
(1937) 02 CAL CK 0036
In the Calcutta High Court

Bengal Nagpur Railway Company, Ltd.

APPELLANT

Vs

Haji Latif Abdulla

RESPONDENT

Date of Decision : 18-02-1937

Acts Referred:

Railways Act, 1924 — Section 72

Citation : AIR 1937 Cal 410 : 173 Ind. Cas. 797

Hon'ble Judges : Jack, J

Bench : Division Bench

Judgement

Jack, J.—This appeal has arisen out of a suit by Messrs. Hazi Latif Abdulla, tobacco merchants for recovery of Rupees 1,167-5-6 on account of damages to 42 bags of tobacco which they despatched by the defendant Company's Railways from their Nephani out-agency to Shalimar, Calcutta. The 42 bags formed part of a consignment of 210 bags and were partly damaged by rain water owing, according to the plaintiffs, to the fact that the wagon in which these bags were carried was leaky and defective. The defendant contends that the goods were carried at the owner's risk covered by risk-note B on account of reduced rate of freight and by risk-note A on account of the goods being "liable to dryage, damage and wettagage in transit". They maintain that the wagon in which the goods were carried was not leaky or defective and that the risk-notes protect them from all liability.

2. Admittedly the effect of the risk-notes, if the goods are covered by them, is to protect the Railway from all liability except that due to misconduct of the Railway Company's servants. So that if the risk-notes apply, it must be proved in that case that the damages would not have occurred but for the misconduct of the defendant Company's servants. The first questions therefore to be decided in this appeal are: (1) Were the damaged goods covered by the risk-notes? (2) If so, was the damage due to misconduct on the part of the defendant Company's servants? It is only if these questions are answered in the negative that we need consider the defendant's liability as bailees. The plaintiff Company claim that the

risk-notes did not apply inasmuch as the goods were not sent by the route contracted for as laid down in the consignment note and receipt. The consignment note and also the receipt (which is a carbon copy of the forwarding note or invoice) show that in both the words KOP PA were originally entered to describe the route, meaning the route via Kolhapur and Poona whereas the goods were sent by a much shorter and cheaper route, viz., via Chikodi and Waltair.

3. The words KOP PA were subsequently changed to CKR and WAT, but the evidence makes it clear that the sender had no knowledge of the change and paid no attention to the original entry as he fully intended that the goods should go by the shorter route which was the route by which his firm invariably sent their tobacco. That they intended the tobacco to go by this route is evident from the fact that had they sent it by the longer route they would have had to pay Rs. 4-7-5 per maund instead of Rs. 2-6-6 per maund which would have made a difference in 210 maunds of about Rs. 430. Thus the Company must have been perfectly well aware that the Railway Company were sending it by the shorter route and have intended this: It seems equally certain that the Railway Company had no intention of sending the goods by any other route than the shorter and cheaper route for I find that under their rules when a consignment is to be booked by other than the cheaper route the sender or his authorised agent must write and sign instructions on the forwarding note to the effect that the consignment is to be forwarded via a dearer route "and a remark must be made in the invoice and receipt which will leave no doubt that the dearer route was selected by the sender". No such entry was made in this case and therefore according to the company's rules the goods were to be sent by the cheaper route and the longer route entries in the consignment note and receipt were obviously just a mistake. The contract was in fact (as understood by the parties) to send them by the cheaper route, for the amount charged was nearly half that which would have been the charge by the longer route. The despatch of a consignment by a different route from the contracted route amounts no doubt to misconduct so as to deprive the company of any protection under the risk-notes, but in this case the goods were in fact despatched by the route by which both parties to the contract intended they should be despatched, so that there was no misconduct of this sort, and the goods were covered by the risk-notes.

4. The effect of the risk-notes is admittedly that the onus is on the plaintiff to show that the damage was due to misconduct on the part of the Railway Company. The question is then what amounts to misconduct? Risk-note in form B was sanctioned by the Governor General of India u/s 72, Railways Act in 1924. In it the word "misconduct" replaced the words "wilful neglect" of the previous risk-note. This alteration was probably made because it was found impossible to establish the liability of the Railway Company under the old form of risk-note. In the English risk-note the liability of the Railway Company depends on "wilful misconduct" Accordingly the liability under the Indian form risk-note is greater than under the English. The definition of misconduct in this connexion given by

