges. On appeal, the learned Additional District Judge, Alipore, agreed with the conclusions of the trial court and dismissed the appeal. As regards the first consignment, he held that the provisions of Section 77 of the Indian Railways Act did not apply to the claim as regards this consignment inasmuch as this was not a case of loss but a case of short delivery. He held also that the suit was not barred under Article 31 of the Indian Limitation Act as time would run not from the date when a part of it was delivered but from the date of assertion by the Station Master at Hilli, which was the destination station, that the goods might be reaching later and that ultimately he was informed in December 1948 or January 1949 that the goods would not arrive.

6. As regards the second consignment, the learned Additional District Judge held, relying on a document, Ex. 1 and the oral testimony of the plaintiff's witness, that there had been short delivery as alleged and that a part of the consignment had not been delivered.

7. Taking up the second consignment for consideration first, I am of opinion that it is not open to us to interfere in second appeal with the conclusion of the court of appeal below that a part of the consignment was not delivered.

8. On behalf of the appellant, Mr. Bose had drawn our attention to the fact that the document, Ex. 1, on which the courts below relied, was not given on a printed form but was written out on a small slip of paper below which one person gave his initial and date without even mentioning what office he held. We have examined this slip and, speaking for myself, I would ordinarily think it unsafe to rely on a document of this nature without corroborating evidence. When there is nothing but a document of this nature and the oral testimony of the party himself in support of the story that a part of a consignment had not been delivered, the court which has to decide the question of fact has to exercise particular care in the assessment of the evidence. That, however, does not justify, in my opinion, any interference with the finding arrived at in this case by the trial court which had the opportunity of seeing the witness and the court of appeal below which agreed with its conclusion that a part of the second consignment was not delivered. It was open to the courts below to believe or disbelieve and I am unable to find any justification for the view that any error of law vitiated that finding. The appeal must, therefore, fail in so far as it is directed against the decree in respect of the second consignment.

9. As regards the first consignment, the first question that requires consideration is whether section 77 of the Indian Railways Act, has any application to this claim. Section 77 provides, inter alia, that a person shall not be entitled to compensation for the loss, destruction or deterioration of goods delivered to be carried by a railway unless his claim to such 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. A notice purported to be under section 77 was served in this case but well beyond the period of six months from the date of delivery of the goods to the railway for carriage. If, therefore, this is a case of claim for compensation for the loss, destruction or deterioration of the goods delivered to be carried, the plaintiff must fail. The mere fact that something was not delivered, in this case, a part of the consignment, is not sufficient to show that there was loss within the meaning of Section 77. In *East Indian Rly. Co. v. Jogpat Singh*[1], this Court held that the word, 'loss' in section 72 of the

Indian Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongly deprived of the possession, use or enjoyment thereof, but means loss of the goods while in transit and such loss occurs whenever the Railway Company, to which the goods have been consigned for conveyance, involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them. This view has been constantly followed. It seems to me to be very clear that this interpretation of the word 'loss', as used in section 72 must be applied to the word as used in section 77, as both these sections form part of the Scheme of the legislature as regards the liability of the railway administration as carriers. The position in law, in my opinion, is that if the non-delivery of a portion of the consignment in this case was due to the fact that the railway involuntarily or through inadvertence lost possession of the goods and was unable to trace them, it would be a case of loss within the meaning of section 77 of the Indian Railways Act.

10. Before we can decide whether in the facts of this case section 77 applies to the claim for the first consignment, it is necessary to decide on whom the burden of proving, that there was such loss within the meaning of section 77, lies. If it was merely a case of the railway seeking the protection of Section 77, it would be for the railway to establish that Section 77 applied and therefore it would be for the railway to establish further that the non-delivery was due to circumstances which made it a case of 'loss' within the meaning of the law. As I have already indicated, however, the plaintiff himself came to court with the case that Section 77 applied and averred that a proper notice under section 77 had been served on the railway. The defendant railway took up the position that the notice was invalid. In view of this, I do not think it possible to say that any burden lay on the railway to show that the non delivery would amount to loss within the meaning as indicated above, and, in my opinion, the plaintiff having taken up the position in his plaint that Section 77 did apply, could perhaps still show at the trial that Section 77 did not apply but the burden was certainly on him to show this.

