APPELLATE CIVIL

*Before Dulat and Mahajan, JJ.*

UNION OF INDIA,—*Appellant.*

*versus*

SHRIMATI TARA RANI AND OTHERS,—*Respondents.*

**Frist Appeal from Order No. 58 of 1954.**

1959

Sept. 21st

*Displaced Persons (Debts Adjustment) Act (LXX of 1951)—Section 2(6)—Debt—Claim for compensation for non-delivery of goods against the Railway—Whether a debt—Indian Railways Act (IX of 1890)—Sections 72 and 76—Indian Contract Act (IX of 1872)—Sections 151, 152, 160 and 161—Nature of the liability of the Railway in respect of carriage of goods.*

*Held,* that to be a debt within the meaning of section 2(6) of the Displaced Persons (Debts Adjustment) Act, 1951, the pecuniary liability must exist as a fact and for its existence it should not depend on determination of something else. In a contract for carriage of goods the pecuniary liability arises the moment the goods are not delivered when they ought to have been delivered. What has to be determined is merely the quantum of that liability. The claim for compensation for non-delivery of the goods consigned is, therefore, a debt within the meaning of section 2(6) of the Displaced Persons (Debts Adjustment) Act, 1951. The Railway can prove that it took all the care of the goods that a prudent man would have taken of his own goods and in spite of that loss occurred for reasons beyond its control. It will be absolved from the pecuniary liability not because there is no such liability but because on the facts proved, the Railway is absolved from it.

*Held,* that the liability of the Railway while carrying goods for hire is that of a bailee and not that of a common carrier.

*Gopi Chand Singh etc.* v. *Union of India* (F.A.O. No. 104 of 1958, decided on August 28, 1959) overruled.

*Case referred by Hon'ble Mr. Justice Bishan Narain, on 18th September, 1956 to a larger Bench as the case involves some important questions of law. The Division Bench consisting of Hon'ble Mr. Justice Dulat and Hon'ble Mr. Justice Mahajan finally decided the case on 21st September, 1959.*

*Appeal from the decree of the Court of Shri Chetan Das Jain, Tribunal, Amritsar, dated the 7th December, 1953, granting the applicants a decree for Rs. 5,151/10/6 against the Union of India and leaving the parties to bear their own costs.*

PARTAP SINGH, for Appellant.

D. R. MANCHANDA, for Respondents.

JUDGMENT

Mahajan, J.

MAHAJAN, J.—This is a first appeal arising out of an order passed by Shri Chetan Dass Jain, Senior Sub-Judge, acting as a Tribunal under the Displaced Persons (Debts Adjustment) Act (No. 70 of 1951)—hereinafter referred to as the Act, in an application under section 13 of the Act against the Union of India. This appeal came up for hearing before Bishan Narain, J., on the 18th of September, 1956, and in view of the importance of the questions involved, it was referred to a Division Bench for decision.

The facts giving rise to this appeal are short and simple. Amolak Ram Sethi was carrying on business of a fruit merchant as sole proprietor under the name and style of Laxmi Fruit Agency at Jammu Tawi (Kashmir) and Rawalpindi (now Pakistan). He booked three consignments of fruits and vegetables from Jammu Tawi to Delhi. One of these consignments—the consignment in dispute in this appeal—was booked on the 12th of August, 1947, and the remaining two, not in dispute in this appeal, were booked on the 27th of

August, 1947. The goods never reached the destination and were neither delivered to the consignee nor to the consignor. Amolak Ram, died in communal riots in Rawalpindi in September, 1947. His widow Smt. Tara Rani and his sons filed the application, which has given rise to this appeal under section 13 of the Act. The claim made in this application related to the three consignments and was made against the Union of India for a sum of Rs. 24,206-3-0. A number of preliminary objections were raised to this petition, and in this appeal only those out of them have been dealt with which were pressed by the learned counsel for the Union of India. On th merits, the principal contentions raised related to the liability of the Union of India and the quantum of that liability. All the preliminary objections were rejected by the Tribunal on the 2nd of May, 1953. On merits, the decision was given on the 7th of December, 1953. The claim of the petitioners with regard to the two consignments of the 27th of August, 1947, was rejected, but a decree was passed for the claim relating to the consignment dated the 12th of August, 1947. Against this decision, the present appeal was filed by the Union of India and on a reference by Bishan Narain, J., it has come up for hearing before us.

At this stage, it will be proper to set out the contentions raised by the learned counsel for the Union :—

(1) That the claim in question is not a 'debt' as defined in section 2(6) of the Act and consequently the Tribunal had no jurisdiction to determine the present controversy.

