CIVIL RULE.

Before Fletcher and N. R. Chatterjea JJ.

1913
Nov. 17.

EAST INDIAN RAILWAY Co.
v.
NILKANTA ROY.*

Railway Company—Loss of goods—Risk-note, Form H—Consignment under Risk-note—Loss of portion of consignment—Onus of proving cause of loss—Railways Act (IX of 1890) s. 72.

Where a number of tins containing oil was consigned to the defendant railway company under risk-note, Form H, and the tins were delivered to the consignee, but the contents of some of the tins were missing :—

Held, that the person who said that the case fell within the exceptions mentioned in the risk-note, Form H, had to prove his assertion.

Sheobarut Ram v. *Bengal North-Western Railway Company* (1) referred to.

CIVIL RULE obtained by the East Indian Railway Company, the defendants.

The plaintiff was the consignee of 242 tins of oil carried by rail under risk-note, Form H. When these tins reached their destination, the plaintiff found four tins were cut open and the contents removed. He refused to take delivery of the four tins and demanded price of the oil from the defendant company, which they refused to pay. The plaintiff, thereupon, instituted this suit in the Court of Small Causes at Burdwan. The suit was decreed, the Munsif holding that the railway company was to make out their claim for exemption from liability in respect of goods lost and that the defendant company had failed to

* Civil Rule No. 947 of 1913, against the order of Umesh Chandra Sen, Munsif of Burdwan, dated April 30, 1913.

(1) (1912) 16 C. W. N. 766.

prove how the loss had occurred. The Munsif presumed that, in the circumstances of the case, the loss was due either to the misconduct or neglect of the defendants' servants. The defendant company, thereupon, moved the High Court and obtained this Rule.

Babu Mahendranath Roy (with him *Babu Ambikapada Chaudhuri*), for the petitioners. The Court below was wrong in relying on section 76 of the Indian Railways Act. That section is not applicable to cases under risk-notes, Forms B and H. He who wants to come under the exceptions contemplated in risk-notes, Forms B or H, must prove how the loss occurred: *Sheobarut Ram* v. *Bengal North-Western Railway Company* (1). Further, in the present case, there is no loss of a complete package or packages, and hence the defendant company is not liable for damages: see *Bombay, Baroda and Central India Railway Company* v. *Ambalal Sewaklal* (2).

Babu Risheendra Nath Sarkar, for the opposite party. The Munsif was right in applying section 76 of the Indian Railways Act in the present case. That section includes all kinds of loss, whether it comes under any one of the risk-notes or not. According to common sense and justice, the railway company should prove how a loss occurs to goods, because the goods remain in their custody. In this case, the defendant company admitted that the tins were cut open and contents removed. According to general principles of the law of evidence, the railway company should explain the cause of the admitted loss. In the case of *Sheobarut Ram* v. *Bengal North-Western Railway Company*(1), the law laid down in section 76 was not brought to the notice of the Judges.

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(2) (1909) Ind. Ry. Cases 48.

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It is a general principle laid down in well-known English cases that the railway company is liable for any loss due to wilful negligence or gross misconduct on the part of the servants of the company, even if there be express contract between the plaintiff and the company that the company should be free from any liability for loss of any kind whatsoever: *Peek* v. *North Staffordshire Ry. Co.* (1), *Ashendon* v. *London and Brighton Railway Co.* (2), *Rivers Steam Navigation Company* v. *Choutmull Doogar* (3). The principle laid down in the Bombay case, cited by the other side, is not always sound, as when the loss is due to the wilful negligence and gross misconduct on the part of the servants of the company. If the loss of a "complete package or packages" be taken in its literal sense, and the principle of the English cases cited above be not followed, there may be cases in which the plaintiff will be without a remedy in tort if the oil be removed in his presence and empty tins are offered for delivery.

FLETCHER J. This is a Rule obtained by the East Indian Railway Company in a suit, which was brought against them as defendants, by one Nilkanta Roy, in the Provincial Small Cause Court at Burdwan, to recover damages for failure to deliver certain tins of mustard oil which had been consigned from Bhagalpore to Burdwan for delivery to the plaintiff. The tins of mustard oil consigned to the defendants were 242 in number. Out of these, 238 tins admittedly were properly delivered to the plaintiff; but the other four tins were not taken delivery of by the plaintiff, because those tins had been cut open and the contents were missing. The goods were consigned to the

(1) (1863) 10 H. L. C. 473.
(2) (1880) 5 Ex. D. 190.
(3) (1898) I. L. R. 26 Calc., 398; L. R. 26. I. A. 1.

defendants under a risk-note which is known as Form H. That risk-note is made under the provisions of section 72 of the Indian Railways Act (IX of 1890) and, in accordance with the terms of that Act, it has received the approval of the Governor-General in Council. The note provides that the owner should undertake "to hold the Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of such consignments from any cause whatsoever except for 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 wilful neglect of its servants, transport agents or carriers employed by them." Now, the learned Munsif who tried the case in the Court of first instance held that the onus of proving the loss fell upon the Railway Company, and that, in the absence of any proof that the loss was caused by one of the risks undertaken by the owner under the risk-note, the Court was bound to presume that the goods were lost under one of the reasons covered by the exception to the risk-note. In that view, the learned Munsif was, in my opinion, clearly wrong. There is a decision of this Court: *Sheobarut Ram* v. *Bengal North-Western Railway Company*(1). That was a decision of Mr. Justice Harington and Mr. Justice Caspersz. It is true that the decision in that case did not turn upon the risk-note, Form H, but upon another risk-note, known as Form B; but, for the purposes of the present case, the wording of the risk-note, Form B, is identical with the wording of risk-note, Form H. In my opinion, we are bound to follow the decision cited above, and, if I may be permitted to say so, I think that that decision is quite

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correct, and that, upon the construction put on this risk-note, it must be held that the person who says that the case falls within the exception has to prove that when the case comes on for trial. Besides that, there is another decision to which the learned vakil for the railway company has called our attention, namely, the case of the *Bombay, Boroda and Central India Railway Company* v. *Ambalal Sewaklal* (1). That is a decision of the High Court at Bombay, Sir Basil Scott C. J. and Mr. Justice Batchelor being the Judges who gave the decision. That again is a case turning on the risk-note Form B; but, for all material purposes, the risk-note Form B is the same as the risk-note Form H and the facts of that case are almost the same as the facts of the present case. The question raised there was whether there had been loss of a complete package, and the learned Judges held that, as the tins forming the separate packages in the consignment were delivered to the consignee, there was no loss of any complete package and, therefore, the railway company could not be held liable. That is exactly what happened in this case. The tins were delivered to the consignee but the contents were missing. It seems to me that that decision of the Bombay High Court is good law. It is impossible to say that there was loss of complete packages when such material portions of the packages as the tins were delivered to the consignee. On both these grounds, the present Rule must be made absolute with costs.

N. R. CHATTERJEA J. I agree.

S. M. *Rule absolute*

(1) (1909) Ind. Ry. Cases 48.