(1922) 08 CAL CK 0002

Calcutta High Court

Case No: Rule No. 272 of 1922

The Assam Bengal Railway Co., Ltd.		APPELLANT
	Vs	
Radhica Mohan Nath		RESPONDENT

Date of Decision: Aug. 28, 1922

Judgement

Richardson, J.

The Opposite Party obtained a decree in the Small Cause Court at Munshigunj against the Petitioner, the Assam Bengal Railway Company, for compensation for non-delivery of a parcel of medicines. The goods were entrusted by the Opposite Party as consignor to a Steamer Company for carriage to a station on the Assam Bengal Railway. It was thus the Steamer Company which delivered the goods to the Railway Company. This Rule, obtained by the Railway Company, calls upon the Opposite Party to show cause why the decree should not be set aside on several grounds of which the following are material:--

1. For that the Court below has erred in low in holding that notice to the Traffic Manager was notice to the Agent of the Defendant Company within the meaning of secs. 77 end 140 of the Indian Railways Act, IX of I and the said Court ought to have held that the Plaintiff''s suit was fit to be dismissed for want of notice.

2. For that in the absence of any finding that the Traffic Manager had any authority to accept notice on behalf of the Agent or that the Agent in this particular case had any knowledge directly or indirectly of the Plaintiff''s claim within the statutory period of six months the Court below is wrong in decreeing the suit.

3. For that the Court below has misconceived the legal effect of the Traffic Manager''s communication made without prejudice to the rights of the Company and this has materially affected the decision of the case on the merits.

As to these picas the question is whether the learned Subordinate Judge correctly applied the law to the facts found by him. What he says in his judgment is this:

Upon the evidence I find that the Plaintiff gave notice of his claim to the Traffic Manager who offered to pay Rs. 18 to him in satisfaction of the claim. Under the rules, the Traffic Manager settles all claims and the Agent refers some claims to him for settlement. Under the circumstances I hold that notice to the Traffic Manager is notice to the Agent as held in Woods v. Meher Ali 13 C.W.N. 24 (1908) and the notice was given within 6 months'' time as laid down in the law.

2. It has frequently been held in this Court under sec. 140 of the Act, that in the case of a Railway Company the head-quarters of which are in England, the notice required by sec. 77 should be given to the Agent of the Company in India. The case of Woods v. Meher Ali 13 C.W.N. 24 (1908) on which the learned Judge relies has been distinguished more than once in language appropriate to the present case. See The East Indian Railway Company v. Babu Madho Lal 17 C.W.N. 1134 (1913), Radha Kishun Lal v. The East Indian Railway Company 19 C.W.N. 62 (1913) and The East Indian Railway Company v. Ram Autar 20 C.W.N. 696 (1915). Here also there is no evidence that claims of this kind are usually referred by the Agent to the Traffic Manager and there is no finding, as there was in the case of Woods v. Meher Ali 13 C.W.N. 24 (1908), that the notice had in fact reached the Agent. In Babu Madho Lal''s case 17 C.W.N. 1134 (1913), it was painted out that the learned Judges who decided Woods v. Meher Ali 13 C.W.N. 24 (1908) did not lay down as matter of law that service on the Traffic Manager was a sufficient compliance with the Act and that the decision was based on the particular facts of the case. Reference may also be made to Kala Chand Shaha v. Secretary of State 21 C.W.N. 751 (1917). In my opinion the view of the learned Judge that notice to the Traffic Manager visas notice to the Agent is erroneous in law.

3. The case of Radha Sham Basak v. The Secretary of State 20 C.W.N. 790 (1916) cited for the Opposite Party is distinguishable. The question which arose there is not the question which we have to determine.

4. As to the offer made by the Traffic Manager to the Opposite Party, the learned Judge does not refer to the fact that the offer was made without prejudice. In any case the offer in itself cannot show that the Traffic Manager had authority to receive the notice on behalf of the Agent.

5. So far the Petitioner is entitled to succeed but for the Opposite Party an attempt was made to support the decision of the learned Judge on the ground that in the present, case no notice under sec. 77 was necessary.

6. It was contended in the first place that the case was not within sec. 77 by reason of the fact that the goods were handed to the Railway Company for carriage not by the Opposite Party but by the Steamer Company. It is not easy, however, to see how the claim made by the Opposite Party against the Railway Company can be maintained at all unless it be on the footing that in handing the goods to the Railway Company, the Steamer Company acted as his agent. It was said that the Steamer

Company referred the Opposite Party to the Railway Company. If that be so, the explanation no doubt is that the Steamer Company took up this position, that as regards the Railway Company the Steamer Company was merely an Agent acting on behalf of the Opposite Party as principal.

7. In the second place, it was argued that in the present case there was no "loss" of any goods within the meaning of sec. 77 of the Act and that for that reason there was no necessity to give any notice of the claim to the Railway Company. It does not appear to have been contended in any previous case in this Court that no notice is required of a claim for compensation in respect of the non-delivery or short delivery of goods entrusted to a Railway Administration for carriage. But that is not of itself a sufficient answer.

