APPEAL FROM ORIGINAL CIVIL.

Before Costello J. and MacNair J.

1937
—
April 30;
May 3.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

GOLAB RAI PALIRAM.*

Carrier—Common carrier—Railways—Limitation—Indian Limitation Act (IX of 1908), Sch. I, Arts. 30, 31—Indian Contract Act (IX of 1872), ss. 151, 152, 161—Carriers Act (III of 1865), s. 2—Indian Railways Act (IX of 1890), ss. 3(6), 72—Indian Railway Board Act (IV of 1905).

Taking a broad definition of "carrier", railways, whether controlled by the State or not, can quite accurately be described as carriers, even though for the purposes of the Carriers Act they are not common carriers.

The word carrier in Art. 30 of Sch. I to the Limitation Act is of a wider meaning than the expression "common carrier," and it is wide enough to cover the case of a railway owned or controlled by Government, which undertakes to carry goods belonging to the public from one place to another.

Article 30, therefore, applies to State-owned railways, for it would not be right to interpolate into Art. 30 the qualifying restriction implied by the word "common" as applied to carriers.

Mylappa Chettiar v. *British India Steam Navigation Company, Ltd.* (1); *Footwear* v. *N. W. Railway* (2) and *Alamgir Footwear and Co.* v. *Secretary of State* (3) referred to.

APPEAL from a decree of Lort-Williams J. preferred by the defendant.

On March 17, 1927, the plaintiff delivered to the Eastern Bengal Railway administration 642 bales of jute for carriage from Poradah Junction to Cossipore Road. Part of the goods was destroyed by fire on March 21, 1927, owing, as the plaintiff alleged, to the misconduct of the servants of the railway administration; the rest was delivered on

*Appeal from Original Decree, No. 1 of 1937, in Original Suit No. 271 of 1930.

(1) [1918] A. I. R. (Mad.) 341. (2) [1933] A. I. R. (All.) 348.
(3) [1933] A. I. R. (All.) 466.

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March 22, 1927, on which date the plaintiff gave notice in writing of his claim for Rs. 11,000 as compensation, and on May 20, 1927, a further notice to the Secretary of State for India in Council and demanded payment. Plaintiff also gave the notice required by s. 80 of the Code of Civil Procedure and filed the suit, from which this appeal has arisen, on the Original Side of the Calcutta High Court after obtaining leave under cl. 12 of the Letters Patent.

On May 23, 1930, Lort-Williams J. dismissed defendants' application (on the summons) praying that the leave already given under cl. 12 might be revoked and that the plaint ought to be struck out. On November 9, 1936, Lort-Williams J. delivered the following judgment:—

Neither party wishes to adduce any evidence. Damages, if any, have been agreed at Rs. 8,500. No further argument has been offered, because learned counsel on behalf of the Secretary of State has nothing to add to his previous argument.

In these circumstances I see no reason to alter the opinion which I have already given in my judgment, dated May 23, 1930.

There will be a decree in favour of the plaintiff for Rs. 8,500 with costs of the suit, costs of the appeal and reserved costs, if any.

This delay of nearly six and a half years was caused by an appeal having been preferred against the order of Lort-Williams J. dated May 23, 1930. The Court of appeal, however, remanded the matter to be dealt with when the suit came on for trial in the ordinary course, but Lort-Williams J's. new judgment of November 9, 1936, was merely:—

I see no reason to alter the opinion which I have already given in my judgment, dated May 23, 1930.

Against this judgment and decree of Lort-Williams J. dated November 9, 1936, the Secretary of State for India in Council, having its office amongst other places at No. 3, Kailâ Ghât Street in Calcutta, preferred this appeal under s. 15 of the Letters Patent, which, though in form an appeal

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against the judgment of Lort-Williams J. dated November 9, 1936, in substance was really an appeal from his judgment dated May 23, 1930, and only the question of limitation was involved in this appeal.

Sir Asoka Roy, Advocate General, S. M. Bose, Standing Counsel, and *P. K. Day* for the appellant.

J. N. Majumdar and *M. N. Ghose* for the respondent.

COSTELLO J. This is an appeal against a judgment and decree of Lort-Williams J. Two points, broadly speaking, were put forward on behalf of the defendant appellant and both of them were in the nature of a demurrer. The first has relation to the question of jurisdiction of this Court to entertain the suit at all, for that the defendant does not carry on business within the jurisdiction of this Court, and that the requirements with regard to the notice provided for by s. 77 of the Indian Railways Act, 1890, which has to be served by the plaintiff before making his claim, did not accurately describe the cause of action so as to bring the matter within the territorial jurisdiction of this Court. The other point was one of limitation.

