

(1926) 07 PAT CK 0033
In the Patna High Court

Ganesh Dass-Bisheshwar Lal

APPELLANT

Vs

East Indian Railway Company

RESPONDENT

Date of Decision : 29-07-1926

Acts Referred:

Contract Act, 1872 — Section 151, 152, 161
Penal Code, 1860 (IPC) — Section 151, 152, 161
Railways Act, 1989 — Section 72, 76

Citation : AIR 1927 Patna 193 : 102 Ind. Cas. 403

Hon'ble Judges : Jwala Prasad, Acting C.J.; John Bucknill, J

Bench : Division Bench

Judgement

John Bucknill, J.—This was an appeal from a decision of the District Judge of Patna, dated the 4th April, 1924, confirming a judgment of the Subordinate Judge of Patna, dated the 24th April, 1923.

2. The facts in the case were of simple character. The plaintiff was one Mali Ram who carried on the business of a cloth merchant as a firm known as Ganesh Das-Bisheshwar Lal at Mokameh, in the Patna District. In November, 1920, a Bombay firm consigned to the plaintiff at Mokameh a bale of cloth valued at Rs. 975-8 6. This bale was never delivered to the plaintiff and accordingly, after several vain attempts to obtain some satisfaction from the Railway Companies which carried the goods, the plaintiff brought a suit against the East Indian and the Great Indian Peninsular Railways (by which the bale had presumably been carried) claiming damages for non-delivery of the cloth. With the Great Indian Peninsular Railway we are not concerned; as it seems to be common ground that the bale of goods was handed over to the East Indian Railway at a place called Manikpur Junction. The Subordinate Judge dismissed the suit and on appeal the District Judge upheld his judgment. It is from this decision of the District Judge that this present appeal has come before this Court.

3. Now, it will be observed that the written statement which was filed by the East Indian Railway Company was of (what is in my experience) a most unusual

character. It will be noticed that the plaintiff in his plaint did not allege that the defendant had lost the goods; presumably he was quite in the dark as to what had happened to the bale; all that he could say was that the goods had not been delivered to him. The defence of the Great Indian Peninsular Railway was as I have mentioned that they had handed over the goods to their co-defendants (the East Indian Railway); this allegation in the written statement of the Great Indian Peninsular Railway was not denied by their co-defendants and seems to have been admitted. The defence of the East Indian Railway seems to me to disclose on the pleadings no defence to the suit. Their defence was in effect that the consignment was booked at owner's risk in consideration of a reduced rate of freight in terms of the well-known Risk Note Form B. The despatch of the bale of goods was admitted but the East Indian Railway Company did not allege in what respect they claim to be exempted under the provisions of the Risk Note B. They did not admit that they had lost the goods; they alleged further that as there was no contract to carry the goods within a specified time they were not liable for any loss of profits to the plaintiff; they denied that there was any neglect on their part in the non-delivery of the goods.

4. Now, I do not think that I have yet seen a written statement quite of this character; in the numerous cases with which I have had to deal connected with the claims against Railway Companies for damages due to goods not having been delivered, I have, to the best of my recollection, always observed either that the plaintiffs pleaded loss or that the Railway Company admitted loss and, in all germane cases which I can remember, the question has, therefore, turned upon the liability of the Company in view of the exemptions contained in the Risk Note B. In the present pleadings there is not even an allegation of loss either by the plaintiff or the defendant Company.

5. In this case the defendant Company has called no evidence to show the loss and the utmost which could be urged by the learned Advocate who appeared for the defendant Company was that it might perhaps be implied that the defendants tacitly admitted having lost the goods. I do not however, think that any such admission can be implied either from the pleadings or from the conduct of the case. From the terms of the Risk Note B it is clear that there might be a variety of circumstances under which the defendant Company might not be liable; but for the Company merely, to state that it simply relies upon the terms of the Risk Note B without even mentioning upon what portion of the elaborate Risk Note it relies is to my mind no proper pleading at all and is, in my view, no defence to the suit. I should, however, in this connection, mention a point which is I think, of no little importance. It is the fact that in this Court it has been at one time held that, if a Railway Company relying on Risk Note B simply admits loss in their pleadings, the onus was then upon the plaintiff to prove that that loss was due to wilful neglect by or on behalf of the Company. [See *The Great Indian Peninsular Railway Company Vs. Jitan Ram Nirmal Ram*, But there is, since that decision, a considerable body of authority which indicates that the more recent view is that it is not sufficient for the Company merely to admit the loss but that the

