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the plaintiff for delivery, and that, too, in Bombay, where the defendants are not and never were bound to deliver; the circumstance that the absence of any demand at Bellary prevented the attention of the defendants' servants being very specially called to the plaintiff's goods—are facts which, if they do not remove from the defendants, at least to some extent lighten the burden cast upon them of proving readiness to deliver within a reasonable time after arrival of the goods. The costs of this reference and of the suit should be disposed of by the Court of Small Causes on the retrial in such manner as it may deem just.

Order accordingly.

Plaintiff appeared in person.

Attorneys for the defendants.—Messrs. *Hearn, Cleveland* and *Little.*

ORIGINAL CIVIL.

(24)

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir C. Sargent, Justice.

KUVERJI TULSIDAS, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.*

1878 *December 6 and 7.*

Railway Company—Carrier, Liability of—Indian Contract Act (IX of 1874), ss. 151, 152—Act XVIII of 1854—Act III of 1865.

The English common-law rule, under which common carriers are held liable as insurers of goods against all risks except the act of God or the king's enemies, is not now in force in India. In cases not met by the special provisions of the Act relating to railways and carriers, the liability of carriers for loss or damage to goods entrusted to them is prescribed by ss. 151 and 152 of the Indian Contract Act (IX of 1872).

The plaintiff's goods were being carried in a train of the defendants from Naingaon to Egatpuri. During the journey the train was plundered by robbers, and the plaintiff's goods were stolen.

Held the defendants were entitled to the benefit of s. 152 of the Indian Contract Act, and should be permitted to give evidence that the robbers of the plaintiff's goods were not the servants or agents of the defendants, and that the defendants (by their servants and agents) took as much care of their goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods in question.

THIS was a case stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by W. E. Hart, First Judge of the Court of Small Causes at Bombay.

* Small Cause Court Reference, Suit No. 11,211 of 1878.

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The question for the High Court was whether the defendants as bailees defined in s. 148 of the Indian Contract Act, could rely on the provisions of s. 152 of that Act as exempting them from liability in respect of goods delivered to them to be carried, unless negligence on their part was proved. The learned Judge stated the case as follows :—

"In the present case the goods of the plaintiff were in a waggon forming part of a goods train running between Nángaon and Egatpuri on the night of the 2nd October 1877. On reaching the foot of a steep incline the driver found about 30 men by the side of the road, and a quantity of sand on the rails. The sand made it impossible for the wheels to hold the rails properly ; and the driver, finding that on that account it was not possible to get the whole train up the incline, went on with the first half, leaving the latter half in charge of the guard. He was absent about 25 minutes, and, on his return with the engine, found that the waggons, which he had left at the bottom of the incline and among which was that containing the plaintiff's goods, had been plundered by the thirty men.

"The rule and the reasons for it, that the common carrier, though the force be never so great as if an irresistible multitude of people should rob him, nevertheless is chargeable, are stated in *Coggs* v. *Bernard*,(1) which case was lately cited with approval in the judgment of the Court of Appeal in *Bergheim* v. *The Great Eastern Railway Company*.(2) But it was here contended, on behalf of the defendants, that the law now applicable in this country to carries, besides the special provisions of the Acts relating to railways and carriers, is that contained in chap. ix of the Indian Contract Act relating to bailment.

"My reasons for dissenting from this proposition are set forth in paras. 14 and 15 of the statement in the said cause, No. 13,993 of 1878,(3) referred for the opinion of the High Court. I, accordingly, prevented the defendants' attorneys from giving evidence to show that the robbers were not servants of the Railway Company, and that all reasonable precaution had been taken for the

(1) 2 Ld. Raym. 918. (2) L. R. 3 C. P. D. 221.

(3) *Ishwardas Gulabchand* v. *G. I. P. Ry. Co.* See *post* at page 125. The judgment in the case referred to, was delivered subsequently to the judgment in the present case.

safety of the goods, the protection of the train, and the watching of the line, and I passed a verdict for the plaintiff for the sum of Rs. 902-12, and costs.

"The said verdict was, at the request of the defendants' attorney, made subject to the opinion of the High Court on the second question submitted in the said cause No. 13,993 of the 1878, viz., whether the defendants, as bailees defined in s. 148 of the Indian, Contract Act, can rely on the provisions of s. 152 as protecting them from liability in respect of goods carried by them for reward. If the answer to that question be in the affirmative, the verdict in the present case will be set aside, and a new trial ordered."

