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MANU/BH/0215/1927

Equivalent Citation: AIR1927Pat234, (1927) ILR 6 PAT 718, 102Ind. Cas.673

IN THE HIGH COURT OF PATNA
FULL BENCH

Decided On: 26.04.1927

Appellants: **Puran Das**
Vs.
Respondent: **East Indian Railway Co.**

Hon'ble Judges/Coram:
Thomas Fredrick Dawson Miller, C.J., B.K. Mullick, Jwala Prasad, Das and Kulwant Sahay, JJ.

JUDGMENT

Thomas Fredrick Dawson Miller, C.J.

1 . In this case sixteen bales of cloth were delivered to the East Indian Railway Company at their station at Howrah consigned to the plaintiff at Bhaptiahi, a station on the Bengal and North-Western Railway Company's system. Only fourteen bales were delivered to the plaintiff at Bhaptiahi and he sued for the value of the missing bales alleging that they had been lost by the negligence of the servants of the Railway Companies, both being impleaded as defendants. Both companies denied liability and relied on the terms of the Risk Note, Form B, under which the goods were carried as exempting them from liability. The Bengal and North-Western Railway Company also alleged that they received only fourteen bales of the sixteen from the East Indian Railway Company and were therefore not liable to deliver more: than they received.

2 . The trial Court found that the Bengal and North-Western Railway Company received only fourteen bales from the other company and therefore were not liable. As against the East Indian Railway Company the Court found that they were not exempted from liability under the Risk Note which whilst exempting the carrier from loss, destruction, deterioration of, or damage to the goods, unless caused by the wilful neglect of the company's servants, did not exempt them from liability for non-delivery.

3 . The District Judge of Bhagalpur on appeal by the East Indian Railway Company held that the company was protected from liability on two grounds, first, that the case made by the plaintiff in his plaint was that the goods had been lost and no issue had therefore been raised upon this point. As the railway company was not liable for loss of the goods unless caused by the wilful negligence of the Railway Administration or its servants or by theft by the latter the company was not liable in the absence of any evidence of willful neglect or theft; secondly, following the decision of this Court in G.I.P. Ry. Co. v. Jitan Ram A.I.R. 1923 Pat 285 he held that the word loss in the Risk Note was wide enough to include everything which amounted to a loss to the owner and that nondelivery was loss within the meaning of the Risk Note.

4 . On second appeal to the High Court my brothers Das and Adami, JJ., differing

from the view expressed, in G.I.P. Ry. Co. v. Jitan Ram A.I.R. 1923 Pat 285 were of opinion that mere non-delivery to the consignee was not in itself evidence of a loss of the goods within the meaning of the Risk Note and, as no finding had been come to by the lower appellate Court whether the goods had been lost, they remanded the case to that Court for a finding whether the Railway Company had established that the loss had occurred by reason of the fact that the defendant company to which the goods had been consigned for conveyance involuntarily or through inadvertence lost possession of the goods and for the time being were unable to trace them.

5. The District Judge on remand found that the company had not proved that the loss occurred by reason of its losing possession of the goods and being unable to trace them. On this finding Das and Adami, JJ., disagreeing with the decision in the earlier case cited referred the appeal to a Full Bench for determination, the question of law being formulated thus:

> Whether the Risk Note in this case applies not only when the goods have been lost by the Railway Company in the sense that it cannot trace them but also when they are lost to the owner because the Railway Company fails to deliver them to him in breach of its contract for any reason whatsoever

6. Shortly put the facts upon which our decision must depend are as follows: Sixteen bales were delivered to the East Indian Railway Company consigned to the plaintiff. Fourteen bales only were delivered. What happened to the two missing bales there is no evidence on the record to show. The Railway Company has therefore not shown by evidence that the goods were lost in the sense that they have disappeared and cannot be traced or have been destroyed or rendered valueless. In other words it has not been shown by evidence that there was a loss of the goods as distinguished from a loss to the owner thereof.

