CALCUTTA HIGH COURT

Commissioners for the Port of Calcutta

Vs.

General Trading Corporation. Ltd

A.F.O.D. No. 258 of 1959

(R.S. Bachawat and A.K. Mukherjea, JJ.)

19.09.1963

JUDGMENT

A.K. Mukherjea, J.

1. This is an appeal against two judgments dated April 4, 1957 and February 6, 1959 respectively as well as a decree dated February 6, 1959 passed by Mallick, J. The suit was filed by a company called the General Trading Corporation, hereinafter called the plaintiff company, against the Union of India and the Commissioners for the Port of Calcutta. The present appeal is by the defendant No. 2, viz. the Commissioners for the Port of Calcutta who will be hereinafter referred to as the Port Commissioners.

2. The facts on which the plaintiff Company have founded their claims against the defendants are shortly as follows : The General Trading Corporation Ltd. hereinafter referred to as the plaintiff Company were the consignee in respect of three consignments of woollen carpets consigned by Messrs. Obetee Ltd. On January 27, 1951, February 3, 1951 and February 5, 1951, respectively, 33 bales, 19 bales and 16 bales of woollen carpets were delivered by the said Messrs. Obetee Ltd., to the East India Railway Administration at Mirzapur Station of the said Railway for carriage to Kidderpore Docks, a station on the railway system belonging to the Port Commissioners. Another consignment of woollen carpets was consigned by Messrs. Rahamatulla and Bros., on January 1, 1951. This consignment consisted of 9 bales and 8 rolls of woollen carpets and was also delivered at the same station viz., Mirzapur station for carriage to Kidderpore Docks. Messrs. Rahamatulla and Bros. were also the consignees in respect of this consignment and they endorsed the railway receipt relating thereto in favor of the plaintiff. The said goods not having been delivered to the plaintiff the plaintiff Company filed this suit against the Union of India as the owner of the East India Railway Administration and the Port Commissioners as the owner of the railway system to which Kidderpore Docks belonged. The particulars of the plaintiffs' claims are set out in paragraph 5 of the plaint. They have claimed Rs. 2,83,527-9-8 pies as the value of the carpets forming the contents of the four consignments and Rs. 28,352-11-11 pies as loss of profits and also a sum of Rs. 1,405-11-0 pies as freight.

3. The defendant Union of India alleged that all the four consignments delivered to them by

either Messrs. Obetee Ltd. or Messrs. Rahamatulla and Bros, were duly handed over by them to the Port Commissioners and that the goods were burnt or destroyed in the fire that broke out in No. 1 Garden Reach Jetty on or about February 17, 1951 under circumstances beyond the control of either of the defendants. The defendant Port Commissioners have also filed a written statement. They do not admit any of the facts alleged in the plaint. Alternatively, they state that the goods covered by the railway receipts mentioned in the plaint were all stored in No. 1 Garden Reach Jetty on various dates in February, 1951. They claim to have taken as much care of the said goods as a man of ordinary prudence would under similar circumstances take of the goods throughout the time they were in their possession. The goods were lost or destroyed by reason of the fire of February 17, 1951. In spite of their best efforts the defendants could not extinguish the fire of the goods forming the subject-matter of the plaintiffs claims in this suit. The defendant Port Commissioners have also taken the plea that the plaintiff has no cause of action and also that the suit is barred by limitation by virtue of the provisions of the Calcutta Port Act, 1890. On these pleadings, the following issues were settled by Mallick, J. for determination :

1. (a) Did Obetee Ltd. deliver bales of Woollen Carpets to E. I. Rly. administration at Mirzapore as alleged ?

(b) Was the plaintiff consignee of the goods mentioned in paragraph 1 of the plaint ?
(c) Are the particulars of the goods set out in paragraph 1 of the plaint correct ?

2. (a) Did Rahamatullah and Brothers deliver bales of rolls of woollen carpets to E. I. Railway administration at Mirzapore as alleged or at all ?

(b) Were Rahamatullah and Brothers Consignee in respect of the said consignment?
(c) Are the particulars of the goods mentioned in paragraph 2 of the plaint correct?

3. Has the plaintiff any claim for delivery of the goods as against these defendants?

4. Were the goods lost by reason of misconduct and/or negligence of these defendants or of their servants or agents ?

5. Did these defendants convert any of the goods ?

6. Bid the plaintiff suffer any damages as alleged in paragraph 5 of the plaint ? If yes, what damages did the plaintiff suffer ?

7. Are the notices mentioned in paragraph 7 of the plaint valid and sufficient ?

8. Were the goods landed and stored in No. 1 Garden Reach Jetty belonging to these defendants on various dates in February. 1951 ?

9. Did these defendants take care of the goods in the manner stated in paragraph 8 of the written statement ?

10. Were the goods lost by reason of a fire in No. 1 Garden Reach Jetty on 17th February 1951

from some unknown cause ?

11. Has the plaintiff any cause of action against these defendants?

12. Did the plaintiff without any fault of these defendants failed to remove the goods from the said premises of these defendants within 3 working days from the said landing?

13. Is No. 1 Garden Reach Jetty a warehouse licensed under Section 16 of the Sea Customs Act, 1878?

14. Did the goods at the time of the alleged loss or damage on February 17, 1951 remain on the premises of these defendants at the sole risk and expense of the plaintiff by and under the provisions of Section 113, Sub-Section (2) of the Calcutta Port Act, 1890 ? Are the defendants liable in respect of the said loss or damage ?

15. Is the suit barred by limitation by virtue of the provision of Section 142 of the Calcutta Port Act, 1890 ?

16. Is the suit maintainable against defendant No. 1 ?

17. Has the Court jurisdiction to entertain the suit against defendant No. 1 ?

18. To what relief, if any, is the plaintiff entitled ?

4. At the time of trial, apart from various questions of law, three very important questions of fact came for determination. The first question was as to whether goods were actually destroyed by fire on February 17, 1951 while they were in storage in shed No. 1 of the Garden Reach Jetty. The second question was whether such destruction was due to any act of negligence on the part of the defendant Commissioners or their servants. The third question has as to the amount of compensation to which the plaintiffs are entitled.

5. With regard to the first question the learned Judge came to a finding that though the goods were discharged at the Garden Reach Jetty, Shed No. 1, there were no materials before him to show that the goods after discharge at that shed had not been removed. The learned Judge on this basis came to a finding against the Port Commissioners and held that it has not been proved to his satisfaction that the goods of the various consignments in suit were lying at Garden Reach Jetty, Shed No. 1 at the time of the fire on February 17, 1951.

6. In this view of the matter it was not strictly necessary for the learned Judge to consider the question of negligence, for, in the absence of evidence that the goods had been destroyed by fire the plaintiffs' case against the defendant Port Commissioners would be a case founded on conversion and it would be unnecessary to consider whether or not the Port Commissioners had been negligent in the handling or storage of the goods. The learned Judge, however, considered the question of negligence also and came to a finding that the Port Commissioners were guilty of negligence in keeping proper watch over the vast quantity of combustible goods stored in G.R. Jetty No. 1.

7. The learned Judge thereafter went into the question of damages in a subsequent judgment

delivered on February 6, 1959 and assessed the damages at Rs. 2,82,871-0-7 pies on the basis of the total invoice price of the goods covered by the railway receipt.

8. Apart from these questions of fact two very important questions of law were agitated before the learned trial Judge, firstly as to the question whether the plaintiff had any cause of action against the defendants and secondly as to the question whether the suit is barred by limitation by virtue of the provisions of Section 142 of the Calcutta Port Act, 1890. It will be of convenience if before dealing with the questions of law we dispose of the questions of fact as to whether the goods were destroyed by fire that broke out in the Port Commissioners' Dock on February 17, 1951. The answer to that question will determine the nature of the claims of the plaintiff company which in turn will decide whether the plaintiffs have any cause of action to sustain their suit against the defendants.

9. The Union of India in its written statement states that the goods forming the subject-matter of the suit were carried by the railways administered by them and delivered to the Port Commissioners at the Kidderpore Dock Station. The relevant pleadings are to be found in paragraphs 4, 5, 6 and 7 of the written statement filed by the Union of India. The fact of such delivery to the Port Commissioners is not seriously challenged either by the plaintiff Company or by the defendant Port Commissioners. In agreement with the learned Judge we hold that the goods had been delivered by the railways of the Union of India to the Port Commissioners and at the relevant time the goods were or should have been in the custody of the Port Commissioners. It appears that the plaintiff never made a case that the goods were not in G.R. Jetty Dock No. 1. Though various witnesses deposed on behalf of the Port Commissioners, there was no suggestion made to any of them by the plaintiffs' counsel that when the fire broke out the goods were not in the jetty or that the goods had not been destroyed by fire. On the contrary there is evidence to show that the plaintiffs all along proceeded on the basis that the goods were on the first floor of the Garden Reach Jetty and were destroyed by the fire of February 17, 1951.

10. Satyananda Ghose, a Director of the plaintiff company said in his evidence that he did not receive delivery of the goods 'due to are'. He had received this information from the Port Commissioners (Qq. 17 to 19). After the arrival of the goods at the Garden Reach Jetty he had sent two telegrams, One to Messrs. Obeete Ltd. and another to Rahamatullah and Bros. to the effect that the goods have been lost by fire. Immediately after the fire he had himself gone to the Docks (Q. 333) and he was satisfied that the goods were destroyed on the dock (Qq. 339, 343). Subsequently he qualifies his statement slightly by saying : "I would not say that I was satisfied beyond doubt". (Q. 344). Abdul Jaffar who was a partner of Rahamatullah and Bros and gave evidence on behalf of the plaintiff said in evidence that he had received information about the goods being destroyed by fire while in custody of the Port Commissioners (Q-157) and came down to Calcutta and saw the goods under fire "with my own eyes". Badal Pandit who was the shipping clerk of the plaintiff company said with reference to two of the railway receipts (Ext. 06 and 05 respectively) that the goods relating to those receipts were landed on the 13th of February and stored in "I Garden Reach Jetty". According to him this fact appears from the endorsements on the railway receipts (Qq. 95 to 100). Badal Pandit had taken delivery of three bales in respect of one railway receipt on the 17th February after 11 A.M., that is to say, immediately before the fire. He did not ask for the delivery of the goods of the other railway receipts on that day (Qq. 128 and 133). He states categorically that the goods in respect of the railway receipts in suit had already arrived and been stored in No. 1 G. R. J. (i.e., in No. 1 Garden Reach Jetty) (Qq. 148 and 149). He deposes that he had tried to salvage his own goods and had "asked the Port

Commissioners Babus to bring down the carpets which were he the first floor because the fire was raging in the downstairs" but the Babus told him that nothing could be done then (Qq. 191 : and 196). It is apparent that the plaintiffs' case was all throughout conducted on the basis that the goods were on the first floor of No. 1 Garden Reach Jetty and were destroyed by fire.

11. Some witnesses gave evidence on behalf of the Port Commissioners to show that the consignment after arrival at the Kidderpore Dock Station at the respective dates were conveyed to the Garden Reach Jetty Shed No. 1 before 17th February, 1951. Certain entries were proved from a book called "Howrah Goods Received on Delivery Book" to show the arrival of these goods in G. R. J. Shed No. 1. These entries were made on the basis of another document called "Unloading Advice" which however the Port Commissioners failed to tender in evidence because, they say, the document has been subsequently destroyed. While commenting adversely on the conduct of the Port Commissioners in destroying this important document, the learned Judge has, however, held in favor of the Port Commissioners that the evidence on record shows that the consignments in question were discharged at the G.R.J. Shed No. 1. In agreement with the learned Judge we also are satisfied that the evidence on record shows that this was the position with regard to the consignment in question. The learned Judge has, however, recorded the further finding that there is no proof that the goods in suit continued to be in Shed No. 1 and that they were not removed before the fire to Shed No. 2. Th appellant's Counsel argued before us that in view of the plaintiff's contention all throughout the case that the goods were in G. R. J. Shed No. 1 and were destroyed by fire, it was not necessary for the Port Commissioners to prove affirmatively that the goods after delivery into G. R. J. Shed No. 1 bad not subsequently been shifted from there prior to the fire. We accept this contention of the Port Commissioners. As I have already shown, the plaintiffs' witnesses themselves were satisfied that the goods were destroyed by fire in G. R. J. Shed No. 1. They never sought to make out a case that the goods have not been destroyed by fire. Though many important officials of the Port Commissioners gave evidence on behalf of the Port Commissioners, there was not one suggestion made to them on behalf of the plaintiff that the goods had been shifted from G. R. J. Shed No. 1 or that for any other reason the goods have escaped the fire which burnt down the entire G. R. J. Shed No. 1.
In these circumstances we have no hesitation in holding that the goods were actually destroyed by the fire in G. R. J. Shed No. 1 on 17th February, 1951.

12. The next question of fact arises whether the Port Commissioners took all reasonable care that a prudent man is expected to take for the protection of the goods. The learned Judge after analysing the evidence on record has held that the evidence was not convincing enough to enable him "to hold that each of the employees of the Port Commissioners performed his duty fully and adequately so as to exclude all negligence on their part." In particular, the learned Judge has severely criticised the Port Commissioners' conduct in not tendering in evidence the report of a Committee which was appointed by the Port authorities to inquire into the causes of fire. From non-production of the report the learned Judge held himself "bound to infer that the report, if produced, would not support the Port Commissioners' case that the cause of fire was unknown." The learned Judge has also held that he was not satisfied from the evidence that the Port Commissioners did not know the cause of fire. The learned Judge has further held that the system of watching of the godowns by the Port Commissioners is unsatisfactory. The learned Judge has recorded his finding in this language : "In my judgment whatever the cause of fire, its detection was so delayed 'that it became unmanageable when in fact it was detected. This delay in detection was attributable to the watch on the part of the employees of the Port Commissioners."

According to the learned Judge "the real cause of the havoc was delay in detection of the fire by the employees of the Port Commissioners which in its turn was caused by the inadequate arrangements for watch.

13. The appellants have contended before us that the usual measures and safeguards taken by the Port Commissioners for protecting from fire the goods lying in their warehouses were adequate.

14. Evidence has been adduced and arguments made to show that the Port Commissioners took all possible care against fire whether it was caused by smoking, by bad stacking, through defective electrical installation, by sparks from engine, or by internal combustion.

15. It appears that elaborate rules and regulations are provided for by the Port Commissioners to guard against fire. The shed itself is made of steel frame structures and its external walls are of reinforced concrete. The floor is of steel filled with cement concrete. Elaborate rules exist as to the various precautions to be taken against fire and also to various measures to be taken if, in spite of all precautions, there is am outbreak of fire. There is complete fire fighting organization properly equipped to fight fire. Smoking is prohibited and naked lights are not allowed. Rules have been devised for proper stacking of goods and there is evidence to show that the rules are strictly enforced. Even on the date-of fire the Deputy Docks Superintendent visited the place in the morning and found nothing wrong. In agreement with the learned Judge we are of the opinion that so far as rules go, they are quite satisfactory and that they do provide for adequate and reasonable precautions against fire. The Port Commissioners' case is that the cause of fire is unknown. Immediately after the fire the Port Commissioners held an enquiry into the fire. Witnesses were examined and a report prepared. It is unquestionable that with regard to afire taking place within the premises of the Port Commissioners, they are the only authorities who are competent or in a position to hold an adequate enquiry. The report of enquiry held by the Port Commissioners therefore, is bound to be of immense value. The Port Commissioners did not withhold the information that they had a report in their hands but they did not place the report before the learned Judge and claimed privilege in respect of the document in their affidavit of documents. The learned Judge in his judgment has rejected the Port Commissioners' claim for privilege and has severely criticized the Port Commissioners for withholding this document. At the hearing of the appeal it was strenuously contended before us on behalf of the appellants that it is not correct to say that the report had been suppressed by the Port Commissioners. The claim of privilege put up by the Port Commissioners was not challenged by the other side. It was open to the plaintiffs to ask for further discovery and the learned Judge could have ordered such further discovery in which event the Port Commissioners would have been compelled to disclose it. Instead of doing that, the learned Judge dealt with the matter merely in his judgment. The appellant contends that the statement in the affidavit of documents is conclusive and binding on the parties until the effect of that statement is taken away by a contrary order of the Court. In the circumstances, no adverse inference could be drawn from the nondisclosure of the report. Secondly, it was argued that the document in any event would have been inadmissible in evidence and even the depositions of various witnesses thereon could not be looked into in connection with this case. In our opinion it is not necessary for us to deal with this matter in view of the fact that we find on a different ground that the Port Commissioners failed to take all possible care with regard to the goods kept in their godown.

16. Certain facts stand out clearly from the materials on record. First, the fire was of a

devastating proportion. Secondly, by the time the fire was detected it had already become so extensive that the best attempts of the fire-fighting organization of the Port Commissioners failed to manage it. Thirdly, the Port Commissioners' regular system of watching the godowns provided for only one watchman for two big sheds. The learned Judge has found that on the evidence recorded before him it was quite clear that when the fire was first detected the fire was in progress for some time. We see no reason to differ from the learned Judge in this finding. There has been some suggestion on behalf of the appellants that when jute goods are stored on a large-scale it is possible due to internal combustion for fire to make a start somewhere in the interior of the jute bales so that a kind of tunnel of fire is created in the jute bales and when the fire comes out into the open it breaks out simultaneously in different parts of the stock of jute goods stored in a godown. There is no evidence to suggest that the fire was in fact due to internal combustion. The possibility of internal combustion was suggested more or less by way of speculation. In any event we are not convinced that if there had been a more vigilant and adequate watch maintained, the detection of the fire would not have been made at a point of time when the extent of its outbreak had not outstripped the Port Commissioners' powers of managing the outbreak. The fact that there is only one watchman for two huge sheds where valuable combustible goods are kept is to our mind a sign of inadequacy of the system of watch provided for by the Port Commissioners. In agreement with the learned Judge, therefore, we must hold that whatever the cause of fire its detection was so delayed that it became unmanageable when in fact it was detected and also that the delay in detection is attributable to negligence in "watch" on the part of the employees of the Port Commissioners. By reason of our finding on this aspect of the case we do not feel called upon to deal with the various other aspects of negligence discussed by the learned Judge in his judgment.