Starling for the plaintiff.—Section 152 of the Indian Contract Act does not apply to railway companies or other common carries as such. The preamble and section 1 show that this Act was not intended to be a general or exhaustive measure, but merely a partial statement of contract law. Neither Act XVIII of 1854 nor Act III of 1865 is repealed by this Act. The definition of bailment in sec. 148 of the Contract Act does not point to the case of carriers, and sec. 158, in referring to the bailment of goods to be carried speaks only of gratuitous conveyance. He cited *Minet* v. *Leman*, (1) *O'Flaherty* v. *McDowell*, (2) *Ex parte Warrington*.(3)

The *Advocate General* (Honourable *J. Marriott*) and *Latham* for defendants.—The liability of Railway companies previously to the passing of the Indian Contract Act was regulated partly by Act XVIII of 1854 and party by common law. The effect of the Indian Contract Act is to relieve railway companies of their common-law liability, and to subject them to the liability imposed by Act XVIII of 1854 and by the Contract Act, The Railway Act XVIII of 1854) did nod affect the common-law liability of railway companies. But that liability is affected by sec. 152 of the Contract Act. Section 148, which defines bailments, is wide enough to include bailments to carriers, and sec. 158 expressly deals with the case of goods to be carried, thus showing that the Act was intended to apply to carriers. If so, it is clear that sec. 152 must apply. They referred to *The East Indian Railway Company* v. *Jordan*.(4)

(1) 20 Bea. 269, 278.
(2) 6 H. L. C. 142, 157.
(3) 3 DeG. M. & G. 159.
(4) 4 Beng. L. R. 97, O. C. J.

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WESTROPP, C.J. (having stated the facts above set forth).—The learned Chief Judge dissented from the contention of the defendants, that the law now applicable in this country to carriers, besides the special provisions of the Acts relating to railways and carriers, is that contained in chap. ix. of the Indian Contract Act which relates to bailment. And he, accordingly, prevented the defendants from giving evidence to show that the robbers were not their servants, and that all reasonable precaution had been taken for the safety of the goods, the protection of the train, and the watching of the line, and gave a verdict for the plaintiff for Rs. 902-12, which he held to be the value of the plaintiff's goods and costs, subject, however, to the opinion of this Court on the question—"Can the defendants, as bailees defined in sec. 148 of the Indian Contract Act, rely on the provisions of sec. 152 as protecting them from liability in respect of goods carried by them for reward?" He has put the same question in another case (*Ishvardas Gulabchand* v. *The G. I. P. Railway Company*, No. 13,993 of 1878) referred to this Court, in which case he stated his reasons for not permitting the railway company to rely on s. 152 of the Indian Contract Act. Those reasons may be summarized thus: that, although that Act has been in force for six years, no judicial authority was cited to show that sec. 152 only applies to carriers for reward, and although many actions had been tried in the Court of Small Causes against the Great Indian Peninsula Railway Company, such a defence had never been raised in these actions: that, although the terms of s. 148 are wide enough to include all carriers, yet ss. 151 and 152 only declare the law as it existed before the Indian Contract Act, in regard to ordinary bailees other than carriers, side by side with which there also existed the special common-law liability of common carriers, who nevertheless then, as now, fell within the strict letter of the definition of ordinary bailees, which special liability of common carriers had been "apparently recognized" by the Legislature in the Railway Act (XVIII of 1854) and the Carriers Act (III of 1865): that the preamble and sec. 1 of the Indian Contract Act showed that it was not intended to be exhaustive and applicable in all cases of bailment, and that Act is silent as to the Railway Act, the Carriers Act, and carriers for

hire, the only reference to carriage in the chapter on bailment being in sec. 158, where the bailment, dealt with, is gratuitous bailment; and he stated his opinion to be "that, had the Legislature intended by ss. 151 and 152 to effect a complete revolution of the law as applied to carriers (for if the construction contended for by the defendants be correct, it must apply, not only to railway companies, but to ships' captains, and in fact, to all who, as carriers for reward, are under special liabilities to the owners of the goods entrusted to them,) express words would have been used for the purpose of giving effect to such intention."

The Indian Contract Act (IX of 1872) is and purports to be only a partial measure. Its preamble recites that "it is expedient to define and amend certain parts of the law relating to contracts." Its first section repeals certain enactments specified in the schedule, but provides that nothing contained in the Act "hsall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act."

