

Relief Act; we hold that the portion of the decree, which makes an order for such removal, is correct and must be affirmed.

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We now come to deal with the other portion of the decree which embodies a perpetual injunction in respect of trees 3 to 12. It is not very clear what this injunction means and what purpose it is intended to serve. In view of the mandatory injunction for the removal of the trees, it is at any rate superfluous, and we are of opinion that it ought to be expunged. It has been contended by the learned vakil for the respondents that the plaintiffs were entitled to a perpetual injunction under section 54 of the Specific Relief Act restraining the defendants from planting any trees, which are likely to damage the foundation of their building and wall. But the respondents have not taken any objection to the decree of the Lower Court under section 561, Civil Procedure Code: nor have we the materials before us, which would entitle us to hold that the plaintiffs have made out a case for the grant of a perpetual injunction. We are, therefore, unable to grant the prayer of the respondents.

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The result, therefore, is that the appeal succeeds in part; the decree appealed against will be set aside only in so far as it grants a perpetual injunction with regard to trees 3 to 12 and will be affirmed in other respects.

As the appeal has substantially failed, the respondents are entitled to their costs of this appeal.

Appeal allowed in part.

31 C. 951 (=8 C. W. N. 725.)

[951] ORIGINAL CIVIL.

Before Mr. Justice Stephen.

JALIM SINGH KOTARY v. SECRETARY OF STATE FOR INDIA.*

[9th June, 1904.]

Carriers—Indian Railways Act, 1890 (IX of 1890), s. 72—Delivery, meaning of—Railway Company, liability of, as carriers—Rules, bye-laws and conditions under ss. 47, 54 of Act IX of 1890—Reasonableness of.

“Delivered” in s. 72 of the Indian Railways Act refers merely to a physical event and is a word devoid of any legal significance.

A Railway Company has cast upon it by s. 72 the duties of an ordinary bailee, but it may determine the conditions under which those duties may vest and in particular may specify the point of time at which they shall vest by rules under ss. 47 and 54.

These rules, however, must be consistent with the Act and reasonable. Where a consignor had delivered goods to a Railway Company for transmission and had had the forwarding note in respect thereof duly registered and marked by the Railway Company, but had obtained no receipt from the Railway Company and the goods were lost:—

Held that rules framed by the Railway Company under ss. 47 and 54, whereby goods were to stand at owner's risk and the Railway Company were not to be liable therefore until a receipt had been granted by them, were inconsistent with the Act and unreasonable and that the Railway Company were liable to pay compensation for the loss incurred.

[Foll. 76 P. R. 1908=189 P. W. R. 1908; Ref. 1 S. L. R. 77.]

IN this suit the plaintiff sued the defendant as representing the Eastern Bengal State Railway for the value of four bales of cotton piece-goods, which he alleged had been lost through the negligence of the

* Original Civil Suit No. 570 of 1901.

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Railway administration or their servants under the following circumstances.

On Friday, February 1st, 1901, the plaintiff's servants delivered to the Railway administration at the Armenian Ghat Railway Station in Calcutta five bales of piece-goods for transmission to Tezapore in Assam. Four of the bales were delivered in one consignment and the remaining one bale separately.

[952] The procedure necessary to be gone through for the transmission of goods may be briefly stated as follows: the goods are taken to the railway station and there a forwarding note for them is filled in which, after passing various officials, is registered by the registering clerk; then the consignor on production of the registered forwarding note gets the goods marked and weighed and after that does not see either the goods or the note again.

The plaintiff's servants were unable on the above date to get the process above mentioned completed, as news was received of the death of the Queen-Empress Victoria and the offices were closed and remained closed on the two following days.

On Monday, February 4th, the offices were reopened and the plaintiff's servants resumed the operation of booking the goods, had them duly entered in the Railway register by the registering clerk and carried the process through, until they arrived at the point when the goods were to be weighed, when they were informed by the Railway authorities that the goods would be weighed in due course and that it was not necessary for them to remain further. The forwarding note and risk note were accordingly left with the railway authorities and nothing further remained to be done with the goods by the plaintiff except to obtain a formal receipt for them.

