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redeem or recover possession of the property. It is all one cause of action which might and ought to be alleged by the mortgagor in his suit to recover possession. (Explan. II to section 13 of the Code of Civil Procedure). The appellant having failed to ask for mesne profits in the previous suit, his present claim is barred either under that section or under section 43 of the same Code.

The decree is confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Batty.

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THE AGENT, G. I. P. RAILWAY COMPANY, BOMBAY, (ORIGINAL DEFENDANT), APPLICANT, *v.* DEWASI VERSEE AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

Indian Railways Act (IX of 1890), sections 77 and 140—Refund of an overcharge—Notice—Letter—Manner of service—Statement of fact not a proof of fact.

Plaintiffs, who were merchants residing at Poona, entered into an agreement with the G. I. P. Railway Company that the latter should deliver consignments of goods despatched from Wadi at Poona at a certain rate. Several consignments were accordingly delivered by the Railway Company at Poona and they were paid for according to the agreed rate. At the time of the delivery of the last consignment, the Railway Company refused to deliver it unless all the consignments, including those already delivered and paid for, were paid for at a higher rate. The plaintiffs thereupon paid the higher rate under protest and sued the Railway Company in the Court of Small Causes at Poona for the recovery of the overcharges claimed and received by the defendant. The defendant contended that the suit was not maintainable inasmuch as no notice of the claim was served by the plaintiffs according to section 77 of the Indian Railways Act (IX of 1890). The Judge over-ruled the defendant's contention and allowed the claim holding that a notice under section 77 of the Act was not necessary because the section contemplated overcharges recovered before the delivery of the goods to the consignee and not to overcharges recovered after the delivery as was the present case. He further held that if notice was necessary, it was

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given by the plaintiff inasmuch as there was an allegation that a notice had been sent in a letter addressed to the Agent of the Company, care of the Station Master, Poona, by the plaintiffs.

The defendant having applied under revisional jurisdiction,

Held, that notice was necessary. The overcharge referred to in the section is not confined in its meaning to an overcharge recovered before the delivery of the goods to the consignee at their destination.

Held further, that the delivery of a letter under section 140 of the Act must be in exact compliance with the terms of the section and it must be delivered to the Agent at his office.

The statement of a fact in a letter is no proof of the fact itself.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts Act IX of 1887) against the decision of P. V. Gupte, Judge of the Court of Small Causes, Poona, in suit No. 1482 of 1905.

The plaintiffs, who traded at Poona, sued the defendant Railway Company for the recovery of Rs. 829-13-9 on account of overcharges claimed and received by the defendant in respect of certain consignments of goods delivered to them at Poona. The plaintiffs alleged that according to an understanding between them and the defendant, the latter charged the plaintiffs 4 annas and 9 pies per Railway maund and subsequenty claimed and received under protest on plaintiffs' part 7 annas and 10 pies per Railway maund. They therefore sought to recover Rs. 655-11-0 paid for the overcharges and interest by way of damages, namely, Rs. 174-2-9, in all Rs. 829-13-9.

The defendant contended, *inter alia*, that the suit was not maintainable in as much as no notice of the claim was served by the plaintiffs under the terms of section 77 of the Indian Railways Act (IX of 1890). The Judge over-ruled the defendant's contention on the ground that a notice under the section was not necessary because the section contemplated overcharges recovered before the delivery of the goods to the consignee and not overcharges recovered after the delivery as was the present case. He further held that, assuming that notice was necessary, it was given by the plaintiffs to the defendant and that the defendant being entitled to charge the plaintiffs at the lower rate only was liable to the plaintiffs' claim. He passed a decree accordingly.

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The defendant preferred an application under the extraordinary jurisdiction under section 25 of the Provincial Small Cause Courts Act (IX of 1887) and a *rule nisi* was issued by Jenkins, C.J., and Beaman, J., requiring the plaintiffs "to show cause why the decree should not be set aside on the ground that it was obligatory on the plaintiff to prefer his claim in writing under section 77 of Act IX of 1890 and that the terms of section 140 of that Act have not been complied with."

