APPELLATE CIVIL.

Before Holmwood and Mullick JJ.

1915

Jan. 13.

EAST INDIAN RAILWAY COMPANY

v.

CHANGAI KHAN.*

Remand—New case—Second appeal—Finding of fact—High Court, power of —Silk—Railway Company, liability of—Railways Act (IX of 1890), s. 75—Practice.

A new case cannot be made on behalf of the plaintiff on remand.

After there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the Second Court, however unsatisfactory it might be, when examined, must stand final.

Ramratan Sukal v. *Nanlu* (1) referred to.

The question whether silk in manufactured or unmanufactured state is to be treated as silk is a question of fact.

Brunt v. *Midland Railway Company* (2), *Hiatunnissa* v. *Kailash Chandra Saha* (3), *Lakhmidas Hira Chand* v. *The Great Indian Peninsular Railway* (4), *Saminadha Mudali* v. *The South Indian Railway Co.* (5), *Pundalik Udaji Jadhav* v. *S. M. Railway Co.* (6) referred to.

SECOND APPEAL by the East Indian Railway Company, the defendants. This appeal arose out of a suit for recovery of the price of articles contained in a lost packet booked from Bombay to Bankipore.

* Appeal from Appellate Decree, No. 1120 of 1912, against the decree of Ibrahim Ahmed, Subordinate Judge of Bankipur, dated Feb. 15, 1912, confirming the decree of Kali Kumar Sarkar, Munsif of Patna, dated Nov. 30, 1910.

(1) (1894) I. L. R. 19 Calc. 249.
(2) (1864) 33 Exch. 187.
(3) (1905) 16 C. L. J. 259.
(4) (1867) 4 Bom. H. C. 129.
(5) (1883) I. L. R. 6 Mad. 420.
(6) (1909) I. L. R. 33 Bom. 703

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Amongst other things the lost packet contained handkerchiefs which were described as "fancy silk-handkerchiefs". The Railway Company contended that in as much as the packet contained silk worth more than Rs. 100, the Railway Company was not liable, as the packet was not insured under section 75 of the Railways Act. The first Court gave a modified decree, *i.e.*, it held that the Company was not liable for the loss of the silk handkerchiefs, but it was liable for the loss of other articles contained in the lost packet. Both sides appealed, but their appeals were dismissed by the Subordinate Judge. The Railway Company then appealed to the High Court mainly on the ground that the Company was not liable for any of the articles contained in the lost packet.

Teunon J. (sitting alone) agreeing with the contention of the Railway Company, remanded the case to the lower Court for a fresh finding as to the particular items of silk handkerchiefs and their respective values directing that the Subordinate Judge, in the first Court of appeal, should come to a finding on the following issue, namely, what is the aggregate value of the handkerchiefs in which, on the evidence adduced, it may be found that the value of silk exceeds the value of the other materials.

The finding on the issue was against the Railway Company. Teunon, J. did not care to hear the appeal. The matter, therefore, was placed before the Chief Justice who referred it to the Bench presided over by Holmwood and Mullick JJ.

Mr. S. R. Das (with him *Mr. G. B. Macnair* and *Babu Ambica Chowdhry*), for the appellants, submitted on the authority of *Hiatunnissa* v. *Kailash Chandra Saha* (1) that the whole case was opened up before

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their Lordships and it was necessary to see whether or not the remand order was bad. The finding of the original Court regarding silk was conclusive and could not be reopened. The High Court could not interfere with the finding of fact: *Ramratan Sukal* v. *Nandu* (1).

Lakhmidas Hira Chand v. *The Great Indian Peninsular Railway* (2) and *Samivada Mudali* v. *The South Indian Railway Company* (3) are distinguishable and do not apply to the facts of the present case. The lost packet containing, as it did, silk articles worth more than rupees one hundred, should have been insured, but, not being insured, the plaintiff could not make the Railway Company liable for anything contained in the said packet.

Moulvi Mustafa Khan, for the respondent, submitted that when the article was lost the Company was liable. The Court could not decide the case on the word 'fancy' only. We gave evidence that the handkerchiefs were not silk handkerchiefs at all, and even if there was any silk, the quantity of silk was very little in those handkerchiefs. Onus was on the Company to show that there was preponderance of silk. Insurance was not necessary. The Company should have taken proper care.