7. By the Risk Note under which the goods were carried the owner in consideration of having the goods carried at a special reduced rate instead of the ordinary tariff chargeable for such consignment undertakes to hold the Railway Administration:

> 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 or one or more packages forming part of the consignment due either to the wilful neglect of the Railway Administration, or to theft, by or 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 counexion 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 a running train or any other unforeseen event or accident.

8. It is not disputed that if the two bales-were lost within the meaning of the Risk Note the onus of proving wilful neglect or theft by the company or its; servants would rest with the plaintiff and that onus has not been discharged. The question for determination raised in the order of reference depends upon whether there was a loss of the two bales within the meaning of the Risk Note. Two views have been expressed in the High Courts in India as to the meaning of the word "loss" in this form of risk note. One is that loss as there used means loss to the owner by reason of the fact that he has failed to get delivery of his goods. This is the view expressed in the case

of G.I.P. Ry. Co. v. Jitan Ram A.I.R. 1923 Pat 285 already referred to.

9 . A somewhat similar view was expressed in M. & S.M. Ry. Co. v. Haridoess Banmalidoss [1918] 41 Mad. 871 where it was held that a mis-delivery of the goods to the wrong, consignee would be covered by the word loss. That decision, however, is not a direct authority upon the question for determination here. The other view is that expressed by Page, J., in E.I. Ry. Co. v. Jagpat Singh MANU/WB/0508/1924 : AIR1924Cal725 where it was held that the term loss as used in the Risk Note and in Section 72 of the Indian 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 themselves whilst 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.

10. I agree that the onus of proving that the goods were lost within the meaning of the Risk Note rests primarily with the Railway Company which seeks to exempt itself from liability to deliver by reason of the exemptions contained in the contract.

11. If "loss" as used in the Risk Note includes pecuniary loss to the owner then that onus has been satisfied in this case. If, on the other hand, it must be restricted to a loss of the goods themselves then there is no evidence to show that they were lost, and were this merely a suit based upon failure to deliver them without any averment in the plaint except non-delivery I should hold that the Railway Company has failed to discharge the onus. But in my opinion the learned District Judge was right in holding that the case is concluded by the pleadings.

12. It is true that the plaintiff alleges in para. 7 of his plaint that on account of non-delivery he has suffered a loss of Rs. 963-14-0, but in the earlier paragraphs of the plaint he alleges that he came to know that the goods had been lost owing to negligence on the part of the servants of the defendants and later refers to the two bales "which were not found". The defendant whilst not admitting the allegations in the plaint relies upon the provisions of the Risk Note which exonerate the company from liability and pleads that there was no negligence on the part of the servants of the company. Accordingly when issues were framed there was no issue as to whether the goods had been lost or not. In these circumstances it being admitted that there was a loss of the goods the onus no longer lay upon the defendants to call evidence upon the point which was admitted in the pleadings. This matter is not one of mere form for, had there been no admission that the goods were lost and had an issue been raised upon this question it must be presumed that the defendants would have called evidence to explain as far as lay in their power how it came that the missing goods were not delivered, and even when the case was remanded for a further finding whether the Railway Company had established that the loss occurred by reason of the fact that the defendant company to which they had been consigned for conveyance involuntarily or through inadvertence lost possession of the goods and for the time being was unable to trace them, the lower appellate Court was directed to decide this point on the evidence already on the record.

13. In my opinion for the reasons already given the decision appealed from was right and this appeal should be dismissed with costs, here and in all Courts.

B.K. Mullick, J.

14. I agree that the reference 'does not arise.

Jwala Prasad, J.

15. I have had occasion to determine a point similar to that raised in the order of reference so far back as 1922 in the case of the E.I. Ry. Co. v. Kali Charan Ram Prasad A.I.R. 1922 Pat 106. I discussed the point in some detail and came to the conclusion that "loss" in Sections 72 to 77 of the Railways Act or in the Risk Note does not include a case based on non-delivery of the article consigned to the Railway Company for transit. The question seems to have been subject matter of decision in several cases in this and in other High Courts and has led to a sharp divergence of opinion. Shortly after Mr. Justice Das passed his order of remand on the 7th of July 1926, in the present case, indicating his views on the subject, the point again arose in the case of Ganesh Das Bisheshwa Lal v. E.I. Ry. Co. A.I.R. 1927 Pat 193 before Bucknill, J., and myself, and we. considered all the authorities for and against and agreed with the view taken by my learned brother Das, J., I fully set out the reasons in support of my view in my judgment in that case and shall, therefore, deal with it briefly.

