
(1961) 11 AHC CK 0012
In the Allahabad High Court
Case No : First Appeal No. 26 of 1951

L. Nathu Lal

APPELLANT

Vs

Dominion of India

RESPONDENT

Date of Decision : 20-11-1961

Acts Referred:

Railways Act, 1890 — Section 72

Citation : AIR 1963 All 137

Hon'ble Judges : K.B. Asthana, J

Bench : Single Bench

Advocate : K.C. Saxena, for the Appellant; T.N. Sapru, P.N. Shukla, S.K. Agarwala and F.R. Kewatram, for the Respondent

Final Decision : Partly Allowed

Judgement

K.B. Asthana, J.—This is a plaintiffs appeal whose suit against the Dominion of India now the Union of India for recovery of damages has been dismissed by the learned Additional Civil Judge, Kanpur.

2. The plaintiff carried on trade and business in the sale and purchase of potatoes in Farrukhabad. On 31st March 1947 the plaintiff booked 170 bags of potatoes containing two maunds and five seers of potatoes in each bag from Kanpur to be transported to Wadi Bandar, Bombay on G. I. P. Railway (now the Central Railway). The plaintiff paid freight on the reduced rate and executed risk notes in Forms A and B in accordance with the requirements of the Indian Railways Act. The potatoes were loaded in a wagon No. 6779 at Kanpur railway station for direct despatch to Bombay and the wagon started from Kanpur without any delay. It reached Jhansi on 2-4-1947 and left that place the same day reaching Bhusawal on 6-4-1947. It appears that on reaching Bhusawal the aforesaid wagon was declared sick and after due repairs left Bhusawal on 12-4-1947 arriving at Wadi Bandar, Bombay on 15-4-1947. The potatoes were available for delivery on that date but there arose some dispute between the railway authorities and the consignee who refused to accept delivery and claimed

delivery on assessment. The railway authorities then got the necessary assessment made and the potatoes were removed by the consignee on 19-4-1947.

According to the plaintiff who was himself the consignee the potatoes delivered at Bombay had been damaged and they were sold at a reduced price in the Bombay market. The plaintiff claimed that on account of the misconduct on the part of the railway caused by delay in transit the potatoes got damaged and he suffered a loss.

3. A second consignment of 181 bags of potatoes containing two maunds and five seers of potatoes in each bag was got booked by the plaintiff at Kanpur on 11-4-47 after executing risk notes in Forms A and B as required by the Indian Railways Act on payment of a reduced rate for being transported to Wadi Bandar, Bombay. The said consignment was loaded in a direct wagon No. 18218 on the G. I. P. Railway (now the Central Railway) and had left Kanpur without any delay. The aforesaid wagon reached Jhansi on 13-4-47 at 14 hours and made onward-despatch the same day and arrived at Bhusawal on 20-4-47 at 16.30 hours. It left Bhusawal at 21.30 hours on 21-4-47 and arrived at Wadi Bandar, Bombay on 25-4-47 and the delivery was taken by the consignee after assessment on 26-4-47. The plaintiff's case was that due to misconduct on the part of the railway authorities caused by delay in transit the potatoes got damaged and they fetched low price in the market and thus he suffered a loss.

4. The plaintiff claimed a sum of Rs. 8232/- as damages for both the consignments with costs and pendants lite and future interest.

5. The suit was defended on behalf of the Dominion of India and the Railway Administration. Their defence in the main was that the plaintiff chose the lower rate of tariff and the two consignments of potatoes were despatched on owner's risk and the railway authorities were not liable for any damages as there was no misconduct on their part. It was pleaded that the delay in transit was a normal delay and the railway authorities took the normal care in transporting the goods. It was further pleaded that the railway was free from all responsibility for the destruction or deterioration of the goods and from any loss arising on that account except on proof that the loss arose from the misconduct of the railway administration or their servants. It was further stated in the written statement that the usual period taken in the transit of goods between Kanpur and Wadi Bandar, Bombay, was 12 or 13 days and there was no abnormal or unavoidable delay and the railway, moreover, did not guarantee to despatch the goods by any particular train or deliver the goods by a definite date. The claim of the plaintiff that he suffered damages on account of any misconduct on the part of the railway was denied and it was pleaded that the amount of damages claimed was excessive.

