and specific sum which a permanent tenure holder agreed to pay by a formal kabuliyat executed on the creation of a permanent tenure created before the passing of the Bengal Tenancy Act is a part of the actual rent within the meaning of section 74 of the Bengal Tenancy Act; and the plaintiff is entitled to succeed on that ground alone. The decree of the lower court is accordingly set aside. The appeal is allowed and the plaintiff's suit is decreed with costs throughout.

DAS, J.—I agree.

Appeal allowed.

S. A. K.

REVISIONAL CIVIL.

Before Fazl Ali, J.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

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Railways Act, 1890 (Act IX of 1890)—"To pay" invoice, consignment sent under—liability to pay freight, on whom rests—consignor primarily responsible—consignee, liability of, when arises—company's right to withhold goods—lien, giving up of—whether evidence of a new contract.

Where a consignment is sent under "to pay" invoices and the freight is made payable on delivery, it is the consignor who is primarily liable to pay the freight, his liability arising from the mere fact of his having made over the goods to the carrier for carriage.

The consignee is not, as such, in the absence of any special contract, liable for the freight.

Domett v. *Beekford* (1), *Shepard* v. *De Barnales* (2), *Fox* v. *Bott*(3), *Sewell* v. *Burdick*(4), *Lidgett v. Perin*(5), and *Sanders* v. *Vanzeller*(6), referred to.

* Civil Revision no. 265 of 1928, against an order of Babu R. C. Choudhury, Small Cause Court Judge of Dhanbad, dated the 23rd April, 1928.

(1) (1833) 5 B. & Ad. 521.
(2) (1811) 13 East. 565.
(3) (1861) 6 H. & N. 630.
(4) (1884) 10 App. C. 74.
(5) (1862) 2 F. & F. 763.
(6) (1843) 4 Q. B. 260., Ex. Ch.

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The consignee's liability may, however, arise in cases where the consignor was acting as an agent of the consignee to the knowledge of the railway company, or where the consignee had, by special contract, made himself liable for the freight or where it was clearly understood by the consignor and the carrier that freight was to be paid by the consignee.

Kennedy v. *Geuveia*(1), *Sewell* v. *Burdick*(2), *Drew* v. *Bird*(3), and *Dickenson* v. *Lane*(4), referred to.

G. W. Railway v. *Bagge*(5), distinguished.

Where, however, the railway company, which is to deliver the goods on payment of freight, makes them over to the consignee without exercising its right to withhold the delivery of the goods until freight has been paid, the receipt of the goods by the consignee, although it does not of itself create an obligation to pay the freight, may be evidence of a new contract distinct from the contract of carriage whereby the consignee, in consideration of the carrier giving up his lien, agrees to pay him the freight.

Cock v. *Taylor*(6), referred to.

Appeal by the plaintiff.

This application arose out of a Small Cause Court suit brought by the petitioner as representing the East Indian Railway Co., against the opposite party, for the recovery of a sum of Rs. 397-2-0.

The facts of the case were briefly these:

Between 6th February 1926 and 25th February 1926 the opposite party, who was the owner of the North Kujama Colliery, despatched five wagons of coal from Pathardi, a station on the East Indian Railway, to Sealdah station on the Eastern Bengal Railway. The wagons were consigned to one B. N. Roy who was impleaded as defendant no. 1 in the suit.

(1) (1823) 3 Dow & Ry. 503, (K. B.)
(2) (1884-85) 10 A. C. 74.
(3) (1828) 1 M. & M. 156.
(4) (1862) 2 F. & F. 188.
(5) (1884) 15 Q. B. D. 625.
(6) (1811) 13 East. 399.

In the declaration notes which were tendered in evidence on behalf of the plaintiff there was a column no. 10 which contained the following heading—

"Charges to be placed to the account of or received from."

The entry in this column was,

"To pay,"

and this entry was explained in the plaint as showing that according to the statement made by the opposite party at the time when the wagons were booked by him, freight was to be paid by the consignee. It appeared that the goods safely arrived at the destination and were duly delivered to the consignee without any freight having been paid by him. The petitioner thereupon brought the suit in which he impleaded both the opposite party (the consignor) and B. N. Roy (the consignee). It was, however, alleged in the plaint that under the terms of the contract the opposite party was bound to pay the freight and that the cause of action arose on and from 6th February 1926 to 25th February 1926 the dates on which the various consignments were booked. The suit was contested by the opposite party only who filed a written statement alleging that he had booked the wagons for and on behalf of B. N. Roy for carrying the coal, which had been previously purchased by the latter, to Sealdah station where B. N. Roy had his coal depôt. The opposite party further denied that there was any express or implied contract between him and the plaintiff for the payment of freight and contended that having regard to the entry in column 10 of the declaration notes and to the prevailing trade usage, it was the consignee who was liable to pay freight which could not therefore be recovered from him. The parties did not adduce any oral evidence and the Small Cause Court Judge who tried the suit decreed the suit ex-parte against B. N. Roy but dismissed it with costs against the opposite party. The petitioner then filed an application in the High Court under section 25 of the Small Cause Court Act praying that

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the judgment of the Small Cause Court Judge in which he had held that freight was not recoverable from the opposite party be set aside, and such other order or orders might be passed as the High Court considered proper.

