1923

NAGENDRA-BALA DASI v. DINANATH MAHISH.

advantage was got by the pleader being allowed to bid under colour of his wife's name and then to buy, their Lordships cannot doubt, for otherwise the point would not be contested. They therefore come to the conclusion that the second deception vitiates the sale also; that consequently the male appellant cannot be allowed to keep the purchase made in name of his wife and that the judgment of the Appellate Court was right. The result is that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants: *Watkins & Hunter*.
Solicitors for the respondents: *Francis & Harker*.

A. M. T.

PRIVY COUNCIL.

P. C.* 1923

Nov. 23.

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD. (DEFENDANTS),

v.

DEKHARI TEA COMPANY, LTD., AND OTHERS (PLAINTIFFS)

(AND CONSOLIDATED APPEALS).

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Carrier—Liability—Carriage of goods—Alleged carriage otherwise than as common carrier—Indian Carriers Act (III of 1865) ss. 2, 6, 9.

A person who is within the definiton of a "common carrier" in s. 2 of the Indian Carriers Act, 1865, that is to say "is engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately" is liable in damages as a common carrier to the owner of goods delivered to him for carriage, unless either (*a*) his liability has been limited by a special written contract as

*Present: LORD ATKINSON, LORD SHAW, LORD WRENBURY, LORD CARSON AND SIR ROBERT YOUNGER.

provided by s. 6 of the Act, or (*b*) in respect of the particular act of carriage he was departing from his usual business and engaging in a different type of business from that of a common carrier.

The appellants who were common carriers between ports upon a river agreed with a Railway Company to assign vessels for the purpose of carrying from Port A to Port B, without calling at intermediate ports, goods consigned to the Railway Company for carriage, but there was no evidence that if persons other than the Railway Company had tendered to the appellants goods for carriage from A and B, these goods also would not have been carried in the vessels.

Held, that the appellants were common carriers in respect of goods carried under the agreement with the Railway Company and under s. 9 of Act liable to the owners of the goods for their loss by fire, without proof of negligence, for loss of the goods by fire.

Decrees of the High Court affirmed.

CONSOLIDATED APPEAL (No. 53 of 1923) from decrees made on the Appeal Side of the High Court (November 30, 1921) affirming decrees made by Rankin J. sitting on the Original Side.

The several respondents brought suits in the High Court against the appellants claiming damages for the loss of packages of tea delivered by them to the Assam-Bengal Railway Company for carriage from Assam to Chittagong, and delivered by that Company to the appellants for carriage by river from Gauhati to Chandpur; the packages had been destroyed by fire while on board the appellants' vessel at Gauhati. The Railway Company also were made defendants, but the suit not being maintainable against them in the absence of notice under the Railways Act, were dismissed as against them by consent.

The facts material to the present appeal are stated in the judgment of the Judicial Committee.

The plaintiffs by their plaint (as amended at the trial) alleged that the present appellants at all material times were common carriers; they further alleged that the loss was due to the negligence of the appellants.

1923

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., *v.* DEKHARI TEA COMPANY, LTD.

The trial Judge (Rankin J.) found that there was no privity of contract between the plaintiffs and the present appellants. In considering whether the appellants Company was a common carrier of the tea, he said:—"It is a Company 'engaged in the business of transporting for hire property from place to place by inland navigation for all persons indiscriminately," and the only question is whether, because it was doing this particular set of journeys for the Railway Company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur, it was departing from its usual business and engaging in a different type of business, viz., the business of a sub-contractor for the Railway in such special sense as takes it *quoad* these journeys out of the avocation of a common carrier. On the whole I think it was not." He was of opinion accordingly that ss. 8 and 9 of the Indian Carriers Act, 1865, applied to the suits. He found that the appellants had not exonerated themselves from their liability under those sections. He further found affirmatively, on an application of s. 106 of the Evidence Act, 1872, that the loss was due to the appellants' negligence. The learned Judge made decrees in favour of the plaintiffs.

On appeal, the decrees were affirmed by Sanderson C.J. and Richardson J. The learned Chief Justice said that he doubted whether upon the evidence he should have come to the conclusion of the trial Judge that a particular flotilla was devoted solely to the purpose of carrying tea under the arrangement with the Railway Company. He, however, accepted that finding, but in his view it, and the fact that a special arrangement as to forfeit was made, would not justify the view that the present appellants had departed from their ordinary occupation of common carriers.

It, therefore, was not necessary to consider whether negligence had been proved affirmatively. Richardson J. delivered judgment to the same effect.

