CHAPTER V

ANALYSIS OF SECTION 71

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5. Resume of the Chapter
Section 71 of the Indian Contract Act, 1872 is envisages that,

"Responsibility of a finder of goods – A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee."

1. THE SECTION GENERALLY:

The terms of the section contemplates another quasi-contractual obligation. The section clearly postulates that a person who finds goods belonging to another takes them into his custody, is in the position of a bailee with all his responsibilities. Though no contract exists between the finder and the owner of the goods, yet an obligation, a responsibility in the eyes of law has been fixed on the finder of goods.

Section 71 requires that, to be responsible for the goods, the finder of the goods have to take them into his custody. Therefore, it is necessary to prove that the finder of goods took custody of the goods i.e., Animus Possidendi is required to amount to possession in law. Then alone he can be saddled with the responsibility of a finder of goods.\(^1\) If a person leaves the goods, and another person takes them into his custody, his responsibility in regard to the said goods would be that of a bailee. But Section 71 will not be applicable if the owner of the goods authorises another person to take and keep the goods as his agent, or as his bailee.\(^2\) Therefore, when a finder of goods accepts the responsibility of the goods, he is placed, vis-à-vis the owner of the goods, in the same position as a bailee.

As the position of the finder of goods is similar to that of a bailee, the study in this chapter extends to the person who finds lost goods takes

\(^1\) Union of India v. Mohammad Khan, AIR 1959 Orissa 103.

them into his custody becomes in effect a bailee as regards the duties incumbent on him. Having assumed custody he must take care of the goods as a man of ordinary prudence.¹ If he makes use of the goods, he may become liable to make compensation to the owner for any damage arising to the goods from or during such use.² Similarly, he should not mix the goods found by him with his own goods.³ The finder of goods may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he so receives.⁴ Even if no specific reward has been offered, but, if after the goods are found the owner promises to pay something to the finder for his services, the finder can enforce this promise under Section 25 (2) of the Contract Act. The finder of goods has, however, been authorised to sell the goods found by him under Section 69.⁵ If the circumstances of a case is not covered by Section 169 and the finder sells the goods he can be made liable for conversion.

Under the provisions of the Indian Penal Code, Section 403 fixes the guilt on a person with criminal misappropriation of property if a finder of goods converts them to his own use dishonestly. Here it is required to prove that there must be actual conversion of the thing misappropriated to the accused’s own use. Where, therefore, the accused found a thing, and merely retained it in his possession, he was acquitted of this offence.⁶ A finder of goods comes to possess a thing rather innocently without any criminal

2. Section 154.
4. Section 168.
5. Section 169.
6. Abdooll, (1868) 10 WR (Cr.) 23A.
intent. But subsequent change of intention may render the retention, entails deprivation, to the owner, and thus becomes wrongful and fraudulent.¹ The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender.²

1.2 *English Law:*

Under English law, a finder of goods is liable with that of a bailee as in India. A finder of goods will not be guilty of conversion if he removes the goods to place of security.³ He has all the rights in it against the whole world except the true owner. In *Bridges v. Hawkesworth*,⁴ case a person entered a shop and found a bundle of bank notes on the floor of the shop. The owner could not be found. In such a situation it was held that the finder has a right to the property. Similarly, a person in possession of a house or land and in actual control of it has superior right to the goods found therein, by his employee or a stranger. A presumption is drawn in favour of the possessor of the house that the goods found in the house or land is in actual possession of the possessor of the house or land.⁵

2. **SECTION 151: Scope and object.**

Section 151 of the Indian Contract Act, 1872 says:

"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."
Since a finder of goods is at par with a bailee, it is essential to analyse the liability of a bailor so as to the extent of care to be taken by a bailee. The bailee must take reasonable care of goods entrusted in bailment to him as a man of ordinary prudence would take of his own goods of similar bulk, quality and value. So an obligation has been set out on the bailee under this section. The section is not concerned with any degree of care and negligence. It declares a uniform standard of care without even recognising any distinction between gratuitous and non-gratuitous bailments. Therefore, it is difficult to fix an inflexible standard for the measure of the bailee’s care as it depends on the facts and circumstances of each case.\(^1\) It varies with the situation and the nature of goods too.\(^2\) So the section prescribes an irreducible minimum care required from bailees in general.\(^3\) A finder of goods steps into the shoes of a bailee.

