

(1938) 03 BOM CK 0003

In the Bombay High Court

Case No : O.C.J. Appeal No. 46 of 1937 and Suit No. 1324 of 1934

Lakhaji Dollaji and Co.

APPELLANT

Vs

Boorugu Mahadeo Rajanna

RESPONDENT

Date of Decision : 25-03-1938

Acts Referred:

Contract Act, 1872 — Section 151

Citation : AIR 1939 Bom 101 : (1939) 41 BOMLR 6

Hon'ble Judges : Kania, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal from a decision of Mr. Justice B.J. Wadia, The facts are really not in dispute. The plaintiffs instructed the defendants, who carry on business as commission agents in bullion in Bombay, to purchase silver bars on their account and to keep them. The defendants purchased the bars and kept them at their pedhi in Bombay, where three of the bars were lost. There is no suggestion that they were lost through any dishonest action on the part of the defendants. Nobody knows how they were lost, but the presumption is that they were stolen. At any rate they were lost, and the plaintiffs sued for damages for the loss of those three bars. The learned Judge held upon the facts that the defendants were guilty of negligence in the manner in which they kept the bars. I do not think that point can be seriously disputed. The defendants kept the bars, with a number of other bars, in their pedhi in Bombay, placed against the wall, the pedhi being open. They were not locked up in any way. The defendants say that the pedhi was never left without somebody being present, there was always either a servant or a partner, but obviously that evidence cannot be correct, because the silver bars weighed seventy pounds each and they could not have been removed in the presence of other persons. I think the pedhi must undoubtedly have been left unattended, possibly on more than one occasion, and somebody got in and removed the bars. The loss was not

discovered till June 28, 1934, when it was found that some gunny-bags had been placed in the position formerly occupied by the bars, and according to the defendants those gunny-bags had been there for some days before it was noticed that the silver bars had been removed. It seems to me impossible to say that the defendants looked after the bars with sufficient care to absolve them from the ordinary liability of a bailee. Therefore, on that point I agree with the learned Judge.

2. The contract between the parties is evidenced by three telegrams sent by the plaintiffs to the defendants. The first telegram read: "Buy five silver vilait ready chowkas. Keep there." The other two telegrams were in similar terms except as to the number of bars. In my opinion the effect of the telegrams was that the plaintiffs offered to the defendants the business of buying bars as commission agents and keeping them pending instructions as to delivery. No doubt the defendants could not have been compelled to keep the bars for more than a reasonable time, but the instructions were that the bars were to be bought and kept by the defendants. Now the defendants in acknowledging these telegrams reported that the bars had been purchased and "kept here at your risk." The learned Judge treated the contract between the parties as a contract in which the bars were retained by the defendants at the risk of the plaintiffs, but he held that the words "at your risk" were not enough to absolve the defendants from the act of negligence which resulted in the plaintiffs' loss. If I agreed with the learned Judge as to the nature of the contract between the parties, I should not be prepared to accept his view as to its legal effect. But, in my opinion, the contract between the parties was not a contract to keep the bars at the risk of the plaintiffs. The offers contained in the telegrams were accepted by the defendants when they executed them, and in my view the contract required the defendants to keep the bars as bailees for a reasonable time, and they were not entitled to add a new term to the contract by providing that they were not to be under the ordinary liability which attaches to bailees.

3. That really disposes of the appeal, but, as the learned Judge dealt with certain points of law arising on the assumption that the contract was a contract to keep the bars at the plaintiffs' risk, I will deal shortly with that point. The liability of a bailee is laid down by Section 151 of the Indian Contract Act which provides that in all cases of bailment a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would take in similar circumstances of his own goods of the same bulk, quality and value as the goods bailed. Then Section 152 provides that in the absence of a special contract a bailee is not liable for any loss, destruction or deterioration of the thing bailed if he has taken the amount of care described in Section 151 ; so that a bailee is liable for negligence, the standard of which is defined in Section 151, It is argued by Mr. Taraporewala that a bailee cannot contract himself out of Section 151, and that every bailee must at any rate be liable to the extent laid down in Section 151. This Court in *Bombay Steam Navigation Co., Ltd. v. Vasudev Baburao* ILR (1927) Bom. 37 : 29 Bom. L.R. 1551, following the case of *Sheik Mohamad Ravuther v.*

