

Union of India (Uoi) Vs. Benode Kumar

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Court : Kolkata

Decided On : Mar-22-1961

Reported in : AIR1962Cal48,65CWN727

Judge : B.N. Banerjee and ;Niyogi, JJ.

Acts : Railways Act, 1890 - Sections 66, 74 and 113; ;Contract Act - Section 19

Appeal No. : A.F.O.D. No. 47 of 1956

Appellant : Union of India (Uoi)

Respondent : Benode Kumar

Advocate for Def. : Sachindra Chandra Das Gupta, Adv.

Advocate for Pet/Ap. : Ajoy Kumar Basu, Adv.

Disposition : Appeal partly allowed

Judgement :

Banerjee, J.

1. The plaintiff, who is the respondent, claims to be a business man in stationery and toilet goods. He came to court with the case that, on June 9, 1951, he purchased a Railway Ticket from Bombay (Victoria Terminus) to Howrah and booked his luggages, consisting of nine cases of toilet goods. He paid the proper

freight for the luggages and obtained luggage. Ticket No. 4919/9, dated June 9, 1951. According to the plaintiff the luggages were to be carried by 1 down train, leaving Bombay on June 9, 1951. Plaintiff alleged that the Railway Administration failed to deliver the luggages at Howrah Station and thus failed to perform its contractual obligation. The plaintiff claimed that he suffered a loss of Rs. 16,767-8-0 as detailed below:

9 cases toilet goods etc. weighing

20 maunds 24 seers valued at

. . .

Rs. 15,000-0-0

Freight etc.

. . .

. . .

. . .

Rs. 267-8-0

Loss of Profit at 10%

. . .

. . .

Rs. 1,500-0-0

Total claim

. . .

Rs. 16,767-8-0

2. In the aforesaid circumstances the plaintiff instituted the suit, out of which this appeal arises, claiming recovery of Rs. 16,767-8-0.

3. The suit was contested by the Railway Administration. Paragraphs 7, 8 and 12 of the written statement, which are material for the purposes of this appeal, are set out below;

'7. In regard to paras 3 and 4 of the plaint, the defendant states that a half-ticket was purchased purporting to be for a minor and that merchandise Of great value was booked under the guise of luggage to avoid declaration, under the Railways Act which the minor was not entitled to do and was in direct contravention of the Rules in force on the Railways and that if there was any contract, it was void as having been made by a minor; that the Railway Administrations are not liable to pay the compensation as claimed. That the plaintiff is put to strict proof of the ownership of the suit goods.

8. As regards para 5 of the plaint, the defendant does not admit the pecuniary loss which is false and highly inflated and puts the plaintiff to the strict proof of the value of the suit goods, The plaintiff is not entitled to refund of freight and that loss of profit at any percent is not maintainable in law being remote. The allegations of negligence, conversion, etc. are specitically denied.

* * * * *

12. That the defendant submits that the whole affair in connection with the luggage ticket is tainted with fraud and appears to be a big conspiracy to defraud the Railways, and that as the enquiry into this highly complicated case Of fraud has not yet been completed; the defendant craves leave of the Court to file an additional written statement as soon as the details we fully elicited and the whole affair is properly end correctly reconstructed, and that the defendant has every reason to believe that a sifting enquiry by a proper machinery for investigation Is bound to reveal a most daring and ingenious case of fraud. In the circumstances, the defendant denies any liability for compensation.'

4. There is no dispute, in the present appeal, that the plaintiff is not a child, below 12 years of age, who alone is entitled to travel on a half ticket. There is also no dispute that the ticket against which the luggages were booked, namely, ticket No. 8859 was a half ticket or a child's ticket in the third class. Also there is no dispute that luggages, numbering nine cases, were book-ed with the Guard of the 1 down train, leaving Bombay on June 9, 1951. Lastly, there is no dispute that the aforementioned luggages were not delivered to the plaintiff after the train reached Howrah Station. The trial Court decreed the claim on the following line of reasoning:

'(a) The main defence of the Railway rests upon a technical plea that the plaintiff having booked the luggage in question on the basis of a half passenger's ticket, which is ordinarily issued to a minor below 12 years of age under the Railway Rules, plaintiff is a minor, and as the suit was filed by plaintiff as major the plaintiff has not been properly represented and that the contract for carriage by the luggage ticket by a minor is void ab initio and as such it is not binding upon the Railway.

* * * * *

(b) The defence therefore in substance is that the plaintiff having falsely represented himself to be a minor at the time of purchasing a half ticket for self, practised fraud upon the Railway by travelling with a half ticket, and the contract of carriage by luggage on the basis of that half ticket was equally void.

