

(1961) 11 RAJ CK 0003
In the Rajasthan High Court
Case No : First Appeal No. 25 of 1955

Union of India (UOI)

APPELLANT

Vs

Lachhi Ram Gurdayalmal

RESPONDENT

Date of Decision : 06-11-1961

Acts Referred:

Goods Tariff General Rules — Rule 28, 28(2), 31
Railways Act, 1890 — Section 47, 47(1), 56, 72

Citation : AIR 1962 Raj 181

Hon'ble Judges : J.S. Ranawat, C.J; L.N. Chhangani, J

Bench : Division Bench

Advocate : M.L. Johari, for the Appellant; Shrikishan Mal, for the Respondent

Judgement

Chhangani, J.—This is an appeal by the Union of India representing the Western Railway Administration, Bombay, against the judgment and decree of the Civil Judge, Bhilwara dated the 10th December, 1954, decreeing the plaintiff-respondents' suit for damages for an amount of Rs. 7391-2-9 with costs and interest. The appeal initially came up for hearing before a Single Judge. The learned Single Judge having regard to the intricate nature of the questions involved in this appeal relating to the nature and extent of the liability of the Railway Administration u/s 72 read with Sections 47 and 54 of the Railways Act and the conflicting state of case-law thereon and other circumstances referred the case to a Division Bench and consequently the case has come before us.

2. The facts leading to the appeal are these. The plaintiff Lachiram Gurdayal Mal, a joint Hindu family firm trading at Shahjehanpur having obtained permit marked Ex. 21 for the export of 2000 maunds of Lauta Gur from Garewganj to Sareri (Shahjehanpur--Rajputana) consigned on 26th and 27th of June, 1945, 1974 parties of Lauta Gur by three consignments detailed in para 1 of the plaint from Carewganj on O. and T. Railway to Sareri on B. B. and C. I. Railway to self. It may be mentioned here that the plaintiffs have not stated in the plaint as to when the goods reached the destination station Sareri and when they learnt of

the same but it appears from the defendant's written statement that the consignment reached on the 2nd, 3rd, and 4th of July, 1945. The plaintiffs' agent Chandrabhan, however, went to the Railway Station Sareri on 8th July, 1945 to obtain delivery.

Chandra Bhan found (1) that the goods of all the three consignments were lying uncovered on the open platform, although July was a Monsoon month and there was tin-shed godown on the station; (2) that the goods were badly soaked in rain water; (3) that about half of the quantity of the said goods was washed away in the rains as they were not covered ever since the consignments were unloaded by the Railway. According to the plaintiffs there were heavy rains at the Sareri Railway Station from 5th to 7th July, 1945, which were responsible for the condition of the goods noticed by the plaintiffs' agent. The plaintiff's agent wanted delivery after weighment and after ascertaining the extent of damage and noting the same.

But the Station Master, Sareri having not agreed to deliver goods in this manner the plaintiffs were telegraphically informed by the agent. Shamlal, one of the Karta of the plaintiffs' firm and his Munim Parmeshwar Dayal thereupon reached Sareri on 17th July, 1945. It was noticed by him that "even after the happenings upto 7th July, 1945, the station staff at Sareri did not cover the goods and did not take any precaution to protect them"" and "as a result thereof the consigned goods had further dwindled away owing to the rains and the quality had also much deteriorated."

The plaintiff Shamlal also made a request to the Station Master ""to deliver the goods alter weighment and upon qualified remark as to condition but he refused to do so." He thereupon wanted to send telegrams to the District Traffic Superintendent, B. B. and C.I. Railway Mhow and the Chief Traffic Manager B. B. and C. I Railway, Bombay, but the Station Master did not accept the telegrams. He accordingly went to Shahpura and sent telegrams to the authorities named above. In the meanwhile the goods were removed to the Goods Shed on 22nd July, 1945. According to the plaintiffs, there was continuous correspondence between the plaintiffs and the Chief Traffic Manager, who eventually by his letter dated 1st September, 1945 informed the plaintiffs that the delivery of the goods might be taken by them "after weighment on qualified remark as to condition of the goods." In the meanwhile the goods having become rotten in the extreme, the plaintiffs replied to the Chief Traffic Manager, Bombay that the delivery would be taken if the shortage be certified by an authorised and responsible officer and the fitness of the goods for human consumption is certified by medical authority.

