ORISSA HIGH COURT

K. Chandrasekharam Subudi

Vs

Union of India

Civil Revn. No. 200 of 1957

(G.C. Das, J.)

07.04.1959

ORDER

G.C. Das, J.

1. This is a plaintiff's petition against the judgment of Small Cause Court Judge of Berhampur dismissing his suit (S. C. C. Suit No. 239 of 1956).

2. The plaintiff commenced the suit for recovery of Rs. 220/- from the defendant-railway (South Eastern Railway) as compensation for damages to a consignment of Atta booked under R/R 5987/32, invoice No. 1 dated 27-9-55 from Bhilsa Railway Station on Central Railway to Berhampur Railway Station on the South Eastern Railway. The plaintiff's whole case was that they being the consignees took delivery of the aforesaid consignment on 13-10-1955 and found that some of the contents were damaged. The Station Master, Berhampur granted a certificate (Ex. 1) on 19-10-1955 to the effect that the contents to the extent of 14 maunds and 10 seers were damaged. Thereafter the plaintiff put in claim under Section 77 of the Indian Railways Act (Act 4 of 1890) (hereinafter referred to as the Act) and received a reply from the Railway administration under the date 13-2-1956 that the matter was receiving their attention. Since the claim was not settled, the plaintiff served a notice on the defendant-railway under Section 80 of the Code of Civil Procedure and filed the present suit on 6-11-1956.

3. The defense was that Bhilsa where the consignment was booked is not on the defendant's railway, and accordingly, the plaintiff is put to the strict proof that the alleged damage was caused to the consignment while passing through the defendant's railway. They further averred that the claim was excessive and that the plaintiff was not entitled to interest as claimed in the suit. Their contention was that there was no negligence or carelessness on the part of the defendant-railway administration. Various other objections were also taken, such as, the suit was bad for non-joinder of parties; that the suit was not maintainable as no notice under Section 80 of the Code of Civil Procedure was served on the defendant; and that the suit was barred by limitation.

4. The trial court found that the plaintiff had successfully proved that the consignment was a full wagon load containing 240 bags of Atta which was booked from Brilsa to Berhampur and that

the plaintiff took delivery of the same on 13-10-1955. It was also proved that out of the consignment only 95 bags of Atta were partly damaged due to rain water trickling into the wagon and the Station Master of Berhampur assessed the damage in respect of 45 bags at 10 seers for each bag of 2 maunds and in respect of 40 bags at 5 seers for each bag. Thus, as per the assessment certificate (Ex. 1), 16 maunds and 10 seers of Atta were found damaged during transit. It was further proved that in order to settle up the claim the plaintiff gave notice under Section 77 of the Act on 19-1-1956 (Exs. 2 and 2-b) receipt of which was acknowledged by the defendant railway administration by their letter dated 6-2-1956 (Ex. 2-a). Finally the suit notice under Section 80 of the Code of Civil Procedure was given by the plaintiff on 24-7-1956 (Exs. 3 and 3-a). This notice was received by the defendant on 26-7-1956 (Ex. 3-a) and the suit was filed on 6-11-1956. Thus all the preliminaries for the suit have been duly complied with, within the prescribed time and the suit had been filed within the period of limitation. It was proved that the price of Atta for each bag of 2 maunds was Rs. 25-0-3 as per the Bijuc (Ex. 4). Hence the value of damage sustained to the consignment had been proved to be Rs. 202-10-0. The trial Court, however, negatived the claim for interest since there was no stipulation to that effect. The main contention on behalf of the defendant-railway was that the onus was upon the plaintiff to prove that the damage was caused while the consignment was on its lines due to the negligence of its employees. The trial Court, however, found that the plaintiff has failed to discharge the onus that lay heavy on him to establish that the damage was caused to the consignment while the goods were on the lines of the defendant-railway, and accordingly, he dismissed the suit. It is against this order that the present civil revision was filed.

