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BANERJI, J.—I also am of opinion that the preliminary objection raised on behalf of the respondent that no appeal lies is well-founded. The order complained of is an order relating to proceedings held by the court under order XXI, rule 66, for the purpose of specifying in a proclamation of sale the matters which are required by the rule to be specified including "every other thing which the court might consider material for a purchaser to know in order to judge of the nature and value of the property." I have no doubt that the proceedings held under the rule are of an administrative nature and are not judicial proceedings. The court can in no sense be held to have determined judicially, as between the decree-holder and the judgement-debtor, what the value of the property actually is. An estimated value is all that is required to be given in order to enable intending bidders to judge of the nature and value of the property. An order declaring the estimated value cannot be said to be an order relating to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Code of Civil Procedure. It is consequently not a decree and no appeal lies from such an order. I would dismiss the appeal.

BY THE COURT.—We dismiss the appeal with costs.

Appeal dismissed.

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March, 12.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

EAST INDIAN RAILWAY COMPANY (DEFENDANTS) *v.* NATHMAL BEHARI LAL (PLAINTIFF.)*

Contract—Agreement for carriage of goods by rail—Risk note—Liability of Company for goods consigned on a risk note—Burden of proof.

Where goods are booked for carriage by railway under a "risk note" and are lost in transit, it lies upon the consignor claiming damages against the Railway Company to show that the loss was occasioned by the theft or wilful neglect of the Company's servants. *Sheobarut Ram* v. *The Bengal and North-Western Railway Company* (1) referred to. *Bengal and North-Western Railway Company* v. *Haji Mutsaddi* (2) distinguished.

* Civil Revision No. 128 of 1916.

(1) (1912) 16 C. W. N., 766. (2) (1910) 7 A. L. J., 833.

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THE facts of this case were as follows :—

On the 18th of March, 1915, 106 bags of sugar and 51 bags of jaggery were delivered to the East Indian Railway at Dohri on Sone for carriage to Cawnpore. They arrived at Cawnpore short by 6 bags of sugar and 3 bags of jaggery. The plaintiff brought a suit for the price of the lost bags. The Railway Company defended the case on the ground that the loss was not due to their wilful negligence. The lower court holding that the burden of showing that reasonable and proper care was taken of the goods consigned to the Company as bailee lay on the Railway Company and the Company failed to discharge it, decreed the plaintiff's claim. The defendant Company came in revision to the High Court.

Mr. *W. Wallach* (with whom Pandit *Ladli Prasad Zutshi*), for the applicant :—

The loss complained of has accrued to the plaintiff, but not by the wilful negligence of the Company. The burden of proof is not on the defendants. He who alleges negligence must prove negligence. The question of the general responsibility of the bailee under sections 151 and 161 of the Indian Contract Act, does not arise here. Under section 72 of the Indian Railways Act the Railway Company has the power to contract itself out of those general provisions. It can limit its liability as a bailee by complying with clauses *(a)* and *(b)* of sub-clause (2) of section 72. The risk note in question has been signed by the consignor: it is a form which has been approved by the Governor General in Council, and is binding on the parties. Under the terms of a risk note, the consignor gets the advantage of a reduced freight and the Railway Company are liable only under certain specified circumstances. The existence of those circumstances should be established by those who allege them. He referred to *Sheobarut Ram* v. *B. N. W. Railway* (1), *East Indian Railway* v. *Sheo Prasad* (2), *East Indian Railway* v. *Nilkanta Roy* (3) and *Jagan Nath Ram Narain* v. *East Indian Railway Co.*, (4).

(1) (1912) 16 C. W. N., 766 at (767).
(2) (1912) 17 C. W. N., 529.
(3) (1913) I. L. R., 41 Calc., 576 (578).
(4) C. R. No. 128 of 1915.

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The evidence on record satisfactorily establishes that the Railway Company did take reasonable care of the goods consigned.

