APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Fazl Ali, J.

1932.

August, 25, 26, 29. *September*, 7.

BENGAL AND NORTH WESTERN RAILWAY COMPANY

v.

MAHARAJADHIRAJ KAMESHWAR SINGH BAHADUR.*

Railways Act, 1890 (*Act IX of* 1890), *sections* 77, 80 *and* 140—*notice of claim, whether may be served on any person authorized by the railway administration to receive such notice—section* 140—" *may be served* ", *meaning of—suit for compensation for non-delivery—Limitation Act*, 1908 (*Act IX of* 1908), *article* 30 *or* 31 *applicable—terminus a quo-contract with one railway company—goods carried on another railway—suit against latter company, whether is suit founded in tort or statutory liability—contract silent as to date of delivery —time, how should be determined—single contract—part of goods not delivered—cause of action, when arises.*

Section 140 of the Railways Act, 1890, provides :—

" Any notice or other document required or authorized by this Act to be served on a railway administration may be served.............. ....in the case of a railway administered by a railway company on the Agent in India of the railway company ".

Held, that the words " may be served " do not mean " must be served "; the section merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the company.

Therefore, a notice contemplated by section 77 of the Act need not necessarily be served on the Agent but may be served on any person who is in fact authorized by the railway administration to receive notice of the claim.

A. Mahadeva Ayyar v. *The South Indian Railway Co.*(1), followed.

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* Appeal from Original decree no. 69 of 1929, from a decision of Babu Suresh Chandra Sen, Subordinate Judge of Darbhanga, dated the 22nd January, 1929.

(1) (1921) I. L. R. 45 Mad. 135, F. B.

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Martin and Co. v. *Fakir Chand Sahu*(1) and *Nadiar Chandra Shaha* v. *Wood*(2), dissented from.

East Indian Railway Co. v. *Bhimraj Srilal*(3) and *East Indian Railway Co., Ltd.* v. *Sowa Lal Sawan Lal*(4), distinguished.

If the company by its course of business holds up any particular official as competent to deal with claims, service of notice of a claim upon such an official must be taken as against the company to be service upon the company.

The loss or injury referred to in Article 30 of the Limitation Act, 1908, is the loss or injury to the goods and not the loss or injury to the consignee. Where the defendant wishes to take advantage of Article 30 the onus is upon him to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date.

Where, however, the claim is for compensation for non-delivery of the goods, Article 31 applies and the period of limitation is to be counted from the time when the goods ought to have been delivered.

A suit under section 80 of the Railways Act for compensation for non-delivery may be brought either against the company with whom the contract for carriage was directly made or against the railway administration on whose railway the loss occurred. If the latter course is taken it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant in the suit.

If no particular date for delivery is specified in the contract it must be determined as a matter of what is reasonable having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant.

Where the contract is a single contract in respect of a single consignment, the cause of action for a claim for compensation arises, not merely on non-delivery of a part of the goods consigned, but when the entire contract purports to have been fulfilled.

(1) (1910) 14 Cal. W. N. 888.
(2) (1907) I. L. R. 35 Cal. 194.
(3) (1926) I. L. R. 5 Pat. 488.
(4) (1928) 10 Pat. L. T. 24.

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Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Courtney Terrell, C.J.

S. N. Bose, for the appellant.

S. M. Gupta and *K. P. Upadhya*, for the respondent.

COURTNEY TERRELL, C.J.—This suit was originally begun by the plaintiff on the 4th October, 1923, against the Agent of the Bengal and North Western Railway and also the Agent of the East Indian Railway for compensation for the loss by the plaintiff as the consignee of goods of which short delivery had been made. The case was heard by the Subordinate Judge and the plaintiff applied to amend his plaint by substituting the respective railway companies as defendants in place of their Agents. The Judge heard the evidence produced by the plaintiff and the defendants but without deciding on the merits dismissed the suit as against both Agents and refused leave to amend the plaint. On appeal by the plaintiff a Bench of this Court dismissed the appeal as regards the Agent of the East Indian Railway but remanded the case to the Subordinate Judge to allow an amendment of the plaint substituting the name of the Bengal and North Western Railway company as defendant for that of its Agent and for a decision of the suit on the merits as against that company. The East Indian Railway company and its Agent were accordingly eliminated from the proceedings. No application was made either by the plaintiff or by the Bengal and North Western Railway company to call fresh evidence and after considering the evidence already before him and allowing the amendment directed, the Subordinate Judge gave judgment for the plaintiff against the Bengal and North Western Railway company who now appeal from his decision.

