Union Of India vs Steel Stock Holders' Syndicate, Poona on 1 March, 1976

Equivalent citations: 1976 AIR 879, 1976 SCR (3) 504, AIR 1976 SUPREME COURT 879, 1976 3 SCC 108, 1976 (1) SCJ 361, 1976 3 SCR 504

Author: Syed Murtaza Fazalali

Bench: Syed Murtaza Fazalali, P.K. Goswami

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
STEEL STOCK HOLDERS' SYNDICATE, POONA

DATE OF JUDGMENT01/03/1976

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
GOSWAMI, P.K.

CITATION:
1976 AIR 879 1976 SCR (3) 504
1976 SCC (3) 108
CITATOR INFO :
R 1990 SC 104 (4)

ACT:
Railways Act. 1890 (as amended in 1961)-Ss. 72, 73, 76, 78(d)-Scope of-Delay in delivery of Goods-Loss of interest on capital-If, could be measure of damages-If Railways Act overrides Contract Act.

HEADNOTE:
A consignment of iron goods was booked by the respondent by rail on December 15, 1961. The due date of delivery under the contract or usage of the railways was December 25, 1961. As the goods were diverted, they were actually delivered on July 21, 1962. The respondent filed a suit for damages alleging negligence on the part of the railway in that, by reason of diverting the consignment,

there was inordinate delay in its delivery which resulted in loss to it by way of interest on capital. The trial court decreed the suit but in the matter of damages by way of loss of interest it gave 6% per annum instead of 12% claimed by the respondent. The District Court dismissed the appellant's appeal, and the High Court dismissed the second appeal in limine.

On appeal to this Court it was contended for the appellant that (i) since the cause of action was based on delayed delivery, the case was covered by the Railway Act, as amended in 1961, that the applicable section is s. 76 and that since the conditions mentioned therein had not been fulfilled, the respondent was not entitled to a decree; (ii) that the respondent could claim for loss of profit or loss of market as the same was expressly barred by s. 78(d) of the new Act; and (iii) that the respondent's claim for damages was not actionable in the absence of any agreement providing interest on capital as a measure of damages. It was contended for the respondent that even if s. 76 barred the remedy, loss of profit or market resulting from delayed delivery would amount to "deterioration" contemplated by s. 76.

Dismissing the appeal to this Court,

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HELD: In view of the finding of fact arrived at by the courts below, the respondent is entitled to damages. [515B]

1. (a) The case is covered by the new Act and not by the old Act as contended by the respondent. There could be no question of liability arising when the goods were booked and the contract was entered into between the respondent and the railways, because, there was no presumption that the contract would result in breach. [512B-C]

In the instant case, the cause of action arose when the consignment was delivered to the respondent on July 21, 1962, that is, after the new Act came into force. The reasonable transit period having expired on January 1. 1962 the breach occurred after the new Act came into force.

(b) Section 76 of the Act has a very limited scope: it contemplates clearly those cases which fall within the contingencies contemplated by it. These contingencies refer to certain physical factors, viz: actual and physical loss destruction, damage or deterioration of goods. Where due to delay on the part of the railway there is physical deterioration or diminishing of the value of the goods, the plaintiff cannot claim damages by way of loss of profits or loss of market plus damages sustained by the actual loss or deterioration of the goods. In such a case the plaintiff can claim only the actual loss in the value of the goods caused by destruction, damage or deterioration and not loss of profit. [512F-H]

(c) The word "deterioration" is used in its ordinary parlance, so as to include within its ambit the actual physical act of deterioration, namely, the change for the

worse in the thing itself. [514E-F]
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B.I. Railway Co. Ltd. v. Piana Mal Gulab Singh A.I.R. 1925 Lah. 255, approved.

G.I.P. Railway Co. & others v. Jugal Kishore Mukat Lal A.I.R. 1930 All. 132 and Union of India and others v. Messrs. Sheobux Satyanarayan, A.I.R. 1963 Orissa 68, not approved.

