APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919.
December, 10.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LIMITED, MADRAS (DEFENDANT), PETITIONER,

v.

MATTAI SUBBA RAO (PLAINTIFF), RESPONDENT.*

Railways Act, Indian (IX of 1890), sec. 72—Risk note—Consignment of goods—Loss, deterioration, or damage, meaning of—Liability of Railway Company—Insurers—Bailees—Competency of Company to contract for less liability than as bailees.

A consignor sent a bale of gunny bags through the defendant Railway Company. The risk note provided that the Company should not be responsible for any loss, destruction or deterioration of or damage to the consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of a Railway administration or to theft by or to the wilful neglect of its servants, etc. The bale was damaged by the dropping of a package of acid by the negligent act of the Company's servant. On a claim against the Company for damages, the latter pleaded that they were not liable on the ground, *inter alia*, that there was no 'loss' of the article consigned within the meaning of the risk note.

Held, that the plaintiff could recover, only if the bale of gunnies was lost, that is, entirely deprived of value.

The distinction between 'loss' and 'destruction, deterioration, and damage' pointed out.

It cannot be said that there is no loss if the outer cover which encloses a parcel is delivered, whatever may happen to the contents.

East Indian Railway Company v. *Nilakanta Roy*, (1914) I.L.R., 41 Calc., 576; *B.B. & C.I. Railway Company* v. *Ambalal Sewaklal*, Ind. Ry. Cas., 48 and C.S. 309 of 1914, Madras High Court (unreported), dissented from.

Per SESHAGIRI AYYAR, J.—The term 'loss' would include cases where the article consigned is lost to the consignor as such article or has lost its identity as such.

Asfar & Co. v. *Blundell*, [1896] 1 Q.B., 123 and *Hearn* v. *The London and South Western Railway Company*, (1855) 10 Exch., 793, referred to.

Under the Indian Law, a Railway Company has not the liabilities of an insurer, but only those of a bailee, and, under section 72 of the Indian Railways Act, can enter into an agreement limiting its responsibility, provided it is in a form approved by the Governor-General in Council.

Sheikh Mahamad Ravther v. *The British India Steam Navigation Co.*, (1909) I.L.R., 32 Mad., 95 (F.B.), commented on.

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* Civil Revision Petition No. 742 of 1917.

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Persons who undertake to do certain things and who employ servants to do those things must be held respon ible for the carelessness or negligence of those servants in the course of their employment.

Joseph Rand v. *Craig*, [1919] 1 Ch. 1, referred to.

PETITION under section 25 of the Provincial Small Cause Courts Act to revise the judgment and decree in S.C.S. No. 751 of 1916, on the file of the Additional District Munsif, Rajahmundry.

The material facts appear from the judgment of OLDFIELD, J. The risk note was as follows:—

Risk Note, Form B, dated 5th June 1916.

MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LIMITED.

RISK NOTE, FORM B.

(Approved by the Governor-General in Council under section 72 (2) (*b*) of the Indian Railway Act, IX of 1890.)

(To be used when the sender elects to despatch at a "Special reduced" or "Owner's risk" rate articles or animals for which an alternative "Ordinary" or Risk acceptance rate is quoted in the tariff.)

Cocanada station, 5th June 1916.

Whereas the consignment of 6 bales of gunnies tendered by me as per forwarding Order No. 576 of this date, for despatch by the Madras and Southern Mahratta Railway Company, Limited, or their transport agents or carriers to Rajahmundry station and for which I have received railway receipt No. 576 of same date, is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment. I/we, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway Company and all other railway administrations working in connexon therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Cocanada station to Rajahmundry station harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or one or more complete packages forming part of a consignment due either to the wilful neglect of a railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and

after transit over the said railway or other railway lines in connexion herewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment : provided the term 'wilful neglect' be not held to include fire, robbery from a running train, or any other unforeseen event or accident.

(Signature of sender in Telugu).

Chamier for the petitioner.—The Railway Company is not liable except for loss of the entire consignment. When the outer covering, such as the gunny that covered the articles packed, is delivered, there has been no loss within the meaning of the risk note. It has been so decided in *B.B. & C.I.Ry.* v. *Ambalal Sewaklal*(1), which view was followed in *East Indian Railway Company* v. *Nilakanta Roy*(2) and in a case in the Original Side of the Madras High Court decided by KUMARASWAMI SASTRIYAR, J.(3).

