APPELLATE CIVIL.

Before Suhrawardy and Patterson JJ.

THE BENGAL NAGPUR RAILWAY Co.

v.

MOOLJI SIKKA & CO.*

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July 9, 10

Railway—Carriage of goods—Risk note B—Onus of proof—Misconduct, meaning of—Difference between English and Indian risk notes, old and new—Person delivering goods for carriage, authority to bind owner—Indian Railways Act (IX of 1890), s. 72.

The immunity which the risk note brings to the railway company is by shifting the burden of proof which is ordinarily on the bailee from the railway company to the owner.

The present risk note is wider and more comprehensive in enlarging the liability of the railway than the old form or the English note.

The word "misconduct" as used in the new risk note B is wide enough to include wrongful commission and omission, intentional or unintentional, or any act done which should not have been done or not done which should have been done. Misconduct denotes any unbusinesslike conduct and includes negligence or want of proper care which a bailee is to take under the Indian Contract Act.

The authority to enter into contract with it is implicit in the delivery of goods. The person who delivers the goods is competent to sign the risk notes and his act binds the owner.

Mahabarsha Bankapore v. *Secretary of State for India in Council* (1) distinguished.

Moolji Sikka & Co. v. *Bengal Nagpur Railway Co., Ltd.* (2) approved.

THE facts appear fully from the judgment.

Rameshchandra Sen and *Jateendrakumar Sen Gupta* for the appellant.

Kalikinkar Chakravarti, *Surendramadhab Mallik* and *Prabodhchandra Mallik* for the respondent.

SUHRAWARDY J. This appeal is by the Bengal Nagpur Railway against the decision of the Additional District Judge of 24-Parganas, decreeing, in

*Appeal from Appellate Decree, No. 2231 of 1928, against the decree of D. P. Ghosh, Additional District Judge of 24-Parganas, dated May 8, 1928, affirming the decree of Upendrachandra Ghosh, Munsif of Alipur, dated July 30, 1927.

(1) (1915) 20 C. W. N. 685. (2) (1929) 1. L. R. 56 Calc. 1060.

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agreement with the trial court, the respondent's 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 Bengal Nagpur Railway. The goods were booked on the 26th June, 1925, at Tumsar Road station and they reached Shalimar on the 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 plaintiffs brought this suit to recover Rs. 1,661-10 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.

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 Great Indian Peninsula Railway Company* v. *Chakravarti Sons & Co.* (1) 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 a 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

(1) (1927) I. L. R. 55 Calc. 142.

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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. 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. *The Great Indian Peninsula Railway Company* v. *Chakravarti Sons & Co.* (1). A 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 Indian Railway Act are quite explicit. Clause (*2*) of section 72 says that an agreement, purporting to limit the responsibility of the railway administration under the Indian 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; the 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

(1) (1927) I. L. R. 55 Calc. 142.

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.

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 East Indian Railway Company, Limited* v. *Ram Chabila Prosad* (1). 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.

The second ground of the judgment of the learned judge is that Nathu Singh signed the risk notes as Nathu Singh for M. S. 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 *Mahabarsha Bankapore* v. *Secretary of State for India in Council* (2). 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

(1) (1924) 86 Ind. Cas. 558. (2) (1915) 20 C. W. N. 685.

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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* 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 it had, 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 plaintiffs in this case. The consignment note bore, under the first column, plaintiff's name in full, Moolji Sikka & Co., and, as the plaintiff company had large dealings with the railway, it is evident what M. S. stood for.

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., Calcutta* v. *Jot Ram Chandra Bhan* (1). This case has been dissented from by this Court in *Moolji Sikka & Co.* v. *Bengal Nagpur Railway Co., Ltd.* (2). I agree with the view held in the latter case and I do not think it necessary to say anything further on the point.

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 anything 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

(1) [1928] A. I. R. (Lah.) 162. (2) (1929) I. L. R. 56 Calc. 1060.

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 were rules as to the mode in which *biris* 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 *biris* 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.

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 find 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.

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

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"or to theft by or to the wilful neglect of its servants, "transport agents or carriers employed by them." 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, under section 72 of the Railway 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." When the risk notes, 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 Company* (1). There the learned Chief Justice accepted the following definition given by Johnson J. in *Graham* v. *Belfast and Northern Counties Railway Company* (2): "wilful misconduct means misconduct to which the "will is party as contra-distinguished 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

(1) [1905] 2 K. B. 532. (2) [1901] 2 I. R. 13.

"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." To it the learned Chief Justice added "or acts with reckless careless- "ness, not caring what the results of his carelessness "may be." 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 Company* (1). It will be noticed from the definition given by Alverstone C. J. in *Forder* v. *Great Western Railway Company* (2) 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 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. IV, paragraph 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." Then it is added "misconduct "is not necessarily established by proving even "culpable negligence." The learned editor had probably in mind, when he used those words, the definition of "wilful misconduct" as it appears that he relied in support of his statement on *Forder* v. *Great Western Railway Company* (2). I am inclined to hold that the word "misconduct" as used in the new risk note B is wide enough to include wrongful

(1) (1915) 114 L. T. R. 183. (2) [1905] 2 K. B. 532.

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commission and omission, intentional or unintentional —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 *The Bengal Nagpur Railway Company, Limited* v. *Moolji Sicka and Co.* (1), 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 under section 151, Indian 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 change in the form of the risk note, there has been no change of law; on the other hand, it has been emphasised 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.

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

(1) (1928) 49 C. L. J. 551.

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 company, 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 plaintiffs objected "to the wagon. The station coolies loaded the "wagon. The locks were supplied by the plaintiffs "and the plaintiffs' seals were placed there by the "coolies." 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 have been 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

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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." 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 under section 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 relation 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 the 6th July, 1925, that it was in the same leaky state on the 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 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 *H. and C. Smith, Limited* v. *Great Western Railway Company* (1), Bankes L. J. said "Although the learned judge of

(1) [1921] 2 K. B. 237.

"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." 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 the 6th July, it must be so on the 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.

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 that each party do bear his own costs throughout.

PATTERSON J. I agree.

Appeal allowed.

A. A.