THE

INDIAN LAW REPORT

PUNJAB SERIES

APPELLATE CIVIL.

Before Falshaw and Kapur, JJ.

S. SUMMAN SINGH,—*Plaintiff-Appellant,*

versus

THE NATIONAL CITY BANK OF NEW YORK, BOMBAY AND OTHERS,—*Defendants-Respondents.*

1951

Nov. 20th

Regular First Appeal No. 122 of 1947.

Indian Contract Act (IX of 1872)—Section 192—Privity of Contract—Whether exists between principal and sub-agent—Whether an agent can contract out of his liability.

S. S. residing in Panama instructed his bankers, the National City Bank of New York to remit money to P. S. B. in India on condition that it could employ sub-agent in India for the purpose and that it would not be liable for the mistakes, negligence or fault of the sub-agent. The National City Bank employed the P. N. Bank, Bombay as its sub-agent in India to pay the amount to P. S. B. on proper identification. Payment was made to a wrong person but bearing the same name as the payee because of want of full particulars. S. S. sued both the banks to recover the amount on the plea that they were negligent in making the payment. The National City Bank pleaded that there was no negligence and in any case it was not liable by virtue of the clause in the contract for any negligence, etc., of the sub-agent. The P. N. Bank pleaded that it was a sub-agent and was not liable to the plaintiff as there was no privity of contract between the two. These pleas prevailed with the Trial Court and the suit was dismissed. S. S. appealed to the High Court.

Held, that there is no privity of contract between the principal and the sub-agent and the sub-agent is not liable to the principal even if the negligence of the sub-agent's servants is held to be proved. In India it is open to a person to contract out of his liability under section 192 of the Indian

Contract Act. There is nothing in the Indian Law which prevents a man saying " that we shall not remit your money unless you agree to absolve us from all liability even if it is due to the negligence of our sub-agents " and that such a contract can be entered into and enforced.

Calico Printers Association v. *Barclays Bank* (1) and *Newzealand and Australian Land Company* v. *Rustan* (2), relied upon.

Case-law reviewed ; view of Sankaram Nair, J., in *Sheikh Mahmad Revuther* v. *R. I. S. N. Co. Ltd.* (3), not followed.

Regular First Appeal from the decree of Shri Zia Ullah Khan, Sub-Judge, 1st Class, Hoshiarpur, dated the 31st January, 1947, dismissing the plaintiff's suit with costs against defendants Nos. 1 and 2, but granting a decree for recovery of Rs. 12,000 with costs against defendant No. 3 Pritam Singh.

R. P. KHOSLA and R. L. KOHLI, for Appellant.

A. N. GROVER, J. L. BHATIA, M. L. PURI and S. L. PURI, for Respondents.

JUDGMENT

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KAPUR, J. This is a plaintiff's appeal against a judgment and decree of Mr. Zia Ullah Khan, Sub-Judge, 1st Class, Hoshiarpur, dismissing the plaintiff's suit. On the 13th August 1941 Summan Singh, appellant, who was residing in Panama at the time instructed his bankers, the National City Bank of New York, to transfer a sum equivalent to Rs. 2,000 to " Pritam Singh, Baddon, Mahilpur, Jullundur, India, " and signed the instructions along with the conditions which are printed at page 98 of the paper book. The Bombay Branch of the National City Bank of New York instructed the Punjab National Bank, Bombay, on the 16th August 1941 to remit by wire Rs. 2,000 to their Jullundur office to be paid to Pritam Singh, Baddon, Mahilpur, Jullundur, against strict identification and receipts in duplicate. This was by a document Ex. D2|24 at page 73. On the 19th August 1941 the Punjab National Bank, Bombay, instructed by telegram their Jullundur City Branch to pay Rs. 2,000

(1) (1931) 145 L. T. 51 C.A.
(2) 44 L. T. 675.
(3) 32 Mad. 95.

to Pritam Singh, Baddon, Mahilpur, on account of Summan Singh. They also instructed them to pay against strict identification and receipts in duplicate and also to inform the payee that the sum had been received from Panama on account of Summan Singh. It appears that a letter was sent by the Punjab National Bank, Jullundur, to Pritam Singh, Baddon, Mahilpur and was received by Pritam Singh Chhimba at Baddon who on the 26th of August 1941 received the money and executed receipts, Ex. D. 2|10 and D. 2|11. As this Pritam Singh was not known to the Bank, Ram Lok Sharma, a customer of the Bank, identified Pritam Singh and wrote "I know Pritam Singh" and signed his name. That a letter was sent by the Punjab National Bank, Jullundur City, to Pritam Singh, Baddon, is proved by document, Ex. D. 2|16, printed at page 75.

