
(1924) 02 CAL CK 0027
In the Calcutta High Court

The East India Railway Company

APPELLANT

Vs

Jagpat Singh

RESPONDENT

Date of Decision : 01-02-1924

Acts Referred:

Railways Act, 1890 — Section 72(2)(b)

Citation : 79 Ind. Cas. 126

Hon'ble Judges : Suhrawardy, J;Page, J

Bench : Division Bench

Judgement

Page, J.—In this ease some important; and interesting questions are raised in respect of the obligations of a Railway Company towards the owner of goods consigned to it for transportation. On the 24th January 1922, twelve tins of ghee were consigned to the B.I. Railway at Arrah to be carried to Chandernagore, and there to be delivered to the plaintiff, the Opposite Party. On the 21st August 1922, seven of the tins wore delivered to the plaintiff at Chandernagore, but the Railway Company failed to deliver five of the tins. The issue in this case is, whether the plaintiff is entitled to recover damages for the non delivery of the said goods. The Railway Company undertook to carry the goods on the terms of a Risk Note which was signed by the consignor. The Risk Note was in the Form (B) which has been approved by the Governor-General in Council pursuant to Section 72 (2) (b) of the Indian Railways Act (Act IX of 1890). It ran as follows:

Risk Note, Form B. (To be used when the sender elects to despatch at a special reduced or "owner's risk" rate articles or animals for which an alternative "ordinary" or "risk acceptance" rate is quoted in the tariff).

Whereas the consignment of twelve tins ghee tendered by meus as per forwarding order No. 77194 of this date, for despatch by the B.I. Railway Administration or their transport agents or carriers to Chandernagore Station and for which I we have received Railway Receipt No. 77194 of same date, is charged at a special reduced rate instead of the ordinary tariff rate chargeable for such consignment I we the undersigned do in consideration of such lower charge,

agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connection therewith, and also all transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals, may be carried from Arrah to Chandernagore harmless and free from all responsibility for any loss, destruction, or deterioration of or damage to the said consignment, from any cause whatever except for the loss of a complete consignment 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 lines working in connection thereto 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 a running train or any other unforeseen event or accident.

2. By Section 72 of the Railways Act it is provided that: 72 (1). The responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee Under sections 152 and 161 of the Indian Contract Act, 1872.

(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 Governor-General-in-Council.

(3) Nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a Railway Administration.

3. The learned trial Judge found, (1) that the Railway Company had not proved that the five tins had been lost, and (2) that the disappearance of the five tins was due to the wilful neglect of the servants of the Railway Company.

4. The first contention urged before us on behalf of the Railway Company, which is the petitioner, was that in order to obtain the benefit of the Risk Note it was not incumbent upon the Railway Company to prove that the goods were lost, inasmuch as the Railway Company admitted that the goods were and that the only issue in the case was whether such loss was due to the wilful neglect of the Railway Company or of its servants, the onus of proving wilful neglect lying on the plaintiff. In my opinion, this contention is unsound. In order to appreciate the object which the Legislature had in view in enacting Chapter VII of the Railways Act, " it is necessary to ascertain what has been the history of the law relating to

