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only to decide whether or not the defendant purported to act in his capacity as municipal officer, and if we find that he did so purport to act, then it appears to us that he was clearly entitled to the notice prescribed by section 49. We are not called upon to decide whether or not the defendant rendered himself liable to damages for malicious prosecution, if he acted with malice or without reasonable or probable cause. All that we decide is that he was entitled to the notice prescribed by the Act and not having received that notice the suit is not maintainable. The case is unlike the case which has been relied upon by the learned advocate for the appellants, namely, that of *Muhammad Saddiq Ahmad* v. *Panna Lal* (1). In that case the defendant did not purport to act in good faith in pursuance of the law, but he took advantage of his position as a police officer to commit illegal and tortious acts maliciously and without cause. That is a different case from the one now under consideration. In this case undoubtedly the defendant did purport to act as member of the Municipal Board charged with the supervision of the sanitation of the town of Banda. The case is more like the case of *Bakhtawar Mal* v. *Abdul Latif* (2). We therefore dismiss the appeal with costs.

Appeal dismissed.

1911 *March*, 31.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANT) *v.* GANPAT RAI (PLAINTIFF).*

Act No. IX of 1890 *(Indian Railways Act), section* 77—*Suit against railway company—Notice—Limitation—Act No. IX of* 1908 *(Indian Limitation Act), schedule I, article* 31—*Waiver of notice.*

Certain goods were despatched on the 26th of March, 1908, from Bombay to Ghazipur. The goods were lost in transit while in possession of the Great Indian Peninsula Railway Company. The consignee made a claim against the East Indian Railway Company, as the result of which he was offered a certain sum as compensation by the assistant traffic manager of that company, who stated that he did so with the authority of the deputy traffic manager of the Great Indian Peninsula Railway Company. There was, however, no proof that any such authority had been given, and the offer was refused. On the 9th

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* Second Appeal No. 938 of 1910 from a decree of Sri Lal, District Judge of Ghazipur, dated the 2nd of August, 1910, reversing a decree of Baij Nath Das, Munsif of Ghazipur, dated the 24th of February, 1910.

(1) (1903) I. L. R., 25 All., 220. (2) (1907) I. L. R., 29 All., 567.

August, 1909, the consignee brought a suit against the Great Indian Peninsula Railway Company for damages for the loss of his goods, but did not give the notice required by section 77 of the Indian Railways Act, 1890. He claimed that certain conditions printed on the back of the railway receipt relieved him of the necessity of giving notice under section 77. *Held* that this was not so; nor did the action of the assistant traffic manager of the East Indian Railway Company amount to a waiver of notice. The suit was also barred by limitation under article 31 of the first schedule to the Indian Limitation Act, 1908.

THE facts of this case were shortly as follows:—

The plaintiff's agent at Bombay sent some goods to him at Ghazipur. The goods never reached their destination, and ultimately it was found that they had been stolen while in the custody of the defendant company on the 1st of April, 1908.

On the 9th of August, 1909, the plaintiff filed this suit against the company for the price of the goods lost and for damages. The suit was defended on the grounds that no proper notice had been given and that the suit was barred by limitation. The Munsif dismissed the suit holding that under section 77 of the Railways Act, IX of 1890, no notice had been served of the defendants. The Judge decreed a part of the claim, holding that a letter of the acting traffic manager of the East Indian Railway, saying that he had been authorized by the deputy traffic superintendent of the appellant company to pay the plaintiff the actual value of the goods, was a sufficient acknowledgement of notice and that the suit could not be contested on that ground. The defendants appealed.

Pandit *Ladli Prasad Zutshi*, for the appellant.

The suit should have been filed within the period prescribed by articles 30 and 31 of the Limitation Act. The lower court decided this issue against the appellant relying on *The British India Steam Navigation Co., Ld.,* v. *Hajee Mahomed Esack & Co.* (1), *Hassaji* v. *The East Indian Railway Company* (2), *Mohansing Chawan* v. *Henry Conder, General Traffic Manager, G. I. P. Railway Company* (3) and *Dan Mull* v. *British India Steam Navigation Company* (4). Articles 30 and 31 were amended by Act IX of 1908, and the rulings referred to were no longer applicable. Further, there was no acknowledgement which took the case out of the statute of

(1) (1881) I. L. R., 3 Mad., 107.
(2) (1882) I. L. R., 5 Mad., 388.
(3) (1883) I. L. R., 7 Bom., 478.
(4) (1886) I. L. R., 12 Calc., 477.

