APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

HAJI TILLOI MAHAMMAD UMER BUKSH
v.
BENGAL NAGPUR RAILWAY COMPANY, LIMITED.*

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Feb. 26.

Railway—Responsibility of railway company—Risk Note, Form H—The word "loss," meaning of—Indian Railways Act (IX of 1890), s. 72.

The language of the exception clause in section 72 of the Indian Railways Act plainly indicates that the railway company is not to be responsible for the destruction or deterioration of or damage to the goods sent under Risk Note, Form "H." The only thing for which, in certain events, they are to be responsible is loss of a complete consignment or one or more complete packages. The word "loss" does not mean monetary or pecuniary loss to the consignee.

East Indian Railway Co. v. *Jogpat Singh* (1) followed.

The Madras and Southern Mahratta Railway Company, Limited v. *Mattai Subba Rao* (2) dissented from.

Marine Insurance notions about what is total loss—either actual total loss or constructive total loss—have nothing to do with the word "loss" in section 72 of the Indian Railways Act (IX of 1890).

Risk Note, Form "H," has no special reference to perishable goods. It cannot be argued that because certain perishable articles became utterly useless on account of delay in transit, it was no longer a question of deterioration but a question of loss.

APPEAL FROM APPELLATE DECREE, by the plaintiff.

The facts out of which this appeal arose are as follows: This was a suit brought to recover damages to the extent of Rs. 3,718, from the Bengal Nagpur Railway Company, Limited, for deterioration of a consignment of oranges, on the allegation that, on the 4th April, 1923, a consignment of 1,328 baskets containing oranges was booked in wagon No. 6939 from Nagpur to Howrah, under a parcel way bill No. 39,

*Appeal from Appellate Decree, No. 641 of 1927, against the decree of N. G. A. Edgley, Additional District Judge of 24-Parganas, dated Sept. 28, 1926, reversing the decree of Maulvi Osman Ali, Subordinate Judge of 24-Parganas, dated May 3, 1926.

(1) (1924) I. L. R. 51 Calc. 615. (2) (1919) I. L. R. 43 Mad. 617.

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to be carried over the defendant company's lines. This wagon was despatched by No. 11 down train on the 5th April, but owing to the supply of defective wagons, the basket of oranges had to be transhipped at Bhandara and again at Bilaspur, with the result that the consignment took eight days to arrive at Howrah. The Sanitary Inspector at Howrah found the oranges unfit for human consumption, and ordered them to be destroyed.

This suit came on for hearing before the Fourth Subordinate Judge of the 24-Parganas, and the learned Judge, being of opinion that the loss was due to the misconduct of the railway administration's servants, and that this case fell within the exception in Risk Note Form " H " of the Indian Railways Act, 1890, decreed the suit of the plaintiff and allowed him Rs. 3,000 as damages and proportionate costs and interest.

Against that decision, the defendant company preferred an appeal before the First Additional District Judge of the 24-Parganas. The learned District Judge held that the special contract under Risk Note " H " was a perfectly valid one under section 72 of the Indian Railways Act, and, inspite of the negligence of its servants, the defendant company still was not liable, unless there was a loss within the meaning of the said section, and set aside the decision of the learned Subordinate Judge. Against this reversal of the first court's decision, the plaintiff took the present appeal to the High Court.

Sir B. C. Mitter, Mr. Charuchandra Biswas and *Mr. Rabindranath Chaudhuri*, for the appellant.

Mr. S. M. Bose, Mr. Amulyachandra Chatterjee and *Mr. Prakashchandra Pakrashi*, for the respondent.

Cur. adv. vult.

RANKIN C. J. This is an appeal from a judgment and decree of the learned First Additional District Judge of the 24-Parganas, and the case has reference

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to a consignment of oranges in a wagon from Nagpur to Howrah upon the terms of a certain Risk Note in Form H. The goods were consigned on the 4th of April, 1923, and they were to go by passenger train, and the wagon commenced its journey on the 5th of April. Apparently, the wagon was not in a fit condition for travel, because, after some forty miles, it was found that its axle was too hot. Thereupon, it became necessary to transfer the goods to another wagon, and much complaint is made that this was not done with sufficient celerity. It is said that this operation was not completed until the 8th. The wagon into which the goods were put again became unfit for travel and at Bilaspur the goods had to be once more transhipped. These goods, which had been put on rail on the 4th April, did not arrive at Howrah until the 12th April. It would appear that they were fresh oranges, but that, upon their arrival at Howrah, they were so decomposed or deteriorated that they were unfit for any purpose. They were in a rotten condition and, when the plaintiff came to take delivery, it was found that the goods were not worth taking delivery of. A certificate from the Sanitary Inspector was obtained, and the best course was adopted in the interest of all the parties, namely, that the wagon-load of rotten oranges was taken to a proper place and the oranges were destroyed. In these circumstances, the plaintiff claimed damages, and the learned Judge has found in favour of the plaintiff that the failure to tranship these oranges at Bhandara with reasonable quickness was not only negligence on the part of the railway company's servants, but was wilful negligence. The language of the learned Judge is not too accurate, but he says that "the conduct of the "station staff at Bhandhara appears to me to have been "not only negligent but also reckless and careless." However, the learned Judge does mean to find that there was a case made out within the meaning of the Risk Note and that the case made out was one of wilful neglect of the railway company's servants.

