APPELLATE CIVIL.

Before Lort-Williams and M. C. Ghose JJ.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

FAKIR MAHAMMAD WAZIR MAHAMMAD.*

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Nov. 29 ; *Dec.* 4, 5, 7.

Railway—Railway administration, Luties of—Fire—Consignor, Position of—Misconduct—Indian Railways Act (IX of 1890).

There is no misconduct on the part of a railway in taking instructions from the consignor, where circumstances did not justify delay in disposal of the consignment and where it was reasonable to expect that the connected railway might object to carry the damaged goods (*e.g.*, grapes).

It cannot be laid down as a proposition of law that the consignor loses his property in the goods as soon as he makes them over to the railway.

It depends on the circumstances whether the consignor or the consignee is to be presumed to be the owner of the goods in transit and the knowledge of the carrier is material in such circumstances.

The carrier is not responsible for loss if he takes instructions from the ostensible agent, *viz.*, the consignor, for the disposal of the consignment, when unable to communicate promptly with the consignee.

The carrier is not responsible for the loss of or damage to a consignment, if for absence of a proper address the carrier cannot consult the consignee.

It is the duty of the consignor to furnish the address of the consignee and to write the same plainly and legibly.

SECOND APPEAL by one of the defendants.

The facts of the case and the arguments advanced at the hearing of the appeal appear fully in the judgment.

Shyamacharan Brahmachari and *Bhabeshnarayan Basu* for the appellant.

Amarendranath Basu and *Beerendranath Basu* for the respondents.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 3034 of 1931, against the decree of R. R. Mukherji, Second Additional District Judge of Howrah, dated July 27, 1931, affirming the decree of Phanibhushan Banerji, First Subordinate Judge of Howrah, dated Jan. 27, 1930.

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M. C. GHOSE J. This appeal arises out of a suit for recovery of Rs. 4,500 as damages for non-delivery of a consignment of 150 baskets of grapes booked by the defendant No. 4, Habibulla, at Chaman station on the North-Western Railway under P. W. Bill No. 77033, dated the 19th October, 1926, in refrigerator van No. 2777 for delivery to the plaintiffs at Howrah station on the East Indian Railway. The delivery of the consignment not having been obtained by the plaintiffs, they, after communication with the railways concerned, instituted the present suit on the last day of limitation provided by the Code.

The suit, in effect, was against two railway administrations, the East Indian Railway and the North-Western Railway. The suit as against the East Indian Railway was dismissed and the suit as against the North-Western Railway administration was decreed in part by the trial court for the sum of Rs. 3,870. That judgment and decree have been affirmed in appeal by the second Additional Judge of Howrah. The North-Western Railway administration have appealed to this Court.

The case was argued before us in great detail by the learned advocates of both sides. The facts of the case are that the consignment left Chaman railway station on the 19th October and covered 812 miles to Jakhal station on the North-Western Railway and arrived at about 10 a.m. on the 22nd October, when fire was seen coming out of the van. Steps were immediately taken to put out the fire and the van was opened and 129 baskets were salvaged, while 21 baskets were totally damaged. The occurrence of the fire was disputed by the plaintiffs in the trial court: but the trial court found, on the evidence, that the fire occurred spontaneously, as stated by the defendants and that 21 baskets were totally damaged and were unfit for use. The courts found that the railway administration was not liable for the loss of these 21 baskets. Both courts, however, have found that the railway administration was liable for the

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price of 129 baskets, which were salvaged and which were not delivered to the plaintiffs at Howrah station.

It is admitted that the consignment was sent by Habibulla under risk note H, under which, in consideration of special reduced or owner's risk rates, the consignor agreed and undertook 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 whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants. The learned advocate for the plaintiffs admits that the case will fail, unless he can establish misconduct on the part of the railway administration or their servants. He argues that, upon the facts and circumstances of the case, the courts below were correct to hold that the railway administration were guilty of misconduct.

The only question before us is whether, upon the facts and circumstances of the case, the courts below were correct to hold that the railway administration were guilty of misconduct in respect of the disposal of the 129 baskets.

It was urged that the railway administration packed the baskets wrongly in the van and were wrong to place 150 baskets in one van. As to this, the facts are that the van was packed entirely by the consignor and his men and the railway officials had nothing to do with the packing. The railway administration, in our opinion, cannot be held liable for the alleged defective packing. The capacity of the van was 150 baskets and it was, therefore, not packed beyond its capacity.

