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the case of *Mukyaprana Bhatta* v. *Kelu Nambiyar* (1) there was possibly no option under the terms of the deed given to the creditor. In any case the same Bench differed from their own decision subsequently in *Rego* v. *Phillip Tauro* (2).

We are, therefore, of the opinion that the view taken by the court below that the present claim is not barred by the provisions of order II, rule 2 is correct. The revision is accordingly dismissed with costs.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

SECRETARY OF STATE FOR INDIA (DEFENDANT) *v.* SIMLA FOOTWEAR COMPANY (PLAINTIFF)*

1935 *January*, 3

Railways Act (IX of 1890), section 77—Suit for compensation for wrongful sale by railway of goods consigned—Notice of claim not necessary—Suit not for "loss" or non-delivery—Limitation Act (IX of 1908), articles 31, 48—Railways Act (IX of 1890) sections 55, 56—Auction sale by railway on less than 15 days' notice—"Local newspapers".

Delivery of a consignment was not taken after arrival at destination, and the railway gave a notice to the consignor that proceedings would be taken under sections 55 and 56 of the Railways Act. The consignor sent a reply asking the railway to continue to keep charge of the goods for him and that he would take delivery about the 1st of May, 1929. The railway waited till the 10th of August, 1929, when it sent to some newspapers, of the place where the auction sale was to be held, an advertisement announcing that the consignment, along with some others, would be sold by auction on the 1st of September, 1929. The newspapers made some delay in publishing the advertisement, which did not actually appear before the 18th of August. The auction sale was held on the 1st of September, and thereafter the railway offered to the consignor the sale proceeds, less the rates and charges due. He declined to accept

*Second Appeal No. 385 of 1932, from a decree of Muhammad Akib Nomani, Subordinate Judge of Agra, dated the 4th of February, 1932, confirming a decree of S. M. Ahsan Kazmi, Additional Munsif of Agra, dated the 15th of June, 1931.

(1) A.I.R., 1928 Mad., 705. (2) A.I.R., 1929 Mad., 371.

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it and brought a suit for compensation for wrongful sale of the goods by the railway:

Held, that the suit not being for compensation for loss, destruction or deterioration of the goods, no notice under section 77 of the Railways Act was necessary. The goods were never lost; they were all along in the possession of the railway until they were sold; and it was the sale which was the plaintiff's cause of action. The right of a railway as distinct from an ordinary bailee to sell goods is conferred by sections 55 and 56 in chapter VI of the Railways Act: and any claim arising out of a wrongful sale purporting to be under those sections would not come under chapter VII, and the notice required by section 77 of chapter VII would have no application to such a claim.

Held, also, that as the suit was not for compensation for non-delivery, article 31 of the Limitation Act did not apply, but article 48 did.

Held, further, that inasmuch as at least fifteen days' notice of the intended auction had not been given, as required by section 55(2), the auction was not strictly justified under that section and therefore the railway could not deduct the rates and charges from the auction price, as the right to realise charges came under that section. But the sale could be upheld on the basis of section 56, under which section also the railway was proceeding. The words in that section, "as nearly as may be", implied that the terms of section 55 were not to be rigidly applied to a sale under section 56; and as it was not shown that the fact that the notice was short by one day caused a lower price to be fetched at the auction, the sale should be upheld under section 56.

The words "local newspapers" in section 55(2) mean newspapers of the place where the auction sale is to be held, and not newspapers of the place where the person entitled to the goods resides.

Mr. *Muhammad Ismail* (Government Advocate), for the appellant.

