Parsram Parumal Dabrai vs The Air-India Limited on 26 August, 1952

Equivalent citations: (1954)56BOMLR944

JUDGMENT

Shah, J.

1. On November 17, 1947, a representative of one Parsram Parumal Dabrai (hereinafter referred to as the plaintiff) delivered at Karachi a parcel containing gold of the value of Rs. 1,80,000 to the Air India, Limited, (hereinafter referred to as the defendants) for carriage by their air service to Bombay. The parcel was accepted by the defendants, and on payment of Us. 164-8-0 as freight charges, the defendants made out a consignment note (exh. A) in favour of the plaintiff. The parcel, however, could not be delivered by the defendants to the consignee at Bombay, as it was lost. The plaintiff filed this suit to recover the value of the parcel on the plea that the loss of the parcel of gold was due to failure on the part of the defendants to take such care as a person of ordinary prudence would under similar circumstances take of similar goods. In the plaint as originally filed, the claim was made on the allegation that the consignment note issued by the defendants and embodying the terms of the contract of carriage was an inland consignment note and the defendants as bailees were liable for negligence. At the trial the plaintiff applied for leave to amend the plaint by pleading that he was entitled to avail himself of the provisions of the Indian Carriage by Air Act, XX of 1934, and that the description of the consignment note as 'inland' was erroneous, and that the same should be struck out. The plaint was allowed to be amended accordingly.

2. The defendants have denied their liability as bailees, and under the Indian Carriage by Air Act. They contended that under the terms of the consignment note the defendants were exempt from liability 'in case of loss or damage or pilferage or detention from any cause whatsoever (including negligence or default of pilots, agents, flying, ground or other staff or employees of the carrier or breach of statutory or other regulations) whether in the course of the journey or prior, or subsequent thereto, and whether while the freight be on board the aircraft or otherwise'. The defendants have also contended that they took such care of the parcel as persons of ordinary prudence would take of similar goods in similar circumstances, and that in any case, the plaintiff having recovered the full value of the parcel from the insurance company with which the parcel was insured, the plaintiffs were not entitled to proceed against the defendants. Finally, it was contended by the defendants that the provisions of the Indian Carriage by Air Act, XX of 1934, did not apply to the loss of the parcel and that even if those provisions applied, the loss of the consignment did not take place during carriage by air, and the suit was not maintainable as it was not filed in accordance with the provisions of that Act, and that the cause of action, if any, was extinguished as it was time-barred.

3. The delivery of a parcel by the plaintiff's agent to the defendants at their Karachi office is admitted. It is also not denied that the parcel contained gold worth Rs. 1,80,000 and it is so mentioned in the consignment note exh. A. The defendants contended that the parcel was received in the air port in Bombay on November 18, 1947, and in due course was carried to their office at the Esplanade Road, Bombay, and was kept in an 'iron cage' in that office, but that it was found to have been pilfered after the closing hours of the office on November 18, 1947, and before the Freight Superintendent of the defendants arrived at the office in the morning on November 19, 1947. That contention of the defendants is supported by the evidence of their witness Antia, their Freight Superintendent, and the entry in the receipt and delivery register maintained by the defendants in the regular course of business. According to the evidence of Antia, Parcel No. 7139 despatched from Karachi was received at the Bombay office on November 18, 1947, at about 7 p.m., that the same was duly checked and with other parcels received that day was put by him in an 'iron cage' after it was duly entered into the receipt and delivery book. The witness Antia has stated that the 'iron cage' was duly locked after the parcel was deposited therein, that on that day he left the office after the office was locked up, and that when he came the next morning to the office at about 9 a.m. he found the hasp of the cage broken, and on checking up the parcels in the cage it was found that parcel No. 7189 consigned to the plaintiff was missing; that thereafter he asked his clerk Borgan to file a complaint with the police, and ultimately on investigation by the police it was found that a sweeper employed by the defendants had stolen the parcel. The sweeper was convicted at a trial held before a Presidency Magistrate, and a part of the gold stolen from the parcel was traced from him, and on conviction of the sweeper, the same was handed over to the defendants. That gold was sold by the defendants, and the defendants realised by the sale thereof Rs. 39,097-12-0. Antia has described in his evidence the topography of the Bombay office of the defendants. It is situated on the ground-floor of a building on the Esplanade Road abutting on two roads and has three exits. The office consists of two rooms: one used for receiving freight for transport, and another used for storage and delivery of parcels received from outstations. Parcels received from out-stations used to be kept in an 'iron cage' 6' x 3' reaching the ceiling. The 'iron cage' was made of round wire l/4th inch in diameter and having rectangular interstices of 1' x 1 1/2'. The contents of the cage could be seen by any one in the office. It is admitted that there was no safe or a strong room in the office of the defendants. It is also admitted by Antia that a number of parcels containing gold were received on November 18, 1947, and that all of them were stored in the 'iron cage'. It is not suggested that carriage by the defendants of parcels containing gold was unusual.

