
(1936) 12 PAT CK 0023
In the Patna High Court

Bengal Nagpur Ry. Co., Ltd.

APPELLANT

Vs

Haruiban Iswar Fathak and Another

RESPONDENT

Date of Decision : 18-12-1936

Acts Referred:

Citation : 169 Ind. Cas. 354

Hon'ble Judges : Mohammad Noor, J

Bench : Single Bench

Judgement

Mohammad Noor, J.—This second appeal is by the Bengal Nagpur Railway Company against an appellate, decree of the Subordinate Judge of Singhbhum allowing the plaintiff-respondent damages for loss by fire of a consignment of sal wood despatched from Sonua Railway Station to Toiang both being on the Bengal Nagpur Railway. The plaintiff made over at Sonua Railway Station 44 sal logs to the appellant company for despatch to Toiang Railway Station. Thirteen of them were, however, returned to the plaintiff to adjust the load of the train, and the remaining 61 which were loaded on two trucks reached Torang. It was discovered then that somehow or other, which is not very clear, the logs had caught fire. According to the defendant company attempts were made to extinguish it but to no effect, and all the logs were burnt to ashes and the trucks on which they were loaded were also partly destroyed. The consignment was covered by a risk note in Form B. On these facts the plaintiff claimed damages from the defendant company. Various pleas were raised in bar of the suit. The trial Court accepted the pleas of the defendant and dismissed the suit. On appeal by the plaintiff the learned Subordinate Judge has passed a modified decree only to the extent to which according to his finding the loss was due to the misconduct of the employees of the defendant. The defendant company has preferred this second appeal. The only point urged on behalf of the appellant has been that there was no evidence on which the learned Judge could come to a finding of misconduct by the railway employees. In order to appreciate this point it is necessary to refer to the risk note in question which is in force from 1924. It will be useful if I give the difference between the risk note which was in force prior to 1924 and

the one which is in force now in order to appreciate the change in the position of the responsibility of the railway in case a consignment is destroyed by fire. The old risk note made the railway administration responsible for loss of, a consignment

except for the loss of a complete consignment or one or more complete packages forming part of a consignment due to the wilful neglect of the railway administration or to theft, etc., etc.

2. There was a proviso to the effect that the term "wilful neglect" "be not held to include fire, robbery from a running train or any other unforeseen event or accident." The risk note which came into force in 1924 exonerates the administration

for any loss, destruction or deterioration of, or damage to the consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration.

3. Then there are two provisos. Only one of them is relevant to this case. It is this. In case of

non-delivery of the whole of the consignment or of the whole of one or more packages forming part of the consignment packed in accordance with the instructions laid down in the Tariff, or where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire, the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but if misconduct on the part of the railway administration or its "servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

4. The difference between the two risk notes is this. In the previous one the railway administration was entirely absolved from responsibility for loss in case of fire, robbery from a running train or any other unforeseen event or accident; but in other cases it was liable only if the loss was brought about by the wilful neglect of the employees of the administration. In the form now in force the words "wilful neglect" have been changed into "misconduct" and the railway administration is liable in case of loss by fire also provided that it is due to the misconduct of their officials. In cases other than loss by fire or robbery a duty is cast upon the railway administration to give evidence as to how they dealt with the consignment. It is clear, therefore, that in this case the railway administration was not bound to adduce any evidence whatsoever as to how they dealt with the consignment. The onus was entirely upon the plaintiff. Rule the railway administration has chosen to lead evidence to prove not the origin of the fire but the steps their employees took to extinguish it. In fact, there is no evidence of any misconduct by the railway on "behalf of the plaintiff. It has,

however been conceded that if the railway administration has chosen to adduce evidence and if from such evidence misconduct of the officials of the defendant can be inferred, the plaintiff is entitled to succeed. Therefore, the main question in this case is whether there is anything in the evidence adduced by the defendant company from which misconduct of their officials can be inferred. If so, the appeal must fail, because if there is any evidence from which misconduct can be inferred the decision of the lower Appellate Court is final. If, on the other hand, there is no such evidence, the appeal must succeed, as a finding based upon no evidence is wrong in law.

