

amount of costs should not be taken into account. As pointed out by a Division Bench of the Rangoon High Court (Sir Sidney Robinson, C.J. and Baguley, J.) in the case of *Ma Shin v. Maung Shwe Hanit*⁽¹⁾ that decision was for the limited purpose of an appeal under section 110 of the Code of Civil Procedure and does not in any way indicate that costs of a suit cannot be considered to be the "subject-matter in dispute" under Schedule 1, Article 1, of the Court-fees Act. The plain fact is that the defendants think that they are entitled to costs and that the Court below was wrong in not acting up to the principle of the costs following the event. The question of costs, therefore, is the subject-matter of dispute between the parties.

I would accordingly hold, in agreement with the view expressed by my predecessor of this Court, that the defendants should pay an ad valorem court-fee upon the amount of costs claimed by them in their cross-objection. There will be no order as to costs.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

JAISRAM RAMREKH DAS

v.

GREAT INDIAN PENINSULAR RAILWAY.*

Railways Act, 1890 (Act IX of 1890), section 77—non-delivery, whether constitutes loss—suit for damages for non-delivery—notice, whether necessary.

*Appeal from Appellate Decree no. 97 of 1926, from a decision of Jyotirmoy Chatterji, Esq., District Judge of Darbhanga, dated the 9th November, 1925, reversing a decision of Babu Parmeshwari Dayal, Munsif of Darbhanga, dated the 6th May 1925.

(1) (1925) 85 Ind. Cas. 257.

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Held, on a review of the following decisions.

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Great Indian Peninsular Railway Company v. Gopi Ram Gouri Shanker(1), *Agent of the Bengal-Nagpur Railway Company, Limited, v. Hamir Mull Chagan Mull*(2), *Great Indian Peninsular Railway Company v. Jitan Ram*(3), *Puran Das v. East Indian Railway Company*(4), *Nagendra Nath Sen v. Bengal and North-Western Railway Company*(5), *Shamshul Hug v. East Indian Railway Company*(6), *Tara Chand Marwari v. Bengal Nagpur Railway Company*(7), that non-delivery does not constitute loss within the meaning of section 77, Railways Act, 1890, and, therefore, that no notice under that section is necessary in a suit for damages for non-delivery of a part of a consignment.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the order of Kulwant Sahay, J.

S. Dayal, for the appellant.

S. N. Bose, and A. C. Roy, for the respondent.

KULWANT SAHAY, J.—This is an appeal by the plaintiff whose suit for compensation for non-delivery of one bale of cloth out of a consignment of ten bales has been dismissed by the learned District Judge of Darbhanga on the ground of want of notice under section 77 of the Indian Railways Act. The facts of the case are set out in our order of the 8th June last. By that order we directed that the record be sent down to the District Judge for a finding whether the defendant Company had been able to prove loss of the goods. The learned District Judge has taken evidence and has submitted his finding to the effect that the Railway Company has failed to prove the loss. The question now is whether on this finding the plaintiff is entitled to succeed.

The learned Munsif gave the plaintiff a modified decree but the learned District Judge dismissed the

(1) (1928) I. L. R. 7 Pat. 192.

(2) (1926) I. L. R. 5 Pat. 106.

(3) (1928) I. L. R. 2 Pat. 442.

(4) (1927) I. L. R. 6 Pat. 718, F. B.

(5) (1928) 9 Pat. L. T. 118.

(6) (1928) 9 Pat. L. T. 611.

(7) (1928) 9 Pat. L. T. 616.

suit on the ground of notice and it is conceded on both sides that if the plaintiff succeeds on the point of notice, then he is entitled to succeed in his suit and there will be no necessity of a remand to the District Judge.

