

Judicial Understanding of Gratuitous Bailment

Manisha Mundhra

O.P Jindal Global University

ARTICLE DETAILS

Article History

Published Online: 15 July 2020

Keywords

Bailment, Judicial, Bailee, legal.

*Corresponding Author

Email: [mundhramanisha20\[at\]gmail.com](mailto:mundhramanisha20[at]gmail.com)

ABSTRACT

The paper focuses on the understanding of involuntary bailment. An important element for a contract to be enforceable is consideration. The absence of consideration in gratuitous bailment and thus its development in its understanding is highlighted in the paper. It tries to point the judicial interpretation of the legal fiction that exists in the contract law where even without consideration gratuitous bailment is considered as a contract. Despite the fact, that India has a codified law and the statutes do not mention the involuntary bailee, the Indian courts have not hesitated to protect the rights of involuntary bailee. It has gone beyond the conceptual understanding and accommodated the pragmatic loopholes. The paper focuses on three common law countries, England, Australia and India and traces the trajectory of this legal fiction.

1. Introduction

Bailment occurs in our daily life in simple activities such as giving clothes to a laundry or a tailor. Bailment is an implied and expressed contract where the possession of good (movable property) is passed from one person to other; the possession has to be delivered back.¹ The delivery of the possession is both actual and constructive. The actual delivery is when the physical possession of the good is transferred while in constructive delivery there is no physical delivery but some gesture that puts the bailee in the possession of the good. The delivery of the keys of the car to the bailee is an example of constructive delivery. The person who receives the possession is the bailee and the person who delivers the possession is the bailor. It is not necessary that the person who delivers the possession is the owner of the property. The purpose ranges from safeguard or for temporary use. When the purpose is completed the possession has to be delivered back to the bailor. As for the bailment, consent of the owner is not required for bailment and can be bailed by the person who possesses it and does not violate its own contract.²

The categorization of bailment is on the basis of which party receives the benefits of the bailment. When both bailor and bailee receive remuneration or benefit, there exist as an ordinary bailment. Further, there are two categories where either the bailor or the bailee receives a gratuitous benefit. Gratuitous bailment is defined as where either the bailee or bailor receives no remuneration for their act.

The definition of the contract is most untenable in cases where the cores of its principles are not met. In cases of gratuitous bailment and involuntary bailee, the absence of consideration and the unawareness of both parties that there exist in a legal contract between them, respectively; questions the understanding of these two subjects under contract. The statutory standard in India has been borrowed from the UK's

¹Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008.

²Anonymous, "Contract and Specific Relief Particular Statutes Contract Act, 1872" EBC Pvt. Ltd.

Lucknow <https://www.scconline.com/Members/NoteView2014.aspx?citation=NTXT-0000730996&&&&40&&&&Search&&&&fullscreen>

common law. The anxiety of distance from the natives and the various forms of uncodified laws forced the British to bring a standard form of law to regulate and extract revenue to the maximum.

2. Research Methodology

2.1 Aims and Objectives

The research aims to include some sort of development in the understanding of gratuitous bailment across the common law countries. It tries to point the judicial interpretation of the legal fiction that exists in the contract law where even without consideration gratuitous bailment is considered as a contract.

2.2 Scope of the Research.

The project broadly includes research in the analytical form on the basis of cases. The cases and their understanding and credential have broadly burrowed from Contracts & Specific Relief by Avtar Singh and articles on the history of bailment from sources such as Heinonline, Jstor SCC, etc.

3. Bailment

3.1 Involuntary Bailment

An involuntary bailee such as the person who finds an object and takes possession of that good or the good is delivered to him, is expected to take the same duty of care as that of a gratuitous bailee. In *Newman v Bourne & Hollingsworth* the judge held that finder is only responsible in case of gross negligence. But in India, there is no mention in the statutory of involuntary bailee but is recognized under S-168 and S-169 of Indian Contract Act as finder of the goods and his rights. In *Standard Chartered Bank v Custodian*³ the finder of good is an equivalent of bailee and is thus expected to take reasonable care. In English law the finder of the goods are not allowed to sue or even lien the product in case there are expenses in maintaining the good as mentioned in *Nicholas V Chapman*.⁴ In *Drake v Shorter* and *Kohler V Hayes* it was

³Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008. Page-684

⁴Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008. Page-685

established that acceptance of possession in gratuitous bailment should be voluntary similarly a finder of lost property cannot be held liable if he has not taken voluntary charge of such property.⁵ Once a gratuitous bailee has undertaken the performance she/he is legally liable for the performance. Possession acts as a consideration for the bailment and thus mere promise to perform the gratuitous bailment is not enough. In the case of *Siegel v Spear & co.* the court held that surrender of possession is enough consideration for the promise.⁶ Defendant had promised the plaintiff to insure the plaintiff's furniture shop and take its responsibility of store free of charge during summer. Plaintiff would bare the cost of insurance and the defendant undertook this promise gratuitously. Plaintiff shop was burned without being insured and the defendant was held responsible for his promise to insure the shop as plaintiff had given the possession and this acted as consideration for the promise. Therefore, gratuitous bailment had some defined boundaries in understanding of consideration which constitutes it as a contract. However the statutory provision of Indian Contract Act allows the finder of the good who is also known as involuntary bailee to have a right of lien over the product. However he is not allowed to sue for the expenses that he is incurred voluntarily to maintain the good but only right to lien.⁷ If the good is perishable he even has the right to sell it if he has taken reasonable attempts in finding the owner.

4. Gratuitous Bailment in Judiciary

4.1 English cases

Earlier in English law there existed an absolute liability on bailee in all case of bailment. For example in *Southcot v Bennet*⁸ the bailee was held responsible where the goods were robbed from him. But eventually the English law started to make a distinction and hold the gratuitous liable only for reasonable care. In *R v Viscount Hertford*⁹ since there was no consideration given and the bailee was robbed; bailee was discharged. Lord Finlay and Sir Gorell Barnes had introduced to the theory of a gratuitous bailee's responsibility. They described the standard of reasonable care as that of a prudent man would use in keeping his own property.¹⁰ Further in *Coggs V Bernard* absolute liability was limited to only public carriers and innkeepers.¹¹ The understanding of difference between the gratuitous bailee and hired bailee is the degree of responsibility. The former is required to take care of the good as a prudent man would take care of his goods while the latter is expected to take care of the goods as the standard of that of skilled man in that business. In *Lenkeit v Ebert* defendant gratuitously offered to drive the plaintiff's truck and the truck

wrecked in accident. It was held that the defendant was not liable as there was no sufficient evidence of gross negligence as he was not skilled enough to drive a truck.¹² A gratuitous bailee is only responsible if there is a special agreement between the bailor and the bailee. The principle that the owner may bring a case of trespass for injury done by a third party while the possession is still in the hands of bailee was laid down in *Lotan v Cross*.¹³ Sir William Jones was of the opinion that if the bailee is of the same neglect as it was regard to his own goods then he cannot be said to have violated the good faith. But for judiciary to distinguish the negligence on the basis of good-faith it would be impractical. But after *Doorman V Jenkins* where the thief stole the bailee's good and the goods that were bailed to him but the judge held that this is not a defence as the standard of reasonable care was not enough to that of a prudent man¹⁴. Halsbury regards that degree of due diligence of prudent man is to be the required standard. As the law developed over time, the English Law moved towards a more standard principle of negligence. In *Blount v The War Office* there existed a gratuitous bailment and in *Martin V London Country Council* a non-gratuitous bailment and in both the cases it was a matter of robbery and the judge held the bailee responsible for the loss.¹⁵

Onus of proof is same for gratuitous bailee is same as that of in normal bailment. The burden of proof is on the bailee to show that he or his agents exercised a reasonable care and if he can prove that he is not liable. As established in *Bullen v Swan Electric Engraving Co* that gratuitous bailee were able to proof that plates were kept in proper management and thus not held liable.¹⁶

4.2 Australian Cases

The lack of consideration in gratuitous has created a contractual fiction. This legal fiction has divided the courts in understanding of gratuitous bailment under two sub-headings of law; contract law and tort law. There is a shift in understanding the gratuitous bailment under contract law. This understanding is seen in Australia. In Supreme Court of New Zealand, in *Walker v Watson* the owner lent his sports car to two inebriated girls.¹⁷ Later, the car was found embedded in the wall and was damaged. Under tort law seeing a possible defense of *volenti non fir injuri* he proceeded against them under bailment. The court held that there existed simple action of negligence and also accepted the view that gratuitous bailment is in no sense contractual. This understanding of gratuitous bailment has nothing to do with contract at all was first established in *Thomas v Hithe* because of lack of consideration.¹⁸ Firstly, reward and consideration cannot be understood same for all purposes of contract. The absence of consideration in a contract makes it unenforceable but in case

⁵Peter V. Ross. *Digest of the Pacific States Reports Prior to the Pacific Reporter* (1913).

