APPELLATE CIVIL.

Before Mr. Justice Fforde and Mr. Justice Campbell.

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Feb. 25.

HARYANA COTTON MILLS COMPANY, LTD. (PLAINTIFFS) Appellants

versus

B. B. AND C. I. RAILWAY COMPANY (DEFENDANT) Respondent.

Civil Appeal No. 1525 of 1924.

Indian Railways Act, IX of 1890, section 77—Suit for damages for non-delivery of goods and conversion—whether notice to the Railway Company is necessary—Damages—Amount of—Interest.

On 20th August 1921 certain machinery was delivered to the defendant Railway Company for conveyance to the plaintiffs who, having heard nothing further of the consignment, addressed a number of enquiries and demands to the Company, the first of which was not however posted until 25th April 1922. None of these letters were answered till the 22nd June 1922, when the plaintiffs' claim was repudiated by the Railway as time-barred. In reply to the plaintiffs' suit for non-delivery and for the price of the goods (with interest) as damages for wrongful detention of the goods the defendant Railway Company pleaded that the goods were now ready for delivery and, without alleging that the goods had ever been misdirected, misdelivered or gone astray, contended that the suit was not maintainable owing to want of notice within six months in accordance with section 77 of the Railways Act. In their replication plaintiffs pleaded that no notice was necessary and added that they were not prepared to take delivery of the goods now.

Held, that as in the present case the Railway Company had not *lost* the goods (even temporarily) but had been guilty of a detention coupled with neglect or refusal to deliver them up after demand made, that refusal or neglect amounted to conversion ; and that the suit being therefore for damages for conversion, no notice to the Railway Company was necessary under section 77 of the Indian Railways Act.

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Owen v. *Lewyn* (1), *Rose* v. *Johnson* (2), *Anonymous Case* (3), *Severin* v. *Keppell* (4), and *Attersol* v. *Briant* (5), cited in Leslie's Law of Transport by Railway, page 77, referred to. Also *East Indian Railway Company* v. *Diana Mal-Gulab Singh* (6).

Hill Sawyers and Co. v. *The Secretary of State* (7), distinguished and commented on.

Held also, that the plaintiffs were entitled to the full price of the goods as damages but not to the interest claimed on that amount prior to the date of institution of the suit.

First appeal from the decree of Lala *Gulwant Rai, Senior Subordinate Judge, Hissar, dated the 3rd March 1924, dismissing the plaintiff's suit.*

N. C. PANDIT and ANANT RAM KHOSLA, for Appellants.

BISHAN NARAIN and GAURI DAYAL, for Respondent.

JUDGMENT.

FFORDE J.

FFORDE J.—The plaintiffs, the Haryana Cotton Mills Company, brought the suit out of which this appeal has arisen against the B. B. and C. I. Railway Company for damages for the wrongful detention of certain goods of the plaintiffs which had been entrusted to the defendant company for conveyance from Bombay to Bhiwani. The measure of damage fixed by the plaintiffs is the price which he had to pay for those goods and interest upon that price calculated at Re. 0-12-0 *per cent. per mensem* up to the date of the institution of the suit, and the plaintiffs also claim interest from that date till realisation.

In the first paragraph of the plaint it is pleaded that the plaintiffs had placed an order with Duncan

(1) (1672) 1 Vent. 223.
(2) (1772) 5 Burr. 2825.
(3) (1705) 2 Salk. 685.
(4) (1802) 4 Esq: 156.
(5) (1808) 1 Camp. 409.
(6) (1924) I. L. R. 5 Lah. 523.
(7) (1921) I. L. R. 2 Lah. 133 (F. B.)