Secondly, there is no wilful negligence on the part of the Company's servants: see *Heaven* v. *Pender*(4). The onus of showing negligence is on the plaintiff. The decisions in *East Indian Railway Company* v. *Nilakanta Roy*(2) and *Hirji Khetsey & Co.* v. *B. B. & C. I. Railway Co.*(5) are distinguishable, as they are cases of liability as bailees under the Indian Contract Act, sections 151, 152, etc.; here, there is the risk note limiting the liability. See *Lewis* v. *The Great Western Railway Co.*(6) and *Asfar & Co.* v. *Blundell*(7).

Ramdoss for the respondent.—The word 'Loss' in the exception to the risk note includes destruction, deterioration and damage; general words following specific words ought to be restricted to the specific words. See Maxwell's Interpretation of Statutes (5th Edition), pages 537 and 538. 'Loss' is defined in the Century Dictionary as the generic word, of which destruction, deterioration, damage, and waste are species. See Wharton's Law Lexion, 4 Halsbury, 27.

'Loss' does not mean disappearance of the article. See as to losses under the Insurance law. Loss may be either partial or

(1) Ind. Ry. Cas., 48.
(2) (1914) I.L.R., 41 Calc., 576.
(3) C S. No. 309 of 1914.
(4) (1883) 11 Q.B.D., 503.
(5) (1915) I.L.R., 39 Bom., 191.
(6) (1877) 3 Q.B.D., 195.
(7) [1896] 1 Q.B., 123.

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total. If goods are not merchantable, it is loss. See Arnold on Marine Insurance, page 1266.

Even if the Railway Company are mere bailees and no insurers, they cannot contract themselves out of their liabilities even as bailees under the Indian Contract Act. Section 152 of the Indian Contract Act, i.e., the minimum liability; a Railway Company cannot in law contract for a less liability, though it may contract for a higher liability than that imposed by section 152 of the Act. See *Kariadan Kumber* v. *The British India Steam Navigation Co., Ltd.*(1). If the Company contract for a lesser liability, it will be ultra vires and void.

Chamier in reply.—The question of reasonableness of the rules made under the Indian Railways Act, sections 54 and 72, does not arise, as the rules after they are made are approved by the Governor-General in Council under the Act. The view of SANKARAN NAYAR, J., in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(2) is not accepted by the learned Chief Justice and WALLIS, J. (as he then was). 'Loss' means total disappearance in this risk note.

OLDFIELD, J.

OLDFIELD, J.—The decision of the second Additional District Munsif, Rajahmundry, comes before us under section 25, Provincial Small Causes Courts Act, IX of 1887. He has held the defendant Railway Company liable on a risk note in respect of one out of a consignment of bales of gunny bags, of which plaintiff was consignee. The risk note, Exhibit B, is in form B and is a contract by the consignor in consideration of the lower charge he has paid to hold the company

"Harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of a Railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connexion therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: *provided the term 'wilful neglect' be not held to*

(1) (1913) 25 M.L.J., 162. (2) (1909) I.L.R., 32 Mad., 95 (F.B.).

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include fire, robbery from a running train or any other unforeseen event or accident."

Two questions have been argued. Firstly, was the injury, which one bale admittedly sustained, due to the wilful neglect of the company's servants? Secondly, did that injury amount to loss within the meaning of the exception, which provides for the company's liability?

The first of these questions can be answered shortly in the affirmative. The lower Court held that there had been wilful neglect by the company's servants in (1) unloading inward goods on the outward platform, (2) placing a leaking acid package on the bale of gunnies. We cannot follow the first portion of this finding and confine ourselves to the second. Something has been said regarding the burden of proof. But it is unnecessary to discuss its incidence, because the company admitted in its written statement that the package of acid was dropped by its coolie and fell on the bale and defendants' first witness deposed to that effect. The acid according to the evidence had leaked on the shoulder of the coolie, having burnt through his coat and he put it down on the bale, disregarding the certainty that it would leak on it also and injure it. We have no doubt that in doing so he was wilfully negligent.

The more difficult question remains whether the injury to the bale is loss, for which the company is liable under the exception in the risk note; and the difficulty arises from the fact that, whilst the exception provides only for the case of loss, the general portion of the note exempts from liability in respect of all claims, not only for loss, but also for destruction, deterioration or damage. It is therefore for plaintiff to establish that the bale is lost; and the lower Court has found that it is so. The contention for the company is that this finding is wrong and that, the bale being merely damaged, its liability is not established.

