

(1940) 11 AHC CK 0003
In the Allahabad High Court

Firm Sheikh Wajid Ali Mohammad Rafiq	APPELLANT
Vs	
Bengal and North Western Railway Co. and Another	RESPONDENT

Date of Decision : 07-11-1940

Acts Referred:

Citation : AIR 1941 All 164 : (1941) 11 AWR 5

Hon'ble Judges : Collister, J

Bench : Division Bench

Judgement

Collister, J.—This is an application in revision u/s 25, Small Cause Courts Act. The applicant was the plaintiff in a suit to which the defendants were the Bengal & North Western Railway Company and the Bombay Baroda & Central India Railway Company. The facts may be briefly stated thus : A consignment of five packages of yarn was despatched to the plaintiff, three being sent by firm Nehal Chand Baldeo Sahai and two by Shambhu Nath. The consignment was despatched under risk note form H from the Gwaltoli station at Cawnpore to the address of the plaintiff at Ballia. On arrival the packages were found to be soiled with molasses, and the plaintiff accordingly instituted a suit for damages against the two railway companies. The learned Judge has dismissed the suit, finding that the defendant companies are not liable for any damages under the terms of risk note form H. He has mainly relied upon a decision of this Court in The East Indian Railway Company, Limited, Vs. Janki Prasad and Others, but in that case a risk note which is no longer in force and whose terms differed materially from the risk note form H with which we are now concerned was under consideration.

2. It is nowhere pleaded by the defendants that the goods were in a damaged condition when they were brought to the Gwaltoli station for despatch and it may safely be presumed that they were undamaged at that time; otherwise they would not have been accepted. And it is an admitted fact that on arrival at Ballia the packages were soiled on one side with molasses. The learned Judge says:

At the most, due to neglect of the servants of either of the railway companies, tins of molasses were placed in the bogie in which the bales in suit were placed.

3. On the assumption that this is a finding of fact, it is contended for the plaintiff that the defendants are liable for the damage caused to the packages. Risk note form H provides that in consideration for the consignment being charged for at reduced rates the consignor does

...hereby agree and undertake to hold the said railway administration harmless and free from any loss, destruction or deterioration of or damages to all or any of such consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants.

4. Then follow certain provisos with which we are not concerned. The issue therefore is whether the plaintiff has proved misconduct on the part of the defendants within the meaning of the word as used in this risk note. I have been referred to a considerable number of authorities, mostly from other High Courts, which disclose a somewhat confusing diversity of view as regards the proper definition of the word "misconduct" in risk note form H. In *M. and S.M. Ry. Co. Ltd. Vs. Sunderjee Kalidas*, it was observed as follows :

...misconduct is not necessarily established by proving even culpable negligence... misconduct is something opposed to accident or negligence ; it 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.

5. In *Jamunadas Ramjas v. E.I.Ry. Co. Ltd.* ("33) 20 AIR 1933 Pat. 630 it was held that "misconduct" would ordinarily mean failure to do what is required of a person to be done. In that case rain water had leaked into a wagon and had damaged a consignment of grain, and the learned Judge at p. 632 says:

Certainly it was the duty of the railway administration to provide against such ordinary contingency such as rain water forcing itself into the wagon and causing damage to grain, etc. in it. The fact that the rain water did enter the wagon and caused damage to the plaintiff's consignment is itself sufficient to show that proper and requisite precautions were not taken by the railway administration to provide against such contingency.

6. Between these two somewhat extreme views as to the meaning of "misconduct" there are many other definitions by learned Judges which I do not think it necessary to cite in this judgment. The only case from our own High Court to which I have been referred in which the meaning of "misconduct" has been considered is *Secy. of State Vs. Madhuri Das-Narain Das*, in which there is an obiter dictum of Niamatullah J. to the following effect:

I may.... note that the word "misconduct" occurring in risk note B is of wider import than the popular sense in which that word is used. Want of proper care and caution may amount to misconduct within the meaning of the risk note B. A mistake in the preparation of the railway receipt which throws doubt on the identity of the consignment to which it relates is a misconduct in the above sense.

7. Admittedly the terms of risk note B as now in force are similar to the terms of risk note H. It seems to me that it will serve no very useful purpose to attempt a general definition of "misconduct" in risk note form H. But if I did venture upon one, I should say that the simplest and most noncommittal definition of the word would be "improper conduct." What the Court has to do in cases of this sort is to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. It was admitted in the present case by two of the defence witnesses, one of whom is the Traffic Inspector of Claims of the B. & N. W. Ry. Co., that molasses or other fluid substances are not placed in the same wagon with yarn, etc., and the obvious reason for this is the danger of the packages of yarn or other similar goods suffering contamination and damage. This being the practice of the company, it seems to me that if it is established that the employees of the railway administration, in defiance of the ordinary practice, placed tins of molasses in the wagon which contained the plaintiff's consignment or alternatively, if they placed the plaintiff's consignment in a wagon which contained tins of molasses, it must be held that they acted recklessly, knowing that contamination and damage would be a likely and probable result, and that by their conduct they showed themselves to be indifferent to such results. If this has been proved to the satisfaction of the Court, I should hold that the plaintiff has established misconduct on the part of the defendants within the meaning of risk note H.

8. But has this been proved? When the learned Judge says that "at the most" there was neglect of the employees by placing tins of molasses in the same wagon, this does not appear to have been a finding of fact on his part; all that he was attempting to do was to put the case at its highest on behalf of the plaintiff. Since therefore I am not bound by any finding of fact, I am free to consider whether on the proved facts misconduct has been committed. It is a curious fact that neither of the two witnesses for the defendants was asked the obvious question whether tins of molasses were or were not placed in the wagon containing the plaintiff's consignment between Gwaltoli station and Ballia. What the plaintiff has proved is that the packages were received in good condition at the Gwaltoli station and that they were found to be damaged by molasses on arrival at Ballia. The question is whether this is enough to prove misconduct on the part of the railway administration. Learned Counsel for the defendants contends that the damage may have been caused in several ways; for instance, he says that while the packages were on the railway premises at the Gwaltoli station, a tin of molasses somewhere in the vicinity may have leaked and the molasses may have trickled as far as the packages in question and so caused the damage. I am bound to concede that there are possibilities of this kind and in such a case, although there might be negligence of some sort, I do not think that it would necessarily amount to "misconduct" on the part of the railway administration. It was for the plaintiff to prove misconduct, but, as I have

already said, all that he has established is that the goods were found to be damaged on arrival at Ballia, he does not appear to have made any attempt whatsoever by cross-examining the witnesses for the defence to elicit what was the act or what were the acts of the railway employees which resulted in this damage. As I said before, if the plaintiff had proved - as he probably could have done without much difficulty - that molasses had been placed in the same wagon and if there was a finding to this effect, I should have allowed this revision; but as it is I am of opinion that misconduct has not been proved. This being my view, I dismiss this application with costs.