appeal, received through the Superintendent of the Jail, had been finally disposed of according to law by the order of a Judge of this Court. We reject this petition of appeal accordingly.

1922

EMPEROR v. KHIALI.

Appeal rejected.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

1922 *June*, 21.

SRI GANGAJI COTTON MILLS COMPANY LD. (PLAINTIFFS) *v.* EAST INDIAN RAILWAY COMPANY (DEFENDANTS).*

Railway—Suit for compensation in respect of goods damaged in transit—Suit brought against one company only out of several over whose lines the goods passed—Offer of compensation made unconditionally by one of the railway companies concerned—Refusal to take delivery on refusal of railway to record damaged condition—Right of sale of goods thereafter.

Certain bales of cotton were despatched from Jaipur to Mirzapur, where they arrived in a more or less damaged condition. In the course of transit the goods passed over parts of four separate railway systems. On the arrival of the goods at Mirzapur, the consignees demanded that the local railway (East Indian Railway) officials should make a record of their condition, and on these officials refusing to do so, declined to take delivery. The question of the amount of damage was inquired into by certain of the higher railway officials and the consignees were offered compensation, first at the rate of Rs. 10 and afterwards at the rate of Rs. 20 per bale. The consignees refused to accept either offer and refused to remove the goods, and these were ultimately sold by the Railway authorities. The consignees then sued the East Indian Railway Company alone, claiming heavy damages on account of the alleged illegal sale of their property and also on account of injury to the same as above described.

Held (1) that the defendants were acting within their rights in selling the goods when the consignees would not take delivery, and (2) that, although the plaintiffs would not ordinarily be entitled to a decree against the defendants, who were not the railway company to whom the goods were delivered by the consignor, unless they could show that the goods suffered damage whilst in their custody, on the other hand the defendants had not, in offering to compensate the plaintiffs, protected themselves by making their offers "without prejudice," and they must therefore be held liable to the extent of the higher offer made.

But, in view of their conduct throughout, the plaintiffs were directed to pay the whole costs of the defendants.

The facts of this case fully appear from the judgment of LINDSAY, J.

LINDSAY, J. :—The suit which has given rise to this appeal was brought against the East Indian Railway Company by the Sri Gangaji Cotton Mills Company Limited, carrying on business at Mirzapur, and the claim was for Rs. 23,980-8-6 plus interest at Rs. 6 per cent. per annum, making a total of Rs. 25,363-6-6.

* First Appeal No. 111 of 1920, from a decree of Man Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 31st of January, 1920.

1922

SRI GANGAJI COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

The suit has been dismissed *in toto* by the Subordinate Judge and the plaintiff company appeals.

The facts of the case are that in May, 1918, a consignment of 108 bales of cotton was booked at Jaipur, on the Bombay, Baroda and Central India Railway, for delivery to the plaintiff company at Mirzapur. A portion of this consignment, consisting of 54 bales, was delivered to the plaintiff company at Mirzapur on the 22nd of May, 1918.

On that date, it appears, the plaintiffs handed over to the East Indian Railway the railway receipt for the entire consignment of 108 bales, and paid the full freight due, amounting to Rs. 437-1-0.

The rest of the consignment, 54 bales, was delayed in transit and did not arrive at Mirzapur till the 2nd of July, 1918, on which date notice of arrival was given to the plaintiffs. The latter, after some inspection of the goods on the railway premises, objected to take delivery on the ground that the bales were damaged, and on the 3rd of July they sent a letter (Ex. Q.) They asked the Goods Clerk to keep the goods at the railway goods shed pending inspection by a railway officer. A telegram to the same effect was sent to the District Traffic Manager at Cawnpore on the same date and this was confirmed by letter (Exs. 10 and 22 respectively).

In this letter they informed the District Traffic Manager that from outward appearance it seemed that the bales had been neglected and exposed to rain and that each bale had been more or less damaged. Plaintiffs said they wanted inspection before taking delivery.

The Railway Company agreed to have an inspection made, and this was carried out on the 21st of July by a Traffic Inspector, Mr. Robinson. It is not denied that Robinson, after inspection, offered the plaintiffs Rs. 10 per bale by way of compensation, an offer which the plaintiffs rejected as inadequate [see their letter to the District Traffic Manager, dated the 30th of July, 1918 (Ex. 11)].

