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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 with 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*.

## ORIGINAL CIVIL.

( 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 proof of negligence—Misdescription of Goods—Act III of 1865 (Carriers' 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.

*McCance v. London & N. W. Railway Company* (1) and *Le Beau v. Gen. Steam Navigation Co.* (2) followed.

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CASE stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, at the request of the defendants' attorney, by W. } E. Hart, First Judge of the Court of Small Causes at Bombay :—

" 1. The plaintiff sued to recover the sum of Rs. 905-0-3 as damages for the non-delivery of the plaintiff's goods received by the defendants for carriage for reward from Bori Bandar to Oojein on the 22nd March 1878.

" 2. The goods consisted of 5 slabs of tin, 4 bundles of copper sheets, and 12 bags of sugarcandy, and were thaken on the afore-said date by the plaintiff's *mukadum*, who had obtained them from the respective vendors, to the station, and there handed over to a broker to be by him consigned to the plaintiff's agent at Oojein.

" 3. The broker, on signing the consignment note at the station, voluntarily stated the contents of the twelve bags to be alum, for which a lower freight is chaged by the defendants than for sugarcandy ; but this he did in ignorance and without fraudulent intention ; and I find, as a fact, that no fraud is to be charged in this respect against the broker, the *mukadum*, or the plaintiff.

" 4. The railway clerk accepted the said statement of the broker without question, and, on payment of the lump sum demanded as freight for the whole consignment in which that payable in respect of the bags was calculated as for alum, handed to the broker a goods' receipt note, stating the number of packages to be twenty-one, and twelve of these to be bags of alum.

" 5. On the back of the goods' receipt note are printed a number of conditions, of which I hold the plaintiff to have had notice at the time of the despatch of these goods, and of which the third is in these words :—

" 'The Company further give notice that they are not responsible for loss or damage arising from fire, that act of God, or civil commotion.'

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"6. The goods were sent in due course in a goods' waggon, the only other contents of which were a quantity of cocoanuts ; but on the road a fire broke out in that waggon on the Holkar State Railway, the result of which was, so far as the plaintiff's goods were concerned, the loss of 28 maunds of the tin, and the destruction of 10 bags of the sugarcandy.

"7. The only witness examined as to the circumstances under which the fire broke out, was Mr. Beard, the Traffic Inspector on the Holkar State Railway, who happened to be a passenger in that same train. He was called by the defendants, and professed himself quite unable to account for the origin of the fire, but admitted in cross-examination that it might have been purposely kindled, or, he added, 'it may have been the act of God'. It further appeared from his evidence that the fire must have made considerable way before it was discovered, for the cocoanuts were destroyed, as was also the whole wood-work of the waggon. The loss was occasioned entirely by the fire, and not by any pilfering on the part of the railway servants.

"8. The defendants then for the first time discovered that what had been consigned as alum was, in fact, sugarcandy. They, however, tendered to the plaintiff's agent at Oojein such of the goods as had been saved from the fire, viz. all the copper, all the tin except 28 maunds, and two out of the 12 bags of sugarcandy, on condition that the plaintiff's agent should give up the goods receipt note, or pass a bond of indemnity. The agent, acting on instructions from the plaintiff, absolutely refused to take delivery of the goods offered with or without conditions of any kind whatsoever. The plaintiff then brought this action to recover the cost price of his goods in Bombay, together with freight paid here for their carriage to Oojein. That is, apparently, he seeks entirely to avoid the contract between the defendants and himself, on the ground that they have not safely carried to their destination all the goods entrusted to them.

"9. The defendants did not dispute the amount claimed by the plaintiff correctly to represent the cost price of his goods and the freight paid by him, but denied all liability saying that, as to that part of the consignment which had been destroyed by fire, they

were protected by the three conditions above stated ; while as to the rest they had tendered the same before action. They also contended, as to the whole consignment, that inasmuch as they came under the definition of the term bailee as contained in s. 148 of the Indian Contract Act (IX of 1872), and had taken as much care of the goods as a man of ordinary prudence would have taken of his own property, they were protected from all liability by the provisions of s. 152 of the last-mentioned Act. They further pleaded, as to the sugarcandy, that their contract was to carry alum, and they were, therefore, not liable for anything in respect of the ten bags of sugarcandy. They, lastly, claimed to set off wharfage of the goods offered to the plaintiff, of which he had refused to take delivery, and the difference in freight between twelve bags of alum and the like quantity of sugarcandy.

