REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8611 OF 2019
(Arising out of S.L.P. (Civil) No. 11213 of 2018)

Taj Mahal Hotel **...Appellant**

Versus

United India Insurance Company Ltd. & Ors. **...Respondents**

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

1. Leave granted.

2. This appeal, by special leave, arises out of judgment dated 05.02.2018 passed by the National Consumer Disputes Redressal Commission ('National Commission') dismissing the appeal against order dated 29.01.2016 passed by the State Consumer Disputes Redressal Commission ('State Commission'), New Delhi in Complaint Case No. 198/1999.

3. The following are the facts out of which this appeal arises:

3.1. On the night of 01.08.1998, at around 11 p.m., Respondent No. 2 herein (Complainant No. 2) visited the Appellant-hotel in his Maruti Zen car. While the car was insured with Respondent No. 1 herein (Complainant No. 1), the Appellant-hotel had taken a non-industrial risk insurance/liability policy from Respondent No. 3. Upon reaching the hotel, Respondent No. 2 handed over his car and its keys to the hotel valet for parking, and then went inside the hotel. The parking tag handed over to him read *inter alia*:

> "IMPORTANT CONDITION: This vehicle is being parked at the request of the guest at his own risk and responsibility in or outside the Hotel premises. In the event of any loss, theft or damage, the management shall not be held responsible for the same and the guest shall have no claim whatsoever against the management."

When Respondent No. 2 came out of the hotel at about 1 a.m., he was informed that his vehicle had been driven away by another person. Upon enquiry with the security officer, he found that three young boys had come to the hotel in their separate car, parked it, and gone inside the hotel. After some time, they came out and asked the valet to bring their car to the porch. During this process, one of the boys, one Deepak, picked up the keys of the car of Respondent No. 2 from the desk, went to the car parking,

and stole the Maruti Zen car. Though the security guard tried to stop him, he sped away. A complaint was lodged with the police, but the car remained untraced.

3.2. Respondent No. 1 (car insurer) settled the insurance claim raised by Respondent No. 2 (car owner) in respect of the stolen car for Rs. 2,80,000. Thereafter, Respondent No. 2 executed a Power of Attorney ('POA') and a letter of subrogation in favour of Respondent No. 1. They both then approached the State Commission by filing a complaint against the Appellant-Hotel seeking payment of the value of the car and compensation for deficiency in service.

3.3. Relying upon this Court's decision in ***Oberoi Forwarding Agency* v. *New India Assurance Company Limited***,[1] the State Commission dismissed the complaint on the ground that an insurance company acting as a subrogee cannot qualify as a 'consumer'. Hence, Respondent No. 1 filed an appeal before the National Commission.

3.4. Notably, ***Oberoi*** was partly overruled by a subsequent decision of a Constitution Bench of this Court in ***Economic***

[1] (2000) 1 SCR 554.

Transport Organisation* v. *Charan Spinning Mills (Pvt.) Ltd.[2] In light of this change in law, by order dated 20.09.2010, the National Commission in appeal remanded the complaint back to the State Commission, observing that Respondent No. 1 (car insurer) had *locus standi* to file the complaint.

3.5. Deciding on merits, the State Commission relied on the decisions of the National Commission in ***Bombay Brazzerie* v. *Mulchand Agarwal***[3] and ***B. Dutta, Senior Advocate* v. *Management of State***[4] to hold that laws of bailment apply when a customer *pays* to park his car in a parking lot and it is then stolen or damaged. It was noted that the price paid for food consumed in the hotel would include consideration for a contract of bailment from the consumer (bailor) to the hotel (bailee). Applying this to the facts of this case, the State Commission observed that though the Appellant-hotel had averred that Respondent No. 2 had not had dinner at the hotel that night, it was improbable for him to have stayed inside the hotel from 11 p.m. to 1 a.m. without consuming any food or snacks or paying

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[2] (2010) 4 SCC 114.
[3] (2002) NCDRC 42.
[4] (2010) 1 CPC 319.

any kind of bill. Hence, the State Commission proceeded on the assumption that Respondent No. 2 had paid consideration for the contract.

In light of this, the State Commission allowed the complaint and directed the Appellant-hotel to pay Respondent No. 1 a sum of Rs. 2,80,000 (the value of the car) with interest at 12% per annum and Rs. 50,000 as litigation costs. In addition to this, it directed payment of Rs. 1,00,000 to Respondent No. 2 for inconvenience and harassment faced by him. The State Commission also held that Respondent No. 3 (insurer of the hotel) would not be liable to indemnify the loss caused to the Appellant-hotel, as the theft of the car had not been notified to it within due time.

3.6. Appeal filed against this order by the Appellant herein was disposed of vide the impugned judgment. On the question of *locus standi* of Respondent No. 1 (subrogee) to file the complaint, the National Commission observed that its earlier order dated 20.09.2010 (supra) had not been challenged, and had consequently attained finality. Hence, it was held that the

Appellant could not argue that Respondent No. 1 (car insurer) did not have *locus standi*.

The National Commission further applied the principle of *infra hospitium* (Latin for 'within the hotel') and observed that common law has historically imposed strict liability on a hotel for the loss of a guest's property if the guest and the property were within the hotel premises. It was noted that once the guest presents the car keys to the valet and possession of the car is transferred from the guest to the hotel, a relationship of bailment is established. Relying on various decisions by foreign Courts on strict liability for property kept *infra hospitium*, the National Commission held that the liability of a hotel cannot be precluded by a printed notice on the parking tag disclaiming liability. Consequently, the appeal against the order of the State Commission was dismissed, although the interest awarded was modified from 12% per annum to 9% per annum. Hence, the present appeal.

4. Learned Senior Counsel for the Appellant made submissions on two fronts. With respect to the *locus standi* of Respondent No. 1, he argued that Respondent No. 1 does not qualify as a

'consumer'. On merits, he vehemently submitted that the decision of the National Commission is erroneous inasmuch the principle of *infra hospitium* is not established under Indian law. He further relied on the decisions in ***Bombay Brazzerie*** and ***B. Datta*** to argue that a bailment necessarily exists under a contract, the terms of which are encapsulated in the parking tag in this case. Since the liability for theft is specifically precluded under the terms stated on the parking tag, he submitted that the Appellant cannot be held liable.

5. Per contra, Counsel for Respondent No. 1 submitted that it is entitled to file a joint complaint with the original consumer in its capacity as a subrogee. Further, he relied on ***Klaus Mittelbachert* v. *East India Hotels Ltd.***[5] and ***Hotel Hyatt Regency* v. *Atul Virmani***,[6] to argue that the duty of care owed by 5-star hotels is higher, and the Appellant must therefore be subject to the highest standard of insurer liability in case of theft of goods from its premises.

6. Heard learned Counsel for both parties.

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[5] AIR 1997 Del 201.

[6] III (2008) CPJ 281 (NC).