On the day following the plaintiff's servants attended at the station to obtain receipts for the two consignments and were handed a receipt for the consignment of one bale, but were informed that there was no receipt for the other consignment of four bales and that no forwarding note could be found for those bales.

After a prolonged search the bales could not be found in the station godown, and the Railway administration finally denied the delivery of the four bales and the marking of them and denied their liability for the loss, inasmuch as they had granted no receipt for the goods.

The *Advocate-General* (Mr. P. O'Kinealy) (with him Mr. *Sinha*) for the defendant. There is an elaborate procedure to be gone through before the Railway administration assume responsibility for goods to be transmitted, all leading up to the grant of a [953] receipt; that is the first moment when the goods are really taken charge of by the Railway administration and responsibility undertaken by them. Railway Companies have been given power to make general rules consistent with the Railway Act for regulating the terms and conditions for warehousing or retaining goods on behalf of a consignee and to impose conditions not inconsistent with the Act or any general rule thereunder with respect to the forwarding of goods. In this connection rules, which it is submitted are reasonable, have been made under s. 47 (1) (f) of the Indian Railways Act, 1890 (IX of 1890) (published in the *Gazette of India*, 1902, Pt. I, p. 504) and conditions have been imposed under s. 54 of the Act.

See also the form of risk notes which have been approved by Government on which exhaustive conditions are endorsed. Forms of

such risk notes are given in Russell and Bayley's book on the Indian Railways Act, p. 266.

The Courts have already dealt with this point.

Nanku Ram v. The Indian Midland Railway Company (1), *Poounga Ram v. The East Indian Railway Company* (2), *Malkarjun Shidapa v. The Southern Mahratta Railway Company* (3), *Slim v. Great Northern Railway Company* (4).

Assuming that the goods in this case were brought to the station, the Railway administration did not assume responsibility for them.

They may have been on the Railway premises, it is true, but it would be dangerous to hold the Railway liable on that ground.

[STEPHEN, J. The usual procedure was interrupted on this occasion.]

That is so, and it is admitted that the consignors cannot take their goods away without the written permission of the Railway authorities, but it would be a strong thing to hold the Railway liable because goods have been given house room.

[STEPHEN, J. You are bailee and doing it as part of the carriage.] The rules are intended to and do exclude all [954] responsibility until a certain point is reached, that is till receipt is given. [STEPHEN, J. But the rules must be reasonable.] They must be rules consistent with the Act. The Court will have to say that the rules in question, namely, those under ss. 47 and 54, are inconsistent with the Act to make them unreasonable.

Mr. A. M. Dunne (Mr. Knight with him) for the plaintiff. Under the Railway procedure once the consignor has delivered his goods to the weighman to be weighed he parts with both goods and forwarding note altogether, until he gets a receipt. All the conditions were satisfied by the plaintiff up to that stage and there was nothing further to be done by him. The goods remain in the possession of the Railway, whilst the forwarding note goes through the remaining stages of the process. The defendant's case is that delivery is no delivery until a receipt is given. That is not so. The receipt is not equivalent to a delivery, but is an acknowledgment of a prior delivery. It may be that there is no responsibility until a receipt is given. There is no express definition of delivery to be found in the Act. But it is submitted that delivery under the Act means delivery under s. 72 and under that section the Railway are liable as bailees. The argument that there is some point of time up to which the Railway are relieved of all responsibility will not stand. With respect to the rules under s. 47 (1) (f) this is not a question of wharfage and the rule itself is inconsistent with s. 72 of the Act, inasmuch as it defines the point of responsibility, but takes away a period of time during which the Railway are responsible under s. 72. The words "subject to other provisions" in s. 72 do not relate to the question of responsibility being otherwise defined under s. 47. The inconsistency of the rules can be shewn by the following example:— Assuming that goods have been weighed, put in waggons and sent on the journey to their destination and no receipt has been given for them by the Railway and afterwards the goods are burnt or lost, could it be contended in that case by the Railway that under their rules or bye-laws they were entitled to give a receipt at their convenience and that

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(1) I. L. R. 22 All. 361.
(2) I. L. R. 30 Cal. 257.