“10. It will be observed that the words of the condition relied on by the defendants are so wide as to include all loss occasioned by fire, however caused. But the power of the railway company to protect themselves by such a condition second to me to be restricted by s. 11 of Act XVIII of 1854, which is in these words :—‘The liability of such Railway Company for loss of or injury to, any articles or goods to be carried by them, other than those specially provided for by this Act, shall not be deemed or construed to be limited or in any wise affected by any public notice given, or any private contract made, by them, but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants.’

“11. It is difficult to put any construction whatever upon so ill-drawn a section as this, the first part of which would seem to mean that in no case may the railway company, by public notification or private contract, avoid their liability in respect of goods such as these, which are not among those specially provided for by the Act ; while the latter part would seem to mean that the railway company are only to be liable for loss or injury occasioned by the *gross* negligence or misconduct of its servants. On a consideration of the section as a whole, however, I was of opinion that what the legislature intended by it was that the

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railway company should, be at liberty to protect itself from liability by public notification or private contract ; but that, whatever the terms of such notification or contract might be, still the company should remain liable if the loss or injury were occasioned by the negligent or wilful misconduct of its agents or servants. That is, to take a simple case, even if the consignor chose to contract with the company that it should not be liable if his goods were stolen by one of its servants, yet the company should not be allowed to plead such contract, and by showing that the loss of the goods was occasioned by the theft of one of its own servants, avoid all liability in respect of such loss.

"12. The defendants then contended that it was for the plaintiff, in the first place, to give affirmative evidence that the fire was occasioned by the negligence or misconduct of a servant or agent of the company, and as he offered no evidence whatever on the subject, they were entitled to rely on the special condition above stated. I was, however, of opinion that in the circumstances of the present case it was for the defendants to show that there had been no negligence or misconduct on the part of their agents or servants, and that, as they could give no evidence of the case or origin of the fire, they could not avail themselves of the special condition on which they relied. It seemed to me, in the first place, that it was incumbent on the defendants, seeking to avail themselves of a statutory provision in their favour which was to relieve them from the ordinary common-law liability of common carriers, to show how they complied with the terms of that provision so as to come under protection. In the next place, I was of opinion that it was for the defendants to displace the presumption of negligence which ordinarily arises against the carrier from the mere fact of non-delivery. Thirdly, I thought that as the defendants assumed complete and absolute control over the goods until their arrival at Oojein, while the plaintiff had no means of knowing the measures taken for their bestowal and disposal, and could himself take no precautions whatever for their safety, it was for the defendants to show that they were in no way in fault ;(1) whereas the facts proved, point rather to the

(1) Since deciding the case I have received the report of the case of *Bergheim v. The Goods Eastern Railway Company* (L. R. 3 C. P. D. 221) in which the Court of Appeal held (see p. 224) that in the converse case it would be unreasonable to throw upon the company the burden of affirmatively proving the negligence of the passenger whose luggage was stolen while under his own immediate control.

contrary conclusion, for not only is nothing known of the cause, time, or place of the origin of the fire, but it must already have made considerable way before it was discovered.

"13. Next, as to the defence based on the Contract Act, I was of opinion that s. 152 did not avail the defendants in the present instance. If that section be applied to carriers for reward, the burden would clearly be on the defendants, of proving that they took as much care of the plaintiff's goods as a man of ordinary prudence would have taken of his own. This the defendants fail to do; for, as has been seen, they cannot account for the fire, admit that it may have been purposely ignited, and show that it was not discovered until it had made considerable progress.

"14. Apart from this question of facts, however, as no judicial authority was cited to show that sec. 152 of the Contract Act applied to carriers for reward, and considering the number of years that that Act had been in force, I declined to be the first to put upon the section in question a construction of which the effect would be to declare that a railway company is exonerated from all liability in every case in which the ordinary precautions have been taken for the safety of the goods, especially as out of the numerous cases tried by myself against the very railway company this defence had only once been raised.

"15. Further, however, I was of opinion that s. 152 of the Contract Act did not apply to carriers for reward. The term bailee, as defined in s. 148, is, no doubt, sufficiently wide to include all carriers, and there is no express exclusion of carriers for reward from chap. ix. of the Contract Act, which relates to the subject of bailment. But ss. 151 and 152 only declare the law as it existed before the passing of the Contract Act in regard to ordinary bailees other than carriers, and side by side with that law there also existed the special common-law liability of common carriers, who, nevertheless, then equally as now, might have been included within the strict letter of the definition of ordinary bailees. Furthermore, this special liability of carriers was, before the passing of the Contract Act, apparently recognized by the Legislature in several enactments, *e.g.* the Railway Act and B. 17.

