
(1924) 11 MAD CK 0022
In the Madras High Court

The B.B. and C.I. Railway Co. Ltd.

APPELLANT

Vs

Nattaji Pratapchand Firm

RESPONDENT

Date of Decision : 18-11-1924

Acts Referred:

Citation : AIR 1925 Mad 745 : 87 Ind. Cas. 79

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—Ten bales of yarn were consigned on behalf of the plaintiff at Sidhapur Railway Station on the B.B. & C.I. Railway to

Bezwada. Only nine bales were delivered at Bezwada. The suit is for the price of the missing bale. The plaintiff got a decree against the B.B. &

C.I. Railway Co., and the company files the Second Appeal.

2. The facts so far as they appear from D.W. 2. (which were accepted by the Courts below) may be stated. The wagon (7365) containing the ten

bales passed through Dadar Junction (the junction connecting the B.B. & C.I. Railway and the G.I.P. Railway) when it was checked and the

goods found correct. From there the train passed ex Waribunder to Kalyan. There was shunting at Matunga on the way. The seals of the waggons

were intact then. The train next stopped at Kurla for shunting. It also stopped at Ghatkooper, Thana and Mumbra. When the train got in motion at

the Mumbra Station, the Guard (D.W. 2) noticed the doors of two waggons (7365 and another) open. But the train was not stopped. It next

reached Kalyan where he reported the matter. D.W. No. 5 took up the matter and reported to the Assistant Station Master (D.W. No. 1) and the

shunting master (D.W. 4). They got the waggon resealed and the waggon was

shunted to the tranship shed. D.W. 3 checked the contents of the waggon and found one bale missing. As I understand the evidence of D.W. 2, there was nothing wrong with the waggon until the train left Mumbra Station.

3. The risk note Exhibit-1 is in the Form B. - Under it the company is not liable 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 over the said railway or other Railway line working in connection therewith or by any other transport agency or agencies employed by them respectively, for the carriage of the whole or any part of the said consignment provided the term "wilful neglect" be not held to include fire, robbery from running train or any other unforeseen event or accident." The question of burden of proof was very much discussed before me. On this point I agree with the observations of Macleod, C.J. and

Crump, J. in *G.I.P. Railway v. Himatlai* AIR 1923 Bom. 389. "In this country a railway company should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods (at p. 354).

4. The onus lies on the plaintiffs to prove that loss was due to the theft or to wilful neglect of the company's servants" (at p. 352). See also

Narayana Aiyar v. The South Indian Railway Co. Ltd. AIR 1924 Mad. 388 and *East Indian Railway Co. v. Nathmal Bahari Lal* [1917] 39 All.

418. There is often a difficulty in proving wilful neglect because the only evidence of wilful neglect is the evidence which can be extracted in cross-

examination from the witnesses for the defence. *B.B. & C.I. Railway v. Dayaram* AIR 1922 Bom. 189. This conclusion seems to be in

accordance with the conclusion in *Ghelabhai v. The East Indian Railway Co.* AIR 1921 Bom. 443 *East Indian Railway Co. v. Kishan Lal Tirkha*

Mal AIR 1924 All. 7 and in *East Indian Railway Co. v. Jogpat Singh*. I observe that the conclusion of Daniels, J., in *East Indian Railway Co. v.*

Kishan Lal Tirkha Mal AIR 1924 All. 7 was arrived at after relying on *Secretary of State for India in Council v. Jiwan Abdullah* AIR 1923 All.

426 where Lindsay, J. held that the company is not liable if the case is one of

deterioration of the goods, and the plaintiff can recover for "loss"

only if they are lost by the Eailway administration and not following Hill Swangers and Co. v. The Secretary of State AIR 1921 Lah. 1 and

distinguishing H.C. Smith v. Great Western Ry. Co. (1922) L.R. 1 A.C. 178. Similar reasoning about "loss" was used by Page J. East Indian