(d)The words "loss, destruction, damage or deterioration" occurring in s. 76 must be read ejuedem generis to indicate the actual and physical loss or change in the goods contemplated by that section. In the instant case, since there was no physical deterioration of the goods at all which were delivered in the same condition in which they were booked, the case of the respondent does not fall within the four corners of the section. Nor can the respondent take advantage of s. 76 relying on the word "deterioration" because of the finding of negligence entered by the courts below. [514G]

If s. 76 does not apply then s. 78 would have no application because that section starts with a non-obstante clause. [513E-F]

(2) Section 78(d), which flows out ofs. 76, provides that the railway administration shall not be responsible for any indirect or consequential damages or for loss of particular market. It merely incorporates the measure of damages as contemplated by s. 73. [513B]

In the instant case as the respondent had not claimed loss of market or remote damages the question of application of s. 78(d) did not arise.

3(a) The case of the respondent is clearly taken out of the ambit of ss. 76 and 78. Hence its suit for damages could not be defeated on the ground that it was barred by s. 76 or s. 78 of the Act. [515A-B]

(b) It is difficult to accept the contention of the appellant that, by virtue of ss. 72 and 73, any contract entered into between the parties and the liability of the railway was governed purely by the provisions of the Railway Act and not by the terms of the contract between the parties. [510G]

The Indian Contract Act provides certain elementary conditions for a binding contract but does not provide any particular form of contract. The fact that where the Government is a party to a contract, the particular form in which the contract is to be executed has been provided for by the Constitution, did not mean that the provisions of the Contract Act stand superseded by the Constitution or in this case by the Railway Act. Section 72 does nothing more than provide for a particular form in which the contract is to be executed and it enjoins that such a form will be prescribed by the railway administration and approved by the Central Government. [510H-511-A]

(c) Section 73 lays down that the Railway

administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery except in certain cases which amount to vis major in which case also the Act places responsibility on the railways if it did not prove that it had used reasonable foresight and care in the carriage of goods. The section, while converting the liability of the railway administration from that of a carrier to that of an insurer, has imposed heavier responsibility on the railway administration. [511F-G]

4(a) There is no question of s. 73 of the Contract Act over-riding the provisions of the Interest Act because in the instant case the Interest Act has no application at all inasmuch as no interest is claimed by the plaintiff; but interest has been used as a measure to determine the compensation which the respondent could seek against the appellant for its negligence in causing inordinate delay in the delivery of the goods. The respondent had only claimed nominal damages for the loss because of the amount of money locked up for more than six months due to late delivery. [517B]

(b) The courts below rightly found that the railway was guilty of gross negligence. As a common carrier the railway is responsible for breach of contract. There was absolutely no reason for the railway to divert the consignment to a place which did not fall on the route at all. [517D]

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(c) The trial court was fully entitled to scale down the amount of interest from 12% to 6%. [517F]

Union of India v. Watkins Mayore & Company A.I.R. 1966 S.C. 275 distinguished.

Digbijai Nath v. Tirbeni Nath Tewari A.I.R. 1946 All. 12 and The Official Receiver, Calcutta High Court & Anr. v. Baneshwar Prasad Singh & Anr. A.I.R. 1962 Pat. 155 approved.

5. The present appeal was concluded by findings of fact. But on the proved facts some clear questions of law arose for decision and, therefore, this was not a case in which the High Court should have dismissed the appeal in limine. [507F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1237 of 1968.

From the Judgment and Order dated the 24th August, 1967 of the High Court of Judicature at Bombay in Second Appeal No. 798 of 1967.

Lal Narain Sinha, Solicitor General for India, S. N. Prasad, and Girish Chander, (Not present), for the appellant.

M. N. Phadke, P. C. Bhartari, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, (Not Present), for the respondent.

The Judgment of the Court was delivered by FAZAL ALI, J.-This is a defendant's appeal by special leave against the judgment and decree of the High Court of Bombay dismissing its second appeal in limine by its order dated August 24, 1967.