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the Carriers Act. Then was passed the Contract Act, which, on the face of it in the preamble and in sec. 1, is not intended to be exhaustive and applicable in every instance, and no mention is anywhere made in it of the Railway Act, the Carriers Act, or of carriers for hire; the only reference, indeed, to carriage at all, in the sections relating to bailment, being in s. 158, where the bailment is expressly stated to be gratuitous. I thought that, had the Legislature intended by ss. 151 and 152 of the Contract Act 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 the railway companies but to ship 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.

"16. As to the third defence, I held, on the authority of *McCance v. The L. and N. W. Railway Company* (34 L. J. Ex. 39) and of certain *dicta* in *Le Beau v. The General Steam Navigation Company* (L. R. 8 C. P. 88), which, however, were not essential for the decision of that case, that the description by the consignor not being a part of the contract, but only the basis of the contemplated contract, the defendants in this case had contracted to carry the packages consigned, and not only the goods described by the consignor. Apart from those authorities, however, I was of opinion that the correctness of the description of the goods is not, ordinarily speaking, essential to the contract to carry and deliver; for, if it were, we should not have certain goods made the subject of express statutory provision, as in the Railway Act and Carriers Act. Moreover, that the defendants themselves did not consider the misdescription of the sugarcandy as alum to go to the root of the contract to carry and deliver, was, I thought, evident from the fact that they offered delivery of the portion saved. I, therefore, held that the defendants were liable to the plaintiff in respect of the goods lost; but, on the authority of the two cases cited above, that the plaintiff could 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 these ten bags, charge freight as for sugarcandy.

The goods saved having been tendered to the plaintiff before action, I held he was bound to accept them, and could not claim their value, and I allowed the defendants' set off in respect of the wharfage of these goods, and the difference in freight between two bags of alum and a like quantity of sugarcandy, and passed a verdict for the plaintiff for Rs. 51-2-7 and costs.

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"17. At the request of the defendants' attorney the above verdict was made contingent on the opinion of the High Court on the questions stated below :—

"(1) Ought the plaintiff to have been called on, in the first instance, affirmatively to prove that the fire which occasioned the loss of his goods was caused by the gross negligence or misconduct of the servants or agents of the defendants? If the answer to this question is in the affirmative, the verdict for the plaintiff will be set aside, and a non-suit entered.

"(2) Can the defendants, as bailees defined in s. 148 of the Indian Contract Act, rely on the provisions of s. 152 as protecting them from liability in respect of goods carried by them for reward?

"The answer to this question will not affect the verdict in the present case, as the defendants have failed to prove that the took of the plaintiff's goods the care required by s. 151 of the Contract Act; but as the verdict in cause No. 11,211 is contingent on the opinion of the High Court on this question, I respectfully request that their Lordships will be pleased to consider it.

"(3) Does the misdescription, by the plaintiff's broker, of the twelve bags of sugarcandy as alum exonerate the defendants from all liability to the plaintiff in respect of those bags?

"If the answer to this question be in the affirmative, the amount of the verdict will be reduced to Rs. 9-11-7.

"To these questions I have, at the request of the plaintiff's pleader, added :—

"(4) Are the defendants liable to the plaintiff, in respect of the ten lost bags, for the value of the actual contents, viz., sugarcandy, and not, as found, for the value of the declared contents, viz., alum?

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"If the answer to this question be in the affirmative, the verdict will be increased to Rs. 120-7-5."

The plaintiff did not appear.

The Advocate General (Honourable *J. Marriott* and *Latham* for defendants.—The question is, whether the *onus* lay on the defendants to show that the fire was not occasioned by their own gross negligence or misconduct: *Bergheim v. Great Eastern Railway Company*, (1) *Peek v. North Staff. Railway Company*. (2) We say the burden lies on the plaintiff, and that no evidence having been given, a non-suit should be entered: *The P. & O. S. N. Co. v. Somaji Visram*, (2) *Ohrloff v. Briscall*, (4) *Czech v. General Steam Navigation Company*, (5) *Angell on Carriers*, pl. 202. As to the effect of the misdescription of the goods in the absence of fraud, the question is concluded by the case of *McCance v. London and North Western Railway Company*, (6) *Reilly v. Hill*. (7) The First Judge (para. 12 of case stated) seems to have thought that the defendants were seeking to bring themselves within a statutory exemption. Section 11 of Act XVIII of 1854 leaves untouched the common-law liability of carriers in cases of gross negligence or misconduct. By the common law a carrier might, by special contract, protect himself for any loss, even though caused by gross negligence (*Peek v. North Staff. Railway Company* (8)). Section 11 of Act XVIII of 1854 limits his right thus to protect himself, and is not a statutory exemption in his favour

[WESTROPP, C.J.—Does not s. 9 of Act III of 1865 rule this case?]