4. The defendants had employed a night-watchman to keep watch on the office premises. The night-watchman used to patrol near the premises. At closing time two out of the three doors used to be locked from inside, and the third door of the office used to be locked from outside, and all the three keys of the three doors used to be handed over to the night-watchman. It appears that before the arrival of the Freight Superintendent in the morning the office used to be opened to enable sweepers and clerks to enter the premises. It is the defendants' case that a sweeper employed by them managed to obtain access to the office premises after the office was closed and the doors were locked when Antia left the office on November 18, 1947, and before he arrived at the office on the morning of November 19, 1947. That the entry of the sweeper into the office premises of the defendants must have been facilitated by reason of the keys of the doors being left with the night-watchman is a reasonable inference which could be made in the circumstances of the case.

The storage of valuable parcels containing gold in a cage, which, as described by Antia, used to be closed by a hasp, may not be regarded as a very efficient protection against removal of parcels surreptitiously, if some one managed unauthorisedly to enter the office premises. In my view the arrangement made by the defendants for storing parcels containing valuable articles like gold received from out-stations cannot be regarded such as a person of ordinary prudence would make for storing similar valuable parcels. In failing to provide a safe or a strong room for storing parcels containing valuable goods which could not be opened as easily as the cage appears to have been opened by the use of a crowbar or a jemmy, and in leaving the keys in the possession of a night-watchman, the defendants must be open to a charge of not having taken as much care of the parcel as persons of ordinary prudence would in similar circumstances take of similar parcels.

5. The defendants have contended that in any case in view of the terms of the clause printed at the foot of the consignment note exh. A, they are absolved from liability. That clause is in these terms :

> Note : The freight is carried on the express condition that the earner shall be exempt from any liability under the law whether to the consignor or to the consignee or their legal representatives, in case of loss or damage or pilferage or detention from any cause whatsoever (including negligence or default of pilots, agents, flying, ground or other staff or employees of the carrier or breach of statutory or other regulations) whether in the course of the journey or prior, or subsequent thereto, and whether while the freight be on board the aircraft or otherwise.
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> If the clause is to have its full effect, the defendants, notwithsanding the finding that they did not take as much care of the parcel as persons of ordinary prudence would take of similar articles in similar circumstances, must be deemed to be absolved from their liability. The question then arises : Is the clause in the consignment note (exh. A) binding on the plaintiff? The clause seeks totally to exonerate the defendants from their liability as carrier, for loss of goods delivered to them for transport.

6. Sections 151 and 152 of the Indian Contract Act prescribe the amount of care required to be taken by bailees. A bailment for carriage is also governed by the provisions of Sections 151 and 152 of the Indian Contract Act, except where the carriage is by a common carrier. A person who engages in the business of transporting property by air is not a 'common carrier' within the meaning of the Carriers Act, III of 1865; and consequently the special law applicable to common carriers under the Carriers Act, III of 1865, is not applicable to carriage by air.

