APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Sen.

SHEO NARAIN (PLAINTIFF) *v.* EAST INDIAN RAILWAY (DEFENDANT).*

1927
July, 15.

Act No. IX of 1890 (*Indian Railways Act*), *section* 76—*Risk-note form B—Negligence—Burden of proof—Act No. IX of* 1872 (*Indian Contract Act*), *sections* 151, 152 *and* 160.

Held, on a construction of "risk-note form B" that, where a plaintiff is claiming damages from a railway company for the loss of entire packages belonging to one consignment, after the plaintiff has given evidence of the loss, it is for the defendant company to show that there has been no wilful neglect on their part, and by "wilful neglect" is meant the failure to take such precautions as a prudent man would in respect of his own goods take to provide against such loss or theft as a prudent man would contemplate as not merely possible, but as likely. *East Indian Railway Co.* v. *Nathmal Behari Lal* (1), and *East Indian Railway Co.* v. *Sri Ram Mahadeo* (2), not followed. *H. C. Smith, Ltd.*, v. *Great Western Railway Co.* (3), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Damodar Das*, for the appellant.

Pandit *Ladli Prasad Zutshi*, for the respondent.

ASHWORTH and SEN, JJ. :—This second appeal arises out of a suit brought by the plaintiff appellant, Sheo Narain, against the East Indian Railway Company for damages on account of the failure of the defendant to deliver a consignment of *ghee* in its entirety. The consignment consisted of

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*Second Appeal No. 1337 of 1925, from a decree of Muhammad Said-uddin, Second Additional Subordinate Judge of Allahabad, dated the 31st of March, 1925, modifying a decree of Muhammad Taqi Khan, Munsif of Allahabad West, dated the 17th of December, 1924.

(1) (1917) I.L.R., 39 All., 418. (2) (1923) I.L.R., 46 All., 125
(3) (1922) 1 A.C., 178.

some bags of rice and 185 tins of *ghee*, each containing 20 seers, despatched at Maihar for delivery to the plaintiff at Allahabad. It is common ground that the consignment was in a waggon that arrived safely at Allahabad with the seals intact on the 22nd of April, 1923. The evidence shows that the waggon was in the goods shed on the 27th of April, 1923: it is not clear whether it was kept outside up to that date. On that date the *chaukidar* reported that its seals were broken. The goods were checked on the 2nd of May, 1923, and found short. They were delivered to the plaintiff on the 2nd of May, 1923. The shortage was as follows: 13 tins were missing and in 3 other tins the amount of *ghee* was only 8 seers instead of 20 seers. The value claimed was Rs. 561-5-0. The defence was that the consignment was despatched under risk-note form B which protected the railway company from any loss occasioned otherwise than by wilful neglect, and that there had been no wilful neglect on the part of the railway company or on the part of its servants. The trial court held that in the circumstances of the case it was for the defendant to prove that the railway company had taken such care of the goods in dispute as a man of ordinary prudence would have taken. It found that the theft of the *ghee* occurred after arrival at Allahabad station and came to the conclusion that it was due to theft by the railway servants. It gave a decree for the loss of the contents of the 13 tins of *ghee* but dismissed the claim as to the shortage in the three tins, holding that the railway company was protected by the risk-note from responsibility for this shortage.

In appeal, the Additional Subordinate Judge of Allahabad set aside the decree of the trial court and dismissed the suit on the ground that the burden of

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proving wiful neglect or theft by the railway administration or its servants was on the plaintiff and he had failed to sustain this burden. The plaintiff appealed.

In this second appeal the six grounds taken in the memorandum of appeal have not been argued. The only ground taken is that the lower appellate court came to a wrong conclusion by incorrectly placing the burden of proof of wilful neglect on the plaintiff. There is, however, one ground, namely, the fifth in the memorandum of appeal, which takes up the broad plea that the defendant was not protected by the risk-note. The counsel for the defendant respondent raised no objection to the appeal being argued on the lines stated. Accordingly we think it permissible to decide this appeal on the question whether the lower appellate court's dismissal of the suit was vitiated by incorrect placing of the burden of proof. At the same time we would point out the extreme risk run by an appellant in formulating the grounds of appeal absolutely at random and then asking the court to interfere with the decree of the lower appellate court on a different ground.

