CIVIL REVISION.

Before Graham and Mitter JJ.

KAJORA COAL CO., LTD.

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

1929

Dec. 11.

Carrier—Contract of carriage by railway how construed—"To pay" invoice, consignor's liability under—Consignee, when liable—Indian Railways Act (IX of 1890).

The person primarily liable for freight is the consignor and the consignee as such is not liable to pay freight payable at destination, when he is not a party to the contract of carriage. The contract is contained in the invoice and intention of the parties must be determined by reference to it.

If the railway company has full knowledge that the consignor is acting merely as agent for the consignee, the liability for the freight would be fastened on the latter.

The Great Western Railway Company v. *Bagge & Co.* (1) and *Secretary of State for India in Council* v. *Ganji Dosa* (2) followed.

Brandt v. *Liverpool, Brazil and River Plate Steam Navigation Company, Limited* (3) distinguished.

CIVIL RULE obtained by the defendants.

The facts of the case were as follows. The Kajora Coal Co., Ltd. despatched nine consignments of coal from the Ondal railway station of the East Indian Railway, to be delivered to the New Eastern Coal Agency Co., Ltd., at their depot at the Sealdah railway station, booked under a "To pay" invoice. The railway administration made over the consignments without realising the freight. The Secretary of State, as owner of the railway, then brought a suit for Rs. 708-15 as. against the New Eastern Coal Agency, the consignee, alleging that the coal was consigned on the stipulation that the freight was to be paid at

*Civil Revision, No. 915 of 1929, against the order of D. Mukherjee, Judge, Court of Small Causes (Sealdah), dated March 27, 1929.

(1) (1885) 15 Q. B. D. 625. (2) (1929) I. L. R. 8 Pat. 669.
(3) [1924] 1 K. B. 575.

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Sealdah at the time of taking delivery, which was not done. The plaint was subsequently amended by adding the Kajora Coal Company, the consignor, as defendant No. 2 and a decree was asked for against both or such of the defendants as were found liable for the freight. The defence of the defendant No. 1 *inter alia* was that the defendant No. 2, the consignors alone, were liable, as they alone were a party to the contract for carriage with the plaintiff; while the defence of the defendant consignor was that the arrangement under the "To pay" invoice was that the defendant No. 1 was to pay the freight before taking delivery, which the plaintiff had neglected to realise at the time and they were, therefore, not liable. The Small Cause Court Judge, who tried the suit, held that the person primarily liable to pay the price of the carriage was the person with whom the carrier contracted, and decreed the suit with costs against the 2nd defendant, the consignor, dismissing it against the other defendant.

The defendant No. 2, thereupon, moved the High Court and obtained this Rule.

Mr. Bankimchandra Mukherji and *Mr. Hariprasanna Mukherji*, for the petitioner.

Mr. Charuchandra Biswas, for the opposite parties.

GRAHAM J. This Rule was granted at the instance of the petitioner, the Kajora Coal Company, to show cause why a decree of the Small Cause Court Judge of Sealdah, directing payment by the said company of a sum of Rs. 708-15 with costs to the opposite party No. 1, the Secretary of State for India, being the amount of freight alleged to be due on account of certain consignments of coal, should not be set aside.

The facts shortly stated are as follows:

The Kajora Coal Company was in the habit of sending consignments of coal to the New Eastern Coal Agency, Ltd., at the latter's depot No. 20 at Sealdah railway station. It was not apparently disputed at the trial that nine such consignments were despatched,

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nor does it seem to have been seriously disputed that the freight was not paid. Where the parties joined issue was that the petitioner the Kajora Coal Company claimed that the coal was despatched under "To pay" invoices, and that the freight was payable, not by that company, but by the consignee, the New Eastern Coal Agency, upon delivery to them. It was further claimed that, although under the said system the railway company was bound to realise the freight from the consignee before delivery, the railway staff, through negligence, omitted to do so, and that that being so, they had no claim to recover the freight from the Kajora Coal Company.

