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shown for giving a lesser sentence. No such rule applies to section 396 of the Indian Penal Code. Accordingly we find no reason in this case why the sentence of death should be imposed. We therefore maintain the conviction of Lal Singh under section 396 of the Indian Penal Code and we reduce the sentence from a sentence of death to a sentence of transportation for life.

REVISIONAL CIVIL

Before Mr. Justice Mulla

1938
August, 8

KISHANLAL MATRUMAL (PLAINTIFF) *v.* B. B. AND C. I. RAILWAY AND OTHERS (DEFENDANTS)*

Railway—Risk-notes forms A and B—Deviation of route due to floods—Notice of deviation not given to consignor—Forfeiture of protection conferred by risk notes—Transhipment of goods to bigger wagons necessitated by the deviation—Knocking about in the bigger wagons—Negligence—Liability of railway—Contract Act (IX of 1872), section 161—Act of God—Bailee adopting different course attended with risk.

Two consignments, each of 420 tins of oil, were booked with the B. B. and C. I. Railway at Hathras for despatch to stations in East Bengal. Each consignment was loaded into and occupied one whole wagon of that railway, the loading being done by the consignor. The consignments were accepted under risk-notes forms A and B. The ordinary route by which the consignments would travel would be over that railway as well as the R. K. Railway and the B. N.-W. Railway, and all the three railways being on the same gauge the original wagons would run through and there would be no transhipment of the goods. Owing, however, to breaches on the B. N.-W. Railway caused by floods, the consignments were diverted to a different route, *via* the E. I. Railway, at Benares, and the latter railway being of a wider gauge the contents of the original wagons had to be transferred to two wagons of that railway. As these wagons were bigger, the tins did not fill them compactly as before and consequently the tins were likely to knock against each other and the sides of the wagons and be injured thereby; the railway took no steps to pack the tins round with grass or straw to prevent such knocking. The court found that this actually happened and consequently there was a leakage of over 11 maunds. No notice was given

*Civil Revision No. 393 of 1936.

to the consignor of the deviation of route or of the transference to bigger wagons. The consignor sued for recovery of the value of the shortage:

Held, that the deviation, without notice to the consignor, from the ordinary route, though it might be due to a part of that route being flooded, caused a forfeiture of the special protection given to the railway by risk-notes forms A and B, under which the railway was absolved from all liability except upon proof of misconduct of the railway servants; that the obligation of the railway to deliver at destination in proper time did not justify such deviation without notice; and that the failure of the railway to take proper measures for the safe and compact packing of the tins on their transhipment to the bigger wagons or to give notice to the consignor to enable him to do so constituted negligence and the railway was liable for the loss.

Though the law places an obligation upon the bailee (carrier) to deliver the goods at their destination in proper time, he can not be held to have committed a default within the meaning of section 161 of the Contract Act if he is prevented from fulfilling that obligation not by any mistake or negligence on his part but by some circumstance beyond human control, e.g. a breach caused in the railway line by floods. On the other hand, if the bailee is unable to fulfil that obligation by some such circumstance, and in order to do so he adopts some other course necessarily attended with risk, which is not contemplated in the contract between him and the bailor, without the latter's knowledge and consent, he does so at his own risk.

Mr. *S. B. L. Gaur*, for the applicant.

Mr. *A. M. Khwaja*, for the opposite parties.

MULLA, J.:—This is a plaintiff's application in revision from a decree of the court of small causes in a suit brought by him for damages for shortage in the goods consigned by him to a railway company. The plaintiff is the proprietor of a firm called Kishan Lal Matru Mal which owns an oil mill at Hathras. He loads tins of mustard oil in railway wagons at a siding in his own mill for being despatched to various places. In this case we are concerned with two consignments, of 420 tins of oil each, which he delivered to the B. B. and C. I. Railway company at Hathras on two different

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dates, one on the 15th of August, 1934, for being despatched to Narainganj and the other on the 28th of August, 1934, for being despatched to Dacca. Each consignment occupied a four-wheeler wagon of the B. B. and C. I. Railway. These consignments were accepted by the railway under risk-notes forms A and B. The acceptance of goods under these forms implied that owing to the bad condition and defective packing of the goods the railway company was not prepared to take any responsibility for the condition in which they might be delivered to the consignee and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration's servants. It implied further that the railway company would not be responsible for any loss, destruction or deterioration of or damage to the consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants.

The ordinary route by which the two consignments in question had to be taken to their destination was *viâ* Kasganj, Sitapur, Gorakhpur and Katihar. The goods had consequently to pass in transit not only on the B. B. and C. I. line, but also on the B. N.-W. and R. K. lines. It is to be noted that all these lines are metre gauge lines so that the two wagons containing the tins of oil despatched by the plaintiff could reach their destination without the necessity of the goods being transferred from one wagon to another at any place on the way.

