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The second point is that attachment is a necessary preliminary to an execution proceeding. This is undoubtedly so; but we must find out a reason for the rule which requires a decree-holder to attach properties as a preliminary to taking execution proceedings. There is no doubt whatever that the whole object of attachment is to prevent an alienation and to make a particular fund available to the decree-holder; but this fund was available to the decree-holder as soon as the security bond was executed. It was impossible for the judgment-debtor after executing the security bond to alienate the property covered by the security bond to the embarrassment of the decree-holder. This has been dealt with by Wallis, C.J., in *Subramanian Chettiar* v. *Raja of Ramnad* (1) and I entirely agree with his conclusion on it.

In my opinion it is impossible to affirm the judgment of the learned Subordinate Judge. I would allow the appeal, set aside the order passed by the learned Subordinate Judge of Purnea and direct that he do proceed with the execution. The decree-holders are entitled to their costs both in this Court and in the Court below.

WORT, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Fazl Ali, JJ.

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Jan., 25, 29. Feb., 25.

HARDAYAL RAM DASS RAY

v.

BENGAL AND NORTH-WESTERN RAILWAY.*

Railways Act, 1890 (*Act IX of* 1890), *sections* 54 *and* 72—*delivery to railway company, what constitutes—giving and*

*Appeal from Appellate Decree no. 1448 of 1926, from a decision of J. A. Saunders, Esq., I.C.S., District Judge of Muzaffarpur, dated the 23rd July, 1926, confirming a decision of Babu Girindra Nath Ganguli, Munsif of Bettiah, dated the 23rd December, 1925.

(1) (1918) I. L. R. 41 Mad. 327.

acceptance—consignment notes, handing over of, to the company, whether equivalent to acceptance—rules framed under sections 47 and 54, how far binding.

Before a Railway Company can be held liable as a bailee of goods it must be shown that the Company in fact accepted the custody of the goods.

Jalim Singh v. *Secretary of State for India*(1), *Sohan Pal*, *Munna Lal* v. *East Indian Railway Company*(2), *Narsinggirji Manufacturing Co.* v. *Great Indian Peninsula Railway*(3), *Munna Lal* v. *East Indian Railway Company*(4), *Lachmi Narain* v. *B. B. & C. I. Ry. Co.*(5) and *Ramchandra Natha* v. *Great Indian Peninsula Railway Company*(6), referred to.

Where a certain number of bags of turmeric were left in a goods-shed by the servants of the plaintiff in the absence of the railway servants, and the bags were neither marked nor weighed, but the consignment notes had been made over to the Marker who was discharging the duties of the Goods Clerk,

Held, that the lower court having found as a fact that the mere acceptance of the consignment notes was not equivalent to acceptance of the goods by the Company and the goods had not been delivered to the Railway Company, this finding could not be challenged in second appeal.

A Railway Company cannot avoid or unduly restrict its liability under the Railways Act by framing rules in that behalf which are unreasonable and inconsistent with the Act: its liability will, therefore, be judged by reference to the general law as embodied in section 72 and independently of any rule so framed.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

K. P. Jayaswal (with him *G. P. Das*), for the appellants.

(1) (1904) I. L. R. 31 Cal. 951.
(2) (1922) I. L. R. 44 All. 218.
(3) (1919) 21 Bom. L. R. 406.
(4) (1924) 82 Ind. Cas. 772.
(5) (1923) I. L. R. 45 All. 235.

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FAZL ALI, J.