Under section 160 of the Contract Act the railway company, as bailee, was bound to deliver the goods consigned in the condition in which they were consigned, but this duty was subject to certain exceptions. One was that the railway company was only bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods consigned, (see section 151 of the Contract Act). It was not responsible for any loss, destruction or deterioration if this amount of care was taken (see

section 152). Now, this being an exception, the burden of proving the exception was on the railway company. Moreover, the circumstances in which the loss and damage occurred were especially within the knowledge of the railway company. So, under the ordinary laws of evidence, the burden of proving that sufficient care was taken was on the railway company. To make this clear beyond all doubt, section 76 of the Indian Railways Act (IX of 1890) enacts that in any suit for loss, destruction etc., of goods, it shall not be necessary for the plaintiff to prove how the loss or destruction was caused. It has been argued, however, by respondent's counsel that the burden of proof placed on the railway company by these provisions of the law was shifted by the fact that the plaintiff signed what is known as risk-note form B. This risk-note amounted to a contract that—

> "the consignor would not hold the railway responsible for any loss except 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, etc".

It also provided that the term "wilful neglect" should not be held to include fire, robbery from a running train or any other unforeseen event or accident. We fail to see how this risk-note could shift the burden of proof. Its only effect was to limit the extent of the railway's responsibility. We hold, therefore, that the lower appellate court was wrong in placing on the plaintiff the burden of proving wilful neglect. It was for the railway company to disclose the facts and show that they were inconsistent with wilful neglect. The counsel for the respondent admitted, indeed he volunteered, that there was little information disclosed by the evidence of the facts.

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He said that the goods train was kept in a siding outside the goods-shed for some time until there was room in the goods-shed for unloading the train. It is sufficient to say that the evidence failed entirely to show what were the risks of theft from the waggon and what precautions were taken to meet those risks.

We would here state that we were not referred in the argument of this appeal to any evidence. We accordingly had to accept what was stated in the judgements of the courts below as mainly correct.

We find then that the evidence did not suffice to justify a finding that there had been no wilful neglect by the railway company. At one time in his argument in this appeal counsel for the respondent seemed to suggest that the fact that there was a *chaukidar* was sufficient to show that there was no wilful neglect. The mere appointment of a *chaukidar* would not appear to us to exclude the possibility of wilful neglect. Again, respondent's counsel argued that wilful neglect meant neglect intended to bring about a theft. This appears to us a desperate argument. The definition of "wilful neglect" in the risk-note appears to us to mean—

> "the failure to take such precautions as a prudent man would in respect of his own goods take to provide against such loss or theft as a prudent man would contemplate as not merely possible but as likely",

fire and robbery from a running train being given as instances of events so exceptional or impossible to guard against as to justify absence of precautions. It is clear that theft from a waggon within the railway station, when the waggon is merely sealed, was a very probable contingency in the absence of definite precautions. We know vaguely the risks, but we do not know the precautions, from the evidence; and the railway company must suffer for their failure to prove

these precautions. It may be that the railway company could prove such precautions or even that they have proved such precautions, but the evidence has not been printed and their counsel has not indicated or attempted to indicate any, beyond saying that there was a *chaukidar* there.

It is urged, however, by counsel for the railway company that there is strong authority for the view that under the terms of the risk-note the burden of proving wilful neglect was on the plaintiff. The risk-note runs as follows :—

"I, the undersigned, do in consideration of such lower charge agree and undertake to hold the said railway administration . . . . . harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the said consignment, 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 . . . . . employed by them before, during and after transit over the said railway . . . . : provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident."

There is nothing in these terms which purports to govern the question of burden of proof. The burden of proof will, therefore, be the same as if the risk-note had not been signed and, as shown above, we are of the opinion that the burden of proving proper precautions rests, apart from the risk-note, on the railway company. We have, however, been referred to the decision of the House of Lords, *H. C. Smith, Ltd.*, v. *Great Western Railway Co.*, (1). We would distinguish this decision on the ground that it dealt with a risk-note containing different terms from risk-note form B. In the risk-note considered by their Lordships the consignor relieved the railway company from all liability for

(1) (1922) 1 A.C., 178 (183).

