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effect of the section. It will be seen that the period of six weeks from the grant of the certificate has not got coupled with it any discretionary period. In practice an appellant secures not much less than 150 days from the decree appealed against under this provision. Our view is that we have no power to extend the period beyond those times which are now definitely and clearly set out in the amended order XLV, rule 7. To decide otherwise and grant extension beyond the period of six weeks would in our view defeat the object and intention of the amendment. The application is therefore rejected and the certificate revoked.

Application rejected.

FULL BENCH.

Before Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Gokul Prasad.

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November, 30.

SOHAN PAL, MUNNA LAL (PLAINTIFFS) *v.* THE EAST INDIAN RAILWAY COMPANY (DEFENDANT).*

Act No. IX of 1890 (*Indian Railways Act*), *sections* 47, 54 *and* 72—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 149—*Liability of Railway Company for goods accepted by a servant of the Company for conveyance—Grant of receipt on behalf of the Company not essential to accrual of liability.*

Where goods are tendered to the appropriate official of a Railway Company for despatch to a particular destination and are accepted by him, the liability of the Company in respect of such goods accrues from the time when the goods are so accepted, and is not dependent upon the granting or withholding of a receipt for the same on behalf of the Company by the official who has accepted the goods *Banna Mal* v. *The Secretary of State for India*, (1) distinguished and doubted.

THIS was an application in revision under the Provincial Small Cause Courts Act, 1887. The facts of the case are stated in the following orders of TUDBALL, J., before whom the case first came. They will also be found in the judgment of PIGGOTT, J.

TUDBALL, J.:—This application in revision arises out of a suit brought by the plaintiff to recover damages for goods which he had delivered to the East Indian Railway at the Agra city station for transmission to Amroha and which have been lost by the Railway Company. The court below has found

* Civil Revision No. 43 of 1920.

(1) (1901) I. L. R., 23 All., 367.

that the bale of gunny bags in question was taken by the plaintiff to the goods shed and left there and that the bale has been lost. It then went on to hold in view of the decision of this Court in *Banna Mal* v. *The Secretary of State for India in Council* (1), that as no railway receipt had been granted by the Company to the plaintiff the liability of the Company had not commenced and therefore the Railway Company could not be held liable for the loss. It accordingly dismissed the suit. I am asked in revision to pay special attention to the decision of the Bombay High Court in *Ram Chandra Natha* v. *The Great Indian Peninsula Railway Company* (2) and also to the decision of the Calcutta High Court in *Jalim Singh Kotary* v. *Secretary of State for India* (3), and I am asked to refer the question if necessary to a larger Bench, as the decision of this Court reported in *Banna Mal* v. *The Secretary of State for India in Council* (1) appears to be incorrect. So far as my own personal opinion is concerned, I agree with HEATON, J., where he says that "a delivery to be carried by Railways means something more than a mere depositing of goods on the Railway premises; it means some sort of acceptance by the Railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case; but it certainly may be completed before a railway receipt is granted." The Bombay High Court in that case held that "the commencement of the liability of a Company for goods delivered to be carried under section 72 was in no way dependent upon the fact of a receipt having been granted but must be determined on evidence quite independently of rule 2 under section 47 of the Indian Railways Act." Before I can consider what steps to take I must have a clearer finding of the facts than that at which the court below has arrived. The mere bringing of the goods and the leaving of them at the railway station by the plaintiff's servant is insufficient to throw any liability on the Railway Company. There must be evidence of a further step namely, that the Railway Company's officials have actually taken over the goods voluntarily

(1) (1901) I. L. R., 23 All., 367. (2) (1915) I. L. R., 39 Bom., 485.
(3) (1904) I. L. R., 31 Calc., 951.

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into their possession, that is, that there has been an actual handing over or delivery to the Railway Company and an acceptance by the Railway Company's servants. It is urged that the plaintiff's servant has alleged that a Forwarding Note was accepted and that the goods were marked and weighed. The lower court has not come to any finding on these facts. I therefore remit the following issue to the court below :—

"Was the bale of gunny bags in question actually handed over by the plaintiff's servant to the Railway officials and accepted by the latter or not?"