Raikes (Acting Advocate General with *Littte and Co.*) appeared for the applicant (defendant) in support of the rule :— Two points arise in the case, namely, (1) Whether it was necessary for the plaintiffs to give us notice under section 77 of the Indian Railways Act, and (2) whether the notice was duly given. The Judge held that notice was not necessary because according to him the term overcharge in the section means an overcharge levied and recovered before the delivery of the goods to the consignee. But the construction adopted by the Judge necessitates the introduction of additional words in the section which by itself is quite clear in its meaning. The Judge says that it would be absurd to hold that the section would apply to the claim of the defendant Company made six months after the goods were delivered for carriage.

In connection with the second point, the Judge finds that notice was duly given. But there is no evidence to support the finding. There is a recital of the notice in a letter. If a man writes a letter and alleges therein that he gave a notice to his opponent, how can this circumstance be evidence against the opponent? The plaintiff says that he sent a registered letter to the defendant. But he has not produced the postal receipt for the registered letter. It should be noted that the plaintiff in his examination never referred to this registered letter. What he relied upon was a letter addressed to the Agent, care of the Station Master at Poona. Such a letter does not meet with the requirements of section 140 of the Indian Railways Act.

Robertson (with *D. A. Khare* and *B. V. Vidvans*) appeared for the opponents (plaintiffs) to show cause :—The *rule nisi* calling on us to show cause consists of two parts. The second part

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relates to section 140 of the Indian Railways Act and to the question whether the terms of that section have been complied with. Therefore on this point no argument can be addressed which is not covered by the wording of the rule.

As regards the first part relating to the notice, the Judge has found as a fact that the plaintiffs had given notice to the Agent of the Company. This is a finding of fact and cannot be interfered with in the present revisional application. The Judge relies upon a letter written by one of the plaintiffs to the Agent along with the other evidence in the case, therefore, the finding of the Judge on this point is unimpeachable. Under section 25 of the Provincial Small Cause Courts Act the High Court can interfere if there is any error in law committed by the lower Court. The defendant at first alleged that the correspondence between the parties was destroyed and then at his leisure produced the letter which speaks of the notice which we had sent to the Agent. The defendant never denied the receipt of the notice. All these circumstances and the conduct of the defendant justified the Judge in drawing the inference that notice duly reached the Agent.

The crucial question in the case is whether notice was necessary before the action? We submit that it was not necessary. The defendant contracted to carry eleven consignments of goods from Wadi to Poona at the rate of 4 annas and 9 pies per Railway maund and did carry and deliver ten consignments which were duly paid for at the above rate. After the lapse of some time they demanded a higher rate on the ten consignments already delivered and paid for and detained on that account the eleventh, that is, the last consignment. We then paid the higher rate under protest and brought the present suit to recover the excess. Under these circumstances we contend that section 77 of the Indian Railways Act, cannot apply. The excess amount which the defendant has recovered from us cannot be called an overcharge. The natural meaning of the term overcharge in the section is the charge, which, as a fact, is higher than what is warranted owing to the class of the goods, their weight or measurement and which the Company puts down against the goods in the receipt given at the time of the

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consignment. Such a charge may either be prepaid at the time the goods are sent or paid at the time of delivery to the consignee. Section 77 does not contemplate that the defendant can at any time after the performance of the contract revise the terms of the agreement. The defendant demanded a higher rate than was agreed upon. Such a case does not fall under section 77. The construction which is sought to be put by the defendant upon the section would infringe upon the rights of the public in favour of the defendant. The section must, therefore, be strictly construed. We submit that the term overcharge means a charge which, as a matter of fact, is higher than is proper and for which the defendant agrees to carry goods. It cannot mean a higher charge which the defendant may afterwards choose to impose. Any other construction of the term would inflict great hardship. If the excess amount recovered in this case be held to be an overcharge, then the defendant can by recovering the alleged overcharge six months after the delivery of the goods for carriage make it impossible for the sender to give notice within time.

RUSSELL, Ag. C. J.—In the year 1902 the plaintiffs herein had a grain shop at Poona and the defendants are the G. I. P. Railway. During May 1902 the plaintiffs' agent went to Wadi to buy grain which he sent to Poona for sale there. The plaintiffs sue to recover from the defendants Rs. 655-11-0 and interest thereon as damages amounting to Rs. 174-2-9 in all Rs. 829-13-9. The sum of Rs. 655-11-0 is in the plaint sought to be recovered as the excess amount claimed and received by the Railway Company at Poona in respect of various parcels of grain sent from Wadi to Poona on different dates in June and July 1902, the details of which are set out in the plaint. The dates of the excess amounts being received are as follow:—

Rs. 187-5-0 received 12th July 1902.
„ 62-6-0 received 16th July 1902.
„ 406-0-0 received 25th July 1902.

