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and which fell due according to the *patni* lease between Aughrain 1299 and Aughrain 1300 *mulki*, and save and except this, allow the rest of the claim.

In the circumstances of the case, we think that each party should bear his own costs both in this and the lower Court.

H. W.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

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December 8.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT No. 1) *v.* DIP CHAND PODDAR AND OTHERS (PLAINTIFFS).*

Railways Act (IX of 1890), section 77—Notice of suit—Agent of Manager—Traffic Superintendent—Civil Procedure Code (Act XIV of 1882), sections 147, 149—Practice—Pleadings.

The Traffic Superintendent is not the Manager's agent, and notice to him is not notice to the Railway Administration within section 77 of the Indian Railways Act (IX of 1890).

Under section 77 of the Indian Railways Act it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing.

THE plaintiffs brought this suit against the Secretary of State for India as the Proprietor of the Eastern Bengal State Railway, and against the Bengal Central Flotilla Company, for compensation for goods lost while being conveyed from Calcutta to Noakhali. The plaintiffs alleged that six bales of cotton goods were consigned to them on the 8th of June 1893, and that only five of these were delivered; the other bale was detained at Khulna, where goods are transhipped from the Bengal Central Railway to the steamers of the Bengal Central Flotilla Company, and did not reach Noakhali till the end of September, when the covering was torn and the contents so damaged as to be unsaleable, and the plaintiffs refused to take delivery.

For the Secretary of State it was pleaded that he was not liable, as there was no negligence shown; that the bale was badly packed, and when weighed at Khulna was found to be in excess of

* Appeal from Appellate Decree No. 1252 of 1895, against the decree of W. H. M. Gun, Esq., District Judge of Noakhali, dated the 22nd of May 1895, affirming the decree of Babu Lal Singh, Munsif of Sudharam, dated the 17th of December 1894

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the weight stated by the consignor; that the bale had been detained at Khulna because it was found on arrival there to be torn; that while in the godowns at Khulna some of its contents had been stolen and that some of the stolen clothes had been recovered, and the bale sent on to Noakhali for delivery to the plaintiffs. The price of the goods as claimed was also disputed. The Flotilla Company denied all liability, as they were ready to deliver the goods in the same condition as when received. The Munsif gave the plaintiffs a decree for the value of the goods as claimed. The Secretary of State appealed to the Judge of Noakhali, who dismissed the appeal.

The *Senior Government Pleader* (Babu *Hem Chandra Banerjee*) and Babu *Ram Charan Mitter* for the appellant.

Dr. *Rash Behari Ghose* and Babu *Lal Behari Mitter* for the respondents.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiffs (respondents) against the Secretary of State for India and the Bengal Central Flotilla Company for compensation for the loss of goods delivered for carriage to the Eastern Bengal State Railway and the Flotilla Company. The plaintiffs allege that they sent notices of demand to the Traffic Superintendent and to the District Collector before the institution of the suit. The defence was denial of liability on the ground that there was no negligence on the part of the defendants. A further objection, not taken in the written statement, was urged on behalf of the Secretary of State at the time of argument, that the claim for compensation was untenable under section 77 of the Indian Railway Act (IX of 1890) for want of notice to the Railway Administration.

The first Court over-ruled the objection in bar and found for the plaintiffs on the merits, and gave them a decree for a certain amount, and that decree has been affirmed on appeal by the District Judge.

In second appeal it is urged on behalf of the Secretary of State, *first*, that the lower Appellate Court is wrong in holding that the Traffic Superintendent should be considered as the Manager's agent, and that the notice to him was a sufficient compliance with

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section 77 of the Railways Act; and, *secondly*, that the lower Appellate Court is wrong in giving the plaintiffs a decree for the amount claimed when there is no evidence to prove that that was the value of the goods damaged.

Upon the second point it is necessary to say only this, that the evidence of the plaintiffs' agent shows that the amount claimed is the true value of the goods, and that evidence has been considered sufficient by the lower Appellate Court. The second contention of the appellant must therefore fail.

The first contention urged for the appellant is however in our opinion correct. Section 77 of the Indian Railways Act requires that in a case like this a notice of the claim should be preferred to the Railway Administration within six months from the date of the delivery of the goods, and by section 3 of the Act "Railway Administration" in the case of a State Railway is defined to mean the Manager, and to include the Government. The notice that was given to the Government was not served within six months from the date of delivery of the goods; and the notice which was served within six months was a notice not to the Manager but to the Traffic Superintendent; and though there is nothing to show that the notice, though addressed to the Traffic Superintendent, reached the Manager, within six months from the date of delivery of the goods, the lower Appellate Court holds the notice to be sufficient, because it is of opinion that the Traffic Superintendent should be considered as the Manager's agent in such matters. We think the Court below is wrong in law in taking this view.

The learned Vakil for the respondents argued in support of the decree of the Court below that, though the notice served in this case might not have been shewn to be sufficient under the law, the plaintiffs were not bound to prove the service of any notice, want of notice not having been pleaded in defence; and in support of this argument the cases of *Davey* v. *Warne* (1), *Smith* v. *Pritchard* (2), and certain other English cases, were relied upon. We are of opinion that this argument cannot succeed, regard being had to the terms of section 77 of the Railways Act and to the provisions of sections 147 and 149 of the Code of Civil Procedure, which

(1) 14 M. & W., 199. (2) 2 C. & K., 699.

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authorize the Court to frame issues from certain materials besides the pleadings and to amend the issues at any stage of the case. The objection on the ground of absence of notice, though not taken in the written statement, was raised in argument, and the objection was entertained and disposed of, though erroneously, by the Courts below. It cannot therefore be thrown out on the ground that it was not specially pleaded.

But though we hold that the objection on the ground of want of notice cannot be thrown out altogether, we are of opinion that as it was not taken in the written statement and was urged only in argument, the plaintiffs are entitled to have an opportunity of meeting it. In our opinion it will be sufficiently met if it is shewn that the notice served on the Traffic Superintendent reached the Manager within six months from the date of delivery of the goods.

The case must therefore go back to the first Court, in order that it may be disposed of after determination of the point indicated above. Both parties will be at liberty to adduce evidence upon the point. Costs will abide the result.

As the appeal is only on behalf of defendant No. 1, and the ground upon which the appeal succeeds relates only to the liability of defendant No. 1, the decrees of the Courts below as against defendant No. 2 will stand.

F. K. D. *Appeal allowed and case remanded.*

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

BANOO TEWARY (DEFENDANT) *v.* DOONA TEWARY AND OTHERS (PLAINTIFFS).*

1896
Dec. 10.

Limitation Act (XV of 1877), Schedule II, Articles 62, 127—Separation in Joint Hindu family—Suit for share in joint property.

At the separation of members of a joint family governed by the Benares School of Hindu law, in 1885, the unrealized debts of the family were left undivided. The debts were subsequently realized by some of the members of the separated family. In a suit brought by the other members in 1893, (*inter alia*), to recover their shares in the debts so realized,

* Appeal from Original Decree No. 262 of 1894 against the decree of Babu Abinash Chandra Mitter, Subordinate Judge of Tirhoot, dated the 21st of June 1894.