Stratton and Company, of Bombay, for supply of certain machinery for a cloth factory belonging to the plaintiffs, then under construction at Bhiwani, and that Messrs. Duncan Stratton and Company on the 20th of August, 1921, made over this machinery to the defendant company at Bombay for despatch to Bhiwani and duly obtained a railway receipt on that date. This paragraph of the plaint is admitted by the defendants. In the second paragraph of their plaint the plaintiffs have pleaded that the defendants have "not delivered the said goods up to the present moment" and that they, the plaintiffs, have suffered a great deal of loss owing to delay in setting up the machinery of the factory. In the fourth paragraph of the plaint it is pleaded that the said goods ought to have reached Bhiwani within one month at the latest from the date of their despatch but that they have not reached their destination up to the time of the institution of the suit. In this paragraph it is also pleaded that the plaintiffs wrote several times to the defendants in respect of their failure to deliver them their goods but that no heed was paid to these letters. The plaint concludes by praying that a decree for Rs. 5,973-3-3, principal and interest, with costs of the suit, be passed in their favour.

The defendants in their pleadings have stated that they do not deny the first paragraph of the plaint; they have traversed paragraphs 2, 3 and 4; and have pleaded in addition: that the plaintiffs must strictly prove the value of the goods, that they are not entitled to any interest, that the case is one of loss or deterioration within the meaning of section 77 of the Railways Act, and that the consignment was upon risk-note form H at owner's risk. In their further pleas they have objected, (*a*) that the plaintiffs did not give

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a valid notice under sections 77 and 140 of the Railways Act and that their suit for this reason is liable to be dismissed, and, (*b*), that "whatever consignment arrived at Bhiwani the plaintiffs can take delivery of that, subject to all legal and valid charges and costs of the defendants".

The plaintiffs in their replication have pleaded that their claim is not with respect to any loss or shortage of the goods in question but with respect to its non-delivery. They do not admit the execution of the risk-note in question, and say that even if any risk-note be proved it has no effect in a case relating to non-delivery, but only to cases relating to loss, shortage and deterioration of the goods. They further plead that under the circumstances of the case no notice of any kind was required in law, and they conclude by saying that they are not prepared to take delivery of the goods alleged to have reached Bhiwani after the institution of the suit as they no longer require them.

The facts of the case are shortly these:—On the 20th of August, 1921, Messrs. Duncan Stratton and Company, Bombay, consigned certain shafts and couplings ordered by the plaintiffs to be used in a cloth factory, then under construction, to the B. B. and C. I. Railway for conveyance to the plaintiffs at Bhiwani. The goods in question were duly received by the defendant company on the 20th of August 1921. Nothing was heard of these goods for several months and on the 31st of March, 1922, the plaintiffs wrote a letter addressed to the Traffic Superintendent, B. B. and C. I. Railway, Ajmer, asking what had happened to this consignment. To this letter there was no reply. On the 25th of April, 1922, the plaintiffs again wrote, this time addressing their letter to the Agent, B. B.

and C. I. Railway, at Bombay, once more asking for information as to what had happened to their consignment and requesting an urgent enquiry into the matter. Again there was no reply. On the 29th April, 1922, Messrs. Duncan Stratton and Company wrote to the defendant company, addressing their letter to the Goods Agent, B. B. and C. I. Railway Carnic Bridge, Bombay, pointing out that the goods which had been consigned to the care of the railway were considerably overdue, that they were urgently required by their clients, the plaintiffs, at Bhiwani, and they would be obliged if the Goods Agent would make enquiries into the matter and let them know the result. The railway company seems to have ignored this letter also. On the 15th of May, 1922, the plaintiffs wrote another letter, addressed this time to the Goods Superintendent, B. B. and C. I. Railway, Bombay, giving the dates of consignment and other necessary particulars and informing him that the progress of their mill was much hampered for want of the articles in question and requesting him to be good enough to make urgent enquiries into the matter. No reply was given to this letter. On the same date Messrs. Duncan Stratton and Company, wrote to the Goods Agent of the B. B. and C. I. Railway, Carnic Bridge, Bombay, informing the Goods Agent that the plaintiffs had been writing Messrs. Duncan Stratton and Company strong letters holding them responsible for the loss which they had been put to every day owing to non-delivery of the goods, and asking the Goods Superintendent to supply them with information as to what had happened to those articles. On the same date the plaintiffs wrote a second letter, sent under registered cover, this time to the Agent of the B. B. and C. I. Railway at Bombay, to the same effect as the previous

