(2011) 08 JH CK 0018

Jharkhand High Court

Case No: F.A. No. 143 of 1992 (R)

Tata Iron and Steel Company Ltd.		APPELLANT
	Vs	
South Eastern Roadways and Mehra Ferro Alloys		RESPONDENT

Date of Decision: Aug. 18, 2011

Acts Referred:

- Carriers Act, 1865 - Section 10
- Contract Act, 1872 - Section 148
- Limitation Act, 1963 - Article 91
- Sales of Goods Act, 1930 - Section 39, 39

Hon'ble Judges: Narendra Nath Tiwari, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Narendra Nath Tiwari, J.
This appeal is against the judgment and decree dated 21st May, 1992 (decree signed on 4th June, 1992)

passed by Sub Ordinate JudgeIII, Jamshedpur in Money Suit No. 132 of 1983, whereby learned court below has dismissed the Plaintiff''s suit.

2. The Plaintiff-Appellant had filed the said suit for recovery of Rs. 5,72,009.20 paise from the Defendants jointly and severally with interest @ Rs.

6% per annum from the date of filing the suit till realisation.

3. The Plaintiff''s case, in short, is that the Plaintiff had placed purchase order being No. S/968109/M 838 dated 29th March, 1979 to the

Defendant No. 2 for supply of ten tonnes of Ferror Molybdenum at the agreed rate of Rs. 350/per Kg. It was agreed between the Plaintiff and

Defendant No. 2 that the supply would be made at the rate of two tonnes per month, commencing from April, 1979. On receipt of the payment

from the Plaintiff, the Defendant No. 2 supplied five tonnes of the materials in five installments between 31st May, 1979 to 31st October, 1979. It

was agreed between the Plaintiff and Defendant No. 2 that 98% of the amount would be payable to the Defendant No. 2 against the documents

through Bank and remaining amount would be paid within one month after receipt of the materials. Subsequently, the Defendant No. 2 had

requested the Plaintiff to enhance the price to Rs. 510/per Kg. and by changed order dated 5th November, 1979 the price of the said article was

revised to Rs. 510/per Kg. with respect to only one ton and for the balance four tonnes order was cancelled. After the said changed agreement,

the Defendant No. 2 informed the Plaintiff that one ton of the material has been despatched in 10 (ten) drums through the Defendant No. 1 as per

Challan No. 3067 and G.R. No. 696883 of Defendant No. 1. On receipt of the intimation from State Bank of India, Jamshedpur of the price Rs.

5,82,379.20 paise98; thereof, as per the terms of payment i.e. Rs. 5,72,009.20 paise was paid by the Plaintiff by cheque.

4. The further case of the Plaintiff is that as per the terms of the carriage of Defendant No. 1, it has right to dispose of the perishable article lying

unidentified after 48 hours of arrival without any notice and it has right to dispose of other goods after 30 days of arrival, only after due notice in

writing to the consignee Bank and the holder interested. In any case, the Bank and the holder are entitled to get the proceeds less freight and

demurrage charges. It has been further stated that the Defendant No. 1 never sent or served any notice or intimation of any sale or disposal to the

Plaintiff. In the month of September, 1981, the Plaintiff approached the Defendant No. 1, but he went on putting off the same on one pretext or the

other. Thereafter, the Plaintiff had sent letter dated 18th September, 1981 demanding delivery of the materials from the Defendant No. 1. On the

receipt of the said letter, the Defendant No. 1 gave evasive reply by letter dated 10th October, 1981 and asked to contact his Central Office,

Bangalore, where the consignment was said to be sent by the Defendant No. 1. Thereafter, the Plaintiff sent its representative to Bangalore, but the

Defendant No. 1 failed to deliver the article even there. Hence the suit.