This finding in favour of loss appears to rest on the result of an inspection, to which the lower Court refers as showing that the bale was completely useless, and also on its statement that the acid penetrated the bale completely and affected all the gunnies. This apparently is also based on the statement of plaintiff's first witness in examination in chief that the bale was burnt in the middle, that the acid affected it right through,

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that not one bag was whole and all the bags seemed to have been damaged. But there is then the fact that as the same witness said in cross-examination,

"I saw the burnt bale in Court. It was not yet opened. I cannot say whether whole bags were found in it."

It has not been suggested before us that the bale was opened later for the Court's inspection and we cannot understand how the lower Court could satisfy itself as its judgment implies or how it could neglect the witness's later statement. Its finding on the question of fact must be rejected on the ground that it was reached without reference to material evidence; and we must therefore remand the case. In doing so it is advisable that we should deal with the legal question which arises and indicate the principle, on which the inquiry on remand should proceed.

To return to the terms of the risk note, it would appear at first sight as though a distinction is drawn between loss and destruction, deterioration and damage and the exception is not intended to apply to cases, in which only the three last mentioned can be established. But, whatever the implication from the separation of these terms, it is clear that the distinction proposed cannot be supported by their use in ordinary parlance. For, whilst loss cannot include deterioration and will always include destruction, it will in some cases include damage, when the extent and nature thereof are sufficient. Shortly we have to decide the point, if any, at which damage becomes loss.

One ground of decision has been suggested, which can be dismissed shortly:—that there is no loss, whatever happens to the contents, if the character of the package as such is unaffected by damage sustained by its outward envelope alone. This is based on *B. B. & C. I. Ry.* v. *Ambalal Sewaklal*(1) followed in *East Indian Railway Company* v. *Nilakanta Roy*(2), and in this Court in O.S. No. 309 of 1914 by KUMARASWAMI SASTRI, J., though only on the ground that, sitting alone, he was not prepared to dissent from the decisions of two Benches in the cases referred to. Those decisions do not commend themselves to us. For they are based on no earlier authority and, with all

(1) Ind. Ry. Cas., 48. (2) (1914) I.L.R., 41 Calc., 576.

due respect, it is unreasonable to suppose that the parties, entering into such contracts as Exhibit B, have regard to the worthless outer covering, not its contents; the bag for instance, not the grain within it; or in the present case the rough gunny covering and iron hoops, not the bags inside, of which the bale really consisted.

Another principle suggested is that damage can be identified with loss, only if the goods concerned have been deprived of the merchantable character, in which they were accepted for transmission; and, if the contract before us were one of insurance, this would be sound. *Asfar and Co.* v. *Blundell*(1) and *Cologan* v. *London Assurance Company*(2). But there is no question here of insurance in connexion with railway contracts, since railways in India are not common carriers. *The Irrawady Flotilla Company* v. *Bugwandas*(3); and the suggestion must therefore be defended on its merits. The objection to it, which must in my opinion prevail, is that even in the absence of a special contract a railway is, under section 72 (1), Railways Act (IX of 1890), liable only as a bailee under sections 151, 152 and 161, Indian Contract Act. It follows that a railway will ordinarily be liable in damages only according to the actual condition of the goods; for their full value, if they are rendered totally valueless; for such portions of it, if they have merely sustained deterioration, as would afford reasonable compensation, without reference to their loss or retention of their merchantable character. It is next material that in the present case the contract embodied in the risk note, Exhibit B, was made in consideration of the railway's acceptance of a reduced charge; and it therefore cannot be regarded as intended to increase its responsibility. It is then impossible to accept respondent's contention, which by treating 'loss' in the exception in Exhibit B as equivalent to the 'loss, destruction, deterioration or damage' in the general portion and to the 'loss, destruction or deterioration' in section 72 (1) of the Railways Act would leave the railway under the liability it would have been under, if Exhibit B had never been given. This entails acceptance of the only alternative construction of Exhibit B, that proposed by the railway and already

(1) [1896] I Q.B., 123. (2) (1816) 5 M. & S., 446.
(3) (1891) I.L.R., 18 Calc., 620.

