APPELLATE CIVIL.

Before Kapur and Soni, JJ.

DOMINION OF INDIA, NEW DELHI,—*Defendant-Appellant.*

versus

FIRM BRIJ and CO.,—*Plaintiff-Respondent.*

Regular First Appeal No. 40 of 1949.

1952

October, 10th

Railway Receipt—Endorsee of—Whether can sue for compensation for non-delivery—Indian Railways Act (IX of 1890)—Section 72—Liability of Railway under—Nature and extent of—Laches of consignor or endorsee,—Whether put an end to the liability of Railway—Interest—Whether allowable to consignee on the value of goods not delivered—Practice—Point raised but not argued—Effect of—Point not raised in Court below—Whether can be raised in appeal.

A Firm of Calcutta consigned goods in dispute to self at Amritsar and endorsed the Railway receipt in favour of a bank who in turn endorsed it to the plaintiff. The railway did not deliver the goods on the plea that the plaintiff had not asked for delivery within a reasonable time and the goods had been sent away to Moghalpura through a mistake. The plaintiff sued for compensation for non-delivery. The defence was that the plaintiff as endorsee of the Railway Receipt, could not sue and that the Railway was not liable because of the laches of the plaintiff in asking for delivery of the goods.

Held—(1) that an endorsee of a Railway Receipt can sue for recovery of compensation for non-delivery as that is a document of title by the endorsement of which the title in the goods passes to the endorsee with the right to enforce the rights under the receipt.

(2) The liability of the Railway is that of a bailee under sections 151, 152 and 161 of the Contract Act which does not terminate at the arrival of the goods at the place of destination and after a reasonable time.

(3) The Railway can dispose of the goods consigned under section 56 of the Railways Act but subject to this section their liability as a bailee is not terminated because of laches of the consignors.

(4) A consignee who suffers a loss because of non-delivery of goods is entitled only to compensation and cannot claim interest on the value of the goods.

(5) A party to the suit who does not address arguments on a point raised and on which evidence is led is deemed to have given up that point.

(6) A point not raised in the court below cannot be allowed to be raised in appeal.

The Firm of Dolatram-Dwarka Das v. *The Bombay Baroda and Central India Railway Company* (1), *Jalan and Sons Limited* v. *The Governor-General-in-Council* (2), *Ramdas Vithaldas Durbar* v. *Amerchand and Co. and another* (3), *Bhayyalal Ramratan Jaiswal v. Agent and General Manager, B. N. Railway* (4), *Sri Ram Krishana Mills Limited v. Governor-General-in-Council* (5), *Chapman* v. *The Great Western Railway Company* (6), *Mitchell* v. *The Lancashire and Yorkshire Railway Company* (7), *Joseph Travers and Sons, Limited* v. *Cobner* (8), relied on; *Stroms Bruks Aktie Bolug* v. *John and Peter Hutchison* (9), held not applicable; *Shamji Bhanji and Co.* v. *North Western Railway Co.* (10), *and Bengal and North Western Railway* v. *Mul Chand* (11), dissented from; *Lalji Raja and Sons Firm* v. *The Governor-General-in-Council* (12), *Vidya Sagar* v. *The Governor-General-in-Council* (13), and *Secretary of State* v. *Harikrishan Dass Kur Mall* (14), distinguished.

Regular First Appeal from the decree of the Court of Shri Jagdish Narain Kapur, Sub-Judge, 1st Class, Amritsar, dated the 22nd December 1948, granting the plaintiff, a decree for Rs 12,796-3-3 with proportionate costs.

K. L. GOSAIN and K. C. NAYAR, for Appellant.

A. N. GROVER, P. L. BAHL and A.M. SURI, for Respondent.

JUDGMENT.

