APPELLATE CIVIL.

Before Rankin C. J. and Mitter J.

MAHIM CHANDRA SARKAR

1927

July 29

v.

EAST INDIAN RAILWAY COMPANY.*

Railway Company—Liability—Compensation—Obligation to follow change of instruction by consignor—Right of purchaser from consignor to sue railway company.

Where a railway company received goods for its own use, but notified to the consignor that the goods were unsuitable for use by the company and thereafter the company accepted a change of in-truction from the consignor as regards the delivery of the goods to a third person, the company was bound to deliver the goods to the consignor or his nominee and had no right to convert the goods to its own use.

A purchaser of the goods from the consignors is entitled to sue the railway company for loss of the goods.

APPEAL FROM APPELLATE DECREE on behalf of the plaintiff.

This appeal arose out of a suit brought by the plaintiffs for recovery of damages from the defendants on the allegation that he purchases coal from defendant No. 3 from time to time, that on the 13th March, 1922, the said defendant consigned one wagon of coal through Messrs. Dana Premji & Co. to be delivered at Kushtia through the railway of the defendants Nos. 1 and 2, but that the consignment was not delivered at Kushtia. The plaintiff, therefore, gave notices to those defendants, as well as to the

*Appeal from Appellate Decree, No. 2113 of 1925, against the decree of M. Osman Ali, Subordinate Judge of Nadia, dated June 29, 1925, modifying the decree of Jogesh Chandra Chatterji, Munsif of Kushtia, dated June 4, 1924.

Collector of Nadia, but did not get his money. Hence he claimed damages of Rs. 200 over and above the price of coal and the freight charges.

Defendants Nos. 1 and 2 denied the liability and stated *inter alia* that the plaintiff had no cause of action against them, nor *locus standi* to bring the suit. The other defendants supported the plaintiff.

The Munsif decreed the suit in part against defendant No. 2, the East Indian Railway Co., alone.

On appeal by that defendant, the Subordinate Judge modified the decree of the Munsif, decreed the suit for Rs. 557 odd against defendant No. 3, but dismissed it against other defendants.

Hence this appeal by the plaintiff in the High Court.

Mr. Khetra Mohan Ghose (with him *Babu Mohendra Kumar Ghose*), for the appellant. The defendent No. 3, Biswas & Co., had sold one wagon of coal to the plaintiff-appellant, who was a *bona fide* purchaser for value. The railway company issued a fresh invoice, S. C. Biswas of Biswas & Co. being mentioned therein as the consignee. This invoice was endorsed on the back to the plaintiff-appellant, who thus got the title to the wagon of coal. The railway company, however, failed to give delivery of the wagon and are bound to indemnify the appellant.

Babu Mrityunjay Chatterji (with him *Babu Biraj Mohan Roy*), for the respondent, Biswas & Co. Dana Premji & Co. consigned the wagon of coal to the Loco Foreman of the East Indian Railway Co. at Sahebganj. Thereafter they received a notice that the railway company had rejected the coal as unfit for their use. The effect of this rejection was that the title to the wagon of coal vested again in Dana Premji & Co., who were, therefore, entitled to sell the

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coal again to whomsoever they pleased, and they actually sold the coal to my clients, who acquired good title thereto. My clients again sold the coal to the plaintiff-appellant and instructed the railway company to rebook the wagon from Sahebganj to Kushtia. The railway company never intimated to any of the parties that they had used up the coal and there is nothing in the record to show that they had used up the coal before the sale by this respondent. And, even if they did, they had no right to do so, having rejected the coal previously—the title to the coal reverting to Dana Premji & Co. This respondent-company acquired good title by purchase from Dana Premji & Co. and were entitled to sue and thereby give good title to the plaintiff. The railway company further issued a fresh invoice in the name of the respondent-company, thereby accepting their position as mere carriers, and it is not open to them now to say that they were purchasers and had used up the coal by virtue of their purchase. If, after all this, the railway company failed to deliver the coal to the plaintiff, the plaintiff's relief lay against the railway company and not, as the Subordinate Judge seemed to think, against this respondent company.