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correspondence, pointing out that they had not as yet been favoured with any reply and asking that the matter be taken up with the least possible delay. On the 31st of May the plaintiffs once more wrote to the Agent of the defendant company referring to previous correspondence, and on the same date wrote a reminder to the Goods Superintendent at Bombay. On the 6th of June the plaintiffs once more wrote to the Goods Agent at Bombay. No communication was made either to Messrs. Duncan Stratton and Company, or to the plaintiffs by any railway official until the 9th of June, 1922, when a post card with an illegible signature, but purporting to be from the Traffic Superintendent, was received by the plaintiffs. This post card is as follows :—"No claim or any letter in connection with the consignment in question was received from you till 31st March, 1922, hence your claim was repudiated as time-barred. However, enquiries are being made as to how the consignment was disposed of and I shall advise you of the result later on." Then on the 16th of June a letter was sent by the Goods Agent, Carnic Bridge, to the plaintiffs acknowledging the receipt of their letter of the 6th of June and stating that the matter was under enquiry. The plaintiffs wrote several more letters, some of them to the Goods Agent and some to the Traffic Manager of the defendant company, but received no reply. Ultimately, on the 28th of August, 1922, the plaintiffs brought the present suit.

Throughout the whole of the correspondence, and during the course of the trial in the Court below, the defendant company never once alleged that the goods had been lost, misdirected, misdelivered or had gone astray in any way.

The learned trial Judge disposed of the suit on the objection in regard to notice. He held that a notice

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was required in accordance with the terms of section 77 of the Railways Act, and, as admittedly no such notice had been served, the suit was not maintainable. He also found that the risk-note alleged to have been signed by the plaintiffs was invalid. He also held that the plaintiffs had not paid the price of the goods, that the goods being consigned to self, the plaintiffs had no right of action, and that the railway receipt "did not appear to be endorsed in plaintiffs' favour".

The main contention before us has been as to the effect of section 77 of the Railways Act. A great deal of authority has been cited by Mr. Bishan Narain in support of his contention that a claim for damages for non-delivery is a claim for compensation for loss and is covered by the provisions of section 77. In all those cases, however, the goods in dispute were not forthcoming. They had either disappeared altogether or they had been sent to the wrong person. No case has been cited to us in which section 77 has been held to apply where a railway company admittedly in possession of a consignee's goods has failed to hand them over to the owner. That is the case here. A good deal of confusion seems to have arisen over the meaning of the word 'loss' in that section. Mr. Bishan Narain has argued that section 77 covers any claim for loss to the claimant, and he relies upon certain dicta of Scott-Smith J. in *Hill Sawyers and Co.* v. *The Secretary of State* (1). In that case the reference to the Full Bench was to determine whether loss in section 80 of the Indian Railways Act included loss by misdelivery, and the Court held that misdelivery was 'loss' within the meaning of that section. But I am unable to accept Mr. Bishan Narain's contention that

(1) (1921) I. L. R. 2 Lah. 133 (F. B.).

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we are bound by Scott-Smith J's. definition of the term 'loss' in Chapter VII of the Indian Railways Act except in so far as it must be deemed to include parting with goods by delivering them to the wrong person. To that extent we are bound by the decision of the majority of the Full Bench. It is perfectly true, as observed by the learned Judge, that 'loss' includes the "pecuniary loss or privation of an article to the owner", but there must be some pecuniary loss in every case in which an action for damages lies, and section 77 does not provide that notice shall be given in every action against a railway company. The present suit is undoubtedly a suit for damages for pecuniary loss sustained by the plaintiffs; that is to say, the plaintiffs sue for the pecuniary loss, or damages, which they have sustained by reason of the defendants wrongfully detaining their goods. In other words, their suit is for damages for conversion. It is not a suit for damages by reason of the defendant company having lost the plaintiffs' goods owing to the goods having gone astray, or been destroyed, or become deteriorated, during the time when they were under the control of the defendants. It is no doubt quite possible to hold that if a railway company loses dominion over the goods entrusted to them owing to their having been wrongly delivered to a person who is not entitled to them, this is a "loss" of the goods in the sense contemplated by section 77, as that word may reasonably be held to cover any misadventure befalling the goods while under the company's care which deprives them of the power to effect delivery. That is what has been held in *Hill Sawyers and Co.* v. *The Secretary of State* (1), where goods had been misdelivered. Such a suit is one, no doubt, for damages for conversion, but such

