Mahendrakumar Chandulal vs Central Bank Of India on 30 March, 1983

Equivalent citations: (1984)1GLR237

JUDGMENT

R.J. Shah, J.

1. Appellant, a registered partnership firm, having lost in the trial Court has come in appeal challenging the judgment and decree dated June 30, 1975 passed in Civil Suit No. 2321 of 1974 by the City Civil Court, Ahmedabad. Respondent-bank is the original defendant.

2. In order to appreciate the rival contentions, a few facts will need to be stated. Appellant had opened a pledge account with the respondent. Pledged bales of cloth belonging to the appellant were kept in a godown which belonged to the appellant but which was under the direct control and supervision of the respondent pursuant to the pledge agreement between the parties. The said godown was, therefore, operated by the respondent whenever needed in the presence of the agent of the appellant with the keys which remained in possession and safe custody of the respondent. On April 17, 1974, appellant's agent went to take delivery of 2 bales along with the godown keeper of the respondent. It was then noticed that there were only 66 bales instead of 70 bales. As the appellant felt that the respondent was liable in respect of 4 missing bales, a registered notice dated April 25, 1974 was served on the respondent calling upon them to return the 4 missing bales or alternatively Rs. 17,600 being the price of the bales together with the difference of price at the prevalent rate, in other words, profit and interest at 12 per cent per annum. According to the appellant, the market price of the said bales at the relevant time was Rs. 21,249.55. The total claim made in the suit inclusive of interest and notice charges was of Rs. 22,255.55. The suit was tried on merits and was ultimately dismissed with no order as to costs.

3. In the present appeal, appellant contends in the first place that it was due to the negligence of the respondent-bailee that the said loss had occurred. It is an admitted position that the relationship between the appellant and the respondent was that of a bailor and a bailee. Respondent had examined one Keki Hormashji at Exhibit 50 at the trial. Since October 1, 1973, this witness was an officer in the Cash Credit Department in Maskati Market Branch of the respondent. This witness has described the procedure that was followed regarding operation of godown such as the one in question. In his cross-examination, an attempt was made to show that there was scope for a godown keeper to play mischief. Regarding procedure, this witness has stoutly maintained that the proper procedure was followed and due care was taken in parting with the keys of the godown for operation.

4. Another witness examined by the respondent was Dahyabhai Maneklal Parekh, Exhibit 59. This witness was serving as an agent at the aforesaid branch of the respondent since a year before the incident. He has deposed that a regular complaint was filed before the police on April 19, 1974, that they had permitted the appellant to keep the goods in the appellant's godown which was taken on lease, that the police had visited the godown twice, that on the second occasion demonstration was made as to how the door could be opened without operating the lock, that it was shown that a man could enter and come out from the said godown and could pass the goods after breaking open the bales and that the police had informed them that nothing further could be done in the complaint. An attempt was made in the course of examination of this witness also to show that it A as possible for the godown keeper to play mischief. An attempt was also made to show that there was laxity in carrying out inspection of the godown. The said agent has deposed in cross-examination that the respondent was bound to take care of the goods as a bailee and they had taken such care and further that it was difficult to say that as to what had actually happened to the aforesaid 4 bales. As nothing turns on the evidence of other witnesses examined at the trial on the point under consideration, it is not necessary to dwell upon the same.

5. The evidence led at the trial does not establish that there was any foul-play regarding missing bales either on the part of the appellant or on the part of the officer or godown keeper of the respondent. The fact, as established on evidence, however remains that the door of the godown was in such a condition that a man could enter and come out of the godown without breaking open or touching the lock applied to the godown. That the godown was properly operated with keys by the godown keeper cannot furnish an answer in this connection on the part of the respondent to the effect that there was no negligence on their part even when the door on which their lock was applied was in such a condition which rendered even the application of the lock a totally idle and useless precaution. Realising this difficulty, the learned Advocate for the respondent submitted that as the aforesaid was a latent and not patent defect the respondent could not be held responsible for the aforesaid. In the first place, such a case has neither been pleaded nor proved at the trial even though the aforesaid demonstration had taken place before the filing of the suit. In the next place, had the said door been inspected carefully before the control of the said godown was obtained by the respondent under the agreement of pledge the said defect could have been detected. Ordinarily, a prudent person would not apply a lock to his premises when the door of the premises is in such a condition that a man can enter or come out from the said door without even touching the said lock. The submission made in this connection on behalf of the respondent, therefore, cannot be upheld.

6. In the aforesaid connection, the learned trial Judge has observed in his judgment that in view of the aforesaid demonstration, a possibility of a theft being done in the godown was real. The judgment does not show however that the learned trial Judge had examined the aforesaid aspect of this matter from the point of view of negligence on the part of the respondent as stated hereinabove.

7. In the aforesaid view of the matter, it has clearly been established on evidence that there was negligence on the part of the respondent-bailee in respect of the 4 missing bales of the appellant-bailor.

8. This brings me to the second aspect of the matter. Respondent contends that even if there was negligence on the part of the respondent it is not liable in view of Clause 9 of the agreement. Exhibit 45 and the document Exhibit 46. The learned Advocate for the appellant submits that on a construction of the said documents it should be held that all the aforesaid documents even when read together do not establish that respondent had contracted out of the minimum liability envisaged under Section 151 of the Contract Act apart from the question that it was not open to the respondent under law to contract out of the said minimum liability.