(3) I. L. R. 27 Bom. 126.
(4) 14 C. B. 647.

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until then they were not responsible? If such a contention were allowed, Railway Companies would only have to procrastinate with the receipt [955] sufficiently to save themselves from all responsibility. There must be some measure of responsibility (see s. 56). Under the Act, moreover, reasonable facilities for the reception of goods are to be given. Section 76 lays down the point of time at which responsibility will attach by delivery. The receipt is given as a matter of course, if the forwarding notes come through. The cases cited on the other side turn upon the question whether there was in fact a delivery. *Slim v. Great Northern Railway Company* (1) does not touch the point. See *Macnamara on Carriers*, p. 385, note. *Poounga Ram v. East Indian Railway Company* (2) does not apply.

STEPHEN, J. This is a case in which the plaintiff sues the Secretary of State, as the authority responsible for the Eastern Bengal State Railway, for the value of four bales of piece-goods, which he delivered to the Railway and which, he says, were lost, while they were in the custody of the Railway.

I will first consider the facts of the case, which are not in themselves complicated, but as to which there is a substantial dispute. We have had the procedure for taking goods by Railway detailed to us very fully by one of the witnesses for the defence, and his statement of the procedure may be taken as substantially accurate. I need not go through it in detail, but the general lines on which the operation of sending off goods by train is performed is that the consignor takes his goods to the station, and there has filled in a document called the forwarding note, which, after he has seen various officials, is registered by the registering clerk; then the consignor on production of the registered forwarding note gets the goods marked and afterwards he gets them weighed; after they have been weighed, he does not see either the goods or the forwarding note again. The latter is sent back to the office and various steps are taken with regard to it, and the former are sent to their destination.

Now the evidence of the plaintiff is that he sent what we may, for purposes of this case, take as two lots of goods to the Railway [956] Station on Friday, the 1st February 1901. The one lot consisted of four bales and the other of one, which was sent at a later time, because additional goods had to be inserted in it. On that day the beginning of the rather lengthy process necessary for transmission of the goods had begun, but before it proceeded far, it stopped, because the office closed on account of the death of the Queen-Empress. The office remained closed until the ensuing Monday. On the Monday, the servants of the plaintiff resumed the operation of booking those goods, and they carried it through, according to them, in its regular course, until they arrived at the point where the goods are marked. According to them, the four bales and the one bale were marked. Then the Railway officials stated that they would see them weighed, and they accordingly came away believing all would be well.

Next day, on going for the receipt, the delivery of which by the Railway Company is the final operation of booking the goods, the plaintiff's servants were told that the one bale had gone through all right, and they got the receipt, but the other four bales were not to be found. Search was made, and eventually they went to Goalundo, which is a point on

(1) 14 C. B. 647.

(2) I. L. R. 30 Cal. 257.

the journey towards the final destination of the goods, and there they failed to find any trace of them. Meanwhile the one bale went safely through to its destination.

Taking the story so far as supporting their case, the plaintiff proves that he purchased these goods through a broker; that is satisfactorily proved by his books. He also produced the forwarding register book of the Railway Company, where there is an entry of those four bales, which so far corroborates his story.

The evidence produced by the defendant goes to show that those four bales in fact never existed. The various officials, who might have spoken to this point, are unavailable, for different reasons. One is said to have left the defendant's service and gone elsewhere. The absence of other important officials has been satisfactorily accounted for; and all the evidence that we really have on the point is that of the stationmaster, who saw the consignors' servants after the receipt for the goods had not been given. The circumstances of that interview are all in dispute.

