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admissible against them. It was at one time considered that the admission of tenants as to the zerait character of the land was inadmissible in evidence; but it was properly conceded by Mr. Sen that since the decision of the Judicial Committee in *Bindeshwari Prasad Singh v. Maharaja Kesho Prasad Singh Bahadur* (1) the question is no longer arguable.

DAS, J. [The remainder of the judgment is not material to this report.]

WORT, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Ross, J.J.

GREAT INDIAN PENINSULAR RAILWAY COMPANY

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v.

Dec., 1.

GOPI RAM GOURI SHANKER.*

Railways Act 1890, (Act IX of 1890), section 77—Risk-note B—“non-delivery,” suit based on—whether notice under section 77 necessary—“non-delivery,” whether constitutes “loss.”

“Non-delivery” does not constitute “loss” within the meaning of section 77, Railways Act, 1890, and, therefore, no notice under that section is necessary in a suit for damages for non-delivery of a part of a consignment, though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss.

*Appeal from Appellate Decree no. 592 of 1924, from a decision of Mr. Nut Bihari Chattarji, Subordinate Judge of Gaya, dated the 19th February, 1924, confirming a decision of Babu Jatindra Nath Ghosh, Munsif of Gaya, dated the 12th July, 1922.

(1) (1926) I. L. R. 5 Pat. 684 P. C.

East Indian Railway v. Kalicharan Ramprashad (1), *East Indian Railway Company v. Jagpat Singh* (2), *Great Indian Peninsular Railway Company v. Jalimchand Patwari* (3), *Nagendra Nath Sen v. Bengal and North-Western Railway Company* (4) and *Tarachand Marwari v. Bengal and North-Western Railway Company* (5), followed.

Agent of the Bengal Nagpur Railway Company, Limited v. Hamir Mull Chagan Mull (6), *Assam Bengal Railway Company, Limited v. Radhica Mohan Nath* (7), not followed

Puran Das v. East Indian Railway Company (8), explained.

Great Indian Peninsular Railway Company v. Jitan Ram (9), referred to.

Appeal by the defendants.

The respondents brought this suit for compensation for non-delivery of one out of four bales of cloth consigned to the Great Indian Peninsular Railway Company at Bombay for delivery to them at Gaya on the East Indian Railway. The defence was that the goods were lost in transit and that the defendant companies were protected by risk-note B; and, further, that the suit was bad for want of notice under section 77 of the Indian Railways Act within six months from the date of delivery of the goods to the defendants.

The Courts below dismissed the suit as against the East Indian Railway and gave the plaintiffs a decree for part of their claim as against the Great Indian Peninsular Railway, holding, inter alia, that as this was a case of non-delivery where no loss was proved, section 77 had no application. The case was remanded for a finding on the question of the service of notice under section 77, and it was found by the Subordinate Judge that there was no proof of service

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(1) (1922) 3 Pat. L. T. 215.

(5) S. A. 224 of 1925.

(2) (1924) I. L. R. 51 Cal. 615.

(6) (1926) I. L. R. 5 Pat. 106.

(3) (1927-28) 32 Cal. W. N. 76.

(7) (1923-24) 28 Cal. W. N. 438.

(4) S. A. 1262 of 1924.

(8) (1927) I. L. R. 6 Pat. 718 F. B.

(9) (1928) I. L. R. 2 Pat. 442.

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of notice beyond the allegation in the plaint which, not having been traversed in the written statement, had to be accepted, namely, that notice was given to the agents of the defendant companies on the 8th of December, 1921. The goods were consigned on the 11th of April, 1921 and three bales were delivered on the 19th of May, 1921. The suit was brought on the 11th of March, 1922. Consequently if notice was required under section 77, the notice was out of time; but if no notice was required then the suit was properly instituted within the period limited by law.

N. C. Sinha, (with him *N. C. Ghosh* and *B. B. Ghosh*), for the appellant.

Siveshwar Dayal and *B. K. Prasad*, for the respondents.

Ross, J. (after stating the facts set out above, proceeded as follows:—) The question for decision is whether in a suit for non-delivery notice has to be given under section 77 of the Act. In *East Indian Railway v. Kalicharan Ramprasad* (1) it was held by my brother Jwala Prasad, J. that section 77 requires notice only in a case of a claim for compensation for loss, destruction or deterioration of goods, and does not apply to a suit based upon compensation on account of non-delivery of goods, as apart from loss, destruction or deterioration of the same. But in *The Agent of the Benagal-Nagpur Railway Company Limited v. Hamir Mull Chagan Mull* (2) it was held by a Division Bench of this Court that non-delivery constitutes loss within the meaning of section 77 and, therefore, service of notice under that section is essential in a suit for compensation for non-delivery. This decision has been followed in other cases.

The learned Advocate for the respondents contends, however, that this decision rests ultimately upon the view taken in *Great Indian Peninsular Railway Company v. Jitan Ram* (3) to the effect that

(1) (1922) 3 P. L. T. 215.