5. The Defendants filed their written statement and contested the suit.

6. The Defendant No. 1South Eastern Roadways defended the suit and stated that the suit is not maintainable and the 3Plaintiff has No. valid

cause of action. The suit is barred by limitation and the same is bad for misjoinder of the parties. It was further stated that the Defendant had No.

knowledge about the booking of the said consignment through his carrier, as there is No. specific date when the alleged materials were

despatched.The Defendant had also No. knowledge of any sale or desptch of the alleged goods by him neither in the month of September, 1981

nor on any date. The Plaintiff had never approached the Defendant for delivery of the alleged goods. After two years of the booking of the goods,

the Manager of the Plaintiff wrote a letter to the Defendant No. 1 about the said booking. The Defendant No. 1 replied the said letter, stating that

the Plaintiff or Defendant No. 2 had never requested or demanded the materials from him. Thus, the Plaintiff is not entitled to any decree against

the Defendant for compensation and interest thereon and as such, the suit is liable to be dismissed.

7. The Defendant No. 2 also contested the suit. It has been stated, inter alia, that the suit is not maintainable in its present form and the Plaintiff has

No. cause of action. The suit is also barred by limitation and under the provisions of the Contract Act, Specific Relief Act and Sales of Goods Act.

The suit is also bad for noncompliance of the mandatory provision of Section 10 of the Carriers Act. However, the Defendant accepted that the

Plaintiff had placed the purchase order of the goods @Rs. 510/per Kg. by order dated 15th November, 1979 and the Defendant No. 2 had

despatched the said goods from Amritsar to Tatanagar in ten drums through the Defendant No. 1. The price was to be paid by the Plaintiff to the

Defendant No. 2 being a sum of Rs. 5,72,009.20 paise. The invoice of the consigned goods was sent through the Bank and the Plaintiff after due

payment had returned the same. Title with respect to the consigned materials was passed in favour of the Plaintiff and the liability of the Defendant

No. 2, with respect to the consigned materials, ceased to exist as soon as the materials were purchased by the Plaintiff on payment of price. The

Plaintiff, thereafter, had issued FormC in favour of the Defendant with respect to the material 4purchased by it during the year 1979 including the

consignment in question. From the correspondence between the Plaintiff and Defendant No. 1, it is clear that the consignment had reached at

Tatanagar in safe condition. But due to negligence on the part of the Plaintiff, the delivery of the consigned materials was not received by the

Plaintiff and the Defendant No. 1 had declared the same as lost property and despatched the same to their godown at Bangalore. In order to help

the Plaintiff, the Defendant gave all possible assistance, but since he had not taken the consignment for a long time, the same was despatched to the

godown of Defendant No. 1 at Bangalore as lost property. The Plaintiff is, thus, not entitled for any relief against the Defendant No. 2.

8. Learned Trial Court framed the following issues:

I.Is the suit as framed maintainable?

II. Has the Plaintiff got cause of action and right to sue?

III. Is the suit barred by limitation, Contract Act, Specific Relief Act, Sales of Goods Act and under the provision of Section 10 of the Carrier

Act?

IV. Is the Plaintiff entitled for a money decree of Rs. 5,72,009.20 paise against the Defendants for the nondelivery of the alleged consignment?

V. To what relief or reliefs, if any, to which the Plaintiff is entitled?

9. In course of trial, the parties led their evidencesoral and documentary.

10. Learned Trial Court on thorough appraisal of facts, evidences and the provision of law, decided almost all the issues against the Plaintiff and

dismissed the suit.

11. Learned Trial Court came to the finding that the suit was filed after more than three years from the date of the cause of action and is barred by

limitation. He further held that the suit is not maintainable and the Plaintiff has No. valid cause of action.

