(19) None of the points raised by Mr. Kuldip Singh having succeeded, this petition must fail and is accordingly dismissed though without any order as to costs.

KOSHAL, J.—I agree.

N.K.S.

APPELLATE CIVIL

Before Prem Chand Pandit and Gopal Singh, JJ.

SHRI DURGA INDUSTRIES,—*Appellant.*

versus

THE UNION OF INDIA,—*Respondent.*

Regular Second Appeal No. 664 of 1967
Civil Misc. No. 1550-C of 1967.

October 20, 1971.

Railways Act (IX of 1890)—Sections 47 and 73—Goods Tarrif General Rules Part I—Rule 138—Whether administrative and ultra vires *Section 73.*

Held, that rule 138 of the Goods Tarrif General Rules Part I, makes it obligatory upon a consignee taking delivery of the goods to give his objection about the damage or loss of the goods in writing to the Station Master before taking delivery of the goods received and their removal from the premises of a ralway. Such objection recorded in writing or service of notice to that effect upon the Station Master cannot be regarded as something pertaining to the use of the railway. The expression "use of the railway" in clause (g) of Section 47 of Railways Act refers to the matters pertaining to the actual user of the railway. Rule 138, therefore, cannot be framed in pursuance of this clause. Hence the Rule is not statutory but is administrative in character and consequently not one of binding validity. (Para 23)

Held, that Section 73 of the Act makes railway administration liable for the loss, damage or non-delivery of goods in course of their transit on account of any cause except the causes constituting *vis major* and other causes referred to therein, for which the railway administration can for no fault of theirs be held responsible. But for Rule 138 of the Rules, a claimant will, under Section 73 of the Act be entitled to decree of his claim

in spite of his having not given notice in writing to the Station Master as envisaged in the Rule. The Rule, therefore, is a kind of proviso or over-rider to section 73. By this rule, the rule making authority has whittled down or curtailed claimant's right to recover damages consequent upon loss although the legislature by Section 73 has not placed any such limitation or restriction upon the right of a claimant to have his claim decreed. Thus Rule 138 is inconsistent with the provision of Section 73 of the Act. That in consistency has to give way in favour of the parent provision of the Section and consequently is *ultra-vires* that Section. (Paras 22 and 24)

Regular Second Appeal from the decree of the Court of Shri Gurnam Singh, Additional District Judge, Gurgaon dated the 7th day of April, 1967 reversing that of Shri Ved Parkash Sharma, Senior Sub Judge, Gurgaon dated the 26th February, 1965 and dismissing the plaintiff's suit and leaving the parties to bear their own costs throughout.

Claim :—For the recovery of Rs. 9,864.30 paise.

Claim in Appeal:—For reversal of the decree of the lower appellate Court.

CIVIL MISC. No. 1550-C of 1967.

Application under Section 5 of the Limitation Act, 1963, read with Section 149 C.P.C. praying that the delay of about 3 days in properly stamping the Memorandum of Appeal be condoned in the interest of justice.

Anand Sarup, Advocate with R. S. Mittal and I. S. Balhara, Advocates, *for the appellant.*

H. S. Gujral and Birinder Singh, Advocates, *for the respondent.*

JUDGMENT

GOPAL SINGH, J.—(1) This is second appeal by Messrs Shree Durga Industries plaintiff against Union of India through the General Manager, Northern Railway defendant. It is directed against the judgment of Shri Gurnam Singh, Additional District Judge, Gurgaon dated April 7, 1967, allowing appeal filed on behalf of the defendant from the judgment of Shri Ved Parkash Sharma, Senior Sub-Judge, Gurgaon, dated February 26, 1967, decreeing plaintiff's suit for recovery of 7,109.