Kapur, J. KAPUR, J. This appeal was brought by the Dominion of India, now the Union of India, against a judgment and decree of Mr J. N. Kapur,

(1) I.L R. 38 Bom. 659
(2) 50 P.L.R. 290
(3) I.L.R. 40 Bom. 630 (P.C.)
(4) A.I.R. 1944 Nag. 362
(5) A.I.R. 1945 Pat. 387
(6) (1880) 5 Q.B. 278
(7) (1875) 10 Q B. 256;
(8) (1915) I K.B. 73
(9) 1905 A.C. 515
(10) A.I.R. 1947 Bom. 169
(11) I.L.R. 42 All 655
(12) 54 C.W.N. 902
(13) A.I.R. 1949 Lah. 166.
(14) I L.R. 7 Lah. 370.

Subordinate Judge, 1st Class, Amritsar, dated the 22nd of December 1948, decreeing the plaintiffs' suit with costs.

Dominion of India, New Delhi
v.
Firm Brij and Co.
Kapur, J.

Firm Gangadhar-Nathamal of Calcutta consigned the goods in dispute which consisted of some chests and bundles of tea on the 16th of July 1947, to self and endorsed the Railway Receipt in favour of the Imperial Bank of India, who in turn endorsed it to the plaintiffs on the 7th of August, 1947. In this case there is non-delivery of the whole of the consignment and the plaintiffs claim Rs 12,294-3-3 as compensation for this non-delivery.

The defence was that the goods had been received at Amritsar on the 23rd of July, 1947 and they remained in the railway station yard up to the 28th of July 1947, when they were, through a mistake, sent away to Moghalpura near Lahore on the 28th of July, 1947, that the Railway Receipt was not presented till the 6th of September, 1947, that the goods were at Badami Bagh railway station and efforts were being made to get them back ; that there was no misconduct or neglect on the part of the railway, and the loss, if any, was due to the laches of the consignee ; that the 'costs of the goods' claimed by the plaintiffs was not admitted and also that the plaintiffs were not owners when the goods arrived at the Amritsar railway station.

The learned Judge framed the following issues :—

1. Whether the plaintiff has got no right to sue and why ?

2. Whether the goods have been actually lost and can the defendant take this plea in view of the defendant's written statement as per para 3 ?

3. Whether plaintiff committed any laches in not taking delivery of the goods and what is its effect ?

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

4. What is the price of the goods ?

5. Relief.

The learned Judge found that the plaintiffs had the right to sue as they were the endorsees of the Railway Receipts ; that the goods had been sent away to Moghalpura ; that the goods were never ready for delivery and the railway servants were guilty of misconduct and negligence and that the plaintiffs were not guilty of any laches and the defendant was liable for the loss. He held the price of the goods to be Rs 12,796-3-3 and decreed the plaintiffs' suit.

Mr. Kundan Lal Gosain, counsel for the railway defendant-appellant, has submitted that the plaintiffs had no right to sue because an endorsee of the Railway Receipt did not have the right to bring a suit. He relied on a Single Bench judgment of the Bombay High Court, (Bhagwati, J.) in *Shamji Bhanji and Co.* v. *North Western Railway Co.* (1), where it was held that even though a Railway Receipt is a document of title, a mere endorsement does not transfer the property in the goods and the endorsement only constitutes the endorsee the agent of the consignee for the purpose of taking delivery of the goods from the railway, but does not give him any right under the original contract with the railway. In other words, even though the ownership of the goods might pass by an endorsement which entitles an endorsee to get delivery of the goods, it does not give him a right of bringing a suit for compensation for non-delivery. This view is contrary to a Bench decision of that Court in *Daulat Ram* v. *B.B.C.I. Ry.* (2), and to the view which has been taken in this Court by a Division Bench consisting of Mahajan and Teja Singh, JJ. in *Jalan and Sons Limited* v. *The Governor-General in Council* (3), where it was held that a Railway Receipt is a mercantile document of title and the endorsee gets ownership of the goods by endorsement of

(1) A.I.R. 1947 Bom. 169
(2) 38 Bom. 659
(3) 50 P.L.R. 290

the Railway Receipt and can maintain a suit against the Railway for non-delivery of the consignment.

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

Under section 2(4) of the Sale of Goods Act, No. III of 1930, "the document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt * * * * and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented. In the Division Bench judgment of this Court, referred to above, the judgment of Mr Justice Bhagwati was referred to but was not followed.

