G.I.P. Railway Company Vs A.B. Tamboli

Court: Bombay High Court

Date of Decision: Oct. 5, 1925

Acts Referred: Railways Act, 1890 â€" Section 72

Citation: (1926) 28 BOMLR 718 : (1926) ILR (Bom) 284

Hon'ble Judges: Madgavkar, J; Fawcett, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Fawcett, J.
The plaintiff is the owner and manager of the firm of Tamboli Brothers & Co., who do business as commission agents in

Amalner in the East Khandesh District. He is the owner of the ginning factory and press at that place, He used, in course of his business, to send

finished pressed bales of cotton to various mills in Bombay, and, on February 5, 1920, he tendered a consignment of one hundred and twenty eight

bales at Amalner station and, on February 7, 1920, another consignment of one hundred and sixty-two bales for the purpose of being carried and

delivered to the Swadeshi Mills of Bombay at Kurla. Owing to a shortage of waggons at that time, there was some delay in the despatch of goods

traffic at this station, and although the bales were accepted by the railway company for despateh to Bombay, they were stacked on a portion of the

goods platform to await their turn as waggons became available. Accordingly, on February 16, 1920, one hundred and sixteen bales out of the first

consignment of one hundred and twenty-eight bales were loaded and despatched to Bombay, and on the next day, the 17th, one hundred bales

out of the second consignment of one hundred and sixty-two bales were similarly loaded and despatched. Thus, there remained a balance of

twelve bales of the first consignment and sixty-two bales of the second, making a total of seventy-four bales. Before these could be despatched, a

fire broke out on the afternoon of February 25, and these bales with others were destroyed by fire The plaintiff accordingly brought this suit against

the Agent of the G.I.P. Railway Company to recover damages for the loss of his bales. The railway company in their written statement contended

that the seventy-four biles in dispute were not legally delivered to the company, and also put the plaintiff to proof that the bales had, in fact, been

destroyed by fire. But these two contentions are not now before us The first one was given up in the trial Court and the finding of the Subordinate

Judge that the seventy-four bales were actually destroyed by fire has also not been disputed here. The main contentions, which we have to

consider, are, firstly, whether the railway company is protected by a risk-note in form H which is said to have been executed on behalf of the plaint

if in November 1919 and is alleged to cover the goods in dispute; and, secondly, whether, assuming that the railway company is not so protected,

the lower Court has erred in holding that there was negligence on the part of the defendant and his servants, entitling the plaintiff to damages. The

amount of damages actually awarded by the lower Court is the sum of Rs. 10,508. The assessment of damages at that amount is not contested

before us.

2. The Subordinate Judge has held that the risk note in form H, Exhibit 68, is not binding on the plaintiff and in any case does not cover the goods

in dispute, while they were remaining on the goods platform at Amalner. u/s 72 of the Indian Railways Act, 1890, this document, Exhibit 68, is

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. No question arises as to its being in the approved form, but it is contended,

and the Subordinate Judge has decided, that it has not been duly signed by or on behalf of the plaintiff, who sent the bales to the station. The

document admittedly was filled up by the witness Jamshedji, nephew of the plaintiff, and against the words in the form ""signature of sender"" he has

written ""Tamboli Brothers,"" that is, the name under which the plaintiff was doing business and sending this particular cotton to Bombay. He entered

the plaintiff''s profession and residence, namely, commission agents at Amalnar, properly. Then, under the word ""witness"" in the first place

provided for the signature of an attesting witness, he has written his own signature and given his residence as Amalner. The document also bears

the signature of another witness, namely, one Vaman Ramji. The Subordinate Judge says on this point:

On the above Bisk Note (Exhibit 68), however, Jamshedji did not sign his own name but the name of the plaintiff''s firm, i.e., Tamboli Brothers,

and he signed his own name under the heading ''witness'' i.e. as an attestor. There is thus no signature at all either of the plaintiff or his agent as

required by the above section.

