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We, therefore, in reply to the question referred to the Full Bench, state our opinion that a Magistrate of the District is competent under s. 435 to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own District.

FIELD, J.—When the case of *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1) was before Mr. Justice McDonell and myself the question now referred to a Full Bench was a new one, and had not been discussed or considered by the other High Courts (so far as the reports show), or by other Judges of this Court. I gave in the judgment in that case reasons which then appeared to me to support the view there taken. Since the appearance of that judgment, the question has been fully considered and discussed by the Madras and Bombay High Courts, who have taken a different view from that acted upon in the case of *Nobin Kristo Mookerjee* v. *Russick Lall Laha*. My colleagues adopt the view taken by the Madras and Bombay High Courts. Under these circumstances, although I cannot say that my mind is wholly free from doubt, I think I ought to defer to the large majority who are in favor of a construction different from that which I originally accepted.

I therefore concur in holding that a Magistrate of a District can, under s. 435 of the Code of Criminal Procedure, call for and examine the proceedings of a Magistrate of the first class.

T. A. P.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

DANMULL (PLAINTIFF) *v.* BRITISH INDIA STEAM NAVIGATION COMPANY (DEFENDANTS.) *

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Limitation Act, 1877, *Sch. II, Arts.* 30, 115—*Bill of Lading—Contract, Breach of, for non-delivery—Onus of proof of loss of goods.*

Where a plaintiff brings a suit for breach of contract for non-delivery of goods under a bill of lading, it is not open to the defendants, after having

*Small Cause Court Reference in case No. 6 of 1885, made by H. Millett, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 22nd of May 1885.

(1) I. L. R., 10 Calc., 268.

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denied receipt of the goods, to set up, or for the Court, after finding that the goods had been shipped but not delivered, to assume, without evidence, that the goods were lost in order to bring the case within Art. 30, Sch. II of the Limitation Act of 1877.

Per GARTH, C.J.—*Semble*, where a plaintiff sues for breach of contract and proves his case, the three years limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful Act of theirs, to which the shorter limitation would apply. *Mohansing Chavan* v. *Conder* (1), and *British India Steam Navigation Co.* v. *Hajee Mahomed Esack* (2) approved.

THIS was a reference from the Calcutta Court of Small Causes. On the 27th October 1884 the plaintiff sued the defendant Company to recover Rs. 1,041-5-0, as damages, by reason of the failure of the defendant Company to deliver to him at Rangoon a bale of piece goods, shipped under a bill of lading dated the 3rd December 1881. The defendant Company denied that they had received the bale, and endeavoured to prove that what was in reality shipped was a bale of gunnies. They further contended that the suit was barred by Art. 30, Sch. II of the Limitation Act of 1877.

The learned Chief Judge of the Small Cause Court found that the bale of piece goods was shipped by the plaintiff at Calcutta, and that the bale had not been delivered by the defendant Company at Rangoon; and as regards this latter point added, "it has been held that the bale of piece goods, the subject of the dispute, has not been delivered; and if it has gone astray between Calcutta and Rangoon it must have been lost, for the Company cannot account for it in any way." "The suit being brought more than two years from the time the loss occurred is barred by limitation under Art. 30, Sch. II of the Limitation Act." He therefore gave judgment for the plaintiff, which, at the request of the defendant Company, was made contingent on the opinion of the High Court, as to whether under the above circumstances, the suit was or was not barred by limitation.

Mr. *Bonnerjee* for the plaintiff.

Mr. *Henderson* for the defendants.

The opinion of the Court was as follows:—

GARTH, C.J.—This was a suit brought by the plaintiff against the defendant Company for damages for not delivering to him at Rangoon, under the terms of a bill of lading, dated the 3rd

(1) I. L. R., 7 Bom., 478. (2) I. L. R., 3 Mad., 107.

December 1881, a bale of piece goods which was shipped from Calcutta.

The plaintiff's cause of suit, as alleged in the plaint, was *for the non-delivery of this bale of goods at Rangoon.*

The answer of the defendants was, that they had never received the bale of piece goods at all; and they tried, moreover, to go behind the terms of the bill of lading, in order to prove that what was shipped as a bale of piece goods was in fact a bale of gunnies.

The plaintiff proved to the satisfaction of the Court that he had actually shipped a bale of piece goods; and the defendants entirely failed to prove their case with regard to the contents of the bale, or that the goods had not been, as they alleged, shipped at all.