The appeal raises important and interesting questions of law relating to the interpretation of some of the provisions of the Indian Railways Act pertaining to the liability of the Railways for breach of contract. The plaintiff/respondent brought a suit for recovery of an amount of Rs. 2,378.65 nP being the damages for breach of contract resulting from delayed delivery of the goods consigned by the plaintiff through the defendant Railways to be delivered at Poona. The plaintiff which is a firm carrying on its business dealing in iron goods booked a consignment with the defendant on December 15 1961 at Bhillai to be carried to Poona and to be delivered therein to the consignee safely and in good condition. The defendant Railways accepted the offer under a Railway Receipt dated December 15, 1961. It appears that there was some delay in the delivery of the goods at Poona and on enquiries made by the plaintiff it appeared that till May 9, 1962 the goods had not been delivered at all. Thereafter the plaintiff served a noted claim and of suit dated May 9, 1962 on the Railway Administration. Soon after the service of the notice the consignment was delivered on July 21, 1962. According to the plaintiff under the contract or the usage of the Railways the normal period of delivery was ten days and as defendant had committed an inordinate delay in delivering the goods it was liable to pay damages to the plaintiff. The plaintiff, however, calculated the damages by way of interest at the rate of 12% per annum on the locked up capital of Rs. 27,332-44 which due to rise in prices has swelled to Rs. 35,476-27 nP. The plaintiff further alleged that the delay in the delivery was due to gross negligence of the defendant Railways which instead of sending the goods direct from Bhillai to Poona diverted them to Aurangabad where the consignment had to be loaded in a meter-gauge train and then to a broad-gauge line and it was only after the defendant received the notice from the plaintiff that it expedited the delivery of the goods. The defendant Railways contested the suit on the ground that there was no inordinate delay, nor there was any contract that the goods were to be delivered within ten days. It is also averred that the plaintiff had led no evidence to show that there was any loss of profits or rise in the market price. The defendant further alleged that the plaintiff was not entitled to claim interest as damages. The Trial Court accepted the plaintiff's case in toto and found- (1) that there was an inordinate delay in the delivery of the goods belonging to the plaintiff at Poona;

(2) that the goods were first diverted to Aurangabad, although the route from Bhillai to Poona lay via Nagpur and Aurangabad does not fall on the route at all; and (3) that the defendant was guilty of gross negligence and was, therefore, responsible for loss for delay or deviation in carrying the goods.

The Trial Court, however, found that the figure of Rs. 27,332-44 the original amount which was deposited by the plaintiff in the Bank against the goods should be taken as the basis for calculation of damages and after calculating interest at the rate of 6% per annum the plaintiff was awarded a sum of Rs. 1250/- including the notice charges and passed a decree for this amount in favour of the plaintiff.

The defendant then filed an appeal before the District Judge Poona who upheld the finding of the learned Munsiff and dismissed the appeal. A second appeal taken by the defendant to the High Court of Bombay was also dismissed in limine, and hence this appeal by special leave.

Normally it would appear that the appeal was concluded by findings of fact but we find that on the proved facts some clear questions of law arise for decision and therefore this was not a case in which the High Court should have dismissed the appeal in limine.

In support of the appeal the learned Solicitor-General submitted three points before us:

> (1)that as the cause of action of the plaintiff is based on the delayed delivery which arose at the most on January 1, 1962, the case of the plaintiff is covered by the provisions of the new Railways Act as amended by Act 39 of 1961, which is an exhaustive Code in itself providing a self-contained machinery in order to determine the liability of the Railways and as the conditions mentioned in s. 76 of the Railways Act have not been fulfilled the plaintiff is not entitled to any decree;
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> (2)that at any rate since the plaintiff has claimed interest as damages, in the absence of any agreement providing for such an interest, the plaintiff's claim is not actionable at law; and (3) that the plaintiff could not claim for loss of profit or loss of market as the same is expressly barred by s. 78(d) of the new Railways Act.

As an alternative argument it was also pleaded that the plaintiff has not averred in his plaint that there was any rise in the prices because the goods belonging to the plaintiff were a controlled commodity and could not be sold without a permit, Before claiming loss of profits it was the bounden duty of the plaintiff to allege that he had been granted the permit to sell the goods.

Mr. Phadke appearing for the respondent has repelled the contentions of the appellant on the ground that the new Railways Act does not reduce or diminish the liability of the railway administration for breach of contract but in fact the Act seeks to increase the liability. Secondly it was submitted that even if the case of the plaintiff does not fall within the four corners of s. 76 of the new Railways Act, the common law right of the plaintiff to claim damages against the appellant has not been barred by the Act. Lastly it was submitted that the plaintiff has not claimed interest on any specified amount of money but has merely calculated the same as a measure of damages which it suffered due to the breach of contract and gross negligence on the part of the Railways which has been found by the Courts below. Finally it was contended that as the contract was entered into between the parties on December 15, 1961, when the goods were booked at Bhillai, the liability for damages arose on that day and the case of the plaintiff would be covered by the provisions of the Railways Act before it was amended by Act 39 of 1961.