5. The gist of the evidence adduced on behalf of the defendant company is that when the train which carried the two trucks loaded with the plaintiffs consignment reached Torang smoke was seen coming out of the logs by a jamadar. The driver and the guard of the train were informed and it was alleged by the witnesses of the defendant that a hosepipe was used to extinguish the fire, but without success. The two trucks were detached from the train and carried to a siding near about a tank and there attempts were made to extinguish the fire, but as the wind was high the attempt was unsuccessful and the consignment along with the trucks was burnt down.

6. The learned Subordinate Judge has held the officials of the defendant guilty of misconduct by holding: (1) that the story of the defendant's witnesses that a hosepipe was used was not true: (2) that they did not fasten the iron chain by which the logs of wood were tied to the trucks: and that had this been done, a portion of the consignment would have been saved; and : Durga Dutta-Shri Ram Firm Vs. Secy. of State for India and Another, . that the fire was noticed in one of the trucks only and that the station staff ought to have detached that truck only and not both of them. He has definitely not said so, but he seems to be of the view that as the two trucks were kept together the fire of one extended to the other and destroyed the logs loaded on it as well. These are the three acts of omission and commission by the Railway Officials on the basis of which he has held the railway administration partly responsible for the loss. Now the finding of the learned Subordinate Judge that no hosepipe was used is a finding of fact and is conclusive in second appeal. But it has been argued on behalf of the appellant that even assuming that no hosepipe was used, its omission does not constitute misconduct. It has further been contended that there is no evidence to show that the iron chain could be unfastened without risk of life or that its unfastening would have saved the consignment. It is urged that there is no evidence on the record to show that the fire in the second truck was not from before and that it caught fire because it was kept by the side of the first truck.

7. It is necessary, therefore, to examine the evidence of the witnesses examined on behalf of the defendant company on these two points not for deciding whether they are sufficient for the findings of the learned Subordinate Judge (of which he was the final Judge) but to see whether there is any evidence at all to support his findings that; (1) only one wagon was found to be on fire and the other one

caught it on account of its proximity to the first, and that (2) the logs could have been unloaded by unfastening the chain and thereby the extent of the damage could have been reduced. (His Lordship then considered the evidence and proceeded.) I am, therefore, clearly of opinion that there is absolutely no evidence on which the learned Subordinate Judge could base his finding that only one wagon was on fire and the other caught fire on account of its proximity to the first, and that the logs could have been unloaded by unfastening the chain. Nor is there any material to hold that the mere unfastening of the chain could have saved the logs without their being unloaded. The learned Advocate who appeared on behalf of the plaintiff suggested that if the chain would have been unhooked on one side, only a number of logs would have fallen down from the trucks. I am unable to hold so on pure imagination. There is absolutely no material on the record to show how the logs were loaded and whether any of them, and if so, how many were above the walls of the truck, or that they would have fallen down themselves by simply unhooking the chain.

8. The learned Advocate, however, contended that if the final Court of fact has drawn inferences from the evidence of the witnesses the findings cannot be questioned in second appeal. As I have said before, had there been any evidence on the record on which the findings can be supported they would have been final, but there is no evidence to support them.

9. Assuming, however, that the findings of the learned Subordinate Judge that the chain could have been unfastened and this would have saved some of the logs from destruction, and that the fire in the second truck broke out later and could have been avoided had that truck been separated from the first one which was on fire, can be accepted and his further finding, which is final, that, hosepipe was not used is given effect to, the question still remains whether these constitute misconduct on the part of the railway company. *M. and S.M. Ry. Co. Ltd. Vs. Sunderjee Kalidas*, it was held by the Calcutta High Court that when misconduct on the part of the railway administration's servants is alleged, it must be shown that the servants were actually responsible for the guilt or wrongful act; knowledge on the part of the railway administration or of their servants that one was likely to cause injury is not sufficient. Misconduct is not necessarily established by proving even culpable negligence: it is something opposed to accident and negligence and is 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 view was adopted in the same Court in *Firm, Banwarilal Jagannath. Vs. B. B. and C. I. Ry. Co. Ltd.*, . In this Court in *Firm Durgadutt Sriram v. Secretary of State*, it was held that the mere omission of the railway company to lock one side of the wagon and simply sealing it was not a misconduct. It was also held that in any case misconduct is not less than "wilful neglect". In *Naurang Lal Vs. B.B. and C.I. Ry. and Another*, , *Wort, J.* held that there is no difference between "misconduct" and "wilful misconduct" a term used in England. "Wilful" expresses the act of the will of the person who is guilty of misconduct, but "misconduct", must always have that condition attached to it.