12. The Appellant has assailed the impugned judgment and decree on the ground that the learned Court below has wrongly applied the provision

of Limitation Act. The facts of the case attracts Article 91(b) of the Limitation Act. Learned Trial Court has wrongly applied Article 11 of the

Limitation Act and erroneously held that the limitation for filing suit was three years from the date the goods ought to be delivered. It has been

contended that the instant suit is not for recovery of compensation of loss, destruction or deterioration of the materials, but being a suit for

compensation for conversion by Defendant No. 1, the same is covered by Article 91(b) of the limitation Act and the three years'' period of the suit

is to be reckoned with the date of demand for delivery by the Plaintiff/Appellant i.e. September, 1981. The suit was filed on 14th July, 1983 and

was well within the period of limitation.

13. Mr. G.M. Mishra, learned Counsel, appearing on behalf of the Appellant, submitted that the learned court below has taken erroneous view

and committed serious errors in dismissing the Plaintiff''s suit by misconstruing the provisions of Limitation Act. He submitted that the learned court

below has completely overlooked the important portion of Ext.8 and has not properly appreciated the relevance of Exts.6, 7, 8 and 9. He further

submitted that Ext.8 clearly establishes that the materials were received by Defendant No. 1 at their Jamshedpur Godown and the same were

redespatched to Bangalore under consignment note of Defendant No. 1 dated 15th May, 1981. Ext.8 dated 20th April, 1982 read with Exts.6

and 7 go to prove that the consigned material came in possession of Defendant No. 1 and, thereafter, it was despatched. Learned court below has

not properly taken into consideration the evidence of P.W.4 and the admitted statement in the plaint, which lead to the conclusion that the

Respondent No. 1 converted the consigned property in its own use and is liable for payment of compensation for conversion.The suit is well

maintainable and within the prescribed period of limitation under Article 91 of the Limitation Act.

14. Learned Counsel submitted that the court below has wrongly relied upon the decisions reported in Union of India(UOI) Vs. New India

Assurance Co. Ltd. and Others, , Union of India(UOI) Vs. Sk. Abdul Majeed, and Bootamal Vs. Union of India (UOI), . He submitted that the

decision of Mysore High Court reported in AIR 1960 Mys 283 is the only relevant decision and the instant case squarely covered by the said

decision. The judgment and decree of the learned court below is contrary to the evidences and the prescribed provisions of law and is liable to be

set aside and the Plaintiff''s suit is fit to be decreed.

15. Mr. Mishra referred to the provisions of Section 39 of Sales of Goods Act, 1930 and Section 148 of the Contract Act, 1872 and urged that

unless otherwise authorized by the buyer, the seller shall make such contract with the career or wharfinger on behalf of the buyer as may be

reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so and the goods are lost or

damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a

delivery to himself, or may hold the seller responsible for damages. He further submitted that the delivery of goods to the Defendant No. 1 amounts

to bailment and the bailee is liable for the loss of the things bailed. In that view the buyer is entitled for the compensation for the loss of the

goods.Article 91 prescribes three years'' period for filing suit for wrongfully taking or detaining any specific movable property lost or for wrongfully

taking or wrongfully detaining any other specific movable property. The limitation runs from the date when the person having right to possession of

the property first learns in whose possession it is.

16. Learned Counsel submitted that the instant suit has been filed for damages within three years from the date the Plaintiff came to learn in whose

possession the consignment is kept. The Plaintiff came to learn about the same after the submission of the report dated 20th April, 1982 by Senior

Store Officer, Ext.8. The suit was filed on 14th July, 1983 well within the limitation period as prescribed by Article 91 of the Limitation Act.

Learned court below failed to take into consideration the said legal provisions and has committed serious error of law in holding that the suit is

barred by limitation in view of the period prescribed in Article 11 of the Limitation Act.

17. Nobody appeared on behalf of the Respondents.

18. Having heard learned Counsel for the Appellant, I meticulously examined the facts and evidences on record and considered the relevant

provisions of law as well as submissions of learned Counsel for the Appellant.

19. Culling from the facts and grounds, the following points emerge for decision in this appeal:

(i). Whether the learned Trial Court has wrongly arrived at the findings without properly appreciating the facts and evidences on record?

