APPELLATE CIVIL.

Before N.R. Chatterjea & Walmsley, JJ.

1913
May 9.

INDIA GENERAL NAVIGATION AND RAILWAY CO. LD.

v.

GOPAL CHANDRA GUIN.*

Carriers—Loss of goods — Undeclared luggage — Carriers Act (III of 1865) ss. 3, 4, 8, 9—Negligence of carrier or his agent—Liability.

Where loss of or damage to goods was caused by negligence or criminal act of the carrier or any of his agent or servant, the carrier is liable for the loss although the value and description of the goods were not declared nor was a higher charge paid for them.

Cahill v. *The London North-Western Railway*(1), *Great Northern Railway Company* v. *Shephard*(2). *David Keays* v. *Belfast Railway Company* (3), *Shaik Roheemulla* v. *Palmer*(4) referred to.

Velayat Hossein v. *Bengal and North-Western Railway Company*(5) distinguished.

S. 9 of the Carriers Act clearly shows that the onus of proving negligence is not upon the plaintiff.

Sheobarut Ram v. *Bengal and North-Western Railway Company*(6) distinguished.

SECOND APPEAL by the India General Navigation and Railway Co. Ld., the defendants.

This appeal arose out of a suit brought against the defendant Company for damages sustained by the plaintiffs in consequence of loss by fire of six

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* Appeal from Appellate Decree, No. 60 of 1911, against the decree of B. C. Mitra, District Judge of Murshidabad, dated Sept. 26, 1910, affirming the decree of Narendra Krishna, Subordinate Judge of that district, dated Aug. 13, 1909.

(1) (1862) 13 C. B. N. S. 818.
(2) (1852) 8 Exch. 30.
(3) (1861) 9 H. L. Cas. 556.
(4) (1864) Coryton's Rep. 133.
(5) (1909) I.L.R. 36 Calc. 819.
(6) (1912) 16 C. W. N. 766.

1913

INDIA GENERAL NAVIGATION AND RAILWAY CO. LD. v. GOPAL CHANDRA GUIN.

packages of *matka* silk-thread made over to them as undeclared luggage for transmission from Maldah to Lalgola. The goods were shipped on the 6th of October 1907 on a steamer named "Barisal." About two and-a-half miles from the place of starting the steamer caught fire and the goods were destroyed.

The plaintiffs sued the defendant Company for Rs. 2,000 damages suffered by them; namely, Rs. 1,811-3-6 the price of the silk-thread and Rs. 188-2 for loss suffered by the plaintiffs for the destruction of the goods.

The defendant Company resisted the claim of the plaintiffs, among others, on the following grounds:—that they were not liable for the loss inasmuch as the plaintiff No. 2, agent of the plaintiff No. 1, concealed from the defendant Company the nature and value of the goods contained in the lost packages; that the goods were of the description mentioned in the schedule to the Carriers Act (III of 1865); that the plaintiff No. 2 did not expressly declare the value and description of the goods and as such the defendants were not liable for the loss.

The learned Subordinate Judge of Berhampore, overruling the contentions of the defendant Company, decreed the suit against them on the 13th of August 1909. Against this order of the Subordinate Judge the defendants unsuccessfully appealed to the District Judge of Murshidabad who, on the 26th of September 1910, dismissed the appeal with costs.

Against this order of the District Judge the defendant Company appealed to the High Court.

Mr. Avetoom (with him *Babu Manmatha Nath Mookerjee*) contended, on behalf of the appellants, that the plaintiffs, having withheld the fact that the packages contained *matka* silk, could not succeed.

1913

INDIA GENERAL NAVIGATION AND RAILWAY CO. LD. v. GOPAL CHANDRA GUIN.

The silk being of the value of more than Rs. 100, the Company, had they known the fact, would have charged a higher rate under sections 3 and 4 of the Carriers Act. The suppression of this all-important fact was fatal to the plaintiffs' case. Further, he submitted, that the Company was not liable inasmuch as they had undertaken to carry luggage only and not merchandise as was the case here: *Cahill* v. *The London North-Western Railway Company* (1), *The Great Northern Railway Company* v. *Shephard* (2), *David Keays* v. *Belfast Railway Company* (3), *Shaik Roheemulla* v. *Palmer* (4).

Then it was urged, on behalf of the appellants, that the fact of negligence of the Company or their servants must be established by the plaintiffs. In support of this contention the case of *Sheobarut Ram* v. *Bengal and North-Western Railway Company* (5) was cited.

Babu Mahendra Nath Roy (with him *Babu Upendra Narain Bagchi*), for the respondent, submitted that notwithstanding ss. 3 and 4 of the Carriers Act, the Company were liable under s. 8 of the Act which clearly lays down the liability of a Company in the event of any loss or damage caused by the negligence or criminal act of its agents or servants. It is not for the plaintiffs to establish negligence. In this case evidence of negligence is clear and positive.