The Chief Traffic Manager, however, did not give any reply to the plaintiffs' letter and an the meanwhile whatever goods had remained were auctioned and despite plaintiffs' request they were not apprised of the quantity Bold. Attributing gross negligence and misconduct to the defendant Railway and its officials in the matter of handling the goods and consequently loss to them, they claimed the following damages : Rs. 6843-9-3 on account of price of 1000 maunds of Lauta

Gur; Rupees 1368-11-3 on account of reasonable profit of 20 per cent; Rs. 523-14-0 on account of interest on the blocked capital. After serving on the Railway Administration a notice u/s 80 C. P. C., a suit was eventually brought in the Court of the Sub-Judge, First Class Railway Lands in Rajputana Jurisdiction, Ajmer, on 22nd August, 1946. The defendant resisted the plaintiffs suit. It was stated that three consignments reached Sareri on 2nd, 3rd and 4th July, 1945, and were actually unloaded by the plaintiff's agent Chandra Bhan on their actual dates of arrival, and that Chandra Bhan took tarpaulin from the Station Master and covered the goods.

It was asserted that Chandra Bhan did not approach for taking delivery of the consignments presumably as he did not get an import permit from the Shahpura State for which he went on trying. The allegations about the condition of the goods in para 3 of the plaint were denied and it was further asserted that as the plaintiff's agent went on assuring the Station Master that he would take delivery of the consignments shortly, the goods were allowed to remain covered by only one Tarpaulin up to 16th July, 1945. But on that date two more Tarapaulins were supplied to the plaintiffs' agent to cover the consignments. The defendant did not admit that there were heavy rains at Sareri from 5th to 7th July, 1945 and, that the plaintiffs' agent wanted delivery even on conditions. On the other hand, the defendant pleaded that the plaintiffs' agent deliberately did not take delivery, and was responsible for the delay in obtaining delivery.

The defendant also denied the allegations about the Gur having become rotten and contended that the conditions mentioned in the plaintiffs' reply letter dated 5th September, 1945, addressed to the Chief Traffic Manager, were illegal and meant only to while away time. The defendant admitted that the goods were auctioned but pleaded that the auction was made u/s 56 of the Indian Railways Act, as the plaintiffs failed to take delivery. The defendant also pleaded that he was amply protected by Risk Notes A and B and as the owners declared weight was accepted correct, the defendant was not liable. On these pleadings the trial Court framed as many as 15 issues, as detailed below:

1. Was the consignment in suit booked under permit No. 324/11 of 9.5.1945 of the Regional Food Controller, Lucknow, if not what is its effects on the case?
2. Was the unloading of the consignments in suit done by Chandra Bhan or the Railway Staff?
3. Are the allegations made in para 3 of the plaint correct?
4. Was there a fall of rain at Sareri Station between 5-7-1945 to 7-7-1945?
5. Did the Station Master at Sareri refuse to deliver the consignments in suit after weighing them? If so, what is its effect.
6. Was the Station Staff negligent in not covering the consignment in suit and not taking precautions against rains?

7. Are the allegations made in para 8 of the plaint correct? If so what are their effect?

8. (1) Was the plaintiff right in claiming that the shortage be certified by an authorised responsible officer and (2) goods to be certified fit for human consumption?

9. Was the defendant Railway guilty of misconduct and negligence in not taking due, proper and statutory precautions, or did the defendant discharge its responsibility u/s 72 of the Railways Act.

10. What is the extent of damages that the plaintiff has suffered and is he not entitled to recover it from the defendant?,

11. Were the consignments in suit booked without import permits required by the Shahpura State? If so what is its effect on the suit?

12. Were the consignments in suit validly auctioned under Sections 55 and 56 of the Railway Act?

13. Were the consignment in suit booked under risk notes A and B. If so, what is their effect?

14. Is the defendant not liable for shortage as the owners declared weight was accepted? What was the actual weight consigned?

15. To what relief are the plaintiffs entitled?

The trial Judge on a consideration of the oral and documentary evidence of; the parties decreed the plaintiffs' suit for an amount of Rs. 7,391/2/9.

3. It will be useful to briefly summarise the findings of the trial Judge on the various issues. Issue No. 1 relating to the permit for export of Gur from Carewganj and Issue No. 11 relating to the necessity of a permit for importing Gur from Shahpura were decided in the plaintiffs' favour and it was held that the plaintiff had a permit for exporting Gur to Shahpura and that there was no necessity for permit from the Shahpura Government for importing Gur into Shahpura. As regards Issue No. 2 the learned Judge found that the goods in dispute were got unloaded by Shri Kalyan Singh, Station Master through the Railway porters and that Chandra Bhan, the plaintiffs' agent did not get them unloaded. Deciding issue No. 4, in favour of the plaintiffs it was held that there were rains at Sareri between the 5th and 7th July, 1945. Dealing issues Nos. 3, 6 and 9 together the the learned judge held that the Railway staff did not take care to keep Gur on stone slabs or sleepers but merely kept on the open platform and did not cover it although the month of July was a Monsoon month; and that in consequence the Gur was drenched in water and was washed away; and that the defendant was guilty of misconduct and negligence in not taking proper and due precautions as required by Section 72 of the Railways Act.