The plaintiffs pressed their claim for compensation at a higher rate and the Railway Company then deputed an Assistant Traffic Manager, Mr. Dyer, who examined the goods on the 9th of August, 1918, and made an offer of compensation at the rate of Rs. 20 per bale. This second offer the plaintiffs also refused by their letter of the 9th of August (Ex. 4). The plaintiffs in that letter said they were willing to accept Rs. 30

per bale and would take delivery if damages were paid at that rate. The Railway Company then arranged with the Upper India Chamber of Commerce for inspection by an expert, Mr. Vernon, the Superintendent of the Elgin Mills at Cawnpore. He proceeded to Mirzapur and examined the goods on the morning of the 18th of August. No representative of the plaintiffs was present at this inspection though notice had reached the plaintiffs on the evening of the 17th of August.

Vernon, who has been examined as a witness in the case, reported that the damage was insignificant, that 48 out of the 54 bales were in good condition and that 6 bales were slightly damaged. He estimated the damage at 10 lb. of cotton per damaged bale and recommended compensation on this scale.

There is no evidence on the record to show that this report was actually communicated to the plaintiffs, though it was stated in para. 34 of the defendant's written statement that an offer in accordance with Vernon's report was made to the plaintiffs on the 7th of September which was refused. The matter is not of much importance for, as the plaintiffs had already refused compensation at Rs. 20 per bale, it can hardly be imagined that they would have been willing to accept the much lower rate of damages which Vernon had assessed.

The next thing we find is that on the 9th of September, 1918, the plaintiffs sent in a claim to the Agent of the Railway in a letter (Ex. 14). They demanded the cost of the 54 bales at the rate of Rs. 80 a maund, a total of Rs. 20,837. To this was added a claim for Rs. 2,925 for damages caused by the delay in delivery, which had led to the closing down of the plaintiffs' mills on account of shortage of cotton. This claim, it may be observed, was the reiteration of a claim put forward on the 28th of June, 1918, and related to the delay which had taken place in the carriage of the goods prior to the 2nd of July, 1918. The third item of the claim made on the 9th of September, 1918, was for Rs. 218-8-6, this being one-half the freight of the whole consignment. The plaintiffs had paid the whole sum due for freight on the 22nd of May.

It is evident from the language of this letter of the 9th of September that the plaintiffs had made up their minds to claim compensation on a scale they had not hitherto contemplated; in fact they were advancing a claim for the total loss of the goods. We find them stating that the goods had been seriously neglected, that " they had been lying in the open, rain water

1922

SRI GANGAJI COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

pouring upon them freely for months and weeks together." The plaintiffs further stated that after " minute examination of the stuff " they had arrived at the conclusion that the quality of the cotton had become seriously deteriorated.

It does not appear when this " minute observation " was made, and it seems rather to be the fact that no such examination was ever made by the plaintiffs.

The Agent of the Railway acknowledged receipt of this claim and promised inquiry, and, thereafter, a good deal of correspondence passed between the parties without any settlement being arrived at.

On the 9th of November, 1918, the Railway Company served a notice on the plaintiffs to say that if the goods were not removed by a date mentioned in the notice, they would be sold at the plaintiffs' risk. The plaintiffs refused to comply with this notice, and eventually the Railway sold the goods at the rate of Rs. 117 per bale. At the hearing of the appeal we were told by the counsel for the Railway Company that this sale took place in March, 1919, and this, no doubt, is correct.

The correspondence between the parties closed with a letter from the Agent to the Railway to the plaintiffs, dated the 28th of April, 1919. The Railway Company refused to consent to further arbitration and offered payment to the plaintiffs of the sale-proceeds of the goods less any amount due to the Railway.

The plaintiffs filed their suit on the 18th of June, 1919; and this, as has been said, has been dismissed by the court below.

In substance the findings of the Subordinate Judge are that the plaintiffs had no right to recover and that the Railway Company was justified in selling the goods. The court held that the plaintiffs were in default, that they had wrongfully refused delivery, and that it had exercised its statutory right to sell the goods in accordance with law.