* * * * *

(c) On a consideration of all evidences I find that the plaintiff made this luggage in his own name and that he was major on the date of 'booking and as such the contract ' between the plaintiff and the railway for the carriage of the suit goods of this luggage ticket, Exhibit 3, is binding upon the railway and that the railway Cannot deny its liability merely because plaintiff obtained a half passenger's ticket either on a false representation of self being, a minor, or booked this consignment on the basis of a half ticket purchased by the plaintiff on behalf of any minor relation of his who might have accompanied him on that occasion.

(d) Issue (5). Plaintiff has proved the prices of the articles booked by this luggage ticket, vide sale invoice Exhibit 5 and the cash-memos Exhibit 8 series. I see no reason to disbelieve the plaintiff's witness and the sale invoice and the cash memos produced by the plaintiff. Defendant is not competent to deny the prices deposed by the plaintiff. I therefore find that plaintiff's claim is fair and has been proved and is not inflated.'

5. The propriety of the decree is being disputed before us at the instance of the defendant.

6. Mr. Ajoy Kumar Basu, learned Advocate for the defendant-appellant, contended, in the first place, that as between a passenger and the Railway Administration no contract for carriage comes to be unless a passenger obtains from the Railway a proper pass or ticket, on payment of the requisite fare. Luggages or more properly passenger's luggages can be booked only against a proper pass or ticket; such booking of luggages is not made on the basis of a separate contract but only by way of an extension of the contract for carriage of a passenger. In other words, the right to book passenger's luggage was a facility attached to the contract of carriage of a passenger, holding a proper pass or ticket. By purchase of a child's ticket, Mr. Basu contended, the plaintiff, an adult male person, did not become holder of a proper pass or ticket and as between him and the railway administration no contract for carriage of him as a passenger did come into existence. The plaintiff was, therefore, not en-titled to book his luggages against the improper ticket held by him and as between him and the railway administration no contract for carriage of luggages also did come into existence. Mr. Basu contended, in the next place, that the evidence led on behalf of the plaintiff, was insufficient to prove the quantum of damages suffered by him.

7. In support of his contention, Mr. Basu relied On the provisions of Sections 65, 66, 68, 74, 112 an 113 of the Indian Railways Act. Section 65 provides for exhibition of Time Tables and Tables of fare at Stations. Section 66 provides for supply of a ticket to every person, desirous of travelling on a railway, specifying the class of carriage and the place from and the place to which the travelling has

to be made, upon payment of the requisite fare. Section 68 contains prohibition against travelling or entering a railway Carriage for the purpose of travelling, unless the passenger has with him a proper pass or ticket. Section 74 makes provision with respect of the liability of the railway administration, as a carrier of passenger's luggage, which we set out below:

'Section 74.--A railway administration shall not be responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt thereof.'

8. Section 112 provides for punishment of a person who with the intent of defrauding the railway administration inter alia, uses or remains in a carriage of a railway in contravention of Section 68. Section 113 deals with travelling without pass or ticket or with insufficient pass or ticket or beyond the authorised distance and we set out the Section herein below:

'Section 113. (1)--If a passenger travels in a train without having a proper pass or a proper ticket with him, or, being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under Section 69. he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge hereinafter in this section mentioned, in addition to the ordinary single fare for the distance which he has travelled or, where there is any doubt as to the station from which he started, the ordinary single fare from the station from which the train originally started, or, if the tickets of passengers travelling in the train have been examined since the original starting of the train, the ordinary single fare from the place where the tickets were examined or, in case of their having been examined more than once, where last examined.

(2) If a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket, or travels in or on a carriage beyond the place authorised by his pass or ticket, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge hereinafter in this section mentioned, in addition to any difference between any fare paid by him and the fare

payable in respect of such journey as he has made.

(3) The excess charge referred to in Sub-section (1) and Sub-section (2) shall be a sum equivalent to the amount otherwise payable under those Sub-sections, or eight annas, whichever is greater:

Provided that where the passenger has immediately after incurring the charge and before being detected by a railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred, the excess charge shall be one-sixth of the excess charge otherwise payable calculated to the nearest anna, or two annas whichever is greater:

Provided further that if the passenger has with him a certificate granted under Sub-section (2) of Section 68 no excess charge shall be payable:

(4) If a passenger liable to pay the excess charge and fare mentioned in Sub-section (1), or the excess charge and any difference of fare mentioned in Sub-section (2), fails or refuses to pay the same on demand being made therefor under one or other of those Sub-sections, as the case may be, any railway servant appointed by the railway administration in this behalf may apply to any Presidency Magistrate or Magistrate of the first or second class for the recovery of the sum payable as if it were a fine, and the Magistrate if satisfied that the sum is payable shall order it to be so recovered, and may order that the person, liable for the payment shall in default of payment suffer imprisonment of either description for a term which may extend to one month. Any sum recovered under this Sub-section shall, as it is recovered, be paid to the railway administration.'