(2) Consignment of 235 iron billets weighing 44.375 metric tons was booked by Northern Railway on April 24, 1962 on behalf of Messrs Tata Iron and Steel Company from Tata Nagar Railway Station to Gurgaon. Railway Receipt No. 281673/F and Invoice

No. 502, Exhibit D-2 were issued in token of despatch of the goods. The goods were loaded in a broad gage wagon bearing No. R-10642/44 with a capacity of 44.380 metric tons. The goods were delivered at Gurgaon on May 7, 1962 to Laxmi Narain, representative of the plaintiff-firm. According to the case of the plaintiff, 125 billets weighing 22.57 metric tons were received in metre gage wagon bearing No. W. R. 22860 with a capacity of 27 metric tons. According to the case of the plaintiff, the fact of short delivery of the goods was brought to the notice of the Station Master at Gurgaon. The plaintiff corresponded with the railway authorities bringing to their notice the short delivery of the goods and also served a claim notice on August 4, 1962 upon the Chief Commercial Superintendent (Claims), Northern Railway, Delhi on the ground of short delivery under Section 77 of the Railway Act, hereinafter called the Act. On June 12, 1963, the plaintiff filed suit claiming damages of Rs. 8,809.22 on account of value of the goods lost and Rs. 1,055.17 as interest totalling Rs. 9,864.39 on the ground of failure of the defendant to give full delivery of the goods despatched from Tata Nagar.

(3) In the written statement, the defendant denied the claim of the plaintiff and pleaded that the consignee had taken full delivery of the goods despatched and was not entitled to claim any damages. It was pleaded on its behalf that at the time the representative of the plaintiff took delivery of the goods, no objection had been taken as to the goods despatched having not been delivered in full. It was also pleaded in the written statement that no notice had been served under Section 80, Civil Procedure Code on the defendant and that the suit of the plaintiff was barred by limitation.

(4) The pleadings of the parties gave rise to the following issues :—

(1) Whether the consignment was short delivered and the same was due to the negligence on the part of the defendant-railway ?

(2) Whether the notice under Section 80, Civil Procedure Code was served on the defendant ?

(3) If issue No. 2 is proved, whether the suit is barred by limitation ?

(4) To what amount of compensation the plaintiff is entitled to in case issue No. 1 is proved ?

(5) On issue No. 2, the trial Court took the view that there having been produced copy of the notice under Section 80, Civil Procedure Code supported by postal acknowledgement receipt, the issue stood proved. As regards issue No. 3, the trial Court held that the defendant had not shown as to how the suit filed on June 12, 1963 in respect of short delivery made on May 7, 1962 was barred by limitation. Thus, both the issues were determined against the defendant. On issue No. 1, the trial Court after consideration of the evidence on the record came to the conclusion that the consignment had been short delivered due to the negligence on the part of the defendant. Under issue No. 4, for the loss sustained by the plaintiff on the basis of the iron billets not delivered the trial Court found that the plaintiff was entitled to Rs. 7,109 inclusive of interest.

(6) On appeal by the defendant before the lower appellate Court, only two points were raised. One pertained to issue No. 1 and the other related to the effect of Rule 138 of the Goods Tariff General Rules, Part I, hereinafter called the Rules. On considering evidence on the record under issue No. 1, the lower appellate Court came to the conclusion that the plaintiff had failed to prove that he had not taken full delivery of the goods despatched. As regards the second point, the Court took the view that by virtue of Rule 138 of the Rules, the defendant was not responsible for any loss of goods unless notice of such loss had been given in writing to the Station Master before delivery and removal of goods from the premises of the railway. The appeal was accordingly allowed.

(7) Shri H. S. Gujral appearing on behalf of the defendant-respondent has raised a preliminary objection that the finding arrived at by the lower appellate Court under issue No. 1 that the evidence does not establish short delivery of the goods despatched is a finding of fact and cannot be reagitated in the second appeal.

(8) Thus, the only points, which require consideration are the following :—

(1) Is the finding of the lower appellate Court under issue No. 1 assailable in this appeal ?

(2) If the finding given under issue No. 1 can be reconsidered, does the evidence led on the record establish short delivery of goods ?