(ii) Whether the learned court below has erred in holding that the suit is barred by limitation and dismissing the Plaintiff''s suit?

FINDING

Point No. (i):

20. The Appellant has taken ground that the judgment and decree of learned court below is vitiated on account of nonconsideration of the facts

and evidence in proper perspective and the learned court below has not properly appreciated the relevance of Exts.7, 8 and 9 and the evidence of

P.W.4.

21. In the suit, the Plaintiff has examined as many as 8 (eight) witnesses. Out of the said witnesses, P.Ws.1, 2, 3, 7 and 8 are formal witnesses.

They have proved the documents, which have been exhibited.

22. P.W.4P. Jagdev is the Purchase Executive of the Plaintiffcompany.On perusal of his evidence, I find that he has supported the Plaintiff''s case

in his examinationinchief.However, in his cross examination, he has stated that he did not remember the date on which he went to the office of the

Defendant No. 1 for taking delivery of the articles. P.Ws.5 and 6 have also supported the Plaintiff''s case in their examinationinchief. But in his

cross examination, P.W.5 has clearly stated that before 30th March, 1982, he had No. knowledge about the said 8consignment. P.W.6P.N. Singh

has stated that he had gone to the office of the Defendant No. 1 at Bangalore to find out the consignment in the lost property godown, but he could

not find the same in the godown. In his crossexamination, he has stated that he has No. knowledge regarding despatch of the said consignment to

the lost property godown of the Defendant No. 1.

23. As documentary evidences, the Plaintiff has got exhibited ten documents. The plaint of the case has been exhibited as Ext.1 and signatures on

the plaint have been marked as Exts.1/1 and 1/2. Ext.2 is the purchase order dated 29th March, 1979. Ext.3 is letter dated 4th June, 1979. Ext.4

is changed purchase order dated 15th November, 1979. Ext.5 is letter dated 15th February, 1983 issued by the State Bank of India to the

Director of Accounts, Tisco, whereby it was communicated that G.R. Nos. 696883 dated 1st December, 1979 of South Eastern Roadways with

Challan No. 3067 was issued to the Plaintiff on payment of Rs. 5,72,009.20 paise and authorising them to take delivery of the material covered by

the said G.R. Ext.6 is the letter written by the Manager (Purchase) of the Plaintiff to South Eastern Roadways, asking them to arrange delivery of

the material of the local godown; Ext.7 is letter written by Road Transport corporation to the Manager Purchase, Tisco, informing that as per the

company''s policy, they have to keep the goods only for six months, but due to cordial relation as well as business point of view, it was kept for

one year. The said letter also gives the option to the Plaintiff to contact their Central Office at Bangalore. Ext.8 is the finding of the Manager

Stores, wherein it has been noted that ten drums of Fe. Moly as per the order dated 29th March, 1979 was despatched by Mehra Fe. Alloy

through South Eastern Roadways under C. Note No. 696883 dated 1st December, 1979.The record of Jamshedpur South Eastern Roadways

Godown shows that the consignment was redespatched to Bangalore on 15th May, 1981. He has drown a conclusion that the copy of the

redespatch ''C'' Note dated 15th May, 1981 be procured and it be verified from the transporter''s Bangalore Office as to whether they had ever

received any such consignment, so that the 9veracity of statement of Jamshedpur office can be tested and further course of action can be decided.

Ext.9 is the tour report of one D. Dunne, Assistant Manager of Tisco to MadrasBangalore from 15th to 18th March, 1982. Ext.9 series are letters

of different dates.

24. The Defendant examined only one witness, namely, D.W.1Hari Shankar Pandey. he happens to be an employee of South Eastern Roadways,

A.C. Road, which, according to him, is sister concern of Road Transport Corporation.

25. Learned Trial Court has discussed the oral and documentary evidences adduced by the party in great detail.On thorough consideration of the

Plaintiff''s evidences, he found that the material evidence P.W.4P. Jagdeo has clearly stated in his cross examination that he had produced the G.R.

