PATNA HIGH COURT

Union of India

Vs

Jutharam

Civil Revn. No. 429 of 1965

(G.N. Prasad, J.)

10.11.1966

ORDER

G.N. Prasad, J.

1. The Union of India, as owner of the Eastern Railway Administration, has preferred this application under Section 25 of the Small Cause Courts Act against the decision of the learned Small Cause Court Judge, Sitamarhi, awarding to the plaintiffs (Opposite Party Nos. 1 and 2) a decree against the petitioner for a sum of Rs. 116.56 in S. C. C. Suit No. 76/212 of 1962. The relevant facts are as follows.

2. A consignment of three tins of ghee was booked by the plaintiffs at Bairgania station on the North Eastern Railway for being carried to Sitarampur station on the Eastern Railway. At Sitarampur, only two of the tins were delivered to the plaintiffs' customer. Accordingly, the plaintiffs made a complaint to the authorities of the Eastern Railway about non-delivery of the third tin in a letter, Ext. 3(f) dated the 12th September, 1961, addressed to the Chief Commercial Superintendent, Eastern Railway. On the 22nd December, 1961, the Chief Commercial Superintendent wrote to the plaintiffs that the matter was being enquired into and that they should contact the Claims Inspector at Asansol and take delivery of one tin upon valuation, which was lying at Sitarampur. Thereupon the plaintiffs sent a letter Ext. 3(c) dated the 12th January, 1962, to the Claims Inspector, Asansol, saying that the tin lying at Sitarampur was not the tin of the plaintiffs since it did not bear the railway mark or the private mark of the plaintiffs. The plaintiffs further mentioned in the letter Ext. 3(c) that arrangement should be made for making delivery of the correct tin or in the alternative, the price of the article might be paid to the plaintiffs. The plaintiffs did not receive any reply from the Claims Inspector, Asansol, but the Chief Commercial Superintendent wrote a letter Ext. 3(b) dated 5-2-1962 advising the plaintiffs to take delivery of the crate lying undelivered at Sitarampur and to submit an amended claim.
In reply, the plaintiffs wrote a letter Ext. 3(g) dated 2-3-1962 saying that the Traffic Inspector should be directed to make open delivery of the tin to the plaintiffs. This, however, was not done, and. ultimately, the plaintiffs instituted the present suit after serving a notice under Section 77 of the Railways Act upon the Eastern Railway Administration as also a notice upon the said Railway Administration under Section 80 of the Code of Civil Procedure . The suit was,

however, instituted not only against the Eastern Railway Administration, but also against the North Eastern Railway Administration. The total claim in the suit was laid at Rs. 146.20 as detailed below :-

(i)	Price of one tin of ghee not delivered	Rs. 11,000/
(ii)	Proportionate railway freight	Rs. 200/-
(iii)	Loss of Profit	Rs. 2,200/-
(iv)	Cost of notice	Rs. 1,200/-
	Total	Rs. 14,600/

3. The defendants denied the plaintiffs' claim and assessed that they were not entitled to any decree substantially for the reason that they had themselves failed to take delivery of the third tin which was lying at Sitarampur. Another substantial defense taken was that the suit was barred by limitation.

4. The learned Small Cause Court Judge dismissed the suit against the North Eastern Railway Administration on the ground that notice, under Section 77 of the Railways Act and Section 80 of the Code of Civil Procedure had not been served upon that Railway Administration. Such notices were served only upon the Eastern Railway Administration. The learned Judge has held that the plaintiffs were entitled to insist upon open delivery of the tin which was lying at Sitarampur, and since open delivery was not acceded to by the railway authorities, the plaintiffs were justified in declining to take delivery of the tin offered to them at Sitarampur. Accordingly, the plaintiffs were entitled to the price of one tin forming part of the consignment which worked out at Rs. 104.56. The learned Judge further found the plaintiffs entitled to the sum of Rs. 12 as cost of notice. The remaining parts of the plaintiffs' claim in connection with the railway' freight and the loss of profit were, however, disallowed and a decree for Rs. 116.56 has been passed in favour of the plaintiffs against the petitioner. The view taken by the learned Judge is that the suit was not barred by limitation.

5. I will first deal with the question of limitation. The relevant Article of the Limitation Act, 1908, as rightly held by the learned Judge, is Article 31 which provides a period of one year for a suit "against a carrier for compensation for non-delivery of, or delay in delivering, goods". The period of one year begins to run from the time 'when the goods ought to be delivered". The moot question for consideration, therefore, is, when the third tin forming part of the consignment ought to have been delivered to the plaintiffs or their customer. The consignment had been booked at Bairgania on 29-8-1961. Two of the tins forming part of the consignment were delivered to the plaintiffs' customer at Sttarampur on 12-9-1961, and it was in consequence of that, that the plaintiffs had addressed their complaint to the Chief Commercial Superintendent, Eastern Railway, through the letter Ext. 3(f) dated 12-9-1961. Upon these facts alone, it is manifest that the third tin forming part of the consignment ought to have been delivered to the plaintiffs or their representative alone with the other two tins on 12-9-1961 itself. All the three tins formed one consignment and were covered by one railway receipt or one Parcel Way Bill which bore No. 678408. The mere fact that there was further correspondence between the plaintiffs and the

railway administration subsequent to 12-9-1961 would not alter the position that the third tin ought to have been delivered by the railway administration to the plaintiffs or their representative on 12-9-1961. Therefore, 12-9-1961 must be deemed to be the starting point of the limitation period of one year provided under Article 31 of the Limitation Act, 1908. In this view, the suit which was instituted on 15-12-1962 must be held to be barred by limitation, even if the period of sixty day requisite for the notice under Section 80 of the Code of Civil Procedure were to be added to the period of one year computed from 12-9-1961.