As regards issue No. 8, the trial Judge observed that the plaintiffs were entitled

to claim certificate regarding shortage of goods and fitness for human consumption. Issues Nos. 5 and 7 were considered simultaneously and the trial judge held that the Station Master having refused to give delivery after weighing the goods and making a note about shortage the defendant will be liable for the plaintiffs' loss. The implication clearly is that the plaintiffs were justified in refusing delivery except on their condition. As regards Issues Nos. 13 and 14, the trial Judge found that the plaintiff had succeeded in proving that the Gur was 1000 maunds and that the Railway having realised freight on that quantity and having failed to establish that the Gur was of lesser quantity the defendant cannot escape liability.

Issue No. 12 was also decided in the plaintiffs' favour and it was held that the defendant was not justified in auctioning the Gur but should have arranged delivery to the plaintiffs after making enquiry as to the shortage. As regards the extent of damages the trial Court found that in the figure of Rs. 6,843/9/3 claimed by the plaintiff as the price of Rs. 1000 maunds of Lauta gur Rs. 250/- were included on account of the expenditure incurred in obtaining an extension of the permit, and the plaintiff was not entitled to this amount. He, therefore, allowed Rs. 6593/9/3 as the price of Gur, Rs. 273/11/9 on account of profit and Rs. 523/14/- on account of interest, the total being Rs. 7,391-2-9. On these findings the trial Judge decreed the plaintiffs' suit for Rupees 7391/2/9. The defendant being aggrieved by the decree of the trial Judge filed the present appeal.

4. We have heard Mr. M. L. Johri for the appellant and Mr. Shrikishanmal Lodha for the respondents at a considerable length. Mr. Johri has in the first instance assailed some of the findings of the trial Judge, He contended that there is no satisfactory proof that the consignment was unloaded by the Railway and that the trial Judge in arriving at the finding took into consideration inadmissible evidence. He also contended that the materials on record do not warrant a finding that the defendant was negligent in handling the goods and did not take due care as a bailee. The finding that there were rains at Sareri on 5th to 7th July, 1945 and that the goods were damaged, have also been attacked as not supportable on evidence. It was also urged that the extent of loss has not been proved. He also made a legal submission that the essential functions of the Railway are to carry goods and that it is not their business to act as a warehouse man or bailee for hire and consequently their liability came to an end on arrival of the goods at the destination station or at any rate after lapse of reasonable time to enable the consignee to obtain delivery.

He relied upon Rule 28 of the Goods Tariff General Rules corresponding to the present Rule 31 by which reasonable time has been fixed as 24 hours after the arrival of goods in this view of the law, he added the Railway's liability came to an end before 5th July, 1945 and consequently the defendant is not liable for losses which according to the plaintiffs were caused after 5th July, 1945. In this connection he further contended that at any rate the Railway being not bound to

give open delivery and the plaintiffs having unjustifiably refused delivery except on condition of weighment, etc. the defendant cannot be held liable for subsequent losses. It was further pointed out that there being no evidence to ascertain the extent of losses upto 8th of July, 1958, and losses thereafter the plaintiffs are not entitled to any relief in the absence of proper measure of damages.

5-7. (His Lordship then considered the questions of fact and agreed with the findings of the trial Court, namely, (1) that the Station Master got the goods unloaded through the Railway porters; (2) that the defendant-Railway acted negligently and did not take adequate precaution for the protection of the plaintiffs' goods; and (3) that the extent of damage had been proved.)

8. We now address ourselves to the question of law relating to the determination of the precise point of time upto which the Railway Administration's liability as a bailee must continue. There are conflicting decisions on this point. Before noticing these cases we consider it proper to refer to the relevant provisions of law and the background in which they were introduced.

9. In England the liability of the common carrier for safe delivery of goods entrusted to his care has been always treated as independent of contract to carry and was founded on common law and custom under which he is regarded as an insurer of goods entrusted to him. The special liability of the carrier, however, is for a limited period only and the courts have held that when once the consignee is in a position to take away the goods beyond reasonable time, the obligation of the carrier becomes that of an ordinary bailee being limited to take care of the goods as warehouseman. Under the earlier Railways Act there ensued a controversy over the applicability of the above English common law rule. The Calcutta High Court consistently applied the rule in several cases but the Bombay High Court held it inapplicable. Section 72 of the present Railways Act was introduced to set at rest the conflict and to give effect to the Bombay view. Section 72 of the Indian Railways Act (No. IX of 1890), as originally enacted, reads as follows:

"72 (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in-so far as it purports to effect such limitation, be void, unless it-

(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Central Government.

