
(1949) 01 CAL CK 0038
In the Calcutta High Court
Case No : Suit No. 95 of 1948

G.A. Jolli

APPELLANT

Vs

Dominion of India

RESPONDENT

Date of Decision : 17-01-1949

Acts Referred:

Citation : (1949) 01 CAL CK 0038

Judgement

Chatterjee, J.—This suit has been instituted by the Plaintiff for the recovery of Rs. 1,20,000" as damage for non-delivery of 233 bundles of dried salted goat-skins, which were consigned by the Plaintiff's agent from Muzaffarpur on the O. and T. Railway to the Plaintiff at Kankinara then on the Bengal and Assam Railway.

2. In the plaint, it was alleged that no part of the said consignment had been delivered to the Plaintiff at Kankinara or at all and, by reason of the non-delivery of the said goods, the Plaintiff suffered loss and damage which he assessed at Rs. 1,20,000, being the total value of the goods on June 24, 1947, when the same could and should have been delivered to the Plaintiff and the expected profit on re-sale thereof.

3. The written statement stated that the consignment was subject to the terms and conditions of Risk Notes A and B. It was pleaded that the Plaintiff wrongfully refused to take delivery duly offered by the East Indian Railway administration. The railway did not plead that the consignment was lost, but its case was that it reached its destination and was offered by the railway administration to the consignee, that is, the Plaintiff, but he wrongfully refused to accept the same. The Defendant stated in the particulars supplied in respect of the written statement that the Plaintiff refused verbally to take delivery of the goods on or about September 26, 1947, at the Hide Grodwn, Sealdah Goods Shed, where 185 bundles of dried salted goatskin belonging to the consignment were removed and kept for delivery at the request of the Plaintiff. The refusal was made to the Asst. Superintendent of Claims, Sealdah, and Claims Inspector, Mr. Ray

Chaudhuri. The Defendant referred to two letters of the Plaintiff addressed to the Chief Commercial Manager, East Indian Railway, dated October 3, 1947, and December 15, 1947, showing his wrongful refusal to take delivery of the 185 bundles.

4. Really, on the pleading and the particulars, the Defendant did not allege any loss, destruction or damage in respect of the consignment or any part thereof. But Mr. Barwell, Learned Counsel for the Plaintiff, did not want to insist on legal technicalities and raised no objection to the following issues which were framed:

Issues.

1. Did the 185 bundles, of which inspection was given and taken, appertain to the consignment in suit?

2. If so, was the Plaintiff bound to take delivery of the same?

3. Is the Defendant entitled to avoid the claim by reason of the special conditions in Risk Note B?

4. Did the loss and/or deterioration of, and/or damage to, the consignment in suit or any part thereof arise from the misconduct of the railway administration's servants?

5. To what relief, if any, is the Plaintiff entitled?

5. Mr. Jyoti P. Mitter, Learned Counsel for the Defendant, did not insist on any additional written statement with reference to any misconduct by the railway administration or its servants. In response to his request, Mr. Barwell gave certain particulars of misconduct.

6. The evidence adduced before me establishes that 233 bundles of goat-skin were consigned by the Plaintiff's agent from Muzaffarpur to Kankinara under invoice No. 3 and railway receipt No. 742361, dated June 17, 1947 (Ex. B). The meter gauge wagon, on which the goods were loaded, bore No. 522 and it was to travel from Muzaffarpur to Parbatipur Junction over the O. and T. Railway and the consignment was to be transhipped at that junction to broad gauge wagon and was to travel on the B. and A. Railway up to Kankinara. The consignor was one Itaff or Md. Amin and the consignee was the Plaintiff. The relative consignment note was No. 24.

7. It appears that Haji Md. Din Punjabi, who was also a Calcutta merchant, consigned 211 bundles of goat-skin from Muzaffarpur to Kankinara, on June 16, 1947. The invoice was No. 1 and the railway receipt was No. 742358. He also consigned another lot of 204 bundles of goat-skin from Muzaffarpur to Kankinara under invoice No. 2 and railway receipt No. 742359, dated June 17, 1947. These two railway " receipts have also been tendered and they are marked Exs. 3(a) and 3(b). Out of Mr. Punjabi's total 415 bundles, 211 bundles were loaded into the meter gauge wagon No. 358 and 204 bundles in wagon No. 607. Mr. Punjabi was himself the consignee in respect of both these consignments.

8. Mr. Punjabi's agent presented these two railway receipts at the Kankinara Railway station and received altogether 415 bundles of goat-skin, which came in two wagons. Sri, Praphulla Kumar Nag Chaudhuri, the Goods Supervisor at Kankinara, says that ordinarily the invoice particulars are received from the forwarding station and thereupon the goods are delivered on the tender of the railway receipts after proper scrutiny. When no invoice particulars are received, as was the case here, the railway does not deliver the goods to the consignee, unless and until it gets confirmation. But, in order to avoid detention of the wagon, the railway delivers the consignment when it can connect the goods mentioned in the railway receipt with the consignment in question from the numbers on the card labels or the railway marks on the packages. Two broad gauge wagons Nos. NW 19354 and 14511 reached Kankinara and the delivery clerk Sushil Kumar Banerji delivered 415 bundles being the contents of these wagons to Mr. Punjabi's agent who produced two railway receipts. One hundred eighty-five bundles of Mr. Jolli were wrongly delivered to Mr. Punjabi. Mr. Nag Chaudhuri reported that fact to his superior officer, whereupon an Inspector under the Chief Commercial Manager made an enquiry. According to this witness, an enquiry by Claims Inspector, Parbatipur, showed that the whole of the 233 bundles of Mr. Jolli were loaded into wagon No. 14511 and that wagon came to Kankinara, was unloaded there and the contents of the entire wagon had gone to Mr. Punjabi. No evidence has been produced before me to establish this fact. The Claims Inspector has not been called, nor the Chief Commercial Manager's Inspector. This witness says that the delivery clerk Banerji was responsible for the wrong delivery of the Plaintiff's goods to Mr. Punjabi.

