

(1989) 02 PAT CK 0017
In the Patna High Court
Case No : A.F.O.D. No. 63 of 1979 (R)

Banwari Lal Podar and Another

APPELLANT

Vs

Road Transport Corporation

RESPONDENT

Date of Decision : 09-02-1989

Acts Referred:

Carriers Act, 1865 — Section 8, 9
Contract Act, 1872 — Section 166, 167
Evidence Act, 1872 — Section 101

Citation : AIR 1989 Patna 303

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : B.K. Dey, for the Appellant; Debi Prasad and Suresh Prasad, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This first appeal arises out of a judgment and decree dt. 24-3-1979 passed by Shri R. P. Sinha, Additional Subordinate Judge, Ranchi in Money Suit No. 93/4 of 1971-78 whereby and whereunder the said learned Court dismissed the plaintiffs"- appellants" suit.

2. The plaintiffs-appellants filed the aforementioned suit for a decree for damages for a sum of Rs. 33,000/- purporting to be on account of non-delivery of 15 bates of cotton yarn by the defendant. The aforementioned suit was filed by the plaintiffs on the ground that the plaintiff 2 carries on joint family business of which plaintiff No. 1 is the Karta and managing member thereof and they carry on business at Ranchi. Admittedly, the defendant is a common carrier carrying on business of transport of goods from one place to another on hire. The plaintiffs in their plaint alleged that on 22/23-11-1970 the plaintiff 1 delivered 15 bales of cotton yarn of count 17NF to the defendant at Gaya for carriage by motor transport to Ranchi. The defendant undertook to carry the said goods to Ranch and made over the consignment note bearing No. 3096 to the plaintiffs.

The plaintiffs have further contended that in terms, of the contract as also in terms of the provision of law the defendant was liable to carry and deliver the goods to the plaintiffs at Ranchi, which it failed to do.

3. The defence of the defendants, on the other hand, as alleged in the written statement is that the aforementioned 15 bales of cotton yarn were initially booked by M/s. Laxminarayan Gaurishankar, a firm of Nagpur to be delivered to another firm. According to the defendant the said M/s. Laxminarayan Gaurishankar was merely to deliver 2 bales of cotton yarn to the plaintiffs-appellants but by mistake the consignment note in respect of aforementioned 15 bales of cotton yarn was delivered to the plaintiffs-appellants.

4. The plaintiffs-appellants, allegedly, taking advantage of the aforementioned mistake on the part of M/s. Laxminarayan Gaurishankar, got the delivery of the same from the bank and had obtained delivery of the consignment from the defendant at Gaya on 21-12-1970. It was further alleged that on 23-11-1970 the plaintiffs purported to have booked the said goods for its transportation to Ranchi wherefor the aforementioned consignment note was given to the plaintiffs. The further ease of the defendant appears to be that it, however, received a telegram on 9- 12-1970 whereby, and whereunder it was requested by M/s. Laxminarayan Gaurishankar not to deliver the said goods to the plaintiffs.

5. The defendant in their written statement, inter alia, stated the fact of the matter in para 10 thereof which reads as follows : --

"That one M/s. Laxminarayan Gaurishankar at Nagpur gave 15 bales of cotton yarn being bales Nos. 1391, 1373, 1363, 1359, 1239, 1290, 1263, 1231, 1315, 1316, 1387, 1399, 1265, 1226 and 1232 to this defendant's branch office at Nagpur at the risk of the owner under Consignment Note No. 18112 dt. 14-11-1970 consigned to "Self at Gaya The goods duly reached Gaya. M/s. Jwala Dull Banwarilal, Ranchi at Gaya took delivery of the goods on production of the consignee's copy of Consignment Note on 21-11-1970. The said bales were asked to be carried by M/s. Jwaladutt Banwarilal, Ranchi to Ranchi and to deliver to M/s. Jwaladutt Banwarilal who was named as a consignee in the Consignment Note No. 30% dt. 23-11-1970. Though the goods were taken delivery of on 21-11-1970, the said goods were not removed physically from the godown of this defendant The said goods were rebooked for Ranchi as stated above. On receipt of a complaint from M/s. Lakshminarayan Gaurishankar that the goods were not meant for delivery to M/s. Jwaladutt Banwarilal but for some other party the goods were detained by this defendant at its godowns requesting the said M/s. Lakshminarayan Gaurishankar of Nagpur to obtain necessary orders for giving delivery of the goods of that firm from a competent Court. Accordingly the said M/s. Lakshminarayan Gaurishankar filed Suit No. 118 of 1971 in the Court of Civil Judge, Senior division, Nagpur against the defendant and also against Banwarilal son of Jwaladutt, Proprietor of the firm "Jwala Dutt Banwarilal carrying on business of Yarn at Upper Bazar, Ranchi-1, District Ranchi, Bihar State and another. Thereafter the said firm Lakshminarayan Gaurishankar filed

