## APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.*

1927 *September*, 16.

BALA PRASAD (PLAINTIFF-APPELLANT) *v.* BENGAL AND NORTH-WESTERN RAILWAY COMPANY (DEFENDANT-RESPONDENT).*

*Railways Act (IX of 1890), section 77—Compensation for non-delivery of goods, suit for—Notice under section 77 of Railways Act, necessity of—Letter to Agent intimating loss of part of consignment and demanding open delivery, whether sufficient notice—Limitation for a suit for compensation for non-delivery of part of a consignment.*

*Held*, that in a suit against a carrier for compensation for non-delivery of goods where it was by no means certain that there had been any loss, destruction or deterioration, and the goods may still be in the possession of the Railway Company, notice under section 77 of the Indian Railways Act is not necessary. If such a notice were required, a letter to the Agent of the Railway Company intimating that three only out of a consignment of four bales had arrived, and asking that he may be given open delivery of those bales was a perfectly good business notice, and was absolutely sufficient.

The time from which the period began to run in such a case was the period when goods ought to be delivered which was the date when the railway at last permitted open delivery of part of the consignment.

Dr. *J. N. Misra* and Mr. *Ali Zaheer*, for the appellant.

Mr. *G. N. Mukerji*, for the respondent.

STUART, C. J., and RAZA, J. :—The facts out of which this second appeal arises are as follows. The plaintiff-appellant Bala Prasad is a trader with a fairly

*Second Civil Appeal No. 80 of 1927, against the decree of Shankar Dayal, First Additional District Judge of Bara Banki, dated the 18th of November, 1926, reversing the decree of Kishen Lal Kaul, Subordinate Judge of Bara Banki, dated the 23rd of September, 1925, decreeing the plaintiff's suit.

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large business in the Bara Banki district. On the 17th of April, 1923, four boxes were consigned to him from Moti Hari railway station on the Bengal and North-Western Railway to the Bara Banki railway station, which is also on the Bengal and North-Western Railway. The consignment arrived somewhere before the 28th of April. The plaintiff consignee, on inspecting the consignment, asserted that although three of the packages were a portion of the consignment, as consigned, the fourth package was not a portion of the consignment and he refused to take ordinary delivery and demanded open delivery. The station master under the rules was not competent to give him open delivery and his requests to obtain open delivery were at first of no avail. We find that on the 16th of July, 1923, the plaintiff-appellant sent the following letter to the Agent, Bengal and North-Western Railway, Gorakhpur, and the Secretary of State for India in Council through the Deputy Commissioner of Bara Banki (he took the latter course to cover the possibility of the claim being considered to be a claim against a State Railway) and sent copies to other interested parties. The letter is as follows :—

"Sir,

> Moti Hari to Bara Banki Parcel Way Bill No. 2854 of 17th April, 1923, four boxes. The above consignment lies undelivered at Bara Banki railway station till now although about three months have elapsed since it reached here. Instead of four bales of consignment only three are present and the remaining one appears not to be addressed to me and changed in transit. I wrote several times to the Traffic Inspector and Station Master asking for delivery of so much of the goods as are mine, after

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noting its condition and also requested, if they thought proper, an open delivery may be given.

At first Traffic Inspector agreed to give open delivery, but no delivery has been made as yet, either open or otherwise, putting me to an enormous loss. The Station Master says that he will not give delivery without instructions from the higher authorities.

I request you, therefore, to arrange for delivery by the 23rd instant, for I will leave this place on the same date, else I am sorry I will be obliged to claim full price with interest, etc."

After further correspondence open delivery was taken by the plaintiff-appellant on the 22nd of September, 1923. He asserted that when the consignment was opened it was discovered that although three of the boxes were his boxes the fourth box was a box which had never been consigned to him and which contained goods of a value considerably less than the goods which had been consigned to him. He accordingly instituted a suit against the Railway Company on the 22nd of September, 1924 (the 20th and 21st of September were close holidays) for Rs. 2,191-7-0 damages. The Company contested his claim on a variety of grounds. It asserted that that the suit was bad for want of notice under section 77, Act IX of 1890 and that the suit was also barred by limitation. It was further asserted that the box in question was the box which had been consigned to the plaintiff. Evidence was called on both sides. The learned Subordinate Judge in a very careful and reasoned judgment decided the suit in the plaintiff's favour for Rs. 1,841-8-0, certain interest and costs. The learned Additional District Judge reversed the decree, deciding only one point. He

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found that the suit was bad for want of the issue of a notice under section 77. The present appeal is filed.

In respect of the ground on which the lower appellate court has allowed the appeal and dismissed the suit it is sufficient for us to say that in the first place we are not satisfied that any notice was necessary under the provisions of section 77. This was clearly a suit against a carrier for compensation for non-delivery of goods. It was by no means certain that there had been any loss, destruction or deterioration. The goods may still be in possession of the Railway Company. But it is sufficient to say that if such a notice were required the letter of the 16th of July, 1923, is, in our opinion, an absolutely sufficient notice. We do not agree with the learned Additional District Judge in his views. We do not consider the letter in the least vague, and we consider it a perfectly good business notice. We, therefore, reverse the decision of the lower appellate court. It is then open to us to return the appeal to the lower appellate court for decision of the points which it has not yet decided. We consider, however, that it would be very unfair to the plaintiff-appellant if we took that course. Nearly two years have already elapsed since he instituted the suit and we consider that he is entitled to as speedy a decision as possible. Therefore as the evidence on the record is sufficient for the purpose we propose under the provision of section 103 of the Code of Civil Procedure and order XLI, rule 24 to determine all the points which the lower court has left undetermined. The first of these points is the point of limitation. We consider that this was a suit against a carrier for compensation for non-delivery of goods. The time from which the period began to run was the period when the goods ought to be delivered. That date we consider to have been the 22nd of September, 1923, the date when the railway at last permitted open delivery. The plaintiff-appellant was entitled to

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open delivery and was well within his rights in refusing to take anything short of open delivery. We are satisfied upon the evidence that the first opportunity he had of obtaining open delivery was on the 22nd of September, 1923 and we, therefore, take the limitation as having commenced from that date. The suit was thus within limitation. The next question which we have to decide is the question of fact, which was decided by the learned Subordinate Judge in the first and seventh issues. We have very little to say here. We have been through the evidence and through the careful judgment of the learned Subordinate Judge and we are satisfied that the view which he has taken on the evidence is absolutely correct. We agree with him, that a box consigned to the plaintiff-appellant never reached him and that the missing box contained the articles which the plaintiff-appellant asserts it did contain. We find that the damages allowed by the learned Subordinate Judge are the correct damages. As a result we allow the appeal, restore the decree of the learned Subordinate Judge as it stands and direct that the Railway Company pay its own costs and those of the plaintiff-appellant in this and the court below.

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***Appeal allowed.***