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there were any conveyances or releases evidencing the partition, and it appears that the partition, if there ever was one, which I very much doubt, took place after the property was attached, in fact after the proclamation of sale was issued (see their letter to the Sheriff of 1st February, 1893, annexed to Nebha Dewsey's affidavit of March, 1893), in which case s. 333 of the Civil Procedure Code prevents s. 332 applying, because, if there was a partition at the time alleged, the judgment-debtor must have transferred his interest, his undivided share in the property claimed, and released his claim over the undivided shares of the claimants in such property after the institution of the suit in which the decree was made. Section 318 of the Civil Procedure Code relied on by Mr. Macpherson, for the purchaser, also provides that a purchaser shall be entitled to be put in possession of the property bought by him, if it is in the possession of a person claiming under a title created by the judgment-debtor subsequent to the attachment of the property.

Under these circumstances, the summons must be dismissed, unless the claimants file a suit within one month.

Attorneys for claimants :—Messrs. *Daphtary and Ferreira.*

Attorneys for purchaser :—Messrs. *Wadia and Ghandy.*

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[723] ORIGINAL CIVIL.

Before Mr. Justice Starling.

RAISETT CHANDMULL HAMIRMULL AND ANOTHER (*Plaintiffs*) v.
GREAT INDIAN PENINSULA RAILWAY COMPANY (*Defendants*).*
[25th, 27th and 29th July, 1893.]

Railway company—Indian Railway Act (IV of 1879), s. 11—Loss of goods—Liability of company—Carrier—Bailment—Declaration of nature and value of goods and payment of increased charge, effect of—Contract Act (IX of 1872), s. 151—Limitation Act (XV of 1877), art. 30, sch. II.

In respect of goods for which, under s. 11 of the Indian Railway Act IV of 1879, a railway company is under no liability unless "an increased charge" is paid, the payment of an increased charge puts them under the same liability as they are under with respect to goods not specially provided for by that section, viz., the liability of ordinary bailees. The payment of "an increased charge" is not equivalent to insurance.

In January, 1890, a box containing silver specie was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. At the time of such delivery the contents of the box were declared, and an increased charge above the charge for ordinary parcels was paid. The box was lost during its transmission to Saugor, but no evidence was called by the defendants to show what was done with the box between Itarsi and Saugor. In 1893 the plaintiffs sued the defendants to recover its value.

Held, that the defendants had not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in s. 151 of the Contract Act (IX of 1872), and that they were liable for the amount claimed.

Held, also, that the suit was not barred by limitation, and that art. 30 of sch. II of the Limitation Act (XV of 1877) did not, as was contended, apply to the case.

THE plaintiffs sued to recover from the defendants Rs. 6,000, the value of a box delivered to the defendant company at Bombay to be carried by them to Saugor, but which had been lost.

* Suit No. 636 of 1892.

The plaintiffs alleged that the box in question contained Rs. 6,000, and that on the 3rd January, 1890, they delivered it to the defendants, consigned to Raghunathdas Amermull at Saugor. The box weighed over two maunds, and was duly sealed and addressed both in English and Marathi.

Saugor is a station on the Indian Midland Railway, about 654 miles from Bombay, and is the terminus of a branch line running from Bina junction on the main line of the said railway, midway between Bhopal and Jhansi.

[724] On delivering the box to the defendants, its contents were declared and an increased charge above the charge for ordinary parcels was paid for the carriage, and a railway receipt was duly handed to the plaintiffs. In the plaint the plaintiffs stated that no intimation was given to them that the increased charge was not for the insurance of the box and its contents; and that they would have paid any further sum required by the company if they had been informed that any further payment was necessary.

The defendants (*inter alia*) pleaded that, under the provisions of s. 11 (1) of Act IV of 1879, they were not liable for the loss of the box in question; that if the box, when delivered, contained specie as alleged by the plaintiffs, the specie was lost either while in transit or at Saugor station. Diligent search had been made for the specie, but none had been found. They also pleaded limitation.

Inverarity and Russell, for plaintiffs:—They cited the Indian Railway Act IV of 1879, s. 11; *Secretary of State for India v. Budhu Nath Poddar* (2); *Irrawady Flotilla Company, Limited v. Bhugwandas* (3); *Bradbury v. Sutton* (4); *Gill v. The Manchester, Sheffield, &c., Railway Company* (5); *Starling on Limitation* (2nd Ed.), p. 152.