Cur. adv. vult.

CHATTERJEA AND WALMSLEY, JJ. This appeal arises out of a suit brought by the plaintiffs respondents for recovery of damages for the loss of 6 packages of *matka* silk-thread which were booked as luggage by the plaintiff No. 2 (who was the agent of the

(1) (1862) 13 C. B. N. S. 818.
(2) (1852) 8 Exch. 30.
(3) (1861) 9 H. L. Cas. 556.
(4) (1864) Coryton's Rep. 133.
(5) (1912) 16 C. W. N. 766.

plaintiff No. 1) for conveyance by a steamer by the defendant Company from Maldah to Kasimbazar. It has been found that the packages were destroyed by fire owing to the negligence of the defendants. The Court of first instance gave a decree to the plaintiff No. 1 for Rs. 1784–15–3, that being the price of the articles lost. On appeal, that decree was affirmed and the defendant Company has appealed to this Court.

It has been contended on behalf of the appellants, *first*, that the plaintiff not having disclosed the fact that the luggage contained *matka* silk of the value of more than Rs. 100 upon which the Company could charge a higher rate under sections 3 and 4 of the Common Carriers Act (Act III of 1865), the defendant was not liable to pay any damages for the loss; and, *secondly*, that there was no contract to carry any merchandise, the defendant having undertaken to carry luggage only.

As regards the first contention, the liability of the defendant Company is to be determined according to the provisions of the Common Carriers Act (Act III of 1865). Section 3 of that Act provides that "no common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorised in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof;" and section 4 provides that "every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix," *matka* silk-thread comes within the description of properties contained in the schedule to the Act which

1913

INDIA GENERAL NAVIGATION AND RAILWAY CO. LD. v. GOPAL CHANDRA GUIN.

mentions "silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials." It is argued on behalf of the appellants that had the plaintiff disclosed that the packages contained silk of the value exceeding one hundred rupees, the Company would have beeen entitled to levy a higher rate of charge under section 4 of the Act, and the said fact not having been disclosed the Company were not liable for the loss of, or damage to the property. But section 8 of the Act provides that "notwithstanding anything hereinbefore contained every common carrier shall be liable to the owner for loss of, or damage to, any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants." Reading sections 3 and 4 with section 8, it appears that although a common carrier is not liable for the loss of or damage to property of certain description above one hundered rupees in value, unless the value and description thereof are expressly declared by the person delivering them to be carried and although the carrier is entitled to charge a higher rate for such properties, he is liable for the loss of or damage to such property if such loss or damage arises from the negligence or a criminal act of the carrier or any of his agents or servants. Had the *matka* silk-thread been lost otherwise than through the negligence of the Company, they would not have been liable for the loss, as the value and description of the property had not been declared as provided by section 3, and as there was no payment of a special rate as provided by section 4. But as the property was lost owing to the negligence of the Company, we are of opinion that they are liable for the loss, although the value and description of the property were not

declared and a higher charge was not paid for them, and that in such a case sections 3 and 4 of Act III of 1865 do not afford any protection to the carrier.

The learned counsel for the appellant relied upon the cases of *Cahill* v. *The London and North-Western Railway Co.* (1), *The Great Northern Railway Company* v. *Shephard* (2), *David Keays* v. *Belfast Railway Company* (3) and *Shaik Roheemulla* v. *Palmer* (4) in support of his second contention that where property is delivered to a carrier as luggage, but which contains merchandise only, there is no contract to carry, and that consequently he is not liable for the loss of such property. But these cases (with the exception of the last) were decided with reference to the liability of the railway companies under the Common Law of England or under Acts which do not apply to this country. In the case of *Velayat Hossein* v. *Bengal and North-Western Railway Co.* (5), a passenger took a journey on the railway and booked as his luggage a package containing merchandise (96 pieces of *durries* or carpet) and paid a certain sum as extra charges in respect of the excess weight of the package beyond what was allowed as free luggage. The package was lost and consequently not delivered at the end of his journey. He, therefore, sued the Railway Company for damages caused by its loss, and it was held that the case was governed by section 72 of the Indian Railways Act (IX of 1890) and sections 151 and 152 and 161 of the Indian Contract Act referred to therein, and that the Railway Company was liable for the loss of the package. The above English cases were cited in argument on behalf of the Railway Company, but the learned Judges

(1) (1862) 13 C. B. N. S. 818.
(2) (1852) 8 Exch. 30.
(3) (1861) 9 H. L. Cas. 556.
(4) (1864) Coryton's Rep. 133.
(5) (1909) I.L.R., 36 Calc. 819.