It is contended on behalf of the Railway Company that under section 77 of the Indian Railways Act notice is necessary even in the case of non-delivery and the word "loss" in section 77 includes non-delivery. The learned Advocate for the Railway Company concedes that there has been a consensus of rulings of this Court to the effect that the word "loss" in the Risk Note Form B does not include non-delivery. But he contends that the significance of the word "loss" in section 77 of the Act is different from that in the Risk Note Form B; that the word "loss" in section 77 has a wider significance and includes non-delivery. The question was considered by this Court in *Great Indian Peninsular Railway Company v. Gopi Ram Gouri Shanker*(¹) and it was held that non-delivery does not constitute loss within the meaning of section 77 of the Railways Act, and that therefore no notice under that section was necessary in a suit for damages for non-delivery of a part of a consignment, though it may turn out that the suit may fail for want of notice if it be established by the Railway Company that it is in fact a case of loss. This case is directly in point and if this case is followed, it is clear that it was not necessary for the plaintiff to give a notice to the Great Indian Peninsular Railway Company in the present case. It is, however, contended that this decision is contrary to a previous decision of this Court in *Agent of the Bengal-Nagpur Railway Co., Ltd., v. Hamir Mull Chagan Mull*(²). There is no doubt a conflict of decisions in these two cases. The question whether the word "loss" in the Risk Note Form B included non-delivery was decided by Mullick and Bucknill, J.J., in *Great Indian Peninsular Railway Company v. Jitan Ram*(³) where it was held that the loss referred

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(1) (1928) I. L. R. 7 Pat. 192. (2) (1926) I. L. R. 5 Pat. 106.

(3) (1923) I. L. R. 2 Pat. 442.

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to in the contract was loss to the owner and therefore that delivery to a person other than the consignee was such a loss as was contemplated by the contract. After the decision of that case it was held in several cases that the word "loss" included non-delivery. The question was, however, referred to a Full Bench of this Court in *Puran Das v. East Indian Railway Company*(¹). This question was not decided by the Full Bench, but certain observations were made in course of the judgment which went to show that the learned Judges were of opinion that the word "loss" did not include non-delivery in the Risk Note Form B. After the decision of the Full Bench in *Puran Das v. East Indian Railway Co.*,(¹) several learned Judges of this Court have consistently taken the view that the word "loss" does not include non-delivery. In *Nagendra Nath Sen v. Bengal and North-Western Railway Company*(²), *Shamshul Hug v. East Indian Railway Company*(³) and in *Tara Chand Marwari v. Bengal Nagpur Railway Company*(⁴), the question was raised in connection with risk notes and it was held by three Division Benches of this Court that the word "loss" did not include non-delivery. Then came the case of *Great Indian Peninsular Railway Company v. Gopi Ram Gouri Shanker*(⁵) in which the question was directly raised with reference to section 77 of the Railways Act, and Ross, J., considered most of the decisions on the point and came to the finding that the word "loss" did not include non-delivery even in section 77 of the Railways Act. It now seems to be settled so far as this Court is concerned that the word "loss" does not include non-delivery so far as the risk note is concerned, and, as regards the use of the same word "loss" in section 77 of the Railways Act, there is no reason why a different interpretation should be placed upon it from that placed upon the same word in the risk note in Form B. I am therefore

(1) (1927) I. L. R. 6 Pat. 718, F. B.

(2) (1928) 9 Pat. L. T. 118.

(3) (1928) 9 Pat. L. T. 611.

(4) (1928) 9 Pat. L. T. 616.

(5) (1928) I. L. R. 7 Pat. 192.

of opinion that so far as this Court is concerned it is now settled that in the case of damage claimed for non-delivery of a consignment no notice is necessary under section 77 of the Indian Railways Act. Having regard to the consensus of opinion of seven Judges of this Court it does not appear necessary to refer the question to a Full Bench.

The result is that the decision of the learned District Judge will be set aside and that of the Munsif restored partially with costs. The Bengal and North-Western Railway Company was also impleaded as respondent in this appeal but the appeal is not pressed against that Company and it will be dismissed as against that Company with costs so far as this Court is concerned. The appeal will be decreed as against the Great Indian Peninsular Railway Company and the decree will be limited to Rs. 909-6-0 the amount at which this appeal has been valued, with proportionate costs as against the Great Indian Peninsular Railway Company in all Courts.

MACPHERSON, J.—I agree.

Appeal decreed.

S. A. K.

APPELLATE CIVIL.

Before Das and Adami, JJ.

THAKUR BAGESWARI CHARAN SINGH

v.

THAKURAIN JAGARNATH KUARI.*

Chota Nagpur Encumbered Estates Act, 1876 (Beng. Act VI of 1876), section 12A—Release of estate—payment by proprietors—subsequent suit by donor's successor for recovery of possession—limitation.

*Appeal from Original Decree no. 158 of 1926, from a decision of Babu Ashutosh Mukharji, Subordinate Judge of Hazaribagh, dated the 26th April, 1926.

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