9. The delivery clerk Sri Sushil Kumar Banerji explained how he committed the mistake and effected delivery by comparing the number of the meter gauge wagon on the railway receipt with the wagon labels. The number of bundles in the railway receipts tallied with the number of bundles in these wagons and he thought that the contents of these two wagons were Mr. Punjabi's goods and that is why he gave delivery. Three hundred and eleven bundless came out of broad gauge wagon No. 19354 and 104 bundles out of wagon No. 14511 and he unloaded both the two wagons on June 25, 1947. Then he made entries in his Tally Book. He says that he reported the matter to the Goods Clerk Bangeshwar Bhattacharjya and after he received orders he delivered the goods to Mr. Punjabi. He could not say as to what had happened to the 185 bundles of Mr. Punjabi, nor did he know anything about the 48 bundles of Mr. Jolli, which remain still unaccounted for. He says that he was sick after this incident. There was some enquiry, but it is amazing that the officer who made the enquiry never examined this delivery clerk nor were any questions put to him.

10. Sri Bangeshwar Bhattacharjya, the Goods Clerk at Kankinara, was called. Bhattacharjya referred Banerji to the Inward Goods Clerk, Mr. S.N. Ghosh, and said that if everything was all right as regards connection then delivery could be given.

11. Sri Surendra Nath Ghosh, the Goods Clerk at Kankinara, produced the Delivery Book and proved the entries therein. He says that no invoice ever came in respect of these consignments. There have been some alterations made in some of the documents produced by the railway. Mr. Barwell has asked me to hold that there has been deliberate tampering, but, it is not possible for me to make that finding.

12. One B.P. Ray, an agent of the Plaintiff, who went up to Parbatipur and made some enquiries, reported to Mr. Jolli on June 26, 1947, obviously on information received from the goods officer there, that wagon No. 522 arrived at Parbatipur on June 20, and the contents thereof were transhipped into broad gauge wagon No. N.W. 14511 on June 21, which left for Kankinara on June 23. Obviously the Plaintiff's agents were making enquiries at Kankinara and could not get his goods. On July 1, 1947, Mr. Jolli wrote to the Station Master, Kankinara, that his 233 bundles which had been transhipped at Parbatipur and which reached Kankinara on June 24, have, through mistake, been delivered to another party. In his letter, Jolli stated:

If this is the case, I must warn you, which I hereby do, that I shall hold you responsible for any loss arising through this mistake.

13. On the same day Mr. Jolli wrote to Mr. Punjabi requesting him to allow one of his men to examine the goods and to take delivery thereof. He specified the marks which had been put on the 233 bundles.

14. On July 2, the Goods Supervisor, Kankinara, wrote to Mr. Jolli that neither the invoices nor the goods were received.

15. Regarding wagon N.W. 14511 it had been connected with R/R No. 742358, dated June 16, as per M.G. wagon shown on the card labels and delivered to the consignee Mr. Punjabi on the 25th June.

16. On July 4, Mr. Jolli reported the matter to the Chief Commercial Manager and demanded compensation. He also stated therein what he had learned at Kankinara with regard to the mis-delivery. On July 4, Muhammad Hashim, the commission agent of the Plaintiff, who actually bought the goods upcountry and consigned the same from Muzaffarpur, went to Mr. Punjabi's godown and sorted out 185 bundles recognising his own marks, thereon and they were stocked separately. Mr. Hashim wanted to bring these bundles, but he was not permitted to do so.

17. On July 5, Mr. Jolli wrote to Mr. Punjabi and asked for delivery of his goods and he undertook to give him a receipt for the same and to write to the railway accordingly and to make a claim only for the balance. Copy of this letter was forwarded by Jolli to the Chief Commercial Manager.

18. On July 5, the Chief Commercial Manager wrote to Mr. Punjabi and asked for delivery of his goods and he undertook to give him a receipt for the same and to write to the railway accordingly and to make a claim only for the balance. Copy

of this letter was forwarded by Jolli to the Chief Commercial Manager.

19. On July 5, the Chief Commercial Manager wrote to Mr. Punjabi as follows:

Sealdah, July 5, 1947.

To

Mr. Hajee Md. Din Punjabi, 29, Colootola Street, Calcutta.

Dear Sir,

Re:--Muzaffarpur to Kankinara Inv. Nos. 1 and 2, dated 16-6-47, and 17-6-47 respectively.