The Subordinate Judge was also of opinion that the plaintiffs had no right to compensation for damage to the goods as the plaintiffs had failed to prove that any damage took place on the defendant company's line, and had omitted to sue the Bombay, Baroda and Central India Railway Company, to which the goods had been made over by the consignor.

He also held that the item of Rs. 2,925 claimed by the plaintiffs on account of damages resulting from the closing of

their mills by reason of the delay in the carriage of the second instalment of the goods could not be awarded, as this was a false claim on the part of the plaintiffs.

It may be observed here that this portion of the claim is no longer pressed, nor indeed could it be, for the Railway Company, defendant, was able to establish conclusively in the court below that if the plaintiffs' mills were closed down, the reason was that there was a shortage of coal and not because of any delay in the transit of the bales of cotton.

To come now to the appeal, it is complained that the court below did not rightly appreciate the nature of the plaintiffs' claim which, it is said, was in reality a claim based upon the wrongful conversion of the plaintiffs' goods by the defendant Railway Company.

Speaking for myself, I do not see that the Judge of the court below was under any misapprehension regarding the nature of the case which the plaintiffs set up, though considering the manner in which the case was set out in the plaint, he might, with some excuse, have been led into doubt.

He has, however, in my opinion, dealt with the case on the right lines as a whole and has definitely found that the Railway Company was justified in selling the plaintiffs' goods in exercise of the power conferred by section 56 of the Indian Railways Act (IX of 1890) which authorizes a railway administration, in certain circumstances and on certain conditions, to sell unclaimed goods.

In this connection the whole question is whether the Railway was in the circumstances entitled to treat the 54 bales of cotton as unclaimed goods.

The argument urged for the plaintiffs, in substance, is that it was not so entitled. It is contended that in the first instance the Railway Company wrongfully put obstructions in the way of the plaintiffs' taking delivery, and it is further argued that because the plaintiffs had put in a claim for damages, the Company had no right to sell pending a settlement of the claim. In my opinion neither of these arguments can be accepted.

To take first the plea that the Railway Company obstructed taking of delivery. What is the case of the plaintiff company on this point?

It is set out in paragraphs 7 and 8 of the plaint, where it is alleged that the plaintiffs sent their men to the railway

1922

SRI GANGAJI COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

station and discovered that the bales were wet and damaged, and that thereupon the plaintiff company " refused to take delivery without an inspection and a note as to the condition of the goods by the defendant company's servants at the Mirzapur station which they refused to do." If this means that the inspection referred to was inspection by the plaintiffs themselves, then the allegation is not true, for it is clear on all hands that the plaintiffs had ample opportunity to inspect the goods and did as a matter of fact inspect them. On the other hand, if it means that the inspection was to be inspection by the Railway Company, then the answer to the plaintiffs' case is that they had no right to insist upon an examination of the goods by the defendant Railway. There seems to have been some argument in the court below about the right to what is called " open inspection " and the Subordinate Judge seems to have thought that the plaintiffs were insisting upon some such right, though that is denied in the 3rd paragraph of the memorandum of appeal.

It has been definitely settled in this Court that a consignee has no right to demand that the goods shall be opened and inspected on the Railway premises before he can be called upon to take delivery : *Jwala Prasad & Co.* v. *Great Indian Peninsula Railway* (1).

But it is argued (see the plea in the 12th paragraph of the memorandum of appeal) that the plaintiffs had a right to have a note made in the Railway Company's delivery register, recording that the goods were in a damaged condition and that if the company's servants refused to make such an entry or allow such an entry to be made, there was an obstruction amounting to wrongful refusal to deliver. Much stress has been laid upon the fact that the plaintiffs had handed over the railway receipt to the defendant company before the second lot of bales arrived and it is said that if the plaintiffs had signed the delivery register without recording that the goods were damaged, they would have been precluded thereafter from claiming damages, on the ground that they had given a clear receipt. This argument does not appeal to me. In the first place, I have not been shown any provision of law or any statutory rule which obliges a Railway Company to make or to allow to be made in its delivery register any note alleging that goods are in a damaged condition. In the next place, it has