The facts are simple. James Duke and Company of Calcutta despatched to the plaintiff on the 27th

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August, 1922, a consignment of 3,229 bundles of round steel rods weighing 851 maunds and also four wooden frames from Ramkristapur railway station on the East Indian Railway to Muktapur railway station on the Bengal and North Western Railway. Risk Note *A* was signed by the agent of the consignor, the contract was made with the East Indian Railway and the East Indian Railway acknowledged receipt of the goods. On three separate dates in September open wagons arrived at Mokameh Ghat station on the East Indian Railway company's line. Each of these contained a portion of the consignment of steel rods. It appears from the evidence called by the East Indian Railway company that in each case the goods were unloaded by the men of the East Indian Railway company from the trucks into the company's godown, and thence were taken over by the men of the Bengal and North Western Railway company and loaded into closed trucks on that company's line. An official of the Bengal and North Western Railway company in each case signed a register belonging to the East Indian Railway. In this register in the case of each portion of the consignment the station of origin (Ramkristapur) and the station of destination (Muktapur) are stated. The names of the consignor and consignee are indicated. Under the head of " description " the goods are variously stated to be " lot bundles round iron " or (5, 11, 4 as the case may be) bundles of rod. Then is stated " weight as per invoice." Then there is a column which is headed " Remarks as to condition, weight on reweighment, etc." There is no statement as to the weight on reweighment and indeed there is nothing before us to show whether the goods were or were not reweighed by the Bengal and North Western Railway company and the observations in the column merely refer to the condition and packing of the goods. In the column headed " weight as per invoice " the weight of the different lots which were received at Mokameh Ghat on the 8th, 19th and 20th September is set forth as totalling 851 maunds as stated in the invoice. It is

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perfectly clear that the Bengal and North Western Railway company had an opportunity to reweigh the goods and they might, if such was the fact, have entered in the register of the East Indian Railway company the statement that the weight of the goods so reweighed did not correspond with the weight in the invoice. They had ample opportunity to prove before the Subordinate Judge (if such had been the case) that notwithstanding that they had acknowledged receipt of 851 maunds from the East Indian Railway company, in fact the amount received by them was something less. In the absence of evidence it cannot be assumed that they took from the East Indian Railway company anything less than the amount acknowledged by them when signing the register. The register makes no mention of the four wooden frames which were part of the consignment despatched by the consignor to the consignee. The three closed wagons into which the iron is said to have been loaded by the Bengal and North Western Railway company were delivered at Muktapur railway station on three different dates. The first delivery was on the 14th September, 1922, the second on the 20th and the third on the 21st. On the occasion of the first delivery the clerk in the employ of the plaintiff signed the entry in the register of the Bengal and North Western Railway company and acknowledged the receipt of the entire amount of iron rod mentioned in the invoice, that is to say, 851 maunds. The closed trucks were taken to the plaintiff's siding, unloaded, and the iron rod was weighed. This operation took two days and it was found that there was a shortage of 248 maunds. The wooden frames were delivered by road van on the 5th October.

One of the defences relied upon by the railway company has been the familiar, and in the circumstances, somewhat disingenuous contention that the plaintiff failed within six months from the date of delivery of the goods to prefer a claim in writing to the railway administration as provided by section 77

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of the Indian Railways Act, and it is necessary, therefore, to examine the correspondence which took place.

On the 23rd October, 1922, the plaintiff's manager wrote to the District Traffic Superintendent of the Bengal and North Western Railway at Samastipur submitting a claim for non-delivery and setting forth precise particulars and asking for an early settlement and also enclosed a copy of this letter to the Traffic Manager of the East Indian Railway company at Howrah.

