

(1923) 04 PAT CK 0004
In the Patna High Court

The East Indian Railway Company Ltd.

APPELLANT

Vs

Netram Ganesh Lal

RESPONDENT

Date of Decision : 17-04-1923

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 25
Railways Act, 1890 — Section 72(2), 76

Citation : AIR 1924 Patna 812

Hon'ble Judges : Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—This is an application for revision u/s 25 of the Provincial Small Cause Courts Act filed by the defendants, the East Indian Railway Company, against the decision of the Small Cause Court Judge of Dhanbad, dated the 14th August. 1922. The suit was brought by the plaintiffs for compensation for non-delivery of three bags of flour out of a consignment of 221 bags. The defendant Company raised the defence, inter alia, that the goods were despatched at owner's risk under Risk Note, Form B, and they were not liable for compensation as the three bags were lost during transit and the loss was not due to wilful neglect on the part of the Railway Administration or to theft by, or to the wilful neglect of, its servants. The learned Subordinate Judge has held that the Risk Note, Form B, was executed by the consignor, but he threw the onus upon the defendant Company to prove that the three packages in question were put into the wagon and sent but were lost. He held that there was no such evidence and that unless loss is proved the plaintiffs could not be called upon to prove that the loss was due to wilful neglect of the defendant. In support of the view taken by him the learned Judge relied upon the case of Ghelabhai Punsli v. East Indian Railway Co. (1921) 45 Bom. 1201. He accordingly decreed the suit with costs.

2. It has been argued by the learned Vakil for the petitioners that the learned Judge was wrong in throwing the onus upon the defendant Company to prove the loss in the first instance. He argues that the onus was entirely on the plaintiffs to prove wilful neglect on the part of the defendant Company. He further argues

that, in any event, it was admitted by the plaintiffs in the plaint that the three packages in question were lost and, therefore, the defendant Company was not called upon to adduce evidence to prove the loss.

3. As regards the first point, the question is now settled by the decision of this Court in the case of *Great Indian Peninsular Railway Co. v. Jitan Ram-Nirmal Ram* 1923 Patna 285 that the loss referred to in Section 72 and other Sections of Chapter VII of the Indian Railways Act is the loss suffered by the consignor or the true owner, where such loss occurred by reason of mis-delivery or non-delivery. The word "loss" in the Risk Note is not confined to the case of involuntary or unwilling parting with the things with reference to which the word is used. If that is so, then non-delivery of the three packages is question in the present case amounts to loss within the meaning of the term used in the Risk Note executed by the consignor and, therefore, it was not necessary for the Railway Company, in the first instance, to prove the loss by adducing evidence on the point. Moreover, the loss of the packages was, I find, clearly admitted by the plaintiffs. The onus was, therefore, upon the plaintiffs to prove wilful neglect on the part of the Railway Administration or, theft by or to the wilful neglect of its servants, agents or carriers as provided for in the Risk Note, Form B.

4. It has been argued by the learned Vakil of the opposite party that, u/s 76 of the Indian Railways Act, it was not necessary for the plaintiffs to prove how the loss was caused, but, as was held in the case of *Great Indian Peninsular Railway Co. v. Jitan Ram-Nirmal Ram* 1922 Pat. 17 the ordinary liability u/s 76 of the Indian Railways Act was limited by the special agreement entered into by and between the parties under the Risk Note, Form B. Such an agreement has been saved by Clause (2) of Section 72 of the Indian Railways Act and the parties were bound thereby. I am, therefore, of opinion that the learned Judge was wrong in throwing the onus upon the defendant Company to prove the loss in the first instance. In order to succeed in the action, it is incumbent upon the plaintiff to prove wilful neglect on the part of the defendants or theft by, or wilful neglect of its servants, transport agents or carriers as provided by the Risk Note. The decree of the Court below must, therefore, be set, aside and the case remanded to it for decision after throwing the onus of proof on the plaintiffs as stated above. It would be open to the plaintiffs to adduce evidence of wilful neglect if they choose to do so. Cost will abide the result. Hearing fee one gold mohur.