8. Sec. 77 of the Act so far as it is material provides:--"A person shall not be entitled .... to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried." that is carried by railway, "unless his claim to the .... 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 animals or goods for carnage by railway."

9. I will assume that the word "loss" in this section means loss by the Railway Administration. The argument is that goods not delivered or short-delivered are not "lost" and reliance was placed on the judgment of Jwala Prasad, J., in The East Indian Railway Company v. Kali Charm Ram Prasad [1922] Pat. 145. The learned Judge referred to the distinction which appears in Arts. 30 and 31 of the schedule of the Limitation Act between claims against a carrier on the one hand for compensation for losing or injuring goods and on the other for compensation for non-delivery of or delay in delivering goods. In the first case limitation runs from the time when the loss or injury occurs and in the second case from the time when the goods ought to be delivered. In my opinion, with respect, these two articles of the Limitation Act throw little, if any, light on the construction of sec. 77 of the Railways Act. There may be reasons for the presence of both articles in the Limitation Act but they may still be overlapping. Where there is an agreement by a carrier to deliver goods at a fixed time or within a reasonable time, a claim for goods lost may be drawn as a claim for their non-delivery.

10. The reasoning of the learned Judge then proceeds on the assumption, mistaken as I venture to think, that a claim for non-delivery necessarily imports that the Railway Company are consciously and deliberately withholding goods in their possession, which they might deliver if they chose to do so.

11. As it seems to me, a claim for non-delivery, without more, merely asserts that the goods were not delivered at the agreed time or within a reasonable time. Such a claim asserts nothing as to the cause of the non-delivery.

12. In Ghelabai Parsi v. East Indian, Railway Company ILR 45 Bom. 1201 (1921) there was no question as to the construction of sec. 77 of the Railways Act. The question was as to the right of the Railway Company to exemption from liability under a risk-note in Form B. The decision is based on the judgment of Palles, C.B. in the Irish case of Curran v. M.G.W. Railway Company 2 IR 183 (1896) which also turned on a special contract between the consignor and the Railway Company, Curran''s case 2 IR 183 (1896) has recently been the subject of comment in the House of Lords in Smith v. Great Western Railway Company [1922] I A.C. 178. But for the present purpose it is unnecessary to examine these cases. The question discussed was a question of the burden of proof turning on the state of the evidence at the conclusion of the trial upon an issue raised between the parties which it was necessary to decide one way or the other.

13. In the present case there is no finding that the goods were detained by the Railway Company. It is true also that there is no finding that the goods had, as the Company alleged, been stolen from the godown. As the case seems to have been framed and placed before the Court, it was not necessary to deal with these matters. Damages were awarded merely for the non-delivery of the goods.

14. I have indicated that in my view, a claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. If that be so, it seems to follow that the statutory notice is a condition precedent to a verdict being taken on that alternative footing, because on that footing the goods may have been lost.

15. If it be conceded, though I do not decide, that where goods are wrongfully detained by a Railway Company, no notice is necessary under sec. 77, a plea by the Company of want of notice must at least be met on that ground and the Court must be asked to find that the goods were being detained and were not lost when they ought to have been delivered.

16. Where detention is not pleaded or put in issue a claim simpliciter for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of sec. 77.

17. The result is that in my opinion the Rule should be made absolute and the suit against the Company dismissed with costs of the Court below and of this Rule (hearing-fee four gold mohurs).

B.B. Ghose, J.

18. I agree. The current of decisions in this Court is that notice under sec. 77 of the Railways Act should be served on the Agent. In the case of Woods v. Meher Ali (1908) 13 C.W.N. 24 , the learned Judges expressly say that they did not desire to differ from those decisions. It was apparently found as a fact in that case that the Agent was aware of the notice and it was held under the circumstances of the case that the

Agent had the required notice. If that is so, the decision was in accordance with The Secretary of State v. Dipchand ILR 24 Cal. 306 (1896), where it was held that the plea of want of notice would be sufficiently met if it were shewn that the notice served on the Traffic Superintendent reached the Manager within six months of the delivery of the goods. There is no such allegation or finding in this case. The notice served on the Traffic Manager was not therefore sufficient in law.

19. I do not think that there is much substance in the argument advanced by the learned Vakil for the Opposite Party in support of the decision of the lower Court that no notice under sec. 77 of the Railways Act was necessary in the present case as the goods were not delivered by the Plaintiff to the Railway Company for being carried by the Railway. If this contention is accepted I think it would cut the ground on which the claim against the Railway Company rests, and the Railway Company would not at all be liable for the value of the goods. The learned Vakil urged that the Steamer Company was really liable to the Plaintiff and the Railway Company is only liable because they took upon themselves the liability of the Steamer Company to pay damages for the breach of their contract. The Plaintiff, however, did not bring his suit on that basis and if he had done so there might have been various grounds for defence on behalf of the Railway Company. The liability of the Railway Company must therefore depend on the fact that there was delivery of the goods to the Railway Company, either by the Steamer Company acting as agents of the Plaintiff, or by the Plaintiff to the Steamer Company who received delivery of the goods us Agents of the Railway Company. The Plaintiff therefore cannot get rid of the obligation to give notice of his claim on this ground.