[957] The plaintiff's gumasta says that when he went to see the stationmaster on failing to get information, the marker and other officials made certain statements before him. This is denied by the stationmaster, who gives an entirely different account of the matter, and in particular denies the statements said to have been made by the marker. One of the few important documents produced is the letter, which the stationmaster gave to the consignor to allow him to have the goods in the goods-shed at Goalundo overhauled by his servant, in order to see if those goods had been transmitted there by any irregular manner.

It is argued strenuously by the plaintiff that he could not possibly have suggested this on his own account. This letter must have been given on the suggestion of the stationmaster. This I doubt, but I think the letter is not a very strong piece of evidence, either one way or the other. Taking the story as told by the plaintiff and considering the credibility which I attach to the witnesses, I incline decidedly to the story told by the plaintiff, one of my reasons being that very little of the stationmaster's evidence was put to the plaintiff in cross-examination. Also there are parts of the written statement which are not fully consistent with that story. Further, it appears that the stationmaster has never in any way recorded the story he tells us, until long after the event occurred. I therefore find as a fact that the four bales were brought to the defendant's premises by the plaintiff, and were left there by the plaintiff under the control of the defendant's servants with the defendant's knowledge and consent. Now, this raises the second point in the case I have to consider: what is the legal position of the Railway Company under the facts which I have found? Three sections of the Indian Railway Act of 1890, which governs this case, seem to me to be of importance. The first is section 72, which puts in a legislative form what I take to be the ordinary law upon the subject, which is that, when goods are delivered to the Railway to be carried, they become liable like any other bailee. It is argued that there was no delivery in this case, because under the circumstances stated, delivery does not take place until a receipt is given by the Railway Company. I cannot read this section in that way. Delivery I take to be a purely lay word, devoid of any [958] legal significance at all; it alludes to a physical event; I do not think one can say that whether there is delivery or not is in any way affected by any legal event. Therefore I take delivery in that section to refer to a physical event, an important element of which is that whatever

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is delivered passes from the physical custody of one man to the physical custody of another.

The real question depends upon the construction that is to be placed upon sections 47 and 54 of the Railway Act. For the present purposes these two sections need not be distinguished. By section 47 the Railway Company may make general rules for regulating the terms on which it will warehouse or retain goods at any station. By section 54 the Railway Company may impose conditions for receiving goods. For the present purposes, these two things are the same. In both cases these rules and conditions have to be consistent with this Act. Now, what does that mean? The Railway Company has cast upon it the duties of an ordinary bailee. As I read the Act, it cannot wholly divest itself of those duties, but it may determine the conditions under which that duty may vest, and in particular it may specify the point of time at which it shall vest. The general common law embodied in section 72 is by those sections liable to be cut down to a certain extent by those rules under sections 47 and 54. The question is to what extent? And the answer is as far as is reasonable, which really means the same thing as being consistent with the Act.

This brings me to the further point that any of the bye-laws or conditions of the Company are void, if and in so far as they are unreasonable, and I have to consider whether the conditions imposed by the rules in this case are or are not reasonable. Two rules have been so imposed—one under section 47, the other under section 54, and again we need to distinguish between the two. By the former the goods are at the owner's risk, until a receipt has been signed by an authorised Railway servant; by the latter, which in this case is endorsed on the back of the forwarding note, the Company are not accountable for any article received, unless a receipt has been given. In both cases what the Railway say is, we are not liable for your goods until we have given you a receipt for them.

[959] We have seen in the procedure detailed to us that giving that receipt is the last act performed by the Company in booking the goods.

But there appears to be no rule as to when the receipt is to be given. It might not be given for a considerable time, and we have evidence that it is sometimes given on the day after the goods have been received. I suppose it might be given after the goods had arrived at their destination. In the present case the receipt for the bale that went through was not given until the bale had been for three nights in the Company's possession, and in any case when the process of booking is interrupted by the end of office hours, goods must necessarily be so left.

