APPELLATE CIVIL.

Before M. C. Ghose and Bartley JJ.

SECRETARY OF STATE FOR INDIA IN COUNCIL.

1934

March 22.

v.

SURJYAMALL HARIBAKSH.*

Railway—Wrong delivery—Mis-delivery—Non-delivery—Loss—Fraud—Connivance of railway officers—Indian Railways Act (IX of 1890), ss. 75,77.

Wrong delivery may amount to loss within the meaning of section 75 of the Railways Act.

The onus is on the railway company to show that the goods were lost.

Loss by theft or by means of fraud is a loss within the meaning of section 75.

Proof of non-delivery or mis-delivery is by no means conclusive evidence as to whether or not a loss has occurred: it must be taken upon the facts of each case whether a loss has occurred within the meaning of section 75.

The expression "loss" includes cases, where goods are not forthcoming and under section 77 mere non-delivery may amount to a loss.

East Indian Railway Co. v. *Jogpat Singh* (1) and *Gopiram Behariram* v. *Agents, East Indian Ry. and O. & R. Ry.* (2) referred to.

Section 75 should not be read so as to exclude cases of lossby wilful neglect or connivance of railway officers: the section has no such qualification.

SECOND APPEAL by the defendant.

The facts of the case and the arguments advanced at the hearing of the appeal appear sufficiently in the judgment.

The Government Pleader, Sharatchandra Basak, and the *Assistant Government Pleader, Roopendrakumar Mitra,* for the appellant.

Radhabinode Pal, Holiram Deka and *Bijalibhooshan Sanyal* for the respondents.

*Appeal from Appellate Decree, No. 314 of 1932, against the decree of I. P. Barhua, Special Subordinate Judge, of Assam Valley Districts, dated July 30, 1931, reversing the decree of Surjyakanta Barhua, Munsif of Gauhati, dated July 31, 1930.

(1) (1924) I. L. R. 51 Calc. 615. (2) (1925) 30 C. W. N. 209.

1934

Secretary of State for India in Council v. Surjyamall Haribaksh.

M. C. Ghose and Bartley JJ. In this case the facts, which are not disputed, are that the plaintiff is a dealer in Assam silk, *endi* and *mugâ*, and other silk cloths and yarns at Gauhati. On the 3rd May, 1927, four conspirators, intending to cheat him, came to his shop paid him an advance of Rs. 20-4 as. and bought goods worth Rs. 710-4 as., leaving Rs. 690 to be paid, when the railway receipt would be sent to them by value payable post to an address in the municipal market in Calcutta. The plaintiff, believing their story, sent the goods by railway parcel from Gauhati to Ranaghat and sent the railway receipt by value payable post to the address in the municipal market. The address in the municipal market being a bogus address, the receipt, after a time, was returned to the plaintiff. He then took steps and asked the station master at Ranaghat to return the parcel to him. But, long before that date, the conspirators had appeared at Ranaghat with a forged telegram purporting to be from the plaintiff at Gauhati and a forged letter posted at Gauhati, written on the plaintiff's printed note paper addressed to the station master at Ranaghat and a bogus indemnity bond. These documents induced the station master at Ranaghat to make over the parcel to them. Afterwards, when the facts became known, the police were informed and they arrested Jateendranath Mukherji, one of the conspirators and he was sent up for cheating, and was convicted. The plaintiff has sued the railway administration for the sum of Rs. 690, which he lost by the loss of the parcel. The trial court found that the parcel was delivered by the station master and the parcel clerk at Ranaghat to Jateendranath Mukherji and another person, who produced certain forged documents, and that, in doing so, the railway officers were guilty of negligence and carelessness, but that as the plaintiff who sent the consignment of Assam silk to the value of Rs. 710 did not declare the value of the same, he was hit by section 75 of the Indian Railways Act and,

accordingly, the trial court dismissed the suit. In appeal, the learned Subordinate Judge found that a fraud was intended to be practised on the plaintiff firm by a bogus customer and that a well-planned case of cheating had been laid out and it was successfully carried out either with the connivance of the station staff at Ranaghat or through their gross and deliberate carelessness. The learned Subordinate Judge further found that, in his view, the wrong delivery of the parcel did not amount to a loss within the meaning of section 75 and, therefore, section 75 did not apply to the case. He allowed the appeal and decreed the suit.

In this Court, the only question is whether section 75 of the Railways Act is a bar to the plaintiff's success of the suit. The learned Subordinate Judge has found and Dr. Pal on behalf of the plaintiff, respondent, has urged that, having regard to the decision in the case in *East Indian Railway Co.* v. *Jogpat Singh* (1) it should be held that misdelivery, such as in this case, does not amount to a loss within the meaning of section 75. We observe that in the case of *Jogpat Singh* (1), the dispute with the railway company was as to the application of risk note form B. Under that risk note, the railway company would be responsible for wilful negligence or theft by railway servants. It was held by Mr. Justice Page that the onus was on the railway company to show that the goods were lost by inadvertence or involuntarily. In that case, if the railway company had admitted that the goods were lost by theft committed by railway servants, they would have lost the suit. The learned Subordinate Judge was, in our opinion, in error in thinking that the loss of the goods by the railway could only occur if the goods had been lost through inadvertance or involuntarily. Loss by theft or by means of fraud is, in our opinion, clearly a loss within the meaning of section 75. This view will appear clear from the

(1) (1924) I. L. R. 51 Calc. 615.

