

PRIVY COUNCIL.*

1916.
 May 26. 29.
 June 22.

RAMDAS VITHALDAS DURBAR (1ST DEFENDANT) *v.* AMERCHAND & Co. (2ND DEFENDANTS) AND ANOTHER APPEAL: TWO APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature at Bombay.]

Contract Act (IX of 1872) section 103—Transfer of Property Act (IV of 1882 as amended by Act II of 1900), sections 4 and 137—“Instrument of title” to goods—Railway receipt—Stoppage in transit—Assignment of railway receipt, effect of.

On this appeal their Lordships of the Judicial Committee (upholding the decision of the High Court in *Amerchand & Co. v. Ramdas Vithaldas Durbar*, L. L. R. 38 Bom. 255) held the “railway receipt” in question in the case, was an “instrument of title” within the meaning of section 103 of the Contract Act (IX of 1872).

Two consolidated appeals 122 and 123 of 1915 from two decrees (31st March 1913) of the High Court at Bombay in its Appellate Jurisdiction, which reversed the decrees (11th January and 13th February 1912) of two single Judges of the same Court, sitting respectively in the exercise of its Original Jurisdiction.

The question in each appeal was whether a railway receipt in a certain form issued to the consignor of goods is an instrument of title to the goods within the meaning of section 103 of the Contract Act (IX of 1872) and whether, when the consignee has delivered the receipt to a person who has advanced money to him on it with an endorsement requesting delivery to such person, the consignor’s right of stoppage in transit as an unpaid vendor becomes subject to payment of the advance.

The facts of the case will be found in the report of the hearing of the appeals in the High Court (SIR BASIL

* *Present* :—Lord Atkinson, Lord Parker of Waddington, Sir John Edge, and Mr. Ameer Ali.

SCOTT C. J. and CHANDAVARKAR J.) where of the two judgments of the Original Courts (MACLEOD J. of 11th January 1912, and BEAMAN J. of 12th of February 1912), which were to the same effect that of MACLEOD J. in the suit which gave rise to appeal 122 is set out so far as material, and where the form of the receipt and the portions thereof material to the present appeals are given : see I. L. R. 38 Bom. 255.

On these appeals,

De Gruyther K. C. and *E. B. Raikes* for the appellant contended that the railway receipts in question were not "instruments of title" to goods within the meaning of section 103 of the Contract Act (IX of 1872). An "instrument of title" was not intended, it was submitted, to be similar to a "document of title," or "document showing title" referred to in other sections of the Act as in sections 102 and 108 ; but was a document of the same nature and effect as a bill of lading, that is one the transfer of which would be equivalent to a delivery of the goods it covered. A railway receipt was of a different nature and effect, and therefore it was not an "instrument of title" within section 103, though it might be a "document of title" or a "document showing title." The Contract Act must be taken as embodying the English Law in force at the time it was passed. The law as to contracts was practically the same, except that in 1877 the Factors' Act (40 and 41, Vict. C. 39) was passed and had never been applied to India : the law therefore, in India, when the Contract Act was passed was the English law before 1877. The effect of sections 4 and 137 of the Transfer of Property Act (IV of 1882 as amended by Act II of 1900) was not to extend the meaning of the expression "instrument of title" in section 103 to a "railway receipt." In the case of *The Great Indian Peninsula Railway*

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Company v. Hanmandas Ramkison⁽¹⁾ a "railway receipt" similar to that now in suit, was held to be not an "instrument of title" within section 103 of the Contract Act. That Act did not deal in sections 108 and 178 with a pledge of goods by the owner: under those sections there would be no valid pledge without delivery of the goods, and if a railway receipt were given there would be no valid pledge unless that document was accepted as being equivalent to the delivery of the goods. To have that effect automatically there must be some document which is negotiable like a bill of lading, the delivery of which alone amounted to a stoppage of the goods in transit. Reference was made to *Merchant Banking Company of London v. Phoenix Bessemer Steel Company*⁽²⁾ and *The Tigress*.⁽³⁾ "Instrument of title" meant a document which gives a person title and enables him to pass that title to a transferee; that is the effect of a bill of lading. A "document of title" is one which only gives a person a title to the goods, and that it was submitted, was the only effect of a railway receipt like those in suit.

Sir H. Erle Richards K. C. and *Sir W. Garth* for the respondents contended that the railway receipt in suit was an "instrument of title" within the meaning of the Contract Act, section 103. No distinction was intended to be made between that expression and the other expressions "document of title," and "document showing title" used in other sections of the Act. If there were any doubt as to the expressions "instrument of title" and "document of title," it is removed by section 137 of the Transfer of Property Act (IV of 1882 as amended by Act II of 1900) which by section 4 is made part of the Contract Act, and which expressly includes a "railway receipt." There was no presumption

⁽¹⁾ (1889) 14 Bom. 57 at p. 66.

⁽²⁾ (1877) 5 Ch. D. 205.