17. Mallick, J. in his judgment of 4th April, 1957 does not deal with the question of damages. There was some amount of evidence on damages during the hearing. In view of the fact that His Lordship had made a declaration in course of hearing that he should first decide the question of liability and then the question of damages and also in view of the fact that the parties might not have applied their mind sufficiently on the question of damages because of the labour and time involved in the determination of the question of liability, Mallick, J. decided not to record his finding on the point of damages on the materials existing on record on that date. His Lordship dealt with the point in a separate judgment delivered on February 6, 1959 after giving the parties further opportunities to disclose additional documents and also to produce further evidence. On the basis of the evidence tendered before His Lordship, His Lordship found; (i). that the plaintiffs-had no beneficial interest in the goods; (ii) whatever amount has been spent by the plaintiffs for handling the goods has been realised by the plaintiffs from the plaintiffs' principals; (iii) the plaintiffs' claim for remuneration for handling the goods was small and the plaintiffs suffered practically no loss on their own account; (iv) the little loss, if any suffered by the plaintiffs on account of commission is not recoverable on the present pleadings; (v) the goods sent by Rahamatullah and Bros, had been insured and insurance money realised; (vi) as regards the goods sent by Obeetee Ltd., His Lordship was inclined to think that these goods were also insured and the insurance money realised. On these findings His Lordship came to the conclusion that the plaintiffs were entitled only to the value of the goods. His Lordship also found that the value of the goods at the material date was the invoice price which amounted to Rs. 2,82,871/0/7 pies. This is the amount which, according to the learned Judge, the plaintiffs are entitled to recover as and by way of damages. The learned Judge found that the claim made in the plaint on account of loss of profit and freight is not recoverable. No cross objection has been filed on

behalf of the plaintiffs. Therefore, the only question that is left outstanding for us to consider is whether the value of the goods has been legally proved. The learned Judge's finding is based on the invoices. There is no independent evidence to prove that the value indicated in the invoices is a correct value. The three invoices of Rahamatullah and Bros. have been marked in a bundle as Exhibit B. The learned Judge in his judgment assumes that the invoice price correctly represents the true value of the carpets forwarded by the railway receipts. In our opinion mere tendering of the invoices as exhibits does not prove the value of the goods. The plaintiffs should have given evidence to prove the contracts between the foreign buyers and the sellers in support of their claim that the values of the goods as shown on the invoices are correct. The witnesses connected with the seller's firm said that the invoice price is usually the cost price plus 10 per cent, representing cost and freight and profit so that the invoice price may reasonably be taken as the price of the goods. But there is no satisfactory evidence to support this. The plaintiffs sought to support their case by adducing evidence as to the value of certain carpets sold by another firm called A. Tellory and Sons to Chatterjee Furnishing Ltd. The learned Judge rejected this evidence on the ground that there was nothing to show that those carpets were of the same quality as the carpets covered by the railway receipt in this suit. In this view of the matter we hold that the plaintiffs have failed to prove the quantum of damages for which they are asking for compensation.

18. I proceed now to discuss the questions of law and start with the question of limitation. At the time of trial the defendant Port Commissioners raised two objections bearing on the question of limitation.

19. First, it was contended that the plaintiffs' claim is barred under Section 113(2) of the Calcutta Port Act under which

> "if any owner, without any default on the part of the Commissioners fail to remove any goods from the premises of the Commissioners within two clear working days from the time of landing, such goods shall remain on the premises at the sole risk and expense of the owner."

On the facts of the case it was argued that the defendant Port Commissioners will be absolved of all responsibility under this Section. The learned Judge overruled this contention. The appellant did not challenge this decision of the learned Judge at the hearing of the appeal.
20. Secondly, it was contended on behalf of the appellants that the suit is governed not by any of the Articles under the Limitation Act, but by the provisions for limitation contained in Section 142 of the Calcutta Port Act which reads as follows :

> "No suit shall be brought against any person, for anything done, or purporting or professing to be done, in pursuance of this Act, after the expiration of three months from the date on which 'the cause of action in such suit shall have arisen."

21. The appellants urge that the cause of action arose in this case on February 17, 1951 and that consequently the time for filing the suit expired, on May 17, 1951.

22. The plaintiffs took two preliminary objections to this argument of the defendant Port Commissioners, viz., that this section applies only to a suit brought against "any person" and that the word "person" cannot mean the Port Commissioners and that the act constituting the cause of action in this suit cannot be described as "anything done or purporting or professing to be done in pursuance of "the Calcutta Port Act. Mallick, J. rejected the first objection of the plaintiff on the I ground that the Port Commissioners are a body corporate under Section 4 of the Calcutta Port Act and hence a 'person' within the meaning of Section 5(2) of the Bengal General Clauses Act. Mallick, J. relied on a judgment of Sarkar, J. in the case of *Probhudas Mulji Dosi v. Governor-General of India in Council*[1], The judgment of the Judicial Committee of the Privy Council in *Commissioners, for the Port of Calcutta v. Corporation of Calcutta*[2], has now put this point beyond doubt since the Port Commissioners in that case successfully invoked Section 142 of the Calcutta Port Act. In any case, the plaintiffs abandoned this point before us. As for the second objection raised on behalf of the plaintiffs this also was rejected by Mallick, J. who after considering various authorities like *ILR Basantalal v. Commissioners, for the Port of Calcutta*[3], *Hazi Sattar Hazi Pir Mahammed v. Commissioners for the Port of Calcutta*[4], an unreported decision of H.K. Bose, J. (as he then was) as well as analogous provisions in other statutes of India and England, came to the finding that since in the instant case the goods were to be exported and were lying in the godown of the Port Commissioners awaiting shipment, "the Port Commissioners were acting in direct pursuance to the Calcutta Port Act". This finding of Mallick, J. was not seriously challenged by the plaintiffs-respondents at the time of the hearing of the appeal. While I do not subscribe to all the views expressed by Mallick, J. in coming to this finding, I am in respectful agreement with the finding itself and do not feel called upon to deal with the point further. I consider it sufficient to say that Section 142 of the Calcutta Port Act will apply in the instant case and the period of limitation is therefore three months from the date of the accrual of the cause of action. A point of real difficulty, however, arises at this stage. It is contended by Mr. Bhattacharyya on behalf of the plaintiffs-respondents that even if Section 142 of the Calcutta Port Act applies and even if limitation starts running from February 17, 1951 when the goods were alleged to have been destroyed by fire, the suit is not time-barred. It is argued that in computing the period of limitation the plaintiffs will get the advantage of the period of extra two months which was the period of notice under Section 80 of the Civil Procedure Code. The suit, it will be remembered, was not only against the Port Commissioners but also against the Union of India as the owner of the other railway systems through which the goods were

[1] ILR 1951 (1) Cal 443
[2] 64 Ind App 363
[3] 1951 (1) Cal 443
[4] AIR 1951 Cal 460

carried before they were delivered at the Kidderpore Dock Station belonging to the Port Commissioners. This is a point which requires careful consideration. Section 15(2). of the Indian Limitation Act runs as follows :

> 15 (2). "In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded."

23. It is clear that by reason of these provisions where a plaintiff in a suit against the Government is required to give notice to the Government under Section So of the Code of Civil Procedure, he

would be entitled to exclude the period of notice, i.e., 2 months, in computing the period of limitation prescribed for the suit. No authority is needed for this proposition which is obvious on the face of it. Reference may, however, be made to the cases reported in *Shri Bhagwan v. Secy. of State*[5], *Secy. of State for India v. Venkataratnam*[6], *B. and N. W. Rly. Co. v. Ramsarup Lal Chaudhuri*[7], Some complications arise in this case because apart from the Government, there is in this suit another defendant and, in fact, the principal defendant, viz., the Port Commissioners. It is clear that if no notice under Section 80 of the Civil Procedure Code is necessary on the facts of a particular case, the plaintiff cannot by serving a notice under Section 80 of the Civil Procedure Code succeed in extending the period of limitation by the period of such notice : *D. Weston v. Peary Mohan Das*[8], In agreement with, the learned Judge we accept the plaintiffs' contention that in the instant case the Union of India was at best a "proper" party. The question arises, therefore, as to whether the plaintiffs are entitled to a deduction of the period of two months not only as against the defendant Union of India to whom the notice under Section 80 of the Civil Procedure Code was to be given, but also entitled to a deduction against the defendant Port Commissioners. Mr. Bhattacharyya for the plaintiffs relied on the case of *Mohammed Shariff v. Nazir Ali*[9], and also the case of *East Indian Railway v. Rahimullah Ilahi Bakhsh*[10], The defendant Port Commissioners relied on a decision of the Calcutta High Court in the case of *Gangadhar Nanda v. Janaki Moni Dassi*[11], Mallick, J. after considering all these authorities held in favor of the plaintiffs that Section 15(2) of the Limitation Act would apply to this case and the plaintiffs would be entitled to compute the period of limitation by excluding the period of notice under Section 80 of the Civil Procedure Code. After consideration of the case laws on the subject we agree with the learned Judge that Section 15(2) of the Indian Limitation Act would apply to this case and that the suit is not barred by limitation of time. We are also in agreement with the learned Judge that even apart from Section 15(2) of the Indian Limitation Act. the suit has been filed in time since limitation starts running from the date of accrual of the cause of action and in the instant case it cannot be said that such cause of action arose before June 25, 1951 which was the first date when the Port Commissioners intimated their inability to give delivery of the goods to the plaintiffs.

24. One of the questions that arises in this case is as to whether this Court has jurisdiction to hear the case against the Union of India. We agree with the learned Judge that so far as

[5] ILR 1939 All 392 : AIR 1939 All 277
[6] ILR 46 Mad 488 : AIR 1923 Mad 652
[7] AIR 1922 Pat 549
[8] ILR 40 Cal 898
[9] AIR 1930 All 742
[10] AIR 1928 Lah 349
[11] AIR 1919 Calcutta 919

the Port Commissioners are concerned this Court has jurisdiction to entertain this suit. We also agree with the learned Judge that the jurisdiction of this Court as against Union of India cannot be invoked on the ground that Government carries on business within jurisdiction. The learned Judge held following the decision of my Lord Bachawat, J. and H.K. Bose, J. (as he then was) that the notice under Section 80 of the Civil Procedure Code is a part of the cause of action and that since this notice had been served upon the Union of India within the limits of the jurisdiction of this Court, this Court will have jurisdiction to entertain this suit. This position has now become untenable in view of the judgment of P.B. Mukherji, J. and H.K. Bose, J. (as he then was) in the later case of *Niranjan Agarwala v. Union of India*[12],

25. This being the position under the latest case-law, a further question may arise as to whether the plaintiff can still invoke Section 15(2) of the Indian Limitation Act were this Court has no

jurisdiction against the party upon whom it is necessary to serve a notice under Section 80 of the Civil Procedure Code. In view of our finding that the suit has been filed in time irrespective of the provisions of Section 15(2) of the Indian Limitation Act, I do not feel it necessary to deal with this point.

26. The next question that we have to consider is as to whether the plaintiffs were entitled to file this suit against the defendants. The plaintiffs were the consignee in respect of the three consignments sent by Messrs. Obeetee Ltd. In respect of the consignment sent by Messrs. Rahamatullah and Bros. the consignee was Messrs. Rahamatullah and Bros., who had endorsed the railway receipt in favor of the plaintiffs. It is admitted that the plaintiffs were not owners of any of the consignments. As regards the consignment of Messrs. Obeetee Ltd., they themselves were the owners of the goods represented by the three railway receipts. The plaintiffs were named as consignees in the railway receipts so that they as shipping agents of Messrs. Obeetee Ltd., could clear the goods and arrange for their shipment to foreign buyers. The plaintiffs were to receive commission for acting as such shipping agents. With regard to the other receipt, M/s. Rahamatullah and Bros., the consignors, were the owners of the goods represented by the railway receipt. They also forwarded the railway receipt to the plaintiffs in order that the plaintiffs as their agents could clear the goods from the railways and ship them to certain foreign buyers of the goods. The plaintiffs did not pay any moneys in respect of any of the goods before the goods were actually destroyed by fire. They, however, paid the freight payable in respect of these goods to the defendant Port Commissioners. As against this payment however, the plaintiffs have admittedly received equivalent amounts from the respective owners of the goods.

27. It further appears from evidence that the actual owners of the goods had insured the goods and have actually received compensation for the goods from the Insurance Company concerned. In fact, the railway receipt in respect of the goods consigned by M/s. Rahamatullah and Bros, was actually returned to them by the plaintiffs for the purpose of realizing the insurance moneys. This receipt was not produced at the trial of this suit. On the whole, it is clear from the evidence that the plaintiffs had no beneficial interest in the goods and were merely acting as shipping and forwarding agents on behalf of the owners of the goods. No consideration passed between the plaintiffs and the owners of the goods for the delivery and endorsement of the railway receipts in favor of

[12]64 Cal WN 502 : AIR 1960 Cal 391

the plaintiffs. In these circumstances it was contended on behalf of the appellant Port Commissioners that the plaintiffs were not entitled to maintain an action in respect of the goods covered by the four railway receipts. It was argued that the plaintiffs were not the parties who entered into the contract of carriage with the railways nor can it be said that in entering into the contract of carriage with the railways, the consignors had acted as the agents of the plaintiffs. Therefore, the plaintiffs are not entitled to sue the railways on the contract. Nor did the plaintiffs have any proprietary or beneficial interest in the goods so that they are not entitled to sue the railways in tort either. Out of these contentions urged on behalf of the appellants, two important questions of law have arisen : (a) Is the consignee named on a railway receipt entitled to sue the railway for non-delivery of the goods; and (b) Is a bare endorsee of a railway receipt entitled to sue the railways ?

28. When a person delivers goods to a railway administration for despatch he or his authorised

agent must sign a forwarding note. The consignor or his agent thereupon receives a railway receipt. The railway receipt contains the terms and conditions upon which the railway authorities accept the goods for transportation. The forwarding note and the railway receipt together constitute the documents which evidence as well as contain the terms and conditions of the contract between the parties. When goods are booked through over the railway systems of two or more railway administrations, the person tendering the goods is deemed to have contracted with each one of the railway administrations. Under Section 80 of the Indian Railways Act, if such goods are subsequently lost, destroyed or damaged a suit for compensation for loss or damage may be brought either against the railway administration to which the goods were delivered by the consignor or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred. Under this section a kind of statutory liability is created for the railway administration on whose system the loss occurs even though ordinarily speaking there is no privity of contract between the consignor and this railway. In the instant case, the contract of carriage was executed between the consignors and the East India Railway Administration. But by virtue of the provisions of Section 80 of the Indian Railways Act, one can proceed as if the contract was also between the respective consignors and the Port Commissioners on whose railway system the actual loss occurred.

29. Under the ordinary law of contract it is only the contracting party who can sue on a contract. This is a direct consequence of the doctrine of privity of contract and is true even in respect of a contract of carriage. Primarily, the person with whom a carrier is supposed to enter into a contract when it receives goods for carriage is the consignor. The liability of the carrier for any breach of the contract to deliver the goods safely and without injury should, therefore, be only towards the consignor who enters into the contract with the carrier. The position, however, becomes slightly complicated in the case of a contract of carriage by three facts. Firstly, in many cases the consignor is a mere agent for the consignee who is the real principal on whose behalf the contract of carriage is entered into. Secondly, quite often the very fact of delivery of goods to a carrier alters at the moment of such delivery the ownership of goods so that in such cases also it may be contended that the real party with whom the carrier enters into the contract of carriage is the consignee in whom the ownership of the goods is vested upon delivery of the goods to the carrier. Thirdly, even apart from the contract of carriage, the railway may be made liable in tort for conversion of or damage to the goods in which cases, of course, only the owners of the goods are entitled to maintain an action in tort. The question whether the consignors or the consignees are the owners of the goods is really, a question depending on the circumstances of each case.

30. The rights and liabilities of a carrier vis-a-vis the consignor or the consignee have gradually crystallized as a result of a series of English decisions culminating in the celebrated case of *Dunlop v. Lambert*[13], I propose now to discuss these English decisions which, in my opinion, have really shaped the law on the subject.

31. In *Davis v. James*[14], the vendors 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 action ought to have been brought in the name of the consignee of the goods and not in the name of the consignors : for that the consignors parted with their property upon their delivering the goods to the carrier; and that no property remained in them after such delivery. Lord Mansfield in overruling the objection delivered the judgment in words that have now become famous :

"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."

32. In *Moore v. Wilson*[15], a common carrier was sued by the consignors for not safely carrying and delivering goods. The declaration stated that the defendant carrier in that case undertook to carry the goods "for at certain hire and reward to be paid by the plaintiffs." It was proved at the trial that Clarke, the consignee, had agreed with the plaintiffs to pay the carriage of the goods. On this ground it was objected that the evidence did not support the declaration. The plaintiffs were non-suited. There was a motion for a new trial on the ground that the allegation about the hire having been paid by the plaintiffs was immaterial and that in all cases of this kind the contract was virtually made between the carrier and the consignor of the goods, that no private agreement between the consignor and the consignee could vary the question as between the consignor and the carrier and that though the consignor might have parted with the property in the goods, he might maintain an action against the carrier. Buller, J. who had earlier non-suited the plaintiffs held that on reconsidering the question he found he had been mistaken in point of law, "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." The rule for a new trial was made absolute.