The words "not inconsistent with the provisions of this Act" must, we think, be limited in their application to the immediately preceding words "nor any usage or custom of trade, nor any incident of any contract," and are not applicable to the words "the provisions of any Statute, Act or Regulation," and, therefore, such Act as the Railway Act (XVIII of 1854) and the Carriers Act (III of 1865) not being mentioned in the schedule to the Indian Contract Act, are not repealed or affected by that Act. The provision of its first section, that nothing contained in the Act shall affect any usage or custom of trade or incident of any contract, not inconsistent with the provisions of the Act, does not aid us in arriving at a solution of the question submitted to this Court, inasmuch as if the 152nd section of the Act is applicable to common carriers for hire, the Act is in that respect inconsistent with the rule or usage of common law relied upon by the Court of Small Causes as the basis of its opinion. That rule is not a common carrier, while to goods entrusted to him for conveyance are in his custody, is bound to the utmost care of them; and, unlike other bailees

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falling under the same class,(1) is, at common law, responsible for their loss, and every injury sustained by them, occasioned by any means whatever, except only the act of God or the king's enemies.(2) The 151st section of the Indian Contract Act is as follows:—"In all cases af bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed." The 152nd section, here relied upon for the defendants, enacts that "the bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of bare of it described in s. 151." If, indeed, the rule of common law already mentioned, and which makes the common carrier an insurer of the goods against loss and injury, except occasioned by the act of God or the king's enemies, has been adopted by the Indian Legislature in Act XVIII of 1854, Act III of 1865, or any other Act not mentioned in the schedule to the Indian Contract Act, the first section of that Act would save the rule. It has not, however, been shown to our satisfaction that the common-law rule has been adopted in Act XVIII of 1854, Act III of 1865, or any other Act of the Indian Legislature. An examination of Act XVIII of 1854 and Act III of 1864 shows why it is impossible successfully to maintain that there has been in those Acts any such adoption of the common-law rule, or that the former of those Acts is exhaustive as to the liabilities of railway companies as carriers, and the latter, of the liabilities of carriers generally.

The important sections in Act XVIII of 1854, in relation to the liability of railway companies for goods delivered to them for conveyance, are ss. 9, 10, 11, and 15. Of these, s. 9 relieves companies of liability in respect of loss or injury to passengers' luggage "in any cause," unless it shall have been booked and separately paid for; and s. 10 relieves companies of responsibility "in any case" for loss or injury to gold, silver, and numerous other articles of great value particularly enumerated in that

(1) The fifth class of bailments, viz., *Locatio operis faciendi*.

(2) The authorities are collected in Mr. J. W. Smith's note to *Coggs* v. *Bernard*, 1 Sm. L. C. 183 (7th ed.), and in Angell on Carriers (4th ed), pl. 148 et *seq.*

section, unless the value and nature of such goods has been declared by the sender, and an increased charge for their safe conveyance accepted by a specially authorized person on behalf of the company. It is manifest that neither of these sections states or implies what, in the case of goods not within the descriptions therein given, shall be the extent of the liability of railway companies. Nor do those sections state what, in the case of loss or injury to goods therein described, shall be the extent of the liability of companies when the requisites to render them at all liable have been complied with. The silence of those sections leaves the solution of that point to the law, as it then subsisted outside that Act; and a variation of such law *dehors* the Act cannot be deemed to affect the provisions of the Act.

The two sections, of which we have been treating, are in favour of railway companies. The next section (the 11th) of the same Act (XVIII of 1854) has a different aspect. At common law, an ordinary carrier for hire might, by special contract, protect himself from responsibility, even for loss or injury occasioned by the gross negligence of himself or his agents.(1) In the case of *Surutram Bhayia* v. *The G. I. P. Railway Co.*,(2) recently referred by the Court of Small Causes, to this Court, it was said here that the 11th section, taken in the aggregate, appears to mean "that a railway company shall be responsible for loss or injury caused by gross negligence or misconduct of their agents or servants (except in cases otherwise specially provided for by the Act: *e. g.* such cases as are mentioned in ss. 9 and 10), notwithstanding any public notice given or private contract made by such companies to the contrary." If, as we think, that be the true construction of s. 11, it leaves untouched the question whether railway companies, as common carriers, shall be answerable, in cases of loss or damage to goods in the absence of any special contract to the contrary, where such loss or damage is not occasioned by the negligence or misconduct of the companies, their servants or agents. That question, if it arose before the Indian Contract act came into force, would necessarily have been decided the common law, which would have treated the common carrier as an

(1) See the cases collected in Angell on Carriers, note (a) to pl. 265, 4th ed.