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We have not heard the respondent in this appeal, and I say nothing about the question whether this neglect is really wilful neglect or not. It appears to me that something might be said on either side. Assuming, however, that it is wilful neglect, the question arises whether the neglect, such as it may be, of the railway company's servants, is a neglect for which the railway company is responsible. By this Risk Note, the consignor undertakes to hold the railway company "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 for the loss of a complete "consignment or of one or more complete packages "forming part of a consignment due either to the "wilful neglect of the railway administration or to "theft by or to the wilful neglect of its servants "transport agents or carriers employed by them "before, during and after transit over the said "railway."

The first question which arises is: what is the plaintiff's cause of action? He says that these oranges arrived at Howrah in a rotten condition and *prima facie*, it seems to me that it is quite clear that he has the general terms of this clause against him. His claim is a claim which involves making the railway company responsible either for loss, destruction or deterioration of or damage to these oranges, and there is no way of putting the plaintiff's claim that does not bring it within the ambit of the general words of the clause. In these circumstances, quite logically and reasonably, the debate in this case has proceeded upon the question whether the plaintiff can say that his case comes within the exception which is in the following words: "except for the loss of a complete "consignment or of one or more complete packages "forming part of a consignment." That is the question to which the learned Judge has addressed himself, and he has held that there has been no "loss" in the sense in which that word is used in this Risk Note. I agree with the learned Judge on that point. It

seems to me that the language of this particular clause points plainly to this that destruction or deterioration of or damage to the goods is a thing which the railway company are not to be responsible for at all. The only thing for which in certain events they are to be responsible is "loss," that is to say, loss of all or any of such consignments and they are to be responsible for that only when there is a loss of a complete consignment or one or more complete packages. All arguments, based upon the notion of loss, as meaning monetary or pecuniary loss to the consignee, have to be put on one side, and I agree with Mr. Justice Page in his view of the meaning of this word as stated in his judgment in *East Indian Railway Co.* v. *Jogpat Singh* (1). I disagree with the view taken by the Madras High Court in *The Madras and Southern Mahratta Railway Company, Limited* v. *Mattai Subba Rao* (2). Marine Insurance notions about what is total loss—either actual total loss or constructive total loss—have nothing to do with this word as used in this Risk Note, and we are not concerned with the many wide meanings that such a word is capable of having in common parlance. We are concerned with the definite meaning, which appears upon this particular exception. We have to say whether this particular consignment has been lost within the sense of this Risk Note, remembering that it is perfectly clear that destruction or deterioration of or damage to these goods is a risk which the railway company does not take, even in a case of wilful neglect.

In my judgment, the position here is that these goods deteriorated. They deteriorated because they were in transit for a longer time than ought to have been required. They took a longer time than should have been required owing to the negligence of the railway company. Of that I have no doubt. For the moment, I will assume that the length of time taken in the transfer, as the learned Judge notes, was owing to the wilful neglect of the railway company's servants. In these circumstances, it seems to me that

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this is not a case of loss at all. These goods were never lost. What happened was that they deteriorated and became worth nothing. There was a pecuniary loss no doubt, but the goods themselves were not lost. In that view, it appears to me that it is necessary to consider carefully the evidence as to what happened at Howrah. I am not saying that if the goods were detained so long in the transit that they became rotten and could not be delivered—if, for example, at some intermediate station, they had to be taken out and thrown away, or even if they had to be thrown away after they arrived at Howrah and so could never have been delivered, I am not saying whether, in either or both of these cases, the plaintiff might not have said that there had been a loss of the goods. It is not necessary to pronounce upon that, because I am satisfied that, in this case, that is not what happened. In this case, what happened was that the goods, being useless and being of such a character that the sensible thing to do was to destroy them, they were destroyed. I am not satisfied that it was impossible for the railway company to give delivery of the goods to the plaintiff. I am not satisfied that the plaintiff had no option, or that it was illegal for him to take delivery of these goods. What happened merely was that the goods being rotten, they were in fact, by consent, destroyed, which was the sensible thing to do. The Railway Sanitary Inspector gave a certificate first to afford the plaintiff proof of the condition of the goods and, secondly, because the railway staff would want some authority to destroy the goods.

