Nath Bros. Exim International Ltd vs Best Roadways Ltd on 27 March, 2000

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Author: S.Saghir Ahmad

Bench: D.P.Wadhwa, S.S.Ahmad

PETITIONER:
NATH BROS. EXIM INTERNATIONAL LTD.

Vs.

RESPONDENT:
BEST ROADWAYS LTD.

DATE OF JUDGMENT: 27/03/2000

BENCH:
D.P.Wadhwa, S.S.Ahmad

JUDGMENT:

S.SAGHIR AHMAD, J.

The appellant had booked a consignment of 77 packages of mulberry/natural silk garments with the respondent for being carried from Noida (U.P.) to Bombay to be delivered to M/s Jeena & Co., who were the clearing agents of the appellant. The consignment was to be exported to the United Kingdom as the appellant had imported raw silk free of custom duty for manufacture of garments, to be exported back to the United Kingdom. The goods along with copies of Invoice No. NBI-7493 dated 9.3.1994 were entrusted to the respondent who issued Consignment Note No.52330 dated 11.3.1994 to the appellant. Since the consignment was not delivered at Bombay, the appellant wrote a letter to the respondent on 21st of March, 1994 mentioning the non-delivery of consignment. On March 24, 1994, the appellant received a letter dated March 19, 1994 from the respondent through which he came to know that the consignment which was stored at a godown in Bhiwandi was completely destroyed by fire. After serving legal notice on the respondent and after considering its

reply, the appellant filed a claim petition before the National Consumer Disputes Redressal Commission, New Delhi (for short, `the National Commission'), for recovery of a sum of Rs.36,12,874.60 along with interest at the rate of 18 per cent per annum besides costs. The case was contested by the respondent who filed a written statement in which it was pleaded that the goods, entrusted to them, were carried by them with due care and were stored in a godown at Bhiwandi on the instructions of the consignee, M/s Jeena & Co., who had indicated in their letter dated 14.3.1994 that since the shipment was to take place from C.F.S. Kalamboli, the consignment may be unloaded at Bhiwandi. The respondent further pleaded that there was no negligence on their part nor was there any deficiency in service. It was stated that the fire had suddenly broken out in the adjacent warehouse from where it spread to the godown where the appellant's consignment was kept and, therefore, that consignment was also destroyed. The respondent also pleaded that the goods were carried at "OWNER`S RISK" and since special premium was not paid, they were not responsible for the loss caused by fire. The National Commission by the impugned judgment dated September 2, 1996, dismissed the claim. Learned counsel for the appellant has contended that the respondent is a `carrier' within the meaning of Carriers Act, 1865 and, therefore, he is liable for non-delivery of goods to the consignee at the destination indicated to them. It is contended that non-delivery is indicative of the negligence on the part of the respondent and, therefore, the National Commission was not justified in rejecting the claim petition on the ground that the goods were destroyed by fire. It is also contended that the goods, having been entrusted to the respondent, for delivery to M/s Jeena & Co. at Bombay, could not have been diverted for being unloaded at Bhiwandi or stored there. In any case, since the goods were stored in a godown which was adjacent to another godown in which highly combustible articles were kept by a third person who owned that godown, the respondent was clearly negligent in keeping the consignment in question, which consisted of the silk garments, in that godown so as to expose them to fire which ultimately engulfed not only the godown where the combustible material was kept but also the adjacent godown where the appellant's goods were negligently stored. The findings recorded by the National Commission that the goods were diverted at the instance of M/s Jeena & Co. for unloading at Bhiwandi have also been assailed. Learned counsel for the respondent has, on the other hand, contended that the goods were entrusted to the respondent for being carried from Noida (U.P.) to Bombay at "OWNER'S RISK" as the appellant had not agreed to pay higher freight, as indicated in the terms of contract and was content with the goods being carried at "OWNER'S RISK". It is contended that since the goods were booked at "OWNER'S RISK", the respondent was not liable for loss of those goods. It is contended that in his capacity as `carrier', the respondent had taken full care of the goods entrusted to him by the appellant and since the goods were directed to be unloaded at Bhiwandi on the instructions of the consignee, it could not be said that the respondent was negligent in any manner. The goods were stored in the appellant's own warehouse. It is another matter that in the adjacent godown, highly combustible articles were stored which suddenly caught fire resulting in the loss of the appellant's goods. The outbreak of the fire was sudden and it could not be controlled in spite of the services of the fire-brigade which were requisitioned by the respondent who had duly informed the appellant not only of the fact that the goods were diverted at the instance of consignee but also that they were completely destroyed by fire in the adjacent godown which had unfortunately spread to the godown where the appellant's goods were stored. Rights and liabilities of common carriers are indicated in the Carriers Act, 1865 [for short, the "Act"]. The Preamble of the Act provides as under:- "WHEREAS It is expedient not only to enable common carriers to limit their liability for loss of or

damage to property delivered to them to be carried but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents." Section 3 of the Act provides that a common carrier would not be liable for loss of, or damage to, the property delivered to it if its value exceeds one hundred rupees and it is of the description contained in the Schedule to the Act, unless the person delivering such property to be carried, expressly declares to such carrier the value and description thereof. That is to say, if the value of the property, delivered to the common carrier, is of more than hundred rupees, the person entrusting the property to the carrier, must disclose and declare to such carrier the value and description of that property. The other Sections which are relevant for purposes of this case are Sections 4, 5, 6, 8 and 9 which are set out below:- "4. For carrying such property payment may be required at rates fixed by carrier.- Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix : Proviso. Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business. 5. The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage. - In case of the loss of or damage to property exceeding in value one hundred rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid. 6. In respect of what property liability of carrier not limited or affected by public notice.- The liability of any common carrier for the loss of or damage to any property (including container, pallet or similar article of transport used to consolidate goods) delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same." 8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.- Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property (including container, pallet or similar article of transport used to consolidate goods) delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. 9. Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.- In any suit brought against a common carrier for the loss, damage or non-delivery of goods (including containers, pallets or similar article of transport used to consolidate goods) entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the