In order to answer the contentions raised by the parties it may be necessary for us to trace briefly the history of the circumstances in which the Railways Act of 1890 was amended by Act 39 of 1961. We would, for short, refer to the Railways Act of 1890 as the "old Act" and the Act as amended by Act 39 of 1961 as the "new Act". It would appear that under s. 72 of the old Act the responsibility of

railway administration as a carrier of animals and goods was clearly that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act. In other words, the railway administration was impressed with the duty to carry the goods with the same care and caution which a prudent owner would apply in the case of his own goods If there was any violation or breach of the said care and caution expected of the Railway it would have been liable to damages. Section 72(1) of the old Act ran thus:

> "(1) The responsibility of a railway administration for the loss, destruction or

deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151. 152 and 161 of the Indian Contract Act, 1872 (9 of 1872)."

It may be pertinent to note that sub-section (3) of s. 72 of the old Act expressly excluded the principles of the common law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers. After our country became free and the Railways entered the commercial field as one of the important wings of the Government, there appears to be a public demand for making the Railway administration as a public body to take upon itself more onerous responsibilities where the rights of the free citizens were involved. Under the British Government most of the Railways were owned by private companies whose ownership was to be extinguished after lapse of a particular period. Soon after the freedom all the Railways were taken over by the Central Government and run by it. In view of the new problems facing the Government and the public demand for a change in the law, the Government appears to have decided to convert the responsibility of the railway from that of a carrier to that of an insurer. But before doing this, the Government appointed a Committee called the Railway Freight Structure Enquiry Committee (1956-57) which recommended that the responsibility of the Railways in India should be changed to that of a common carrier instead of a bailee. The Committee which had been asked to examine the statutory provisions dealing with the responsibility of railways as common carriers was of the opinion that the public would derive much satisfaction from a radical change from bailee's responsibility to that of a common carrier, and that this change was bound to tone up the administrative machinery of the railways in respect of effective prevention of transit losses. In view of the recommendations of the said Committee the Government introduced a bill in the Lok Sabha for amending some of the provisions of the Railway Act in order to implement those recommendations. From a perusal of the debates of the Lok Sabha when this Bill was introduced it would appear that the Deputy Minister of Railways explaining the objectives of the Bill observed as follows:

> "Taking into account all aspects of the problem, it is proposed that railways should assume the responsibility of a common carrier instead of that of a bailee. As bailees, the railways are required to take as much care of the goods entrusted to them for carriage as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value.
>
> However, closely following the legal position in the United Kingdom, it is proposed that the basic responsibility of our railways for loss, destruction or deterioration etc. of animals or goods be as set out in the proposed section 73.

> When the railways assume this responsibility, broadly speaking, they will be liable for loss of or injury to goods while in transit by rail, arising from any cause whatsoever, unless such loss or injury is proved by the railways to have been caused by an act of God, or by an act of war, or by an act of public enemies or is proved to be consequence of inherent vice in the thing carried or is attributable to the consignor's own fault.
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> Even where the loss is proved by the railways to have been caused by the excepted perils, just referred to by me, the railways will not be absolved of their responsibility unless they further prove that they had used reasonable forethought and care in the carriage of animals or goods.
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> The result of the changes proposed will be that the railways will be paying claims for compensation in many cases where they are not paid at present, for example, in cases of losses due to running train thefts, damage by wet in transit in spite of bailee's care having been taken etc."

This was the clear background against which the new Act was passed. Even the statement of objects and reasons, the relevant parts of which may be extracted as under, shows the main object of the new Act:

> "The Railway Freight Structure Enquiry Committee (1956-57) has recommended that the responsibility of the railways in India as carriers of animals and goods, which is at present that of a bailee, should be changed to that of a common carrier. There is also a public demand for such a change. After a careful and detailed examination of the question, the Government have decided to accept the Committee's recommendation.
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> x x x x x
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> (a) The Bill seeks to make it clear that in the case of through booking of consignments over an Indian Railway and a Foreign Railway, the responsibility of the Indian Railway as a common carrier would extend only over that portion of the carriage which is over the Indian Railway;
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> x x x x x
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> (c) Other amendments included in the Bill are intended to rectify certain defects or ambiguities in the existing provisions of the Act which were revealed by experience in its working."