3. He then cites the ruling in Mahabarsha Bankapore v. The Secretary of Sate for India in Council (1916) 20 C.W.N. 685 and referring to the

judgment in that case says :-

When the law says "signed" it means the writing of the name of the person who signs it either by his own hand or by the hand of an agent who must

be disclosed and have authority. In contracts of this nature which derogate from the ordinary law of bailment, the provisions of the law must be

strictly carried out; and a signature like the above was expressly held to be no signature in that case.

4. This case, however, differs from that of Mahabarsha Bankapore v. The Secretary of State for India in Council in so far as, undoubtedly,

Jamshedji has put his own signature on this document, although he has not put it, it may be said, in the proper place, namely, after ""Tamboli

Brothers"", with some words or letters signifying that he made that signature of Tamboli Brothers as an agent of that firm. Mr. Campbell, for the

appellant, also contends that, in any case, the decision in Mahabarsha Bankapore v. The Secretary of State for India in Council is incorrect in

laying down that ""when the law says "signed" it means the writing of the name of the person who signs it either by his own hand or by the hand of

an agent who must be disclosed and have authority"" (p,686). In support of this, ha has quoted France v. Dutton [1891] 2 Q.B. 208 which

supports his contention. To my mind, the view taken in the Calcutta case goes too far and imports words into the section, which are not there. But,

apart from that, in the present case, there is undoubtedly the signature of the plaintiff"s nephew, who had signed the document giving his proper

name and address, and if it is a necessary requirement that the name of the actual consignee should be a part of the signature in order to make it

valid, then the only question that remains is, whether the fact that Jamshedji signed as a witness prevents the document being authoritative. It seems

to me that the view of the Subordinate Judge, undoubtedly, lays greater stress on a technicality than on the real substance of the matter. The object

of the legislature plainly is to have some clear evidence that the terms of the contract have been accepted by the person who, it is alleged, is bound

by it, In the present case, it is clear that Jamshedji, purporting to act on behalf of the plaintiff, did accept the terms of Exhibit 68. No authority has

been cited of any case where a Court in England has taken such a technical view of the matter, although there is a similar provision as to the signing

of a risk-note of this kind contained in the Railway and Canal Traffic Act, 1854, Section 7. It is presumably upon the precedent of that enactment

that this provision has been made in Section 72 of the Indian Railways Act. Some assistance is afforded by the analogous case of contracts, which,

under the Statute of Frauds, (29 Oar. 2, c. 3), Section 4, have to be evidenced by some memorandum or note thereof in writing, signed by the

party to be charged or some person lawfully authorised by him to sign. There have been numerous decisions upon what constitutes a proper

signature in such cases, and I may refer to Halsbury"s Laws of England, Vol. VII, Article 776, page 376, where it is said :-

It is not enough that the party to be charged is identified by the memorandum; he is required to sign it but if it is signed it matters not for what

purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract.

5. Again in Article 775 at page 375 it is stated :-

The signature must be so placed as to show that it was intended to relate and refer bo, and that in fact it does relate and refer to, every party of the

instrument. It does not, however, signify in what part of the instrument the signature is to be found, if it is inserted in such a manner as be have the

effect of authenticating the whole of the instrument.

6. In Article, 779, at page 379, it is said :-

...The signature of an agent may bind his principal though the agent signs only in the character of witness.

7. There the case of Wallace v. Roe [1903] 1 I. R. 32 is cited, and it is directly in point. These principles, I think, apply equally to the present

case, so long as Jamshedji"s signature was intended to evidence that he, as the representative of Tamboli Brothers, authenticated the contract as

one which Tamboli Brothers accented. If so, it is immaterial whether the signature appears in the proper place, namely, the place provided for the

signature of the sender, or whether it appears in the place meant for one of the attesting witnesses. It might, no doubt, make a difference, if the

document were one which requires to be attested by two witnesses, like a mortgage u/s 59 of the Transfer of Property Act, because then it might

naturally be said that the plaintiff"s signature could not be taken as covering the signature of the proper executant as well as the signature of an

attesting witness. Also reliance might be placed on rulings that an attesting witness should be an independent person and not one who is intimately

connected with the execution of the document. But the present is not a case of that kind. Mr. Bahadurji, for the respondent, argued that, inasmuch

as the form provides a space for the signature of two attesting witnesses, it must be taken that the law requires two such attestations to make it

valid If that had been the intention of the legislature, nothing would have been easier than to have said in Clause (a) of Sub-section (2) of Section

72, that the document must also be attested by two witnesses; and the mere fact that the form provides a place to enable two witnesses to attest

the signature of the sender does not amount to enacting that the document is invalid, unless it is attested by two witnesses. Obviously, it is a

precaution, which is useful, to have it attested by one or two attesting witnesses. Inasmuch, however, as Section 72 only requires that there should

be a signature, such as I have mentioned, and makes no reference to the necessity of attestation, I do not consider that Mr, Bahadurji"s contention

is sound.