9. Clause 9 of Exhibit 45 dated November 12, 1973 provides as under:

> 9. That during the continuance of this Agreement the Bank shall not be responsible, notwithstanding anything to the contrary in Section 152 of the Indian Contract Act, for any loss or deterioration of or damage to the said goods whether caused by theft, fire, rain, flood, earthquake, lightning, or any other cause whatever.
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> 10. At Exhibit 46, there is a letter dated November 12, 1973 written by the partners of the appellant to the respondent wherein they have stated as under:
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> In amplification and confirmation of the terms of agreement of pledge dated 12-11-73 executed by us in connection with our Cash Credit Account against pledge of goods with you, we have to inform you that even though the godown with the goods is given in your possession under Bank's lock and key and the delivery of the goods will be looked after by your Godown keeper from time to time, we shall be responsible for the safety of the goods stored in such godown(s).
>
> We hereby absolve the Bank from all liabilities for the shortage of goods by way of pilferage, stealth or removal from the godown by any manner whatsoever.
>
> We do not consider it necessary to post your chowkidar for the protection of our goods pledged to you and you should not engage a chowkidar for the same.
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> Exhibits 45 and 46 bear identical date, namely, November 12, 1973. Exhibit 46 is in amplification and confirmation of the terms of agreement of pledge Exhibit 45. Both these documents therefore will have to be read together as they form part of the same agreement. If Clause 9 of Exhibit 45 was alone in the field, then prima facie there was some scope for the submission that it did not provide for protection where goods were lost due to the negligence of the bailee. In that case, I would have examined the submission further. Since such is not the case, no useful purpose will be served by examining the matter as if Clause 9 of Exhibit 45 was alone operating and governing the situation. Paragraph 2 of Exhibit 46 clearly provides that the respondent will be absolved from all liabilities for the shortage of goods by way of pilferage, stealth or removal from the godown in any manner whatsoever. There is, therefore, no manner of doubt that the respondent would not be liable even though the said bales have been held to be lost due to the negligence of the respondent on a mere construction of

> the said agreement, that is to say, on a conjoint reading of Exhibits 45 and 46 divorced from the further question as to whether it was open to the respondent under law to contract out from the minimum liability imposed on the bailee under Section 151 of the Indian Contract Act.
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> 11. In the aforesaid circumstances, it has become necessary to examine as to whether it is open under law to a bailee to provide in an agreement with the bailor for absolving the bailee from the minimum liability provided under Section 151 of the Indian Contract Act.
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> 12. Sections 151 and 152 of the Indian Contract Act, 1972 provide as under:
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> 151. Care to be taken by bailee: In all cases of bailment the bailes is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.
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> 152. Bailee when not liable for loss, etc. of thing bailed: The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration, of the thing bailed, if he has taken the amount of care of it described in Section 151.

Section 151 does not contain any words like "in the absence of any special contract" or "subject to a contract to the contrary" or some such words. Section 151, therefore, contains no qualifying words which may authorise parties to contract out of the minimum liability provided under it.

13. So far as Section 152 is concerned, it contains qualifying words "in the absence of any special contract". Section 152 without the aforesaid qualifying words would read as under:

> 152. Bailee when not liable for loss etc. of thing bailed :- The bailee...is not responsible for the loss, destruction, or deterioration, of the thing bailed, if he has taken the amount of care of it described in Section 151.

In other words, if the bailee has taken care of the thing bailed as described in Section 151 then the bailee will not be liable even if the loss, destruction, or deterioration of the thing bailed occurs. But the bailee may as well provide in a special contract under Section 152 where under it chooses to undertake larger responsibility under such terms as it may like. Considering it from the aforesaid angle, is it or is it not possible to read Section 152 as providing:

> The bailee, if he has taken the amount of care of the thing bailed as described in Section 151, is not responsible for the loss, destruction or deterioration of the thing bailed in the absence of any special contract.
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> In reading as aforesaid, not a single word will need to be added to Section 152. Could it, therefore, not be that in enacting Section 152 Legislature has intended to provide

> only for increased liability under a special contract and has not intended to provide that a bailee can also do away with the minimum liability under Section 151 by virtue of a special contract?

14. The aforesaid subject has received attention in a number of cases. Mr. M.D. Pandya, the learned Advocate for the appellant has first referred to Sheik Mohamad Ravuther v. The British India Steam Navigation Co. Ltd. (1909) ILR 32 Madras 95 In this case, the plaintiffs claimed damages for the loss of 246 bags of rice out of a consignment of 4,000 bags carried by the defendants under a bill of lading from Rangoon to Tuticorin. These 246 bags with others were destroyed by the municipal authorities after they had been landed on account of their damaged condition. The plaintiffs alleged that the damage was occasioned by the negligence of the defendants or their agents. The learned Chief Justice and Sankaran Nair, J. held that on the construe-tion of the bill of lading the defendants were not exempted from liability for negligence. Wallis, J. dissented from the said view and held that the bill of lading sufficiently protected the defendants from liability for negligence during the discharge of the cargo. In the same case, the Chief Justice and Wallis, J. further held that in England it was competent to a shipowner to protect himself, by express contract, from liability for the negligence of himself or that of his servants and that this was also the law applicable in India. Sankaran Nair, J. on this aspect of the case has posed a question as under:

> Assuming then that a shipowner can enter into an agreement with the cargo owner as stated above, can it be possibly contended that we are to enforce, in this country, the English law of contract even where it differs from the Indian law?