(2) That the application under section 13 of the Act was barred by time.

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(3) That the Act only confers benefit on the person, who actually was displaced from Pakistan and not on his legal representatives.

(4) That the loss of goods was not due to any fault of the Railway and thus the Union of India is not liable for the price of the goods.

(5) That there is no proof on the record to prove the price of the goods and thus no decree for Rs. 5,151-10-6 could be passed.

I propose to take up each of the contentions of the learned counsel for the Union in the order in which they have been set out above.

The first question that arises for determination is whether the claim in question is a debt or not as defined in section 2(6) of the Act. Section 2(6) of the Act is in these terms :—

"2(6) : 'debt' means any pecuniary liability, whether payable presently or in future, or under a decree or order of a civil or revenue Court or otherwise, or whether ascertained or to be ascertained, which—

(a) * * * * * *

(b) * * * * * *

(c) * * * * * *

The contention of the learned counsel is that this is merely a claim for damages and as such is not a 'debt'. For this proposition, he relies on the following decisions, reported as—

(1) *Iron and Hardware (India) Co.* v. *Firm Shamlal and Bros.* (1),

(1) A.I.R. 1954 Bom. 423

(2) *Karamchand Pessumal* v. *Madhavdas Savaldas and others* (1),

(3) *S. Jogindra Singh* v. *Sardarni Chattar Kaur* (2),

(4) *S. Milkha Singh and others* v. *Messrs N. K. Gopala Krishna Mudaliar and others* (3),

(5) *Gopi Chand Singh, etc.* v. *Union of India* (4) (decided on the 28th of August, 1959, by a single Judge of this Court).

It is beyond dispute that the liability of the Railway while carrying goods for hire is that of a bailee. Chapter VII of the Indian Railways Act (No. 9 of 1890), and the Indian Contract Act (No. 9 of 1872), deal with the liability of the Railway as a carrier. The relevant provisions in the Railway Act bearing on the matter in controversy are set out below :—

"Section 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.
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> (3) Nothing in the common law of England or in the Carriers Act,

(1) A.I.R. 1956 Bom. 669
(2) 57 P.L.R. 226
(3) A.I.R. 1956 Punj. 174
(4) F.A.O. 104 of 1958

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1865, regarding the responsibility of common carrier with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration."

"section 76. In any suit against a railway administration for *compensation* for any delay, loss, destruction, deterioration or *damages*, the burden of proving—

(a) in the case of animals, the value thereof, or the higher value declared under section 73, and, where the animal has been injured, the extent of the injury ; or

(b) in the case of any parcel or package the value of which has been declared under section 75, that the value so declared is its true value, shall lie on the person claiming the compensation, but, subject to the other provisions contained in this Act, it shall not be necessary for him to prove how the delay, loss, destruction, deterioration or damage was caused."

The relevant provisions of the Indian Contract Act (No. 9 of 1872) are as under :—

"Section 151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

"Section 152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151."

"Section 160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished."

"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 from that time."

Railways under the Indian Law while carrying goods are not liable as a common carrier, but they are liable as bailees. (*See Mohd. Ekram* v. *Union of India* (1), and *Secretary of State for India for Oudh and Rohilkhand Railway and Great Indian Peninsula Railway* v. *Saiyed Afzal Hussain* (2).

Now coming to the decisions cited by the learned counsel, it will be appropriate to take them in the order in which they have been set out above.

In *Iron and Hardware (India) Co.* v. *Firm Shamlal and Bros* (3), the claim was for damages on a breach of contract,

(1) I.L.R. 1957 Pat. 1359
(2) 56 I.C. 714
(3) A.I.R. 1954 Bom. 423

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and while deciding that case Chagla, C.J., observed as follows :—

"Now, in order that there should be a debt there must be an existing obligation. The payment may be due immediately or it may be due in future, but the obligation must arise in order that the debt should be due. It may even be that the actual amount due in respect of the debt may require ascertainment by some mechanical process or by the taking of accounts. But even when the actual amount is to be ascertained the obligation must exist. It is well settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to any debt and, therefore, it has been held that a right to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim, there must be a debt in the sense of an existing obligation. But inasmuch as a breach of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned."