7. Section 151 of the Indian Contract Act requires the bailee 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. Under Section 152 of the Act, in the absence of any special contract, the bailee is not responsible for loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of the thing bailed as described in Section 151 of the Act. The combined effect of the two sections is that the bailee must take due care of the thing bailed which may be taken by a person of ordinary prudence, and that if such care is taken, in the absence of a contract to the contrary, the bailee is not liable for loss, destruction or deterioration of the thing

bailed.

8. Can a bailee contract himself out of the liability imposed by Sections 151 and 152 of the Indian Contract Act to take such care of the goods bailed to him as a person of ordinary prudence would in similar circumstances take of his own goods of a similar type ? Mr. Mody on behalf of the plaintiff urged that a carrier cannot contract himself out of that liability. Mr. Mody submitted that under Section 152 of the Indian Contract Act a bailee may by special contract undertake liability for loss, destruction or deterioration of the goods bailed to him, even when he has taken such care of the goods bailed to him as a person of ordinary prudence would in similar circumstances take of his own goods, but a bailee is not entitled to contract himself out of the liability which arises by reason of his failure to take such care of the thing bailed to him as is provided in Section 151 of the Indian Contract Act,

9. In my view the contention cannot be accepted. Undoubtedly Section 151 of the Contract Act imposes upon a bailee liability to take such care of the goods bailed to him as a person of ordinary prudence would take of similar goods in similar circumstances, but that provision does not negative the general liberty of contract between a bailor and the bailee. If an agreement is illegal or prohibited by law or is otherwise against public policy, or if carried out is likely to defeat the provisions of any law, it will not be recognised; but where rights and obligations are sought to be created by the Contract Act, they are normally subject to a contract to the contrary; and in my view there is nothing in Sections 151 and 152 of the Act which excludes that liberty of contract. The view that I am taking is supported by two decisions of this Court reported in Bombay Steam Navigation Co Ltd. v. Vasudev Baburao (1927) I.L.R. 52 Bom. 37 : S.C. 29 Bom. L.R. 1551 and Lakhaji Dollaji & Co. v. Boorugu Mahadeo Rajanna (1938) 41 Bom. L.R. 6. A similar view has been taken by the Rangoon High Court in a judgment reported in Put Chang v. Maung Po Cho (1020) I.L.R. 7 Ran. 389.

10. Mr. Mody on behalf of the plaintiff has referred me to a passage in Pollock and Mulla's Contract Act, 7th edn., at p. 497, in support of the proposition that "a bailee's liability cannot be reduced by a contract below the limit prescribed by Section 151; a contract by a bailee purported to exempt him fully from liability of negligence is not valid." In my view, the paragraph is misleading, and is not supported, by the authorities referred by the learned authors in support of the proposition in note (1): viz. Sheik. Mohamad Ravuthar v. The British India, Steam Navigation Co., Ltd. (1908) I.L.R. 32 Mad. 95 and Bombay Steam Navigation Co. Ltd. v. Vasudev Baburao (1927) I.L.R. 52 Bom, 87 : S.C. 20 Bom. L.R. 1531.

11. In Sheikh Mohamad v. The British India Steam Navigation Co., which was decided by a Full Bench, Sir Arnold White C. J. and Wallis J. were of the view that in England it is competent to a shipowner to protect himself, by express contract, from liability for the negligence of himself or his servants, and that was also the law applicable in India, while Sankaran Nair J. was of the view that the rule of English law, which allows shipowners to exempt themselves, by express contract, from liability for negligence, cannot be applied in India, as it is inconsistent with the provisions of the Indian Contract Act, and the manifest intention of the Legislature in enacting such provisions, and that Section 151 of the Act lays down the absolute minimum of care required of bailees. He held :

> ...having regard to the provision of section 152, which allows a bailee to undertaken higher responsibility, and to the absence of provisions allowing a bailee to limit such liability, the amount of care required by section 151 is irreducible by any contract between the parties.
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> A contract limiting such liability will be opposed to public policy and void under section 28 of the Contract Article as it will be against the interests of the mercantile community and not necessary in the interests of the shipowners.