The lower court will note that the decision of this issue depends considerably upon the ordinary course of business at the booking station in the course of which goods are offered and accepted for transport. The parties may give further evidence on this point. On receipt of the findings the usual ten days will be allowed for objections.

On receipt of the findings the following order was passed :—

TUDBALL, J. :—The finding of the court below on the issue referred is that the gunny bags in question were actually handed over by the plaintiff's servant to the Railway officials and accepted by the latter though no receipt was actually granted. In my opinion, in these circumstances, the Railway Company having accepted delivery of the goods, were liable for the loss thereof though the Company had not actually granted a formal receipt. In my opinion the rulings of the Bombay High Court and Calcutta High Court seem to be correct and the decision of this Court in *Banna Mal* v. *The Secretary of State for India in Council* (1) to be incorrect. As I cannot override a two Judges' decision of this Court I refer the case to a Bench of two Judges. I think it would be advisable that that Bench should refer the case to the Chief Justice with a view to the constitution of a larger Bench.

The case was then laid before a Division Bench which passed the following order :—

WALSH and WALLACH, JJ. :—It is agreed in this case that in order to follow the decisions in the cases cited from Bombay and Calcutta by our brother TUDBALL it would be necessary to

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disagree with a decision of this Court reported in I. L. R., 23 All., 367. As matters stand the construction of section 72 of the Indian Railways Act differs radically in the Calcutta and in the Allahabad High Courts, both of them being on the system of the East Indian Railway. Counsel for the Railway informs us that it is desired that the matter should be reconsidered in this Court with a view to a definite decision upon the point. We, therefore, without deciding it ourselves, which will only accentuate the controversy, refer the matter to the Chief Justice. The question is, was the case of *Banna Mal* v. *The Secretary of State for India* (1) rightly decided?

The application was, by order of the Chief Justice, laid before a Bench of three Judges.

Dr. *Kailas Nath Katju*, for the petitioner.

Pandit *Ladli Prasad Zutshi*, for the opposite party.

PIGGOTT, J.:—This is an application in revision against a decision of the Judge of the Court of Small Causes at Agra. The plaintiff sues the East Indian Railway Company, through its agent, for damages for the loss of a consignment, namely, a package of gunny bags, alleged by him to have been delivered to an authorized agent of the Company at Agra for carriage to Amroha, which certainly never reached its destination. There was some conflict of evidence as to the facts. The Railway Company in the first instance denied that the plaintiff had ever even brought to their office at Agra any such package as that referred to in the plaint. Their main defence, however, was of a technical nature. They called attention to a notification published in the *Gazette of India* of the day of 5th July, 1902, vide page 504 of Part I, notification No. 231, dated the 3rd day of July, 1902, in which certain rules were notified and the sanction of the Governor General in Council to the same published for general information. These rules purport to have been made under the power conferred by section 47, sub-section (1), clause (*f*), of the Indian Railways Act (IX of 1890). One of them is in the following words:—"Goods will in all cases be at the owner's risk until taken over by the Railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorized Railway servant." The Small Cause Court, after investigating the facts found them generally in favour of the plaintiff. The

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learned Judge, however, felt himself constrained to hold, with reference to a reported decision of this Court in *Banna Mal* v. *The Secretary of State for India* (1), that the process of delivery by the plaintiff to the Railway Company's agent had not been completed, because no receipt had been granted by the latter to the former. He dismissed the suit accordingly and the plaintiff applied in revision to this Court. The application was entertained by a learned Judge of this Court who, for reasons given in his order, remitted an issue to the trial court for determination. The issue is in these terms:—"Was the bale of gunny bags in question actually handed over by the plaintiff's servant to the Railway officials and accepted by the latter or not?" In remitting this issue the learned Judge added the following observations:—"The lower court will note that the decision of this issue depends considerably upon the ordinary course of business at the booking station in the course of which goods are offered and accepted for transport. The parties may give further evidence on this point." Neither party offered further evidence upon the remitted issue and the finding of the lower court has been recorded upon the evidence tendered at the original trial. The finding is in favour of the plaintiff on both points; *i.e.*, the bale in question was actually handed over by the plaintiff's servant to the Railway officials and was accepted by the latter. Upon this the case has been referred to a Bench of three Judges in order that the principles laid down in *Banna Mal* v. *The Secretary of State for India* (1) may, if necessary, be further considered. Our attention has been drawn to the fact that this decision has been commented upon by two other High Courts. The cases in question are those of *Jalim Singh Kotary* v. *Secretary of State for India* (2), and *Ram Chandra Natha* v. *The Great Indian Peninsula Railway Company* (3). We find, also, that in a subsequent case, *Narsing Girji Manufacturing Company* v. *Great Indian Peninsula Railway* (4), which has not been printed in any of the authorized reports, but which is to be found in the 21st volume of the Bombay Law Reporter at page 406, a Bench of that Court has