Section 151 postulates a rule general to all kinds of bailment whether gratuitous or for hire. The duty of a bailee for hire is not greater than the duty of a gratuitous bailee. Both are to take the same care of goods entrusted to them as a reasonably prudent and careful man may fairly be expected to take of his own property of the same bulk, quality and value.\(^4\) A ‘sanctioning right’\(^5\) has been allowed to the bailor to claim damages from the bailee for wrongful detention of the goods bailed or for their loss; destruction or deterioration, if the bailee will not take reasonable care of the goods. Therefore, the obligation of the bailee starts as soon as the bailee accepts delivery or receives property for a certain purpose.\(^6\)

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In the absence of any special contract between the parties limiting the liabilities of the carriers under Section 72 of the Railways Act, the defendant Railways, were bailees for the goods consigned to them, and therefore responsible for the loss, destruction or deterioration thereof under Section 151,152 and 161 of the Contract Act, 1872. where Section 71 admits a fiction of recognition of a contract of bailment implied by law in circumstances, Section 151 imposes an obligation on the finder of goods, who accepts the responsibility of goods vis-à-vis the owner of the goods in the same position as a bailee. Under Section 151 of the Contract Act, the bailee is bound to take care as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value of the goods bailed. Therefore, the obligation of the bailee starts as soon as the bailee accepts delivery or receives property for a certain purpose. He will be liable for loss or damage caused to the goods due to his negligence, as he is required to take all care as a man of prudence would do.

As the bailee possess the bailed goods the essence of bailment is possession and a bailment may arise even when the owner of the goods has not consented to their possession by the bailee. Therefore, the bailee should take reasonable care of the bailed goods as a man of ordinary prudence would, under similar circumstances, take of his own goods. Where the possession of the truck was handed over to the defendants when the truck was parked in the parking center of the defendants, on receiving a valuable consideration for the safe keeping of the vehicle, a contract of

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bailment came into force. The defendants as bailee having failed to deliver the vehicle back to the second plaintiff within the contracted period and not having shown any prudent care for the safety of the truck, are held liable for its loss. Similarly, a surety in possession of attached goods by order of Court, has to produce the same when the Court calls for it. The surety’s possession is possession of the Court. He is in the position of a bailee and so is liable under Section 151 of the Contract Act. His liability can be executed under Section 145, C.P.C. for the value of the goods. The surety bond is not a special contract within the meaning of Section 152 so as to absolve him of the obligation under Section 151.

The scope of Section 151 of the Contract Act has been extended to a trustee which is similar to that of a bailee. Under Section 15 of the Indian Trusts Act, a trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own. So, a trust is an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of the beneficiaries. The exception is where there is a contract to the contrary. If a trustee takes the same care of the trust property that a man of ordinary prudence would take of his own, he will not be liable for any loss, destruction or deterioration of the trust property.

Similarly, the pawnee has a duty to take care of the goods as a man of ordinary prudence would take of his own goods and will be liable to the pawner for the loss or damage caused to the goods on account of his negligence. It necessarily follows that the goods to be returned by the

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pawnee should be the same goods pledged by the pawner and they should be in the same condition in which they were entrusted to the pawnee meaning thereby that no damage should have been caused to those goods on account of the negligence of the pawnee.¹

In the absence of any special contract, a bailee is not liable for the loss, destruction or deterioration of the things bailed if he has taken reasonable care. The effect of Section 152 is that degree of care enjoined under Section 151 is subject to the contract to the contrary. When the goods entrusted to the bailee are lost or damaged, there is initial presumption of negligence or failure to take reasonable care by the bailee.² The care required of the bailee under Section 151 is a finding of fact only, and so it cannot be opened to question in reversion.³ Where a bank takes possession of documents of title, it is responsible for the safe custody of the title deeds and not of the goods.⁴ Act of bank in collection of bills, remittances to bills, meeting expenses of storing goods and debiting same to current account even without cheques from plaintiff, would lead to inference that creation of fiduciary relationship or agency in respect of goods not warranted. Where the bank delivers goods to wrong person, the liability of bank is absolute.⁵

2.1 **Standard of care :**

The standard of care required of a bailee is that of a man of ordinary prudence, who would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. As the words of

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this section are vary wide, no hard and fast rule can be laid down for fixing the measure of care due from bailees in general. Rather it should invariably depend upon the facts and circumstances of each case.¹ Thus, to leave a bicycle in an open yard in charge of a contractor, who left the stand in charge of two boys, without locking the bicycle is not at all prudent.² Similarly, for a bailee to keep the bullion³ or money ⁴ entrusted to him unlocked is not prudent. Where bailed goods are perishable a bailee is expected to take special care.⁵ Where a bailee exercises due care in the selection of servants, he is not liable if the servant steals the article bailed.⁶ But he will be liable for the servant’s negligence during the course of his employment.⁷ If the care required under Section 151 is not proved, it is no defence for a bailee that he lost his own goods also alongwith the bailed goods.⁸ If the bailee deposits in a bank which fails, bailee is not responsible.⁹ When grain was damaged by a flood which was unprecedented, it was held that the bailee has not been remiss in his obligations and he was not responsible for the loss, destruction or deterioration of the thing bailed.¹⁰ The burden is on the plaintiff to show that the defendant bailee was guilty of want of diligence either by himself or by his agents or servants.¹¹ Where the pawnnee kept the pawned ornaments