7. At this juncture, it is pertinent to note that the compensation awarded by the State Commission (including interest) has already been paid by the Appellant to Respondent Nos. 1 and 2. Thus, we are only concerned with the questions of law involved in the matter. Based on a perusal of the record, the following issues arise for consideration in the present appeal:

First, whether the insurer had *locus standi* to file the complaint as a subrogee?;

Second, whether the Appellant-hotel can be held liable for the theft of a car taken for valet parking, under the laws of bailment or otherwise?;

Third, if the second question is answered in the affirmative, what is the degree of care required to be taken by the Appellant-Hotel?; and

Fourth, whether the Appellant-hotel can be absolved of liability by virtue of a contract?

We will be adverting to each of these in turn.

I. COMPLAINT FILED BY INSURER AS A SUBROGEE

8. It has been settled by a Constitution Bench of this Court in ***Economic Transport Organisation*** (supra) that even though a consumer complaint filed by an insurer in its own name is not maintainable, a complaint filed by the insurer acting as a subrogee is maintainable if it is filed by:

i) the insurer in the name of the assured, wherein the insurer acts as the attorney holder of the assured; or

ii) the insurer and the assured as co-complainants.

9. In the instant case, Respondent No. 2 (actual consumer/assured) had executed a POA and a letter of subrogation in favour of Respondent No. 1 (car insurer). Consequently, the complaint before the State Commission was filed by Respondent Nos. 1 and 2 as co-complainants. Hence, both the conditions are squarely applicable to this case and the complaint is maintainable.

10. Having considered the maintainability of the complaint, we now proceed to examine the liability of the Appellant-hotel for theft of the vehicle of Respondent No. 2.

II. LIABILITY OF HOTELS FOR THEFT OR LOSS OF VEHICLES OF GUESTS

11. The liability of hotel owners or innkeepers (as they were traditionally called) for the loss of, or damage to goods of their guest has been a subject of judicial consideration for a long time. Though the issue has come up before this Court for the first time in this case, it has received ample judicial and academic attention in other common law jurisdictions. Thus, we find it appropriate to allude to this jurisprudence for a comparative context to the legal issue at hand. Though other jurisdictions have dealt with the liability of innkeepers with respect to goods or property of the guests in general, we will be confining our discussion to vehicles of guests, as the present case is concerned with the same.

12. Broadly, two approaches have been taken towards the liability of an innkeeper for loss or damage to the vehicles of his guest[7] – *first*, the common law rule of insurer's liability wherein the innkeeper is treated as an insurer and made responsible for any loss or damage to the vehicle of its guest, regardless of the presence or absence of negligence on his part ('the common law rule'); and *second*, the rule of prima facie negligence wherein the innkeeper is presumed to be liable for loss or damage to the

[7] John E. H. Sherry, *The Laws of Innkeepers: For Hotels, Motels, and Restaurants* (3rd edn, Cornell University Press 1993) 415-417.

vehicle of his guest, but can exclude his liability by proving that the loss did not occur due to any fault or negligence on his part ('prima facie liability rule').

A. Common law Rule

13. At common law, innkeepers were held strictly liable for the loss of or damage to a guest's horse or carriage placed within the confines of the inn, i.e. *infra hospitium*. They were excused from liability only if the loss or damage occurred by an act of God, an act of the public enemy, or the fault or negligence of the guest himself.[8]

13.1. The earliest recorded opinion discussing this rule is ***Dickerson* v. *Rogers***,[9] where the Supreme Court of Tennessee State (USA) held the innkeeper liable for injury caused to a horse brought by the guest and placed in the stable of the inn. Citing English common law, the Court noted as follows:

> "It is laid down by Chancellor Kent (2 Com. 593), upon the authority of the English cases, that an innkeeper is bound to keep safe the goods of his guest deposited within the inn, except where the loss is occasioned by inevitable casualty, or by superior force, as robbery. And Mr. Justice Story says (Law of Bailments, 306, sec.

[8] Joseph James Hemphling, 'Innkeeper's Liability at Common Law and Under the Statutes' (1929) 4(7) Notre Dame Law Review 421, 422.
[9] 4 Humph 179 (1843).

> 470) that an innkeeper is bound to take, not ordinary care only, but uncommon care of the goods and baggage of his guests. If, therefore, the goods or baggage of his guest are damaged in his inn, or are stolen from it by his servants or domestics, or by another guest, he is bound to make restitution…
> …If this rule was not inflexibly enforced, no traveller would be safe in entrusting his horse to the hands of the inn-keeper until he had first inspected his stables, and selected a place for his horse to be kept, an inconvenience which could not be endured."

13.2. The imposition of such strict liability was dictated by the conditions of the time. It emerged in a context where inns were intended to provide a safe haven to travelers against bands of marauders and robbers. However, the popular prejudice was that innkeepers would collude with such persons to rob the guests of their properties.[10] Given the vulnerability of travelers to robbery and violence in such a setting, the judges fashioned the strict liability rule to allow travelers to recover from innkeepers without the need to prove fault. This is well-captured in the following observations made in ***Dickerson*** (supra):

> "…rigorous as this rule may seem, and hard as its operation may be in a few instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. "For" as Sir William Jones

[10] Wayne Quinton, 'Liability for Automobile Parking at Hotels: The Tennessee Case Abstract' (1992) 16(1) Hospitality Research Journal 109, 110; Sylvan H. Hirsch, 'Limited Liability of Innkeepers Under Statutory Regulations' (1928) 76 University of Pennsylvania Law Review 272.

> justly observes (Bailments, 95), "travellers who are most numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innkeepers, whose education and morals are none of the best, and who might have frequent opportunities of association with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them.""

13.3. As the horse and buggy gave way to modern transportation including automobiles and motor vehicles, the common law rule of strict liability was extended to them. In ***Aria* v. *Bridge House Hotel (Staines) Ltd.***,[11] it was further held that the insurance liability of an innkeeper for the goods of his guest also applied to automobiles parked in a space adjoining the hotel, upon directions given by the porter. Since the car of the plaintiff in that case had been parked in such a manner and was stolen while he was dining at the hotel, the defendant hotel was held liable.

13.4. English Courts as well as some jurisdictions in the United States continued to apply the strict liability principle for vehicles of guests through the first half of the 20th century.[12] In England,

[11] (1927) 137 LT 299. *See* John H. Sherry, 'The Innkeeper's Liability for Automobiles and Their Contents' (Aug 1964) <https://doi.org/10.1177/001088046400500202> accessed 2 November 2019.

[12] *See Park-O-Tell Co. v. Roskamp*, 203 Okla. 493, 223, P.2d 375 (1950); *Abercrombie v. Edwards*, 62 Okla. 54, 161 P. 1084 (Okla. 1916).

this was partly possible as the Innkeeper's Liability Act of 1863 did not exclude or limit the innkeeper's liability for motor vehicles. The high point of English case law on this point came with the decision in ***Williams* v. *Linnitt***,[13] where the Court held the innkeeper strictly liable for theft of the car of a guest who had parked it in an open lot provided free of charge. The Court noted that the provision of free parking space was an invitation to the guest to park there, which was sufficient to constitute the lot as being *infra hospitium.* Notably, liability was imposed despite a notice in the car park stating that the innkeeper would not be liable for loss or damage to any vehicle or goods therein. The following observations of Asquith L.J. are noteworthy:

> "The most material facts in this case are that the area, being an area contiguous to the inn, is one in which the guest with a motor car is invited to leave it; that there is no evidence that any other accommodation belonging to the inn is provided for cars, though a garage was marked as being in the neighbourhood of the inn on a plan which was not agreed or proved; and that it is part of the innkeeper's normal business to provide for guests who arrive in cars. These circumstances are very strong evidence that the area is within the "hospitium", and, as I read the judgment, the judge has so found.