S. N. Bose, for the respondent.

FAZL ALI, J.—This appeal arises out of a suit brought by the plaintiff-appellants against the B. & N. W. Railway Company to recover a sum of Rs. 559 as compensation for the loss of nine out of eleven bags of turmeric said to have been delivered to the Railway Company for being sent to Moradabad and Batala. The facts of the case as found by the Courts below are that on the 25th June, 1924, the plaintiffs sent 11 bags of turmeric to the railway station at Bettiah through one of their peons with the direction that some of the bags were to be despatched to Moradabad and some to Batala; that the bags were unloaded and placed in the railway goods-shed but this was not done in the presence of the goods clerk or any other railway servant; that the peon handed to the railway clerk in charge of the shed two consignment notes but the clerk instructed the peon to come for a receipt on the following day as he was too busy to write it out then; and that subsequently it was discovered that nine out of the eleven bags were missing. It was also found by the Munsif, and the finding was not challenged before the lower appellate Court, that when the goods were unloaded no one of the staff was called to witness it; that the case of the plaintiff that the bags were counted by the railway clerk was not true and that the forwarding notes had not been filled up and no marks been put on the bags before it was discovered that they were missing. Both the Courts below held that in the circumstances of the case there was no delivery to the Railway Company and the plaintiffs were therefore not entitled to a decree. *25th Feb., 1929.*

The only question that was argued on behalf of the appellants in this Court was that on the facts proved the Courts below should have come to the conclusion that there had been a delivery to the Railway Company, and a number of decisions were cited before us on behalf of the appellants as well as the respondents in this connection. Now, before dealing with

these decisions, I may say at once that the question as to when certain goods will be deemed to have been delivered in a particular case to the Railway Company is really a question of fact and will have to be decided with reference to the special circumstances of that case. It will, however, be useful to keep in view the provisions of law which govern the liability of a Railway Company in respect of articles delivered to them to be carried from one place to another. The most important provision which defines such liability is to be found in section 72 of the Indian Railways Act (IX of 1890) which runs as follows—

72. (*1*) " The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 152 and 161 of the Indian Contract Act, 1872.

(*2*) An agreement purporting to limit that responsibility shall in so far as it purports to effect such limitation, be void, unless it—

(*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(*b*) is otherwise in a form approved by the Governor-General in Council.

(*3*) Nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility as in this section defined of a railway administration."

Section 152 of the Indian Contract Act lays down that the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the kind and quality as the goods bailed. Again, section 161 lays down that if, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Before, however, we go into the question of the measure of responsibility of the Railway Company as

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a bailee it is important to consider at what point of time the responsibility of the Railway Company as a bailee commences. This will be clear by a reference to sections 148 and 149 of the Contract Act. Section 148 defines bailment as the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. Section 149 runs thus—

"The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf."

Thus it will appear that the important question to be considered in each case is whether the acts which have been performed by the consignor are such as will have the effect of putting the goods in the possession of the Railway Company or some person authorized to hold them on its behalf. The various railway companies have made their own rules in order to indicate when they will be deemed to have become responsible for goods made over to them. The rule which has been framed by the B. & N.-W. Railway Company to limit its responsibility under section 72 of the Indian Railways Act is rule 27, clause (*a*), which runs as follows—

"The Railway Administration hereby give public notice that they are not accountable for any articles unless the same are booked and a receipt for them given by their clerk or agent, and that when the articles are so accepted for conveyance, the responsibility of the railway for the loss, destruction or deterioration of the articles is subject to the provisions of section 72 of the Indian Railways Act IX of 1890."

Thus if it is once held that this rule correctly defines as to when the liability of the B. & N. W. Railway Company begins as a bailee, then it is clear that unless the Railway Company is shown to have actually issued a receipt for the goods it cannot be held liable for any loss or deterioration or destruction of the goods. It has, however, been rightly pointed out by the trial Court that the Railway Company cannot avoid or unduly restrict its liability under the

Railways Act by framing its own rules for the purpose and that, if any such rules are framed and it is found that they are unreasonable and inconsistent with the Act, such rules will be declared to be ultra vires and not binding upon those who have to deal with the Railway Company. The view which has been taken by the trial Court is fully supported by authorities and it has been definitely held in a series of decisions that similar rules to those relied upon in this case by the B. & N. W. Railway Company were ultra vires and, being inconsistent with the Act and unreasonable, were not binding upon the public even though they might be rules which are said to have been framed under sections 47 and 54 of the Railways Act. In the case of *Jalim Singh* v. *Secretary of State for India*(1), Stephen, J., who decided that case observed as follows: "The real question depends upon the construction that is to be placed upon sections 47 and 54 of the Railways Act. For the present purposes these two sections need not be distinguished. By section 47 the Railway Company may make general rules for regulating the terms on which it will warehouse or retain goods at any station. By section 54 the Railway Company may impose conditions for receiving goods. For the present purposes, these two things are the same. In both cases these rules and conditions have to be consistent with this Act. Now, what does that mean? The Railway Company has cast upon it the duties of an ordinary bailee. As I read the Act, it cannot wholly divest itself of those duties, but it may determine the conditions under which that duty may vest, and in particular it may specify the point of time at which it shall vest. The general common law embodied in section 72 is by those sections liable to be cut down to a certain extent by those rules under sections 47 and 54. The question is: To what extent? And the answer is: As far as is reasonable, which really means the same thing as being consistent with the Act."