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

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

loss means loss to the owner and that, as that view is no longer tenable since the decision of the Full Bench in *Puran Das v. The East Indian Railway Company* (1), the ground of the decision that notice is necessary in cases of non-delivery has gone. In an elaborate judgment in *East Indian Railway v. Jogpat Singh* (2) Page, J., held that the term "loss," as used in the risk-note and in Chapter VII of the Railways Act, does not mean pecuniary loss to the owner of the goods, but means loss of goods by the Railway Company while in transit. And it has recently been decided by the Calcutta High Court in *Great Indian Peninsular Railway Company v. Jalim Chand Patwari* (3), by Ranken, C. J. and Mitter, J. that in suits for damages for non-delivery of a part of a consignment delivered under risk-note B, there is a necessity of proving that there has been in fact a "loss" of the part concerned, and the initial burden of proving that is on the Railway Company. In *Puran Das v. East Indian Railway* (4) Das and Adami, JJ. agreed with the view of Mr. Justice Page and as this view differed from the decision in *Great Indian Peninsular Railway Company v. Jitan Ram* (5), they referred the case to a Full Bench. It was found by the Full Bench that on the pleadings the reference did not arise; but reliance is placed upon the judgment of my brother Jwala Prasad, J. and on certain observations in the judgment of the learned Chief Justice. This decision of the Full Bench has since been considered along with other decisions of the Court in two cases by two Division Benches of this Court; and in *Nagendra Nath Sen v. Bengal and North-Western Railway Company* (6) it was held that in a suit based on non-delivery the Railway Company must prove

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

(2) (1924) I. L. R. 51 Cal. 615.

(3) (1927-28) 92 Cal. W. N. 76.

(4) S. A. no. 1289 of 1923.

(5) (1929) I. L. R. 2 Pat. 442.

(6) Second Appeal no. 1262 of 1924.

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loss before they can claim the benefit of the risk-note; and in *Tarachand Marwari v. Bengal-Nagpur Railway Company* (1) that decision was followed; and it must be taken that since the decision of the Full Bench the view in this Court has been that non-delivery does not constitute loss and, therefore, the decision in *Great Indian Peninsular Railway Company v. Jitan Ram* (2) is not conclusive of the present question. Now on the language of section 77, a notice is only required in cases of claims for refund of an overcharge or for compensation for loss, destruction or deterioration. If non-delivery is not co-extensive with loss, it would seem to follow that notice is not required in a suit based on non-delivery; and obviously non-delivery includes much more than loss which is only one of several possible cases. Non-delivery may be due to mis-delivery or to wilful detention by the Railway Company as well as to loss. As was pointed out by Page, J. in the case cited above, the true view would seem to be that the goods may or may not be lost, and that proof of non-delivery or mis-delivery is by no means conclusive evidence as to whether or not loss has occurred. "Indeed I go further and beg leave to state that on such evidence alone an inference could not reasonably be drawn that the goods had been lost." It would seem to follow from this decision as well as from the language of the section itself that when non-delivery without more is pleaded, no notice under section 77 is required, though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss. A different view was taken by the Calcutta High Court in *The Assam Bengal Railway Company, Limited v. Radhica Mohan Nath* (3), where it was held that in a suit based on non-delivery notice under section 77 is required, though there the question whether notice would be necessary where the goods were wrongfully detained

(1) Second Appeal no. 224 of 1925.

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

(3) (1923-24) 28 Cal. W. N. 438.

was left open. That decision seems to have proceeded on an interpretation of "loss" which is inconsistent with the later decisions. In effect the question of notice seems to come back to the prior question of loss. If the Railway Company plead want of notice they must show that this case of non-delivery was a case of loss. The position, therefore, on the merits, and on the technical question of notice is precisely the same, viz., the defendant company must plead and prove loss before it can rely either on the risk-note or on want of notice.

The appeal is dismissed with costs including the costs of the first hearing and of the remand.

JWALA PRASAD, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

PANDIT GOBARDHAN MISSIR

v.

SHAMA KANT LALL.*

Code of Civil Procedure, 1908 (Act V of 1908), Order 1, rule 8—representative suit—Order 1, rule 8, failure to comply with provision of—suit whether maintainable—plaintiff, whether entitled to a decree against defendant before the Court.

Where the plaintiff brought a suit for a declaration, inter alia, that certain lands specified in the plaint belonged to him and that the defendants or any other member of the sabha or of the Hindu community had no right to the same, but no steps were taken by the plaintiff to comply with the requirements of Order 1, rule 8, Code of Civil Procedure, 1908, *held*, that

*Second Appeal no. 1027 of 1925, from a decision of Babu N. R. Chatterji, Subordinate Judge of Gaya, dated the 20th June, 1925, reversing a decision of Babu Nirmal Chandra Ghosh, Munsif of Gaya, dated the 20th December, 1920.

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