On the 9th May 1942, Summan Singh again instructed the National City Bank of New York to send the equivalent of Rs. 10,000 by wire to Pritam Singh, Village and Post Office Baddon, District Hoshiarpur. The document which is signed is similar to the one which is signed when he sent Rs. 2,000 previously. The conditions are printed at page 100 and are as follows :—

> "In this transaction the funds are accepted only on the following conditions, unless it is expressly and specially agreed to the contrary in writing :—
>
> The National City Bank of New York can, at its discretion, convert into foreign currency the funds received from the client at the selling rate of exchange ruling at this Bank on the date on which the funds are received; the Bank's written statement according to the due entries in its books showing such conversion has been effected being considered as decisive and final. Once this has been done, and by way of an individual transaction, the Bank shall take the necessary steps for effecting the remittance in accordance with this contract; in fulfilling it, the

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Bank shall be at liberty to make use of, or substitute, any correspondent, its agents or any other agency soever; but in no case shall the Bank or any of its correspondents be responsible for the mutilations, interruptions, errors or delays that may occur in the Post or in the Cable Companies, Telegraphs and Wireless Telegraphs or which may be caused by any employee of such companies or brought about by any cause that may be beyond the control of the Bank or of its correspondents: the Bank not being responsible for such errors as may arise owing to the mistake, negligence or fault of any correspondent, sub-agent, or any other agency soever."

By a document, Ex. D. 2|25, printed at page 78, the National City Bank of New York at Bombay instructed the Punjab National Bank, Bombay, to send by telegram Rs. 10,000 to Pritam Singh, Village and Post Office Baddon, District Hoshiarpur, against strict identification and receipts in triplicate. The Punjab National Bank, Bombay, instructed their Hoshiarpur Branch to pay Pritam Singh Rs. 10,000 against strict identification. On the 15th May 1942 the Punjab National Bank wrote to Pritam Singh, Village and Post Office Baddon, informing him of the receipt of this amount of Rs. 10,000. It will be noticed that this time nothing was mentioned about Summan Singh as there were no instructions in the original instructions of Summan Singh nor were they sent by the City Bank to the Punjab National Bank. By a letter, Ex. D. 1/10, the date of which is illegible, Pritam Singh wrote a letter to the City Bank at Bombay telling them he had received a letter, dated the 13th May, that as he was ill he had come for treatment to Meerut and he requested that the sum be sent to him at Punjab National Bank, Meerut, and an intimation be sent to him on the following address—

"C|o Postmaster, Mayopati,
via Phagwarah (Jullundur District)
(Sd) PARDESI."

It will be noticed that this letter is on a sheet of paper which has got printed on the left hand corner top

" S. Pritam Singh
Pardesi,
Photographer. "

and is signed " PARDESI ". On the 27th May 1952 the City Bank by a letter, Ex. D. 2|26, printed at page 81, instructed the Punjab National Bank to act in accordance with the instructions of the letter which was received by them from Pritam Singh which was quoted in full in the letter to the Punjab National Bank, Bombay. The Punjab National Bank, Bombay, on the 30th of May 1942 instructed their Hoshiarpur Branch to act in accordance with the instructions which they had received, i.e., that the money be paid at Meerut. The Meerut Branch then issued a payment order, Ex. D. 2, printed at page 82 for Rs. 10,000 payable to Pritam Singh. This amount was paid to Pritam Singh, son of Bhag Singh, on the identification of one Shambu Nath on the 9th June 1942. This Shambu Nath was a Treasurer in the Meerut Branch of the Punjab National Bank.