(3) Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or

goods, shall affect the responsibility as in this section defined of a railway administration."''

Sub-section (2) of Section 72 has since been deleted by the Railway (Amendment) Act No. 56 of 1949. The next relevant provision of law is Section 47, which empowers a Railway Company or in the case of a Railway administered by the Government, an officer to be appointed by the Central Government to make rules consistent with the Act for the following-purposes, namely:

"(f) for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner;"

Sub-section (3) of Section 47 requires that

"a rule made under this section shall not take effect until it has received the sanction on the Central Government and been published in the Official Gazette."

10. It may be further pointed out than under this provision of law, rules were made as early as 1902 for regulating the terms and conditions on which the Railway Administration agreed to warehouse or retain goods. These rules provided inter alia scales of wharfage and demurrage charges. Reference may also be made at this stage to Rule 28 of the Goods Tariff General Rules, the relevant portion of which reads as follows:--

28. (2) That in respect of goods not removed from Railway premises at station of destination within the time allowed free of demurrage and wharfage the Railway is not liable in any respect for any loss, destruction, deterioration of or damage to such goods arising from whatever cause notwithstanding that the Railway may have warehoused or otherwise kept the goods and notwithstanding that the Railway shall be entitled to be paid the authorised charges for goods so left on their premises."

This rule with some amendments now stands as Rule 31.

11. Yet another provision of law deserving reference is Section 56, which provides for the disposal of unclaimed things on the railway. The section reads as follows:--

"56. (1) When any animals or goods have come into the possession of a railway administration for carriage or otherwise and are not claimed by the owner or other, person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be-served upon him, requiring him to remove the animals or goods.

(2) If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the railway administration may, within a reasonable time, subject to the provisions of any other enactment for the time being in force, sell the animals or goods as nearly as may be under the provisions of the last foregoing section, rendering the

surplus, if any, of the proceeds of the sale to any person entitled thereto." On a proper construction of the above provisions of law in their back ground the principles properly deducible may be stated as follows:--

(1) The English notion of the carrier's liability terminating on the arrival of goods or soon thereafter having their origin in the special liability, should not be imported into India as in India railways are exempt from special, liability of the insurer of goods and their liability is that of an ordinary bailee.

(2) Section 72 of the Act being silent and not helpful to understand the period upto which the responsibility extends; Section 47 contemplating likely delays on the part of the consignee in obtaining delivery and empowering the railway to regulate the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner, and finally Section 56 while providing for the sale of unclaimed goods requiring that "if the owner of the goods or the person entitled to them is known, the railway administration should serve notice upon him requiring him to remove the animals and goods before selling them u/s 56 and further requiring the railway administration to render any surplus if any, of the proceeds of the sale to any person, entitled, thereto, clearly contemplate the continuance of the contract of bailment in the event of an omission or refusal on the part of the consignee to take delivery upto the sale of goods u/s 56, and these various provisions considered together do not fit in with the suggestion that the railway's liability as a bailee terminates automatically with the expiry of the reasonable time after the arrival of the goods.

There is an obvious inconsistency in the contention that while the contract of bailment is over and the railway is exonerated from the liability to take care of the goods, yet it should be empowered to warehouse and retain the goods and to regulate the terms and conditions "for the same, and should be further under a necessity to serve notice upon the owner or the consignee before conducting sale and to render the surplus to them. The Railway's collections of demurrage and wharfage and under the terms and conditions to be regulated u/s 47 can be appreciated only on the assumption of the continuance of status as bailee under the original contract for carriage and cannot be justified otherwise. It must, however be made clear that it may be open to the railway to take appropriate action after the arrival of the goods to secure a discharge or limitation of its liability by appropriate legal action as contemplated by the law relating to bailment. For instance, after the arrival of goods, the railway may give a proper and reasonable notice that it cannot arrange to warehouse the goods or does not propose to do so and that it will not consequently claim wharfage, etc. it cannot, however, be permitted to take an incongruous stand--"that even though it retains the right to charge wharfage, etc. and means to enforce its claim it must still be exempt from the liability of a warehouseman or to take reasonable care of the goods--except on a proper legal sanction which cannot be supplied by Rule 28 and which is consequently lacking.