It is contended on behalf of the defendant appellant that Art. 30 of the first schedule to the Limitation Act, 1908, applied to the circumstances of this case. There is no doubt that if that contention is correct, and if Art. 30 does apply to this case, then the plaintiff is unable to succeed, because it is quite clear that the suit would be barred by lapse of time.

The learned Judge came to the conclusion that the contention of the defendant as regards the point of limitation could not be sustained and that the Article governing the facts of this matter is Art.

115 of the first schedule to the Limitation Act of 1908. This matter has had a somewhat curious history with the result that to-day we are in effect sitting in appeal as regards a judgment delivered by Lort-Williams J. as long ago as May 23, 1930. The judgment delivered by Lort-Williams J. on May 23, 1930, was taken in appeal and came before the late Chief Justice of this Court Sir George Rankin and Pearson J. on April 16, 1931, and the Court of appeal then held that the questions discussed before Lort-Williams J. were of such importance that they should not have been dealt with on a mere application to revoke leave granted under cl. 12 of the Letters Patent. The matter had originally come before Lort-Williams J. upon an application of that kind. The Court of appeal remanded the matter to be dealt with when the suit came on for trial in the ordinary course. Thus it came about that the points dealt with by the learned Judge in his judgment of May 23, 1930, came again before the same Judge (as it happened) on November 9, 1936. On that date, however, neither party availed himself of the opportunity of giving evidence as contemplated by the Court of appeal, when they declined to adjudicate upon the matter in 1931. On November 9, 1936, therefore, the position, to all intents and purposes, was precisely the same as when the matter originally came before Lort-Williams J. on May 23, 1930; and so it is not surprising, in the circumstances, that the learned Judge on November 9, 1936, said, "I see no reason to alter "the opinion which I have already given in my "judgment, dated May 23, 1930". It follows, therefore, as I have already indicated, that although in form this is an appeal against the judgment of the learned Judge dated November 9, 1936, in substance it is an appeal from the judgment of the learned Judge given on May 23, 1930.

We have now only to consider the question of limitation for that was the only point determined

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by the learned Judge, and it is the only point which has been argued before us. All that we have to decide is whether or not the Secretary of State for India in Council can take advantage of the provisions of Art. 30 of the first schedule to the Limitation Act, 1908, and avail himself of that provision as a plea in bar to the plaintiffs' claim. The learned Judge came to the conclusion that Art. 115 was the Article most appropriate to the facts of this case. He based his decision upon this, that it hardly could be intended that a railway administration or Government should be absolved from the onerous responsibilities of common carriers, and yet at the same time have the benefit of the short period of limitation expressly provided by Art. 30 for traders who are burthened by the law with such obligations. The learned Judge took the view that, as the responsibility of the railway administration for loss of, and damage to, goods is regulated by s. 72 of the Indian Railways Act, 1890, which puts a railway company into the position of a bailee under ss. 151, 152 and 161 of the Indian Contract Act of 1872, and the railway administration has not the liability of common carriers, it must have been intended by the legislature that Arts. 30 and 31 should not apply but should only be available to persons who are in the position of common carriers.

The learned Advocate-General has reminded us of the well-known observations of Lord Esher with regard to the position of a Court which is being invited to express an opinion on the provisions of statutes or other enactments and it is argued that it is clearly not the function of the Court to make endeavours to get behind the precise language of an enactment for the purpose of ascertaining what might be presumed to be the intention of the legislature at the time when the enactment was made. In the course of the argument, I quoted the words of Lord Bacon when he said that the Court has to *jus dicere* and not *jus dare*. We have to interpret

the statute as we find it and not put a gloss upon it or read into it something which is in fact not there. The precise words of Art. 30 are these:—

> Against a carrier for compensation for losing or injuring goods—the period described is one year from the date when the loss or injury occurs.

The language of Art. 31 is this:—

> Against a carrier for compensation for non-delivery of, or delay in delivering, goods—one year, when the goods ought to be delivered.