It appears that the old s. 72 was completely deleted including sub-s. (3) which expressly prohibited the principles of the common law of England for determining the liability of the Railways as common carriers. Instead the new s. 72 laid down the form in which a contract was to be executed between a consignor and the Railway and a risk note was provided for by clause (b). It may be

necessary to note an argument put forward by the learned Solicitor-General on this point. It was submitted that by virtue of the provisions of ss. 72 and 73 of the new Act the statute superseded any contract entered into between the parties and the liability of the Railways was governed purely under the provisions of the Railways Act and not under the terms of contract which may have been entered into between the consignor and the Railway. We are, however, unable to accept this argument. It is well settled that while the Indian Contract Act merely provides certain elementary conditions under which the contract becomes binding on the parties, it does not provide any particular form or condition of a contract. It is, therefore, clear that the parties to the contract may agree to a particular form or condition or of mode in which the contract is to be executed. In case where the Government enters into a contract with a person or vice versa a particular form in which the contract is to be executed has been provided for even by the Constitution and the contract has to be in that form.

This does not mean that the provisions of the Contract Act stand superseded either by the Constitution or by the Railways Act which provide for a particular mode or a form in which the contract has to be entered into. Section 72 therefore does nothing more or nothing less than provide for a particular form in which the contract is to be executed and it enjoins that such a form will be prescribed by the railway administration and approved by the Central Government. The provisions of s. 72 of the new Act run thus:

> "72. Any person delivering to a railway administration any animals or goods to be carried by railway shall-
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> (a) if the animals or goods are to be carried by a train in tended solely for the carriage of goods, or
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> (b) if the goods are to be carried by any other train and consist of articles of any of the following categories, namely:-
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> (i) articles carried at owner's risk rates.
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> (ii) articles of a perishable nature.
>
> (iii) articles mentioned in the Second Schedule.
>
> (iv) articles in a defective condition or defectively packed.
>
> (v) explosives and other dangerous goods.

execute a note (in this Act referred to as the forwarding note) in such form as may be prescribed by the railway administration and approved by the Central Government, in which the sender or his agent shall give such particulars in respect of the animals or goods so delivered as may be required".

It is not possible from the provisions of s. 72 to spell out the principle that the new Act completely supersedes the provisions of the Contract Act both in respect of the conditions and the liability. Section 73 of the new Act lays down that the railway administration shall be responsible for the loss, destruction, damage, deterioration or non- delivery except in certain cases which amount to vis major. But there also the proviso confers responsibility on the Railways for loss etc., if the railway administration does not prove that it has used reasonable foresight and care in the carriage of the goods.

The Solicitor-General contended that s. 76 of the new Act is the provision which deals with delay in the delivery and the plaintiff can succeed only if his case falls within the four corners of the section. Before answering this question, it may be necessary to dispose of a point on which the counsel for the parties have joined issue. According to the Solicitor-General the liability of the Railway would be governed by the new Act inasmuch as the cause of action has arisen after coming into force of the new Act. Counsel for the respondent, however, submits that the matter will be governed by the old Act because the liability of the Railway arose when the goods were booked in December 1961. In our opinion, there is a very short answer to this question. The plaintiff has clearly and categorically pleaded in paragraph-2 of the plaint that the cause of action arose at Poona when the complete consignment was delivered to the plaintiff on July 21, 1962 i.e. after the new Act had already come into force. Further more, it is also alleged that the reasonable and normal transit period expired on January 1, 1962. In these circumstances, therefore, according to the plaintiff itself, the breach occurred only after the new Act had come into force-whether it was January 1, 1962 or thereafter. There can be no question of the liability arising when the goods were booked and the contract was entered into between the plaintiff and the Railway, because there is no presumption that the contract would result in breach. The plaintiff would be entitled to damages only when there was a breach of contract and if the said breach, even according to the plaintiff itself, occurred on January 1, 1962 or thereafter, then it is manifest that the case would be covered by the new Act and not by the old Act.

The first contention put forward by the Solicitor- General was that the case of the plaintiff does not fall under any of the contingencies contemplated by s. 76 of the new Act. Section 76 runs thus:

> "76. A railway administration shall be responsible for loss, destruction, damage or deterioration of animals or goods proved by the owner to have been caused by delay or detention in their carriage unless the railway administration proves that the delay or detention arose without negligence or misconduct on the part of the railway administration or of any of its servants."