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limitation. The acknowledgement relied on was a letter from the assistant traffic manager, East Indian Railway, in which he stated that he was authorized by the deputy traffic manager of of the Great Indian Peninsula Railway, to offer to the plaintiff Rs. 499-7-3, being the amount to which "he (the plaintiff) was actually entitled according to the sender's *bijak.*" The deputy traffic manager, Great Indian Peninsula Railway, "emphatically denied" this fact. There was no evidence on the record to show that the assistant traffic manager had any authority to make this offer. Even if it be assumed that the assistant traffic manager had authority from the Great Indian Peninsula Railway to make an offer, such an offer would be without prejudice to their right to notice, and the offer not having been accepted, the plaintiff was not entitled to rely upon this letter as an acknowledgement. It was admitted that no notice was given to the agent of the Great Indian Peninsula Railway, under section 77 of the Railways Act within six months from the date of the delivery of the goods for carriage by the railway. The learned District Judge held that under paragraph 4 of the printed notice at the back of the railway receipt, the claim was to be made to the superintendent of the receiving station, and therefore the railway was to be deemed to have waived its right under section 77 of the Railways Act. Condition 5 of the railway receipt drew attention to section 77 of the Railways Act. Paragraph 4 must be read with paragraph 5, and reading the two paragraphs together it was obvious that it was not intended by paragraph 4 to relieve the plaintiff of his liability of giving notice required by section 77 of the Railways Act; *G. I. P. Ry. Co.* v. *Chāndra Bai* (1).

Mr. *Ahmad Karim,* for the respondent, submitted that the suit was not barred by limitation, as the period should be computed from the last letter sent by the East Indian Railway after consultation with the Great Indian Peninsula Railway, the letter in which the latter company expressed their willingness to pay the actual price of the goods sent but not the damages claimed. He referred to section 19 of the Limitation Act. Further that it was inequitable that the suit having been delayed by the admission of liability by the company, the latter should

(1) (1906) I. L. R., 28 All., 552.

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now be allowed to set up the defence of limitation. As regards the rulings cited on the question of notice, he submitted that in none of them was the question of admission by the railway Company or the directions printed at the back of the railway receipt brought to the notice of the court. The 4th paragraph of these directions had been put in to facilitate the work of the agent by allowing notice to be given to the assistant traffic manager. There was a clear distinction between this paragraph and the next, which reproduced the wording of the Railways Act. He submitted that the right of an agent to receive notice had been delegated by him to the subordinate staff, and this form had the sanction of the Government of India. Therefore, if the notice came to the knowledge of the assistant traffic superintendent, it was sufficient notice within the Act. Acknowledgement amounted to a waiver of notice—*Periannan Chetti* v. *South Indian Ry. Co.*, (1)—and also saved limitation. Besides it had not been shown that the appellants had been prejudiced in any way.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for damages for non-delivery of a bale of goods consisting of gauze which was consigned by the plaintiff's agents in Bombay to him at Ghazipur on the 26th of March, 1908. The goods were lost on the Great Indian Peninsula Railway, and it is stated that they were stolen in transit and that the thief was tried and convicted of the theft. Amongst the defences filed by the Great Indian Peninsula Railway Company was one based on section 77 of the Indian Railways Act, namely, that no notice of action as required by law was given to that company.

The court of first instance found that no notice was given and dismissed the plaintiff's suit.

An appeal was preferred by the plaintiff, with the result that the lower appellate court held that the notice required by the Act had been waived by the defendant company; and also in view of the fact that an offer had been made to the plaintiffs for payment of a sum of Rs. 499-7-3 in satisfaction of his claim, the company could not now be allowed to go behind this offer and set up the technical ground of defence that no notice of the claim had been served within the meaning of the section above

(1) (1899) I. L. R., 22 Mad., 137.

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referred to. Accordingly that court reversed the decision of the court below so far as regards the Great Indian Peninsula Railway Company, and allowed the plaintiff's claim as against that company but dismissed it as regards the East Indian Railway Company.