It must be presumed that when the plaintiff despatched the two consignments from Hathras and the railway company accepted the consignments, it was clearly understood between the parties that the ordinary route will be followed. In this case, however, there were breaches caused on the B. N.-W. line by floods and hence the two consignments were diverted either from Sitapur or from Gorakhpur to a different route

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and were sent to Benares. It is admitted that no information of this diversion of route was conveyed to the plaintiff. At Benares both the consignments were transferred from the four-wheeler wagons of the B. B. and C. I. to bigger wagons of the East Indian Railway. It is again admitted that the plaintiff was not given any information of this transfer of the consignments from one class of wagon to another. As the East Indian Railway wagons were bigger in size, the tins of oil were necessarily packed rather loosely so that there was likelihood of the tins striking against each other and against the sides of the wagon. The consignments reached their destination and were unloaded in the presence of the railway authorities. A note was made at the time that there was a shortage of 11 maunds, 7 seers and 4 chhataks in weight. It was in order to recover damages for this shortage that the plaintiff brought the suit out of which this application in revision arises. The suit was brought in the court of the Munsif at Hathras on the small cause court side. It may be mentioned here that the plaintiff had despatched nine other consignments on different dates to a place called Bhairavbazar. These consignments had also to be taken by the same route and they were also diverted to Benares with the exception of one which was detained at Sitapur. When these consignments reached their destination and the plaintiff's agents took delivery it was found that there was a shortage and the tins bore marks of having been cut or bored with some pointed instrument. The consignment which had been detained at Sitapur reached its destination later on by the ordinary route, and it was found at the time of delivery that there was no shortage in it. The plaintiff brought a regular suit for damages in respect of the eight consignments in which there was a shortage. The learned Munsif disposed of both the suits by the same judgment. He gave the plaintiff a decree in respect of the eight consignments in the regular suit on the ground that the shortage was due to misconduct on the part of

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the railway servants. In the other suit out of which this application arises he held that owing to the diversion of route without the plaintiff's knowledge the defendants could not claim any protection from liability under risk-notes forms A and B and their liability had to be determined under the Contract Act, but he found that in transferring the goods from a small wagon to a bigger one they had not done anything which a prudent man would not have done in the circumstances and hence they were not responsible for the loss. Upon this finding the suit has been dismissed and the plaintiff has come up in revision.

Now the first question for consideration is whether the diversion of route in this case was or was not a circumstance which deprived the defendants of the exemption from liability afforded to them by the risk-notes forms A and B. The lower court has answered that question in the affirmative, but it has been contended on behalf of the defendants that in diverting the consignments to Benares the defendants only tried to fulfil their obligation to deliver the goods at their destination in proper time. It was suggested that if they had failed to do so and there had consequently been a delay in the delivery of the goods at their destination causing loss to the plaintiff, the defendants would have been held liable for that loss and hence they acted in good faith in diverting the consignments to Benares in order to save themselves from that liability. I do not find much force in that contention. It is true that the law places an obligation upon the bailee to deliver the goods consigned to him at their destination in proper time, but I do not think that he can be held to have committed a default within the meaning of section 161 of the Contract Act if he is prevented from fulfilling that obligation not by any mistake or negligence on his part but by some circumstance entirely beyond human control, as, for instance, a breach caused in the railway line by floods which happened in the present case. On the other hand, I think that if the

bailee is unable to fulfil that obligation by some circumstance entirely beyond human control, and in order to do so he adopts some other course necessarily attended with risk, which is not contemplated in the contract between him and the bailor, without the latter's knowledge and consent, he does so at his own risk. In the present case it was necessarily implied in the contract between the plaintiff and the defendants that the consignments would be taken to their destination by the ordinary route. He had loaded and packed the consignments upon that clear understanding and he had taken the risk of loss or deterioration upon himself by executing risk-notes forms A and B. If the defendants had followed the ordinary route they would have been free from all responsibility for any loss, destruction or damage except upon proof of misconduct on the part of their servants. When they found that they could not take the consignments to their destination by the ordinary route, I think it was their duty to inform the plaintiff before diverting the consignments to another route, and especially so because the diversion necessarily involved a transfer of the goods from a small wagon to a bigger one which introduced a new factor for causing loss or damage. If the plaintiff had been advised of the intended diversion of route involving a transfer of the goods from a small wagon to a bigger one, he could have exercised his option either to direct the defendants to detain the goods at the point beyond which they could not be taken by the ordinary route or to take the necessary measures himself to prevent loss or damage which was likely to be caused by the transfer of the goods from a small wagon to a bigger one. In the course which the defendants adopted in the present case an important condition of the contract between the parties was varied without the plaintiff's knowledge and he was given no opportunity of safeguarding himself against any loss or damage likely to result from the change. I am, therefore, of the opinion that the diversion of route and the transfer of goods from a small wagon to a bigger one constituted a breach of a