15. He has proceeded further to observe that if the consideration or object of the agreement is opposed to public policy as declared by the Indian Legislature or the Indian Courts, no words in a contract will estop a party from pleading, or the Courts from deciding that the contract cannot be enforced. Sankaran Nair, J. has thereafter proceeded to test the validity of the said exemption clause by the Indian Contract Act:

> Section 148 of the Indian Contract Act as pointed out by the Judicial Committee in The Irrawady Flotilla Co. v. Bhagwandas (1891) ILR 18 Calc 620 at p. 627 undoubtedly includes bailment for carriage. This is also the view of the Calcutta High Court in Mackillican v. The Compagnie Des Messageries Maritimes De France (1881) TLR 6 Calc. 227 and of the Bombay High Court in Kuverji Tulsidas v. The Great Indian Peninsula Railway Co. (1879) ILR 3 Bom at p. 109. A ship-owner is a bailee within the terms of that section. Under Section 151 of the Act, the defendants, therefore, are bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances. It is only the incident of any contract not inconsistent with its provision that remains unaffected by the Contract Act (see Section 1 of the Contract Act). The incident of the contract before us that the bailee is exempt from taking the care required by Section 151 appears to me to be clearly inconsistent with that section. Section 152 seems to make this clear. It declares that the bailee's liability is limited as declared by Section 151, "in the absence of any special contract," or in other words he may by contract undertake a higher

responsibility for instance that of an insurer. The Calcutta High Court and the Judicial Committee relied upon this section to hold that these provisions do not limit the liability imposed by the common law rule recognized in the Carriers Act, 1865, which was the only point decided in that case. The provision in Section 152 that a bailee may undertake a higher responsibility, the absence of a similar provision that he may limit the liability imposed by Section 151, and the fact that, in the chapter IX relating to Bailment, whenever a rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated (see Sections 163, 165, 170, 171 and 174) - leave no doubt in my mind that a bailee's liability cannot be reduced by contract below the limit prescribed by Section 151. In fact, throughout the Act, whenever the legislature intended that the provisions of the Act should be enforced only in the absence of a contract between the parties they have said so. (See Sections 109, 113, 116, 121, 93, 94, 95, 202, 219, 221, 230, 241, 253, 256, 261, 265). The obligation imposed by Section 151 applies to bailees as well as to their servants in the discharge of their duty. The agent represents the bailee under the Act. The Contract Act thus sweeps away all the distinctions between the degrees of care required of the bailees. In the Tnglish la'A the amount of care required seems to depend upon the benefit accruing to the bailee Under the Contract Act the obligation arises from the simple fact of accepting delivery or receiving property for a certain purpose, and the care to be taken is the same in all cases. Thus, under Section 71, a person undertakes the same responsibility as a bailee from the mere fact of taking goods belonging to another into his custody. The relations between parties may well be left to be regulated by contract when the degree of care required is dependent upon the benefit derived from the bailment, but when the same amount of care is required independent of any benefit to the bailee then it may well be that the legislature did not think it right to allow the bailee to reduce his liability.

Assuming then that the rule of English law that a common carrier can get rid of his liability by contract has been accepted in India, the contract itself must be obviously one which will be recognized in the Indian Courts, and, if I am right in the view above set forth, it necessarily follows that while a common carrier may exempt himself from the liability of an insurer by contract, he cannot exempt himself from the liability of an ordinary carrier imposed by Section 151 of the Indian Contract Act.

16. After examining the legal aspect still further Sankaran Nair, J. has observed as under:

I am therefore of opinion that the English common law that has been accepted in India is the law as declared by Story and Lord Blackburn which is based on grounds of public policy applicable alike to England and India; that its further development as to exemption by contract due to the Carriers Act of 1830 for loss due to negligence has not been accepted in India, but, on the other hand, has been declared inapplicable by Act III of 1865 to the cases falling within that Act, and following the reasoning of the Privy Council, that, though an Act may be inapplicable, it ought to be followed as a rule of justice, equity and good conscience, in cases similar to those

> dealt with by the legislature in the absence of any circumstances to the contrary, the principles, embodied in Act III of 1865 ought to be followed, I am further of opinion that a rule of English common law ought not to be followed when it is opposed to the principles followed and acted upon by the Indian legislature.

17. The next question examined by Sankaran Nair, J. was whether the contract exempting a shipowner from the consequences of negligence of himself or his servants in not taking reasonable care or the care referred to in Section 151 of the Indian Contract Act is opposed to public policy and is, therefore, void. In doing so, he has observed that he was quite alive to the fact that if possible we ought to follow the English law in this respect. He has proceeded further to observe as under:

> It has also to be remembered that the English law attaches an importance to freedom of contract which is not recognised in India where people are accustomed to have their relations regulated not by contract, but by law to a greater extent than in England. Holding the view that such an agreement is unreasonable the English Judges construe the terms of every agreement very strictly against the shipowner. The rule has not been accepted in America. The Indian law on bailment is not the same as English law on a material and relevant point. The Common Carriers Statute of 1830 is different in this respect from the Common Carriers Act of 1865. In the Liverpool Bill of Lading of 1882, the Hamburg Bill of Lading of 1885, and London Conference Rules of Affreightment, 1893, exemption from loss arising from negligence in the cases referred to therein were allowed, but not in a case like the one before us. So too in the forms adopted in the Mediterranean, Black Sea and Baltic trades and in the New York trade respectively in 1885. in each case after long negotiations in which both merchants and shipowners are alleged to have taken part.
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> Such an exemption clause is. therefore, clearly against the interests of the mercantile community and not necessary in the interests of shipowners.
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> I am of opinion, therefore, that it is against public policy to enforce this stipulation, and that it must be left to the legislature, if necessary, to introduce a rule of law, held unreasonable in England and utterly unsuited to the conditions of this country.