Lang (Acting Advocate-General) and *Macpherson*, for defendants:—They cited *Venkatachala v. South Indian Railway Company* (6); *Robinson v. The South-Western Railway Company* (7); [725] *Laljiibhai v. The Great Indian Peninsula Railway Company* (8); Statute 12 and 13 Vict., c. 83.

JUDGMENT.

STARLING, J.—In this case the plaintiffs sue the defendants to recover from them the sum of Rs. 6,000, being the value of a box of silver specie alleged to have been delivered at the Byculla Station for carriage to Saugor on the 3rd January, 1890, but which never reached its destination. The first point to be determined is whether such a box was delivered to the defendants to be carried to Saugor. (His Lordship referred to the evidence and continued:—) I must come to the conclusion that the box for which Ex. B is the receipt, was delivered to the defendants

(1) Section 11 of Act IV of 1879:—

When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

When any property of which the value and nature have been declared under this section has been lost, destroyed or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared.

(2) 19 C. 538. (3) 18 I.A. 121 = 18 C. 620.

(5) L.R. 8 Q B. 186.

(7) 34 L.J. (O.P.), 234.

(4) 19 W.R. 800 = 21 W.R. 128.

(6) 5 M. 208.

(8) 15 B. 537.

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and did contain Rs. 6,000 in silver coin. That box did not arrive at Saugor, but when the agent of the addressee went to the Saugor Station on the morning of the 6th January with Ex. B, he was tendered a box packed in gunny, with no seals on it, weighing only 36 seers, and which was afterwards discovered to contain nothing but a quantity of black cotton soil and two large iron hammer heads. The box despatched not having been delivered at its destination, the question arises whether the defendants are liable for its non-delivery.

The first defence relied upon by the defendants is that of limitation, they alleging that art. 30 of sch. II of the Limitation Act (XV of 1877) applies, and that, as this suit is not brought within two years from the date of loss, it is barred; but there are a number of cases, all of which are cited at page 132 of Starling's Limitation Act, which show that that article does not apply to a case like the present, and that this suit, having been brought within three years, is in time.

The defendants then say that as the contents of the box were silver coin, and it was sent uninsured, they are not liable for its loss under any circumstances. The determination of this point requires the discussion of the liability of railway companies under Act IV of 1879 in respect of goods delivered to them for carriage.

For the purposes of this judgment I assume that the decision in *The Secretary of State v. Budhu Nath* (1) is unaffected by the judgment of the Privy Council in *Irrawady Flotilla Co. v. Bhugwandas* (2) so far as railways in India are concerned, and that the [726] ordinary liability of such companies was in January, 1890, only that of bailees, and that they were bound to take as much care of goods delivered to them for carriage as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as those delivered for carriage, and no more. Then s. 11 provides that, with respect to certain classes of goods, among which are silver or silver coin, no liability whatever shall attach to them in respect of the loss, &c., of such goods, unless at the time of delivery for despatch the value and nature of the goods shall have been declared, and an increased charge for the safe conveyance of the same, or an agreement to pay the same, have been accepted by the railway company. The ordinary state of the company with regard to such goods being therefore entire freedom from liability, what liability attaches to them if the requisite declaration is made, and the extra charge paid? In England the point is easier to decide, because carriers are insurers and are absolutely liable for the safety of goods in general entrusted to them for carriage, unless exempted from such liability by law, which is the case in respect of certain special goods unless certain conditions are fulfilled; but if those conditions are fulfilled, then their ordinary liability attaches, which is that of insurers. In this Presidency railway companies were in 1890 under the ruling of this Court (*Kuverji Tulsidas v. G. I. P. Railway Company* (3)) entirely exempted from the liability of insurers, and were only subject to the ordinary liabilities of bailees. But if, in England, the fulfilment of certain conditions in respect of certain goods relegates carriers to their ordinary liability as insurers, I do not see why in this country the fulfilment of similar conditions should not relegate railway companies back to their ordinary liability as bailees, because the section does not provide that, if the prescribed conditions be fulfilled, the railway company shall become an insurer, but only that the ordinary liability

(1) 19 C. 538.

(2) 18 I.A. 121 = 18 C. 620.