It has been represented to me that out of the bundles taken delivery of by you from Kankinara against your consignments of goat-skins booked as above, about 185 bundles pertain to a consignment belonging to Mr. G.A. Jolli, booked from the same station to the same destination.

Will you please, therefore, keep these bundles separate until further advice from this office.

Yours faithfully, (Illegible), for Chief Commercial Manager, Sealdah.

Copy forwarded to G. A. Jolli Esq., 49 Chingrihata Road, P.O. Tengra, Calcutta, for information.

Sd. Illegible, for Chief Commercial Manager, Sealdah.

20. In the meantime the railway authorities were making enquiries and they in fact looked into the transshipment records.

21. Thereafter the Chief Commercial Manager wrote a letter to Mr. Punjabi on July 7, 1947, copy of which I set out:

Sealdah, July 7, 1947.

To

Mr. Mohammad Din Punjabi, 29, Colootola Street, Calcutta.

Dear Sir,

Re:-- Muzaffarpur to Kankinara (1) Inv. No. 1 of 16-6-47 (2) Inv. No. 2 of 17-6-47, and (3) Inv. No. 3 of 17-6-47.

In continuation of this office letter of even number, dated the 5th instant, it has further been learnt that the entire consignment booked under Invoice No. 3 as referred to in item (3) above, has been delivered to you through mistake. The said consignment consisting of 233 bundles of goat-skin belongs to Mr. G.A. Jolli, who has been pressing for delivery.

I shall appreciate your returning the consignment for delivery to Mr. Jolli and the

time and place for this delivery may please be fixed by you.

In the event of your consignments having been delivered short, if at all, you may prefer claim for compensation.

This may please be treated as urgent.

Yours faithfully, (Illegible), for Chief Commercial Manager, Sealdah.

Copy forwarded to Messrs. G.A. Jolli and Company, 49, Chingrihata Street, Calcutta for information.

Sd. Illegible, for Chief Commercial Manager, Sealdah.

22. On that very day, July 7, 1947, Messrs. N.C. Bural and Pyne, attorneys of Mr. Punjabi, wrote to Mr. Jolli that it was not possible for their client to give him delivery of the 185 bundles and that he should arrange for taking delivery of the same through the railway. The attorneys wrote also to the Chief Commercial Manager and asked the railway to take back the 185 bundles from Mr. Punjabi's godown and to deliver to him in exchange there for 185 bundles consigned under the railway receipts of Mr. Punjabi which had been already made over to the railway.

23. On July 8, Mr. Jolli wrote to the Chief Commercial Manager pointing out that Mr. Punjabi had refused to give delivery of the goods to him and that his claim was against the railway. Mr. Jolli took up a proper attitude and informed the railway that he was prepared to accept the goods provided they were tendered to him within a reasonable time.

24. On July 9, Messrs. Bural and Pyne again wrote to the Chief Commercial Manager (Ex. 9) and requested the railway to take delivery of the 185 bundles from Mr. Punjabi's godown on any day during office hours in exchange of 185 bundles short delivered. The attorneys also adopted a reasonable attitude and they stated that if the railway was not in a position to give delivery of 185 bundles, they should arrange for payment to Mr. Punjabi of the value of the goods short delivered by the railway.

25. The railway was really doing nothing even after the receipt of the attorney's letter and on July 11, Mr. Jolli complained that no steps whatever were being taken by the railway to regain possession of his goods.

26. On July 14, the attorneys of Jolli wrote to the Government of India making a claim for damages for non-delivery of the goods.

27. On July 22, the Chief Commercial Manager at last replied to Messrs. Bural and Pyne's letter of June 17, 1947. Thus it took the Railway five weeks to reply to that important letter, a copy whereof I set out hereunder:

Sealdah, July 22, 1947.

To

Messrs. N.C. Bural and Pyne, Solicitors and Notaries Public, IB, Old Post Office Street, Calcutta.

Dear Sirs,

Re:--Muzaffarpur to Kankinara 1. Inv. 1 of 16-6-47?211 bundles G/skins. 2. Inv. 2 of 17-6-47?204 bundles G/skins. 3. Inv. 3 of 17-6-47?233 bundles G/skins.

Ref:--Your letter No. 3044/47, dated 9-7-1947.

My reference to Invoice No. 3 Ex. Muzaffarpur to Kankinara, dated 17-6-74, in this connection is correct.

In my letter, dated the 5th instant, if you will please re-peruse it it was mentioned that it was represented to me that 185 bundles of Mr. G.A. Jolli's consignment were in. the lot taken delivery of by your client and in my letter, dated the 7th instant, which was in continuation of my letter, dated the 5th, your client was told what was learnt after enquiry into the matter.

The fact is, as transpired on enquiry, that all the three consignments were handled at the transshipment point at Parbatipur simultaneously and the transshipment records indicate that the two broad gauge wagons were loaded with the whole of Mr. Jolli's consignment booked under invoice No. 3 and 282 bundles of the consignment pertaining to invoices Nos. 1 and 2 and your client took delivery the said goods contained in the said two broad gauge wagons. The balance 133 bundles pertaining to invoice No. 2 have since arrived and awaiting delivery at Kankinara.

