The Bombay, Baroda and Central India Railway Co., Ltd. Vs Nattaji Pratapachand Firm

Court: Madras High Court

Date of Decision: Nov. 18, 1924

Citation: (1925) 21 LW 728 : (1925) 48 MLJ 400

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 was accepted by the Courts below) may be stated. The wagon No. 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 wagons

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

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

reached Kalyan where he reported the matter. D. W. 5 took up the matter and reported to the Assistant Station Master (D. W. 1) and the

Shunting Master (D. W. 4). They got the wagon resealed and the wagon was shunted to the tranship shed. D. W. 3 checked the contents of the

wagon and found one bale missing. As I understand the evidence of D. W. 2, there was nothing wrong with the wagon until the train left Mumbra

Station.

3. The risk note (Ex. 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 lines 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 a 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, O. J. and

Crump, J. in G.I.P. Railway Vs. Himatlal Jagjivandas, : ""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 page 354).

The onus lies upon the plaintiffs to prove that loss was due to theft by or to the wilful neglect of the Company''s servants (at page 352). ""See also

Narayana Aiyar v. S. I. Ry. Co. Ltd. (1923) 18 LW 322 and E.I. R.y. Co. v. Nathmal Behari Lal ILR (1917) 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. and C.I. Railway Vs. Dayaram Bechardas, . This conclusion seems to be in accordance with common sense and sound

principles of law. It is also in accordance with the conclusion in Ghelabhai v. E. I. Ry. Co. ILR (1921) B 1201 and E. I. Ry. Co. v. Kishan Lal

Tirkha Mal ILR (1923) A 530 and in E. I. Ry. Co. v. Jogpet Singh ILR (1924) C 615. I observe that the conclusion of Daniels, J. in E. I. Ry. Co.

v. Kishan Lal Tirkha Mal ILR (1923) A 530 was arrived after relying on Secretary of Slate for India in Council v. Jiwan Abdullah ILR (1923) A

380, 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 railway administration and not following Hill, Sawangers and Company v. Secretary of State (1921) 2 Lah. 133, and

distinguishing H. C. Smith v. Great Western Railway Company (1922) LR 1 AC 178. Similar reasoning about '' loss '' was used by Page, J. in E.

I. Ry. Co. v. Jogpet Singh (1924) ILR 51 C 615. In the Bombay case G.I.P. Railway Vs. Himatlal Jagjivandas, the case of H. C. Smith v. G. W.

Ry. Co. (1922) LR 1 AC 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 M. arid S. M. Ry. Co. v. Subba Rao ILR (1919)M 617

: 38 MLJ 360. 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. E. I. Ry. Co., Ltd. ILR (1921) B 1201 rests on Curran v. M. G.

W. Ry. Co. (1896) 2 IR 183, the weight of which is somewhat shaken by H. C. Smith v. G.W. Ry. Co. (1922) LR 1 AC 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 their servants through whose hands the goods passed are not keeping back the goods, which is at least a possibility. [See

E.I. Ry. Co. v. Sukh Das Goverdhan (1923) 74 IC 431]. For this purpose, they 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.

4. 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.

Railway Vs. Himatlal Jagjivandas, 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 and there is little scope for ''theft in the running train, '' I assume robbery in the Form B is equivalent to theft [G. I. P. Ry.

Co. v. Bhola Nath Debi Das ILR (1922) A 56]. The facts in B.B. and C.I. Railway Vs. Dayaram Bechardas, 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 when he saw the doors open.

Mr. Nambiar argued that this conduct does not amount to wilful neglect. In Forder v. G.W. Ry. Co., Ltd. (1905) 2 KB 532 there was no neglect.

The consignment of sheep skins was placed in truck of wood chips, but there was no notice to the company of the nature of the consignment. The

case of Joshua Buck-ton and Co. v. London and N.. W. Ry. 87 LJKB 234 is also peculiar. It was held that sending a wagon of three-ton capacity

though asked to send a wagon of five-ton capacity on account of a mistake did not amount to wilful neglect. It was believed by the defendants''

foreman that the wagon was a wagon of a capacity of five tons. It had originally been standing between two wagons of other railway companies

which were five-ton wagons and it was believed to be of the same strength and I do not see how these cases can help the appellant. The case in

Wakleirn v. L. and S.W. Ry. 12 AC 41 is a case of collision and Pomfiet v. Lancashire and Yorkshire Ry. (1903) 2 KB 718 is a case under

Workmen''s Compensation Act. In Grill v. General Iron Screw Collier Co. LR 1 CP 600 Willes, J. at page 612 said: ""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 In re, Young and Harston''s Contract 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, and although in some branches of the 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. in The Queen v. Downes 1

QBD 25 at 30. 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., Ltd. v. G.I.P. Ry. ILR

(1921) B 155].

5. The Second Appeal fails and is dismissed with costs.