(3) Whether the defendant is not responsible for the loss to the plaintiff on account of short delivery of the goods for want of notice of loss as provided in Rule 138 of the Rules ?

(9) The preliminary objection raised by the counsel for the respondent cannot prevail in the present case inasmuch as the lower appellate Court has not considered the documentary evidence of material character. That Court has ignored to take into consideration while discussing the evidence pertaining to the short delivery of goods by the representative of the plaintiff, the following two material documents :—

(i) Entry of stock register, Exhibit P.W. 3/7 proved by Mohar Singh P.W. 3.

(ii) Report, Exhibit P. 5 dated August 13, 1962 drawn up by the Station Master and Laxmi Narain, Goods Clerk, P.W. 1.

(10) The entry, Exhibit P.W. 3/7 reproduced from the stock register maintained by the plaintiff-firm shows that the goods received on on May 7, 1962 were 125 iron billets weighing 22.575 metric tons. The entry in the stock register was made on May 9, 1962 after the goods had been received in the stocks of the plaintiff-firm. In pursuance of notice of claim lodged on behalf of the plaintiff under Section 77 of the Railway Act, the Station Master was directed to hold an enquiry about the loss claimed to have been suffered by the plaintiff. The original report as indicated Exhibit in the copy of the report Exhibit P. 5 proved by Laxmi Narain P.W. 1 is signed both by the Station Master and Laxmi Narain, Goods Clerk P.W. 1. Laxmi Narain P.W. 1 has proved that report to be correct. In that report, it is given that the wagon received was of the capacity of 27 metric tons and 44.375 metric tons despatched as per Railway Receipt, Exhibit D. 2 could not have been accommodated in the wagon received and that the plaintiff had been pressing for the non-delivered goods being delivered. Both these documents, which show that there was short delivery of goods as contended on behalf of the plaintiff, received no attention by the lower appellate Court.

(11) The trial Court, after scrutinising the evidence of Hari Parkash, Goods Clerk, Railway Station Sarai Rohala, Delhi D.W. 4 rejected his evidence holding that his evidence did not inspire confidence. Without assigning any reason against the view taken by the

trial Court for rejection of evidence of Hari Parkash the lower appellate Court has accepted his evidence. In order that finding of fact arrived at by the lower appellate Court may be treated as final and the appellant barred from further reagitating that finding, the entire material evidence whether documentary or oral must have been taken into consideration by the lower appellate Court in arriving at that finding. If on account of any reason, the trial Court rejected any evidence, the reason given by the trial Court for such rejection must be countered and duly met by the lower appellate Court. As indicated above, the documentary evidence in the form of entry of stock register and the report prepared by the Station Master and the Goods Clerk, which go a long way to support the plea of the plaintiff that there had been received by its representative short delivery of the goods that arrived at the destination, has not been considered at all. Similarly, the lower appellate Court has not assigned any reason why the view taken by the trial Court for the rejection of the evidence of Hari Parkash is not tenable and has without controverting that reason depended upon the evidence of Hari Parkash for coming to the conclusion that there was no short delivery. Such a finding of fact arrived at by the lower appellate Court could not be treated as final. Failure or error of that type on the part of lower appellate Court amounts to error of law and the finding so arrived at can be reconsidered by the High Court. I overrule the preliminary objection and proceed to consider the evidence on the record under point No. 2.

(12) On behalf of the plaintiff-appellant, there have been produced three witnesses, namely, Laxmi Narain P.W. 1, Laxmi Narain P.W. 2 and Mohar Singh P.W. 3 Laxmi Narain P.W. 1 is Goods Clerk at Gurgaon Railway Station. It is he who delivered the goods received on May 7, 1962 to Laxmi Narain P.W. 2, representative of the plaintiff-firm. It has been testified by Laxmi Narain P.W. 1, undoubtedly the official concerned charged with the duty of delivery of goods received at the Railway Station, that the goods delivered to Laxmi Narain P.W. 2 were received on May 7, 1962 in a wagon with capacity of 27 metric tons. He also admits that part of the consignment of the goods having not been received, the same were awaited as the goods had been despatched from Tata Nagar in a wagon of 44 metric tons. He added that the entire volume of goods weighing 44.375 metric tons despatched from Tata Nagar could not have been contained or accommodated in the wagon of capacity of

