
(1958) 03 PAT CK 0017
In the Patna High Court
Case No : A.F.O.D. No. 340 of 1951

Mahadeo Lal Prabhu Deyal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 26-03-1958

Acts Referred:

Railways Act, 1890 — Section 72, 72(2), 77

Citation : AIR 1959 Patna 202

Hon'ble Judges : K. Dayal, J; K. Ahmad, J

Bench : Division Bench

Advocate : Agarwal, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Allowed

Judgement

K. Ahmad, J.—This is an appeal by the plaintiffs who are in this case a firm, Mahadeo Lal Prabhu Deyal. The suit was for recovery of damages for non-delivery of 31 bales of piece-goods out of 60 bales which had been consigned by one Messrs. Bombay Agents Limited to the G. I. P. Railway at Wadibunder station on the 1st of December, 1947, for carriage to Baidyanathdham Railway station on the E. I. Railway under Railway Receipt No. 7213/57 and Invoice No. 30 of the same date. It is not denied that at Wadibunder Railway station the consignment was loaded in Wagon No. 9643 which reached Moghulsarai on the 9th of December, 1947 at 11-55 a.m. by 192 Down Goods Train.

But as from Moghulsarai it was to be carried by another train, which had not yet been constituted, the wagon had to be detained there for about three days until the 12th of December 1947, when again at 0-40 p.m. it started for its forward journey by 214 Down Goods Train and eventually reached Baidyanathdham on the 21st of December 1947. And there on the same day when the railway receipt was presented for delivery, what the plaintiff, who was the consignee thereof, got from the Railway was only 29 bales out of 60 bales and as to the remaining 31 bales they were informed that they were missing.

Accordingly, there was some correspondence between the parties over the matter, but in spite of all efforts, those 31 bales were never delivered to the plaintiff. Hence the suit which was filed on the 20th of November, 1948, after necessary notice on the 31st August, 1948, u/s 80 of the Code of Civil Procedure. The trial court has found that this notice u/s 80 of the CPC was served validly as contemplated under law and this finding has not been challenged in appeal. Therefore, the finding is not (?) conclusive. But what the trial Court held against the plaintiff is that as the consignment was covered under Risk Note Z which, for the purpose of this case, was the same as Risk Note B, the onus was on the plaintiff to prove that the non-delivery was due to negligence or misconduct on the part of the Railway administration or any of its servants and as the same had not been discharged by the plaintiff, the suit, was bound to fail.

Further, in giving this finding it also found that so far as the obligation of disclosure on the part of the Railway was concerned which lay upon them under the terms of the proviso to that risk note, that had been fully discharged and their evidence conclusively established that it was a case of running train theft, & therefore, there was no liability on the part of the Railway for the non-delivery of the remaining 31 bales, of piece-goods as claimed by the plaintiff. Thus at the trial the claim was- mainly disposed of on the consideration of the contractual liability that arose between the parties on the terms of Risk Note Z.

And in appeal also the controversy has centred around mostly on that very point. Now, so far as the scope, nature and extent of liability under Risk Note Z is concerned, that has been elaborately explained in the well-known decision of their Lordships of the Privy Council in AIR 1937 152 (Privy Council) , but before I go into the question as to how far the rule of law laid down, therein applies here, it may be useful to deal first with the general scheme of liability in the case of carriage by Railways.

Ordinarily, when there is no other contract between the parties the responsibility of the Railway administration for the loss, destruction or deterioration of the goods delivered to them for carriage is that of a simple bailee as provided in Section 72 of the Indian Railways Act. But if there is a contract otherwise as provided in law, the position is obviously different. At the relevant time, when the aforesaid 60 bales of piece-goods were consigned to the Railway for carriage, there was a provision made in Sub-section (2) of Section 72 of the Indian Railways Act which read as follows:

"Section 72.

(1)

(2) An agreement purporting to limit that responsibility shall in so far as it purports to effect such limitation, be void, unless it--

(a) is in writing signed by or on behalf of the person sending Or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Federal Railway Authority."