(1) (1904) I. L. R. 31 Cal. 951.

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Again, in the case of *Ramchandra Natha* v. *The Great Indian Peninsula Railway Company*(1) Heaton, J., who had to deal with a rule framed by the G. I. P. Railway, which was very similar to the one relied upon in this case, made the following observation: "This (section 47) gives no express power to make rules regarding the liability of the Railway and that liability it seems to me remains precisely as defined by section 72. To hold otherwise would be to assume that the legislature conferred, not expressly but indirectly or by implication, a power to modify by rule the natural meaning of a section of the Act. I think this cannot be so, first, because it is a manner of making laws that I cannot attribute to a responsible legislature; and, secondly, because I think it is directly against the provision that the rules must be consistent with the Act."

The same view was taken in *Narsinggirji Manufacturing Co.* v. *Great Indian Peninsula Railway*(2) and in *Sohan Pal, Munna Lal* v. *East Indian Railway Company* (3). Thus it is clear that this case will have to be decided independently of rule no. 27 framed by the Railway Company. I will now refer to the decisions which were cited and discussed before us and consider how far they assist us in deciding the present case.

In *Jalim Singh* v. *Secretary of State*(4) certain goods had been taken to the railway station and there, a forwarding note being filled in, the consignor had the goods duly entered in the Railway Register by the Registering Clerk. It was then found in that case that nothing further remained to be done by the consignor except to obtain a formal receipt for the goods from the Railway Company, and in these circumstances the goods were held to have been delivered to the Railway Company even though the latter

(1) (1915) I. L. R. 39 Bom. 485.
(2) (1919) 21 Bom. L. R. 406.
(3) (1922) I. L. R. 44 All. 218.
(4) (1904) I. L. R. 31 Cal. 951.

denied responsibility for the custody of the goods on the ground that no formal receipt had been issued by them.

In *Sohan Pal, Munna Lal* v. *East Indian Railway Co.*,(1) it was found that certain goods had been actually handed over by the plaintiff's servant to the railway officials and accepted by the latter though no receipt was actually granted by them, and it was held that the liability of the Company would accrue from the time when the goods had been accepted, and was not dependent upon the granting or withholding of the receipt for the goods on behalf of the Company by the officials who had accepted the goods.

In *Narsingginji Manufacturing Co.* v. *G. I. P. Railway*(2) the goods were found to have been placed in the goods-yard, registered in the Company's books, weighed and marked by the Railway Company, and it was further found that the consignment notes in respect of the goods had been received by the Goods Clerk but he had not yet issued a receipt in respect of those goods. In these circumstances it was held that the goods should be deemed to have been delivered to the Railway Company.

In *Munna Lal* v. *East Indian Railway Company* (3) the facts which were found to have been proved were that certain goods had been delivered to the Station Master to be booked, but he being unable to book, on account of a stoppage of booking, kept the goods on the railway premises without definitely directing the plaintiff to remove the goods or telling him in unmistakable terms that the goods were being kept at his own risk, though at the same time not definitely accepting the goods at the railway risk. In these circumstances it was held that the conduct of the Station Master in retaining the goods in the railway shed afforded satisfactory evidence that he had accepted the bailment of the goods on behalf of the Railway Company.

(1) (1922) I. L. R. 44 All. 218. (2) (1919) 21 Bom. L. R. 406.
(3) (1924) 82 Ind. Cas. 772.