But the learned Judge, although he found the facts entirely in favor of the plaintiff, so far as the shipping of the goods and the non-delivery of them at Rangoon was concerned, considered that the suit was barred by limitation, as coming within Art. 30 of the Limitation Act.

That article provides that suits against carriers for compensation for losing or injuring goods, shall be brought within two years of the loss or injury; and the learned Judge considered that, as the plaintiff's goods were not delivered at Rangoon, it was his duty to find that they were lost; and as the suit was not brought within two years of the loss, he held that the plaintiff was barred by limitation, although assuming the suit to be founded on contract, it would have been in time.

But the plaintiff never alleged that the goods were lost. On the contrary his case was that the goods had not been delivered to him by the defendants as they ought to have been. He sued the defendants *upon their contract for a breach of the terms of the bill of lading.*

Nor, indeed, was it the defendant's case that the goods were lost; because they alleged that the goods had never been shipped; and there appears to have been no evidence on either side to lead the learned Judge to the conclusion that the goods were lost.

But the way in which he puts it in his judgment is this. He says: "It has been held that this bale of piece goods, the subject of the dispute, has not been delivered, and if it has gone astray

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between Calcutta and Rangoon, it must have been lost, for the Company cannot account for it in any way."

I consider that in point of law the learned Judge was not justified in coming to any such conclusion. If the defendants desired to prove that the goods were lost, it was for them to have alleged and proved it. But that was not their case; on the contrary, their case was, as I have explained, quite inconsistent with that contention.

In a Bombay case, to which we have been referred, *Mohansing Chawan* v. *Conder* (1) where the plaintiff sued to recover the price of bags not delivered, and the defendants contended that the suit was barred under Art. 30 of the Limitation Act, the bags not having been delivered, and therefore lost, within two years before suit, it was held by the Court that the mere non-delivery of the bags was no proof of their loss, the onus of proving which as an affirmative fact lay on the defendants.

In this I entirely agree, and indeed I should be disposed to go further, and to hold with the Madras Court (in the case of the *British India Steam Navigation Co.* v. *Hajee Mahomed Esack* (2) that where the plaintiff sues for a breach of contract, and proves his case, the three years limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs to which the shorter limitation would apply.

In the present case, the plaintiff sues for the non-delivery of his goods; he does not sue for their loss; he knows not whether the goods have been lost or not. His case is, that the defendants contracted with him to deliver the goods at Rangoon, and that they have failed to complete their contract; and he claims his right to bring a suit for the breach of contract within three years of the time when the goods ought to have been delivered.

It may be that the goods were lost; it may be that the defendants may have been guilty of some other misconduct, with reference to them, of which the plaintiff was not aware; but I do not see why the defendants have a right to take advantage of their own wrong, in order to change the nature of the plaintiff's

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suit, for the purpose of bringing themselves within the protection of the two years limitation.

The plaintiff's suit is no less a suit on contract, because the defendants may have been guilty of a tort, of which the plaintiff was not aware.

I am therefore of opinion that the question referred to us should be answered in the negative; and that the plaintiff should have his costs of this reference.

WILSON, J.—I am entirely of the same opinion. I only desire to add a few words.

I wholly concur with the Bombay Court in holding that, if the loss of the goods could be set up, as the learned Judge of the Small Cause Court has held in this case that it may be, in order to introduce the shorter period of limitation, then it would be for the defendants to raise that case in a proper way and to prove it by evidence.

I also concur with the Madras Court in holding that in a case of this kind such a course is not open to the defendants. The case is somewhat analogous to one which might easily occur. Suppose a lessee, under a registered lease executed in Calcutta to sue his landlord for breach of covenant for quiet enjoyment, could the landlord set up in reply, "true I have broken my contract, but what I did amounted also to a trespass, and inasmuch as the period of limitation for a trespass is a short one, your suit on the contract is barred." The answer would be, "I do not care whether there was a trespass or not, you have broken your contract and I am suing you as for the breach, not for trespass."

Here the suit is for breach of a contract to deliver goods. The Judge says the goods were lost. The plaintiff may reply, "I do not care whether the goods are lost or not; I am not suing on any such ground, but because the defendants have broken their contract to deliver the goods; and I am entitled to sue within the time allowed for suits upon a breach of contract."

Attorney for the plaintiff: Mr. *Pittar*.

Attorneys for the defendants: Messrs. *Barrow & Orr*.

T. A. P.