Receipt in the office of the Defendant No. 1 for the delivery of the articles, but he did not recollect the date on which date he had gone to the office

of the Defendant No. 1 for taking delivery of the articles. However, the Plaintiff had not produced the G.R. Receipt through which the articles were

allegedly sent through the transporterDefendant from Amritsar to Tata Nagar. The Plaintiff has not given any explanation for nonproduction of the

G.R. Receipt. The witnesses also failed to say the date and other details regarding production of the G.R. Receipt in the office of the Defendant

No. 1 for taking delivery of the articles.The Trial Court has not found his evidence believable and reliable. Learned Trial Court has also discussed

the evidences of P.Ws.5 and 6. He has found that P.W.5 is hearsay witness on the point of consignment. P.W.6P.N. Singh claimed that he had

visited Bangalore Office of the Defendant No. 1 to find out the consignment in the lost property godown, but in his cross examination, he has

accepted that he has No. knowledge whether the said article was sent to the lost property godown of Defendant No. 1. It is not clear from his

evidence that the consignment was sent to the lost property godown of the Defendant No. 1.

26. Learned court below has discussed the evidence of P.W.7 and found that he has simply proved the letter dated 15th February, 1983 (Ext.5)

showing that the Plaintiff had paid Rs. 5,72,009.20 paise through cheque in the State Bank of India and received the goods receipt (GR).

27. Learned court below has discussed the documentary evidences in detail and found that Ext.2 is a purchase order dated 29th March,1979. Ext.

3 is a letter issued by the Defendant No. 2, showing acceptance of purchase order. Ext.4 is a letter issued by Tisco to Defendant No. 2 in respect

of purchase order by which he had himself accepted the price of goods @ Rs. 510/per Kg.

28. Learned Trial Court has observed that there is No. dispute about the said letters and there was No. use in further discussing the same.

29. He has also considered the letter dated 15th February, 1983 (Ext.5) issued by the Manager, State Bank of India to the Plaintiff.Ext.6 is a letter

issued by the Plaintiff dated 18th September, 1981 to the South Eastern RoadwaysDefendant No. 1. Ext.7 is the reply to the said letter by

Defendant No. 1.

30. The Court below has discussed Ext.8 in detail, which is a report prepared by P.N. Singh, Senior Store Officer, who had inspected the office

of the Defendant No. 1 at Bangalore.According to the said report, he had gone to the lost property godown of South Eastern Roadways at

Bangalore on 5th April, 1982, but the staff present over there did not give any information regarding the consignment. On Inspection, he did not

find Ferro Alloys in the godown. In view of the above, learned court below held that the claim of despatch of the articles from Jamshedpur to

Bangalore could not be substantiated by the Plaintiff. He has also discussed Ext.8/a, which is another letter issued by the Manager (Purchase),

Tisco, and the report of Mr. D. Dunne i.e. Ext.9 regarding nondelivery of the article. Ext.10 is the photostat copy of terms and conditions of goods

receipt (GR) and held that same do not prove the Plaintiff''s case.

31.On perusal of the terms and conditions of carriage agreement between the Defendants and the Plaintiff, it is clear that the goods were

transported under ownership and the G.R. Receipt was to be obtained by the consignee from the bank after making payment, where the bank

agreed to accept the receipt as consignee, endorses for lending to and collection of or discounting the bills of its customers. On production of the

said G.R. receipt, the carrier was to deliver the goods to the consignee. Learned court below found in the instant case that there is No. such

document to show that on 1st December, 1979 when the said articles were sent by Mehra Ferro Alloys to the Plaintiff at Jamshedpur through

Defendant No. 1 they had ever made any attempt to take its delivery from Defendant No. 1 after producing the G.R. receipt in the office of the

Defendant No. 1.

