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MANAJI
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with. So the decision of the trial Judge was correct and the appeal must be dismissed with costs to the 8th defendant.

Solicitors for the appellant: Messrs. *Dikshit, Maneklal & Co.*

Solicitors for the respondent: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

Appeal dismissed.

G. G. N.

ORIGINAL CIVIL.

SMALL CAUSE COURT REFERENCE.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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June 21.

SHANKAR BALKRISHNA TORNE (PLAINTIFF) v. SOUTH INDIAN RAILWAY AND OTHERS (DEFENDANTS)*.

Carriage of goods—Risk-note, form B—Goods diverted from agreed route by mistake of Railway—Whether tortious act—Claim to compensation—Notice of claim—Indian Railways Act (IX of 1890), section 77.

The plaintiff consigned certain goods to the S. I. Railway from Alleppy (in the Madras Presidency) to be carried to Wadi Bunder in Bombay, via Erkulam (S. I. Railway), Jallarpet (M. & S. M. Railway) and Raichur (G. I. P. Railway). The consignor executed a risk-note form B, whereby he undertook "to hold the Railway administration and all other Railway administrations working in connection therewith over whose Railways the said goods may be carried in transit from Alleppy to Wadi Bunder harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith, or any other agency employed by them respectively for the carriage of the whole or any part of the said consignment." At Jallarpet, a wrong label was attached, through mistake, to the wagon containing the goods, by the M. & S. M. Railway; and the goods instead of being sent along the line to Raichur were sent via Madras along the East Coast up to Waltair, the terminal station

* Small Cause Court Suit No. 1147/150075 of 1920.

of M. & S. M. Railway and at Waltair they were delivered to the B. N. Railway which carried them on its line up to Ramkistopore where they were traced two months after they were first sent from Alleppy. The goods were eventually brought back in a damaged condition to Wadi Bunder, via B. N. Railway and G. I. P. Railway. The plaintiff sued in the Court of Small Causes at Bombay, the S. I. Railway, the M. & S. M. Railway and the G. I. P. Railway to recover Rs. 1,290 as damages. Notice under section 77 of the Indian Railways Act was given to the G. I. P. Railway within six months from the date of delivery of goods at Alleppy, but the other defendant Companies were served with notices after the expiry of the said period of six months. The plaintiff however contended that no notice was in fact necessary as the defendants were guilty of a tortious act. The judge of the Small Cause Court referred the case to the High Court for its opinion on the questions (1) whether the Railway Companies could claim exoneration from liability by virtue of the risk-note and (2) whether notice under section 77 of the Indian Railways Act was necessary.

Held, without expressing any opinion on the 1st question, (1) that the G. I. P. Railway Company were not liable for the acts of the M. & S. M. Railway and the plaintiff had no cause of action against them ;

(2) that though the diversion of the goods by mistake of the M. & S. M. Railway might amount to a breach of contract on their part, it could not be described as a tortious or wrongful act, and the plaintiff's claim, therefore, fell within the terms of section 77 of the Indian Railways Act which deals with claims for "deterioration of goods delivered to be carried by Railway ;"

(3) that the plaintiff could not recover damages against the S. I. Railway and M. & S. M. Railway as he had failed to give notices within six months as required by the said section.

CASE stated for the opinion of the High Court by S. F. Billimoria, Third Judge, Small Cause Court, Bombay.

The plaintiff sued the South Indian Railway Co. the Madras and Southern Maratha Railway Co., and the Great Indian Peninsula Railway Co., in the Small Cause Court of Bombay, to recover Rs. 1,290 as damages for deterioration of goods in circumstances stated as under :—

On 22nd July 1919, the plaintiff's agent at Alleppy consigned to the S. I. Railway 215 bags copra to be

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carried to Wadi Bunder, Bombay, having signed a forwarding note which provided that the goods were "to be sent via Erkulam, Jallarpet and Raichur." On the 29th July 1919, a Railway Receipt was granted to the consignor which also provided that the goods were to be carried from Alleppy to Wadi Bunder, via Erkulam, Jallarpet and Raichur.