Mr. Amarendra Nath Bose (with him *Babu Ambikapada Chaudhuri*), for the respondent, East Indian Railway Company. Dana Premji & Co. sold the wagon to the railway and the railway had used up the coal; and unless it could be shown that the railway had not used it up before the sale to the plaintiff, no title passed to the plaintiff, as the subject-matter of the sale to the plaintiff had already ceased to exist, and the plaintiff is not entitled to recover the coal. The plaintiff has no *locus standi* to bring the suit. He was neither the

consignor nor the consignee. Further, there was no delivery of a wagon-load of coal to the railway company for the purpose of carriage to Kushtia. The coal had been booked to Sahebganj, where it had been used up and there was nothing to send to Kushtia and the railway company can in no way be liable to the plaintiff. Then again, S. C. Biswas had no right to endorse over the railway receipt in favour of the plaintiff and the plaintiff acquired no title thereby.

RANKIN C. J. In this case, I am of opinion that the appeal must be allowed. The judgments of the Courts below are singularly deficient in dates of the material transactions, but the facts appear to be as follows: Dana Premji & Co. consigned a wagon of coal from Pathardihi station to Sahebganj station on the East Indian Railway. This coal was consigned to the Loco Foreman of the East Indian Railway Company and was intended for use by the East Indian Railway. That consignment was on the 9th of February, 1922, and there was a consignment note. The next thing which happened, so far as Dana Premji & Co. are concerned, is that they received a notice from the East Indian Railway Company stating that that coal was unsuitable for their purposes and that it was rejected. The date of that notice is not given in the judgments. The next thing that happened was that they resold that wagon of coal to defendant No. 3. Defendant No. 3, at some date before the 13th of March, 1922, sold it again to the plaintiff, the plaintiff being a person at Kushtia on the Eastern Bengal Railway. The exact dates of the contracts between Dana Premji & Co. and Biswas, the defendant No. 3, and between Biswas and the plaintiff are not given, but they must have taken place before the 13th of March 1922.

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It now appears, according to the case of the East Indian Railway, that although the wagon of coal was rejected, the railway company nevertheless retained it and were proposing to use it. They say that the rejection was a mistake; but I need not point out that however much the railway company might have been mistaken, their refusal addressed to Dana Premji & Co. to accept this wagon of coal put Dana Premji & Co. in the position of being revested with the ownership of the coal and entitled to resell it. The property in that coal would pass upon such a resale. It is said for the railway company that the coal came to Sahebganj and was immediately sent on to Jamalpur in order to be used. When it was used, by whom it was used and when it ceased to be in existence, there is no evidence at all. It may have been about a week or a month on one of the railway company's sidings or it may have been immediately consumed. On this point there appears to be no evidence at all, to which the learned advocates on either side are able to point, nor is there any mention of any finding as to this matter or any details about it given in the judgments.

What happened was this that, in these circumstances, the railway company issued a new railway receipt at Sahebganj It is a railway receipt or "fresh invoice issued in supersession of old invoice "No. 44 of the 9th of February, 1922 to Sahebganj" and on that invoice the senders are Dana Premji & Co. and the consignee is S. C. Biswas. The address for carriage is Kushtia. This railway receipt was endorsed on the back by S. C. Biswas to the plaintiff. Plaintiff says that he has paid Biswas for this coal and there is no finding to the contrary, nor does it matter.

The plaintiff brings this suit against the East Indian Railway Company, amongst other defendants,

and the question is whether, in these circumstances, the East Indian Railway Company has any answer to the plaintiff. In my opinion it has none.

The Courts below have differed in opinion. The learned Subordinate Judge of Krishnagar has taken the view, first, that the plaintiff has no *locus standi*. He has also been under some misapprehension, as is now admitted, upon facts, and says "it appears that "the wagon was first booked to Sahebganj and then "was re-booked to Jamalpur, but, as a matter of fact, "the coal was used up at Sahebganj. So that there was "nothing to send to Kushtia. There was only a paper "transaction regarding the fresh invoice No. 10" That, as is now admitted, is an entire mistake.