32. Learned court below has also taken notice of the fact that the Plaintiff has not brought the G.R. receipt before the Court. The Plaintiff also

failed to prove as to on which date in the month of December, he had taken G.R. receipt from the bank and had gone to the office of the

Defendant No. 1 for taking delivery of the articles.

33. Thus, there is No. evidence on record to establish that the Plaintiff had ever gone to the office of the Defendant No. 1 to take delivery of the

articles. The Plaintiff has also not mentioned in his plaint the date or month on which he had gone to the office of the Defendant No. 1 to take

delivery of the articles on the basis of G.R. receipt. Learned court below has referred to Ext.10 and held that there was a clear term that the

articles would be delivered only on production of goods receipt of the consignee, but the Plaintiff failed to produce the G.R. receipt and could not

prove that they had ever gone to the office of the Defendant for taking delivery of the articles but the articles were not delivered due to laches on

the part of the Defendant No. 1.

34. Learned court below has further held that the Plaintiff has not filed any chit of paper given by Defendant No. 1 to prove that the articles were

booked on 1st December,1979 through the 12Defendant No. 1. The Plaintiff has not produced the G.R. receipt, bearing No. 696883, issued by

the Defendant No. 1 or any paper showing receipt of G.R. from the bank.

35. Learned Trial Court has held that the goods receipt, which is the basis of the suit, has not been produced on behalf of the Plaintiff and No.

explanation has been furnished for nonproduction of the goods receipt and that adverse inference has to be drawn against the Plaintiff. The Plaintiff

has failed to prove his claim.

36. On scrutiny of the evidences referred to in the impugned judgment, I find No. error in appreciation of the same. Learned court below has

thoroughly discussed the relevant oral and documentary evidences and its finding, being based on proper consideration and appreciation of

evidence on record, calls for No. interference of this Court. I also find No. substance in the ground of the Appellant that the learned Trial Court

has failed to properly appreciate the evidences, particularly Ext.8 along with Exts.6 and 7. The court below has considered the said documents

thoroughly and in right perspective.

37. The Point No. (i) is, therefore, answered in negative and it is held that the learned court below has properly appreciated the evidences and

material on record and has come to the correct finding and there is No. error in his finding.

Point No. (ii):

38. On perusal of the impugned judgment, I find that the learned court below has taken up the issue of limitation in precedence to other issues, as

the Defendant had strongly contested the suit being barred by limitation. Learned court below, after considering the facts and the relevant

provisions of law, has come to the finding that the suit is barred by limitation.Learned court below has found that the consignment, in question, was

said to be booked from Amritsar to Tata Nagar through Defendant No. 1 on 1st December, 1979. The Plaintiff claimed to have received the

Goods Receipt (G.R.) No. 696883 of Defendant No. 1 from the State Bank of India after making 13payment of Rs. 5,72,009.20 paise through

cheque. The Plaintiff for the first time approached the Defendant No. 1 in September, 1981 for the delivery of the consignment. Learned court

below has observed that he finds No. reason as to why the Defendant No. 1 would approach for taking the delivery of the consignment in

September, 1981, which was sent in the year 1979. Learned court below has held that since the goods were dispatched on 1st December, 1979

and the expected date of delivery was December, 1979, the period of limitation would start running from December, 1979. The Plaintiff filed the

suit on 14th July, 1983 for the cause of action, which arose in December, 1979, and as such the Plaintiff''s suit is barred by limitation in view of the

provisions of Article 11 of the Limitation Act.

39. Learned court below has discussed the decisions reported in Union of India(UOI) Vs. New India Assurance Co. Ltd. and Others, , Union of

India(UOI) Vs. Sk. Abdul Majeed, , Bootamal Vs. Union of India (UOI), and has come to the finding that ordinarily the words of a statute have

to be given their strict grammatical meaning and equitable consideration are out of place, particularly in interpreting the provisions of Law of

Limitation. Learned court below has also considered the decision of Mysore High Court in Union of India v. A. Faizulhukka Pathan (Supra) and

found that the facts and circumstances of the said case was not identical to the instant case.