Cur. Adv. Cult.

N. C. Ghosh and *B. B. Ghosh*, for the petitioner.

S. C. Mazumdar, for the respondent.

Fazl Ali, J., (after stating the facts set out above proceeded as follows :)

The main question to be decided in this case is whether the consignor was or was not liable for the freight for the recovery of which the suit was instituted. In order to decide this question it will be necessary to find out as to who were the contracting parties in this case and as to what was the nature of the contract between them. If it appears that the contract was between the consignor and the Railway Company and the consignor had undertaken to pay freight, the consignor will be obviously liable to pay it. If, on the other hand, it appears that the consignor was merely contracting as an agent and that the Railway Company had sufficient notice that the consignee was the principal for the purpose of the contract and that the consignee was to pay freight, it is equally clear that in such a case the consignee will be principally liable for freight. The question, however, cannot be so easily answered when we have to deal with implied contracts or when the evidence as to the nature of the contract is meagre or not clear. In such circumstances one will have to fall back upon the principles laid down in certain decided cases. It appears, however, that there is hardly any reported decision on this point in this country and the reason for this seems to be that the Railway Companies have framed their rules in such a way that they always can and in fact do realise freight either when the goods are delivered to them or when the goods are

delivered by them to the consignee. There are, however, a large number of decisions of the English Courts relating to both railway and shipping companies and one can always look to them for guidance so far as the general principles are concerned.

The decisions of the English Courts are unanimous on the point that the person who is primarily liable for the payment of freight is the consignor [*Domett* v. *Beckford* (1), *Shepard* v. *De Barnales* (2), *Fox* v. *Nott* (3) and *Sewell* v. *Burdick* (4)]. It has been pointed out in some of the cases that the liability of the consignor is to be implied from the mere fact that he has made over the goods to the carrier for the purpose of being carried to their destination and that therefore his liability may in some cases be even independent of the question of the actual ownership of the goods [*Lidgett* v. *Perin* (5)]. The case, however, will be different if the facts of the case show that the consignor acted to the knowledge of the carrier as agent only in which case the person on whose behalf he acted is in reality the principal and liable for freight accordingly [*Dickenson* v. *Lane*(6)]. It follows that the consignee is not as such liable to pay freight because he is generally not to be treated as a party to the contract of carriage [*Sanders* v. *Vanzeller* (7)]. The following passage from the Law of Transport by Railway, by Leslie, may be quoted here—

"In the vast majority of cases the consignor contracts with the carrier as principal. He may in fact be the principal, though the goods are consigned to a named consignee, as in a case where they are sent on approval: or he may be the consignee's general agent: or, if there be an enforceable contract of sale, he will be deemed to be the consignee's special agent to make the contract of carriage. But if he makes the contract as principal the carrier is entitled to look to him for the freight. There is indeed a presumption that goods delivered to a carrier, for delivery by him to a person other than the sender, are delivered pursuant to an ordinary contract of sale, and that the property in the goods vests

(1) (1833) 5 B. & Ad. 521.
(2) (1811) 13 East. 565.
(3) (1861) 6 H. & N. 630.
(4) (1884) 10 App. Cas. 74.
(5) (1862) 2 F. & F. 762.
(6) (1862) 2 F. & F. 188.
(7) (1843) 4 Q. B. 260, Ex. Ch.

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in the buyer on delivery to the carrier, so that the consignee is, prima facie, the proper person to sue the carrier. This presumption might have been extended so that, prima facie, the carrier should look to the consignee for freight. But, whether the result is or is not logical, the Courts have not so extended the ambit of the presumption; and the carrier in accordance with the ordinary rule of agency, is entitled, prima facie, to treat the consignor as the person with whom he contracts."

In certain cases, however, the consignee has been held to be liable for freight, as for example when he has made himself liable by express contract [*Kennedy* v. *Gouveia* (1)] or when he is treated as the undisclosed principal of the shipper [*Sewell* v. *Burdick* (2)]. The decisions, however, are not unanimous as to what would be the liability of the consignee if the carrier who is to deliver the goods on payment of freight makes them over to the consignee (or to the endorsee of the bill of lading) without exercising his right to withhold the delivery of the goods until freight has been paid. The view taken in some of the leading cases on this point has been summarised in the following passage in Halsbury's Laws of England, Volume 26, page 295:—

"Since, however, the shipowner has a right to withhold delivery until the freight has been paid the receipt of the goods by the consignee in such a case, though it does not of itself create any obligation to pay freight, may amount to evidence of a new contract, distinct from the contract of carriage, whereby the consignee, in consideration of the shipowner giving up his lien, agrees to pay him the freight. Whether this new contract exists or not is a question of fact, to be determined by reference to the circumstances of the particular case. The conduct of the consignee, and in particular his previous dealings with the ship-owner, and, perhaps, his usual course of business must be such as to meet the inference that his receipt of the goods was in pursuance of the new contract, and not merely in discharge of his duty to his principal. Though the receipt of the goods may, in the absence of any explanation, be sufficient, no such inference is to be drawn, where at the time when the consignee received the goods, he was known by the shipowner to be acting as agent for their owner and the delivery was made to him in that capacity."

