

(1928) 08 CAL CK 0011
In the Calcutta High Court

The Bengal Nagpur Railway Company, Limited

APPELLANT

Vs

Moolji Sicka and Co.

RESPONDENT

Date of Decision : 14-08-1928

Acts Referred:

Citation : 122 Ind. Cas. 625

Hon'ble Judges : Mitter, J

Bench : Single Bench

Judgement

Mitter, J.—This Rule was obtained by the Bengal Nagpur Railway Company Limited, for the revision of a judgment of the Small Cause Court Judge of Sealdah by which the defendant Company were made liable in an action brought by the plaintiffs opposite party for recovery of compensation from the defendant Company on account of damage to some goods booked from Tirosa Station to the Shalimar Station belonging to the defendant Company. The case made by the plaintiffs-opposite party is that out of a large number of bags of biri consigned from Tirosa, eleven bags were found to have been damaged by wet and the allegation is that this was due to the fault of the defendants' servants and consequently plaintiffs were entitled to recover damages. It is necessary in particular to refer to para. 3 of the plaint upon which some argument has been advanced before me. Paragraph 3 of the plaint runs as follows: "That it was ascertained on enquiry that the said damage was due to the consignment having been evidently carried on a wagon which was defective and that sufficient and reasonable care was not taken by the Railway Staff:" After the defendant Company had filed their written statement the matter proceeded to trial. Evidence was led on behalf of the plaintiffs to show that the biris were carried in a wooden topped wagon contrary to some rules of the defendant Company by which it was the duty of the Company not to carry such goods in monsoon weather in foreign Railway wagon with roof other than iron topped roof. The Subordinate Judge held after examining the evidence on both sides that the goods were carried in a wooden topped wagon. The Railway Company led evidence to show that the goods were not carried in a wooden topped wagon but

in an iron topped wagon and this case was not believed by the Small Cause Court Judge and the learned Judge held that as the goods were carried in a wooden topped wagon and that water was dripping from the roof according to the evidence, the goods were damaged by wet and the Railway Company were responsible for such damage. The Small Cause Court Judge granted a decree to the plaintiffs for Rs. 179-100 with proportionate costs. The Railway Company moved this Court and obtained this Rule on several grounds. The first ground on which the Rule was granted was that the Court below was wrong in allowing the plaintiffs to raise a new case at the time of the hearing at variance with that made in the plaint and in awarding the plaintiffs a decree on the basis of such new case made a case which is inconsistent with that made in the plaint, It has been argued by Mr. Sen who appears for the Railway Company that his clients have been considerably prejudiced by this change of case and there had been a variance between pleadings and proof and in the circumstances the judgment of the Small Cause Court Judge ought to be set aside and the matter remanded for re-trial. It appears, however from para. 3 of the plaint which has been, quoted in extenso in the previous part of my judgment that the plaintiffs pleaded a case of negligence in so far as they stated that the goods were carried in a defective wagon, The Railway Company did not ask for further and better particulars of negligence. At the time of trial plaintiffs led evidence to show that the wagon, according to the rules, was not suitable to the carrying of goods of the description which were carried. The Railway Company led evidence to show that, as a matter of fact, the goods were not carried in such wagon, namely, wooden topped wagon. The Station Master was called and he gave evidence that, as a matter of fact, the goods were carried in an iron topped wagon, but his evidence was not accepted. I do not think, therefore, that the Railway Company had no notice of the precise grounds on which the plaintiffs led evidence. it is only singular that the Railway Company did not make any application either oral or written before the Small Cause Court Judge asking him to postpone the hearing in order that the Rail-way Company might furnish evidence to rebut the new case of the carrying of these goods in a wooden topped wagon made by the plaintiffs in evidence. Paragraph 3. of the plaint sufficiently covered the case of negligence or of misconduct for in certain circumstances a negligence is good evidence for misconduct mismanagement of the Railway Company.

2. It has next been argued that the suit ought to have been dismissed as the plaintiffs did not disclose in their plaint that the liability of the Railway Company as a bailee Under Sections 151 and 152 of the Indian Contract Act was limited by two Risk Notes in the new Forms A and B and it is said that as the plaintiffs paid reduced freight, the liability of the defendant Company was to carry the goods free from all responsibilities except for any misconduct. It will appear that before 1924, the Railway Company were liable for wilful neglect but since 1924 instead of those words "wilful neglect" the word used in the Risk Note is simply "misconduct" and it cannot be argued now in view of the change in the form of the contract which limits the responsibilities of the Railway Company that the

Railway Company were not liable for mismanagement of the kind which has occurred in the present case. The Railway Company certainly had notice of the class of goods which had been Carried. The damage, it is not said or proved, is due to any event or any circumstance Over which the Railway Company had no control. The ordinary damage itself is presumptive evidence or negligence. The Railway Company might have discharged that burden which although it did not lie prima facie on them was shifted on, to the Railway Company after evidence was led to show that it was carried in a particular class of wagon to establish or to repel the presumption which arose in the circumstances of this case in favour of the plaintiffs.

3. I think the decision of the Small Cause Court Judge was right. He holds, as a matter of fact, that the damage was caused by water dripping from the roof by which these goods were wet and by the fact that the goods were carried in a wagon contrary to the rules of the Railway Company. It is said that those rules are not statutory rules. That may or may not be so, but the Railway Company have not denied that these rules existed and that shows that in their view the goods of this class should not have been carried in a wooden topped wagon and the servants of the Railway Company did not conform to the rules as it was their duty to do and the Railway Company are to be held liable. This Rule, therefore, is discharged with costs hearing fee one gold mohur.