Shamji Bhanji And Co. vs North Western Rly. Co. on 21 December, 1945

Equivalent citations: (1946)48BOMLR698

JUDGMENT

Bhagwati, J.

1. The plaintiffs are a partnership firm carrying on business as dealers in saltpetre, sulphur, chlorate of potash, etc. On May 22, 1942, they sold fifty eases of chlorate of potash to one Shahjada Abdul Hakim who was the proprietor of the Afghan Match Factory (Commercial) at Kabul at a price of Rs; 850 per case, Bardan, Mukadami and railway charges to be paid by the plaintiffs. The goods were to be supplied by the plaintiffs to Shahjada A. Abdul Hakim at Peshawar and the plaintiffs accordingly on May 23, 1942, entrusted the fifty cases of chlorate of potash to the B. B. & C. I. Railway at the Carnac Bridge Goods Depot for carriage to Peshawar City. Chlorate of potash has been classified in Red Tariff No. 15 which contains rules and rates for the conveyance by rail of explosives and other dangerous goods as dangerous, corrosive and poisonous goods, and it has been provided in the Bed Tariff No. 15 that chlorate of potash should be packed in drums or in casks or cases lined, with closely woven calico or paper of sufficient strength not to allow the contents to escape. When these fifty cases of chlorate of potash were entrusted by the plaintiffs to the B. B. & C. I. Railway they executed in favour of the railway a consignment note for dangerous, explosive and combustible articles as required by Rule 64 of the Red Tariff No. 15. On the railway staff being satisfied that the general packing regulations set out in Red Tariff No. 15 were complied with and that the plaintiffs had executed the necessary consignment note in that behalf, the B. B. & C. I. Railway issued to the plaintiffs their railway receipt dated May 23, 1942, for the consignment of these fifty cases of chlorate of potash from Carnac Bridge to Peshwar City via New Delhi, The goods were consigned at railway risk and the plaintiffs paid an increased charge of Rs. 100 for the carriage of these goods from Carnac Bridge to Peshawar City paying an aggregate sum of Rs. 900-3-0 as and by way of freight.

2. The transaction had been negotiated by Shahjada Abdul Hakim with the plaintiffs through one Bhasin who was then carrying on business in Bombay in the name and style of the National Cotton Trading Company. The railway receipt was obtained by the plaintiffs as the consignors in favour of self as the consignees and was endorsed by the plaintiffs in favour of the National Cotton Trading Company with express instructions given by the plaintiffs to Bhasin that he should not part with the railway receipt in favour of Shahjada Abdul Hakim except against payment of the price of the goods by him. It appears that Bhasin in. his turn endorsed the railway receipt in favour of Messrs. Sidhuram Ganesh Das, a firm of shroffs and commission agents, who were then carrying on business at Kalbadevi outside the Fort of Bombay. Messrs. Sidhuram Ganesh Das endorsed the railway receipt in favour of Shahjada Abdul Hakim, thus enabling Shahjada Abdul Hakim to obtain

delivery of the goods when they arrived at Peshawar City. It appears, however, that the goods were transhipped a Muttra station near Delhi and were there delivered by the B. B. & C. I. Railway to the North Western Railway for being carried to Peshawar City, and whilst the wagon No. C.R. 1840 in which they were loaded was at the Bhatinda station yard, a station on the line of the North Western Railway, the said goods were destroyed by fire. This loss was discovered by Shahjada Abdul Hakim when he was informed by the railway authorities at Peshawar City about the same. He wrote a letter to the plaintiffs dated June 17, 1942, intimating to the plaintiffs that the goods had been destroyed by fire at Bhatinda station yard and that it was therefore necessary that the claim should be lodged with the North Western Railway promptly for the same. This letter was addressed by Shahjada Abdul Hakim directly to the plaintiffs or sent by him to Bhasin for the purpose of delivery thereof to the plaintiffs; either way the plaintiffs called upon Bhasin either to get payment of the price of the goods or the railway receipt in respect of the same, and Bhasin handed over to the plaintiffs the railway receipt dated May 23, 1942. The railway receipt when it came into the possession of the plaintiffs bore a further endorsement on the face of it which was made by Shahjada Abdul Hakim in favour of the plaintiffs. The effect of all the endorsements made on the railway receipt was thus to constitute the plaintiffs who were the consignees of the railway receipt the ultimate endorsees of the same, thus entitled on the face of the railway receipt to obtain delivery of the goods represented by the same. ,

3. On July 11, 1942, the plaintiffs addressed a letter to the General Manager,, North Western Railway, Lahore, authorising Bhasin to negotiate and settle their claim in respect of the goods and asking him to expedite the matter, us a considerable amount of money was involved therein. On. July 23, 1942, the plaintiffs addressed a letter to the General Traffic Manager, B. .B. & C. I. Railway, stating that they were the consignors of the goods which had been destroyed by fire at Bhatinda, that they held the railway receipt in their possession and that the claim in respect of the goods should be payable to them, A reply was sent by the Chief Traffic Manager, B. B. & C. I. Railway, on August 7, 1942, stating that the Chief Commercial Manager, North Western Railway, Lahore, was the competent authority to deal with the matter and asking the plaintiffs to communicate direct with him. A similar letter appears to have been addressed by the plaintiffs to the 'General Manager, North Western Railway, Lahore, also. A reply was sent by the General Manager, North Western Railway, to the plaintiffs acknowledging receipt of that letter and stating that such action as might be called for would be taken and the plaintiffs would be addressed again on the subject. Though the letter itself bears no date, the postal mark from the station of despatch is dated August 11, 1942, and the postal mark showing the receipt of the letter in Bombay is dated August 14, 1942.

4. The plaintiffs made repeated attempts thereafter to obtain compensation for the loss of these goods from the General Manager, North Western Railway, Lahore. The plaintiffs gave him the necessary particulars and repeatedly pressed him to make the payment of compensation to them. It. appears that there wore communications exchanged between the B, B. &'C. I. Railway and N. W. Railway and that a certain departmental inquiry was held by the Assistant Transportation Officer, North Western Railway, Delhi Division, in conjunction with the Assistant Mechanical Engineer, When no satisfactory reply was received by the plaintiffs from the General Manager, N. W. Railway, they entrusted the papers to their solicitors, who addressed a letter dated December 9, 1942, to the General Manager, N. "W. Railway, Lahore. The only response to this letter was that the matter was