6. The learned Additional Civil Judge who tried the suit, on the pleadings of the parties, framed the following issues :

1. Was the Railway Administration guilty of misconduct and gross negligence in respect of the consignment in dispute?

2. Was there any agreement to absolve the defendant from responsibility as alleged by the defendant?

3. To what amount of damages, if any, is the plaintiff entitled?

7. The learned Judge of the lower court considered issues Nos. 1 and 2 together. On a consideration of the entire material on record, he held that no misconduct was proved on the part of the Railway Administration and that on the basis of risk note Form B executed by the plaintiff there was a clear agreement absolving the railway from the liability except as provided therein. The learned Judge in arriving at his finding on the issues in question seemed to have been of the opinion that there was negligence on the part of the Railway in the transportation of the consignments but as a matter of law he held that no amount of negligence could be enough to constitute misconduct. He went even so far as to hold that misconduct was something more than mere negligence and will not include even culpable negligence.

8. On issue No. 3 the learned Judge of the lower Court did observe that the actual loss to the plaintiff would be the freight plus the difference in the price of the goods but as he had decided issues Nos. 1 and 2 against the plaintiff he thought that in the circumstances it was not necessary for him to deal with the question of damages as there was no liability on the part of the defendant to pay any amount. He accordingly dismissed the suit with costs.

9. Against the above said judgment and decree of the learned Additional Civil Judge this appeal has been filed. The learned counsel for the appellant has contended that on the evidence on record the plaintiff had discharged his burden of proving misconduct on the part of the railway authorities within the meaning of risk note Form B executed in connection with each of the consignments in suit and the plaintiff was entitled to the damages claimed. While, on the other hand, it has been submitted by the learned counsel for the respondent that the onus was always on the plaintiff to prove that the damages or loss was caused to the plaintiff as a result of misconduct on the part of the railway authorities and on the evidence on record misconduct has not been established.

10. In order to appreciate the different contentions of the parties it is necessary to examine the oral and documentary evidence on record produced at the trial. It may be observed at the outset that the learned counsel for the appellant has not seriously contended that misconduct has been established on the part of the railway in the delay in transit in respect of the second consignment. But he has seriously contended that misconduct has been established in respect of the delay in transit of the first consignment and the damage was suffered by the plaintiff as a result of such misconduct.

11. As already observed by me above, the first consignment which was loaded in

wagon No. 6779 reached Bhusawal on 6-4-1947. In my opinion, there has been no delay in respect of the transit between Kanpur and Bhusawal in respect of this consignment. The despatch of the said wagon was delayed at Bhusawal and it left Bhusawal on 12-4-47. It has come in evidence of Sri Manohar Narain, a witness for the defendant, who "was a train examiner at Bhusawal that the wagon No. 6779 was marked sick on 6-4-47 at 7 A.M. and the said wagon reached the sick yard on nth April 1947 at 7 A.M., when he ordered repairs of the bearing brasses which were pat in, According to the evidence of this witness the checkup of the axle box was also carried out which indicated that the bearings were bad. In the cross-examination of this witness it has been elicited that he did not know what happened to this wagon for five days that is between 6th April 1947 and nth April 1947.

According to the evidence of Sri Ram Dayal, another witness for the defendant who was a fitter at Bhusawal, the wagon No. 6779 was detained on the sick siding only for one day. He put some brass, packing and oil in the bearings. According to this witness, as soon as the said wagon reached the sick siding, it was put right by 12 noon the same day. It would thus appear from the evidence of these witnesses that there is no explanation whatsoever on behalf of the railway authorities for the detention of the said wagon for five days at Bhusawal. The railway authorities would be presumed to know that the said wagon contained a cargo of potatoes which were perishable commodities. They would also be presumed to know that unavoidable (sic) delay or unnecessary delay in transporting such perishable commodities would result in damage to the commodity. The railway as carrier was under a duty to despatch such goods on wagons which were fit for travelling on the rail road. No doubt in the course of normal wear and tear there may arise mechanical defects, but the railway is under a duty and is responsible for getting the repairs and the defects removed with the greatest possible despatch.