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In *Lachmi Narain* v. *B. B. & C. I. Railway Co.*(1) the facts found were that certain goods had been brought to the railway station and a forwarding note had been presented to the loading clerk who marked a number on them; that the clerk told the consignor to come the next day for the receipt and have the goods marked; that in the meantime the goods were deposited in a tin-shed where it was the custom to leave goods in similar circumstances in the custody of the owners. In these circumstances the learned Judges who decided the case took the view that on the evidence that was before them, they were unable to find " that nothing had been done by the plaintiff which would amount to putting the goods in question in the possession of the Railway Company or any person authorised on behalf of the Railway ".

Now, the only general rule which may be deduced from these decisions is that, if there is something to show that the consignor has done all that is possible for him to put the goods in the possession of the Railway Company and that there is nothing left for him to do in that connection, and there is clear evidence, direct or circumstantial, that the Railway Company has accepted the custody of the goods, the liability of the Railway Company as a bailee will begin to operate. In other words, to quote, the observations of Heaton, J., in *Ram Chandra Natha* v. *G. I. P. Railway Co.*(2), " 'A delivery to be carried by railway' 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."

In this particular case the difficulty in the way of the appellant is that it has been concurrently found by the two Courts which had to deal with the facts of the case that the bags of turmeric were left in the

(1) (1925) I. L. R. 45 All. 235. (2) (1915) I. L. R. 39 Bom. 485.

goods-shed by the servants of the plaintiff in the absence of any railway servant, and that there was sufficient evidence in the case to hold that it was the practice of merchants and traders to bring their goods and place them in the goods-shed at their own risk, this being permitted by the Railway Company solely for the convenience of traders. It has also been found that the bags had neither been marked nor weighed and all that had happened was that the consignment notes had been made over to the Marker who used also to discharge the duties of the Goods Clerk when the latter was busy otherwise. In these circumstances it has been definitely held by the Courts below that the goods had not been put in the possession of the Railway Company and that mere acceptance of the consignment notes was not equivalent to acceptance of the goods by the Railway Company. In view of these findings which are binding on us in second appeal it is impossible to interfere with the judgment of the Court below.

The learned Counsel for the appellant, however, draws our attention to rule 19 framed by the Bengal and North-Western Railway Company, which says that every consignment of goods, when handed to the railway for despatch, must be accompanied by a forwarding note signed by or on behalf of the consignor or consignors, and must contain a declaration of the weight, description and destination of the goods consigned and the route by which they are to be carried. It is said that this implies that as soon as the consignment notes are made over to the Railway Company, it is to be presumed that the goods have been handed over to the Railway Company for despatch. I am afraid, however, I do not agree with this reasoning. The rule has been made only for the guidance of customers of the Railway Company and all that it means is that a forwarding note must accompany the goods when they are delivered to the Railway Company for despatch. It cannot be assumed that the rule is never infringed in practice

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or that the railway employees may not relax it in any particular case. In any case the question as to whether goods have been actually delivered to the Railway Company or not is a question of fact which is to be proved by evidence in each case, and in my opinion the rule referred to by the learned Counsel does not dispense with the necessity of such evidence in cases in which it has been proved that the consignment notes have been actually made over to a railway servant. It may be that acceptance of the consignment notes will in certain cases be considered to be some evidence of acceptance of goods, but, as the lower appellate court has pointed out, it cannot be held that it must necessarily in all cases be treated as equivalent to acceptance of the goods.

The appeal therefore fails and is dismissed, but in the circumstances of the case there will be no order as to costs.

DAS, J.—I agree.

S. A. K.

Appeal dismissed.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

(On a difference of opinion between Ross and Chatterjee, JJ.)

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Feb., 25.

JYOTIBATI CHAUDHURAIN

v.

LAKSHMESHWAR PRASAD CHAUDHURI.*

Court-fees Act, 1870 (*Act VII of* 1870), *section* 7 (*iv*)(*f*), *and Schedule II, Article* 17(*vi*)—*suit by a member of joint Hindu family, for partition—prayer for rendition of accounts by karta—suit, whether essentially one for partition—karta, whether liable to render accounts.*

A karta of a joint Hindu family is not responsible to the other members of the family for the management of the joint

*First Appeal no. 185 of 1925. In the matter of court-fee.