27 metric tons containing the quantity of goods received. He being the official concerned for delivery of goods to the representative of the plaintiff and he having admitted short delivery of goods and also the fact that the entire quantity of goods namely, 44.375 metric tons despatched from Tata Nagar could not have been carried in wagon with capacity of 27 metric tons, his evidence establishes that the goods received could not have been delivered in full as despatched. He also mentioned in the report Exhibit P. 5 that part of the goods which had been delivered were awaited after the date of delivery of the goods received by Laxmi Narain P.W. 2. It may be noted that the goods were despatched by broad gage wagon weighing 44.380 metric tons wehereas the goods were received in metre gage wagon with capacity of 27 meric tons. It is also admittedly the case of the parties that there had taken place transhipment on the way from broad gage wagon to metre gage wagon. These facts show that the short delivered goods had been lost in transit.

(13) Laxmi Narain P.W. 1 also proved copy of entry Exhibit D. 1 from the delivery book dated May 7, 1962. According to him, although the objection as to there being short delivery of the goods received is not recorded in the delivery book, it was taken by Laxmi Narain P.W. 2 on behalf of the plaintiff. It appears that objection raised by Laxmi Narain P.W. 2 was not recorded in the delivery book, although admittedly raised by him on behalf of the plaintiff, as assurance had been given by the Station Master that the remaining goods would be arriving later and Laxmi Narain P.W. 2 was told that the wagon received containing the goods delivered was of smaller capacity of 27 metric tons and the entire volume of goods of 44.375 metric tons despatched from Tata Nagar could not be contained in the wagon received. Acting upon that assurance the representative of the plaintiff did not persist for his objection as to short delivery being noted down in the delivery book.

(14) Laxmi Narain P.W. 1 further proved telegram Exhibit P. 1, which had been sent by him to the Station Master, Tata Nagar about the short delivery of the goods despatched to the plaintiff. The witness has admitted that at the time the delivery of goods received was taken on behalf of the consignee, the goods were not weighed. His suggestion is that the weight given in Exhibit D. 1 is not the actual

weight of the goods received. This weight as suggested by the witness had been entered on the basis of the entry made in Railway Receipt, Exhibit D. 2. In the Railway Receipt, which was issued in token of goods having been despatched, the weight given in the column of 'actual weight' is 44.375 metric tons while in the column 'weight charged' the weight given is 44.380 metric tons. Similarly, in Exhibit D. 1, the weight given against the entry, 'actual weight' is 44.375 metric tons while against the 'weight charged', the figure given is 44.380. It appears that when this Railway Receipt was produced before the Goods Clerk for taking delivery of the goods received, the Goods Clerk, as he has admitted that the goods were never actually weighed, made the same entries as they occurred in these two columns in the Railway Receipt. The evidence both of Laxmi Narain P.W. 1 and Laxmi Narain P.W. 2. leaves no doubt that goods were received at Gurgaon in wagon with capacity of 27 metric tons and were not weighed there.

(15) In pursuance of notice of claim served on behalf of the plaintiff, the railway offcials drew up report dated August 13, 1962 Exhibit P. 5. In that report, it has been admitted that the goods received in wagon No. 22860 on May 7, 1962 have been delivered to the consignee but the remaining goods were awaited as 44.375 metric tons of goods as despatched from Tata Nagar could not be accommodated in 27 metric tons wagon. It is further stated in this document that several telegraphic reminders have been issued by the plaintiff for delivery of the remaining goods. It is also stated in that report that arrangements may be made to locate the missing part of the consignment so that the same be delivered to the consignee who has already preferred claim for the loss of the goods. This document has been drawn up by the Station Master, Gurgaon and the Goods Clerk. Had there not been short delivery of goods, this report made by the two concerned officials of the defendant-railway would not have stated these facts therein. This report reinforces the stand taken by the plaintiff that the goods received were not 44.375 metric tons but only 22.57 metric tons.