In some cases, however, distinction has been drawn between "wilful misconduct" and "misconduct". The latter has been held to mean "unbusiness-like conduct". Be that as it may, the question whether misconduct can be inferred from a set of facts is a question of law Mookerjee, J. in Akhil Chandra Saha v. Iidia General Navigation and Ry. Co., Ltd 21 C.L.J. 565 : 29 Ind. Cas. 260 : AIR 1916 Cal. 647, quoted the observations of Lord Cairns in Metropolitan Ry. Co. v. Jackson (1873) 3 A.C. 193 : 47 L.J.C.P 303 : 37 L.T. 679 : 26 W.R. 175:

It is impossible to lay down any rule except that which at the outset I referred to, namely that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the jury whether it ought to be inferred.

10. The learned Advocate for the respondent has relied upon the case in Vaughan v. Menlove (1837) 3 Bing. 468 : 132 E.R. 490 : 4 Scott 244: 1 Jur. 215 : 3 Hodges 51 : 6 L.J.C.P 92, for the proposition that the decision of the question of neglect is one of fact and not of law. In that case neglect was established and the question was whether it was such that a prudent man could not be guilty of it; and it was held that this question was properly left to the jury. In this case the very question of misconduct is in issue. In Secretary of State v. Ghanaya Lal Srikishan 10 Lah. 329 : 111 Ind. Cas. 523 : AIR 1928 Lah. 837, it was held that the question whether facts established amount to wilful negligence is a question of law and not of fact. The question, therefore, is, whether the omission to apply a hose, to unfasten the chain and keeping a truck in the proximity of one which was on fire are such from which misconduct can be legitimately inferred. Now according to the defence evidence, which seems to have been accepted by the learned Subordinate Judge, the servants of the railway company soon after the discovery of fire shifted the two trucks, took them to a siding and engaged a number of men to pour water upon the burning logs by buckets, but they were unable to save them from being burnt down. It is easy at this stage to say why a particular act was not done. Nobody can say that the unfastening of the chain and attempting to unload the truck or using hosepipe would have been as useless as the pouring of water by means of buckets. Unless the conduct of the officials was unbusiness like, misconduct cannot be inferred: Because the Railway Officials took one step rather than the other, they cannot be said to be guilty of misconduct. They did whatever they thought prudent at that time to do, and the question whether some other thing could have been done is absolutely immaterial, as there is nothing to show those other steps would have been efficacious.

11. The learned Advocate for the respondent has relied upon a Single Judge decision in B.N. Ry. Co. Ltd. Vs. Moolji Sicka and Co., , for the proposition that neglect is good evidence of misconduct; but in this case there is in my opinion no neglect. It is, as I have said, a question of taking one step to extinguish the fire instead of the other. Even if the officials erred in their judgment, it is not a case of neglect, much less of misconduct. He further relied upon the case of

Musgrove v. Pandelis (1919) 2 K.B. 43 : 88 L.J.K.B 915 : 120 L.T. 601 : 35 T.L.R. 299 : 63 S.J. 353, and contended that the omission to use a hosepipe, to detach one wagon from another, and to unfasten the chain amounts to neglect; but in that case there were clear materials on which the Court found that the fire which originally started would have harmlessly burnt itself out had the servant of the defend it turned off the cap leading from the petrol tank to the carburetter. Here it is not a case of taking no steps at all. Some step was taken and it was not unreasonable nor un business like. In my opinion, therefore, the plaintiffs have not made out a case for damages. I allow the appeal, set aside the decree of the learned Subordinate Judge and restore that of the trial Court. The appellant will get costs of this Court as well as of the Court of Appeal below.