APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1915.
March 5.

RAMCHANDRA NATHA AND ANOTHER (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY (ORIGINAL DEFENDANT), OPPONENTS.*

Indian Railways Act (IX of 1890), section 72—Rule 2† made under section 47, sub-section (1), clause (f)—Rule not valid—Delivery of goods to be carried by Railway administration—Grant of railway receipt not essential to complete delivery.

The plaintiffs brought certain goods to the railway premises and handed a consignment note to the clerk of the Railway Company. No receipt was given as the goods were not weighed and loaded. In the meanwhile, a fire broke out on the premises and destroyed the goods. The plaintiffs having sued the Railway Company for the loss of goods, the lower Court held that the Company was not liable for the loss in absence of a railway receipt, as provided for in Rule 2 framed under section 47, sub-section (1), clause (*f*), of the Indian Railways Act (IX of 1890). On plaintiffs' application under Extraordinary Jurisdiction :—

Held, that the commencement of the liability of the Company for goods delivered to be carried under section 72 was in no way dependent upon the fact of a receipt having been granted, but must be determined on evidence quite independently of Rule 2 under section 47, sub-section (1), clause (*f*), of the Indian Railways Act (IX of 1890).

Held, also, that inasmuch as Rule 2 sought to define and by defining changed what would otherwise be the meaning of section 72 of the Act the rule was bad.

Per HEATON, J. :—" A 'delivery to be carried by railway' (within the meaning of section 72 of the Indian Railways Act, 1890) means something more than a mere depositing of goods on the railway premises : it means some sort of acceptance by the railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case ; but it certainly may be completed before a railway receipt is granted."

* Civil Extraordinary application No. 218 of 1914.

† The rule in question runs as follows :—

" Goods will, in all cases, be at owner's risk until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorized railway servant."

1915.

RAMCHANDRA NATHA
v.
G. I. P. RAILWAY COMPANY.

Per SHAH, J. :—"The delivery contemplated by section 72 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would no doubt involve not merely the bringing of the goods on the railway premises but acceptance thereof by the Company for the purpose of carrying the same by railway. Such acceptance may be expressed or implied in a variety of ways by the usual course of business, and may be quite independent of any receipt being granted by the Company. Of course it will depend upon the circumstances of each case and the usual course of business of the railway administration as to whether the goods can be said to be delivered to be carried by railway under section 72 of the Act."

THIS was an application under extraordinary jurisdiction under section 115 of the Civil Procedure Code (Act V of 1908).

The plaintiffs took 37 empty wooden casks to the goods yard of the Great Indian Peninsula Railway Company at Sholapur, and made out a consignment note. The note was received by the Company's clerk who numbered it. No railway receipt was given for the casks as they were not weighed and loaded.

Whilst the casks were thus lying in the goods yard, a fire broke out, and consumed 26 out of 37 casks.

The plaintiffs filed a suit against the Railway Company to recover the damage caused by the loss of the 26 casks. The Railway Company contended that they were not liable for the loss, inasmuch the casks were not delivered to them, no receipt having been granted for the same. They also relied on Rule 2 framed under section 47, sub-section (1), clause (*f*), of the Indian Railways Act, 1890.

The learned Judge (H. B. Tyabji) held that the Company were not liable for the loss of goods which were not delivered to them. This decision was confirmed by a Full Court of the Bombay Court of Small Causes on the following grounds :—

"We do not think the rule saying the Railway Company will only be responsible when a Railway receipt is passed is *ultra vires* especially as it is admitted it has been sanctioned for this particular railway by the Governor

General in Council (*Banna Mal* v. *Secretary of State*, 23 All. 367, which is inconsistent with 31 Cal. 951).

"We do not think there was any entrustment to the Railway in the case. The weighing and marking of the goods is to identify the goods and ascertain the freight and does not amount to taking them over from the consignor. The goods lie in the railway yard at his risk and that yard is merely a convenience where goods can be placed until the Railway Company chooses to take delivery of them. The railway had not accepted the goods to be carried (see 23 All. 367).

The plaintiffs applied to the High Court.

Jinnah, with *B. G. Kher*, for the applicants:—The goods were taken to the Railway goods-shed, a consignment note was duly handed up, and they were weighed and marked. They were then left in the railway shed to be loaded. The receipt for the goods was asked for but was not given. The goods were thus "delivered to be carried by railway" within the meaning of section 72 of the Indian Railways Act, 1890.

The rule No. 2 made by the Railway Company under section 47, sub-section (1), clause (*f*), of the Act is *ultra vires* being inconsistent with the provisions of section 72.

The granting of the railway receipt is not essential to complete delivery of goods to the Railway Company. The word 'delivery' is not defined in the Indian Railways Act, 1890. There is nothing in the Act or in the Rules to compel the Railway Company to grant a receipt. They should not, therefore, be allowed to plead absence of receipt as a ground of non-liability.