The Company, however, claims a right to delay the beginning of its own responsibility until a performance of a formal act of its own, which may be delayed until the goods have passed out of their possession at the other end of their journey. This seems to me unfair, and I cannot think the condition is reasonable. It is also open to this view that that construction was never intended by the framers of the rules. I think it is not unreasonable that as long as the consignor's servant is seeing the goods through the process of booking, marking and weighing, the Railway Company should not be responsible; but that the Company should become responsible if the booking process is interrupted for any substantial time and the goods are left in their possession, as in such a case they practically must be. I think this construction might not unreasonably be put on the rules in question. But then they could not apply to the present case.

Under these circumstances I hold that the defendant is liable for the loss of these four bales. There has been no question as to the value of the bales; judgment will accordingly be for the plaintiff for Rs. 2,381-11 with interest at 6 per cent. from the 4th February 1901 until date of action and costs on scale No. 2.

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[960] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Mitra.

RAJ KUMAR SARKAR v. NAYA CHATOO BIBI.*

[15th July, 1904.]

Jungleburi lease—Kabuliat—Raiyat—Heritable interest—Occupancy rights—Rent, enhancement of—Bengal Tenancy Act (VIII of 1885) ss. 18 and 30—Status of such raiyat.

E held 50 bighas of land for more than 12 years under a *jungleburi* lease which provided for a progressive rate of rent and did not expressly provide that the interest of *E* was to be heritable or perpetual.

It did not expressly exclude enhancement on any ground, but expressly provided for enhancement on the ground of increase in the productiveness of the soil effected at the expense of the landlord.

Held that the interest created by the lease was not one covered by s. 18 of the Bengal Tenancy Act, and that *E* was not a raiyat holding at fixed rates.

Held (per Rampini, J.) that *E* was a raiyat with occupancy rights.

SECOND APPEAL by plaintiffs Raj Kumar Sarkar and others.

This appeal arose out of an action brought by the plaintiffs to recover possession of one-half of 50 bighas of land, which was originally the holding of one Ekabbar. These 50 bighas of land were situated within a *Shamilat* taluq, which formerly belonged to three persons, Gopinath Sarkar, Umacharan Sarkar and Chunder Kumar Sarkar. The plaintiffs subsequently acquired the rights of Gopinath and Umacharan, whilst defendants Nos. 30^a to 38 were in possession of the share of Chunder Kumar by virtue of a *Durmowasi* right. The allegations of the plaintiffs were that under a *kabuliat*, dated 30th Asar 1278 B. S. (13th July 1871) Ekabbar, the father of defendant No. 20 and predecessor in title of defendant Nos. 25 to 29, held 50 bighas of land under the said Gopinath, Umacharan and Chunder Kumar at a rent of Rs. 37-8; and that Ekabbar had no transferable interest therein; that [961] in execution of a mortgage-decree the right, title and interest of defendants Nos. 25 to 29 in the holding having been sold, defendants Nos. 1 and 2 purchased the same on the 20th September 1898, and thereafter the defendants Nos. 25 to 29 abandoned the land and went away; that the defendants Nos. 25 to 29 had no transferable interest in the land and therefore defendants Nos. 1 and 2 acquired no title at all; that the plaintiffs on attempting to take possession of the said land were opposed by the defendants Nos. 1 and 2 and also by defendants Nos. 3 to 24, who set up a title under them; that the co-sharers not having joined in the suit they were made defendants, and hence the suit was brought for recovery of possession of 8-anna share which belonged to

* Appeal from Appellate Decree No. 59 of 1902, against the decree of Jadu Nath Ghose, Additional Subordinate Judge of Khulna, dated the 7th October 1901, affirming the decree of Rajendra Lall Sadhu, Munsif of Bagirhat, dated the 30th March 1901.