As this payee, Pritam Singh, who got the money was not the Pritam Singh for whom money was meant Summan Singh throughout his agent, Dalip Singh, his father, brought a suit for recovery of Rs. 12,000 alleging that he had instructed the City Bank to pay to his son Pritam Singh at Baddon in the District of Hoshiarpur and that the defendants, the City Bank and the Punjab National Bank, never made the payment to Pritam Singh, his son, but negligently paid it to another Pritam Singh who was Chhimba by caste and was a resident of Gondpur and that they did not make any proper enquiries about the identity of Pritam Singh before they made the payment. He also alleged that defendant No. 1, i.e., the City Bank had appointed defendant No. 2, i.e., the Punjab National Bank as agent for payment of the amount in question and that defendant No. 2 on account of connivance and negligence paid the money to a stranger and therefore both of them were liable. He

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also made Pritam Singh Chhimba, the man who had received the money, a party defendant to the suit, he being defendant No. 3.

The defendant No. 1, i.e., the City Bank, denied the allegations of the plaintiff and pleaded that it had paid the money in accordance with the instructions of the plaintiff, that the defendant was guilty of laches and gross negligence in not informing the defendant about the non-receipt of the money and for not giving the full particulars of the payee, that he was guilty of contributory negligence and that the plaintiff had sent the amount at his own risk and liability and "therefore by his agreement and conduct he is debarred from bringing this suit against the remitting bank."

Defendant No. 2 denied the allegations of connivance and negligence and pleaded that it had paid the money after proper identification and that there was no privity of contract as between the plaintiff and it (defendant No. 2) and the plaintiff could not bring a suit against it. It denied its negligence and also pleaded that the plaintiff was guilty of contributory negligence as he had not given the full particulars of the payee.

The trial Court held that the defendants had carried out the instructions of the plaintiff in a *bona-fide* manner, that there was privity of contract between the plaintiff and defendant No. 1, but defendant No. 2 was only a sub-agent and that there was no privity of contract between defendant No. 2 and the plaintiff and that the plaintiff did not remit the money at his own risk. On these findings he dismissed the plaintiff's suit who has come up in appeal to this Court.

The defendants have in the forefront of their arguments submitted that defendant No. 1 is in no case liable because it faithfully carried out the instructions of the plaintiff and at any rate under the conditions of the contract it had contracted out of any liability for loss which may be caused through the errors arising "owing to the mistake, negligence or fault of any correspondent, sub-agent, or any other agency soever", and on behalf of defendant No. 2 it has

been submitted that there was no privity of contract between it and the plaintiff.

I shall first take up the case of defendant No. 2. In his first notice sent by Mr. Durga Das, Pleader of Hoshiarpur, to the National City Bank of New York, Bombay, dated the 30th November 1942 which is printed at page 93, the plaintiff stated as follows :—

> "There is no privity of contract between my client and the Punjab National Bank and the Bank refuses to settle the matter directly with my client. So you will please settle the matter between the Punjab National Bank and yourself. As suggested above instead of simply depending on the word of the Punjab National Bank you will kindly send for the copies of the papers and see for yourself."

In the plaint at page 2, line 6, the plaintiff definitely stated that the defendant No. 1 appointed defendant No. 2 as its agent for payment of the amount in question. Defendant No. 2 in its reply at page 5, line 25, pleaded that there was no privity of contract as between it and the plaintiff. At page 14 in his replication the plaintiff again at line 23 reiterated that defendant No. 2 had paid the money as a result of connivance, negligence and dishonesty of the Bank Manager and that defendant No. 2 as the agent of defendant No. 1 was liable for payment of the money. Issue No. 7 was raised in the following words :—

> "(7) Is there any privity of contract between the plaintiff and defendant No. 2 ?"

The learned Judge when discussing this issue has stated that it was admitted by counsel for the plaintiff that the position of defendant No. 2 was that of sub-agent only. In his grounds of appeal in this Court Mr. R. P. Khosla took up the plea that defendant No. 2 acted as substituted agent and would therefore be liable, a case which has never been set up at any stage of the proceedings before. In my opinion the

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case of the plaintiff must in regard to defendant No. 2 be confined to this that defendant No. 2 was the sub-agent of defendant No. 1 and that there was no privity of contract between the two.

The law in regard to sub-agents is contained in section 192 of the Contract Act which is as follows :—

"192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong."