18. The aforesaid reasoning of Sankaran Nair, J. had not found favour with the remaining members of the Bench including the Chief Justice. In a bill of lading case, the majority view was that in England as well as in India the law was the same, namely, that it was competent to a shipowner to protect himself by express contract from liability for the negligence of himself or his servants.

19. The next case referred to in this connection is that of The Official Assignee, Bombay v. Madholal Sindhu 48 BLR 828. The dispute in this case centred round 26,000 shares on the security of which loan was taken. The learned Chief Justice while allowing the appeal and passing an order of redemption of the 26,000 Asian shares in favour of the Official Assignee was pleased to observe as under:

The Indian Contract Act of 1872 applies to all contracts in India and with regard to a pawn is codification of the English common law. Speaking of the common law right to sell Mr. Justice Story in his commentaries on the Law of Bailments, eighth edition, says at p. 262:

Another right resulting, by the common law, from the Contract of pledge, is the right to sell the pledge, where there has been a default in the pledgor in complying with his engagement, but a sale before default would be a conversion. Such a right does not divest the general property of the pawner, but still leave in him (as we shall presently se) a right of redemption.

And at p. 263:

The common law of England, existing in the time of Glanville, seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. But the law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale; or, he may proceed to sell ex mero motu, upon giving notice of his intention to the pledgorv.

The terms of an instrument of pledge, such as there is in this case, giving an unqualified power of sale, are inconsistent with the provisions of Section 176 of the Indian Contract Act, and, therefore, by virtue of Section 1 of that Act must give place to the express provisions of the Act: see Chilguppi & Co. v. Vinayak Kashinath (1920) ILR 45 Bom. 157 S.C. 22 Bom. L.R. 659.

The group of sections in the Indian Contract Act dealing with bailment commence with Section 148, and it is to be observed that in Sections 152, 163, 171 and 174 the power is given to contract out of the Act. In the former section the words are "in the absence of any special contract" and in the three latter sections the expression used is "in the absence of any contract to the contrary." In my opinion, therefore, except in these four sections, the provisions of the Act with regard to bailment are mandatory: see The Co-operative Hindusthun Bank Ltd. v. Surendranath De (1931) ILR 59 Cal. 667.

Section 176 of the Contract Act is as follows :

If the pawner makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawner may bring a suit against the pawner upon the debt or promise, and retain the goods pledged a collateral security; or he may sell the thing pledged, on giving the pawner resonablc notice of the sale.

The rest of the section deals with the application of the proceeds of sale and is not material.

> In my judgment, a notice must be given in all cases of pledge, even when the instrument of pledge itself contains an unconditional power of sale. This opinion is held by three distinguished editors (Sir Federick Pollock, Sir Dinshah Mulla and Sir Maurice Gwyer) of Mulla's Indian Contract Act, seventh edition (see p. 519). It follows that even if it is possible to regard the contract of October 23-24-1941, as a sale by the bank as pledgee of Mr. Nissim, that sale is invalid as being in breach of Section 176, unless it could be shown that before his insolvency Mr. Nissim effectively waived the giving of notice so as to bind the Official Assignee.

20. Chagia, J. (as he then was) on the aforesaid aspect of the matter has observed as under:

> In the first place, it is argued that the transaction of pledge between Meyer Nissim and the 2nd defendant bank was the subject of a contract entered into by them and it is that contract which regulates the rights of the parties and not Section 176 of Indian Contract Act; under this contract the 2nd defendant bank was given the authority to sell the shares on the default of Meyer Nissim at its discretion, and, therefore, no question of giving notice to the pledger could arise under the terms of the contract. Therefore, the question is whether the terms of Section 176 of the Indian Contract Act are mandatory and override the provisions of any contract to the contrary. The scheme of the Indian Contract Act is that it is competent to parties to incorporate into any contract any incident which is not contrary to or inconsistent with any provision contained in the Act. But they can only override a specific provision contained in the Act provided the particular section dealing with that provision contains a saving clause in respect of special contracts to the contrary. If one looks at the various sections of the Indian Contract Act, one finds that some of them specifically mention "in the absence of a contract to the contrary". There is no such saving clause in Section 176, and in my opinion its provisions are mandatory, and it is not open to parties to contract themselves out of those provisions. The notice that is to be given to the pledger of the intended sale by the pledgor is a special protection which the statute has given to the pledgor, and parties cannot agree that in the case of any pledge the pledgre may sell the pledged articles without notice to the pledger. The Calcutta High Court The Co-operative Hindusthan Bank Ltd. v. Surendranath De (1931) ILR 59 Cal 667 has taken the same view of the section. In Chitguppi and Co. v. Vinayak Kashinath (1920) ILR 45 Bom 15 7 our High Court held that under Section 133 of the Indian Contract Act any variation made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharged the surety as to transactions subject to the variation although the surety had agreed to such variation. It was held that such an agreement was inconsistent with the express provisions of Section 133 of the Indian Contract Act and Section 133 did not provide for any contract to the contrary,

21. The aforesaid decision turned on a construction of Section 176 of the Indian Contract Act but the Division Bench had reached the conclusion as aforesaid after examining the scheme of the Contract Act. While doing so, the learned Chief Justice had considered the group of sections dealing with

bailment. Sections 151 and 152 of the Contract Act form part of the same group. The Division Bench of the Bombay High Court to all intents and purposes had agreed with the conclusion drawn by Sankaran Nair, J. in Sheik Mohamad Ravuther's case (supra) regarding the scheme of the Contract Act though the said case was not cited before the Bombay High Court. The aforesaid Bombay decision is a binding precedent.