In *Cock* v. *Taylor*(3) which is one of the earliest cases on the point Le Blanc, J., enunciated the principle referred to above as follows: "The purchaser must

(1) (1823) 3 Dow and Ry. 503 (K. B.).
(2) (1884) 10 App. Cas. 74.
(3) (1811) 13 East. 399; 104 E. R. 424.

have understood at the time that the goods were liable to be detained for the payment of the freight, if it were not paid before delivery, and his receiving them from the master and the master's parting with his lien and giving them up to the purchaser at his request is evidence of a new contract between them that the purchaser would pay the freight;"

Another important class of cases in which the question of a consignee's liability has to be considered are cases in which it is understood between the consignor and the carrier that freight is to be paid by the consignee. In *G. W. Railway* v. *Bagge* (1) the carrier sued the consignor for freight and he was held to be liable for it even though it appeared that he had given a direction to the carrier to collect it from the consignee. This case, it may be mentioned, cannot be easily reconciled with *Drew* v. *Bird* (2). The perusal however of the judgment given by Lord Coleridge in *G. W. Railway* v. *Bagge*(1) will show that he based his decision on the facts of the particular case and he clearly indicated his view that the true construction of the contract in the particular case was that the consignor should pay freight. The result, therefore, will be different if the consignor with due authority contracts only as an agent for the consignee or unambiguously discloses that he is merely such an agent [Leslie's Law of Transport by Railway, page 49]. Again, it may be that there was a special contract between the consignor and the carrier to the effect that apart from any question of agency the latter will look only to the consignee for freight and in that case it is clear that the consignee alone would be liable.

I have stated the law at some length in this case owing to the paucity of decisions in this country and also because to my mind it appears that neither the trial Court nor the parties to the case had clearly realised how the main issue ought to have been

(1) (1884-85) 15 Q. B. D. 625. (2) (1828) 1 M. & M. 156.

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approached in the present case. In my opinion it was a case in which some evidence ought to have been gone into to prove the nature of the contract and the position held by the opposite party with reference to the contract. The trial Court also should have more clearly formulated the points for determination in the case and should have gone a little more fully into the question as to what was the nature of the contract in this particular case and whether there was any special contract in the case to make the consignee alone liable for freight. As, however, no oral evidence was adduced by any of the parties, I must assume that the opposite party entered into the contract for the carriage of goods as a principal and would therefore be prima facie liable for freight. The onus of proving the allegations made by him in the written statement that in booking the wagons he was merely acting as an agent for B. N. Roy to the knowledge of the East Indian Railway Co., was on him and he has not discharged this onus. Thus if the case rested here only there would be no difficulty in holding that the decision of the learned trial Court was wrong and liable to be set aside. I find, however, that the declaration-notes filed in this case on behalf of the plaintiff taken along with the admission made by the plaintiff in the plaint lend support to the inference which seems to have been arrived at by the trial Court, though the trial Court might have expressed himself a little more clearly on the point that under the terms of the contract the Railway Company had undertaken to realise the freight from B. N. Roy and not from the opposite party. It is true that even in these circumstances one could have held on the authority of the decision in *G. W. Railway* v. *Bagge* (1) that this was not sufficient to exempt the opposite party from the liability. But after all the question as to what was the contract between the parties as to the payment of freight is a question of fact and a Court of revision cannot substitute its own view on the question for the

(1) (1885) 15 Q. B. D. 625,

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view taken by the Court of trial. There is also another circumstance which has considerably weighed with me and in view of which I am reluctant to interfere with the order of the trial Court and it is this. I find that one of the rules framed by the East Indian Railway Company is that money in payment of freight due on consignments booked under "To-pay" invoices must be paid before the consignments are to be delivered. Thus although the East Indian Railway Company had the authority to withhold the delivery until the freight was paid, they actually delivered the goods to the consignee without charging the freight. There is nothing on the record to show why this unusual course was adopted in the present case. Besides, the Railway Company impleaded B. N. Roy also as one of the defendants in case, and the lower Court has awarded them a decree against B. N. Roy. These being the circumstances of the case, I do not propose to interfere with the judgment of the Small Cause Court Judge and dismiss the application with costs.

Application dismissed.

S. A. K.

APPELLATE CIVIL.

Before Terrell, C.J. and Jwala Prasad, J.

DINANATH JHA

v.

GANESH DUTT JHA.*

1929.

Dec., 10, 11, 17. Jan., 18.

Hindu Law—Jajman, right of, to appoint and dismiss priest—fees and perquisites paid to officiating priest—agreement for division, absence of—rival priest, whether can claim a share.

*Appeal from Appellate Decree no. 909 of 1926, from a decision of Maulavi Wali Muhammad, Subordinate Judge of Motihari, dated the 29th March 1926, confirming a decision of Babu Girindranath Ganguli, Munsif of Bettiah, dated the 26th February, 1925.