In the circumstances, your client should return to the Railway Administration the 233 bundles pertaining to invoice No. 3, dated 17-6-46, which goods do not belong to your client. Your client should take delivery of the balance of his consignment from Kankinara without delay. The date and time when your client can hand over the said 233 bundles may please be intimated at an early date. The question of payment of Rs. 55,500 to your client as stated in your letter under reference does not arise at all.

The matter should be treated as very urgent.

Yours faithfully, (Illegible).; for Chief Commercial Manager, Sealdab.

28. This letter shows that the statement in the railway's letter of July 7, 1947, that the Plaintiff's entire consignment of 233 bundles had been made over to Mr. Punjabi was made with due deliberation after enquiry and after consulting the transshipment records. These transshipment records have not been produced before me nor any satisfactory explanation has been given as to why they have been withheld nor did the officer or officers who held the enquiry come forward to depose in this case.

29. On September 8, the Chief Commercial Manager wrote to Mr. Jolli and informed him that 185 bundles of goat-skin pertaining to his consignment were

available at the Hide. Godown, Sealdah Goods Shed. From the evidence of Mr. Ray Chaudhuri, the 'Asst. Commercial Manager, E.I. Railway, it appears that this gentleman removed 185 bundles from Mr. Punjabi's godown to Sealdah on September 7. Really nothing was done before the 1st September in order to recover these goods. I believe Mr. Ray Chaudhuri when he says that there was some kind of trouble on that day and that is why he made the final recovery on the 7th September. There is really no satisfactory explanation why no step was taken before September 1, 1947, to recover the goods. A plea was put forward that the godown was in a disturbed area and Mr. Ray Chaudhuri, who is a gentleman of rather small stature and not of strong physique, found it difficult to go there. But no attempt was made to secure any armed guard or to contact the police or to take the help of the officer in charge of the thana which was in close proximity to the godown, nor was any European or Anglo-Indian employee deputed by the authorities for recovering the goods. Really there is no evidence of any riot or actual disturbance in this area in the months of July and August and the Plaintiff's men visited the place a number of times in the month of July.

30. On September 8, Mr. Jolli wrote to the Chief Commercial Manager and informed him that he was prepared to accept the 185 bundles without prejudice to his rights, but the railway must accept the responsibility for the shortage of 48 bundles and he wanted to examine the goods when unpacked. There was no reply to this letter until September 20, when the railway informed Mr. Jolli that a Special Inspector had been instructed to give him open delivery strictly without prejudice on September 25. This Special Inspector was Mr. Ray Chaudhuri who has given evidence.

31. On September 25, inspection began and on preliminary examination of the bundles it appeared that they were not in their original condition and that they had been tampered with.

32. Mr. Jolli immediately drew the attention of Mr. Ray Chaudhuri to this fact and put the same on record in his letter of September 26 to the Chief Commercial Manager. Mr. Ray Chaudhuri also supported this statement. Mr. Jolli wanted that a responsible officer from the headquarters should be deputed to superintend the operation in addition to the inspector who took delivery of the lot from Mr. Punjabi's godown. Mr. Raghavan was accordingly deputed.

33. I am satisfied from the evidence of Mr. Hashim, Mr. Golam Kader Mallik and Mr. Thompson, a partner of Messrs. Lardner North and Company, that the 185 bundles had been tampered with and that the bulk of the goods which were submitted for examination at the Sealdah goods shed on September 25, 1947, and the following days were not really Mr. Jolli's goods and that he was justified in refusing to accept the same. This fact was recorded in the letter of Mr. Jolli to the Chief Commercial Manager, dated October 3, and there the particulars are given. The joint inspection had taken place in the presence of both Mr. Ray Chaudhuri and Mr. Raghavan. From the joint inventory made and the Survey Report of Messrs. Lardner North and Company and the oral evidence given in this

case I am satisfied that there had been deliberate tampering of these bundles. It is difficult to say where and when it was done, but it is clear that the bulk of the skins of Mr. Jolli had been removed from these bundles and carefully replaced by inferior skins properly folded and packed up. Mr. Punjabi was a rival of Mr. Jolli in the trade and it might have happened in his godown where the goods were lying for weeks or it might have been done at the hide godown, Sealdah goods shed, where the packages were also lying for some days. Mr. Ray Chaudhuri and the other railway officer did not see the original consignment and their evidence is not of value when they say that there were no signs of tampering. I accept the evidence of Mr. Hashim. I refuse to believe that Mr. Jolli, who is a businessman of some position, would reject these goods on a false or flimsy ground, specially when he was all along showing his anxiety to receive the goods.

34. On December 4, 1947, the railway wrote to Jolli. It had realised in the meantime that mischief had been done and they tried their best to put the blame on him. I am satisfied that the case made in the railway's letter that the bundles did not betray any signs of tampering is not correct and the refusal on the part of Mr. Jolli to take delivery of the bundles which were offered to him was justified. Mr. Jolli's solicitor replied on December 15, 1947, repudiating the railway's allegation. A sample of goatskins was taken by Mr. Fisher, the senior partner of Messrs. Lardner North and Company, in pursuance of an order of this Court. I am satisfied that the selection of samples was properly made and the same is fairly representative and excepting one skin, Ex. A7, the rest never came from Muzaffarpur.