5. Commissioner for Port of Rangoon v. Moollia, Dawood & Sons, 9 IC 470.
7. Sanderson v. Collins, (1904) 1 KB 628; Secretary of State v. Ramadhan Das Dwarka Das, AIR 1934 Cal. 151.
10. Santi Lal v. Tara Chand, AIR 1933 All. 158.
in an iron box with his own ornaments and the key was kept in a cash box and the room was locked. The burglars took the key from the cash box and burgled. It was held that the pawnee had not taken all the care which an ordinary man would take of his own goods.¹ Where the defendant placed the money entrusted to him by the plaintiff in a box with his own money and subsequently it was theft. It was held that the defendant was liable as he was not prudent.² A gratuitous bailee is also bound to take the same care as a prudent man would take in respect of his own goods.³

Under Section 151, the liability is for negligence in absence of a special contract. In Union of India v. Amar Singh,⁴ it was held that the Railway was guilty of negligence and did not act as a prudent man and hence liable for the loss and deterioration of the articles. Misdelivery is also a loss under certain circumstances and therefore, the defendants are held liable for the price of the goods which the plaintiff had lost.⁵ But where misdelivery has taken place in spite of due care and caution, the defendants would not be responsible for resulting loss to the plaintiff.⁶

The measure of diligence, demanded of a bailee, is, as a rule, that degree of diligence which men of common prudence generally exercise about their own affairs. As a general rule, the fact that he keeps the goods bailed in the same manner as he keeps his own may be; but it is not necessarily sufficient to exempt him from liability. If, however, the thing bailed is injured or destroyed, while in the custody of the bailee, although similar

6. Ibid., Governor General in Council v. Kaliram, AIR 1948 Pat. 345; AIR 1957 Cal. 573
things belonging to him sustain no damage, it seems that the onus of proof rests on the bailee to show that he has not unduly favoured his own things. In *Dwarka Nath v. Rivers Steam Navigation Co. Ltd.*, the Privy Council held that a plaintiff claiming damages for failure to take care on the part of a person to whom Section 151 of the Contract Act applies may succeed in discharging his onus in two ways:

(i) He may show that the defendant has failed to place before the Court all the materials available to him, as required under Section 106 of the Evidence Act, and ask the Court to presume that if produced such materials would have gone against the defendant.

(ii) He may also show, on such materials as have been produced by the defendant, that he has not taken as much care as is required of him under Section 151 of the Contract Act.

This view of Privy Council has been taken in subsequent judicial pronouncements. It is therefore essential to establish, whether the bailee has used all reasonable diligence and hence in each case it is a question of fact.

In case of a sudden emergency the standard of care expected from the bailee cannot be the same as in the ordinary circumstances. Where the damage is caused to the goods by an unprecedented flood, it cannot be attributed to any negligence. In law, that being the effect of *vis major* and hence compensation cannot be awarded. The expression *vis major* or ‘act of God’ is merely a naturally caused incident directly and exclusively without human intervention and cannot be prevented by any amount of foresight and pains and care reasonably to be expected from a common man. In such circumstances, a common carrier is not liable.

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1. AIR 1917 PC 173 at P. 175.
Therefore, if a man who encounters a sudden emergency does something which he might reasonably think proper under those circumstances, he should not be held guilty of negligence.\(^1\) In an emergency, the bailee has the same power to act as an agent under Section 189 of the Contract Act and in cases of difficulty, he is under the same duty as has been cast upon the agent under Section 214 of the Contract Act, which makes it incumbent on the agent to use reasonable diligence in communicating with his principal and in seeking to obtain his instructions.\(^2\)

Where there is a complete loss of property, the measure of damages is the price of the goods.\(^3\) The word "loss" appears in the sense of something that happens to the goods, as distinct from any loss or injury sustained by the owner. Therefore, the bailee should act in an emergency in a particular manner, like a man of ordinary prudence, under similar circumstances. Otherwise he will be saddled with liability. Where the Government official attached and seized goods, and due to rains the goods were damaged it was held that heavy rains is not an act of God or \textit{vis major}. It is the duty of the official to take such care of the goods as a prudent man would take of his own goods. The bailee Government must prove that the damages was due to reasons beyond their control.\(^4\) Where the customer entrusted ore to a company for transport and a shortage resulted, the onus lies on the transport company to prove its prudent care.\(^5\)