40.. Learned court below, thus concluded that limitation period of three years starts from the date when the goods ought to be delivered and since

the expected date of delivery of goods was in the month of December, 1979, the suit filed in July 1983 is barred by Law of Limitation.

41. Learned Counsel for the Appellant has assailed the finding of the learned Trial Court mainly on the ground that from the facts of the instant

case, the status of the transporter was that of a ''bailee'' and the delivery of goods by the seller was delivery by the ''bailor'' and the consignment

was bailment and for the lost of the consignment, the Defendant No. 1 is liable to indemnify the Plaintiff.

42.ChapterIX of the Contract Act, 1872 deals with ""Bailment"".

Section 148 of the said Act defines ""Bailment"", ""Bailor"" and ""Bailee"", which runs as follows:

148. ""Bailment, ""bailor"" and ""bailee""A ""bailment""is the delivery of goods by one person to another for some purpose, upon a contract that they

shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.The

person delivering the goods is called the ""bailor"". The person to whom they are delivered is called the ""bailee

43. On plain reading of the definition ""Bailment"", it is clear that that ""Bailment"" is established only when there is delivery of goods by one person to

another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or disposed of according to the

direction of the person who delivers the goods. It is clear from the facts of the case that the same do not attract the said provision of the Contract

Act.

44. In Tilendra Nath Mahanta Vs. United Bank of India and Others, , it has been held that it is the duty of the bailee to deal with the goods

according to the direction of the bailor.

45. Since the Plaintiff is not the bailor, the consignment, in question, cannot be said to be bailment.

46. Further Section 152 clearly provides that the ''Bailee'', in the absence of any special contract, is not responsible for the loss, destruction or

deterioration of the things bailed, if he has taken the amount of care of it described in Section 151.

47. The facts of the instant case being entirely different, the consignment in this case cannot be said to be bailment.

48. I, therefore, find No. substance in the submission of the learned Counsel that since the consignment was bailment, suit for damages was

properly filed within time under Article 91(a) or 91(b) of the Limitation Act. In view of the above discussion, it is held that either Article 91(a) or

91(b) of Limitation Act is not attracted in the instant case.

49. Mr. Mishra, learned Counsel for the Appellant, then tried to establish his point with reference to the provisions of Section 39 of the Sales of

Goods Act.

50. Section 39 of the Sales of Goods Act, 1930 is reproduced hereunder:

39. Delivery to carrier or wharfinger

(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier,

whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for sale custody, is prima

facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be

reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or

damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a

delivery to himself, or may hold the seller responsible for damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to

insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the

goods shall be deemed to be at his risk during such sea transit.

51. The Defendant No. 1 admittedly is not the seller of the goods. The provision deals with the contract between the buyers and sellers. Even if it

is said that the goods are lost or damaged in course of transit, the buyer can decline to treat the delivery himself and he may hold the seller

responsible for damages. The provision of the said Section is also not attracted to the facts of the instant case.

52. Learned Counsel for the Appellant placed heavy reliance on the decision of Mysore High Court in Union of India v. A. Faizulhukka Pathan

(Supra), I find that the said decision was rendered on a different facts situation and it has No. application to the facts of the instant case.

53. In view of the said conclusions, I am in agreement with the learned Trial Court that the Plaintiff''s suit falls within the ambit of Article 11 of the

Limitation Act and Article 91 of the Limitation Act has No. relevance for determining the period of the limitation in the instant case.

54. I, therefore, concur with the finding recorded in the impugned judgment and hold that the learned court below has not committed any error in

holding that the suit is barred by 16limitation in view of the provisions of Article 11 of the Limitation Act and dismissing the same. Point No. (ii) is

decided accordingly.

55. In view of the above discussions and findings, I find No. merit in this appeal and the same is dismissed.

56. However, there is No. order as to costs.