1934

Secretary of State for India in Council v. *Surjyamall Haribaksh.*

observation of Mr. Justice Page in the case of *Jogpat Singh* (1). There the learned Judge observes thus :

> It appears to me that it is equally inaccuruate to affirm that goods which are not duly delivered, or have been misdelivered, are lost, as to assert that they are not lost. The true view would seem to be that in either case the goods may or may not be lost, and that proof of non-delivery is by no means conclusive evidence as to whether or not a loss has occurred.

In our opinion, it must be taken upon the facts of each case whether a loss has occurred within the meaning of section 75.

The learned Government Pleader, on behalf of the appellant, has quoted the cases in the *Madras and Southern Mahratta Railway Company, Limited* v. *Haridoss Banmalidoss* (2), *Hill, Sawyers and Company* v. *The Secretary of State* (3) and *East Indian Railway Company* v. *Fazal Ilahi* (4), in all of which it has been held that the expression "loss" includes cases where the goods are not forthcoming and under section 77 mere non-delivery may amount to a loss. We are of opinion that we need not refer to the decision of other High Courts. The decision of Suhrawardy and Page JJ. in the case of *Jogpat Singh* (1), which was followed in *Gopiram Behariram* v. *Agents, East Indian Ry. and O. & R. Ry.* (5), is in our opinion, sufficient for our purpose.

The facts in this case are clear. A set of four thieves went to Gauhati to the shop of the plaintiff; while some of them ordered the goods, one of them stole some note paper of the plaintiffs. Thereafter, one or more of the conspirators remained at Gauhati and in the name of the plaintiff sent to the railway station master at Ranaghat a bogus telegram and a forged letter written on the plaintiff's note paper and one of the conspirators arrived at Ranaghat with other bogus papers and induced the station master and the parcel clerk to make delivery of the parcel to him. The courts below have concurrently found that the

(1) (1924) I. L. R. 51 Calc. 615.
(2) (1918) I. L. R. 41 Mad. 871.
(3) (1921) I. L. R. 2 Lah. 133.
(4) (1924) I. L. R. 47 All. 136.
(5) (1925) 30 C. W. N. 209.

station master and the parcel clerk were guilty of carelessness and connivance. There is no doubt, however, that the goods were practically stolen by Jateendranath Mukherji. He was traced and tried in a criminal court and convicted. It is thus clear that the goods were stolen by some thieves and disposed of by them. Dr. Pal argues that the mere fact that the goods were taken away by some thieves does not lead to the inference that the railway administration had really lost the goods, for they have not given any evidence to show that they made any endeavour to recover the stolen goods. We are of opinion that the argument has no force in this case. The goods had been obtained by fraud by some thieves. The railway administration complained to the police, who would have produced the goods, if they could have recovered the same from the thieves. In the circumstances of this case, we are of opinion that the goods were lost by fraud and theft, and it was a loss within the meaning of section 75 of the Railways Act.

It is next urged on behalf of the plaintiff, respondent, that section 75 should not be read so as to include cases of loss by wilful neglect or connivance of railway officers. The section has no such qualification. It plainly says that, when any articles mentioned in the second schedules are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction and deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway. The plaintiff did not declare the value of the silk in the parcel; he is hit by section 75, and he cannot escape the effect of the section on the ground that the loss happened by the negligence or connivance of

1934

Secretary of State for India in Council v. Surjyamall Haribaksh.

railway servants. It appears to us that in the case of valuable goods declaration of value is a matter of importance to the railway administration, as it would put the responsible officers of the railway on their guard and they would take special care to guard the said parcel. Under section 75, the railway administration may require the consignor to pay a percentage on the value of the parcel by way of compensation for increased risk. Though they are not compelled to require such additional payment, yet the declaration would put responsible officers of the railways on their guard and for lack of such a declaration the plaintiff would stand to suffer in the case of loss of his goods.

In the last place, it was urged by Dr. Pal that the railway administration did not directly plead loss of the parcel and, therefore, they are not entitled to succeed under section 75 in this Court. The reply is that in paragraph (4) of their written statement they directly raised the plea of protection under section 75 and it is also pointed out that the plaintiff in the notice he served on the railway administration pleaded loss of the parcel. In our opinion, there is no force in the argument.

In the result, we are of opinion that section 75 applies to the facts of the present case and that, as the plaintiff did not make the requisite declaration, his suit must fail. The appeal is allowed and the suit is dismissed with costs in all courts.

Appeal allowed.

G.S.