33. In *Dawes v. Peck*[16], an action was brought by Dawes the consignor of goods against the defendant Peck a common carrier, for not safely carrying two casks of gin from London to one Thomas Odey of Warwickshire within the time limit of the excise permit in respect of the goods. The casks of gin were seized and forfeited to the Crown. The

[13](1859) 6 Cl and Fin 600
[14](1770) 5 Burr 2680
[15](1782) 1 Term Rep 659
[16](1799) 8 Term Rep 330

question arose as to whom was the person competent to bring an action against the carrier. In course of trial a letter was read out to the jury in which the plaintiff had written to Odey, the consignee, after the fact of seizure had been known, that the liquors sent

"were in quantity and prices exactly conformable to your (Odey's) order but by what authority they were ever left at the Crown Inn, at West Haddon remains for the innkeeper, or carrier to explain or account for. All I have to observe is this that the goods having been sent conformably to your orders and by the carrier you directed I shall certainly look to you for their amount". On the basis of this letter Lord Kenyon was of opinion that the action by the plaintiff could not .be supported for that the legal right to the goods. After such delivery was vested in the consignee to whom alone the carrier was answerable, if at all and therefore the plaintiff was non-suited. A new trial was moved for and a rule nisi was issued. At the hearing of the motion it was contended on behalf of the plaintiff that both, the consignor and the consignee could maintain the action against a, carrier for the loss of goods. The consignor's right of action arose because of the privity of contract between him and the carrier. In the particular case in question the booking was paid for by the consignor which was an evidence of a contract between him and the carrier and the

consignor remained liable to the carrier for the price of the carriage if the consignee did not accept the goods. Lord Kenyon C.J. in dismissing the plaintiff's motion declined to accept the plaintiff's argument that the right of property on which the action is founded fluctuated according to the choice of the consignor or the consignee. His Lordship held that the question

"must be governed by the consideration, in whom the legal right was vested; for he is the person who has sustained the loss, if any, by the negligence of the carrier and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured." On the facts of the case, His Lordship said, "the vendee must stand to the risk". In the same case Grose, J. observed :

"The plaintiff who was at one time the owner of the goods delivered them by the order of Odey to the defendant, a common carrier, for the purpose of having them conveyed to Odey. By such delivery they became the property of Odey. It is true that while the goods remained in the hands of the carrier there was a latent right in the plaintiff to stop them in transit; but that is in its nature an equitable right, though now grown into law; but the legal right was, by the delivery of the carrier, vested in the consignee by whose order they were so delivered."

Lawrence, J. held :

"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 which 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."

The rule was discharged.

34. In *Brown v. Hodgson*[17], goods which were consigned to a merchant in a foreign country were stated in the bill of lading to be shipped "by order and on account of Hesse and Co. of Hamburgh". Before the goods arrived at Tooningen that place was declared in a state of blockade and the ship was ordered to return home by an English frigate. On her arrival at the Thames, the captain made an affidavit that he believed the cargo to be Danish property in consequence of which the goods were unloaded by an order from the Court of Admiralty and afterwards labelled as lawful prize to His Majesty. The goods were, however, by a subsequent decree of the Court of Admiralty restored to the plaintiffs. The plaintiffs in their declaration contended that the captain had made the affidavit knowing it to be false and claimed damage for the injury the goods had suffered and also the expense incurred by the plaintiffs in the Admiralty Court proceedings. It was contended on behalf of the defendant that the action could not be maintained by the plaintiffs who had no property in the goods. Since the bill of lading stated the goods to be shipped by order

and on account of Hesse and Co. the property in the goods vested in Hesse and Co. the moment the goods were put on board the ship. Lord Ellen-boroagh accepted the defendant's contention and said : "I can recognise no property but that recognised by the bill of lading. This action cannot be maintained." The plaintiffs were on these grounds non-suited.

35. In *Joseph v. Knox*[18], there was an action against the owner of a ship on a bill of lading signed by the master for not carrying goods from London to Surinam. The bill of lading stated that the goods were shipped and the freight was paid by the plaintiffs and that they were to be delivered in Surinam to Levy Davids or his assigns. The defendant contended that the action could not be maintained by Joseph and Co. who had no interest in the goods and were merely a conduit through which the goods were to be transmitted from two persons of Amsterdam to Levy Davids at Surinam. The property being in Levy Davids he alone was injured by the non-delivery of the goods and he alone could sue to recover their value. Lord Ellenborough was of the opinion that the suit was competent and observed :

> "There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shippers they have no interest in the goods and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods and they will hold the sum recovered as trustees for the real owner."

36. In *Sargent v. Morriss*[20], the bill of lading provided that the captain was to deliver the goods to the consignor and in his name to the consignee. At the time of shipment, the consignee had no property in the goods. The plaintiff who was the consignee upon receiving advice of the shipment effected an insurance on account of Bayo, the consignor

[17](1809) 2 Camp 36
[18](1813) 3 Camp 320
[19](1820) 3 B and And 277

and advanced the premiums before the arrival of the ship. It was objected that the action ought to have been brought by Bayo and Sons, the consignors and not by the plaintiff, the consignee. The Lord Chief Justice found in favor of the plaintiff. Upon a motion by the defendant for non-suit, it was argued on behalf of the plaintiff that the plaintiff had a qualified property in the goods which was sufficient to entitle him to maintain the action, for he had paid freight and premiums of insurance. To that extent the plaintiff contended he had a lien and might maintain trover. Abbott, C.J. held that the bill of lading on the face of it does not show distinctly whether the contract made by Bayo and Sons was made on their behalf or as the agent of Sargent who is named in the bill of lading as the person to whom delivery is to be made. From other circumstances it appeared afterwards that the shipment was made on account of Bayo and Sons, at their risk, and, for their benefit and not at the risk or for the benefit of the plaintiff. Bayley, J. observed :

> "Now I take the rule to be this : if an agent acts for me and on my behalf, but in his own name then, inasmuch as he is the person with whom the contract is made, it is no answer

to an action in his name, to say that he is merely an agent, unless you can also shew, that he is prohibited from carrying that action by the person on whose behalf the contract was made. In such case, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made. In policies of insurance, it is a common practice to bring an action either in the name of the agent or the principal. In this case, the contract appears, by the terms of the bill of lading, to have been made with the Spanish house. Then for whom was it made ? Why, upon the evidence in the cause, on account of the Spanish house. It is, however, urged, that inasmuch as Sargent had made certain advances on their account, they were his goods at the time of the shipment. Now, in the first place, there is no evidence to shew, that at the time of the shipment, he had made any advance whatever. At that time, the right of action was vested in the party to whom the goods belonged. What was done subsequently does not affect this point. As to the advance, I take it to have been made in the ordinary way in which an agent makes an advance for his principal, in respect of which he would be entitled to sue his principal, on whose credit the advance was made. If, indeed, the goods had reached his possession, he might have had a lien till he had been repaid; but no lien can take place till the goods come into his possession. The prospect of a lien made in respect of advances subsequent to the shipment, never can satisfy the allegation of the plaintiff, that he had caused the goods to be shipped and that the defendants contracted with him to deliver; the contract, in fact, was not with him, but with Bayo".

37. The position in law was examined thoroughly in the celebrated case of (1859) 6 Cl and Fin 600. That was a decision of the House of Lords and may be regarded as the locus classicus on the subject. The appellants were wine and spirit merchants in Edinburgh. The respondents were the owners of a steam vessel. The appellants shipped on board certain quantities of spirit addressed to one Robson of Newcastle. The bill of lading declared the goods to be deliverable unto Robson or his assigns. While in course of a voyage from Leith to Newcastle, the vessel came across a severe tempest and the crew of the vessel were compelled to jettison a part of the cargo of the vessel for the safety of the vessel and its crew. Immediately after the spirits had been shipped, the appellants had written a letter to Robson, the buyer, notifying him about the shipment and sending him an invoice along with the bill of lading by which the goods were made deliverable to him or his assigns. When the ship arrived at Newcastle it appeared that the casks of spirit were among the goods jettisoned by the crew while at sea. The question arose whether the respondents, that is, the carriers were responsible to the appellants who were the consignors for the loss of the property where it appeared that the consignors had sent an invoice to the consignee charging the consignee for the freight and insurance which had in the first instance been paid by the consignors. Lord Cottenham, L.C. in delivering the judgment dealt with the matter practically from first principles. The following principles were laid down by the Lord Chancellor :

(i) Delivery by the consignor to the carrier is as a general rule a delivery to the consignee and the risk after such delivery is the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance : the delivery to the ordinary carrier is then a delivery to the

consignee and the consignee incurs all the risk of the carrier and it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent;

(ii) The general rule stated above is capable of being varied by special arrangement between the parties. Thus, where the consignor undertakes to consign and undertakes to deliver at a particular place, the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignors. Again, the consignor may make such a special contract with the carrier 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.

(iii) Generally speaking, therefore, where there is a delivery to a carrier to deliver to a consignee, the consignee is the proper person to bring the action against the carrier should the goods be lost;

(iv) 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, i.e., the person making the contract with the carrier may maintain the action, though the goods may be the goods of the consignee.

(v) The consignor is entitled to maintain the action where there is a contract to deliver at a particular place provided the risk appears in fact to be still on him.

38. Lord Cottenhara rested his judgment not merely on general principles, but on various cases which His Lordship dealt with in details in his judgment. In particular, His Lordship dealt with (1770) 5 Burr 2680, (1782) 1 Term Rep 659, (1799) 8 Term Rep 330, (1820) 3 B. and Ald. 277 and (1809) 2 Camp 36.

39. In *Coombs v. Bristol and Exeter Rly. Co*[19]. the plaintiff, an umbrella manufacturer and dealer in whalebone at Bristol had agreed with one Avery to buy from him any quantity

[19](1858) 3 H. and N. 510 : (157 ER 572)

of whalebone that he could procure at 2 section 7 d. a pound; the whalebone was to be delivered at the station of the defendant railway at Exeter and addressed in the name of the plaintiff who was to pay the carriage. Some whalebone to an amount exceeding £10 having been delivered at the railway station by Avery to be consigned been duly invoiced through him was lost in the transit. Avery then wrote to the plaintiff requesting him to make a claim against the Railway company. One of the questions that arose was as to whether any property in the goods had passed to the plaintiff in view of the fact that the contract was for sale of goods above the value of £10 and there was no agreement is writing for acceptance of the goods within the Statute of Frauds. Pollock, C.B. observed :

"The question is whether the property passed to the vendee. If it passed, the plaintiff, the vendee, is the proper person to sue; if not, the vendor should have sued. It would be very inconvenient to treat the liability of a carrier as ambulatory, to hold that he is not liable to the consignee unless the latter does some act showing an intention to treat the contract as valid but that he may be made liable by the act of the consignee in bringing an action.....

> 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."

On the facts of the case Pollock, C.B. found that there had been no acceptance of the goods by the vendee and there was nothing else to take the case out of the Statute so that property did not pass to the plaintiff. On that ground the plaintiff was non-suited. Bramwell, B held :

> "I do not think that in fact the contract was made in the name of the plaintiff. 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 :

> "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 sale or approval. If when the goods arrive it is open to the consignee to repudiate them, there is no complete contract."

Watson, B quotes with approval the proposition stated by Parke, B in *Swain v. Shepherd*[20],

> "Generally speaking when goods of a fair merchantable quality are forwarded in pursuance of a written order which binds the person giving the order to receive the goods, the property passes to that person by the delivery to the carrier."

40. As a result of these decisions which we have just discussed as well as of subsequent decisions which, followed them the following principles have now emerged in a more or less crystallized, form on the question as to who between the consignor and the consignee is entitled to sue the carrier i.e., the Railway for loss or non-delivery of goods :

[20](1832) 1 Moore and Rob 223

> (i) (a) Where the action is founded on contract, the right to maintain an action on the contract belongs to the person who entered into the contract. Ordinarily that person is the consignor.
>
> (b) Where, however, the consignor acts as an agent of the consignee and the contract is actually entered into on behalf of the consignee, the consignee may sue in his own name.
>
> (c) Thus, if the property in the goods passed to the consignee at the time of the delivery of the goods to the railway (as indeed it often can happen under Section. 23 of the Indian Sale of Goods Act), the consignee would be deemed to be the person who had entered into the contract of carriage with the railway company through his agent, the consignor. In such a case, the consignee is the proper party to sue.
>
> (d) It would be open nonetheless 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.

(ii) Subsequent dealings with, the railway receipt after the goods have been consigned would have no effect on the incidents of contract as between the consignor and the railway company. They would have a bearing on the rights and liabilities of the consignor and the consignee inter se.

(iii) (a) The owner of the goods, however, is entitled as such to sue for the loss or non-delivery or injury to the goods.

(b) Ordinarily the consignee is presumed to be the owner of the goods. Such presumption is, however, rebuttable.

(c) Where the consignor has parted with his title to and ownership of the goods, the consignor cannot maintain an action against the carrier on the basis of such ownership.

(d) Where, however, the property has not passed out of the consignor, the consignor must sue in his own name as, for instance, in the case of goods sent for sale on approval.

41. These principles are valid as much in India as they are in England. In most of the Indian cases on the subject, however, we find that the question of the rights of the consignor or the consignee to maintain an action against the railways for non-delivery or loss of goods is mixed up with the question of the rights of an endorsee to maintain such an action. It may, therefore, be convenient before discussing the Indian cases to deal with the rights and obligations of the railway vis-a-vis a person in whose favor a railway receipt is endorsed.

42. The essential thing to remember is that an endorsee enters into the picture after the making of the contract and that endorsement is an element in the process of transfer of the railway receipt. We may as well start by considering how a railway receipt is ordinarily transferred.

43. One of the conditions under which the railway generally accepts goods for carriage is that delivery of the goods to the consignee named in the railway receipt or to a person whose name is endorsed on the back by the consignee of the railway receipt is a sufficient discharge of the obligations of the railway. In the instant case, for example, condition 3 on the back of the railway receipts reads as follows :

> "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.

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."

44. When a consignor wants to transfer the railway receipt to the consignee, he merely delivers it

to the consignee named in the railway receipt. Such delivery without further endorsement is enough to constitute a sufficient transfer of the railway receipt to the consignee.

45. When a person named on the railway receipt as the consignee wishes to make a transfer of the railway receipt, he is not only to deliver the railway receipt to the transferee but also to endorse the railway receipt. He may make the endorsement in favor of a named person and deliver the railway receipt to him in which case it is only such named person who can take delivery of the goods. But the consignee can also make a blank endorsement and deliver it to the transferee in which case the transferee may in his turn make a further transfer by delivering the same railway receipt to the second transferee. This process of transfer may then go on by successive deliveries to successive transferee. As soon as the name of a particular transferee who is to receive the goods represented by the railway receipt is endorsed on the railway receipt he only can receive the goods unless under the conditions of the contract of carriage he can make a further subsequent transfer by another endorsement and delivery.

46. Condition 3 of the railway receipt to which we have just referred shows that if a railway receipt bears an endorsement made by the consignee asking the railway to make delivery to a person named therein the railway company may proceed on the footing that the endorsee is constituted an agent of the consignee to receive delivery of the goods on his behalf. That means either the consignee himself has to take delivery of the goods or he may send his agent in which case he has to indicate to the railway company by an endorsement on the back of the railway receipt the name of the person whom he authorizes to receive the goods on his behalf. In the case of multiple endorsements, it is the last endorsee who is to be taken by the railway company as the person authorized to receive the goods on behalf of the consignee.

47. In practice, there are various ways in which a consignee deals with a railway receipt. Sometimes a railway receipt is pledged as a security for advances made to the consignee. Sometimes again a consignee sells the goods covered by the railway receipt to a *bona fide* transferee for value.

48. Certain special consequences arise from the fact that a railway receipt has by certain statutes been given the position of a "document of title". It is necessary, therefore, to consider what are the incidents of a document of title and also what are the effects of placing a railway receipt in that category.

49. Section 103 of the Indian Contract Act (Act IX of 1872) in dealing with the seller's right to stop goods while they are in transit to the buyer used the expression "instrument of title". Sections 102 and 108 of the same Act used the expression "document showing title." In Section 108 the expression "document showing title" was used in connection with a "bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods". All these various sections of the Indian Contract Act were repealed by the Indian Sale of Goods Act, 1930. Section 178 of the Indian Contract Act repeats the same enumeration with this difference that this Section instead of using the expression "document showing title" uses the expression "document of title". None of these sections specifically mentions the railway receipt as a "document of title" or "document showing title". Section 137 of the Transfer of Property Act, 1882 (as amended by the amending Act II of 1900) explains

> "mercantile document of title to goods" by saying that this expression includes a bill of lading, dock warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of the goods or authorizing or purporting to authorize either by endorsement or by delivery, the possessor of tie document to transfer or receive goods thereby represented."

This section is to be read as a part of the Contract Act by virtue of the provisions of Section 4 of the Transfer of Property Act. The definition of the expression "mercantile document of title to goods" in Section 137 of the Transfer of Property Act is taken practically verbatim from the definition of "document of title" in Section 4 of the English Factors Act, 1842 and again in Section 1(4) of the English Factors Act of 1889 (52 and 53 Vict. c. 45) which was adopted by Section 62 of the English Sale of Goods Act, 1893 (56 and 57 Vict. C. 71).

50. In *Ramdas Vithaldas v. S. Amer Chand and Co*[21]. the Judicial Committee of the Privy Council had to consider the effect of this difference in terminology in the use of the expressions '"document showing title", "instrument of title" and "document of title to goods" and, in particular, the question as to whether a railway receipt which entitled an endorsee by the conditions of carriage to take delivery of the goods represented by the receipt was an instrument of title to goods within the meaning of Section 103 of the Indian Contract Act, 1872. The appellants in that case were a firm of commission agents who had been instructed by one Chhaganlal Kalidas, a tradesman at Bombay to purchase certain cotton at Eagalkote and deliver the same after ginning and pressing to Chhaganlal Kalidas at Bombay. The appellants after some tune handed to the Madras and Southern Maratha Railway Company at Bagalkote consignments of cotton for delivery in Bombay to Chhaganlal Kalidas. The cotton was to be carried by rail to Marmagoa and then by sea from there to Bombay by the Bombay Steam Navigation Company. The railway receipts

[21] 43 Ind App 164

issued by the railway company against the goods covered the entire journey from Bagalkote to Bombay and were transmitted by the appellants to Chhaganlal Kalidas who endorsed and delivered two of the railway receipts to the appellants and one to another party by way of security against advances. The hundis drawn in favor of the appellants by Chhaganlal Kalidas were not met and the appellants tried to stop the bales of cotton by telegraphing to the Bombay Steam Navigation Company asking them not to deliver the goods to the consignee but to deliver to a named agent of the appellants. The parties to whom Chhaganlal had endorsed and delivered the railway receipts also claimed the bales in question. Arising out of these transactions two suits were filed. Macleod, J., of the Bombay High Court who heard the first suit held : (1) the appellants viz., Ramdas Vithaldas Durbar had the rights of unpaid sellers to stop the goods in transit; (2) the railway receipts were not instruments of title within the meaning of Section 103 of the Indian Contract Act. Macleod, J., also found on the facts of the case :

> "amongst merchants and commission agents, dealing in cotton in Bombay railway receipts indorsed by one holder to another are considered as representing the goods and entitling the last indorsed to delivery. But it does not follow from that, that there is a usage that the last indorsed is entitled to delivery as against an unpaid vendor who stops the

goods in transit."

