APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

1922. *January* 11.

VALI MAHOMED HAMAD (ORIGINAL PLAINTIFF), APPLICANT *v.* THE AGENT, G. I. P. RAILWAY COMPANY (ORIGINAL DEFENDANT), OPPONENT*.

Railway—Carriage of goods by a particular route—Deviation from the route—Liability of the Railway Company—Risk note.

The plaintiff's consignor delivered certain oil tins to the South Indian Railway Company at Sevoy Petoy Station to be carried to Jalgaon, a station on the line of defendant Railway Company and signed a risk note in the Form B. The nearest route to Jalgaon was from Raichur via Dhond and Manmad. Instead of carrying the goods by this route, the defendant Company took them from Dhond to Kalyan via Poona and from Kalyan they were redirected to Manmad. Some of the goods being lost in transit, the plaintiff sued to recover the price of the same from the defendant Railway Company. The Company relied on the risk note and contended that they were not bound to carry the goods by any particular route.

Held, that the route via Dhond and Manmad would be the usual route for goods coming from Southern India via Raichur and the Company by carrying the goods via Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the risk note so as to be absolved from liability for the loss which accrued to plaintiff.

APPLICATION under Extraordinary Jurisdiction against the order passed by the First Class Subordinate Judge at Jalgaon.

Suit to recover money.

The plaintiff-applicant was a merchant carrying on business at Jalgaon, East Khandesh.

The plaintiff's agent consigned 440 tins of groundnut seed oil from Sevoy Petoy Station of the South Indian Railway to be carried from Sevoy Petoy to Jalgaon, a station on the Great Indian Peninsula Railway Company (defendant). The consignor signed a risk note in the Form B.

* Civil Extraordinary Application No. 183 of 1921.

The goods were to be carried by the defendant Company on the defendant Company's lines from Raichur to Jalgaon via Dhond and Manmad.

The Company carried the goods from Raichur as far as Dhond and thereafter took the same to Kalyan via Poona and from Kalyan the goods were redirected to Manmad. When the goods arrived at Jalgaon, it was found that the oil in certain tins had been removed and lost to the applicant-plaintiff. The applicant gave notice to the Railway of the said loss and claimed from the defendant Company Rs. 224 on account of the damage suffered by the applicant.

The defendant Company contended *inter alia* that the Company was not bound to carry the goods by any particular route, that the consignor had consigned the goods at his own risk under a risk note and that the defendant Company was absolved from all liability.

The Subordinate Judge held that the defendant Company had only agreed to carry the goods via Raichur and there was no agreement proved to the effect that the goods were to be carried via Dhond and Manmad; besides carrying via Kalyan was more attractive to the plaintiff because there was only one junction via Kalyan while by the other route there were two, viz., Dhond and Manmad; that under the risk note the defendant Company was absolved from all the liability. He, therefore, dismissed the suit.

The plaintiff applied to the High Court.

I. J. Sopher, for *M. D. Ashtaputre*, for the applicant.

Sir Thomas Strangman, Advocate General, with *Little & Co.* for the opponent.

MACLEOD, C. J.:—This was a suit filed by the consignee of certain goods, which were delivered to the South Indian Railway Company, to be carried from

1922.

VALI MAHOMED v. G. I. P. RAILWAY COMPANY.

Sevoy Petoy, a station on the South Indian Railway to Jalgaon, a station on the defendant Company. Admittedly when the goods arrived at Jalgaon the oil of 14 tins had been removed and lost to the consignee. The consignor had signed a risk note in the Form B, and so the G. I. P. Railway Company would not be liable for any such loss, unless it could be shown to have occurred owing to the wilful neglect of their servants, provided the goods were carried in accordance with the contract of carriage. It was proved that the waggon containing the plaintiff's goods instead of travelling along the shortest route via Dhond and Manmad was carried to Kalyan, and thence to Jalgaon. There was evidence that the Station Master of Kalyan had to put fresh seals on the waggon containing the plaintiff's goods and that would point to the loss having occurred between Kalyan and Dhond. The learned Judge found that there was no evidence to show that the Company agreed to carry the consignment via Dhond and Manmad, and that the only agreement was to carry the goods via Raichur. He also was of opinion that the carriage via Kalyan was more attractive to the plaintiff because there was only one junction on the route via Kalyan while by the other route there were two, viz. Dhond and Manmad. He forgot the fact that the goods train had to be marshalled at Lanowli and remarshalled at Karjat before it arrived at Kalyan, and that the same process would have to be repeated at Kasara and Igatpuri on the way from Kalyan to Jalgaon, and, therefore, instead of that route being more attractive to the plaintiff, there would be many more opportunities for the loss to occur than on the route via Dhond and Manmad. It seems obvious that the contract was to carry the goods by the nearest route, and that if the Railway Company, to suit their convenience, wished to carry the goods by

a longer route which offered far more opportunity for the loss to occur, they were bound to give notice to the consignor so as to give him an opportunity of deciding whether he should sign the risk note in Form B or not. The evidence also shows that the route via Dhond and Manmad would be the usual route for goods coming from Southern India via Raichur, and that as a matter of fact, the charges were recovered from the plaintiff as if the goods had travelled via Dhond and Manmad. It seems to us, therefore, that the Company by carrying the goods via Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the risk note so as to be absolved from liability for the loss which occurred. Therefore the decree dismissing the suit must be set aside and there must be a decree for the plaintiff with costs throughout.

Rule made absolute.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

BALVANT RAGHUNATH (ORIGINAL PLAINTIFF), APPELLANT *v.* BALA VALAD MALU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1922. *January* 11.

Civil Procedure Code (Act V of 1908), Order XXI, Rules 91, 93—Civil Procedure Code (Act XIV of 1882), section 315—Execution of decree—Auction sale—Setting aside of sale—Refund of purchase money.

Where a person purchases property at a Court-sale but does not succeed in obtaining possession thereof he must get the sale set aside under Order XXI, Rule 91 of the Civil Procedure Code, before he can obtain the right to ask for a refund of the purchase money.

* Second Appeal No. 392 of 1921.