In Bowstead's Digest of the Law of Agency Article 42 gives the relations between the principal and sub-agent, which are as follows :—

"There is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not, and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto : Provided, that the relation of principal and agent may be established by an agent between his principal and a third person, if the agent be expressly or impliedly authorised to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted.

Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts."

In *Calico Printers' Association* v. *Barclays Bank* (1), the facts were as follows. The plaintiffs, who were financially interested in goods to be shipped to Beyrout, appointed Barclays Bank agents to collect the price of goods sold to a purchaser in Syria. The Bank in turn employed the Anglo-Palestine Bank as sub-agent to collect the proceeds and remit it to them and to warehouse and insure the goods if the purchaser should fail to take delivery. The purchaser did not take delivery and the sub-agents failed to insure the goods, which were destroyed by fire. In an action by the plaintiffs against the Barclays Bank and the Anglo-Palestine Bank it was held that the plaintiffs could not recover against the sub-agents because no privity had been established between them and the plaintiffs. Wright J. refused to accept the argument that privity was created inasmuch as the employment of the sub-agent was in the known course of business. At page 55 of the report Wright J. said as follows :—

> "To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof. In general, where a principal employs an agent to carry out a particular employment, the agent undertakes responsibility for the whole transaction, and is responsible for any negligence in carrying it out, even if the negligence be that of the sub-agent properly or necessarily engaged to perform some part, because there is no privity between the principal and the sub-agent."

At page 55, Wright J. again said :—

> "The rule is illustrated by an ordinary transaction like the employment of a bank in this country to collect funds abroad, which will ordinarily involve having the services of a foreign banking correspondent."

(1) (1931) 145 L. T. 51 C. A.

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Continuing Wright J. said at page 56 :—

> "I think the rule applies to the present case. The defendants, Barclays, by accepting the employment for ¼ per cent commission accepted responsibility for the whole service, including that part of it which necessarily involved the employment of a sub-agent or correspondent at Beyrout. The mere fact that he was nominated by the plaintiffs does not in my judgment affect the position; the defendants, Barclays, accepted the nomination and accepted the defendants, the Anglo-Palestine Bank, as their instrument to fulfil their contract. The case is one of most ordinary banking practice, and to accept the contention that the defendants, Barclays, were not responsible for the acts of the defendants, the Anglo-Palestine Bank, their foreign correspondents, or that there was privity between the latter and the plaintiffs, would be in my judgment to go contrary to the whole commercial understanding of a transaction like this."

In the case of *New Zealand and Australian Land Company* v. *Ruston* (1), the plaintiffs brought an action against brokers in London for the net balance of proceeds of certain cargoes. These cargoes had been consigned for sale to factors in Glasgow, who were in the habit, as the plaintiffs knew, of selling the goods in London through agents there, and in fact employed the defendants for that purpose. It was held that there was no privity of contract between the plaintiffs and the defendants, and the claim failed. Bramwell, L. J., said :

> "It was admitted that if the defendants had misconducted themselves in the sale of these cargoes, and had sold improperly, the plaintiffs could have brought no action against them for such misconduct, but

(1) 44 L. T. 675.

must have sued Matthews and Thielman"—they were the agents—"for not performing their duty by the sub-agents whom they employed....."

Several other cases were referred to by Wright, J., in Calico Printers case which, it is not necessary to mention or discuss here. Relying on these two cases mentioned by me I hold that there was no privity of contract as between the plaintiff and defendant No. 2 and it is not liable to the plaintiff even if negligence of its servants is held to be proved.

The next question to be decided is the liability of the City Bank. Their plea was that they are not liable for the negligence of their agent, the Punjab National Bank, because of the clause in the contract which Summan Singh signed before they agreed to remit the money to a remote village in a foreign country, i.e., India. I have already given the contract in full. The City Bank relied particularly on the following passage—

"the Bank not being responsible for such errors as may arise owing to the mistake, negligence or fault of any correspondent, sub-agent, or any other agency soever."

In *Calico Printers' Association* v. *Barclays Bank* (1), a case which I have already referred to, the condition of the contract was as under :—

"Collections are undertaken at depositor's risk only on the understanding that no liability whatever attaches to the bank in connection therewith or with the storage and insurance of the relative goods."