[13] *Williams v. Linnitt*, 1 ALL E.R. 278 (Eng. 1951).

> If I am wrong in thinking that the question is substantially one of fact, I consider that the conclusion which the judge has reached on this point is the right legal inference from the circumstances referred to, and, if his conclusion is right, the strict liability attached and could not, in my view, be displaced by such notice as was put up in the car park, which, incidentally, would be quite invisible at 9 p.m. on a February night. For these reasons, and those given by my Lord, I agree that the appeal, though very attractively argued, should be dismissed."

13.5. However, with increasing commercial development, the conditions in which the common law liability of innkeepers originated began fading away. Mindful of these changes, in 1954, the Law Reform Commission in England recommended that the *extent* of absolute liability of innkeepers be reduced. It observed that the most serious hardships due to the strict liability rule occurred with respect to motor vehicles, since these cases were often a battle between two insurance companies. Recognising the increasing burden of liability as in cases such as ***Williams* v. *Linnitt*** (supra), the Committee recommended that liability should only be imposed when the innkeeper is negligent.[14]

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[14] L.J. Blom-Cooper, '*Second Report of the Law Reform Committee on the Law of Innkeepers' Liabilities for Property of Travellers, Guests, and Residents (May 1954)*' (Jul 1955) 18(4) The Modern Law Review 374, 376.

13.6. These recommendations were eventually given effect with the introduction of the Hotel Proprietors Act, 1956, which continues to remain in force in the United Kingdom till date. The Act is significant, as it was the first time that the strict liability of hotels in relation to vehicles of their guests was considered. While it retains strict liability of hotel proprietors in respect of guest's property in certain circumstances, it specifically excludes motorcars and other vehicles of any kind as well as property left in them.[15] In effect, the application of the common law strict liability has been limited by this legislation, in recognition of the unfair burden placed on the innkeepers.

13.7. A study of the law in other jurisdictions reveals that the unlimited common law liability of innkeepers with respect to vehicles has been similarly restricted by legislation. In Singapore, the Innkeeper's Act of 1921 specifically excludes horse, live animals, a car or carriage from the purview of strict liability. Likewise, several states in Australia (including Victoria and New South Wales) have excluded motor vehicles and their contents from the liability of innkeepers, recognizing that this is a well-

[15] Hotel Proprietors Act 1956, s 2(2) (United Kingdom).

established exception to the innkeeper's liability.[16] Arguably, this limitation has been on the basis of the availability of travel insurance for motor vehicles, and the absence of any undue burden thereby falling on the guest. This exception is also recognized in the Convention on the Liability of Hotel-keepers concerning the Property of their Guests, which applies to several members of the European Union. Under the Convention, no form of strict liability has been fastened with respect to vehicles, any property left in vehicles, or to live animals.[17]

13.8. While the exception has increasingly been adopted in these jurisdictions, some states in the United States, such as Oklahoma and Utah, continue to apply the strict rule of insurance liability to an innkeeper with respect to goods kept *infra hospitium*.[18] At the same time, other States have attempted to balance the interests of hotel owners and guests by adopting the relatively moderate prima facie liability rule, which we will now discuss.

B. Prima facie liability Rule

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[16] Innkeepers Act 1968, s 6(a) (New South Wales); Carriers and Innkeepers Act 1958, s 29(a) (Victoria).

[17] Annex to the Convention on the Liability of Hotel-Keepers concerning the Property of their Guests, Article 7 (Paris, 1962).

[18] Sherry, *supra* note 11.

14. Though there has been a shift away from the common law insurer's rule with respect to vehicles of guests, this has not meant that legislatures have completely absolved hotel owners of liability. Instead, they have adopted an approach where the hotel owner/proprietor is held responsible only for those losses that occur as a result of his negligence. Under this rule, the hotel owner is *presumed* to be liable for loss or damage to the vehicle of the guest upon his failure to return the same. However, he has an opportunity to exonerate himself by proving that the loss did not arise due to negligence or fault on his part or that of his servants. The rationale for adopting this approach is well-explained in ***Laird* v. *Eichold***:[19]

> "Innkeepers, on grounds of public policy, are held to a strict accountability for the goods of their guests. The interests of the public, we think, are sufficiently subserved, by holding the innkeeper *prima facie* liable for the loss or injury of the goods of his guest; thus throwing the burden of proof upon him, to show that the injury or loss happened without any default whatever on his part, and that he exercised the strictest care and diligence. And it is more in accordance with the principles of natural justice, to permit him to exonerate himself by making such proof, than to shut the door against him, and hold him responsible for an accident happening entirely without

[19] 10 Ind. 212 (1858).

his default, and against which strict care and prudence would not guard."

(emphasis supplied)

14.1. Today, this rule is prevalent in several jurisdictions in the United States including Indiana, Illinois, Kentucky, Maryland, Texas, and Vermont,[20] as well as in other common law jurisdictions where strict liability for vehicles has been excluded by statute.

14.2. In most States, the liability is predicated on the existence of a bailment relationship between the guest and the hotel owner.[21] Where a contract of bailment can be said to exist, the mere failure to deliver the vehicle, or its redelivery in a damaged condition, constitutes a prima facie case against the bailee (hotel owner). He must then bring forth evidence to show that the loss was not caused by his negligence.

C. Position in India

15. In the backdrop of the aforementioned two approaches adopted in other jurisdictions, we will now examine the relevant provisions under Indian law and the approach that should be

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[20] Sherry, *supra* note 7, at 417.

[21] Sherry, *supra* note 11.

adopted in the Indian context in respect of liability of hotel owners for loss of or damage to vehicles of their guests.

15.1. Notably, we have not found any instances where Indian courts have applied the common law rule of insurer's strict liability upon a hotel owner. It appears that the impugned judgment of the National Commission is the first time that the principle of strict liability for vehicles *infra hospitium* was read in and applied in the Indian context.

15.2. From an examination of the underlying rationales for each of the approaches, we find that the imposition of strict liability for loss or damage to vehicles of guests is overly burdensome in today's context. The strict liability rule had emerged in an age and time where travel was rare and tourism was virtually non-existent, thereby prompting Courts to hold hotel owners liable so as to protect the interests of the guests. However, in today's context of economies with well-established hotel industries and mandatory insurance of vehicles owned by guests, there has been a trend across jurisdictions of moving away from the strict liability of innkeepers in respect of vehicles of guests.