35. Mr. Fazal Ahmad, grandson of Mr. Punjabi, who looks after the business of his grandfather, stated that he had not tampered with the bundles and said that no tampering could be done, so long as they were in Mr. Punjabi's godown. Mr. Punjabi has filed a suit against the railway for damage for non-delivery of the balance of his goods. It is admitted that one wagon which contained 119 bundles of Mr. Punjabi's consignment reached Kankinara on July 15, 1947, and it is amazing that that wagon was standing there under load for weeks till September 15, 1947, when Mr. Bay Chaudhuri unloaded the same, and took the stuff to Punjabi's godown. The usual plea of communal riot is put forward to explain why delivery was not given in the meantime. Bangeshwar Bhattacharjya said that notices had been given to Mr. Punjabi, but neither the original nor copy of any of the notices was produced. Mr. Fazal Ahmad admitted that he allowed the 185 bundles to be removed from his godown on the railway's assurance to give him Mr. Punjabi's goods from the wagon at Kankinara and to grant a short certificate for any deficiency. If the railway had only done in July what it did in September, possibly there would have been no claim at all regarding 185 bundles. Mr. Fazal Ahmad stated that no businessman would take the skins which were produced in Court as Muzaffarpur goat-skins and he admitted that they were inferior stuff and that one of them got the mark "Fazl" on it,, which was the mark on skins coming to him from Dacca. There is no doubt that at least one of the goat-skins which Fazal used to get from Dacca had been smuggled into Jolli's bundles,

along with others when they were tampered with and large scale substitution was effected. I am satisfied that the original ropes of the bundles or packages were also removed and the plaintiff's witnesses told the truth.

36. What is meant by the word "loss"? Can it be said that the (railway lost 185 bundles of Mr. Jolli when it made over the same to Mr. Punjabi on or about the 25th June and shortly thereafter realised that it made a mistake and knew that the goods were with Mr. Punjabi and were lying in the godown of the latter. There is some conflict of judicial opinion on the meaning of the word "loss". Some High Courts have taken the view that "loss" means loss to the owner and non-delivery or mis-delivery is "loss" to the consignor or owner. The Calcutta High Court has taken a contrary view and has consistently held that the word "loss" means loss of goods by the railway and does not mean pecuniary or monetary loss to the consignor or the owner. In some cases it has been held that non-delivery or wrong delivery may amount to "loss" and there may be a "loss", although it is due to wilful neglect of the railway administration. Learned Counsel for the Defendant cited the following authorities: Madras and Southern Mahratta Railway Company Limited v. Haridoss Banmalidoss ILR (1918) Mad. 871; East Indian Railway Company v. Jogpat Singh ILR (1924) Cal. 615, 625; Secretary of State for India in Council v. Surjyamall Haribahsh ILR (1934) Cal. 599; Bengal Nagpur Railway Company Ltd. v. Nibaran Chandra Bhar (1945) 50 C.W.N. 86, and Hill Sawyers and Company v. Secretary of State ILR (1921) Lah. 133.

37. In none of the cases cited by the Defendant the goods could be traced and were actually found in the possession of a person to whom the railway had improperly made them over and who was willing to return the same. In some cases wrong delivery may constitute "loss" when the goods have been consumed or converted by the consignee, or, when the same cannot be traced and are not at all forthcoming. But there is nothing in the judgment of Page J. in the case of East Indian Railway Company v. Jogpat Singh ILR (1924) Cal. 615, 625, which justifies the contention of the railway that it can successfully plead "loss" when the goods are identifiable and available. I quote the relevant portion of the judgment of Page J. in that case:

In my opinion, the term "loss" as used in the risk note, and in Chap. VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods, through being wrongfully deprived of the possession, use, or enjoyment thereof, but means loss of the goods by the railway company while in transit and such "loss" occurs whenever the railway company to which the goods have been consigned for conveyance involuntarily, or through inadvertence, loses possession of the goods, and for the time being is unable to trace them. The term "loss" denotes a fact, not a cause of action.

38. Page J. emphasises two aspects: (a) the railway company has lost possession of the goods and (b) the railway company for the time being is unable to trace them. Both the factors must coincide and, if they do not, it is impossible to hold that there was a "loss". In my view, proof of non-delivery or mis-delivery is by

no means conclusive evidence as to "loss". The judgment of Page J. has been followed in *Gopiram Behariram v. Agents, East Indian Ry. and O. and Rule Ry.* (1925) 30 C.W.N. 209; *Great Indian Peninsular Railway Company Ltd. v. Jes Raj Patwari* ILR (1927) Cal. 132; *Haji Tilloi Mahammad Umar Buksh v. Bengal Nagpur Railway Company Limited* ILR (1929) Cal. 73; *Secretary of State for India in Council v. Suriyamall Haribaksh* (supra); *Bengal Nagpur Railway Company Ltd. v. Nibaran Chandra Bhar* (supra) and *Great Indian Peninsular Railway Company v. Gopi Ram Gouri Shanker* ILR (1927) Pat. 192.