\(^1\) \textit{Dwarkanath v. Rivers Steam Navigation Co. Ltd.}, AIR 1917 PC 173, 175.
\(^2\) \textit{Santi Lal v. Tara Chand Madan Gopal}, AIR 1933 All. 158 at p. 159.
\(^3\) \textit{Munna Lal Pansari v. Ganga Prasad}, AIR 1955 VP 30 at p.31.
Where the goods in a Railway open wagon was looted by a large gang of organised thieves, the Railway is not guilty of negligence and is not liable for the loss.\(^1\) Where on account of the partition of the country a bank had to flee along with mass exodus from Pakistan to India, the bank was held to be not liable for goods bailed to it in Pakistan and which were thus lost there.\(^2\) Therefore, it is a question of fact and circumstances in each case for determining whether proper care has been taken or not. Where a bailee kept the bailer’s ornaments in a locked safe and kept the key in a cash-box in the same room. The room was situated in the ground floor and was locked from outside, the ornaments having been stolen, the bailee was held liable.\(^3\)

It is now clear that the principle under Sections 151 and 152 of the Indian Contract Act, 1872, that the loss or damage of goods entrusted to the bailee is *prima facie* evidence of his negligence. The burden to disprove in existence of negligence would lie on the bailee. Any contract regarding exemption from liability of the bailee however, is not illegal.\(^4\) Where American cotton bales were unloaded from a ship and stacked in the open premises uncovered by tarpaulin and continued to remain so in spite of the warning of the approaching storm by meteorological office and consequently goods so kept in the open were spoiled, it was held that the Port Trust is liable for damages as that of a bailee.\(^5\) Similarly, where damages to the machine is caused by several employees appointed under the Bombay Port Trust Act the liability is no more than that of a bailee.

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under Section 151, 152, 156 and 161 of the Contract Act. The burden of proof is, therefore, on the bailee to disprove negligence when damage or loss is established.

3. **INTERPRETATION:**

3.1. **English Law**

The English Law postulates different grades of care to different kinds of bailment whether gratuitous or for reward. In a gratuitous bailment, the bailee is liable for loss of, or damage to, goods only if he is guilty of gross negligence. Where a house belonging to the plaintiff was requisitioned by the War Office, the plaintiff was allowed to store certain articles in a strong room in the house, which he locked. On negligence of the troops stationed there, a quantity of silver plates were stolen. It was held that the defendants were liable for the loss.

The standard of care expected of a paid bailee has been expressed in almost similar terms. In *Martin v. London County Council*, it was held that the defendants as bailees for reward were liable for the loss as they had failed to exercise a care, which the nature and quality of the articles required. In *Newan v. Bourne & Hollingsworth*, it was held that the defendant was liable as he had not exercised that degree of care which was due from one who had found an article and he had assumed possession of it. The degree of negligence must be measured by the apparent value of the article.

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4. (1947) KB 628.
5. (1951) 31 TLR 209.
But if an involuntary bailee, without negligence, does something, which results in the loss of the property, he will not be liable for conversion.¹

A gratuitous bailee is a bailee for reward only and his liability comes only at his gross negligence.² In case of mandate, a reasonable care has enjoined, while in deposit, liability existed only for gross negligence.³ English decisions vary in their views. But the balance of authority enjoins on the gratuitous bailee, reasonable care, no matter if it is mandate or deposit.⁴ Therefore, gratuitous bailments are for the benefit of the bailee and the bailment for valuable consideration may be received either by the bailee or for the bailer. But in Houghland v. R.R. Low (Luxury) Coaches Ltd.,⁵ the Court held that there is no difference between these two classes of bailments as far as the standard of care required. To sum up, the bailee must take reasonable care in a bailment whether gratuitous or for reward, according to the circumstances of the particular case.

3.2. Indian Law

In India, the English pronouncement in Houghland's case continues to be a matured precedent.

The provisions under Section 151 of the Indian Contract Act, 1872, provides a uniform standard of care in all cases of bailment, that is, a degree of care which a man of ordinary prudence would take of his own goods of the same type as under similar circumstances. If the care devoted

¹. Elvin and Powell Ltd. v. Plummer Roddis Ltd., (1933)50 TLR 158; (1960)75 LQR 364.
². Shiells v. Blackburne, 1 HB 1 158 (Mandate) and 111 ER 99 (Deposit).
³. (1703) 2 Lord Raym 909, 918., Cogss v. Bernard.
⁵. (1962) 1 QB 694, 698.
by the bailee falls below the standard, he will be liable for the loss or
damage to the goods, but not otherwise. So, the section is concerned only
with the scope and extent of care to be taken by a bailee. It has not provided
any degree of care and negligence. It declares a uniform standard of care
without recognising any distinction between gratuitous and non-gratuitous
bailments.