The view which we submit has been approved by the Calcutta High Court in *Jalim Singh Kotary* v. *Secretary of State for India*[1], and *Velayat Hossein* v. *Bengal and North-Western Railway Co.*[2]. The only point decided in *Banna Mal* v. *The Secretary of State*

[1] (1904) 31 Cal. 951. [2] (1909) 36 Cal. 819.

1915.

RAMCHANDRA NATHA v. G. I. P. RAILWAY COMPANY.

for India in Council[1] was that the rule was not inequitable.

Binning, instructed by *Little & Co.*, for the opponents :—There is no contract with the Railway Company in absence of a receipt. The goods were lying in the goods-shed at the risk of the plaintiffs. The goods were not weighed and marked. They were not 'delivered' to us within the meaning of section 72 of the Indian Railways Act, 1890. If section 47 of the Act empowers the Railway Company to make rules, rule 2 is one of the rules so made. It has been sanctioned by the Governor General ; it is, therefore, a valid and binding rule. Further, the liability of the Railway Company under section 72 is "subject to the other provisions of the Act".

We rely on *Banna Mal* v. *The Secretary of State for India in Council*[1] and *Slim* v. *The Great Northern Railway Co.*[2].

Jinnah, in reply.

C. A. V.

HEATON, J. :—This is a case in which the plaintiffs have claimed damages from the Great Indian Peninsula Railway Company on account of certain goods which were destroyed after they had been placed on the Railway Company's premises and which the plaintiffs allege in effect had been delivered to the Company for the purpose of carriage by railway. The suit was disposed of by a Judge of the Court of Small Causes at Bombay in favour of the defendant, and after a hearing before the Full Bench the same conclusion was reached.

An application was made to this Court by the plaintiffs, a rule was issued and we have heard the matter fully argued. As neither the applicants nor the opponent

(1) (1901) 23 All. 367. (2) (1854) 14 C. B. 647.

have any objection to our disposing of this matter, I do not propose to say anything on the question of our jurisdiction except that so far as I am enabled to form an opinion in the absence of arguments, I do not see any serious reason to doubt that we have jurisdiction.

Section 72 so far as it covers this case runs as follows :—

"The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 152 and 161 of the Indian Contract Act, 1872."

A "delivery to be carried by railway" means something more than a mere depositing of goods on the railway premises : it means some sort of acceptance by the railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case ; but it certainly may be completed before a railway receipt is granted. For by the instructions of the G. I. P. Railway "a railway receipt would not be granted until the consignment has been loaded." The loading, it seems to me, would indubitably finish the delivery. As to whether the delivery would be complete at some earlier stage, for example, by the weighment, I say nothing, for the Court below has held that a receipt is essential and that is the only matter we are called on to decide. But it is argued that section 72 alone does not control the case, that the meaning of the section is modified by a rule made under section 47. This rule runs :

"Goods will in all cases be at owner's risk until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised railway servant."

If that rule is good then the decision of the Court below is correct. Is it good ? I think not. Its effect is to define and by defining change what otherwise would be the meaning of section 72.

1915.

RAMCHANDRA NATHA v. G. I. P. RAILWAY COMPANY.

The provision to make rules which we are concerned with is contained in section 47 and is as follows :—

47 (*f*)—"Every railway company .... shall make general rules consistent with this Act .... for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner."

This gives no express power to make rules regarding the liability of the Railway and that liability it seems to me remains precisely as defined by section 72. To hold otherwise would be to assume that the legislature conferred, not expressly but indirectly or by implication, a power to modify by rule the natural meaning of a section of the Act. I think this cannot be so, firstly because it is a manner of making laws that I cannot attribute to a responsible Legislature: and secondly because I think it is directly against the provision that the rules must be consistent with the Act.

I would, therefore, make the rule absolute, set aside the decree of the lower Court and remand the suit to be disposed of with reference to the observations contained in our judgments in this matter.

Costs of this rule will be costs in the suit.

SHAH, J. :—The point argued in this case is whether rule No. 2 under section 47, sub-section (1), clause (*f*), is consistent with the provisions of section 72 of the Indian Railways Act or not, in so far as it makes the responsibility of the railway administration dependent upon a receipt being granted in the prescribed form.

The learned Judges of the Full Court have held that it is consistent with section 72 of the Act. Their decision proceeds upon the assumption that the goods were marked and weighed after the consignment note was tendered to the Company by the plaintiffs' agent.

I have considered whether a point of this kind could be appropriately decided in the exercise of the extra-

ordinary jurisdiction of this Court. Having regard to the importance and nature of the point, as also to the fact that both the parties are willing that it should be decided, I think it is a fit case for our interference, if not under section 115 of the Code of Civil Procedure, under the powers of superintendence which this Court has over the Presidency Small Causes Courts in virtue of section 6 of Act XV of 1882 and of the provisions of 24 and 25 Victoria, Chapter 104.