15.3. Keeping in view the change in socio-economic conditions in India, we do not think it proper to impose a standard of strict liability upon hotel owners. Due to the growing population and the parallel economic expansion in the country, hotels and similar establishments are much more accessible to the public than they may have been a few decades ago. Hotels have also launched diversified services to keep up with changing times and to meet growing competition from alternate hospitality ventures. Hence, a person may frequent hotels for limited periods of time for purposes other than residing as a guest in the rooms. For example, a person may visit a hotel for business meetings, conferences, weddings, dinner outings, and so on. In all such situations, if the hotel is made strictly liable for the safety of vehicles of these persons *without proof of negligence* on its part, it may lead to grave injustice. Given the growing number of visitors, hotels cannot be expected to maintain surveillance of each and every vehicle parked on their premises at all times.

16. At the same time, it is true that persons visiting hotels and parking their cars in their premises or under valet parking, cannot be left at the mercy of hotel owners. It is essential to balance the

interests of hotel owners and guests, and we find that the prima facie liability rule strikes this balance without placing undue burden on either of the parties. The fact that guests are already protected by virtue of insurance of their vehicles tips the scale in favour of adopting a relatively moderate approach. Thus, given that the prima facie liability rule is premised on the existence of a bailment relationship, in cases where such a relationship is found to exist between the hotel and its guest, the rule should be applied in respect of vehicles so bailed to the hotel.

Notably, this is also the approach that has found mention under Indian law. The general rule has been that in a contract of bailment, if goods are lost or damaged while in the possession of the bailee, he will be liable. The burden of proof will be on the bailee to show that he took a reasonable degree of care in respect of the bailed goods (See ***N.R. Srinivasa Iyer* v. *New India Assurance Co. Ltd.***[22]). This is because there is an implicit expectation between the hotel and the guest when a vehicle is handed over for valet parking that the vehicle would be taken reasonable care of, and returned in a proper condition. Thus, the

[22] AIR 1983 SC 899.

failure to return the vehicle strikes at the root of the bailment relationship and gives rise to a prima facie case of negligence against the hotel. In our considered opinion, the strict liability rule under common law is a relic of the past and should not be given effect in the Indian context. To this extent, we find that the National Commission has erred in adopting the common law rule without justifying its choice or without noting the well-recognised exception in respect of the vehicles of guests.

17. In light of this exposition on the applicability of the prima facie liability rule in India, we will now examine whether a bailment relationship exists in the present case for such liability to be affixed on the Appellant-hotel.

D. Existence of bailment relationship

18. The existence of a contract of bailment often turns on the degree of control exercised by the prospective bailee over the property or good in question. In other words, the crucial point to be considered is whether the custody or possession of the vehicle is purposefully handed over to the hotel (as is the case with valet parking) or whether the complainant is merely allowed to park his car in a parking space or facility. While the laws of bailment apply

in the former case, the latter is only a licensor-licensee relationship where laws of bailment or the prima facie liability rule cannot be applied.

18.1. In a number of decisions, the National Commission has held that the manager of a parking facility cannot be held liable as a 'bailee' for loss of vehicles parked therein. In ***Commissioner, Corporation of Madras*** **v.** ***S. Alagraj***,[23] a 3-member Bench held that a person who provides parking facility for a nominal fee does not undertake to ensure the safety of the vehicle. Later, a 5-member Bench in ***Rohini Group of Theatres*** **v.** ***V. Gopalakrishnan***[24] relied upon ***Alagraj*** (supra) and held that an attendant in a theatre parking lot who collects a nominal fee for parking of the vehicle cannot be said to be a bailee, as in such cases, it cannot be said that the vehicle was 'delivered' for some 'purpose.' Hence, the operators of the parking lot would not be liable for the vehicle going missing.

18.2. However, in our opinion, these decisions do not support the case of the Appellant, as they relate to situations where the possession of the vehicle was not purposefully handed over to the

[23] I (1996) CPJ 54 (NC)
[24] II (1996) CPJ 1 (NC)

hotel or management of the parking facility, or their servants. In the aforementioned cases decided by the National Commission, the concerned facility had only licensed out its premises for parking, and left it to the discretion of the vehicle owner as to where to park the car. In such instances, the manager of the premises does not undertake the safe return of the vehicle and there is no 'parking service' rendered by the parking facility operator as such. Rather, it is the owner's responsibility to find a suitable parking spot, park the vehicle correctly, return, and take out the vehicle upon display of the parking token/slip. Hence, in such situations, it cannot be considered that possession has been handed over or that a relationship of bailment has been created.

18.3. On the other hand, in a situation where the hotel actively undertakes to park the vehicle for the owner, keep it in safe custody and return it upon presentation of a parking slip in a manner such that the parking of the vehicle is beyond the control of the owner, a contract of bailment exists. Thus, the hotel would be liable as a bailee for returning the vehicle in the condition in which it was delivered. To further elaborate upon this point, we

may refer to the following provisions of the Indian Contract Act, 1872 ('Contract Act'):

> "**148. 'Bailment', 'bailor' and 'bailee' defined.**—A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'...
>
> **149. Delivery to bailee how made.—**The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf."
>
> (emphasis supplied)

In view of these provisions, it is clear that in a scenario where possession of the vehicle is handed over to a hotel employee for valet parking, it can be said that 'delivery' of the vehicle has been made for the purposes of Section 148 and 149. Consequently, a relationship of bailment is created. The parking token so handed over to the bailor is evidence of a contract, by which the bailee (hotel) undertakes to park the car and return it in a suitable condition when the vehicle owner so directs.

18.4. The distinction between a person who leaves his vehicle in a car park, and a person making delivery of a vehicle for

safekeeping has been well-established in common law by the Court of Appeal in ***Ashby* v. *Tolhurst***.[25] In this case, the plaintiff parked his car in a car park owned by the defendants and received a parking ticket with an "owner's risk" clause. The car park attendant allowed another person to take away the car based upon a mistaken impression that the thief was the true owner of the car. The Court of Appeal held that no relationship of bailment was established, and the defendant was under no contractual liability to the plaintiffs as:

> "It seems to me that reading the document as a whole, including its own description of itself, namely "Car park ticket," it really means no more than this: the holder of this ticket is entitled to park his car in the Seaway Car Park, but this does not mean that the proprietors are going to be responsible for it…If that be the true view, the relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations on the part of the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there.
>
> The word "give" in the context quite clearly is not accurately used. The car is placed upon the ground, and if the owner came for it he would get into it and drive it away. There is no question of giving, no question of physical delivery coming into it at all. It is not like articles in a railway cloak-room which have to

[25] [1937] 2 K.B. 242.

> be handed out by the cloak-room attendant before the person claiming them can get them. This is a case where any one can walk on to the land and get into a car, and I cannot myself read that one phrase as evidence of any such delivery as Mr. Cloutman admits is essential for the success of his case."
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> (emphasis supplied)

18.5. Similarly, in ***Tinsley* v. *Dudley***,[26] the plaintiff went to a public inn and parked his motorcycle in the premises. No parking fee was charged, nor was there any attendant to look after the vehicles. Relying upon ***Ashby*** (supra), the Court of Appeal held that the inn would not be liable:

> "But, apart altogether from that point, it seems quite plain that the decision in this court proceeded upon the view that one who parks his car in a car park does not thereby deliver over the possession or custody of the motor car to the keeper of the park — at any rate in the absence of some unusual or special circumstances which did not exist in that case and were not to be imported by the giving or the terms of the ticket.
>
> It seems to me clear, therefore, that there is no basis for saying that there was any delivery over to the defendant, or to any agent of his, of the possession or custody of the motor-bicycle. There was nobody about, and it is not suggested that access to the yard was not available to any who liked to walk in…
>
> …As Romer, L.J., said in *Scarborough* v. *Cosgrove*, all these cases must depend upon their own facts; and it should not be assumed that in every case in which, adjoining a public house there is a place provided for

[26] [1951] 2 K.B. 19.