The second suit was tried by Beaman, J., but by agreement between the parties, judgment was given in accordance with the first decision of Macleod, J., subject to appeal. Thereafter, both appeals were dealt with by the Bombay High Court in one judgment (see *S. Amarchand and Co. v. Ramdasi*[22]). Before Sir Basil Scott, C.J. and Chandavarkar, J., who heard the appeals it was conceded that Ramdas Vithaldas Durbar were in the position of unpaid vendors. Their Lordships found on the facts of both cases that the advances had been made in good faith and held :

(i) part of the transit being by sea, the railway receipts were similar to bills of lading and were "instruments of title" within the meaning of Section 103 of the Indian Contract Act :
(ii) that the Transfer of Property Act, 1882 by Section 137 had declared "railway receipts" to be "instruments of title";
(iii) that the evidence as to usages of trade showed that the receipts were instruments of the character referred to in Section 103.

51. On these findings, the judgments of Macleod, J. and Beaman, J., were reversed. Against this appeal late decision, an appeal was preferred before the Judicial Committee of the Privy Council who upheld the appellate decision of Bombay High Court. Lord Parker who delivered the judgment of the Board considered the various sections of the Indian Contract Act and also the provisions of the English Factors Act, 1842 and held that

"whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of the goods or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the

[22] ILR 38 Bom 255 : AIR 1914 Bom 290

document to transfer or receive the goods thereby represented." In the particular case before the Board the railway receipts in question satisfied that test. On this ground their Lordships held that even without the assistance of Sections 4 and 137 of the Transfer of Property Act "the receipts in question are documents showing title to goods within Sections 102 and 108 and documents of title to goods within Section 178 of the Indian Contract Act". Referring to Section 102 of the Indian Contract Act, Lord Parker construed the effect of the section as follows :

"First, so far as bills of lading are concerned, it enacts the rule of the common law by which a second buyer who obtained an assignment, of the bill of lading obtained constructive delivery of the goods represented by the bill so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading."

52. Construing the effect of Section 103, in particular with reference to its use of the terminology "instrument of title", Lord Parker observed in the first place that title in both the expressions, viz.,

"instrument of title" or "document of title" can relate only to the right to receive the delivery of the goods to which the instrument or document relates. "It can have nothing to do with ownership". His Lordship also observed that "the only point in which a bill of lading differs from other documents of title is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers and that then is no other document of title with this peculiarity."

53. When the Indian Sale of Goods Act, 1930 was passed the whole of Chapter VII the Indian Contract Act comprising Sections 76 to 103 was repealed by Section 65 of the Indian Sale of Goods Act. Section 2(4) of the Indian Sale of Goods Act defined "document of title to goods" in the same language in which the expression "mercantile document of title to goods" had been defined in Section 137 of the Transfer of Property Act.

54. In *Official Assignee of Madras v. Mercantile Bank of India Ltd.*[23], the question arose whether the pledging of railway receipts was a pledge of the goods represented by the railway receipts of merely a pledge of the actual documents, i.e., "a pledge of the ipso corpora of the documents." Their Lordships of the Privy Council after considering the effect of Sections 102, 103, 172 and 178 of the Indian Contract Act, Section 137 of the Transfer of Property Act 1882, as well as Section 2(4) of the Indian Sale of Goods Act, 1930 held that a railway receipt which under its conditions of contract provides that delivery of the consigned goods is to be made upon the receipt being given up by the consignee or by a person whom he names by indorsement thereof is a document of title within the meaning of Section 178 of the Indian Contract Act, 1872 and a pledge of the railway receipts operated under that section (as it stood before its repeal in 1930) as a pledge of the goods. The pledge does not release the pledge by banding the receipt to the pledgor in order that he may collect the goods from the railway company and place them in a ware-house on behalf of the pledge. In dealing with the question Lord Wright who delivered the judgment of the Board considered the history as well as the present state of the relevant law in England. As His Lordship's judgment has often been misconstrued, I think it appropriate to set out a portion of His Lordship's observations here:-

[23]61 Ind App 416

> "At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledger had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were, if, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledge, the change being perfected by the third party affording to the pledge, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery; the goods in the hands of the third party came by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was 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. This exception has been explained on the ground that the goods-being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant developed in order to facilitate mercantile transactions, whereas the process of, pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken, before the importance of documents of title in mercantile transactions was realised. So things have remained in the English law; a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always-excepting a bill of lading) is merely a pledge of the ipsa corpora of them; the common law continued to regard them as merely tokens of an authority to receive possession ....."

His Lordship goes on to observe : "It need not be repeated that bills of lading stand apart."

55. The net effect of the decisions of the Privy Council in 43 Ind App 164 and 61 Ind App 416 is therefore, only this that railway receipt and other documents mentioned in Section 2(4) of the Sale of Goods Act are assimilated to bills of lading, for the purpose of Sections 103 and 178 of the Indian Contract Act. Except for this limited extent these documents are not to be treated on the same footing as bills of lading. In fact the two Privy Council decisions contained the clearest possible indication that a railway receipt is not to be assimilated to a bill of lading for all purposes. It is unfortunate that in spite of this clear warning of the Privy Council there has been a tendency in many Indian decisions to ascribe to a railway receipt various properties and attributes which belong only to a bill of lading which, by its peculiar position in the Law Merchant and also by reason of the special provisions of the Bill of Lading Act (Act IX of 1856) which in terms-is practically a reproduction of the English Bills of Lading Act, 1855 (18 and 19 Vict. c. III), occupies altogether a different position. This contusion has been created by the use of the terms "railway receipt". "dock-warrant", "warehouse-keeper's certificate" and "warrant or order for the delivery of goods" in juxtaposition to the term "bill of lading" and by the description of all these documents under the compendious term "documents of title". Even in England there was a stage in the development of English mercantile law when much, confusion arose because all these terms were often used together as documents of title. As a result, 'delivery orders', 'dock-warrants', etc., were often likened to bills of lading which in turn were likened to bills of exchange. The distinction between these different kinds of documents, though material and significant, became blurred and was often overlooked. Lord : Ellenborough in *Waring v. Cox*[24], observes that "much confusion has arisen from similitudinary reasoning on the subject". The confusion which plagued earlier English common lawvers seemed to have sorely troubled us also in India and apparently, still continues to do so as we shall presently see when we discuss the Indian case-law on the subject.

56. From the aspect of negotiability a railway receipt is more or less comparable to a bill of lading as it was at common law before the passing of the Bills of Lading Act, 1855 in England. As I have already said the Indian Bills of Lading Act, 1856 followed immediately after the passing of the Bills of Lading Act, 1855 in England and corresponds exactly to the English Act. It is, therefore, important to consider what were the exact legal properties and incidents of a bill of lading in England both before and after the enactment of the Bills of Lading Act in 1855. The course of evolution of a bill of lading is neither clear nor simple; its exact incidents have been the subject of many a legal battle in England. But the dusts of controversy seem to have settled long ago and one can now trace the course with a reasonable degree of certainty.

57. When goods are sold they are not always in the possession of the vendor; they are often in the possession of a third person, e.g., a warehouseman, a wharfinger or a carrier or for the matter of that any other bailee. In such cases, as a matter of convenience, the vendor often gives delivery by directing this third party or bailee to deliver the goods to the buyer or to hold the goods subject to the control of the buyer. The question arises as to when the delivery to the buyer becomes complete. Before delivery, the goods, while in the possession of the bailee, are deemed to be in the possession of the seller himself for the bailee is in the contemplation of law a mere agent for the seller. After the delivery becomes complete, the bailee becomes the agent of the buyer and the goods come into the constructive possession of the buyer though in fact they still continue to remain in the possession of the same bailee. Delivery becomes complete as soon as the bailee is transformed from his status as an agent for the seller into the status of an agent for the buyer. It is easily understood that under ordinary law this can happen only if all the three parties, viz., the vendor, the bailee and the buyer join in the agreement for the simple reason that the agent of the seller cannot be converted into an agent for the buyer without his own knowledge and consent. In such circumstances the seller by merely handing over to the buyer a delivery order directing the bailee either to deliver the goods to the buyer or to hold them under the control of the buyer does not effect such a change of possession as would amount to actual receipt unless the bailee accepts the order or recognises it or consents to act in accordance with it. Even if the buyer obtains by transfer a 'warrant' issued originally by the bailee himself that will not amount to an actual receipt by the buyer unless the bailee attorns to it (see *Bentall v. Burn, (1824) 3 B and C 423*, *Farina v. Home*[25],). This is the legal principle underlying Section 20(3) of the English Sale of Goods Act. The corresponding provision in the Indian Sale of Goods Act, 1930 is Sub-Section (3) of Section 36. Though this was the position with regard to documents like delivery order or warehouseman's warrant or wharfinger's certificate, the

[24](1808) 1 Camp 369 [25](1846) 16 M and W 119

position of a bill of lading was different. A transfer of a bill of lading by the vendor of the goods to the buyer was always regarded as constituting an actual receipt- The reasons for this are obvious. When goods are at sea in the possession of the shipowner's agent, the buyer who has taken the bill of lading cannot possibly seek out the master of the ship and ask him to assent to the transfer and thereby attorn to his rights. When, however, the goods are on land, there is no obstacle to the buyer's taking immediate possession of the goods, actual or constructive. "There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession of the goods and yet not give such an effect to the transfer of documents of title to goods on shore". In the celebrated words of Bowen, L.J., is *Sanders v. Maclean*[26], "it is the key which, in the hands of the original owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be".

58. Benjamin on Sale, 8th Edition, at page 742 observes :-

> "Other mercantile documents, such as delivery orders dock and wharf warrants and warehousemen's and wharfinger's certificates and a fortiori informal documents, such as 'undertakings' to deliver, do not like bills of lading represent the goods, so far as delivery by the seller in performance is concerned, so as when indorsed to transmit the possession itself, but are mere 'tokens of an authority to receive possession' in the future;

consequently in the case of these documents the attornment of the bailee is necessary, or possession of the goods must be taken by the buyer."

59. This common law distinction between the transfer of a bill of lading (in which case no attornment by the bailee is necessary) and the transfer of other documents of title (where suck attornment is necessary has not been completely wiped out by the Sale of Goods Act, English or Indian.

60. What exactly is transferred by the endorsement and delivery of the bill of lading is a more difficult question. A bill of lading is not only an instrument issued by the carrier to the consignor in acknowledgment of receipt for the goods delivered to and received by the carrier (ordinarily a shipowner) but also an agreement to carry the goods from the place of shipment to the place of destination. The effect of assignment if the bill of lading by endorsement and delivery is different according as it is considered as a receipt for the goods or as an evidence of the contract of carnage. Besides, the Bills of Lading Act fundamentally altered the effect of such endorsement and delivery of a bill of lading.

61. The celebrated and yet highy controversial case of *Lickbarrow v. Mason*[27] (revsd. *Sub-nom Mason v. Lickbarrow*[28], and subsequent proceedings, (1794) 5 Term Rep. 683) has been always regarded as the most important source of law upon the subject. That case, as is well known, was never properly concluded and the. Judges who figured in the various hearings of that case at various stages between the years 1787 and 1794 were much divided in opinion. Even today there is great confusion among jurists as to what exactly was decided or intended to be decided by that case. The judgment of Lord Loughborough is, however, generally regarded as an accurate exposition of the nature of

[26](1883) 11 QBD 327 (341)
[27](1787) 2 Term Rep 63
[28](1790) 1 Hy Bl. 357

a bill of lading in spite of the fact that the judgment of the Court over which he was presiding was reversed upon the essential point in issue. Lord Loughborough after considering the Circumstances attending the transfer of a bill by special endorsement indicates what should be the guiding principle in the determination of all question arising out of the transfer of a bill of lading and observes :

> "The general property remains with the shipper of the goods, until he has disposed of it, by some act sufficient in law to transfer property. The endorsement of the bill of lading is simply a direction of the delivery of the goods; when this endorsement is in blank, the holder of the bill of lading may receive the goods and his receipt will discharge the ship-master; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special endorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge of the skip-master; and in this respect I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the endorsee; a right to receive the goods and to discharge the ship-master as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater

> force than the actual possession of the goods. Possession of goods is prima facie evidence of title, but that possession may be precarious as of a deposit; it may be criminal as of a thing stolen; it may be qualified, as of things in the custody of a servant, a carrier or a factor. Mere possession without just title gives no property and the person to whom such possession is transferred by delivery must take his hazard of the title of his author." (*Lickbarrow v. Mason*[29], at pp. 359-60).

62. After these observations. Lord Loughborough draws three principles regarding the nature of a bill of lading. First, "an order to direct the delivery of goods endorsed on a bill of lading, is not equivalent to or even analogous to the assignment of the order to pay money by the endorsement of a bill of exchange". Second, "the negotiability of bills and promissory notes is founded on the custom of merchants and positive law; there is no such law relating to such an instrument as a bill of lading". Third, a bill of lading is cot negotiable as a bill, but assignable and "passes such right and no better, as the person as signing had in it :- ..... mere endorsement can in no case convey an absolute property."

63. Lord Loughborough's observations have stood the test of history in spite of occasional onslaughts in subsequent decisions, none of which succeeded in endowing the bills of lading with any greater magic than what Lord Loughborough ascribed to them. The verdict of the jury in the second trial of *Lickbarrow v. Mason*[30], that

> "by the custom of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been and are at any time after such goods have been shipped and before the voyage performed, negotiable and transferable by the shipper or shippers of such

[29](1790) 1 Hy BL 357

[30](1794) : 5 Term Rep. 683

> goods to any other person or persons .....; and that by such endorsement and delivery, or transmission, the property in such goods hath been and is transferred and passed to such other person or persons" has been the subject of scrutiny and commentary in a series of decisions. This special verdict was the source of what is now widely recognized as an incorrect statement of Lord Eltenborough in *Coxe v. Harden*[31], that "an endorsement of a bill of lading for a valuable consideration and without notice by the endorsee of a better title passes the property". Lord Ellen-borough himself retreated from this position only two years later in *Newsom v. Thornton*[32], by holding that an indorsement of a bill of lading does not pass the property in goods except where it is intended so to operate. This last statement is recognised as completely true even now. There were occasional deviations from this position, for example, in *Pease v. Gloahec*[33], *Leduc v. Ward*[34], *Barber v. Meyerstein*[35], But the true doctrine was finally re-established in *Sewell v. Burdick*[36], where it was clearly held that the mere endorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property of the goods to the endorsee so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act". Referring to the special juror's verdict in *Lickbarrow v. Mason*, viz., that

> "bills of lading are after the shipment and before the voyage is performed, negotiable and transferable by the shipper's endorsement and delivery ..... and that by such endorsement and delivery the property in such goods is transferred,"

Lord Selborne first notes that this is also the language of Bills of Lading Act and then goes on to observe :

> "I do not understand it as necessarily meaning more than that 'the property' which it might be the intent of the transaction to transfer, whether special or general, passes by such an indorsement according to the custom of merchants. The finding must be reasonably understood ; it cannot (for instance) mean that the property will be transferred when there is no consideration."

64. Lord Blackburn comments (at page 100 of the Report) that "neither the statement of the custom of merchants in the special verdict in *Lickbarrow v. Mason* nor the opinion of Buller, J. justifies the inference that the endorsement of a bill of lading for a, valuable consideration must pass the entire legal property, whatever was the intention of the parties."

65. Decisions subsequent to *Lickbarrow v. Mason* have now made it clear that an endorsement and delivery of a bill of lading made after shipment of the goods and before complete delivery of their possession has been made to the person having a right under the bill of lading to claim them transfers such property as it was the intention of the patties to the endorsement to transfer. The presumed intention of the parties in endorsing a bill of lading may vary according to the circumstances. Thus, intention may be to transfer absolutely the property in the goods subject only to the unpaid vendor's right of stoppage in transitu or to pass the property on certain conditions or to effect a mortgage of the goods as security for an advance or to effect a pledge of the goods for the same

[31](1803) 4 East 211 [33](1866) LR 1 PC 219 [35](1817) 4 HL 317
[32](1805) 6 East 17 [34](1888) 20 QBD 475 [36](1884) 10 AC 74

purpose and sometimes even to pass no property at all in the goods (sea Scrutton on Charterparties and Bills of Lading, 16th Edition, Articles 58 and 59 at pp. 194-95). Scrutton after referring to the decision in (1884) 10 AC 74 comments that the special verdict in *Lickbarrow v. Mason*, that "the property is transferred by endorsement" must be read as "the property which it was the intention to transfer is transferred."

66. It follows logically that a mere holder of a bill of lading, if he has no interest in the goods nor authority from the real owner to sell an interest in them, could not, in cases to which the Factors Act did not apply, give to his endorsee any title in the goods even though the endorsee had *bona fide* given value for such endorsement of the bill. An endorsement of a bill of lading does not by itself prima facie confer any legal right of possession of the endorsee or anything more than an authority to receive; in this respect a bill of lading is totally unlike a bill of exchange and can scarcely be called negotiable. The vital characteristic of negotiability is that if a transferee for value takes a negotiable instrument with good faith and without notice of any defect in the title of the transferor, he acquires an indefeasible right to the property in the instrument and to the benefits represented thereby. He acquires not merely possession but property. Bills of lading do not satisfy this requisite of negotiability. Bills of lading would never pass from hand to hand like

money. A bare assignment of a bill of lading does not invest the assignee with any legal right either of property or possession of the goods. It confers upon him merely an authority to receive the goods. Unless there is an independent assignment of an interest in the property of the goods (either absolute or limited), an assignment of the bill of lading would not give the assignee such an interest in the goods as would enable him to maintain an action in his own name for any injury done to them. (See Blackburn on Contract of Sale, 3rd Edition p. 431).