In consideration of freight being charged at a special reduced rate instead of the ordinary tariff rate, the consignor executed on 22nd July 1919 a risk-note in form B as approved by the Governor General in Council under section 72 (2b) of the Indian Railways Act, whereby the consignor undertook "to hold the Railway administration and all other Railway administrations working in connection therewith over whose Railways the said goods may be carried in transit from Alleppy to Wadi Bunder, harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith, or any other agency employed by them respectively for the carriage of the whole or any part of the said consignment."

Alleppy was an out-agency station where goods from the out-lying districts were collected for carriage over the S. I. Railway. From Alleppy the goods were brought to Erkulam, a station on the S. I. Railway where the Railway journey commenced. Jallarpet was the junction of the S. I. Railway with the M. & S. M. Railway and was the place where the S. I. Railway would deliver the goods to the M. & S. M. Railway for forward carriage. Raichur was the junction of the M. & S. M. Railway with the G. I. P. Railway where the former Railway would deliver the goods to the latter for carriage to Wadi Bunder.

The 215 bags of copra formed the cargo of one whole wagon (No. 4096) which was to be a "through load" i.e., the wagon was to be carried through over all the three Railway lines without transfer or transshipment at any stage. The S. I. Railway alleged that the wagon was properly labelled and sealed and handed over to M. & S. M. Railway at Jallarpet together with the junction invoice showing particulars of destination.

At Jallarpet the wagon ought to have been put on the line of the M. & S. M. Railway going north-west towards Raichur, but by some mistake or other reason not accounted for the wagon was put on another line of the M. & S. M. Railway going east and north towards Waltair with a new label indicating that the wagon was destined for Ramkrishtopore, a station on the Bengal Nagpur Railway situate within thirty miles of Calcutta. The goods lay at Ramkrishtopore up to 23rd September 1919 as unclaimed goods, and on the latter date they were traced by the defendant Companies and brought back to Wadi Bunder on the 26th September 1919 via B. N. Railway and the G. I. P. Railway.

The goods were found considerably damaged and infested by insects; and by consent of the plaintiff and the G. I. P. Railway they were jointly surveyed by two surveyors appointed by each party and the surveyors agreed in declaring that the whole consignment was damaged and depreciated and that the damage was assessed at Rs. 6 per bag.

Before the goods had been traced the plaintiff gave notice to the Agent, G. I. P. Railway, on 18th September 1919 claiming the whole value of the consigned goods. After the goods reached Wadi Bunder, seeing that they were considerably damaged he refused to take delivery and by notice dated 27th September 1919 claimed the whole value. After the survey which was held on the 2nd December 1919 he gave a further notice to the

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Agent, G. I. P. Railway, on 6th December 1919, claiming Rs. 1,290 as damages sustained.

No notices to the S. I. Railway and the M. & S. M. Railway were given "within six months" as required by section 77 of the Indian Railways Act, but the same were given on 24th March 1920, i.e., more than "six months from the date of delivery of goods for carriage."

The plaintiff alleged in his plaint negligence of the defendant Railway Companies and claimed Rs. 1,290 as the amount of damages actually suffered, the costs of the suit and professional costs.

The defendant Companies filed statements of defence and on the pleas made therein, the Judge of the Small Cause Court raised the following two preliminary issues :—

(1) Whether under the risk-note the defendant Companies are not exonerated from liability ?

(2) Whether the plaintiff can maintain this suit in view of the fact that notice under section 77 of the Railways Act has not been given to the South Indian Railway and the M. & S. M. Railway ?

The learned Judge held that there was no cause of action against the G. I. P. Railway as the goods never came into possession of that Railway under the journey contemplated by the contract of carriage, i.e., at Raichur, that the bringing of the goods from Ramkrishtopore to Wadi Bunder was an act which the G. I. P. Railway was not bound either under the contract or in common law to perform and was only an act of charity and that no damage was caused while the goods were brought back to Bombay on the line of that Railway the damage having occurred already at Ramkrishtopore. The Judge was further of opinion that the S. I. Railway and M. & S. M. Railway would be liable for the

plaintiff's claim unless the risk-note and the want of notice under section 77 of the Indian Railways Act could save them. He ultimately came to the conclusion that the risk-note did not protect the S. I. Railway and the M. & S. M. Railway from liability: *Mallet v. Great Eastern Railway*^(a).