22. The case of British India Steam Navigation Co. v. Ratansi (1898) ILR 22 Bom. 184 turned merely on the construction of bill of lading under consideration. One does not find that a consideration of the scheme of the Indian Contract Act was undertaken therein.

23. In the case of the Bombay Steam Navigation Co. Ltd. v. Vasudev Baburao Kamat 29 BLR 1551 it has been held that where goods shipped under a bill of lading are lost, the consignee, who claims under the bill of lading to recover the loss is bound by its terms under Section 1 of the Bill of Lading Act 1856 and further that it is competent to a shipping company to protect itself by a clause inserted in the bill of lading from liability for the negligence of its servants notwithstanding Section 151 of the Indian Contract Act, 1872. This is also a Division Bench judgment wherein on the point under consideration, it has been observed as under:

> There is a further point as to whether in any event conditions of the nature relied on in this bill of lading are legal having regard to Section 151 of the Indian Contract Act viz. 148 et seq. and that under Section 151 he is bound to take as much care of the goods bailed as a man of ordinary prudence would of his own goods; and that there is no clause which permits him to contract himself out of that minimum liability. In this respect, there is a marked contrast under Section 152. But there it is expressly provided that in the absence of any special contract the bailee is not liable for the loss if he has taken the amount of care described in Section 151. As far as the Indian Carriers Act is concerned, that does not, I think, apply to carriage by sea. I exclude of course inland navigation. There is some difference of opinion in certain High Courts as to whether the bailment sections of the Indian Contract Act apply to carriage by sea. But in Sheik Mohamad Ravuther v. The British India Steam Navigation Co. Ltd. (1908) ILR 32 Mad. 95 the point now raised was considered, and Sir Arnold White and Mr. Justice Wallis, as he then was, held 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. This is also the law applicable in India." Mr. Justice Sankaran Nair took the contrary view, holding that it was inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions.
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> But we see no adequate reason here to adopt the view of the learned dissenting Judge.
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> It would, therefore, seem that the scheme of the Contract Act regarding bailment sections has been considered in the above case, but only in the context of carriage by sea and not in the context of a case such as the one in question.

24. My attention in this connection has also been invited to Lakhaji Dollaji and Co. v. Boorugu Mahadeo Rajanna 41 BLR 6 In this case, the plaintiffs instructed the defendants who carried on business as commission agents in bullion in Bombay to purchase silver bars on their account and to keep them. Accordingly, bars were purchased but three of them were lost at the pedhi (business premises of the firm). The plaintiffs sued for damages. The trial Court as well as the Division Bench were of the opinion that the defendants were negligent regarding the manner in which they kept the bars. So far as the contract was concerned, the Division Bench differed from the view that the learned single Judge had taken. The Division Bench was pleased to hold that the contract between the parties was not a contract to keep the bars at the risk of the plaintiffs. The contract only required the defendants to keep the bars as bailees for a reasonable time and they were not entitled to add a new term to the contract by providing that they were not to be under the ordinary liability which attaches to a bailee. Beaumont, C. J. then proceeded to observe as under:

> That really disposes of the appeal, but as the learned Judge dealt with certain points of law arising on the assumption that the contract was a contract to keep the bars at the plaintiffs' risk. I will deal shortly with that point. The Liability of a bailee is laid down by Section 151 of the Indian Contract Act which provides that in all cases of bailment a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would take in similar circumstances of his own goods of the same bulk, quality and value as the goods bailed. Then Section 152 provides that in the absence of a special contract a bailee is not liable for any loss, destruction or deterioration of the thing bailed if he has taken the amount of care described in Section 151, so that a bailee is liable for negligence, the standard of which is defined in Section 151. It is argued by Mr. Taraporewala that a bailee cannot contract himself out of Section 151, and that every bailee must at any rate be liable to the extent laid down in Section 151. This Court in Bombay Steam Navigation Co. Ltd. v. Vasudev Babunv (1927) ILR 52 Bom 37 following the case of Sheik Mohamad Ravuther v. The British India Steam Navigation Co. Ltd. (1908) ILR 32 Mad. 95 F.B. held that it was open to a bailee to contract himself out of the obligations imposed by Section 151, and I feel no doubt whatever that that view is correct. The Act does not expressly prohibit contracting out of Section 151 and it would be a startling thing to say that persons sue juris are not at liberty to enter into such a contract of bailment as they may think fit. Contracts of bailment are very common, although they are not always called by their technical name. I can see no reason why a man should not be at liberty to agree to keep property belonging to a friend on the terms that such property is to be entirely at the risk of the owner and that the man who keeps it is to be under no liability for the negligence of his servants in failing to look after it. The learned Judge took that view, but he held that the words "at your risk" did not amount to a contract taking the case out of Section 151. Therein I am unable to agree with him. It seems to me that on his judgment the words "at your risk" are given no meaning at all, and, if they are part of the contract between the parties, they must be given some meaning. The words mean that the risk is to be that of the owners, and not of the bailees. The only liability of a bailee is for negligence under Section 151, and, therefore, any words absolving him from risk must cover the consequences of negligence : see McCawley v.