3. The condition laid down in Rule 28(2) that the railway is not liable in respect of any loss, destruction, deterioration and damage to such goods if the goods are not removed from railway premises at station of destination within the time allowed free of demurrage and wharfage, essentially seeks to exempt the railway from the liability as a bailee, and cannot be treated as regulating delivery or a term or condition on which the railway might warehouse or retain the goods. This condition cannot be valid as it exceeds the rule-making power of the railway and it is also inconsistent with the liability imposed on the railway u/s 72 of the Railways Act. Besides the rule fixing an arbitrary maximum limit of 24 hours after arrival of goods irrespective of the circumstances of individual cases, e.g. the bulk and nature of goods, the chances about the safe predictability of the arrival of goods, bona fide controversies over the quantum of charges payable to the Railway and the identity or damage of goods cannot but be treated as a limitation of the liability as bailee and is thus inconsistent with Section 72.

4. The argument that the consignee of goods cannot make the carrier responsible for any loss if he for his own convenience or by his own laches allows them to remain with them for an unreasonable time after the goods had arrived at the destination and the carriers are ready to deliver them, cannot be accepted, as the railway is empowered under the statute to regulate the terms and conditions on which the goods are to be warehoused or retained and that the railway is in a position to adequately safeguard its rights. Of course delay in taking delivery can be taken into consideration as a factor contributing to the damage of goods and an important circumstance in determining the question whether the Railway exercised proper care but delay by itself cannot be pleaded to defence to the negligence and misconduct of the Railway employees.

5. Lastly, it also does not appear reasonable to treat the provisions of Rule 28(2) as a part of the agreement between the Railway and consignors and to accept that irrespective of the validity of Rule 28 (2) the parties should be deemed to have contracted to the exoneration of the railway's liability. Obviously, there is no express contract to the effect and the clause in the Railway Receipt that the contract will be subject to the rules, cannot be equated with such a contract. Evidently the rules contemplated in the Railway Receipts must be rules which are validly and authorisedly framed.

12. On the above general considerations of the relevant provisions of law we are inclined to hold that the railway's liability should prima facie continue until actual delivery or until sale of goods under the procedure prescribed by Section 56 of the Act.

13. We may now proceed to examine the various cases cited at the Bar.

14. The extreme proposition of law that the railway accepts goods only for the purpose of carriage and that the railway's liability should terminate as soon as the carriage operation is over, does not derive support from the decided cases. There are of course some observations in *Badrudin Vs. Secy. of State* and

Others, to this effect.

""The goods in question were delivered to the Railway company for the purpose of being carried to Karachi. When the railway company carried the goods to Karachi, they fulfilled their part of the contract and that contract came to an end."

However, there is a great preponderance of authorities against this view and it has been generally accepted that the contract to carry also implies the contract to deliver the goods. I need not refer to the various cases on the point, as the matter now stands concluded by the following observations of the Supreme Court in Governor General in Council Vs. Musaddi Lal,

"The railway administration being a bailee of the goods delivered for carriage to it is therefore a bailee during the period when the goods remain in its custody for the purpose and in the course of carriage and for the purpose of delivery after the goods are carried to the destination."

15. On the much debated contention that at any rate the Railway's liability must cease with the expiry of reasonable time after the arrival of goods and that under Rule 28(2) of the Goods Tariff General Rules, the reasonable time is the time allowed for free delivery, the learned counsel for both the parties cited cases expressing rival views. Mr. Johri for the Railway, relied upon the following cases:--

1. B.N.W. Railway Co. and Another Vs. Mul Chand, 2. Secy. of State for India v. Firm Harkishandas Kuremal, AIR 1926 Lah 575(2); 3. Vidya Sagar v. Governor-General in Council, AIR 1949 Lah 166 ; 4. The Union of India (UOI) Vs. Radhikaran Satyanarayana, 5. Lalji Raja and Sons v. Governor-General in Council, 54 Cal WN 902 ; 6. Kanyaka Parmeswari Vs. Union of India (UOI) and Others, 7. Sarjug Prasad Ishwar Purbey Vs. Union of India (UOI), Mr. Shrikishanmal Lodha, appearing for the plaintiff-respondents relied upon the following cases:

1. Firm Sohanpal Munnalal Vs. The East Indian Railway, 2. Governor-General in Council v. L. Jagannath, AIR 1943 Lah 244 ; 3. Chhatumull Chowthmull Vs. Union of India (UOI), 4. Union of India (UOI) Vs. Shantilal Nanchand Jain, 5. Haji Mohamad Jamaluddin Brothers Vs. Union of India (UOI),