5. Mr. H. G. Panda, learned counsel on behalf of the petitioner contended that when the fact of damage had been proved the railway-administration is liable to pay the compensation, it does not matter where the damage had occurred, and as such, the plaintiff is entitled to a decree. It is admitted that the goods were booked at Bhilsa railway station which is on the Central Railway for delivery to the consignee (plaintiff) at Berhampur Railway station on the defendant railway. Section 80 of the Act gives an option to the plaintiff to sue either the Railway administration with whom the contract was made or the railway administration on whose railway the loss occurred. The plaintiff in this case exercised his option and sued the defendant-railway. Thus, in terms of Section 80 it is for the plaintiff to prove that the loss in question had occurred while the consignment in suit was on the lines of the defendant-railway administration. From the plaint allegations, it is clear that the consignment was on the lines of both the Central and Southern Railways between September 27, 1955 and October 13, 1955. It is evident from Ex. 1 that the damage was caused to the consignment due to leakage of rain water inside the wagon which was a non-water-tight one. Plaintiff No. 5 examined himself as P.W. 1 and stated in his deposition that the damage was caused while the consignment was in transit through the defendant-railway, but in his cross-examination he admitted that he did not know where actually the damage was caused. The consignment was in transit for a period of 15 days and it was not known for how many days it remained on the lines of each of the railways through which it passed. Therefore, it cannot be definitely said whether the rain water poured into the wagon in question, and if there was any rain at all while the consignment was on the lines of the defendant-railway. It may be remembered that there is no specific allegation in the plaint regarding the fact that the consignment was damaged while it was on the lines of the defendant-railway. Each Railway administration is a separate entity with a separate existence and juristic personality. The plaintiff to begin with had his right to sue the contracting railway, but he chose to omit that administration and sued the defendant-railway which carried the goods contracted for carriage by the Central

Railway. The plaintiff could not produce any satisfactory evidence to show that the damage occurred on the lines of the defendant-railway. I may mention here one other fact on which some reliance was sought to be placed by the learned counsel. The plaintiff called upon the defendant-railway to produce certain documents to prove as to where actually the loss occurred, but those documents were not produced. The trial court found that the summons for the said documents was served on the defendant's lawyer on 22-5-1957 demanding production of a register of Calcutta South Eastern Railway showing the receipt of consignment covered by R/R in question from the Central Railway. The defendant's contention was that the description of the document was rather vague and accordingly, it was not possible for them to produce it. They, however, contended that even if the document was traceable, it would not have improved the plaintiff's case in any way, inasmuch as, the consignment being a full wagon load, the contents thereof were not to be checked while the charge was made over by the Central Railway Administration to the defendant-railway administration. Since the wagon was a non-water-tight one there was a chance of leakage and the plaintiff may have a good causa against the contracting railway, but the defendant-railway being merely to carry the wagon in the condition in which it was given to him is not liable unless it is specifically proved that the damage occurred to the consignment while the wagon was on its lines. This being the factual position let us now examine the position in law.

6. The Act underwent certain major changes by the Indian Railways (Amendment) Act, 1949 (Act 56 of 1949). By this Act, Section 72 which doubtless underwent certain changes as far as is necessary for the present purposes lays down that the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 (Act 9 of 1872). Act 56 of 1949 abolished the risk notes and enacted Sections 74-A to 74-E reproducing some of the provisions of the risk notes. In consequence Section 74-A replaced certain provisions of risk note A; Section 74-B similarly replaced risk note C; whereas Section 74-C replaced certain portions of risk notes B and Z. Section 74-D, it appears, replaced the proviso to risk note B; whereas Section 74-E reproduced some of the provisions of risk note A covered by Section 74-A and risk notes B. D. C. and Z covered by Sections 74-C and 74-D. Thereafter, Section 80 made provision for the burden of proof in suits for compensation for injury to through-booked traffic.
It provides that notwithstanding anything in any agreement purporting to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to, a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway loss, injury, destruction or deterioration occurred. Mr. Panda mainly relied on the provisions of Sections 74-E and 80 of the Act.