> Furness Railway Co. (1872) L.R. 8 Q.B. 57 and Rutter v. Palmer (1922) 2 K.B. 87. Those cases show that there is a distinction between the case of an agent, like a common carrier, who is liable for loss or damage to goods whether or not occasioned by the negligence of himself or his servants, and the case of an agent, like a bailee, who is liable only for loss resulting from negligence. In the former class of cases a contract excluding liability may have effect given to it by excluding only the liability for acts not resulting from negligence unless of course the contract is so expressed as to make it clear that liability from negligence was to be excluded, but in the latter class of cases, where the only liability is in respect of negligence, any contract excluding liability must apply to acts of negligence because there is nothing else on which it can fasten. Had I, therefore, taken the same view as the learned Judge as to the nature of the contract between the parties, I should have said that the defendants have contracted themselves out of their liability as bailees. But, in my opinion, the true contract between the parties was that the defendants were to hold the bars for a reasonable time as ordinary bailees, and it was not open to the defendants to alter the contract until a reasonable time had expired, and they never suggested that a reasonable time had expired. In my opinion, therefore, the appeal fails and must be dismissed with costs.

25. Kania, J. also agreed that there was no contract in the case before them which excluded the liability provided in Section 151 of the Indian Contract Act. Kania, J., however, had not found it necessary to express an opinion as to the meaning of the words "at your risk" used in the particular circumstances of the case or the extent to which McCawley v. Furness Railway Co. or Rutter v. Palmer would apply in India.

26. As stated above, Vasudev Baburao's case (supra) and Sheik Mohamad Ravuther's case (supra) were cases regarding bill of lading in respect of which it was held in those cases that the law in England and India on the point was the same. In Lakhaji Dollaji's case (supra), the Division Bench has not examined the scheme of the Contract Act regarding the group of section concerning bailment as has been previously done in the dissenting judgment of Sankaran Nair, J. in Sheik Mohamad Ravuther's case (supra) or has been subsequently done by the Division Bench in Madholal's case (supra). As a matter of fact, the point in question has been shortly dealt with as stated in the judgment as the appeal in question was virtually disposed of on the factual aspect of the matter as stated hereinabove.

27. Reliance has next been put on Parshram Parumal Dabrai v. The Air-India Limited 56 BLR 944 by the learned Advocate for the respondent. In this case, the plaintiff through his representative delivered at Karachi on November 17, 1947 a parcel containing gold of the value of Rs. 1,80,000 to the defendants for carriage by their air service to Bombay. The defendants agreed to do so. The parcel arrived at Bombay and in due course was carried by the defendants to their office in Bombay and stored in iron cage there. The same was stolen from the iron cage before it could be delivered to the plaintiff. A suit was filed by the plaintiff to recover the value of the parcel. In the said suit it was held that the clause in Exhibit A under which it was sought to exclude liability of the defendants in so far as there might be loss or destruction or damage to the parcel during carriage by air in all its

stages as defined by Rule 18 was invalid but the same remained operative in so far as it excluded liability when the loss, destruction or damage occurred when the goods were not in 'carriage by air' and so the defendants must be regarded to have 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. The suit was accordingly dismissed and Appeal No. 121 of 1952 was preferred against the said decision but the same was dismissed (Chagla & Dixit, JJ.) on April 17, 1953 by consent of the parties.

28. While deciding as aforesaid, the learned single Judge has observed regarding Sections 151 and 152 of the Indian Contract Act as under:

> 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.
>
> 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.
>
> 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.
>
> 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) ILR 52 Bom. 37 and LakhajiDollaji and 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 Fut Chong v. MaungPo Cho (1929) ILR 7 Ran 339.

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 negli-gence 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 Mahamad Ravuther v. The British India Steam Navigation Co. Ltd. and Bombay Steam Navigation Co. Ltd. v. Vasudev Baburao.

In Sheikh Mahamad 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 undertake a 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.

A contract limiting such liability will be opposed to public policy and void under Section 23 of the Contract Act, as it will be against the interests of the mercantile community and not necessary in the interests of the shipowners.

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.

The statement in Note (1) at p. 497 of the Contract Act, 7th edn. by Pollock and Mulla 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.

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 Mohamad 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 Sheikh Mahamad Ravuther v. The British India Steam Navigation Co. Ltd. in deciding the case reported in Lakhaji Dollaji and Co. v. Boorugu Mahadeo Rajanna. Those decisions are binding upon me.

Mr. Mody has referred me to a judgment of a Division Bench of this Court reported in Official Assignee, Bombay v. Madholal Sindhu (1946) 48 Bom. L.R. 828 and the observations made in that judgment at p. 84. The only observation in that case on which reliance is placed is that in Sections 152, 163, 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 discussing 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. 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.

The aforesaid is a single Judge's decision. In this decision, the case of Fut Chong v. Maung Po Cho (1929) I.L.R 7 Ran 339 has been referred to The said case has also been reported at AIR 1929 Rangoon 145. In this case the facts were that the applicant was licensed pawn broker with whom certain jewellery was deposited by the respondent. A pawn ticket was issued and the pawn ticket contained a clause exempting the pawn broker from all liability in case of destruction of property by the

"five kinds of enemies, insects and mice. At the foot of the ticket appeared a note:

The following is regarded as acts of providence : destruction of vermin, rats, water, fire or robbery or theft.

It was held in this case that a bailee can contract himself out of liability. It is not clearly deducible from the terms of Section 152 that a bailee may only make a special contract increasing his responsibility and that he cannot make a special contract reducing it. While holding as aforesaid, it has been observed inter alia as under:

Upon the face of it, the argument lacks conviction, for if such had been the intention of the legislature it would have been a simple matter to give expression to it.