Mr. *Shah Zamir Alam*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a second appeal by a defendant against whom the lower courts have passed a decree for Rs.600 damages. The appellant is the Secretary of State for India in Council representing the North-Western Railway and the Great Indian Peninsula Railway. The facts are simple. The plaint sets out that the plaintiff, a firm in Agra, sent certain

boxes of shoes from Agra Fort to Amritsar. The date of despatch was the 26th of January, 1929, and the consignment arrived on the 7th of February, 1929. Delivery was not taken at Amritsar and on the 20th of April, 1929, the railway company sent a registered notice to the plaintiff stating that the goods had been sent to the Lost Property Office and that proceedings would be taken under sections 55 and 56 of the Railways Act. On the 24th of April, 1929, the plaintiff sent a very indefinite letter to the railway company asking the railway company to retain the goods and stating that delivery would be taken about the 1st of May. The railway company sent no reply to this letter and the plaintiff took no further action in the matter. On the 1st of September, 1929, the railway company put up the consignment for sale along with other goods at a general sale and the consignment was sold for Rs.400. After this the plaintiff states that in the first week of October, 1929, he was informed that the goods had been sent to the Lost Property Office in Lahore, and on the 22nd of October, 1929, he was informed that the consignment had been sold by public auction. The railway company offered to the plaintiff the proceeds Rs.400, less Rs.28-2, that is, Rs.371-14 which the plaintiff did not accept. The plaintiff has brought a suit for the cost price of the goods Rs.759-12 and various other sums amounting in all to Rs.1,035-11. The lower courts have awarded Rs.600 as damages.

The first point which was argued in second appeal was that the lower appellate court erred in holding that no notice under section 77 of the Railways Act was necessary. This section states: "A person shall not be entitled to 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 administra-

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tion within six months from the date of the delivery of the animals or goods for carriage by railway." The appellant claims that the present suit is one which would come under this section. The section refers to a suit for compensation for loss, destruction or deterioration of goods. The argument is that in the present case loss has been caused to the plaintiff by the sale of the goods by the railway company or the non-delivery of the goods to the plaintiff by the railway company, therefore the notice is required under this section, and the notice should have been given within six months from the date of delivery of the goods, i.e. within six months from the 26th of January, 1929. The notice, therefore, according to the appellant, should have been given by the 26th of July, 1929. It is obvious that in this case the notice according to this theory should have been given before the goods were sold. It is difficult to see on what grounds it could have been alleged on the 26th of July, 1929, that the goods had been lost. On that date the goods were in the Lost Property Office of the railway and the railway had made no refusal to deliver them to the plaintiff. On the contrary the railway had issued a notice to the plaintiff on the 20th of April, 1929, asking the plaintiff to take the goods. It is clear therefore that it could not be said that the goods were in any sense lost on the 26th of July, 1929. Therefore, if the contention of the appellant were correct it would be impossible to bring this case at all. Learned counsel for the appellant referred to a large number of cases which, he contended, established or tended to establish his point. The earliest of these case is *Great Indian Peninsula Railway* v. *Ganpat Rai* (1). That was a case where the goods had actually been lost as they had not actually reached their destination. The case was, therefore, different from the present case where the goods had reached

(1) (1911) I.L.R., 33 All., 544.

their destination and had never been lost from the possession of the railway company until sold. The next case is *East Indian Railway Co.* v. *Sheo Ratan Das* (1). In that case the railway company retained the goods on the lien under section 55. *Secretary of State for India* v. *Jiwan* (2) is a case where it was held that the word "loss" in section 77 of the Railways Act means the actual loss to the company and not a loss to the plaintiff in the sense that he does not receive the value of the goods. This was also held in *East Indian Railway Co.* v. *Kishan Lal* (3) and *East Indian Railway* v. *Makhan Lal* (4). In *Badri Prasad* v. *G. I. P. Railway* (5) it was held that a notice under section 77 was only necessary where there was an actual loss of the goods by the railway company, and this ruling specifically dissented from certain rulings of Patna and Madras which held to the contrary. In *East Indian Railway Co.* v. *Fazal Ilahi* (6) there was a case where the goods were actually lost and it was held that there was no distinction between a suit which was brought for damages for non-delivery and a suit which was brought for the loss of the goods. The expression "damages for non-delivery" was not intended in that ruling to apply to a case like the present. In *Thakurdas Manrakhan* v. *E. I. Railway* (7) there was again a case where goods were actually lost by the railway company and it was held that a notice was necessary for a suit even though the suit was expressed as a suit for non-delivery. In *Sheodayal Niranjan Lal* v. *Great Indian Peninsula Railway* (8) there was a similar ruling in a case where there was a shortage found in the goods and it was held that notice was needed. In none of these cases were the facts similar to the present where the goods have all along been in the possession of the railway company until the railway company sold the goods. These rulings there-

(1) (1913) 11 A.L.J., 335.
(2) (1923) I.L.R., 45 All., 380.
(3) (1923) I.L.R.., 45 All., 530.
(4) (1923) I.L.R., 45 All., 575.
(5) (1924) 22 A.L.J., 897.
(6) (1924) I.L.R., 47 All., 136.
(7) A.I.R., 1926 All., 686.
(8) A.I.R., 1926 All., 698.