In a Division Bench judgment of the Bombay High Court in *The Firm of Dolatram Dwarkadas* v. *The Bombay Baroda and Central India Railway Company* (1), it was held that a Railway Receipt is a mercantile document of title and the endorsee of the receipt has sufficient interest in the goods covered by it to maintain an action against the Railway Company for damages in respect of the goods covered by the receipt.

In *Ramdas Vithaldas Durbar* v. *Amerchand & Co. and another* (2), their Lordships of the Privy Council upholding the decision of the Bombay High Court held that the railway receipt was an "instrument of title" within the meaning of section 103 of the Contract Act. At page 637 Lord Parker while delivering the judgment of their Lordships said:—

> "In the first place it is to be observed that 'title' in both expressions can relate only to the right to receive delivery of the goods to which the instrument or document relates."

(1) I.L.R. 38 Bom. 659.
(2) I.L.R. 40 Bom. 630 (P.C.)

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

At a previous page at 634 his Lordship said—

> "In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented * * * * * *"

The Nagpur High Court also in *Bhayyalal Ramratan Jaiswal* v. *Agent and General Manager, B. N. Railway* (1), held that an endorsee has the right to claim the delivery of the goods and is entitled to bring a suit for compensation for damages. The same view was taken by the Patna High Court in *Sri Ram Krishna Mills, Limited* v. *Governor-General in Council* (2). A number of cases taking the same view were referred to at page 388 of this report. I would, therefore, repel the contention of the appellant that the plaintiffs had no right to bring the suit. A second point in this very connection was sought to be raised and that was that the loss had occurred before the endorsement was made in favour of the plaintiffs, but this point was never taken in this form in the Court below and there is no evidence to show that the goods had been lost and when they were lost. On the other hand the plea as taken by the defendant was that the goods had been sent to Badami Bagh now in Pakistan and attempts were made to bring them back. This part of the case therefore neither arises nor can be allowed to be raised.

The next submision of Mr. Kundan Lal Gosain was that the plaintiff was not entitled to

(1) A.I.R. 1944 Nag 362
(2) A.I.R. 1945 Pat. 387

the price claimed by him as compensation, because he was only entitled to the price of the goods at Amritsar on the day when the goods should have been delivered or at the most the price of the goods at Calcutta on the day they were delivered to the railway for consignment. That is not the case which was made by the defendant at any stage of the proceedings. In paragraph 6 of the written statement it was pleaded that the claim of the plaintiffs was exaggerated and that the plaintiffs were put to strict proof of the "cost of goods" and their ownership before the arrival of the goods at the destination. The issue raised to which no objection seems to have been taken was. "What is the price of goods?" The learned trial Judge at page 11 of his judgment in the paper book has stated that the counsel for the defendant did not address the court on this issue. It must be taken therefore that at the time of the arguments no objection was taken to the plaintiffs' evidence on this point or to the arguments addressed by their counsel. An objection was then taken that Exhibit P. 4, which is a copy of the invoice received by the plaintiffs from the original sellers and Commission Agents, had not been proved. No objection was taken as to the proof of this document at any stage in the Court below or to the fact that Exhibit P. 4 was a copy of the original, and none could be taken because at the request of the railway authorities the original invoice had been sent to the defendants before the suit was brought. This is clear from the document, Exhibit P. 3, printed at page 22 of the paper book.

Counsel for the appellant then raises the objection that the measure of damages is the cost of the replacement at the place of the destination at the time of arrival. In support he relies on a judgment of the House of Lords in *Stroms Bruks Aktie Bolag* v. *John & Peter Hutchinson* (1), but that case is of no application to the facts of the present case. The case now put forward was never the case of the defendant in the Court below, and, in view of the fact that this issue was not

(1) 1905 A.C. 515

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

argued by the defendants in the Court below it must be taken to have been given up by the defendant specially when the issue raised was the question of 'cost of the goods.'