(2) No. 1608 of 1878, *supra*, p. 96. See p. 105.

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insurer against all risks, except the act of God or the king's enemies; and, if the loss had not been attributable to either of these exceptions, would have held the common carrier liable, although neither misconduct nor negligence had occurred on his part or on that of his agents, &c. If this be no longer so since s. 152 of the Indian Contract Act came into force, the change thus made is not any alteration of s. 11 of Act XVIII of 1854, but is a departure from the common law. Section 15 relates to the carriage of dangerous goods, and sheds no light on the liability of railway companies free from the imputation of negligence or misconduct; nor, so far as we can perceive, is there any other portion of Act XVIII of 1854, not already noticed, which has such a result.

Act III of 1865(1) is intituled "An Act relating to the rights and liabilities of common carriers," and in its preamble recites that, "it is expedient not only to enable common carriers to limit their liability for loss or damage to property delivered to them to be carried, but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents. The preamble therefore, betrays no intention on the part of the Legislature to fix on the common carrier the character of an insurer against all risks, except the act of God or the Queen's enemies. The 2nd section declares that in the Act a "'common carrier' denotes a person, other than the Government engaged in the business of transporting, for hire, prorerty from place to place by land or inland navigation, for all persons indiscriminately," and that "'person' includes any association or body of persons, whether incorporated or not." The 3rd section in effect enacts that no common carrier shall be liable for the loss of, or damage to, property delivered to him to be carried exceeding in value Rs. 100, and of the description contained in the schedule (including gold and silver and many other specified articles of value), unles the person delivering the property to be carried, or his agent, has expressly declared to the carrier or his agent the value and description of such property. The 4th section relates to the rate to

(1) The analogous enactment in England is Stat. 11, Geo. IV. and 1 Wm. IV, c. 68, but it is not in all respects similar to Act III of 1865.

be charged in the cases mentioned in the preceding section; and the 5th section provides for a refund of such charge in the event of loss or damage to the goods in such cases. With respect to property other than that specified in the schedule to the Act, the 6th section prevents any common carrier from limiting or affecting his liability by any public notice, but permits such a carrier, (not being the owner of a railroad or tramroad constructed under Act XXII of 1863, which the defendants' railway was not), by special contract signed by the owner of the property or his agent, to limit his liability in respect of the same. This 6th section does not lay down what shall be the extent of the common carrier's liability if he do not limit it by special contract, but leaves that question to be dealt with by the common law. If that liability has been varied by the Indian Contract Act, it is the common law, and not the 6th section of Act III of 1865, which has been interfered with. The 7th section prevents the owner of any railroad constructed under Act XXII of 1863 from limiting of affecting his liability by any special contract, but enacts that he "shall be liable for the loss of, or damage to, property delivered to him to be carried, only when such loos or damage shall have been caused by negligence, or a criminal act on his part or on that of his agents or servants. This is the first mention of negligence in the enacting part of this Act, and no measure is given whereby to determine what constitutes such negligence; or, in other words, there is not any statement as to the amount of care which the owner of a railroad or tramroad, constructed under the provisions of Act XXII of 1863, is bound to take of property entrusted to him for carriage. Hence subsequent legislation, defining the amount of care to be taken in such a case, would not be any interference with section 7. The 8th section is as follows:—"Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of, or damage to, any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier, or of any of his agents or servants." Here, again, the measure of negligence being omitted, the same remark as that made on s. 7 is applicable. Section 9 in effect relieves the owner of goods, in suits brought

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against common carriers, of the burden of proving negligence or criminal conduct against the latter, and leaves it to them to prove that the loss, damage, or non-delivery of the goods was not owing to the negligence or criminal act of themselves (the carriers), their servants or agents. This section also leaves untouched the question of the degree of care necessary on the part of common carriers in order to exonerate themselves from liability. The 10th (and last) section provides that "nothing in this Act shall affect the provisions contained in the ninth, tenth and eleventh sections of Act XVIII of 1854 (relating to railways in India.)"