> the leaving or storage of motor cars by patrons of the house it will follow that the publican is under no liability. That question will depend on whether, in the particular case, a contract of bailment comes into existence or not."
>
> (emphasis supplied)

18.6. Indian courts have also followed this distinction. In ***New India Assurance Co. Ltd.* v. *Delhi Development Authority***,[27] the insurer had filed a civil suit (as subrogee) to recover damages on account of theft of a truck from the parking facility maintained by the defendant-authority. While holding that this was a case of bailment under Sections 148 and 149, the Delhi High Court made the following pertinent observations:

> "6…There is nothing on the record to show that the Idle Truck Parking Centre was only an open space of land where licence was being granted to the truck owners to park their trucks on payment of certain fee without their being any obligation on the part of the defendants to look after the safety of the vehicles parked therein…
>
> 7…If I may apply the principle of law as laid above, it is a clear case of bailment and the defendants as bailee having failed to show having exercised reasonable care as man of ordinary prudence are liable for the loss of the truck…
>
> 10. Essence of bailment is possession. The possession of the truck was handed over to the defendants when the truck was parked in the Parking Centre of the defendants. The defendants had issued a receipt and

[27] AIR 1991 Del 298.

> charged Rs. 3/- for the safe keeping of the vehicle for a period of 24 hours. Immediately at that time a contract of bailment came into being. The defendants as bailee having failed to deliver the vehicle back to the second plaintiff within the contracted period and not having shown to have exercised any prudent care for the safetly of the truck, are liable for its loss. It is immaterial if the driver of the truck was also sleeping in the vehicle. The vehicle could not have been taken out of the Parking Centre without surrendering the receipt.
>
> This is particularly, so when the plaintiffs have submitted that the truck was under the charge, custody, control and possession of the defendants. I would have certainly agreed with Mr. Amit Chadha, learned counsel for the defendants, if there was anything on the record to show that the defendants were merely collecting a fee for parking and were not to guard or watch the vehicles parked generally in the Idel Parking Centre…
>
> …I find, in the present case, the vehicles was parked in the Truck Parking Centre against a receipt and it was the duty of the defendants to guard the truck for 24 hours and to deliver the same back to the plaintiff No. 2 within this period. It was not that the defendants had merely granted a licence to the plaintiff to park the truck at any open space on a certain fee without there being any liability on the part of the defendants to look after the truck for its safe keeping."
>
> (emphasis supplied)

18.7. In view of the foregoing discussion, we find that the decision in ***Bombay Brazzerie*** (supra) is wrong insofar as the National Commission observed that the laws of bailment would apply only when a customer makes a separate payment to park

the car in a parking lot. It is not disputed that a contract of bailment under Section 148 may be gratuitous. In any case, it is common knowledge that ‘complimentary’ services provided by 5-star hotels are not actually free-of-cost. These services are covered by the exorbitant rates charged for renting of rooms, food, entry fee to lounges and clubs, and so on. It cannot be denied that valet parking service, even if offered gratuitously, benefits the hotel. A hotel holding itself out to the public as providing such a service seeks to pitch it as a value addition to the experience of a guest and incentives greater foot fall. In fact, many luxury hotels are located in central urban areas which are prone to congestion, thereby necessitating valet parking to protect guests from overcrowding and pollution caused by haphazard parking of vehicles. In such a setting, the provision of valet parking offers the hotel an edge over others, as visitors are generally inclined to accept the invitation of greater convenience furnished by the hotel, i.e. of having someone else park their vehicles in a secure place. Therefore, for such cases, there exists an implied consideration for the contract of bailment created by virtue of the valet parking service.

18.8. Applying this to the instant case, Respondent No. 2 had given up possession of his car by handing it over to the valet. Thus, the Appellant-hotel cannot refute the existence of bailment by contending that its valet parking service was purely complimentary in nature and that the consumer (bailor) had not paid for the same. In other words, the existence of a bailment relationship is clear. In view of this finding, the requisite standard of care under such a bailment contract merits examination.

III. THE REQUIRED DEGREE OF CARE UNDER BAILMENT

19. Given the existence of a bailment relationship, the failure of the Appellant to deliver the car to Respondent No. 2 (car-owner), raises a *prima facie* case of negligence against it. Thus, the burden of proof is on the hotel (bailee) to show that efforts were undertaken by it to take reasonable care of the vehicle bailed, and that the theft did not occur due to its neglect or misconduct.

20. To ascertain the standard of reasonable care to be taken by the bailee (hotel) for vehicles parked within its premises, Sections 151 and 152 of the Contract Act are relevant:

> "**151. Care to be taken by bailee.**—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, quantity and value as the goods bailed.
>
> **152. Bailee when not liable for loss, etc., of thing bailed.**—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."

20.1. Under Sections 151 and 152, the bailee has a duty to keep its premises in a condition of safety that would be reasonable to prevent loss, damage, or theft of the goods of its guests. With respect to 5-star hotels specifically, we find that the responsibility to take such measures is higher. Counsel for Respondent No. 1 sought to rely on ***Klaus Mittelbachert*** and ***Hotel Hyatt Regency*** (supra) to argue that 5-star hotels should be subject to the strict liability standard of insurers under common law. Here, it is crucial to note that ***Klaus Mittelbachert*** was in respect of personal injury caused to the guests on account of negligence by the hotel. As mentioned supra, such standard cannot be applied in the context of liability for vehicles of guests. However, we do agree with the observations of Lahoti J. in ***Klaus Mittelbachert*** that the high prices charged by such hotels imply a relatively

higher degree of care as a reasonable person would normally expect higher quality and safety of the services made available by such hotels. This is also in consonance with the observations of the National Commission in ***Hotel Hyatt Regency*** (supra) that five star hotels have a high duty of care for cars parked in their premises.

20.2. This would mean that it is not sufficient for the hotel to merely appoint an attendant or security guard who takes the responsibility of parking the vehicle and keeping the car keys in his custody until the vehicle owner is inside the hotel premises. The hotel must take additional steps to guard against situations which may result in wrongful loss or damage to the car. This includes, for example, ensuring that the car keys are kept out of reach of outsiders, that the valet parks the car in a safe location, that parking spaces which are in the vicinity of the hotel are well-guarded, that parking spaces inside the hotel (if any) are reasonably well-maintained and CCTV cameras are installed there for detecting any suspicious activity, that the car is handed over only to those who present the parking slip and so on. Needless to say this is only an illustrative, and not an exhaustive list.