carriers by rail in this country. The first legislation on the subject is that contained in Act XVIII of 1854, Section 11 of which is as follows : " The liability of such Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in any wise affected by any public notice given, or any private contract made by them : but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servant": This continued to be the case until the passing of the Carriers Act 1865 ...On the 10th September 1867 it was decided in the case of *E.I.B. v. Jordan* 4 B.L.R.O.C. 97 : 14 W.R.O.C. 11 by a Divisional Bench of this Court (Peacock, C. J., and Macpherson, J.) that Railway Companies in India were common carriers, and liable as such, that is to say, as insurers of goods delivered to them We now come to the Railways Act of 1879, Section 2 of that Act contains the following provision: Nothing in the Carriers Act, 1885, shall apply to Carriers by Railway. I cannot read these words in any other sense than as repealing all the provisions of the Carriers Act which relate exclusively to Carriers by Railway and confining the operation of the remaining provisions to Carriers other than Carriers by Railway, so that by the repeal of so much of the Carriers Act as related to Railways, and that of the whole of the Railways Act of 1854, the liability of carriers by Railway as it stood before the Acts of 1854 and 1865 was restored follows that after the passing of the Act of 1879 the liability of Carriers in India, including Carriers by Railway, was not limited to a liability for negligence, but was a liability as insurers "of the goods delivered to them" (Per Petharam, C.J., *Ghogemul v. Commissioners for the Improvement of the Port of Calcutta* 18 C. 427 at P. 440 : 9 Ind. Cas. Dec. (N.S.) 285, see also *Changa Mai v. The Bengal Northwestern Railway Co.* 6 P.R. 1897, and *Irrawaddy, Flotilla Co. v. Bugwandas* 18 I.A. 121 : 18 C. 620 (P.C.) : 6 Sar. P.C.J. 40 : 15 Ind. Jur. 408 & 542 : 9 Ind. Dec. (N.S.) 418 (P.C.). The object and effect of Section 72 of the Railway Act of 1890 was, in my opinion, to limit the liability Railway Companies during the transit of goods consigned to them for carriage, and to substitute the obligations of a bailee for the obligations of an insurer of such goods which, prior to the passing of that Act, were imposed upon them under the Common Law. Section 72 of the Railway Act 1890 was enacted to confer a benefit upon Railway Companies, and, in my opinion, except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which pro tanto exempt it from liability, unless and until evidence has been adduced which satisfies the Court that a loss has occurred (see *GhelaBhoiPunsi v. E.I.B.* 63 Ind. Cas. 241 : 45 R. 1201 : 28 Bom.L.R. 525., *E.I. B. v. Nilkanta Boy* 22 Ind. Cas. 679 : 41 C. 576 : 19 C.L.J. 142 : 19 C.W.N. 95, and *G.I.P. Railway Company v. Jitan Ram* 72 Ind. Cas. 440 : (1923) pat. 82 : 4 P.L.T. 173 : 1 p.L.R. 169 : AIR (1923) AIR (Pat) 285 : 2 Pat. 442. In the last case *Mullick, J.*, observed:

It is clear that upon this special contract the burden of proof lies in the first

instance upon the defendants, that is to say, they must first prove that there was such loss as is contemplated by the first part of the Risk Note, and -when have done so the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendants or their servants as provided in the latter part,

(See also *E.I.B. v. Kanak Behari Hal-dar* 44 Ind. Cas. 691 : 22 C.W.N. 622)

5. It was further contended that, if it was incumbent upon the Railway Company to prove that the goods were "lost" within the meaning of that term as used in the Risk Note, the Railway Company had discharged the onus which lay upon it by proving that the goods in question had not been delivered to the consignee. It was urged that "loss" as contemplated in the Risk Note meant loss to the owner, and that such loss accrued whenever the person entitled to possession of the goods was wrongfully deprived of such possession by reason of the non-delivery, or the miss delivery of the goods or otherwise.

6. It was admitted and urged by both parties, in my opinion, rightly that the same construction must be put upon the term loss in the Risk Note and in the sections which compose Chapter VII of the Railways Act, 1890.

7. Now, a distinction is drawn between suits for non-delivery of goods consigned to a carrier, and suits for compensation for the loss of such goods in Articles 30 and 31 of the first Schedule to the Limitation Act (Act IX of 1908), and, if the proper meaning to be attributed to the term "loss" is, that for which the Railway Company contends, the learned Vakil who appeared for the Railway Company was constrained to admit, not only that the word "destruction" in the Risk Note and in Section 72 is mere surplus age, but also that it would follow that where goods consigned for carriage were not duly delivered because, for example, such goods were being deliberately detained by the Railway Company, or had been miss delivered to a person other than the consignee, or had been converted by the Railway Company to its own use, in each of such cases the Railway Company would be entitled to pray in aid the provisions of Section 72 which limits its liability in respect of "loss" to that of a bailee.

8. In my opinion, the meaning for which the Railway Company contends cannot reasonably be attributed to the term "loss" either in the Risk Note or in Section 72 and the kindred sections of the Railway Act 1890.