Mr. Bose, on behalf of the East Indian Railway Company, contends that the plaintiff has no *locus standi* and that unless it can be shown that this coal was not consumed before the 13th of March, 1922 there was no contract vesting the coal in the plaintiff, and the plaintiff cannot recover it. It is to be observed that the railway company entered into this matter originally, not merely as carriers, but as purchasers. The coal was delivered to them by their own railway. They rejected the coal and the coal again became the property of Dana Premji & Co. They were as people who had rejected that coal under an obligation to deal properly with Dana Premji & Co's property. Dana Premji & Co. required them to reconsign the coal to Biswas. That is the basis of the document, the invoice—to which I have already referred. This is an invoice in supersession of the original invoice. The railway company says by it: "We received certain coal at Pathardihi on "the 9th February and we now undertake as carriers "to send that to Kushtia to the order of S. C. Biswas". That is the meaning of it. Dana Premji and Co.

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were quite entitled to give them that instruction and that instruction they accepted as carriers. S. C. Biswas, the nominal consignee, was a servant of the real consignee, the defendant No. 3, J. N. Biswas. I need not say that the fact that he had no title of his own and was a bare trustee for J. N. Biswas does not make him any the less the proper person to endorse over the railway receipt to the plaintiff and the plaintiff gets as good a title in that way as he could have got. Indeed, if it had been endorsed over by J. N. Biswas, then the transaction would have been irregular, because it was for the consignee to make the endorsement. In these circumstances, I am of opinion that the plaintiff has every right to sue the railway company for the coal that has not been delivered. He had a perfectly good contract with Biswas, who had a perfectly good contract with Dana Premji & Co. as regards a specific ascertained wagon-load of coal. It is not shown, nor is there any evidence that can be pointed out, that this coal ceased to exist on the 13th of March, 1922. I am clearly of opinion that the burden of proving that it ceased to exist rests upon the person who asserts that proposition. Whether it ceased to exist or not, in my opinion, makes no difference to the present case, because the railway company on these facts received the coal on the 9th of February, upon certain instructions. They accepted, as they were bound to do, a change in that instruction, and they were under an obligation to deliver that coal to Dana Premji and Co. or their nominee and they had no right to use it after they had rejected it. It seems to me that it is an ordinary case by a purchaser of coal against a railway company who has lost the coal or, as in this case, has converted the coal to its own use by mistake.

In my judgment, the judgment of the trial Court is right. The decree of the lower Appellate Court is

set aside and that of the trial Court is restored with costs against the East Indian Railway Company in this Court and in the lower Appellate Court.

MITTER J. I agree.

Appeal allowed.

S. M.

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RANKIN C. J.

APPELLATE CIVIL

Before Page and Graham JJ.

DURGA SANKAR SARMA ROY

v.

KAMINI KUMAR SARMA ROY.*

1927

Aug. 2.

Ouster—Exclude and Oust, meaning of—Joint possession of co-sharers.

To hold that a co-sharer is in possession of part of the common land to the exclusion of the other co-sharers is much the same thing in the eye of the law as saying that he has ousted his co-sharers, for to exclude is to "keep out", to oust to "put out" of possession.

If one co-sharer separately occupies a portion of the common land without objection from his co-sharers, and with their express or implied consent, he is not to be subjected to a suit in which the plaintiffs claim joint possession of the plot of which the defendant is in sole occupation. If the separate occupation of the defendant is with the tacit or express assent of his co-sharers, and the co-sharers are dissatisfied with the manner in which the joint land is being held in possession by the tenants in common, their proper remedy is to bring a suit for partition. On the other hand, if the separate occupation of a co-sharer is continued after objection from any of his co-sharers and in defiance of their claim to be in joint

* Appeals from Appellate Decrees, Nos. 571 to 573 of 1925, against the decree of Ram Chandra Banerjee, Subordinate Judge, Sylhet, dated Nov. 4, 1924, modifying in S. A. 571 and confirming S. A. 572 and 573 of 1925, decree of Debendra Nath Sen Gupta, Munsif, Habiganj, dated June 1, and 15, 1923.