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necessarily implied term in the contract between the parties and the defendants cannot therefore claim any protection under the risk-notes forms A and B. This view is, I think, fully supported by a single Judge decision of this Court in the case of *Secretary of State for India* v. *Kesho Prasad Sheo Prasad* (1). The learned Judge of this Court who decided that case made the following observations relevant to the present case:

"It appears to me that the exemption from liability afforded to the railway administration by the risk-notes forms A and B is operative and available to the railway administration only during the transit on the ordinary route, and once the goods are diverted from that route the protection afforded by these risk-notes ends. In the absence of a clear and unambiguous stipulation to the contrary the presumption is that the consignor at the time of consigning his goods contemplates that the goods would be transmitted across the ordinary route within a reasonable time and the railway administration must in such cases always be deemed to have accepted the goods for despatch by the ordinary route. The contract evidenced by risk-notes forms A and B does not contemplate the carrying of the goods otherwise than by the ordinary route, and if there is a diversion from the ordinary route—it does not matter for what distance—the railway administration cannot invoke to its aid the benefits of the said forms."

With these observations, which to my mind lay down a general proposition relating to the liability of railway companies, I entirely agree. The learned counsel for the defendants, however, argued that these observations must be deemed to be confined to a case where the diversion of route takes place owing to a mistake or negligence on the part of the railway company, but they cannot be applied to the present case where the diversion was deliberately made in good faith. I am unable to agree with that contention, for to my mind the *ratio decidendi* of the case to which I have referred was the breach of contract involved in the diversion of route and not the mere fact that the diversion was due to some mistake or negligence on the part of the railway company. I am, therefore, of the opinion that the defendants in this case

(1) [1932] A. L. J. 788.

cannot invoke the protection initially given to them by the risk-notes forms A and B under which they accepted the two consignments in question.

The next question for consideration is whether the diversion of route and the transfer of the goods from a small wagon to a bigger one did actually cause the loss or shortage in the present case. The lower court has answered that question in the affirmative, relying principally upon the indisputable fact that no shortage occurred in the solitary consignment which was detained at Sitapur instead of being diverted to Benares like the other consignments. That finding cannot but be accepted as correct, and all that remains for consideration is whether the defendants can be absolved of negligence and the consequent responsibility for the shortage. The lower court has found that they did nothing which a prudent man would not have done in the circumstances, but I cannot agree with that finding. In my opinion, when the goods were transferred from a small wagon to a bigger one, it was the duty of the defendants to see that they were so packed as to prevent the possibility of the tins striking against each other and the sides of the wagon. It is admitted that they took no steps to prevent that possibility. If they had informed the plaintiff he would have taken the necessary measures, but they did not convey any information to him. I cannot, therefore, hold that they acted like an ordinary prudent man dealing with his own goods and I find that they were guilty of negligence and are consequently liable for the loss caused to the plaintiff. The reason given by the lower court for arriving at a finding in favour of the defendants is that it was proved upon the evidence that the plaintiff himself had not put any grass or *bhusa* round the tins so as to prevent them from striking against each other and against the sides of the wagon. The plaintiff had made an allegation to that effect, but the lower court found that it had not been proved. That does not, however, afford a ground for holding that the defendants

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were not guilty of negligence. It appears to me that the lower court entirely ignored the fact that when the plaintiff loaded the consignments at Hathras, he did so in small four-wheeler wagons of the B. B. and C. I. Railway and it may not have been necessary to put any grass or *bhusa* round the tins having regard to the small space inside the wagon. That did not, however, afford any justification to the defendants for omitting to take that precaution when the goods were transferred from the small wagons to bigger ones. It appears from the judgment of the lower court in the regular suit that one of the defendants, namely the R. K. Railway, could not be held responsible for any loss or shortage because it had obtained a clear receipt and that suit was accordingly dismissed against the R. K. Railway. That consideration applies to the present case also. In the result I allow this application in revision and setting aside the decree passed by the lower court decree the plaintiff's suit with costs and future and *pendente lite* interest at $3\frac{1}{4}$ per cent per annum against all the defendants excepting R. K. Railway, defendant No. 3. As against defendant No. 3 the suit is dismissed with costs.

MISCELLANEOUS CIVIL

Before Mr. Justice Harries

1938
August, 12

MAHESHWARI BROTHERS (APPLICANTS) *v.* LIQUIDATORS, INDRA SUGAR WORKS (OPPOSITE PARTIES)*

Trust—Security deposit by employee of a company—Agreement to pay interest—Money not agreed to be kept apart, but mixed with general funds of company—Whether trust, or relationship of creditor and debtor—No priority or preference—Companies Act (VII of 1913), section 109(e)—Floating charge—Nature of—Necessity of registration with Registrar.

Certain persons were appointed as the selling agents of a sugar company, and by agreement they made a security deposit of Rs.50,000 with the company. It was agreed that the money was to carry interest at 5 per cent. per annum; it was to be

*Miscellaneous Case No. 9 of 1936.