If they detain a wagon containing perishable commodities and do not repair it and make it rail road worthy within a reasonable time, they would fail in the performance of their duty and would be guilty of not doing what they ought to do in the circumstances. It is not the case of the railway that after the wagon reached Bhusawal, they did their best but for reasons beyond their control it was not possible for repairing the wagon in question before the sixth day. The evidence of the witnesses of the defendant which has been discussed above show that very minor repairs were needed and the said wagon was detained actually at the sick siding for working upon it only for 4 or 5 hours. There is no reason if the authorities at Bhusawal had been normally vigilant in the performance of their duty why the said wagon should not have been repaired within a few hours" time after it was reported to be sick on the 6th April 1947.

It has been argued by the learned counsel for, the respondent that in law the burden being on the plaintiff to show that there was misconduct on the part of the railway, he cannot rely simply on the evidence of the defendant's witnesses

that the said wagon was detained at Bhusawal for 5 or 6 days as it was reported to be sick in order to establish misconduct.

According to the submission of the learned counsel, the plaintiff ought to have proved further facts to show that the delay at Bhusawal on the part of the railway authorities was intentional or wilful and unless this was established it could not be said that the delay caused at Bhusawal was intended with a view to cause harm to the plaintiff or cause damage to the goods and no misconduct in these circumstances can be inferred against the railway authorities.

12. In support of his submission the learned counsel for the respondent has relied upon the case of *Madras and Southern Mahratta Ry. Co. Ltd. Vs. Ravi Shing Deepsing and Co.*, wherein it has been observed that

"the railway administration shall not be liable for any loss except upon proof that the loss arose from misconduct on the part of the Railway Administration servants. The burden of proving such mis-conduct is admittedly upon the plaintiff. Delay on part of Railway to carry consignment which is not unreasonable is no indication of mis-conduct. Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence and 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."

13. The learned counsel submits that even if culpable negligence is established, it would not be misconduct unless it is proved that in delaying the repairs of the said wagon the railway servants were intentionally doing something which they knew to be wrong. The learned counsel has also referred to the observations of their Lordships of the Privy Council in the case of *Ardeshir Bhicaji v. G. I. P. Rly. Co.* AIR 1928 PC 24. It has been observed by the Board explaining wilful neglect that the expression "wilful neglect" means that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. A reference has also been made to the case of *Jhunni Lal v. B. B. and C. I. Rly. Co.* (1916) 14 All LJ 396 : *Jhunni Lal and Another Vs. The Bombay, Baroda and Central India Railway Company and Another*,

In this case a learned single Judge held on the facts found which, according to the learned counsel, were similar to the facts of the present case, that the failure of the railway authorities to tranship the bags at the Wardha junction was due to a mere mistake, and that there was nothing to show that the railway authorities intentionally or purposely omitted to tranship the bags and therefore it was impossible to hold that the railway authorities were guilty of wilful neglect within the meaning of the risk-note.

14. I have carefully considered the decisions in the above cited cases and I do not think that the ratio of those cases are applicable to the facts found in the present case or can be applied to the interpretation of the word "misconduct" in the risk note Form B in question. In *Madras and Southern Mahratta Ry. Co. Ltd.*

Vs. Ravi Shing Deepsing and Co., Lodge, J., has while considering the question as to when misconduct is established, laid down two criteria -- (i) the intentional doing of something which the doer knows to be wrong and (2) which he does recklessly not caring what the result would be. This dictum when closely examined in my view would not support the contention of the learned counsel for the respondent. An act which a person does recklessly not caring what the result would be, according to the view of Lodge, J., is also misconduct.