Dunne, K.C., and *Kenworthy Brown*, for the appellants. The trial Judge found, and the findings were accepted by the Appellate Court, that the tea was carried under an agreement with the Railway Company whereby vessels were specially assigned for the purpose, and the carriage was to be direct from Gauhati to Chandpur without calling at intermediate ports. In view of those findings the appellants were not engaged in carrying "for all persons indiscriminately" so as to be common carriers within the definition in s. 2 of the Indian Carriers Act, 1865, nor were they common carriers according to English law, which is intended to be reproduced by the definition. The view in certain of the English cases that a ship-owner or barge-owner who is not a common carrier may yet contract subject to the liabilities of one, is not applicable to this case as it has been found concurrently that there was no privity of contract between the appellants and the respondents. [Reference was made to *Johnson* v. *Midland Ry. Co.* (1), *Scaife* v. *Farrand* (2), *Liver Alkali Co.* v. *Johnson* (3), *Nugent* v. *Smith* (4), *Hill* v. *Scott* (5).] In any case a ship owner is under the liability of a common carrier only when the ship is a general ship, not where he is carrier for goods under a special bargain: *Nugent* v. *Smith* (4). It is conceded that if the appellants had carried the tea as common carriers they would have been liable for the loss: *Irrawaddy Flotilla Co* v. *Bhugwandas* (6). There

(1) (1849) 4 Exch. 367.
(2) (1875) L. R. 10 Ex. 358.
(3) (1874) L. R. 9 Ex. 338.
(4) (1876) 1 C. P. D. 423.
(5) [1895] 2 Q. B. 371; affirmed 713.
(6) (1891) I. L. R. 18 Calc. 620; L. R. 18 I. A. 121.

1923

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., v. DEKHARI TEA COMPANY, LTD.

being no privity of contract, the appellants were not, as regards the respondents, under the obligation imposed upon bailees by the Indian Contract Act, 1872; in any case that obligation is defined by ss. 151 and 152 merely as one to take care. No negligence was proved; s. 106 of the Indian Evidence Act, 1872, could not properly be used to raise a presumption of negligence.

Their Lordships desired to hear the respondents' counsel upon the question whether the appellants were common carriers of the tea, before the question of negligence was dealt with further.

Neilson K. C. and *E. F. Spence*, for the respondents. There were concurrent findings that the appellants were common carriers; the question whether a person is or is not a common carrier is one of fact: *Brind* v. *Dale* (1) *Belfast Ropework Co.* v. *Bushell* (2). The agreement between the appellants and the Railway Company shown by the letters, did not involve any stipulation that the flotilla should be reserved entirely for goods carried by the Railway Company, and there was no verbal evidence of any stipulation to that effect. The fact that the appellants allotted vessels for the purpose is not material. The transportation of the tea is not removed from the class of transactions which the appellants in their ordinary business carried on as common carriers.

Dunne, K. C, replied.

The judgment of their Lordships was delivered by

Nov. 23. LORD SHAW. These are consolidated appeals against decrees, dated the 30th November 1921, pronounced by the High Court of Judicature at Fort William in Bengal. These decrees affirmed seven decrees of Mr. Justice Rankin, dated the 19th January 1921.

(1) (1837) 8 Car. & P. 207. (2) [1918] 1 K. B. 210.

The action was directed by the respondents against the Assam-Bengal Railway Company as well as the present appellants, the India General Navigation and Railway Company. It was dismissed by consent against the former, called the Railway Company, and it proceeded against the latter, called the Shipping Company.

The plaintiffs' claim is for damages for the loss of certain tea, part of a consignment of their goods which in November 1915, was delivered by the respondents to the Railway Company for the purpose of transport from Assam to Chittagong for shipment to England. Consignments are in ordinary course thus taken and carried over all the Railway Company's own line without recourse to any other system of transport.

A section of the line, however, south of Lumding, in June 1915, broke down. It had broken down two years previously and arrangements had then been made for taking the goods by ships or flats from Gauhati on the Brahmaputra river down to Chandpur on the Meghna river. At the latter point the goods could again be put on rail and so reach Chittagong. This river service was performed both in 1913 and 1915 by the present appellants. The only bargain on the subject of the goods in the present case was contained in a single letter, dated the 11th June 1915, from the Traffic Manager of the Railway Company to the Agents of the Shipping Company and was to the effect that

"All tea from Upper Assam stations for Chittagong will be diverted "*viâ* Chaudpur and Gauhati. The division of the freight between the "Steamer Company and this Railway following the precedent of 1913."

No conditions of any kind, other than that, were either produced or proved.

What happened to the goods was that they were conveyed from Bordubi Road (Assam) by rail to Gauhati. The railway having broken down the goods

1923

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., v. DEKHARIA TEA COMPANY, LTD.

were there put on board the Steamship Company's flat *Cauvery* for carriage by river to Chandpur.

On the 21st December 1915, while the vessel was still lying at Gauhati, a fire broke out and certain of the tea was destroyed.

There were two questions in the case. First, whether the Steamship Company were liable to the respondents, the owners of the goods, in damages as a common carrier; and, second, whether if not so liable, they were liable at common law, by reason of the fire having been caused through their negligence. Their Lordships have not thought it necessary to deal with this second legal head of claim, the materials for which are in the evidence, because they are of opinion that the judgments pronounced by both the Courts below on the first point are clearly right, viz., that the Shipping Company in the circumstances described were under the law of India common carriers and answerable to the owner in damages as per the decrees.