(16) Laxmi Narain P.W. 2 has stated unequivocally that he took delivery on May 7, 1962 only of 125 iron billets whereas the billets despatched from Tata Nagar were 235. His evidence shows that there was short delivery to the extent of 110 billets. He has also stated that he brought the fact of short delivery to the notice of

Laxmi Narain P.W. 1, Goods Clerk, who assured him that as the goods despatched could not have been contained in the wagon received with capacity of 27 metric tons, part of the goods that had not been received would be delivered later on their arrival.

(17) The third witness produced by the plaintiff is Mohar Singh P.W. 3. He is Manager of the plaintiff- firm. He has proved copy of entry from the stock register, Exhibit P.W. 3/7. It shows that after delivery of the goods had been taken by Laxmi Narain P.W. 2 on May 7, 1962, entry to the effect of the receipt of 125 billets weighing 22.575 metric tons was made in the stock register. This also supports the stand of the plaintiff that the goods received were 22.575 metric tons and not the full delivery of 44.375 metric tons as despatched from Tata Nagar.

(18) As against the above oral evidence of the plaintiff, the defendant produced Mool Chand D.W. 1, Gauri Shankar D.W. 3 and Hari Parkash D.W. 4. Mool Chand is Senior Railway Clerk, Railway Station, Ajmer. According to the documents, Exhibits D.W. 1/1 and D.W. 1/2 as proved by him, the capacity of the wagon in which the goods had been received at the destination would be of 35.6 metric tons. His evidence is in conflict with the evidence of Laxmi Narain P.W. 1, Goods Clerk, who himself gave delivery of the goods after getting the same unloaded. The person most concerned about the capacity of the arriving wagon is Laxmi Narain P.W. 1. There is no reason to doubt the testimony of Laxmi Narain P.W. 1. Gauri Shankar D.W. 3 is Goods Clerk at Tata Nagar. He proved Forwarding Note Exhibit D.W. 3/1. In that note it is stated that the wagon despatched was of 44 metric tons. It is admittedly the case of the parties that the goods despatched were 44.375 metric tons and the same had been despatched in wagon with capacity of 44.380 metric tons. His evidence is of no avail in establishing the capacity and contents of the wagon received at the destination. The witness was employed as Goods Clerk at Tata Nagar. He could not possibly know about the capacity of the wagon received at the destination and the weight of the goods contained therein.

(19) Hari Parkash D.W. was Goods Clerk at Sarai Rohala Railway Station. He stated that the wagon, in which goods had been despatched from Tata Nagar was of the capacity of 43 metric tons and not of 44 metric tons as deposed to by Gauri Shankar D.W. This

witness had nothing to do with the delivery of the goods at Gurgaon Railway Station, where delivery was taken on behalf of the plaintiff. In his zeal to support the defendant-railway, he has stated that the wagon despatched was of 43 metric tons. His evidence when read out in Court did not inspire confidence. The trial Court had rightly rejected his evidence and no reason has been assigned by the lower appellate Court for repelling the view taken by the trial Court about the rejection of his evidence.

(20) For the above reasons I set aside the finding of the lower appellate Court given under issue No. 1 and hold that 22.57 metric tons were delivered to the representative of the plaintiff at Gurgaon Railway Station at the time delivery of the goods was taken on May 7, 1962 and not the full quantity of 44.375 metric tons despatched from Tata Nagar.