Mr. Das was not called upon to reply.

HOLMWOOD AND MULLICK JJ. This second appeal arises out of a suit brought by the plaintiffs against the East Indian Railway Company for the loss of a certain parcel consigned to the company for conveyance from Bombay to Bankipur the value of which is stated to be Rs. 516-5-7½ pies. After a prolonged correspondence about the claim the plaintiffs submitted

(1) (1891) I. L. R. 19 Calc. 249. (2) (1867) 4 Bom. H. C. 129.
(3) (1883) I. L. R. 6 Mad. 420.

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to the defendants a detailed statement of the goods in the parcels, and it appears from that statement that fancy silk handkerchiefs of the value of Rs. 138-2 annas had been lost with the parcel. The defendants thereupon denied their liability relying on section 75 of the Railways Act, IX of 1890, and Schedule II thereto annexed. The Munsif and the Subordinate Judge in concurrence held that the defendants were not liable for the silk inasmuch as it had not been declared or insured. But they held that the plaintiffs can recover the value of the other goods contained in the parcel, which did not appear to have come within Schedule II of the Act.

The second appeal came before Mr. Justice Teunon sitting alone, and he was of opinion, and rightly in our view, that the whole case of the plaintiffs must fail if scheduled goods of the value of over 100 rupees were in the parcel, and for this reason that section 75 of the present Act, differing in that respect from the former Act, says that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel and not of the articles mentioned in the Schedule II. It is therefore clear that if this parcel contained silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in the parcel; and that was the sole ground upon which the Railway Company came before Mr. Justice Teunon in appeal. Mr. Justice Teunon, as we have seen, decided that point in favour of the Railway Company, and there we should have thought would have been an end of the matter, inasmuch as the plaintiffs did not file any cross-objection and did not say anything about the question of silk. But Mr. Justice Teunon appears to have thought that the company could not recover

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anything unless there really was silk to the value of over 100 rupees in the parcel, and he therefore remanded the case to the lower Court for a fresh finding as to the particular items of silk handkerchiefs and their respective values directing that the Subordinate Judge in the first Court of appeal should come to a finding on the following issue, namely, what is the aggregate value of the handkerchiefs in which on the evidence adduced it may be found that the value of silk exceeds the value of the other materials.

The learned Subordinate Judge on remand expressed himself wholly unable on the evidence to decide this issue. But he said that he was satisfied with the statement in the plaint that the silk handkerchiefs were worth 91 rupees and the other handkerchiefs which were not silk were worth 42 rupees and odd, and this was a sufficient basis for making a new decree.

It is there that the principal question in this appeal arises. It is obvious even if the remand which was made was a competent remand with which we shall deal presently, the Subordinate Judge could not make a new case for the plaintiffs. The finding of fact of the first two Courts before remand was at any rate conclusive that the plaintiffs had admitted to the Railway Company that they had consigned 138 rupees silk goods for them to carry, and the only question that was remanded was, what was the proportion of silk in each kind of handkerchief so as to show whether the aggregate amounted to 100 rupees or not. We are of opinion, relying on the decision in *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (1), that the remand itself was incompetent and that we in dealing with it as a Divisional Bench are bound to treat the case as coming before us on appeal from the Subordinate Judge who heard the first appeal. It is

(1) (1905) 16 C. L. J. 259.

unnecessary to go into the considerations which induced the late Chief Justice and Mr. Justice Mitra to hold in the similar case that the remand was incompetent. It is clear as matter of principle that after there has been a decision of fact in the two Courts of original and first appellate jurisdiction the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. These are the words of their Lordships of the Judicial Committee in the well known case of *Ramratan Sukal* v. *Nandu* (1).

It was argued that Mr. Justice Teunon remanded the case on finding that the onus had been wrongly placed and that that was a point of law. But we find that he does not specifically find there was any misplacing of the onus. He says the Courts below, while placing upon the plaintiffs the whole burden of proof, have proceeded, it appears, solely upon the description fancy silk contained in the statement of claim, and he concludes by saying, even if the Courts below were right in throwing the whole burden on the plaintiffs, in view of the expression of opinion to be found in the cases which we shall presently deal with, the findings at which they had arrived is not sufficient; and why is it not sufficient? Because the possibility of equality in value has been overlooked and also the details of the value of each silk handkerchief have not been gone into. Now, these points surely come within the dictum of their Lordships of the Judicial Committee as to the soundness of the findings of fact rather than as to the findings of fact themselves.