67. But what is the effect then of the fact that a bill of lading is also a written contract ? The effect is no more than this that the shipowner undertakes an obligation to deliver the goods to the person who is designated as the assignee by the shipper of the goods. By delivering the goods to the assignee the shipowners, or the master of the ship acting as his agent, fulfill their obligations under the contract. If they refuse to deliver the goods to the assignee, there is a breach of the contract. But, as Blackburn points out in his treatise on the 'Contract of Sale', "the contract contained in a bill of lading is a chose in action and there was no means whatsoever by which any person Could be rendered a party to the contract contained in a bill of lading who was not a party t0 it from its first inception". The result was this that prior to the Bills of Lading Act, 1855 even if the assignee of a bill of lading had acquired the full legal and equitable property in the goods, so that the damage arising from the non-delivery was exclusively his, still he was compelled to bring any action on the contract in the name of the original contractor as his trustee; for, its general, contracts do not by the law of England run with the goods and no custom has ever been recognized making the contract contained in a bill of lading an exception. This principle had been stated by Lord Blackburn also in his judgment in (1884) 10 AC 74 (at page 91 of the Report) where commenting on the position of bills of lading at common law His Lordship observes :

> "Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the endorsement of the bill of exchange; but I think since the decision in *Thompson v. Dominy*[37], in 1845, it has been undisputed law that under no circumstances could any one not a party to the contract from the beginning sue on it in his own name. Any action on the Contract at common law must be brought in the name of the original contractor and no action could be brought on the contract against one who was not liable to be sued as an original contractor."

68. The Bills of Lading Act of 1855 (18 and 19 Vict. c. III) alters the position by providing :

> "Every consignee of goods named in a bill of lading and every indorsed of the bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment, or endorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." One should not however, overlook that even after the enactment of the Act where the property does not pass by the endorsement, the endorsee does not acquire by the endorsement any right to sue on the contract evidenced by the bill of lading (See Scrutton on Charterparties and

Bills of Lading 16th Edition at p. 194).

69. In the light of the foregoing discussion we can now briefly recapitulate the incidents and attributes of bill of lading as well as the effect of endorsement and delivery of a bill of lading by the Law Merchant, that is to say, before the Bills of Lading Act, 1855 as well as after the enactment of that Act.

(1) A bill of lading is both a receipt as well as a contract. It is a receipt for the goods shipped in a particular ship. At the same time it contains and evidences the terms on which the goods are delivered by the shipper and received by the shipowner or his agent.

(2) A bill of lading though often loosely described as a negotiable instrument is not, in the strict and technical sense, a negotiable instrument. As Scrutton says, it is negotiable to the same extent as a cheque marked 'not negotiable' i.e., it is transferable.

(3) By the mercantile custom endorsement and delivery of a bill of lading made after the goods have been shipped and before they have been delivered to the person having a right under the bill to claim the goods, transfers only such property as it was the intention of the parties to the endorsement to transfer. "On a transfer therefore, of the bill of lading by way of sale or mortgage or pledge the property in the goods passes either absolutely or otherwise, according to the intention of the parties, provided that the transferor was competent to dispose of the goods; and the right of the original owner to the goods to stop them in transit is either wholly defeated (in the case of an absolute transfer by way of sale) or becomes subject to the mortgage or pledge" (Halsbury's Laws of England, 3rd Edition, Vol. 35 P. 332)

(4) So far as the ship-owner is concerned, ha is under an obligation to deliver the goods to the holder of the bill of lading on production of the bill. Such delivery

[37](1845) 14 M and W 403

absolves the ship-owner from any other obligation even where the holder is not in fact the owner of the goods and is not entitled to the goods provided, of course, that such delivery is made in good faith without notice of any defect in the holder's title.

(5) Under the common law, endorsement and delivery of a bill of lading did not transfer the contract contained in the bill of lading to the endorsee.

(6) An endorsee could not at common law sue the shipper on the contract contained in the bill of lading merely because the property in the goods had been transferred to him by endorsement and delivery of the bill of lading. The endorsee, however, had such right of suit as would ordinarily belong to a person having a proprietary interest an the goods. Such right of suit was, however, independent of the contract contained in the bill of lading and generally arose ex delictu that is, for conversion or negligence. If no property or interest in the goods has been transferred to the endorsee he was merely a collecting agent on behalf of the endorser and had merely the right to receive the goods. He could bring no action against the ship-owner in his own name. An endorsee without a proprietary interest was in the position of a consignee who had no right of property in the goods.

(7) After the Bills of Lading Act, 1855, endorsement and delivery of the bill of lading

transferred to the endorsee all the rights under the contract contained in the bill of lading.

70. As we have already said, the position of a railway receipt in India is exactly like that of a bill of lading at common law, that is to say prior to the enactment of the Bill of Lading Act, 1855 in England and the enactment of the Bill of Lading Act, 1856 in India. The properties and incidents of a railway receipt and the effect of endorsement and delivery of the same in India can therefore, be formulated on exactly parallel lines as follows :-

(1) A railway receipt is like a bill of leading a receipt for the goods delivered by the consignor and accepted by the railway as well as contract.
(2) A railway receipt is not a negotiable instrument.
(3) Transfer of a railway receipt by endorse, merit and delivery after the goods have been railed and before they have been delivered to the consignee passes only such property in the goods as it was the intention of the parties to the endorsement to transfer. On transfer of a railway receipt by way of sale, mortgage or pledge, the property in the goods would pass absolutely or otherwise according to the intention of the parties provided that the transferor is competent to dispose of the goods.
(4) The railway discharges its obligations completely as soon as it delivers the goods to the consignee or to person whose name is endorsed on the railway receipt as the assign.
(5) Endorsement and delivery of the railway receipt does not transfer the contract contained in or evidenced by the railway receipt to the transferee.
(6) An endorsee of a railway receipt cannot sue the railway on the contract contained in the railway receipt merely because the property or an interest in the goods has been transferred to him. He only has such right of suit as would belong to a person haying a proprietary interest in the goods - that is to say, he can sue in his own name only for conversion or negligence. Without such property or interest he has only the right to receive delivery of the goods and his position can be likened to the position of a consignee who has no right of property in the goods.

71. I now propose to deal with the Indian Case-law on the subject. As I have already said, the question of the rights of the consignor or the consignee to maintain an action against the railways has, in the Indian cases, been mixed up with the question of the rights of an endorsee. In fact, the rights and obligations of the consignors, the consignees and the endorsees are so inextricably mixed up in the Indian decisions that it is often difficult and sometimes well-high impossible to decide whether the ratio of a particular case is based on the rights that a person may have qua consignor, or consignee or qua endorsee. The decisions, moreover, are not always clear as to whether a plaintiff's right of action, where such right has been upheld, is founded on the contract contained in the railway receipt or on the right of property which such person may have in the goods represented by the railway receipt. The confusion is increased further by the very profusion of the judgments. One can say, however, that judging by sheer quantity a large majority of the decisions is in favor of the view that a bare endorsee is entitled to sue the railway administration. With the utmost respect to the learned Judges who held that view, I cannot vield to the persuasion of either number or quantity by subscribing to that view. The judgments on this subject are so numerous that one would have almost been over-whelmed by them, but for the fact

that a very large majority of these decisions base themselves on certain earlier decisions which in turn take their ratio from still earlier decisions in such a manner that one can almost trace a genealogy among these decisions. Some decisions in both groups, that is to say, of the majority view as well as the minority view have been regarded as outstanding and subsequent decisions have done nothing more than follow them so that if the more important cases in each group are dealt with one can almost cover the whole field by saying that no otter additional principles or reasons can be found in the other cases. It is, therefore, not necessary to deal with all the cases on the subject.

72. The decision in the case of ILR 38 Bom 255 : AIR 1914 Bombay 290 appears to be the authority for most of the Indian decisions dealing with the endorsee's right to sue the railway for non-delivery of goods. Curiously enough this case did not at all deal with the right of an endorsee of a railway receipt to sue the railway for non-delivery or short delivery of the consignment. In that case the only question that came up for consideration was whether an unpaid vendor had the right of stoppage in transitu as against an endorsed. The vendor had consigned cotton bales to the purchaser and handed over to him the railway receipts in exchange for hundis which were dishonoured on the insolvency of the purchaser. The purchaser had borrowed moneys and endorsed the railway receipt in favor of the creditors as securities for advance taken from them. The unpaid vendor tried to stop the goods by instructing the steamship company for not delivering them to the purchaser. On arrival of the bales at the destination the creditors as well as the person nominated by the unpaid vendor to receive the goods claimed the bales from the company. The steamship company filed two suits requiring the claimants to the bales to interplead together concerning their claims. The Bombay High Court held that there was no right of stoppage in transitu because the endorsees were entitled to the benefit of Section 103 of the Contract Act against the unpaid vendor. On appeal to the Privy Council, this decision was upheld in 43 Ind APP 164 . I have already dealt with the judgment of the Privy Council in detail.

73. In *Doulatram Dwarkadas v. B.B. and C. I. Railway, Co*[38]. the Bombay High Court purporting to rest their decision on the case of ILR 38 Bom 255 : AIR 1914 Bombay 290 held that the endorsee of a railway receipt has sufficient interest in the goods covered by it to maintain an action of this kind. It is to be noted that no further reasoning was given and no other authorities cited in support of this sweeping proposition. Significantly enough, the case which was purported to be followed nowhere laid down the wide proposition sought to be laid down in this case.

74. In the case of *M. S. M. Railway Co. Ltd. v. K. Rangaswamy Chetty*[39], it was held on the authority of (1799) 8 Term Rep 330 that a consignee alone can sue and the responsibility of the railway company is to the consignee and not to his agent, the consignor. The facts of the case do not appear from the judgment, but it is clear that the plaintiffs who were the consignors were not the owners of the goods and were the agents of the consignee. This judgment, if I may say so respectfully, is perfectly in consonance with the general principles of law and is unexceptionable.

75. The case of *Secretary of State v. Rishi Ram Jagdish Prasad*[40], dealt with the effect of endorsement of a railway receipt in favor of another person. This was a suit for damages on account of alleged wrongful delivery by the railway of certain sacks of wheat consigned by the plaintiff to self at Bombay. The plaintiff had sent the railway receipt unendorsed to one Shiv Ram Narain who endorsed it over to the Prince of Wales Flour Mills, Bombay. The endorsee took delivery of the goods. On the same day, the plaintiff gave notice to the railway company not to

deliver the goods either to Shiv Ram Narain or to any one other than the plaintiff. On the facts of the case it appears that the notice had reached the railway only after the goods had been delivered. The Allahabad High Court thought that the railway company had a very simple defence which, however, had not been taken by them in their written statement and which was to this effect that the plaintiff by sending the railway receipt to Shiv Ram Narain had appointed him as the agent for taking delivery of the goods by implication so that the Prince of Wales Flour Mills was a sub-agent of the plaintiff's agent by reason of the endorsement made in its favor on the railway receipt. Instead of taking the simple defence, the railway took the plea that a railway receipt even though unendorsed is a document of title in the hands of the person to whom it is sent. The Allahabad High Court held that it was impossible to take this view in the absence of evidence to show a mercantile custom that an unendorsed railway receipt is used in the ordinary course of business as proof of the possession or control of the goods. They further held that even assuming that the unendorsed railway receipt was a document of title, there is no authority for holding that possession of it by a certain person justifies another person in regarding the possessor as a duly appointed agent. It was further held that under Sections 108 and 178 of the Contract Act a document of title is a negotiable instrument only to the extent that the possessor of it can give a valid title to 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

[38] ILR 38 Bom 659 : AIR 1914 Bom178 [40] AIR 1928 All 143

[39] AIR 1924 Madras 517

represented by the document". I am in respectful agreement with the principle laid down in this judgment. It is, in ray opinion, a correct statement of the effect of Sections 108 and 178 of the Contract Act and Sections 4 and 137 of the Transfer of Property Act, particularly with reference to the Privy Council decision in the case of 43 Ind App 764 .

76. In *Maula Baux Mohammed Safi v. Secretary of State*[41], Johnston, J., held that the endorsement of a railway receipt in favor of a person does nothing more than give him a right to obtain delivery of the goods. But he still has to obtain delivery as an agent and the property in the goods does not pass to him. This was a case of commission agent suing the railway for non-delivery on the basis of a railway receipt sent to him by the principal. His Lordship followed a very old decision of the Madras High Court, viz., *Subramama Pattar v. Narayana Nayar*[42], I find myself in respectful agreement with His Lordship.

77. In the case of *Mercantile Bank of India Ltd. v. Central Bank of India Ltd*[43]. a firm of merchants named C.K. Narayana Ayyar and Sons, who were in the habit of purchasing ground-nuts from up-country growers and despatching the same by rail to Madras obtained a loan from the Central Bank of India, Ltd., on the security of the goods covered by the railway receipts and delivered the relevant railway receipts to the bank by way of pledge giving to the bank at the same time a promissory note for the amount advanced and also a letter of lien. The bank then passed the receipts on to their own godown-keeper to enable him to obtain possession of the goods. In accordance with the usual practice adopted by the bank and in order to avail himself of the merchants' services, the godown-keeper handed the railway receipt back to the merchants for the specific purpose of clearing the goods and storing them in the bank's godown. The merchants, however, fraudulently used the same receipt to obtain a second advance from the appellants, that is, the Mercantile Bank of India Ltd., from whom they had been in the habit of securing loans under arrangements similar to those negotiated with the Central Bank of India

Ltd. and who were unaware of the loan by the respondent bank. The Central Bank of India Ltd., then instituted a suit against Mercantile Bank of India Ltd., for wrongful conversion and that suit was decreed by two Courts in India and the decree of the Appellate Court was taken up to the Privy Council. Lord Wright in delivering the judgment of the Court at first dealt with the rights of the holder of a railway receipt and made the following observations :-

> "The ground-nuts were covered in respect of each consignment or wagon-load by a document called a 'railway receipt' which contained particulars of the goods and the names of the consignor and the consignee. In all the consignments in question in these proceedings the merchants' were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because if they were not so named, the document had been endorsed by the named consignee."

78. This passage has often been misconstrued to mean that a consignee or the endorsee of a consignee is entitled to entertain an action for non-delivery of goods covered by the railway receipts. In my opinion, there is no warrant for giving this extended interpretation to His Lordship's statement. His Lordship does not at all deal here with the question of

[41] AIR 1929 Lahore 590 [43]65 Ind App 75

[42] ILR 24 Mad 130

transfer of title. His Lordship merely says that the consignee or the endorsee has authority to take delivery of the goods and nothing more. Whatever doubts there might be on this point must be set at rest by the following observations of Lord Wright at page 93 of the report (Ind App) :-

> "The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best, an ambiguous document. Its possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been."

Clearly enough His Lordship holds that a mere possession of a railway receipt would not confer title on the possessor. It must be remembered, however, that Their Lordships of the Privy Council were not dealing with the case of endorsement of a railway receipt. In fact, the case before their Lordships was that the railway receipts did not bear any endorsement. All that their Lordships said in this case was that no inference as to title can be drawn from the mere possession of a railway receipt.

79. In *Bhayalall Ramratan v. B.N. Railway*[44]*,* Bobde, J., held that an endorsement on the back of the railway receipt by a person who was both the consignor and the consignee entitled the endorsee to claim delivery of the goods and must entitle him to bring the present suit. His Lordship neither cites any authority nor gives reasons to come to what in my respectful opinion is a completely wrong decision.

80. In *Sree Ramkrishna Mills Ltd. v. Govenor-General-in-Council*[45], it was held that when goods have been delivered to the railway company for consignment it is only the consignee or the person to whom the railway receipt has been endorsed who can sue for non-delivery of goods. On the facts of the case it appears that the plaintiff was neither the consignor nor the consignee. In fact the consignee is shown in the railway receipt as 'self', i.e., the same as the consignor. There was no endorsement made by the consignor in favor of the plaintiff. After reference to the decision in AIR 1924 Madras 517 as well as to the decision of the Privy Council in 65 Ind App 75 , it was held that the right to sue vests either in the consignee or in the person to whom the railway receipt has been endorsed. I may respectfully point out that the first part of the decision is correct on the facts of that case since it appears that the consignee (who was also the consignor) was the owner of the goods. The second part of the decision to the effect that an endorsee has a right to sue was obiter and was also wrong in so far as that finding was sought to be based on the cases reported in ILR 38 Born 255 : AIR 1914 Bombay 290, ILR 38 Bom 650 : AIR 1914 Bombay 178 and *Pearelall Gopinath v. E. I. Rly. Co. Ltd*[46]., The finding was based on a misunderstanding of those cases.

81. In *Premsukh Rampratap v. Governor-General-in-Council*[47],

[44] AIR 1944 Nag 362
[45] AIR 1945 Pat 387
[46] ILR 46 All 691: AIR 1924 All 574
[47] AIR 1946 Nag 169

Niyogi, J., held that a railway receipt is a mercantile document of title and, therefore, an endorsee thereof has sufficient interest in the goods covered by it to maintain an action for damages against the railway company. On the facts of that case the plaintiff was the owner of the goods and could, therefore, sue the railway for damages for non-delivery. To this extent the judgment is right, but His Lordship's formulation of the principle that a bare endorsee of a railway receipt has sufficient interest in the goods covered by it to maintain an action for damages is, in my respectful submission, wrong. His Lordship seeks to derive authority for this principle from ILR 46 All 691 : AIR 1924 Allahabad 574. I cannot see how His Lordship could rely on the Allahabad case for this principle. His Lordship, however, considers the law as 'so clear' that he did not find it necessary to quote further authorities.

82. In ILR 46 All 691 : AIR 1924 Allahabad 574, Dalal, J., of the Allahabad High Court followed the case of ILR 38 Bom 659 : AIR 1914 Bombay 178 as an authority for the proposition that the title of the consignor can be conveyed to another person by an endorsement on the railway receipt and that the endorsee of a railway receipt has sufficient interest in the goods covered by it to maintain an action for damages against the railway company, the carrier. I find myself in respectful disagreement with this decision just as much, as with the authority which it sought to follow.

83. The case of *Shamji Bhanji and Co. v. North Western Ry. Co*[48]. is, in my opinion one of the most important decisions on the subject so far as Indian case-law is concerned. This case throws a flood of light on the question as to who is entitled to sue the railway in the case of loss of goods. If I may say with respect, almost all the propositions formulated by the learned Judge in this case are correct. Strangely enough, this case has often been overlooked in subsequent decisions. Sometimes this case though noticed has not been followed. But even in those cases where it has not been followed there has been no attempt made to meet the various arguments and reasonings of Bhagwati, J. The various propositions enunciated by Bhagwati J. in this case may be summarized as follows :

(1) A bare endorsement of a railway receipt is not enough by itself to transfer the property in the goods represented by the receipt to the endorsee. Such endorsement without anything more only constitutes the endorsee an agent of the consignee for the purpose of taking delivery of the goods represented by the receipt from the railway Company.
(2) The endorsement created rights, if any, 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, the only remedy of the endorse being against the endorser.
(3) Section 2(4) of the Sale of Goods Act assimilates railway receipt and other documents of title enumerated therein to bills of lading for the purpose of the right of stoppage in transit under Section 103, Contract Act and a pledge under Section 178 Contract Act and not for all purposes. Those documents are not negotiable instruments.
(4)(a) In the absence of a special contract, entered into by the consignor with the railway company which makes the railway company liable to the consignor, it is the consignee, in whom the property in the goods has passed, who will be entitled

[48] AIR 1947 Bom 169

to maintain an action against the railway, company.
(b) 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 consignor would then be merely the agent of the consignee.
(c) If, on the other hand, the property in the goods had not passed to the consignee at the time of the consignment, it would be the consignor alone who would be entering into the contract of carriage with the railway company.