In further reinforcement of his contention Mr. Basu relied on two decisions, one reported in *Union of India v. Sardarni Harbans Kaur*, (S) and the other reported in *Ram Chandra Prasad v. Union of India*, : AIR1959 Pat316 . In the case before the Punjab High Court a person was travelling by goods train, without a ticket, and died as a result of train collision. There was neither explicit nor implicit consent of the railway with regard to his travelling by that train. In a suit for damages, for fatal accident to the deceased due to negligence of the railway, the railway administration took the defence that the deceased had no right to travel by that

train because he possessed no ticket and as such not entitled to damages. The Punjab High Court held. (i) that generally speaking a passenger is one who travels in a public conveyance by virtue of a contract with the carrier express Or implied; (ii) that a person who travels contrary to a bye-law and against the wishes of the railway servants is a trespasser and he cannot recover damages for injuries caused as a result of negligence of the carrier. In the case before the Patna High Court, Ramaswami, C. J., and R, K. Choudhury, J. held that the term 'passenger' was nowhere defined in the Railways Act, but reading Sections 66 and 68 together it was clear that a person desirous of travelling in a railway must obtain a ticket, under Section 66 of the Act, or travel with the permission of the railway servant, under Section 68 of the Act, if he had no proper pass Or ticket. Therefore, unless he was supplied with a ticket or given the requisite permission he would not be a passenger. Hence a person, travelling on a train without a proper pass or ticket Or without the requisite permission cannot be called a passenger and if such a person dies as a result of a railway accident, his heirs cannot recover damages, under Section 82-A of the Act. None of the aforesaid two cases deals with loss of passenger's luggage. Mr. Basu. however, contended that we should apply the analogy of the aforesaid two decisions to cases of loss of passenger's luggages.

9. The point raised by Mr. Basu is a question of very great importance to all persons who travel by railway. The point does not appear to have been absolutely raised and decided and it may not be Safe to proceed on mere analogies; far less it may be safe to proceed on the authority of old English decisions, on this point, with which annotated editions of the Indian Railways Act bristle, as will hereinafter appear.

10. AS far back as in 1871, *Macrow v. Great Western Rly. Co.*, (1871) 6 QB 612 was decided by a Bench consisting of Cockburn C. J., Blackburn and Mellor, JJ., and in deliver ing the judgment Cockburn, C, J. observed:

'The conveyance of the personal luggage of the Passenger being obviously for his convenience, and, therefore, necessary, as it were to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of the passengers' luggage should have been coextensive only with the liability in

respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carrier's of passengers.'

The learned Chief Justice further observed (ibid):

'While the authorities referred to establish that a passenger cannot claim to have carried as ordinary personal luggage articles unconnected with the personal use and convenience of the traveller, or, as in *Hudston v. Midland Rly. Co.*, ((1869) 4 QB 366), of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use Or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament--leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers* luggage as a carrier of goods, he undoubtedly becomes entitled--but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying.'

11. The observations by Cockburn, C. J., were followed with approval by Darling J., in *Casswell v. Cheshire Lines Committee*, (1907) 2, KB 499.

12. The two cases in (1871) 6 QB 612 and (1907) 2 KB 499 were decided before the Railway Act 1921. In a much later decision in *Page v. London Midland and Scottish. Rly. Co.* (1943) 1 All ER 455, Atkinson, J. emphasised on the changes Introduced in England by the Railways Act in the following language at pp. 457-58 :

'All these cases were decided before the Railways Act, 1921. It must be remembered that before 1921, there was no obligation upon railway companies to

carry other than personal luggage belonging to a passenger. They were bound to carry a certain weight free, for a third class passenger 100 lbs., and they were entitled to charge for any excess. They were entitled, of course, to carry merchandise for a passenger, but they were under no obligation. All four cases were cases where the plaintiff was seeking to carry free under the description of 100 lbs. free passenger luggage something which was not ordinary passenger's luggage. In each case there was a loss and the company was sued. The answer was the same in every case; the only contract made was the contract made on the sale of the railway ticket which was to carry the passenger and 100 lbs, of ordinary passenger's luggage. If something else was put into the train, there was no contract relating to it, and further than that there was no obligation upon the railway company to carry goods of that kind.