negligence or criminal act of the carrier, his servants, or agents." Section 4 contemplates the rates fixed by the carrier for carrying the property entrusted to it to the place indicated by the consignor. The Proviso to this Section contemplates a still higher rate than the ordinary rate of charge for carrying the goods. The only requirement is that the carrier should have exhibited at the place of his business a notice indicating the higher rate of charge required for carrying the goods. Section 5 provides that where the property entrusted to the carrier is lost or damaged, then the owner thereof would be entitled not only to recover the damages for the loss or damage to the property, but he will also be entitled to recover any amount which might have been paid to the carrier as a consideration for carrying the goods. Section 6 speaks of unlimited liability of the common carrier in respect of goods, not being of the description contained in the Schedule to the Act. It is provided that the liability shall not be deemed to be limited or affected by any public notice. Section 8 provides in specific terms that where any property is entrusted to any carrier for being carried to the destination indicated by the owner thereof, the carrier shall be liable for loss or damage caused by neglect or fraud of the carrier or its agent. Section 9 provides that in a suit for recovery of damages for loss or non-delivery of the goods, the burden of proof would not be on the plaintiff to establish that loss or damage or non-delivery was caused owing to the negligence or criminal act of the carrier, his servants or agents. Learned counsel for the appellant has contended that under Section 151 of the Indian Contract Act, the carrier as a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods. It is contended that if that amount of care, which a person would have taken of his own goods, is not taken by the carrier, it would amount to deficiency in service and the carrier would be liable in damages to the owner for the goods bailed to him. Before analysing the submissions made by learned counsel for the appellant, we may reproduce the provisions of Sections 151 and 152 of the Indian Contract Act, 1872, hereinbelow : "151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. 152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." These provisions, in effect, embody the English Common Law Rule as to the liability of bailee. Under the English Common Law Rule, the measure of care required of the person to whom the goods were bailed, was the same as a man of ordinary prudence would take of his own goods. In other words, it was a mere matter of negligence on which the liability was founded. If a person was negligent and did not take as much care as he would have taken of his own goods, he would be liable in damages. These principles of the English Common Law Rule were also applied in this country as indicated in the decision of the Privy Council in Irrawaddy Flotilla v. Bugwandas (1891) 18 I.A. 121 = (1891) ILR 18 Cal. 620, in which, it was, inter alia, observed as under : "For the present purpose it is not material to inquire how it was that the common law of England came to govern the duties and liabilities of Common Carriers throughout India. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the Carriers' Act, 1865, an Act framed on the lines of the English Carriers Act of 1830." The law was also explained in Halsbury's Laws of England, IIIrd Edn., Vol. 4 at page 141 as under : "A common carrier is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises solely from act of God or the Queen`s enemies or from the fault of the consignor, or inherent vice in the goods themselves. He is, therefore, liable even when he is overwhelmed and robbed by an irresistible number of persons. He is an insurer of the safety of the

goods against everything extraneous which may cause loss or injury except the act of God or the Queen`s enemies and if there has been an unjustifiable deviation or negligence or other fundamental breach of contract on his part, he will be liable for loss or injury due to the Queen`s enemies or, it would seem, due to act of God. This responsibility as an insurer is imposed upon a common carrier by the custom of realm, and it is not necessary to prove a contract between him and the owner of the goods in order to establish liability. Failure on the part of the carrier to deliver the goods safely is a breach of the duty placed upon him by the common law; and therefore an action of tort lies against him for such breach, the owner not being bound to prove any contract. Where, however, there is a contract, liability may arise either at common law or under the contract, and the contract may limit the carrier`s responsibility. A common carrier is liable for loss or injury caused wholly by the negligence of other persons over whom he has no control; as where the carrier`s barge runs against an anchor wrongfully left in the water by a stranger, or where the goods which he is carrying are destroyed by accidental fire or by rats, or where they are stolen from him, even though taken by force. The general obligation of a common carrier of goods to carry the goods safely whatever happens renders it unnecessary to import into the contract for carriage a special warranty of the roadworthiness of the vehicle or the seaworthiness of the vessel, for if the goods are carried safely the condition of the vehicle or vessel is immaterial, and, if they are lost or damaged it is necessary to inquire how the loss or damage occurred; where however, a common carrier of goods is seeking relief from liability by reason of one of the excepted perils the condition of the vehicle or vessel is material in determining the question of negligence, and if the carrier fails to prove a sufficient and proper conveyance and loss or damage results therefrom he will be liable, it is unnecessary to inquire how the loss or damage occurred; where however, a common carrier of goods is seeking relief from liability by reason one of the excepted perils the condition of the vehicle or vessel is material in determining the question of negligence, and if the carrier fails to prove a sufficient and proper conveyance and loss or damage results therefrom he will be liable." In the meantime, the Parliament intervened and the Carriers Act, 1865 was enacted with the result that the liability of a common carrier came to be considered in the light of the provisions contained in that Act. It is true that Section 158 of the Indian Contract Act speaks of bailment of the goods for being carried on behalf of the bailor, but it is also to be noticed that the bailment spoken of in that Section is gratuitous as it is specifically provided that "the bailee is to receive no remuneration." That apart, the definition of `bailment' as set out in Section 148 of the Indian Contract Act may be said to be wide enough so as to cover `entrustment of goods' to a carrier for carriage. But as pointed out above, with the enactment of Carriers Act, 1865, the extent of liability of the carrier has to be found in that Act. The question of liability of a common carrier was considered by various High Courts in subsequent decisions. In The British & Foreign Marine Insurance Co. v. The Indian General Navigation and Railway Co. Ltd., Calcutta Weekly Notes (15) 226, the Calcutta High Court held that the relative rights and liabilities of common carriers and those for whom they carry are outside the Indian Contract Act and are governed by the principle of the English Common Law as modified by the Carriers Act of 1865. A common carrier, therefore, in India is subject to two distinct classes of liability, the one for the losses for which he is liable as an insurer, and the other for losses for which he is liable under his obligation to carry safely. Speaking generally, the first of these are insurable risks from which the element of default is absent, the second are risks of conveyance in which that element is present. The Carriers Act of 1865 has in some degree modified this position. The Court was also of the opinion that the effect of Sections 6, 8 and 9 of the Carriers Act of 1865 is that the