In pursuance of this provision there were a number of forms known as risk note approved by the Central Government for the use of the consignors where-under they had to pay reduced freight and the Railway on terms stated therein used to be relieved of some of their liability as provided in Sub-section (2) of Section 72 of the Indian Railways Act. One of these forms was Risk Note Z which, as already stated above, was for the purpose of this case, the same as another risk note, namely. Risk Note B.

In the case of these forms the goods were carried at a rate what is usually known as "Owner's Risk Rate". And in consideration of that reduced rate, the Railway were not to be held responsible for any loss, destruction or deterioration or damage to such goods for any cause whatsoever as contemplated u/s 72 of the Indian Railways Act, except upon proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the Railway administration or any of its servants.

But this was subject to a proviso given therein that where the whole of a consignment or goods or whole of one or more packages or any part of the consignment carried at the owner's risk was not delivered to the consignee and such non-delivery was not proved by the Railway administration to have been due to any accident to the train or to fire, the Railway were bound to disclose to the consignee how the consignment or the package was dealt with throughout the time it was in their possession or control and it was only when any negligence or misconduct on the part of the Railway administration or any of its servants could not be fairly interred from such disclosure, that the burden of proving such negligence or misconduct was on the consignee. Therefore, it is obvious that the Railway in the case of non-delivery as here cannot take advantage of the Risk Note Z unless the contractual obligation undertaken by them under the proviso to that Risk Note was fully discharged.

2. In the present case it is not denied that the Railway did make certain disclosures and did give some evidence also in proof of that disclosures. Further, it is also denied that the plaintiff thereafter did not make any prayer for any further disclosure on the allegation that what had been disclosed by the Railway was not sufficient. Therefore, here there can be no question of drawing any adverse inference against the Railway on the ground that though a prayer for further disclosure was made, but it was not complied with.

That being so, the simple question we are left with is whether on the facts disclosed by the Railway can it be said that the initial onus which lay on them under the proviso to the Risk Note Z has been discharged as contemplated in law. If the answer is in the negative, then on that ground alone they will fail to take any advantage of the risk note, and their liability in that case will be assessed on the footing of simple bailee.

But if the answer is in the affirmative, then the plaintiff, in view of the terms of

the contract as stipulated in the risk note cannot succeed unless they show that the non-delivery in this case was due to the negligence or misconduct on the part of the Railway administration or any of its servants either exclusively on the evidence given by the Railway in support of their disclosure, or failing that, on the direct evidence, if any, which they have given in support of their case that the non-delivery was due to the negligence or misconduct on the part of the Railway administration or any of its servants.

Here, however, there is no doubt that so far as the direct evidence given by the plaintiff is concerned, that is more or less of a formal character and, as a matter of fact, no reliance has been placed on that evidence to establish any negligence or misconduct on the part of the Railway Administration or any of its servants. Therefore, here the liability rests on the consideration of the other two questions alone.

3. As to the first question, namely, whether the disclosure made by the Railway is sufficient in law to discharge the burden that lay on them under the proviso to Risk Note Z, the main argument advanced by Mr. G. P. Das appearing for the plaintiff is that despite the fact that no prayer for further disclosure was made at the trial on behalf of the plaintiff, the onus was still on the Railway to disclose fully as to how the consignment was dealt with while it was in their possession, and as they have failed to do it, they cannot claim that they have done what was required of them under the proviso.

In other words, his contention is that in this case the Railway cannot be protected by the Risk Note. That means, according to him, the liability in this case has to be assessed against the Railway on the footing of their being; a simple bailee. In answer thereto, the contention advanced by Mr. P. K. Bose appearing for the Railway is that if the plaintiff were of opinion that what had been disclosed by the Railway was not sufficient, it was for them to say so at the trial by asking for further disclosure and as they did not do so, it is not open to them now in appeal to make any grievance fit the fact that because the disclosure made by the Railway at the trial was not sufficient, therefore, the onus as laid upon them under the proviso to Risk Note Z has not been discharged.