9. In the course of the argument in *Seam v. L. & S.W. Ry.* (1855) 10 E. 793 : 3 C.L.R. 597 : 24 L.J. E. 1800 : 1 Jur. (N.S.) 236 ; 159 E.R. 660 : 102 R.R. 833., in which case the question arose whether goods the delivery of which had been delayed were lost within the meaning of that term used in the analogous provisions of the Carriers Act, 1830, Section F. Baron Martin put this question to Counsel, "Suppose a person delivered to a porter at a railway station a casket of jewels, and in consequence of his refusal to forward it the casket remained for some time at the station, would that be a "loss" within the Act?" and Baron Alderson asked, "Suppose the goods were known by the carrier to exist, but

were not delivered by him for a month, would that be a "loss" within the Act?" An affirmation that, in such circumstances, the goods have been "lost" surely involves a distortion of the meaning of the word so extravagant as to approach an abuse of the English language. That judicial authority is not wanting in support of the construction of the term "lost" "for which the Railway Company contends would appear to be due, if I may say so with great respect, to the fact that the intention of the legislature in enacting Chapter VII of the Railway Act of 1890 has not always sufficiently been borne in mind. The object, and, in my opinion, the effect of Section 72 was not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to a Railway Company, but to lessen the burden of the obligation which, prior to the passing of Section 72, had lain on Railway Companies as insurers of such goods.

10. which ought to be declared and are not declared are detained by a carrier without being lost by him, he is liable for such detention," observed : " the Statute then proceeds to enact that no carrier shall be liable for the loss of, or any injury to, any of the enumerated articles. This does not mean the loss of the monies of the carrier, but the loss of the article itself, or injury to it. In ordinary parlance, this appears to mean the loss by the carrier of the articles committed to him, or injury to them, whilst in his care, not the loss sustained by the owner by non-delivery of the article in due time or altogether, or the loss of the use of the article by him. By the term " the injury " is clearly meant the injury to the article itself and the reason of the law must be considered as being to protect the carrier, not in all cases where the owner of the articles sustained a damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel was either abstracted altogether, or taken from the place where it ought to be, and was incapable of being delivered at the time it ought to be by reason of that sort of loss. We think this is the true construction of the clause and the carrier is exempted only from being responsible for a loss by him of the particular articles named." The same interpretation was given to the term " loss " in *Mian v. Brasch* (1883) 10 Q.B.D. 142 : 52 W.J.Q.B. 127 : 47 L.T. 685 : 31 R. 190 : 47 J.K.P. 180. The facts in that case were that on 13th November 1879 the plaintiff delivered to the defendants, who were carriers, for hire from London to Rome, a trunk to be sent from London to Liverpool by rail, and thence to be shipped to Italy. Through the negligence of the defendants' servants the trunk was placed in a vessel bound for America and was shipped to New York. The mistake was not discovered until 15th December 1879. The issue in the case was whether the trunk had been " lost," and Lindley, L. J., in giving the judgment of the Court observed: " The result comes to this; if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers Act, must depend upon whether they have been lost by the carrier as distinguished from lost to the owner: See *Ream v. L. & S.W. By. Co.* (1855) 10 E. 793 : 3 C.L.R. 597 : 24 L.J. E. 1800 : 1 Jur. (N.S.) 236 ; 159

E.R. 660 : 102 R.R. 833. (supra); and this, again, must depend on the facts of each particular case. If the carrier temporarily loses the goods, and delivers them within a reasonable time after he discovers them, he will not be liable; but if he keeps them after he has recovered them, the Carriers Act will not protect him from such consequent breach of the duty. The obligation on the part of the carrier to deliver the goods will remain or revive, and he will be responsible for future Breaches of that obligation As we understand the facts, the plaintiff's trunk was shipped and sent to New York as Hamburge's case, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered; and the carriers had lost possession of the trunk, and did not in fact know where it was nor what had become of it. This was, in our opinion, a "loss" of the trunk by the Carriers."

