
(1930) 01 PAT CK 0011
In the Patna High Court

Firm Durga Dutta Shri Ram

APPELLANT

Vs

Secretary of State for India and Another

RESPONDENT

Date of Decision : 07-01-1930

Acts Referred:

Citation : 124 Ind. Cas. 833

Hon'ble Judges : Wort, J;Kulwant Sahay, J

Bench : Division Bench

Judgement

Wort, J.—This is the plaintiff's appeal Which arises out of an action in which the plaintiff, the consignee, sued the Railway Company as represented by the Railway Administration for damages for the loss of a bale of cloth which he valued at Rs. 6344-0. The goods were consigned from Bombay over the Great Indian Peninsular Railway and then on to the Bengal and North-Western Railway to Chapra on what is now known as Risk Note Form B. The learned Munsif before whom the case came for trial gave judgment in favour of the plaintiff; but on appeal to the learned District Judge the decision of the Munsif was set aside. There is no doubt that under the Risk Note in Form B it was necessary for the plaintiff, in order to succeed in the action, to show that the loss was due to the misconduct of the Railway Company or their servants. The learned Munsif dealt with the case on that basis. When the matter came before the learned District Judge, whether by reason of the confusion in his mind or not, the case was dealt with on the basis that the Risk Note used the expression "wilful neglect" which incidentally was the expression used in the old Form of Risk Note B. It may, however, be that the learned District Judge dealing with the matter on that basis looked upon the expression "wilful neglect-as equivalent to "misconduct" which was the expression used in the Risk Note upon which these goods had been consigned.

2. There are certain facts which have been proved in the case and it is as well to state them before dealing with the question which arises in this appeal. The first fact is that the goods were placed in a Railway waggon which was locked on one

side only, the Other side being merely sealed with thin wire and a lead seal. The second fact was that there was no arrangement on the side of the waggon, which was merely sealed, for the placing of a lock and the theft took place from the side which was sealed only; that at Bhatpuri Station at which the guard (whose report was received in evidence) took charge, the seals of this particular waggon were examined and found intact; that at one of the stations namely, Manmad, where the train, stopped for about five minutes, it was found that the seal on the waggon was broken; that when the train arrived at the next stopping place which was Nandgaon, the waggon was examined and it was found that the bale of goods in question was missing; that another waggon was found to have its seal broken at Manmad, but as that waggon had a lock, it appears that the goods packed in that waggon were not tampered with.

3. The learned Advocate on behalf of the appellant has argued a number of questions the most important of which are these. He contends that the learned District Judge was wrong in law in coming to the conclusion that the facts which I have just stated do not amount to wilful neglect. His argument amounts to this that the mere fact of consigning goods in a Railway waggon, one side of which had a seal and not a lock, was in itself wilful neglect. The second branch of his argument is that, that as it was found (which is, as I have stated, one of the proved facts in the case) that at Manmad the seal was found to be broken the fact that the guard in charge or none of the Railway servants did anything to re-seal it or examine the waggon at the station was again evidence of wilful neglect. It seems to me that the latter argument can be dealt with at once. The learned Advocate pleaded that particular argument before the Court on the assumption that what the learned District Judge stated in the course of his judgment, namely, and the robbery took place between Manmad and Nandgaon, was a fact. But we have taken the course of looking at the report of the guard Swami who purports to prove these facts, and have come to the conclusion that what the report stated was not that it had taken place between Manmad and Nandgaon but between It station called Ugaon and Manmad. If that be the fact, it seems to me clear that it throws an entirely [different complexion upon the case and particularly upon the argument in this connection. It seems to me to be quite clear that unless it could be shown that the goods were in the waggon at Manmad it cannot be said that the mere fact that the Railway servants omitted to re-seal the waggon at Manmad amounts to wilful neglect, because, as pointed out by any learned brother during the course of the argument, that what the plaintiff had to show in order to take himself outside the exception of the Risk Note was that the loss which undoubtedly occurred was a loss which occurred at the result of wilful neglect. And that being so, we are thrown back on to the question of whether in the first place it was wilful neglect on the part of the Railway Company to pack these goods in a waggon which had locks on one side only.

4. Now, perhaps, before proceeding with the judgment it is necessary to deal with this question of the meaning of misconduct or wilful neglect. In the course

of the case of Bindraban alias Balmukund Vs. G.I.P. Railway Company Walsh, J., in delivering one of the judgments of the Full Bench treats the expression "wilful neglect" as synonymous with "misconduct. The expression, as I have already stated, is the expression used in the Risk Note Form B, with which we are dealing and, in any event, it seems to me that if the plaintiff ailson the evidence to prove a wilful neglect, it must necessarily follow that he will equally fail in proving misconduct, which at any rate cannot be said to be something less than wilful neglect, Therefore, in dealing with the remaining points in the case it will be sufficient to deal with the case on the basis that the expression used in the Risk Note is "wilful neglect."

5. I have stated that the question comes back to the point whether the fact that the goods were consigned in this waggon which was sealed only and not locked on both sides can be considered to be wilful neglect. In the course of the judgment in the case to which I have just referred, when the matter went from the Full Bench back to the Divisional Court the Chief Justice states a proposition with which I respectfully agree:

As an abstract proposition it is impossible to lay down that mere failure properly to secure waggons always amounts to wilful neglect, or that the mere sealing of a waggon necessarily excludes wilful neglect.

