

the name of the other partner in the firm should be disclosed, the Subordinate Judge was not justified in rejecting the suit under section 32. This was the view taken by the District Judge (Mr. Macpherson), which was confirmed on appeal. The case having been remanded, and the name of Málamchand having been brought on the record, the Subordinate Judge found as a fact that Ságarmal was entitled to sue for the firm, and that the addition of Málamchand's name came under the provisions of section 27, not of section 32. The District Judge (Mr. Scott) came to the same conclusion, and we think that he was right, and confirm the decree with costs.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.*

TIPPA'NNA, PLAINTIFF, v. THE SOUTHERN MARATHA RAILWAY COMPANY, DEFENDANTS.\*

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July 7.

*Railway Company—Exemption from liability—Special contract—Risk note.—Railways Act (IX of 1890), Sec. 54, Cl. (1), Sec. 72, Cls. (a), (b), Sub-cl. (2) and (3)—Carriers' Act, 1865.*

The plaintiff sued the defendants (a Railway Company) for damages for short delivery of goods consigned to him. The defendants pleaded a special contract signed by the consignor, which, in consideration of their carrying the goods at a special reduced rate instead of the ordinary tariff rate, exempted them from liability for loss or damage to the goods from any cause whatever before, during, and after transit over their railway or other railways working in connection therewith.

*Held*, that under the contract the defendants were not liable to the plaintiff.

This was a reference from Ráo Sáheb Vináyak Vithal Tilak, Subordinate Judge of Bágalkot, in his Small Cause jurisdiction, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was as follows :—

"3. On the 21st April, 1891, a certain man at Salem, (a station on the Madras Railway), consigned 230 bags of cocoanuts (each bag containing 100 nuts) for delivery to plaintiff at Bágalkot

\* Civil Reference, No. 3 of 1892.

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(a station on the Southern Marátha Railway). The two rail-ways work in connection with each other. The defendants having delivered only 229 bags to the plaintiff, the latter has sued to recover damages (Rs. 4) for the short delivery.

"4. Under section 76<sup>(1)</sup> of the Railways Act (IX of 1890) it is not necessary for the plaintiff to prove how the loss of one bag was caused. Nor has the defendants produced any evidence on the point.

"5. The defendants rely on section 72<sup>(2)</sup> of the Railway Act and on \* \* the risk note<sup>(3)</sup>, (Exhibit 7), which is

(1) Section 76 of the Indian Railways Act (IX of 1890) :—

In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused.

(2) Section 72 of the Indian Railways Act (IX of 1890) :—

(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 151, 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 the common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

(3) *Risk Note.*

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate articles for which an alternative "ordinary" or "railway risk" rate is quoted in the tariff.)

*Station, 21st April 1891.*

Whereas the consignment of ..... tendered by me as per forwarding order No. of this date, for despatch by the Madras Railway to station, and for which I have received railway receipt No. of the same date, is charged at a special reduced rate instead of at ordinary tariff rate chargeable for..... I, the undersigned, do in consideration of such lower charge agree and undertake to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the said consignment from any cause whatever before, during, and after transit over the said railway or other railway lines working in connection therewith.

signed by the consignor and attested by witnesses. They contend that the special contract contained in the risk note exonerated them from all liability to damages.

"6. It is admitted that the risk note is in the form approved by the Governor in Council."

The Subordinate Judge referred the following question:—

"Can the defendant claim exemption from liability by reason of the special contract contained in the risk note?"

The opinion of the Subordinate Judge was in the negative, though he considered that the decision of the Calcutta High Court in *Moheshwar Dás v. Carter*<sup>(1)</sup> supported the defendants' contention.

*Dáji Abáji Khare* (*amicus curiæ*), for the plaintiff, relied on *Chogemul v. The Commissioners for the Improvement of the Port of Calcutta*<sup>(1)</sup>.

*Mahádeo Bháskár Chaobal* (*amicus curiæ*), for the defendants, relied on *Moheshwar Dás v. Carter*<sup>(2)</sup>.

*PER CURIAM*:—In this case the Subordinate Judge of Bágalkot has referred the following question:—Can the defendants claim exemption from liability by reason of the special contract contained in the risk note which the plaintiff has signed? His opinion was in the negative. The risk note, as the Subordinate Judge states in paragraph 6 of his reference, is admittedly in the form approved of by the Governor General in Council.

This case comes within the Railways Act (IX of 1890). By section 54<sup>(3)</sup>, clause (1) of that Act, subject to the control of the Governor General in Council, a railway administration may impose conditions not inconsistent with the Act, or with any

(1) I. L. R., 10 Calc., 210.

(2) I. L. R., 18 Calc., 427.

(3) Section 54 of the Indian Railways Act (IX of 1890):—

(1) Subject to the control of the Governor General in Council, a railway administration may impose conditions, not inconsistent with this Act, or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods.

(2) The railway administration shall keep at each station on its railway a copy of the conditions for the time being in force under sub-section (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times.

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general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. By section 72, sub-clause (2), an agreement purporting to limit the responsibility of a railway administration for the loss of goods delivered to be carried by railway 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 goods, and (b) is otherwise in a form approved by the Governor General in Council. There is a further sub-clause (3) which is as follows:—"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."

Mr. Khare, who argued this case for the plaintiff, contended that there is something in the Common Law of India which will enable him to recover damages notwithstanding the terms of the risk note. In our opinion, as there is a risk note in this case signed by the plaintiff, which is in a form approved by the Governor General in Council, his contention must fail. This risk note says: "To be used when the sender elects to despatch at a 'special reduced' or 'owner's risk' rate articles for which an alternative 'ordinary' or 'railway risk' rate is quoted in the tariff." The risk note states that, whereas the consignment is charged at a special reduced rate instead of at ordinary tariff rate charged for the goods (230 bags of cocoanuts), the plaintiff does, in consideration of such lower charge, agree and undertake to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment from any cause whatever before, during, or after transit over the said railway or other railway lines working in connection therewith. As pointed out by Garth, C. J. (Prinsep and Wilson, JJ., concurring) and by O'Kinealy, J., in *Moheswar Dás v. Carter* <sup>(1)</sup>, similar contracts have frequently been construed by English Courts and full effect has been given to their provisions. We cannot understand the doubts of the Subordinate

(1) I. L. R., 10 Calc., 210, at p. 213.

Judge, when, moreover, he had a ruling of the Calcutta High Court to guide him.

The recent decision of the Calcutta High Court in *Chogemul v. The Commissioners for the Improvement of the Port of Calcutta* (1), so strongly relied upon by Mr. Khare, has no application in the present case, as there was no special contract signed by or on behalf of the consignor of the goods. The present case turns upon the provisions of the risk note, which, in our opinion, shows that the defendants have a complete defence to this action.

Mr. Khare further argued that, apart from the measure of the general responsibility of railways as defined by clause (1) of section 72, and the non-applicability thereto of the Common Law of England or of the Carriers' Act, 1865, there was a Common Law of India untouched by the section, and that under that law defendants could not claim exemption by reason of the risk note. We are unaware of such a law. The Common Law, which came to govern the duties and liabilities of common carriers throughout India, was the Common Law of England (see remarks of Privy Council in *The Irrawaddy Flotilla Company v. Bugwándás* (2)). The effect of that law as regards railways is restricted by section 72 of Act IX, 1890.

In answer, therefore, to the question referred by the Subordinate Judge we are of opinion that the defendants can claim exemption from liability by reason of the special contract contained in the risk note.

*Order accordingly.*

(1) I. L. R., 18 Calc., 427.

(2) I. L. R., 18 Calc., 620.

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