8. Again, I may refer to cases which have been decided in India with reference to the provisions of Section 19 of the Indian Limittion Act. Both in

the Act of 1877 and that of 1908, in order to make an acknowledgment of the kind referred to in that section binding, it has to be signed by a

person against whom a right is claimed or by an agent duly authorised in that behalf, and there have been numerous rulings as to the signature

necessary in such a case. For instance, it was held in Andarji v. Dulabh I.L.R.(1877) 5 Bom. 88 and Jekisan Bapuji v. Bhowsar Bhoga Jetha,

I.L.R(1880). 5 Bom. 89 that it is quite sufficient if a debtor signs at the top of an account instead of at the button; and in Gangadharrae Venkatesh

v. Shidramapa Balapa Desai, (1893) ILR 18 Bom. 586 it was held that, even if the debtor did not give his name bat wrote certain words at the

beginning and at the end of the letter, and it was proved that this was the usual mode of signing and authenticating letters and informal documents

among the class to which the defendant belonged, still the letter was signed so as to fulfil the conditions prescribed by Section 19. Similar rulings, to

which I may refer, are Mathura Das v. Babulal ILR (1878) All. 683 and Sadasook Agarwalla v. Baikanta Nath Basunia I.L. R (1904) Cal. 1043

where the decision in Gangadharrao Venkatesh v. Shidramapa Balapa Desai ILR (1893) 18 Bom. 586 whs approved. Technicalities of the kind,

to which the Sub-bordinate Judge has listened, have not been allowed to defeat a substantial fulfilment of what is really required, namely, some

clear evidence that the sender is bound by either personally signing or by employing an agent who signs on his behalf; and, in my opinion, the

signature in this case does bind the plaintiff, so long as it is shown by evidence that Jamshedji had either express or implied authority from the

plaintiff to sign a document of this kind. Before, however, I go to that question, I may briefly refer to the rules in Exhibit 101, which have been

relied upon by Mr. Bahadurji and were also relied upon in the lower Court. The Subordinate Judge held that these rules were made simply for the

guidance of the railway officials and have no force of law, and I quite agree with that opinion. The instructions in some parts go beyond the actual

requirements of Section 72, for instance, Order No, 55 of the Traffic Instruction Book prohibits an agent being allowed to sign, whereas Section

72 clearly allows an agent to sign for his principal. It is quite clear that these rules cannot restrict the plain provisions of Section 72.

9. The Subordinate Judge has not dealt in detail with the question whether Jamshedji had authority to sign Exhibit 68, and, I think, in the

circumstances, it may be taken that he did not hold it proved that he had such authority. In my opinion, the evidence of the plaintiff and Jamshedji

clearly establishes that Jamahedji, who, it must be remembered, is the nephew of the plaintiff, had ample authority to sign Exhibit 63. He says that

he was looking to this work of consigning goods from the railway station at Aanlnar, and the plaintiff admitted that the consignment notes in those

cases were executed by Jamshedji on his behalf. He also admitted that the goods are generally booked on risk-notes, although he alleged that he

did not know whether any risk-notes were actually passed by his firm or on behalf of his firm. This allegation is undoubtedly open to suspicion.