The railway company pleaded, on the other hand, that they were entitled to recover the freight from one or both of the defendants.

The learned Subordinate Judge found that the coal was actually delivered to the agents of the New Eastern Coal Agency, at their depôt at Sealdah, without realising the freight, and that it did not appear that there was any agreement that the consignee was to pay the freight on delivery. He further held that the person primarily liable to pay the freight was the person with whom the carrier company had contracted, and, in that view of the matter, gave a decree against the consignor, the Kajora Coal Company.

On behalf of the petitioner, that decision is assailed as being erroneous in law, and the argument has been repeated that the freight ought to have been realised from the Eastern Coal Agency Company, as it was payable on delivery of the coal to them, and that the railway company ought not to have parted with the coal until its charges had been paid. This defence, however, is demolished by the finding of fact arrived at by the learned Subordinate Judge to the effect that it did not appear that the consignee was to pay on delivery, and that, that being so, the Kajora Coal Company, having contracted with the plaintiff for the carriage of the coal, must be held liable to pay

the freight. To this, it is replied, on behalf of the petitioner, that the learned Subordinate Judge, in so finding, has gone *contra* to the admission of the Secretary of State in his plaint, and, in support thereof, reference was made to paragraph 5 of the plaint. The plaint, however, must be read as a whole, and in paragraph 4 it is distinctly stated that the consignors stipulated to pay the freight at the time of delivery, but did not do so.

It seems to me that the case really turned upon the question whether any express contract had been proved, whereby the consignee alone was to be liable to pay the freight, and that, in the absence of any such proof, the plaintiff's suit was bound to succeed. This view finds support in the remarks of Lord Coleridge in the case of *The Great Western Railway Company* v. *Bagge & Co.* (1), and in the commentary in Maclachlan's Law of Merchant Shipping, Chapter X, page 396.

In my opinion, the case has been rightly decided, and the remarks which were made by Lord Coleridge in the case referred to above, animadverting upon the conduct of the consignors in that case, in disputing their liability, apply, with equal force, to the petitioners in this case.

The Rule must be discharged with costs—hearing-fee, three gold mohurs.

MITTER J. Messrs. Kajora Coal Company, Limited, despatched from the Ondal railway station of the East Indian Railway nine consignments of coal to the New Eastern Coal Agency Company, Limited, under "To pay" invoices, to be delivered to the latter at their depôt at Sealdah railway station. The railway administration did not realise the freight from the consignee and made over the consignments without realising the same. The Secretary of State, as the owner of the East Indian Railway Company, brought an action against the consignee (defendant

(1) (1885) 15 Q. B. D. 625, 627.

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No. 1) for recovery of the freight. In paragraph 4 of the plaint, it was distinctly alleged that the *consignors of defendant No. 1 booked* the consignment of coal from Ondal and Jheria, stipulating to pay their freight at Sealdah, at the time of delivery and that they did not pay the freight due from them at the time of taking delivery, and that the freight due from them was Rs. 779-3. Subsequently, this plaint was amended and the consignor defendant No. 2 company were impleaded in the suit and the plaintiff asked for a decree against the two defendants, or such of them as may be held liable.

The Small Cause Court Judge of Sealdah, in a careful judgment, decreed the suit in part against defendant No. 2 company, that is the consignor, and dismissed the suit against defendant No. 1. Defendant No. 2, accordingly, obtained the present Rule for revision of the decree of the Small Cause Court Judge.

It has been strenuously argued that there is no foundation for the liability of defendant No. 2 for the freight, as the goods were sent under the "To pay" system and the railway administration should look to the consignee for the freight and indeed should not have delivered the goods to the consignee before recovering the freight. It is argued that the consignor was really acting as the agent for the consignee and, therefore, the consignee is liable.