When one looks at this Risk Note, one finds that it is a Risk Note in a form that is applicable to the carriage of goods and animals. It is not a Risk Note which has any special reference to perishable goods such as oranges, and the contention that is really raised upon this Risk Note is this that, if perishable goods are sent under Risk Note H, so that, in consequence of delay in transit, they become useless, then

the protection, which the railway company have stipulated for, entirely vanishes. It is said that, because they become entirely useless, it is no longer a question of deterioration or destruction, but a question of loss. In my judgment, so to construe this Risk Note would be to give it a meaning which it was never intended to bear. It would give it a meaning with reference to perishable goods which would defeat the plain intention of the contract. "Loss," in this case, is not used with reference to perishable goods in particular. The contract is dealing with ordinary goods, and when it says "the loss of a complete consignment," it is not to be construed as though it were a part of the special intention of that phrase that it is to be applied to highly perishable goods.

Learned counsel, Sir Benode Mitter, has put before this Court various arguments and contentions and has cited opinions from certain other courts to the effect that the Calcutta decisions as to the meaning of this word "loss" place too narrow a construction of this Risk Note. I can only say for myself that I am entirely of the opposite opinion: I think the Calcutta decisions place a meaning upon the words in this Risk Note, which it can be seen to bear by a careful study of the Risk Note itself.

If a person entrusts goods to a railway for carriage to X and for delivery to himself or to his consignee at X, then if the railway fails to give delivery, his *prima facie* right is to sue the railway for his goods and for damages for their detention. Nothing in these Risk Notes is intended to enable the railway to keep other people's goods, nor are railway companies, as a rule, so unreasonable as to seek so to do. These Risk Notes come into operation in the much more common case where the railway company cannot deliver the goods because it has not got them. Then a question arises of its "responsibility for any loss of "all or any of such consignments", to use the words of the Risk Note before us. The words "loss, destruc-"tion or deterioration" are followed by the words "loss of a complete consignment" and the word

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"loss" means the same thing in both cases. The word "destruction" is not repeated, and this of itself points firmly against any extension of the meaning to be given to the word "loss." The loss of goods, in the sense in which this Risk Note is concerned with it, is a question of presence or absence and not of condition. However little it may matter to a trader whether his goods are destroyed, whether they are delivered to him in a useless condition, or whether he never gets delivery at all, to a railway company carrying all sorts of goods and animals these eventualities represent very different risks. Moreover from this point of view, "the loss of a complete "package" is a different thing from the loss of some of the contents of a package. A consignee, who proposed to insure his goods for the transit, would soon find out these differences and a consignee, who proposes to be his own insurer, would be well advised to learn them.

The next point, which arises, has been dealt with by the learned Judge in a manner which is, I think, correct in its result. It was argued before the learned Judge that there was no alternative for the despatch of fresh oranges from Nagpur to Howrah and that the plaintiff could only despatch them on owner's risk terms. When we come to consider the logic of that argument and what it has to do with the question of this contract, I can only say that, while I paid attention to the argument of Sir Benode Mitter, I have failed to find that there is any ground for supposing that the existence of another method of consignment or the non-existence of another method of consignment has any effect upon the validity of the particular contract before us. I do not understand why in the absence of proof that fresh fruits would have been accepted at railway risk, this consignment note is supposed to be without consideration, nor do I follow the argument which apparently impressed the learned Judge that the existence of an alternative rate was a condition precedent to the operation of that portion of the Risk Note by which the company contracted

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themselves out of their general responsibility. However, the learned Judge has found upon a construction of the documents laid before him that it is not shown that there was no alternative rate, and he has held that there was an alternative rate. The documents have been put before us. There is a document, first of all, of 1919, which purports to say that perishable articles are to be carried at the owner's risk. Then, in 1920, came a series of arrangements, and I am satisfied, as the learned Judge was satisfied, that the notice of 1919 came to an end as regards the consignment of oranges from Nagpur to Howrah. There was a further document of 1921 and yet a further document of 1922, which have been laid before us. The 1921 document continued the 1919 arrangement only as regards certain named articles, sections or stations and as regards rates and fares " which are in force at " present." For the present purpose, as we know, the arrangement of 1919 came to an end in 1920. Again in 1922, it appears that if a man must consign oranges from Nagpur to Howrah, *both* in wagon-loads *and* by passenger train, then the rate charged was a certain fixed rate. There is nothing whatever to show that there was no alternative course open. In my opinion, the learned Judge is right in his finding as to that and no cause of action arises to the plaintiff in this respect.

In my opinion, this appeal should be dismissed with costs.

GHOSE J. I agree.

O. U. A. *Appeal dismissed.*