The goods in this case are said to have been brought on the railway premises and a consignment note given to the Company by the plaintiffs' agent. The parties are not agreed as to whether the goods were marked and weighed, and there is no finding of the Full Court on the point. It is common ground that no receipt was given by the Company. It is urged on behalf of the applicants that the Company is responsible for the loss or destruction of the goods delivered to the Company to be carried by railway as a bailee under sections 151, 152, and 161 of the Indian Contract Act—subject of course to the other provisions of the Indian Railways Act under section 72 of the Act. Apart from the rule in question it is not seriously disputed—and in my opinion cannot be disputed—by the Company that there may be delivery of goods to be carried by railway within the meaning of section 72 before any receipt is issued by the Company. The delivery contemplated by section 72 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would no doubt involve not merely the bringing of the goods on the railway premises but acceptance thereof by the Company for the purpose of carrying the same by railway. Such acceptance may be expressed or implied in a variety of ways by the usual course of business, and may be quite independent of any receipt being granted by the Company. Of course it will depend

1915

RAMCHANDRA NATHA v. G. I. P. RAILWAY COMPANY.

upon the circumstances of each case and the usual course of business of the railway administration as to whether the goods can be said to be delivered to be carried by railway under section 72 of the Act.

This being my view of the meaning of the expression 'delivered to be carried by railway' used in section 72, the question is whether rule 2 limits or modifies it in any way, and if it does so, whether it can do so. In my opinion it does not and cannot do so. The rule provides that "goods will, in all cases, be at owner's risk until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised railway servant." This rule has been sanctioned by the Governor General in Council and promulgated under section 47, sub-section (1), clause (*f*), for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner. It relates to wharfage, and is one of the rules under the heading " on goods for despatch waiting to be consigned." The first rule relates in terms to goods brought to railway premises for despatch but not consigned, and to a period before the consignment note is received. If due regard is had to the context as well as to the purpose of the rule in question, it seems to me that it cannot be used as in any way affecting the Company's liability under section 72 of the Act. It is true that the wording of the rule is rather wide and lends itself to the construction that no liability of the Company can arise unless and until a receipt has been granted by an authorised railway servant. Assuming, however, that the rule can be used for that purpose, it is necessary to consider whether it is consistent with the Act. If apart from the rule the goods can be delivered to be carried so as to render a railway administration liable as a bailee under section 72 without

1915.

RAMCHANDRA NÁTHA v. G. I. P. RAILWAY COMPANY.

any receipt being granted, the rule, which postpones the liability until a receipt is granted, seems to me to be inconsistent with section 72. The liability defined by the Act cannot be thus modified by a rule, and the fact that the rule has received the sanction of the Governor General in Council cannot remove the inconsistency. The result of thus postponing the liability may be serious in some cases. If the rule be allowed to have the effect, which the Company contends in this case it has, the goods can practically remain in charge of the Company for an indefinite length of time without the owner having any control over them, and without the Company being in any way liable for their loss or destruction. It is a result which ought to be avoided as far as possible. The Act does not appear to me to contemplate any such result, and in my opinion it cannot be secured by the rule in question.

It is urged on behalf of the Company that the consequences of holding that there may be delivery of goods within the meaning of section 72 before a receipt has been granted would be anomalous in those cases where the owner ultimately agrees to limit the responsibility of the Company as provided in sub-section (2) of section 72 inasmuch as there may be the liability of the Company before a receipt is granted, while after it is granted it would cease because of the agreement limiting the responsibility. I do not think that there is any anomaly in this nor can I think that the possibility of such an agreement being entered into in any case is any ground for not giving effect to the view that the rule in question is not consistent with the terms of section 72. Mr. Binning has relied upon the decision of *Banna Mal* v. *The Secretary of State for India in Council*[1]. Apparently the only ground urged and considered in that case was whether the rule, which was similar to

(1) (1901) 23 All. 367.

1915.

RAMCHANDRA NATHA v. G. I. P. RAILWAY COMPANY.

the rule with which we are concerned in this case, was bad because it was inequitable. It does not appear to have been argued that the rule was inconsistent with the provisions of section 72 of the Act. I am, therefore, unable to accept that case as any guide in deciding the question which has been argued in the present case.

It follows, therefore, that the commencement of the liability of the Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted, and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (*f*).

For these reasons I concur in the order proposed by my learned brother.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1915. *March* 17.

RASULKHAN HAMADKHAN AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

GULAB CHHITU AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, V. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), schedule I, Article 14—Possession of land as owner for fifty years—User of land as graveyard and also as timber depôt—Order by Government for discontinuing the user as timber depôt—Order ultra vires—*Land Revenue Code (Bombay Act V of 1879), sections 65, 66.*†

* First appeals Nos. 267 and 270 of 1912.

† The sections run as follows :—

65. An occupant of land appropriated for purposes of agriculture is entitled by himself, his servants, tenants, agents or other legal representatives, to erect