It is submitted that although there was delay in the delivery of the goods on the part of the railway administration, but the railway administration would be responsible only if the plaintiff further proves that there has been loss, destruction, damage or deterioration of the goods by virtue of the delay. It is true that the plaintiff has not alleged that there was any physical loss, destruction, damage or deterioration of the goods, but that, in our opinion, does not put the plaintiff out of court. Section 76 appears to have a very limited scope: it contemplates clearly those cases which fall within the contingencies contemplated by s. 76. These contingencies refer to certain physical factors, viz.,

actual and physical loss, destruction, damage or deterioration of goods. For instance, where the goods worth Rs. 10,000/- due to delayed delivery have sustained deterioration as a result of which their value has gone down to Rs. 5,000/- then once this fact is proved the railway administration shall be liable for such a loss or the value of such deterioration. We are of the opinion that s. 73 of the new Act, while converting the liability of the railway administration from that of a carrier to that of an insurer, has imposed heavier responsibility on the railway administration.

The history and the object with which the radical provisions of the new Act were introduced bear testimony to change of the nature of the liability of the railway administration. But in order to avoid the payment of double damages, ss. 76 and 78 have been inserted. In other words, where due to delay on the part of the Railway there is physical deterioration or diminishing of the value of the goods, the plaintiff cannot claim damages by way of loss of profits or loss of market plus damages sustained by the actual loss or deterioration of the goods. In such a case the plaintiff can claim only the actual loss in the value of the goods caused by destruction, damage or deterioration and not loss of profit. Section 78(d) which flows out of s. 76 clearly provides that the railway administration shall not be responsible for any indirect or consequential damages or for loss of particular market. The Solicitor-General, therefore, rightly contended that in cases falling squarely within the four corners of s. 76 of the new Act, s. 78(d) will apply. In fact s. 78(d) merely incorporates the measure of damages as contemplated by s. 73 itself. It is well settled that the liability of an ordinary carrier even in the English common law does not extend to a damage which is indirect or remote. Loss of profit or loss of a particular market has been held by a number of decisions to be a remote damage and can be awarded only if it is proved that the party which is guilty of committing the breach was aware or had knowledge that such a loss would be caused. Section 78(d), however, seeks to bar the remedy of this kind of damage. In the instant case, however, as the plaintiff itself has not claimed loss of market or remote damages, the question of application of s. 78(d) does not arise. Moreover, in the instant case, it is conceded that there was no physical deterioration of the goods at all which were delivered to the consignee at Poona in the same condition as they were booked from Bhillai by the plaintiff. In these circumstances, the case of the plaintiff does not fall within the four corners of s. 76, nor does it fulfil any of the categories mentioned therein. If s. 76 does not apply to the facts of the present case, then s. 78 will also have no application, because s. 78 starts with a non obstante clause "Notwithstanding anything contained in the foregoing provisions of this Chapter, a railway administration shall not be responsible". We, therefore, agree with the learned counsel for the respondent that under the new Act the liability of the Railway has been increased so as to take upon itself the responsibility of a common carrier.

Counsel for the respondent submitted that even if s. 76 barred the remedy of the plaintiff, the fact that due to delay in delivery there was loss of profit or loss of market would amount to "deterioration as contemplated by s. 76 of the new Act. In support of this contention, the learned counsel relied on a decision of the Allahabad High Court in G.I.P. Railway Co. & others v. Jugul Kishore Mukat Lal where Sulaiman, Ag. C.J., as he then was, observed as follows:

> "It is clear to us that the meaning of the word "deterioration" in s. 161 which imposes the liability on the railway company must be the same as in risk-note form B which lays down the special conditions under which the railway company is protected. In

> both these "deterioration"

resulting from a delay in tendering the good is contemplated. x x x We therefore accept the view expressed by Mukerji, J., in the unreported case and hold that the word "deterioration" is wide enough to include depreciation in value on account of a fall in the price of the goods."

