

made in this matter must have led the applicant to fear might be perpetual.

There must be for these reasons an order for the release of the applicant.

Application granted.

Attorneys for plaintiff:—Messrs. *Máneklál and Dámodar.*

Attorneys for the defendant:—Messrs. *Crawford, Burder & Co., and Messrs. Tyebji and Dayabhai.*

ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Farran.

BA'LA'RA'M HARICHAND AND OTHERS, PLAINTIFFS, *v.* THE SOUTHERN MARHATTA RAILWAY COMPANY, LIMITED, DEFENDANTS.*

Railway Company—Liability for loss of goods—Railways Act, IX of 1890, Sec. 75.

(1) The words "loss, destruction or deterioration" in section 75(1) of the Indian Railways Act, IX of 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof.

* Suit No. 4019 of 1894.

(1) Section 75 of the Indian Railways Act, IX of 1890:—

"75. (1) When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package, unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

"(2) When any parcel or package of which the value has been declared under subsection (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared, and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

"(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule that a railway servant authorised in this behalf has been satisfied, by examination or otherwise, that the parcel actually contains the article declared to be therein."

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(2) Under section 75 of that Act it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared before the railway administration can be held liable in respect thereof.

(3) The payment by a consignor of silver coin of the specie rate required by the general regulations of a Railway Company to be paid for the carriage of such goods is not such a payment as satisfies the requirements of section 75 of the Indian Railways Act, IX of 1890.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge:—

“1. This was a suit brought by the plaintiffs to recover from the defendant company a sum of Rs. 672-14-6, being the value of a parcel of Rs. 700 in cash, consigned by the plaintiffs from Sangli to Bombay, which the defendant company failed to deliver, less a sum of Rs. 27-1-6 paid to the plaintiff in respect thereof by the police superintendent of the defendant company.

“2. The facts of the case together with the reasons for my decision are fully set out in my judgment delivered on the 4th July, 1894, of which a copy is hereto annexed, and to which for brevity's sake I crave leave to refer.

“3. The questions of law which I beg to submit for their Lordships' consideration are as follows:—

“(i) Whether the words ‘loss, deterioration or destruction of the parcel’ contained in section 75 of the Indian Railways Act, 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof?

“(ii) Whether under section 75 it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared before the railway administration can be held liable in respect thereof?

“(iii) Whether the plaintiffs have satisfied the requirements of section 75 by paying for the parcel in question the special rate required by clause 50 of the defendant company's rules (p. 47 of Exhibit I) to be paid for the carriage of treasure, &c.?

“(iv) Whether the percentage on the value, mentioned in section 75 which the consignor is, if required by the administration,

to pay or engage to pay by way of compensation for increased risk, is equivalent to insurance as prescribed by the company's bye-laws and rules?

"4. The suit was dismissed by me subject to the opinion of their Lordships on the above questions. The plaintiff has deposited in Court the professional costs Rs. 51 awarded against him together with Rs. 50 to meet the costs of reference."

Clause 50 referred to in the third question was as follows. It was contained in the company's book of rates, and laid down the following regulation with regard to the carriage of specie:—

"50. *Specie*.—(a) Treasure including specie, bullion, gold and silver coin, jewellery, trinkets, plate, &c., shall be carried at the following rates *viz.*:—

	Pies per maund per mile.
Up to 27 maunds	2½
Above 27 and up to 81 maunds	2
81 do. 270 "	1½
Over 270 maunds	1

Provided that the charge for any quantity shall not be less than that for a smaller quantity according to the above scale.

"*Insurance Rates.*

"54. *Goods or Parcels.* (a) The rates for insurance of goods, parcels, &c., shall be as follows:—

"Gold and silver and other excepted articles—2 annas per 100 miles or fraction of 100 miles.

"Subject to a maximum of one per cent.

"(b) The insurance shall in no case be less than two rupees for the whole distance."

The judgment of the Chief Judge of the Small Cause Court dismissing the suit was as follows:—

JUDGMENT:—This is a suit brought by the plaintiffs to recover from the defendant company a sum of Rs. 672-14-6, the value of a parcel containing Rs. 700 consigned from Sāngli to Bombay by the last plaintiff Rāmchandra Dayāram, which parcel the defendant company failed to deliver, but on account of which they have paid to the plaintiffs Rs. 27-1-6.