(1) (1901) I. L. R., 23 All., 367.
(2) (1904) I. L. R., 31 Calc., 951.
(3) (1915) I. L. R., 39 Bom., 485.
(4) (1918) 21 Bom. L. R., 406

re-affirmed the principles laid down in *Ram Chandra Natha's* case (1) mentioned above.

I am inclined to doubt whether the principle of law about which this Court is supposed to have differed from the High Courts at Bombay and at Calcutta really arises in the present case. The rule to which we have been referred occurs in a notification dealing with wharfage, and section 47 (1) (*f*) of the Indian Railways Act empowers the Railway Companies to make general rules consistent with the Act for regulating the terms and conditions on which the Railway administration will warehouse or retain goods at any station on behalf of a consignee. In the present case the Court has believed the story told by the plaintiff where there is a conflict between his evidence and that of the booking clerk and of another servant of the Company who were called for the defendant. According to the plaintiff's story no question of wharfage arose. His package was taken over for despatch and it never reached its destination. The court below, without recording a positive finding on the point, has given very good reasons for believing, on the evidence, that the package in question was actually put upon the rail and was mis-sent to another destination and lost in consequence of having been so mis-sent. Further, the expression "shall be at owner's risk" is in itself a technical one. There are several kinds of "owner's risk," and the Railway Company's manual which has been produced before us shows that responsibility for goods made over to the Railway Company may be differently divided between the owner and the Company, according as to whether the former elects to consign his goods on the terms provided by "Risk note A" or on the terms provided by "Risk note B." Whatever might be the case if the package in question had been destroyed by fire, for instance, while lying on the Company's premises at Agra, it is by no means clear that the expression "owner's risk" in this notification would exempt the Railway Company from liability, if in fact the package has been totally lost and the failure to deliver the same can be traced to negligence on the part of the Company's servants in sending it to a wrong destination.

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As, however, the case has been referred to a Full Bench for an expression of opinion on the general questions of law involved, and those questions have been argued before us, I think it advisable to add a few words. It seems to me that, if a rule like that relied upon by the Railway Company in the present case, (a rule supposed to have been made in virtue of the powers conferred by section 47 of Act No. IX of 1890), is put forward as limiting the statutory liability imposed upon the Railway Company by section 72 of the same Act, then that rule is inconsistent with the provisions of the Act and is of no effect. I do not think it is open to the Railway Company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorized servant of the administration to be carried by the railway, nevertheless the court shall not deem them to have been so delivered unless and until the railway servant in question has performed a particular act. To this extent I agree with the decision of the Bombay High Court in *Ram Chandra Natha's* case (1).

In argument before us an alternative case was put forward on behalf of the Railway Company, differing from that upon which the question was litigated in the court below. Our attention was called to section 54 of the Indian Railways Act (No. IX of 1890), which empowers a Railway Administration to impose conditions, not inconsistent with the Act or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. We were asked to hold, in effect, with reference to certain public notifications said to have been issued by the East Indian Railway Company, and reproduced in a manual of general rules shown to us, that this Company had given general notice to the public that any person desiring to despatch goods for transit by that Company should retain the same under his own supervision and consider himself responsible for their safe custody, until he held a receipt properly made out by the railway servant responsible for taking over delivery of the goods. In reality the line of argument here sought to be taken was anticipated by the learned Judge of this Court who remitted for trial the issue to which reference has

(1) (1915) I. L. R., 39 Bom., 485.