Mr. Bose in support of this contention has laid reliance on the decisions in Choa Mahton Vs. Union of India (UOI) and Others, and Union of India(UOI) Vs. Jetha Bhai Ninshi, . In my opinion, none of these two authorities lend any support to his contention. The case in (Choa Mahton Vs. Union of India (UOI) and Others,) is one relating to deterioration of a consignment and not to any non-delivery of it either as a whole or in part and it is not challenged. and I think cannot be challenged, that so far as the proviso referred to above is concerned, that comes into play only in a case involving either non-delivery or pilfering as is laid down therein and not in the case of loss, destruction, deterioration or damage as contemplated u/s 72 of the Indian Railways Act.

Similarly, the case in Union of India(UOI) Vs. Jetha Bhai Ninshi, is completely

silent on this point. Rather, what came to be considered there was whether the disclosure made by the Railway was sufficient to discharge the onus laid upon them under the proviso. So, that case instead of helping Mr. Bose is in a sense against him. Further, on principle also, the proposition as is laid down by Mr. Bose, cannot be supported and this is evident from the reasoning given in *Governor-General in Council Vs. Ramglal Nandlal*, which has been relied upon by Mr. G. P. Das in support of his contention.

That case is on all fours applicable to the facts of the present case and it clearly lays down that even in a case where no further disclosure is demanded by the consignor on the ground that what has been already disclosed by it is not sufficient, it is open to him to submit and for the court to determine that on the facts disclosed the onus as laid upon the Railway under the proviso to Risk Note Z has not been discharged. And rightly, otherwise, the valuable right that is secured in favour of the consignor under the proviso to Risk Note Z or B will in many cases be reduced to a farce or nothing.

It is true that in many cases where the consignor knows as to how the consignment has been dealt with by the Railway in the course of its transit or while it was in their control and possession in those cases, it will be possible for him to ask for further disclosure if he thinks that the disclosure already made is not sufficient, but there may be other type of cases also where the consignor may not know at all as to how the consignment has been dealt with in the course of its transit or when the same was in the control and possession of the Railway and in those cases obviously there will be nothing for the consignor to say as to what should be further disclosed.

But, for that reason, the obligation of disclosure laid upon the Railway under the proviso to Risk Note Z cannot be said to have been discharged simply because no demand for further disclosure has been made even though what has been disclosed is, on the very face of it, nothing but an apology for disclosure. Further, the question as to whether the obligation under a contract has been discharged is in ultimate analysis, a mixed question of fact and law, and therefore, on the facts stated, it is for the court to say whether the same has been discharged. This is obvious from what their Lordships of the Privy Council have stated in AIR 1937 152 (Privy Council) in the following passage:

"It is clearly for the administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair inference of misconduct. They will doubtless keep in mind the provisions of Section 114, Evidence Act."

And it was in that sense that a Division Bench of this Court in *Governor-General in Council Vs. Ramglal Nandlal*, interpreted the aforesaid observations of their Lordships of the Privy Council and in doing that the learned Judges held that "the mere fact that the plaintiff did not call upon the defendant to produce his evidence is no reason why the Court should not draw an adverse inference

against the defendant on the ground of the non-production of the evidence". For these reasons I think that there is no substance in the contention, raised by Mr. Bose that on the facts of this case it is not open to Mr. Das to contend that what was disclosed at the trial is not sufficient to discharge the onus as laid upon the Railway under the proviso to Risk Note Z.

4. In this case, therefore, it has to be seen whether the disclosure made by the Railway at the trial is sufficient in law to discharge the onus as laid upon the Railway under the proviso to Risk Note Z. This takes us to the facts which directly bear on this part of the case. Here, it may be noted that the non-delivery of the 31 bales of piece-goods, according to both the parties, was due to their removal from the wagon while they were in the course of their transit after the consignment reached Moghalsarai, but they differ as to how and where this removal was made.

According to the plaintiff, this was done at Moghalsarai while the wagon had been detained there for a few days and that by or in collusion with the Railway servants, while according to the Railway it was done by some third party and that partly while the train was running between Moghalsarai and Dildarnagar and partly while it was running between Dildarnagar and Buxar. I have already said that the wagon reached Moghalsarai on the 9th of December 1947, at 11-55 a.m.