Jamshedji in his evidence stated that he looked to the filling up of the consignment notes as to bales sent by Tamboli Brothers and that no other

person did that work. Again he says : "" The office work I do does include the work of sending goods to the station, and I am supposed to do

everything necessary in connection with this work."" He also states that he has been doing this work since 1915, and that ""we ""i.e. presumably

Tamboli Brothers, had executed several risk-notes in favour of the company since 1915. No doubt, it is not proved that Jamshedji has signed any

other risk-note on behalf of Tamboli Brothers, but the other evidence that I have alluded to, in my opinion, clearly establishes that, by virtue of

Sections 187 and 188 of the Indian Contract Act, Jamshedji had implied authority to sign a risk-note like Exhibit 68, which was part of the

plaintiff''s business of consigning goods from Amalner to Bombay. The evidence of the foreman, Mohaniraj, and of the Station Master can, in no

way, detract from the effect of the evidence of the plaintiff and Jamshedji. Even if the foreman thought that the risk-note could only be signed by

the actual sender, that was not good law and cannot bind the railway company. Again, the opinion of the Station Master that Jamshedji should

have signed his own name as for the principal is not conclusive for the reasons I have given. The fact that Jamshedji signed in the place he did,

suffices to make his signature one on behalf of the plaintiff, within the meaning of Section 72 of the Indian Railways Act. Jamshedji''s signature was

made by him as an agent who had authority to make such a signature. In Aldridge v. The Great Western Railway Company (1864) 33 L.J.C.P.

161 where a carrier was employed both by the plaintiff and defendant and signed a special contract of this kind, the Court held that his signature in

the name of the plaintiff bound the plaintiff. The present is a much stronger case. Jamshedji was the authorised representative of the plaintiff in

regard to the business of consigning goods, and his signature clearly binds the plaintiff.

10. The Subordinate Judge has, however, also held that the word ""witness"" in this risk-note above Jamshedji"s signature appears to have been

scored out and that this scoring must have been done by somebody on defendant"s behalf, probably for the purpose of this suit. He also holds that

the foreman, Mohani-raj, made insertions in this form in the plaintiff"s absence, and that it is not proved that he did so at the instance of the

plaintiff"s witness Chunilal, These are the writing of the words ""For Swadashi Mill and David Mill"" at the top of the form, and the writing of the

words ""G.I.P."" twice in the form itself. He says : ""In fact, the risk-note was originally an incomplete document and was unauthorisedly filled up and

completed by the foreman and as such it cannot be held to be binding on the plaintiff."" I did not understand Mr. Bahadurji to support this

reasoning. He, in fact, said that he conceded that this scoring, if real, made no difference to the defendant"s main contention. But, in any case,

assuming that such alteration was unauthorised, it, in my opinion, clearly falls under the principle laid down in Aldows v. Cornwell (1868) L.R. 3

Q.B. 573 and followed in Tikamdas Javahirdas v. Ganga kom Mathuradas (1874) 11 B.H.C.R. 203 that where a subsequent addition to a

document, though unauthorised by the executant, serves only to state explicitly what is already implied in the document, and what the law would

infer from it, such addition is immaterial, and does not vitiate the instrument. Here, in the view of the law I have taken, the scoring of the word

witness"" made no real difference in the validity or the effect of the document as originally executed, and the insertions of the letters ""G.I.P."" and the

heading ""For Swadeshi Mill and David Mill"" only carried out what was implied in the document and what the law would infer from it. It is not a

case where the result goes to make the instrument operate differently from the original instrument like that in Code ychand Booda-ji v. Bhaskar

Jagonnath I.L. R.(1881) 6 Bom. 371.Therefore, in my opinion, the view of the Subordinate Judge on this particular point is clearly unjustifiable.

11. The Subordinate Judge, has, however, decided that, even if Exhibit 63 is a valid document, it does not absolve the railway company from all

liability absolutely and unconditionally, and that ""the liability would subsist, if the plaintiff could prove that the fire, which destroyed his biles, was

not due to any unforeseen event or accident."" He comes to that view by holding that the ejusdem generis rule of construction applies, so that the

words ""fire or robbery in a running train"" are only illustrative of the words ""any other unforeseen event or accident"" appearing at the end of the

sentence. Strictly speaking, the ejusdem generis rule does not apply to the present case, because that rule is one that is ordinarily applied to the

case of construing a general expression occurring at the end of a clause such as ""or any unforeseen event or accident."" Thus, under that rule, those

words can be considered as restricted to a case ejusdem generis with the previous words such as ""fire or robbery in a running train."" But the