Pandit *Kailas Nath Katju*, for the opposite party :—

Two questions have been argued. (1) The question fo burden of proof and (2) the question of sufficiency of evidence. The former question is rather academical. Both parties having entered into evidence the case will have to be decided on the merits. There are three considerations which throw the burden of proof on the Railway Company. First, under the circumstances it is absolutely impossible for any consignor to give evidence of any neglect whatsoever on the part of the Railway Company. Secondly, the goods being in the possession of the Railway Company it is bound to give a reasonable account of them. Thirdly, if no evidence whatsoever was produced the plaintiff would be entitled to a decree. He referred to *East Indian Railway* v. *Gauri Dat Gopal* (1). The reduction of freight will not reduce or limit responsibility. The position of a bailee who accepts remuneration for his service cannot be better than that of a voluntary bailee, who too has to show reasonable and proper care. The contract as exhibited in the risk note does not wholly discharge the Railway Company of all responsibility. Under that contract the Railway Company will be liable for its wilful negligence. "Wilful" is rather an unhappy term. It seems to belong to the region of criminal law. In civil law we generally meet with gross negligence. If "wilful negligence" means "gross negligence" then there is no difference between "negligence" and "gross negligence." "Gross negligence" has been well explained in 562 English Reports, 159 (Exchequer). From the evidence on record it should be clearly established that the Railway Company took reasonable and proper care. What would constitute reasonable and proper care would depend on the circumstances of each case. The question is not of manner or means. It is one of degree. If the court is of opinion that the Railway Company took all possible and reasonable care, I have no case. Even then I would submit that in revision the court has merely to see that the view taken by the lower court is a view warranted by the evidence on record. It may not be the

(1) C. R. No. 81 of 1911.

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only view or it may not even be the best view. The view taken in this case by the lower court was taken in a like case by two Judges of this Hon'ble Court in *Bengal and North-Western Railway Co.* v. *Haji Mutsaddi* (1). Under the circumstances it can hardly be called unreasonable.

RICHARDS, C. J., and BANERJI, J. :—This is an application for revision seeking to set aside the decision of the Small Cause Court Judge at Cawnpore. The only facts before the Court are admitted. A consignment of sugar was sent from Dohri on the Sone to Cawnpore. Apparently after the waggon was loaded the doors were duly sealed in such a way that the Railway servants would be able to see whether or not the waggon was entered in the course of transit. From time to time during the journey this waggon and the other waggons composing the train were examined and the seals found intact. The examination continued until the last station but one before the arrival of the train at Cawnpore. At this last examination the seals were still found intact, but on the arrival of the train in Cawnpore the seals of the doors on five waggons were found to have been broken and six of the bags of sugar consigned by the plaintiff were found missing. The plaintiff had entered into a contract with the Railway at the time the goods were consigned in what is called "Risk-Note, Form H." By this contract the plaintiff, in consideration of payment of freight at a lower rate, agreed to hold the Railway 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 one or more complete packages forming part of the consignment due either to the wilful neglect of the Railway Administration or to theft or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the Railway. This contract is admittedly a valid contract within the meaning of section 72 of the Indian Railways Act, clauses *(a)* and *(b)*. The plaintiff brought the present suit claiming Rs. 175-11-0, compensation for the loss of the sugar. The Railway relied on the terms of the special contract entered into. The learned Judge of the Small Cause Court decided in

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favour of the plaintiff, chiefly relying on an unreported decision of a single Judge of this Court in which under very similar circumstances it was held that the Railway was liable. It seems to us that, unless it could be shown in the present case, either that the loss was caused by the theft by one or more of the Railway servants, or unless it could be shown that the loss was caused by their wilful neglect, the Railway were not liable having regard to the contract entered into with them by the plaintiff. It is said that the *onus* of showing that the loss was not so caused lay on the defendants. We think that this contention is not well founded; on the contrary that the Railway were not liable unless the plaintiff could show that the loss was occasioned by the theft or wilful neglect of the Railway servants. The respondent's vakil has cited the case of *The Bengal and North-Western Railway Co.* v. *Haji Mutsaddi* (1). That was the case of a second appeal in which there had been a finding by the lower appellate court that the Railway were guilty of wilful neglect in the manner in which they secured the doors of the waggons. This was a finding of fact which was binding on this Court in second appeal. The case therefore affords us no help in the decision of the present case. On the other hand, the appellants rely on the case of *Sheobarut Ram* v. *The Bengal and North-Western Railway Co.* (2), in which it was held that in a case where the consignor has entered into a special contract like the present the *onus* lies on him of bringing the case within the *proviso* mentioned in the contract. The learned Small Cause Court Judge has thought that the expression "robbery from a running train" did not mean an ordinary theft in a running train but had reference to "robbery" as defined in the Penal Code. It is perhaps unnecessary for the decision in the present case, but we doubt very much whether the expression "robbery from a running train" in the contract means anything else than an ordinary theft. Under the circumstances of the present case as proved in the court below, we consider that no court could hold that the loss was due either to a theft by the Railway servants or to their wilful neglect. We allow the application, set aside the decree of the court below and dismiss the plaintiff's suit. The parties will abide their own costs in both courts.

Application allowed.

(1) (1910) 7 A. L. J., 833.

(2) (1912) 16 C. W. N., 77.