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the present matter on the present materials. In our opinion this order of the learned Judge must be discharged.

As regards costs, we think the uncle must bear the costs throughout of both applications. The learned Judge in the Court below seems to have doubted his *bona fides*, and under these circumstances we see no reason why the infant should be saddled with the costs of these irregular applications.

Therefore in Civil Revision Application No. 293 of 1926, the rule is to be absolute. Order discharged. Waghjibhai to pay the costs throughout. In First Appeal No. 311 of 1926 appeal allowed. Order of the lower Court discharged. Waghjibhai to pay the costs throughout. In Stay Application No. 748 of 1926 rule made absolute. Order discharged.

Rule made absolute.
Appeal allowed.

J. G. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell

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August 15

THE BOMBAY STEAM NAVIGATION COMPANY LIMITED (ORIGINAL DEFENDANTS), APPLICANTS *v.* VASUDEV BABURAO KAMAT (ORIGINAL PLAINTIFF), OPPONENT.*

Bills of Lading Act (IX of 1856), section 1—Conditions in bill of lading—Consignee bound—Liability of shipping agent for negligence of servants—Indian Contract Act (IX of 1872), section 151—High Court—Revisional jurisdiction—Civil Procedure Code (Act V of 1908), section 115—Bombay Regulation II of 1827, c. I. s. 5 (2)—Act XII of 1873—Government of India Act (5 & 6 Geo. V., c. 61), sections 106 and 130.

The plaintiff's agent at Bombay shipped some packages to the plaintiff at Honawar by a vessel belonging to the defendant company. One of the conditions of the bill of lading, which the plaintiff's agent had not in fact been authorised by the plaintiff to accept, was that the defendant company was not liable for loss from the negligence of its servants. Whilst the shipment was being unloaded in the Honawar harbour, one of the packages got loose from a sling, fell into the sea and was lost. The plaintiff having sued to recover the value of the lost package;

Held, that it was competent to the defendant company to protect itself against liability for loss arising from negligence of its servants, by a condition in the bill of lading, notwithstanding section 151 of the Indian Contract Act, 1872.

Sheik Mahamad Ravuther v. *The British India Steam Navigation Co. Ltd.*,[1] followed.

* Civil Revisional Application No. 310 of 1926.

[1] (1908) 32 Mad. 95.

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Held, further, that, under section 1 of the Bills of Lading Act, the plaintiff was in the circumstances bound by the conditions of the bill of lading, though he might not have expressly authorised his agent to accept them.

The High Court of Bombay has the power, independently of section 115 of the Civil Procedure Code, to call for the proceedings of any subordinate Civil Court and to issue orders thereon, under Bombay Regulation II of 1827, Chapter I, section 5 (2). This power, originally established in the Sudder Diwani Adawlat, and thereafter transferred to the High Court in 1861, was not affected by the repealing Act XII of 1873, and was continued in force by virtue of sections 106 and 130 of the Government of India Act, 1915.

Bai Atrani v. *Deepsing Baria Thakor*[1] and *Secretary of State for India* v. *Narsibhai Dadabhai*[2] relied on.

THIS was an application under civil revisional jurisdiction of the High Court against the decision of A. F. Kindersley, District Judge of Karwar, reversing the decree passed by P. H. Gunjal, Subordinate Judge at Honawar.

Suit for damages.

The plaintiff was a merchant at Honawar. His agent at Bombay shipped to him certain packages of merchandise by the defendants' steamer. The bill of lading given for the shipment contained the following conditions, among others: The company was not liable for "accidents, loss or damage from any act, neglect, nonfeasance, misfeasance, malfeasance, error in judgment or default whatsoever of . . . . agents or other servants of the company." While the goods were being unloaded in the Honawar harbour by means of a sling, the steamer rolled, the sling struck against the side of the steamer and a cask of nails fell into the sea and was lost. The plaintiff sued to recover the value of the cask from the defendant. The defence was that the company was protected by the conditions in the bill of lading.

The trial Court dismissed the suit on the ground that the defendant was protected by the conditions in the bill of lading.