liability of a common carrier for the loss of goods, not being of the description contained in the schedule to the Act, may be limited by special contract signed by the owner save where such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants. The extent of liability of a common carrier also came to be considered by the Assam High Court in River Steam Navigation Co. Ltd. & Anr. vs. Syam Sunder Tea Co. Ltd., AIR 1955 Assam 65, wherein it was laid down as under :

> "The common law of England regulating the responsibility of common carrier was in force at the time of the passing of the Carriers Act (Act 3 of 1865) and is still in force in this country, being almost unaffected by the provisions of the Indian Contract Act. Section 6 Carriers Act, to which I have referred earlier, enables the common carrier to limit his liability by a special contract; otherwise the liability which the common law imposes is there. Even the special contract contemplated by S.6 would be of no avail where the loss or damage has been caused by negligence or any criminal act on the part of the carrier or his agents or servants. Where the loss or damage arises from any criminal act of the carrier or any of his agents or servants, the common carrier shall be liable to the owner for the loss or damage, and S.9 of the Act relieves the plaintiff from the burden of showing that the loss or damage or non-delivery was owing to any such negligence or criminal act. These sections, therefore, recognise the common law doctrine, save in so far as the liability is limited by some special contract, as provided by S.6. Therefore, even if it were found that the defendants took as much care of the goods as a man of ordinary prudence would, under similar circumstances, the defendants would be liable if the loss was not occasioned by any act of God or the King's enemies, which, in case of republican States, would mean the enemies of the State. There is a third exception recognised where there is some intrinsic vice or defect in the goods themselves or where they are of a perishable nature. The liability of the `carrier' is not that of a mere bailee, as defined by Sections 151 and 152 of the Indian Contract Act. The extent of his liability is very often described as the liability of an insurer against all risks; but it is not a question of any contract to insure and no contract of any insurance has to be made out. If, therefore, the boat, ship or steamer sank on account of its having struck upon some snag and the cargo was lost, that may be a mere `peril of navigation', but not an act of God, and the steamer companies would still be liable even if, under the circumstances, they were found to have acted with reasonable care and prudence." In P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar & Ors. AIR 1962 Madras 44, in which the earlier decision of the Privy Council in Irrawaddy Flotilla's case (supra) was relied upon, it was held that where loss has occurred to cotton bales in transit, cotton being one of the goods not mentioned in the schedule to the Carriers Act, 1865 and in respect of which the liability of the common carrier is not limited by a special contract, the owner of the goods in a suit against the common carrier for loss, damage, or non-delivery of articles or goods entrusted to the carrier is not required to prove negligence; the reason is that the liability of a common carrier is that of an insurer. It, therefore, follows that, notwithstanding the fact that there is no negligence on the part of the common carrier, he is liable to compensate the owner of goods for the loss of the

goods that occurred during the transit thereof by the lorry belonging to the carrier. In another Madras decision in Messrs Konda Rm. Eswara Iyer & Sons, Madurai & Ors. vs. Messrs Madras Bangalore Transport Co., Madurai & Ors. AIR 1964 Madras 516 it was held as under : "The liability of a common carrier is not limited only to negligence. In the case of loss or damage he cannot plead that he has exercised all reasonable diligence and care. He must be liable in spite of taking all due care and precautions. As Chief Justice Hale observed in Mors v. Slew (1672) 1 Vent 190 at p.239 -- "And if a carrier be robbed by a hundred men, he is never the more excused." Thus the general principle of the common law is a common carrier is insurer of goods which he contracts to carry and he is liable for all loss of, or injury to those goods while they are in the course of transit unless such loss or injury is caused by the act of God or by the State enemies or is the consequence of inherent vice in the thing carried or is attributable to consignor`s own fault." It was further held as under : "The law is the same in India. The Carriers Act No. III of 1865 is framed on the same lines of the English Carriers Act of 1830." The Bombay High Court in Hussainbhai Mulla Fida Hussain v. Motilal Nathulal & Anr. AIR 1963 Bombay 208, held that the liability of common carriers under the Common Law and the Carriers Act, 1865 is not affected by the provisions of the Contract Act and by law common carriers are liable as insurers of goods and they are responsible for any injury caused to the goods delivered to them, howsoever caused except only by act of God or action of alien enemies. The Court further held that no proof of negligence is, in such a case, needed and the defendant has to establish the exception. The Assam and Madras decisions as also the Privy Council decision referred to above were relied upon. To the same effect is the decision of the Rajasthan High Court in Vidya Ratan vs. Kota Transport Co. Ltd. AIR 1965 Raj. 200. In R.R.N. Ramalinga Nadar vs. V.Narayana Reddiar AIR 1971 Kerala 197, it was held as under

