
(1930) 07 CAL CK 0023

Calcutta High Court

Case No: None

B.N. Ry. Co.

APPELLANT

Vs

Moolji Sicka and Co.

RESPONDENT

Date of Decision: July 10, 1930

Acts Referred:

- Railways Act, 1890 - Section 72(2)

Citation: AIR 1930 Cal 815 : 129 Ind. Cas. 769

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

Bench: Full Bench

Judgement

Suhrawardy, J.

This appeal is by the B.N. Ry. against the decision of the Additional District Judge of 24-Parganahs decreeing in agreement with the trial Court the respondents' suit for damages to their goods sent through the railway company. The plaintiffs' case is that they despatched 348 bags of country biris out of which 60 bags were damaged by rain in the course of transit from Tumsar Road station to Shalimar station, both on the B.N. Ry. The goods were booked on 26th June 1926 at Tumsar Road station and they reached Shalimar on 3rd July, but the wagon was not brought to the shed till the 6th July when the goods were delivered to the plaintiffs. The plaintiff company had hired a whole wagon and the goods were carried in that wagon. When their man took delivery of the goods he discovered that there were holes in the wagon through which water leaked into it and damaged 60 packages of the goods. He immediately brought the fact to the notice of the "Superintendent of the station and subsequently the plaintiff brought this suit to recover Rs. 1,66.1-10-0 by way of damages. In the plaint the plaintiff company does not make mention of any risk notes covering the goods. The plaint as framed was against the railway company as if they were mere bailees of the goods and were liable for damages as such. The defence was that the goods were covered by risk notes A and B executed by one Nathu Singh who, according to the defendants, held legal authority from the

plaintiff company to sign the risk notes. The railway further pleaded that there was no misconduct on their part as the wagon was in a good condition at the starting station. The trial Court gave a decree to the plaintiffs; and the appeal by the railway was dismissed. We have got to consider the various points that were raised before the learned District Judge and his findings thereupon. The learned Judge has discussed several points and decided them against the appellants. It will be convenient to consider the points mentioned in the judgment of the learned Judge in the order they are given there.

2. The first point discussed by the learned Judge is whether Nathu Singh had authority to sign the risk notes on behalf of the plaintiff company. On the evidence he agreed with the Munsif that the appellants failed to prove that Nathu Singh was the legally constituted agent of the plaintiff company. But it was argued before him on behalf of the appellants that though Nathu Singh was not the constituted agent of the plaintiff company as he had delivered the goods and signed the risk notes, the plaintiff company was bound by his acts and that the railway is entitled to rely upon the immunity given to it under the risk notes. The learned Judge observed that this question was not raised in the trial Court. It is true that it was not raised in the trial Court, but it was probably so because there was no express decision upon the point when the case was tried. It so happened that immediately after the Munsif's judgment was delivered the case of the [G.I.P. Ry. Co. Vs. Chakravarti, Sons and Co. and Others](#), was reported and the point was evidently taken in consequence before the Judge on appeal. Though it so happened we do not think that it is proper that he should have refused to consider the point which is a pure question of law based upon the admitted facts of the case. Now, with regard to the delivery of the goods by Nathu Singh I do not think that there can be any dispute, though the learned Judge in one part of his judgment says that Nathu Singh did not deliver the goods to the goods clerk. The consignment note by which the delivery of the goods was made was signed by Nathu Singh and so were the risk notes. All these documents have been proved by the witness on behalf of the railway company who was examined on commission. On looking at the order-sheet it appears that the appellant company wanted to take out commission in order to prove Nathu Singh's signature on those papers; and the pleader for the plaintiffs intimated that if proper notice were given to him for admission he might admit that they were signed by Nathu Singh. There is no finding by any of the Courts below that the documents were not signed by Nathu Singh. What the learned Judge means to say is that Nathu Singh at the time of the delivery of the goods was accompanied by a man in the service of the plaintiffs and therefore it should be taken that the goods were delivered not by Nathu Singh but by the plaintiffs through their man.