Even so, it is interesting to see how guarded the Court was in ((1871) 6 QB 612). The Court consisted of Cockburn, C. J., and Blackburn and Mellor, JJ. The judgment of the court was given, by Cockburn, C. J. who said, at pp. 617-620:

'By the Act of Parliament by which the company is constituted it is provided that passengers by the railway shall be entitled to have a fixed quantity of ordinary luggage, according to their respective classes, conveyed with them free of charge. The question for our decision is whether the articles of bedding hereinbefore referred to can be considered as ordinary passenger's luggage Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the Railway Acts have in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveller. The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of the passenger's luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles 'carried as passenger's luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the

passenger himself takes the personal charge of them, as in *Talley v. Great Western Rly. Co.*, ((1870) 6 Cp 44), in which case other considerations arise. On the other hand the obligation of a railway company, or other carrier of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what property falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely, irrespectively of negligence, attaches. It is necessary to state the proposition with this qualification; for, as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection of the carrier it follows that in either respect it may be waived by the latter; and, consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity, of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligenceIt being clear that the contract on the part of a railway company is to carry personal luggage only, it follows that it is only in respect of what can properly be termed personal luggage that a liability in case of loss, in the absence of negligence, arises.' So that three times over he uses the expression 'irrespective of negligence', or 'in the absence of negligence', or the like, which seems to indicate that, even with goods being carried as personal luggage which were not personal luggage, there still might, or would be, liability in a case of negligence. All those cases were before the Railways Act, 1921. Just before I come to that Act, it is interesting to refer to three or four lines in Halsbury's Laws of England, Hailsham Edn., vol. 27 p. 120 para 273:

'Formerly, if a passenger included in his luggage articles other than his personal belongings these were carried at the passenger's risk. Now, however, these must be carried on the standard conditions of carriage by passenger train at company's risk rates.' The main relevant change made by the Railways Act, 1921, was that an obligation was imposed upon Railway companies to carry merchandise as well as personal luggage for a passenger at the company's risk.'

13. Under the Indian Railways Act there appears to be no bar Or hindrance to the carriage of toilet articles, such as had been booked in the Instant case, as

passengers' luggage. We are, therefore, not bothered with the problem, whether the articles booked at all satisfied the description of luggage or passengers' luggage, such as had troubled the English Judges in the aforementioned cases. The main points for our consideration are: (i) 'Did the plaintiff book the luggages on the footing of the children's ticket that he had allegedly purchased? (ii) Did a contract for carriage of the plaintiff, an. adult male person, come in existence On the basis of the improper ticket that he was said to have purchased? (iii) If the first contract did not come into existence, could any contract for carriage of his articles as passengers' luggage come into existence

14. On the point whether the plaintiff purchased the ticket or whether the ticket was purchased, in the name of the plaintiff the evidence is not very satisfactory. The plaintiff did not examine himself. A constituted attorney of his (P. W. 1) gave evidence but he admitted in cross-examination that he was not present during the booking. Nevertheless, the luggage ticket (Ext. 3) came from the possession of the plaintiff and, therefore, it is just probable that either the plaintiff himself or some one on his behalf purchased the half-ticket or the children's ticket, and on the strength thereof booked the luggages.

15. As a result of the purchase of a passenger's ticket a contract for carriage of passenger ordinarily comes into existence. In Pollock 'On Contract' (Eleventh Edition) page 41, the following passage appears:--

'When a railway passenger (to take the simplest example) asks for a ticket, he is not concluding a contract but at most offering to be carried by the company on the terms to which he knows, or as a reasonable man should know the company will agree. But It appears on reflection that he is not even making an offer but only opening communications leading to an offer and acceptance. The ticket is issued in regular course only against payment, so that the railway Company (or other purveyor of services to the public in a like position, as the case may be) makes an offer by tendering the ticket, and the contract is formed only by acceptance of the ticket immediately after payment of the fare. This is the view taken, though, not always explicitly stated, in the line, by this time numerous, of authorities on such cases.'

16. There is nothing in the Indian Railways Act which goes contrary to the observation of the learned author above referred to. Therefore, by purchase of the passengers' ticket there initially came to be a contract between the railway administration and the plaintiff for the carriage of the latter's person. That contract, as it now appears, was caused by a misrepresentation, in that a 'half-ticket' was obtained from the railway ad-ministration for carriage of an adult person, to the financial prejudice of the former. That did not, however, make the contract void from its inception but the contract became voidable, at the option of the railway administration, under section 19 of the Contract Act. Moreover, Section 113 of the Railways Act provides for realisation of excess charge from a passenger travelling with an improper ticket and thereby validating the improper ticket.