16. The facts in B.N.W. Railway Co. and Another Vs. Mul Chand, were these:

A trader at Agra had consigned to him by rail 113 bags of chillies to be delivered at Kasganj. There was an express contract with the railway providing that the wagon should be unloaded by the consignee. The consignment arrived in a sealed wagon on 11th May, and was ready for unloading on 18th May. One Reotiram, an employee of a firm at Kesganj, employed by the plaintiff to take delivery on his behalf, presented himself before the railway authorities on 18th May. As a matter of concession he was allowed to unload even without the railway receipt. He tendered the railway receipt on 22nd May but did not remove the goods. On 31st May when a member of the firm asked to be shown the plaintiff's goods, they were missing. The learned Judge, who decided the case

entertained some, doubts, that Reotiram himself was responsible for the removal of the goods, and they observed the railway company was not responsible for the honesty of Reotiram or any other agent or sub-agent of the plaintiff. They further observed that, the plaintiff's suit deserved to be dismissed on a simple ground for want of evidence to support it. They, however, still considered necessary to consider to examine the legal position. Quoting with approval the observations of Cockburn, C. J. in *Chapman v. Great Western Railway Co.*, (1880) 5 QBD 278 they recorded the following conclusion:

"No explanation of the delay between the unloading on 13th May and the so-called breach of duty on 22nd May, was attempted by the plaintiff or required of the defendants. It is clear that the contract of carriage was over. To hold otherwise would be to impose a wholly unreasonable burden upon carriers. The railway company might be responsible as warehousemen, when a somewhat different set of considerations would arise, if any evidence had been led to show that such an arrangement was either expressly or impliedly made. The charge for demurrage does not necessarily give rise to such an application, nor would any duty rest upon the company for breach of which they have been held liable by the lower appellate Court until such an arrangement had begun." It appears to us that in coming to the conclusion the learned Judges were influenced by the English law under which the carrier's special liability as an insurer of goods comes to an end, as soon as the carriage operation is over. As stated earlier, the liability of railway in India being that of an ordinary bailee, the principle of English law is not strictly relevant. The learned Judge's emphasis on "the absence of any explanation of delay on the part of the consignee to take the delivery and the absence of any evidence of arrangements for warehousing clearly shows that the decision was reached on the peculiar facts of the case. On the basis of this authority we do not feel inclined to change the conclusion, which we have recorded earlier that on a consideration of the combined effects of Sections 72, 47 (1) (f) and Section 56 and of the various rules framed u/s 47, the Railway's liability as bailee should continue until delivery or until sale u/s 56 or until otherwise duly discharged by an appropriate action after the arrival of the goods.

17. In AIR 1926 Lah 575 the consignment consisting of 172 bags of *ata* reached the destination railway station on 3rd July, 1920. The plaintiff failed to take delivery till 10-7-1920. The plaintiff presented for the delivery on 10th July, but refused to accept delivery saying that the "*ata*" was damaged. On plaintiff's refusal to take delivery the Railway authorities sold the goods on auction. The plaintiff sued for the price of the "*ata*" bags. The learned Judges dismissed the suit relying upon the principle laid down in *B.N.W. Railway Co. and Another Vs. Mul Chand*,

18. In *Vidya Sagar's* case, AIR 1949 Lah 166 also where there was delay of six weeks in consignee's approaching for delivery, *Acchru Ram, J.* relying upon *Secy. of State for India's* case, AIR 1926 Lah 575 observed, that-

"The liability of the railway administration u/s 72, for the loss, destruction or deterioration of goods delivered to it to be carried by rail, remains in force only for the period during which the goods remained in transit and for a reasonable time after their arrival at the destination. After the expiry of such reasonable time, there is no legal obligation imposed on the railway administration to look after the goods or account for them."

19. Rule 28 (2) of the Goods Tariff General Rules prescribing 24 hours as the reasonable time was also referred to before Achru Ram J. and the decision in AIR 1943 Lah 244 declaring that rule ultra vires was cited. The learned Judge, however, did not think it necessary to make any comments on the view taken in Governor General in Council's case, AIR 1943 Lah 244 The view taken by Achru Ram J. in Vidya Sagar's case, AIR 1944 Lah 166 was also followed in Lalji Raja and Sons' case, 54 CWN 902.

20. For the reasons given in connection with the decision in B.N.W. Railway Co. and Another Vs. Mul Chand, we do not feel persuaded to change our conclusion with reference to these cases.