Counsel then raised the question of laches and submitted that the goods were not claimed within a reasonable time and if they were lost after that reasonable time the railway could not be saddled with any liability. Reliance was placed on several judgments of different Courts. *Chapman* v. *The Great Western Railway Company* (1), was relied upon. There the goods were received at the place of destination and were then placed in the station warehouse. The railway did not know the address of the consignee and the goods were not called for till 27th, the goods having reached on the 25th. Fire broke out accidentally and the warehouse was burnt down. The plaintiff on the same day after the fire called for his goods and on not receiving them brought an action against the railway company as common carrier to recover their values and it was held that after the interval of time which the plaintiffs had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and consequently that the action was not maintainable in the absence of any evidence of negligence on the part of the railway company. The action was defeated really on the ground that there was no evidence of negligence, but there are certain observations in this judgment which go to show that this case instead of helping the appellant is in favour of the respondent. At page 282 Cockburn C.J. said—

> "When once the consignee is in mora by delaying to take away the goods beyond a reasonable time, the obligation of the Carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident.

(1) (1880) 5 Q.B. at p. 278

What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such it must depend on the circumstances of the particular case."

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

Mr. Grover for the respondent, on the other hand, has submitted that there is no proof of the fact that the goods arrived in Amritsar on the 23rd of July, 1947. At any rate, there is no proof that when the wagon arrived, the goods were in it and the defendant was therefore never in a position to deliver the goods. In order to decide the question of laches it has first to be established as to when the goods arrived in Amritsar. Although one of the witnesses for the railway has stated that the wagon in question did arrive on the 23rd of July, 1947, there is no documentary evidence on the record to prove this, although this proof would be in the possession of the railway. D.W.1 for the railway has stated in cross-examination that the wagon when it arrived could not be unloaded without a check by the police as the seals on both the sides had been broken and the police could not check it because the wagon never came in a position where it could be unloaded and that he did not check the wagon, and when he stated that the goods had arrived at Amritsar, it was because the wagon had not been unloaded. This is a very unsatisfactory piece of evidence, and from this it can neither be deduced that the wagon in which the goods were sent had arrived on the 23rd of July, 1947, nor whether the goods were in the wagon, and from this evidence it is clear that the railway was not in a position to deliver the goods when it arrived, even if they did arrive on the 23rd of July, 1947.

What then is the liability of the railway ? In *Mitchell* v. *The Lancashire and Yorkshire Railway Company* (1), the plaintiff was the consignee of some flax which had been sent on the defendants' railway to a railway station N. On its arrival an

(1) (1875) 10 Q.B. 256

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

intimation was sent requiring the consignee to remove it, and the railway company there stated that it would not hold it as common carrier but as warehousemen at owner's sole risk, and subject to the usual warehouse charges. The plaintiff went and took delivery of a portion of the goods consigned and left the rest at the railway station for more than two months and it became damaged because of wet weather. It was held that the defendants were not exempted from liability for negligence to the extent that they would be liable as warehousemen or bailee for hire.

Mr Grover then relied on an unreported judgment of the House of Lords which is referred to in *Joseph Travers and Sons, Limited* v. *Cooper* (1), where Lord Loreburn said—

> "It is for him (bailee) to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good."

And Lord Halsbury said at the same page—

> "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment the proof of that rested upon him."

In the Railways Act, the liability of the railway is given in section 72 which provides—

> "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

(1) (1915) 1 K.B. 73 at p. 88

a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872."

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

Subject to the provisions of the Railways Act therefore the responsibility of a railway administration is that of a bailee under sections 151, 152 and 161 of the Contract Act. Under section 151 of the Contract Act, the care to be taken by a bailee is as much as a man of ordinary prudence would, under similar circumstances, take of his own goods; and under section 152 the bailee is not responsible for the loss of the thing bailed, if he has taken the amount of care of it as given in section 151 of the Contract Act. Under section 161, if by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods. These English cases and the statute law impose upon the railway the duties of a bailee and merely because a consignee or endorsee of a Railway Receipt is not very vigilant or does not go, within what is called reasonable time after the arrival of the goods to take delivery, this would not deprive him of his rights against the railway or give to the railway the right to withhold the goods of the bailor or the consignee. There is section 56 of the Indian Railways Act which provides for disposal of unclaimed goods consigned on a railway. If the goods consigned are not claimed it is the duty of the railway to serve a notice upon the owner and if in spite of this notice he does not take delivery the railway can sell the goods and pay the surplus after deducting their costs etc., to the consignor or the consignee as the case may be but it does not give them the right to sell or withhold and convert goods or does not relieve them from the liability which the law imposes upon a bailee. Mr Gosain relied upon a judgment of the Allahabad High Court in *Bengal and North Western Railway* v. *Mul Chand* (1). In that case the goods arrived at the destination station and one Reoti Ram presented the railway receipt, handed it over to the goods clerk with a clear receipt for