16. Sections 72 to 76 of the Indian Railways Act deal with the responsibility of the Railway Company in the matter of the carriage of goods. Clause (1) of Section 72 makes the Railway Company liable as bailees under Sections 151,152 and 161 of the Indian Contract Act, 1872, Clause (2) of that section forbids any limitation of that responsibility except as provided therein. One of those provisos is, that the responsibility of the Company case be limited by an agreement in writing executed by the person delivering the article it the form approved by the Governor-General in Council. Risk Note B was introduced by the Railway Company in order to define and describe the limited responsibility of the company with regard to goods conveyed at reduced rates. Generally speaking, the carriage of goods under this Risk Note is said to' be at the owner's risk. Under the Risk Note the consignor agrees, and undertakes:

> to hold the railway administration 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 or 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 rafter transit.... Provided the term wilful neglect' be not held to includes fire, robbery from a running train or any other unforeseen event or accident.

17. This agreement, as set forth in the risk note, is an exception to the general liability of the Railway Company as a bailee under Sections 151, 152 and 161 of the Contract Act, Section 151 requires the bailee to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods. Section 152 makes the Railway Company responsible as bailee for the loss, destruction or deterioration of the article bailed unless it has taken the amount of care described in Section 151. Section 161 makes the Railway Company responsible as bailee for the delivery and tendering at the proper time to the bailor of the goods as bailed, failing which the company is liable to the bailer for any subsequent loss, destruction or deterioration of the property. Section 160 imposes an obligation upon the bailee to return or deliver, according to the bailor's directions, the goods bailed as soon as the time for which they were bailed has expired failing which the bailee is liable for non-delivery. Section 72 deals only with the responsibility arising from loss, destruction or deterioration of goods delivered to the railway administration for

carriage and does not deal with the responsibility for non-delivery. Similarly the agreement in the Risk Note based upon Section 72, limits the general liability of the railway administration only in respect of loss, destruction or deterioration of goods consigned to it and not in respect of non-delivery of the goods. The responsibility to deliver the goods in the same quantity and condition as consigned to the railway administration arising under the common law and Section 160 of the Indian Contract Act remains unaffected and such a responsibility cannot in any way be limited by any contract between the consignor and the consignee whether the care of the goods is undertaken on reduced rate or even free of any rate.

18. Upon this principle an hotel keeper is liable for he loss of his guest's goods though no negligence on his part is proved. The Risk Note only affects the question of onus. Under the common law, as set forth in the Contract Act relating to the responsibility of a bailee, the onus is upon him to show that he used diligence and care in respect of the goods bailed. The Risk Note purports to shift this onus by providing that in case of loss of goods by the Railway Company, the onus will be upon the consignor or the bailor to show that the loss was due to theft by the latter. Until loss is proved by the company, the presumption under Section 114 of the Evidence Act would be that the goods are in the possession of the Railway Company in the same condition in which they were delivered to the company until the contrary is proved.

The Risk Note is an exception to the ordinary responsibility of the Railway Company for the loss, destruction or deterioration of the goods consigned. It must, in the first instance, be proved by the company that the circumstances in which exception from the ordinary responsibility is claimed existed in the case. In other words, the Railway Company must prove that the goods consigned were lost, destroyed or deteriorated before they can take advantage of the agreement contained in the Risk Note. It is not sufficient for the Railway Company to plead the execution of the Risk Note or to plead the loss, destruction or deterioration; but the Railway Company must prove that there was loss, destruction or deterioration such as is contemplated in the agreement set forth in the Risk Note. Unless this is primarily proved the ordinary responsibility of the Railway Company as bailee under Sections 151,152 and 161 does not cease. The object of this requirement for the Railway Company to prove loss, destruction or deterioration is that the consignor will then be in a position to know how his goods were dealt with and that the Railway Company exercised primarily the ordinary care that is required of it as a bailee. If is only after this is established that the Railway Company can plead (exemption from the liability for the loss, destruction or deterioration of the goods under the Risk Cote B. "The words loss destruction or deterioration" in the risk note do not 'cover the case of non-delivery, mis-delivery, detention, etc.