12. Now, the proposition stated by Pollock and Mulla at p. 497 is the minority view of Sankaran Nair J. It is true that ultimately Sankaran Nair J. agreed with Sir Arnold White C. J. on the construction of the bill of lading that the liability of the shipowners was specially provided by a clause in the bill of lading and it could not be invoked in aid of the general negligence clause in the body of the document, and accordingly the defendants were held not to be exempt from liability for Negligence. Wallis J. disagreed with that view.

13. The statement in note (1) at p. 497 of the Contract Act, 7th edn., by Pollock and Milla that:

> In Bombay Steam Navigation Co. v. Vasudev Baburao the dissenting judgment in this case seems to have been taken for the judgment of the Court, so the result is not instructive. On the facts it is not easy to see, so far as they appear, evidence of any negligence at all.
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> appears to have proceeded upon some misconception. The Court in Bombay Steam Navigation Company's case followed the majority view of the Madras High Court reported in Sheikh Mahamad Ravuther v. The British India Steam Navigation Co., Ltd. as expressed by White C. J. and Wallis J. and dissented from the view of Sankaran Nair J. Beaumont C. J. and Kania J. also followed the decision in Bombay Steam Navigation Co. v. Vasudev Baburao, and the decision in Sheik Mahamad Ravuther v. The British India Steam Naiigation Co, Ltd. in deciding the case reported in Lakhaji Dollaji & Co. v. Boorugu Mahadeo Rajanna. Those decisions are binding upon me,

14. Mr. Mody has referred me to a judgment of a Division Bench of this Court reported in Official Assignee, Bombay v. Madholal Sindhu (1046) 48 Bom. L.R. 828 and the observations made in that judgment at p. 848. The only observation in that case on which reliance is placed is that in Sections 152, 171 and 174 the power is given to contract out of the Act, whereas in other sections there is no similar provision, and therefore the rest of the provisions of the Act with regard to bailment must be regarded as mandatory. But it is to be noted that the learned Chief Justice there was not discussing the provisions of Section 151 of the Indian Contract Act, but was discusing the provisions of Section 176 of the Indian Contract Act. In that case there is no considered decision of the Court on the question, whether the provisions of Section 151 of the Contract Act must be regarded as mandatory, and that the parties to a contract of bailment cannot contract themselves out of those provisions.

15. In my view it was open to the parties to contract themselves out of the liability imposed upon them by Sections 151 and 152 of the Indian Contract Act.

16. It was contended on behalf of the plaintiff that in any case the defendants were liable to make good the loss by reason of the Warsaw Convention of the year 1929, which is now enacted as law in the Carriage by Air Act, XX of 1934. The defendants contended that the Carriage by Air Act, 1934, is not applicable to the claim of the plaintiff, and that even if the Act applied, the plaintiff's claim is not maintainable for two reasons : (1) that the parcel was not lost daring carriage, by air within the meaning of Article 18 of the First Schedule to the Act, and (2) that the claim was not made consistently with the provisions of the Act, and within the period prescribed.

17. In order to appreciate the argument advanced on behalf of the defendants it is; necessary to consider some of the provisions of Act XX of 1984 and the circumstances in which it came to be passed. The Act was enacted to give effect in British India to a Convention for the unification of certain rules relating to international carriage by air. The preamble of the Act stated : :

> Whereas a Convention for the unification of certain rules relating to international carriage: by air (hereafter referred to as the Convention) was, on the 12th October, 1929, [signed at Warsaw;
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> And whereas it is expedient that British India should accede to the Convention and should make provision for giving effect to the said Convention in British India;
>
> And whereas it is also expedient to make provision for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air in British; India which is not international carriage within the meaning of the Convention;
>
> It is hereby enacted as follows :-

18. Section 2, Sub-section (1), of the Act, was, before 1947, as follows :

> 2. (1) The rules contained in the First Schedule, being the provisions of the Convention, relating to the rights and liabilities of carriers, passengers, consignors, consignees and other" persons, shall, subject to the provisions of this Act, have the force of law in (British India) in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.
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> Sub-s. (2) of Section 2 was to the following effect:
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> 2. (2). The Governor General in Council may, by notification in the Official Gazette, certify who are the High Contracting Parties to the Convention, in respect of what territories they are parties, and to what extent they have availed themselves of the Additional Protocol to the Convention, and any such notification shall be conclusive

evidence of the matters certified therein.