3. The learned Judge overlooked the fact that the consignment note at the time of the delivery of the goods was signed by Nathu Singh. It cannot therefore be questioned that the goods were delivered by Nathu Singh and received by the defendant company from him. Now it has been authoritatively held that the

consignor may be bound not only by the signature of himself or his agent on the contract but also by the signature of the person who delivers the goods to the railway company whether that person had authority to sign or not [G.I.P. Ry. Co. Vs. Chakravarti, Sons and Co. and Others](#), . Another commentator on the Railways Act (Leslie) says that the contract may be signed not merely by the party, but also by the person delivering for carriage. Such person has not merely such authority to bind the sender as naturally arises from his position as agent, but an absolute statutory authority to bind him, and it seems that prima facie he has authority to sign any form of contract Lahiri's Law of Carriers, p. 282. I do not think that much authority is needed to support this proposition because the words used in the Railways Act are quite explicit. Clause (2), Section 72 says that an agreement purporting to limit the responsibility of the railway administration under the Contract Act shall be void unless it is in writing signed by or on behalf of the person sending or delivering to the railway administration the goods. The railway administration is not concerned with the ownership of the goods; authority to enter into contract with it is implicit in the delivery of goods. The person therefore who delivers the goods is competent to sign the risk notes and his act binds the owner. It is in evidence that Nathu Singh is a broker who acts on behalf of persons dealing with the railway. He was evidently employed on behalf of the plaintiff on this occasion.

4. There is another way of looking at the question. The plaintiffs prove delivery of the goods to the railway company by means of the railway receipt which mentions the risk notes executed by Nathu Singh and which shows that the goods, were delivered under the risk notes to be carried at a reduced rate. It is not reasonable to hold that the plaintiff can retain to himself the advantage} of the reduced rate but repudiate the consideration for it, the risk notes executed) by the person who delivered the goods to the railway, as being unauthorised. This was the view taken by Chotzner, J. in the [\(Sir\) Hukumchand Kasliwal and Another Vs. Radhakissen Chamarla and Others](#), . The plaintiff's suit is not a straight forward one. He knew of the risk notes but did not in his plaint refer to or repudiate them for reasons not far to seek. I am accordingly of opinion that the risk notes were duly executed and they are binding on the plaintiff.

5. The second ground of the judgment of the learned Judge is that Nathu Singh signed the risk notes as Nathu Singh for M. Section This the learned Judge thinks is not a proper signature and therefore the risk notes are not valid. In support of this view he relies upon the decision of this Court in Mahabasha Bankapore v. Secy. of State [1915] 32 I.C. 393. In that case the person who consigned the goods to the railway did not sign his own name on the risk note but the owner's name. On a construction of Section 72(2)(a) the learned Judges held that it was not a proper compliance with the requirements of that section. It is not necessary for us to consider that decision though to my mind it requires further consideration, because the facts of that case are totally different from the facts of the present case and it cannot by any stretch of argument support the view expressed by the learned Judge

on this point. Here the risk notes were signed by the person who delivered the goods with the addition of the words "for M.S." This does not in any way take away the effect of the execution of the document by Nathu Singh. The learned Judge has further relied on Mahabarsha's [1915] 32 I.C. 393 case for the view that the name of the principal should be mentioned in full. In that case the agent Kundan Mull, instead of signing his name and stating that he signed on behalf of Mahabarsha, his principal, simply wrote "Mahabarsha." This the learned Judges held was not according to law, as it would be impossible to prove that the agency had previously terminated if the name of the agent did not appear on the document. The argument adopted in that case is too technical and it does not help the plaintiff's in this case. The consignment note bore under the first column plaintiff's name in full, Moolji Sicka and Co., and as the plaintiff company had large dealings with the railway it is evident what M.S. stood for.

6. The third ground put forward by the learned Judge is that the risk notes, forwarding order and the railway receipt do not bear the same date, and therefore there was no binding contract between the parties. For this view he relies upon the decision in E.I. Ry. v. Jot Ram Chandra Bhan AIR 1928 Lah. 162. This case has been dissented from by this Court in [Moolji Sikka and Co., Vs. B.N. Ry. Co. Ltd.,](#) . I agree with the view held in that case and I do not think it necessary to say anything further on the point.

7. The fourth point which the learned Judge has decided against the appellants is that on the risk note A the remark made by the goods clerk is that the packing conditions were not fulfilled and that the goods were liable to be damaged in course of transit. The learned Judge did not find in any thing before him as to what the packing conditions were and he thinks (not without justification in many cases) that this device is adopted by the railway servants for the purpose of taking risk notes. This ground was not taken in the trial Court and the appellant company justly complain that they were never given an opportunity of showing to the Judge that there are rules as to the mode in which goods sent through the railway should be packed. The tariff of the railway has been produced before us and we find that the instruction given is that goods or biddies should be packed in a certain way. This point however is not of much importance in view of the fact that the real contract on which the railway company base their claim is the risk note B.