(1) (1921) I. L. R. 2 Lah. 133 (F. B.)

conversion has resulted in the loss of the goods in the sense that the railway company has parted with its dominion over them. In the case just referred to, the reference to the Full Bench was made owing to the difference of opinion between Abdul Raoof and leRossignol JJ. On reference to the Full Bench, consisting of Scott-Smith, leRossignol and Abdul Raoof, JJ., the two former Judges were in agreement, Abdul Raoof J. dissenting. In his judgment in the Full Bench leRossignol J. expressed the view that the word 'loss' within the meaning of section 80 of the Indian Railways Act is not used in the sense of loss to the railway company but loss to the passenger. With great respect to the learned Judge there seems to me to be a confusion of ideas in this reasoning. Loss of a passenger's goods is never loss to the railway company in the sense in which it is a loss to the owner of the goods. The railway company do not lose anything pecuniarily by allowing the goods to disappear or be destroyed or become deteriorated, whereas the owner necessarily loses the article or its value. In that case the plaintiff's cause of action does not arise merely because he has suffered a pecuniary loss, but because he has suffered such pecuniary loss by reason of the fact that the railway company have permitted his goods to disappear or deteriorate. It is the loss of the goods by the railway company which entitles the plaintiff to sue for damages. leRossignol J. says: "Section 80 of the Indian Railways Act itself furnishes clear evidence that the word "loss" is not used in the sense of "loss to the Railway Company" for it provides *inter alia* for a suit for compensation for loss of life of a passenger. Can it be argued that the loss here is the loss to the railway and not to the unfortunate passenger?"

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Of course loss in the sense used by the learned Judge is loss to the passenger and not to the railway company, but the cause of action for the loss of the passenger's life arises from the negligence of the railway company. It is the company which has lost the passenger's life. If the passenger's death were due to natural causes, in no way referable to the railway journey, he would have lost his life but it would not be a case of loss by the railway company. This is a very striking instance of the confusion which has arisen from the failure to keep separate the two meanings of the word loss. The word in the sense used in Chapter VII, meaning a loss by the company, and in the other sense the damage or injury sustained by the plaintiff by reason of such loss. In the one sense the word denotes the state of fact of being lost, *i.e.*, gone from the control of the person in charge, and in the other sense it means the deprivation or the pecuniary suffering which results to the owner from such loss. It seems to me that leRossignol J's. definition of the term 'loss' in his first judgment is perfectly sound and one which can be adopted and applied to the construction of section 77. The learned Judge at page 138 of the report expresses himself as follows :—

"I interpret 'loss' in its natural sense to mean any dealing with the goods which dispossess the railway of them so as to render impossible delivery to the consignee, whether that dealing is done with or without the consent and knowledge of the railway administration."

In the present case, however, the railway company has not lost the goods in that, or in any sense. There has been no dealing with the goods "which dispossessed the railway of them so as to render impossible delivery to the consignee". The answer of the railway

company to the present suit is briefly : We do not deny that we received the goods; we do not allege or suggest that we ever parted with them; and they are, in fact, now available to the plaintiffs if they choose to accept them. In my judgment, such a defence does not avail the railway company. Their conduct appears to me to be a clear case of conversion by detention. Mere detention of course is not in itself a conversion, but where there has been, as in the present case, a detention coupled with neglect or refusal to deliver up the article detained after demand made, that refusal or neglect is evidence of conversion. This is a simple case of a bailee admitting that he has the goods but refusing to deliver them within a reasonable time after demand made, and refusing to give any information as to what has happened to them. The cause of action in the present case arose when the railway company refused, after reasonable time had elapsed, to carry out their duty to deliver the goods which had been entrusted to their care. In Leslie's Law of Transport by Railway the law is expressed as follows :—