21. Great reliance was placed by Mr. Johri on The Union of India (UOI) Vs. Radhikaran Satyanarayana, which was described by him as the best authority in his favour. The learned Judge noticed most of the earlier cases taking a view favouring the railway. The cases taking contrary view in AIR 1943 Lah 244 , Chhatumull Chowthmull Vs. Union of India (UOI), and, Union of India v. Firm of M/s. Parikh Shankerlal Jethalal, AIR 1956 Nag 255 were also considered and commented upon and the learned Judge expressed his disagreement with the view expressed in those cases. Dealing with Governor-General in Council's case AIR 1943 Lah 244 the learned Judge observed as follows:

"I am unable to see that any part of Rule 28(2), which corresponds to Rule 31(2) denies the liability of the Railway administration as bailee u/s 72. As for the making of the rules u/s 47(1)(f), the terms and conditions contemplated, therein may also, in my opinion, comprise the conditions that the railway administration will act as ware-housemen but retain the goods thereafter on other terms for the defaulting consignee on payment of demurrage."

Chhatumull Chowthmull Vs. Union of India (UOI), was not followed as the learned Judge observed that the Judges deciding Chhatumull Chowthmull Vs. Union of India (UOI), did not consider the effect of Rule 31 in arriving at this conclusion.

22. With respect we find it difficult to agree with the view taken in The Union of India (UOI) Vs. Radhikaran Satyanarayana, as in our opinion, the railway's liability cannot be over until delivery of appropriate action u/s 56 of the Railways Act. Rule 28(2) providing for the automatic termination of the railway's liability after the expiry of 24 hours is certainly tantamount to denial of liability. We are also inclined to hold that Section 47 cannot contemplate a rule authorising the railway to act as warehouseman in connection with the contract for carriage and

delivery and to charge demurrage and wharfage and at the same time deny its liability as a bailee for the proper care of the goods.

23. *Kanyaka Parmeswari Vs. Union of India (UOI) and Others*, is of no great assistance so far as the present case is concerned. The learned Judge did not make any comment, on the correctness of *Jagannath's case*, AIR 1943 Lah 244 declaring Rule 28(2) ultra vires but distinguished *Jagannath's case* AIR 1943 Lah 244 on the ground of subsequent amendment of Section 72. The decisions in *Chhatumull Chowthmull Vs. Union of India (UOI)*, and *Union of India (UOI) Vs. Shantilal Nanchand Jain*, taking the contrary view were distinguished on their facts.

24. The decision in *Sarjug Prasad Ishwar Purbey Vs. Union of India (UOI)*, followed by the decision in *Lalji Raja and Sons' case* 54 CWN 902 and it was further observed that the view expressed in that case was not dissented in the later case, *Chhatumull Chowthmull Vs. Union of India (UOI)*, This case also proceeds on the reasons given in earlier cases and does not introduce new grounds so as to induce us to modify our conclusion.

25. Now examining the respondent's case, the decision in *Jagannath's case*, AIR 1943 Lah 244 is a direct authority on the point of validity of Rule 28(2). Dhawan J. after noticing: some cases, summed up the position as follows :

"The condition requiring the goods shall be removed from the railway premises within a certain period after which demurrage and wharfage will be charged may be a valid condition relating to the delivery but the further condition laid down in Rule 28(2) that the railway is not liable in respect of any loss, destruction, deterioration or damage to such goods arising from whatever causes if the goods are not removed within the time allowed free of demurrage and wharfage is not a condition affecting delivery. It is a condition exempting the railway from its liability for loss. Such a condition cannot be held to be valid because it not only exceeds the rule-making power of the railway but is also inconsistent with the liability imposed on the railway u/s 73 of the Act."

26. In AIR 1948 65 (Nagpur) *Padhye, J.* took the view that "even if the consignee refused to take delivery of the goods duly offered to him the railway still continues to be the bailee and remains liable as such."

27. In *Chhatumull's case*, AIR 1955 Cal 1264 *Das Gupta J.* sitting with *Mookerjee, J.* stated the law as follows:

"Where the consignor's representative fails to take delivery within a reasonable time after it is ready for delivery by the carrier; the liability of the carrier ceases. But the Court should consider the further question whether after the liability of the carrier strictly so called has ceased, there has or has not arisen from the fact that the Railway continues to keep the goods. And in this respect the provisions of Section 47 (1)(f), Railways Act, have to be noticed along with the fact that it was under the rules framed on 3-7-1902 for regulating the terms and conditions

on which the Railway Administration agreed to warehouse or retain goods on behalf of the consignor or owner on payment of certain charges. As in this case wharfage charges are recovered from the consignor at the time when delivery of goods were taken, the Railway is liable u/s 152, Contract Act as bailee on a contract of bailment for warehousing the goods and is, therefore, liable for the loss caused by the goods having been damaged while so warehoused."