an application before the learned Judge at Nagpur under Order 9, Rules 1 and 2 read with Rules 6 and 7, C.P.C. for temporary injunction restraining this defendant from delivering the said 15 bales booked under Consignment Note No. 18112 dt. 14-11-1970 from Nagpur to Gaya and rebooked from Gaya to Ranchi under Consignment Note No. 3096 dt. 23-11-1970 to the defendant 2, namely, Banwarilal son of Jwaladutt, Proprietor of the firm "Jwala Dull Banwarilal". The learned Judge passed an ad interim order of injunction or, 16-3- 1971 and modified the said order on 35-3-1971 by allowing the delivery of the said 1.5 bales to M/s. Lakshminarayan Gaurishankar by this defendant on furnishing security by the said M/s. Lakshminarayan Gaurishankar to the extent to Rs. 23,000/- in Court. The said firm Lakshminarayan Gaurishankar under the aforesaid order of the learned Court at Nagpur took delivery of the goods and the said matter is still pending in the Court at Nagpur. In this connection, several correspondence passed between this defendant and the said M/s. Lakshminarayan Gaurishankar and the said Jwaladutt Banwarilal on different dates. The dates of letters are 15-12-1970, 20-12-1970, 30-1-1971, 11-2-1971 and others. The matter being sub judice this defendant cannot do anything in the matter and the proper course of the "plaintiffs is to fight out the said suit now pending in the Court at Nagpur."

6. It is admitted by the parties that M/s. Jwala Dutt Banwarital filed a suit in the Court of Civil Judge at Nagpur which was registered as Civil Suit No. 118 of 1971. In the said suit an application for injunction was filed by the plaintiffs thereafter whereupon by an order dt. 16-3-1971 the defendant was enjoined from delivering of aforementioned 15 bales to the plaintiffs. However, the said order was modified later on as a result whereof the aforementioned 15 bales of cotton yarn were delivered to M/s. Lakshminarayan Gaurishankar by the defendant upon furnishing security to the extent of Rs. 23,000.

7. In the said suit the learned Civil Judge at a later stage held that the said suit was not maintainable. The aforementioned order of the learned Civil Judge was the subject-matter of a Civil Revision Application before the Nagpur Bench of High Court of Judicature at Bombay which was registered as Civil Revision Application No. 395 of 1971. By an oral judgment dt. 8-8-1975 the said High Court held that the Civil Judge, Nagpur has jurisdiction to entertain the said suit and thereby allowed the same civil revision application.

8. When the hearing of this appeal was taken up Mr. Debi Prasad, the learned Counsel appearing on behalf of the respondent filed an application for adduction of additional evidence in terms of Order 41, Rule 27, C.P.C., which was allowed by this Court on 6-12-1989.

9. From the judgment passed in the aforementioned case it appears that the aforementioned suit was dismissed as having become infructuous by an order dt. 27-4-1979.

10. The learned Court below framed five issues in the aforementioned suit which

are as follows : --

- (1) Is the suit as framed maintainable?
- (2) Have the plaintiffs cause of action for the suit?
- (3) Have the plaintiffs acquired title to the suit property?
- (4) Are the plaintiffs entitled to enforce the contract from the defendant who is bailee?
- (5) To what relief or reliefs, if any, are the plaintiffs entitled?

11. The learned trial Court took up issues Nos. 3 and 4 together and held that the plaintiffs have failed to prove the ownership in respect of the aforementioned 15 bales of yarn and thus were not entitled to any relief. It further held that as the plaintiffs have not delivered the price of the aforementioned 15 bales of cotton yarn, the question of suffering any loss by them or damages does not arise.

12. The learned trial Court while deciding issue No. 1 held that M/s. Lakshminarayan " Gaurishankar was a necessary party according to the proviso to Order 1, Rule 9, C.P.C. and in its absence the suit was not maintainable. The trial Court also decided issues Nos. 2 and 5 against the plaintiffs.