It was quite clearly established, to use the language of their own witness, Parrot, one of their staff: "We are undoubtedly common carriers so far as the river portion of the journey is concerned." The case for the appellants, however, was that by reason of the special nature of the contract of carriage entered into in this case the denomination of common carriers could not apply to them nor the liability of common carriers attach.

There was considerable reference made to the law of England. Whether the result under that law would have been in anywise different from that arrived at is doubtful enough; but the reference was unnecessary, because the point to be decided arises under the law of India. The true question in the appeal simply is whether under the Carriers Act, No. III, which received the assent of the Governor-General in Council on the

14th February 1865, the definition of common carrier there mentioned covers the appellants *quoad*, the present transaction. That definition is to the following effect :—

"In this Act, unless there be something repugnant in the subject or context—'Common carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately."

It is not denied that the appellants were *de facto* "engaged in the business of transporting for hire property from place to place by . . . . . inland navigation." The challenge, however, is that this was not done "for all persons indiscriminately." There is no question raised as to the goods being beyond the appellants' carrying capacity; they in fact, receiving a large consignment, supplied the ships or flats to carry it. So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery.

In the present case all of these propositions are admitted; but it is said that there was here a contract of a special nature. The specialities in it were two, *first*, that the Shipping Company did in fact assign particular flats for the considerable block of business coming to them at Gauhati by reason of the railway break-down; and, *secondly*, that these flats were destined from Gauhati to Chandpur without calling at the ordinary intermediate ports. On the first of these

1923

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD, v. OKHARI TEA COMPANY, LTD.

points their Lordships would observe that there is no written proof in the case apart from the letter already referred to, which was simply to the effect that the rate for carriage would be the same as that charged in 1913. And as to special flats being employed there is no trace in the evidence that if there had been other customers' goods awaiting shipment for Chandpur and consigned to Chittagong, these could not and would not have been sent alone with the cargo taken over from the Railway Company. In short, the idea of this portion of the river carriage being a temporary and exclusive monopoly for one single customer on special terms entirely disappears.

On the second point, viz., that this was a through route, their Lordships fail to see how that circumstance decategorises the appellants from being common carriers under the statute, or relieves them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction, another and different type of business had been entered on.

When, for a particular contract, special terms are desired which involve a different category of liability, there is nothing to prevent that being secured; section 6 of the Indian Carriers Act can then be taken advantage of. The language of section 6 is as follows:—

"The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier . . . . . may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some persons duly authorised in that behalf by such owner, limit his liability in respect of the same."

The goods were accepted for delivery by the appellants without any such special signed contract for limitation of liability.

What is required in the case of a person who answers the definition under the Indian Carriers Act, viz., of transporting for hire goods from place to place, for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. The Judges in both Courts appear to have not only correctly looked at the case from this point of view, but to have been entirely right in their conclusion. The learned Rankin, J., puts the matter thus:—

"The only question is whether, because it was doing this particular set of journeys for the Railway Company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur, it was departing from its usual business, and engaging in a different type of business, viz., the business of a sub-contractor for the Railway in such special sense as to take it *quoad* these journeys out of the avocation of a common carrier. On the whole I think it was not."

Their Lordships agree that the question is correctly thus put in law and the proper answer given in fact.

The learned Sanderson, C.J., quotes the passage just given and agrees with it, as do their Lordships; and the learned Richardson, J., put this matter simply thus:—

"A common carrier cannot divest himself of his responsibilities as such without satisfying the Court that in the particular transaction he acted in some other capacity, and in this case, in my opinion, the appellant Company have not discharged the burden which lay upon them."

The above also appears correct.

As already mentioned all other points in the case have disappeared.

1923

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., v. DEKHARI TEA COMPANY, LTD.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors for the appellants: *Morgan, Price, Gordon & Marley.*

Solicitors for the respondents: *Sandersons & Orr Dignams.*

A. M. T.

APPELLATE CIVIL.

Before Chatterjea and Panton JJ.

1923

July 10.

BIJOY CHAND MAHATAB

v.

AKHIL BHUIYA.*

Landlord and Tenant—Presumption of uniform payment—Bengal Tenancy Act (VIII of 1885), s. 50, cl. (2).

Section 50, clause (2) of the Bengal Tenancy Act, was not intended to apply to cases where under a custom a tenant gets an abatement of rent occasionally from the landlord and the landlord is not entitled to realise the full rent on the happening of certain events.

Radha Gobind Roy v. *Kyamutoollah Talookdar* (1) distinguished.

SECOND APPEALS by Sir Bejoy Chand Mahatab, Maharajadhiraj of Burdwan, the plaintiff.

These 70 appeals arose out of as many proceedings under section 105 of the Bengal Tenancy Act taken by the same landlord for settlement of fair rents. The tenants were recorded in the record-of-rights as settled raiyats. The landlord prayed for additional

* Appeals from Appellate Decrees, Nos. 2601, 2602, 2603, etc., of 1920 against the decrees of R. K. Sen, 2nd Additional Special Judge of Midnapur, dated July 26, 1920, affirming the decrees of Akshoy Kumar Mukherjee, Assistant Settlement Officer of that district, dated April 14, 1919.

(1) (1874) 21 W. R. 401.