(21) With reference to point No. 2 pertaining to the effect of Rule 138 of the Rules, it was conceded by the counsel for the appellant that no notice of short delivery or loss of goods had been given in writing to the Station Master before the delivery of the goods was taken and the goods were removed from the premises of the railway. He, however, contended that Rule 138 was *ultra-vires* the rule making authority and curtailed the right of a claimant to recover damages consequent upon loss of goods in transit as provided in Section 73 of the Act. In order to appreciate the points of argument, it is necessary to consider the contents of these two provisions. Section 73 runs as follows :—

> "Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, of animals or goods delivered to the administration to be carried by railway, arising from any cause except the following namely,—
>
> (a) act of God;
>
> (b) act of war;
>
> (c) act of public enemies;
>
> (d) arrest, restraint or seizure under legal process;

(e) orders or restrictions imposed by the Central Government or a State Government or by the officer or authority subordinate to the Central Government or a State Government authorized in this behalf;

(f) act or omission or negligence of the consignor or the consignee or the agent or servant of the consignor or the consignee;

(g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;

(h) latent defects;

(i) fire, explosion or any unforeseen risk;

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relived of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods."

Rule 138 is reproduced below :—

"The railway shall not be responsible for any damage to, or loss of, property unless notice of such is given in writing to the Station Master before delivery and removal from the railway's premises of the property or of the package or packages, the contents or parts of the contents of which are alleged by the claimant to be damaged or lost or of the rest of the consignment, a portion of which is alleged by the claimant to be lost (as the case may be)."

(22) Section 73 makes railway administration liable for the loss, damage or non-delivery of goods in course of their transit on account of any cause except the causes constituting *vis major* and other causes referred to therein for which the railway administration could for no fault of theirs be held responsible. The counsel for both the parties conceded that the present case is covered by Section 73 of the Act and does not fall within the scope of any of the clauses providing for exceptions to the responsibility of the railway administration to meet the claim consequent upon short-delivery of goods. It was, however, contended on behalf of the counsel for the defendant

that by virtue of Rule 138, the railway administration is not liable for any loss of property carried by railway unless notice of that loss is given in writing to the Station Master before the delivery and removal of goods from the railway premises. According to this rule, the railway administration has been rendered immune from liability if the notice referred to therein is not served on behalf of the consignee in respect of the loss of goods suffered by him in course of their transit by the railway. The counsel for the defendant was asked as to what exactly is the Section of the Act in pursuance of which power has been conferred to frame this rule. No notification was referred to us showing the Section of the Act, under which the Rules including Rule 138 were framed. No authentic proof has been placed before the Court by the counsel for the defendant to show that the rule was not of administrative character and was framed in exercise of the power under the Section conferring rule making power. He argued that the rule seems to have been framed by virtue of the provision of Section 47 of the Act. Section 47 runs as follows :—

"(1) The Central Government, or in the case of a railway administered by a railway company, the railway company shall make general rules consistent with this Act for the following purposes, namely :

(a) for regulating the mode in which and the speed at which, rolling-stock used on the railway is to be moved or propelled ;

(b) for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage ;

(c) for declaring what shall be deemed to be, for the purposes of this Act, dangerous or offensive goods and for regulating the carriage of such goods ;

(d) for regulating the conditions on which the railway administration will carry passengers suffering from infectious or contagious disorders, and providing for the disinfection of carriages which have been used by such passengers ;

(e) for regulating the conduct of the railway servants ;

(f) for regulating the terms and conditions on which the railway administration will warehouse goods or

retain goods, or animals at any station on behalf of the consignee or owner; and

(g) generally, for regulating the travelling upon, and the use, working and management of, the railway.

(2) The rules may provide that any person committing a breach of any of them shall be punished with fine, which may extend to any sum not exceeding fifty rupees, and that, in the case of rule made under clause (e) of sub-section (1), the railway servant shall forfeit a sum not exceeding one month's pay, which sum may be deducted by the railway administration from his pay.

(3) A rule made under this Section, whether by the Central Government or a railway company, shall not take effect until it is published in the official Gazette, and in the case of a rule made by a railway company, unless before such publication it has also received the sanction of the Central Government.