under reference with the B. B. & C. I. Railway and the plaintiffs would be advised further on hearing from them. A reminder was sent on January 16, 1943, a copy whereof was sent also to the Chief Traffic Manager, B. B. & C. I. Railway. Nothing, however, came out of the same. The plaintiffs' attorneys thereafter on March 10, 1943, addressed a letter to the Secretary, Central Government, Delhi, giving him formal notice of the plaintiffs' claim and forwarding a copy thereof to the I Manager, B. B. & C. I. Railway. The Chief Traffic Manager, B. B. & C. I. Railway, replied on March 18, 1943, stating that he had forwarded that letter to the Chief Commercial Manager, N W. Railway, Lahore, who was the competent authority to deal with the plaintiffs' claim. The Deputy Director, Railway Board, replied on March 22, 1943, stating that that letter had been forwarded by him for disposal to the General Manager, North Western Railway, who was the competent authority to deal with the matter. The General Manager, N. "W. Railway, replied on March 29, 1943, stating that the matter was under inquiry and the plaintiffs would be advised further as soon as the inquiries were completed. It appears that the departmental inquiry which T have referred to above was completed sometime thereafter and ultimately the General Manager, N. "W. Railway, wrote to the plaintiffs' attorneys to say that the cause of fire was due to defective packing of the said consignment and also to the packing conditions for chlorate of potash laid down at p. 14 of the Red Tariff No. 15 not having been complied with. Under the circumstances he stated that the N, W. Railway administration was not responsible for the loss of the consignment and finally repudiated the plaintiffs' claim. The General Manager, N. W. Railway, further contended that the plaintiffs' action in not complying with the packing conditions above mentioned and tendering the consignment for despatch with defective packings rendered the plaintiffs liable for all claims received by their administration in connection with other consignments which were damaged and became a total loss doe to the fire and that their administration reserved to themselves all necessary fights in that connection. The plaintiffs' attorneys replied by their letter dated April 26, 1943, pointing out that even though the plaintiffs had been corresponding with the railway administration concerning the -'loss of the goods since July, 1942, it had taken nearly nine months to discover that the packing was defective and that the cause of the fire was due to the alleged defective packing. The plaintiffs maintained that the goods were packed in accordance with the general packing regulations, denied that the packing conditions for chlorate of potash as laid down in Red. Tariff No. 15 were not complied with and maintained that the administration was liable for the loss of their consignment and to compensate them for the same. They repudiated all liability for the total loss, if any, of the other consignments damaged by the fire and intimated that in view of the repudiation of the plaintiffs' claim a suit would be filed in the High Court of Bombay to recover damages as already intimated.

5. By their attorneys' letter dated April 28, 1943, addressed to the Governor General in Council, the owner and administrator of the N. W. Railway and the B. B. & C. I. Railway, the plaintiffs gave statutory notice under Section 80 of the Civil Procedure Code of their claim for compensation due to the loss of the goods by fire, setting out therein the cause of action and the relief claimed against him. The Deputy Director, Railway Board, replied on May 14, 1943, stating that the notice had been forwarded for disposal to the General Manager, N. W. Railway, Lahore, who was the competent authority to deal with the matter. The General Manager, N. W. Railway, wrote on June 23, 1943, purporting to send a reply to the plaintiffs' attorneys' letter dated April 26, 1943, hereinbefore referred to and stating that three consignments besides the consignment booked by the plaintiffs were destroyed by fire, that out of the three consignments two claims for Rs. 649 and one for Rs. 43

were received so far and were tinder negotiations and that the plaintiffs would be advised further when the claims would be paid and the plaintiffs would then be asked to make good the loss as their administration held the plaintiffs responsible as stated in. their letter dated April 19, 1943.

6. As in spite of repeated demands aforesaid the plaintiffs were not paid compensation for the loss of the goods by either the B. B. & C, I, Railway or the N. W. Railway or by the Governor General in Council, the owner and administrator of the N. W. Railway and the B. B. & C. I. Railway, the plaintiffs filed this suit on July 16, 1943. After setting out the facts hereinbefore stated the plaintiffs submitted that under the circumstances the railway administrations of the N. W. Railway and the B. B. & C. I. Railway were liable to make good to the plaintiffs compensation for the loss of the goods and claimed a sum of Rs. 42,500 being the value of the goods from the two railway administrations or the Governor General in Council as the owner and administrator of the two railway administrations. The Governor General in Council, the third "defendant, filed his written statement in which he contended that the plaintiffs had no title to maintain the suit. He stated that the railway receipt for the goods was made out in the name of the plaintiffs as consignees, that it was thereafter endorsed by them to Shahjada Abdul Hakim and there were other and further endorsements, the goods covered by the receipt having been sold f to others by the plaintiffs, that it was after the goods had been destroyed by fire to the knowledge of the endorsees and the plaintiffs that the railway receipt was endorsed to the plaintiffs, that the plaintiffs by such re-endorsement I acquired no title to the goods or to compensation, that such endorsement Purported to transfer only a mere right to sue and that therefore the plaintiffs i had no title to maintain the suit. He also contended that the suit was not maintainable for want of a valid notice under Section 77 of the Indian Railways Act read with Section 140 of that Act. Without prejudice to his contentions he further contended that the second defendants, viz. the B. B, & C. I. Railway, relied upon the declarations contained in the consignment note executed by the plaintiffs, but it was subsequently found that in fact the goods were not packed in accordance with the requirements of the rules contained in the Red Tariff. He also contended that:

> It was found at Delhi that four of the cases had broken, the contents were falling out, and the covering of one or more cases was burnt. It was also found that there was in the said cases no inner lining of the nature required by the rules.
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> He further contended that the notice dated April 24, 1943, purporting to be a notice under Section 80 of the Civil Procedure Code was not a valid or proper notice under that section. He denied the plaintiffs' claim and submitted that the suit should be dismissed with costs.

7. When the suit came on for hearing defendants Nos. 1 and 2 were struak off from the. suit, defendant No. 3, viz. the Governor General in Council, being the only person against whom the suit was continued, he being the owner and administrator of both the railway administrations, the N. W. Railway and the B. B. & C. I. Railway which were respectively defendants Nos. 1 and 2 in the suit. The suit has thus proceeded against defendant No. 3 who is now the only defendant in the suit.

8. The first question which arises for my consideration is whether the plaintiffs have a title to maintain the suit. The defendant contended that the railway receipt was a document of title, that the same was negotiable, that the endorsements made by the plaintiffs and by the subsequent endorsees on the face of the railway receipt passed the property in the goods represented by the railway receipt to the successive endorsees thereof, that Shahjada Abdul Hakim was the final endorsee at the date when the goods were destroyed by fire, that 011 such destruction of the goods by fire what survived was merely; a claim for compensation for loss of the goods which could be made by Shahjada Abdul Hakim who was the then endorsee of the railway receipt, that that right of Shahjada Abdul Hakim was merely a right to sue and could not be ' the subject-matter of any assignment in favour of the plaintiffs, that the re-endorsement by Shahjada Abdul Hakim in favour of the plaintiffs being thus merely an assignment of a mere right to sue could not invest the plaintiffs with any title to claim compensation from the defendant for the loss of the goods and that therefore the plaintiffs were not entitled to maintain the suit. The plaintiffs, on the other hand, contended that even though a rail-was receipt was a document of title to goods, mere endorsement of a railway receipt was not by itself enough to transfer the property in the goods represented by the railway receipt to the endorsee thereof, that the endorsement of the railway receipt was merely an authority to the endorsee to receive delivery of the goods represented thereby from the railway company, that the railway receipt did not cease to be operative as a document of title on the destruction of the goods by fire during the transit, that the re-endorsement by Shahjada Abdul Hakim in favour of the plaintiffs had merely the effect of investing in the plaintiffs all the rights which they had under the railway receipt as the consignees thereof, that in any event the railway receipt was evidence of a contract of carriage of the goods entered into between the plaintiffs and the railway company, that the right of the plaintiffs to claim compensation for the loss of the goods from the railway company had nothing to do with the passing of the property in the goods but was a right which accrued to the plaintiffs under the terms of the contract which they had entered into with the railway company, and that irrespective of the fact whether the property in the goods had passed to Shahjada Abdul Hakim or not, they were the only persons entitled to claim compensation from the railway company in respect of the loss of the goods and to maintain this suit.