20. It is next urged by the learned Vakil for the Opposite Party that no notice under sec. 77 was necessary as the Plaintiff sued for non-delivery of the goods and not for loss. For this distinction reliance is placed on the case of East Indian Railway Company v. Kali Charan [1922] Pat. 145. I find some difficulty in understanding the facts of the case as reported. It is stated at page 147 of the report: "The Court below has found that the goods in question were lost not on account of a running train robbery, nor on account of theft but on account of the wilful neglect on the part of Defendant''s servants." Thus there was finding that the goods were lost, and in such a case it cannot be questioned that notice is necessary. But there is another passage at p. 148 which runs thus:-- "The lower Court has disbelieved the plea set up by the Defendant of the loss of the goods in the manner alleged by the Company and has expressly held that it was a case of non-delivery of the goods of the Plaintiff." The learned Judge, however, held that although no notice was necessary the Plaintiff had actually given notice, which according to him was good notice under sec. 77 of the Act. He cited a number of cases in support of his opinion that the notice served was sufficient. It may, however, be pointed cut, in passing, that the cases of the Calcutta High Court cited do not seem to support his proposition. The observations, therefore, in the judgment that notice under sec. 77 was not necessary in the case of non-delivery of goods, are mere obiter. In conclusion the learned Judge declined to

exercise his discretionary power of revision in favour of the Company as in his opinion justice had been done.

21. Reference has been made to Arts. 30 and 31of the Limitation Act in support of the contention that there is a distinction between loss and non-delivery. That distinction may be necessary for the purpose of fixing the starting-point for the period of limitation for suits under different circumstances. Art. 30 applies only to a suit for compensation against a carrier for losing or injuring goods, and difficulty was actually experienced in applying the appropriate article to suits for damages for non-delivery before the amendment of the Limitation Act, I shall refer to later on. It can therefore be hardly argued by reference to those articles that the word "loss" in sec. 77 of the Railways Act excludes "non-delivery" of the goods. The words "non-delivery of" in Art. 31 of the Limitation Act was first introduced by way of amendment in the Limitation Act of 1877, by sec. 3 of Act X of 1899. By sec. 2 of the same Act addition of a new sec. 10 to the Carriers Act of 1865 was made. Sec. 9 of the Carriers Act provides that: "In any suit brought against a common carrier for the loss, damage or non-delivery of goods .... it shall not be necessary for the Plaintiff to prove." . . . Under the new sec. 10 notice was required to be given as is provided in sec. 77 of the Railways Act. The word "non-delivery" does not appear in sec. 10, but it seems to me that it was not intended to exclude the necessity of giving notice in the case of non-delivery, although a different article was found necessary for the purpose of limitation of suits. The case might have been different if the suit was for damages for wrongful detention of the Plaintiff''s goods. But in such a case as that, the Plaintiff must prove that the goods are with the Railway Company which have been wrongfully detained by them, otherwise his suit must fail. The word "loss" used in sec. 77 is in my opinion wide enough to include all cases where the goods are not forthcoming and therefore includes a case of non-delivery. It may also be observed that under sec. 72 of the Railways Act, subject to the other provisions of the Act, the liability of the Railway Company is that of a bailee under secs. 152 and 161 of the Indian Contract Act, Sec. 161 of the Contract Act runs as follows: "If by the fault of the bailee the goods are not returned, delivered or tendered at the proper time he is responsible to the bailor for any loss or destruction or any deterioration of the goods from that time." It seems to me that if any person asks for damages for any loss on account, of goods not being delivered against a Railway Company, he is under the provisions of sec. 72 bound to give notice under sec. 77.

22. In order to see whether the contention of the Opposite Party can find any support in the case of Curran v. Midland G.W. Ry. Co. 2 IR 183 (1896) and the case of Ghelabai v. E.I. Ry. Co. ILR 45 Bom. 1201 (1921) which followed the Irish case, we have examined those cases as also the case of Smith v. G.M. Ry. Co. [1922] I A.C. 178 in which Curran''s case 2 IR 183 (1896) was distinguished and commented on, Curran''s case 2 IR 183 (1896) turned upon the question of burden of proof with reference to the special contract entered into between the parties and cannot therefore be of any assistance in deciding the question whether the word "loss" in

sec. 77 of the Railways Act excludes the case of " non-delivery." I am therefore of opinion that it was incumbent on the Plaintiff, who sues the Railway Company for damages for non-delivery of goods to give notice as provided in sec. 77 of the Railways Act. I desire, however, to make it clear that I do not intend to express any opinion as to the meaning of the word "loss" where it is contained in a risk-note or any other document, which should be construed with reference to the context. I agree with the order proposed by my learned brother.