Provided that ————————

where the rule is in the term of a rule which has already been published at length in the official Gazette, a notification in that Gazette referring to the rule already published and announcing the adoption thereof, shall be deemed a publication of a rule in the official Gazette within the meaning of this sub-section."

(23) Admittedly, clauses (a) to (f) of sub-section (1) of Section 47, under which the Rules could be framed do not deal with the subject covered by Rule 138. The counsel for the respondent argued that clause (g) covered the subject of that rule. According to clause (g), rules in general to regulate the use, working and management of railway could be framed by the Central Government. Obviously, the subject of Rule 138 does not relate to the management of a railway nor that rule could be covered by the expression, 'working of a railway'. The counsel argued that if the word, 'working' did not cover the subject of that rule, it was covered by the expression 'use of the railway'. The rule makes it obligatory upon a consignee taking delivery of the goods to give his objection about the damage or loss of the goods in writing to the Station

Master before taking delivery of the goods received and their removal from the premises of a railway. Even such objection recorded in writing or service of notice to that effect upon the Station Master could not be regarded as something pertaining to the use of the railway. The expression, 'use of the railway' refers to the matters pertaining to the actual user of the railway. If that expression could be construed as widely as the counsel for the respondent wants the Court to construe, clauses (a) to (f) and also the remaining part of clause (g) pertaining to the working and management of railway would become superfluous. We are not satisfied that Rule 138 could be held to have been framed in pursuance of clause (g) of sub-section (1) of Section 47 of the Act. In spite of opportunity having been given to the counsel for the defendant to place notification, by virtue of which the Rules, in which Rule 138 occurs, have been framed, no notification was placed before us to show that Rule 138 had been notified in exercise of the powers conferred by clause (g). Under these circumstances, it could not be held that the Rule is statutory and derives its force from Section 47 of the Act. No material having been placed before us to show that the Rule is statutory, the Rule has to be treated as administrative in character and consequently not one of binding validity. Even if it is found that the rule had been issued under clause (g) of sub-section (1) of Section 47 of the Act, it could not be held to be intravires the authority of the Central Government empowered to frame rules within the scope of clause (g) relied upon as the source of that authority.

(24) But for Rule 138, a claimant will under Section 73 of the Act be entitled to decree of his claim in spite of his having not given notice in writing to the Station Master about the short delivery of goods at the time delivery of goods received was taken on his behalf if the evidence apart from that pertaining to the non-raising of such objection satisfies the Court that the claimant not raising objection of that type at the time of delivery was entitled to the decree of his claim. In other words, this is a kind of proviso or over-rider to Section 73. Even if a claimant in a case falling outside the scope of the clauses pertaining to exceptions is entitled to have his claim decreed, his claim shall not be decreed if he did not raise objection and had that objection recorded in writing with the Station Master to the effect that there was loss of the goods despatched. By this rule, the rule making authority has whittled down or curtailed his right to recover damages consequent upon loss although the legislature by

Section 73 has not placed any such limitation or restriction upon the rights of a claimant to have his claim decreed. Thus Rule 138 is inconsistent with the provision of Section 73 of the Act. That inconsistency has to give way in favour of the parent provision of that Section and consequently is struck down as ultra-vires that Section.

(25) The counsel for the appellant relied on *Sant Saran Lal and another* v. *Parsuram Sahu and others,* (1). In that case, a money-lender was registered under the Bihar Money-Lenders Act, 1938. He could sue for recovery of a loan during the period of time, when certificate of his registration as money-lender was in force even though at the time he advanced the loan he had exceeded the limit of the amount mentioned in the registration certificate as the amount upto which he could transact his money-lending business. Rule 3 was framed in pursuance of Section 27 of the Act dealing with the conferment of rule making power. That rule provided that the certificate of a money-lender shall be cancelled if money lent by him exceeded the limit for which the certificate of registration was granted. It was held that in no Section of the Act, there was provided any such restriction. The rule was struck down as ultra-vires the provisions of the Act. Their Lordships of the Supreme Court observed as follows :—