"The expression 'to be ascertained' may well apply to a case which I have indicated earlier where the pecuniary liability cannot be ascertained without accounts being taken or some other process being

gone through. But the whole basis of a suit for damages is that at the date of the suit there is no pecuniary liability upon the defendant and the plaintiff has come to Court in order to establish a pecuniary liability. Now, whether the case falls under section 2(6), clause (a), (b) or (c) at the date when the application is made, there must be an existing debt, or, in other words, an existing obligation, and when the respondent firm filed its application for damages, there was no debt existing in respect of which an application could be made under the Act. If the intention of the Legislature was that a special tribunal set up under the Act should adjudicate not only upon debts, but also upon damages, nothing was easier than for the Legislature to have said so. But the Legislature advisedly uses the expression 'debt' and not 'damages', and the tribunal is set up for the adjustment of debts and not for the determination of pecuniary liability and the assessment of that pecuniary liability."

In *Karamchand Pessumal* v. *Madhavadas Savaldas and others* (1), the dispute was between the partners *inter se* for taking partnership accounts of a dissolved partnership, and it was held that this type of claim is not a 'debt' within the meaning of section 2(6) and the learned, C.J., made the following observations :—

"Therefore, in order that there can be a debt which can be adjusted or with regard to the recovery of which the special

(1) A.I.R. 1956 Bom. 669

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facility provided by this Act can be afforded to a displaced person, it must be not only any liability but a pecuniary liability and the pecuniary liability must be an existing obligation although it may not be payable '*In presenti*' and even though it may not be ascertained at the relevant date. But the emphasis that the Legislature has placed is upon the word 'pecuniary' which qualifies 'liability', thereby ruling out other kinds of liability which although based upon an existing obligation are not pecuniary in their nature."

(3) In *S. Jogindra Singh* v. *Sardarni Chattar Kaur* (1), the question that arose for determination was whether future maintenance is a 'debt' or not, and it was held that though arrears of maintenance is a debt as defined in the Act, future maintenance is not.

(4) The claim in *S. Milkha Singh, etc.* v. *Messrs N. K. Gopala Krishna Mudaliar and others* (2), arose in a contract relating to sale of goods on account of breach of warranty. It was held that such a claim could not be held to be a pecuniary liability, because the breach would only give rise to a right to recover damages depending on the determination of the initial question as to who is guilty of the breach, thus there being no existing liability till such determination had taken place. The decision in *Iron and Hardware (India) Co.* v. *Firm Shamlal and Bros.* (3), was followed.

Thus it will be seen that in all these cases. the pecuniary liability was not existing at the date when an application to the Tribunal was made.

(1) 57 P.L.R. 226
(2) A.I.R. 1956 Punj. 174
(3) A.I.R. 1954 Bom. 423

In the case of a breach of contract what has to be settled first of all is as to who is responsible for the breach and it is after this matter is settled it can be said that a pecuniary liability on the part of the person guilty of the breach arises to pay damages. Till then, there is no liability. It is difficult to predicate right away as to who out of the two contracting parties is guilty of the breach of contract. Thus it would be clear, that, what was sought to be determined by an application under the Act in all these cases, excepting one, was merely the question whether there was a breach of contract and not that on an existing pecuniary liability the tribunal was called upon to ascertain or determine the amount of that liability. It is not disputed that if the pecuniary liability exists and the tribunal has to determine its extent, it will be covered by the definition of 'debt' in section 2(6) of the Act. What is disputed is that there is no existing pecuniary liability. If the contention is that in all claims for compensation or damages, there is no existing pecuniary liability, I am afraid I am unable to agree. The cases cited by the learned counsel merely deal with that type of a breach of contract where before a pecuniary liability could arise, the liability giving rise to that pecuniary liability had to be determined and till that was determined, there could be no pecuniary liability, and as such no existing liability. But there can be cases where on the breach of a contract the pecuniary liability is an existing liability; not depending on the determination as to who is guilty of the breach. The decision relied upon by the learned counsel would have no applicability to such cases. The decisions do recognise the broad fact that to be a debt within the meaning of section 2(6) of the Act, the pecuniary liability must exist as a fact and for its existence, it should not depend on determination of something else.

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In a contract for carriage of goods the pecuniary liability arises the moment the goods are not delivered when they ought to have been delivered. What has to be determined is merely the quantum of that liability.

The only case where this question directly arose is the unreported decision of R. P. Khosla, J., in *Gopi Chand Singh, etc.* v. *Union of India* (1), and the learned Single Judge has merely followed the Bombay and the Punjab decisions quoted above. As I have already stated, in the present case the liability arose immediately the goods were not delivered and it cannot be disputed, that, that liability was a pecuniary liability because what the plaintiff became entitled to was the price of the goods at the date of non-delivery. All that had to be ascertained was the price of the goods and the mere fact that the railway could avoid that liability on proof of certain facts which will be mentioned presently would not make it nonetheless a pecuniary liability. Just as in a claim on a bond, the liability is there and it cannot be disputed that it is a debt, but a person may avoid that liability by saying that on the date he executed the bond, he was a lunatic, or that he was a minor or that the amount of the bond had been discharged by payment, or the bond was obtained by fraud or undue influence or coercion and thus there is no liability in fact. But all the same, the liability under the bond is there till any of the aforesaid facts are established. It is all the time an existing liability. Similarly, the Railway can prove that it took all the care of the goods that a prudent man would have taken of his own goods and in spite of that the loss occurred for reasons beyond its control. It will be absolved from the pecuniary liability not because there is no such