As to the cause of the fire, the train examiner of the railway administration gave evidence. He stated many different theories as to the cause of fire. He said that he could not come to any definite conclusion, but that, in his opinion, the fire had started spontaneously by the friction of the canes of the

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baskets with the roof of the van. That there was something wrong in the van appears from the same officer's evidence that, while the first fire was put out at 10 a.m., fire again broke out in that van at 8 p.m. and for the third time the fire broke out at midnight. In our opinion, the courts below were right to hold that the railway administration cannot be held responsible for the loss by the fire.

The question is whether the 129 baskets, which were salvaged after the fire at 10 a.m. on the 22nd, could be duly sent on to the consignee at Howrah. Both the courts below came to the conclusion that the salvaged baskets were in perfectly good condition and could have been sent to Howrah from Delhi in about 25-27 hours. The learned advocate for the railway administration urges that this conclusion of the courts below is not justified by the evidence. From Jakhal to Delhi the distance is 124 miles and the North-Western Railway administration terminates there. From Delhi to Howrah the distance is 902 miles and it is in the administration of the East Indian Railway. The evidence is that, upon the fire occurring, the van on fire was emptied and the salvaged baskets were put into another van and sent on by a train leaving Jakhal at 5 p.m. and the same van reached Delhi on the 23rd October and delivery of the baskets was made to one Daroga Rahman Bux, fruit merchant, at Delhi at 8 a.m. on the 24th. Even at that time Daroga Rahman Bux found that 50 out of the 129 baskets were damaged and he made a note in the receipt, which he gave to the railway administration. He stated in evidence that the remaining baskets were also soft emitting juice. The learned advocate for the railway administration argues that the van was sent by an express parcels train and it took three days to cover the first 812 miles and in ordinary course, it would have taken more than three days to cover the 1,026 miles from Jakhal to Delhi and, having regard to the poor condition of the salvaged grapes, the railway administration acted reasonably in holding that the

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grapes could not bear a journey to Howrah. He also urges that, having regard to the soft condition of the grapes, the East Indian Railway administration, who were to carry the fruits from Delhi to Howrah, might reasonably have objected to carry them. It is well known that soft fruits, specially when subjected to heat and pressure, do not keep long fit for human consumption. In all these circumstances, we are of opinion that the conclusion drawn by the courts below was wrong. The North-Western Railway administration acted properly in disposing of the salvaged goods at Delhi. They cannot be held guilty of misconduct on that account.

The next question is whether it was the duty of the railway administration to consult the plaintiffs, who were the consignees, about the disposal of the goods at Delhi. The learned advocate for the plaintiffs has urged that the plaintiffs being the consignees, the railway administration ought to have concluded that they were the owners of the goods and it was their duty to consult them. He urges that, when the consignor consigned the goods to the consignee and made over the goods to the railway administration, the interest of the consignor ceased in the goods and the railway administration became the agents of the consignee and it was their duty to consult the consignee and, as they did not consult the consignee, the courts below were right to hold that they were guilty of misconduct. We are of opinion that it cannot be laid down as a proposition of law that the consignor loses his property in the goods as soon as he makes them over to the railway administration for delivery to the consignee at another station. In this connection, it is interesting to note the case of *Chhaganlal Shaligram Shet* v. *East Indian Railway Company* (1), where one G. booked a consignment of goods to be delivered to one R. at Kampti; after the goods had left the receiving station and were on their

(1) (1903) I. L. R. 27 Bom. 597.

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way to Kampti, G. the consignor instructed the railway administration not to deliver the goods to R. at Kampti but to deliver the same to the plaintiffs at another station. The goods arrived at Kampti and R. insisted on taking delivery of them and threatened the railway officers, whereupon delivery was made to him. The plaintiffs thereupon sued the railway administration and obtained damages from the courts. This case would go to show that the proposition, that the consignor loses his property in the goods as soon as he makes them over to the railway administration, cannot be accepted as a correct proposition of law. It would depend upon the circumstances of each case. It may be that the consignor would remain the owner of the goods during the time they are in the possession of the railway administration or it may be that the consignee was the owner of the goods. The facts must be considered; and we must, in fairness, consider what was the knowledge of the railway administration at the time, when the damage at Jakhal took place and they had to act quickly in an emergency. It is in evidence that Habibulla is a partner in a firm of fruit merchants at Quetta and the firm have a large trade in fruits, which they send by the North-Western Railway, and, some time before the present occurrence, Habibulla on behalf of the firm had executed and delivered to the North-Western railway administration an owner's risk note in respect of all fruits, which the firm would send by the railway during the next six months. From this fact it is urged by the learned advocate for the railway administration that the railway officers had good reason to believe that in this case the consignor remained the owner even after making over the goods to the railway administration. As a matter of fact, it was proved by evidence and accepted by the courts below that the plaintiffs were really the owners of the goods and Habibulla, the consignor, was the agent of the plaintiffs. Accepting that finding of the