In my opinion, doing of a positive act or omission to do an act which a person is duty bound to do stand on the same footing. If a person deliberately and carelessly without heeding, the result of his omission to do a duty cast on him causes damage or harm to another person, in my opinion, he is guilty of misconduct. In the Privy Council case AIR 1928 PC 24, relied on by the learned counsel what "misconduct" in risk note Form B means was not considered.

The learned counsel seems to rely on this case by first equating the words "wilful neglect" with "misconduct" and then applying ratio of that case to the facts and circumstances of the present case. Their Lordships of the Privy Council in the case cited were considering the language of risk note H vis-a-vis Section 72 of the Railways Act. In that case on the facts it was found that certain goods which were awaiting transshipment were lying on the railway platform when they caught fire. They were cotton goods and it was found that the railway had no means to extinguish the fire of such an immense dimension and the one hydrant which was at the station was not found to be working. I think that the facts of that case are quite distinguishable from the facts of the present case before me. Their Lordships of the Privy Council on the facts found held that it was a pure accident and therefore it could not be held to be "wilful neglect".

The third case relied on is Jhunni Lal and Another Vs. The Bombay, Baroda and Central India Railway Company and Another, and it is a single Judge decision of this court. I find from the judgment reported that there is no discussion of the law and it is confined to the peculiar facts found in that case. I do not think that this case is helpful as a ruling to the learned counsel for the respondent. Even if it be said that it lays down the law, with great respect to the learned single Judge who gave that judgment I am unable to agree with the view of law taken by him in that judgment. In that case the wagons carrying the goods ought to have been detached from the train at Wardha Junction, but instead of this they were carried on to Nagpur, and there they remained unnoticed by the authorities.

On discovery they were despatched from Nagpur, and after some delay reached their destination where the goods were found in a stinking condition. In the risk note H executed in that case the consignor undertook to hold the Railway Administration "free from all responsibility except for the loss of the complete consignment due either to the wilful neglect of the Railway Administration or" It would be noticed that in the case cited under the terms of the agreement it was the loss of the complete consignment which could give rise for cause of action against the railway authorities. That to my mind is a

distinguishable feature and the learned Judge was considering the meaning of the words "wilful neglect" in that context.

15. The question as to what is the meaning of the word "misconduct" in risk note Form B came up for consideration recently before a Division Bench of this High Court in First Appeal No. 290 of 1950, *The Dominion of India, Ministry of Railway, New Delhi and Others Vs. Amrit Banaspati Co. Ltd., Ghaziabad*, In their judgment *A. P. Srivastava and B. Dayal, JJ.*, after reviewing the case law on the point concluded as follows: -

"This Court has thus consistently been of the view that the word "misconduct" as used in the risk notes executed under the provisions of the Railways Act included culpable negligence and conduct which was improper and undesirable. The Division Bench decision in the case of *E.I. Ry. Co. and Another Vs. Narain Das Ganga Saran* is binding on us and we also respectfully agree with it."

In the above case the facts were that the wagon in which the goods were consigned was attached to a Goods Train which was stabled at the Asaoti railway station and while stabled there thefts were committed and the goods were stolen. It also appears that the railway authorities sent information to the police but no action was taken and the theft and looting continued for a few days more. It was found that no steps were taken by the railway authorities or by the police authorities to protect the goods and there was no watch and ward staff. It was also established on evidence that the things got so much out of control that the railway staff itself deserted the station and the train to save their lives and the train was left to the mercy of the looters. In those circumstances the learned Judges found it established that the railway administration and its employees were guilty not only of negligence but of gross improper misconduct and dismissed the appeal against the decree under which the plaintiff's suit was decreed against the Dominion of India.