By Sub-section (4) of Section 2 of the Act it was provided that notwithstanding any other provisions, the rules contained in the First Schedule were to apply and determine the liability of a carrier in all cases to which those rules applied. Under Section 4 the Governor General by notification in the Official Gazette was entitled to apply the rules contained in the First Schedule to carriage by air, not, being international; carriage by air.

19. On September 18, 1989, the Governor General issued a notification under Section 2, Sub-section (2), of Act XX of 1934 in supersession of the previous notification, and certified the High Contracting Parties to the Warsaw Convention of 1929 and the territories in respect of which they were respectively parties and the dates on which the Convention came or would come into force in respect of those territories as were specified in cols. 1, 2, and 8 of the schedule annexed to that notification.

20. In the schedule, in respect of "India" the High Contracting Party to the Convention was described as "His Majesty, the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India" and the Convention was deemed to have come into operation in respect of "India" on February 18, 1935. By the Act of 1934 the Legislature of British India (which expression included a substantial part of the territory which is now part of Pakistan) made provision for the application of the rules contained in the Convention to international carriage by air and in respect of the territories of British India, British India .became a High Contracting Party to the Convention. The notification dated September 13, 1989 makes it clear that "India" became a High Contracting Party to the Convention in respect of the territories of India as from February 18, 1985. To the original Convention "India" was not a party: See the Convention set out in Shawcross and Beaumont on Air Law, 2nd edn., at pp. 574 and 575. The original signatories to the Convention were Germany, Austria, Belgium, Brazil, Denmark, Spain, Prance, Great Britain and Northern Ireland, Commonwealth of Australia, Union of South Africa, Greece, Italy, Japan, Lithuania, Lexembourg, Norway, Holland, Poland, Roumania, Switzerland, Czechoslovakia, U. S. S. R, and Yugoslavia. Act XX of 1934 was brought into operation as from February 18, 1935. It is not clear from the evidence in this case, whether under Rule 38 of the Convention, India acceded to the Convention by a notification addressed to the President of Poland. The Statement of Objects and Reasons for enacting the Act as published in the Gazette of India dated March 17, 1934, Part V, at p. 78, appear to indicate that the Government of India proposed to adhere to the Convention as soon as the requisite legislation to implement the provisions of the Convention had been enacted, and for that purpose they had framed the Bill which was ultimately passed as Act XX of 1934. Whether there was a formal accession to the Warsaw Convention by India is not material for the purpose of the decision in this present case. It may, however, be observed, that Shawcross and Beaumont on Air Law at p. 88, Article 47, Clause (e), state that India had by subsequent accession become a party to the Warsaw and other Conventions.

21. In Section 18, Sub-section (3), of the Indian Independence Act, 1947, it was provided:

> Save as otherwise expressly provided in this Act, the law of British India and of the several partis thereof existing immediately before the appointed day, shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.
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> The Indian Carriage by Air Act, 1934, became, therefore, the law of the Dominion of India as from August 15, 1947. On August 14, 1947, the Governor General had published an order No. G.G.O. 17, dated August 14, 1947, called the The Indian Independence (International Arrangements) Order, 1947, which provided that the international rights and obligations to which India is entitled and subject immediately before August 15, 1947, will devolve in accordance with the provisions of the agreement arrived at by the Partition Council on August 6, 1947. Under Clause 2 of the schedule to the Order membership of all international organisations together with the rights and obligations attaching to such membership devolved solely upon the Dominion of India, and Pakistan was to take steps to apply for membership of such international organisations as it chooses to join.

22. Under Clause 8 of the schedule to the Order it was provided :

> (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.
>
> (2) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

23. The effect of the Indian Independence (International Arrangements) Order, 1947, was, therefore, qua the Warsaw Convention to confer rights and obligations upon the Dominion of India over the territory of India, and similarly upon the Dominion of Pakistan over the territory of Pakistan.