39. Taking a common sense view of the matter, the "loss" in such a case means the disappearance of the goods and there can be no "loss", when the goods are not in fact lost but are actually in existence and are available to the railway for delivery to the consignee. In , my opinion, non-delivery or mis-delivery simpliciter cannot constitute a loss. It depends on the facts and circumstances of each case. A very pertinent question was put by Baron Alderson in the course of argument of counsel in *Hearn v. London and South Western Railway Company* (1855) 10 Ex. 793 : I.R. 660:

Suppose the goods were known by the carrier to exist, but were not delivered by him for a month, would there be a "loss" within the Act.

Page J. observed:

An affirmation that in such circumstances the goods have been "lost" surely involves a distortion of the meaning of the word so extravagant as to approach an abuse of the English language.

40. With respect, I agree, with Page J. that non-delivery of goods may be due to the fact that goods are being deliberately detained by the railway company, or that they have been mis-delivered to some person, or that they are "lost". Non-delivery or mis-delivery may be due to "loss" or it may be due to other causes.

41. By virtue of Section 72 of the Railways Act, the responsibility of a railway as a bailee can be limited by agreement contained in the risk notes. Under risk note B a special agreement is made between the railway and the owner of the goods limiting the responsibility of a bailee. The consignor in consideration of a special reduced rate--

agrees and undertakes to hold the railway administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the consignment from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage arose from misconduct of the railway administration's servants.

42. On the recommendation of a committee appointed by the Government of India, the Governor-General u/s 72 of the Railways Act sanctioned the present risk note form B in 1924. The new risk note B imposes a larger measure of responsibility on the railway administration. Under the old risk note B the onus

was on the Plaintiff in the first instance to prove that the loss arose on account of the wilful neglect of the railway administration or its servants. It was almost an impossible burden to discharge and that is why the new risk note B was introduced. Under the proviso to the new risk note B 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 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 proof of such misconduct shall lie upon the consignor.

43. The proviso to the risk note B means that the railway company should disclose to the consignor before a suit is filed as to how the consignment was dealt with and that after the matter comes into court, if necessary, the railway must give evidence as to the nature of its dealings with the consignment while under its control, before the consignor is called upon to prove misconduct. In *Sural Cotton Spinning and Weaving Mills Ltd. v. Secretary of State for India* in Council ILR (1937) Bom. 375 : L.R. 64 IndAp 176, the Judicial Committee has construed such risk note. If the consignor is not satisfied that the disclosure made by the railway has been adequate or accurate then the matter must be judicially decided and the railway administration should be the first to submit their evidence at the trial. If misconduct can be fairly inferred from such evidence, the consignor is absolved from his original burden of proof. If any material evidence is withheld, the railway may expose itself to the presumption u/s 114(g) of the Evidence Act.

44. In a recent case *Raigarh Jute Mills Ltd. Vs. Commissioners for the Port of Calcutta*, , Gentle J. discussed the relevant cases and laid down the law clearly. I quote a portion of His Lordship's judgment:

Risk Note B relieves the Defendants from liability for loss, save upon proof of misconduct of their servants but the immunity given to them is subject to the proviso that, in case of non-delivery of the whole or part of the consignment, the Defendants are bound to give evidence how they dealt with the consignment throughout the time it was in their possession or control. The production of that evidence is a condition to be fulfilled by the Defendants in order to avail themselves of the immunity given by the risk note. It is not sufficient for some evidence to be given, but the evidence must be comprehensive and relate to all the dealings with the consignment. In this case the condition has not been complied with and, therefore, the Defendants cannot avail themselves of the benefit given by the risk note. Although it is not so expressed, this seems to be the ratio decidendi in *The M. and S.M. Ry. Co. Ltd. Vs. Garimella Satynarayana and Sons and Another*, . Having failed to observe the condition in the risk note, the Defendants are liable for the loss, even in the absence of proof that it was caused by the misconduct by the servant, since the benefit of the risk note

cannot be availed. Subject to the statutory defences raised in the written statement, and with which I will now deal, the Plaintiffs are entitled to recover the amount claimed for non-delivery of their jute.

45. In that case the railway administration alleged destruction by fire of the jute which was consigned but withheld evidence as to their dealing with the jute during the period it was in their possession or control. Gentle J. held that it brought Section 114(g) of the Evidence Act into operation and, in such a case, it is fair to presume that if all the available evidence had been produced, it would have shown that the non-delivery of the Plaintiff's jute was occasioned by the misconduct of the Defendant's servants.