: "A common carrier is not a mere bailee of goods entrusted to him. He is an insurer of goods. He is answerable for the loss of goods even when such loss is caused not by either negligence or want of care on his part, act of God and of King`s enemies excepted. This arises because responsibility attached to the public nature of the business carried on by him. He holds out as a person who has the expertise and the facilities to conduct the business of transport; consequently he is treated as an insurer of the goods and is answerable for its loss. This concept as to the liability of a common carrier has been applied in India uniformly. The rule of the Roman law as to the liability of a carrier is different. It does not conceive of an absolute liability as in the English Common Law and the rule of the Roman Law has been adopted by many States in the continent. The extent of liability of a bailee under Ss. 151 and 152 of the Indian Contract Act, 1872, is different from the extent of liability of a common carrier. A bailee is only bound to take proper care of the goods and for loss beyond his control he is not answerable. But the provisions of the Indian Contract Act do not govern the liability of a common carrier nor do they override the provisions of the Carriers Act, 1865. This question was considered by the Privy Council in (1891) ILR 18 Cal.620 (PC) and it was held that notwithstanding the provisions of the Indian

Contract Act, the liability of a common carrier continues to be absolute subject to any special contract entered into by him." This decision was followed by the Kerala High Court in Kerala Transport Co. v. Kunnath Textiles 1983 Kerala Law Times

480. A perusal of the decisions referred to above would indicate the extent of liability of a carrier. We have already reproduced the provisions of Sections 6, 8 and 9 above. Section 6 enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or loss to the goods, entrusted to him, has been caused by his own negligence or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In this situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council). The Calcutta decision in The British & Foreign Marine Insurance Co. vs. The Indian General Navigation and Railway Co.Ltd. (supra), the Assam decision in River Steam Navigation Co. Ltd & Anr. vs. Syam Sunder Tea Co. Ltd. (supra), the Rajasthan decision in Vidya Ratan vs. Kota Transport Co.Ltd. (supra), the Kerala decision in Kerala Transport Co. vs. Kunnath Textiles (supra), which have already been referred to above, have considered the effect of special contract within the meaning of Sections 6 and 8 of the Carriers Act, 1865 and, in our opinion, they lay down the correct law. In the Madras decision in P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar & Ors. (supra), it was held that an act of God will be an extraordinary occurrence due to natural causes, which is not the result of any human intervention, but it was held that an accidental fire, though it might not have resulted from any act or omission of the common carrier, cannot be said to be an act of God. Similarly, in Kerala Transport Co. v. Kunnath Textiles (supra), it was held that the absolute liability of the carrier was subject to two exceptions. One of them is a special contract that the carrier may choose to enter into with the customer and the other is the act of God. It was further held that an act of God does not take in any and every inevitable accident and that only those acts which can be traced to natural causes as opposed to human agency would be said to be an act of God. In Associated Traders & Engineers Pvt. Ltd. v.

Delhi Cloth & General Mills Ltd. & Ors. ILR Delhi 1974 (1) 790, a fire which broke out in a bonded warehouse where the goods were kept was held not to be an act of God and, therefore, the carrier was held liable. This Delhi decision has been relied upon by the learned counsel for the appellant on another question also to which we shall presently come, to show that the agreement by which the liability of the carrier is sought to be limited must be signed by the owner of the goods, entrusted to the carrier for carriage. From the above discussion, it would be seen that the liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the

carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants. Learned counsel for the respondent contended that the goods were booked at "OWNER`S RISK" and, therefore, if any loss was caused to the goods, may be on account of fire, which suddenly engulfed the neighbouring warehouse and spread to the godown where the goods in question were stored, the carrier would not be liable. "OWNER`S RISK" in the realm of commerce has a positive meaning. It is understood in the sense that the carrier would not be liable for damage or loss to the goods if it were not caused on account of carrier`s own negligence or the negligence of its servants and agents. In Burton v. English (1883) 12 Q.B.D. 218 and again in Wade v. Cockerline (1905) 10 Com.Cas. 47, it was held that in spite of the goods having been booked at "OWNER`S RISK", it would not absolve the carrier of its liability and it would be liable for the loss or damage to the goods during trans-shipment or carriage. These decisions granted absolute immunity to the carrier, but they have lost their efficacy on account of subsequent decisions in Svenssons v. Cliffe S.S.Co. (1932) 1 K.B. 490, which was considered in Exercise Shipping Co. Ltd. v. Bay Maritime Lines Ltd. (The Fantasy) (1991) 2 Lloyd`s Rep. 391 [Queen`s Bench Division], in which it was observed as under : "The question whether words such as "at charterer`s risk" can operate as an exemption clause in favour of a party otherwise liable for negligence was decided by Mr. Justice Wright (as he then was) in Svenssons Travaruaktiebolag v. Cliffe Steamship Co. (1931) 41 Ll.L.Rep. 262; (1932) 1 K.B. 490. He considered the authorities in detail and concluded : It is quite clear, in my judgment, on the authorities as they now stand, that the words "at charterers' risk", standing alone and apart from any other exception in the charter-party, do not excuse the shipowner in the case of a loss due to the breach of warranty of seaworthiness... I think that the words standing by themselves have also to be read as limited to losses and damages where there has been no negligence on the part of the shipowner or his servants. He went on to consider the charter-party terms in that case which also included an exceptions clause, cl. 11. He held that that clause should have its full effect whereas if "at charterers' risk" had included an exception of negligence, it might not have done so. That judgment has been followed since 1932, for example in The Stranna (1937) 57 Ll.L.Rep. 231; (1937) P.130 and East & West Steamship Co. v. Hossain Brothers, (1968) 2 Lloyd`s Rep. 145 (Supreme Court of Pakistan) and it has not, so far as I am aware, been dissented from." In Mitchell v. Lanc. & Y.R., 44 LJQB 107 = LR 10 QB 256, it was held that "OWNER`S RISK" only exempts the carrier from the ordinary risks of the transit and does not cover the carrier`s negligence or misconduct. So also, in Lewis vs. The Great Western Railway Company 3 Queen`s Bench 195, the words "OWNER`S RISK", were held to mean, "at the risk of the owner, minus the liability of the carrier for the misconduct of himself or servants." Thus the expression "at owner`s risk" does not exempt a carrier from his own negligence or the negligence of his servants or agents. We may now consider the facts of this case. The Consignment Note No. 52330 dated 11th March, 1994, through which the goods were booked with the respondent says "AT OWNER`S RISK". In the column meant for insurance, again, the alphabets "OR" are mentioned, which obviously mean "OWNER'S RISK". The terms and conditions are printed at the back of the Consignment Note. Condition No. 1, inter alia, reads as under :