Subordinate Judge goes further and treats the rule as restricting the meaning of the previous expressions by reference to the subsequent general

expression. That, no doubt, is permissible in a case where the general expression clearly covers the previous words, such as in the case of Great

Western Railway Co. v. Swindon and Cheltenham Railway Co. (1884) 9 App. Cas. 787 where the expression used was ""horses, oxen, pigs, and

sheep, from whatever country they may come,"" There the general expression ""from whatever country they may come"" was as much applicable to

the first three classes of animals as to the last one. In the present case, to construe this particular contract as if it read ""provided that the term ''wilful

neglect'' be not held to include any unforeseen event or accident such as fire or robbery from a running train"" is to redraft the whole clause, There is

no adequate ground, in my opinion, to hold that the parties meant anything other than what is expressed by the contract, namely, that the term

wilful neglect"" should not in any case be held to include fire, that is to say, wilful neglect in omitting to take proper precautions against fire; and the

argument of the Subordinate Judge resembles that of the trial Judge in B.B. and C.I. Railway Vs. Sakarchand Kalidas Shah, which was dissented

from by this Court in that case. Be there held that two or three thefts in every week and almost as a matter of course clearly called for greater

vigilance on the part of the railway administration, and that when the frequency of such thefts assumed almost scandalous proportions, an additional

duty was imposed on the railway company to take preventive measures and not to shirk its responsibility under cover of a risk-note, which must

have been intended to provide for stray or isolated cases of unforeseen or unavoidable thefts. The learned Chief Justice in his judgment says (p.

788):-

Unfortunately the learned Judge went on to make some remarks which were not necessary for the purpose of deciding the case, and if those

remarks were to stand, they might be followed in similar cases by the Subordinate Courts, and, therefore, it is necessary to remark that if there is a

theft in a running train, then the Company are protected by the Risk Note.

12. I think that applies equally to this case, namely, that if there is a fire, then so far as the question of wilful neglect with regard to that fire is

concerned, the railway company is protected by Exhibit 68, if valid and applicable to the bales in question. The Subordinate Judge says that his

construction is obviously right because, "" else, even if fire was intentionally caused by a railway servant, the company would be exempt from all

liability under the above proviso, which is obviously absurd,"" But I think that, in such a case, the company would not be exempt, in spite of the

risk-note, on the general principle that no man can take advantage of his own wrong, which would include wrongs committed by his servants, if

proved to be deliberate. Then the Subordinate Judge holds that "" in the present case the fire, which occurred at the Amalner station, on February

25, 1920, was not an unforeseen event or accident," but could have been anticipated and steps taken to prevent it."" It is not really necessary to

consider that point in the view of the meaning of the proviso that I have taken. But supposing the Subordinate Judge"s view is correct, still I do not

agree that the fire in question can be said not to be an " unforeseen event or accident." No doubt, the circumstances were such that the possibility

of such a Ore taking place could be foreseen. But that is a very different thing to being able to foresee this particular fire as an actual event. The

case is somewhat analogous to that of an act of God which, in the legal sense of the term, may be defined as an extraordinary occurrence or

circumstance which could not have been foreseen and which could not have been guarded against: Halabury"s Laws of England, Vol. VII, Article

878, p. 428. But, as is there pointed out, the mere fact that a phenomenon has happened once, when it does not carry with it or import any

probability of a recurrence- when, in other words, it does not imply any law from which its recurrence can be inferred-does not prevent that

phenomenon from being an act of God. This is not, of course, an act of God, though the same principle, in my opinion, applies, namely, that the

event was not one which could be foreseen within the meaning of the expression as used in this clause.

13. The main contention, however, of the respondent is that, in any case, Exhibit 68 did not cover the seventy-four bales in question. This also was

a point on which the Subordinate Judge found in favour of the plaintiff, He says:-

Another circumstance is that the particular bales in question, the subject matter of the present suit, were not despatched by the Company at all, and

as no freight, much leas reduced freight, was charged in respect of them, the Risk Note (exhibit 68) cannot apply to them. It may be, that the

consignor intended to send them at a reduced freight, but so long as the reduced rate was not paid, the special contract limiting the general liability

of the defendant Company as a bailee cannot come into force... The mere fact that these bales were a part of one consignment note as to some

bales in which reduced freight was taken, can have no legal significance.