Then having left Moghalsarai on the 12th of December, 1947, at 6.40 p.m. it reached Buxar on the 13th of December, 1947 at about 0.30 mts. in the midnight. During this part of the journey from Moghalsarai to Buxar the guard in charge of the train was one Ram Prasad Ram who was examined at the trial as D.W.2. His evidence is that between Moghalsarai and Buxar there was only one halting station, namely, Dildarnagar and there it arrived on the 12th of December, 1947, at 9.30 p.m. and after a stoppage for a few minutes, it again left for Buxar.

5. According to the Railway, the theft was committed on this part of the route and what they pleaded in the written statement about it was as follows :

"The consignment in suit was loaded in M.S.M. Wagon No. 9643 at Wadihunder properly scaled and secured with rivets on both sides and came up to the Moghalsarai Rly. station quite safe. But when the wagon reached Buxar it was found in a defective condition, which induced a suspicion in the mind of the Railway employees on duty at the time who immediately examined the wagon, checked the contents therein and found 31 bales short.

That the suit consignment was despatched from Wadibunder in M. S. M. Wagon No. 9643 labelled for Baidyanath Dham via Naini on 21-12-47 (1-12-47). The wagon in question was received at Chheoki on 7-12-47 and was despatched by 192pn. on 8-12-47. The wagon reached Moghalsarai on 9-12-47 and was despatched by 214 Down on 12-12-47 with both sides seals and rivet correct and intact. But when the wagon in question was received at the Buxar Railway station on 13-12-47 one side door of the wagon was found in an open condition. The

wagon was then immediately re-sealed and detached for checking. The contents of the wagon, however, were checked on 14-12-47 and it was found that 31 bales were short. The matter was then reported to G.R.P. and the Watch and Ward. The I.G. of Police Bihar and V. P. Section Officer, G.R.P. Patna and the Assistant Superintendent W/W Dhanbad were also informed about the matter. The Section Officer G.R.P. Patna enquired into the matter and reported that it was a case of running Goods Train Theft and the G.R.P. V. P. reported that a case was registered in connection with the above incident in which 7 persons were arrested and 295 pairs of stolen Dhotis, were recovered and the case was pending."

Therefore, according to the written statement, the theft for the first time was detected at Buxar Railway station and not at any place before Buxar. At the trial, however, the defence for the first time disclosed in evidence that the theft was, in fact detected for the first time near Dildarnagar, and in support of this new version, the Railway examined two witnesses -- the guard (D.W.2) and the Relieving A.S.M. of Dildarnagar (D.W. 9). The evidence of D.W. 2 was :

"On 12-12-47 I brought the 214 Down goods express train from Moghalsarai to Dinapur. The train stopped itself between warner and Home signals of Dildarnagar station. On a lighting from the train I found that the connecting hose-pipes between the two wagons had been cut. This happened at about 9.30 p.m. I connected the hosepipe and brought the train to Dildar Nagar Railway Station.

At the place where the train stopped I found that the northern flapdoors of Wagon No. 9643 were open. I brought it in the same condition at Dildar Nagar. This entry in my Rough Memo Book was made by me at Dildar Nagar, Ext. A.

I got the wagon sealed and rivetted at Dildar Nagar. There was no checking at Dildar Nagar as it was not a G.R.P. checking station. When we reached Buxar we again found the same flapdoors open. We sealed and rivetted it again at Buxar. We then disconnected that wagon from the train."

While D.W. 9 stated :

"I received the 214 Down Goods Express Train at Dildar Nagar at 21-30 hours on 12-12-47 (consults the diary). The northern flap doors of wagon No. M.S.M. 9643 were found open when it arrived at the platform. The southern flapdoors were intact with the original seal.

The contents could not be checked there due to shortage of staff. I sealed the wagon there in presence of the guard and the watch and ward staff. The guard gave me a sealing memo. He wrote it in my presence, Ext. H.