1913

INDIA GENERAL NAVIGATION AND RAILWAY CO. LD. v. GOPAL CHANDRA GUIN.

observed: "A variety of English cases have been referred to, according to which it is contended that the defendants cannot be fixed with liability in this case; but all such cases have been decided on a consideration of the position of the railways as carriers or under Acts that do not apply here."

The liability of the defendant Company in the present case is to be determined not according to any common law but according to the provisions of Act III of 1865. In the present case, certain property (six packages of *matka* silk) were delivered for carriage by the defendant Company, and it is found that the packages were lost owing to the negligence of their servants. The defendants are therefore liable under the provisions of section 8 of the Act. The Act does not make any distinction between 'personal luggage' and goods or merchandise and merely speaks of property delivered. There is no doubt that six packages of *matka* silk were "property delivered," within the meaning of the Act, although they were passed off as luggage and not declared to be merchandise. They were paid for as luggage excepting for 30 seers allowed as free luggage. It does not appear that there are different rates for luggage and goods in the defendant Company's rules, and even if there were, we think it would not make any difference, because the liability for loss in consequence of negligence had reference to 'property delivered' which includes luggage as well as goods.

In the case of *Shaik Roheemulla* v. *Palmer* (1) (affirming the decision reported at page 24 of the said reports), it was no doubt held that misdescription of the nature of goods entrusted to a common carrier disentitles the sender to recover for their loss although the goods would not be subject to any extra

(1) (1864) Coryton's Rep. 133.

rates had they been properly described. But the case was decided before the Indian Carrier's Act III of 1865 was passed. On the other hand in the case of *Narang Rai Agarwalla* v. *Rivers Steam Navigation Company, Limited* (1) referred to in *Narang Rai Agarwalla* v. *Rivers Steam Navigation Company, Limited* (2), the defendant Company claimed exemption from liability for loss of the *endi* silk under section 4 of the Carriers Act, as there was no payment of the special rate in respect of the *endi* silk which fell under the description of excepted articles and which the plaintiffs delivered to the defendant to be carried. The learned Judges referring to the Common Law liability of common carriers observed "the liability however may be limited as to loss of valuable articles unless the sender has declared their value and paid a higher rate for their carriage. But even then he is liable for loss occasioned by his negligence or criminal act, as no Court will exonerate a bailee under such circumstances. These rules have been adopted in India by Act III of 1865 and section 8 of the Act lays down a rule as to a common carrier's liability in all cases of negligence or criminal act." In that case although the fact that the property delivered to be carried was not disclosed to be silk, and although no special rate was paid for it, it was held that the defendant would be liable, if the loss was occasioned by the negligence of the defendant, and the case was remanded to the lower Court for a finding upon the point.

It was argued that the *onus* of proving negligence was upon the plaintiff and the case of *Sheobarut Ram* v. *Bengal and North-Western Railway Co.* (3) was relied on. That case, however, was under the Railways Act and the goods were consigned under a

(1) (1903) S. A. No. 2310 (unreported). (2) (1907) I. L. R. 34. Calc. 419.
(3) (1912) 16 C. W. N. 766

1913

INDIA GENERAL NAVIGATION AND RAILWAY CO. LD. v. GOPAL CHANDRA GUIN.

risk-note under which the railway Company were absolved from all liability for loss of, or damage to the goods, subject to the proviso that the Company would be liable for loss due to wilful negligence on the part of their servants. Section 9 of the Carriers Act clearly shows that the *onus* of proving negligence is not upon the plaintiff. Moreover, in this case, the plaintiff gave positive evidence of negligence which has been apparently believed by the Courts below.

We are accordingly of opinion that the Courts below came to a right conclusion, and that the appeal must be dismissed. Having regard, however, to the circumstance of the case, we think that each party should bear his own costs in all Courts.

S. K. B. *Appeal dismissed.*

CRIMINAL REVISION.

Before Imam and Chapman, JJ.

1913
May 22.

EAD ALI

v.

LAL BIBI.*

Maintenance—Liability of estate of deceased person for arrears of maintenance accrued prior to death—Abatement of order for maintenance after death—Criminal Procedure Code (Act V of 1898) s. 488 (1), (3), (6).

A claim for arrears of maintenance abates on the death of the person against whom an order under sub-s. (1) of s. 488 of the Criminal Procedure Code has been made, and cannot be enforced thereafter against his estate.

Semble: Before a warrant is issued under sub-s. (3), wilful neglect to comply with the order must be found, and for that purpose evidence has to be taken under sub-s. (6) in the presence of the accused.

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* Criminal Revision No. 343, of 1913, against the order of J. M. Chatterjee, Subdivisional Officer of Arambagh, dated Feb. 17, 1913.