⁶Norman F. Arterburn, *Liability for Breach of Gratuitous Promises*, 22 Ill. L. Rev. 161, 169 (1927-1928)

⁷Indian Contract Act. S-168, S169

⁸Davidge, C. V. "Bailment," *Law Quarterly Review* vol. 41, no. 4 (1925): p. 433-440.

⁹L.S.F, *Validity of an Ordinary Bailment Contract Limiting Liability of Bailee for Negligence*, *University of Pennsylvania Law Review and American Law Register*, Vol. 86, No. 7 (May, 1938), pp. 772-779

¹⁰G. W. Paton, *Duty in Gratuitous Bailment*, 1 U. Queensland L.J. 17, 28 (1948)

¹¹Anonymous, "DUTY IN GRATUITOUS BAILMENT", *The University of Queensland* L.J.<http://classic.austlii.edu.au/au/journals/UQLawJl/1948/7.pdf>

¹²Anonymous, "Automobiles-Gratuitous Bailee-Imputed Negligence," *Indiana L.J.*, Vol. 5 :Iss. 6, Article 6, (1930)

¹³W. H. Mason. *New York Law of Negligence*(1928).

¹⁴Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008.

¹⁵Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008.

¹⁶G. W. Paton, *Duty in Gratuitous Bailment*, 1 U. Queensland L.J. 17, 28 (1948)

¹⁷Palmer, N. E. "Gratuitous Bailment: Contract or Tort?" *The International and Comparative Law Quarterly* 24, no. 3 (1975): 565-72. <http://www.jstor.org/stable/758783>.

¹⁸Palmer, N. E. "Gratuitous Bailment: Contract or Tort?" *The International and Comparative Law Quarterly* 24, no. 3 (1975): 565-72. <http://www.jstor.org/stable/758783>.

of non-gratuitous bailment it hardly affects the relationship between the bailor and bailee. The overlap has been countered by pointing out the differences wherein in the contract law duty is owed only to the contracting party while in tort law the duty is owed to the world. The duty of care is higher than the tort law. However, **Scholars have argued that to free from the limitation of contract such as doctrine of privity and to avoid the legal fiction of consideration the concept of bailment should be developed as an independent law.**¹⁹

4.3 Indian Cases

However, in Indian Contract Act S-151 does not differentiate between different types of bailee and the judges have also interpreted in the same direction, that there is no difference in understanding of the bailee's duty of care as a gratuitous bailee or bailee for reward. The codified structure of Indian Contract Act has not allowed a flexible approach in differentiating between gratuitous bailee and bailee for reward unlike in English Cases. This view has been expressed in cases such as Sri Narasimhaswami, Namagiri Amman and Sri Ranganathaswami Temple by its executive officer, Sri P. Rangarajuv. Muthukrishnalyengar, Secy. of State V Ramdhan Das Dwarka Das Firm and 244 P.

Rangaraju v. Muthukrishna.²⁰ The judges claim that it is a complete waste of time to discuss the position of bailee, as gratuitous or for reward since the Contract Act itself does not make a distinction between two. It is important for us to understand that we have received a codified law while the principle of our law i.e., English cases have no such act which makes it easier for them to make decisions and provide differences from case to case basis. However, the courts have taken a broader interpretation of Section 152 which states that "in absence of any special contract" and allowed the obligation of bailee to be waived off if there exist a contract to the contrary of Section 151.²¹ This view was adopted in case of Bombay Steam Navigation Co v Vasudev Baburao and State Bank Of India V Quality Bread Factory.²² However this view was seen as unnatural reading of the sections and standard of duty of care should be revised upward and not diluted. This view was expressed in the case of United India Insurance v Pooppally Coir Mills.²³ Since Indian Judiciary does not make a distinction between a gratuitous bailee and bailee who receives reward therefore the presumptions or rights of the bailee may be symmetrical to each other and thus duty of care cannot be done away with but the liability may increase upwards.