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loss, damage, etc., except by the proof that such loss, damage, etc., arose from the wilful misconduct of their servants. Their Lordships held that these words amounted to a contract by the consignor that he would not be entitled to compensation unless he proved the wilful misconduct of the railway company. Lord BUCKMASTER made the following remarks:—

"It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods..............The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. Nonetheless, that is the burden that he has undertaken".

It will be seen that the risk-note before their Lordships was one which required positive proof of wilful misconduct. Their Lordships, therefore, in effect, held, that the plaintiff could not rely upon mere negative proof of want of sufficient precautions. The risk-note before us, form B, says nothing about proof, and on this ground we would distinguish it. We may mention that recently a new form of risk-note, form H, has been issued by the railway company to take the place of risk-note form B. That risk-note provides for the consignor holding the railway administration free from all responsibility . . . . . "except upon proof that such loss, destruction, etc., arose from the misconduct of the railway administration servants." Apparently this form was issued with the specific purpose of making the judgement of the House of Lords applicable. This conjecture is strengthened by the fact that in the new form H an endeavour has been made to meet the objection of their Lordships that the risk-note was

unfair to the tradesmen, inasmuch as the risk-note also contains an obligation on the railway company that the railway administration shall be bound to disclose their dealings with the packages in transit and to give evidence thereof. It appears then that it was recognized by the Government (which is required to approve of the form of risk-notes) when approving the new rule, that the House of Lords' decision could not be invoked in favour of the railway company under the old form B. Then we have a two-Judge decision of this Court, *East Indian Railway Company* v. *Nathmal Behari Lal* (1), where it was held that under risk-note B " it lies upon the consignor claiming damages to show that the loss was occasioned by the theft or wilful neglect of the company's servants." In this case there was a theft between the last station but one before Cawnpore and Cawnpore on a running train. The evidence in this case justified a finding on the facts that there was no wilful neglect to take the necessary precautions by the railway company. All the usual precautions were proved to have been taken. The decision would, therefore, appear to have been justified on the facts, without invoking the reason that the burden of proof lay on the plaintiff. So far as that ruling is authority for holding that the burden of proof, in the absence of any evidence as to precautions being taken, should be placed on the consignor, we are not disposed to agree with it. Then we have a single Judge decision of this Court, *East Indian Railway Company* v. *Sri Ram Mahadeo* (2). This decision was based on the case of *East Indian Railway Company* v. *Nathmal Behari Lal* (1) and on the House of Lords' decision referred to. As we are not disposed to follow the former and have distinguished the latter, this decision of a single Judge should not, in our opinion, be followed. There are many decisions

(1) (1917) I.L.R., 39 All., 418. (2) (1923) I.L.R., 46 All., 125.

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which impose on the plaintiff, in such a case as this, the initial burden of proof, but differ as to the exact amount of proof which will shift the burden of proof. We agree that it is for the plaintiff to prove non-delivery, and so far the initial burden of proof is on the plaintiff. On such proof the burden would, in our opinion, shift to the railway company to show that they took reasonable precautions. A very little evidence in this direction may again shift the burden of proof. In the present case counsel for the railway company has only pointed to the fact that there was a *chaukidar* at the Allahabad railway station. This, as stated above, we do not consider to be sufficient evidence to shift the burden of proof.

We hold, therefore, that the lower court was wrong in putting the burden of proof on to the plaintiff. On this ground we set aside the decree of the lower appellate court and restore that of the trial court. The plaintiff will get his costs in this and in the lower appellate court.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

SURAJ PRASAD AND ANOTHER (APPLICANTS) *v.* BALDEO (OPPOSITE PARTY).*

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June, 17.

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), *section* 17—*Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 164—*Application for re-hearing—Necessity for furnishing security within time.*

The giving of security within the time limited by article 164 of the first schedule to the Indian Limitation Act, 1908, is a necessary condition precedent to the entertainment of an

*Civil Revision No. 111 of 1927.