It is true, as observed, in *The Union of India (UOI) Vs. Radhikaran Satyanarayana*, that effect of Rule 31 was not expressly considered in this case but as Rule 28 corresponding to Rule 31 is ultra vires and invalid, the correctness of the decision cannot be effected.

28. Mr. Johri invited our attention to explanation to Section 148 of the Contract Act, which reads as follows:

"If a person already in possession of the goods of another contracts to hold them: as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment."

An argument addressed in this connection was that to constitute the liability as a warehouseman it is necessary to establish an agreement of the Railway to that effect and the railway by expressly laying down in the rule that it will not be responsible for the loss, destruction etc. cannot be said to so contract. We are unable to accept this argument, because the explanation contemplates that the goods were not delivered by way of bailment in the first instance. In the case of the goods delivered to the railway for carriage the initial delivery of goods is under a bailment and as such the applicability of the explanation is not attracted. As we look at the matter, we consider that the correct conclusion appears to be that the railway by claiming charges on account of demurrage, wharfage, agrees to continue as a bailee in pursuance of the original contract of carriage and is bound to take due and reasonable care of the goods.

29. In *Union of India (UOI) Vs. Shantilal Nanchand Jain, Bhutt, J.* has given further reasons for holding the railway's liability. The following observations may be usefully quoted;

"His duty to deliver is subject to the condition that he has right to retain the goods until he receives due remuneration for the service he has rendered in respect of them when the service is rendered in accordance with the purpose of the bailment. During all this period the liability to take care of the goods, enjoined on him by Section 151 must necessarily continue. It is only when he takes the amount of care described in this section that in the absence of any special contract to the contrary, he is absolved u/s 152 from the responsibility for the loss, destruction or deterioration of the goods."

The Andhra Pradesh High Court also in *Haji Mohamad Jamaluddin Brothers Vs. Union of India (UOI)*, has taken this view although the earlier case was not

noticed.

30. We are in respectful agreement with the conclusion reached in these cases and also generally with the reasons therefor. The contention of Mr. Johri that with the expiry of reasonable time after the arrival of goods, the railway's liability ceased, cannot be accepted.

31. The last contention of Mr. Johri is that the railway was not bound to give an open delivery and that it was the duty of the plaintiff-respondents to have taken delivery and then to sue for compensation. As in our opinion the liability of the railway as a bailee continues in spite of omission and refusal to take delivery the contention merits no detailed consideration. We may, however, record our agreement with the following observations in the *The Dominion of India formerly the Governor General in Council Vs. Adam Haji Pir Muhamed Essac* represented by his duly authorised agent Sulaiman Abdulla,

"There is nothing in the bailment sections of the Contract Act, which lay down any obligation on the bailor to take delivery from the bailee when he offers it, nor is there any decision, which lays down any such hard and fast rule. Normally as property in the goods entrusted to a carrier remains with the owner, he is bound to take delivery even if they are damaged, his remedy being to claim compensation, nor can he cast upon the bailee responsibility for further custody as bailee, without payment of storage or demurrage dues. Each case has to be considered on its own facts and no hard and fast rule can be laid down."

32. Lastly, it may be noted that the Court below has not allowed the railway its claim of Rs. 2,052-4-0 on account of freight charges and wharfage charges. The Railway had a lien of the freight and wharfage charges on the goods and the plaintiff cannot disown the liability of the claim of the railway in this behalf. The Court below has allowed an amount of Rs. 523-14-0 on account of interest to the plaintiff but as the plaintiff had failed to take delivery when he could have done so, he cannot reasonably justify his claim of getting interest on the amount of compensation. No term of any contract for payment of interest has been set up by the plaintiff nor has he proved the usage of payment of interest on such claims. An amount of Rs. 523-14-0 on account of interest and an amount of Rs. 2,052-4-0 on account of freight and wharfage charges, making a total of Rs. 2,576-2-0 deserves to be reduced in the amount of the decree passed by the lower Court. The decree for compensation shall thus be an amount of Rupees 4,814 only instead of for an amount of Rupees. 7391-2-9. With this modification the decision of the Court below is upheld. As regards costs of the suit and the appeal, it may be noted that the plaintiff-respondent shall be allowed costs, on the decretal amount finally adjudged by this Court in both the courts and that the defendant-appellant shall get costs of the first Court on the amount of the claim of the plaintiff that has been finally disallowed and of this Court on the amount for which the appeal has succeeded.