19. The last words are expressly stated in the risk note in the case of H.G. & Smith and Co. Ltd. v. Great Western Ry. Co. [1922] 1 A.C. 178. referred to and relied upon by Mr. Justice Mullick in the case of the G.I.P. By. Co. v. Jitan Ram Nirmal Bam A.I.R. 1923 Pat 285. The Risk, Note form in that case clearly shows that non delivery and mis-delivery are quite different from loss, destruction or deterioration. The Risk Note must be construed strictly, and if for some reason the Legislature did not think it proper to include cases of non-delivery or mis-delivery or detention, we cannot add those words to the Risk-Note in order to amplify the scope of it and to limit the liability of the Railway company with regard to goods consigned to it.

20. Now the difference between non-delivery on the one hand and loss, destruction

or deterioration on the other has been recognized in Articles 30 and 31 of Schedule 1 to the Indian Limitation Act. Before that, provision similar to Article 30 only existed which related only to loss, destruction or deterioration. Questions were then raised as to whether cases of non-delivery would come under that Article or under Articles 149 and 150 of the Indian Limitation Act, the latter being applicable to cases where there is no express provision in the Act. It was with a view to set at rest the question raised that Article 31 was subsequently added to the Limitation Act. In spite of that the words non-delivery, mis-delivery or detention were not added to the Risk Note B. The Indian Contract Act also makes a distinction between non-delivery, loss, destruction and deterioration. Sections 151 and 161 relate to loss, destruction and deterioration, while Section 160 relates to non-delivery. The Risk Note B is similar to the risk note in the case of Hearn v. London & S.W. Ry. Co. [1855] 10 Ex. 973. where Baron Parke, J. held:

> the word 'loss' does not mean the loss of the moneys 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 articles in due time or altogether the loss of the use of the article by him...the carrier is exempted only from being responsible for a loss by him of the particular articles named.

21. In the case of Millen v. Brasch [1882] 10 Q.B.D. 142 Lindley, L.J., observed:

> whether the goods not permanently lost are lost within the meaning of the Carrier's Act, must depend upon whether they have been lost by the carrier as distinguished from loss to the owner.

22. I would accordingly answer the question raised in the order of reference that the risk note applies only when the goods are lost by the Railway Company and has gone out of its possession or that the company cannot trace them so as to be able to deliver the same to the consignor. It does not include loss to the owner on account of the non-delivery of the article by the Railway Company in breach of its contract.

23. The plaintiff in the present case claims compensation in respect of two bales of cloth out of sixteen bales which were not delivered to him. The case as laid in the plaint is to my mind on account of non-delivery of the goods as is expressly stated in paragraph 7 of the plaint. This is also clear from the cause of action stated in paragraph 8 of the plaint. The cause of action was not based upon the loss of or injury to the goods.

The goods in the present case (sixteen bales of cloth) were booked at the Howrah railway station on the East Indian Railway to be carried and delivered to the plaintiff at Bhaptiahi station on the Bengal & North Western Railway. The plaintiff took open delivery on the 26th of February 1921, at Bhaptiahi station and got only fourteen bales after a list of the same was made by the Delivery Inspector of the Defendant No. 1, (the Bengal & North Western Railway Company) and noted in the Delivery Register, The plaintiff did not get the two bales in question. Accordingly he states that the cause of action arose on the 26th February at Bhaptiahi when and where the goods were to be delivered and were not delivered. The cause of action stated is in accordance with Article 31 of Schedule I to the Limitation Act which relates to non-delivery and states in column 3 that the cause of action in such a case arises from the date when the goods ought to be delivered. The plaintiff does not base his cause of

action for loss of his goods, for, in that case he would have stated the cause of action to have arisen on the date when the loss or injury occurred as required by Article 31 of the Limitation Act.