11. In my opinion, the term " loss " as used in the Risk Note and in Chapter VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and such " loss " occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily, or through inadvertence, loses possession of the goods, and for the time being is unable to trace them. The term " loss " denotes a fact, not a cause of action. A valid cause of action against a Railway Company in India for damages for the non-delivery of goods consigned to it for carriage must be based either on contract or on tort, and must arise from the breach of some duty owed to the plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occurred may sometimes found, sometimes defeat, such a cause of action: But a cause of action for loss without more is not known to the law. Non-delivery of goods consigned to a Railway Company for conveyance may be due to the fact that the goods are being deliberately detained by the Railway Company or that they have been miss delivered to some person other than the consignee, or that they are " lost", It does not, therefore, necessarily follow that by proving the non-delivery of such goods the " loss " of the goods is also proved, for non-delivery or miss delivery of goods may be due to " loss," or may be due to other causes.

12. The question as to what is the meaning of the term " loss " in Risk Note (B) and in Section 72 of the Railway Act does not appear up till now to have arisen in the Calcutta High Court. In Civil Rule No. 972 of 1922 my brothers Rischarlson and B.B. Ghose, in a case where damages were claimed against the Assam Bengal Railway Company for non delivery of goods consigned to it for transportation, held that it was incumbent upon the plaintiff to prefer a written notice of his claim to the Railway Company in accordance with the provisions of Section 77 of the Railway Act. In the course of his judgment, Richardson, J., observed: " I have indicated that in my view a claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. If that be so, it seems to follow that the statutory notice is a condition precedent to a verdict being taken on that alternative

footing, because on that footing the goods may have been lost. If it be conceded, though I do not decide, that where goods are wrongfully detained by a Railway Company no notice is necessary u/s 77, a plea by the Company of want of notice must at least be met on that ground, and the Court must be asked to find that the goods were being detained, and were not lost when they ought to have been delivered. Where detention is not pleaded or put in issue, a claim simplicities for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of Section 77.

13. The ratio decidendi of that case is consistent with the construction which I have placed upon the term " loss" in the Risk Note, although the interpretation to be given to the term did not directly arise for determination in that case.

14. The view which I have expressed as to the meaning of the term " lose " in the Risk Note and in Section 72 is supported by three recent decisions of the Allahabad High Court *Secretary of State for India v. Jiwan* 71 Ind. Cas. 609 : 45 A. 380 : 21 A.L.J. 220 : AIR (1928) (A) 426, *E.I. B. v. Kishan Lal* 73 Ind. Cas. 986 : 45 A. 530 : 21 A.L.J. 438 : 9 O A.L.R. (A.) 531 : AIR (1924) (A.) 7, *E. I. B. v. Makhan Lal* (13). The same meaning has been attributed to the term " loss " by the Patna High Court in *E.I. B. v. Kali Gharan Ram* 69 Ind. Cas. 103 : (1922) Pat. 145 : 3 P.L.T. 215 : AIR(1922) (Pat) 106, by the Chief Court of the Punjab in *Changa Mai's* case 6 P.R. 1897. (supra) ; in the Bombay High Court by *Kajiji, J.*, in *O.1. P. By. v. Bam Chunder Jagannath* (15), and in the Lahore High Court by *Abdul Roof, J.*, in *Bill Sawyers & Co., v. Secretary of State* 61 Ind. Cas. 926 : 2L. 133 : 3 L.L.J. 297. In each of the last two cases, and in *C.I.P. By. v. Jitan Bam* 72 Ind. Cas. 440 : (1923) pat. 82 : 4 P.L.T. 173 : 1 p.L.R. 169 : AIR (1923) (Pat) 285 : 2 Pat. 442, however, a Division Bench has held that " loss " means loss "to the owner or Consignor of the goods. It is to be observed that, whereas *Jwala Prosad, J.*, in *E.I.B. v. Kali Charari Bam* 69 Ind. Cas. 103 : (1922) Pat. 145 : 3 P.L.T. 215 : AIR (1922) (Pat) 106, (supra) held that when goods are not delivered by the Railway Company they are not " lost," *Mullick, and Bucknill, J J.*, in *O.1. P. By. v. Man Bam* 72 Ind. Cas. 440 : (1923) pat. 82 : 4 P.L.T. 173 : 1 p.L.R. 169 : AIR (1923) (Pat) 285 : 2 Pat. 442. (supra) held that goods which are not delivered or are miss delivered are " lost" within the meaning of that term as used in Risk Note (B) and in sections 72 and 80 of the Railways Act. As I construe the term loss, with great respect to these learned Judges, I am unable to accept either of these propositions as being correct. It appears to me that it is equally inaccurate to affirm that goods which are not duly delivered, or have been miss delivered, are lost, as to assert that they are not lost. The true view would seem to be that in either case the goods may or may not be lost, and that proof of non-delivery or miss delivery is by no means conclusive evidence as to whether or not a loss has occurred. Indeed, I go further, and beg leave to state that, in my opinion, from such evidence alone an inference could not reasonably be drawn that the goods had been lost. It was, moreover, conceded by the learned Judges who decided the case of *G.I.P. By. v. Jitan Ram* 72 Ind. Cas. 440 : (1923) pat. 82 : 4 P.L.T. 173 : 1 P.L.R. 169 : AIR (1923) (Pat) 285 : 2 Pat. 442.