I made an entry of this fact in my station diary, Ext. I".

That means, according to these witnesses, it was much before Buxar that the doors of the wagon had already been found open-firstly, by the guard near the warner signal of Dildarnagar Station and then both by the guard and the

Relieving A.S.M. of Dildarnagar (D.W. 9) at the Dildarnagar station. This version is obviously different to what had been pleaded in the written statement.

Therefore, Mr. Das has contended that this new story is not only hit by the rule of pleadings but is, in fact, a completely got-up story without any element of truth in it and the papers relied upon in support of it are all concocted documents. This may or may not be so; but this much is certain that this way of disclosing facts is not consistent with what is contemplated under the proviso to Risk Note Z. In the case of AIR 1937 152 (Privy Council) , their Lordships observed:

"..... this obligation arises at once upon the occurrence of either of cases (a) or (b) and is not confined to the stage of litigation. Clearly, one object of the provision is to obviate, if possible, the necessity for litigation."

That being so, it was incumbent on the Railway, to communicate all these facts, if they were, in fact, true, at the earliest opportunity to the plaintiff either in reply to the letter which they wrote on 10-4-1947, or at least, in the written statement. That not having been done, it is validly open to the plaintiff to say that the Railway in not disclosing the full facts at the earliest opportunity, have failed to discharge the onus that lay upon them under the proviso to Risk Note Z.

6. Alternatively, it has also been argued by Mr. Das that even if this belated version of the occurrence as given at the trial be accepted as true, yet, the disclosure made in support of it is not full or in any case not enough to establish that the removal of the goods from the wagon was, in fact, not done at Moghulsarai or in between Moghulsarai and Dildarnagar and that by or in collusion with the servants of the Railway administration.

The witnesses examined from Moghulsarai are only three, namely, D. W. 1. D. W. 8 and D. W. 14. D. W. 1 was at that time the station officer of Moghulsarai. His evidence is more or less formal and is confined to the version as to how a case connected with the theft of some piece goods was started there u/s 379 of the Indian Penal Code. He does not say anything about the wagon while it was at Moghulsarai.

On that point it is only the evidence of the other two D. W.s, namely, D. W. 8 and D. W. 14, which is relevant for the purpose of this case. Both of them were then posted there as assistant train clerks. The claim of D. W. 14 is that it was he who received 192 Down Goods train at Moghulsarai on 9-12-1947 at 11.55 hrs. and at that time along with him one Mr. S. P. Misra was also present.

In support of this version he laid reliance upon an entry made (Exhibit F) in the inward guidance book which had been made by Mr. Mishra in his presence. According to his statement, the train had been received in receiving G. W. No. 4 and from there on the 11th of December, 1947, it was sent to the marshalling yard and there the wagon was detained until it left by 214 Down Goods Train for Buxar. His evidence is that:

"In receiving line No. 4 there are kept two watchmen on duty. They examine the

wagons when any goods train arrives, and they keep notes of the same. They also examine the wagons when a goods train leaves a station.

The train examiner examines the hosepipes before the train leaves. He also maintained a register, the watchman also keeps a memo, and it is signed by the guard."

It is unfortunate that none of the watchmen or the notes referred to in the aforesaid statement was attempted to be produced at the trial nor the train examiner or his register was brought before the court to show that the seals and rivets in the wagon had been properly checked there. Further, according to this witness, the memo prepared by the watchmen is signed by the guard. But the guard in his evidence does not say that he signed any memo, when he left Moghulsarai.

Lastly, all that this witness (D. W. 14) deposed is that he received the train on 19-12-1947 at 11.3-5 hrs. in a normal condition and there was nothing wrong till then either about the train or the wagon. That, however, does not solve the problem. What was more important for the Railway to show was as to how the wagon was dealt with while it was at Moghulsarai for about two or three days.

On this point the evidence given by the Railway is completely silent, for the other witness who comes from Moghulsarai, namely, D. W. 8 deposed only this much that he despatched the wagon in a good condition and made an entry to that effect in the outward summary book which has been marked at the trial as Exhibit G.