In the course of the argument, I pointed out to the learned advocate for the appellant that, as appears from the invoice order, the contract was with the consignor and *prima facie* he was the person who was liable. It was said that the words "To pay" in the invoice suggested that the freight was to be paid on delivery by the "consignee." That is not the contract. It does not say that the freight was to be paid by the consignee. Even assuming there was such a stipulation, the consignee could very well say that he was not bound to pay, as he never entered into a contract with the plaintiff; and the suit could only be

based on contract. It was sought to supplement the contract contained in the invoice by certain rules of the railway administration, to the effect that the freight was to be paid before delivery apparently by the consignee. But this is not permissible, for the contract is contained in the *invoices* and intention of the parties must be determined by reference to them. It may be that under the rules, railway companies always can and do realise freight, either when the goods are delivered by them to the consignee or when the goods are delivered to them. If the consignee was not the contracting party, one is in search for an intelligible principle under which the consignee is to be made liable. The learned advocate has failed to satisfy us that there is any principle on which to rest the liability on the consignee. If the facts of this case established that the railway company had full knowledge that the defendant No. 2 (the petitioner before us) was acting merely as agent for defendant No. 1, then liability for the freight would be fastened on the latter. Reference may be made in this connection to *Dickenson* v. *Lano* (1). Ordinarily primarily the contracting party is liable. It is now fairly settled in England that the person who is primarily liable for the freight is the consignor and that the consignee is not liable as such to pay freight since he is not a party to the contract of carriage. As Lord Blackburn put it in *Sewell* v. *Burdick* (2), "I do "not think that, either at the trial or on the argument, "it was at all disputed that at common law the remedy "of the ship-owner under a bill of lading was by "enforcing his lien upon the goods, or by bringing an "action on the contract against any one who, at the "time when the goods were shipped, was a party to "the bill of lading, either as being on the face of it "a contracting party, or as being an undisclosed "principal of such a party. In either of these cases "he might be sued as having been from the very "beginning a party to the contract." It has been held that since the railway administration has a right to

(1) (1860) 2 F. & F. 188.

(2) (1884) 10 App. Cas. 74, 91.

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withhold delivery until the freight has been paid, the receipt of the goods by the consignee in such a case, though it does not of itself create any obligation to pay freight, may amount to evidence of a new contract distinct from the contract of a carriage, whereby the consignee, in consideration of the railway company giving up his lien, agrees to pay him his freight. See *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Company, Limited* (1). But whether this new contract exists or not is to be determined by the circumstances of each particular case. But in the present case, no such contract could be inferred, for the conduct of the consignee does not lead to the inference that the receipt of the goods was in pursuance of the new contract and not merely in discharge of his duty to his principal. It is said that such a contract must be inferred, as a concession was given to defendant No. 1 of their not being required to pay freight on delivery and this amounted to a new contract, so as to make the defendant No. 1 liable and to exonerate defendant No. 2's liability. In *The Great Western Railway Company* v. *Bagge, & Co.* (2), even where the consignor stated in the contract that the freight was to be paid by the consignee, the consignor was held liable. It is true, as pointed out by Lord Coleridge in this case, that in every case it must be a matter of construction of contract. In the case before us, there is nothing in the invoice to say that the "consignee" was to pay the freight and the learned advocate had to fall back on the rules of the railway company to supplement the contract, a course which is opposed to all canons of construction. Reliance was placed on *Drew* v. *Bird* (3), but this case was not followed in *The Great Western Railway Company* v. *Bagge & Co.* (2). The petitioner in effect says that sue the defendant No. 1, with whom you have not a contract, but do not sue me, with whom you have the contract. He cannot be heard to say this. The view we take has been taken

(1) [1924] 1 K. B. 575. (2) (1885) 15 Q. B. D. 625.
(3) (1828) 1 Mood. & M. 156.

by Mr. Justice Fazl Ali of Patna High Court in *Secretary of State for India in Council* v. *Ganji Dosa* (1), where the learned Judge has remarked on the paucity of Indian decisions on the point and has reached the same conclusion, at which we have arrived, after a review of the authorities in the English Courts.

For these reasons, I agree with my learned brother in discharging the Rule.

Rule discharged.

A. A.

(1) (1929) I. L. R. 8 Pat. 669.