13. Mr. B. K. Dey, the learned Counsel appearing on behalf of the appellants firstly submitted that the approach of the learned trial Court is erroneous in law in view of the fact that it failed to take into consideration that in the instant case both the consignor and the consignee were the plaintiffs and in this view, of the matter the question of ownership in respect of the goods, in question did not and could not arise: The learned Counsel has further drawn my attention to a judgment of this Court passed in Civil Revn. No. 17 of 1975(R) disposed of on 20th April, 1978, wherein a learned single Judge of this Court, inter alia, held that the suit filed by the aforementioned M/s. Lakshminarayan Gaurishankar, Nagpur has got nothing to do with the suit filed by the plaintiffs and in this view of the matter according to the learned Judge the suit ought not to have been stayed. The said order was marked as Ext. J/1. The learned Counsel, therefore, contended that in this view of the matter it was not open to the learned Court below to hold that the aforementioned M/s. Lakshminarayan Gaurishankar was a necessary party. The learned Counsel further submitted that the learned trial Court has further committed an illegality insofar as it held that the plaintiffs did not deliver the consignments in question to the defendant inasmuch as no physical delivery thereof took place. The learned Counsel in this connection submitted that in view of Section 2(2) of the Sale of Goods Act not only a physical delivery comes within the purview of the aforementioned provision but also a constructive delivery must be held to be a delivery within the meaning of the said provision.

14. The learned Counsel has further drawn my attention to the provisions of

Sections 160 and 161 of the Contract Act for the purpose of contending that the carrier being in the position of a bailee could not challenge the title of the plaintiffs so far as the said goods are concerned. The learned Counsel has further submitted that the plaintiffs have also been able to prove the quantum of damages in view of the fact that admittedly the valuation of the goods of the aforementioned 15 bales of cotton yarn was Rs. 23,168.59p. as admitted by D.W. 4 himself and in this view of the matter the plaintiffs' estimate so far as the valuation of the said good that Rs. 30,000/- is concerned, the same is reasonable. The learned Counsel in this connection has drawn my attention to Ext. I-E, in order to show that the plaintiffs had already taken advance from another businessman for delivery of the said goods to him and as he could not fulfil his promise he must be held to have suffered damages to that extent. The learned Counsel further submitted that the plaintiffs are in these circumstances also entitled to a sum of Rs. 3,000/- by way of interest for non-payment of their legitimate dues by way of damages. The learned Counsel has further drawn my attention to the fact that the letter of the defendant-company dt. 31-12-1970 which was marked as Ext. I-E which letter was sent to the plaintiffs in reply to their letter dt. 28-12-1970 which was marked as Ext. I-F.

15. According to the learned counsel in view of the fact that in the said document Ext. IE the defendant did not dispute the plaintiffs' claim to obtain delivery of the said consignment, it cannot excuse itself of its liability to pay the said amount.

16. Mr. Dey further contended that in any event the purported defence of the defendant that it was enjoined by a competent Court of Law from delivering the goods to the plaintiffs has no legs to stand upon inasmuch as the said suit was not instituted in terms of the provision contained in Section 167 of the Contract Act.

17. Mr. Debi Prasad, the learned counsel appearing on behalf of the respondent, on the other hand, submitted that the conduct of the defendant was absolutely bona fide. The learned counsel drew my attention to the statements made in paras Nos. 9 and 10 by P.W. 5 for the purpose of showing that admittedly the plaintiffs merely paid a sum of Rs. 2948.94 p which admittedly was not the price of 15 bales of cotton yarn but was the price of 2 bales of cotton yarn. The said witness, admitted that the bill in respect of 15 bales of cotton yarn did not accompany the hundi and according to the said witness a sum of Rs. 20,000/- was later on to be paid by the plaintiffs to the aforementioned firm M/s. Lakshminarayan Gaurishankar.

18. The learned counsel, in this" connection, has also drawn my attention to Section 8 of the Carriers Act, 1865 (hereinafter referred to as "the Act") and submitted that in terms thereof only the owners of the goods were liable to obtain a decree for damages and as in the instant case the plaintiffs were not the owner in respect of the goods question, they are not entitled to any relief whatsoever.

19. Mr. Debi Prasad has further contended that in any event the plaintiffs are not entitled to the damages, as prayed for, by them as also the interest on the said amount.