Company must prove, so far as is possible, in some way in what fashion the loss of the goods whilst in its hands has occurred. It would seem from an unreported case [Second Appeal No. 1289 of 1923] that Das and Adami, JJ., propose to refer this question to a Full Bench of this Court; this would appear to be so from the judgment of their Lordships dated the 7th July last. It is, therefore, undesirable that I should say anything further on this matter especially as I was associated with Mullick, J., in the case of *The Great Indian Peninsular Railway Company Vs. Jitan Ram Nirmal Ram*, which I have quoted above. I have only mentioned this question because it will be at once observed that it is now a moot point whether, even if the defendant Company had admitted loss in their pleadings, such an admission would have been a good answer to the plaintiff's suit unless such admission was coupled by evidence adduced by the Company of a character showing, so far as possible, how the goods had disappeared whilst in the Company's custody vide *East Indian Railway Co. Vs. Jogpat Singh*, per Suhrawardy and Page, JJ. *Ganesh Lal and Another Vs. The East Indian Railway Co. Ltd.*, ; per Suhrawardy and Chotzner, JJ., *Gopiram Behariram Vs. Agent, East Indian Railway and Agent, Oudh and Rohilkhand Railway*, per Chatterjea and Cuming, JJ., *Barada Chandra Dhar Vs. Assam Bengal Ry.*, ,per Suhrawardy and Mukherji, JJ. *The B.B. and C.I. Railway Co. Ltd. Vs. Nattaji Pratapchand Firm*, , per Ramesam, J. *East Indian Railway Company Vs. Tota Ram Pirbhu Dayal* ; per Sulaiman and Daniels, JJ.; *East Indian Railway Vs. Brij Kishore* ; per Sulaiman and Daniels, JJ. *G.I.P. Railway and Another Vs. Kunj Behari Lal Sharma* per Daniels, J., *East Indian Ry. Co. v. Kali Charan Ram Prashad* 69 Ind. Cas. 103 : 3 P.L.P. 215 : (1922) Pat. 145 : AIR 1922 Pat. 106 per:92 Ind. Cas. 993; *Jwala Prasad, J. Great Indian Peninsular Ry. Co. v. Jitan Ram-Nirmal Ram* 67 Ind. Cas. 664 3 P.L.T. 222 AIR 1922 Pat. 17 per *Jwala Prasad, J.*; *East Indian Ry. Co. and G.I.P. Ry. Co. Ltd. Vs. Firm Sukhdeo Das and Another*, ; per Foster, J.; *East Indian Ry. Co. v. Firm Mohan Lal-Panna Lal* 73 Ind. Cas. 447 : AIR 1923 Lah. 432 per *Zafar Ali, J.*; *Jamnadhhar Baldevdass Firm v. Burma Railways Co.* 64 Ind. Cas. 395 : 10 L.B.R. 354 : 3 Bur. L.T. 190 per *Robinson, C.J.*; *Daudbhai v. Great Indian Peninsular Ry. Co.* 69 Ind. Cas. 750 per *Dhobley A.J.C.*

6. In the present appeal it will be seen that the plaintiff's case is really far stronger than if the defendant Company had admitted loss in its written statement. In this appeal the defendant Company had done nothing beyond, as it were, throwing at the plaintiff the Risk Note B and telling him to make the best of it. This appears to me to be no pleading and no defence.

7. Under those circumstances I think this appeal should be allowed as against the East Indian Railway. Company and that the judgment of the Subordinate Judge of the 24th April, 1923, and that of the District Judge, dated the 4th April, 1924, should be set aside.

8. As for the amount which the plaintiff claimed it should be observed that in his plaint he claimed the following sums:

(a) Rs. 975-8 6 for price of the undelivered goods;

(b) Rs. 100 damages for loss of profits on the cloth; and

(c) Rs. 57-7-6 interest for 5 months and 10 days.