This is a case of some importance so far as it deals with the responsibility of a railway administration under the Indian Railways Act, 1890.

The facts, except as to what took place with regard to the declaration of the parcel, are not in dispute. On the 9th June, 1891, the plaintiff Rāmchandra Dayāram wished to consign a parcel of Rs. 700 from Sāngli (where his firm is carried on in the name of Raghunāth Rāmchandra) to Bombay. He accordingly sent the box containing the rupees by his man Ganu Rendāla to one Rāmchandra Ganesh at Sāngli Station. It

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appears that Rámchandra Ganesh is a mukádam and does consignment business at Saugh for various merchants. Rámchandra Ganesh tendered the parcel to the assistant station master, who asked him what it contained, to which he replied rupees in cash. Rámchandra Ganesh also stated before me that he had told the station master the amount. This was not till he had been recalled and the question put to him by the Court. On consideration of the whole evidence I am inclined to think that nothing at all was said as to the value of the parcel; that no question was put by the assistant station master as to that, but that he merely enquired the contents and made out the various documents as for a parcel of silver coin weighing 10 seers. The charge made was fifteen annas, in accordance with the rates prescribed for treasure, which charge was paid by Rámchandra Ganesh. The assistant station master, it is true, states that he asked Rámchandra what was the value of the parcel, and that Rámchandra replied that he did not know. I do not feel disposed to accept this statement as accurate. It is improbable that the assistant station master would recollect exactly what was said more than three years ago. I think it more probable that it never occurred to either the assistant station master or Rámchandra to think of the value, and that the parcel was despatched in what appears to have been the usual way, namely, on payment of the higher rates required for treasure, but without insurance. The parcel was duly handed to the guard of the train by name Belcher. On the arrival of the train at Poona no such parcel was delivered by the guard, and of course it never reached its destination at Bombay. Some days later, in consequence of its non-arrival, enquiries were made, and it ultimately appeared that the parcel had been stolen by Belcher. He was subsequently put on his trial in respect of the theft, to which he pleaded guilty, and was sentenced to a term of imprisonment which he is still undergoing. The police superintendent of the defendant company has returned to the plaintiffs a sum of Rs. 27-1-6, the proceeds of sale of Belcher's effects. It was admitted by the plaintiff's pleader that the plaintiff considered that he had no remedy against the defendant company, but in consequence of the decision of Starling, J., reported at I. L. R., 17 Bom., 723, he was induced to file this suit.

The defendant company raised three defences: (i) that the goods not having been properly declared, the company are not liable under section 75 of the Indian Railways Act, 1890; (ii) that, if the goods were so declared, the company took such care of the same as was required by sections 151 and 152 of the Indian Contract Act; (iii) that the parcel did not contain Rs. 700.

As to the third defence, the statement of Rámchandra Dayáram, that he saw the Rs. 700 put into the box and sent to the station, stands uncontradicted, and I see no reason for supposing that the parcel did not contain the number of rupees alleged.

As to the second defence, I think that there can be no doubt whatever that the defendant company have not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in section 151 of the Indian Contract Act. So far from proving that they have, by the admissions of their own witness Mr. Lindsay, who gave his evidence most fairly and candidly, shown that they acted in this matter as, in my opinion, no prudent man could possibly have acted. In the first place, they engaged this guard Belcher and put him in a position of trust without making any enquiries as to his character and ante-

cedents. Inquiries were then instituted, and although they almost immediately found therefrom that he had been dismissed from the employ of the Indian Midland Railway Company for criminal breach of trust, for which he had suffered six months' imprisonment; though they found that subsequently he had left his employment under the Bengal-Nágpur Railway Company under circumstances which, to say the least, imputed to him serious neglect of duty, they nevertheless kept him on and allowed him to remain in a position where the highest integrity was necessary. The only reason for so doing seems to be that they were much in need of guards, and thought that Belcher might be able to clear his character. As these facts were known to the defendant company in May, 1891, and the theft occurred in June, I am strongly of opinion that in this case the defendant company cannot shelter themselves under the provisions of the Indian Contract Act by saying that they have acted in this case as a prudent man would have acted.