> "1..... The Company carries the goods at Owner`s Risk unless a special insurance of Rs.0.80 for every hundred rupees of value declared by the sender having been charged and paid. Payment of such Insurance charges, if made, should be mentioned on the G.C. Note at the space provided for the same." The name of the consignee

indicated therein is "Messrs Jeena & Co., Bombay." The address of the ultimate consignee is mentioned as : "Sears Womenswear Limited, 1 Garrick Road, Hendon, London NW9 6AU, U.K.". It is further indicated that the goods are to be loaded at Bombay. The nature of the goods indicated in the invoice is "100% Natural Silk Readymade Garments" consisting of 3672 pieces of the value of GBP 48,470.40. The description of the goods indicated in the Consignment Note was "Mulberry Raw Silk Garments (Natural Silk Readymade Garments) comprising 77 packages. The contention of the learned counsel for the respondent that since the goods were booked at "OWNER`S RISK" the respondent would not be liable for any loss to those goods, is not acceptable to the appellant who contends that before the liability of the carrier can be restricted, there has to be an agreement in writing as contemplated by Section 6 of the Act, which has to be signed by the owner of the goods, and since the Consignment Note, even if it is to be treated to be an agreement between the parties, is not signed by the owner or the appellant, there was no contract between the parties within the meaning of Section 6 of the Act and, therefore, in spite of the mention in the Consignment Note that the goods would be carried at "OWNER`S RISK", the liability of the carrier would not be restricted and it would still be liable for the loss caused to the undelivered goods at Bhiwandi by the outbreak of fire in the godown where they were stored. When the goods were entrusted to the carrier for delivery at Bombay to Messrs Jeena & Co., the Consignment Note which was issued to the appellant, mentioned that the goods were to be carried at "OWNER`S RISK." The appellant did not, at that stage, object to the words "OWNER`S RISK" being mentioned in the Consignment Note. On 19th March, 1994, the respondent informed the appellant that the goods were destroyed by fire. In this letter, it was, inter alia, mentioned by the respondent as under : "In the meantime, since the consignment was booked at Owner`s Risk basis, you are requested to please take up the matter with your Insurance Company." Although it was clearly mentioned that the goods were booked at "OWNER`S RISKS" in the aforesaid letter, the appellant in his reply dated 26th March, 1994 did not repudiate the assertion of the respondent that the goods were booked at "OWNER`S RISK." Even in his earlier letter dated 21st March, 1994, the appellant did not say a word about "OWNER`S RISK." Thereafter, the appellant sent a notice dated 22nd April, 1994 to the respondent through Mr. S.K. Kaul, Advocate, but in that notice also the fact that the goods were booked at "OWNER`S RISK" was not repudiated. Even in the subsequent notice dated 30th May, 1994, sent through Shri R.C. Gupta, Advocate, the appellant did not say anything about "OWNER`S RISK." Even in the Claim Petition filed before the National Commission, the appellant did not say anything about "OWNER`S RISK." The respondent, however, in para 4 of the Written Statement filed before the Commission stated, inter alia, as under : "4. That the Opposite party had carried the goods at the "Owner risk" as offer to the complainant to get the goods insured by them was declined. That the terms and conditions of the contract of the carriage as incorporated in the Goods Consignment No. 52330 dated 11th March, 1994 under which the complainant booked the goods with the opposite party for transportation provides: 1. The Company (opposite party) carriages the goods at owners risk, unless

a special Insurance of Rs.0.80 for every hundred rupees of value declared by the vender, having been charged and paid. Payment of such insurance charges, if made, should be mentioned on the goods consignment note at the space provided for the same. 2. The Company (opposite party) shall not be responsible for any loss or damage due to theft, fire explosion or accident, unless the special insurance charges, as stated in clause 1 above is charged and paid. An affidavit duly attested by Sukhbir Singh, the Booking Clerk of the opposite party, who had booked the goods of the complainant on behalf of the opposite party is annexed as Annexure A-1." It was then that the appellant in his rejoinder, raised the question that there was no agreement in writing between the parties so and, therefore, the liability of the carrier would not be restricted. The appellants pleaded in paragraph 4, as under