9. The defendant Company denied that it was liable for any loss of profits, did not admit the value of the goods and submitted that the plaintiff was not entitled to any interest. The plaintiff proved quite satisfactorily that the value of the bale of cloth not delivered to him was as claimed, namely, Rs. 975 8-6: and he is entitled to recover this sum. He did not, however, prove at all clearly any loss of profit and I do not think he is entitled to recover any sum under this heading. I do not see how he can claim any interest save that he will be entitled to recover six percent, interest on the decretal amount from the date of the decree. The result will be that the judgments of both the lower Courts will be set aside and the suit decreed in favour of the plaintiff for Rs. 975-8-6 with interest at 6 per cent from the date of the decree. The appellant will recover his costs throughout.

Jwala Prasad, A., C.J.

10. I entirely agree. I had occasion to deal with a similar point in the case of East Indian Ry. Co. v. Kali Charn Ram Prashad 69 Ind. Cas. 103 : 3 P.L.P. 215 : (1922) Pat. 145 : AIR 1922 Pat. 106. Since then I have had the advantage of knowing the views both for and against, and all the cases bearing upon the subject were placed before us. After careful consideration of the criticisms against the view taken by me in the aforesaid case as well as those that have been advanced in support of my view I find that I am confirmed in my opinion expressed in that case. I do not propose to go over the grounds again upon which I based my decision in that case. It seems to me that the point can be simplified. Sections 72 to 76 of the Indian Railways Act deal with the responsibility of the Railway Company in the matter of carriage of goods. Clause (1) of Section 72 makes the Railway Company liable as bailees under Sections 151, 152 and 161 of the Indian Contract Act, 1872. Clause (2) of that section forbids any limitation of that responsibility except as provided therein. One of those provisos is that the responsibility of the Company can be limited by agreement in writing signed by or on behalf of the person sending or delivering the goods to the Railway Administration. Risk Note B was introduced by the Railway Company in order to define and describe the limited responsibility of the Company with regard to the goods conveyed by them at reduced rates. Generally speaking the carriage of goods under this Risk Note is said to be at the owner's risk. Under the Risk Note the consignor agrees and undertakes to hold the Railway Administration and all other Railway Administrations working in connection therewith and all other transport agents or carriers employed by them respectively over whose Railways or by or through those transport agency or agencies the said goods and animals may be carried in transit "harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its

servants, transport agents, or carriers employed by them before, during and after transit...provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event or accident."

11. This agreement absolving the Railway Company from the liability under certain circumstances set forth in the Risk Note is an exception to the general liability of the Railway Company as a bailee under Sections 151 152 and 161 of the Indian Contract Act. Section 151 requires the bailee to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods. Section 152 makes the Railway Company responsible as bailee for the loss, destruction, or deterioration of the thing bailed unless it has taken the amount of care described in Section 151. Section 161 makes the Railway Company responsible as bailee for the delivery and tendering at the proper time to the bailor of the goods bailed, failing which the Company is liable to the bailor for any loss, destruction or deterioration. The Risk Note is an exception to the ordinary responsibility of the Company for the loss, destruction or deterioration of the goods consigned. As an exception to the general responsibility the Risk Note must be proved by the Railway Company to have been duly executed. It must also be proved that the circumstances under which the exemption from the ordinary responsibility is claimed exist in the case. In other words, the Railway Company must prove that the goods consigned were lost, destroyed or deteriorated before they can take advantage of the agreement contained in the note. It is not sufficient for the Railway Company to plead the execution of the Risk Note or to plead the loss, destruction or deterioration, but the Railway Company must prove that there was loss, destruction or deterioration such as is contemplated in the agreement set forth in the Risk Note. Unless this is primarily proved the ordinary responsibility of the Railway Company as bailee under as. 151, 152 and 161 does not cease. The object of this requirement for the Railway Company to prove loss, destruction or deterioration is that the consignor will then be in a position to know how his goods were dealt with and that the Railway Company exercised primarily the ordinary care that is required of it as a bailee. It is only after this is established by the Railway Company that it can plead exemption from the liability for the loss, destruction or deterioration under Risk Note B unless the claimant proves that the loss, destruction or deterioration was due to wilful neglect on the part of the Railway Company. To put it shortly in a case of claim against a Railway Company based on non-delivery of the goods consigned it is in the first instance for the Company to plead and prove loss, destruction or deterioration and when this is done then the onus shifts upon the claimant to show that the loss, destruction or deterioration was due to the wilful negligence of the Company. The agreement in the Risk Note is an exception to the general principle governing the responsibility of the Railway Company as common carriers and bailees. The Railway Company relying upon the agreement as an exception to the general rule must prove the conditions under which the agreement would apply, that is, they must prove the loss, destruction or deterioration of the goods in order to