20. In support of this contention the learned counsel has placed heavy reliance upon a decision of the Andhra Pradesh High Court in D.P. Narasa Reddy Vs. Ellisetti China Venkata Subbayya and Another,

21. In this case a peculiar situation has arisen in view of filing of the civil suit by M/s. Lakshminarayan Gaurishankar in the Court of Civil Judge, Nagpur. Admittedly, in the said suit the plaintiff No. 2 was a party. Had that suit been decided on merit the controversy between the parties could have been resolved once for all.

22. In view of the rival contentions as noticed hereinbefore, the following questions emerged for consideration in this appeal :

(a) Whether the question as to whether the plaintiffs were the owners of the goods or not could have been gone into in the facts and circumstances of this case.

(b) Whether the plaintiffs could obtain a decree for damages, as prayed for, despite the fact that the defendant-company had delivered the goods to M/s. Lakshminarayan Gaurishankar in terms of the order dt. 25-3-1971 passed in Civil Suit No. 118 of 1971?

(c) Whether the plaintiffs are entitled to the interest on the amount of damages?

23. From the contentions of the parties, as referred to hereinbefore, the following facts appear to be admitted : --

(a) Goods were delivered to the plaintiffs by the defendant at Gaya on 21-12-1970 but the plaintiffs did not take actual physical delivery of possession.

(b) Consignments were rebooked by the plaintiffs for Ranchi from Gaya on 23-11- 1970.

(c) On 9-12-1970 the defendant received an intimation from M/s. Lakshminarayan Gaurishankar not to deliver the said consignments to the plaintiffs.

(d) On 4-2-1971 M/s. Lakshminarayan Gaurishankar filed the Civil Suit No. 118 of 1971 in the Court of Civil Judge at Nagpur.

(e) on 16-3-1971 in the said suit an order of injunction was passed restraining the defendants from delivering the goods in question to the plaintiffs.

(f) On 25-3-1971 the learned Civil Judge directed that the said goods be delivered on acceptance of a security for a sum of Rs. 23,000/- (Ext. I).

(g) On 5-4-1971 the consignments in questions were delivered by the

defendants to the plaintiff No. 5 of the aforementioned Civil Suit No. 118 of 1971.

24. The said Act was enacted not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents as is evident, from preamble thereof. The provisions of the said Act are not in derogation of the provision of the Contract Act but are to be read subject to the provision thereof.

25. Section 3 of the said Act makes an exception so far as the liability of the common carrier is concerned, unless the person delivering such property declares the value and description thereof.

26. Section 4 authorises to receive payment by the carrier for carriage of the goods, at such rate as he may fix.

27. Section 5, of the said Act authorises a person to receive the money paid by the carrier of the said goods in case of the loss or damage thereof.

28. Section 6 of the said Act provides that the liability of the common carrier for the loss or damage of the property shall not be deemed to be limited or affected by any public notice, subject to which such contract is entered into by and between parties thereto.

29. Section 8 is material for the purpose of this case which reads as follows :--

"8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent -- Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants"

30. From a perusal of the aforementioned provision it is evident that a common carrier shall be liable to the owner for loss or damage to any property delivered to it where loss or damage has arisen from the criminal act of the carrier and loss or damage to the owner of any such property other than the property to which the provisions of Section 3 apply and in respect whereof no declaration as required thereunder has been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.

31. There is nothing on the record to show that the plaintiffs had complied with the provisions of Section 3 of the Act. The plaintiffs, therefore may be held to be entitled to loss or damage provided the carrier is found to be guilty of any

criminal act on its part or its agents or servants.

32. However in terms of Section 9 of the said Act, a suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

33. From a perusal of Sections 8 and 9 of the Carriers Act, 1865 it is, therefore, clear that the burden of proof that there was no criminal act or negligence on the part of the carrier or its agents or servants is upon the carrier.

34. However, when the parties have placed all evidences en record on which they relied before the trial Court it is for the Court to see as to whether on such evidences the criminal acts of the carrier or negligence on the part of the carrier or its agents or servants have been proved.

35. In the instant case, of course, the parties have proceeded on the basis that the claim of the plaintiffs was maintainable in terms of the provisions of the Carriers Act. However, in my opinion, the provisions of the Carriers Act, in the - facts and circumstances of this case are not at all attracted for the simple reason that admittedly no loss or damage has occurred to the plaintiff's in respect of the goods in question.