On appeal, the District Judge decreed the claim, on the ground that, as the plaintiff had not accepted the conditions in the bill of lading, he was not bound by its terms.

[1] (1915) 40 Bom. 86.

[2] (1923) 48 Bom. 43.

The defendant company applied to the High Court.

Kemp with *Little & Co.*, for the applicant.

Nilkant Atmaram, for the opponent.

MARTEN, C. J. :—This is one of those cases which, though petty in amount, involve legal points of importance and some difficulty. The subject-matter of the dispute is a humble cask of iron nails. The plaintiff who is a merchant at Honawar had a dalal at Bombay. The latter sent this case of nails together with other cases and some other goods by the s.s. "*Indravati*" of the defendant company for being delivered to the plaintiff at Honawar harbour. The company's bill of lading was sent by the plaintiff's dalal to the plaintiff. The plaintiff presented it to the company at Honawar, and got delivery of all the goods except the suit cask of nails. The plaintiff then called on the company to deliver the suit cask. The answer was : it was lost overboard in unloading through an accident due to the ship rolling, and we are not liable under the terms of our contract contained in the bill of lading.

The plaintiff nevertheless brought his suit. The trial Court held that the loss was due rather to an incident of the sea than to an accident of the sea, and that accordingly one particular clause in the bill of lading did not protect the defendants. But it was held that another clause applied which protected the company from the negligence of its stevedores and servants, and that in fact the accident was caused by such negligence, and that consequently the suit failed and must be dismissed.

The plaintiff, however, was not content. He appealed, and a somewhat surprising result happened. The view the learned District Judge took was that it was not proved that the plaintiff in any way by himself or by his broker accepted the conditions in the bill of lading. Therefore it was not binding on him, and the shipping company were liable. The shipping company now apply in revision.

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At the outset we must bear in mind that in the plaint itself the plaintiff had pleaded that on October 3 the plaintiff's dalal at Bombay had sent some goods to be delivered to the plaintiff at Honawar harbour, and paragraph 3 stated that the defendant company was to give delivery of the suit cask of iron nails to the plaintiff at Honawar harbour. The plaintiff had also stated in his evidence that he had received an invoice from his commission agent from Bombay. In cross-examination he said :—

"I get my goods from Kagal Laksman Anant. He sends me bill of lading for the goods sent. I see the bill of lading which was received by me and given to the Agent. It is Exhibit 19."

Now as I understand the judgment of the learned trial Judge, he held as a matter of law that even although goods are shipped under a bill of lading and the consignee claims the goods under that bill of lading, yet unless the shipowners can show that the consignee expressly authorised his shipping agent to accept the terms in the bill of lading, the consignee is not bound. In other words, the consignee may accept the carriage of the goods, but he is not bound by the special conditions of carriage unless his broker has been authorised to assent to them, and has in fact assented to them, and the consignee has assented to them.

Now that view is in the teeth not only of mercantile custom but also of the statute which has been in force ever since 1856. I refer to the Bills of Lading Act, 1856. There section 1 provides :

"Every consignee of goods named in a bill of lading..... shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The learned Judge is clearly bound by that Act. He had no jurisdiction to ignore it. I say nothing about mercantile custom, for it is obvious to any one having any familiarity with shipping business, that if the learned Judge's view was correct, the shipping industry would be paralysed, so far as the carriage of cargo is concerned.

Under these circumstances I say nothing as to the blunder which was apparently made in the trial Court in not putting in evidence the forwarding note which is referred to as No. 2 of the defendant's list of documents. There is an affidavit of July 6, 1926, by the agent of the steamship company as to that, and he says that the trial Court disallowed it in evidence. That appears to have been the view also taken in the lower appellate Court. As to this I would only refer to the evidence of Pandurang Narayan, the agent of the company, who in his examination-in-chief said : " I see the goods forwarding note given by the shipper Lakshman Anant Pai. It is produced to the company and accordingly the bill of lading is written." I should have thought that that document being produced from the proper custody, viz., that of the shipowners' agent, it would lie upon the plaintiff to prove that it was not authorized or that the signature was a forgery, and none the less so because apparently there was no cross-examination. But we decide the case irrespective of that, and solely on the evidence that was actually before the Court.