There were also in the margin the following instructions :—

"Documents to be surrendered against payment : if goods are not taken up, please do your best on our behalf to warehouse and insure them against fire."

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The Anglo-Palestine Bank to whom the document had been sent did not insure them and the goods were destroyed by fire at the Customs House, Beyrout, when uninsured. The plaintiffs alleged that their loss was due to negligence on the part of the defendant bank and (or) their sub-agents in omitting to insure the goods. The plaintiffs contended in that case that the clause providing that no liability should attach to the defendant bank must be disregarded, as being repugnant to the contractual duty undertaken by the defendants to do their best to warehouse and insure the goods. It was held by Wright, J., that there was no conscious departure from the contract on the part of Barclays Bank, but an intention to carry it out, and that the bank was protected by the exemption clause. An appeal was taken against the judgment of Wright, J., to the Court of Appeal which held that in construing the exemption clause the court must have regard to the document in its entirety, must consider what would be the liability of the defendants if there were no exemption clause and also held that the words in the exemption clause were wide enough to cover the negligence alleged in the failure to insure the goods. During the course of the judgment of the Court of Appeal Scrutton, L. J., at page 61, observed as follows :—

> "First of all, you construe the whole words that are used and not a portion of them. Then you look to see what could be the suggested liability without the clause which purports to exempt from liability. What would be the liability here if there were no such clause? To accept goods on the terms 'Please do your best on my behalf to warehouse and insure' is not an absolute obligation; it is an obligation, if accepted, to use due care. That being the obligation which would lie upon the respondents if there was no clause, the appellants say : 'I ask you to do it on the terms of the memorandum at the end,' which

terms are 'On the understanding that no liability whatever attaches to the bank in connection therewith, or with the storage and insurance of the relative goods.' It seems to me quite clear that, interpreting that document as a whole, the bank is under no liability in respect of storage or insurance."

Delivering his judgment in this case Greer, L. J., said at page 63 :—

> "I think they would have had very great difficulty in saying that they were protected by the condition assuming for the purposes of this part of the argument, as I do, that the contract is a contract which imposes some form of legal liability; but in the circumstances of this case, it seems to me quite clear that the bank are protected because they have used words which are wide enough; to cover the events which, in fact, happened in the present case."

Several cases were referred to in the judgment of the Court of Appeal. In *Turner* v. *Civil Service Supply Association, Limited* (1), Miss E. M. Turner entered into a contract with the Association to remove her household goods to Hailsham. The contract was made subject to various conditions, one of which was that the defendants were not responsible for loss or damage caused by fire, and in the course of the transit a fire caused by the negligence of the defendants' servants destroyed the plaintiff's goods. In an action by the plaintiff to recover the value of the goods so destroyed it was held that the defendants were protected from liability by the condition of the contract. This case was followed by Horridge, J., in *Fagan* v. *Green and Edwards, Limited* (2), which was also a case of removal of furniture by a firm of furniture removers and warehousemen, where the contract was of a similar kind.

(1) (1926) I K. B. 50.
(2) (1926) 1 K. B. 102.

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In Rutter v. *Palmer* (1), the owner of a motor-car deposited the car for sale on commission with the keeper of a garage and one of the terms of the contract was " Customers' cars are driven by your staff at customers' sole risk ". The car was sent out by the garage keeper in charge of one of his drivers to be shown to a prospective purchaser and was damaged owing to the negligence of the driver. It was held that this clause protected the defendant from liability for the negligence of his servants.

In *Rosin and Turpentine Import Company* v. *B. Jacob* (2), the House of Lords had to interpret the following exemption clause :—

> " Every reasonable precaution is taken for the safety of goods whilst in craft ; they will not be liable for any loss or damage, including negligence, which can be covered by insurance. "

This clause was held not to be ambiguous and protected the defendants from liability. Mr. Scrutton, K.C., who appeared for the plaintiffs contended that if a carrier intended to contract himself out of his common law liability for negligence he must use unambiguous language. Lord Chancellor on page 82 considering this argument said as follows :—

> " For my own part I must say that in my view if you read these words carefully there is no contradiction as there is no ambiguity.— .....Substantially that means, ' You must not suppose that we are careless people, but we will not accept liability ; you must insure if you wish to be protected, both from our own and our servants' negligence'. "

(1) (1922) 2 K. B. 87.
(2) 102 L. T. 81.