(1) I.L.R. 42 All. 655

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

the whole consignment, but he went away without removing the goods. Later on another man Jhamman Lal asked to see the plaintiff's goods, but by then the consignment had got lost and the plaintiff, the consignee sued for damages amounting to Rs 2,060. It was found that the goods had been properly sealed and arrived in a sealed van at the destination station in the same condition in which they had been despatched and were placed in the goods-shed. It was also found that there was no evidence of misfeasance or conversion by the railway. It was in these circumstances that the claim of the consignee was rejected. The facts in that case were quite different and there is no analogy between the facts there and in the present case. There the railway receipt had been presented duly endorsed with a receipt of the goods and the goods were allowed to be left at the railway station and in these circumstances it may be that there was no duty cast on the railway to take proper care of the goods. Mr Gosain then referred to a judgment of the Calcutta High Court in *Lalji Raja and Sons Firm* v. *The Governor-General of India in Council* (1), where it was held that the liability of the railway company as bailee is limited to the period of transit or carriage of the goods with the addition of a reasonable period of time for loading the goods and a reasonable period of time which is to be given to the consignee to take delivery, and does not extend to any period beyond this time. I am unable to agree with the view taken in that judgment as it is contrary to the duties of a bailee under section 72 of the Railways Act and the decision must be confined to the facts of that case and there the plaintiff knew of the receipt of the goods, but he could not take delivery as he had not the railway receipt, and the deterioration in the goods had occurred due to the plaintiff's delay in taking the delivery. That is quite a different case from the one before us. Similarly, in a Single Bench judgment of Achhru Ram, J. in *Vidya Sagar* v. *The Governor-General in Council* (2), it was held that the liability of the Railway

(1) 54 C.W.N. 902
(2) A.I.R. 1949 Lah. 166

Administration under section 72 for the loss of goods remains in force only for the period during which the goods remain in transit and for a reasonable time after their arrival at the place of 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. Reliance was in that case placed on the Allahabad case, *Bengal and North Western Railway* v. *Mul Chand* (1), and on a judgment of the Lahore High Court in *Secretary of State* v. *Harikishen Das Kura Mal* (2). In my opinion the first case does not lay down correct law, because under section 72 of the Railways Act, which is subject to the provisions of section 56 of the Railways Act, the liability of the Railway is that of a bailee which does not end with the arrival of the goods at the place of destination and after a reasonable time. It was held in the English cases, which I have discussed above, that the liability of the bailee does not cease merely on the arrival of the goods at the place of the destination, the railway still remains a bailee. The latter case referred to by Mr Justice Achhru Ram, *Secretary of State* v. *Harikishen Das-Kura Mal* (2), was very much different. The consignee there failed to take delivery within seven days and then he refused to take delivery on the ground that a portion of the goods had deteriorated because of rain, and ultimately the goods were auctioned. It was held that only a portion of the goods had become damaged and so the consignee was not entitled to refuse the whole of them and that he should have taken delivery and sued for the loss. It was after this finding that an observation was made that the railway administration could be held liable as a bailee and if the consignee neglected to take delivery within a time fixed by the rules the latter could not claim damages. As I have said, the facts of that case are quite different from the one before me and I do not think that the rule laid down in that case, even if correct, applies to this case.