36. In my opinion, therefore, the liability of the defendant, if any, was in terms of the provisions of the Contract Act. There is no doubt that the defendant whether in the capacity of a bailee or in the capacity of a public carrier was under a bounden duty to see that the consigner received the goods in question.

37. However normal situation is not obtaining in this case. There is absolutely no doubt that a mistake has occurred at the hands of M/s. Lakshminarayan Gaurishankar in sending a wrong Bizak and Hundi to the plaintiffs.

38. From the evidence of the plaintiff No. 1 who examined himself as P.W. 5 it is evident that a sum of Rs. 2,948.94 p. was only paid by it which represented the value of only 2 bales of cotton yarn and not 15 bales of cotton yarn.

39. In law a bailee is not ordinarily entitled to challenge the title of the bailor. However in this case, as seen hereinbefore, the position is absolutely different. There is no doubt that there has been some delay and negligence on the part of the defendant inasmuch as it did not transport the goods in question from 23-11-1970 to 9-12-1970. However, it has come on records that the goods are transported depending upon the availability of the truck.

40. It is not the case of the plaintiffs that the defendant company acted mala fide or had not despatched the consignment in question till 9-12-1970 in conspiracy with the aforementioned M/s. Lakshminarayan Gaurishankar or any other person.

41. From a perusal of para 10 of the written statement, as seen hereinbefore, the defendant had placed all necessary evidences and facts before the Court.

Even during trial it has produced all the relevant documents which were in its possession.

42. In this connection the conduct of the plaintiffs must also be noticed. The plaintiffs, in my opinion, had not been acting in good faith. It must have discovered while it received the consignment notes through the bank that a mistake has been committed by M/s. Lakshminarayan Gaurishankar in sending the consignment note in question to them whereas the same was meant for some other party. It is also evident in view of the statements of P.W. 5 in paras Nos. 9 and 10 of his deposition that the plaintiffs-firm had paid the price for 2 bales of cotton yarn only and not for 15 bales of cotton yarn. It, therefore, in law did not acquire the ownership of 15 bales of cotton yarn.

43. The entire case has thus to be judged on the backdrop of the aforementioned events.

44. There is no doubt that as a carrier the defendant was responsible to deliver the goods in question to the plaintiffs but it merely took precautionary measure in not sending the said consignments upon receipt of the aforementioned telegram from M/s. Lakshminarayan Gaurishankar.

45. In my opinion the following relevant facts have got to be taken into consideration some of which have been considered by the trial court also :--

(a) If the consignments were meant for the plaintiffs then there is no reason as to why the same were sent by M/s. Lakshminarayan Gaurishankar to Gaya and not to Ranchi. In such an event also there was no occasion for the plaintiffs to rebook the said consignments from Gaya to Ranchi under fresh consignments notes.

(b) The statement made by P.W. 5 that he received hundi of Rs. 2,948.94 p. being the price of 2 bales of cotton yarn and he was to pay a further sum of Rs. 20,000/- to M/s. Lakshminarayan Gaurishankar was made for the first time in Court.

(c) It is not the case of the plaintiffs that they had paid the aforementioned amount of Rs. 20,000/- to M/s. Lakshminarayan Gaurishankar nor offered the same to them.

(d) The injunction order was passed by the Civil Judge Nagpur in the aforementioned Civil Suit No. 118/1971 on 16-3-1971. In the said suit the plaintiff No. 2 was a party. As noticed hereinbefore by reason of an order of the said Court the defendants delivered the aforementioned 15 bales of cotton yarn to M/s. Lakshminarayan Gaurishankar on its furnishing a security of Rs. 23,000/-. In spite of the fact that the plaintiff was a party to the said suit it did not question the said order before any higher Court.

(e) For reasons best known, they did not appear to have contested the said suit at its final hearing.

(f) It also does not stand to reason as to why if it had a genuine claim in respect of the aforementioned 15 bales of cotton yarn it did not make any prayer that the security furnished by M/s. Lakshminarayan Gaurishankar be executed in its favour.

(g) Even when, at a later stage, the suit was dismissed as having become infructuous, it did not make any prayer that the plaintiffs should not be permitted to withdraw the said suit and in any even some order should be passed by the said Court with regard to the aforementioned security.

(h) The plaintiffs could have pointed out before the learned Civil Judge, Nagpur that although the plaintiffs thereof might have achieved its purpose by obtaining an order with regard to the security furnished in that suit.