Suhrawardy, J. in *B.N. Ry. Co. Vs. Moolji Sicka and Co.*, is wrongful commission and omission, intentional and unintentional, and includes negligence or want of proper care which a bailee is to take u/s 152, Contract Act. No special definition however should be required as there is no reason to suppose that the word is not used in its ordinary sense. Misconduct is defined in Oxford Dictionary as "bad management, mismanagement, malfeasance or culpable neglect of an official in regard to his office," and there is no reason to think that it is used in risk note in any other sense. The view of the meaning of misconduct taken by the learned Judges in *M. and S.M. Ry. Co. Ltd. Vs. Sunderjee Kalidas, and Firm, Banwarilal Jagannath. Vs. B. B. and C. I. Ry. Co. Ltd.*, was somewhat different to this. They defined it as the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. This is founded on the definition in English cases, *Forder v. G.W. Ry. Co.* (1905) 2 K B 532 and others in which the learned Judges, as pointed out by Suhrawardy, J., in *B.N. Ry. Co. Vs. Moolji Sicka and Co.*, were really defining wilful misconduct, the term used in the English risk-note form. Negligence in my view would not always be tantamount to misconduct but it amounts to misconduct in the ordinary meaning of the word if it involves culpable neglect likely to cause damage, even if it does not involve recklessness.

5. Having thus considered what is meant by misconduct we come back to the question whether the plaintiff has succeeded in proving that the Railway Companies were guilty of misconduct. In this connexion we have to consider what facts the appellate Court has found to be established as against the Railway Companies and whether those facts show misconduct. There is no direct evidence of misconduct and, to establish it by circumstantial evidence, it must be shown that the circumstances are capable of no other explanation. The circumstances are that 42 bags contained in one particular wagon were found damaged by water. The learned Judge thinks this could not have occurred in the circumstances unless there was some leakage or unless the doors were insecurely fastened. This is probably correct since there is no suggestion that the damage was caused during transshipment or at any time except while the bags were in the wagon. We have to consider therefore in the first place whether there was any misconduct in connexion with the despatch of the goods. Inasmuch as all wagons containing damaged goods are inspected on arrival and the wagon was inspected in this case, but no inspection report has been produced by the Railway Company, the learned Judge has concluded from the state of the bags that the wagon arrived in a leaky condition or the doors were not properly fastened. This however would not necessarily show misconduct since the long journey might have caused some defect in the wagon on the way and failure to inspect the wagon at every stage cannot be said to amount to misconduct.

6. Misconduct would, however, be shown if it is found that the goods were despatched in a wagon in the rainy season in which they were likely to be damaged by rain. The appellate Court has found that the evidence of plaintiff's witness, Suleman (P.W. 4) is reliable. He says he saw leaks in the roof of the

wagon after it arrived at Shalimar, and further says that the wagon was labelled non-waterproof. This is a circumstance that tells very much against the Railway Company who allowed the despatch of the goods and carried them during the rainy season in a non-waterproof wagon. The goods were transshipped into this wagon at Tadapaki by the Madras and Southern Mahratta Railway Company and thereafter travelled over the lines of both companies to Shalimar. I am not sure that the servants of the second company should in the ordinary course have been aware that there was tobacco in the non-waterproof wagon so as to show misconduct on their part in allowing them to remain in such a wagon, but I think there was certainly misconduct shown by the servants of the Madras and Southern Mahratta Railway Company in deliberately putting them into a non-waterproof wagon as they must have known that the tobacco was likely to be damaged by rain in consequence. One of the witnesses of the Railway Company, H.S. Rao, admits that a report was written after inspection of the wagon, and if Suleman's statement on this point was not true, this report should have been produced to contradict it. The company do not appear to have given any reason for its non-production. The transshipment register which might have thrown some light on this matter, was also not produced. S.M. Rajagopal (D.W. 6) refreshed his memory as to the condition of the wagon by reference to a copy of this register, but that copy was not produced. If the original was (as stated) filed in another case the copy should at least have been produced.

7. I cannot say therefore that the learned Judge was not justified in relying on the evidence of Suleman, and his evidence shows misconduct on the part of the Railway Company in despatching the goods in a non-water proof wagon. When on arrival the goods were found damaged by water, I think it is a fair inference that this was due to their despatch in a wagon of this sort. The plaintiff is therefore entitled to damages. No objection to the amount of damages assessed has been raised in this Court. I find therefore that the plaintiff is entitled to the amount of damages assessed by the Additional District Judge. In view of my finding that misconduct has only been proved against the Madras and Southern Mahratta Railway Company who put the goods into this non-water proof wagon at Tadapaki, they will be liable for the whole amount of damage, decreed i.e., Rs. 709-9-0 with interest at six per cent, per annum from 28th June 1929 and for costs of the plaintiff in the Courts below in proportion to their success and the plaintiff's costs also in this Court.