Rs. 655-11-0.

The plaint was filed on 10th July 1905.

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The learned Judge of the Small Cause Court at Poona raised the following preliminary issue. Whether the suit was not maintainable for want of notice under sections 77 and 140 of Act IX of 1890 (the Indian Railways Act)?

The proper form of this issue would be whether the suit is maintainable in the absence of notice, &c.

Mr. Raikes, Advocate General, for defendants, said he would argue the two points only.

(*a*) Whether notice was necessary?

(*b*) Whether notice was given in time?

Before we deal with these two points it is desirable that we should state shortly what was proved at the hearing as to the fixing of the rates in question.

It appears that prior to February 1902 the rate for grain and seeds between Wadi and Poona had been 7 annas 10 pies per Railway *maund*.

By Circular No. 13, dated 18th February 1902, it was reduced to 4 annas 9 pies from 20th February 1902. But by a subsequent Circular No. 25, dated 14th May 1902, the reduced rate was cancelled and the former rate restored from 1st June 1902. But this subsequent Circular had not been posted or affixed at Wadi Station or made known to the public there or at Poona before the grain in question herein was sent from Wadi to Poona. Nor were the Railway people at Wadi and Poona aware of the subsequent Circular otherwise they would not have entered the reduced rate in the Railway receipts at Wadi and allowed delivery of the grain (except the last consignment Invoice No. 6) to the consignee at Poona on payment of the reduced rate. It was not till the last consignment had reached Poona that the enhanced rate was demanded. Further the plaintiffs' agent at Wadi inquired of the then goods clerk there what was the rate and was told the reduced rate.

As to the first question then the learned Judge held that notice as above was not necessary.

His reasoning is set out in his judgment pages, 17 and 18, as follows:—"The amount recovered by the defendant from the

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plaintiff on account of the alleged undercharges was charged and recovered, in some cases, not before, but some days after, the goods in respect of which the amount was recovered, were delivered to the plaintiff (the consignee) at their destination. I am of opinion that section 77 of the Railways Act (IX of 1890) does not apply to such a case. The section provides that 'a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by Railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by Railway.' Having regard to the time from which the period of six months is to be computed, it seems that the 'overcharge' referred to in the section means an overcharge charged and recovered before the delivery of the goods to the consignee at their destination, and that it does not include an overcharge which is charged and recovered after the delivery of the goods to the consignee at their destination. Suppose, an amount is charged and recovered on account of undercharges more than six months after the goods were delivered for carriage by Railway would the section apply to such a case? Certainly not. It would be simply absurd to hold that the section would apply to such a case. It thus necessarily follows from this that the 'overcharge' referred to in the section does not include an overcharge which is charged and recovered after the goods were delivered to the consignee at their destination."

But it appears to us that this is to read into the section words which are not there.

Section 77 is plain.

77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by Railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

Notification of claims to refunds of overcharges and to compensation for losses.

Section 140 is as follows:—

Service of notices on railway administrations.

140. Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager and, in the case of a railway administered by a railway company, on the Agent in India of the railway company—

(*a*) by delivering the notice or other document to the Manager or Agent, or

(*b*) by leaving it at his office, or

(*c*) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indain Post Office Act, 1866.

In the American and English Encyclopœdia "overcharge" is defined as "a charge of more than is permitted by law," citing *Woodman* v. *Rio Grande*[1]. That a charge such as the present is not "permitted by law," is apparent from case of *Winkfield* v. *Packington*[2]. There it was held that if before sending goods by a carrier the sender applies at his wharf to know at what price certain goods will be carried and he is told by a clerk who is doing the business there 2*s.* 6*d.*, per cwt., and on the faith of this he sends the goods the carrier cannot charge more; although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates in which 3*s.* 6*d.*, per cwt., was set down for the goods of the sort in question. Lord Tenterden's remarks in that case are very strong. They are:—

"If a person goes to the office of a Carrier, and asks what a thing will be done for, and he is told by a clerk or servant who is transacting the business there, that it will be done for a certain sum, the master can charge no more."

This case is cited in Angell on Carrier, section 127, as being still the law.

Again the words in section 77 "*in respect of* animals or goods" are as wide as they can be.