From the decree of this court the present appeal has been preferred, and the main grounds of appeal are two: first, that no notice having been served within the meaning of section 77 of the Indian Railways Act, the suit was bound to fail as against the Great Indian Peninsula Railway; that there was no waiver of the requisite notice, and that the court below was therefore wrong in allowing the plaintiffs' claim. There is a further ground of appeal, namely, that the suit is barred by limitation, not having been brought within one year from the date on which the goods ought to have been delivered.

As regards the first question it is not disputed that notice was not served upon the Great Indian Peninsula Railway Company pursuant to the provisions of section 77 of the Indian Railways Act. That section provides that "a person shall not be entitled to compensation for the loss of goods delivered to be carried by railway unless his claim to 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 goods for carriage by railway." Under section 140 of the same Act a notice or other document required, or authorized by the Act to be served on a railway administration "may be served in the case of a railway administered by a railway company, as is the Great Indian Peninsula Railway Company, on the agent in India of the Railway Company, by delivering the notice or other document to the agent; or by leaving it at his office; or by forwarding it by post in a prepaid letter addressed to the agent at his office and registered under part III of the Indian Post Office Act of 1866." The mode of service upon the Great Indian Peninsula Railway Company would ordinarily in the absence of a provision such as this, be effected by service upon the company at their head office in London. This mode of service had been prescribed, no doubt, for the purpose of saving the delay and the expense which would attend service in London. In this

case no service either under section 140 or directly upon the defendant company in London was effected. Consequently it would seen that the learned Munsif was right in holding that the suit could not be maintained. The learned District Judge, however, was of opinion that section 140 was not exhaustive and that a mode of service was prescribed by a condition which appears on the back of the receipt form in use on the Great Indian Peninsula Railway on the consignment of goods to them for carriage. The condition runs as follows:—

"That all claims against the railway for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken, and that a written statement of the description and contents of the articles missing, or of the damage received must be sent forthwith to the traffic superintendent of the district, or goods superintendent at Bombay, Wadi Bundar, in which the forwarding or receiving station is *situated*; *otherwise* the railway will be freed from responsibility."

The learned Judge observes that "this paragraph lays down the procedure to be followed by consignors in case of the loss of goods and it forms part of the legal contract between the Great Indian Peninsula Railway Company and the consignor." He held that where a consignor sends in a claim in accordance with the provisions of the said paragraph, the railway company is bound to treat it as a proper notification of his claim to compensation within the meaning of section 77, and that it is not then necessary to serve a notice in any of the ways mentioned in section 140 or otherwise. He found upon the evidence that the plaintiff did prefer his claim in writing to the traffic superintendent of the district in which the receiving station is situate, and that the assistant to the traffic manager, East Indian Railway, after communicating with the Great Indian Peninsula Railway, entertained the plaintiffs' claim and offered to pay him Rs. 499-7-3, the value of the goods lost. He therefore held that the notice which was given by the plaintiff was sufficient notice within the meaning of section 77. He further found that by the offer of the assistant traffic manager of the East Indian Railway to pay Rs. 499 odd damages, the Great Indian Peninsula Railway must be taken to have waived their right to the notice required by law. We are unable to agree with the learned District Judge in the view which he formed. If the learned Judge had read the

condition on the receipt form following the one upon which he relied, he would have found that it was not the intention of the company that the provision upon which he relied should relieve the plaintiff from the necessity of complying with section 77 of the Indian Railways Act. Condition 5 provides that by section 77 of the Indian Railways Act, 1890, "a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway, or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway company within six months from the date of the delivery of the animals or goods for carriage by the railway."