8. The fifth point referred to by the learned Judge is that in the case of risk note B it must be proved that there were two rates for carriage of goods and that they were carried at the reduced rate in consideration of the execution of the risk note, but there was no evidence before the learned Judge whether the plaintiff company paid the ordinary rate or that they sent their goods at the reduced rate. The same observation, applies to this ground as to the ground preceding. The point was not raised at the trial and the learned Judge did not care to look into the various tariff tables issued by the railway to find whether the goods were really sent on reduced;

rate. Mr. Sen on behalf of the railway has produced the tariff and we found, that the goods were sent at reduced, rate. The plaintiffs never claimed that the goods were sent at the ordinary rate and that therefore the risk notes were without consideration and not binding upon them.

9. The last point which is the most important point in the case is the finding; of the learned Judge that the railway company has been guilty of misconduct; under risk note B. It may be profitable to enquire as to what "misconduct" means as used in the risk note form B. The words used in the old risk note B" (we quote only those that are necessary for our present purpose) were:

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.

10. It is a matter of modern history that an agitation was started against this form on the ground that it was well nigh impossible to prove the liability of the railway under it. On the recommendation of a committee appointed by the Government of India, the Governor-General u/s 72, Railways Act, sanctioned in 1924 the present risk note form B. In place of the above words in the old form the following words are substituted:

Except upon proof of such loss or damage arising from misconduct of railway administration's servants.

11. When the risk note, old and new, are compared, it will be found that there has been introduced a wide difference in their scope. In this case we are concerned with the substitution of the words "misconduct of the railway administration's servants" for the words "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

in the old form. The English form of the risk note contains the words "wilful misconduct." The present risk note therefore is wider and more comprehensive in enlarging the liability of the railway than the old form or the English note. Under that note, as well as under the English note, misconduct should be intentional and it therefore excluded unintentional neglect or act. "Wilful misconduct" in the English form has been defined by Alverstone, C.J., in *Forder v. Great Western Railway* [1905] 2 K.B. 532. The learned Chief Justice accepted the following definition given by Johnson, J., in *Graham v. Belfast and Northern Counties Railway Co.* [1901] 2 I.R. 13:

Wilful misconduct means misconduct to which the will is party as contradistinguished from accident and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or to omit to do (as the case may be), a particular

thing and yet intentionally does or fails or omits to do it, or persists in the act, failure or omission regardless of consequences.

12. To it the learned Chief Justice added

or acts with reckless carelessness, not caring what the results of his carelessness may be.

13. This addition was objected to by Avery, J., as inconsistent with the above definition but approved by Lush, J., in *Norris v. Great Central Railway Co.* [1915] 114 L.T. 183. It will be noticed from the definition given by Alverstone, C.J., in *Forder v. Great Western Railway* [1905] 2 K.B. 532 that it is confined more to the interpretation of the word "wilful" than to "misconduct." Divested of the words, used to stress the sense of "wilful" in the above definition, the definition of misconduct will stand thus : Misconduct is distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself, when it is wrong conduct on his-part in the existing circumstances to do, or to fail or omit to do (as the case may be) a particular thing or to persist in-the act, failure or omission or acts with carelessness. In the Oxford Dictionary "misconduct" is said to mean bad management; mismanagement, malfeasance or culpable neglect of an official in regard to his office. According to Halsbury's Laws of England, Vol. 4, para. 55,

misconduct is as that if a contract purports to relieve a company from liability for any fault or negligence, the company remains, liable in case of misconduct.

14. Then it is added:

Misconduct is not necessarily established by proving even culpable negligence.

15. The learned editor had, probably in mind when he used these words the definition of "wilful misconduct" as it appears that he has relied in support of his statement on *Forder v. Great Western Railway* [1905] 2 K.B. 532. I am inclined to hold that the word "misconduct" as used in the new risk note B is wide enough to include wrongful commission and omission, intentional or unintentional, of any act which it wrongfully did or which it wrongfully neglected to do, or to put it in another way, did what it should not have done and did not do what it should have done. This seems to be the view taken by Mitter, J., in [B.N. Ry. Co. Ltd. Vs. Moolji Sicka and Co.,](#) where the learned Judge observes that in certain cases negligence will be good evidence of misconduct and mismanagement of the railway company. I am not inclined to accept the view that misconduct only refers to acts of gross or culpable negligence and the term does not ordinarily cover acts of mere negligence. In my judgment the word "misconduct" denotes any unbusiness-like conduct and includes negligence or want of proper care which a bailee is to take u/s 152, Contract Act. The immunity which the risk note brings to the railway company is by shifting the burden of proof. In the case of a bailee, if the goods are found damaged in his

possession, the onus is upon him to prove how the damage occurred, if he wants to avoid liability. In the case of goods damaged in the possession of the "railway company covered by a risk note, the owner of the goods is to prove that the injury to the goods was caused by the misconduct of the railway company. Under the old -form the onus was always upon the owner to prove it in order to recover damages from the railway company. By the changes in the form of the risk note there has been no change of law; on the other hand it has been emphasized by the words "except upon proof of." The plaintiffs therefore in this case have to prove that the injury to the goods of which they complain was caused on account of the misconduct of the railway company.