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referred to as consistent with ordinary parlance. It is said that an unreasonable contract results from it. But the form has, as the Act requires, been approved by Government, and it has not been shown how the acceptance of a smaller responsibility in consideration of a lower charge than that which is normally payable and which respondent's consignor could have paid, if he desired a full idemnity, is oppressive. For these reasons I hold that respondent can recover only if his bale of gunny bags is entirely deprived of value.

The lower Court must therefore submit a finding on the issue :—

"Was respondent's bale of gunny bags when delivered to him of no value?"

The bale is, it is alleged, with the respondent. The lower Court will give him an opportunity to produce it in Court and, if it is so produced, will inspect it and the bags composing it, noting their condition in its finding. In any case, fresh evidence may be adduced by both parties regarding its condition and that of its contents. Findings due in two months. Seven days for objections.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The question raised in this case is one of considerable importance : therefore I have taken the liberty of writing a separate judgment although I do not differ from the conclusions arrived at by my learned brother. The facts are fully set out in the judgment just now delivered. I will first say a few words upon some subsidiary points raised by Mr. Ramdoss before dealing with the main question. It was contended by the learned Vakil for the respondent that a Railway Company is not competent to limit its liability to less than the minimum care which the Indian Contract Act imposes on bailees. It is now well settled that under the Indian Law, a Railway Company has not the liabilities of an insurer but only those of a bailee. See *India General Steam Navigation Company* v. *Bhagwan Chandra Pal*(1). The observations of SANKARAN NAYAR, J., in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(2) were relied on for the proposition that a common carrier cannot exempt himself from liability for

(1) (1913) I.L.R., 40 Calc., 716. (2) (1909) I.L.R., 32 Mad., 95 (F.B.).

negligence if such an exemption would be inconsistent with the provisions of the Indian Contract Act. The first observation with reference to this *dictum* is that the learned Judge was dealing with the case of a carrier by sea. The principles applying to carriers by land are not the same which govern the liability of a carrier by sea. In the next place two other learned Judges differed from him on this very question. In a later case *Kariadan Kumber* v. *The British India Steam Navigation Co., Ltd.*(1), Justice SADASIVA AYYAR and Justice TYABJI did not act upon this *dictum* of SANKARAN NAYAR, J. I must therefore hold that the contract is enforceable. Reliance was placed on certain English decisions which hold that an exemption from contract by a carrier from liability must be reasonable and just. There is great difference between the English law and the Indian law on this subject. If I understand the position aright, a Railway Company in England would be authorized by Parliament to make its own rules and regulations. It would be created by an Act of Parliament and would have full power to regulate its internal management. Under these circumstances Courts may be at liberty to decide whether the regulations framed by the Company are just and reasonable and whether they are *intra vires* the Act of Parliament. In this country, the position is very different. Under section 72 of Act IX of 1890, a Railway Company may enter into an agreement to limit its responsibility provided it is in a form approved by the Governor-General in Council. It is not denied that the rule with which we are concerned has been sanctioned by the Governor-General in Council. Therefore *prima facie* the rule must be regarded as being within the powers of the Railway Company. It is on the respondent to show that the rule in question which the legislative authority has sanctioned is inconsistent with any portion of the Railway Act, and the learned vakil for the respondent has not satisfied me on this point. I must therefore hold that the rule is *intra vires*. Reference may also be made to *Toonya Ram* v. *East Indian Railway Company*(2), *Tippanna* v. *The Southern Maratha Railway Company*(3) and *East Indian Railway Company* v. *Bunyad Ali*(4).

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(1) (1913) 25 M.L.J., 162.
(2) (1903) I.L.R., 30 Calc., 257.
(3) (1893) I.L.R., 17 Bom., 417.
(4) (1896) I.L.R., 18 All., 42.

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Another point relied on on behalf of the respondent is that the word 'loss' in the exemption clause of the Risk Note (Form B) includes 'Destruction, deterioration and damage.' The note is not a very carefully drafted one, and it may be possible for the Government of India to scrutinize its language on some future occasion. But as it stands at present I am compelled to hold that the word 'loss' has a meaning distinct from the other three words mentioned by me. All the four words are placed seriatim in the earlier portion. But when it comes to imposing liability, notwithstanding the contract to the contrary, the draftsman has used the word 'loss' alone and has left out the words 'destruction, deterioration and damage.' I take it that this was done on purpose. Reasonable meaning can be attached to the note as it stands by imputing to the draftsman the intention to hold the company liable only for the loss of a complete consignment of one or more complete packages and by exempting the company from liability where there has been 'destruction, deterioration and damage' to such a complete consignment of one or more complete packages. I am not concerned in seeing whether this is good policy, or whether the consigning public will not be injured by it. But construing the language of the note as it stands I can give it only the meaning which I have indicated and not the meaning which the learned vakil for the respondent has suggested.