Lort-Williams J. was of opinion that the word "carrier" should be read as if it was exactly the same thing as the two words "common carrier". Mr. Majumdar has invited us to say that that is the correct interpretation of the Article. In other words it is contended on behalf of the plaintiff-respondent that we ought to place before the word "carrier" the qualifying adjective "common", so that the operation of both the Arts. 30 and 31 should be restricted to those cases in which the defendant is in law a common carrier. Mr. Majumdar sought to fortify his argument by an historical survey of various statutes or Acts of the legislature relating to railways, relating to limitation and relating to carriers. Put quite shortly, that part of Mr. Majumdar's argument which is based on chronological and historical review of the enactments of the kind I have enumerated comes to this that until the Carriers Act of 1865 came into existence there was no specific provision in the Limitation Act relating to suits against carriers, and it was only after 1865 actually in the year 1871 by the Limitation Act of that year that for the first time there came into existence a definite provision with regard to limitation in relation to suits of that character. That provision was contained in Arts. 36 and 37 of the Schedule to the Act of 1871. Subsequently those two Articles became Arts. 30 and 31 of the Limitation Act of 1877.

The other fact, which Mr. Majumdar thought of considerable importance for the purpose of his

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argument, was that an amendment was made touching the question of limitation in an Act of the year 1899—Act X of that year—which was described as an Act to Amend the Law Relating to Carriers and which in fact added s. 10 to the original Carriers Act of 1865, and which, at the same time, by s. 3 of Act X of 1899 transferred Arts. 30 and 31 of the second schedule of the Limitation Act of 1877 from part V to part IV, thereby reducing the period of limitation from two years as it was then to one year as it became from the year 1899 onwards. At the same time s. 3 of Act X of 1899 made a slight alteration, or rather made an addition to Art. 31 by putting in the words "non-delivery".

From the circumstances I have just mentioned, Mr. Majumdar asked us to draw the inference that the word "carrier" as used in Arts. 30 and 31 must be looked at in the light of the Carriers Act, 1865. Therefore, it can only have application in the case of common carriers. It is quite clear that a railway company, as regards its responsibility towards persons consigning goods, is answerable only to the extent provided for by s. 72 of the Indian Railways Act, 1890, which repealed the previous Act of 1879 which Act had contained a provision that the Carriers Act of 1865 had no application to railways. Mr. Majumdar, however, rests his argument ultimately and indeed fundamentally upon the fact that in s. 2 of the Carriers Act of 1865 there is a definition which seems to put the Government as a carrier outside the category of common carriers. That however, in my opinion, is of little importance and indeed of no importance at all because, as Mr. Majumdar agrees, railways—whether they are owned and controlled by the Government or whether they are not, that is to say, whether they are State railways or non-State railways—are all in the same position, as regards their responsibility as carriers of goods. Taking, therefore, a broad definition of "carriers"—we find it for example in

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Wharton's Law Lexicon—one can scarcely doubt that railways whether State-controlled or not, can quite accurately be described as carriers, even though for the purposes of the Carriers Act they are not common carriers. It seems to me that it would be a misuse of language to say that railways which carry goods for reward are not carriers, even though it is quite accurate to say that for the purposes of the Carriers Act of 1865 and any amendment of that Act they are not common carriers. In my opinion, it would not be right that we should interpolate into Art. 30 the qualifying restriction implied by the word "common" as applied to carriers. There is a case, *Mylappa Chettiar* v. *British India Steam Navigation Company, Ltd.* (1), which is very material to the present discussion. In that case the plaintiff had been the consignee of certain timber through the first defendant which was a firm of carriers by sea. The timber was consigned under a bill of lading. The second defendant was a firm which had a monopoly of landing all the goods from ships belonging to the first defendant but on receipt of separate charges from the consignee. It was held:—

(*i*) that there was a privity of contract between the consignee and the landing agents, the second defendants; (*ii*) that the case being one of continuous carriage of goods, the second defendant was a carrier though not a common carrier within the meaning of the Carriers Act of 1865, and (*iii*) that the suit against both the defendants was governed by Art. 31 of the Limitation Act.

This case is of importance for our purpose by reason of the second and the third points of the decision. Sir John Wallis, who was then the Chief Justice of the Madras High Court, says:—

The suit as against the first defendant is barred under Art. 31 according to the Full Bench ruling in *Venkatasubba Rao* v. *Asiatic Steam Navigation Company of Calcutta* (2).

Mr. Justice Kumaraswami Sastri says:—

There can be little doubt that the second defendant company are carriers though not common carriers within the meaning of the Carriers Act of 1865.

(1) (1917) 34 Mad. L. J. 553; [1918] A. I. R. (Mad.) 341.

(2) (1915) I. L. R. 39 Mad. 1.

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The word "carrier" in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire (Wharton Law Lexicon) and the second defendant falls within the definition.