20.3. Further, it is relevant to note that Sections 151 and 152 of the Contract Act do not distinguish between a gratuitous bailee and a bailee for reward. In ***Port Swettenham Authority* v. *T.W. Wu & Co***,[28] the Privy Council commented on Sections 104 and 105 of the Contracts (Malay States) Ordinance of 1950, which are *in pari materia* with Sections 151 and 152 of the Contract Act, as follows:

> "It will be observed that these sections apply to all bailments and make no distinction between bailments for reward and gratuitous bailments...
> ...There is no compelling authority that a gratuitous bailee who fails to return the goods left in his custody is not obliged to explain why he is not able to return them and to show that their loss is not due to his failure to have taken as much care of the goods as a man of ordinary prudence would have taken of his own goods in similar circumstances. In any event, a bank, which offers its customers, in the ordinary course of business, the service of looking after goods deposited with it, can hardly be described as a gratuitous bailee. The bank must realise that were it to refuse a customer such a service it would probably lose the customer who would have no difficulty in finding another bank which would be happy to render the service which is normally offered by banks to their customers.
>
> However, this may be, in their Lordships' view the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safe keeping."

[28] [1979] A.C. 580

Therefore, it is irrelevant as to how much parking fee was paid by the consumer, or whether any parking fee was paid at all, as the duty of care required to be taken by the hotel will be the same in all circumstances. However, this is not a strict liability standard insofar as Section 152 excludes the liability of a bailee for loss or damage of the bailed goods if he is able to show that he fulfilled the standard of reasonable care under Section 151. Whether or not such standard of reasonable care was fulfilled will depend upon the facts and circumstances of each case.

21. Coming to the facts of the instant case, the records show that the car of Respondent No. 2 was stolen when three young boys who had parked their car in the Appellant-hotel came out of the hotel, asked the valet driver to bring their car to the porch, and one of them then picked up the keys of the car of Respondent No. 2 from the desk, went to the parking area and stole the car. It has been stated in the complaint that the thief escaped despite an attempt by the hotel guard to stop him. Notably, in the written statement filed by the Appellant-hotel, it has denied negligence by stating that the guest was aware of the risk of valet parking,

which was not a service for safe custody of the vehicle, especially given the terms printed on the parking tag. Its entire case has been premised on the exclusion clause in the notice, and not on the absence of negligent conduct on its part. In fact, there has been an admission of the fact that one of the three young boys who had visited the hotel stole the car of Respondent No. 2, while its keys were under the watch of the valet driver.

As mentioned supra, to meet the requisite standard of care, the hotel must go beyond appointing an attendant or security guard and take additional measures to guard against situations that may result in wrongful loss of or damage to the car of its guest. Here, the manner in which the car was stolen manifests that no steps had been taken by the Appellant-hotel to ensure that car keys were kept outside the reach of outsiders or that the cars were parked in a safe location with adequate barriers to verify their owners. In the absence of such measures, the Appellant has failed to discharge its burden of disproving the prima facie case of negligence against it. Thus, we find that the theft of the car of Respondent No. 2 was a result of the negligence of the Appellant-hotel.

IV. EXCLUDING LIABILITY BY CONTRACT

22. Since the parking tag given to Respondent No. 2 stated that the parking would be at the guest's own risk, it is to be considered whether it is open to the Appellant-hotel (bailee) to contract out his liability for negligence beyond what is already provided under Section 152 of the Contract Act. In other words, can the bailee contractually exclude liability for his negligence or that of his servants?

23. Under Indian law, the seminal decision on this point is that of a Full Bench of the Madras High Court in ***Sheik Mahamad Ravuther* v. *The British Indian Steam Navigation Co. Ltd***.[29] In that case, the plaintiffs alleged that their goods were damaged on account of the negligence of the defendant shipping company. The trial court and the lower Appellate Court found that there had been no negligence on the part of the defendants. However, in second appeal, though the Division Bench of the High Court agreed that the defendants were negligent, they differed on whether the terms of the bill of lading excluded liability for

[29] (1909) ILR 32 Mad 95.

negligence. Consequently, the case came before the Full Bench by way of a Letters Patent Appeal.

On facts, Sir Arnold White C.J. and Sankaran Nair J. of the Full Bench found that the defendant had been negligent and allowed the appeal, whereas Wallis J. dissented. However, with respect to the question of whether the bill of lading excluded liability for negligence, White C.J., and Wallis J. were of the opinion that a carrier is not exempted from liability for his negligence or that of his servants, unless such an exemption is made in express terms through a 'specific negligence clause'. While holding so, they noted that such a contractual exemption, if properly made, would not be contrary to public policy. However, on facts, White C.J. found that such a specific negligence clause had not been inserted in the bill of lading. Thus, he allowed the appeal. Placing significant reliance upon the decision of the King's Bench in ***Price & Co* v. *Union Lighterage Company***, (1903) 1 K.B. 750 while arriving at this conclusion, he observed that:

> "...The view which I take appears to be in accordance with the decision of the Court of Appeal in *Rathbone Brothers & Co.* v. *David MacIver Sons & Co.* where the Court holding that the carriers were unable, on the facts, to claim the benefit of a special proviso relating

to unseaworthiness, the carriers were held liable notwithstanding general words in the bill of lading which exempted them in the case of injury or default…

…The words "in all cases and under all circumstances" in the present bill of lading are no doubt as wide and as general as possible, but the reiterated use of general words does not of course exclude the application of the special canons of construction which a long course of Judicial decisions has held applicable to the construction of contracts which purport to relieve a carrier from liability for negligence. The authorities were discussed by Walton, J., in *Price & Co*. v. *Union Lighterage Company*. In that case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. The learned Judge held that the barge owner was not protected from liability by the contract. In the course of his judgment the learned Judge observed: "…If it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases and looking only at the language used, it might very well be said that its meaning was that the defendants wore to be exempt from liability for insurable losses whether caused by negligence or not. But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms."

After discussing the authorities Walton, J., summarises their effect in these words: "it really comes to this, that if a carrier wishes to exempt himself from

> liability for the negligence of his servants he must insert in his contract, in one form or another, something equivalent to what is well-known as a negligence clause." Now I understand a negligence clause to be a provision which in express terms exempts a carrier from liability for the negligence of his servants. The specific condition in the bill of lading in the present case contains no such provision…
> … It is no doubt true that the bill of lading in the present case does not contain contradictory terms and, in a sense, it is not ambiguous, but the portion of the bill of lading which deals with the liability of the carrier at the particular stage of the adventure when the negligence occurred, is not express with reference to the question of negligence, and this being so I do not think the carrier is protected…
> … As in my view of the law a shipowner is not exempted from liability for negligence unless the contract which exempts him is both clear and express, and as the contract in the present case, though it may perhaps be said to be clear is certainly not express, I am of opinion that the defendants are not protected by their bill of lading. Two other questions remain for consideration. I can deal with them shortly. Mr. Sundara Ayyar contended that a contract which purported to relieve a shipowner from his liability as a carrier for negligence was contrary to public policy and should not be enforced. As pointed out by Walton, J., in *Price & Co.* v. *Union Lighterage Company*, the law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence, whilst the law of England does not. I am of opinion that on a question of this character Courts in India ought to follow the law of England."
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> (emphasis supplied)