One or two minor points raised by Mr. Chamier may now be dealt with. The learned Counsel contended that there was no wilful negligence on the part of the Railway Company and quoted *Heaven* v. *Pender*(1), for this contention. The District Munsif has found on the facts that there was wilful negligence; and on the evidence which has been fully commented on before us it seems to me that the Railway Company acted carelessly in the matter. The servant who was employed to carry an acid substance, unable to bear the injury which it inflicted on his shoulders, threw the acid over the gunny bags. His act was wilful in the sense that he must have known that the corrosive substance would cause injury to the article over which it was thrown. In *Lewis* v. *The Great Western Railway Company*(2) Lord Justice BRAMWELL said:

(1) (1883) 11 Q.B.D., 503. (2) (1877) 3 Q.B.D., 195.

"wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct must be wilful."

Lower down the learned Lord Justice said:

"I am much inclined to think that would be wilful misconduct because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not I think that would be wilful misconduct."

Applying this definition I am satisfied that there was wilful default on the part of the servant.

Mr. Chamier next suggested that the act of the servant should not be charged against the Company. It is a well known rule of law that persons who undertake to do certain things and who employ servants to do those things must be held responsible for the acts of those servants done in the discharge of the duty entrusted to them. It may be different no doubt if the servant acted in violation of his duties. The very recent case of *Joseph Rand* v. *Craig*(1) establishes this proposition very clearly. SWINFEN EADY, M.R., pointed out that if the act was done deliberately by the servant to benefit himself that should not be attributed to the master. But if it is a case of carelessness or negligence in the course of employment, the master would be held liable. The latter is what actually happened in the present case. Therefore the Company is liable for the conduct of the servant.

Now comes the main question as to whether the package can be said to have been lost. The judgment of KUMARASWAMI SASTRI, J., in Civil Suit No. 309 of 1914, was quoted before us and also *East Indian Railway Company* v. *Nilakanta Roy*(2). The learned Judge felt bound by the Calcutta decision and by a judgment of the Bombay High Court to hold that if the outer cover which encloses a parcel was delivered the article cannot be said to have been lost by the Railway Company. The Bombay and the Calcutta cases do not discuss the matter and it seems to me that they have put too narrow a construction upon the expression 'loss'. I am inclined to the view that the term 'loss' should be construed as including cases where the article consigned is lost to the consignor as such article. If the

(1) [1919] 1 Ch., 1.

(2) (1914) I.L.R., 41 Calc., 576.

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goods entrusted to the care of the Company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to me that the Company should be held to have lost the goods. In *Asfar and Co.* v. *Blundell*(1) Lord ESHER gave this meaning of the term 'loss'. "The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged; but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss." Although the learned Master of the Rolls was dealing with the case of an article carried by sea, I do not see why the definition of the term 'loss' should not be utilized in cases of other carriers. In *Hearn* v. *The London and South-Western Railway Company*(2) Baron PARK expressed himself to the same effect. In my opinion therefore if it is proved that the article has lost its identity as such it would amount to loss. On the question of the burden of proof the case in *Hirji Khetsey and Co.* v. *B B. and C. I., Railway Co* (3) lays down that it is the Railway Company that has to show that there was no loss. But I am not satisfied that in this case the District Munsif has considered the evidence very fully, on this question of loss. I agree that he should be asked to return a fresh finding on the question suggested by my learned colleague.

In compliance with the order contained in the above judgments, the Principal District Munsif of Rajahmundry submitted a finding to the effect that the bags could not be said to have been so much damaged to be of no value at all.

The Court delivered the following JUDGMENT :—

We accept the finding and allow the petition, dismissing the suit with costs throughout.

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(1) [1896] 1 Q.B., 123. (2) (1855) 10 Exch., 793.
(3) (1915) I.L.R., 39 Bom., 191.