1889

JASODA KOER v. SHEO PERSHAD SINGH.

the estate, which he and his brother inherited from their maternal grandfather, passed, on Kasi Prasad's death, to his widow, and, after her death, it has passed to the plaintiff; and we accordingly direct that the decree of the Court below be varied, and the plaintiff's suit decreed as regards an undivided moiety of the property in dispute with costs in proportion in both Courts.

T. A. P. *Appeal allowed in part.*

Before Sir W. Comer Petheram, Knight, Chief Justice and Mr. Justice Gordon.

1889
June 14.

INDIA GENERAL STEAM NAVIGATION COMPANY (DEFENDANTS) *v.* JOYKRISTO SHAHA AND OTHERS (PLAINTIFFS).*

Carriers Act (III of 1865) ss 6, 8—Negligence—Accident, Loss by—Special contract,—Divisibility of contract.

A flat belonging to the defendants, carrying goods belonging to the plaintiff, was lost by coming into contact with a snag in the bed of a certain river, the existence of which snag could not have been ascertained by any precautions on the part of the defendants.

The goods were received for carriage by the defendants under conditions printed on the back of "forwarding note" signed by the plaintiff, by one of such conditions the defendants protected themselves from liability against accident of certain particular kinds, and "from any accident, loss, or damage resulting from negligence, &c."

Held, that the loss was not occasioned by the negligence of the defendants; that the forwarding note "was a special contract" within the meaning of the Carriers Act; that the clause purporting to protect the defendants from negligence was bad as being in contravention of the Carriers Act; but that, nevertheless, the contract was not thereby rendered wholly bad, but was divisible, being good so far as it provided that the defendants were not to be liable for loss by accident, but bad so far as it provided that they should not be liable for negligence.

THIS was a suit brought by the plaintiffs, who were merchants carrying on business at Calcutta and Dacca, against the defendant Company to recover the value of goods made over to the defendants for carriage from Calcutta to Dacca on their flat the *Bhyrub*.

The goods in question were shipped in May 1886 and were made deliverable to the plaintiffs' son at Dacca. On the journey up, the *Bhyrub* struck on a snag in going round a bend in the river

* Appeal from Original Decree No. 146 of 1888, against the decree of Baboo Anund Kumar Surbadhikari, Subordinate Judge of Dacca, dated the 23rd of January 1888.

1889

INDIA GENERAL STEAM NAVIGATION COMPANY v. JOYKRISTO SHAHA.

Chili Chang Pijang, and was wrecked, all the goods on board her being lost or so damaged as to be valueless. The defence to the suit was that the flat was lost without negligence on the part of the Company and that the defendant Company was protected from liability by special contract in a forwarding note on the back of which was printed the conditions under which goods were received and carried by the defendant Company. This note was signed by the shipper. Paragraph 6 of these conditions was as follows: "The Company will not be liable for any loss or damage non-delivery or short delivery occasioned by the Act of God, dacoity, piracy, destruction, or damage by fire, or vermin, leakage, and breakage or rust or deteriorations of perishable goods, accidents of and from machinery or ship tackle, boilers, steam, risks of separation of the cargo vessels from the steamer, stress of weather, want of water in the rivers or the difficulties or casualties of navigation, or any danger or accident of the rivers, or navigation of whatever nature or kind soever, or any accident, loss, or damage resulting from any act negligence or default of the master mariners or other servants of the Company in navigating the vessel, &c., &c."

The Subordinate Judge found that the goods were lost by the negligence of the defendant Company, and that the conditions set out in para. 6 of the forwarding note were unreasonable and contrary to public policy; that the document was not a special contract within the meaning of the Carriers Act; and that there being no special contract between the parties, the duties and liabilities of the defendant Company were to be regulated by the English Common Law, and the Company considered as insurers of goods against all risks, except the Act of God and the Queen's enemies; that the accident not falling within either of these exceptions, the defendants were liable, and he therefore gave the plaintiffs a decree for Rs. 3,505.

The defendants appealed to the High Court.

Mr. *Evans* and Mr. *Henderson*, (instructed by Mr. *McNair*) for the appellants.

Baboo *Srinath Dass*, Baboo *Rash Behari Ghose*, and Baboo *Kuluda Kinker Roy* for the respondents.

The case turned upon the questions whether the forwarding note constituted a special contract within the meaning of the Carriers Act, and whether the defendants Company were, according to law, entitled to protect themselves by special contract against accidental loss or injury; the Court finding that the loss of the goods had not been caused by negligence on the part of the defendant Company.

Mr. *Evans* contended on these points, that, under s. 6 of the Carriers Act, the Company might limit their liability by special contract, citing *Peek* v. *Directors of the North Staffordshire Railway Company* (1) as to the meaning of a special contract; and *Zunz* v. *South Eastern Railway Company* (2), *Moothora Kant Shaw* v. *India General Steam Navigation Company* (3) and referring to *Ashendon* v. *London-Brighton Railway Company* (4), *Rooth* v. *North Eastern Railway Company* (5), *Henderson* v. *Stevenson* (6), *Manchester-Sheffield and Lincolnshire Railway Company* v. *Brown* (7), *Poonoo Bibee* v. *Fyez Buksh* (8), *Price* v. *Green* (9), as to the divisibility of the liability clause.

Baboo *Srinath Dass* for the respondents.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This was a suit which was brought by the plaintiffs against the India General Steam Navigation Company to recover the value of goods which were entrusted by the plaintiffs to them for carriage. The defendants are carriers of goods between Calcutta and various parts of the country by means of flats towed by steamers, which proceed up the rivers in the country. The plaintiffs are merchants carrying on business at Calcutta and at Dacca, and the business to a great extent consists in the purchase of goods in the Calcutta market and sending them up from Calcutta to Dacca by means of these flats for sale in their shop there.