Lower down on the same page the learned Judge observed :—

If, however, the second defendant company are carriers and I think they are, it is clear that Art. 31 of the Limitation Act would apply equally to them. It is not necessary for the purposes of Art. 31 that they should be common carriers.

With that proposition I respectfully and entirely agree. I am supported in that view of the matter by two cases which were decided in the High Court of Allahabad. Unfortunately, they do not seem to have found their way into the authorised law reports, but they are to be found in the All-India Reporter for the year 1933. The first of these two cases is *Footwear* v. *N. W. Railway* (1). The head-note of that case is as follows :—

It is true that Government is excluded from the definition of "common carriers" for the purpose of the Carriers Act, 1865, but Art. 31, Limitation Act, does not contain the expression "common carrier"; it only applies to a "carrier" and is therefore presumably of a wider meaning, and therefore Art. 31 does apply to a State railway.

Mr. Justice King in the course of his judgment said :—

The first point taken is that Art. 31 does not apply because Government is not a "carrier" within the meaning of Art. 31. It is pointed out that in s. 2, Carriers Act, 1865, the expression "common carrier" is defined as denoting 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.

I am disposed to adopt this language as being of direct application to the circumstances of this present appeal. The learned Judge continued :—

The argument is that Government is expressly excluded from the definition of "common carrier" ; so Art. 31 cannot apply to a suit against State railway. In this case it appears that both the railways concerned, namely, N. W. Railway and the G. I. P. railway are State railways. I think there is no force in this contention. It is true that Government is excluded from

(1) [1933] A. I. R. (All.) 348, 349.

the definition of "common carrier" for the purpose of the Carriers Act, 1865, but Art. 31, Limitation Act, does not contain the expression "common carrier"; it only applies to a "carrier" and is therefore presumably of a wider meaning. I see no reason on the face of it why it should not apply to a State railway and Art. 31 has been applied to the case of a State railway in *Radha Shyam Basak* v. *Secretary of State for India* (1). I may also note that in *Mutasadi Lal* v. *Bombay, Baroda and Central India Railway Company* (2), Art. 31 was applied to a suit of this nature although it does not appear that the railway in question was a State railway.

That decision was given on February 3, 1933. About a month later a similar point came before Mr. Justice Mukerji in the same High Court in the case of *Alamgir Footwear and Co.* v. *Secretary of State* (3). We need not pause to consider the precise facts of the case. It is sufficient to refer to a passage in the judgment at p. 467 where the learned Judge says this:—

> The next point urged was that even if the suit was time-barred against the railway administration it was not barred against the Secretary of State. This is a fallacious argument. The Secretary of State has been impleaded only as the owner of the railway concern and not in any other capacity.

Mr. Majumdar, in answer to a question from me said that he was not seeking to draw a distinction between the Secretary of State and the railway administration. He admitted that for the purpose of the present case the railway administration and the Secretary of State must be taken to be one and the same.

The learned Judge further said:—

> The argument that the Government is not a "common carrier" within the meaning of the Carriers Act (III of 1865) does not make the Secretary of State for India in Council incapable of taking advantage of Art. 31, Sch. 1, Limitation Act. There the word used is "carrier" and not a "common carrier." Then there is no warrant for the contention that the word "carrier" in Art. 31 has the same meaning as the words "common carrier" as defined in the Carriers Act.

This judgment is obviously very germane to the point now before us. It is with considerable regret that I find myself unable to agree with the view taken by Lort-Williams J. in the year 1930, but I think that upon the plain, unambiguous and

(1) (1916) I. L. R. 44 Cal. 16. (2) (1920) I. L. R. 42 All. 390.
(3) [1933] A. I. R. (All.) 466, 467.

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unequivocal words of the Article we have to construe, one is bound to hold that the word "carrier" is of a wider meaning than the expression "common "carrier" and that it is wide enough to cover the case of a railway owned or controlled by Government which took upon itself to carry goods belonging to the plaintiff from one place (Poradah Junction) to another (namely, Cossipore Road.)

It follows, therefore, that the defendant was in a position to avail himself of the protection afforded by Art. 30 or 31 or both. The appeal is therefore allowed and the suit dismissed, with costs throughout. The applicant will be entitled to retain his costs of the appeal and of the suit out of the moneys lying in Court.

McNair J. I agree with the judgment which has just been delivered by my learned brother and I have nothing to add.

Appeal allowed : Suit dismissed.

Attorney for appellant: *H. P. Sutcliffe.*

Attorney for respondent: *N. C. Seal.*

G. S.