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were reviewed and *Ramjas Agarwala* v. *Guru Charan Sen* (1), a case relied upon by the learned counsel for the applicant, was expressly dissented from.

Speaking for myself, and with due respect, I entirely agree with the view of the law laid down in *Girindra Nath Ray* v. *Kedar Nath Bidyanta* (2). I may add that the decision of the court below having done substantial justice between the parties, I should in any case have been disinclined to interfere in revision. The application is accordingly dismissed with costs.

Before Mr. Justice Niamat-ullah

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March, 30

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* MADHURI DAS NARAIN DAS (PLAINTIFF)*

Railways Act (IX *of* 1890), *section* 72—*Risk-note Form B*—*"Misconduct"*—*Wrong consignment number entered in railway receipt*—*Right of consignee to "open delivery"*—*Delay in making delivery*—*Loss caused by prices falling during such delay*—*Liability of railway.*

A consignment of ghee was marked as No. 93, but by some mistake of the railway clerk the number entered in the railway receipt was 23. When the consignee went to take delivery he was offered the canisters marked No. 93, but as the number did not tally with that entered on the railway receipt he was doubtful whether these were the right goods, and demanded an "open delivery", i.e. that the canisters should be opened and their contents examined by him before accepting delivery. As it was beyond the authority of the local railway officials to give an "open delivery" they transmitted the consignee's request to higher authorities, and after some days a higher official arrived and gave the open delivery, and the contents were found to be right. During this interval, however, the market prices of ghee had gone down considerably, and the consignee sued the railway for damages for the loss resulting from this fall in prices. The question arose whether the railway was protected against such a claim by the terms of risk-note Form B, under which the consignment had been booked.

Held, that the loss complained of by the plaintiff was not

* Civil Revision No. 751 of 1932.

(1) (1909) 14 C. W. N., 396. (2) (1924) 29 C. W. N., 575.

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covered by the indemnity clause in risk-note Form B. The clause in question protects the railway administration against a claim for damages arising out of loss or destruction or deterioration of, or damage to, the goods, and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves, but by some act of the railway administration or its employees not affecting the condition of the consignment or the goods consigned.

Held, also, that in the circumstances the plaintiff was entitled to insist on an open delivery, before giving a discharge to the railway administration, and the responsibility for the delay in delivery was not his, but that of the railway administration.

Held, further, that want of proper care and caution may amount to "misconduct" within the meaning of risk-note Form B. A mistake in the preparation of the railway receipt, which throws doubt on the identity of the consignment to which it relates, is a misconduct in the above sense.

Mr. *Ladli Prasad Zutshi*, for the applicant.

Mr. *Damodar Das*, for the opposite party.

NIAMAT-ULLAH, J. :—This is an application in revision by the Secretary of State for India in Council against a decree passed by the Judge of the small cause court at Allahabad in a suit brought by the plaintiff opposite party for damages arising out of late delivery of a consignment sent by G. I. P. Railway from Lalitpur to Naini. The consignment was under risk-note B, which implies that in consideration of payment of a lower freight the railway company is relieved of its responsibilities as bailee to a certain extent. The circumstances leading to the institution of the suit which has given rise to this application in revision are briefly as follows.

The consignment in question arrived at its destination, Naini, on the 19th of August, 1931. The name of the consignee entered in the railway receipt was that of the firm Madhuri Das Narain Das, the plaintiff opposite party. The railway receipt described the relative consignment as No. 23, which implied that the consignment also bore the same number, so that at the