24. In paragraph 3 of the plaint the plaintiff states that when he did not get delivery of the two bales of cloth at the Bhaptiahi Railway station on the 26th February, 1921, he came to know that the said two bales were lost or destroyed (noksan ho gaya) owing to the neglect on the part of the servants of the defendant companies. His statement in paragraph 3 could not possibly be his personal knowledge, for, as stated by the goods clerk examined by the defendant the Bengal & North-Western Railway Company (Defendant No. 1) received only fourteen bales of cloth at the Mokameh Junction which they delivered to the plaintiff at their station at Bhaptiahi. The plaintiff could not know what happened to the goods between Howrah and Mokamah. In his evidence the plaintiff's gomastha who took delivery of the goods states that the Station Master of Bhaptiahi told him that the goods were stolen by the Railway servants. The Station Master of Bhaptiahi station has not been examined by the defendants to challenge this statement.

25. The defendants in his written statement does not admit the plaintiff's statement in the plaint regarding the loss of the goods. The defendant simply throws upon him the Risk Note B executed by him and claims exoneration from the liability on the basis of this note. Risk Note B is an elaborate document and exonerates the Railway Company from liability under various circumstances, for instance, the loss of goods to the Railway Company by running train, theft or robbery. Upon what particular portion of the Risk note the defendants rely is not stated. They do not admit the loss of the goods due to negligence as stated by the plaintiff and they cannot be permitted to take a part of the admission in the plaint and say that the loss is admitted and the negligence on their part is not admitted. The admission of the plaintiff must be taken as a whole, The defendants' pleading must be construed strictly.

26. The reliance simply on the Risk Note is not a sufficient pleading in the case, as was held by Bucknill, J., in the case of Ganesh Das Bisheswar Lal v. E.I. Ry. Co. A.I.R. 1927 Pat 193. The plaintiff stated that on the 26th February 1921, when he did not get the two bales of cloth the Station Master of Bhaptiahi told him that they were stolen by Railway servants. This is a specific statement; yet the Railway Company did not challenge or rebut it nor did they say what became of the goods. They had special means of knowledge about it. The observations of Macleod, C.J., and Crump, J., in the case of the C.I.P. Ry. v. Himat Lal A.I.R. 1923 Bom. 389 would apply. Their Lordships say:

> Under Risk Note Form B the plaintiff must prove that the loss was due to theft by or wilful neglect of the Railway servants. The Railway Company, however, 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.

27. This was the view also reiterated by Ramesam, J. in the case of B.B. & C.J. Ry. Co. v. Firm Nataji Pratap Chand A.I.R. 1925 Mad. 745. wherein his Lordship says:

> Under Risk Note Form B, the Railway Company must give prima facie or formal evidence that so far as they know the company or its servants through whose hands the goods have passed are not keeping back the goods. For this purpose they must tender their servants for cross-examination and it is for

the plaintiff, if he can, to prove by such cross-examination wilful neglect of or theft by the Railway servants.

28. The Railway company in the present case has not examined the Delivery Inspector or the Station Master upon whose statements the plaintiff alleges that he came to know that the goods were lost owing to the neglect on the part of the Railway Company and particularly on account of theft of their servants.

29. Thus upon a true import and scope of the pleadings in the case, I hold that the plaintiff's case is one of non-delivery and that the 'loss' of the goods within the meaning of the terms in the Risk Note is neither admitted nor pleaded nor proved, and the Risk Note does not apply or exonerate the defendant from the liability to the plaintiff for non-delivery of the goods in question.

30. I would accordingly set aside the decision of the lower appellate Court, restore that of the trial Court and decree the appeal of the plaintiff with costs throughout.

Das, J.

31. On an anxious consideration of the pleadings in the case and having regard to the fact that there was no issue on the question of loss I have reluctantly come to the conclusion that the reference does not arise. I would therefore dismiss this appeal with costs.

Kulwant Sahay, J.

32. I agree with my Lord the Chief Justice and am of opinion that the reference does not arise in the present case.

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