This condition gave notice to the consignors that section 77 of the Railways Act must be complied with. Paragraph 4 must be read in connection with it, and reading the two conditions together, it is obvious that it was not intended by condition 4 to get rid of the obligation which lay upon the plaintiff of giving notice of action as required by section 77 of the Indian Railways Act. This was expressly decided in the case of *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1) by a Bench of which one of us was a member. In that case the provisions of section 77 were considered, and also of section 140. It was pointed out that the notification of a claim prescribed by section 77 may be given either to the railway administration as defined in section 3, sub-section (6), or in any of the ways mentioned in section 140; that it was necessary for the plaintiff to prove service of notice of his claim upon the Great Indian Peninsula Railway Company at their office in London or else in any of the ways prescribed in section 140, and that there having been no proof of any such service, and the time of such service having expired, the suit was not maintainable. The learned District Judge, referring to this and other rulings, observes that these rulings were in his opinion not applicable to the present case, as in none of the cases which resulted in those rulings, did the defendant railway company ever admit the claim of the plaintiff or offer to settle it out of court. "Moreover, the question whether compliance with the directions contained in para-

(1) (1906) I. L. R., 28 All., 552.

graph 4 of the notice mentioned hereinbefore meets the requirements of section 77 and renders the service of notice under section 140 unnecessary was never raised in those cases." As we have pointed out, the directions contained in paragraph 4 obviously do not avail the plaintiff in view of the fact that in the subsequent paragraph the necessity for the observance of section 77 is expressly stated. It appears to us that the learned District Judge must have overlooked paragraph 5 which succeeds the paragraph upon which he relied.

Then as to waiver, it is said that the assistant traffic manager of the East Indian Railway stated that he had authority from the deputy traffic manager of the Great Indian Peninsula Railway Company to offer to the plaintiff Rs. 499-7-3 compensation, and it is contended that this amounted to a waiver of notice on the part of the Great Indian Peninsula Railway Company. We are unable to hold that there was any waiver. In the first place the district traffic manager of the Great Indian Peninsula Railway Company repudiated the allegation that he gave any authority for the making of any offer to the plaintiff. The assistant traffic manager was not summoned to prove the letter of authority which he alleged he had received. There is nothing to show that the Great Indian Peninsula Railway Company ever waived their right to notice of the claim. On the contrary, they in their written statement relied upon the absence of notice, and there is nothing upon the record to justify us in holding that they waived their rights in this respect. Even if it be assumed that the Great Indian Peninsula Railway Company authorized the assistant traffic superintendent of the East Indian Railway Company to make an offer, such an offer would be without prejudice to their rights, and the offer not having been accepted, it could not be held that they were not entitled to rely upon the pleas which they had set up in their defence. Upon this point, therefore, we think that the learned District Judge was wrong in reversing the decision of the court of first instance.

There is besides this another ground of defence which appears to us to be fatal to the plaintiffs' claim, and that is the plea based on the statute of limitation. Article 31 of the Limitation Act (Act No. IX of 1908) prescribes the period of limitation for a

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suit for compensation for non-delivery of goods. In this article the former article of limitation was modified and certain words introduced, so as to adapt the article to the case of a claim such as the present one for damages or compensation for non-delivery of goods. The article is as follows:—"Against a carrier for compensation for non-delivery of or delay in delivering goods, one year from the time when the goods ought to be delivered." The goods, as we have said, were consigned to the plaintiffs on the 26th of March, 1908, and the suit was not instituted until the 9th of August, 1909. The period within which the goods in this case ought to have been delivered would not exceed a fortnight, or at the outside three weeks from the time when the goods were consigned at Bombay. Several months over and above one year from this time, therefore, had elapsed before the suit was instituted. As an answer to this plea, it is contended that there was an acknowledgement which took the case out of the statute of limitation. That acknowledgement is the letter from the assistant traffic superintendent of the East Indian Railway Company offering to pay the sum of Rs. 499-7-3, in full satisfaction of the plaintiffs' claim. There is no evidence before the court which would justify us in holding that the Great Indian Peninsula Railway Company ever gave authority to the assistant traffic superintendent of the East Indian Railway to make this offer. There is no evidence that the Great Indian Peninsula Railway Company ever admitted liability in respect of this sum. We, therefore, are unable to say that there was any such acknowledgement by the Great Indian Peninsula Railway Company such as would prevent the operation in their favour of the Statute of limitation.

Upon these two main points which have been taken by the learned vakil for the defendant railway company, we think that the appeal should be allowed, and we must set aside the decree of the lower appellate court so far as regards the Great Indian Peninsula Railway Company. We, accordingly, allow the appeal of the company, set aside the decree of the lower appellate court and restore the decree of the court of first instance. Under the circumstances we make no order as to the costs of this appeal, or as to the costs in the lower appellate court.

Appeal decreed.