16. Not only I am bound by the above decision of the Division Bench but I respectfully agree with the views expressed and the law laid down therein. In my opinion, the carelessness and the negligence shown by the railway authorities in the present case in not undertaking the small repairs to the wagon in question with the greatest possible despatch as soon as it was reported sick and particularly when the railway authorities knew that it contained perishable goods for onward despatch to Bombay shows that they were not only acting negligently but improperly in the circumstances. Even though the goods may be carried by the railway at the owner's risk, it does not mean that the railway administration can do anything with the goods and not take proper care so that during the transit they do not get damaged. The only effect of executing the risk note Form B or transporting the goods at owner's risk on a reduced rate is that the railway authorities are absolved from any loss or damage as an ordinary carrier or as a bailee being in possession of the goods except in so far as it is proved that the loss or damage was due to misconduct on their part.

The meaning of the word "misconduct" in my opinion should not be so construed as to make it impossible for any consignor or consignee to establish the same. According to the argument of the learned counsel for the respondent, the burden on the plaintiff, was not only to prove that the wagon was delayed for five days at Bhusawal and no proper steps were taken to repair it and despatch it on the onward journey as soon as possible, but he ought also to have proved that this was intentionally done to cause damage to the goods or to cause harm to him by the railway authorities. I fail to see how any person who consigns the goods for despatch on the railway-can ever establish, if that were the law that the railway authorities intended in fact to harm the goods or cause damage to him. The law as laid down by the Division Bench in F. A. No. 290 of 1950, D/-31-7-1961 : AIR 3963 All 134 referred to above gives, in my opinion the true test for finding out on the facts proved whether there has been misconduct on the part of the railway.

17. In this connection my attention has also been drawn by the learned counsel for the appellant to the case of Union of India (UOI) Vs. Ganesh Chandra Das, . The facts of the case cited were almost similar to the facts of the present case before me. That case also dealt with a consignment of potatoes which were a perishable commodity. It appears that a consignment of 222 bags of potatoes was despatched from Patna Ghat railway station on the Eastern Railway on 2nd May, 1950, to Moga railway station. The goods were loaded in a wagon with an iron floor on the consignor's responsibility who also duly executed risk note in Forms A and B. The wagon containing the consignment reached Jhanja station on 4th May, 1950 and it was detached and detained at that station till 11th May, 1950 on which date it was attached to another goods train.

The consignment ultimately reached its destination on 15th May 1950, when it was found by the Station Master that the entire stock of potatoes had been damaged. The potatoes were eventually destroyed under the orders of the Health Officer as they were found unfit for human consumption. The plaintiff sued the railway for damages on the ground that there was misconduct on the part of the railway on account of unreasonable delay in transit. Their Lordships of the Calcutta High Court held that there was no proper explanation as to why the wagon containing the goods was detained at Jhanja for such a long time. The explanation given on behalf of the railway authorities was that due to congestion in the railway yard at Jhanja and derailment of 5 Up Pan-jab Mail train a few miles down Jhanja station, the wagon could not be despatched.

This explanation was not found to be relevant by the learned Judges. In fact in that case the counsel appearing on behalf of the Union of India had to concede that in the absence of any explanation to show what was the necessity for detachment of the wagon at Jhanja, it must be held that the wagon was detached and detained on account of gross negligence on the part of some of the railway officials at Jhanja and this amounted to misconduct. It would appear that on the facts that was a stronger case in as much as an explanation was offered

on behalf of the railway as to why the wagon was detained at Jhanja. In the present case there is a complete absence of any explanation on the part of the railway authorities as to why the wagon in question could not be attended to for the necessary repairs before the sixth day after it was reported to be sick.

18. I may here notice an argument advanced by the learned counsel for the respondent that it was for the appellant to establish that the railway authorities were careless and negligent in not attending to the repairs of the wagon for five days and since the onus was on the plaintiff to establish misconduct he had failed to discharge the burden. I do not agree with this contention of the learned counsel. The plaintiff did discharge his burden when in the cross-examination of Sri Manohar Narain, the train-examiner at Bhusawal, an opportunity was afforded to the railway to explain as to what was happening to the wagon during the five days that it was detained at Bhusawal.