6. The teamed Small Cause Court Judge has held that the starting point of limitation was the 22nd December, 1961, when the Chief Commercial Superintendent wrote the letter Ext. 3(d) to the plaintiffs, and in support of his view, he has relied upon the *Governor-General in Council v. Kasiram Marwari*[1], and *Union of India v. Khemchand*[2], But the legal position has now been authoritatively settled by the decision of their Lordships of the Supreme Court in *Boota Mal v. Union of India*[3], In that case, their Lordships construed the words "when the goods ought to be delivered" occurring in the third column of Article 31, and held that these words can only mean the reasonable time taken for the carriage of goods from the place of despatch to the place of destination. Their Lordships further observed that the view taken by some of the High Courts that the time begins to run from the date when the railway finally refuses to deliver cannot be correct, for the words in the third column of Article 31 are incapable of being interpreted as meaning the final refusal of the carrier to deliver. Their Lordships pointed that the very fact that Article 31 deals with both cases of non-delivery and delay in delivering the goods, shows that in either case the starting point of limitation in after reasonable time has elapsed for the carriage of goods from the place of despatch to the place of destination. As to the question as to what is the reasonable time, their Lordships have laid down that, that would depend upon the circumstances of each case. Their Lordships have further observed.

> "Nor do we think that there could be generally speaking any question of estoppel in the matter of the starting point of limitation because of any correspondence carried on between the carrier and the person whose goods are carried. But, undoubtedly if the correspondence discloses anything which may amount to an acknowledgment of liability of the carrier, that will give a fresh starting point of limitation. As we have said already, the words in the third column refer to reasonable time taken for the carriage of goods from the place of despatch to the place of destination and this reasonable time generally speaking cannot be affected by the subsequent conduct of the parties".

7. In the instant case, there cannot be the slightest doubt that the reasonable time for, the carriage of the consignment from Bairgania to Sitarampur was the 29th August 1961 to the 12th September, 1961. In fact, two of the tins forming part of the consignment had been delivered o the plaintiffs' representative on 12-9-1961. There is no reason to think that the reasonable time was different in respect of the third tin included in the said consignment. Therefore, the starting point of limitation must be deemed to be the 12th September, 1961. A fresh starting point of limitation can only

[1] AIR 1949 Pat 268 [3] AIR 1962 SC 1716
[2](1958) B. L. J. R. 677 at p. 680

arise if there is anything in the correspondence which took place between the parties disclosing an acknowledgment of liability on the part of the Eastern Railway Administration. In the letter

Ext. 3(d) dated 22-12-1961, addressed to the plaintiffs by the Chief Commercial Superintendent, all that was said was that an inquiry was being made into the matter and that the plaintiffs should contact the Claims Inspector at Asansol and take delivery of one tin on valuation which was lying at Sitarampur. By no means, this letter Ext. 3(d) can be construed as acknowledgment of liability of the plaintiffs' claim on the part of the Chief Commercial Superintendent. On the contrary, in the subsequent letter Ext. 3(b) of the Chief Commercial Superintendent, dated the 5th February, 1962, the Railway Administration insisted that the plaintiffs should take delivery of one crate which was lying undelivered at Sitarampur and submit amended claim. That clearly shows that the Railway Administration were not admitting the plaintiffs' claim on the footing that the tin offered to them for delivery at Sitarampur was not a part of the original consignment. The liberty to the plaintiffs to submit an amended claim clearly snows that the original claim was not accepted by the Railway Administration as correct, I have therefore, no doubt in my mind that the starting point of limitation for the present suit was the 12th September, 1961, and that the suit instituted on 15-12-1962, more than fourteen months after the date when the consignment ought to have been delivered, must be held as barred under Article 31 of the Limitation Act, 1908.

8. Since the suit has been found to be barred by limitation, it is hardly necessary to go into any other question arising in this case. I wish, however, to indicate that the view taken by the Court below that the plaintiffs were entitled to the price of the ghee, contained in the tin which was not delivered, on account of the refusal of the railway to give open delivery of the tin which was lying at Sitarampur is not quite correct. The reason is that a consignee cannot claim open delivery as of right. This follows from at least two unreported Bench decisions of this Court, namely, Civil Revn. No. 1199 of 1962, D/d. 22-2-1966 (Pat) and Letters Patent Appeal No. 52 of 1960. D/d. 27-7-1966 .

9. Inthe instant case, the plaintiffs seem to have insisted upon open delivery since they thought that the tin offered to them for delivery was not the original tin forming part of the consignment and there was ground for suspicion that the contents of that tin were not ghee of the quality which had been booked by the plaintiffs. Therefore, unless open delivery was effected, the plaintiffs would be in dark as to the nature and extent of their loss in the event of the contents being, what the plaintiffs suspected. But it is manifest that in that event, the plaintiffs would not have been without remedy. They could nevertheless prove by leading satisfactory evidence that the nature and quality of the contents of the tin delivered to them by the Railway Administration were different from or inferior to the commodity which they had tendered to the railway for carriage to Sitarampur. In that event the plaintiffs would have been entitled to recover from the Railway Administration whatever loss, if any, they suffered by reason of the non-delivery of the original consignment. As it is, the plaintiffs are in possession of no material which they could bring on the record in support of their claim for compensation in the present action. Consequently, the Court is not in a position to hold what loss, if any, was suffered by the plaintiffs in this case so as to be in a position to pass a decree in their favor.

10. For the reasons which I have given, I have come to the conclusion that the plaintiffs are not entitled to any decree in this action. The decree of the Court below is, accordingly, set aside and the plaintiffs' suit is dismissed. The application is allowed. But there will be no order for costs since the plaintiffs did not appear in this Court.

Petition allowed.