9. For a proper appreciation of these rival contentions, it is necessary to set out here Clause (3) of the notice to consignors printed at the back of the railway receipt. Clause (3) runs as under:

> That the Railway receipt given by the railway company for the articles delivered for conveyance, must be given up at destination by the consignee to the railway company, otherwise the railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.
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> If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced, the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company.

This clause would prima facie suggest that an endorsement made on. the face of a railway receipt by the consignee is meant to indicate the person to whom the consignee wishes the delivery of the goods to be made if he does not himself attend to take delivery. An endorsement made by the consignee on the face of the railway receipt requesting the railway company to deliver the goods to the endorsee merely conveys to the railway company, if due regard be had to the wording of this clause, that the person in whose favour the endorsement is made by the consignee is constituted by him a person to whom he wishes that delivery of the goods should be made on his behalf, he not being able himself to attend to take delivery of the same. If anything further is to be read in an endorsement which has been made by a consignee on the face of the railway receipt, evidence would have to be led before the Court showing the circumstances under which the railway receipt which has been defined in Section 2, Sub-section (4), of the Indian Sale of Goods Act, as a document of title to goods, was dealt with by the consignee indicated as such on the face of the railway receipt. The railway receipt being a document of title to goods can be dealt with by the consignee in various ways. He might pledge the railway receipt with a bona fide pledgee for value to secure advances which he has obtained on the security of the railway receipt. He might sell the goods represented by the railway receipt to a bona fide purchaser for value thereof and endorse the railway receipt in favour of such bona fide purchaser for value, thus creating in him an indefeasible title to the goods as against an unpaid vendor claiming a lien thereupon or claiming to exercise a right of stoppage in transit with reference to the goods. This right which a consignee has of dealing with the railway receipt which is a document of title to the goods represented thereby depends, however, as I have already stated, on the facts of each particular case. If the railway receipt is in "the hands of the owner of the goods or a mercantile agent, dealing therewith in the manner indicated above would have the effect of investing in the bona fide transferee for value of the railway receipt a title to the goods which cannot be challenged by the owner of the goods. It, however, does not follow that this result is created merely by the endorsement of the railway receipt in favour of the bona fide pledgee for value or the bona fide transferee for value of the railway receipt. The endorsement as such is not sufficient to invest the bona fide pledgee for value or the bona fide transferee for value with that right. It is the circumstances attendant upon the transaction that have that effect. Merely by reason of an endorsement on the face of a railway receipt it cannot be urged that the endorsee of the railway receipt became the prima facie owner of the goods represented by the railway receipt or had any rights in the goods represented by the railway receipt created in him of the type mentioned above. As was observed by the learned Judges of the Allahabad High Court in Secretary of State for India, in Council v. Rishi Ram Jagdish Prasad (1927) I.L.R. 60 All. 227 (p. 230) :

Under sections 108 and 178 of the Contract Act a document of title is a negotiable instrument to the extent that the possessor of it can give a valid title of the goods represented thereby to a vendee or a pledgee. The principle underlying these sections is that a bona fide transferee for value may rely on delivery of a document of title as

> proof that the person delivering it is entitled to transfer the goods represented by the document. The principle cannot operate in favour of a mere agent in any way.
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> These remarks go to show that an endorsement by itself is not enough to constitute the endorsee either a bona fide pledgee for value or a bona fide transferee for value of the goods represented by the railway receipt. Without anything more, it only constitutes the endorsee the agent of the consignee for the purposes of taking delivery of the goods represented by the railway receipt from the railway company. If this be the true position, successive endorsements on the face of the railway receipt would have no other effect than that of constituting the successive endorsees the agents of the consignee for the purpose of taking delivery of the goods represented thereby from the railway company and a re-endorsement by the last endorsee in favour of the consignee himself of the type we have here before us. would only have the effect of re-investing in the consignee who endorsed the railway receipt in the first instance the right to take delivery of the goods represented by the railway receipt according to the tenor thereof. The consignee would in such a case have re-invested in him the original right which he had to take delivery of the goods represented by the railway receipt from the railway company, and this result could be achieved not only by re-endorsement in favour of the consignee by the last endorsee of the railway receipt but also by a cancellation of the previous endorsements including the one made in the first instance by the consignee himself.

10. The whole confusion in the argument which has been addressed to me on behalf of the defendant has been created by reason of the fact that in Section 2, Sub-section (4), of the Indian Sale of Goods Act, the railway receipt for the purpose of. the definition of a document of title to goods has been placed in juxtaposition with a bill of lading. The "document of title to goods'" in that definition includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger V certificate, railway receipt, warrant or order for delivery of goods and any other document used in the ordinary, course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the; document to transfer or receive goods thereby represented. As regards Bills of lading they occupy a pecular position not only by reason of the law merchant but also by reason of the enactment of the Bills of Lading Act, 1855 (19 & 19 Vie. e. Ill) in England and the Bills of Lading Act (IX of 1856) in India. At common law a bill of lading was not negotiable like a bill of exchange, so as to enable the endorsee to maintain an action upon it in his. own; name, the effect of the endorsement being only to transfer the property in the goods but not the contract itself. As Alderson B. observed in Thompson v. Daminy (1845) 14 M. & W. 403 (p. 408) :-

> This is another instance of the confusion, as Lord Ellenborough in Waiting v. Cox (1808) 1 Camp. 869 expresses it, which 'has arisen from similitudiuous reasoning upon this subject.' Because, in Lickbartote v. Mason (1787) 2 T.R. 63, 73, a bill of lading was held to be negotiable, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would load to absurdity to carry the doctrine to that; length. The word ' negotiable ' was not used in the sense in

which it is used as applicable to {i bill of exchange, but as passing the property in the goods only.

Delivery orders, warrants, written engagements to deliver goods and similar documents are in the same position as the bills of lading were before the Bills of Lading Act, 1855 (18 & 19 Vic. c. III), They are mare promises by the seller, being the issuer or transferor, to deliver, or authorities to the buyer to receive possession. (See Halsbury's Laws of England, Hailsham Edition, Vol. XXIX, p. 143, para. 179). It is only by reason of the enactment of the Bills of Lading Act, 1855 (18 & 19 Vic. c. III) that the issue, or transfer of a bill of lading operates as a delivery to the buyer of. the goods shipped, and. the consignee of the bill of lading is entitled to sue, upon, the contract contained ,in the same. (See also Bills of Lading Act IX of 1856 in India). Even, though as observed by their Lordships of the Privy Council in Ramdas Vithaldas v. S. Ameerchand & Co.: Ramdas Vithaldas v. Chhaganlal and The 'Official Assignee, Madras v. Mercantile Bank of India , the railway receipt and all other documents enumerated in Section 2, subs-s. (4), of the Indian Sale of Goods Act, are assimilated to bills of lading for the purposes of .the right of stoppage in transit under Section 103 of the Indian Contract Act and a pledge under Section 178 of the Indian Contract Act, the effect of those decisions is not to assimilate the railway receipt to a bill of lading for all purposes whatsoever. The position of these documents is the same as it was at common law and that position is not affected at all by the enactment of Section 2, Sub-section (4), of the Indian Sale of Goods Act, or the enactment of provisions analogous, to Sections 103 and 178 of the Indian Contract Act therein. As stated in Halsbury's Laws of England, Hailsham Edition, Volume XXIX, at p. 143, Article 179:

Such documents, although they may purport to be, or may commonly be treated as, transferable, are not negotiable instruments, unless there lie a trade usage to that effect. Accordingly, subject, to the provisions of the Factors Act, 1880, the owner cannot claim delivery of the goods except from the seller who is the issuer or immediate transferor of the document.