6. The case which the learned Advocate for the appellant relies upon is the case of Secretary of State for India v. Ghanaya Lai Sri Kishen 111 Ind. Cas. 523 : 10 Lah. 329 : AIR 1928 Lah. 837. In that case there was a discussion first of all of the meaning of the expression "wilful neglect" and the case which came before the Judicial Committee of the Privy Council, viz., Ardeshir Bicaaji Tamboli v. Agent, G.I.P. Ry. Co. 107 Ind. Cas. 124 : 9 P.L.T. 171 : 54 M.L.J. 167 : AIR 1928 P.C. 24 : 30 Bom. L.R. 275 : 47 C.L.J. 214 : 5 O.W.N. 219 : 32 C.W.N. 544 : 27 L.W. 667 : 26 A.L.J. 545 : 52 B. 169 : (1928) M.W.N. 938 : 55 I.A. 67 (P.C.) was quoted and relied upon. That case in term refers to the definition given by the Lord Chief Justice of England in the case of R. v. Senior (1899) 1 Q.B. 283 : 68 L.J.Q.B. 175 : 63 J.P. 8 : 47 W.R. 367 : 79 L.T. 562 : 15 T.L.R. 102 : 19 Cox, C.C. 129 in which the expression "wilful neglect" was taken to mean that "the act is done deliberately and intentionally and not by accident or inadvertence, to that the mind of the person who does the act goes with it."

7. Now apart from the authorities in India on this question I should be content to hold that there was no evidence in this case which would bring the case within the definition to which I nave just referred. The Lahore case Bindraban alias Balmukund Vs. G.I.P. Railway Company to which I have just referred dealt with the definition of wilful neglect and also dealt with a number of other authorities, particularly the case of Baldeo Sahai and Another Vs. B.B. and C.I. Railway and Another . This much may be said about the Lahore case [Bindraban alias Balmukund Vs. G.I.P. Railway Company and the case of Firm Balram Das-Fakir Chand Vs. G.I.P. Railway Company , the case upon which the appellant relies in this appeal, that a finding that there was a wilful neglect was in the

circumstances very different from those of the present case now before us. In *Firm Balram Das-Fakir Chand Vs. G.I.P. Railway Company* the learned Judge of the Divisional Court held that the evidence which came before the lower Court was sufficient upon which they could come to a finding that there had been wilful neglect, but the evidence which was particularly relied upon was not merely the fact that the goods were consigned in a waggon which had seals upon it only and not locks, but that in the circumstances of the case that method of securing a Railway waggon was insufficient the facts which are brought to the notice of the Court being that on that part of the Railway over which the goods were consigned there had been constant thefts. In this Case we have no such evidence, It might be argued (and I think it has been argued by the learned Advocate on behalf of the appellant) that we should take judicial notice of the fact that there have been a large number of cases on this Railway of the thefts which have been reported. But the case [*Secretary of State for India v. Ghanaya Lai Sri Kishen* 111 Ind. Cas. 523 : 10 Lah. 329 : AIR 1928 Lah. 837] upon which the learned Advocate relies establishes the proposition, with which I respectfully agree, that unless there is direct evidence on the point, the Court is not in a position to decide that such thefts are of frequent occurrence. In other words, we are not entitled to take judicial notice of the thefts merely from reported cases. In my opinion the learned District Judge was quite right in deciding that the fact that these goods were packed in this waggon in the fashion which I have stated is, not evidence sufficient to establish wilful neglect which would entitle the plaintiff to succeed in this action.

8. A further argument has been advanced on behalf of the respondent of this case, and that is this that as the learned District Judge has come to a definite finding that the evidence does not amount to wilful neglect, it being a finding of fact the matter is concluded so far as this Court is concerned. The learned Advocate for the appellant, however, contends that what the learned District Judge has in fact decided is that there was no evidence of wilful neglect, that is to say, under no circumstances could it be held that this offence constituted a wilful neglect. But from a perusal of the judgment in the case it seems to me clear that the learned District Judge considered the whole evidence in the case and has come to the conclusion that no wilful neglect on the part of the defendant has been proved in fact. This point as to whether the matter is a question of law or a question of fact has been dealt with by a Bench of the Calcutta High Court in the case of *Akhil Chandra Shaha v, India General Navigation and Railway Co. Ltd.* 29 Ind. Cas. 260 : 21 C.L.J. 565. The question in that case was whether negligence had been proved. It is true that negligence and wilful neglect are vastly different things ; but the principle governing this matter is the same. The learned Judge, Mukerji, J., dealt with the matter in these words:

It has been finally argued that the question whether there was or was not negligence on the part of the carriers under given circumstances, is always a question of law which can be determined by this Court in second appeal.

9. Then the learned Judge states the law as laid down by Lord Cairns in the case of Metropolitan Railway Co. v. Jackson (1878) 3 A.C. 193 : 47 L.J.P.C. 303 : 37 L.T. 679 : 36 W.R. 175. The proposition laid down by Lord Cairns is this:

It is impossible to lay down any rule except that which at the onset 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. If the finding in this case had been that there was wilful neglect, it would have been for this Court to say whether there was any Evidence of wilful neglect and that undoubtedly was a question of law. But when. the learned Judge in the Court below has considered all the facts and circumstances in the case and comes to the conclusion as a fact that there has been no wilful neglect, I agree with the argument, which was put forward by Mr. S.N. Bose on behalf of the respondent, that the matter is concluded so far as this Court is concerned. On that ground alone it seems to me that the appeal should fail. But on both questions, namely, whether there was any wilful neglect and on the second question which I have just Stated it seems to me that the appeal must fail. There was a question in the Court below as to whether the value of the goods was proved. On the evidence which was adduced in the case it seems to me that there was sufficient proof of the value of the goods; but for the reasons which I have just stated this question obviously does not now arise.

11. In those circumstances I would dismiss the appeal with costs.

Kulwant Sahay, J.

12. I agree.