APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

OHHAGANLAL SHALIGRAM SHET (ORIGINAL PLAINTIFF), APPELLANT, *v.* EAST INDIAN RAILWAY COMPANY (ORIGINAL DEFENDANT), RESPONDENT.* 1903. *June* 24.

Railway Company—Consignment of goods—Diversion of consignment while en route—Delivery to the original consignee—Liability of the Railway Company—Railway Act (IX of 1890), section 77—Notice—Second appeal—Plea of want of notice whether allowable—Practice.

G booked a consignment of goods from the Sakrigali Ghat Station on the East Indian Railway to R at Kamptee, a station on the Bengal-Nagpur Railway. Whilst the consignment was *en route* to Kamptee, G directed the railway servants at Sakrigali Ghat Station to notify to the Station Master at Kamptee to deliver the consignment to plaintiff at Nargaon. This direction was given: but disregarding the order the Station Master at Kamptee delivered the consignment to R at Kamptee. The plaintiff sued the East Indian Railway to recover compensation for loss of goods.

Held, that the Railway Company was liable in damages; the case was a simple case of breach of contract; the defendant contracted to carry the goods and deliver them at Nargaon to the plaintiff and failed to do so.

Held, further, that the liability of the Railway Company was not affected by the fact that the Station Master at Kamptee acted wrongly in disregarding the instructions which he had received from Sakrigali Ghat Station.

Held, further, that a plea of failure to give notice under section 77 of the Indian Railway Act, 1890, urged for the first time in second appeal, and not supported by any evidence that such notice was not given, was taken too late. This could not be regarded as a stale demand as the suit was filed within two months after the cause of action arose.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khándesh, confirming the decree passed by V. N. Rahurkar, Subordinate Judge at Bhusáwal.

Suit to recover compensation for loss of goods.

One Gangaram booked, on the 27th May, 1900, a consignment of 166 bags of *khesary* (lakh grain) from Sakrigali Ghat Station, a station on the East Indian Railway, to one Rupram Govindram at Kamptee, a station on the Bengal-Nagpur Railway. Whilst the consignment was *en route* to Kamptee, Gangaram, on the 31st

* Second Appeal No. 631 of 1902.

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May, 1900, requested the railway servant at Sakrigali Ghat to divert the consignment from Kamptee to the plaintiff at Nargaon, another station on the same line (Bengal-Nagpur Railway), 234 miles distant from Kamptee. This diversion was communicated to the Station Master of Kamptee. But the latter took no notice of the communication as the original consignee Rupram Govindram threatened to sue the Company for damages if the consignment were not delivered to him. The consignment was accordingly delivered to Rupram on his paying the hire and passing an indemnity note.

The plaintiff thereupon filed this suit against the East Indian Railway to recover Rs. 1,164 as compensation for loss of goods.

The Subordinate Judge dismissed the suit for non-joinder of parties, inasmuch as the Bengal-Nagpur Railway was not joined as a defendant.

On appeal, the District Judge held that the Bengal-Nagpur Railway was not a necessary party to the suit, but held that the defendant was not liable on the following grounds:

"Though the Station Master was guilty of default, I do not see why the defendant should be held liable. The Station Master was either the agent (or sub-agent) of the defendant or he was not. If he was, his act was clearly not within the scope of his authority and the defendant is therefore not responsible (*vide* section 238, Contract Act, 1872). If he was not, defendant did his utmost to protect plaintiff's interest and there can be no liability."

Plaintiff preferred a second appeal.

D. A. Khare, for the appellant.

Scott (Advocate-General), with *Crawford & Co.*, for the respondent.

CANDY, ACTING C. J.—In this case we have no doubt that on the merits the plaintiff was entitled to a decree.

In the first Court one of the defences was that the defendant's servant had no authority to divert the consignment, and that therefore the defendant was not bound by the act of the servant.

In the District Court this defence was disallowed by the District Judge, who held that the Station Master at Kamptee was guilty of default in directing the delivery of the goods to the original consignee, but the District Judge further held that the defendant Company was not liable for the act of the Station Master which

was not within the scope of his authority (quoting section 238 of the Contract Act).

We are unable to agree with the applicability of this section. It seems to us that this is a simple case of breach of contract; the defendant contracted to carry the goods and deliver them at Nargaon and failed to give such delivery to the plaintiff. The Station Master at Kamptee may have acted wrongly in disregarding the telegram which he had received, but that fact cannot divest the Company of its liability under the contract.

As there is no dispute about the rates, the plaintiff would be entitled to the sum claimed with all costs.

But in this second appeal the defendant Company have filed cross-objections, the third one being pressed by the learned Advocate-General. That objection runs:—"That the lower Courts should have dismissed this suit on the ground (*inter alia*) that the plaintiff did not prove that his claim for compensation had been preferred in writing by him or on his behalf to the Railway administration as required by section 77 of the Indian Railway Act, 1890."

That section provides that a person shall not be entitled to compensation for the loss of goods delivered to be so carried, unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway administration within six months from the date of the delivery of the goods for carriage by railway.

Here the breach of contract occurred in May or June, 1900. The suit was filed and summons was served on the defendant in August, 1900. Neither in the written statement nor in the arguments before the Court of first instance, nor in the District Court on appeal, was any mention made of this plea. No affidavit has now been filed on behalf of the Agent of the Company to the effect that no notice was received according to the section. Under these circumstances, we are asked to assume that no such notice was given.

The learned Advocate-General's argument is based on the proposition that the plaintiff, not being entitled to compensation unless notice was given, was bound to allege in his plaint and prove that such a notice had been given; in short that proof of the notice was a condition precedent to the filing of the clai

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We are unable to agree with that view. If notice had not been given it is difficult to suppose that the Agent or his officers or their legal advisers would not have made mention of the fact.

We do not think that it would be right at this stage of the case to send it back in order that evidence might be taken. We have no reason to suppose that the notice was not given. The object of the section apparently is to prevent stale claims, and this most certainly was not a stale claim, for the Company were sued within two months of the breach of the contract.

We therefore reverse the decisions of the lower Courts and award the amount of the claim with costs in all Courts.

Decree reversed.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

1903. *June* 30.

AMARCHAND LAKHMAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* KILA MORAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sections 58, clauses (b), (d), and 98—Usufructuary mortgage—Simple mortgage—Anomalous mortgage—Suit by mortgagees for recovery of debt and in default of payment by mortgagors for foreclosure and possession.

A mortgage-deed (1) put the mortgagees in possession of the mortgaged property and authorized them to retain possession until payment of the mortgage-money, the mortgagors being given credit for all profits recovered from the mortgaged property over and above the Government assessment. (2) It also contained a personal covenant by the mortgagors to pay the mortgage-money and an implied agreement that in the event of non-payment the property should be sold (the debt to be recovered from the mortgaged land and from the persons and from other property of the mortgagors).

Sometime after the date of the mortgage the mortgagees let out the mortgaged property to the mortgagors for a certain term, and before the expiration of the term, the mortgagees brought a suit for the recovery of the debt and in default of payment by the mortgagors for foreclosure and possession.

Held, that owing to the proviso (1), the mortgage was usufructuary within the meaning of clause (*d*) of section 58 of the Transfer of Property Act (IV of

*Second Appeal No. 711 of 1902.