The rights, if any, are between the endorser and the endorsee inter se. There are no rights created merely by reason of the endorsement between the endorsee and the railway company which has issued the railway receipt to the consignee, the only remedy of the endorsee being against the endorser. This was the position as I have already observed of all the documents of this class at common law, accept in the case of bills of lading the transfer of which by the Law Merchant operated as a transfer of the possession of as well as the property in the goods, as observed by Lord Wright in Official Assignee, Madras v. Mercantile Bank of India . This position has been the subject-matter of a statutory enactment in the Bills of Lading; Act, 1855 (18 & 19 Vie. e. Ill) and the Bills of Lading Act, IX of 1856, which I have hereinbefore referred to.

11. It follows from the above that the endorsement on a railway receipt has not without anything more the effect of passing the property in the goods represented by the railway receipt to the endorsee, nor does the endorsee thereby become the person entitled to receive delivery of the goods from the railway company merely by reason of the endorsement. There are cases contemplated by the Indian Railways Act, 1890, where two or more persons may claim the goods which have been entrusted with the railway company for the purposes of carriage or where the railway receipt issued by the railway company in respect of the goods so entrusted to them for carriage is not forthcoming. It has been enacted by Section 67 of the Indian Railways Act that in such cases the railway company may withhold delivery of the goods until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company against the claims of any other persons with respect to the goods. The same provision is also to be found in Clause (3) of the terms printed at the back of the railway receipt which I have above referred to where it is stated:

> If the receipt is not produced, the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company.

These provisions go to show that the person in whose favour the railway receipt happens to be endorsed at a particular time may not necessarily be the owner of the goods or the person entitled to receive delivery of the goods from the railway company and the railway company may in its discretion withhold delivery of the goods in spite of the person in whose favour the railway receipt has been endorsed asking for delivery of the same unless and until a proper indemnity is given to the railway company in terms set out above. There is no evidence in this case to show what were the circumstances under which the endorsement came to be made by Bhasin in favour of Messrs. Sidhuram Ganesh Das or by Messrs. Sidhuram Ganesh Das in favour of Shahjada Abdul Hakim. The partner of the plaintiffs' firm Durgashankar Harishankar Mehta has deposed that when he gave the railway receipt to Bhasin he made the endorsement in favour of the National Cotton Trading Company and handed over the receipt to Bhasin on the express condition that he was not to part with the possession of the railway receipt in favour of Shahjada Abdul Hakim except against payment of the price of the goods represented by the railway receipt. Neither Bhasin nor any person from the firm of Messrs. Sidhuram Ganesh Das has been called by either party to prove the circumstances under which the subsequent endorsements came to be made, and merely from the circumstance of the plaintiffs having stipulated with Bhasin that he should not part with the possession of the railway receipt except against payment of the price of the goods represented thereby by Shahjada Abdul Hakim I am not prepared to assume that the price of the goods was paid by Shahjada Abdul Hakim before the endorsement was made in his favour by Messrs, Sidhuram Ganesh Das as shown on the railway receipt. In the absence of any evidence in that behalf I am unable to come to the conclusion that Shahjada Abdul Hakim was at any time a bona fide transferee for value of the goods represented by the railway receipt or that he became entitled to obtain possession of the goods from the railway company in his own right. It is also not in evidence under

what circumstances Shahjada Abdul Hakim made the re-endorsement in favour of the plaintiffs. If any inference can be legitimately raised from that circumstance, it appears that Shahjada Abdul Hakim made the re-endorsement in the ordinary course in favour of the plaintiffs as the persons really entitled to delivery of the goods represented by the railway receipt from the railway company, and there was no question whatever at any time of Shahjada Abdul Hakim having paid the moneys to Messrs. Sidhuram Ganesh Das and having recovered the same from them or Bhasin or any other party as a condition of the re-endorsement which he made in favour of the plaintiffs. On this state of the evidence, therefore, I am of opinion that the endorsements which were made by the plaintiffs and the subsequent parties in favour of Bhasin and the subsequent endorsees as appear on the face of the railway receipt were no more than authorities conferred on the successive endorsees by the endorsers of the railway receipt to obtain delivery of the goods represented by the railway receipt from the railway company. They had not the effect of passing the property or title in the goods in favour of the successive endorsees nor was there anything in the circumstances surrounding the successive endorsements to detract from the position of the endorsements being merely authorities successively granted by the endorse; in favour of the endorsees to obtain delivery of the goods represented by the railway receipt from the railway company.

12. If Shahjada Abdul Hakim on the position stated above did not become the owner of these goods and the property in the goods did not pass to Shahjada Abdul Hakim by reason of the endorsements made in his favour as shown on the face of the railway receipt, is there any other circumstance ,in the evidence which would go to show that the property in the goods had passed to Shahjada Abdul Hakim at any time? It was contended by Mr. Joshi for the defendant that the transaction had been entered into between the plaintiffs and Shahjada Abdul Hakim on March 22, 1942, that Shahjada Abdul Hakim had at that time given instructions to the plaintiffs to consign the goods by railway, that the plaintiffs appropriated the goods to the contract and gave delivery thereof to the railway company as the agent of Shahjada Abdul Hakim and in any event when they made the endorsement in favour of the National Cotton Trading Company of which Bhasin -was the sole proprietor, the property in the goods passed to Shahjada Abdul Hakim with the result that at the relevant time when the goods were lost, having been destroyed by fire at the Bhatinda station yard, the plaintiffs had not left in them any property in the goods and that therefore they were not entitled to maintain this suit. There is no doubt that where there is a contract for sale of unascertained goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract by the seller with the assent of the buyer, the property in the goods thereupon passes to the buyer; and where in pursuance of the con tract the seller delivers the goods to the buyer or to a carrier or other bale< (whether named by the buyer or not) for the purpose of transmission to buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. (Vide Section 23 of the Indian Sale of Goods Act.) The difficulty in the way of the defendant, however, is that the plaintiffs here did not unconditionally appropriate the goods to the contract but reserved the right of disposal in so far as they obtained the railway receipt in respect of these goods in their own favour as consignees. The intention of the plaintiffs was within the terms of Section 25(1) of the Indian Sale of Goods Act by