46. It has been contended by Mr. Jyoti P. Mitter, Learned Counsel on behalf of the railway, that Gentle J. is wrong in the view he has taken. He urged that the learned Judge made three errors in that judgment, (i) the first error was that immunity given to the railway under risk note B is subject to the proviso that in case of non-delivery the railway is bound to give evidence, (ii) the second error was that the evidence must deal with the consignment throughout the time it was in their possession or custody and (iii) the third error was that the production of such evidence is a condition precedent to any immunity under the risk note. In my view, there is no substance in these contentions. The clear words of the risk note B make it incumbent on the railway to disclose "how the consignment was dealt with, "throughout the time it was in its possession and control." With respect, I agree with Gentle J. in the view that he has taken in the above case. The language of risk note B is clear. If necessary, the railway administration shall be bound to give evidence thereof before the consignor is called upon to prove misconduct. Beading the whole proviso, it means that it is incumbent on the railway to give evidence as to how the entire consignment was dealt with throughout the time it was in its possession or control. Unless and until that is done, there is no obligation cast upon the consignor to prove any misconduct. Governor-General in Council Vs. Visheshwar Lal, . If the railway fails to make the requisite disclosure or to adduce the requisite evidence, the railway must be made liable for the goods and is not entitled to invoke the protection or immunity on the basis of the risk note B. No evidence has been adduced in this case with regard to the railway's dealing with the entire consignment and there has been a breach of the contractual obligation on the part of the railway to adduce the requisite evidence. The railway is not entitled to call upon the Plaintiff to allege or prove misconduct on the part of the railway administration or its servants. Really we have not got to the stage where the question of misconduct arises and the risk note does not come into play and the railway must pay compensation for the non-delivery of the goods consigned.

47. Assuming I am wrong in the view I have taken and the railway is entitled to split up the consignment and to treat the portions separately and it has discharged the burden of making disclosure with regard to 185 bundles, I hold that even then the non-delivery is due to misconduct on the part of the servants

of the railway administration in not recovering the goods from Haji Md. Din Punjabi immediately they came to know of the fact of mis-delivery. The bailee's duty ends when it makes over the goods bailed to the bailor. He cannot be heard to say that he has made over the goods of X to Y and refer X to Y. Here Y was willing to return the goods to the railway provided the railway undertook the liability of making over the goods which ought to have been made over to Y. The railway did nothing for several weeks. It is an amazing conduct on the part of a responsible administration that when the real owner is pressing for his goods and the person to whom the goods have been wrongly delivered is willing to return the same in exchange of his own goods and the goods of the latter are actually in the wagon standing at the railway station near Calcutta, the railway pursued a policy of inactivity for weeks. It wrote letters to Haji Md. Din Punjabi, who adopted a proper attitude, but the railway adopted an improper attitude and failed to do that which it ought to have done, viz., to come to Mr. Punjabi, remove the goods from his godown and make them over immediately to Mr. Jolli, the Plaintiff. Ultimately the railway recovered the goods in the month of September. Even then, from the 7th to the 25th September, really nothing was done, and I am satisfied that during the period between July and September, the bundles had been tampered with and the bulk of the goat-skins which had been consigned from Muzaffarpur had been substituted by inferior stuff. The railway must thank itself for this tampering or substitution and the Plaintiff was justified in refusing to accept the same. All this was due to gross and culpable negligence on the part of the railway and, if this is not misconduct, then I do not know what is misconduct. There is no use multiplying cases to show what is misconduct. It depends on the facts of each case. I know there are cases which say that misconduct does not ordinarily cover acts of negligence nor even culpable negligence. This High Court has held that misconduct means the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result shall be. *Madras and South Maharatta Railway Company Ltd. v. Sundarjee Kalidas* ILR (1933) Cal. 996. This case has been followed in *South Indian Railway Company Ltd. v. V.M.K.S. Dandayutham Chettiar* AIR (1934) (Mad.) 715. As has been observed by Gentle J. in *Rallia Ram Dingra v. Governor-General of India in Council* ILR (1944) Cal. 487, that the learned Judges in *M. and S.M.* case went too far with regard to the meaning of "misconduct".

48. I hold that the railway was guilty of misconduct. There was improper behaviour on its part. It was not mere accident or negligence. The goods were lying in Mr. Punjabi's godown in Calcutta from the early part of July to the first week of September and no delivery was offered till the end of September. With full knowledge of all the material facts, the railway did nothing to recover the goods for two months with the result that when they were tendered, they represented something substantially different from the goods consigned. Misconduct can be fairly inferred from the evidence adduced by the railway administration and, even if the onus is placed on the Plaintiff, I hold on the entire

evidence in the case that the onus has been 1 discharged.

49. In the course of the argument Mr. Mitter drew my attention to Rule 47 of the Goods Tariff, General Rules, published in August, 1948, by the Indian Railway Conference Association. Rule 47 compels the consignee to take partial delivery of a consignment notwithstanding that the remaining goods are short or damaged or have not arrived or are otherwise not available for delivery.

50. Mr. Mitter urges that condition No. 9 endorsed on the railway receipt attracts the rules and conditions printed from time to time in the railway administration's Goods Tariff and goods booked to or over a foreign railway are subject to the rules and regulations and wharf age and other charges in force on such railway.

51. Mr. Barwell objected to my looking into the Goods Tariff, which is a book not published by the Government and there is no evidence before me to show that Rule 47 was one of the rules referred to in condition 9 or that the same was in force on the relevant date.

52. In this case, there is no evidence that the balance 48 packages are not available for delivery. Even if that rule applies, it would mean that Mr. Jolli as consignee must take delivery of 185 bundles, if they were really part of his consignment; but that rule has no bearing on the question of onus or on the question as to whether the railway can avail of the benefit of risk note B in the absence of full disclosure or requisite evidence.

53. I answer the issues as follows:

Issue No. 1: The answer is in the negative.

Issue No. 2: In view of my finding on issue No. 1, this issue really does not arise. I hold that the Plaintiff was not bound to take delivery of 185 boundles of which inspection was given.

