

(1933) 03 CAL CK 0004
In the Calcutta High Court

M. and S.M. Ry. Co. Ltd.

APPELLANT

Vs

Sunderjee Kalidas

RESPONDENT

Date of Decision : 03-03-1933

Acts Referred:

Railways Act, 1890 — Section 72

Citation : AIR 1933 Cal 742 : 147 Ind. Cas. 752

Hon'ble Judges : Guha, J

Bench : Division Bench

Judgement

Guha, J.—The petitioner was defendant 2 in the suits instituted by the plaintiff opposite party for damages on the allegation that a number of bags of tobacco had been damaged during transit from Niphain to Shalimar. The consignments in question were both covered by risk-notes in Forms A and B. The defendant denied liability in the matter of the claim for damages as made in the suits, pleaded protection under the risk-notes, and asserted that all possible care of the goods consigned was taken. The case of the defendant was that the damage to the consignment was due to causes which were beyond the control of the Railway Administration (defendant 2). The learned Judge of the Court of Small Causes at Sealdah, by whom the suits were tried, after stating the case for the parties before him, observed that:

the existence of the aforesaid damage would lead to an assumption that there was negligence on the part of defendant 2 such as to entitle the plaintiff to relief sought; it has not been established by any reliable independent evidence that there was absolute want of negligence on their part.

2. With reference to the risk-notes executed by the plaintiff, which purported according to their terms to protect defendant 2 from liability except upon proof of misconduct of the Railway Administration's servants, the learned Judge remarked as follows:

It does not appear from the evidence on the record that the officers of defendant

2, in whose line the damages have occurred, took all necessary precaution; for had they done so the goods would not have been damaged. Now this would lead to a finding of misconduct on their part.

3. The Court below concluded by saying that on a consideration of the evidence and circumstance of the cases, the suits by the plaintiffs were to be decreed. Defendant 2 applied to this Court for revision of the decision arrived at by the Court below; and Rules were granted by this Court on three grounds specified in the applications to this Court. The first of these grounds related to the question of onus of proof in the matter of misconduct of the servants of the Railway Administration concerned, in view of the risk-notes in Forms A and B. The next ground was with reference to there being no evidence of misconduct on the part of the servants of the Railway Administration. The last of the three grounds was that the Court below had erred in law in holding that merely because the goods had been damaged, the inference was that the defendant did not take all necessary precautions to prevent the damage complained of.

4. It is necessary to take into consideration the scope and significance of the risk-notes, in view of the question arising for consideration in these cases, regard being specially had to the question of burden of proof as raised in them. The risk-note in form A is used when articles tendered for carriage, are already in bad condition or so defectively packed as to be liable to damage in transit. Risk-note in Form B is used when the consignor elects to despatch at special reduced rates at owner's risk goods for which an alternative ordinary or risk acceptance rate is quoted in the railway tariff. In both cases it is provided by the terms of risk-notes that the Railway Administrations are free from all responsibility from any loss or damage from any cause whatsoever, except upon proof that such loss or damage arose from misconduct on the part of the Railway Administration's servants. So far as the question of the onus of proof is concerned the statutory provision contained in Section 72, Railways Act, limits the responsibility of a Railway Administration in the case of risk-notes, and the risk-notes require proof of misconduct on the part of the Railway Administrations' servants. The obvious implication of the provision of the law is that the onus of proving misconduct is on the party alleging it and this is what may be taken to be settled law in England: see *Stevens v. C.W. Ry. Co.* (1885) 52 LT 324. When misconduct on the part of servants is alleged, it must be shown that the servants were actually responsible for the guilt or wrongful act: knowledge on the part of the Railway Administration, or of their servant, that an act is likely to cause injury is not sufficient: see *Forder v. G.W.Ry. Co.* (1905) 2 KB 532. It may also be noticed in this connexion that it was observed by their Lordships of the Judicial Committee of the Privy Council in the case of *Ardeshir Bhikaji Tamboli v. G.I.P. Ry. Co.* AIR 1928 PC 24, with reference to risk-notes in form H, which is used as an alternative to risk-note in Form B, when a sender desires to enter into a general agreement instead of executing a separate risk-note for each consignment that a Railway Administration was exonerated for damage to goods except where the loss was due to its wilful neglect, and there was ample evidence in the case