29. The learned advocate for the respondent-bank has heavily relied upon a Division Bench judgment of this Court rendered in Chhitarmal Anandilal and Ors. v. The Punjab National Bank Ltd. (1969) 10 ILR Guj. 480. This was also a case of pledge of goods to secure cash credit account which was opened by the borrowers with the respondent-bank. It was not disputed that on June 25, 1951, 3,593 bags of pulses were in the godown. It was also not disputed that when the panchnama of the godowns was made on July 24, 1951 on the bank lodging a complaint against defendant No. 3 a large number of bags of pulses was found missing and some bags of husks were instead found lying in the godown. It was alleged that the bank was responsible for the loss of goods while the bank had contended that it was protected by virtue of the special agreement and it was open to it to contract out of the minimum liability. While dismissing the appeal, Shah J. after reproducing Section 151 of the Indian Contract Act observed as under:

Thus, liability of the bailee is laid down in Section 151 of the Act. Bailee is liable to take as much care of the goods bailed to him as a man of ordinary prudence would take in similar circumstances of his own goods of the same bulk, quality and value as the goods bailed. The section prescribes an irreducible minimum care, required from bailee in general. The standard of diligence required of the bailee is that of the average prudent man. It is an objective standard similar to that of reasonable care having regard to the nature of goods. Section 152 provides that in absence of special contract, the bailee is not responsible for the loss etc. if he has taken the amount of care of the thing bailed as described in Section 151 of the Act. A pawnee is thus protected by Sections 151 and 152 of the Act. He is only required to take ordinary care of the goods. Even here, it is open to the bailee to contract himself out of the obligations imposed by Section 151 of the Act. A special agreement by the bailee to use more or less than the exact degree of care, the law would have required of him is, in general, valid. The Act does not prohibit contracting out of Section 151 of the Act. The only liability of a bailee is for negligence under Section 151 of the Indian Contract Act, and therefore, any words absolving him from risk must cover the consequences of negligence.

Thereafter, the aforesaid Lakhaji Dollaji and Co. v. Boorugu Mahadeo Rajaanna 41 BLR 6 has been referred to and the aforesaid observations of Beaumont, C.J. have been reproduced with approval. The aforesaid decisions in Bombay Steam Navigation Co. Ltd. v. Vasudev Baburao and in Sheik Mahamad Ravuther v. B.S.N. Co. Ltd. have also been referred to with approval. The Division Bench of this Court in the aforesaid Chhitarmal's case has then proceeded to observe as under:

Thus, the Bombay, Calcutta and Madras High Courts have taken a similar view on the point and we are in respectful agreement with the aforesaid observations to be found in those decisions. We are of the opinion that it was open to the Bank to contract itself out of the obligation imposed by Section 151 of the Act as it did.

The aforesaid Division Bench judgment of the Bombay High Court in the Official Assignee's case (48 BLR 828) has not been referred to in Chhitarmal's case (supra).

30. Another case relied upon by the respondent-Bank is that of Union of India v. Amar Singh wherein in paragraph 16 it has been observed as under:

If so, the next question that arises is what is the extent of the liability of the appellant in respect of the goods of the respondent entrusted to it for transit to New Delhi. We have held that, in the circumstances of the present case, the application of the provisions of Section 80 of the Indian Railways Act is excluded. If so, the liability of the Forwarding Railway is governed by Section 72 of the said Act. Under that section 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 the Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. Under Section 151 of the Indian Contract Act, the bailee is bound to take such 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 of the goods bailed; and under Section 152 thereof, in the absence of any special contract, he is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken such amount of care of it as described in Section 151. In other words, the liability under these sections is one for negligence only in the absence of a special contract. Generally goods are consigned under a risk note under which the Railway Company is absolved of all liability or its liability is modified. No such risk note is forthcoming in the present case. The question, therefore, reduces itself to an enquiry whether, on the facts, the Forwarding Railway observed the standard of diligence required of an average prudent man. The facts found by the High Court as well as by the Subordinate Judge leave no room to doubt that the Forwarding Railway was guilty of negligence in handling the goods entrusted to its care.

In the above Supreme Court's decision, Official Assignee's case 48 BLR 828 and the analysis of Sankaran Nair, J. in the aforesaid Madras decision have not been referred

> to or considered. The case was against the forwarding railway for compensation for non-delivery of goods entrusted to the said railway. It does not seem to have been specifically decided in the said case that a person can contract out of his liability imposed under Section 151 of the Contract Act. The scheme of the Contract Act regarding the group of sections concerning bailment does not seem to have been examined in detail.

31. In the case of Summon Singh v. National City Bank of New York Bombay AIR 1952 Punjab 172 a Division Bench of the Punjab High Court has examined the question as to whether according to the law of India the bank in Panama could contract out of its liability under Section 192 of the Contract Act, and has answered it in the affirmative. While doing so, the Division Bench has observed in paragraphs 18 and 19 of the judgment as under:

> A consideration of these authorities makes it clear that in India it is open to a person to contract out of his liability under Section 192 of the Contract Act. In Irrawaddy Flotilla Co. Ltd. v. Bugwandas 18 Ind. App. 121 P.C. at p. 129 Lord Macaghten said as follows:
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> The Act of 1872 (Indian Contract Act) does not profess to be a complete Code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts.
>
> I hold, therefore, (1) that there was a contract between the remitter and the remitting bank i.e., the City Bank, that the latter will not be liable for the negligence of its agents, (2) that the authorities show that such a contract can be entered into (3) that in spite of Section 192 of the Indian Contract Act it is open to the agent to contract out of his liability, (4) that the view taken by Sankaran Nair. J. is, with very great respect to the learned Judge, not correct and that contracting out is allowed under the law of India and (5) that the view of Mr. Justice Sankaran Nair has not been accepted by the other High Courts including Bombay, Madras itself and Rangoon. I am, therefore, of the opinion that the appeal of the plaintiff as against the City Bank also must fail.
>
> It may be noticed that the Official Assignee's case (48 BLR 828) has not been referred to in the said Division Bench judgment of the Punjab High Court.