(supra) " that if loss to the owner was meant, then there was no necessity for any reference to liability for destruction of the goods.

15. On the other hand, the Madras High Court in the case of Madras Southern Mahratta Railway Company v. Subba Rao 55 Ind. Cas. 754 ; 43 m. 617 : (1920) M.W.N. 198 : 11 L.W. 358 : 38 M.L.J. 360 : 28 M.L.T. 49. finding itself unable to accept the view that the term " loss " in the Risk Note (B) includes " destruction, deterioration and damage", held that "if goods entrusted to the care of the Company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to us that the Company should be held to have lost the goods." Seshagiri Ayar, J., was of opinion that the term "loss" bore the same meaning in Section 72 as that attributed to " total loss" in a policy of insurance. But, with great respect, the obligations undertaken by an insurer under a policy of insurance differ to from those undertaken by a Railway Company under a contract of carriage, such as that contained in Risk Note (B). The Railway Company undertook to carry the goods as a bailee on the terms of the Risk Note, but the insurer under a policy of insurance is not in any sense a bailee of the goods covered by the policy, his undertaking being that he will indemnify the assured in respect of the pecuniary loss which the assured may suffer by reason of the happening of any or every specific peril set out in the contract of insurance.

16. For the reasons which I have given, I have been unable to persuade myself that the construction which was put upon the term " loss " in the last mentioned oases is correct, and I am unable to adopt it. The question then arises, were the five tins which the Railway Company failed to deliver in this case "lost " in the sense which I have indicated? In my opinion, the only inference which can reasonably be drawn from the evidence adduced at the trial is that the goods in question were lost, and there was no evidence which would justify the finding of the learned Judge that the five tins were not lost.

17. In these circumstances, the only issue which remains is whether the loss of these five tins was due to the wilful neglect of the Railway Company, or of its servants, as provided in the Risk Note. The learned Judge has decided that issue in a manner adverse to the Railway Company. Was there evidence from which the learned Judge could reasonably have arrived at that conclusion? Having regard to the following facts, namely, that ghee is a perishable article; that there was no satisfactory evidence adduced to prove that the five tins were put into wagon No. 34395 at Dinapur; or that they arrived at Asansole; and that no attempt was made by the Railway Company's servants between 11th February, when the wagon arrived at Asansole and the 28th April to ascertain whether the goods loaded in the wagon were safe and sound, I am unable to hold that there was not evidence adduped before the learned trial Judge which would justify him in finding that the loss of the goods was due to the wilful neglect of the Railway Company's servants. The other findings of the learned trial Judge are not challenged. In these circumstances, the rule, in my opinion, should be

discharged with costs.

Suhrawardy, J.

18. I agree. The rule is discharged with costs. We assess the hearing fee at two gold mohurs.