before the Judicial Committee of negligence on the part of the administration, but the administration could not be made liable merely on that account in the absence of finding of wilful neglect. The word "misconduct" has now taken the place of the expression wilful neglect" in the risk-notes in Forms B and II approved by the Governor-General in Council u/s 72, Railways Act. The question as to what is misconduct in the matter of fixing liability on a Railway Administration has received the consideration of the Courts in England; and it may be taken to be well settled now, that misconduct is not necessarily established by proving oven culpable negligence: *Glenister v. G.W. Ry. Co.* (1873) 29 LT 423, *Forder v. G.W. Ry. Co.* (1905) 2 KB 532. Misconduct is something opposed to accident or negligence *Lewis v. G.W. Ry. Co.* (1877) 3QBD 195]; it 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: *Forder v. G.W. Ry. Co.* (1905) 2 KB 532, *Norris v. Great Central By.* (1915)85 LJKB 285, and *Shepherd and Son v. Midland Ry.* (1915) 85 LJK 283. The question to be considered next is whether a rule as contained in Section 72, Railways Act, permitting a Railway Administration to limit its responsibility and liability by a special contract which the general law and the Indian Contract Act impose on parties is ultra vires has been considered in many decisions by the High Courts in India, and there can be no doubt that the authoritative view on the subject about which there has not been any divergence of opinion up to the present time, is that a limitation of responsibility and liability, if it is in approved form, as prescribed by the risk-notes, is not ultra vires: see *Toonya Ram v. E.I. Ry. Co.* (1903) 30 Cal 257, *E.I. Ry. Co. v. Bunyard Ali* (1895) 18 All 42, *Balaram Harchand v. S.M. Ry. Co.* (1S95) , *M. & S.M. Ry. v. M. Sub19 Bom 159ba Rao A1R 1920 Mad 512*. There was then the onus of proof on the plaintiff claiming damages against a Railway Administration, by virtue of the statutory provisions contained in Section 72, Railways Act, and under the clear terms of the risk-notes in Forms A and B. There was also the initial burden on the plaintiff in a suit to prove his case before the Court. The plaintiff, it must be said, had failed to discharge the twofold burden that was on him, and it is not too much to state that he had not made even a beginning in the way of evidence on which a liability could be fixed on defendant 2 in the suit.

5. The learned Judge in the Court below has to my mind failed to appreciate the bearing of the risk-notes in Forms A and B, which contained the terms of special contract between the parties, concerned, the plaintiff and defendant 2; it has entirely misdirected itself in proceeding on the footing that it was for the Railway Administration to establish by evidence that there was absolute want of negligence on its part and that it was for the Railway Administration to make out that its officers took all necessary precautions for the purpose of avoiding damage being caused to the goods consigned by the plaintiff under the terms of the risk-notes in Forms A and B. Misconduct had to be proved; and the meaning and import of the word used in connexion with action on the part of carriers in the position of a Railway Administration has been explained by Courts of law, as

mentioned above. There was no proof on the side of the plaintiff of such misconduct on the part of the servants of the Railway Administration concerned, defendant 2 in the suit; and the inference made by the Court below that the defendant did not take precautions, from the fact that the goods consigned were damaged in transit, is wholly unsupportable. In the above view of the cases, the decision and the decrees passed by the Court below in favour of the plaintiff opposite party in these Rules, must be set aside. The plaintiff having failed to discharge the onus that was on him to prove misconduct on the part of the Railway Administration's servants and there * being no finding of misconduct, the plaintiff's suits should have been dismissed by the Court below. The Rules are made absolute. The decrees passed by the Court below in favour of the plaintiff opposite party are discharged, and the suits in which the decrees were passed are dismissed. The parties are to bear their own costs in the Court below, as also in this Court.