

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3310/2015.

Rucha Engineers Pvt. Ltd.,
K-249 – A, MIDC, Waluj,
Tal. Gangapur, Dist. Aurangabad.
Through it's Asst. General Manager
(HR and Systems),
Shri Ravikumar Chandrakant Mangalarap,
age 41 years, Occu.Service,
R/o K-249-A, MIDC Waluj,
Tal. Gangapur, Dist. Aurangabad. ...PETITIONER

Versus

Transport Corporation of India,
(Supply Chain Solutions),
Through Branch Office at
Gat No.5, Garware Limited,
Opp Sai Petrol Pump, Aurangabad
- Pune Road, Waluj, Aurangabad
Through it's Manager,
Shri Chandrashekhar Pandey
Hiramani Pandey, age 54 years,
Occ. Service, R/o Gat No.5,
Garware Limited, Opp. Sai Petrol
Pump, Aurangabad-Pune Road,
Waluj, Aurangabad. ...RESPONDENT

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Mr. D. P. Palodkar, Advocate for petitioner
Mr. S. V. Natu, Advocate for Respondent (sole)

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CORAM : A.M. DHAVALA, J.

DATED : 11TH JULY, 2017.

ORAL ORDER :-

1. Rule. Rule made returnable forthwith. By consent of parties, the matter is taken up for final hearing.

2. The original plaintiff by this petition challenges the order passed by learned Civil Judge, Senior Division, dated 19th January, 2015, below Exh.14, in Special Civil Suit No. 294/2013. Vide the said order preliminary issue has been framed regarding, maintainability of the suit for want of notice under Section 16 of Carriage of Goods by Road Act, 2007, with liberty to the parties to adduce their evidence.

3. The petitioner has filed Special Civil Suit No.294 of 2013 against the respondents for damages of Rs.26,38,341/- along with interest, on account of non-delivery of consignment to Tata Motors Limited during the period 2009 to March 2011. The plaint does not show averment about issuance of notice under Section 16 of Carriage of Goods by Road Act, 2007,

4. The plaint shows some correspondence between the parties. Learned advocate Mr. D. P. Palodkar, for the petitioner made two fold submissions. His first submission is that, it is not a case of the plaintiff of loss or damage to the consignment for which notice is necessary. It is a case of non-delivery. He relied on, **Transport Corpn. Of India Ltd.**

Versus Veljan Hydrair Ltd., (2007) 3 Supreme Court Cases

142, wherein it is observed,

“Such notice under [Section 10](#) will certainly be required where the common carrier delivers the goods in a damaged condition, or where the common carrier loses the goods entrusted for carriage and informs about such loss to the consignor/consignee/owner. The object of the section is to put the carrier on notice about the claim in respect of the loss or damage to the consignment so that it can make good the loss occasioned. But where there is no loss or injury to the goods, but the common carrier wrongly or illegally refuses to deliver goods and the person entitled to delivery initiates action for non-delivery, obviously [section 10](#) will not apply.”

“In fact [section 10](#) does not use the word 'non- delivery' of goods, but uses the words 'loss of, or injury to, goods'. A case of 'non-delivery' will become a case of 'loss' of consignment, only when the common carrier informs the consignor/consignee about the loss of the consignment.”

He argued that, though the said rule is made under Section 10 of the earlier Carriers Act, 1865, the provision is *pari materia* with Section 16 of the new Act.

5. His second submission is that, there was sufficient compliance in view of the correspondence between the parties by which the defendant was made aware about the non-delivery of the goods or partial delivery of goods. He further argued that, this is a mixed question of law and facts. He has no objection for framing of issue but he has objection for hearing the same as preliminary issue, as it will lead to two tyre evidence, and serious delay in trial. He submitted that, the defendants have also filed a suit for freight charges and both the suits are required to be heard together. The learned Trial Judge is imposing heavy costs for not proceeding with the suit of the defendant.

6. Per Contra, learned advocate Mr. S.V. Natu, for the respondent submitted that, it is a pure question of law. There

is not even whisper about issuance of notice, therefore the learned Trial Judge has rightly framed the issue. He submitted that, Section 10 of old Carriers Act, 1865 is not pari materia with new provisions of Section 16 of Carriage of Goods by Road Act, 2007.

7. The learned advocate for the petitioner relied on **Ramesh B. Desai and Others Versus Bipin Vadilal Mehta and Others, (2006) 5 Supreme Court Cases 638 (para No.13)**, to submit that, when the issue involved is a mixed question of law and fact, it should not be tried as preliminary issue. The Learned advocate for the respondent relied on, **Colgate-Palmolive (India) Ltd. & Ors. Versus Rajendra Vinayakrao Ayachit, 2012 (2) Bom. C.R. 86 (para Nos.12 & 13)**, to submit that, though issue of limitation is a mixed question of law and fact in some cases, it was held as pure question of law and it was decided as preliminary issue.

8. After hearing the learned advocates, I find that there is

no dispute that, if issue is a mixed question of law and facts, it cannot be tried as preliminary issue. except in cases governed by Section 9-A of Civil Procedure Code. The learned Trial Judge has held that, it is a mixed question of law and facts as he has directed that, "the parties are at liberty to adduce their evidence," which clearly indicates that, he was of opinion that it is a mixed question of law and fact.

9. After considering the arguments advanced before me, I find that a question whether notice under Section 16 of the Act is necessary or not, depends upon determination of factual aspects also whether it was a case of non-delivery/ partial delivery or not and whether such non-delivery or partial delivery could be covered by Section 16 of the Carriage of Goods by Road Act, 2007. Without going deep into the merits, I hold that, it is a mixed question of law and facts and as held in Ramesh B. Desai and Others Versus Bipin Vadilal Mehta and Others case, it cannot be tried as preliminary issue. Trying the same as preliminary issue will cause great

inconvenience to the plaintiff and there will be delay in completion of trial. It will be also contrary to the binding precedent laid down by the Apex Court.

10. It is clarified that, there is no objection for framing of the issues and trial of the same along with other issues.

11. In the light of the above facts, the impugned order passed by the learned Civil Judge, Senior Division, dated 19th June, 2015 needs to be modified with a direction that the issue regarding maintainability of the suit for want of notice under Section 10 of Carriage of Goods by Road Act, 2007 shall not be heard as preliminary issue but it shall be heard along with other issues.

12. I accordingly, direct the learned Civil Judge, Senior Division, to treat the said order modified as above and proceed with the suit. The rule is made absolute.

[A.M. DHAVALE, J.]

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vjg/-