the terms of the contract or appropriation to reserve the right of disposal of the goods until certain conditions were fulfilled, viz. the price of the goods was paid by Shahjada Abdul Hakim as against the receipt of the goods by ham from the railway company at the Peshawar City. In such cases notwithstanding the delivery of the goods to the carrier or other bailee for the purpose of transmission to the buyer the property does not pass to the buyer until the conditions imposed by the seller are fulfilled. Section 25(2) (,f the Indian Sale of Goods Act makes this position quite clear when it lays down that where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal. The railway receipt which was obtained by the plaintiffs in this case was in favour of themselves as consignees, the goods were deliverable to the order of the plaintiffs and the plaintiffs should prima facie be deemed to have reserved the right of disposal of these goods. The condition which was imposed by the plaintiffs, viz. the payment of the price of the goods against receipt thereof by Shahjada Abdul Hakim from the railway company at Peshawar City was not fulfilled. No evidence has been led by the defendant to show that Shahjada Abdul Hakim in fact paid any moneys by way of price of the goods represented by the railway receipt, and in the absence of any such evidence I am not prepared to hold that the condition which was imposed by the plaintiffs in this behalf was fulfilled, so that the appropriation made by the plaintiffs of the goods towards this contract became final and the property in the goods passed to Shahjada Abdul Hakim, the buyer of the goods. On the evidence as it stands on the record before me, I hold that the property in the goods never passed to Shahjada Abdul Hakim and that at no time material for the purposes of this suit did he ever become the owner of the goods represented by the railway receipt. If any authority were needed, apart from the sections of the Indian Sale of Goods Act which I have discussed above, it is to be found in the judgment of Mulla J. in Ford Automobiles v. Delhi Motor Co. where the learned Judge observes (p. 1146):

> If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and docs so not as agent, or on behalf of the purchaser, bat on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser.

13. As a result of the considerations which I have set out above, there is no doubt that it was the plaintiffs who were entitled to sue the railway company for compensation for loss of the goods represented by the railway receipt. I shall. however, consider the position on the assumption that my finding on the question as to whether the property in goods had passed to Shahjada Abdul Hakim be not correct. If contrary to my finding in that behalf it be held that the property in the goods had passed to him at the time when the goods were destroyed by fire at the Bhatinda Station Yard, it remains to consider whether the plaintiffs would be competent to maintain the suit against the defendant for recovering such compensation. As I have already stated the railway receipt is evidence of the contract of carriage which had been entered into between the plaintiffs and the railway company. The plaintiffs were the consignors. They agreed to pay freight to the railway company for carriage of these goods from Carnac Bridge to Peshawar City. They signed the consignment note for dangerous, explosive and combustible articles which was necessary to be signed by them under the Bed Tariff No. 15.

14. The position in law has been thus stated in Macnamara's Law of Carriers by Land, 3rd edn., p. 96, Article 90 :-

> In the case of goods the subject-matter of a contract of sale being lost or damaged, and in the Absence of any special contract between the carrier and the seller or buyer as the case i may be, the proper person to sue the carrier is the person in whom the property in such goods I is vested during transit.
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> I In the note to Article 90, the learned author quotes the remarks of Lord Cottenham L.C. in Dunlop v. Lambert (1838-30) 6 CI. & F. 600, 626(p. 626) :
>
> ...although, generally speaking, where there is a delivery to a carrier to deliver to a the consignee J is the proper person to bring the action against the carrier should the goods be lost; yet that if the consignor made a special contract with the carrier, and the carrier agreed to take the goods from him, and to deliver them to any particular person at any particular place, the special contract supersedes the necessity of showing the ownership in the goods; and...the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee.
>
> Dunlop v. Lambert was a decision of the House of Lords and was arrived at after a consideration of various cases on the point which had been the subject-" matter of earlier decisions. In Dunlop v. Lanibert (1838-39) 6 Cl. & F. 600, the Lord Chancellor/observed (p. 621) :
>
> And again, though in general the following the directions of the consignee, and delivering the goods to a particular carrier, will relieve the consignor from the risk, he may make such a special contract, that, though delivering the goods to the carrier specially intimated by the consignee, the risk may remain with him; and the consignor may, by a contract with the carrier, make the carrier liable to himself.
>
> At p. 623 the Lord Chancellor referred to various cases which had been cited at the bar, Davis and Jordan v. James (1770) 5 Burr. 2680, Moore v. Wilson (1787) 1 T. R. 659, Dawes v. Peak (1799) 8 T. R. 330 and other cases, and came to the conclusion that (p. 626) :
>
> I am of opinion, that although, generally speaking, where there is a delivery to a carrier ID deliver to a consignee, he is the proper person to bring the action against the carrier should the goods be lost; yet that if the consignor made a special contract with the carrier r and the carrier agreed to take the goods from him and to deliver them to any particular person at any particular place, the special contract supersedes the necessity of showing the ownership in the goods; and that, by the authority of the case of Davis v. James and Joseph v. Knox the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the

goods of the consignee.

In Davis and Jordan v. James the vendors had delivered certain goods to a carrier, who undertook to carry for a certain price, and to deliver within a certain time. The goods were lost, and the consignor having brought an action to recover the amount of their value, the argument was raised that the consignee alone was entitled to maintain such an action, -for that the consignors parted with their property in the goods on delivering them to the carrier. But Lord Mansfield said (p. 2680):

There is neither law nor conscience in the objection : The vesting of the property may differ according to the circumstances of cases; but it does not enter into the present question, This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought by the persons who agreed with him , and were to pay him.

In Moore v. Wilson the plaintiffs were the consignors, and the action was brought against the common carrier for not safely carrying and delivering the goods. It was proved at the trial that the consignee had agreed with the plaintiffs to pay the carriage of the goods. On this it was objected that the evidence did not support the declaration, which was on an undertaking to carry the goods "for a certain hire and reward to be paid by the plaintiffs", and the plaintiffs were non-suited. But on a motion for a new trial, Buller J. said that he had mistaken the law, (p. 659) "for that, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor;" and the rule for the new trial was made absolute. In Dawes v. Peck the goods had been sent by the consignor conformably to the orders of the consignee, and by the carrier he had pointed out; and the plaintiff was non-suited, because Lord Kenyon thought that, under the circumstances of that case, the legal property in the goods was, by the delivery to the carrier, vested in the consignee. A motion was afterwards made for a new trial; but the Court, thinking that there were no special circumstances to take that case out of the general rule, refused the new trial. The remarks of Lawrence J. are very apposite (p. 334) :

Some stress has been laid on the circumstance of the consignor having paid the carrier for booking the goods us evidence of a special contract between them, in order to bring this lease within those which were cited at the Bar; but that circumstance would not give a right of action against the carrier, to recover damage for the loss of the goods, if it appeared that they were the property of another person; and here it is admitted that the action might have been brought by the consignee in right of hiss property in them. It is true that in some special cases a man may make himself liable to either of two persons, on account of the same interest but that is not usual; and it is more consonant to the general principle of law to refer all transactions of agents to the principal, on whose account they were entered into. Now here I consider that what was done by the consignor in respect of the booking, was as the agent of the

consignee, at whose risk the goods were sent; and, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom, the goods are directed, and to whom he looks for the price of the carriage upon delivery.