(1) (1918) 11 A. L. J., 772.

been definitely decided by a Bench of this Court that the plaintiff cannot refuse to take delivery because the Railway Company refuses to make an entry in their books. There the plaintiff's case was that there was a shortage in the weight of the goods. The Bench held that the plaintiff could not insist upon an entry. If he had any complaint, he was entitled to make his representation to the company in any other way: *Koka Mal* v. *Great Indian Peninsula Railway* (1). And, lastly, it is not correct to say that the plaintiffs would have been barred from a suit if they had signed the delivery register so as to constitute what is called a "clear receipt"; *East Indian Railway Company* v. *Sispal Lal* (2).

I am satisfied, therefore, that the plaintiffs cannot maintain that anything done by the defendant Railway's servants on the 2nd of July, 1918, amounted to a wrongful refusal to deliver the goods.

As for anything which happened after that date, I can find no evidence of wrongful retention of the goods by the defendant Railway. It is true they kept the goods in their custody, but that was at the plaintiffs' own request. The Railway Company, in order to satisfy the plaintiffs, consented to have the goods inspected by their own officers and by Mr. Vernon, but the plaintiffs cannot be heard to say that this was, in any way, a wrongful act on the part of the Railway Company. After the inspections had been made and compensation had been offered to the plaintiffs, it was their duty to remove their goods and no hindrance to removal was placed in their way.

The argument put forward on behalf of the plaintiffs seems to imply that they had a right to call upon the Railway Company to warehouse their goods until such time as the company was prepared to offer them damages which they would accept. There is, in my opinion, no warrant for such a proposition, and it may be added that even if there were, the plaintiffs abandoned the position completely when they wrote to the Agent, on the 9th of September, 1918, claiming not damages but the full price of the goods.

I hold, therefore, that the suit for damages for wrongful conversion fails and that the decision of the court below on this point is correct. The only question which remains to be

(1) (1913) 11 A. L. J., 775.
(2) (1911) I. L. R., 39 Calc., 311.

1922

SRI GANGAJ. COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

considered is whether the plaintiffs should be awarded any compensation for damage to the goods.

That the goods were damaged there is no reason to doubt. On the other hand, it is clear that the damage was inconsiderable and that the claim put forward by the plaintiffs is grossly exaggerated. This is apparent from the fact that they were willing to accept compensation at the rate of Rs. 30 per bale.

In dealing with this matter it has to be borne in mind that the goods were carried over the systems of several railways. They were made over at Jaipur to the Bombay, Baroda and Central India Railway and they travelled first over the line under that Railway's control, then over the lines of the Bengal North-Western Railway and of the Oudh and Rohilkhand Railway before they came upon the line of the defendant company at Mogal Sarai which is only a short distance from Mirzapur.

The Bombay, Baroda and Central India Railway Company, with which the goods were booked, is no party to the suit, nor has any other of the above-named administrations been impleaded as defendant. The sole defendant is the East Indian Railway Company.

In these circumstances the plaintiffs could only recover damages from the East Indian Railway Company by proving that the damage was caused on its system. This is clear from the provisions of section 80 of the Indian Railways Act (IX of 1890) and the law has been so interpreted in the case of *Great Indian Peninsula Railway* v. *Sham Manohar* (1).

The plaintiffs have not produced any direct evidence to show that the defendant Railway Company is responsible for the damage to their goods.

The only evidence which has any bearing on this question is the statement of Krishna Gopal Das, a witness called for the defendant. He is a clerk on the Oudh and Rohilkhand Railway and deposes that the 54 bales were received at Benares Cantonment station on the 26th of June, 1918, from the North-Western Railway (a metre-gauge line) and were transhipped the same day into a waggon on the broad-gauge system of the Oudh and Rohilkhand Railway for despatch to Mirzapur *viâ* Mogal Sarai. He deposes that the bales were in good condition at the time of transhipment and that they were placed in a sealed waggon.

(1) (1912) I. L. R., 34 All., 423.