The same view appears to have been taken by the Orissa High Court in Union of India and others v. Messrs. Sheobux Satyanarayan where Misra, J., as he then was, observed as follows:

> "Though there was some difference of opinion as to the import of the word "deterioration" used in section 72 of the Indian Railways Act and in section 161 of the Indian Contract Act, the position is now well settled that it is wide enough to include depreciation in value on account of a fall in the price of the goods."

As against this a Division Bench of the Lahore High Court in R. I. Railway Co. Ltd. v. Diana Mal Gulab Singh observed as follows:

> "The 'deterioration' of a thing, whether it be in quality or in value, implies in ordinary parlance a change for the worse in the thing itself. If a thing is worth less than it was before only because the market rate has gone down it would be correct to say that it has depreciated in value, but not that it has deteriorated."

Having regard to the background and the setting in which the word "deterioration" occurs in s. 76 of the new Act it seems to us that the parliament intended that the word should be used in the ordinary parlance and in a restricted sense so as to include within its ambit the actual physical act of deterioration, i.e. the physical part of it, namely, the change for the worse in the thing itself as very aptly put by Martineau, J., in the Lahore High Court judgment referred to above. We must seek to draw a clear distinction between a physical deterioration of a thing and depreciation in its value according to market price. These are two separate concepts having separate ingredients. The words used in s. 76 of the new Act, namely, "loss, destruction, damage or deterioration" must be read as ejusdem generis so as to indicate the actual and physical loss or change in the goods contemplated by s. 76. In these circumstances, therefore, with due respect, we are unable to agree with the somewhat broad view taken by the Allahabad High Court and followed by the Orissa High Court in the cases referred to above. We, on the other hand, prefer to adopt the view taken by the Lahore High Court in the case referred to above. In this view of the matter, it is clear that the word "deterioration" used in s. 76 referred to the physical and actual deterioration of the goods which has admittedly not taken place in the present case. The plaintiff cannot take advantage of s. 76 relying on the word "deterioration" because of the finding of negligence entered by the Courts below. The case of the plaintiff is clearly taken out of the ambit of ss. 76 and 78 and his suit for damage also cannot be defeated on the ground that it is barred by s. 76 or s. 78 of the new Act. We are, therefore, of the opinion that in view of the finding of fact arrived by the Courts below the plaintiff is undoubtedly entitled to damages This brings us to the second contention raised by the Solicitor General, namely, that the plaintiff is not entitled to interest as damages for breach of the contract. It was submitted that what the plaintiff has done is to calculate interest at the rate of 12% which has

been reduced to 6% per annum on the amount deposited by him in the Bank which remained locked up for more than six months and to claim the same as damages. It was contended that the plaintiff plainly could not do so in view of the Interest Act under which interest can only be charged before suit if so stipulated by the parties to the contract. It is common ground that in the present case the contract between the parties does not provide for charging any interest for breach of contract. The Solicitor-General relied on a decision of this Court in Union of India v. Watkins Mayore & Company where this Court observed as follows:

> "Under the Interest Act, 1839, the Court may allow interest of the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case is not a sum certain but compensation for unliquidated amount. On behalf of the respondent it was submitted by Mr. Aggarwala that interest may be awarded under the Interest Act which contains a provision that "interest shall be payable in all cases in which it is now payable by law". But this provision only applies to cases in which the Court of Equity exercises jurisdiction to allow interest. In the above case the plaintiff had brought a suit for damages claiming a particular quantified amount of Rs. 1,07,700/- as compensation for storage of over 600 tons of iron sheets for a particular period. This quantified amount included a sum of Rs. 2,974/2/- as interest on the various sums claimed by the plaintiff as compensation, namely, godown rent, chowkidar's salary, cartage from Railway station to godown etc. The High Court, however, granted a decree only for Rs. 27,525/5/- including the amount of interest claimed by the plaintiff. Thus this Court in that case was dealing with interest claimed by the plaintiff not as a yardstick for assessing damages but as pure and simple interest on the quantified amount of compensation or damages claimed by the plaintiff. This Court held that the interest to the extent of Rs. 2,974/2/- as claimed by the plaintiff could not be allowed in the absence of there being any contract justifying the charging of such interest. This Court was not at all concerned with a case like the present one where the plaintiff has merely claimed damages pure and simple and in order to assess the same had applied the yardstick of charging interest at a particular rate on the locked up capital for a period of more than six months. In these circumstances, therefore the ratio of the aforesaid decision in Watkins Mayore & Company (supra) is not applicable to the facts of the present case.
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> Similarly in Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji which was relied upon by this Court in Watkins Mayore & Company (supra) the amount claimed by the plaintiff was a specified amount on the basis of which interest was charged which had the effect of increasing the damages sought for. That was a case of a contractor who had brought a suit for recovery of the amount due from the Government Department and had added interest to the total claim made by the plaintiff. The Privy Council pointed out that as there was no stipulation which authorized the plaintiff to charge interest on the quantified amount of damages, the plaintiff was not entitled to any interest. Thus, in other words, the ratio of the decision in Ruttanji Ramji's case as also in Watkins Mayore & Company (supra) would apply only to such cases where