Similarly we say nothing as to whether the lower Courts were correct in thinking that this was an incident of the sea and not an accident of the sea, and also in holding that there was any negligence whatever by the shipping company in what happened in the present case. Their findings of fact on this point we must of course, and we do, accept.

I must too guard myself against any suggestion that a shipping company has only to produce a duplicate of the bill of lading to a consignee, and the latter is then bound to accept the bill of lading and accept the goods, whether or no he has ever authorised the goods to be sent, or has anything whatever to do with them. That of course is not the case here. Admittedly the plaintiff authorised the goods to be sent by his commission agent and he is in fact claiming the goods under the very bill of lading which his agent sent.

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Further, my brother Blackwell reminds me that in his letter before suit the plaintiff writes :

"I hereby inform you that my goods covered by Bill of Lading No. 26479, dated October 20, 1923, consigned by my agent, Mr. K. L. Anant Pai at Bombay port, to me at Honawar are short of one cask of iron nails."

On the facts then of this particular case we are of opinion that the learned Judge gave his decision in disregard of statutory authority which was binding on him, and that by reason of such disregard of statutory authority, he arrived at exactly the contrary result to that which in law he ought to have arrived at.

There is a further point as to whether in any event conditions of the nature relied on in this bill of lading are legal having regard to section 151 of the Indian Contract Act. The plaintiff's argument is that the shipowner is a bailee under the bailment sections of the Indian Contract Act, viz., 148 *et seq.*; and that under section 151 he is bound to take as much care of the goods bailed as a man of ordinary prudence would of his own goods; and that there is no clause which permits him to contract himself out of that minimum liability. In this respect there is a marked contrast under section 152. But there it is expressly provided that in the absence of any special contract the bailee is not liable for the loss if he has taken the amount of care described in section 151. As far as the Indian Carriers Act is concerned, that does not, I think, apply to carriage by sea. I exclude, of course, inland navigation. There is some difference of opinion in certain High Courts as to whether the bailment sections of the Indian Contract Act apply to carriage by sea. But in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co. Ltd.*[1] the point now raised was considered, and Sir Arnold White and Mr. Justice Wallis, as he then was, held that—

"In England it is competent to a shipowner to protect himself, by express contract, from liability for the negligence of himself or his servants. This is also the law applicable in India."

[1] (1908) 32 Mad. 95.

Mr. Justice Sankaran-Nair took the contrary view, holding that it was inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions.

But we see no adequate reason here to adopt the view of the learned dissenting Judge. Accordingly we do not think that this latter point affords an effective answer to the present revisional application.

If then the conditions of the bill of lading are binding on the consignee, then having regard to the findings in both Courts below the shipping company is protected. I should have explained that the learned District Judge took the correct course in recording a finding on all points. We have, therefore, the benefit of his judgment on the alternative issues, supposing his decision as to the bill of lading being not binding on the consignee is incorrect. Incidentally the learned Judge has adopted the same course with reference to *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*,[1] which, as I have indicated, we propose to adopt.

This brings me next to what as regards certain aspects seems to me a difficult question. If the appellant can only rely on section 115 of the Civil Procedure Code, then having regard to certain decisions of the Privy Council on the point and to various other decisions, many of which are difficult to reconcile either with the Privy Council decision or as between themselves, it might well be desirable to refer the point to a Full Bench notwithstanding the small amount of money that is involved here. I need only refer to the notes to section 115 in Mulla's Civil Procedure Code to illustrate what I mean. But in Bombay there are decisions which are binding on this Division Bench to the effect that in the old Bombay Regulation No. II of 1827, Chapter I, section 5, sub-section (2), we have certain supplemental powers which we are entitled to exercise. That sub-section runs—

"It shall also be competent to the said Court to call for the proceedings of any subordinate Civil Court, and to issue such orders thereon as the case may require."

[1] (1908) 32 Mad. 95.