14. It is rather difficult to go as far as the Subordinate Judge, in any case, in view of the evidence of the plaintiff that the railway freight in respect of

such consignments is never paid in advance, but is always paid on delivery. The view of the Subordinate Judge, that the risk-note could not come

into force with regard to those bales until the freight had actually been paid, would, in those circumstances, entail the absurd result that goods

would not be covered by the risk-note even, while in transit on the railway. Mr. Bahadurji, for the respondent, naturally has not gone so far as that,

but his contention is that the paragraph at the beginning of the risk-note, "" unless I/we shall have entered into a special contract in relation to any

particular consignment,"" gave him an option of deciding not to send any bales at the owner''s risk at a reduced rate under Exhibit 68, but at the

railway risk at a higher rate, and that until the occasion had arisen for finally deciding whether the goods were to go at owner''s risk or railway risk,

the agreement, Exhibit 68, did not come into operation so as to affect the ordinary liability of the railway as a bailee u/s 72 of the Indian Railways

Act. He has pointed out evidence which shows that no railway receipt was granted at the Amalner Railway Station until the goods had been

actually loaded, and that it is only when the railway receipt, or at any rate, the part of the consignment note dealing with this matter had actually

been filled in, and a remark made as to whether the goods were being sent at owner''s or railway risk, that the option was finally determined. I

think that there are two difficulties in the way of this particular contention. The first is, that this parenthesis appears not in the actual terms of the

agreement arrived at between the parties but in the preliminary recitals, which is not quite on the same footing as if the words "" unless I we shall

have entered into a special contract in relation to any particular consignment"" had appeared after the words "" do hereby agree and undertake; and,

therefore, it is certainly open to some doubt whether this general agreement did in fact give an option of the kind now in question. But assuming that

is an objection of a technical kind and that the plaintiff could ask the railway company to send any particular consignment at railway risk instead of

at owner''s risk, the main question, in my opinion, is whether any such option could in fact be said to exist in the circumstances of the present case.

It is quite clear from the evidence in the case, which confirms the general recital at the beginning of Exhibit 68, that the practice was for all such

cotton bales to be sent at the special reduced rates at owner''s risk under this particular contract, or similar contracts. This contract was entered

into on November 3, 1919, and, according to the un-contradicted evidence of the foreman, Mohoniraj, remained in force for six months from its

date. I agree with Mr. Campbell that the ordinary presumption, in any case where the plaintiff"s bales were brought to the station and delivered to

the railway company for carriage, would be that the goods were to be at owner"s risk under this particular general contract. There is no suggestion

in the evidence of the plaintiff or of any witness on his behalf that there ever was any idea of these particular seventy-four bales not being sent in

accordance with the usual practice; and we have the further fact that two hundred and sixteen bales had been despatched a few days previously,

forming the bulk of the two consignments, at the reduced rate. Even supposing that it was open to the plaintiff to go and ask that the remaining

bales should be sent at railway risk, in fact no such request had been made to the railway company, according to the evidence, prior to the fire

breaking out; and, in my opinion, the remaining bales must, in the circumstances, be treated as being bales which had been tendered to the

company for carriage at owner"s risk. Consequently, unless there is anything in the document to prevent it, the reduced liability of the company

under the terms of the contract would come into operation as soon as the goods had been so tendered and so accepted by the railway company.

15. The other view would violate the ordinary rule that a person cannot act on an agreement and at the same time repudiate it, Crossley v. Dixon

(1863) 10 H.L.C. 293. The plaintiff had acted under this agreement in regard to the two hundred and sixteen bales, and he cannot be allowed to

say that it did not operate in respect of the remaining bales, which (under the presumption that I have drawn) were to be sent similarly under the

terms of this contract. A similar principle applies to a ease where a person has an option to rescind an agreement discovered to be void. In such a

case, a man cannot rescind the contract in part only, When he decides to repudiate it, he must repudiate it altogether. The case is also somewhat

similar to that of the appropriation of goods for a particular sale, so as to make the goods " ascertained " u/s 83 of the Indian Contract Act. Here

there was a definite appropriation of these bales by the plaintiff to the contract, Exhibit 68, and that had been assented to by the railway company.