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On the second issue the learned Judge observed:—

“I am therefore of opinion, though not without considerable hesitation and doubt, and I confess sorely against my sense of justice and equity that notice under section 77 is necessary to enable plaintiff to maintain his claim for compensation.

The hesitation and doubt are the result of the several arguments advanced on behalf of the plaintiff and which may and can be advanced against the applicability of the section to the facts of the case.”

The gist of these arguments was (i) that a Railway Company who diverted the goods into alien hands and alien route and country in breach of its obligation was not a Railway Company acting as such to whom goods were “delivered for carriage” but was an ordinary bailee and liable as an ordinary bailee and (ii) that the breach by the defendant Companies being a tortious act, the defendants could not claim the benefit of section 77 of the Indian Railways Act.

Ultimately the learned Judge stated the case for the opinion of the High Court under section 69 of the Presidency Small Cause Court Act and Order XLVI, Rule 1, of the Civil Procedure Code, the questions referred being:—

(1) Whether under the facts as found in the judgment the Railway Companies can claim exoneration from liability by virtue of the risk-note?

(2) Whether under the facts and the circumstances as found, notice under section 77 of the Indian Railways Act was necessary to be given and can the plaintiff maintain the action not having given such notice?

The reference was heard.

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Rangnekar, for the plaintiff.

K. B. Dastur, for the South Indian Railway.

Binning, for the M. & S. M. Railway.

MACLEOD, C. J.:—This is a case stated for the opinion of the High Court by Mr. Billimoria, Third Judge, under section 69 of the Presidency Small Cause Courts Act and Order XLVI, Rule 1, of the Code of Civil Procedure.

The facts are set out in the case, and the second question propounded is, whether, under the facts and circumstances as found, notice under section 77 of the Indian Railways Act was necessary to be given, and whether the plaintiff not having given such notice could maintain the action. If that question is answered, as the Judge thinks it should be answered, in the affirmative, then there is no necessity to deal with the first question.

The goods in question were consigned to the S. I. Railway to be carried to Wadi Bunder in Bombay via Erkulam, Jallarpet and Raichur. By some unfortunate mistake the goods went from Jallarpet via Madras all along the East Coast up to Waltair which is the terminal station of the M. & S. M. Railway, and at Waltair they were delivered to the Bēngal Nagpur Railway which carried them on its line up to Ramkishtopore.

Eventually the goods reached Bombay in a damaged condition. The suit was filed to recover damages for the deterioration of the goods. It is contended by the plaintiff that there was no deterioration of goods within the meaning of section 77 of the Indian Railways Act, and therefore notice was not necessary. The only possible basis for that argument would be a finding that the Railway Company had been guilty of some tortious act. But the evidence only points in

this case to a mistake on the part of the Railway Company's servants whereby a wrong label was attached to the wagon with the result that the wagon went by the wrong route. That may be a breach of the contract. It certainly cannot be described as a tortious or wrongful act. It seems to me obvious that this claim of the plaintiff comes within section 77 which deals with claims for deterioration of the plaintiff's goods delivered to the Company to be carried by them. As a matter of fact notice was given to the G. I. P. Railway Company within six months. But unfortunately the plaintiff did not realise that there were three Companies concerned, and, therefore, did not serve notices on the other two Companies; and clearly as the G. I. P. Railway Company were not liable for the acts of the M. & S. M. Railway Company it was no use filing a suit against them. It was necessary to give notices to the other Companies and as the notices were not given within six months plaintiff cannot recover.

It will, therefore, not be necessary to express an opinion on the first question whether on the facts as found in the judgment the Railway Companies can claim exoneration from liability by virtue of the risk-note, Exhibit B, signed by the consignor.

Costs of the reference will be costs in the case. The Small Cause Court to decide who is to pay the costs. When it is decided then the costs are to be taxed on the scale as on the Original Side of this High Court.

Solicitors for the plaintiff: Messrs. *Chitnis, Kanga and Manubhai.*

Solicitors for the defendants: Messrs. *Jehangir, Gulabbhai and Billimoria: Crawford, Bayley & Co.*

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