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fore are no authority for the proposition advanced by learned counsel for the appellant. We may point out that section 77 comes in chapter VII of the Railways Act which is headed "Responsibility of railway administrations as carriers." That chapter begins with section 72 which lays down the responsibility of the railway administration for the loss, destruction or deterioration of animals or goods, and it is stated that the responsibility is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. Those sections do not refer to the action of a bailee in selling the goods as in the present case, nor is a bailee entitled to do so. The right of a railway company as distinct from an ordinary bailee to sell goods depends on the statutory provisions in sections 55 and 56 of chapter VI of the Railways Act. Any claim which would arise from a railway company failing to act under those sections, although it purported to act under them, would not come under chapter VII. Accordingly the notice provided by section 77 of chapter VII clearly does not apply to the present case.

Learned counsel for appellant then argued that the suit was one to which article 31 of the Limitation Act applied, that the period for that article was one year from the time when the goods ought to have been delivered, which was on arrival on the 7th of February, 1929, that the period of one year expired on the 7th of February, 1930, that the present suit was brought on the 4th of October, 1930, and was therefore time barred. Article 31 is for a suit "Against a carrier for compensation for non-delivery of, or delay in delivering, goods." Learned counsel argues that the present plaint could have been based on the non-delivery to the plaintiff as the cause of action, and that therefore the suit might come under this article 31. But the cause of action is not stated in the plaint to be non-delivery. Paragraph 11 of the plaint states that the cause of action was the sale by

public auction against the express direction of the plaintiff. This cause of action is more than mere non-delivery, and the cause of action will come under article 48: "For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same." The plaint alleges that the railway company acted without justification in taking the goods of the plaintiff and selling them by auction and that the plaintiff is entitled to compensation for this wrongful act. The period of limitation for article 48 is three years from the time when the person having the right to the possession of the property first learns in whose possession it is. Consequently the present suit is within time under this article, whether we take the starting point for limitation as the 20th of May, 1929, when the goods were sent to the Lost Property Office at Lahore, or the 1st of September, 1929, the date of auction sale.

The third ground sets out that under the circumstances of the case the sale was regular, justified, and according to law. The facts are that the plaintiff sent the goods on the 26th of January, 1929, the goods arrived at Amritsar on the 7th of February, 1929, consigned to self, but his customer did not want the goods, and paragraph 2 of the plaint admits that plaintiff asked the railway company to keep the goods till the plaintiff was in a position to take delivery of them. Paragraph 3 shows that the plaintiff wanted the railway to store his goods till he would be able to sell them at Amritsar. It is no part of the business of a railway to act as a storage company and the request was unreasonable. On the 20th of April, 1929, the railway sent a registered notice to the plaintiff in clear terms telling him to take delivery of his goods or the railway would deal with the goods under sections 55 and 56 of the Railways Act. The plaintiff did not take delivery