(1) F.A.O. No. 104 of 1958

liability, but because, on the facts proved, the Railway is absolved from it. Therefore, with due respect to my learned and esteemed brother R. P. Khosla, J., I am constrained to hold that the decision in *Gopi Chand Singh, etc.* v. *Union of India* (1), does not lay down the correct rule of law so far as the liability of a bailee for the non-delivery of goods is concerned.

The second question that arises is whether the application under section 13 is barred by time. The Act came into force on the 10th of December, 1951, and the petition under section 13 of the Act was filed on the 2nd of August, 1952, i.e., within one year of the coming into force of the Act. Section 13 of the Act is in these terms :—

> "13. At any time within one year after the date on which this Act comes into force in any local area, any displaced creditor claiming a debt from any other person who is not a displaced person may make an application, in such form as may be prescribed, to the Tribunal within the local limits of whose jurisdiction he or the respondent or, if there are more respondents than one, any of such respondents actually and voluntarily resides, or carries on business or personally works for gain, together with a statement of the debt owing to him with full particulars thereof."

There can be no manner of doubt that in view of the aforesaid provision, the present application is within time. Therefore, the objection of the learned counsel on this score is not tenable.

As regards the third contention, it has also no substance. In the first instance, Amolak Ram

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Sethi died in Pakistan in September, 1947, and his widow and sons who were residing in Rawalpindi, would themselves be displaced persons, and as the right to the consignment arose on the death of Amolak Ram Sethi and it cannot be said to be a personal right, it survived to them and they are entitled to make an application under section 13 of the Act. Thus there is no force in the third contention raised.

As regards the fourth contention, the tribunal has found as a fact that the railway had failed to prove that the loss of goods was not due to any fault on their part. As a matter of fact in this case, there is no evidence that the goods were ever put on rails at Jammu Tawi or if they were put on rails what happened to them. The Railway would be liable in these circumstances. It cannot avoid its liability in this manner.

The last contention has no force. The finding of the tribunal as to this matter is based on evidence which cannot be said to be either worthless or inadequate. It has been found as a fact by the tribunal that the price of the goods lost comes to Rs. 5,151-10-6. It has based its decision on the account books of the dealers from whom Amolak Ram Sethi purchased the fruit and the vegetables in question, the account books of Laxmi Fruit Agency and the oral evidence given by the witnesses at the trial. Therefore, there is no force in this contention either.

The respondent has filed cross-objections respecting the amount of the claim rejected by the tribunal. The learned counsel for the respondent did not seriously press them, nor is there any merit in them.

For the reasons given above, this appeal and the cross-objections fail and are dismissed with no order as to costs in this Court.

DULAT, J.—I agree.

*B.R.T.*

LETTERS PATENT APPEAL

*Before Bhandari, C.J. and Falshaw, J.*

CUSTODIAN-GENERAL; DELHI,—*Appellant.*

*versus*

RIKHI RAM AND ANOTHER,—*Respondents.*

**Letters Patent Appeal No. 4 of 1957.**

1959

Sept., 24th

*Administration of Evacuee Property Act (XXXI of 1950)—Sections 7 and 46—Power to adjudicate whether a property is evacuee property or not—Whether vests in the Custodian exclusively—Courts or Tribunals—Jurisdiction of—How determined.*

*Held,* that Sections 7 and 46 of the Administration of Evacuee Property Act, 1950 have conferred upon the Custodian the power, and imposed upon him the duty, to decide whether a certain property is or is not evacuee property. It has prescribed the manner in which the power to adjudicate is to be exercised. It has declared expressly that the authority to try and determine this question shall vest in the Custodian and not in the ordinary civil or revenue Courts. It has stated clearly that the Custodian's jurisdiction shall be exclusive.

*Held,* that a Court or a tribunal for the transaction of judicial or quasi-*judicial* business can be created either by the Constitution or by the Legislature. It owes its existence to a legislative enactment and can exercise only such jurisdiction and powers as the instrument by which it is created chooses to confer upon it. The extent of the jurisdiction can be determined by the provisions of the statute by which the Court or tribunal has been created or by the