We say that section should be read with s. 8: *McQueen v. Great Western Railway Company*.

WESTROPP, C.J.—The first question, submitted to us by the learned Chief Judge of the Court of Small Causes, is—"Ought the

(1) L. R. 3. C. P. Div. 221.

(5) L. R. 3 C. P. 15.

(2) 10 H. L. C. 473 *per* Blackburn at 506, and *per* Lord Wensleydale at 343.

(6) 7 H. & N. 477. S. C. 3 H. & C. p.

p. 575.

(7) 5 Beng. L. R. 217.

(3) 5 Bom. H. C. Rep. 113.

(8) 10 H. L. C. P. 473.

(4) L. R. 1 P. C. 231.

(9) L. R. 10 Q. B. 569.

plaintiff to have been called on, in the first instance, affirmatively to prove that the fire which occasioned the loss of his goods was caused by the gross negligence or misconduct of the servants or agents of the defendants?" This question we answer in the negative, as we think we are bound to do by s. 9 of the Carriers Act (III of 1865). That section runs thus: "In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents." The defendants have relied on the exception of fire in the consignment note as throwing upon the plaintiff the burden of proof of negligence, and cite *Ohrloff v. Briscall*, (1) *Czech v. General Steam Navigation Company*, (2) and *P. & O. S. N. Co. v. Somaji Visram* (3) as establishing that proposition. The 9th section of Act III of 1865 is, however, general, and says that "in any suit" brought against a common carrier for loss, damage or non-delivery of goods, the burden of proof of negligence or criminality shall not be cast upon the plaintiff. That Act being confined (s. 2) to carriers by land or inland navigation, the Bombay case, last above cited, was not governed by it, inasmuch as the action there was in respect of goods conveyed by sea from China to Bombay. The 2nd section shows that the term "common carrier" would include "any association or body of persons, whether incorporated or not," and, therefore, would be applicable to a railway company, unless it be excluded by some other part of the Act. We have not overlooked s. 10, which enacts that "nothing in this Act shall affect the provisions contained in the 9th, 10th, and 11th sections of Act XVIII of 1854 (relating to Railways in India)." We have examined those sections of Act XVIII of 1854 most carefully, and discover nothing laid down in them as to the party on whom the burden of proof of negligence or no negligence, of misconduct or no misconduct, shall be placed. However, the special saving contained in s. 10 of the Carriers Act (III of 1865) and ss. 9, 10 and 11 of the railway Act (XVIII of 1854) is pregnant with the implication that in other respects

(1) L. R. 1 P. C. 231.

(2) L. R. 3 C. P. 14.

(3) 5 Bom. H. C. Rep. 113, O. C. J.

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the Carriers Act is applicable to railway companies where there is nothing in it repugnant to such a construction.

The second question,—viz., “Can the defendants, as bailees defined in s. 148 of the Indian Contract Act, rely on the provisions of s. 152 as protecting them from liability in respect of goods carried by them for reward?”—is in this case immaterial, as the Chief Judge has found, as a fact, that the defendants have not proved that they took such care of the plaintiff’s goods as a man of ordinary prudence would have taken of similar goods of his own. A full reply has already been given here to a like question in suit No. 12,211 of 1878 (*Kuvarji Tulsidas v. The G. I. P. Railway Company.*(1)) recently referred to this Court by the Chief Judge.

The third question—“Does the misdescription, by the plaintiff’s broker, of the twelves bags of sugarcandy as alum exonerate the defendants from all liability to the plaintiff in respect of those bags?”—we answer in the negative.

The fourth question—“Are the defendants liable to the plaintiff in respect of the ten lost bags for the value of the actual contents viz., sugarcandy, and not, as found, for the value of the declared content, viz. alum?”—we answer in the negative.

Our reasons for replying to the third and fourth questions in the negative being those assigned by the learned Chief Judge for his similar conclusions, we deem it unnecessary to state them here.

We affirm the judgment of the Court of Small Causes, with costs of the reference to be paid by the defendants to the plaintiff.

*Order accordingly.*

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

(1) *Supra* p. 109.