Issue No. 3: The answer is in the negative.

Issue No. 4: I have already pointed out that this issue does not arise. As evidence had been laid, I hold that there was no loss of the consignment and in any event the non-delivery of what was traceable of his consignment was due to misconduct of the railway administration's servants.

Issue No. 5: Mr. Hashim, the Commission Agent of the Plaintiff, has proved two invoices and I am satisfied that the price of the goods and other charges and costs came up to Rs 88,364-3-6. I am satisfied that he actually consigned 28,825 pieces of goat-skins from Muzaffarpur and that he charged Mr. Jolli the price at which he bought the goods plus his commission, and other charges as shown in the invoices. The Plaintiff did not give evidence in this case. Mr. Strazzini, head assistant of the Plaintiff, said that this was a special consignment because it was purchased for shipment to London and also to Madras, and that the Plaintiff expected to make a profit of 10 per cent, on these skins. The reasonable and fair price of Muzaffarpur skins of the relevant grades in June,

1947, was about Rs. 300 for 100 pieces and the Plaintiff expected to sell the same for Rs. 320 to Rs. 330, but he could not possibly have got this large quantity of Mazaffarpur goat-skin from Calcutta market in June and July, 1947. In cross-examination, this witness said that the Plaintiff also buys goat-skins in Calcutta, which other people used to bring down from Muzaffarpur, but he did not produce his books and did not prove the prices at which goat-skins were purchased in June, 1947. He admitted that he was really not certain about the profit that could be made. No books of account of any merchant have been produced before me wherefrom authentic information as to the state of the market in dried salted goat-skin could be found. From time to time Hashim was paid during the year 1947 a total amount of Rs. 3,40,974-6-0. That amount was paid so as to cover prices and other charges in respect of a large quantity of goat-skins including the consignment in this suit. Really there has been no adjustment as yet and the books of the Plaintiff do not show any specific appropriation because they only record the quantities actually received.

54. Mr. Md. Hadi who is the Secretary of the Hide and Skin Trader's Association, said that the goods of the quality and grades described by Mr. Hashim would be reasonably worth Rs. 88, 364-3-6, which is the total amount mentioned in Hashim's invoices. In this state of the evidence it, is not possible for me to award any amount for expected profits.

55. For breach of a contract of carriage of goods the Plaintiff is ordinarily entitled to recover as damages the value at the time when the goods should have been delivered to him. *Schulze and Company v. Great Eastern Railway Company* (1887) 19 Q.B.D. 30, and *Stroms Bruks Aktie Bolag v. John and Peter Hutchinson* (1905) A.C. 515.

56. It is the general intention of the law that in giving damages for breach of contract, the Plaintiff should be placed in the same position as he would have been if the contract had been performed. *Salley Wortheim v. Chicoutimi Pulp Company* (1911) A.C. 301. But loss of profits is not an ordinary consequence of delay or default and cannot be recovered unless the circumstances are, brought to the knowledge of the carrier at or before the date of the contract *Hadley v. Baxendale* (1854) 9 Ex. 341 : 156 E.R. 145.

57. When the goods are lost, and in consequence the Plaintiff loses the profits which he could have earned, the value of the lost goods can be recovered, but not any profits, in the absence of proper notice. *British Columbia and Vancouver's Island Spar, Lumber, and Sair Mill Company, Limited v. Nettleship* (1868) L.R. 3 C.P. 499.

58. It has been urged by the Plaintiff that he is entitled to such profits in as much as mis-delivery of the goods by either a carrier or a warehouseman will render him liable for conversion. *Devereux v. Barclay* (1819) 2 B. and Ald. 702 : 106 E.R. 521, and *Lancashire and Yorkshire Ry. v. MacNicoll* (1918) 88 L.J.K.B. 601. Even on that basis the result would not be different. Where the Plaintiff

complains of non-delivery and the real cause of action is the breach of a contract to deliver goods, the measure of damages should be the same, even if the Defendant's wrongful action constitutes a tort of conversion.

59. The damages to which a Plaintiff who has been deprived of his goods is entitled, are *prima facie*, the value of the goods together with any special loss which is naturally the result of the wrong (Clerk and Lindsell on Torts, 10th Ed. p. 457-8). In actions of trover and conversion the value must be taken as it stood at the time of the wrongful conversion. The proper measure of damage ordinarily is the market value of the goods at the time of the conversion. If there be a market price, the value of the goods is to be taken as the market price at the time of conversion. If there be no market price, the value of the goods must be determined by evidence, and the price at which the goods had been bought or sold under a sub-contract may afford evidence of their value. *The Arpad* (1934) P. 189, In this case there is really no evidence of the market price. There is no evidence that the railway was informed at the material time of the purpose for which the goods were being consigned. Mr. Hadi whose evidence I accept, said that the goods which were despatched from Muzaffarpur to the Plaintiff, if sold in the Calcutta market towards the end of June 1947, would fetch approximately the amount charged by Mr. Hashim or a little more, if sold to shippers.

60. There will be a decree for Rs. 88, 364-3-6 in favour of the Plaintiff against the Defendant with costs on scale No. II including reserved costs and interest on judgment at 6 per cent, per annum. Certified for two counsel.