7. The judicial opinion until 1949 appears to be that the contracting as well as the subsequent railway administration through which the goods passed were jointly and severally liable. In the case of *Jamunadas Ramjas v. E. I. Rly. Co. Ltd*[1]. Jwala Prasad J. while considering Section 80 was of the view that the principle underlying that section is that the Railway which takes delivery of goods with an undertaking to carry it safe, is an agent for the railways over which the goods

have to pass in order to reach its destination and vice versa. The consignor is a third person. He contracts with particular Railway to deliver to him, at a particular station, the goods consigned and the arrangement of carrying the goods between the railways over which the goods have to pass and has nothing to do with the consignor. He may sue the company to which the goods are delivered or the company on whose railway the loss, injury, destruction or deterioration occurred or both. In the case of *Jankidas Marwari v. Governor General of India in Council*[2], Fazl Ali, C.J. and Pande, J. took a similar view that where goods are consigned at the Railway of one administration and are carried over and delivered at the railway of another administration both the administrations are jointly and severally liable. Although no specific reference was made to the decision in AIR 1933 Patna 630 yet the same principles, as in that case, were reiterated in this case. A departure, however, was made in 1949 by the same High Court. The view thus taken was that the question of agency does not arise in these cases when the provisions in the Statute are manifestly clear. In the case of Governor-General of India in *Council v. Sukhdeo Ram Marwari*[3], Sinha and Das JJ. held that Section 80 gives the plaintiff the choice of claiming his remedy either against the railway administration to which the goods are consigned or against the railway administration on which the loss occurred. The remedy is alternative and not cumulative. Where the goods are consigned to a railway for delivery at a railway station on another railway and the suit for damages for short delivery is brought against the Governor-General representing the latter railway, where, however, the loss does not take place, the latter cannot be made liable for the loss on the theory of agency and partnership. It may be remembered here that Section 80 did not undergo any change by the amending Act 56 of 1949. The view taken in AIR 1949 Patna 329 appears to have been followed not only in the subsequent decisions of that High Court, but also by the Calcutta and Madras High Courts. In two later decisions of the Patna High Court reported in *Union of India v. Shamsu Mian*[4], and *Manilal Raghavji v. Union of India*[5], it was laid down that the onus was on the plaintiff to prove that the loss occurred to the goods while on the lines of the defendant-railway administration if the same was not the contracting railway.

8. In the case of *Darjeeling Himalayan Rly. Co.. Ltd. v. Jetmull Bhojraj*[6] , their Lordships of Calcutta High Court following the decision in AIR 1949 Patna 329 were of the opinion that Section 80 lays down a specific rule of law governing the liabilities of different railways over which goods may be carried and those specific rules must be given effect to irrespective of any other consideration based on agencies or partnership. The onus is on the plaintiff to prove that the loss had occurred while on the railway over which the goods have passed which is attempted to be made liable. Similarly, in the case of *Kishanlal Roopchand and Co. v. Indian Dominion*[7], it was held that the "Railway administration" under Section 77 does not mean "any railway administration" over which the goods are carried. Section 77 read with Section 80 shows that each railway administration is treated as a separate entity with a separate existence and a separate juristic personality. It is true that the Dominion of the Government of India now own all these railways but they are none the less separate railway administrations with separate Agents and General Managers. So long as Sections 77, 80 and 140 stand as they are, before a railway administration can be made liable in a suit for compensation, a necessary statutory requirement is the service of a notice on it by the claimant. These notices should be sent to the principal contracting railway who accepts the goods for carriage and whose liability cannot be questioned even though the loss takes place on another railway on through traffic.

The view that a notice to the Railway administration who, the claimant thought, was directly responsible, should be considered sufficient when that notice had been somehow brought to the notice of the other administration from whom the claimant seeks to claim the relief is not sound.