(3) 3 B. 109.

shall not attach unless those conditions are fulfilled. I am of opinion, therefore, that if the conditions prescribed by s. 11 be fulfilled by the consignor of goods referred to in that section, the railway company will then become liable for such goods in the same way as for those classes of goods which are not specially [727] provided for by that section, viz., as bailees. Then, what is meant by "an increased charge"? I do not think that a charge for insurance is "an increased charge" within the meaning of this section. A contract of insurance, unless it is otherwise provided for therein, implies an absolute guarantee for the safe arrival of the goods insured at the place of their destination; but, if I am right in holding that the fulfilment of the conditions specified in s. 11 relegates the company to its ordinary position as bailees, their liability is certainly not that of insurers: consequently "an increased charge" cannot be a payment which imposes upon them liabilities larger than those of ordinary bailees.

Let us now look at what happens when a parcel is taken to one railway station for conveyance to another. In ordinary cases, the booking clerk asks no questions, and the consignor gives no information as to the contents of the parcel, but the ordinary charge for a parcel is made (which in the present case would have been Rs. 9) and a receipt is given for the parcel, in respect of which the railway company is bound to exercise the care which an ordinary bailee should exercise, and is not liable at all in respect of any articles referred to in s. 11 which may be in it. If the booking clerk, however, is informed that the parcel contains certain specific articles, he would at once look up the rates in the coaching tariff-book, and would charge the proper rate for those articles, it might be less or more than the ordinary parcel rate. If the rate was more than the ordinary rate, and the contents of the parcel such as fell under the exceptions in s. 11, I think that rate would be "an increased charge" within the meaning of s. 11. The actual cost to the railway company of receiving, carrying and delivering a maund of silver is no greater than that of a maund of iron. Why, then, should a larger sum be charged, unless it is to compensate the company for the increased risk they run in consequence of the greater value of the same weight and bulk or, in respect of other articles, of their greater liability to damage? To hold otherwise would be to hold that for a parcel in respect of which the company ran no liability whatever, and for the carriage of which they were put to no extra expense, they might charge a larger sum than for one in respect of which they were subject to liability, [728] and that before they incurred any liability at all in respect of the former, they were entitled to make two increased charges, viz., the higher rate for carriage and insurance, and not merely "an increased charge." That the acceptance of a higher rate for excepted articles might possibly subject the company to their ordinary liability was present to the minds of the framers of the rates in the present case, is evident from the fact that on page 67 of the book of rates put in evidence, it is expressly stated that uninsured treasure is carried at owner's risk. That declaration would have been unnecessary if "increased charge" was equivalent to insurance. A similar remark is made with regard to opium, though not in such explicit terms, and a reference is also made to the page where the charges for insurance may be found. So, too, in rule 41, at page 70 where mention is made generally of the articles excepted by s. 12, although the company do not categorically state that all such articles are at owner's risk unless insured, they seem to infer it, as they there refer to the place where the insurance rates are to be

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found. Such specific limitations of liability, however, if beyond what the law actually gives, and if reducing the liability of the company below that of bailees, are of no avail unless there is an agreement to that effect which must (*inter alia*) be in writing signed by or on behalf of the consignor (s. 10). This attempted limitation, by the defendants, of their liability cannot shield them in this case, as there is admittedly no agreement for limitation of the company's liability signed by or on behalf of the consignor. The defendants must, therefore, stand or fall on the decision of the question whether "an increased charge" is equivalent to insurance. I have shown that, in my opinion, it is not. Consequently as, according to the evidence of the booking clerk Fonseca, those who brought the parcel told him that it contained *chandi rokra*, or silver coin, and paid an increased charge for it, *viz.*, Rs. 18-1-0 instead of Rs. 9, I am of opinion that the defendants are liable for the non-delivery of the parcel, unless they can show that they have taken that care of it required by s. 151 of the Contract Act (IX of 1872). I may add that I have come to the opinion that those who handed the parcel to Fonseca also told him that it contained Rs. 6,000. Motilal and Buria say they did this, and [729] Fonseca admits he heard them talking about the box containing Rs. 6,000, although he denies that they actually told him; but, unless for the purpose of informing him what the contents were, I cannot conceive why they should mention the matter. I have not gone into the question as to whether the rates charged are lawful, as Farran, J., did in *Laljiibhai v. G. I. P. R. Company*(1), because the legality of the amount is not in dispute here. The only question is what liability the defendants are under when they accept certain rates. The Exs. Nos. 4 to 9 only settle the amount chargeable for the carriage of certain classes of goods, and do not determine what the liability of the defendants is in respect of those goods; that had already been provided for by the Act of the Legislative Council, and no resolution of Government could alter or modify the liability so provided, as the Act does not permit such an alteration.