(1) I.L.R. 42 All. 655
(2) I.L.R. 7 Lah. 370

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

What has according to the defendants happened in the present case is that the goods after they arrived at Amritsar railway station, were left in the yard and then sent to Moghalpura. This I take from the evidence of the railwaymen themselves. It is not a case of loss which has occurred due to the laches of the plaintiff. The plaintiff has stated on oath that he went to take delivery of the goods on the 7th of August 1947, and was told that the goods had not arrived. This could be rebutted either by cross-examination or by any other evidence to the contrary which was not done. This clearly shows that the statements of the witnesses for the defendant cannot be believed as to the date of arrival of the goods. But the fact remains that the defendant had admitted that the goods were sent away to Moghalpura. Besides, even according to the statements of the witnesses for the defendant the wagon in which the goods were alleged to have arrived was not unloaded. Nobody verified whether the goods were there or not, and no care and caution seems to have been taken of the goods which arrived at the railway station. On the other hand whatever had arrived was sent away to Moghalpura. In these circumstances the liability of the bailee is not excluded and I am of the opinion that the learned trial Judge rightly decreed the plaintiffs' suit.

The next question which has been raised is one of interest. We have already held in Regular First Appeal No. 38 of 1949, decided on the 8th of October, 1950, that a consignee who suffers a loss because of non-delivery of goods is entitled only to compensation and cannot claim interest on the value of the goods. Nothing has been shown in this case to make us change our opinion on this point. I would, therefore, disallow the sum of Rs 502 which is claimed as interest by the plaintiffs. The amount of the decree will be reduced to Rs 12,294-3-3. I hold therefore that—

(1) (a) An endorsee of a Railway Receipt can sue for recovery of compensation for non-delivery as that is

a document of title by the endorsement of which the title in the goods passes to the endorsee with the right to enforce the rights under the receipt.

(b) There is no proof that the goods were lost nor that the transfer in the goods to the plaintiffs was after the loss had occurred.

(2) (a) In this case the only controversy raised by the defendant was as to the price of the goods and when proof was led by the plaintiff he, by his not addressing arguments on this point, gave up his objections to the amount of the price.

(b) The price as claimed by the plaintiff has been proved.

(c) The rule that the measure of damages claimable by a plaintiff against the railway is the cost of replacement at the place of destination was never raised in the Court below and cannot now be raised.

(3) (a) The plaintiff is not guilty of laches and even if he was the defendant cannot be relieved of his liability as a bailee in this case.

(b) On the other hand it has not been proved as to when the goods arrived and, therefore, it cannot be determined as to when the delivery should have been taken.

(4) The liability of the Railway is that of a bailee under sections 151, 152 and 161 of the Contract Act which does not terminate at the arrival of the goods at the place of destination and after a reasonable time.

Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

(5) The Railway can dispose of the goods consigned under section 56 of the Railways Act but subject to this section their liability as a bailee is not terminated because of the laches of the consignors.

(6) In this particular case the liability of the Railway is not excluded.

(7) No interest is allowable on the amount of money awarded as compensation.

The decree will, therefore, be modified to the extent indicated above i.e., reduced to Rs 12,294-3-3. The plaintiff will have his proportionate costs in this Court and the Court below.

SONI, J.—I agree.

REVISIONAL CRIMINAL.

Before Khosla and Soni, JJ.

AJAIB SINGH ETC.,—*Convicts-Petitioners.*

1952

versus

October, 11th

THE STATE,—*Respondent.*

Criminal Revision No. 651 of 1951.

Code of Criminal Procedure (Act V of 1898)—Section 439—Competency of revision when appeal provided and not filed—Procedural irregularity—Whether entitles the aggrieved party to file a revision instead of an appeal.

The police seized four horses and some *tilla* as unclaimed property but did not report the seizure to the magistrate as required by Section 523 of the Code of Criminal Procedure. Six days later the petitioner made applications to the magistrate claiming the entire property and for an order that the police may be directed to deliver the seized property to them. The Magistrate gave them an opportunity to substantiate their claims and after recording the evidence the magistrate passed an order that the petitioners had failed to prove that the seized property belonged to them and that it should be forfeited to the Government under Section 524 of the Code. The magistrate, before passing the order, did not issue any proclamation. The petitioners did not file an appeal