16. It has been unquestionably proved that when the wagon arrived at Shalimar 10 or 11 days after, it was found to have holes on the roof. This alone in my judgment is not enough to charge the railway company with misconduct. The plaintiffs should prove not only that the wagon was found defective at the arrival station but also that it was on account of the misconduct of the servants of the railway company that it was or became defective. In other words they should prove that the goods were negligently or wilfully loaded in a defective wagon at the starting station or it was by their misconduct allowed to become leaky. But this they have not proved. On the other hand there is evidence on the side of the defendant that the wagon was in a good condition when it was loaded. D.W. 2, Sujat Ali, the goods clerk at the Tumsar Railway Station says:

Nathu Singh and plaintiffs" man examined the wagon before booking. I examined the wagon myself also. There was no hole or defect in the wagon. The wagon did not leak. It was examined by throwing water by a hose pipe over the roof. No one on behalf of the plaintiffs¹ objected to the wagon. The station coolies loaded the wagon. The looks were supplied by the plaintiffs and the plaintiffs" seals were placed there by the coolies.

17. This evidence does not seem to have been challenged or contradicted on behalf of the plaintiffs. It is therefore clear that there is evidence that the wagon was in a good condition when it left Tumsar Station, but it was found in a leaky state when it arrived at Shalimar. The defect in the wagon that was discovered at Shalimar might be due to causes other than misconduct of the railway company. Unless the plaintiffs succeed in definitely establishing that the injury to their goods was due to misconduct of the railway servants and that the cause of such injury was their misconduct and nothing else, they are not entitled to succeed on mere surmise, The learned advocate for the respondent has strenuously argued that the findings upon this point by the Courts below are findings of fact with which we are not entitled to interfere in second appeal. But at the same time it is a well established rule that when there is no evidence in support of a finding of fact this Court can interfere with it. The learned Judge records his finding thus:

I cannot certainly conceive of a worse case of misconduct than the loading of a consignor's goods in a leaky wagon and thereby causing him considerable loss.

18. Here the learned Judge assumes that the consignor's goods were loaded in a leaky wagon. As I have pointed out there is no evidence in support of this finding and if there is any evidence upon this point it is just the other way. But it is argued that u/s 114, Evidence Act, the existence of any fact which is likely to happen, regard being had to the common course of natural events, human conduct and public and private business in their relations to the facts of the particular case, may be presumed. Therefore the Court is justified in presuming from the fact that the wagon was found leaky on 6th July 1925 that it was in the same leaky state on 26th June 1925. I do not think that Section 114 goes so far as to enable the Court to presume that the present state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. The goods were sent in the rainy season they took 10 or 11 days to arrive at their place of destination. It is possible that the wagon got damaged on the way by the elements or by some other cause not referable to the misconduct of the railway servants. The plaintiffs must establish by positive evidence that it was owing to the defective state of the wagon in which the goods were loaded that injury was caused to them. By merely proving that when the wagon reached its destination it was found in a defective state they do not discharge, the onus which lies heavily upon them to prove misconduct by the servants of the railway company. In cases where the Court has to depend upon probabilities based on certain facts, which do not lead to one conclusion, the rule that has been adopted in English Courts may profitably be followed here. In *Smith Ltd. v. G.W. Railway Co.* [1921] 2 K.B. 237 Bankes, L.J. said:

Although the learned Judge of the County Court was undoubtedly entitled to draw inferences from the facts proved before him, the inferences must be such as could legitimately be drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them, or if the particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails.

19. This observation is applicable to the facts of this case. I do not think that any Court is justified in presuming that because the wagon is found leaky on 6th July it must be so on 26th June without any evidence to support it. The result of all these considerations is that the plaintiff company have failed to discharge the onus that lay upon them, namely to prove that the injury to their goods was due solely to the misconduct of the railway servants.

20. In the result this appeal is allowed, the decree of the lower appellate Court set aside and the suit dismissed. In the circumstances of this case we order each party to bear his own costs throughout:

Patterson, J.

21. I agree.