Now, what is the evidence as to the care taken of the parcel by the defendants? The proper place for a parcel of coin such as this to be carried in, as appears from the book of rates put in evidence, was the brake-van in charge of the guard, where he would be able to keep an eye on it, and thus see that it was not meddled with; but at Byculla it was put into a road van, which was not locked, and was away from the constant direct superintendence of the guard. Fortunately, however, the parcel arrived safely at Itarsi and was there transferred to the Midland train. Then comes an entire blank; no evidence whatever is given as to what was done with the parcel, or what care was taken of it between Itarsi and Saugor, although in the ordinary course of business it would have to be taken out of one van at Bina and put into another for Saugor, which is on a branch line, and it appears from Ex. Y that at Bina there was a period of some hours during which the parcel would be lying at the station, or in the van, possibly at some distance from the platform, waiting for the train to start for Saugor, and, if the evidence of the parcel clerk and station master at Saugor is to be believed, the parcel had already been tampered with when it arrived there. In the absence of any evidence as to how the parcel was treated between Itarsi and Saugor, it is impossible to [730] hold that the defendants have discharged the *onus*, which lay upon them, of showing that they had in respect thereof fulfilled the duties of a bailee as laid down in s. 151 of the Contract Act.

(1) 15 B. 537.

It will be seen that I have not discussed the effect of the case of *The Secretary of State v. Budhu Nath* (1). I have not done so, because it seemed to me that I could dispose of the case in favour of the plaintiff on the assumption that the case of *Kuverji Tulsidas v. The G. I. P. Railway Company* (2) was good law, and as the view of the law contained therein has been adopted by the Legislature in the Railway Act of 1890, I thought a decision on those lines would be useful at the present time. If, however, it be held that the case of *The Secretary of State v. Budhu Nath* (1) has overruled that of *Kuverji Tulsidas v. The G. I. P. Railway Company* (2), then, on the payment by the consignor of the "increase discharge" as before explained, the railway company would have at once become insurers, and there would be no necessity to enquire what amount of care they had taken of the parcel. I must, therefore, pass a decree for the plaintiffs for Rs. 6,000, and by way of damages for the non-delivery of the parcel award them interest at 6 per cent. on such amount from the 6th January, 1890, till this day. Costs and interest on judgment at 6 per cent.

Attorneys for the plaintiffs:—Messrs. *Crawford, Burder, Buckland and Bayley*.

Attorneys for the defendants:—Messrs. *Little, Smith, Nicholson and Bowen*.

17 B. 731.

[731] CRIMINAL REFERENCE.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

MUNICIPALITY OF AHMEDABAD v. JUMNA PUNJA.*
[22nd January, 1891.]

Bombay Act VI of 1873, s. 84—Proceedings taken under s. 84 for the recovery of municipal taxes—Such proceedings are judicial and not ministerial—Magistrate's duty under the section.

A proceeding before a Magistrate for the recovery of municipal cesses and taxes instituted under s. 84 of Bombay Act VI of 1873, is a criminal prosecution, and must be conducted in the manner prescribed for summary trials under Chapter XXII of the Code of Criminal Procedure (Act X of 1882).

In such a proceeding a Magistrate is not bound to order payment of the full amount claimed by the municipality, but must satisfy himself as to the extent of the defaulter's legal liability before passing any order against him.

[F., 30 B. 241 (244)=7 Bom. L.R. 951; Rat. Unr. Cr. Cas. 559 (561); Appr. and D., 23 B. 446 (448); R., 11 Cr. L.J. 87=4 Ind. Cas. 951=2 P.R. 1910 (Cr.)=109 P.L.R. 1909=23 P.W.R. 1909; D., 22 A. 111 (112).]

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged by the Municipality of Ahmedabad a cess rate of one rupee per annum for the removal of sullage water. He refused to pay the rate, and thereupon the Municipality prosecuted him under s. 84 of Bombay Act VI of 1873.

The trying Magistrate held that the accused was liable to pay only one-half of the rate charged, and ordered him to pay that amount.

* Criminal Reference, No. 138 of 1890.

(1) 19 C. 538.

(2) 3 B. 109.

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