: "That the submissions made in para No. 4 of the preliminary objection are not correct. The term "Owner`s risk" has not been defined in the Carriers Act. As per Section 6 of the Carrier Act, a common carrier can limit his liability not by means of public notice but by entering into a special contract. If there is no special contract, the liability of carrier remains absolute. It is not the case of parties herein that they had entered into any special contract or the consignment note bears the signatures of the complainant in token of their acceptance that the goods were booked at owner`s risk. The agreement/contract becomes binding when the parties so agree and execute such contract. The complainant has not signed any document/contract wherein the complainant has accepted the goods were booked at the owner`s risk. It is submitted that even where the goods were carried at "Owner`s Risk", the carrier is not absolved from his liability for loss of or damage to the goods due to his negligence or criminal acts. Section 9 of the Carriers Act provides that the common carriers are liable for the loss if any caused to the goods entrusted to the carriers and it is the duty of the carriers to carry the goods to the destination station. It is absolutely incorrect that the opposite party made any offer to get the goods insured. Section 8 of the Carriers Act deals with the liability of the common carriers for loss or damage caused by the neglect of the carriers or his agent. The opposite party is liable to pay the damages to the complainant even if the goods are not insured. Thus the question of insurance of goods is not at all relevant. In any case, the opposite party could not have asked for the payment of insurance charges as mentioned by them in the reply i.e. 80 paisa per 100/- of value because carriers cannot in law collect the premium for insurance of goods and issue any valid receipt of Insurance Premium. The opposite party cannot work in place of Nationalised Insurance Companies who perform their duties by virtue of statute, i.e. Insurance Act. The complainant could not have been asked to enter into an illegal contract. As such the submissions made in para No. 4 of the written statement are incorrect, hence denied. The affidavit (Annexure I) to W.S.) is collusive and managed one. In any case the contents of affidavit are false and denied. The complainant submits herewith affidavit of its employee Shri Puran Singh to establish that the opposite party brought their truck to the factory of the complainant and loaded the goods there for carrying the same to Bombay and the representative of the opposite party issued consignment note in the factory of the complainant and

at no stage the opposite party asked the complainant to get the consignment insured. The affidavit of Shri Puran Singh is submitted herewith as ANNEXURE-J to the rejoinder. [Emphasis supplied] In view of the above, there did arise a controversy between the parties whether there was any special agreement between them which would have the effect of restricting the liability of the respondent in carrying the goods in question to Bombay for delivery to Messrs Jeena & Co. This question has not been answered in clear terms by the National Commission and a positive finding, whether or not there existed a special contract between the parties within the meaning of Section 6 of the Act, has not been recorded. The Commission, after considering various provisions of the Act came to the conclusion that EVEN IF the goods were carried at "OWNER`S RISK", the carrier would not be fully absolved of his liability to pay compensation if the loss was occasioned on account of his negligence or the negligence of his servants and agents. The Commission, to this extent, is right and, therefore, a positive finding on the existence of a special contract is not insisted upon but what is now questioned is the finding of the Commission on the question of negligence. The Commission held that since the goods were diverted to Bhiwandi by the consignee, Messrs Jeena & Co., to whom the goods were to be delivered, and they were destroyed by the fire which initially broke out in the adjacent godown and subsequently spread to their own godown, the respondent would not be liable as he had taken all possible care which was expected of him as carrier. This, we feel, is not the correct approach. There was a serious dispute between the parties not only on the existence of a special contract within the meaning of Section 6 of the Act, but there also arose a dispute with regard to the diversion of goods to be unloaded at Bhiwandi instead of being delivered to Messrs Jeena & Co. at Bombay. This question, namely, diversion of goods, has been decided by the Commission without scrutinising the relevant pleadings of the parties. The goods, according to the learned counsel for the respondent, had reached the destination, but when the consignee was informed that the goods have arrived, the carrier was instructed by the consignee, Messrs Jeena & Co., to unload the consignment at Bhiwandi as the shipment of the 77 packages, which were delivered to the carrier by the appellant, was to take place at C.F.S. Kalamboli (Nhava Sheva Port). It is contended that the consignee was the agent of the appellant and the goods were to be delivered to him and if the consignee, on information that the goods have arrived at Bombay, diverted the carrier to Bhiwandi for unloading the goods there, the carrier shall be deemed to have delivered the goods to the consignee, namely, Messrs Jeena & Co. and the carrier cannot be held liable for any loss caused to the goods after delivery thereof to the consignee. Whether or not Messrs Jeena & Co. had directed the respondent to unload the goods at Bhiwandi, is a question of serious dispute between the parties. The respondent relied upon the letter dated 14th March, 1994 from Messrs Jeena & Co. which reads as under : "This has reference to the information given by you regarding arrival of 77 packages at Mulund Check Post of M/s Nath Brothers, Exim International Ltd., New Delhi, booked by you under your G.C. No. 52330 dt. 11.3.94 Ex. Delhi to Bombay. In this connection we hereby advise you to unload the said consignment of 77 packages of the above party at Bhiwandi as