46. If the plaintiffs had suffered an adverse order in the said suit they must thank themselves therefor. In my considered opinion, the plaintiffs cannot take advantage of their own wrong. The plaintiffs in the facts and circumstances of the case are not entitled to an equitable relief for the simple reason that they cannot be permitted to reap the benefit of a bona fide mistake committed by M/s. Lakshminarayan Gaurishankar and the learned Court below has rightly come to the conclusion that the consignment note had wrongly been delivered to plaintiff No. 1 as is evident from the deposition of the plaintiff No. 1 himself.

47. Mr. Dey, the learned counsel for the appellant has, however, placed reliance upon various decisions which are M.G. Brothers Lorry Service Vs. Prasad Textiles, , St. Joseph Union Tile Works Vs. Rappai I.S.P. Trading Co. Vs. Union of India (UOI), . The Great India Trading Co. Pvt. Ltd. Vs. Nowrangrai Ramniwas and Another, , Umarani Sen and Others Vs. Sudhir Kumar Datta and Others, and Konda Rm. Eswara Iyer and Sons and Others Vs. Madras Bangalore Transport Co. and Others, .

48. The decision of the Supreme Court reported in M.G. Brothers Lorry Service Vs. Prasad Textiles, , M. G. Brothers Lorry Service v. Prasad Textiles is in relation to a case under the Carriers Act.

49. The decision of I.S.P. Trading Co. Vs. Union of India (UOI), is a case under the Railways Act.

50. In the said decision it has merely been held that by the endorsement of the Railway Receipt for value the property in the goods passes and part of the cause of action for the endorsee of R.R. for non-delivery of goods against the Railway arises at the place where the document is negotiated.

50a. In the The Great India Trading Co. Pvt. Ltd. Vs. Nowrangrai Ramniwas and Another, it has been held by a Division Bench of the Calcutta High Court that the burden of proving that the plaintiff was not owner of goods is on common carrier who asserted that fact. In the aforementioned case it was further held that the property in the goods did not pass to the buyer by reason of an endorsement made in the bill of lading made by the Managing Director of the common carrier.

51 In Umarani Sen and Others Vs. Sudhir Kumar Datta and Others, it was held that a consignee has right to institute a suit against a carrier in terms of Section 180 of the Contract Act.

52. In the said decision it was held that a suit against a common carrier is maintainable if the common carrier fails to deliver the goods within a reasonable time and to ensure their safety during their carriage and until delivery; Act of God and the King's enemies being excepted. In the said decision it was held that such a duty of the carrier arises irrespective of the contract. Applying the said principles it was further held therein the plaintiffs albeit not owners of the goods but the transport booking agents to whom the owners of the goods had entrusted the goods for transport must be held to have a special property in them as bailee, and thus are entitled to sue for the loss of goods by the carrier.

53. In the aforementioned case, as noticed hereinbefore, there was no dispute with regard to the ownership of the goods. As a matter of fact the plaintiffs thereof admittedly had been entrusted to book the same as a bailee of the owner and thus the plaintiffs in the suit had been representing the owners themselves.

54. In St. Joseph Union Tile Works Vs. Rappai a learned single Judge of Kerala High Court held that the consignor is entitled to sue the carrier either on the basis of his title and if the property in the goods had not passed from him, or on the basis of privity of contract between himself "and the carrier for the carriage of goods. In the said decision, the Kerala High Court took into consideration the various difficulties which may arise to find out as to whether in fact title in the goods has passed on to the consignees or not.

55. Similarly in Konda Rm. Eswara Iyer and Sons and Others Vs. Madras Bangalore Transport Co. and Others, a learned single Judge of the Madras High Court on construing Sections 2 and 7 of the Carriers Act held that carrier not enquiring of a person's tendering consignee's note makes himself liable for misdelivery and in respect thereof he is liable for damages for loss of consignment. In the said decision it has been held that the liability of the carrier depends upon the contract.

56. However, as noticed hereinbefore, the Andhra Pradesh High Court in D.P. Narasa Reddy Vs. Ellisetti China Venkata Subbayya and Another, held as follows :
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"though a person other than the owner may employ a common carrier on his own account and then sue him for loss on contract either express or implied whether such a person has employed the common carrier on his own account or not is a question of fact, depending upon circumstances of each case."