Gratuitous bailee can sue a wrongdoer, he must account to the bailor for the damages that are recovered by the bailee. The possession will form a bar to claim and without questioning the owner's possession as mentioned in *Kanhaiyalal v Badrilal*

and Anr.²⁴ However, if a bailee transfers the title of the goods under a gratuitous bailment which does not title him to the goods, the bailee is guilty of conversion. This stands strong even when the third party has brought the goods in good faith and in consideration the bailee is liable of conversion. This was explained in the case of *Ramasami Gupta v. Kamalamma*²⁵ where the bailor had given gold ornaments to the bailee for decking up her daughter as a bride. But the bailee after 6-7 months sold the goods but the court held on the above principle. Even, when the third party is suffering a collateral damage because of these unfair means of bailee, the sale is not successful as it would amount to an encouragement to breach of trust. The depository if uses the possessed goods more than specified in the contract he is liable for breach of contract or for some instance conversion. However, a bailee is entitled to recover from bailor all expenses that the bailee suffers in preserving the deposit under right to lien. In English Law the bailee may return the god to the owner instead of the lender as held in *Shelbury v Scotsford*.²⁶

Bailor's duty in the Indian Contract Act is a more relaxed one. In gratuitous bailment the bailor is only responsible for the defaults that he knows and he has disclosed it to the bailee.²⁷ On the other hand, the bailor in non-gratuitous bailment has much higher liability wherein he is even responsible for the defaults that he was unaware of. In *Bristol v Exeter Ry. Co.* this principle was established and according to the *Blakemore* decision the duty is contractual.²⁸ A gratuitous bailor may even revoke the gratuitous lent anytime and if the bailee suffers any loss he is entitled to be indemnified by the bailor. This power is given to the bailor under Section 159 of the Indian Contract Act.

5. Conclusion

This paper has tried to point out the development in judicial understanding of gratuitous bailment across countries. The clear statutory definition of s-151 poses no possible question of different liability of gratuitous bailment and non-gratuitous bailment in India. However, it is interesting to note that countries like English Law have developed from absolute liability to a standard duty of care of that of a prudent man. In Australia, the contractual fiction has led them to point out grey area between the contract law and the tort law. The aim of the paper was not to point out the responsibility of a gratuitous bailee as that would have aligned with the responsibility of that of a bailee under Indian Contract Act. The paper tries to point out the change towards the standard of duty of care expected out of a gratuitous bailee and the different standards that are followed in common law countries such as England, Australia and India.

¹⁹ Gratuitous Bailment: Contract or Tort? Author(s): N. E. Palmer Source: The International and Comparative Law Quarterly, Vol. 24, No. 3 (Jul., 1975), pp. 565-572 Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law Stable URL: <https://www.jstor.org/stable/758783> Accessed: 26-10-2018 17:18 UTC

²⁰ Anonymous, "Contract and Specific Relief Particular Statutes Contract Act, 1872" EBC Pvt. Ltd. Lucknow <https://www.sconline.com/Members/NoteView2014.aspx?citation=NTXT-0000730996&&&&40&&&&Search&&&&fullscreen>

²¹ Indian Contract Act, S151 & S152

²² Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008. Page-676 & 677

²³ Avtar Singh, "Contract & Specific Relief", 10th Edition, 2008. Page-677

²⁴ *Kanhaiyalal vs. Badrilal and Anr.* (26.10.1964 - RAJHC) :

²⁵ *Ramasami Gupta v. Kamalamma* I.L.R 45 Mad. 173; s.c 14 L.W 599.

²⁶ William F. Elliott. *Commentaries on the Law of Contracts: Being a Consideration of the Nature and General Principles of the Law of Contracts and Their Application in Various Special Relations* (1913)

²⁷ Indian Contract Act, s 164

²⁸ H. P. "Liability of Bailors and Other Suppliers of Personal Property for Injuries Due to Defects." *University of Pennsylvania Law Review and American Law Register* 78, no. 3 (1930): 413-20. doi:10.2307/3307336.