The phrase ‘in all cases of bailment’ used in Section 151 has given wide
scope and applicability. It is immaterial whether the bailment is gratuitous
or for reward as under English law.

The liability of a bailee has been derived from the term ‘negligence’.\(^1\) So, where the plaintiff stayed in hotel and during absence of the plaintiff from
the hotel, his articles were stolen, it was held that the hotel keeper is
liable for his negligence.\(^2\) Similarly, where the bailee kept the bailer’s
ornaments in a safe custody, but the ornaments having been stolen, the
bailee was held liable.\(^3\)

The question of negligence is always a question of fact or at the most
mixed question of fact and law. In a case governed by Section 151 and 152
of the Indian Contract Act, the non-return of articles entrusted by the
plaintiffs to the defendant by itself is \textit{prima facie} proof of negligence of
the bailee. It is not for the bailer to lead positive evidence proving the
negligence of the bailee in respect of unreturned articles entrusted by the
bailer to the bailee. It is for the bailee to prove that the bailee is duly
exempted from his liability to pay the reasonable amount of compensation

\(^1\) \textit{Union of India v. Amar Singh, AIR 1960 SC 233.}

\(^2\) \textit{John & Sons v. Commeron, 1922 All. 735.}

\(^3\) \textit{Rampal v. Gouri Shankar, AIR 1952. Nag.8.}
or rescued one and that the alleged stipulation is binding on the bailer under the law of the land. No exemption clause, total or partial, can be invoked where the bailee has recovered insurance amount from the insurance company in respect of article entrusted to him by his customer the bailer. No bailee is entitled to unjustly enrich himself by retaining the insurance amount recovered by the bailee in respect of his customer’s articles. The defendant is not entitled to withhold the relevant information from the Court or from the plaintiff on this aspect and refuse to give inspection of relevant documents.

Section 152 of the Indian Contract Act, 1872, however, provides that in the absence of a special contract, the bailee is not responsible for any loss, destruction or deterioration of the thing bailed, is only he had exhibited the standard care set out in Section 151. Therefore, by a special contract the bailee can enlarge his liability. If the bailer requires a complete protection, he will have to insure the goods. Similarly, a bailee should take reasonable care and if he has done, he is not liable for any loss, destruction or deterioration of the thing bailed. In other words, the bailee can be absolved where he has done the act like an ordinary prudent man do under similar circumstances.  

Under English Law, the duty of a bailee to take reasonable care has been explained by the House of Lords in two directions:

(i) The duty to take all reasonable precautions to obviate the risks which may be reasonably apprehended.

(ii) The duty to take all proper measures for the protection of the goods when such risks are imminent or had actually happened.

Therefore, the directions made by the House of Lords is quite synonymous to the words used under Section 151 of the Contract Act. Since the standard of care is that of a reasonable or prudent man, he is required to use reasonable care to avoid dangers which are reasonably foreseeable but not to guard against 'fantastic possibilities'. At the same time the standard of a reasonable man is an impersonal standard and leaves out all account the personal equation of the man concerned. The degree of care required varies with the degree of risk involved in the operations in which the person is engaged. The more dangerous the act the greater is the care that must be taken in performing it. Similarly, where the work requires special skill, the standard of care is raised, in as much as the person who undertakes such work must possess the skill which is required to perform that work and he must conduct himself in a skillful manner.

As the standard of care and diligence imposed on the bailee on receiving a valuable consideration, an obligation implies, for which, he is bound to use due care and diligence in keeping and preserving the things entrusted to him. If it is injured through his negligence, he cannot be excused on the ground that it has been subsequently destroyed by inevitable mischance. A question may arise whether it is possible to reduce the prescribed quantum of care and diligence. From the wording of Sections 151 and 152 it seems that an irreducible minimum is suggested. Section 151 is applicable to "all cases of bailment" and there is complete absence of words 'permitting any contract to the contrary.'

1. Fardon v. Harcourt Rivington, All. ER. 81 (H.L.); Bolton V. Stone, 1951 n A.C. 850 at p. 856; Calcutta Credit Corporation Ltd. v. Prince Peter, AIR 1964 Cal. 374,379.
4. Philips v. William, (1938)1 All.ER 566.
The bailee is not, apart from special contract, an insurer of the thing bailed, and therefore, in the absence of negligence on his part he is not liable for loss or damage to the thing due to some accident, fire, the acts of the third parties, or the unauthorized acts of his servants acting outside the scope of their employment. But the bailee must deal with the thing in the manner authorised by the bailment, otherwise he takes upon himself the risks of so doing.