11. On behalf of the respondent, Mr. Mukherji has tried to convince us that the circumstances, to which the non-delivery was due, were facts peculiarly within the knowledge of the defendant railway and so the burden was on them to establish those circumstances. There might have been some force in this contention if the consignment had been carried all the way by the defendant railway or by any of its agents. Clearly however the arrangement was that the consignment would be carried only a part of the way by the defendant railway and from there upto its destination by the Pakistan Railway.
The Pakistan Railway cannot, in law, be considered to be the agent of the defendant. I am unable, therefore, to accept the contention that the circumstances due to which a part of the I consignment could not be delivered at Hilli Station within Pakistan were within the knowledge of the defendant.
12. The position, in law, therefore, is that there is no evidence on the record to establish that the non-delivery was due to the fact that the railway involuntarily or through inadvertence lost possession of the goods and for the time being was unable to trace them. The plaintiff has thus not been able to prove this fact. It may be true, as Mr. Mukherji has
[1] ILR 51 Cal 615 : AIR 1924 Cal 725
contended, that it is difficult for the plaintiff to prove that, but difficulty of proving a fact cannot alter the requirement of law under which he cannot succeed unless he proves the fact.

13. I have, therefore, come to the conclusion that it has not been proved that Section 77 of the

Indian Railways Act, does not apply and that the plaintiff having taken the position in the plaint itself that section 77 does apply, the Court is bound to proceed on the basis that section 77 is applicable. The necessary consequence of that finding is that the notice in this case having been served more than six moths after the date of the booking, the requirement of Section 77 has not been satisfied and so under the provisions of section 77, the plaintiff is debarred from getting any compensation for the loss.

14. In view of this decision, it is hardly necessary for us to consider the question of limitation based on Article 31. Mr. Mukherji contended that Article 31 can have no application and Article 48 would apply. If there was any reason to think, as Mr. Mukherji contends there was, that this was a case of conversion by the railway, there can be no doubt that Article 48 would be the appropriate article of limitation. I am unable to see, however, anything on the record on which we can reasonably base a conclusion that this was a case of conversion by the railway. There is no scope, therefore, for the application of Article 48 of the Limitation Act.

15. In applying Article 31, it is necessary to come to a conclusion as regards the date when delivery ought to have been made. In this case, the major portion of the consignment was actually delivered on 20-9-1948. If this be taken to be the time when the remainder also ought to have been delivered, the suit which was filed on 25-1-1950 would clearly be beyond the time prescribed by Article 31. In my judgment, it would, in most cases, be proper to hold, in the absence of peculiar circumstances, that the date when a major portion of the consignment was delivered, would be the date when the rest of the consignment ought also to have been delivered. This was the view taken in a recent decision of this Court in *Darjeeling Himalayan Rly. Co. Ltd. v. Jetmul Bhojraj*[2], It is true that what appears to be a contrary view was taken by Gentle J. in *Raigarh Jute Mills Ltd. v. Commrs. for the Port of Calcutta*[3], In that case Gentle J. held that the time when a whole consignment ought to be delivered, was not necessarily the date on which the major portion of it arrived at the destination. It has to be remembered that in that case Gentle J. was dealing with a case of transit during war period and referred to this fact expressly in his judgment.

> "Transit of goods on railways," he observed : "more particularly during the war period, is subject to delay and goods handed to a railway in one bulk are frequently delivered by installments spread over a considerable period. In such delivery, it cannot be said that the railway is in default of its obligations by failing to deliver the whole at one and the same time." His later decision, that the date, on which the major portion of it arrived at the destination, should not be taken to be the time when a whole consignment ought to have been delivered, should reasonably be taken to refer to the peculiar facts of that case. In the present case, the whole consignment consisting of 9 bags was delivered on 20-9-1948. It is, in

[2]60 Cal W. N. 683: AIR 1956 Cal 390

[3] AIR 1947 Cal 98

> my opinion, unreasonable to think that though for the 9 bags the proper time for delivery was September, 1948, for the other four bags, a later date should be taken to be the proper time for delivery. In the facts of this case, therefore, I am of opinion that 20-9-

1948 is the date when the remainder of the consignment also ought to have been delivered and consequently the suit in so far as it is in respect of the first consignment is barred by limitation.

16. My conclusion, therefore, is that the plaintiff is not entitled to any decree as regards the first consignment and that portion of the decree should be set aside while the other portion of the decree which is in respect of the second consignment should be affirmed.

17. I would, therefore, allow the appeal in part and in modification of the orders passed by the courts below, order that the suit be decreed in part for the sum of Rs. 985/14/- (Rupees Nine hundred and eightyfive and fourteen annas) with proportionate costs. The appellant will get proportionate costs of the hearing in this Court and the court of appeal below.

U.C. Law, J.

4. I agree.

Appeal partly allowed.