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Their Lordships gave effect to the exemption clause and held that the defendants were not liable.

For the appellant two contentions were raised in regard to the exemption clause, firstly that it was an ambiguous clause and therefore did not protect the defendant, the City Bank, and secondly that in view of section 192 of the Indian Contract Act the Bank could not contract out of its liability for the acts of its agents. As neither party has raised the question of *lex contractus* I must apply the law of this country which the pleadings show was relied upon by all the parties and which in the absence of proof must be held to apply : Dicey, conflict of Laws, rule 194, p. 866. With regard to the argument of ambiguity or the contract not being specific I must say that the words are as clear as they possibly could be, and the contract specifically says that the Bank will not be responsible for the negligence etc. of its correspondent, sub-agent or other agency and in the words of Lord Loreburn in *Rosin* and *Turpentine's case* (1), there is neither any ambiguity nor any want of clarity. I therefore overrule this contention.

Coming now to the question whether according to the Law of India the Bank in Panama could contract out of its liability under section 192 of the Indian Contract Act, my opinion is that it could. There is nothing in the Indian law as far as I can see which prevents a man saying, " that we shall not remit your money unless you agree to absolve us from all liability even if it is due to the negligence of our sub-agents." Mr. Khosla strongly relied on a judgment of the Madras High Court in *Sheik Mahamad Ravuther* v. *B. I. S. N. Co., Ltd.* (2) where Sankaran-Nair, J., was of the opinion that in the case of bills of lading a ship owner could not contract out of his liability which was imposed upon him by sections 151 and 152 of the Indian Contract Act, those being sections

(1) 102 L. T. 81 at p. 83.
(2) I. L. R. (1909) 32 Mad. 95.

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dealing with liabilities of a bailee. At page 122 the learned Judge said :—

> "In fact throughout the Act, whenever the legislature intended that the provisions of the Act should be enforced only in the absence of a contract between the parties they have said so. (*See* sections 109, 113, 116, 121, 93, 94, 95, 202, 219, 221, 230, 241, 253, 256, 261, 265.) The obligation imposed by section 151 applies to bailees as well as to their servants in the discharge of their duty. The agent represents the bailee under the Act. The Contract Act thus sweeps away all the distinctions between the degrees of care required of the bailees. In the English law the amount of care required seems to depend upon the benefit accruing to the bailee. Under the Contract Act the obligation arises from the simple fact of accepting delivery or receiving property for a certain purpose, and the care to be taken is the same in all cases. Thus, under section 71, a person undertakes the same responsibility as a bailee from the mere fact of taking goods belonging to another into his custody. The relations between parties may well be left to be regulated by contract when the degree of care required is dependent upon the benefit derived from the bailment, but when the same amount of care is required independent of any benefit to the bailee then it may well be that the legislature did not think it right to allow the bailee to reduce his liability."

The view of Sankaran Nair, J., comes to this that parties to a contract cannot contract out of those provisions of the Contract Act which are not expressly stated to be subject to a contract to the contrary and therefore a carrier, a bailee or an agent cannot reduce his liability. This view of the learned Judge was not accepted in regard to bills of lading in a

later Madras Case *Kariadan Kumber* v. *The British India Steam Navigation Company, Limited* (1).

In Rangoon the view taken by Mr. Justice Sankaran-Nair was not followed in *Fut Chong* v. *Maung Po Cho* (2), where it was held that a bailee can contract himself out of liability for negligence by special contract. This is a judgment of a single Judge and it followed a Full Bench judgment of the Chief Court of Burma *B. I. S. N. Co., Ltd.* v. *Ali Bhai Mahomed* (3), where the question was discussed at great length by Robinson, J., and by Rigg, J. Reference was made in this Full Bench judgment of the Rangoon Court to a Full Bench judgment of the Calcutta High Court *Moothera Kant Shaw* v. *The India General Steam Navigation Co.* (4) and also to *Irrawaddy Flotilla Company, Limited* v. *Bugwandass* (5) in which the view taken by the Calcutta Full Bench was held to be a correct one. Following these judgments it was held that there was nothing in sections 151 and 152 which prevented a contract limiting the liability of a shipping company. In *Bombay Steam Navigation Company* v. *Vasudev Baburao Kamat,* (6), a Division Bench of the Bombay High Court followed the opinion of White, C. J., rather than that of Sankaran-Nair, J., and the following passage from I. L. R. 32 Mad. 95 was quoted with approval :—

> " In England it is competent to a ship-owner to protect himself, by express contract, from liability for the negligence of himself or his servants. This is also the law applicable in India."

