

CIVIL RULE.

Before Mr. Justice Stephen and Mr. Justice Vincent.

VELAYAT HOSSEIN

v.

BENGAL AND NORTH-WESTERN RAILWAY Co.*

1909
June 8.

Railway Company, liability of—Passengers' Luggage—Merchandise booked as "Luggage," loss of—Railways Act (IX of 1890) ss. 47, 72—General Rules of Railway Companies—Damages, suit for.

A passenger took a journey on a railway and booked as his "luggage" a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss :—

Held, that the case was governed by s. 72 of the Indian Railways Act (IX of 1890) and the sections of the Contract Act referred to therein ; and that the Railway Company was liable for the loss of the package.

RULE granted to the plaintiff, Velayat Hossein, the petitioner.

On the 15th June 1908, the plaintiff, a trader in *durries* or carpets purchased two third-class tickets for a journey on the Bengal and North-Western Railway and booked as his "luggage" a package containing 96 pieces of *durries* or carpets, for which he obtained a certain free allowance under his said two tickets, and paid a certain sum of money for excess weight not covered by the free allowance. At his destination the said package was found missing, and delivery of the same was not consequently made to the plaintiff who instituted a suit in the Court of Small Causes at Patna, against the Bengal and North-Western Railway Company for the sum of Rs. 332 being the price of the said *durries*.

The defence was, that the plaintiff sent the goods at his own risk, and that the Railway Company was not liable for the loss of the same under rule No. 76 of the Company's

* Civil Rule No. 1271 of 1909, against the decree of Umesh Chandra Sen, Subordinate Judge of Patna, dated Jan. 15, 1909.

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General Rules. [Rule No. 76 will be found in their Lordships' judgment.]

The Subordinate Judge, exercising Small Cause Court jurisdiction, dismissed the suit concluding as follows :—

“Rule 76 (of the Railway Company), I think, applies to this case, and that these articles were despatched at his (plaintiff's) own risk. The defendants cannot, therefore, be held liable. I dismiss the case, but won't grant the defendants' costs.”

The plaintiff, thereupon, moved the High Court and obtained this Rule on the defendant Company to show cause why the judgment and decree of the Subordinate Judge should not be set aside.

Babu Naresh Chandra Sinha, for the petitioner. The responsibility of Railway Companies in carrying goods is that of a bailee, and they cannot vary or limit this responsibility without complying with the provisions of section 72 of the Railways Act (IX of 1890), wherein the responsibility of Railway Companies is clearly set out : *Sesham Patter v. Moss* (1), *Wilkinson v. The Lancashire and Yorkshire Railway Co.* (2) affirmed on appeal (3). Any rule made by a Railway Company must be consistent with the Act and reasonable : *Jalim Singh Kotary v. Secretary of State for India* (4). I submit that rule No. 76 of the Company's General Rules is inconsistent with the Act, and the Bengal and North-Western Railway Company cannot shirk their responsibility under the Railways Act by taking advantage of their own rules. Railway Companies, as bailees, have the *onus* on them to show that they have taken reasonable and ordinary care : *Trustees of the Harbour, Madras, v. Best & Co.* (5) and *Raisett Chandmull Hamirmull v. Great Indian Peninsula Railway Co.* (6).

Babu Joy Gopal Ghose (*Mr. McNair* with him), for the Railway Company. The question is whether the petitioner is entitled to consider the package of *durries* or carpets as “luggage.” I submit he is not so entitled. The term “luggage”

(1) (1894) I. L. R. 17 Mad. 445.

(2) [1906] 2 K. B. 619.

(3) [1907] 2 K. B. 222.

(4) (1904) I. L. R. 31 Calc. 951.

(5) (1899) I. L. R. 22 Mad. 524.