Railway Co. v. Jogpat Singh . In the Bombay case the case of H.C. Smith Ltd. v. G.W.R. Co. (1922) L.R. 1 A.C. 178 was applied to Risk notes

in Form B. On the question as to whether plaintiff can recover only for goods lost by the Company or recover for deterioration of goods, I agree

with the decision of this Court in Madras and Southern Mahratta Railway Co. v. Subba Rao (1920) 43 Mad. 617. But I do not quite see how the

question as to what kind of loss plaintiff can recover for, has any bearing on the question what the company must prove and what the plaintiff must

prove. The case in Ghelabhai v. East Indian Railway Co. AIR 1921 Bom. 443 rests on Gurran v. M.G.W. Railway Co. (1896) 2 I.R. 183 the

weight of which is somewhat shaken by H.C. Smith v. G.W.R. Co. (1922) L.R. 1 A.C. 178 possibly they are distinguishable. It seems to me that

the Company to whom the goods are delivered must give prima facie or formal evidence that so far as they know, the company or its servants

through whose hands the goods passed are not keeping back the goods, which is at least a possibility. See East Indian Ry. Co. and G.I.P. Ry. Co.

Ltd. Vs. Firm Sukhdeo Das and Another, . For this purpose, they must tender their servants for cross-examination and it is for the plaintiff, if he

can, to prove by the cross-examination wilful neglect or theft by the Railway servants.

5. In the present case I am glad to say that the conduct of the company is perfectly straightforward and they complied with the requisites of G.I.P.

Ry. v. Himatlal AIR 1923 Bom. 389 by examining D.Ws. 1 to 5. The plaintiffs have been able to elicit by the cross-examination of D.W. 2 that

there was neglect of the guard in not stopping the train. As the door was found open as soon as the train started, the bale would have been

probably found on the line as there is little scope for theft in the running train; I assume robbery in the Form B is equivalent to theft. Great Indian

Peninsula Railway Co. v. Bholā Nath Devī Das AIR 1923 All. 79. The facts in B.B. & C. I Ry. v. Dayaram AIR 1922 Bom. 189 are different.

There it was found that a thief could enter either while the train was standing there (Narbada Bridge Cabin) or while the train was approaching the Narbada bridge and that it was pitch-dark night and the train would be going very slowly before reaching the station. Here the loss was in the morning before 9 a.m. and the probability of a thief stealing a bale of yarn is far less on the facts. The question is one of fact and as I think the inference of the Courts below is right. I accept their finding that the loss was due to the neglect of the guard in not stopping immediately he saw the doors open. Mr. Nambiar argued that this conduct does not amount to wilful neglect. In *Forder v. Great Western Railway Co.* [1905] 2 K.B. 532 there was no neglect. The consignment of sheepskins was placed in truck of wood chips, but there was no notice to the Company of the nature of the consignment. The case of *Joshwa Suckton & Co. v. L. and N.W. Railway* (1918) 87 L.J.K.B. 234 is also peculiar. It was held that sending a waggon of three ton capacity though asked to send a waggon of five ton capacity on account of a mistake did not amount to wilful neglect. It was believed by the defendants' foreman that the waggon was a waggon of a capacity of five tons. It had originally been standing between two waggons of other railway companies which were five ton waggons and it was believed to be of the same strength and these cases cannot help the appellant. The case in *Waklein v. London and South Western Railway* (1887) 12 A.C. 41 is a case of collision and *Pomfret v. Lancashire and Yorkshire Railway* [1903] 2 K.B. 718 is a case under Workman's Compensation Act. In *Grill v. General Iron Screw Collier Co.* (1866) L.R. 1 C.P. 600 some confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. Gross, therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care and skill. In *Re Young and Harston's Contract* [1886] 31 Ch. D. 168 Bowen, L.J., said "'The term 'wilful default' is not a term of art, and to pursue authorities with a view to defining for all time what is its meaning in a contract like this appears to me to press citation far beyond the point at which it ceases to be useful. The other word which it is sought to define is 'Wilful'. That

is a word of familiar use in every branch of law, it may have a special meaning, it generally as used in Courts of law implies nothing blameable, but

merely that the person of whose action the expression is used, is a free agent, and that what has been done arises from the spontaneous action of

his will"". Similar remarks are used about "wilfully neglecting" by Lord Coleridge, C.J. *The Queen v. Downes* [1841] 1 Q.B.D. 25. I think wilful

neglect has been proved in this case. I think on the facts, the Courts below were right in thinking that the loss is probably due to it. It is not

necessary to show that there is no other possible explanation for the loss. It is enough if ""the facts proved strongly preponderated in favour of the

theory"", which fixed the company with liability, (*Central India Spinning and Weaving Co. v. G.I.P. Railway* AIR 1922 Bom. 46. The second

appeal fails and is dismissed with costs. Appeal dismissed.