24. Admittedly the consignment in dispute was consigned after August 15, 1947. The question then arises, whether an air consignment from a place of departure in Pakistan to a place of destination in India is, since the setting up of the two Dominions, carriage by air within the meaning of the Indian Carriage by Air Act, XX of 1984. It is true that India did not sign the Warsaw Convention, and there is no evidence of accession by India. The original Convention was signed amongst others by Great Britain and certain other components of the Commonwealth like Australia and the Union of South Africa. But the Governor General of India issued a notification under which 'His Majesty the King of Great Britain and the Emperor of India' was described as the High Contracting Party qua India as from February 18, 1985. That notification is by Section 2, Sub-section (2), of the Act, conclusive evidence of the matters certified therein. It appears that in respect of the territory of the British

Commonwealth the High Contracting Party was deemed to be 'His Majesty the King of Great Britain and Northern Ireland and the Emperor of India'. Ex facie the notification under Sub-section (2) of Section 2 of the Act meant that there was a single High Contracting Party in respect of the territories in the British Commonwealth, and inasmuch as a party cannot contract with himself, any travel between the territories of one component of the Commonwealth may be regarded as inland travel, except when there is an agreed stopping place within the territory subject to the suzereignty, mandate or authority of another power. But what may appear at first sight to be the effect of notification is, in my judgment, not the true effect on a closer examination of the nature of the relation between the different components of the Commonwealth before India became a sovereign republic. As observed in Halsbury's Laws of England, 2nd edn., Vol. 11, at p. 34, Article 57 :

> It is clear that for many purposes the Dominions are endowed with a considerable amount of international personality independent of the United Kingdom. But the common allegiance and the common Crown interfere with the idea of each Dominion being a distinct sovereign State connected merely in a personal union.
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> In my view even before August 15, 1947, British India was a distinct State with an international personality independent of the United Kingdom, it is true with a severely truncated sovereignty but none-the-less with all the attributes of a State in so far as the territories of the British India were concerned. It has had its own Legislature, Executive, Judiciary, and nominally its own Army, though so far as external sovereignty was concerned, it was entirely under British control. British India, however, was not governed as a part of Great Britain or as a part of the Commonwealth. It is of course difficult to define with precision the exact ties which bound British India to the Commonwealth. But a community of Government governing all the components of the Commonwealth or the Empire was not a recognised incident of that tie. Each component of the Commonwealth was a separate State with a varying degree of sovereignty and subject to varying degrees of control-internal as well as external and factual as well as legal. If Act XX of 1934 recognised British India as a distinct State qua the observance of the Warsaw Convention, the description in the notification issued under Section 2(2) of 'His Majesty The King of Great Britain and Northern Ireland and the Emperor of India' as a High Contracting Party must mean that His Majesty was the High Contracting Party qua each of the States, and that all the component States of the Commonwealth did not collectively as a single unit become Contracting Party under the Act. In effect the notification makes each individual component of the Commonwealth a High Contracting Party qua others within and outside the Commonwealth.

25. Mr. Bhabha on behalf of the defendants has strongly relied upon the following observations in paragraph 48 at page 89 of Shawcross and Beaumont on Air Law, 2nd edn.:

> The status of various components of the British Empire and Commonwealth in relation to the numerous Civil Aviation Conventions cannot be determined by any general formula. The position of each must be examined individually.

> In some cases, such as Warsaw Convention, different parts may be regarded in English law as being one with the whole, whilst by local or other laws they may be regarded as separate parties. The position of new States, such as Burma, Israel and Ceylon is even more obscure.
>
> To some authorities, the general rule seems to be that a new State formed upon the breakaway of territory previously subject to another does not succeed to treaty obligations previously incurred by that other, even though it has not expressly denounced them, unless they relate especially to such territory or otherwise have a local character....
>
> Moreover, in the case of certain treaties, such as the Warsaw Convention, 1929, new States like India, Pakistan, the Philippines or Israel will not necessarily become parties even by express declaration unless followed by the formalities laid down in the Treaty itself for ratification or adherence.