According to the ruling of this Court in Ram-chandra Natha v. G.I.P. Railway Company I.L.R.(1915) 39 Bom. 485 17 Bom. L.R. 496 such a

delivery to the railway company and acceptance by the railway is valid in law, before a railway receipt is actually granted; and there is nothing

either in the law or in the rulings of this Court which, I think, prevents the view that I have mentioned being accepted. The contract itself, as would

naturally be the case, seems clearly to have been drawn to as to cover not only the period of actual transit but also the period before such transit,

during which the goods may be in the actual possession of the railway, as well as the period subsequent to such transit, before they are actually

given delivery of to the consignee. The words ""bafore, during and after transit"" are too clear to be open to any other construction, and this is also in

accordance with the view that has been taken in England as to the commencement and duration of the liability of a common carrier of goods, who

carries on the business both of a warehouseman and a common carrier. As stated in Addison''s Law of Contracts, 10th Edition, page 973, if

goods are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the

ordinary duties and responsibilities of a warehouseman or bailee for hire. But if the destination is marked out, and the carrier has nothing to do but

to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may

occur to the goods in the warehouse, as they are then in transitu, in contemplation of law. The cases relied upon are Forward v. Pittard (1785) ITR

27 and Hyde v. The Trent and Mersey Navigation Company (1793) 5 I T.R. 889. Here, if the goods cannot be said to have been in transitu in

contemplation of the law, the contract itself makea provision for their being covered during this particular period. Consequently, in my opinion, the

view which found favour in the lower Court as to the contract not covering these seventy. four bales is erroneous, and the contract clearly applies

to them.

16. The result is that, in my opinion, the plaintiff is bound by this contract, and that the railway company are absolved from any liability in respect of

this fire, inasmuch as the term ""wilful neglect"" cannot under the terms of the contract, be deemed to include any wilful neglect connected with that

fire.

17. In this view the other point as to the lower Court''s finding that there was negligence in dealing with the goods under the ordinary rule of law,

u/s 72 of the Indian Railways Act, does not really arise for decision, but, as the case may go further, I think we should give our opinion. It has been

laid down by this Court, following Brabant & Go. v. King [1895] A.C. 632, 640, that the obligation of the railway company towards the

consignor of goods includes not only the duty of taking all reasonable precautions to obviate risks, but the duty of taking all proper measures for

the protection of the goods when the risks actually occur : vide, Lakhichand v. G.1.P. Railway (1911) 14 Bom. L.R. 165 .Thus in Narsing-girji

Mafg. Co. v. G.I.P. Railway (1918) 21 Bom. L.R. 408 the railway ware held to be negligent in having no proper water arrangements to put out

the fire after it had occured. In the present case, it seems quite clear from the evidence that the arrangements for dealing with the fire were

inadequate, and that there was also an insufficient supply of water. The evidence has been sufficiently summarised by the Subordinate Judge, and I

need not repeat it here. I have regard to the consideration that has been put before us by the learned Counsel for the appellant that it is

impracticable for the railway company to have werehouses properly protected from risk of fire through engine sparks or otherwise, or to provide

tarpaulins or other protection at every station where bales of cotton may be brought; but the present case arose at an important junction, where we

might expect efficient arrangements, at any rate, for the suppression of fire, to be available, Certainly, on an occasion like the present one where

there was considerable delay in the despatch of bales, which meanwhile had to remain in the open, a prudent owner would take extra precautions

against the risk of the bales catching fire. I see no reason to differ from the view of the Subordinate Judge that there was a shunting engine

employed constantly at this station, and although spark arrestors were used to reduce the risk of fire, yet the circumstances did give occasion for

extra precautions in preventing such risk, It has been laid down in Smith v. London and South Western Railway Co. (1870) L.R. 6 C.P. 14 that

although there may be no negligence in the working of the engine or in its construction, a company may be liable for damage done by fire caused

by sparks, if by leaving inflamable material close to the line, or otherwise, its negligence caused the damage. In view of the evidence as to the

ineffective arrangements for suppressing fire, I think that there is no sufficient ground for our differing from the finding of the lower Court that there

was negligence, if the case is dealt with only under the liability of a bailee u/s 72. There was negligenoe, I think, in the company"s not taking steps

to see that the hydrants were working properly and that there was a sufficient supply of water in case fire broke out, I also think that there was

some negligence in their not having a proper watch kept to prevent the risk from sparks or bidi smoking mentioned by the Subordinate Judge.