(6) (1893) I. L. R. 17 Bom. 723.

is distinguishable from the term "merchandise" and he cannot treat merchandise as luggage: *Hudston v. Midland Railway Co.* (1), *Cahill v. The London and North-Western Railway Co.* (2), *Great Northern Railway Co. v. Shepherd* (3), *Belfast and Ballymena, &c., Railway Cos. v. Keys* (4). The plaintiff has taken advantage of his own wrong in claiming damages for loss of articles other than "luggage," viz., merchandise. If he books merchandise as "luggage," he has to suffer the loss, if any, of his merchandise. Section 72 of the Railways Act contains the words "subject to the other provisions of this Act," and includes section 47 and rules framed thereunder, and all provisions as to "risk notes." The rules framed by the Bengal and North-Western Railway Company under section 47 are not inconsistent with the Act and, therefore, not *ultra vires*; and the Railway Company is not liable in damages for the loss of the package. There is no authority on this point, and the cases cited on behalf of the petitioner do not bear on the present case.

Babu Naresh Chandra Sinha, in reply.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. This is a Rule on the Bengal and North-Western Railway Company to show cause why a judgment and decree of the Subordinate Judge of Patna should not be set aside under the following circumstances. The petitioner took a journey on the Bengal and North-Western Railway for which he took two third-class railway tickets. At the same time he delivered a package to the servants of the Railway Company to be taken as passenger's luggage and paid a certain sum as extra charges in respect of the excess weight of the package beyond what was allowed free of charge. The package contained merchandise which it is not suggested could be considered as luggage. It was not delivered to the petitioner at the end of his journey, and he sued before the Subordinate Judge acting in his Small Cause Court jurisdiction,

(1) (1869) L. R. 4 Q. B. 366.

(2) (1863) 13 Scott N. S. 818.

(3) (1852) 8 Exch. 30.

(4) (1861) 9 H. L. Cas. 556.

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for damages caused by its loss. The Judge dismissed the suit holding that the case was governed by rule No. 76 of the Company's General Rules. This is as follows:—"The term 'luggage' will include only wearing apparel and effects required for the personal use of passengers. Persons tendering amongst their luggage articles not properly classifiable as such do so at their own risk." The petitioner contends that this rule does not absolve the Railway Company from their liabilities under the Indian Railways Act of 1890. Section 72 of that Act provides that "(1) the responsibility of a Railway Administration for the loss of goods delivered to the Administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161" of the Contract Act. The second sub-section provides that an agreement purporting to limit that responsibility is void, unless it is in writing signed by the person sending or delivering the goods, and is in a form approved by the Government of India. The third sub-section enacts that "nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway Administration."

If by force of the above enactment the above-mentioned provisions of the Contract Act apply to this case, the liability of the defendants in the suit cannot be questioned. But section 72 of the Railway Act is "subject to the other provisions of this Act": and it is contended on behalf of the Railway Company that the section is accordingly subject to a rule duly made under section 47 of the Railways Act, as it is not denied that rule No. 76 was made. By para. (2) of this section the Company can make a rule "consistent with this Act" for the purpose of "regulating the carriage of" passenger's "luggage." Does this rule absolve the Company from liability under section 72? The question seems to us to admit of no answer but an unhesitating negative. A very definite enactment would be necessary to give the Company power to repeal a provision of the Act, particularly so

general a one as that contained in section 72, by a rule ; and in this case the rule has to be "consistent" with the Act, an expression which is singularly inapplicable to a rule that repeals a part of it. Then it does not appear that the words in section 72, whereby its operation is made "subject to the other provisions of this Act," apply at all to rules under section 47. A rule made under the Act is not a provision of the Act, and the words have an obvious reference to section 73 relating to the carriage of animals, and section 75, relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of section 74. Moreover, the provisions of sub-section (2) of section 72 have not been complied with in this case.

A variety of English cases have been referred to, according to which it is contended that the defendants cannot be fixed with liability in this case ; but all such cases have been decided on a consideration of the position of the Railways as carriers or under Acts that do not apply here. The law here has been carefully simplified by the exclusion of the operation of the common law as to carriers and the Carriers Act, 1865, from cases of loss of goods, and this case is consequently governed by section 72 of the Railways Act and the section of the Contract Act there referred to, and by them alone.

This Rule is accordingly made absolute, the decree of the lower Court is set aside. We have no evidence before us on which to assess the damage caused to the petitioner by the loss of his goods. We, therefore, remit this case to the Subordinate Judge to be re-tried by him in accordance with the law that we have laid down.

The petitioner is entitled to his costs on this Rule.

O. M.

Rule absolute.

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