Further as a matter of practice the difficulty suggested by the learned Judge is not likely to arise, for in the Forms of consign-

(1) 67 Tex. 418. (2) (1827) 2 C. & P. 599.

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ment-note sanctioned by the Governor-General (see page 272, Bayley on the Indian Railways Act) "the freight on all goods must be paid either previously or at the time of delivery" and it is in the highest degree improbable that a Railway Company if freight were not paid previously or on delivery would allow anything like so long as six months to elapse before they demanded payment of the freight. And by section 55 of the Act payment must be made "on demand."

In our opinion we must read section 77 in its plain and ordinary sense and bearing in mind the mischief at which it was aimed, *viz.*, stale claims against Railway Companys in India. We, therefore, think the judgment on this point is wrong and should be reversed.

The next question is: was notice under section 140 in fact given or rather seeing that we are dealing with this case under section 25 of the Provincial Small Cause Courts Act, was there evidence upon the consideration of which the learned Judge was justified in finding that due notice had been given?

The learned Judge deals with this part of the case as follows:—

Assuming (but not holding) that the section does apply to a case like the present, the plaintiff in the present case did prefer his claim in writing to the defendant's Agent at Bombay by registered post within six months from the date of the delivery of the goods for carriage by Railway, as will be seen from the plaintiff's letter to the General Traffic Manager dated 11th August 1903 and produced by the defendant. In paragraph 1 of that letter, it is distinctly stated that the plaintiff did prefer his claim to the Agent by a registered letter No. 103, dated 14th October 1902. This registered letter as well as some other correspondence relating to the subject-matter of this suit is not forthcoming. The plaintiff has tried his best to procure their production. But the defendant's servants, in their evidence, state that the correspondence of 1902 has been destroyed according to the rules of the defendant Company. In none of the subsequent correspondence of 1903 does the receipt of the said registered letter of 14th October 1902 appear to have been denied. The

goods in respect of which the undercharges were recovered were delivered at the Wadi Station to the defendant Company in the months of June and July 1902, as will be seen from the Invoices produced by the plaintiff. The above mentioned registered letter was sent to the Agent within six months from the date of the delivery of the goods to the defendant Company.

The passage in the letter, Exhibit O, to which he refers is as follows:—

"I respectfully beg to point out that you are entirely wrong in stating my claim was not preferred within six months of the date of delivery, although (sic) my first registered letter No. 103 was addressed to your Agent dated 14th October 1902 and for which he acknowledged receipt." The learned Judge has inferred from the fact of there being no denial by the defendants of that statement that therefore the fact of the delivery of the letter of 14th October 1902 is proved.

But in our opinion this is not so. The statement of a fact in a letter cannot be accepted as proof of the fact itself. Nothing could have been easier than for the plaintiff then to prove that such a letter had been written and posted. The alleged receipt for the letter is not produced and no reason given for its non-production. On the contrary Devsi Versee says: "We then sent letters to the Agent through the Poona Station-Master for refund of the amount." The letter he refers to is dated 24th July 1902 and runs thus:—

To,
The Station Master,
G. I. P. Railway,
Poona.

Dear Sir,

In reply to your letter of the 18th July I beg to state that you are not entitled to the undercharges mentioned in your letter No. 4709 under the 55th Gaba of the Railway Act 9 of 1890. You refer to empower you to demand. The same in any way. I shall only pay the sum under protest and if you accept them so.

Yours sincerely,
SHA NARSI VARJUNG,
(in Gujarati).

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The witness is evidently trying to make out that this is the letter sent in compliance with sections 77 and 140. Of course it is not, for section 140 requires letters to be addressed as therein set forth. The witness does not refer to the alleged letter of 14th October 1902 at all.

Further, even assuming the learned Judge was right in the view he took of the letter of 11th August 1903 still that does not show that all the requirements of section 140 were complied with. It does not say that the letter was delivered to the Agent *at his office* as required by section 140; *non-constat* that it was not addressed to him c/o., the Station-Master at Poona as the letter of 24th July 1902 had been, which was not in compliance with section 140 exact compliance with which is necessary: *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1).

For the above reasons (it not being necessary to go into the other issues decided by the learned Judge) we would allow this application. But looking at the extreme hardship of the case upon the plaintiff, we direct that each party do pay their own costs throughout.

Application allowed.

G. B. R.

(1) (1906) 28 All. 552.