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and took no steps in the matter other than to send on the 24th of April, 1929, a maundering letter on the back of one of his advertisements, asking the railway to keep the goods and that he would be responsible for the charges and would arrange for someone to take delivery about the 1st of May, 1929. No reply was given by the railway and the railway was not bound to accept the request of the plaintiff to act as his storekeeper. No person was sent by the plaintiff to take delivery about the 1st of May. The railway with great patience waited till the 10th of August, 1929, when it sent a notice to five newspapers of a sale of property on the 1st of September, 1929. The railway was entitled to take this action in regard to the goods both under section 55(2) of the Railways Act as the plaintiff had failed to pay on demand the railway rate for the goods entered in the railway receipt, and under section 56 as the plaintiff had failed to claim the goods (that is, to take delivery of the goods), and notice had been served on him on the 20th of April, 1929, and he had failed to comply with the requisition in the notice. Up to this point the action of the railway was strictly according to statute. The plaintiff is able to show that at this stage there was a very minor irregularity. Although the notices were of the 10th of August, the various papers made some delay in publishing the notices, and the earliest notice to appear was in the edition of the Civil and Military Gazette bearing date the 19th of August, 1929, which is delivered to the public on the 18th of August. From the 18th to the 31st of August is 14 days, and thus there was 14 days' notice before the sale of the 1st of September. Section 55(2) of the Railways Act says that the auction should be "on the expiration of at least fifteen days' notice of the intended auction". The notice was therefore short by one day. We consider therefore that the auction was not strictly justified under section 55(2), and, therefore, the railway cannot deduct the amount of Rs.28-2 from

the auction price, as the right to realise charges comes under this section. But the railway was also proceeding under section 56, which gives a right of sale "as nearly as may be under the provisions of the last foregoing section". We lay stress on the words "as nearly as may be" and we consider that these words imply that the terms of section 55 are not to be rigidly applied in a sale under section 56. We consider that the notice of fourteen days was a sufficient notice for a sale under section 56. The sale was a general one, as the terms of the published notice show, and there would be a number of bidders at such a sale. Mere postponement of the sale of this lot of goods to the 2nd of September would not be likely to produce more bidders. The plaintiff was unaware of the date of sale and he would have taken no action in the matter. No evidence has been called to show that any higher price would have resulted from sale on a later date. The point therefore is merely technical and not a point of substance.

One further point was urged and finds place in the judgment of the lower appellate court,—that the papers should be "local" papers as laid down in section 55(2) and that local means the papers of the place where plaintiff resides. We consider that the word "local" in section 55(2) means papers of the place where the sale is to be held, and that the provision is intended to give notice of the sale to persons of the locality who are likely to attend to purchase. The owner of the goods is provided for in section 56(1) which directs that notice to remove the goods should be sent to him. We hold that the sale under section 56 was a good sale and that the railway was fully justified in selling the goods to dispose of them when plaintiff failed to comply with the notice to remove them. But the company is not entitled to make any deduction from the sale price of Rs.400.

Accordingly we allow this appeal to this extent that we set aside the decrees of the courts below and we substitute a decree in favour of the plaintiff for Rs.400 with interest at 6 per cent. per annum from the date of suit till the date of realisation, and we direct that the parties should pay their own costs throughout.

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

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October, 1

JUMNA DAS AND ANOTHER (PLAINTIFFS) *v.* MISRI LAL AND OTHERS (DEFENDANTS)*

Agra Tenancy Act (Local Act III of 1926), sections 99, 230—Suit by one co-tenant against another for share of profits—Cognizable by civil court—Jurisdiction—Civil and revenue courts.

A suit by one of several co-tenants of an occupancy holding for his share of the profits of that holding against the other co-tenants is cognizable by the civil court.

Where one of several co-tenants in a holding is solely in possession he can not, by that fact alone, be considered to be in wrongful possession, nor can the other co-tenants be said to have been wrongfully dispossessed from the holding; for, possession of one co-sharer is possession of all. So, the suit does not come under section 99 of the Agra Tenancy Act; and as the fourth schedule of the Act makes no mention of such a suit, section 230 of the Act does not oust the jurisdiction of the civil court which it has under section 9 of the Civil Procedure Code.

Dr. *N. P. Asthana*, for the applicant.

The reference was heard *ex parte*.

NIAMAT-ULLAH and ALLSOP, JJ.:—This is a reference under section 267 of the Agra Tenancy Act by the Collector of Agra. It appears that a suit was instituted by one of several co-sharers of certain occupancy holdings for profits in the court of the Munsif, Agra, who returned the plaint for presentation to the revenue court on the ground that the suit is one which is within the exclusive jurisdiction of the revenue court. The learned Munsif made a reference to section 99 of

*Miscellaneous Case No. 349 of 1934.