time of delivery the consignee could assure himself as regards the identity of the consignment which he had to take delivery of. As already stated, the consignment was under risk note B. Another consignment addressed to the plaintiff opposite party had arrived two days earlier, i.e. on the 17th of August, 1931. Through some misunderstanding, the nature of which it is not necessary to mention, he paid not only the freight due in respect of that consignment but also the freight payable in respect of the consignment in question. The plaintiff opposite party arranged for delivery being taken on the 19th of August, 1931. The person deputed by him for that purpose proceeded to the railway station and demanded delivery of the consignment. The consignment consisted of a number of canisters of ghee. The railway official showed his readiness to hand over a number of canisters said to be those mentioned in the receipt presented by the plaintiff's man; but the latter discovered that the canisters bore No. 93 and not 23, as mentioned in the railway receipt. He entertained some doubt regarding the identity of the consignment. Accordingly he requested that "open delivery" be made. In other words, he desired that the contents of the canisters be examined by him in the presence of the railway official giving him delivery of the same. The canisters would have to be opened for the purpose of examination. The railway official noted this request for transmission to the higher authorities as he could not allow the canisters to be opened on his own responsibility before delivery was taken. On the 25th of August, 1931, the plaintiff sent a letter to the Divisional Traffic Manager, G. I. P. Railway, Jubbulpore, complaining that a great delay had occurred in the delivery of goods. The circumstances in which open delivery was insisted upon were mentioned in detail. The letter also contained a warning that the prices of ghee had gone down and were going down still further and that the railway company would be responsible for any loss

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occasioned by the delay. It was not delivered till the 1st of September, 1931, when an inspector came to Naini and allowed the plaintiff's man to open the canisters to satisfy himself regarding the contents. This was done and delivery of the goods taken on behalf of the plaintiff. Between the 19th of August, 1931, and the 1st of September, 1931, the price of ghee went down considerably, the difference amounting to Rs.150-7, which is claimed by the plaintiff together with interest amounting to Rs.16.

The only ground on which the plaintiff's claim, as stated in the plaint, is based is that delivery should have been made on the 19th of August, 1931, and that the unwarranted delay which resulted in loss to the plaintiff was attributable to the railway staff. It was pleaded in defence that the plaintiff was not justified in refusing to take delivery on the 19th of August, 1931, except after examining the contents of the canisters.

It was admitted on behalf of the defendant that No. 23, entered in the railway receipt, was the result of a mistake and that the correct number which the consignment bore, viz. No. 93, should have been noted in the receipt.

The lower court held that the railway administration was responsible for the loss occasioned to the plaintiff in consequence of late delivery, inasmuch as the mistake in the receipt as regards the number of the consignment amounted to a misconduct on the part of railway officials. On this finding the suit has been decreed.

It has been argued before me by the learned advocate for the applicant that the consignment being under risk-note B, the railway administration could not be held responsible for any loss which might have resulted to the plaintiff. Reference has been made to section 72 of the Railways Act, which provides that the responsibility of a railway administration for the loss, destruction or deterioration of goods delivered to the

administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act of 1872. Sub-section (2) of the same section provides that an agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it is in writing signed by or on behalf of the person consigning or delivering to the railway administration the goods and is otherwise in a form approved by the Governor-General in Council. It is not disputed that the risk-note B, employed in this case, is in accordance with the form approved by the Governor-General in Council. It is also not disputed that the general liability of the railway administration, referred to in the earlier part of section 72, is subject to the limitations imposed by the risk-note B. The note contains the following clause: "We, 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 upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants." Then follow certain provisos, which it is not necessary to mention for the purpose of this case. It is argued that the loss complained of by the plaintiff is covered by the indemnity clause quoted above. I do not think this contention is sound. The clause in question protects the railway administration against a claim for damages arising out of loss or destruction or deterioration or by damage to the goods, and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves but by some act of the railway administration or its employees not affecting the condition of the consignment or the goods consigned. Obviously the note is intended to protect railway administrations where goods