4. **THE RIGHTS AND OBLIGATION OF A FINDER OF GOODS:**

*in relation to Sections 154, 155, 156, 157, 168 AND 169:*

4.1 **Section 154** of the Indian Contract Act, 1872 says:

> "If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailer for any damage arising to the goods from or during such use of them."

The terms of the Section are very clear. The section makes a bailee liable for the unauthorised use of goods bailed. If a bailer makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailer for any damage caused to the goods from or during such use of them. So, a liability is inferred on the bailee for unauthorised use of the goods bailed. A breach of the conditions of bailment will result in the bailee's being liable to compensate the bailer for any damage caused to the goods from or during such use of them.

Where a car was entrusted to the defendant as a bailee and the evidence establishes that he was using the car for his private purposes in

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contravention of this agreement with the plaintiff, the bailer, it was held that the defendant was liable for the damages arising from such use.¹

A horse lent for riding should not be used for any other purpose and if it is used outside the scope of the bailment, the bailee would be liable for any damage to the horse howsoever happening. So, the goods must be used by the bailee strictly for the purpose for which they have been bailed to him. Any unauthorised use of the goods would make the bailee absolutely liable for any loss of or damage to the goods. And no plea of act of God or inevitable accident would avail.

4.2 **Section 155 of the Indian Contract Act, 1872** says:

> "If the bailee, with the consent of the bailer, mixes the goods of the bailer with his own goods, the bailer and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced."

The section provides the effect of mixture of goods of bailee with that of the bailer with the bailer’s consent. In such an event each will command an interest proportionate to his respective share in the mixture. So, the bailee should maintain the separate identity of the bailer’s goods. He should not mix his own goods with those of the bailer and without his consent. Once there is the mixture or confusion it becomes the common property. It is immaterial whether the things remain distinguishable or not.²

In the case of confusion of goods, the English Law partly agrees with and partly differs, where those of two persons are so intermixed that the several portions can be no longer distinguished. If the intermixture be by consent,

in both the cases the proprietors have an interest in common in proportion to their respective shares. But if one willfully intermixes his money, corn or hay with that of another man without his approbation or knowledge or casts gold in like manner into another's melting pot or crucible, the civil law to guard against fraud, gives the entire property without any account to him whose original dominion is invaded and endeavoured to be rendered uncertain without his own consent.¹

Where goods of two owners are mixed together, by consort or by accident, the owners of the goods so mixed become tenant-in-common of the whole, in the proportion which they have severally contributed to it. But if a person willfully mixes and confuses goods which he holds with those of another, so that he cannot distinguish what was his own, the whole must be considered as belonging to the others.² In these circumstances Section 156 will be applicable.

In India, it is however satisfactory that all the above confusions are absent in the provision in Section 155 of the Contract Act, where it is specifically stated that if the goods are mixed with the consent of the bailer, both will have a proportionate interest in the mixture thus produced. The bailer and the bailee become tenants in common of the whole in the proportion of their respective contribution.³ Sections 155,156 and 157 provide rules for three different sets of circumstances under which the bailer’s goods may become mixed or confused with those of the bailee.

¹ Blackstone, Black Comm AO 405.  
4.3 **Section 156** of the Indian Contract Act, 1872 says:

"If the bailee, without the consent of the bailer, mixes the goods of the bailer with his own goods, and the goods can be separated or divided, the property in the goods remains in the parities, respectively; but the bailee is bound to bear the expenses of separation or division, and any damage arising from the mixture."

The section postulates the situation of a case where the bailee, without the consent of the bailer, mixes the goods of the bailer with his own goods but the goods can be separated or divided. In other words, where the mixture is made without the bailer’s consent, both the bailer and the bailee retain their separate interest in their respective goods.\(^1\) In such a case, the property in the goods remains in the parties, respectively, the bailee incurs only an obligation to bear the expenses of separation or division and to compensate the bailer for any damage arising from the mixture. So, where there is a possibility of separation of goods, the separate interest in the goods continues to exist in the bailer and the bailee respectively and the bailee will be held liable for any resulting damage to the goods bailed.

However, when a separation of goods is effectuated the cost of separation has to be borne by the bailee. So, there is a duty cast on the bailee not to mix the goods bailed with his own. But if he does so, then he is answerable to the operation of Section 155, 156 and 157 of the Contract Act.

4.4 **Section 157** of the Indian Contract Act, 1872 says:

"If the bailee, without the consent of the bailer, mixes the goods of the bailer with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailer is entitled to be compensated by the bailee for the loss of the goods."