I may also refer to the case of Coombs v. The Bristol and Exeter Railway Co. (1858) 3 H. & N. 510' That case turned on the question whether there had been an acceptance and receipt of the goods within Section 17 of the Statute of Frauds, and the consignee therefore was held not entitled to sue the railway company for the loss, Pollock C.B. observed (p. 515):

But the liability of the carrier cannot be altered by anything which takes place after the loss : it must be certain at the moment of the loss. Therefore the question is whether the delivery to the carrier was a delivery to the vendee.

Bramwell B. observed (pp. 518, 519) :

The cases show clearly that the goods were not the goods of the plaintiff at the time of the delivery of them to the Railway Company....

It is more reasonable to hold that the consignor, when the property is not out of him does not contract for the consignee.

Watson B. observed (p. 519):

The contract between the carrier and the person sending the goods depends upon the property. If the property has not passed out of the consignor, he must sue as in the case of goods sent on gale and approval.

15. The position on these authorities is that in the absence of a special contract which may be entered into by the consignor with the railway company which makes the railway company liable to the consignor, it would be the consignee in whom the property in the goods has passed who would be entitled to maintain the suit against the railway company. If the consignor delivered the goods for the purpose of carriage to the railway company under instructions of the consignee, the property in the goods would pass to the consignee. The goods as delivered to the railway company would be the goods of the consignee and the consignor would in that event be merely the agent of the consignee for the purpose of entrusting the goods with the railway company for carriage. By the very circumstances of the case the act of the consignor, once the property in the goods had passed to the consignee, would be attributed to him as the agent of the consignee and the railway company would be receiving the goods from the consignor as the agent of the consignee, the contract for carriage-having been entered into by the consignor as the agent of the consignee, the principal in the transaction. The relevant date therefore for the purpose of this consideration would be the date when the goods are entrusted to the railway company for carriage. If under Section 23 of the Indian Sale of Goods Act the property in the goods has passed to the consignee at the time of the consignment, the consignee, the principal in the transaction, would be deemed to be the person who

had entered into the contract of carriage with the railway. company through his agent the consignor and would be the proper party to sue the railway company in the event of loss, destruction or deterioration of the goods so consigned. It would be open none the less to the consignor to make a special contract with the railway company whereby the railway company would even though the property in the goods had passed to the consignee at the time of the consignment remain liable to the consignor. Apart, however, from that circumstance the consignee would be the principal in the transaction and entitled to claim compensation from the railway company for the loss, destruction or deterioration of the goods. If, on the other hand, the property is goods had not passed to the consignee at the time of the consignment be the consignor alone who would be entering into the contract of carriage with the railway company, and any subsequent dealing by the consignor with the document of title to goods or anything that happened between the consignor and the consignee which would have the effect of passing the property in the goods represented by the railway receipt to the consignee would have no effect whatever on the incidents of the contract which had been entered into between the consignor and the railway company. Such subsequent dealings would have a bearing on the rights and liabilities of the consignor and the consignee tinier se. The railway company, however, would not be affected thereby. By subsequent dealings between the consignor and the consignee, the contract of carriage which had been entered into by the consignor with the railway company would not be transferred to the consignee and the consignee would not as a result of such dealings between himself and the consignor acquire a right to sue under the contract which had been entered into between the consignor and the railway company. The contract would remain all the same between ||ie consignor and the railway company, and in the event of loss, destruction ^r' deterioration of the goods represented by the railway receipt, the consider; would be the only person entitled to sue the railway company for compensation for the same.

16. In the present case there was no unconditional appropriation of the goods towards the contract at the date of the consignment. The consignors had Reserved unto themselves the right of disposal of the goods by taking out the railway receipt in their own name as consignees. At the date of the consignment therefore by no stretch of imagination could it be said that the property in the goods had passed to Shahjada Abdul Hakim. On May 23, 1942, not only was the railway receipt taken out by the plaintiffs in their own name as consignees, but the plaintiffs also signed the consignment note for dangerous, explosive and combustible articles which made them liable to the railway company in the event of the declaration contained in the consignment note being in any manner untrue. These circumstances are, in my opinion, indicative of a special contract having been entered into between the plaintiffs and the railway company which would make the railway company liable to the plaintiffs, and the plaintiffs alone, irrespective of the fact whether at the time of the consignment the property in the goods had passed to Shahjada Abdul Hakim or to anybody else. In my opinion by reason of the terms of the railway receipt itself the property in the goods had not passed to Shahjada Abdul Hakim at the time of the consignment. Even if it may be assumed for the purposes of argument contrary to what I have stated above, that the property in the goods had passed to Shahjada Abdul Hakim, there was a special contract entered into by the plaintiffs with the railway company which took the ease out of the ordinary rule, and the position was analogous to the one which obtained in the cases which I have cited above, viz. Dunlop v. Lambert, Dawes v. Peek and Coombs v. The Bristol and Exeter Railway Company.

17. The above conclusions which I have reached are in consonance with the general principles of the law of contract in England as well as in India. It is a fundamental principle of English law that only a person who is party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of contract. The weight of decisions in India also is in favour of the view that a person not a party to the contract cannot sue on the contract unless the case comes within one of the recognised exceptions which have been laid down in the decided cases on the point including, the one decided; by our Appeal Court in National Petroleum Company, Ltd. v. Popatlal . It was held in that case that:

> A person who is not a party to a contract is not entitled to maintain an action upon that contract. This rule is subject to well-recognised exceptions, e. g. a person who is not a party to a contract can sue on it if he is claiming through a party to the contract or if he is in the position of a cestui que trust of or a principal suing through an agent, or if he claims under a family settlement.
>
> The contract of carriage having been arrived at between the consignor and the railway company, the consignor would be prima facie the person entitled to sue the railway company for compensation for loss, destruction or deterioration of the goods represented by the railway receipt, and the question the property in the goods having .passed to the consignee would be relevant and would have a bearing on this question only in so far as the consignor would be deemed, under those circumstances, to have acted as an agent of his principal, the consignee, in whom the property in the goods had vested at the time of the consignment. This position would certainly bring the case within the well recognised exceptions to the rule enunciated above, and except in that exceptional case it would be the consignor only who would be entitled to sue the railway company for compensation in respect of the loss, destruction or deterioration of the goods represented by the railway receipt, by virtue of the contract of carriage entered into between the consignor and the railway company. In the case before me Shahjada Abdul Hakim does not satisfy any of the categories which are recognised as exceptions to the rule enunciated above and would therefore have no title to maintain the suit.

18. On all the grounds set out above, I have, therefore, come to the conclusion that the contentions raised on behalf of the plaintiffs are correct, that the endorsements made on the railway receipt had not the effect of passing the property in Shahjada Abdul Hakim, that the re-endorsement made by Shahjada Abdul Hakim in favour of the plaintiffs had the effect of investing in the plaintiffs the right to receive the goods represented by the railway receipt from the railway company, that the contract of carriage had been entered into by the plaintiffs with the railway company, and that the plaintiffs were the only persons entitled to maintain the suit against the defendant for recovery of compensation for loss of the goods by reason of their being destroyed by fire at the Bhatinda station yard.