It was then for the railway authorities to have explained that they had made their best efforts to get the repairs done but it was reasonably not possible to do the repairs before the sixth day. Moreover when evidence, on behalf of the parties, has come on record the question of burden of proof hardly remains material. The plaintiff in law is entitled to rely upon such evidence which has been led on behalf of the railway to prove, that there was misconduct on the part of the railway and I am not impressed with the ultra technical plea of the learned counsel for the respondent that the evidence of Sri Manohar Narain train examiner and of the other witness Sri Ram Dayal fitter who were produced on behalf of the defendant railways should not be taken into consideration in arriving at a finding that misconduct on the part of the railway was established.

19. I may also refer to certain observations made by Bramwell, L. J., in *Lewis v. Great Western Rly., Co.* (1877) 3 QBD 195. In that case the goods were carried by the railway at the owner's risk and the meaning of the words "wilful misconduct" fell for consideration by the Court of appeal. At p. 206, Bramwell, L. J., observed as follows: -

"I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now, this may or may not be a right thing to do." He might say, "well, I do not know which is right and I do not care; I will do this." I am much inclined to think that that would be "wilful misconduct", because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not."

In this same case, Brett, L.J., has observed at pp. 210 and 211 as follows:-

"I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he

may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do."

20. From the observations quoted above, it is clear that to establish misconduct it is not necessary to prove that the act complained of or the omission complained of was done intentionally or with deliberation to cause harm. That element would be necessary to be established when a party is to be held guilty of "wilful" misconduct. Here in the risk note Form B the railway authorities are liable if misconduct is established. It is not necessary for the consignor or consignee to establish "wilful" misconduct. The argument of the learned counsel for the respondent, it seems to me, proceeds on the basis that misconduct means in the risk note Form B wilful misconduct and for that reason I hold that the contention is untenable.

21. The case in F. A. No. 290 of 1950, D/-31-7-1961 The Dominion of India, Ministry of Railway, New Delhi and Others Vs. Amrit Banaspati Co. Ltd., Ghaziabad, referred to above, as I read it, does not lay down that the onus on the plaintiff would not be discharged unless he proves or establishes that the railway authorities has delayed the repair of the wagon in question with the intention of harming the consignor or with the intention of damaging the goods. I think the omission of the railway authorities to take reasonable and prompt steps to put the wagon in question on the rail road after the necessary repairs comes within the observation of Bramwell, L. J., and Brett, L. J., quoted above, and it is not right to say that no blame can come on the railway authorities, because there was no evidence on record that they had intended to harm the consignor or damage the goods.

22. The counsel for the respondent has sought to build up an argument on the basis of the entries in the railway receipt that the covering was old and repaired, sewing was weak, contents were fresh and moist smelling and submits that it shows that the plaintiff as consignor was careless in not packing the potatoes properly and that they were already rotten or damaged as they were smelling.

No doubt in the additional pleas of the written statement filed on behalf of the defendant a plea was raised that once the goods were consigned at the owner's risk and they were moist smelling and the packing was defective, the consignor was taking the risk when he booked the potatoes at the owner's risk at the reduced rate after executing the risk notes in Forms A and B, but I do not read this plea as a plea that the goods were damaged on account of defective packing or that the goods were already rotten and no damage occurred to these goods on account of undue detention of the wagon at Bhusawal. Paragraph 15 of the additional pleas is clearly a plea relating to the onus of proof. After describing the condition in which the goods were packed and delivered for transshipment, it is pleaded that the consignor absolved the railway from responsibility for the

condition in which the goods may be delivered to the consignor at the destination and for any loss arising therefrom on the part of the railway administration servants, except on proof of misconduct and it was further pleaded that there was no misconduct and the defendant was not liable for any deterioration.