Therefore, on that part of the case, I would not interfere with the lower Court"s decree.

18. I think that the appellant is entitled to succeed on his other contentions, and I would, therefore, allow the appeal with costs.

Madgavkar, J.
The main question in this appeal is whether the liability of the appellant company is according to the terms of the risk-note

in form H, Exhibit 68, or is that of a bailee under the Indian Contract Act.

2. Two main objections to the risk-note are taken for the respondent. The first is that the signature is not in accordance with Section 72 of the

Indian Railways Act. The signature is by Jamshedji, the nephew of the owner of the respondent firm. On the evidence, Jamshedji has been in

charge of the business since 1915, and particularly in charge of consigning and delivering goods to the railway from the respondent''s factory at

Amalner. He is, therefore, in the habit of signing for the firm, and in the particular year in question, in November, Jamshedji signed the particular

form H. It is common ground that, during the current cotton season, all the consignments sent by the respondent, including the seventy-four bales,

were sent on the terms of this risk-note in form H. The respondent thus admits that Jamshedji had authority, It appears to me, therefore, whether

the word ""witness"" is scored by Jamshedji or no, the agreement is in writing, it is signed on behalf of the respondent by Jainshedji, and, in my

opinion, it is sufficient compliance with the terms of Section 72, Clause (2) (a), to make the agreement valid in law.

3. The second objection is more subtle, It is argued that this formal agreement is not to come into force until the goods were moved or at least they

were loaded in waggons The respondent used to send all the bales to the company, even before they had waggons ready with them, and the

consignment note was then taken pending the actual payment of freight for that particular consignment. It appears that the consignment note was

sent when the goods were tendered, and the lower portion was filled in when the goods were ready to be loaded in waggons. Reliance is placed

on the words in brackets in the form ""unless I we shall have entered into a special contract in relation to any particular consignment "". It is argued

that the respondent has, therefore, the option of paying higher freight and sending the goods at the risk of the railway; and, therefore, at the time

when the fire occurred at the station, the risk-note in form H was not effective between the parties. Reading the agreement as a whole, however, it

will be noticed that the general agreement was entered into in November for all the consignments for the season on the part of the respondent, and

that it extends to goods ""before, during and after transit."" The clause, which was relied upon for the respondent, enables him in the case of a

particular consignment to send it at railway risk, if he chooses to pay higher freight. That option, in my opinion, is not an option, which can set aside

the general agreement between the parties'', Exhibit 68, until and unless there was at least a clear expression of an intention on the respondent''s

part to set it aside on his paying higher freight and sending the goods at railway risk. Of such intention there is no evidence whatever. The words

before, during and after transit"" clearly mean the entire period from the time the delivery was taken by the railway company to the time delivery

was made by the railway company to the consignee. They cover, therefore, the period when the fire took place. Moreover, the railway company

charged the respondent no rent for storage in the yard and no demurrage. Thus, there is no obvious reason to extend the appellant''s liability.

4. Under the convenants of this risk-note in form H the appellant is clearly absolved in express terms from fire.

5. The remaining question is whether any wilful neglect on the . appellant''s part was proved. It appears upon the evidence that the means of

extinguishing fire were not as they ought to be in the case of a large cotton exporting station such as Amalner. One hydrant was certainly not

working and the water was not at sufficient pressure, Probably, on the whole, this was neglect, but not, I think, wilful neglect within the meaning of

risk-note form H, so that the company should be made liable merely on this account.

6. For these reasons, I agree that the appeal must be allowed, and the plaintiff-respondent''s suit dismissed with costs in both the Courts.