57. It was further held therein that when the suit itself is on the basis of liability created by Section 8 of the Carriers Act, no question of waiver of objection to maintainability of the suit can be inferred by virtue of provisions of Order 8, Rule 2 C.P.C simply because the defendant did not specifically raise it in his

written statement.

58. It was further held in the said decision that it is only the owner of the goods, therefore, who is entitled to the benefit of Section 8 and an agent of the owner to whom goods are entrusted for carriage who entrusts them to a common carrier to carry cannot maintain a suit for recovering damages for loss of such goods against the common employed by him.

59. A learned single Judge of this Court in *Rohtas Industries Ltd. v. Union of India*, reported in *Rohtas Industries Ltd. Vs. The Union of India (UOI) and Others*, held that in the absence of pleading and proof with regard to the payment of price of goods in question, it cannot be said that the title to goods has passed on the consignee (endorsee of railway receipt) and such a suit would therefore not be maintainable by the plaintiff only on the basis of an endorsement in the railway receipt.

60. From the decisions aforementioned it is evident that there exists a conflict in views as to whether a suit for damages on account, of loss or damage to the property delivered to a common carrier for carriage thereof lies only at the instance of the owner of the goods or by the consignor thereof who is not the owner of the goods.

61. In view of my aforementioned findings, in the facts and circumstances of the case the provisions of the Carriers Act are not attracted although the plaintiffs had instituted a suit in terms of Section 8 of the Carriers Act.

62. In terms of Section 166 of the Contract Act a bailee is not responsible to the owner if a delivery is made by him to or according to the direction of bailors in good faith. True it is that under common law ordinarily a bailee cannot deny the bailor's title.

63. However, a common carrier's position is not quite the same as in the case of any other bailee. The common carrier must in any case accept the goods offered to him for carriage and cannot make an enquiry as to the ownership. He may have to deliver the goods, in question, in pursuance of his employment but there is an exception thereto.

64. The said exception is that once he has noticed that some third person is claiming the ownership in respect of such goods he is bound to make an election and base his decision in good faith *inter alia* as to whom the goods should be delivered. In the event, in my opinion, if he delivers the goods to the real owner, he is not to be held liable therefore for damages to the bailor. Reference in this connection may be made to *Sheridan v. New Quay CO.* (1858) 4 CBN Section 618 which has been followed in *Eagleton v. E.I.R. Co.* (1872) 8 BLR 581

65. The law in this connection has been stated in *Halsbury's Laws of England*, 4th Edn. Vol. 5 at para 343 wherein also *Sheridan's* case has been quoted with approval in the following terms : --

".....and if he delivers the goods on demand, out of the ordinary course, to one who is entitled to possession of them, he is under no liability. If the goods are demanded, carrier, may give a qualified refusal so as to have a reasonable opportunity of acquainting himself with the facts of the case."

66. In the instant case, as seen hereinbefore, the defendant delivered the goods under pain of an order passed by a competent court of law wherein, as stated hereinbefore, the plaintiff was also a party.

67. In my opinion the plea of estoppel as against the bailee ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by a title paramount. True it is that in such a case the course of action for a bailee may be to inter-plead but in this case such an occasion did not arise as a suit had already been filed and an order of injunction was passed therein and as such the defendant was bound to act, in terms of the order passed by a competent court of law. He could not take the risk to suffer a contempt more so when the said order was passed in presence of the plaintiffs- appellants and the plaintiffs-appellants had also an opportunity to set up a plea of their title in respect of the consignment in question and had also an occasion to file an application for vacation and/or for variation of the said order of injunction.

68. In this view of the matter there cannot be any doubt that the defendant acted in good faith as it was bound by the order of a competent court of law.

69. It is true as contended by Mr. Dey that the suit filed by M/s. Lakshminarayan Gaurishankar was strictly not in terms of Section 167 of the Indian Contract Act inasmuch as in the said suit the plaintiff thereof did not pray for declaration of its title.

70. However, it is needless to observe that the plaintiffs may take recourse to such other remedy as may be available to them for enforcing the security furnished by M/s. Lakshminarayan Gaurishankar in the aforementioned Civil Suit No. 181 of 1971 or take such an action against the said firm to which they may be found entitled in law.

71. In view of such a peculiar situation obtaining in this case, in my opinion, the defendant must be held to have discharged its obligation as a bailee in its capacity as a common carrier.

72. In the result I find no merit in this appeal? which is accordingly dismissed. However on the facts and in the circumstances of the case the parties shall bear their own costs throughout.