The British India Steam Navigation Co., Ltd. ILR (1908) Mad. 95., held that it was open to a bailee to contract himself out of the obligations imposed by Section 151, and I feel no doubt whatever that that view is correct. The Act does not expressly prohibit contracting out of Section 151 and it would be a startling thing to say that persons sui juris are not at liberty to enter into such a contract of bailment as they may think fit. Contracts of bailment are very common, although they are not always called by their technical name. I can see no reason why a man should not be at liberty to agree to keep property belonging to a friend on the terms that such property is to be entirely at the risk of the owner and that the man who keeps it is to be under no liability for the negligence of his servants in failing to look after it. The learned Judge took that view, but he held that the words "at your risk" did not amount to a contract taking the case out of Section 151. Therein I am unable to agree with him. It seems to me that on his judgment the words "at your risk" are given no meaning at all, and, if they are part of the contract between the parties, they must be; given some meaning. The words mean that the risk is to be that of the owners, and not of the bailees. The only liability of a bailee is for negligence u/s 151, and, therefore, any words absolving him from risk must cover the consequences of negligence : see *MacCawley v. Furness Railway Co.* (1872) L.R. 8 Q.B. 57 and *Rutter v. Palmer* [1922] 2 K.B. 87. Those cases show that there is a distinction between the case of an agent, like a common carrier, who is liable for loss or damage to goods whether or not occasioned by the negligence of himself or his servants, and the case of an agent, like a bailee, who is liable only for loss resulting from negligence. In the former class of cases a contract excluding liability may have effect given to it by excluding only the liability for acts not resulting from negligence unless of course the contract is so expressed as to make it clear that liability from negligence was to be excluded; but in the latter class of cases, where the only liability is in respect of negligence, any contract excluding liability must apply to acts of negligence because there is nothing else on which it can fasten. Had I therefore taken the same view as the learned Judge as to the nature of the contract between the parties, I should have said that the defendants have contracted themselves out of their liability as bailees. But, in my opinion, the true contract between the parties was that the defendants were to hold the bars for a reasonable time as ordinary bailees, and it was not open to the defendants to alter the contract until a reasonable time had expired, and they never suggested that a reasonable time had expired. In my opinion, therefore, the appeal fails and must be dismissed with costs.

Kania, J.

4. The facts are stated in the judgment of the learned Chief Justice. On the question whether it is open to two contracting parties to contract a bailee out of his liability as provided in Section 151 of the Indian Contract Act, I agree with the conclusion mentioned in the judgment in appeal and with what is stated by the learned Chief Justice. But the question is whether there is a contract in this case which excludes that liability. The facts show that the plaintiffs had asked the

defendants to purchase and keep the bars. By purchasing the bars in the market the defendants accepted the commission which was given to them. They had therefore no right to add to the instructions given to them or to the contract which arose out of their action in purchasing the bars according to the instructions. The statement contained in their letter that from the moment of delivery they had kept the bars at the plaintiffs' risk, was not consistent with the commission accepted by them and has no value at all. It was an attempt to impose an additional term which was never accepted by the plaintiffs. It was urged on behalf of the defendants that on the expiry of a reasonable time it should be treated that the bars were kept at the risk of the plaintiffs. I am unable to accept that contention. The letters containing the additional terms were written at a time when the first contract was subsisting. While that contract was subsisting it was not open to the defendants to state that from the very commencement they had kept the bars at the risk of the plaintiffs. They can so intimate after the expiry of a reasonable time. The additional term was his offer which had never been accepted. There being no obligation to repudiate the additional term, no question of acquiescence to form a later contract arises. That case has not been set out in the written statement and was not even suggested by defendants' witness. On that ground the appeal must fail.

5. It is not necessary for me to express an opinion as to the meaning of the words "at your risk" used in the particular circumstances of this case or the extent to which *McCawley v. Furness Railway Co.* (1872) L.R. 8 Q.B. 57 or *Rutter v. Palmer* [1922] 2 K.B. 87 would apply in India.