Their Lordships relied on the following passage in the case of AIR 1949 Patna 329 :

> "Hence it may be said that the legislature intervened in the year 1890, and laid down a specific rule of law governing the liabilities of the different railway administrations as regards compensation for loss, etc. caused to the owner of the goods carried over those several railway systems. Section 80, therefore, being a specific provision in this behalf must be given effect to, irrespective of any other considerations based on the doctrine of agency or of partnership which may lead to conflicting results. When the legislature has intervened to make the position absolutely clear, it is not safe to appeal to certain doctrine of law of general application."

9. Great reliance was placed on the wording of Section 74-E by Mr. Panda. Section 74-E provides that when any animal or goods tendered to a railway administration for carriage by railway have been booked through over the railways of two or more railway administrations or over one or more transport system not belonging to any railway administration, the person tendering the animals or goods to the railway administration shall be deemed to have contracted, with each one of the railway administrations or the owners of the transport system concerned, as the case may be, that the provisions of Sections 73, 74-A, 74-B, 74-C, 74-D and 75 shall apply so far as may be, in relation to the carriage of such animals or goods in the same manner and to the same extent as they would have applied if the animals or goods had been carried over only one railway administration. This section, as I have stated earlier, reproduces some of the provisions of risk note form A and forms B, D, G and Z. Undoubtedly, this section lays down that the agreement should be deemed to be made separately with all railway administrations or transport agents or other persons who should be carriers for any portion of the transit. Under this section, the sender of
goods which have been booked through over the railways of two or more railway administrations and one or more transport systems not belonging to any railway administration is deemed to have contracted with each one of them that the provisions of Sections 73, 74-A, 74-B, 74-C and 75 should apply in relation to the carriage of goods. The omission of Section 72 providing general responsibility of the bailee from Section 74-E is rather important. Thus Section 74-E is more restrictive in terms than being general. This section came up for consideration by the Patna High Court in a recent case, *Union of India v. M/s. Shamsuddin Waizuddin*[8], In that case, the learned single Judge of that Court took the view that Section 74-E only provides that although goods were delivered to one railway, the other railways through which the goods travelled would also be deemed to have contracted with the persons delivering the goods for their carriage. The existence of a contract alone, however, is not sufficient to fasten the liability, although all the railways will be deemed to have entered into the contract. The question remains who will be responsible and in what cases. That question is determined by Section 80. Section 80 only determines the liability of the different railways. Once that liability has been fixed, the railway cannot argue that it had not entered into contract with the persons who made the consignment because such a contention is now invalid in view of the provisions of Section 74-E of the Act. This is all that is provided by Section 74-E. But before Section 74-E comes into play, the loss must be proved as provided in Section 80. If the loss is not proved, then the only remedy of the person making the consignment is to sue the contracting railway.

10. Mr. Panda lastly sought to rely on the provisions of Section 106 of Indian Evidence Act and

contended that since certain facts were within the special knowledge of the defendant-railway administration, they should have adduced evidence to that effect. Section 80 having laid down a certain procedure and the plaintiff, in the present case, having exercised the option for suing the defendant-railway administration, the onus is certainly upon him to prove that the damage or destruction was occasioned while the goods were on the lines of the defendant-railway. The plaintiff having failed to discharge the onus cannot now take advantage of Section 106 of the Indian Evidence Act.

11. Thus, in view of the above position of law, there does not appear to be any force in the contentions of Mr. Panda. Accordingly, I would dismiss this application and discharge the rule with costs. Hearing fee Rs. 32/-.
Application dismissed.

Cases Referred.

[1] AIR 1933 Pat 630
[2] AIR 1946 Pat 336
[3] AIR 1949 Pat 329
[4] AIR 1956 Pat 71
[5] AIR 1956 Pat 434
[6] AIR 1956 Cal 390
[7] AIR 1955 Mad 151
[8] AIR 1958 Pat 575