According to him, the wagon was moved to the receiving yard after its arrival and it remained there until it was despatched though according to D. W. 14, it was moved to the marshalling yard on 11-12-1947 and before that it was on the receiving line No. 4. This shows that this witness (D. W. 8) had no information at all as to how the wagon had been dealt with before it was despatched by the 214 Down Goods Train on 12-12-1947. Further, in my opinion, the solitary statement made by him that he despatched the wagon in a good condition cannot be very seriously accepted.

Perhaps that is based on the entry made in Exhibit G which, as it appears from his statement was based on the report given to him. There is nothing either in the evidence or in Exhibit G to show that he personally examined the wagons of the train and found the seals and rivets in proper condition. On the contrary, what has been admitted by him in cross-examination, lends support to the view that Exhibit G was not made by him but was prepared by somebody else, for in his cross-examination he has admitted:

"I cannot say if the hosepipes were examined before the train started. The train-examiner does it. He keeps the record for the same. Rivets and seals are examined by watch and ward staff. They keep a record of it."

Therefore, it was necessary for the Railway administration to examine the train-

examiner and the members of the watch and ward staff and also to produce the papers and records maintained by them. Unfortunately, this also was not done. If that is so, then on the solitary statement of D. W. 8 which is based on the entry made in Exhibit G, it is difficult to say that the wagon, as a matter of fact, left Moghulsarai in good condition.

7. Then comes the evidence of D. W. 2. In the examination in chief his deposition is confined to what happened near the warner signal of Dildarnagar. His evidence On that point is:

"The train stopped itself between warner and Home signals of Dildar Nagar Station. On alighting from the train I found that the connecting hosepipes between the two wagons had been cut. This happened at about 9.30 p. m. I connected the hosepipe and brought the train to Dildar Nagar Railway Station.

At the place where the train stopped I found that the northern flapdoors of Wagon No. 9643 were open. I brought it in the same condition at Dildarnagar.

This entry in my Rough Memo. Book was made by me at Dildar Nagar, Ext. A.

I got the wagon sealed and rivetted at Dildar Nagar. There was no checking at Dildar Nagar as it was not a G. R. P. checking station. When we reached Buxar we again found the same flapfloors open. We sealed and rivetted it again at Buxar."

In cross-examination he, no doubt, does say that he had checked the rivets and seals of the wagons at Moghulsarai but he does not produce any document in support of it and when faced with that question in cross-examination he says:

"I cannot say if any entry was made in connection with this train at Moghulsarai office."

This is contrary to what has been stated by D. W. 8. He claims:

"Rivets and seals are examined by watch and ward staff. They keep a record of it."

Therefore, the very absence of this record from the evidence in this case and the way in which the guard has given a halting reply go a long way to suggest that the Railway Department did not take proper care in checking the wagon while it left Moghulsarai. This gets further support from the fact that even the train examiner who examined the hosepipes was not brought to the witness-box. According to the guard when the train was between the Warner and Home Signals of Dildarnagar, he found that the connecting hosepipes between two wagons had been cut.

If that was so, it was the duty of the Railway to disclose that when the train had left Moghulsarai there was nothing wrong in its hosepipes. Unfortunately, here also the evidence given on the side of the Railway is silent. Then the guard admitted that there were three escorts also along with him and that they were

guarding the train on either side. At least, these escorts would have been very important witnesses on the point as to how the train started from Moghulsarai and ultimately what happened between the warner signals and home signal of Dildarnagar Station.

But they also have been withheld. If it is true, as stated by the guard, that there was no arrangement for any person for coming to the flapdoors from the buffer and that the train was running all along at an average speed of 19 miles per hour, it is difficult to accept that any outsider could have managed to open the flapdoors of the wagon while it was in motion between Moghulsarai and Dildarnagar.

The probability is more in favour of the conclusion that somehow the seals and rivets of the wagon had been allowed to be broken at Moghulsarai and all arrangements had been completed there as to how the goods would be removed from the wagon when the train would leave that station and this could have been done only either by or in collusion with the servants of the Railway administration at Moghulsarai.