32. Considerable reliance has also been put on Balkrishan R. Dayma v. Bank of Jaipur Ltd. and Anr. (1971) 41 Comp. Cases 557. In this Division Bench judgment of the Bombay High Court, the trial court's findings that on the facts of the case, the Bank took such care of the pledged goods as a bailee thereof was required to take under the law were upheld. It was further held that on a reasonable business-like construction of Clause 7 of the agreement the wording thereof was wide enough to include negligence on the part of the defendant's servants in taking care of the pledged goods. The

aforesaid Official Assignee's case 48 BLR 828 has not been referred to in this binding judgment. The scheme of the Contract Act pertaining to the group of sections regarding bailment has also not been considered in this judgment.

33. The aforesaid analysis shows that there are binding decisions of Division Bench of equal strength which have taken inconsistent views regarding the group of sections dealing with bailment of the Indian Contract Act, 1872 and the Supreme Court has not so far resolved the said controversy so as to declare that view expressed in the aforesaid case of Official Assignee Bombay and the views of Sankaran Nair, J. as divorced from the consideration of its application to bill of lading cases are not correct and do not lay down correct propositions of law.

34. Regarding precedents, my attention has been invited to Lala Shri Bhagwan and Anr. v. Ram Chand and Anr. AIR 1965 Supreme Court 1767. In paragraph 18 of the judgment, the Supreme Court has observed as under:

> Before we part with this appeal, however, we ought to point out that it would have been appropriate if the learned single Judge had not taken upon himself to consider the question as to whether the earlier decisions of the Division Benches of the High Court needed to be reconsidered and revised. It is plain that the said decisions had not been directly or even by necessary implication overruled by any decision of this Court, indeed, the judgment delivered by the learned single Judge shows that he was persuaded to re-examine the matter himself and in fact he had substantially recorded his conclusion that the earlier decisions were erroneous even before his attention was drawn to the decision of this Court in Laxman Pvrshottam Pimputkar 's case . It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be re-considered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself.
>
> The present case stands on a different footing since there are two sets of decisions of Division Benches of equal strength as stated above.

35. A special Full Bench of this Court consisting of five Judges has examined the question of precedents in the case of State of Gujarat v. Gordhandas Keshavji Gandhi 3 GLR 269 K.T. Desai, C.J. speaking on behalf of himself, Shelat and Mody, JJ. has observed as under:

> In the case of Jai Kaur and Ors. v. Sher Singh and Ors. , the Supreme Court has laid down that a decision of a Full Beach should be regarded as binding on a Division

Bench of the same High Court. In that case, the Supreme Court, at page 1122 observes as under:

> When a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. We had recently occasion to disapprove of the action of a Division Bench in another High Court taking it upon themselves to hold that a contrary decision of another Division Bench on a question of law was erroneous and stressed the importance of the well-recognised judicial practice that when a Division Bench differs from the decision of a previous decision of another Division Bench the matter should be referred to a larger Bench for final decision. If, as we pointed out there, considerations of judicial decorum and legal propriety require that Division Benches should not themselves pronounce decisions of other Division Benches to be wrong, such considerations should stand even more firmly in the way of Division Benches disagreeing with a previous decision of the Full Bench of the same Court.
>
> A Judge of this Court sitting singly will, therefore, be hound by Division Bench judgments of this High Court as also by Division Bench judgments of the Bombay High Court to the extent mentioned in the aforesa'd Full Bench decision.

36. K.T. Desai. C.J. has proceeded to observe as under:

> The rule that a Court should follow the decision of another Court of co-ordinate jurisdiction is subject, however, to several exceptions which have been dealt with in Salmond's Jurisprudence, 11th Edn. at page 199 to 217.
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> (1) A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.
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> (2) A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute.
>
> (3) A precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court.
>
> (4) A Court is not bound by its own previous decisions that are in conflict with one another. If the new decision is in conflict with the old, it is given per incuriam and is not binding on a later court.

Although the later court is not bound by the decision so given per incuriam, this does not mean that it is bound by the first case. Perhaps in strict logic the first case should be binding. Since it should never have been departed from, and was only departed from per incuriam. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own the court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later.

(5) Precedents sub silentio are not regarded as authoritative. A decision passes sub silentio when the particular point of law involved in the decision is not perceived by the court or present to its mind.

(6) Decisions of equally divided courts are not considered binding.

37. In view of the aforesaid, the question of referring the matter to a larger Bench does not arise. In the aforesaid circumstances, it must be held that it is not open under law to a bailee to provide under an agreement with the bail or for absolving the bailee from the minimum liability provided under Section 151 of the Indian Contract Act in a case such as the present.

38. The learned advocate for the respondent has not addressed me regarding the value of the missing bales as also regarding other claims made in the suit touching the pecuniary aspect of the case. The learned advocate for the appellant has also not challenged at the hearing the finding of the trial Court regarding the claim of Rs. 956 by way of interest up to the date of the suit. No submission has also been made regarding notice charges claimed in the suit.

39. In the result, the appeal partly succeeds. The judgment and decree of the trial Court dismissing Civil Suit No. 2321 of 1974 is hereby set aside to the extent mentioned above. The suit stands decreed in favour of the plaintiff and against the defendant in the sum of Rs. 21,249.55 with interest at 6 per cent per annum from the date of the suit till realisation. Respondent will pay the costs of the appeal to the appellant and bear its own.