84. The decision in the case of *Governor-General of India in Council v. Joynarain*[49], is important in so far as Meredith, J. in his judgment not only proceeded on the basis of earlier precedents but also dealt with the question on general principles. Certain tics of vegetable ghee were booked to Dhanbad by the Vegetable Vitamin Food Co. Ltd. who were both the consignors and the consignee. The railway receipt was endorsed in blank on the back by the consignor and it was transferred to Messrs. Mohammed Ibrahim Md. Zaffar and Co. who in turn endorsed the railway receipt in blank and made it over to the plaintiff. The plaintiff took delivery of a part of the consignment through his servant. It was contended that the plaintiff being neither the consignor nor the consignee nor an endorsee of the railway receipt has no right to sue. Meredith, J, first considered whether the consignor made the contract of carriage as agent of the plaintiff so as to make the plaintiff a party to the contract. He rightly proceeded to find out whether the legal property in the goods could pass to the plaintiff on delivery of them to the railway company as carrier. He discussed various case-laws on the subject and on the facts of the case came to a finding that since the plaintiff was not the original party to the contract he could not sue. Meredith, J. also considered the question whether an endorsee of a railway receipt" has sufficient interest in the goods to maintain a suit against the railway administration. Meredith, J. held that a contract indicated by the railway receipt can be transferred by endorsement in blank coupled with the delivery of the document to the transferee subject to the condition that the intention must be to make an absolute delivery carrying with it the right to the good's." His Lordship found that on

the facts of the case before him there was an absolute transfer both of the goods and of the right to take delivery under the contract. His Lordship observed also "it was clear that the property in the goods under the contract of sale passes to the buyer directly. There latter pays the price and the railway receipt endorsed in blank is delivered to him." In view of His Lordship's findings that the property in the goods had passed to the plaintiff one cannot take exception to His Lordship's further finding that in such a case the endorsement and delivery of the railway receipt entitled the endorsee to institute an action against the railway.

85. In *Jalan and Sons Ltd. v. Governor-General in Council*[50], the Punjab High Court held that since a railway receipt is a mercantile document of title, the endorsement of it vests the endorsee with a valuable right and that the endorsee of a railway receipt not only can take delivery of the goods covered by the receipt but he can also give a complete discharge. It follows that he is also competent to bring a suit against the railway company for damages in respect of the goods covered by the receipt. Their Lordships took notice of the judgment of Bhagwati, J. in AIR 1947 Bombay 169, but rested content by merely

[49] AIR 1948 Pat 36

[50] AIR 1949 East Pun190

observing that certain observations by Bhagwati, J. were of the nature of obiter. Their Lordships, on the other hand, preferred to follow the decision of ILR 38 Born 659 : AIR 1914 Bombay 178 which I have already noticed and which practically gives no reasons or arguments in support of their decision except referring to the decision of the Bombay High Court in 38 Bom 255 : AIR 1914 Bombay 290 which had no relevance or application to the facts of the case before them. I find myself utterly unable to accept this decision of the East Punjab High Court. I fail to see the logic which would make a person authorised to receive goods and to give complete discharge for them automatically entitled to sue the carrier in his own name.

86. In *Chunnalall v. Governor-General in Council*[51], the Allahabad High Court held that when the goods have been delivered to railway company for consignment and the consignor sues for loss caused by the non-delivery of goods definitely alleging that the consignee was his commission agent meaning thereby that the property in the goods had not passed to the consignee, his suit cannot be dismissed in limine without affording him an opportunity to substantiate his allegation that the property in the goods had not passed to the consignee. Apparently, Seth, J. was of the opinion that if the consignor was the owner of the goods he would be entitled to sue. I respectfully agree with this decision.

87. In *Harimohan Dutt v. Dominion of India*[52], Mitter, J. held that an endorsement of a railway receipt by itself is not enough to constitute the endorsee an owner of the goods, competent to sue for compensation for non-delivery of the goods and that it is only an endorsement for valuable consideration that makes the endorsee such owner of the goods. Mitter, J. also indicates in that case that the railway receipt cannot be treated on the same footing as negotiable instruments, though by trade usage it might assume some of the attributes of negotiable instruments.

88. The case of *Ramnarain v. Dominion of India*[53], was a case of non-delivery of a part of the consignment. The plaintiff was a consignee of 10 packages of betel leaves out of which 3 packages were delivered to and taken delivery of by one Beni Prosad as an agent of the consignee. It was held that consignee under railway receipt is entitled to sue the railway administration for non-delivery of the consignment so long as he has not specifically endorsed

the railway receipt in favor of any other person. While I respectfully agree with the main decision I am not quite sure that the learned Judge was right in making a reservation. The learned Judge said :

> "If there had been a valid endorsement by the plaintiff in favor of Beni Prosad, then, in my judgment, the railway administration would have faced the plaintiff with that legal position and would have told him that he has no right or title to interfere with any arrangement that is being made by the railway administration in respect of this consignment with Beni Prosad." I am afraid, I cannot understand what the learned Judge means by 'valid endorsement'. If the learned Judge means an endorsement which, for instance, is accompanied by such consideration as would pass the property to the endorsee, I am in agreement with the learned Judge. Otherwise I find no justification for the reservation made by the learned Judge.

[51] AIR 1950 All 89 [53] AIR 1953 All 460
[52]57 Cal WN 167 : AIR 1954 Cal59

89. There is an unreported judgment of Lahiri, J., (as he then was) in *Ramniwas Kumaria Ltd. v. Union of India*[54], in this High Court. In that

case a question arose whether a bare endorsee of a railway receipt could sue the railway for non-delivery. Lahiri, J. held, following the decision of the Privy Council in the case of 65 Ind App 75 that an endorsee gets authority to obtain delivery of the goods and nothing more.

90. In *Erachshaw Desabhai Kerrawala v. Dominion of India*[55], the plaintiff was the purchaser of certain carboys of acids which were consigned in his name as the consignee by the vendor Eastern Chemical Co. Ltd. The goods were lost in transit. One of the questions arose whether the plaintiff had a right to sue in his own name. The learned Judges came to the finding that the plaintiff was the purchaser of the goods. In this view of the matter, the plaintiff, it was held, was entitled to sue the railway. While I respectfully agree with this conclusion of the learned Judges, there are certain observations in the judgment which in my respectful opinion are not right in principles and are apt to create confusion. Thus the learned Judges observation that the plaintiff as a consignee of the goods had a "sufficient interest in the goods so as to enable him to file this suit" is hardly acceptable. The plaintiff had a right to sue not merely because he was a consignee but he was the purchaser of the goods and the title in goods had passed to him. The learned Judges further observed :

> "it cannot be denied that railway receipt is a document of title as will appear from the definition of the term in Sale of Goods Act, Section 2(4) and enables the person mentioned as consignee to give a valid discharge with respect to the goods to which it relates. How can it then be said that he is not entitled to file a suit ?"

in my respectful opinion the learned Judges' conclusion is not at all warranted by the premises. The fact that a person is authorized to receive goods and to give a valid discharge for the goods can by no stretch of imagination be equated with the right to file a suit. The conclusion is, if I may say with respect, based on a fundamental confusion between right of suit and right to take

delivery of goods. It is interesting to note that the learned Judges' next observation brings out clearly that the learned Judges were not unaware of the real legal principle that ought to apply in this case, for the learned Judges go on to say :

> "But, even assuming that where the consignee is a mere agent or sub-agent of the consignor, right of suit survives to the consignor and consignee cannot sue. It is clear in this case on the findings arrived at by me that the plaintiff was the purchaser and the property in the goods had passed to him. He, therefore, is entitled to this action."

91. In *Estate of H.E.H. Nizam v. Padaturi Malliah*[56], a consignment of four barrels of castor oil was sent by the plaintiff as consignor to himself as consignee. The consignment was never delivered to the consignee. It was stated in the plaint that the plaintiff had sold the railway receipt to two other persons who in their turn sold them to one Nagesappa who, however, refused to accept the hundi issued on the

[54]C. R. Case No. 3565 of 1955 (Cal) [56] AIR 1956 Hyd 30
[55] AIR 1955 Mad Bha 70

occasion. It was contended that Nagesappa was the only person competent to sue the railway. The learned Judges found that the plaintiff was entitled to sue. While on the facts of this case this finding must be taken as correct, the learned Judge's observation that the right arose from the mere fact that the plaintiff was a consignee does not, if I may say so respectfully, seem to be quite correct.

92. The case of *Dominion of India v. Gaya Pershad Gopal Narain*[57], was a case in which the Full Bench of the Allahabad High Court had to consider the following question :

> "Whether a consignee who is not the owner of the goods but to whom the goods are consigned for the purpose of sale on commission basis is entitled to maintain a suit in respect of the loss caused to the goods in transit."

In that case the consignee, though not the owner of the goods, was a commission agent and the goods had been sent to him for the purpose of sale on commission basis. Kidwai, J. delivered the judgment of the Full Bench. Though considering that it is a Full Bench decision which is entitled to the utmost respect, I must say that the whole decision is full of observations and arguments which cannot be supported either by precedent or authority or on general principles. I set out some of the observations in the judgment which in my humble and respectful opinion cannot be supported on any principle whatsoever :

> (1) "The owner of the goods as such does not come into the picture at all."
> (2) "It is well established in India that not only can parties to contract sue upon it but also who are entitled to a benefit under it or to whom the rights created by it are transferred." It is argued that since under clause (3) of the conditions on the back of the railway receipt a consignee can take delivery of the goods that itself is a clear indication of his right to sue.
> (3) "It is not a matter which concerns the railway as to who has actually suffered the loss; the railway is primarily liable to the consignor who is the bailor although the consignor himself may be merely an agent."

93. The judgment purports to follow the authority of the cases of ILR 38 Bom 659 : AIR 1914 Bombay 178 and AIR 1949 East Punjab 190. I have dealt with these cases already and, have indicated the reasons why they cannot be supported or followed.

94. The case of *Chhangamal Harpaldas v. Dominion of India*[58], is an important case from our point of view since the decision in that case was reached after a discussion of the fundamental principles. In that case one Malhari Bhiga loaded a wagon with banana which were then sold to Pir Mohammed and Sons. We will refer Malhari Bhiga as MB and Pir Mohammed and Sons as PM. MB were named as the consignors and consignees in the parcel way bill. The goods on arrival at Delhi were found damaged. Another forwarding note for a second wagon load of banana was signed by PM and the parcel way bill was obtained in name of PM as consignors. The plaintiffs were named as consignees. A third wagon load of banana was also sent in Delhi by PM in which the consignors were PM and the consignees were the plaintiff. The second and third consignments of banana on arrival at Delhi were found damaged. The plaintiffs sued the railway company for

[57] AIR 1956 All 338 (FB)
[58] AIR 1957 Bom 276

damages in all the three transactions. The question arose whether

the plaintiffs as consignees of the goods could maintain an action for compensation. Shah. J. after discussing various case-laws on the subject laid down the following propositions :

> (i) The right of action to recover compensation ordinarily vests in the consignor. A consignee who is in possession of a railway receipt duly endorsed by the consignor may maintain an action for compensation for loss of the goods covered thereby but he can do so not because he is the consignee, but because he is the owner of the goods. A consignor may sue for compensation for loss relying upon the breach of contract of consignment.
> (ii) An owner of goods covered by a railway receipt may sue for compensation relying upon his title.
> (iii) A bare consignee who is not a party to the contract of consignment and who is not, the owner of the goods, cannot maintain a suit for compensation for loss or damage to the goods. He has on cause of action ex contract or ex delictu.
> (iv) Unless a consignee is the owner of tan goods covered by the railway receipt, the consignee is an agent, of the consignor for receiving the goods : and an agent of the consignor cannot sue the railway administration for loss of the goods. I respectfully agree with the propositions laid down by His Lordship in this case.

95. The case of *Mulji Deoji v. Union of India*[59], is an important case for our purpose. In that case the plaintiff sued the railway for damages in respect of short delivery of a consignment of sugar. The plaintiff was a mere endorsee of the consignment in question and was not its owner. The case came up in a revision application before the late R. Kausalendra Rao, J. One of the questions raised was whether the plaintiff as a hare endorsee of the railway receipt could

maintain an action for damages against the railway administration. His Lordship referred the case for decision to a Division Bench. The matter was then heard by a Division Bench consisting of Hidayatullah, C.J. and Kaushalendra Rao, J. The question, as it was framed by Rao, J. for decision by the Division Bench was in the following terms :

> "When goods are consigned to 'self' under a railway receipt and the receipt is endorsed in favor of another, can the endorsee, merely by reason of the endorsement in his favor, institute a suit against the railway administration for damages either for non-delivery or short-delivery of the goods covered by the railway receipt."

Rao, J. answered this question in the negative, but Hidayatullah, C.J., answered it in the affirmative but made the answer subject to only one corollary, viz., that the endorsee must have got the document by endorsement and delivery and not by fraud or any collusive process. Because of the difference of opinion the question was referred to a third Judge, viz., Tambe, J. who agreed with the answer given by Hidayatullah, C.J. I have carefully considered all the three judgments and find myself in respectful agreement with the minority judgment of Rao, J. on this point. I regret that I could not persuade myself to

[59] AIR 1957 Nag 31

accept the reasoning of either Hidayatullah, C.J. or Tambe, J. on this point.

96. Rao J. considered this question with reference not merely to the more important earlier decisions of the Indian High Courts, but also with reference to the general principles of law. He particularly relied on the decision of Bhagwati, J., in AIR 1947 Bombay 169. On the various decisions favoring an affirmative answer to the question, Rao, J. observes that the source of authority of all these decisions could be traced back to the decision of the Division Bench of the Bombay High Court in ILR 38 Bom 255 : AIR 1914 Bombay 290. Rao, J. further and in my respectful opinion, very correctly observes, that this Bombay case was not concerned with the right of an endorsee of a railway receipt to maintain an action against the railway administration for non-delivery or short delivery of the consignment. The question that arose for consideration in the Bombay case was about the right of stoppage in transitu by an unpaid vendor. The Judges of the Bombay High Court held against the right of stoppage in transitu because the endorsees were entitled to the benefit of Section 103 of the Contract Act against the unpaid vendor. The decision of the Bombay case was rested apart from any custom, on the ground that railway receipts being instruments of title had, as against the unpaid vendor, the effects stated, in Section 103 of the Contract Act. Rao, J. points out very cogently that the decision of the Privy Council when the matter was taken in appeal there was not rested on any proposition of law laid down by the Bombay High Court, but on the ordinary course of business in the cotton trade in Bombay as proof of the possession or control of goods authorizing or purporting to authorize either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented. Rao, J. considered the railway receipt from different aspects, that is to say, in so far as it is a receipt given for goods accepted for carriage or a contract for carriage and also in so far as it is a document of title by statute. On the basis of the principles of various English decisions as well as Indian decisions. His Lordship came to the following conclusions :

> (i) Where the action is founded on contract of carriage, the principal question to determine is with whom the contract is made. If the consignor consigns the goods to self, the

property in the goods at the time of the contract is with the consignor and in that case the consignor is the proper person to sue on the contract.

(ii) A mere endorsement on the railway receipt can only be considered as constituting the endorsee an agent of the consignee for the purpose of taking delivery of the goods represented by the railway receipt. One who becomes all agent for the purposes of receiving delivery of the goods by an endorsement on the railway receipt is not entitled to sue the railway for enforcing the contract.

(iii) Endorsement of the bill of lading is only prima facie evidence of the property in the goods covered by the bill being transferred to the endorsee. Prior to the Bills of Lading Act, the endorsee or transferee, though he might have acquired property in the goods covered by the bill, did not acquire any right to sue in his own name a carrier for a breach of the contract. As a result of the Bills of Lading Act the rights under the contract pass to every consignee of goods named in a bill of lading and to every endorsee of a bill of lading.

(iv) A railway receipt and other documents of title mentioned in Section 2(4) of the Sale of Goods Act are in the same position as bill of lading at common law prior to the enactment of the Bills of Lading Act. By reason of Section 2(4) of the Sale of Goods Act these documents are assimilated to bills of lading only for the purpose of the right to stoppage in transit under Section 103 of the Contract Act and a pledge under Section 178 of the Contract Act and not for all purposes whatsoever.

(v) An endorsement by itself is not enough to constitute the endorsee either a *bona fide* pledgee for value or *bona fide* transferee for value of the goods represented by the railway receipt. Without anything more such an endorsement only constitutes the endorsee an agent of the consignee for the purpose of taking delivery of the goods represented by the railway receipt from the railway company.

(vi) If the property in the goods does not pass to the consignee at the time' of the consignment, the consignor alone can sue.

(vii) The fact that a railway receipt is a document of title and that the endorsee who has become tile owner of the goods covered by it has a sufficient interest in the goods does not by itself establish that he can sue on the contract of carriage to which he was not a party.

(viii) The endorsee may bring an action as an assignee of the contract of carriage, but then the assignment has to be proved as in any other case. Section 137 of the Transfer of Property Act does not have the effect of making a railway receipt a negotiable instrument.

(ix) The right to sue the railway on the contract of carriage is not affected by changes in title to goods covered by the railway receipt subsequent to the making of the contract.

97. So far as these conclusions go, Rao, J. follows the decision of Bhagwati., J. in AIR 1947 Bombay 169 closely. I find myself in respectful agreement with all these conclusions. It is, however, necessary to indicate why I do not find myself in agreement with the views of Hidayatullah, C.J. and Tambe, J. who gave the majority judgment. The judgment of Hidayatullah, C.J., is based on several statements of the law in England as to assignment. With

the utmost respect to the learned Judge I must say I have found it difficult either to understand or to accept some of the propositions of law stated by His Lordship. Thus I have failed to understand what His Lordship meant when His Lordship stated :

> "It is a rule of English law that liabilities under a contract cannot be assigned without the consent of the other side and they can only be assigned both by legal assignment or by equitable assignment and even by operation of law."

