

(1925) 06 BOM CK 0003
In the Bombay High Court
Case No : Second Appeal No. 762 of 1923

G.I.P. Railway Company

APPELLANT

Vs

Haji Tarmahomed Hasam

RESPONDENT

Date of Decision : 24-06-1925

Acts Referred:

Citation : AIR 1925 Bom 534 : (1925) 27 BOMLR 1111 : 90 Ind. Cas. 562

Hon'ble Judges : Norman Macleod, J;Coyajee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—The plaintiff sued to recover Rs. 1,600 as the price of the contents of the plaintiff tins of oil, with interest. The trial Court decreed the plaintiff's claim to the extent of Rs. 957. The appellate Judge increased the decretal amount to Rs. 1189-12-9. The railway company have appealed, it is curious to note that in so many of these risk-note cases, the parties fail entirely to realise what are the real issues in the case, and in second appeal they endeavor to remedy the defects which have occurred in the proceedings in the Courts below. The third issue in the trial Court was : "Is the risk note set up by the defendant railway company duly proved?" That was found in the affirmative. Then the second part of the issue was: " If so, are the defendants absolved from any liability ? " Under the terms of the risk-note the defendants would only be liable, in any event, for the loss of a complete package or of a consignment consisting of a complete package or packages, and if a package or packages were missing, then the defendants would only be liable, if plaintiff could prove wilful neglect as mentioned in the risk-note. The trial Court held that the defendants were not absolved from liability, apparently on the ground that plaintiff had proved that the loss had occurred by wilful neglect of the defendants.

2. The question whether the defendants were liable at all, because (they alleged that no complete package had been lost, does not appear to have been raised in

the issues. The Judge really considered that the railway company were responsible for the oil that disappeared from the plaintiff's tins, and decreed the plaintiff's claim. There was no question also in the trial Court, whether there had been a deviation of the route, or whether the unloading or reloading of the tins at Wari-Bunder by the defendants was unjustifiable.

3. In appeal, the same faults of procedure also occurred. The same issues were raised while the vital points in the case do not seem to have been discussed. It is difficult then to consider them, if they are questions of fact, in second appeal.

4. The first question really is whether any of the plaintiff's packages have been lost. We have been referred to the decision in *East Indian Railway Company v. Nilkanta Roy* ILR (1913) Cal. 576 in which it was held that if in the case of tins of oil the tins are delivered, then there is no loss of a package even although the tins contain no oil when delivered to the consignee. The decision of Mr. Justice Fletcher to that effect depended on a decision of this Court, which has not been reported. However we can quite understand how it came to pass that the railway companies asked the legislature to sanction a form of risk-note so as to absolve them from liability, except in the case of a loss of a complete package. If a tin of oil disappears entirely, then undoubtedly it is lost. But a question would arise if the contents are partly lost and the tin is there, how much oil should be left in a tin so as to constitute delivery of the package. Other complicated questions might arise, and the solution of the difficulties was found by absolving the company from liability unless the package has disappeared entirely.

5. We have now got the decision of this Court in *B.B. & C.I. Railway Company v. Ambalal Sevaklal* (1909) Civil Application No. 198 of 1909 (Unrep.) which says :-

In this case we think it is quite clear that there has been no loss of a complete package forming part of the consignment. All the tins forming separate packages in the consignment were delivered to the consignee. The fact that all the contents of some of the tins were lost does not make the railway company liable under the terms of the Risk Note in Form B.

6. That therefore would dispose of the case unless it could be found that the defendants had committed a breach of their contract. "It was never alleged that there was such a breach of the contract as to make the defendants liable, apart from the terms of the risk-note, for any loss of the goods, and therefore, we are not in a position to say that the conduct of the defendants in unloading the goods at Wari Bunder and reloading them again, itself amounted to a breach of contract

7. There is no question of deviation in this case because the goods came to Bombay, as they would ordinarily come to Bombay, and it would not make any difference if they were unloaded at Wari Bunder and reloaded again for being carried on to B.B. & C.I. Railway line. On the question whether it would be more convenient from an administration point of view that the goods should go to Dadar, instead of to Wari Bunder, there is no evidence, so that we are unable to hold that there is any foundation for saying that the company was guilty of a

breach of contract under the terms of the risk-note.

8. We think that the decision of the Court below was wrong and the appeal will be allowed and the suit dismissed with costs throughout.