On the 27th October, 1922, the District Traffic Superintendent of the Bengal and North Western Railway wrote acknowledging the receipt of this letter and stating

"The matter is receiving my attention."

On the 30th October the Acting Traffic Manager of the East Indian Railway company acknowledged the receipt of the copy of the letter sent to him and stated that it was receiving his attention.

Nothing further seems to have happened until the 19th February, 1923, when the plaintiff's manager again wrote to the District Traffic Superintendent of the Bengal and North Western Railway again setting forth particulars of the claim and stating that his letter had not been acknowledged and that unless an immediate settlement was reached the matter would be placed in the hands of lawyers.

On the 3rd April, 1923, the District Traffic Superintendent of the Bengal and North Western Railway appears to have paid a personal visit to the plaintiff's mill and made an inspection of the goods which had been delivered.

On the 14th May the plaintiff's manager again wrote to him referring to the visit and asking if he had anything to communicate in connection with the plaintiff's claim.

On the 22nd May the District Traffic Superintendent replied that he had forwarded the plaintiff's letter dated the 22nd August, 1922, to the Traffic Manager at Gorakhpur for favour of disposal.

On the 23rd July the plaintiff's manager wrote direct to the Agent, Bengal and North Western Railway, at Gorakhpur, referring to the claim stating that his several letters addressed to the Traffic Department had received no attention and stating that the matter would have to be handed over to the plaintiff's solicitors.

On the 4th August, 1923, the Traffic Manager of the Bengal and North Western Railway at Gorakhpur wrote to the plaintiff's manager. After referring to the plaintiff's letter of the 27th August, 1922, he said

"The consignment was delivered to you as received from the East Indian Railway and I regret I can do nothing in this case."

The defendants in support of their contention refer to section 140 of the Indian Railways Act the material parts of which are as follows:—

"Any notice or other document required or authorized by this Act to be served on a railway administration may be served,............... in the case of a railway administered by a railway company on the Agent in India of the railway company."

They contend that the letters written by the plaintiff's manager to the District Traffic Superintendent at Samastipur do not comply with section 77 and that the words "may be served" in section 140 mean "must be served". It is interesting to note that no such point is taken in the final letter of the 4th August, 1923, from the Traffic Manager and no such point was made in answer to the letter of the 23rd July from the plaintiff's manager to the Agent of the railway. The company have persisted in a course of business by which they have allowed their District Traffic Superintendent to deal with claims for compensation. The Agent has at no time until the written statement in this case repudiated the action of his subordinate. A series of cases of the Calcutta High Court have been cited to us in which

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the opinion has been expressed that the word "may" in section 140 is to be construed as "must" such, for example, as *Martin and Co.* v. *Fakir Chand Sahu*(1) and *Nadiar Chanda Shaha* v. *Wood*(2). I am entirely unable to understand the reasoning which prompted these expressions of opinion and I decline to follow them. Section 140, in my opinion, merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the company, but section 77 enacts that the service must be upon the administration and inasmuch as a company must conduct its business through its authorised agents the only question to be decided is whether the District Traffic Superintendent is in fact in the circumstances of the case the duly authorised agent of the railway company. If the company by its course of business holds up any particular official as competent to deal with claims, then service of notice upon such an official must be taken as against the company to be service upon the company. I agree with the reasoning of Mr. Justice Kumaraswami Sastri in the Full Bench decision of the Madras High Court in *A. Mahadeva Ayyar* v. *The South Indian Railway Co.*(3). The learned Judge said "The question whether a particular officer is authorised by the Agent to receive such notices on his behalf is a question of fact to be determined in each case. Agency may be proved either by direct evidence of authority, or by a course of conduct which in the opinion of the Court would justify the inference that the subordinate official was authorised by the Agent to receive notices on his behalf."

The decision of this Court in *East Indian Railway Co.* v. *Bhimraj Srilal*(4) is a decision upon the facts of the particular case and it was held that

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(1) (1910) 14 Cal. W. N. 888.
(2) (1907) I. L. R. 35 Cal. 194.
(3) (1921) I. L. R. 45 Mad. 135 (154, 155).
(4) (1926) I. L. R. 5 Pat. 488.