exonerate themselves from the liability.

12. Now Risk Note B to my mind does not cover the case of non-delivery. Sections 151 152 and 161 of the Contract Act deal with, the case of loss, destruction or deterioration and the Risk Note protects the Railway Company from loss, destruction or deterioration as used in the Indian Contract Act, Sections 151 and 152. The case of non-delivery comes u/s 161 of the Indian Contract Act which says that a bailee is bound to deliver or to tender at a proper time and place the goods bailed. If this is not done thereafter their responsibility arises for loss, destruction or deterioration. Now the words "loss, destruction or deterioration" are not wide enough to cover the case of non-delivery, misdelivery, detention, etc. These last words are expressly stated in the Risk Note in the case of *Smith & Co., Ltd. v. Great Western Ry. Co.* 65 S.J. 172 : 37 T.L.R. 117 referred to and relied upon by Mullick, J., in the case of *The Great Indian Peninsular Railway Company Vs. Jitan Ram Nirmal Ram*, . The Risk Note Form in that case clearly shows that non-delivery and misdelivery are quite different from loss destruction or deterioration; The Risk Note must be construed strictly and if for some reason the Legislature did not think it proper to include cases of non-delivery or misdelivery or detention in spite of the words having been used in Section 161 of the Indian Contract Act and in spite of those words being found in the Risk Note referred to in *Smith & Co., Ltd. v. Great Western Ry. Co.* (1921) 2 K.B. 237 : 90 L.J.K.B. 644 : 125 L.T. 4 : 26 Com. Cas. 81 : 65 S.J. 172 : 37 T.L.R. 117 we cannot add those words to the section in order to amplify the scope of it and to limit the liability of the Railway Company with regard to goods consigned to them. Now the difference between non-delivery on the one hand and loss, destruction or deterioration on the other has been recognized in Articles 30 and 31 to Schedule I of the Indian Limitation Act. It was after careful consideration that Article 30 was added. Before that, provision similar to Article 31 only existed which related only to loss, destruction or deterioration. Questions were then raised as to whether the case of non-delivery would come under that Article or under Article 149 or Article 115 of the Limitation Act, the latter being applicable to cases where there is no express provision in the Act. It is with a view to set at rest the questions raised that Article 30 was subsequently added to the Limitation Act. In spite of that the word non-delivery, misdelivery or detention was not added to Risk Note B. This view seems to have been taken by Das and Adami, JJ., in S.A. No. 1289 of 1923, and I entirely agree with the reasons given by Das, J., in his judgment.

13. There seems to be a sharp divergence in the decisions of this Court as well as of the other High Courts. The trend of the recent decisions of the other High Courts, however, notably of the Calcutta High Court, seems to be in favour of the view taken by me vide *East Indian Railway Co. Vs. Jogpat Singh*, *Gopiram Behariram Vs. Agent, East Indian Railway and Agent, Oudh and Rohilkhand Railway*, ; *Ganesh Lal and Another Vs. The East Indian Railway Co. Ltd.*, ; *Badri Prasad Vs. G.I.P. Railway East Indian Railway Vs. Firm Makhanlal-Bindesri Prasad and Ghelabhai punsi v. East Indian Ry. Co.* 63 Ind. Cas. 241 : 45 B. 1201 : 23

Bom. L.R. 525. All the decisions for and against have been summarised in VII Patna Law Times, pages 77n to 86n.

14. I have, therefore, no hesitation in agreeing with the decision delivered by my learned brother and I would, therefore, allow the appeal.