I now come to the consideration of the first issue. This turns upon the interpretation of section 75 of the Indian Railways Act, 1890. I may, however, first deal with the argument of the plaintiffs' pleader that that section cannot absolve the defendant company where the loss, deterioration or destruction has been caused by the criminal act of one of its own servants. It is certainly noteworthy that the words "in any case" which occurred in the corresponding section of the Act of 1854, and which were the subject of judicial interpretation in I. L. R., 5 Mad., 208 (*Venkatachala v. Southern India Railway Company*) do not occur in this section, but then again there seems to be nothing in the Act as it at present stands to except the case of the loss, &c., occurring in consequence of negligence or misconduct of the company's servants, and to say that in such cases responsibility shall attach. I think, therefore, the section must be taken to cover all cases of losses, destruction, deterioration of parcels under whatever circumstances. Nor, I think, can much importance be attached to the argument of Mr. Manchashankar that there was no loss of the parcel in this case. It was lost to the defendant company and to the plaintiffs, and I do not think it can be said not to be so lost because an employé of the company made away with it.

Then I come to the final question whether these goods were properly declared. Having regard to the evidence, I am unable—and I regret that I am unable—to find that they were so declared. The section distinctly stated that the person delivering the package to the administration must cause the "value and contents" to be declared, or declare them. Now here no value was declared. The declaration of the value has become a far more important incident under this new Act, inasmuch as the consignor must give the administration the opportunity of claiming a percentage on the value declared by way of compensation for increased risk. Unless the value be declared, the percentage cannot be ascertained or asked for. I think, therefore, that the declaration of the value must be regarded as a condition precedent to the attaching of the responsibility of the defendant company. I do not think it would be obligatory on the defendant company to enquire what the value was. This must, it appears, be declared by the sender. In this respect the wording of the Act has been changed; and it seems to me that this case is so far distinguishable from that decided by Starling, J. I do not think that under this section it is enough to declare the contents and pay the higher rates as laid down

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for treasure. The administration must also have the opportunity of demanding a percentage. It is not for me here to rule on the rights of the defendant company to fix the rates or make byelaws, but I may mention that byelaw 26, which purports to be an abstract of the Indian Railways Act, 1890, section 75, gives anything but a correct view of the provisions of that section, and the degree of responsibility or exemption from responsibility attaching to the company under it.

As I said, I regret to come to this conclusion, as it seems to me to be a case where the defendant company ought, if possible, to be made responsible. As both parties wish the case to go to the High Court, I make my judgment contingent on the opinion of their Lordships. That judgment is that the suit be dismissed, and Rs. 51 certified as costs of the defendant company.

Lang (Advocate General) for the plaintiffs:—He referred to Act IX of 1890, section 72; *Hearn v. London and South-Western Railway Company*⁽¹⁾; *Skipwith v. The Great Western Railway Company*⁽²⁾; Act XVIII of 1854, section 10; *Secretary of State for India v. Budhu Nath*⁽³⁾; *Venkatachala v. South Indian Railway Company*⁽⁴⁾; *Raisett v. G. I. P. Railway Company*⁽⁵⁾.

Inverarity for defendants:—He referred to the Indian Carrier's Act III of 1865; Russell and Bayley on Railways at p. 233; *Robinson v. The South-Western Railway Company*⁽⁶⁾; *Venkatachala v. South Indian Railway Company*⁽⁴⁾; *Illoor Kristmah v. The G. I. P. Railway Company*⁽⁷⁾.

At the conclusion of the argument the Court found as follows:—

In the affirmative on the first and second questions referred by the Small Cause Court. In the negative on the third question. No answer was given to the fourth question.

Attorneys for the plaintiffs:—Messrs. *Matubhai and Jamietram*.

Attorneys for the defendants:—Messrs. *Crawford, Burder and Co.*

(1) 10 Ex. 793; 24 L. J. Ex., 180.

(2) 4 Times Law Rep., 529.

(3) I. L. R., 19 Calc., 538.

(4) I. L. R., 5 Mad., 208.

(5) I. L. R., 17 Bom., 723.

(6) 34 L. J. (C. P.), 234.

(7) I. L. R., 2 Mad., 310.