the shipment of the same will take place at CFS, Kalamboli (Nhava Sheva Port)." The appellant disputed the genuineness of this letter and contended that it was a forged letter. It was contended that 14th March, 1994 was a public holiday at Bombay on account of "Idul-Fitr" and the offices of the banks including that of Messrs Jeena & Co. were closed. It was also contended that Messrs Jeena & Co. had addressed a fax message on 15th March, 1994 to the appellant complaining of non-receipt of the goods. It was contended that if the goods had arrived at Bombay and were diverted by Messrs Jeena & Co. to Bhiwandi for being unloaded there, they would not have issued the fax message of 15th March, 1994 complaining of non-receipt of goods. It is also pointed out that in none of the communications earlier exchanged between the parties, respondent had indicated about the letter dated 14th March, 1994 of Messrs Jeena & Co. by which they had instructed the respondent to divert the goods to Bhiwandi. It is also pointed out that when a notice was issued by the appellant to the respondent, the latter, namely, the respondent sent a reply through their counsel on 27th June, 1994, but in that reply also they did not mention about any written instructions from Messrs Jeena & Co. for unloading the goods at Bhiwandi. In the Claim Petition also, the appellant did not say a word about diversion of goods at the instance of Messrs Jeena & Co. But when the respondent filed his Written Statement and pleaded that the goods had been diverted to Bhiwandi on the express written instructions of Messrs Jeena & Co., the appellant raised a dispute about that question in his rejoinder. In para 10 of the Written Statement, the respondent stated as under : "That para No. 10 of the complaint as stated is wrong and denied, while it is not denied that the booked consignment had to be delivered at Bombay, but the same had to be taken to Bhiwandi and unloaded of the opposite party godown as there was specific instruction from the consignee and freight Forwarder M/s Jeena & Company, Bombay. The opposite party had received a letter dated 14.3.1994 wherein M/s Jeena and Company, on receipt of the information from the opposite party about the arrival of the consignment at Mulund Check post, directed the opposite party to unload the said consignment at Bhiwandi as the shipment of the same will take place from C.F.S. Kalamboli (Nava Sheva Port). The letter dated 14th March, is annexed as Annexure A-2. The true facts of the case are that opposite party had booked the consignment of 77 boxes for delivery to their clearing, forwarding and shipping agents M/s Jeena & Co. at Bombay under goods consignment note No. 52330 dated 11th March, 1994 which is Annexure B to the complaint. As per the instruction of the complainants consignees at Bombay, M/s Jeena & Co., International Freight forwarders the consignment was to be shipped from Nhava Sheva Port and not from Bombay Docks. As soon as the consignment reached the Muland Check Post on 14th March, 1994, the said consignee vide letter dated 14.3.1994 which is Annexure A-2, directed the opposite party to offload the cargo at Bhiwandi situated at the outskirts of Greater Bombay where no octroi duty was payable and which was meant for despatch from the newly set-up port at Nhava Sheva via the ship/vessel CMB Medal V-212, Rotation No. 405, which was expected to depart on any day immediately after 16th March, 1994. Annexure A-3 is the map of the Greater Bombay showing the location of the Mulund Check post of the Greater Bombay, where Octroi duty is collected by the

Municipal Corporation on the entry of the goods, Bhiwandi on the outskirts of the Greater Bombay and the situation of the Bombay Docks and Nhava Sheva Port across the Creek of Bombay. It is, therefore, not true that opposite party wrongly unloaded the consignment at Bhiwandi, outside the Bombay Octroi check post and hence it can easily be inferred from the facts as stated above, that storing of the goods at Bhiwandi instead of directly taking it to Bombay, does not speak of any deficient and in-adequate service on the part of the opposite party. The opposite party will further like to add that complainant was bound to have complied with the requirement and provision of the Bombay Municipal Corporation Exemption from Octroi (Export) Promotion Rule 1976, copy of which is annexed as Annexure A-4, in respect of the articles imported into Greater Bombay for the purpose of export to foreign countries, as such registration as exporters with the Municipal Corporation of Greater Bombay, delcaration that cargo was to be shipped from Bombay Docks and comply with all other procedure and formalities in this particular case, the consignment was to be shipped from the Port at Nhava Sheva, situated across the creek of Greater Bombay and as such the consignment was intended to be imported within the Octroi limits of the Greater Bombay which would have attracted Octroi duty of 2% of the value of the consignment, failing which the goods would have been seized by the Municipal Corporation of the Greater Bombay at Octroi check post. It is only when the consignee or their forwarding agents desired this extra facility in respect of the export cargo to save octroi that the opposite party take this extra responsibility and incur expenditure, in unloading which involves heavy labour charges. It is denied that the complainant has suffered loss of goods including profits as per price settled. It is denied that loss of reputation has been caused to the complainant. As the complainant was immediatley informed vide letter dated 19.3.1994 (which is annexure "E" in the complaint) about the loss of the goods due to accidental fire and hence there was no occasion for the complainant to have suffered huge expenses on travelling. The complainants apprehension regarding claims from foreign customers, at this stage, is unfounded and pre-mature to be considered by the Hon'ble Commission. In any case loss if suffered any is too remote and indirect under section 73 of the Indian Contract Act and could not be considered." The letter dated 14th March, 1994 from Messrs Jeena & Co. was filed with the Written Statement as Annexure A-2. The appellant in his rejoinder to the Written Statement of the respondent repudiated the above pleadings of the respondent and stated in para 10 thereof, inter alia, as under : "Para 10 of reply is wrong and false and, therefore, denied. It has been admitted by the opposite party that the booked consignment had to be delivered at Bombay. Thus it is not in dispute that there was no agreement for carriage of goods to Bhiwandi or its storage at Bhiwandi. It is not the case of opposite party that complainant had directed them to change the destination of goods from Bombay to Bhiwandi or to store them there. It was further stated as under : 10(1) Without prejudice to the above submissions it is stated that the letter dt.14.3.94 purported to have been issued by Jeena & Co.