1922

SRI GANGAJI COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

If this statement be true, then all that can be said is that any damage which was caused to the goods must have been caused between the 26th of June and the 2nd of July, 1918, either on the Oudh and Rohilkhand Railway system or on the system of the defendant company. That evidence would not suffice to fasten liability upon the East Indian Railway Company. Apart from this, there remains only the fact that the defendant company did, on three occasions subsequent to the 2nd of July, 1918, offer compensation to the plaintiffs. I have stated above that Rs. 10 per bale was offered by Robinson, one of the defendant company's inspectors. Later on, another employee of the defendant Railway, Mr. Dyer, offered Rs. 20 per bale, and, lastly, there was the very much reduced offer made after the inspection by Mr. Vernon on the 18th of August.

The question is whether these offers constitute an acknowledgment of liability on the part of the Railway Company which would justify an award of damages.

In paragraph 9 of the written statement the plea of the defendant company is that these offers were made in order to lead to a settlement out of court, but neither Robinson nor Dyer has been examined; so it is not possible to say whether the offers were made "without prejudice," nor have we been referred to any documentary evidence on the point. I have considered this point carefully and am disposed to hold that the Railway Company has acknowledged liability.

As to the amount of damages I think a fair sum is at the rate of Rs. 20 per bale offered by Dyer. It is true that the expert evidence of Mr. Vernon would, if accepted, show that this offer was in excess of what was really claimable. But Vernon's inspection was not made till the 18th of August, more than six weeks after the goods had arrived at Mirzapur—a fact which must be taken into account when estimating the value of his report.

I would, therefore, allow the plaintiffs damages to the extent of Rs. 1,080. The plaintiffs are not entitled to return of the freight, for the goods were carried to their destination. They are entitled to the sale-proceeds of the goods at the rate of Rs. 117 per bale.

There should, therefore, be judgment for Rs. 7,398 in all, but the plaintiffs having been in the wrong throughout, must be made to pay the defendant company's costs in both courts.

1922

SRI GANGAJI COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

Allowing the appeal in part, I would substitute for the decree of the court below a decree for Rs. 7,398 and direct that the plaintiffs do pay the costs of the defendant company in both courts.

KANHAIYA LAL, J. :—I agree in the order proposed.

BY THE COURT.—The appeal is allowed. A decree for Rs. 7,398 will be prepared in favour of the plaintiff company. The plaintiff company will pay the costs of the East Indian Railway Company in both courts.

Appeal decreed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

1922

June, 21.

MAHADEO PRASAD AND OTHERS (DEFENDANTS) v. DHIRAJ SINGH (PLAINTIFF).*

Mortgage by conditional sale—Interest—No specific provision for post diem interest—Right of mortgagee to claim interest post diem, at contractual rate.

A mortgage by conditional sale provided for the payment of the mortgage money on a certain specified date. It also provided for the rate of interest which the mortgage money was to bear. But there was no separate provision as to interest *post diem*.

Held, on suit for foreclosure brought some years after the expiry of the term of the mortgage, that the mortgagee was entitled to claim interest at the rate stipulated for in the bond up to the date of suit. *Mathura Das* v. *Raja Narindra Bahadur* (1), *Bindesri Naik* v. *Ganga Saran Sahu* (2) and *Sarala Dasi* v. *Jogendra Narayan Basu* (3) referred to.

THIS was a suit for foreclosure of a mortgage by conditional sale.

The main question in the suit was whether the plaintiff was entitled to get *post diem* interest, and, if so, whether at the rate stipulated for in the bond or any other. The court of first instance held that the plaintiff was entitled to interest up to the date of payment at the contractual rate, even though there was no express provision for this in the bond, and decreed accordingly.

The defendants appealed.

Dr. *Surendra Nath Sen*, for the appellants, contended that the plaintiff was not entitled to charge compound interest after the date fixed for payment. He further contended that if the plaintiff be held entitled to such interest by way of damages after the date fixed for payment of the mortgage, the claim would be barred by limitation. He commented upon

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* First Appeal No. 165 of 1920, from a decree of Lakshmi Narain, Additional Subordinate Judge of Cawnpore, dated the 28th of February, 1920.

(1) (1896) I. L. R., 19 All., 39.
(2) (1897) I. L. R., 20 All., 171.
(3) (1897) I. L. R., 25 Calc., 246.