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This regulation was repealed by Act XII of 1873, but there is an express section which provides that it was not, amongst other things, to affect any established jurisdiction, etc.

In *Bai Atrani* v. *Deepsing Baria Thakor*,[1] Mr. Justice Batchelor and Mr. Justice Hayward considered this regulation and stated the paragraph, I have just referred to in the Repealing Act, viz. (p. 94) :—

"It shall not affect any . . . established jurisdiction, form . . . or procedure or existing usage, custom or privilege . . . notwithstanding that the same respectively may have been in any manner affirmed, recognized or derived, by, in, or from any enactment hereby repealed."

Then the judgment goes on to say :—

"It follows, I think, that the jurisdiction established in the Sadar Diwanee Adalut in 1827 and in the High Court in 1861 was not affected by the repeal of the Regulation in 1873."

So, too, in *Secretary of State for India* v. *Narsibhai Dadabhai*,[2] which was a decision of Sir Lallubhai Shah and Mr. Justice Coyajee, both the learned Judges arrived at a similar conclusion. Mr. Justice Coyajee at page 55 says :—

"In any event, our powers derived from section 5 of Bombay Regulation II of 1827 are very wide. The powers thereby conferred on the Suddur Dewanny Adawlat were transferred to this Court by section 9 of the High Courts Act, 1861, and they continue still in force by virtue of section 106 of the Government of India Act."

Mr. Justice Shah says (p. 59) :—

"Even assuming that the case is not covered by section 115, I think it would clearly be covered by the words of the second clause of section 5 of Bombay Regulation II of 1827. Though the Regulation on this point is repealed, this Court still retains the power under the statutes, which the Sadar Devanni Adawlat had under the said repealed clause."

Then as regards the Government of India Act, 1915, in addition to section 106 which Mr. Justice Coyajee referred to, I may mention section 130 which provides that the repeal was not to affect "the validity of any law, charter, letters patent . . . rule . . . order, regulation . . . under any enactment hereby repealed and in force at the commencement of this Act." That Act repeals, for instance, the Indian High Courts Act, 1861, and the Indian High Courts Act, 1865.

[1] (1915) 40 Bom. 86. [2] (1923) 48 Bom. 43.

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We think, therefore, it is open to us to act under Regulation II of 1827, whether or no section 115 of the Civil Procedure Code applies. Consequently it is competent for us to issue such orders as the case may require. But I wish it to be clearly understood that it is only in a very exceptional case that I would be prepared to exercise such a power as this, more especially as normally we should act, if at all, under section 115. I regard, however, this particular case as a very exceptional one and as a very important one to the shipping world, and that consequently it is eminently one where we ought to interfere irrespective of the small amount involved, because to allow a contrary decision to remain might well result in much confusion.

I would, therefore, act under the Regulation, viz., II of 1827, and make the rule absolute, and discharge the order of the learned District Judge, and restore the decree of the Subordinate Judge, and direct the plaintiff to pay the costs throughout.

BLACKWELL, J. :—I agree.

Rule made absolute.

R. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

1927
August 17

THE AGENT, G. I. P. RAILWAY, BOMBAY (ORIGINAL OPPONENT), APPELLANT *v.* KASHINATH CHIMAJI (ORIGINAL APPLICANT), RESPONDENT.*

Workmen's Compensation Act (VIII of 1923), section 3, sub-section (1)—Injury by accident—"Arising out of employment"—Compensation—Notice.

A workman in the employ of G. I. P. Railway Company, on a salary of Rs. 25 a month, was sent on a message by one of the Company's Officers from Kalyan to Bombay. In Bombay he was directed by another of the Company's Officers to return to Kalyan. On the way back he travelled in an electric train which was to take him as far as Kurla. The door of the carriage in which he was travelling was open and he was standing at the entrance supporting himself on a vertical iron bar. The train gave a jerk while going up an incline and the workman fell down on the lines and received severe injuries which resulted in his death. Under section 30 of the Workmen's Compensation Act, 1923, the Commissioner awarded a sum of Rs. 750 as compensation

* First Appeal No. 291 of 1926.