Wallis J. in his dissent, similarly relied upon Walton J.'s decision in ***Union Lighterage Company*** (supra) and observed that:

> "As regards the second point I am of opinion that it is not open to us to hold that contracts exempting a carrier from liability for the negligence of his servants are void as opposed to public policy. As pointed out by Walton, J., in *Price & Co.* v. *Union Lighterage Company* "the law of England, unlike the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms." So far as the general question goes this is the law which has been received and applied by the Indian Courts, [*Jellicoe* v. *The British, India Steam Navigation. Co.* and *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France*]. Contracts have been made and business has been carried on for many years in India on this footing, and if the law is to be altered now it must be by the legislature."
>
> (emphasis supplied)

24. Notably, neither White C.J. nor Wallis J. adverted to the provisions of the Contract Act, which was in force in India at that time, in their opinions on the enforceability of contractual 'negligence clauses'. Rather, they primarily placed reliance upon the common law in England which governed the issue at the time. On the other hand, Sankaran Nair J. in his concurring judgment, upon a detailed consideration of the provisions of the Contract Act, particularly the provisions relating to bailment, opined that it is not open to a bailee to contract out of the minimum standard of

liability under Section 151. He noted that while the rule of law in England allowed shipowners to contractually exclude their responsibility for the negligence of their servants, the validity of the exemption clause under Indian law would necessarily have to be tested on the touchstone of the provisions of the Contract Act. The following portions of his opinion are important for deciding this issue:

> "Under Section 151 of the Act, the defendants, therefore, are bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances. It is only the incident of any contract not inconsistent with its provisions that remains unaffected by the Contract Act (see Section 1 of the Contract Act). The incident of the contract before us that the bailee is exempt from taking the care required by Section 151 appears to me to be clearly inconsistent with that section. Section 152 seems to make this clear. It declares that the bailee's liability is limited as declared by Section 151, "in the absence of any special contract," or in other words he may by contract undertake a higher responsibility, for instance, that of an insurer. The provision in Section 152 that a bailee may undertake a higher responsibility, the absence of a similar provision that he may limit the liability imposed by Section 151, and the fact that, in the chapter IX relating to Bailment, whenever a rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated - (see Sections 163, 165, 170, 171 and 174) leave no doubt in my mind that a bailee's liability cannot be reduced by contract below the limit prescribed by Section 151. 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…

…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. Assuming then that the rule of English law that a common carrier can get rid of his liability by contract has been accepted in India, the contract itself must be obviously one which will be recognized in the Indian Courts, and, if I am right in the view above set forth, it necessarily follows that while a common carrier may exempt himself from the liability of an insurer by contract, he cannot exempt himself from the liability of an ordinary carrier imposed by Section 151 of the Indian Contract Act.

…The reason why a common carrier is bound to receive goods tendered and the great responsibility of an insurer is imposed upon him is that necessity compels the owners of goods to trust him…As Best, C.J., puts it in *Riley* v. *Horne*, "When goods are delivered to a carrier, they are usually no longer under the eye of the owner.... If they should be lost or injured by the grossest negligence of the carrier or his servants, or

stolen by them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." For the above reasons it is essential that common carriers must in India also be subject to the English common liability, and the Privy Council have now placed the matter beyond dispute. Where the obligation is imposed upon the common carrier for the benefit of the public he cannot get rid of that obligation by agreement, if it is not reasonable.

The reasons given above by Lord Holt, Lord Mansfield and Abbot, C.J., are, it appears to me, conclusive to show that it is against public policy to allow a claim for exemption as the one now put forward. There is practically no freedom of choice, and persons when entrusting shipowners with their property are obliged to accept any condition that may be imposed upon them by the steamship companies. The cargo-owners have no control over the servants, and it is only right that the master and not the cargo-owner should suffer for the misuse of his powers by the servant as he has armed him with those powers. The law which requires care and diligence on the part of a carrier will, otherwise, to illusory in the case of steamship companies, as everything is left to the servants. There will be a tendency to lax supervision over the servants, and to make their selection dependent more upon cheapness than on efficiency... Nothing is more easy than for the carriers to call their servants as witnesses and to prove prima facie that the goods were protected in the usual way. It would then be impossible for the plaintiff to bring negligence or criminality home to the carriers although the goods may not be forth coming and no explanation given how the loss occurred."

(emphasis supplied)

Sankaran Nair J. was firmly of the opinion that any exemption clause with regard to negligence would be against the interests of the mercantile community and shipowners, and thereby void as opposed to public policy. This would be true even in a case where the bailor agreed to pay lower remuneration to the bailee on the condition that the latter would not be liable for their servant's negligence.

25. Admittedly, the opinion of Sankaran Nair J. forms part of one school of thought on the point of contractual exclusion of liability for negligence. However, in India, the opinion of White C.J. and Wallis J. in ***Sheik Mahamad*** (supra) on this point has largely been followed in subsequent decisions of various High Courts. These decisions have held that a bailee would be liable for the negligence of its servants, except in cases where a specific negligence clause is inserted in the contract. They have all noted that the Contract Act does not prohibit a party from contracting out of its duty of care under Section 151.[30]

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[30] *See Kariadan Kumber v. British India Steam Navigation* (1913) 38 Mad. 941; *Hollandia Pinmen v. H. Oppenheiner* AIR 1924 Rang 356; *Bombay Steam Navigation Ltd v. Vasudev Baburao Kamat* ILR (1928) 52 Bom 37; *Lakhaji Dollaji & Co. v. Boorugu Mahadeo Rajanna* 41 Bom LR 6; *Indian Air Lines Corporation v. Jothaji Maniram* AIR 1959 Mad 285; *State Bank of India v. M/s Quality Bread Factory, Batala* AIR 1983 P&H 244; *Central Bank of India v. M/s Grains & Gunny Agencies* AIR 1989 MP 28.

26. Notably, academic opinion has also supported the view that a bailee may contract out of his liability under Section 151. The Law Commission of India has opined that the view of White C.J. and Wallis J. in ***Sheik Mahamad*** (supra) is correct and that the words "in the absence of any special contract" ought to be added to Section 151 of the Contract Act to resolve the controversy.[31] Similarly, in their commentary on the Contract Act, **Pollock and Mulla** have noted that though a bare reading of Section 152 indicates that a bailee may make a contract to *increase* his responsibility over and above the standard under Section 151, the provision has been interpreted to mean that the duty of care enjoined on a bailee under Section 151 may be subject to a contract excluding such responsibility. Hence, a contract of exemption from liability for any loss or damage due to the fault, carelessness or negligence of the bailee's staff would bind the parties and not be void as opposed to public policy.[32]

27. On a closer reading, we find that the decision in ***Sheik Mahamad*** (supra) and the subsequent High Court decisions

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[31] Law Commission of India, *Contract Act, 1872* (LawCom No 13, 1958) para 125.

