

1895.  
July 12.

*Before Knox, Officiating Chief Justice, and Mr. Justice Aikman.*  
EAST INDIA RAILWAY COMPANY (DEFENDANT) v. BUNYAD ALI<sup>c</sup>  
(PLAINTIFF).\*

*Act No. IX of 1890 (Indian Railway Act), section 72—Contract saving liability of Company for loss of goods carried by it—“Risk note.”*

The contract embodied in what is commonly known as a “risk note,” *i e.*, a contract whereby in consideration of goods being carried by a Railway Company at a reduced rate the consignor agrees that the Company shall be free of all responsibility for any loss or damage to the goods, is a valid and legal contract within the terms of section 72 of Act No. IX of 1890. *Suntokh Rai v. East India Railway Company* (1) distinguished.

IN this case the plaintiff-respondent sued to recover from the East Indian Railway Company a sum of Rs. 110 as the value of certain boxes of ghi, which had been made over by the plaintiff to the Company at Khurja, for transmission to Serampur and had not reached their destination. The goods were despatched at owner's risk, and what is known as a “risk note” was taken from the consignor. A “risk note” contains the terms of a special agreement whereby the consignor, paying a lower freight than he would otherwise be bound to pay, “in consideration of such lower charge, agrees and undertakes to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever, before, during, and after transit over the said railway, or other railway working in connection therewith.” The loss of the goods in question was admitted by the defendant Company; but they pleaded that they were absolved from liability by the terms of the contract entered into by the plaintiff. The Court of first instance (Munsif of Saháranpur) decreed the plaintiff's claim. The defendant appealed and the appellate Court (Subordinate Judge of Saháranpur) referred the question of the validity of the contract relied upon by the defendant to the High Court under section 617 of the Code of Civil Procedure. That Court was of opinion that, inasmuch as the ordinary liability of a Railway Company for loss of goods delivered to them for transmission was, by section 72 of Act No. IX of 1890,

\* Miscellaneous No. 173 of 1895. Reference under section 617 of Act No. XIV of 1882, by Pandit Bansidhar, Subordinate Judge of Saháranpur.

(1) N.-W. P. H. C. Rep., 1867, p. 200.

that of a bailee under the Indian Contract Act, 1872, sections 151, 152 and 161, the Company could not contract itself out of all liability, since even a gratuitous bailee was not absolved from all liability from any cause whatever. The lower Court referred to the case of *Suntokh Rai v. East Indian Railway Company* (1) and *Tippanna v. The Southern Maratha Railway* (2).

The Hon'ble Mr. *Colvin*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

KNOX, OFFICIATING C. J., and AIKMAN, J.—The Subordinate Judge of Meerut had before him an appeal in which his decree would be final, and entertaining doubt as to the construction of a document, which construction affected the merits of the appeal before him, he has referred a statement of the facts of the case for the decision of this Court. The document regarding the construction of which the Subordinate Judge entertained doubt is what is ordinarily known as a "risk note," in other words, it is a document purporting to limit the responsibility of the East Indian Railway Company for the loss, destruction or deterioration of goods delivered to the said Company to be carried by railway. It is admitted by both the parties to the appeal that the agreement is in writing, signed by the persons sending the goods, and is otherwise in the form approved by the Governor-General in Council. It falls clearly within the provisions of section 72 of Act No. IX of 1890, and no attempt is made by the learned vakil for the respondents to take the agreement out of the provisions of section 72 of Act No. IX of 1890. Under this agreement the consignor, who had the option of forwarding his goods at an ordinary rate, in which case the Railway administration would have been responsible for their loss, elected, instead of paying that ordinary rate, to pay a lower charge, and in consideration of such lower charge agreed and undertook to hold the East Indian Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of the said consignment from any cause whatever before, during or after transit over the said Railway. In the present case the goods delivered to the Railway Company for transit over their line were lost, and in

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(1) N.-W. P. H. C. Rep., 1867, p. 200.

(2) I. L. R., 17 Bom., 417.

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spite of the agreement entered into by him, the consignor sued the Railway Company for damages on account of such loss. The doubt entertained by the Subordinate Judge is really a doubt as to whether such an agreement is morally defensible. He seems to consider it wrong on the part of the Railway Company to tempt the public to incur such risk, and he seeks to fortify his opinion by a ruling of this Court in *Suntokh Rai v. East India Railway Company* (1). The risk note in that case was quite different. The law prevailing at that time was quite different, and the ruling has no bearing on the facts of the case.

The provisions of section 72 of Act No. IX of 1890 are quite clear and free from all ambiguity, and it is not open to any Court to take a case out of the provisions of the Statute when the case clearly falls within those provisions.

Our answer to the reference is in the affirmative. The defendant Company is absolved from all liability, under the circumstances set out, for the non-delivery of the plaintiff-respondent's goods. A copy of this judgment under the signature of the Registrar will be transmitted to the Court by which the reference has been made.

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Before Mr. Justice Blair and Mr. Justice Burkhitt.

DARYAI BIBI AND ANOTHER (DEFENDANTS) v. BADRI PRASAD AND ANOTHER (PLAINTIFFS).\*

*Civil Procedure Code, sections 626, 629—Review of judgment—Appeal.*

No appeal will lie from an order granting a review of judgment except under the conditions specified in section 629 of the Code of Civil Procedure. *Bombay and Persia Steam Navigation Company, Ltd., v. The S.S. "Zuari"* (2) followed.

In this case the present respondents were plaintiffs in the original suit. The suit was decided *ex parte* in their favour. The defendants appealed to the District Judge, who decreed the appeal on a point which had not been raised in the suit. The plaintiffs then applied for review of the lower appellate Court's judgment allowing the appeal. They tendered fresh evidence in the shape of a material document, with an affidavit as to the reason of its non-production

\* First Appeal No. 1 of 1894, from an order of F. B. Elliot, Esq., District Judge of Allahabad, dated 23rd December 1893.

(1) N.-W. P., H. C. Rep., 1867, p. 200.

(2) I. L. R., 12 Bom., 171.