already been made. It would have been open to the Railway Company at the trial of that issue to bring forward the facts which have been pressed upon us in argument regarding the public notification of this alleged rule, governing the delivery and receipt of goods at their railway stations, to prove by evidence the fact of such publication and the existence of a regular course of business founded upon the general knowledge by the public of the existence of such a rule. The Railway Company having failed to produce any fresh evidence on the remitted issue, it seems to be impossible for us to take up the question from the point of view now pressed upon us. The submission that any such public notification was issued by the Railway Administration to the public is not really supported by any evidence before us, nor have we any evidence as to the existence of such a general understanding or such an established course of business. On the contrary the plaintiff has been believed in his evidence where he says that as a matter of fact, after his package or bale had been taken over by the goods clerk and duly marked, he was told to go away and come back for a railway receipt in a couple of days' time or so, as nothing further could be done at the moment because the particular line along which he desired his goods to be despatched was blocked. If this is to be treated as a finding of fact, it scarcely leaves room for the alternative argument which has been pressed upon us. For these reasons I would accept the application in revision, set aside the order of the court below and decree the plaintiff's claim with costs throughout. In view of the circumstances of the case we should allow counsel for the applicant the full amount of the fee certified by him.

WALSH, J.:—I entirely agree. The primary and fundamental responsibility of a Railway Company entrusted with goods under a contract either to despatch or to warehouse them is defined in section 72 of the Railways Act as that of a bailee for reward as defined in sections 151, 152 and 161 of the Indian Contract Act of 1872. Those sections, of course, cannot be construed without first interpreting the contract of bailment as defined in section 148 of the Indian Contract Act, which again involves the definition of "Delivery" as contained in section 149 of the

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Indian Contract Act, and the two sections 148 and 149 are equally incorporated with the Railways Act and define and control the liability of the Railway Company. Whatever rules the Company may make under its statutory authority contained in the same Act, they cannot, and it is provided by the statutory authority enabling them to make such rules that they shall not, make rules inconsistent with the Act. It, therefore, follows that no rule, which any Company can make, can cut down, control or limit its liability which is the creature of statute under section 72, and, if a rule is relied upon by the Company which is inconsistent with that liability it has clearly gone beyond the authority created for making rules. In these railway cases half the difficulty is often created by failure on the part of the railway authorities themselves, or rather those who represent them in the courts, and the failure of mufassil tribunals, to clear their minds first as to what I have described as the fundamental and primary liability of the Railway Company. When one has done that, it is easier to see whether a suggested expansion or modification of it is really anything of the kind. Instead of that, it frequently happens that the courts are invited to plunge into a discussion of some rule or explanation which the Railway Company puts forward as being sufficient in itself to absolve it from all liability, very often without the Railway authorities themselves or those who present them in court really understanding what it is that they are relying upon. I think that is what has happened in this case. It is suggested that some general rules of the Company made under section 54 are sufficient to absolve the Company under the circumstances of this case, which are that a Company admittedly received goods for despatch to a particular destination and either sent them to the wrong one or lost them altogether. Apart from the contention that such general rules if they attempted to cut down the definition of "Delivery" would be inconsistent with the provisions of the Act which are incorporated with the Railway Act, I am of opinion that what is contemplated by section 54 are merely general conditions with regard to receiving, forwarding or delivering. It seems tautologous to say that that is contemplated because those are the actual words used. To my mind that section has nothing to do

with the responsibility of a company as bailee. A Railway Company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods. Section 54 enables it to make provisions or conditions with regard, for example, to the receiving of goods. It is not bound to receive goods at all unless they are first weighed, or unless they are properly labelled, but those provisions, namely, with regard to receiving goods, are antecedent to the act of delivery; in other words they provide that the Company may insist on the consignor doing certain acts before he is able to deliver the goods to the Company at all. Similarly, with regard to forwarding, for example, live stock and wild animals, they can reasonably insist on their being put under proper control. With regard to the trucks for the conveyance of live stock they can insist on the consignor approving of the means of transit proposed. All these matters are, I think, antecedent to the performance of the act which is legally and technically known as "Delivery." To my mind section 54 and rules thereunder have nothing to do with the case in hand. I am of the same opinion with regard to rule 2 which was sanctioned by the Governor General in 1902 under section 47 (1) (*f*) of the Railways Act and which was relied upon by the Company and has frequently been referred to in this controversy and the decided cases that have been cited to us. I hesitate to hold that that rule is inconsistent with anything contained in the Act. In my view it is not. If it were intended to lay down some rule which would have the effect of defining "Delivery," or deciding when delivery, in the sense in which it is used in the Contract Act, took place, then undoubtedly it would be inconsistent, or as stated in one case, *ultra vires*. It purports on the face of it to be a rule made for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner and it is placed under a heading, and finds itself in a collection of rules made under a heading, which runs as follows:—"I—*Wharfage on goods for despatch waiting to be consigned.*" It seems to me that that has nothing whatever to do with the liability of a Railway in