⁽³⁾ (1863) 32 L. J. Adm. 97.

that the Contract Act represented the English law, which at that time on the matters to which section 103 relates was uncertain. Lord Blackburn's view was accepted in England: see Benjamin on Sale 5th Ed., pages 847, 851; Carver's on Carriage by Sea, 5th Ed., page 684, section 532; and *Farina v. Home*⁽¹⁾ which was not overruled until the Factors' Act, 1877 (40 and 41, Vict. C., 39). The English law is now contained in the Factors' Act, 1889, section 10, and the Sale of Goods Act, 1893, section 47: see Chalmers on Sale of Goods Act, page 136. The case of *The Great Indian Peninsula Railway Company v. Hanmandas Ramkison*⁽²⁾ was wrongly decided.

De Gruyther K. C. in reply referred to Benjamin on Sale, 5th Ed. page 852.

1916 June 22nd :—The judgment of their Lordships was delivered by

LORD PARKER :—The question which arises on these appeals is whether a railway receipt issued to the consignor of goods in the form appearing on pp. 70 and 71 of the record is "an instrument of title" within the meaning of section 103 of the Indian Contract Act.

Section 103 of this Act is one of a group of sections relating to a seller's right to stop goods while they are in transit to the buyer. Section 99 defines the right. Section 100 provides that goods shall be deemed to be in transit while in course of transmission to and not yet come into the possession of the buyer. Section 101 lays it down that the right does not, except in the cases thereafter mentioned, cease on the buyers reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some one on his behalf.

(1) (1846) 16 M. & W. 119.

(2) (1889) 14 Bom. 57.

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Section 102 provides that the right of stoppage ceases if the buyer, having obtained a bill of lading or other "document showing title" to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

The expression "document showing title" is used again in section 108, which refers to a "bill of lading, dock warrant, ware-house-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods." The same enumeration is found in section 178, except that in this section the expression "document of title" is substituted for "document showing title." Sections 108 and 178, though they very possibly extend, at least cover the same ground as, the provisions of the Indian Act No. XX of 1844, which with certain modifications not material for the purposes of this appeal made the provisions of the English Factors' Act, 1842, applicable to British India. Both the last-mentioned Acts use the expression "document of title to goods," and define it as including "any bill of lading, India warrant, dock warrant, ware-house-keeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes for the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising

or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not and indeed cannot be disputed before this Board, that the railway receipts in question satisfy this test. It is therefore unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act No. II of 1900 would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are "documents showing title to goods" within sections 102 and 108, and "documents of title to goods" within section 178 of the Indian Contract Act.

Returning to section 102, its effect may be stated as follows: First, so far as bills of lading are concerned, it enacts the rule of the common law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the appellant's right of stoppage would have been displaced.

Passing now to section 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had

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used the expression "document showing title" or "document of title" instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendor could not have stopped the goods in transit without payment or tender to the respective respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question. In other words, the section would have done, in the case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a resale.

Great stress was naturally laid by the appellants on this difference of expression. They argued that "instruments of title" were a particular species of the genus "documents of title," and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading. They supported this argument by the following considerations: First, they contended that the Indian Contract Act was primarily a consolidating Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, they urged the improbability of the Indian legislature having taken the lead in a legal reform for which this country had to wait until the passing of the English Factors' Act of 1877. Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is, therefore, an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing

law. Again, their Lordships do not see any improbability in the Indian legislature having taken the lead in a legal reform. Such reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous.

It remains to consider the appellant's argument, so far as it is based on the use of the expression "instrument" instead of "document" of title. In the first place it is to be observed that "title" in both expressions can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus "document of title." The fact that a document confers title in this sense cannot, therefore, be used as the distinguishing mark of a particular species of the genus. The truth is that the only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellant's counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity. In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per caritatem* in case there were any such instrument other than a bill of lading is far-fetched. Moreover, they cannot help thinking that the section, if intended to have the effect for which the appellant contends, would have been otherwise worded. Further, no reason can be suggested why, if (as is clearly the case) the legislature intended by section 102

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to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, it should not have by section 103 intended to do the same in favour of a *bona fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions, "document showing title" and "document of title" in the same sense shows that the draughtsman was not very careful in his use of language.

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for the appellant : Messrs. *Hughes & Sons*.

Solicitors for the respondents : Messrs. *T. L. Wilson & Co.*

Appeals dismissed.

J. V. W.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

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February 1.

ISMAIL ALLARAKHIA (PLAINTIFF-APPELLANT) v. DATTATRAYA R. GANDHI (DEFENDANT-RESPONDENT).⁵

The Indian Contract Act (IX of 1872), sections 20 and 65—Fraudulent representation and impersonation by one of the executants of a deed—Mistake as to a matter of fact essential to the agreement—A person fraudulently mortgaging property not his own—Mortgagee believing in good faith the mortgagor to be owner of property—Transfer of mortgage by mortgagee in

⁵ Appeal No. 59 of 1915.