I have failed also either to understand or to accept the proposition made by His Lordship that "early in England the Law Merchant developed to embrace within equitable assignment the assignment by endorsement of documents of title to goods". I have found myself, if I may say with respect, completely puzzled by His Lordship's further statement that in the case of bills of lading

> "it was found necessary to make constructive delivery of the goods depending upon the endorsement of the bill of lading issued by the master of the ship and to confer an equitable right on the endorsee to bring a suit in his own name." I have found no precedent or authority for such a proposition in regard to the English Law Merchant. Referring to a document of title His Lordship save that it is a term well-understood in mercantile law and that "it is a document which enables the assignee to deal with the property described in it as an owner". This again, in my respectful opinion, is a statement for which I can find no authority. Neither in English law nor in Indian law does a document of title entitle the assignee (by which word His Lordship has obviously referred to the endorsee) to deal with the property as an owner. Hidayatullah, C.J., in dealing with the case of 65 Ind App 75 at first notices that the Privy Council said that "a document of title to goods was not a negotiable instrument" and then immediately afterwards goes on to remark :
>
> "They were comparing it to the bill of exchange and they meant merely to say that a holder in due course, though acquiring it *bona fide* and for valuable consideration, could not get any benefit without a clear assignment on the face of the document showing that it had been so negotiated. In my opinion, the case in 65 Ind App 75 did not show that the document was not negotiable nor that the negotiability created by the Sale of Goods Act as well as Section 137 of the Transfer of Property Act was completely washed out".

With great respect, I must say that Hidayatullah, J. gives an extended meaning to the term "negotiability" for which there is no warrant in the Privy Council judgment. His Lordship takes notice of the test applied by the Privy Council to the question as to negotiability of railway receipts and yet fails to see that that is the only real test of negotiability. Though I have read the judgment of His Lordship with great respect and close attention, I find that His Lordship's findings are vitiated by the fact that His Lordship has started from legal propositions which, if I may say with respect, cannot be supported either on principles or on precedents. In fact, some of them are completely contrary to the fundamental principles of law which are now widely recognised. Coming to the judgment of Tambe, J. which is, by and large founded on different

principles from those followed by Hidayatullah, C.J. I have come across the same difficulty. After tracing the evolution of the law of assignment of choses in action both in England and in India, His Lordship observes on the basis of Section 137 of the Transfer of Property Act that "a railway receipt being a mercantile document of title to goods, the mode of assignment prescribed in Section 130 is not applicable to assignment of a contract of carriage of goods contained in a railway receipt." Tambe, J. overlooks that Section 137 itself makes a distinction between instruments which are negotiable and mercantile documents of title to goods. Tambe, J. thinks that Bhagwati, J's remark in AIR 1947 Bombay 169 to the effect that a mere endorsement on a railway receipt does not by itself transfer the property in the goods and is a mere authority to the endorsee for the purpose of taking delivery of the goods runs counter to the decision of the Judicial Committee of the Privy Council in 43 Ind App 164 . With utmost respect to the learned Judge I fail to seek how the judgment of Bhagwati, J. ran counter to the decision of the Privy Council. Referring to the Privy Council case, Tambe, J. remarks : "True, in that case provisions of Sections 4 and 137 of the Transfer of Property Act were not relied upon, but that was because there was evidence of prevailing custom to support the conclusion which was enough". Thereafter, Tambe, J. makes, what in my respectful opinion is, an unjustified extension of the judgment of the Privy Council when His Lordship goes on to say :

> "In 43 Ind App 164 , their Lordships have held that the Legislature in India intended to assimilate documents of title to goods to bills of lading. True, their Lordships were dealing with the case falling under Section 103 of the Contract Act then in force, but no reasons can be suggested why these observations be taken only in a limited sense."

In my respectful opinion there is no warrant to give a wider sense to a judgment of the Privy Council when the judgment itself is made in a limited sense. That is not a permissible way of interpreting a judgment of any Court, far less a judgment of the Privy Council. I find it utterly impossible to agree with Tambe, J. when he says that in 43 Ind App 164 their Lordships of the Privy Council have "held that the Legislature in India intended to assimilate other documents of title to bills of lading, which admittedly had acquired negotiability."

98. Tambe, J. has also in my opinion, not made a fair construction of the judgment of Rao, J. For instance, Tambe, J. observes :

> "Late Rao, J. has, however, not gone to the extent of holding that endorsement of the railway receipt is not itself enough to transfer to the endorsee the property in the goods represented by the receipt. In his judgment, even though the endorsee acquires ownership of the goods covered by the railway receipt, he is still a stranger to the contract of carriage evidenced by the railway receipt."

After thus summarizing Rao, J's judgment, Tambe, J. disagrees with him. If I may say with respect, this is hardly a, correct representation of the findings of Rao, J., In fact, the propositions attributed to Rao, J. are in a sense the contrary of what Rao, J. sought to convey. Thus, Rao, J. did go to the extent of holding that an endorsement of a railway receipt is not by itself enough to transfer to the endorsee the property in the goods represented by the receipt. The second proposition does not logically arise because Rao, J. did not hold that an endorsee by reason of the

endorsement acquires ownership or the goods. Again, Rao, J. did indeed consider how far a stranger to the contract of carriage has a right to sue. But, if I may say with great respect to Tambe, J. the very confusion which Rao, J., had tried to clear up by indicating that a railway receipt has various aspects to it has vitiated Tambe, J's appreciation of the findings of Rao, J. Tambe, J. does not deal with the various reasons of Bhagwati, J., in AIR 1947 Bombay 169. He summarily disposes of that case by saying that it runs counter to the Privy Council decision in 43 Ind App 164 . Nor does Tambe, J. properly deal with the reasoning of the judgment of Rao, J. As a result, Tambe, J. has missed the correct import of the decision of Bhagwati, J., as well as the decision of Rao, J.

99. In *Bajranglal Agarwalla v. Dominion of India*[60], G.K. Mitter, J. of this Court had to deal with the question as to who has a right to sue the railways in the case of non-delivery of goods. In that case the plaintiff was neither the endorsee nor the consignor nor the consignee. Therefore, the plaintiff's title could rest only on his title to the goods. The facts of the case are rather confusing and the evidence not quite certain. The plaintiff claimed to have purchased the railway receipt from one R.K. Haldar. It was not contended that original owner had transferred or assigned the benefit of the contract to him. The learned Judge on the facts of the case found that after putting the goods on rail the consignor had sold them to the plaintiff without transferring the benefit of the contract to him or even endorsing the railway receipt to him. The judgment in this case is not, therefore, directly

[60] ILR (1958) 2 Cal 212

relevant to the question at issue in the present case. But G.K. Mitter J. made an elaborate analysis of the case law both in India on the respective rights of the owner, consignor or consignee of the goods or of the endorsee of the railway receipt to sue the railway for non-delivery of goods. Some of His Lordship's findings were perhaps obiter for the purposes of the case before him but they are entitled to great respect. I find it appropriate, therefore, to summaries His Lordship's findings with most of which I find myself in respectful agreement. These are some of the conclusions of His Lordship on the subject :

> (1) Where the consignor is the owner of the goods at the time of consignment and names an other person as consignee, the latter is merely an agent of the consignor to receive the goods from the railway and failure to deliver the goods to the named consignee will not give the latter a right of action.
>
> (2) If the consignor puts the goods on rail at the direction of the consignee, the property in them being vested in the latter at the time of the consignment, it is clearly the consigner who has a right of action against the railway.
>
> (3) It is open to the consignor or the consignee, while the property in the goods is still vested in him, to transfer the benefit of the contract to a third person and in such a case the transferee may sue the railway company. Such a contract can, however, be assigned only before a breach has taken place.
>
> (4) If the property in the goods had passed to the consignee at the time of the consignment, the consignee alone is the person to sue. If the goods, while in transit, were at the risk of the consignor it is for the consignor to bring the action.
>
> (5) It is not necessary that the consignor should be the owner of the goods in order to be able to institute a suit.

100. In the case of *Union of India v. Gangajee Kalyanjee*[61], the plaintiff was the consignor and the consignee. He authorised one Trilokinath to take delivery of the consignment as agent. The consignment never reached its destination. The defence was that the plaintiff had assigned his right under the railway receipt to his agent Trilokinath and Trilokinath being the owner was alone entitled to maintain the suit. The learned Judge in delivering the judgment refers with approval to the judgment of Tambe, J., in AIR 1957 Nagpur 31 though that decision was not strictly relevant in this case. The real point decided in this case was that a consignor's right to sue is based on the privity of contract with himself and in his capacity as the consignor the plaintiff could maintain the present action irrespective of an endorsement of the railway receipt.

101. In the case of *Mohammed Sank v. Union of India*[62], Bijayesh Mukherji, J. of this Court held that an endorsement simpliciter on the railway receipt clearly shows the intention of the transferor to transfer the rights under the contract of carriage and a bare endorsement without more conveys the title to goods to the endorsee. His Lordship observes that the railway receipt passes from one hand to another by mere endorsement. His Lordship seeks to take judicial notice of the treatment of a railway receipt by the mercantile community as a notorious fact. The judgment as far as I can see is based on this supposed custom. I see no warrant for His Lordship's finding about such a custom. I know of no precedent or authority for this proposition. It is well known that a custom is a question of fact and must be proved by clear evidence. In the case before His Lordship

[61] AIR 1959 Mad Prad 222

[62]67 Cal WN 279 : AIR 1963 Cal 399

there was no such evidence. His Lordship relies on various earlier decisions of other Indian High Courts which I have also dealt with in my judgment in this case. If I may respectfully point out, His Lordship relies on some of these decisions without examining the validity of the various legal propositions made out in them and comes to a finding which it is impossible to accept either on principles or on the basis of precedents.

102. In a recent case decided by the High. Court of Patna namely. *Union of India v. North West Coal Co. Ltd*[63]., a consignment of coal did not reach the destination. Both the consignee and the consignor claimed compensation. The consignor submitted the railway receipt and the 'bijak' to the railway. The railway, however, told the consignor that the claim of the consignee was superior whereupon the consignor filed a suit against the railway company. It was held that the railway had rightly paid the compensation to the consignee and that the railway was not concerned as to whether the title in the goods had really passed to the consignee or were still with the consignor. This judgment, if I may respectfully say so, is utterly unsupportable. The judgment neither refers to any authority nor gives any reasoning for the decision. It merely upholds the contention on behalf of the railway that the railway company as a carrier was responsible only to the consignee or to the ultimate endorsee for the purpose of delivering the articles consigned under the railway receipt. Since the railway receipt in question was not endorsed by the consignee in favor of the plaintiff and the plaintiff had failed to produce a letter of authority from the consignee, the railway company was held justified in paying the compensation money to the consignee. The learned Judge's finding is, in my respectful opinion, completely counter to all accepted principles of law on the subject.

103. In *Union of India v. Dayabhai Laxman*[64], V.B. Raju, J. of the Gujarat High Court held that

in the event of damages caused to goods the railway is responsible only to the consignor. A bare consignee having a railway receipt in his hands is not entitled to bring a suit against the railway. It was not a case in which the plaintiff claimed that the contract had been assigned in his favor. Nor was it suggested by the plaintiff that the consignor was acting as his agent. Therefore, on the facts of the case, this judgment must be taken as a correct decision on the point.

104. We have now dealt with the more important cases on the subject. Coming now to the case before us, the plaintiffs own case is that the plaintiff is not the owner of the goods. As I have already said as regards the three consignments sent by Messrs. Obeetee Ltd. the plaintiff is a mere consignee. As regards the consignment sent by Messrs. Rahamatullah and Bros. the plaintiff is a mere endorsee. Under these circumstances, the plaintiff is not entitled to bring an action against the railway in respect of either of the consignments. We must, therefore, hold that the plaintiffs have no cause off action against the defendant Port Commissioners and were not competent to file this suit.

105. In this view of the matter and also in view of our finding that the plaintiffs have failed to prove the quantum of damages, we order that the appeal be allowed and the judgments dated 4th April, 1957 and 6th February, 1959 as well as the decree dated 6th February, 1959 passed1 by Mallick, J. in Suit No. 3029 of 1951 be set aside and that the plaintiffs' suit against the defendants stand dismissed. Taking in view the facts and

[63] AIR 1960 Pat 167

[64] AIR 1962 Guj 266

circumstances of this case we direct that the parties will pay and bear their respective costs throughout the entire proceedings both in the suit and in the appeal.

Bachawat, J.

106. In this appeal the following questions-arise for decision; - (1) Were the goods lost by fire; (2) Was the loss due to the negligence of the appellants or of their servants or agents; (3) Is the suit against the appellants barred by the special law of limitation contained in Section 142 of the Calcutta Port Act, 1890; (4) Have the plaintiffs proved the damages claimed by them and (5) Are they entitled to maintain the suit ? On the first, second, third and fourth questions I agree with the judgment of my learned brother and I have nothing more to add. On the fifth question I will add a few words. The plaintiffs were the consignees named in three railway receipts and the fourth railway receipt was endorsed to them by the consignees named therein. The plaintiffs claim that they are entitled to maintain the suit, either because they were named as the consignees in the railway receipts or because if they were not so named, the document was endorsed to them by the named consignee.

107. The railway receipts were issued between January 27, 1951 and February 5, 1951, under the Indian Railways Act 1890 as it then stood. Under Section 72-A of the Act the consignor is required to execute a forwarding note in the prescribed form. The railway administration in its turn issues a railway receipt acknowledging receipt of the goods and embodying the terms and conditions of the contract of carriage. The consignor and the receiving railway administration are parties to this contract. By Section 74-E of the Act, where the goods are booked through over the railways of two or more railway administrations, the consignor is deemed to have contracted with each one of the administrations concerned and under Section 80 of the Act a suit for the loss of

the goods may be brought either against the administration to which the goods were delivered by the consignor or against the administration on whose railway the loss occurred. By Section 72 of the Act the responsibility of a railway administration for the loss, destruction or deterioration of the goods delivered to the administration to be carried by railway is, subject to the other provisions of the Act, that of a bailee under Sections 152 and 161 of the Indian Contract Act, 1872.

108. Normally a consignor may sue or be sued on the contract between him and the railway, but where he acted as the agent of another, his principal may sue or be sued upon it, where the consignee named in the railway receipt had some property in the goods on the date of their delivery to the railway, the consignor may be considered to have acted as the agent of the consignee and the consignee may then sue or be sued upon the contract as a principal, see Disney on Carriage by Railway, 8th Edition, page 94, *Cork Distillery Co. v. G.S. and W. Rly. Co*[65]. *Coombs v. Bristol and Exeter Railway Co*[66]. see also *Anderson v. Clark*[67], *Tronson v. Dent*[68], at p. 334. But the consignee named in the railway receipt may not sue or be sued on the contract in the absence of proof that the consignor acted as his agent or may be considered to have so acted because he had some proprietary interest in the goods on the date of their delivery to the railway, see (1820) 3 B and Ald 277, (1858) 3 B and N 510, *Secretary of State v. Ganji Dosa*[69], As between the

[65](1874) LR 4 HL 269 (273) [67](1824) 2 Bing 20 [69] AIR 1929 Pat 265
[66](1858) 3 H and N 1 [68](1853) 8 Moo PC 419, 436-40, (1799) 8 TR 330

consignor who owns the goods and the railway, the railway receipt fixes the duty of the latter as to the person to whom it is then the pleasure of the former that the goods should be delivered; but the owner may change his instructions at any time before the consignee has received the railway receipt or the goods and may direct the railway to deliver the goods to some other person. A consignee is not entitled to sue the railway for breach of the contract to carry and deliver the goods safely, merely because he is named as such in the railway receipt : see Chhangamal Harpaldas, ILR 1957 Bom 647 : AIR 1957 Bombay 276 and if the contrary was decided in the case of AIR 1956 Allahabad 338. I cannot agree with the decision. A bare consignee as such is not a party to the contract, nor can the consignor be deemed to have entered into the contract as a trustee for the benefit of a bare consignee who had no interest or property in the goods on the date of their delivery to the railway.

109. The next question is whether the negotiation of the railway receipt after the making of the contract passes the benefit of the contract to the consignee or the endorsee. The railway receipt is a document of title see Section 137 of the Transfer of Property Act 1882. In the instant case each of the railway receipts contain the usual condition to the effect that the receipt must be given up at destination by the consignee, failing which the railway may refuse to deliver and the signature of the consignee or his agent in the delivery book at destination shall be complete evidence of delivery. They also provide that 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 to be made and if the receipt is not produced the delivery of the goods may be withheld until the person entitled to receive them has given an indemnity. These conditions show that the railway receipt is a document of title authorizing either by endorsement or by delivery its possessor to transfer or receive the goods represented by it. Being a document of title, the railway receipt is transferable by the consignor by his delivering it to the consignee and by the consignee by endorsing his name on it and delivering it to the endorsee. The railway receipt may be endorsed specially or in

blank. In a special endorsement the endorsee, to whom delivery is to be made, is named. The named endorsee may in his turn, if the form of the endorsement so permits, transfer the document by endorsement and delivery to a subsequent endorsee. In an endorsement in blank, the name of the endorser only is endorsed and the endorsee is not named. The document endorsed in blank is transferable by mere delivery and its holder may at any time, convert the endorsement in blank into a special endorsement by filling up the name of the person to whom the delivery is to be made and the document, when so filled up, has the same effect and operation as if the same had been made by the endorser when he made the endorsement.