(1) 10 H. L. C., 473.
(2) L. R., 4 Q. B., 539.
(3) I. L. R., 10 Calc., 166.
(4) L. R., 5 Exch. D., 190.
(5) L. R., 2 Exch. D., 173.
(6) L. R., 2 H. L. Sch., 470.
(7) L. R., 8 App. Cas., 703.
(8) 15 B. L. R., App., 5.
(9) 16 M. & W., 346.

1889

INDIA GENERAL STEAM NAVIGATION COMPANY v. JOYKRISTO SHAHA.

The owner of the plaintiffs business is a person of the name of Joy Kristo Shaha, and he has two sons who assist him in his business, one of them being at Dacca and the other at Calcutta, and it is the business of the man at Calcutta to purchase goods and forward them to his brother at Dacca, whose business is to sell them there.

The defendants are common carriers within the meaning of the Indian Carriers Act (Act III of 1865), and the defence which they set up to the action is, that these goods were lost by the loss of the flats without any negligence on their part, and that they are protected from liability by the special contract which they make with their customers, and which they made with the plaintiffs in this case.

The first question that was tried in this case was whether the goods were, in fact, lost by the negligence of the defendants, and the learned Subordinate Judge who tried the case has found that the defendants were negligent in the performance of their duty as carriers and that the goods were lost by such negligence. In that finding we are unable to concur, and the learned Pleader who argued the case for the plaintiffs did not attempt to support it, because upon the evidence which was adduced in this case there is nothing whatever to show any negligence on the part of the defendants, or to show that in this case every care was not taken by them.

The flat, in which the goods in question were being carried, was lost by coming in contact with a snag in the bed of the river, the existence of which could not be ascertained by any precautions on the part of the defendants; and that being the case, the case comes within the class of cases in which accidents have been caused by hidden defects in machinery and in which consequently the loss has been held to be due to accident and not to negligence in any sense. We find therefore, as a fact, that the loss here was not caused by any negligence on the part of the defendants.

That being the case, the question then arises, whether the defendants were, according to the law, entitled to protect themselves by special contract against accidental loss or injury.

The Carriers Act, s. 6, provides that, under certain circumstances,

1889

INDIA GENERAL STEAM NAVIGATION COMPANY v. JOYKRISTO SHAHA.

carriers may limit their liability by special contracts. The way in which the defendants carry on their business is this: when goods are received by them they obtain from their customer a forwarding note which is signed by the customer, and by the terms of the note the customer delivers over to them the goods subject to the condition that they are not to be held liable for accidents, and next, that they are not to be held liable for negligence; and the first question is whether this is a special contract within the meaning of the Indian Carriers Act.

It has been contended here with great force, that the special contract under that Act must mean a contract for some different consideration than the mere agreement by the carriers to carry the goods, it must mean that the customer has the option of different rates, or some new arrangement making a different contract.

The case of *Peek* v. *North Staffordshire Railway Company* (1) shows that it has been established for many years in England that a special contract under such circumstances means a special arrangement by the carrier with his customer for the carriage of his goods; and that such arrangement will be binding on the customer notwithstanding the fact that he does not get any advantage beyond getting his goods carried, provided the terms of the special arrangement or contract are reasonable; and the reason for that seems to be this, that although the carriers are common carriers and as such bound to take and carry the goods with the liability of common carriers, they do not carry them as common carriers, when they are delivered to them without tender of their reasonable charges for their carriage, but under a new arrangement or contract which they make with their customers.

Under these circumstances, we think that this was a special contract within the meaning of the Act, and that therefore the defendants were not liable for loss not caused by the negligence of their servants, and the only question which is left is, whether this contract is so divisible that it is a good contract to protect the defendants from liability from accident notwithstanding that one of the terms of it is that they, the carriers, will not be

(1) 10 H. L. C., 473.

1889

INDIA GENERAL STEAM NAVIGATION COMPANY v. JOYKRISTO SHAHA.

liable for negligence, it being provided by s. 8 of the Indian Carriers Act that such a contract as that shall not be binding upon the customer.

Various cases have been cited and especially the case of *Ashendon* v. *London and Brighton South Coast Railway Company* (1), in which the Court of Exchequer held that where carriers made a contract with their customers that they would not be liable for any loss, however occasioned, such a contract was unwise, and was unreasonable and bad, and could not be enforced as to any part of it; and that no doubt would be so, because the contract by a carrier not to be liable for the negligence of his servants has been held to be bad in England, and such a contract would clearly be bad in this country, because it is prohibited by the terms of the Statute.

But in this particular case the terms are distinct because the customer says, in effect, to the carrier, I hand you my goods to be carried on the terms that I will not hold you liable for accidents, and then in another clause he goes on to say, and further I will not hold you liable for negligence. The two things are totally distinct, and, drawn in that way, we do not think it can be taken to be so indivisible as to render the whole of it bad by reason of one of its terms being so.

Under these circumstances we think that the contract in this case was a special contract within the meaning of the Indian Carriers Act; that it was a divisible contract, so that one portion of it might be good and another portion bad; and that, so far as it provided that the defendants were not to be liable for loss by accidents, it was a good contract: and we think that the Subordinate Judge was wrong in decreeing the plaintiffs' suit, and this appeal must be decreed and the suit dismissed with costs in all the Courts.

Appeal allowed.

T. A. P.

(1) L. R., 5 Exch. D., 190.