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no such delegation of authority had in fact been proved. The point that the notice required by section 77 must under section 140 be served on the Agent did not directly arise and, in my opinion, the case is no authority for that proposition. Similar observations may be made on the case of *East Indian Railway Co., Ltd.* v. *Sowa Lal Sawan Lal*(1). In my opinion in this case not only is it unnecessary in order to prove service on a railway administration to establish that the notice was served upon the Agent but there is ample evidence in this case in the course of conduct of the railway company and the behaviour of the Agent in not raising the point in reply to the letter of the 23rd July to establish that the District Traffic Superintendent at Samastipur was in fact authorised by the railway administration to receive notice of the claim.

The second contention on behalf of the railway company is to my mind as unattractive as the first. They rely upon Articles 30 and 31 of the Limitation Act. It is contended that if the matter is to be considered as governed by Article 30 the suit has not been brought within one year of the loss incurred by the plaintiff. It is said that the last delivery of iron was made on the 21st September and it was then made clear that the whole of the iron which could be delivered had been delivered and the suit having been begun on the 4th October, 1923, a period of more than one year had elapsed. The answer to this contention is simple. The loss or injury referred to in Article 30 is the loss or injury to the goods and not the loss or injury to the consignee. If the defendants wish to take advantage of Article 30 the onus is upon them to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date. In this particular case the defendants have throughout taken up the position that no loss in fact occurred and that the goods were delivered as received by the defendants from the East

(1) (1928) 10 Pat. L. T. 24.

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Indian Railway company. The Article of the Limitation Act which is applicable to this case is Article 31, that is to say, the claim is for compensation for non-delivery of the goods and the period of limitation is to be counted from the time when the goods ought to have been delivered. The defendants contend that even under Article 31 the date to be considered is that on which the last delivery of the iron rods was in fact made, that is to say, the 21st September. To this contention there are two answers. First, this is a suit under section 80 of the Act for compensation for loss. Such a suit may be brought either against the company with whom the contract for carriage was directly made or against the railway administration on whose railway the loss occurred. If the latter course be taken it does not follow that the suit is one founded in tort. The suit is founded on statutory liability which is attached to the contract though that contract be made with a railway other than the defendant to the suit. Reference may be had to the contract for carriage for the purpose of determining the date when the goods ought to have been delivered. If no particular date is specified it must be determined as a matter of what is reasonable having regard to the circumstances of the contract, and this criterion must be applied as much in favour of the plaintiff as in favour of the defendant. Now the contract referred not only to the delivery of iron but also to the delivery of the four wooden frames. It was a single contract in respect of a single consignment and the plaintiff might reasonably take the point of view that until the entire contract purported to have been fulfilled he was not in a position to complain of non-delivery of a part of the goods subject to the contract. As I have said, the wooden frames were delivered by road van on the 5th October and the suit was begun on the 4th October in the following year and is, therefore, in time. But there is another aspect of the case which is even more conclusive against the defendants' contention. The plaintiff on the 23rd October wrote to the defendants of the loss. He was justified in waiting to bring his

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suit until the defendants had made it clear that they had no intention of delivering the goods. Had the position been reverse the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late. In my opinion the attitude of the railway company has throughout been lacking in candour and their defence to this suit even in its most technical aspects has no merit. I would, therefore, dismiss this appeal with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

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March, 16.

Before Adami and Fazl Ali, JJ.

BIBI MEHDATUNNISSA BEGAM

v.

SEWAK RAM.*

Execution—mortgage decree laying down order in which mortgaged properties are to be sold—executing court, whether can change the order—High Court, privilege and prerogative of, to vacate erroneous order in the ends of justice when entire record is before the court—order without jurisdiction—whether such order can be validated by consent of parties.

While it is true that an executing court may, in certain exceptional cases where equities demand it, prescribe the order in which the mortgaged properties are to be sold, it has no

* Appeal from Original Order no. 163 of 1928, from an order of Babu Radha Krishna Prasad, Subordinate Judge of Additional Court, Patna, dated the 11th August 1928.