19. The next question to consider is whether a valid and proper notice was given by the plaintiffs to the N.W. Railway and the B. B. & C. I. Railway under Section 77 of the (Indian Railways Act read

with Section HO of that Act. Section 77 of the Indian Railways Act lays down that:

> A person shell not be entitled to a refund of an overcharge in respect of animals or good carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

Section 140 of the Indian Railways Act lays down that:

> Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager and, in the case of a railway administered by a railway company, on the Agent in India of the railway company...

It was contended by Mr, Joshi that the N. W. Railway as well as the B. B. & O. I. Railway being railway administrations owned and administered by the Governor General in Council, the notice under Section 77 of the Indian Railways Act should have been given to the Managers of the respective railways; and not having been so given, there is no valid notice under Section 77 read with Section 140 of the Indian Railways Act. As regards the B, B. & C. I. Railway the plaintiffs in this case wrote a letter on July 23, 1942, to the General Traffic Manager B. B. & C.I. Railway. A reply thereto was sent by the chief traffic Manager, B. B. & C.I. Railway, on August 7, 1942, and there were no further communications between the plaintiff on the one hand and the B. B. & C. J. Railway on the other. As regards the N. W. Railway a letter appears to have been addressed again by the plaintiffs on July 23, 1942, presumably to the General-Manager, N. W. Railway, Lahore, and was acknowledged by the General Manager, N.W. Railway, on or about August 11, 1942. It was contended by Mr. Joshi that neither the General Traffic Manager, B. B. & C. I. Railway, nor the General Manager, N. W. Railway, Lahore, fulfilled the category of the "Manager" stated, in Section 140 of the Indian Railways Act, and therefore the plaintiffs were not entitled to maintain the suit for want of the requisite notice served by them within the prescribed period on those railway administrations. Mr. Joshi in this connection relied upon a decision of our Appeal Court in- East Indian Railway Company v. Jethmull (1902) I.L.R. 26 Bom. 669 : s.c. 4 Bom. L.R. 495 which says that the formalities which the Legislature has imposed cannot be dispensed with, and if the plaintiffs have failed to comply with the same, they can be non-suited. In the very same decision, however, it has been pointed out, after referring to the case of Union Steamship Company of New Zealand v. Melbourne Harbour Trust Commissioners (1884) 9 App. Cas. 365, that though notice of action is not to be construed with extreme strictness, there must be a substantial compliance with the terms of the Act by which it is prescribed. Having regard to these observations of their Lordships of the Privy Council, I have to consider whether the notices, which were given by the

plaintiffs to the two railway administrations, viz. the B. B. & C. I. Railway and the N. W. Railway, were a substantial compliance with the terms of Section 77 read with Section 140 of the Indian Railways Act. I am of opinion that these notices were in substantial compliance with Section 77 read with Section 140 of the Indian Railways Act. I may quote in this connection the observations of Tyabji J. in East Indian Railway, Co. v. Jethmull, cited above, which ace reported at p. 678:

According to my view of it, the object of the section is not to throw obstacles in the way of a plaintiff recovering in a suit, but to protect the Railway Company against state claims-against claims that may be sprung upon them long after the goods have been delivered to them, and therefore enjoins the duty upon claimants to make their claims within a reasonable time so as to enable the Railway Company to make inquiries and if satisfied of their justice to pay the claims. Every one of these requirements has been complied with in the present case.

Not only is the General Traffic Manager a very important officer of this Company-so important, indeed, is he that It is he who has declared the written statement in this case- but he is the principal officer charged with the duty of investigating claims made against the I Company. It seems to me, therefore, that if I were to hold that this notice was not served upon the Company, I must hold that Section 140, instead of being an enabling section, where it says that service may be made on the Agent, is an exclusive and compulsory section, which would be absurd since it is admitted that service of a notice at the head office of a Company is England would be perfectly good. It is therefore not an exclusive section. It indicates one mode in which a notice may be served, but in my opinion it does not exclude other modes if the Court thinks that the notice has been brought sufficiently to the cognizance of the Railway Company.

There is also a decision of Henderson J. in Sristhidhar Mandal v. Governor Genaral [1945] A.I.R. Cal. 412, which says:

It is sufficient to comply with Section 77 if in fact notice is given to the railway administration. Notice under Section 77 in respect of claim for non-delivery of goods consigned served on the Chief Commercial Manager of the Railways who is the officer responsible for investigating claims instead of on the General Manager is a good notice to the railway administration because if it had been served on the General Manager he would merely have forwarded it to the Chief Commercial Manager.

The ratio of these two decisions of Tyabji J. and Henderson J. is sufficient to that there was a substantial compliance with the requirements of Section 77 read with Section 140 of the Indian Railways Act, that the plaintiffs gave due and prescribed notice of their claim to both the railway administrations, and that there being valid and proper notices served on the two railway administrations in writing within the prescribed period at the instance of the plaintiffs, the suit is "maintainable) by the

plaintiffs.

20. Even assuming I was wrong in my conclusion as regards the validity of the notice served by the plaintiffs against the B. B. & C. I. Railway, there is no doubt on the facts of this case that the plaintiffs gave due notice within the meaning of Section 77 read with Section 140 of the Indian Railways Act to the N. W. Bail-way, Lahore, the railway administration on whose line the goods were destroyed by fire. The N. W. Railway were thus in any event liable for the loss, distraction or deterioration of the goods occurring on their railway line, and 'under the circumstances of the present case there being a valid and proper notice, addressed by the plaintiffs to that railway administration, there would not be the slightest difficulty in the way of the plaintiffs maintaining this suit against the Governor General of India in Council, the only defendant in this suit, he being the owner and administrator of the N. "W. Railway also. Even if the claim could not be sustained against the B. B. & C. I. Railway and could only be sustained against the N. W. Railway, there is no doubt in my mind that the present defendant being the owner and administrator of the N. W. Railway, the plaintiffs are entitled to maintain this suit because they in any event gave a due, valid and proper notice under Section 77 read with Section 140 of the Indian Railways Act to that railway administration.

21. The above two questions which I have disposed of were very strenuously contested by the defendant who apparently had no defence on the merits. Proceeding now to consider the merits of the case, I may observe that the responsibilities of railway administrations as carriers have been laid down in Chapter VII of the Indian Railways Act. Section 72(1) Of the Indian Railways Act lays down:

> The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 152 and 161 of the Indian Contract Act, 1872.
>
> As regards the burden of proof in respect of loss of goods it is laid down in Section 76 of the Indian Railways Act:
>
> In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused.
>
> The goods in this ease were consigned by the plaintiffs at railway risk, the plaintiffs paying increased charges in respect of these goods which were dangerous, explosive and combustible articles. The terms of Section 76 of the Indian Railways Act are very clear on the point as to on whom the onus of proof lies. The responsibility of the railway administration is that of a bailee, and once the entrustment of the goods to the railway administration is proved and it is also proved, as is admitted in this case, that the goods are not delivered by the railway company in accordance with the terms of the railway receipt issued by them, the goods having been admittedly destroyed by

> fire at the Bhatinda station yard, the onus lay on the railway administrations to prove that within the terms of Section 151 of the Indian Contract Act they took as much care of the goods bailed to them 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. 'If it were necessary to refer to authorities on this point, they are to be found in Nanku Earn v. The Indian Midland Railway Company (1800) I.L.R. 22 All. 861 where it was held :
>
> Where goods are delivered to a railway company for carriage not ' at owner's risk,' and such goods are lost or destroyed while in the custody of the company, it is not for the owner suing for compensation for such loss or destruction to prove negligence on the part of the company, but, when the owner has proved delivery to the company, it is for the company to prove that they have exercised the care required by the Indian Contract Act, 1872, of bailees for hire . It was for the Company to establish the circumstances which would enable them to be relieved from the liability.
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> and Trustees of the Harbour, Madras v. Best & Co. (1890) I.L.R. 22 Mad. 524 where Benson J. observed (p. 537) :
>
> In my view, when the loss is established it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss.

