

(1923) 11 AHC CK 0005
In the Allahabad High Court

Gadodia and Co.

APPELLANT

Vs

The Great Indian Peninsula Railway Company

RESPONDENT

Date of Decision : 21-11-1923

Acts Referred:

Citation : AIR 1924 All 254 : (1924) ILR (All) 161

Hon'ble Judges : Piggott, J;Grimwood Mears, J

Bench : Division Bench

Judgement

Grimwood Mears, Kt., C.J. and Piggott, J.—On the 30th of April, 1919, the plaintiff, through his agent, tendered to the defendant company 5 bales of cotton tussore to be carried from Sholapur to Cawnpore.

2. Over some portions of their railway the defendant company carry goods at a reduced or "owner's risk" rate. It appears quite clearly that whilst the company had an established owner's risk rate from Sholapur to Itarsi, they had published no such rate between Itarsi and Cawnpore and no consignors of goods between these two latter stations could require the company to carry them at owner's risk. The goods would go via Itarsi to Cawnpore. The consignor signed an owner's risk-note by which he agreed to hold the company free from, responsibility in a number of contingencies. The Subordinate Judge has found that in fact the consignor paid a total sum made up of the reduced rate from Sholapur to Itarsi and of the ordinary rate from Itarsi to Cawnpore. The figures are not mathematically exact, but are so near as to justify the conclusion of the learned Subordinate Judge. When, on the 13th of May, 1919, the goods were proceeding on their journey between Itarsi and Cawnpore, smoke was seen to be issuing from a waggon near the engine. The train was brought to a standstill at station Sanchi and an endeavour made to put out the fire. It was burning fiercely inside the waggon, and, in the result, the consignor sustained a pecuniary loss by destruction of and damage to his goods to the extent of Rs. 5,436-5-6. He made a claim on the company who repudiated it on the ground that they were covered by the owner's risk" note signed by his agent which purported to cover

the entire journey.

3. To this the consignor replied that whatever might be the form of the note, the fact was that he paid the ordinary rate on the Itarsi-Cawnpore section of the journey and was, therefore, entitled to regard the railway company during this portion of the journey as a bailee. We think the plaintiff's contention is clearly right in the admitted absence of an owner's risk rate from Itarsi to Cawnpore.

4. This is the final result of the arguments in this Court; but in the court below the matter was greatly obscured and the trial lengthened by defective pleadings on both sides and by an inability on the part of the counsel on both sides to forecast the possibility of the company being found to be bailees. Thus it happened that the counsel for the railway company failed to provide himself with the necessary evidence to prove the taking of proper care.

5. The circumstances under which the fire originated are unknown. The waggon was of iron and was a covered one. It was apparently of proper construction, clean and fit for the accommodation of the goods of the plaintiff. The van contained the plaintiff's goods, also some cases of military stores, some bags of cocoanuts and 12 other boxes. All the goods except those of the plaintiff, had come from the Madras and South Mahratta Railway. It is conceded in this case that, if the defendants are entitled to rely on the owner's risk note as governing the Itarsi-Cawnpore journey, they must succeed in the action, as the plaintiff has failed to give any such proof as would upset the wide protection given to the company by that document. If, however, the defendants were carrying the goods between Itarsi and Cawnpore at the ordinary rate, then the defendants were bound to put before the court all materials necessary affirmatively to prove that in the carriage of the plaintiff's goods they had acted with the same degree of care in relation to those goods as a reasonably prudent man would act in relation to his own. The burden of proof, if the goods were carried at owner's risk, lay on the plaintiff. If the company were bailees, the onus shifted to them.

6. Their proper defence should have been, first, that they were under no liability because of the consignment note, alternatively, if it were held that that note was not applicable, that they took of the goods the degree of care described above. That position was, however, as we have said, never clearly in the minds of the legal advisers of the railway company in the lower court and in fact they actually resisted an application made by the plaintiffs on the 14th of July, 1920, which, if assented to by them and proper particulars obtained, would, in our view, in all probability, have made their position as bailees safe and supplied the gap in their evidence which still exists. On the 14th of July, 1920, the plaintiffs were casting about for any evidence which might help them to overcome the provisions of the owner's risk note. On the previous day Pandhari Nath Balwant, a witness for the defendants, had mentioned the presence of "12 other boxes" in the waggon and had said that he did not know what they contained. No one to this day knows what they contained. It was the plain duty of the railway company, for their own protection, on learning of the fire to have communicated in May, 1919, with the

Madras and South Mahratta Railway Company and to have made inquiries as to the description, contents, etc., of these boxes, if they had not already, as they may have had, these very materials in their possession. These boxes were part of the contents of a waggon in which a fire had mysteriously broken out on their line and the company ought to have taken every step to ascertain, if they could, the nature of the goods entrusted to them. They did not make inquiries at the time. At all events, if they did, the result was not was not communicated to the court, and as we have said, they resisted an application which sought to obtain that information from them. Even if immediately after the outbreak of the fire, the company had omitted to inquire from the Madras and South Mahratta Railway as to the nature of the articles in the 12 boxes, it was the plain duty of their legal advisers, when the company became defendants in an action, a few months later, to tell them that they would, if unprotected by the risk note, be bound to give an explanation as to the contents of the other articles in the waggon, and then diligently to pursue that inquiry.

7. Further, they had in their possession at this time, when, the action was commenced, some documents which they had received relative to the boxes from the Madras and South Mahratta Railway. Although they were highly relevant to the action, the defendants say that they destroyed them in the ordinary course of business.

8. The railway company, therefore, produced no evidence as to the general nature of the contents of the boxes. It would, in our opinion, have been sufficient if they had merely proved the consignment or delivery notes of the Madras and South Mahratta Railway, which we are told as a matter of practice pass from one line to another on receipt of goods, provided of course that the details on those notes contained nothing to arouse any suspicion that the goods were likely to be dangerous to carry.

9. They could then have said that they accepted the boxes in accordance with the usual practice, and that there was nothing on the consignment notes, or in the appearance of the boxes, which would cause any one to hesitate to carry them in the ordinary way, or to place them in proximity to other goods. That evidence would have satisfactorily discharged the onus which lay upon them, as soon as their position was decided to be that of bailees, and would have entitled them to succeed in the action. There being this gap in the evidence as to the 12 boxes, we are obliged to hold that the defendants did not produce that quality or amount of evidence which they were bound by law to do in order to prove affirmatively the taking of all due care. Inasmuch, however, as the plaintiff did not plead his causes of action with precision, and in that he alleged negligence on the part of the railway company without giving any particulars of such negligence, and also failed in his pleading and at the trial to bring out the alternative position of the railway company as bailee, on which point the appeal has succeeded, we, whilst reversing the judgment of the lower court and decreeing the plaintiff's claim, deprive the plaintiff of all costs in the lower court.

The plaintiff will have in this Court the costs of the appeal.