As I have already held above, that the plaintiff has succeeded in establishing misconduct on the part of the railway administration within the meaning of the risk note Form E, the argument that the learned counsel seems to be raising is that irrespective of the misconduct, as the goods themselves were delivered to the railway authorities for transport in a bad state, therefore, it cannot be said that on account of undue detention of the wagon at Bhusawal that the goods further deteriorated. This is a question of fact which is being raised and I find that the parties were not at issue on this question in the Court below. In fact it could not be and as I have already explained above, it was never the case of the defendant that the potatoes were already bad when delivered for despatch and they were not responsible for the deterioration in the consignment of the potatoes. In these circumstances I would not be justified in entertaining this argument of the learned counsel for the respondent at the appellate stage.

23. As regards the second consignment which was despatched from Kanpur railway station on the 11th of April, 1947, I do not think it is necessary for me to discuss the case of the plaintiff in detail. As I have observed above, the learned counsel for the appellant has not seriously contended that there was any misconduct on the part of the railway in regard to this consignment. There is no doubt a delay in transit, namely, the goods booked on the nth of April, 1947, at Kanpur did not reach Wadi Bandar, Bombay before the 25th April 1947, that is, they took about 14 days to cover a journey of 900 and odd miles. In the written statement filed on behalf of the defendant it has been pleaded that it takes 12 to 13 days clearly to cover that distance by goods train.

No evidence was led on behalf of the plaintiff although an assertion was made in the plaint that the journey should not take more than a week, I think there is no material on record to hold that there was misconduct on the part of the railway authorities as regards the time taken in the transit of the second consignment. It can be due to the normal delays which the railway administration may suffer in the transport of goods under normal traffic condition. It may be that due to the fact that the potatoes remained packed in a wagon for fourteen days and certain deterioration might have resulted on that account, but the plaintiff is not entitled to any relief in so far as the second consignment is concerned as there is no sufficient material to prove that there was misconduct on the part of the railway in this respect.

24. The next question that arises is that -the railway administration being guilty of misconduct as regards the first consignment, what amount of damage is the plaintiff entitled to recover from the defendant. According to the evidence of the plaintiff he purchased the potatoes of the first consignment at Rs. 6/- to Rs. 6/4/- per maund. In round figures, therefore, the plaintiff spent about Rs. 2200/-. It

has also been stated by the plaintiff that when the potatoes of this consignment were sold in Bombay, it fetched Rs. 1071/- only. It has also been stated by the plaintiff that he paid Rs. 651/- as freight. It has further come in evidence of the plaintiff that the prevailing rate in Bombay on the date when he sold his consignment was Rs. 5 / - per Bombay maund. According to the statement of the plaintiff. Bombay maund is of 14 seers. All this evidence of the plaintiff remains un rebutted by the defendant. If the potatoes were in their normal state and in good condition, no doubt they could have been sold at Rs. 5/- per 14 seers in Bombay.

However, there is no evidence that what quality of potatoes were fetching Rs. 5 / - per Bombay maund at Bombay and further the potatoes which the plaintiff had despatched were of that quality. In my opinion, the plaintiff has not been able to establish by good evidence that the variety of the potatoes which he had sent would clearly fetch Rs. 5/- per Bombay maund. I would, therefore, not award the plaintiff damage on the basis of the difference between the market rate of Bombay as alleged by him of that date and the price which he actually got. In my opinion, it will be more equitable that the plaintiff should get damages on the basis of the difference between cost price which he paid plus, freight and the actual price of Rs. 1071/- which he obtained in Bombay. On that basis in round figures the plaintiff would be entitled to Rs. 1800/- as damages. This would be appropriate measure of the loss which the plaintiff suffered.

25. In the result, the appeal is allowed and the decree of the lower Court is set aside. The suit of the plaintiff is decreed for a sum of Rs-1800/- as damages. The plaintiff will be entitled to get interest at the rate of six per cent, from the date of the sale of the first consignment in Bombay upto the date of the suit and thereafter at the rate of 3 1/2 per cent pendente lite and till the date of the payment.

26. As the plaintiff has succeeded only in past and he had come to the Court with an exaggerated claim. I do not think that he is entitled to any costs. As regards the railway, I do not think that their conduct in transporting the goods of both the consignments was free from blemish, hence they would not be entitled to their costs.