22. Besides leading the evidence of Herbert Sydney Parker, the Assistant, Transportation Officer, N. W. Railway, Delhi, who only deposed that the result of the inquiry held by him was that "We could not come to any conclusion as to the cause of the fire no evidence at all was led by the the loading and unloading clerk employed in the B. B. & C. I. Railway at the date of the consignment, viz. May 23, 1042, beyond saying that the wagon No. C.B. 1840 in which the fifty eases of chlorate of potash were loaded was pasted, with three labels: (1) "Not to be loose shunted", (2) "Handle with care", and (3) "Dangerous" on both sides of the wagon, and was sealed in his presence, did not throw any light on the question as to how the goods which had been consigned by the plaintiffs with the railway administration were dealt with by them during the course of the transit.

23. It has been contended by the defendant that the fifty cases of chlorate of potash were not packed as they should have been, having regard to the requirements laid down in that behalf in Red Tariff No. 15. As a matter of fact in para; 5 of the written statement the defendant had contended:

> It was found at Delhi that four of the cases had broken, the contents were falling Out, and the covering of one or more cases was burnt. It was also found that there was in the said COMB no inner lining of the nature required by the rules.

Even though positive averments were made in this behalf, the defendant failed to produce any evidence, at the hearing to prove either of these allegations. On the contrary the plaintiffs called Durgashankar Harishankar Mehta, their partner, Kaikushru Manchersha Engineer, a salesman who was for over twenty years in the employ of Messrs. Mitsui Bushan Kaisha, a Japanese firm, prior to their closing down in December, 1941, Framroz Nasarwanjee Sahiyar, an assistant in the Western India Match Company, and Popatlal Narottamdas Shah, the Manager of N, Jivanlal & Co., a firm of importers, through whom the plaintiffs had imported the goods which were ultimately consigned by them on May 23, 1942, to show that these goods which had been so consigned by them had been imported by them from Japan, that all the goods which came from Japan had paper lining inside the wooden cases which would satisfy the requirements of packing laid down in Red Tariff No. 15, that the eases of chlorate of potash which were imported from Japan were invariably lined with paper lining which would satisfy these requirements and that these goods were not defectively packed and the packing thereof complied with the packing conditions of chlorate of potash laid down in Red Tariff No. 15. As a matter of fact, Jagannath Ramchandra Bapat in his evidence admitted that he examined the fifty cases and satisfied himself by ripping open the outer covering of gunny bags of two or three cases out of the whole lot that the contents were in a safe and south condition and that there was no leakage or defective packing of the same, of accept the evidence which has been led on behalf of the plaintiffs in this behalf and hold that the said fifty cases of chlorate of potash were not packed in a defective manner and that the packing thereof fully complied with .the packing conditions for the chlorate of potash laid down in lied Tariff No. 15. That being so, the plaintiffs are not at all responsible for the loss which occurred by reason of the goods being destroyed by fire in the Bhat hula station yard. The defendant has absolutely failed to lead any evidence to show how he dealt with the consignment during the course of its transit from Bombay to the Bhatinda station yard. The defendant has failed and neglected to discharge the onus of proof which lay on him of showing that under Section 1 51 of the Indian Contract Act he took 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. The defendant is, therefore, liable to the plaintiffs for the loss of the goods by reason of their having been destroyed by fire in the Bhatinda station yard.

24. The issue whether the notice given by the plaintiffs' attorneys to the Governor General of India in Council on April 28, 1943, being the notice under Section 80 of the Civil Procedure Code, was a valid or proper notice was not pressed by Mr. Joshi and 'I need not say anything on that point.

25. What then is the compensation which the plaintiffs are entitled to recover from the defendant? The date of the loss is approximately the date when the goods were expected to arrive at Peshawar City, the fire having occurred at the Bhatinda station yard on June 9, 1942. It is not seriously disputed that the goods would in the ordinary course have reached Peshawar City by about June 13 or 14, 1942, and Shahjada Abdul Hakim the endorsee of the railway receipt could have obtained

delivery of the goods at Peshawar City on or about that date. That, in my opinion, is the date which is relevant for the purpose of ascertaining the compensation payable by the defendant to the plaintiffs. The plaintiffs have put in evidence entries which go to show that chlorate of potash had been purchased by them from the bazar on Kay 21 and 22, 1942, at the rate of Rs. 750 per case, with a rebate by way of discount at the rate of half a per cent, on the total price of the goods. The price which they agreed to charge Shahjada Abdul Hakim was Rs. 850 per case. That, however, included the Bardan, Mukadami and the railway freight which the plaint-it's themselves were to pay. It is in evidence in the railway receipt itself that the railway freight paid by the plaintiffs in connection with this consignment was Us. 900-3-0 which works out at an average of Rs. 18 per case. There is no evidence before me of the Bardan and Mukadami charges which they would have to incur or which they in fact incurred. On the other hand, in the evidence of Framroz Nassarwaujee Sahiyar, the employee of the Western India Match Company, we find a compilation of the market rates which he had made after due inquiries in the bazar and this evidence of his goes to show that towards the middle of June 1942 the rate of chlorate of potash ex-godown in Bombay was Rs. 6-11-0 per pound which multiplied by 112 would yield about Rs. 738 per case. We have of course got to add to this the Bardan, the Mukadami and the railway freight and arrive at a proper price of these goods which would be the market price of these goods at the Peshawar City on or about June 15, 1942. Further light is thrown on this question by the letter dated June 17, 1942, addressed by Shahjada Abdul Hakim to the plaintiffs in which, after informing the plaintiffs as to the loss of these goods at the Bhatinda station yard, he asked the plaintiffs to reserve fresh fifty cases of chlorate of potash f or him at the agreed price of Rs. 850 per case. The statements contained in this letter go to show that Shahjada Abdul Hakim could not have obtained the goods at Peshawar City on June 17, 1942, at any price which would cost him less than Rs. 850 per case as otherwise he would not have made that offer or suggestion to the plaintiffs. Having regard to all the circumstances act out above, I have therefore come to the conclusion that I can safely take the market price of these goods at Peshawar City on or. about June 15, 1942, at Rs. 800 per case net. On this computation the compensation payable by the defendant to the plaintiffs in respect of the fifty cases of chlorate of potash consigned by the plaintiffs on May 23, 1942, would amount to Rs. 40.000.

26. There will, accordingly, be a decree for the plaintiffs against the defendant for Rs. 40,000 with interest thereon at the rate of six per cent, per annum from the date of the suit, viz. July 16, 1943, till judgment, costs of the suit and interest on judgment at the rate of six per cent, per annum till payment.