The trial court has disbelieved the evidence of guard to the effect that no man could approach the flapdoors while the train was in motion on the simple ground that D. W. 6, the Claim Inspector at Buxar stated in his evidence that there is, however, always a rod running from the middle of the wagon on each side up to the wheels. But there is no statement made by him that the rod could be used by a thief to reach the flapdoors from the buffer.

In the absence of such a statement, it was nothing but conjecture on the part of the trial court and that in spite of the statement made by the guard to the contrary that after all it was not impossible for a nimble thief to reach the door of the wagon from the buffer with the help of that rod. And if the statement of the guard is accepted as untruthful on this important part of the case, then there is nothing worthy of reliance left on the record to show that what happened near the signal of Dildamagar Station was not an attempt made by the Railway servants to cover the removal of the goods which had already been complete in between Moghulsarai and near the Warner signal of Dildarnagar. Further, it has to be remembered that the train stopped at that place for about 15 minutes.

Still, the guard was bold enough to admit that no fog signal had been given there. Then the guard's written statement which he claimed to have submitted to the Department recording therein as to what happened near the warner signal is not on the record of this case and what has been produced is a duplicate of it, namely, the guard's rough memo, which, on his own admission, remains always with him and is never submitted before any higher authority.

Therefore, much reliance cannot be placed upon that document. Lastly, what is most surprising is that it was after a long gap of six months when the guard gave a report about this incident to the Assistant Superintendent, Dinapore, in writing. Therefore, in this state of evidence it is difficult to believe that the version given

by the guard is at all a true story. Further, as already stated above, there is no evidence on the record to show as to how the wagon was dealt with while it was at Moghulsarai.

8. I have, therefore, no hesitation to hold that the disclosure made by the Railway is not at all sufficient to show as to how the consignment was dealt with from the time it reached Moghulsarai till its arrival at Dildarnagar. And so far as the evidence of D. W. 1 is concerned, that I think, is of little avail on the point that we are considering here. That evidence at best suggests only this much that there was a theft committed in the train in between Moghulsarai and Dildarnagar.

Even if it were so, that is not inconsistent with the plaintiff's case that it was done by or in collusion with the servants of the Railway Administration. Moreover, there is no clear evidence to establish conclusively that the goods that were recovered during the investigation of that case were exactly a part of this consignment and that they had been necessarily stolen in the course of a running train theft.

Therefore, I accept the contention of Mr. Das that in this case the contractual liability that was imposed upon the Railway under the proviso to Risk Note Z was not discharged by them. That being so, they cannot take any advantage of the Risk Note and their liability in that case has to be assessed on the footing of a mere bailee independent of any consideration of the Risk Note Z.

On the facts of this case, therefore, the onus lay on them to prove that the non-delivery was not due to any negligence or misconduct on the part of the Railway Administration or any of their servants or that in the course of the transit they had taken all care that a prudent owner of the same could have done. But as the evidence given by them is not only not worthy of reliance but wholly insufficient to show as to how the goods were dealt with in the course of transit, the liability for non-delivery is on them. Accordingly, in my opinion, the claim of the plaintiff has to be decreed.

9. Before, however, I close the case, I may mention here that Mr. Bose in his argument also tried to raise the contention that if it was a case of theft committed by or in collusion with the servants of the Railway Administration as suggested by the plaintiff, then the notice u/s 77 of the Indian Railways Act was inevitable for the maintainability of this suit, and, as it has not been done, the suit should fail on that ground alone.

In my opinion, there is no substance in this contention, firstly, for the reason that the case was all along fought at the trial court on the footing that it was a case of non-delivery and not of loss and secondly, the case here fails because of the failure on the part of the Railway to discharge the onus cast upon them under the proviso to Risk Note Z and not on the ground that it is a case of loss as contemplated u/s 77 of the Indian Railways Act.

10. Accordingly, the appeal is allowed with costs and the judgment and decree of

the trial court are set aside.

K. Dayal, J.

11. I agree.