> "We have referred to the fact that the Act does not anywhere provide for the fixing of the upper limit for the loans remaining outstanding at any particular time. The rule-making power of the Government does not extend to the fixing of such a limit."
>
> "The mere ground that a certain construction of a rule or consideration of its effect will defeat the purpose or object of the Act is not a good ground for taking away the right of the money-lender to sue for the recovery of a debt due to him when the Act itself contains no provision authorising any limit to the loan, which a money-lender may lend at a time or may not exceed by lending further loan if the amounts outstanding at the particular point of time had exceeded the limit laid down."

(1) A.I.R. 1966 S.C. 1852.

(26) That rule was struck down as ultra-vires the provisions of the Act.

(27) In reply, the counsel for the respondent relied on *Chamanlal Premchand* v. *The State of Bombay* (2). In that case, the validity of Rule 65 of the Bombay Agricultural Produce Markets Rules, 1941 was challenged on the ground that the rule was in excess of the power of the State Government conferred by Section 26 of the Bombay Agricultural Produce Markets Act, 1939 pertaining to the rule making power of the State Government. By taking into consideration the provisions not only of Section 27 of the Act but also that of Section 26, it was held that the Rule was not in excess of the powers conferred upon the State Government. In the present case, neither the rule-making Section nor any other Section in the body of the Act can persuade us to come to the conclusion that the Central Government could frame Rule 138 of the Rules. On the other hand, we find that the Rule comes in conflict with the provisions of Section 73 of the Act and results in deprivation of the right of a claimant to claim damages consequent upon loss of goods in transit by railway simply because the claimant had not recorded objection about that loss with the Station Master. As the following portion of the ratio determined in this case decided by the Supreme Court will show, the judgment in that case is obviously distinguishable :—

> "The Rule (Rule 65) was certainly one made for the purpose of facilitating the Market Committee to function effectively under Section 27 of the Act. That the legislature conferred such a power on the State Government is also supported by the provisions of Section 27 of the Act. Under Section 27(1), the bye-laws made by the Market Committee for the regulation of business and conditions of trading in the Market area are subject to the rules made by the State Government under Section 26. This indicates that under Section 26 of the Act, the State Government has also power to make rules for the regulation of business and conditions of trading in the market area and that power can be spelled out from the provisions of Section

(2) A.I.R. 1960 S.C. 96.

26(1) of the Act. Therefore, Section 26(1) confers ample power on the State Government to make Rule 65. In this view, it is not necessary to invoke the provisions of Section 26(2)(e) to sustain the power of the State Government to make Rule 65."

(28) For the reasons recorded above, we allow the appeal with costs, set aside the judgment of the lower appellate Court and restore that of the trial Court.

P. C. PANDIT, J.—I agree.

N. K. S.

FULL BENCH

Before D. K. Mahajan, R. S. Narula and Bal Raj Tuli, JJ.

M/s. SAMAND SINGH SOHAN SINGH AND CO.,—*Petitioners.*

versus

THE STATE OF PUNJAB ETC.,—*Respondents.*

Civil Writ No. 2744 of 1970.

November 13, 1973.

Punjab Excise Act (1 of 1914)—*Section* 36—*Auction of licence for retail vend of country liquor—Licensee thereof—Whether entitled to receive proportionate quota of monthly supplies of the liquor without payment of licence fee for that particular month before the date of such payment—Excise Authorities—Whether can insist on advance payment of the licence fee—Temporary stoppage of supplies of liquor on default of payment of the license fee—Whether amounts to penalty not covered by the conditions of the licence.*

Held, that when a licence by auction for retail vend of country liquor is issued, the licensee has the right to ask for monthly proportionate quota of the country liquor without making the payment of licence fee for that particular month in advance. The monthly quota is determined by dividing the annual quota by twelve and the payment of monthly licence fee