[32] Pollock and Mulla, *The Indian Contract and Specific Relief Acts* (Nilima Bhadbhade ed, updated 14th edn, 2013) 1505, 1522.

which followed it were in the context of common carriers as bailees. With respect to liability of common carriers, it is settled that the opinon of Sankaran Nair J now holds the field. A Division Bench of this Court has clarified in ***Nath Bros. Exim International Ltd.*** **v.** ***Best Roadways Ltd.***[33] that their liability is equivalent to that of an insurer and is absolute. Further, it has been observed that such liability is governed by the Carriers Act of 1865 and not by Sections 151 and 152 of the Contract Act, and can therefore not be excluded by way of a special "owner's risk" clause in a contract. However, given that the present case concerns with liability of a hotel for loss of vehicles of its guest due to negligence, the question arises whether White C.J.'s opinion in ***Sheik Mahamad*** holds good with respect to Section 151 and 152 and the *prima facie* liability standard which we have laid down supra.

28. Upon perusal of the relevant decisions on this point, we find that White C.J. and Wallis J's opinion in ***Sheik Mahamad*** (supra) was peculiar to the facts of that case. The case of a common carrier at sea is different from a hotel which undertakes to park

[33] (2000) 4 SCC 553.

vehicles for its guests on ground. In the former case, given the unpredictable conditions at sea, and the fact that the shipowner may be unable to supervise the conduct of his servants during an overseas voyage, it can be argued that carriers should have the liberty to contract out of liability for their servants' negligence.

However, with respect to liability for vehicles bailed to a hotel as is the case with valet parking, we are of the considered opinion that Sankaran Nair J.'s opinion in ***Sheik Mahamad*** should be adopted. Given that such vehicles would normally be parked in the hotel's own parking facility, or in the vicinity of the hotel, the hotel staff is well-placed to ensure safe custody of the vehicle and monitor its condition. Though valet parking may be offered as an optional complimentary service in some instances, more often than not, guests visiting the hotel have no other option but to entrust their vehicles to the hotel's custody, especially given the congested urban areas where such hotels are located. As emphasized earlier, the guest has an implicit expectation that the repute and standards of 5-star hotels would entail adequate safety of the vehicles handed over for valet parking. Thus, in such a scenario, if the hotel is allowed to exclude its liability for

negligence by way of a contract, the standard of care imposed under Section 151 will become illusory and virtually redundant, rendering consumers vulnerable without any remedy. In our view, the standard of care required to be taken by the hotel as a bailee under Section 151 is sacrosanct and cannot be contracted out of.

It is important to clarify that though courts may have construed the phrase 'in the absence of any special contract' in Section 152 to mean that a bailee can reduce his liability under Section 151, such an interpretation is incorrect. The words 'in the absence of any special contract' in Section 152 clearly indicate that it is open to the bailee to accept a *higher* standard of liability than Section 151 under contract, and not otherwise.

However, this does not mean that the hotel would be liable in all scenarios or that it cannot impose any exemption clause through a contract. There may be situations where the loss or damage may be caused due to the negligence of third parties, the bailor's own negligence or unforeseen circumstances beyond the bailee's control, which could not have been foreseen with ordinary diligence. This would include, for example, acts of God, seizure of the vehicle under legal process or by public authorities,

damage due to natural causes such as unforeseen weather conditions, presence of inherent defects in the vehicle, acts of loss or damage caused by the guest's own negligence and so on. A joint reading of Sections 151 and 152 shows that, in such cases, the Contract Act intended that the bailee should not be liable for the loss or damage of the goods bailed on *all* occasions. To re-iterate, Section 152 expressly states that the bailee, in the absence of any special contract, is *not* responsible for loss or damage of the thing bailed, *if* he is able to prove that he has taken the amount of care required under Section 151.

Therefore, hotels are at liberty to print clear contractual disclaimers notifying their guests that their liability is excluded for loss or damage to vehicles taken for valet parking which are occasioned by acts of a third party, contributory negligence or by *force majeure* events. However, as mentioned supra, this would always be subject to the hotel discharging its initial burden of proving that it fulfilled the standard of care imposed under Section 151 of the Contract Act. Where the hotel or its servants have actively connived against or acted negligently in

safeguarding the vehicles delivered for valet parking, 'owner's risk' clauses in the parking token will not come to their rescue.

In this regard, it is relevant to note where a valet or servant has been handed custody of the vehicle, and such a servant takes away the vehicle without authority, the hotel will be liable. This is because there will still be a *prima facie* assumption that the hotel has exercised laxity in supervising the actions of its servants. However, the hotel will not liable where, in spite of due diligence, a servant or employee who was not entrusted with custody of the vehicle takes it without authority[34], as this would be similar to a case of theft by a third-party.

At this juncture, we would like to emphasize that the above observations are limited to the issue for consideration before us, that is, the liability of hotels as bailees for vehicles handed over to them for valet parking. We are not commenting on whether the rule as laid down by White C.J. and Wallis J. in ***Sheik Mahamad***, and followed in subsequent High Court decisions, holds good in other kinds of contracts, and we desist from commenting further on this aspect.

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[34] *See* Pollock and Mulla (n 32) 1505.

29. In light of the above discussion, in a case of theft of a vehicle given for valet parking, the hotel cannot claim exemption from liability by arguing it was due to acts of third parties beyond their control, or that they are protected by an 'owner's risk' clause, prior to fulfilling its burden as required under Section 151 and 152. It is by now well established, that while a case of a robbery by force is visibly beyond a bailee's control, in cases of private stealth, or simple theft where no force or violence is involved, the bailee still has the *prima facie* burden of explaining that the loss or disappearance of the goods in his custody is not attributable to his neglect or want of care. This is because no one apart from the bailee is in a position to explain the fate of the goods.

In the instant case, given our finding that the theft of the car of Respondent No. 2 was a result of the negligence of the Appellant-hotel, the exemption clause on the parking tag will not exclude the Appellant's liability. Hence, the argument of the Appellant-hotel on this count fails.

30. In conclusion, we would summarize our observations on this point as follows:

(i) the hotel-owner cannot contract out of liability for its negligence or that of its servants in respect of a vehicle of its guest in any circumstance. Once possession of the vehicle is handed to the hotel staff or valet, there is an implied contractual obligation to return the vehicle in a safe condition upon the direction of the owner.

(ii) Even where there is a general or specific exemption clause, there remains a *prima facie* burden of proof on the hotel to explain that any loss or damage caused to the vehicles parked was not on account of its negligence or want of care per Sections 151 and 152 of the Contract Act. It is only after this burden of proof is discharged that the exemption clause can come into force. The burden of proving that such loss or damage was covered by the exemption clause will also be on the hotel.

31. In view of the foregoing discussion, we hold that the consumer complaint in consideration is maintainable as it was filed by the insurer as a subrogee, along with the original owner as a co-complainant. Further, we find that strict liability cannot be imposed on hotel owners in respect of loss of or damage to

vehicles of their guests. Instead, the rule of prima facie negligence should be adopted. Applying this rule to the present case, it is clear that the Appellant has not explained why its failure to return the vehicle to Respondent No. 2 was not on account of fault or negligence on its part. Thus, liability should be affixed on the Appellant-hotel due to want of the requisite care towards the car bailed to it. The instant appeal is dismissed accordingly.

.....J.
(Mohan M. Shantanagoudar)

.....J.
(Ajay Rastogi)

New Delhi;
November 14, 2019