In *Lakhaji Dollaji and Co.* v. *Boorugu Mahadeo Rajanna* (7), Beaumont, C.J., referred to the judgment of Mr. *Sheik Mahamad Ravuther* v. *B. I. S. N.*

(1) I. L. R. (1915) 38 Mad. 941.
(2) I. L. R. 7 (Rang.) 339.
(3) 62 I. C. 378.
(4) I. L. R. (1884) 10 Cal. 166.
(5) 18 I. A. 121.
(6) I. L. R. (1928) 52 Bom. 37.
(7) A. I. R. 1939 Bom. 101.

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Co., Ltd. (1) and approved of the rule laid down in *Bombay Steam Navigation Company* v. *Basudev Baburao* (3) and said as follows :—

> "The Act (Contract 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."

A consideration of these authorities makes it clear that in India it is open to a person to contract out of his liability under section 192 of the Contract Act. In *Irrawaddy Flotilla Company, Limited* v. *Bugwandass* (3), Lord Macnaghten said as follows :—

> "The Act of 1872 (Indian Contract Act) does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to shew that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts."

I hold therefore (1) that there was a contract between the remitter and the remitting bank, i.e., the City Bank, that the latter will not be liable for the negligence of its agents, (2) that the authorities show that such a contract can be entered into, (3) that in spite of section 192 of the Indian Contract Act

(1) I. L. R. (1909) 32 Mad. 95.
(2) I. L. R. (1928) 52 Bom. 37.
(3) 18 I. A. 121 at p. 129.

it is open to the agent to contract out of his liability, (4) that the view taken by Sankaran-Nair, J., is, with very great respect to the learned Judge, not correct and that contracting out is allowed under the law of India and (5) that the view of Mr. Justice Sankaran-Nair has not been accepted by the other High Courts including Bombay, Madras itself and Rangoon. I am therefore of the opinion that the appeal of the plaintiff as against the City Bank also must fail.

I would accordingly dismiss the appeal of the plaintiff, but in the circumstances of this case I leave the parties to bear their own costs throughout.

FALSHAW, J. I agree.

Appellate Civil

1951

Nov. 29th

Before Falshaw and Kapur, JJ.

MAHANT HEM RAJ,—*Plaintiff-Appellant,*

versus

BAWA MATHRA DASS,—*Defendant-Respondent.*

Regular First Appeal No. 171 of 1948

Will—Construction—Two persons given property under the will in equal shares, whether tenants in common or joint tenants—Indian Succession Act (XXXIX of 1925), Sections 106 and 107—One of the devisees dying in the lifetime of the testator, whether his share of the property under the will lapses—Custom Punjab—Right of Representation—Extent of recognition.

Under his will R. D. bequeathed his entire estate to M. D. and R. R., his *chelas,* in equal shares. In 1925, R. R. died leaving behind a son H. R. R. D. died in 1929. In 1945 H. R. sued for partition of the estate of R. D. on the ground that it was the property of the Joint Hindu Family and also that under the will of R. D. he was entitled to half of it. M. D. denied that there was any joint Hindu Family and also pleaded that as R. R. had died during the lifetime of R. D. he alone was entitled to the entire estate under the will. M. D.'s contentions prevailed and the suit of H. R. was dismissed. H. R. appealed to the High Court.

Held, that on the true construction of the will the property was given to M. D. and R. R. as tenants in common and not as joint tenants. But as R. R. had died in the lifetime of the testator there was intestacy as to his share, the devise having lapsed and the property which would have been taken by R. R. if alive became available to the heirs of R. D. in accordance with the rule of succession, i.e., the