110. In view of Section 137 of the Transfer of Property Act 1882, a railway receipt may be transferred otherwise than in the manner indicated by Section 130 and the transfer is not controlled by the subsequent sections of that Act. But Section 137 does not prescribe the mode or effect of the transfer of the railway receipt. Being a document of title, it may be transferred by endorsement and delivery. Though such a transfer is not controlled by Section 132 of the Transfer of Property Act, the railway receipt is not like a negotiable instrument, see 65 Ind App 75 at p. 91 : (AIR 1938 PC 52 at p. 58) and subject to the exceptions mentioned in Sections 30 and 53 of the Indian Sale of Goods Act 1930 and Section 178 of the Indian Contract Act 1872, its possessor cannot give a better title to the goods than he has, see ILR 50 All 227 : AIR 1928 Allahabad 145 at p. 146. The railway receipt is not like a bill of exchange. The negotiation of the railway receipt may pass the property in the goods, but it does not transfer the contract contained in the receipt or the statutory contract under Section 74-E of the Indian Railways Act. The contract is not annexed to the goods and does not run with it. See *Union of India v. Ali Isaji Bohari*[70], at pp. 603-4, 609. By the negotiation of the railway receipt, the consignee or the endorsee may become the owner of the goods, but it is not correct to say that whoever is the owner of the goods at the time of the loss, is entitled to sue the railway on the contract, see ILR (1958) 2 Cal 212 at p. 226. Where the ownership of the goods is thus vested in the consignee or the endorsee by the negotiation of the railway receipt after the making of the contract, the consignor may become a bare trustee of the contractual rights for the benefit of the owner, but nevertheless the later cannot sue the railway on the contract in his own name. With respect I am unable to agree with the decisions in ILR 46 All 691 : AIR 1924 Allahabad 574, AIR 1948 Patna 36 at p. 38, AIR 1957 Nagpur 31 at p. 44-7 in so far as they held that the benefits under the contract of carriage passes to the endorsee of the railway receipt by reason of endorsement.

111. In this respect the railway receipt is like a bill of lading before the Indian Bills of Lading Act 1856 corresponding to the English Bills of Lading Act 1855. Before the passing of the Bills of Lading Act, the consignee named in the bill of lading or the endorsee of it could not sue or be sued on the contract, merely because the property in the goods had subsequently passed to him, see (1845) 14 M and W 403, *Sewell v. Burdick*[71], at p. 91, Anson on Law of Contract, 20th Edition pages 283-284, (1820) 3 B and Ald 277, Blackburn on Contract of Sale, 3rd Edition pages 421-2. Even under the Bills of Lading Act the right to sue and the liability to be sued on the contract does not pass to the consignee or the endorsee, unless the whole property in the goods has passed to him, see (1884) to AC 74.

112. But independently of the Bills of Lading Act, the consignee named in the bill of lading or the endorsee of it having some proprietary interest in the goods as owner, pledgee or bailee in or entitled to the possession of them may sue the carrier for conversion of the goods or for negligence causing loss or injury to them, for independently of contract, there is a duty on all

men not to injure the property of others, see Scrutton on Charter Parties 15th Edition Article 94 pages 71-72, Bristol and *West of England Bank v. Midland Rly. Co*[72]*. Hayn v. Culliford*[73]*,* The Winkfield, (1902) P. 42. But the consignee or the endorsee, having no proprietary interest in the goods and who incurs no risk in their transportation, cannot maintain such a suit. Persons having a merely equitable or contractual right or license to the possession of the goods and having no proprietary interest in them, cannot sue the carrier for their conversion, see *Nippon Yusen Kaishia v. Ramjiban Serowgee*[74]*,* In the absence of any evidence to the contrary the consignee is presumed to have some property in the cargo, see *Coleman v. Lambert*[75]*, (PC)* but this presumption may be rebutted and it may be shown that no property passed to him on the consignment of the goods, see *Mitchel v. Ede*[76]*,* or on the subsequent delivery of the bill of lading to him, *Montgomery v. Foy Morgan and Co*[77]*.* at p. 323. The endorsee will acquire such property, general or special as is intended to pass to him, see (1884) 10 AC

[70] ILR 1956 Born 600
[71] (1884) 10 AC 74
[74] 65 Ind App 263 at p. 278-9 : (AIR 1938 PC 152 at p. 156)
[75] (1839) 5 M and W 502 at p. 505, (1853) 8 Moo PC 419 at p. 437. 438
[72] (1891) 1891-2 QB 653, (1799) 8 Term Rep 330
[73] (1879) 4 CPD 182
[76] (1840) 11 Ad and El 888
[77] (1893) 2 QB 321

74, but he acquires no property, if none is intended to pass. In the absence of direct proof, it may sometimes be inferred from the surrounding circumstances that the endorsement was for valuable consideration and was intended to pass the property in the goods to the endorsee, see *Dracachi v. Anglo Egyptian Navigation Co*[78]*. Hibbert v. Carter*[79]*,* If the consignee has no property in the goods, he is merely the agent of the consignor to collect the goods on his behalf and an endorsee having no property in the goods has no more than an authority to collect the goods on behalf of the endorser. If the consignee or the endorsee acquires some property in the goods, his authority to receive the goods, being coupled with interest, is irrevocable and he is entitled in his own right to delivery of the goods from the carrier, see (1805) 6 East 17 at p. 41. An endorsement of the bill of lading without any consideration is not intended to pass any property and is no more than an authority to the endorsee to receive the goods on behalf of the endorser, see Halsbury 3rd Edition, Volume 35, Article 498 page 348, Scrutton on Charter Parties, 15th Edition, Article 757 page 216, (1808) 1 Camp 369, (1803) 4 East 211. Referring to the finding in *Lickbarrow v. Mason*[80] as to the custom of merchants that by endorsement and delivery of the bill of lading, the property in the goods is transferred, Earl of Selborne, L.C., observed in (1884) 10 AC 74 at p. 79-80.

> "But I do not understand it as necessarily meaning more than that "the property" which it might be the intent of the transaction to transfer, whether special or general, passed by such an endorsement, according to the custom of merchants. The finding must be reasonably understood; it cannot (for instance) mean that the property will be transferred when there is no consideration." An agent, who is authorized to collect the goods and to hold them on behalf of the principal, suffers no wrong if the carrier refuses to deliver the goods or causes loss or injury to them. He has no right of property or possession in the goods and can maintain no action in his own name for any wrong done to the right of possession or property of his principal, see Blackburn on Contract of Sale, 3rd Edition, pages 420-1, 423-4, *Burgos v. Nascriments McKeand Claimant*[81]*,* The case of *Morison v. Gray*[82]*,* decided that an agent of the seller, to whom the bill of lading has been endorsed by the seller without any consideration, is in the position of the seller for the purpose of

stopping the goods in transit and this principle is now codified in Section 45(2) of the Indian Sale of Goods Act 1930, but in so far as that case decided that such an agent can bring trover against the carrier, it is inconsistent with the decisions in (1808) 1 Camp 369, (1803) 4 East 211, the observations of the Earl of Selborne, L.C., in (1884) 10 AC 74 at p. 79-80, (1908) 100 LT 71, *Patten v. Thompson*[83], at p. 361, 368, see also Benjamin on Sale 8th Edition page 881 foot-note (o), Blackburn on Contract of Sale, 3rd Edition, pages 434-6.

113. The like principles apply in the case of a railway receipt and the consignee named in it and the endorsee of it having some proprietary interest in the goods may use the railway administration in tort for conversion of the goods or for negligence causing loss or injury to them, but the consignee or the endorsee, having no proprietary interest in the goods and who incurs no risk in their transportation, cannot maintain such a suit. Like presumptions as to the proprietary interest of the consignee or the endorsee may be made in the case of a railway receipt as in the case of a bill of lading.

[78](1868) 3 CP 190
[79](1787) 1 TR 745
[80](1794) 5 TR 683
[81](1908) 100 LT 71
[82](1824) 2 Bing 260
[83](1816) 5 M and S 350

114. The property in the goods may be intended to pass and may pass on their consignment to the consignee who has advanced moneys or is under acceptances on account of the goods, see *Eagleton v. East Indian Rly. Co*[84]*. Evans v. Nichol*[85]*,* but it may appear that the consignee is a mere agent of the consignor to take delivery of the goods from the railway and no property was intended to pass or has passed to him on consignment of the goods, see ILR 1957 Bom 647 : AIR 1957 Bombay 276, or on the subsequent delivery of the railway receipt to him and, if so, the consignee is not entitled to sue the railway for the loss of the goods, see (1858) 36 H and N 510. Where the consignor is the seller and the consignee is the buyer and the consignor reserves the right of disposal, the property in the goods is transferred to the consignee not on delivery of the goods to the carrier, but on delivery of the railway receipt against payment, see *Commissioner of Income-tax v. Bhopal Textiles Ltd*[86]*.,* at p. 428, Sections 23(2) and 25(1) of the Indian Sale of Goods Act, 1930. The delivery of the railway receipt to the consignee does not transfer the property in the goods, if the property is not intended to pass by such delivery. In AIR 1962 Gujarat 266 the consignee named in the railway receipt was non-suited on the ground that the purpose of the consignment did not appear from the evidence on the record of the case, but I think that, in the absence of any evidence to the contrary, the Court might well have presumed that the consignee had some property in the goods.

115. The endorsement and delivery of the railway receipt may be intended to operate as a transfer of property in the goods and, if so, such property passes as is intended to pass. In ILR 38 Bom 659 : AIR 1914 Bombay 178 and AIR 1949 East Punjab 190 it was held that an endorsee who is the commission agent of the endorser for the sale of the goods would acquire a sufficient interest in the goods entitling him to maintain a suit against the carrier for the loss or injury to the goods. But the question is ultimately one of the intention with which the endorsement was made; see ILR 1956 Bom 600 at p. 604-9.

116. A negotiation of the railway receipt for value is normally intended to pass the property in the goods and part of the cause of action of the holder of the railway receipt arises at the place

where the document is negotiated, see 57 Cal WN 167 : AIR 1954 Calcutta 59 an unreported decision of Lahiri J., in Civil Revn. Case No. 3565 of 1955 (Cal). Where the authority of the consignee named in the railway receipt or the endorsee of it to receive the goods is coupled with an interest in the goods, the authority cannot, in the absence of an express contract, be terminated to the prejudice of such an interest and such a consignee or endorsee is entitled to the delivery of the goods from the railway in his own right, see Section 202 of the Indian Contract Act 1872, 8 Beng LR 581 at pp. 601-2. But a mere endorsement and delivery of the railway receipt, without any consideration, is not intended to confer any proprietary interest in the goods on the endorsee and is no more than a revocable authority to the endorsee to receive the goods from the railway on behalf of the endorser, see AIR 1947 Bombay 169-at pp. 174-6. Such an endorsee has no right of property or possession in the goods and cannot maintain a suit against the railway administration for conversion of the goods or for loss of or damage to them and with respect I am unable to agree with the decision to the contrary in 67 Cal WN 279 : AIR 1963 Calcutta 399.

[84]8 Beng LR 581 [86] AIR 1961 SC 426

[85](1841) 3 Man and G 614

117. In 65 Ind App 75 at p. 81 : (AIR 1938 PC 52 at p. 53) Lord Wright said

> "in all the consignments in question in these proceedings the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been endorsed by the named consignee." The report of the case shows that the merchants concerned were the owners of the goods. The case did not lay down a general proposition that any and every consignee or endorsee of the railway receipt is entitled to sue the carrier for loss of or damage to the goods, see ILR (1958) 2 Cal 212 at p. 224-5.

118. The plaintiffs in the instant case were not the owners of the goods destroyed by fire. Messrs. Obeetee Limited were the owners and consignors of the goods mentioned in three railway receipts and the plaintiffs were the consignees, named in those documents. Satyananda Ghosh and Sambhunath Dixit have sworn that the plaintiffs were the shipping agents of Obeetee Limited remunerated by commission. Messrs. Rahmatullah and Bros. were the owners and consignors of the goods mentioned in the fourth railway receipt and this document was endorsed by them with an order for delivery of the goods to the plaintiffs. Satyananda Ghosh and Abdul Jaffar have sworn that the plaintiffs were the shipping agents of Rahamatullah and Bros. remunerated by commission and the railway receipt was endorsed by the owners in favor of the plaintiffs in order that the plaintiffs might clear from the railway and ship them to a foreign port on account of the owners. All the four railway receipts were forwarded by the owners to the plaintiffs. The owners did not receive any valuable consideration from the plaintiffs either for the consignment of the goods or for the endorsement and delivery of the railway receipts to them. The plaintiffs did not advance any moneys against the goods before they were destroyed by fire. After the loss of the goods by fire, the plaintiffs paid the freight to the appellants and obtained a delivery order from them, but they have recovered the amounts paid by them from the owners. The owners of the goods insured them against fire and they have collected the insurance moneys from the insurers. The fourth railway receipt is not now in the possession of the plaintiffs; this document was returned by them to Messrs. Rahamatullah and Bros. to enable the latter to realise the insurance moneys and was subsequently made over to the insurance company. Of the three railway receipts in which Messrs. Obeetee Limited were named as the consignors, one of them is

not in the possession of the plaintiffs. Satyananda Ghosh has stated that this document is not traceable. The plaintiffs have not produced any document showing their appointment as agents by the owners and the terms and conditions of such appointment. At one place Abdul Jaffar swore that by the endorsement of the fourth railway receipt, the plaintiffs became proprietors of the goods mentioned therein, but he admitted that the endorsement was merely for the purpose of enabling the plaintiffs to ship the goods on account of Rahamatullah Bros. The endorsement of this document was without any consideration and was not intended to pass any property in the goods to the plaintiffs. In agreement with the learned Judge we hold that the plaintiffs had no beneficial interest, in the goods. The evidence leaves no room for doubt that the plaintiffs had no interest in the goods and incurred no risk in their transportation and that they were merely the shipping and forwarding agents of the owners of the goods remunerated by commission and the railway receipts were delivered or sent by the owners to the plaintiffs in order to enable them to clear the goods from the railways and to ship them on behalf of the owners. The consignment of the goods and the endorsement and/or delivery of the railway receipts to the plaintiffs were made by the owners without any consideration with the object of enabling the plaintiffs to receive and forward the goods on behalf of the owners and not with the intention of passing any property in them to the plaintiffs. In the circumstances of the case it is not possible to make a presumption that the plaintiffs either as the consignees named in the railway receipts or as the endorsees thereof had some property in the goods. On the evidence before us it is made plain that the plaintiffs had no proprietary interest or possession in the goods on the date of the fire and they suffered no injury by the loss of the goods by fire. They had no more than a revocable authority or license from the owners to take delivery of the goods from the railways. The plaintiffs had no proprietary interest in the goods entitling them to sue the appellant in tort independently of contract for their conversion or for negligence causing loss to them. There is also no privity of contract between the plaintiffs and the appellants. The goods were booked by the owners at Mirzapore, a station on the East Indian Railways for carriage through over the railways of several railway administration including those of the appellants and for delivery at Kidderpore dock, a station on the railways of the appellants. There were contracts between the owners and the receiving railways and statutory contracts under Section 74-E of the Indian Railways Act between the owners and the appellants. On the date of the delivery of the goods by the owners to the railways, the plaintiffs had no property in the goods and the owners cannot be considered to have entered into the contracts as agents on behalf of the plaintiffs. The benefits of those contracts did not pass to the plaintiffs by the subsequent delivery or the subsequent endorsement and delivery of the railway receipts to them. The plaintiffs are not entitled to sue the appellants on those contracts for non-delivery or loss of the goods.

119. There are dicta in 43 Ind App 164 at p. 171 , 61 Ind App 416 at pp. 423-427 : (AIR 1934 PC 246 at pp. 248-251), 65 Ind App 75 at p. 82 : (AIR 1938 PC 52 at p. 54) to the effect that under the general law of this country the assignment of a railway receipt, whether upon a resale or by way of pledge does not operate as a constructive delivery of the relative goods and that save in the case of a bill of lading, the transfer of a document of title does not change the possession of the goods and that under the general law, apart from statutory exceptions, the pledge of the railway receipt does not operate as a pledge of the goods. These dicta may require reconsideration. The point was left open by the Supreme Court in *Dunichand Ratario v. Bhuwalka Brothers Ltd*[87]*.,* at p. 188. Under the English legislation compendiously described as the Factors Acts, it is possible for mercantile agents to pledge the goods by pledging the document of title, because Section 3 of the Factors Act, 1889 provides that "a pledge of

document of title to goods shall be deemed to be a pledge of the goods". There is no legislation in India corresponding to Section 3 of the English Factors Act, 1889; nevertheless Section 178 of the Indian Contract Act 1872 and Sections 30 and 53 of the Indian Sale of Goods Act 1930 proceed upon the assumption that in the cases covered by those sections a pledge of document of title to goods will operate as a pledge of the goods. The legislature seems to assume that a transfer of a railway receipt for value transfers the possession of the goods and that consequently a pledge of the document of title to goods operates as a pledge of the goods. Such a conclusion may well follow from Section 137 of the Transfer of Property Act which by Section 4 of that Act is deemed to be part of the Indian Contract Act. There is no provision in English law corresponding to Sections 4 and 137 of the Transfer of

[87] AIR 1955 SC 182

Property Act. Under our system of law it has been observed that a railway receipt being a document of title to goods for all purposes represents the goods, see AIR 1961 Supreme Court 426 at p. 428. In the instant case, the railway receipts were not transferred to the plaintiffs upon a resale or by way of pledge or for valuable consideration and it is not therefore necessary to decide whether such a transfer of the railway receipt operates as a transfer of possession of the relative goods. No doubt, the plaintiffs were in possession of the railway receipts under an authority from the owners to clear and receive the goods on their behalf. But the possession of the railway receipts in these circumstances is not equivalent to the possession of the goods. Even in the case of a bill of lading, the possession of the document is not for every purpose the same thing as actual possession of the goods, see (1884) 10 AC 74 at p. 83; and an endorsement and/or delivery of the document, not made in furtherance of a bargain conferring an interest in the goods is not equivalent to delivery of possession of the goods, see Blackburn on Contract of Sale, 3rd Edition pages 431, 434-5, (1816) 5 M and S 350.

120. I have therefore come to the conclusion that the plaintiffs are not entitled to sue the appellants either for breach of contract or for an actionable wrong independently of contract and on this ground alone the appeal must be allowed and title suit must be dismissed. In the instant case no injustice is done because the owners who suffered the loss have recovered the full value of the goods from the insurance companies. I was inclined to hold, if I could, that every consignee named in the railway receipt as also every endorsee of it by the named consignee are entitled to sue the railway administration concerned for loss or injury to the goods. The existing commercial practice favors such a right of suit and I was inclined to uphold the practice, if I could. But on the authorities and on principle, I am compelled to hold otherwise. I regret this conclusion, because it will encourage technical defense by the railway administrations. In the interest of commerce, the legislature should intervene and sanction the existing commercial practice. I concur in the order proposed by my learned brother.

Appeal allowed.