26. It was urged by Mr. Bhabha that the Covenant entered into by 'His Majesty the King' on behalf of India could not devolve upon the Dominion of India unless all the formalities laid down in the Warsaw Convention itself for ratification and adherence were gone through. But that argument, in my view, loses sight of the essential nature of the relation created by the notification issued. So far as this Court is concerned, for purposes of Act XX of 1984 the notification must be regarded as conclusive evidence and the Court cannot go behind the Order and .investigate the true position, whether "British India" or "India" had in fact acceded to the Warsaw Convention and had thereby become a High Contracting Party to the Convention. Under the Notification which must be regarded as conclusive evidence, British India qua the territories thereof became a High Contracting Party, and by reason of the partition of the country what was British India into two dominions,-the Dominion of India and the Dominion of Pakistan- under the Indian Independence (International Arrangements) Order, 1947, the rules and obligations in respect of the territories which fell within the two dominions devolved upon the respective Dominions, If British India may be regarded under Act XX of 1934 as a High Contracting Party to the Warsaw Convention in respect of the territory which was then a part of British India the attainment of that State as a recognition of political maturity to dominionhood can obviously not affect her status vis-a-vis the Covenant with the other covenanting parties. Nor does the separation of a part of the territory by partition or inclusion of territory by integration of what were Indian States, in my view, affect the real nature of that transition, which while affecting the territorial integrity of British India conferred more extensive political sovereignty upon the two parts of what originally was British India.

27. By reason of the provisions of Clause 3 of the schedule to the Indian Independence (International Arrangements) Order, 1947, the rights and obligations under international agreements having exclusive territorial application to the area comprised in the Dominion of India devolved upon the Dominion of India on August 15, 1947, and those rights and obligations in my view included the rights and obligations under the Warsaw Convention. By the Adaptation of the Indian Laws Order the words "British India" were substituted by the words 'Provinces of India,' and the Dominion of India, in so far as the Provinces of India were concerned, became High Contracting

Party in respect of those territories, and the rules contained in the schedule to Act XX of 1934 continued to apply to carriage by air as if the Dominion of India was the High Contracting Party. Pakistan having been constituted a separate Dominion and having by reason of the provisions of the Indian Independence (International Arrangements) Order, 1947, become in its turn also a High Contracting Party to the Covenants, any carriage where the place of departure was in Pakistan and the place of destination was in the Dominion of India, became international carriage within the meaning of Rule 1, sub-cl. (3), of the First Schedule to Act XX of 1934.

28. I am unable, therefore, to agree with the contention of Mr. Bhabha that carriage of the parcel by the plaintiff to Bombay was "inland carriage" and not "international carriage." The form of the consignment note used by the defendants cannot affect the real nature of the carriage. Under Rule 8 of the First Schedule an air consignment note is required to contain certain particulars, including a statement that the carriage is subject to the rules relating to liability contained in that schedule; and by Rule 9 it is provided that "if the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in Rule 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability."

29. By Rule 18 (1) it is provided :

> The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.
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> (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
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> (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

30. Rule 20 provides :

> (I) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures....

31. Rule 22, sub-r. (2), provides for limiting the liability of a carrier in respect of registered luggage and of goods. Rule 23 provides that:

> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.
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> Rule 24 requires that an action for damages, however founded, can only be brought subject to the conditions and limits set out in the schedule. Rule 29 provides:
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> The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

32. The consignment note not having been issued in the form required by Rule 8, the carrier in the event of liability arising under Rule 18, may not be entitled to avail himself of the provisions of the schedule which exclude or limit that liability. It is true that the amendment by which the claim was made was also sought to be sustained under the provisions of the Indian Carriage By Air Act was not mentioned in the plaint as originally framed, but it cannot be said that the claim of the plaintiff is made more than two years after the date of the arrival at the destination of the aircraft. The suit having been filed in 1948 was filed within the period of limitation provided by Rule 29 of the First Schedule to the Act.