We must now revert to the Indian Contract Act (IX of 1872). It has already been remarked that the preamble shows that the Act is not exhaustive; but, on the other hand, when we turn to the chapter (ix) on bailment, we find at its commencement in s. 148 the following definition of a bailment, viz.: "A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them." That definition is not narrowed by any subsequent provision in that chapter, and is sufficiently comprehensive to include all bailments of the fifth class as well as of the other classes. The bailment of goods for the purpose of carriage is one of those of the fifth class, and although not amongst the bailments specified in the sections following sec. 148 down so far as sec. 157, yet, unless we find that the Act somewhere either expressly or by clear implication excludes bailments for the purpose of carriage from the scope of the chapter, we think that we should regard such bailments as comprised within it. So far, however, from discovering any provision of that excluding character, we find that s. 158 distinctly shows that bailments of goods for conveyance were in the contemplation of the Legislature when framing the ninth chapter. That section provides that "Where, by the conditions of the bailment, the goods are to be kept, or *to be carried*, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment." Although

the special provision made by this section is for the benefit of gratuitous bailees only, we find in that circumstance no logical means whereby we could limit s. 148 and the rest of the chapter on bailment, including s. 152, to gratuitous bailees generally, or to gratuitous carriers only.

We are of opinion that the defendants are entitled to the benefit of s. 152 of the Indian Contract Act. Consequently, we must set aside the verdict for the plaintiff, and direct a new trial, at which the defendants should be permitted to give evidence that the robbers of the plaintiff's goods were not the servants or agents of the defendants, and that the defendants (by their servants and agents) took as much care of thse goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The costs of the suit and of this reference we leave for disposal by the Court of Small Causes on the new trial in such manner as that Court may deem to be just.

We observe that Messrs. Cunningham and Shephard, in the note to s. 148 of the Indian Contract Act in their first edition of that Act, give it as their opinion that chapter 9 on bailment will govern the law of carriers so far as Act III of 1865 and Act XVIII of 1854 (1)fail to provide such law. The first page of the introduction, however, has been referred to as stating that amongst other "special and subsidiary chapters of the law of contract" the subject of "consignor and carrier" has been "intentionally omitted" as not having "received that elaborate consideration which their importance deserved." The observations, however, at page 4 of the introduction show that the remark at page 1 of the same is not intended to be, and is not inconsistent with that in the note to s. 148 above quoted. After saying that the definition of bailment is wide enough to include all classes of bailment, they continue thus:—"But the Act deals specifically with only five of the various sorts of bailment which fall within the definition. These five are: the bailment of hiring, of loan, for work to be done, of goods found, and of pledge. The bailment for carriage is intentionally omitted, that subject being already

(1) That Act has been amended by Acts XIII of 1870 and XXV of 1871, but not in any respect material to the present question.

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provided for by a distinct enactment: nor is any special mention made of the bailment which arises out of the relation of a vendor and vendee when the former is either exercising his original right of line, or has revived it by stoppage *in transitu*. As the Act does not profess to deal which the several kinds of bailment separately, it is presumable that the rules given are, so far as they are applicable, intended to regulate the relations between bailor and bailee, whatever be the character of the bailment."

Attorneys for the plaintiff.—Messrs. *Ardasir and Hormusji.*

Attorneys for the defendants.—Messrs. *Hearn, Cleveland and Little.*

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(25)

1878.
November 30th & December 13th

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Green.

ISHWARDAS GULABCHAND, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.*

Railway Company—Carriers—Evidence—Burden of prof of negligence—Misdescription of Goods—Act III of 1865 (*Carrir's Act*), s. 9; *Act X VIII of* 1854, s. 11.

The plaintiff caused to be delivered to the defendants, for carriage from Bombay to Oojein, certain goods, among which were twelve bags of sugarcandy. His agent, when signing the consignment note at the railway station, erroneously but without fraudulent intent, stated the contents of the twelve bags to be alum, for which a lower freight was charged by the defendants. The railway clerk received the goods, and gave receipt note, on which the following condition was printed:—"The Company give notice that they are not responsible for loss or damage arising from fire, the act of God or civil commotion." In the course of the journey a fire broke out in the train, and a large portion of the plaintiff's goods, including ten bags of the sugarcandy, was destroyed. In an action for damages for non-delivery,—

Held 1, Under the provisions of s. 9 of the Carriers Act (III of 1865) the burden of proving negligence on the part of the defendants did not rest upon the plaintiff, notwithstanding the condition in the receipt notice.

2. The misdescription, by the plaintiff's agent, of the twelve bags of sugarcandy as alum did not exonerate the defendants from all liability to the plaintiff in respect of these bags. The plaintiff, however, was only entitled to recover, in respect of the ten lost bags, the value of alum only, and not sugarcandy; while the defendants, on the other hand, could not, in respect of the said ten bags, charge freight as for sugarcandy.

* Small Cause Court Reference, Suit No 13,993 of 1878.