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respect of goods which have been actually accepted by a Railway servant for despatch and have been either despatched or lost. It is intended to define the boundary line, in cases where it would otherwise by debateable, which divides the owner's loss from the warehouseman's loss and, although the point does not arise in this case, I am inclined to think that, although that boundary line is fixed as being the time when the receipt is given by the Railway official, it only applies when in fact a receipt is given; and has no application when a receipt is not given; in other words, if the Railway official asks the consignor's consent to postpone the handing over of the receipt, nonetheless the case would have to be decided as if the receipt had been given when it would have been given in the ordinary course of business if the handing over had not been, for some special purpose and by common consent, waived.

Lastly, I would merely add that really the case in I. L. R., 23 Allahabad, does not govern this case, even if it were rightly decided. In my view it was wrongly decided. It was decided under a slightly different set of rules from the rules which are now before us, and on the principle of a decision in England in 1854 which the court followed without, I think, sufficient reason. When the facts of the English decision are studied it becomes apparent that there the plaintiff, knowing full well the course of business of the Company, had not merely waived some formal performance of an act like the handing over of the receipt, but had departed altogether from the practice at that particular station, and had left six pigs in the possession of one of the Railway porters to do what was necessary in order to consign them to London, making him, as the Judges held, for that purpose his servant. The Company had made rules for dealing with live stock delivered to them for despatch and the plaintiff did not attempt to carry out any of them, but merely left it to the Railway porter to carry them out, and in the leading text-book in England on "Carriage," I find the case cited for this proposition that "delivery must be in conformity with the known course of the Company's business." It has been found in this case on overwhelming evidence that it was, and there is nothing in the Company's rules, and in my opinion there could not in law be

anything, to cut down the Company's ordinary liability as a bailee after taking delivery.

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GOKUL PRASAD, J.:—I agree with the order of the Court and the reasons given by my brother PIGGOTT, to which I think it unnecessary to add anything.

BY THE COURT.—The application in revision is accepted, the order of the court below is set aside and the plaintiff's claim is decreed with costs throughout, the said costs to include the fee certified by the applicant's counsel.

Application allowed.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

MUHAMMAD HASHIM (DEFENDANT) *v.* MISRI (PLAINTIFF).*

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Act No. IX of 1872 (*Indian Contract Act*), *sections* 56 *and* 65—*Lease—Property leased compulsorily acquired by Government—Right of lessee to obtain compensation from lessor.*

If during the continuance of a lease of immovable property the subject of the lease is compulsorily acquired by Government under the provisions of the Land Acquisition Act, 1894, performance of the contract having thereby become impossible, the lessee is entitled to obtain from the lessor compensation for the loss which he has sustained in consequence of being deprived of the possession of the demised premises. *Dhuramsey Soondersdas* v. *Ahmedbhai Hubibbhoy* (1) referred to.

THIS was an application for revision of the decree of the Court of Small Causes at Cawnpore. The facts of the case sufficiently appear from the judgment of the High Court.

Babu *Sital Prasad Ghosh*, for the applicant.

Babu *Saila Nath Mukerji*, for the opposite party.

BANERJI, J.:—The applicant Muhammad Hashim owned a flower garden in the city of Cawnpore which he let to the plaintiff for one year from March, 1920, to the following March, on a rent of Rs. 230. On the 15th day of November, 1920, the garden was acquired under the Land Acquisition Act for improvements in Cawnpore, and the plaintiff was deprived of possession. He brought the present suit in the Court of Small Causes to recover Rs. 65 which he said was the loss incurred by him by reason of being deprived of possession of the garden in November, 1920.

* Civil Revision No. 79 of 1921.

(1) (1898) I. L. R., 23 Bom., 15.