33. The question then is : whether by Rule 18 of the First Schedule the defendants were liable for the loss occasioned to the plaintiff. Under Rule 18 the liability of the carrier is for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. Ordinarily in the expression 'carriage by air' cannot be included mere storage of goods, after they are transported by aircraft to the destination, and are awaiting delivery to the consignee. Under sub-cl. (2) of Rule 18 the normal connotation of 'carriage by air' is extended to include the period during which the goods arc in the aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatever. But it is expressly provided in sub-cl. (3) of Rule 18 that the period of carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome; but if carriage by land, by sea or by river takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment the damage shall, subject to proof to the contrary, be presumed to have been the result of an event which took place, during the carriage by air. Even under the presumption which in effect extends the scope of carriage by air so as to include any carriage by sea, by land or by river performed outside an aerodrome for the purpose of loading, delivery or transhipment in consequence of a contract for carriage by air, such carriage by sea, by land or by river only can be presumed to be carriage by air; but once the goods have reached the destination and have been carried to the office, where they are to remain in storage till called for by the consignee, it cannot be said that there is any continuing carriage by air.

34. It was urged by Mr. Mody on behalf of the plaintiff that sub-r. (2) of Rule 18 included within the expression 'carriage by air' any stage at which the goods were in charge of the carrier, and the expression : 'whether in an aerodrome or on board an aircraft, or in the case of a landing outside an

aerodrome, in any place whatsoever' set out illustrations of the different stages, but was not limitative of the meaning of the expression 'carriage by air'. It is difficult to accept that contention. If it was the intention of the covenanting parties to impose a liability upon carriers for loss of goods at any stage once the goods came into their possession for the purpose of carriage and before they were delivered to the consignee, it was not necessary to make the provision which has been made under sub-rr. (2) and (3) of Rule 18 of the rules framed under Act XX of 1934, It could then have been provided that carriage by air within the meaning of sub-r. (1) of Rule 18 comprised the entire period when goods or luggage are in charge of the carrier. Even though the carriage of goods from Karachi to Bombay was international carriage by air, and even though a consignment note in the form required by Rule 8 of the First Schedule to the Act was not issued, the liability of the defendants did not in my judgment arise under Rule 18 because the goods cannot be regarded as lost during carriage by air.

35. On the view that I have taken the clause in exh. A which seeks to exclude liability of the defendants in so far as there may be loss or destruction or damage to the parcel during carriage by air in all its stages as denned by Rule 18, must be regarded as invalid, but it still remains operative in so far as it excludes liability when loss, destruction or damage occurs when the goods are not in 'carriage by air', and the defendants must be regarded so having validly contracted themselves out of the liability to pay damages for loss of the parcel, when it was in their custody awaiting delivery to the consignee.

36. It is true as admitted by the plaintiff's witness that the insurance company has made good the loss. But the plaintiff is not prohibited from proceeding with the suit on that account. The contract is between the plaintiff and the defendants, and if as a result of loss of the consignment, the defendants were liable to make good the loss to the plaintiff, it would be no defence to the plaintiff's action that the insurance company has paid to the plaintiff the amount for which the goods were insured.

37. Mr. Mody on behalf of the plaintiff has informed me, and it is not denied by the other side, that the payment by the insurance company is subject to the condition that the plaintiff proceeds with the suit against the defendants, and that whatever amount that may be decreed in favour of the plaintiff would be payable to the insurance company.

38. On the view taken by me, therefore, whatever amount the defendants have received under orders of the Criminal Court in the case filed by them in respect of the theft of the parcel will of course have to be paid over to the plaintiff if the same has not been paid over to them before this date. But subject to that there is no liability of the defendants to make good any loss occasioned to the plaintiff by reason of the loss of the parcel.

Curiam, J.

39. I am informed by counsel that the value of the gold which was received by the defendants from the Magistrate's Court has been handed over to the plaintiff. In the circumstances of the case the plaintiff's suit will be dismissed. The plaintiff to bear 3/4tha costs of the defendants, and bear his

own. There will be no order as to the costs of the adjournment order dated July 31, 1952.