(Annexure 2 to W.S.) relied upon by the opposite party to justify the change of destination of consignment from Bombay to Bhiwandi is totally false, collusive, an after thought, managed one and mischievous in view of earlier fax of dt. 15.3.94 of Jeena & Co. (Annexure K) in which they informed the complainant regarding 77 packages (Consignment in question) "CARGO AWAITED". Furthermore, the opposite party could not have informed Jeena & Co. on 14.3.94 and Jeena & Co. could not have issued impugned letter dt. 14.3.94 on that date itself as this day was a holiday under Negotiable Instruments Act on account of Id-ul-Fitr when undoubtedly Govt. Offices and Bank were closed in Bombay. To this effect a telex confirmation dt. 29.4.95 issued by Indian Overseas Bank R.O. (Metro) Bombay to Indian Overseas Bank, Parliament Street, New Delhi (Bankers of the Complainant) is enclosed herewith as Annexure L. Furthermore, the office of Jeena & Co. itself was closed on 14.3.94 as certified by them in the fax message dt. 22.4.95 which is enclosed herewith as Annexure M. Furthermore, the opposite party had not taken any plea based on the letter dt. 14.3.94 in their first official communication being letter dt. 19.3.94 (Annexure 5 to W.S.). This proves that letter dated 14.3.94 is after thought. 10(2) In the above connection it is further submitted that the veracity of claim of opposite party that it changed the destination of goods on instruction of Jeena & Co. is highly dubious for two more reasons. .....

....". [Emphasis supplied] It was further stated in paragraph 10(4) of the rejoinder as under : "It is submitted that above facts clearly show that the story of giving information of arrival of goods at Bombay to Jeena & Co. and receiving instructions from them to unload goods at Bhiwandi on 14.3.1994 is totally false and the opposite party stored the goods at Bhiwandi of their own volition. The implantation of letter dated 14.3.1994 is, therefore, only a crude attempt to justify their unauthorised action of storing goods at Bhiwandi." In view of the above pleadings, a serious dispute had arisen between the parties as to the genuineness of the letter dated 14th March, 1994, said to have been written by Messrs Jeena & Co. to the respondent to unload the goods at Bhiwandi instead of delivering the consignment at Bombay. The National Commission did not advert itself to these questions and disposed of the whole matter observing, inter alia, as under : "The carrier has, however, pointed out that they had taken the consignment, as per the instructions of the petitioner, and informed the consignee that the goods were ready for delivery at Bombay, but the consignee directed them to unload the said consignment of 77 packages at Bhiwandi. The diversion of the consignment to Bhiwandi was thus made at the direction of the consignee himself. In this regard, the Opposite Party has produced a letter from M/s Jeena & Co., dated 14th March, 1994 which reads as follows : "This has a reference to the information given by you regarding arrival of 77 packages at Mulund Check Post of M/s Nath Brothers, Exim International Ltd., New Delhi, booked by you under your G.C. No. 42330 dt. 11.3.94 Ex. Delhi to Bombay. In this connection we hereby advise you to unload the said consignment of 77 packages of the above party at Bhiwandi as the shipment of the same will take place at CFS, Kalamboli (Nhava Sheva Port)." The argument of the Opposite Party, the carriers, is that on these specific instructions from the consignee and freight forwarder M/s Jeena & Co., Bombay, the said consignment was unloaded and stored at Bhiwandi. That was done, according to them, since the consignment was to be shipped from Nhava Sheva Port and not from Bombay Port and, therefore, the consignee diverted the consignment from Mulund Check Post to Bhiwandi, which was nearer to Nhava Sheva Port, and at the same time also avoided the octroi duty which had to be paid, had the delivery been taken at Mulund Check Post when the consignment reached there. The goods were stored at Bhiwandi in godown Nos. 5 & 6, Wadi

Compound, Anjur Village, Anjurphate, outside the octroi limits of Greater Bombay along with other export consignments, the total value of which, according to the Opposite Party, was more than Rs. 2 crores and all of which were to be shipped from Nhava Sheva port across the creek of the Greater Bombay. All those goods were destroyed around noon on 16.3.1994 because of a huge fire and explosion that occurred in the adjoining godown No. 7 belonging to Shri Rati Bhai were drums containing hazardous chemicals were stored. The fire spread to the Opposite Party`s godown Nos. 5 and 6 as well as other adjoining godowns. In spite of all efforts by the fire fighting engines, the fire could not be contained in time. The accidental fire was reported to the Police Station, Bhiwandi, and an FIR was also lodged on the 16th March, 1994 itself. The Police prepared a Panchanama in front of independent witnesses and the fire brigades of Bhiwandi and Nizampur Nagar Parishad confirmed this accidental fire. This fire was also reported in the newspapers on 16th and 17th March, 1994. It is not the case of the Petitioner that the carrier did not take adequate precautions or steps to save the goods from the loss by the fire. On the other hand, it has been successfully proved by the carrier that the consignment of the Petitioner was diverted from Mulund Check Post to Bhiwandi on the specific instructions of the consignee and further that the loss was caused by fire which was beyond their control. It has been mentioned by them that they took due care, within their capacity and now they have lodged a claim on the owner of the adjoining godown from where the fire started." The above will show that the National Commission acted upon the letter dated 14th March, 1994 of Messrs Jeena & Co. without deciding the question whether it was genuine and was at all issued by Messrs Jeena & Co. as the appellant had contended that the letter was forged or was procured collusively. Since the above aspects have not been considered and decided by the Commission, we cannot uphold the judgment of the National Commission. The appeal is consequently allowed, the impugned judgment dated 2.9.1996 passed by the National Commission is set aside and the case is remanded to the Commission for disposal afresh in the light of the observations made above and in accordance with law.