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courts below as correct, namely, that the plaintiffs were the owners and Habibulla, the consignor, was the agent of the plaintiffs, it is a question whether the railway administration acted improperly in consulting Habibulla in the matter of the disposal of the goods. In the first place, the railway administration in that emergency could not very well consult the plaintiffs, as there was not sufficient address, from which the plaintiffs could be found. The court of appeal below has stated that, for the omission to obtain the proper address of the plaintiffs, the railway administration are responsible and that the failure to obtain the address of the plaintiffs constituted misconduct on the part of the railway administration. We are of opinion that this conclusion of the court of appeal below is wrong in law. It is the duty of the consignor to furnish the address of the consignee and write the same plainly and legibly. If the consignor does not perform his duty and the goods are thereby lost or delayed, the railway administration cannot be held responsible for the same.

It was next urged by Mr. Basu on behalf of the plaintiffs that, even though the company did not know the address of the plaintiffs, they should have asked the consignor for the address of the plaintiffs and then consulted the plaintiffs as to the disposal of the goods. In not doing so, they committed misconduct. In our opinion, this proposition cannot be accepted. First of all, we must note that the situation called for prompt action. The salvaged goods had been subjected to pressure and heat and would soon become unfit for consumption. In the circumstances of emergency it was not reasonable to expect that the railway administration would telegraph to the consignor and obtain the address of the plaintiffs from him and would then telegraph to the plaintiffs at Calcutta and wait before the disposal of the goods for a reply from the plaintiffs. It is not improbable that, if they had taken that course, the goods by that time would have become unfit for human consumption.

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The next question is whether the railway administration disposed of the goods on the instruction of Habibulla, the consignor, and whether their action was right. Mr. Brahmachari on behalf of the railway administration has argued that, if Habibulla was not the owner of the goods, he was at any rate the agent of the plaintiffs and as such he had authority, in the circumstances of emergency, to do everything which was necessary without notice to his principal. Habibulla, who was examined on commission on behalf of the railway administration, tried to wriggle out of the position. The court of appeal below has quoted only a portion of his deposition. We think that, for a proper appreciation of the circumstances, the whole of his deposition should be considered. In reply to interrogatories he admitted that grapes were of a perishable nature ordinarily; but when protected by ice, they could not go bad in a fortnight. He was informed of the accident by fire at Jakhal and he admitted that some one at Chaman phoned him at Quetta informing him of the wagon catching fire and asking him for instructions for disposal of the goods left. He pretended he did not know who spoke to him on the phone. The railway station-master at Chaman has stated that he phoned to Habibulla and Habibulla on the receipt of the phone message went from Quetta to Chaman to see him, and instructed him in the circumstances to make over the goods to Daroga Rahaman Bux at Delhi and Habibulla sent a telegram to Daroga Rahaman at Delhi to receive the goods. In these circumstances there is, in our opinion, no doubt that the railway administration duly consulted Habibulla and disposed of the goods according to his instructions and as Habibulla was, if not the owner, at any rate the agent of the plaintiffs, the instruction given by him to the railway administration is binding on the plaintiffs.

Having regard to all the circumstances, we are of opinion that the North-Western Railway

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administration were not guilty of misconduct in disposing of the salvaged goods as they did.

The result is that the appeal is allowed. The decrees of the courts below are set aside and the plaintiffs' suit dismissed with costs in all the courts.

LORT-WILLIAMS J. I agree that, upon the facts proved in this case, the defendants cannot be held guilty of misconduct within the meaning of the risk note. The appeal, therefore, must be allowed with costs throughout.

Appeal allowed.

G. S.