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The learned Munsif found as a fact that from the list supplied by the plaintiffs to the defendants it appears that the lost box contained silk handkerchiefs worth more than 100 rupees. That *primâ facie* clearly relieved the defendants from any burden. To avoid their liability to make a declaration and to insure the goods the plaintiffs stated that the handkerchiefs were not real silk but were known as such in the market, though they sold for no more than 5 or 6 pice each, while real silk handkerchiefs sold at Rs. 12 or 13 a dozen. They did not ask the Court to go into the question of whether there were so many at 15 annas and so many at higher price so that the aggregate of the real silk would not amount to 100 rupees. They took the general statement that fancy silk meant sham silk. They then produced a witness with samples of handkerchiefs which they alleged were similar to the lost hankerchiefs; and upon this evidence and relying on the case *Lakhmidas Hira Chand* v. *The Great Indian Peninsular Railway*(1), and on the case of *Saminadha Mudali* v. *The South Indian Railway Company* (2), they sought to argue that such handkerchiefs could not be considered as silk within the meaning of the Act. The learned Munsif then said, in deciding whether a particular article when wrought up with other article is to be regarded as silk or not within the meaning of the Railway Act, the proper test to apply, according to those decisions, was to ascertain whether the value of the silk was more than half of the whole article. He then gives his finding, "the evidence placed before me is not sufficient to show that the price of the silk contained in the handkerchiefs, if any, was less than half that of the whole article." It is argued that if we deal with this finding on the strictest mathematical principles it is not the finding

(1) (1867) 4 Bom. H. C. 129. (2) (1883) I. L. R. 6 Mad. 420.

that he set himself to find, namely, that there was more than half of the value in silk in the handkerchiefs. But having regard to what he sets out to be the necessary finding, it is obvious that he intends to find that there is a sufficient preponderance of silk in the handkerchiefs to bring them within the rulings he cites; and he fortifies his finding by saying that they go by the name of silk in the market and are sold as such; and this brings us to the consideration of the English case on which both the cases in India relied. It is the case of *Brunt* v. *Midland Railway Company* (1), where Baron Pollock clearly says, that the question whether silk in manufactured or unmanufactured state is to be treated as silk within the meaning of the English Act, the words in which are precisely similar to those in Schedule II of the Indian Act, is a question of fact which very properly might be left to a jury. When it is left to a Judge, the Judge must decide where the line should be drawn, that is to say, some test must be taken by the Court as to whether the case came within the definition or not. The line shifted according to the circumstances but the question which a Judge of fact has to answer is not where to draw the line, but whether the particular article before him is within the line; and he found as a fact that in this particular case that was before him the silk did come within the line. In the judgment by another Judge, Baron Pigott, who also treats it as a simple question of fact it is stated that in that case the ingredients of silk amounted to more in proportion and value to any other article. As a matter of fact it was a question of two pence in two shillings so that it was very near the dividing line of half and half.

We do not, and indeed we cannot, bind all Courts to follow the exact test which was adopted by the

(1) (1864) 33 Exch. 187.

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Madras Court in one case and by the Bombay Court in another. Each case must depend upon its own circumstances. Where a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of the section, that is in our opinion a clear finding of fact and the Court cannot go behind it in second appeal. The Subordinate Judge, though he has said less, has put the matter even more strongly. He says the plaintiffs have failed to prove that the handkerchiefs were not silk handkerchiefs or rather that they contained less silk than cotton. This is sufficient to bring the case within the schedule, and we are therefore of opinion that in second appeal we cannot go behind that finding.

Then comes the question whether the decree made in favour of the plaintiffs with regard to the other articles can stand. We have already indicated that we agree with the view taken by Mr. Justice Teunon that it cannot, and we are fortified in that opinion by the clear decision in the case of *Pundalik Udaji Jadhav* v. *The Agent, S. M. Railway Company* (1).

The result is that the appeal is decreed and the plaintiff's suit is dismissed with costs in all Courts.

S. K. B. *Appeal allowed.*

(1) (1909) I. L. R. 33 Bom. 703.