\(^1\) Colwill *v.* Reaves, 2 Camp., 576.
This section applies to a case, where the bailer has not given consent for the mixing of the goods and it is found impossible to separate the goods on mixture, the bailer who is entitled to return of his goods can demand compensation for the loss of the goods. The section, however, silent as to the effect of the mixture in the property in the goods.

In India, the right of the bailer and the measure of damages payable by the bailee, has been developed through judicial pronouncements. The Court held that it rests only on damages payable to the bailor by the bailee and the bailee is otherwise left in custodia regis of the mixed goods in entirety. The option lies with the bailer and once he exercises it, the bailee is liable for the damages caused and compensate accordingly.1

Section 66 of the Indian Trusts Act also lays down a proposition which is analogous to that contained under Section 157. If a person wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him. No provision in made for cases where the mixture is caused by the act of a third person.

In England, the judicial pronouncement on this doctrine is well established. If a trustee or an agent mixes and confuses the property which he holds in a fiduciary character with his own property and which cannot be separated with perfect accuracy, he will be liable for the whole.2 The reasons explained by Blackstone is that “the English Law is to guard against fraud, gives the entire property without any account to him whose original domain is invaded and endeavoured to be rendered uncertain without his own consent.”


2. Cook v. Addison LR 7 Eq 466; Referring to Lupton v. White, 15 Ves 432.
4.5 **Section 168** of the Indian Contract Act, 1872 says:

"The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward and may retain the goods until he receives it."

The section provides the right of a finder of goods. Accordingly, a finder of goods has no right to sue the owner for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner. He has, however, the right of particular lien in respect of those goods. He may retain the goods against the owner until he receives compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner. In short, what a finder of goods cannot recover directly he can get indirectly by detaining the goods under a right of lien.¹

Under Section 71, a person who finds goods belonging to another and takes them into his custody in entitled to retain the goods against the owner until he receives compensation. But if he has delivered them over to him, he cannot sue the owner for compensation for trouble and expense incurred by him to preserve the goods, and he is also subject to the responsibility as a bailee to take due care of the goods and try to find out the owner.

Comparing the sections 168 and 71 it can be said that a person who finds goods and takes them into his custody, is subject to the same responsibility as a bailee. So, a finder of goods has all the obligations of a bailee. Since the position of the finder of goods is that of a bailee, he is supposed to

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take the same amount of care with regard to the goods as is expected of a bailee under Section 151. He is also subject to all the duties of a bailee, including a duty to return the goods after the true owner is found. If he refuses to return he could be made liable for conversion. Moreover, if by his default in returning the goods, there is some loss, destruction or deterioration of the goods, he will be liable for the same.

The term ‘finder’ means an innocent finder. Such a finder has possession, and is entitled to assert his rights against third parties who have no title to the thing. The right to claim the reward being a statutory right would be available even in the absence of any contract to the effect. However, such right under Section 168 is in respect of the lost goods only. If the reward does not pertain to the goods, then the same cannot be claimed unless there is a contract for the payment of the same. If the goods have been found by the finder voluntarily, and then the owner of the goods promises to compensate the finder for his past voluntary services, the contract is binding and the owner is bound to pay the promised amount.

So where a conscientious finder spends for the preservation of the goods the owner should compensate him before he claims possession. Hence it is Section 168 which extends a lien to the finder. The finder has no lien for his expenses in caring for the thing, or for removing it. But on ground of justice the expenses incurred by the finder should be paid by the owner. Though no lien is created, but restitution for reasonable expenses may, certainly, be allowed, if the owner claims to recover the thing. The finder is justified in taking steps for the protection and safe custody of the thing, until he finds the true owner, unless the expenses are out of all proportion to the value of the thing and seem to be unreasonable.

Salvage lien is a right to retain property of another or an action of saving a ship or its cargo from wreck, capture etc. belonging to another until a debt from the actual owner of the property is paid.\textsuperscript{1} In India, the principle of salvage lien has been recognised.\textsuperscript{2} But where a person makes a payment for his own benefit in order to save a property belonging to him or if he was under a personal covenant which he was duty bound to carry out, salvage lien will not be applicable.\textsuperscript{3}

Under the English Law, if the thing is really lost, the finder who takes it to save it for the owner, is not a trespasser, as he becomes a bailee by the implied consent of the owner and with an intent of appropriation, is a trespasser. So if the thing is apparently and not really lost, the taker is a trespasser, though excusable so long as he acts for the owner.