interest by way of damages is claimed for wrongful detention of a debt or where the interest is claimed on a specified amount due or claimed against any debtor. The principle adumbrated in the two cases mentioned above will not apply to cases where the plaintiff does not claim interest on a quantified amount or on damages but where the plaintiff merely calculates interest as a yardstick or measure to assess the damages which he would be entitled to. In the instant case the Courts below have clearly found that the plaintiff had deposited a sum of Rs. 27,332-44 in the Bank soon after booking the consignment with the railway administration. The plaintiff was a stockist and as the money in the Bank remained idle for a period of more than six months due to the delayed delivery made by the Railway on account of its negligence, the plaintiff merely claimed compensation for this delayed delivery on the basis that if the amount was not locked up it would have earned some interest which would yield some profit to the plaintiff. Thus it is clear, therefore, that in the instant case the plaintiff neither claimed interest on any quantified amount, nor did he claim profit due to loss of market.

In Digbijai Nath v. Tirbeni Nath Tewari a Division Bench of the Allahabad High Court, while interpreting the decision of the Privy Council referred to above, observed as follows:

"We do not consider that this case is authority for the proposition that interest cannot be claimed by way of damages for breach of a contract under s. 73, Contract Act. All that was held in it was that interest cannot be allowed by way of damages for wrongful detention of debt. * * * The position is different where interest is claimed as part of the damages for breach of a contract.

A similar view was taken by a Division Bench decision of the Patna High Court in The Official Receiver, Calcutta High Court and another v. Baneshwar Prasad Singh and another. We find ourselves in complete agreement with the principles laid down in those cases.

For these reasons, therefore, we are of the opinion that the decision of this Court in Watkins Mayore & Company (supra) does not appear to be of any assistance to the appellant, so far as the facts of the present case are concerned. Thus it is clear that there is no question of s.

73 of the Contract Act overriding the provisions of the Interest Act, because in the instant case the Interest Act has no application at all inasmuch as no interest is claimed by the plaintiff at all but interest has been used as a measure to determine the compensation which the plaintiff could seek against the appellant for its negligence in causing inordinate delay in the delivery of the goods. The contention raised by the learned Solicitor-General on this point is, therefore, overruled.

The plaintiff is not claiming the sum decreed by way of interest but he is claiming the damages calculated on a particular basis. As a common carrier the Railway is undoubtedly responsible for

breach of contract. In the instant case the Railway Receipt shows that the goods were booked to be carried from Bhillai to Poona which is on the Nagpur route. There was absolutely no reason nor any occasion for the Railway to divert the goods to a different route and for taking the same to a different route and for taking the same to Aurangabad which did not fall on the route to Poona at all. The Courts below, therefore, rightly found that the Railway was guilty of gross negligence.

The last question submitted by the learned Solicitor General was that the plaintiff was not entitled to loss of profit or loss of market, because the plaintiff has not pleaded anywhere that he had obtained any permit for the goods which, were a controlled commodity and sustained loss of market. It is true that the plaintiff has not pleaded this fact, but the plaintiff has not at all prayed for any damages on the ground of loss of market or loss of profit. The plaintiff has only claimed nominal damages for the loss which occurred to him because of the amount of money which he had deposited in the Bank and was locked for more than six months due to the delayed delivery. The Trial Court has already scaled down the amount from Rs. 2,378-65 to Rs. 1,250/- and we think the Trial Court was fully entitled to do so.

In these circumstances, therefore, all the contentions raised by the Solicitor General fail and we find no merit in this appeal which is accordingly dismissed with costs.

P.B.R. Appeal dismissed.