"A mere failure by a carrier to deliver goods by reason of the fact that he has lost them does not amount to a conversion (*Owen* v. *Lewyn* (1), *Ross* v. *Johnson* (2), even though he denies that he has lost them, or asserts that he has delivered them (*Anonymous Case* (3)). *Severin* v. *Keppell* (4). If, however, he still has the goods a refusal to deliver them amounts to a conversion (*Anon., supra; Attersol* v. *Briant* (5))."

In *East Indian Railway Company, defendant-appellant* v. *Diana Mal-Gulab Singh, plaintiff-respon-*

(1) (1672) 1 Vent. 223.
(2) (1772) 5 Burr. 2825.
(3) (1705) 2 Salk. 685.
(4) (1802) 4 Esq: 156.
(5) (1888) 1 Camp. 409.

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dents (1), Martineau and Moti Sagar JJ. held that delay in delivery was not "loss" within the meaning of Chapter VII of the Railways Act and they declined to accept Scott-Smith J.'s definition of that term in *Hill Sawyers and Co.* v. *The Secretary of State* (2). The present case, as I have shown, goes beyond delay in delivery of the consignment. It is a refusal to deliver on demand or to give any information concerning the goods.

As to the defence that the defendants are protected by the terms of the risk-note, I may point out that that risk-note has not been printed in this record. It is not before us and we have no means of considering whether or not it is in the prescribed form and duly executed. I would, therefore, accept the finding of the learned trial Judge that the risk-note is not a valid document.

As regards the finding of the learned trial Judge that the plaintiff has not paid the price, that finding is, in my opinion, entirely opposed to the evidence. Mr. S. N. Lala, Secretary of the Bhiwani Trading Company, in answer to interrogatories, stated that Rs. 5,480, the price of the goods, was paid by the plaintiffs on the 22nd of March, 1922. This statement has not been contradicted. Mr. Frank Harwood, partner of Duncan Stratton and Company, on being asked "Has this sum of the price of the said goods, namely, Rs. 5,480, been paid to you by the plaintiffs" replied "The matter is not still settled in full". The plaintiffs, however, even though the full price may, not have been paid by them, are liable to Messrs. Duncan Stratton and Company, for whatever balance may be due, and, in my judgment, they are entitled to the full price of the goods as damages, but they are

(1) (1924) I. L. R. 5 Lah. 523. (2) (1921) I. L. R. 2 Lah. 133 (F. B.).

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not entitled to the interest claimed on the value of the goods prior to the date of institution of the suit.

For the reasons I have given I would accept this appeal and enter judgment for the plaintiffs for Rs. 5,480 with interest at the rate of 6 *per cent. per annum* on that sum from the date of institution of the suit till realisation, and I would award them proportionate costs throughout.

CAMPBELL J.

CAMPBELL J.—I agree. It seems to me that the case of the relation of section 77 of the Indian Railways Act to a suit for damages for non-delivery stands thus. A plaintiff who institutes such a suit without having preferred a claim in accordance with section 77 takes a considerable risk. In nine cases out of ten the railway comes into Court and pleads that the goods have disappeared out of the railway's sight or control, that they are lost, and hence that the suit is barred by the provisions of section 77. This seems to have been the situation in all the cases cited before us in which it has been held that failure to give notice of the claim under section 77 bars a suit for compensation for non-delivery, and on the authority of those cases the plaintiff might very well fail in his action.

The present however is the tenth case, where the railway does not say either that the goods are lost or that they ever have been lost, even temporarily, where both parties are agreed that the goods have never been lost either by the railway or to the consignee and where neither has alleged any deterioration of the goods. In such circumstances I cannot see that the terms of section 77 have any bearing upon the question whether the suit can lie or not.

N. F. E.

Appeal accepted.