Where a finder of goods lost in public place or a quasi-public place can claim right to hold it against all except the true owner.\textsuperscript{4} The finder can even maintain an action against any person except the true owner.\textsuperscript{5} If the goods are found in a private place the presumption is it belongs to the owner of the place and so the finder cannot maintain an action for possession in such a case.\textsuperscript{6}

A finder at best has no higher claim or duties than a bailee.\textsuperscript{7} The Section 168 is based on natural justice permitting a lien till compensation or reward is paid. In the case of an offer of specific reward, the finder has a lien on the goods and can sue for the reward. Under Section 168 the finder’s lien

\begin{itemize}
\item \textsuperscript{1} Vijay Kumar v. M/s Jullender Body Builders, Delhi, 1981 Delhi 126.
\item \textsuperscript{2} Nagendra Chander v. Kaminee, 11 MIA 241; Dukhina Mohan v. Saroda Mohan, LR 20 IA 160.
\item \textsuperscript{3} Lankaram v. Sundaragopala, AIR 1941 Mad. 208 at p. 216.
\item \textsuperscript{4} Bridges v. Hawkesworth, (1851)21 LJQB 75.
\item \textsuperscript{5} Jeffries v. Great Western Railway Co., (1856)119 ER 916.
\item \textsuperscript{6} South Staffordshire Water Co. v. Sharman, (1896)2 QB 44.
\item \textsuperscript{7} Issac v. Clork, (1115)2 Bulsr. 306 at p. 312.
\end{itemize}
on the goods extends till he is paid compensation. This lien is absent in English Law. Where the finding was done without a request from the owner, the compensation is denied under the English Law but in India only a lien is given and not a right to sue.

4.6 **Section 169** of the Indian Contract Act, 1872 says:

"Where a thing which is commonly the subject of sale is lost, if the owner cannot with responsible diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it –

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

The section provides where an ordinary saleable object is lost and it is found by the finder and if the finder cannot with reasonable diligence find the owner or if the owner on demand by the finder refuses to pay the lawful charges, an option is then given to the finder to sell the goods –

(a) when the thing is in danger of perishing or losing the greater part of its value; or

(b) when the lawful charges of the finder amount to two-thirds of its value.

Therefore, if a sale is made in accordance with the provisions under Section 169, the finder is entitled to his costs out of the sale proceeds. The rest of the amount belongs, not to the finder, but to the true owner. Sections 168 and 169, however protect the interest of a finder. Of cause, sale by finders of goods and action by true owner are rare in India.

Under the English Common Law, a person in respect of goods found, has no right of sale and a sale by him will be an act of conversion. The same would be true under the Indian law except when the conditions laid down in Section 169 are satisfied in which case the finder of the goods has a right to sell them. It should, however, be remembered that out of the sale-proceeds the finder is entitled to his costs, and compensation only. Balance if any belongs not to him but to the true owner.

5. **RESUME OF THIS CHAPTER**:

Section 151 of the Indian Contract Act, 1872 prescribes the amount of care to be taken by a bailee. It does not lay down the consequences, if the bailee fails or neglects to take the statutory amount of care. Section 152 rather enacts that the bailee is not responsible for the loss, destruction or deterioration, if he has taken the amount of care as described under Section 151. But it has not been discussed in the entire chapter of bailment. The terms of the provisions contained in the Indian Contract Act, 1872, has been amply simplified through judicial pronouncements. In India, to this chapter the rule of ordinary prudence is applied in case of the goods bailed. In England, however, it turns on the purpose of the bailment and whether it was gratuitous or not.

Section 156 and 157 provide the situations where without the consent of the bailor, the bailee makes a mixture of the goods bailed with his own. But Section 155 deals with cases where there is bailer's consent. Neither the Section 156 nor the Section 157 deals with the cases where the mixture takes place either by an accident or by the act of a third party. It is however clear that the rights of the bailer and the bailee remain unaffected, provided

their goods can be distinguished. If they cannot be so distinguished they become tenants in common as in a mixture resulting from consent.¹

Section 168 allows the finder to retain the goods against the owner until he receives compensation for trouble and expenses. Further, where the owner has offered a specific reward for the return of the goods lost, the finder may sue for such reward, and may retain the goods until he receives it. But the section does not say that the finder of goods is a bailee except in the case of a deposit. If he takes charge of the goods he stands in the shoe of a gratuitous bailee. He can only institute where a reward is announced and not paid. Therefore, he who finds the goods is not bound to preserve them from putrefaction. No law compels the finder to keep the thing safely. If he is not negligent in keeping the thing, the finder cannot be held responsible.² Unlike in English Law, in India the finder has the right to sell the goods if the conditions provided in Section 169 are fulfilled. He can recoup his costs and compensation out of the sale proceeds.