17. In view of what we have stated it cannot be held that no contract for carriage of the plaintiff came to be on the basis of his purchase of the improper ticket, namely, the half-ticket in the instant case.

18. That being so the booking of luggage, on the strength of the half-ticket purchased by the plaintiff, did not become a void contract. The railway administration having had received the luggage charges and the luggages and having had booked them against a proper receipt, became a bailee in respect thereof and was responsible for the loss thereof, under Section 74 of the Indian Railways Act. We, therefore, repel the first branch of the contentions of Mr. Basu.

19. We now turn to the second branch of Mr. Basu's contention, namely, that the plaintiff had failed to prove the measure of damages.

20. In this respect the plaintiff adduced both-documentary and oral evidence. The documentary evidence consists, firstly, of an invoice (Ext. 5) made out by R. Sankarlal and Co., from whom the plaintiff alleged to have purchased the goods, said to be contained in his luggages. That invoice goes to show that the plaintiff purchased goods worth Rs. 15,284/8/- Inclusive of commission, packing charges, cartage, freight etc., on the goods, he became liable to pay Rs. 15,777/4/6. The next document is the stock book (Ext. 7) which shows debit entries, against the name of the plaintiff, of goods worth Rs. 15,283/12/-. The last document is an entry in Rokar Book (Ext. 6) showing deposit of Rs. 10,000/- by the plaintiff with R.

Sankarlal and Co., for purchase of goods.

21. An officer of R. Sankarlal and Co. (P. W. 2) deposed as follows:--

'Plaintiff purchased goods worth Rs. 15,284/8/-on 9th June, 1951, of which Rs. 10,000/- had been paid on 1st June, 1951. Plaintiff also paid Rs. 152/13/6 as our commission and paid Rs. 35/4/- as packing charge. Plaintiff paid the balance on 9th June, 1951.' * * * * *

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Cross examined: 'I have no personal knowledge about the prices paid except as per accounts.'

22. The other witness examined on behalf of the plaintiff (P. W. 1) has also no personal knowledge either of the purchases made or of the booking. We have already seen that P. W. 2 also does not claim any personal knowledge about the matters in issue. Therefore, the oral evidence is not of any value. It is significant to note that the plaintiff, the only person who is said to have personal knowledge of the purchase and booking, keeps away from the witness box and does not prove his case.

23. We are thus left with the documentary evidence produced on behalf of the plaintiff. Ext. 7 shows deposit of a sum of Rs. 10,000/- by the plaintiff with. R. Sankarlal and Co., 'for purchasing of goods.' The Oral evidence is insufficient to connect this deposit with the goods, said to have been purchased under invoice (Ex. 5) and said to have been booked as luggages. Ext. 7 (Stock book) mostly shows debit entries in respect of goods entered in the invoice (Ext. 5). The invoice shows that the plaintiff purchased toilet goods worth Rs. 15,284/8/-. On that invoice the number of the luggage receipt No. 4919/9, dated June 9, 1951, appears. There is no indication why it became necessary to note the luggage receipt number on the invoice. According to the story of the plaintiff, he himself went to Bombay and purchased the goods against cash payment. If that was so the invoice, to all intents, and purposes, was a cash memo or should have been so. That is also what the words, 'Direct against Cash payment' written on exhibit 5

indicate. Who wrote the luggage receipt number on such an Invoice? It would not have been the concern of R. Sankarlal and Co., to write all that on the Invoice, unless of course, it was, acting as a booking agent for the plaintiff. Of that there is no evidence. If, on the other hand, the noting of the luggage receipt number, on the Invoice, was done or caused by the plaintiff, that itself will not prove the physical booking of the goods, as detailed in the invoice. The plaintiff has, therefore, been unable to lead sufficient evidence of the booking of the goods, as detailed in the invoice (Ext. 5) and unless he succeeds in proving that he does not prove the measure of damages suffered by him. The learned Subordinate Judge appears to have accepted the evidence as to damages much too readily and we are unable to agree with him.

24. Regard being had to the largeness of the claim, we do not desire to shut out the plaintiff altogether from proving his claim. We therefore, allow him another opportunity to prove, by sufficient evidence, the amount of damages suffered by him.

25. This appeal is allowed on the ground that the plaintiff has failed to prove the amount of damages suffered by him. The case will now go back to the trial court so as to enable the plaintiff to lead evidence as to the amount of damages said to have been suffered by him. The defendant will be entitled to lead rebutting evidence, if it so chooses. The case will be reheard only on the point of measure of damages suffered by the plaintiff and on no other point.

26. This appeal is allowed to the extent indicated above. There will be no order as to costs.

Niyogi, J.

27. I agree.