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in whole or in part are lost or destroyed or spoiled otherwise than through misconduct of the railway administration or its employees. The plaintiff's case has no reference whatever to anything having happened to the goods themselves, which arrived safely at their destination. The plaintiff was entitled to take delivery of the goods on the 19th of August, 1931, when he presented the railway receipt. He was also entitled to take delivery of the consignment according to the description thereof given in the railway receipt. The railway officials, however, offered to deliver goods bearing a different number. The plaintiff had reason to doubt the identity of the canisters which he was asked to take delivery of. The railway receipt in his possession entitled him to insist on delivery of a consignment bearing No. 23. It does not appear to have been so represented, but it was clearly implied in the action of the railway employees who offered the canisters bearing No. 93, that the number entered in the railway receipt was wrong and that the correct number which should have been entered in it was 93. The plaintiff was justified in not accepting this assurance, except after an examination of the canisters to satisfy himself whether they contained ghee or something else. As a prudent man, the plaintiff was justified in insisting on the contents being examined before he could give a discharge to the railway administration. In case the contents did not turn out to be ghee, as mentioned in the railway receipt, delivery would have been lawfully refused and the fact would have been noted by the railway official, so that no dispute could arise in future as to whether the contents turned out to be something different from ghee. In these circumstances the plaintiff was within his rights in insisting on the consignment bearing the same number as given in the receipt being delivered to him, or, in the alternative, on permission being given to him to examine the contents before taking delivery of the goods so as to give a discharge to the railway administration.

I have been told that open delivery could not be given by the station master at Naini on his own responsibility and that, according to the rules by which he was bound, he had to make a reference to the higher authorities who were to arrange for the presence of some responsible railway official for open delivery to be given. It is argued that the delay was not unreasonable in the circumstances of the case, as some time would elapse before the presence of such official could be arranged for with due regard to the exigencies of the railway administration. Assuming such a rule does exist, it is only a departmental rule and cannot bind third persons, who are entitled to insist on their legal rights. It was clearly the duty of those representing the railway either to deliver the goods the description of which tallied with that entered in the railway receipt or to afford an opportunity to the plaintiff to examine the contents with a view to satisfying himself as regards the identity of the goods. If, therefore, through negligence or otherwise, the railway administration could not deliver the goods on due date, or even within a reasonable time after that date, it must be held to be liable for any loss which the plaintiff suffered. The important fact, which should not be lost sight of in this connection, is that the entire difficulty with which the plaintiff and also the railway officials at Naini were confronted on the 19th of August, 1931, arose out of the mistake committed by the clerk who prepared the railway receipt. The railway administration must be held responsible for the action of one of its employees. The learned Judge has expressed the opinion that the mistake amounted to a misconduct. This was because the learned Judge thought that the risk-note B protected the railway administration in the absence of evidence establishing misconduct on the part of the railway administration or its employees. I have taken a different view of the risk-note B and do not think it necessary to hold that the mistake amounted to a misconduct. I may, however,

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note that the word "misconduct" occurring in risk-note B is of wider import than the popular sense in which that word is used. Want of proper care and caution may amount to misconduct within the meaning of the risk-note B. A mistake in the preparation of the railway receipt, which throws doubt on the identity of the consignment to which it relates, is a misconduct in the above sense.

In the view of the case I have taken, this application for revision is dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

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March, 31

RAM PRASAD (PLAINTIFF) *v.* BINAEK SHUKUL (DEFENDANT)*

Limitation Act (IX of 1908), sections 19, 20—Payment in handwriting of debtor but without specifying whether towards interest or principal—Appropriation by creditor towards interest—Not payment of interest as such—Acknowledgment—Part payment, by itself, is not acknowledgment of the balance.

It is an erroneous assumption that where interest is not paid as such, i.e., the debtor does not clearly mention that the payment made by him is to be appropriated towards interest, it should be considered to have been paid by him towards principal. A debtor may pay a certain amount in part satisfaction of what is due from him, without specifying that the sum is to be appropriated towards interest or principal; the creditor may, however, appropriate such payment towards interest, as he is entitled to do under section 61 of the Contract Act, but the payment cannot be considered to be the payment of interest as such, within the meaning of section 20 of the Limitation Act. Nor can it be considered to be payment in part satisfaction of the principal, as it has been lawfully appropriated by the creditor towards interest. Therefore, although the fact of the payment may appear in the handwriting of the debtor, limitation is not saved under section 20 of the Limitation Act.

*Second Appeal No. 1638 of 1931, from a decree of J. C. Malik, Additional Subordinate Judge of Mirzapur, dated the 20th of July, 1931, confirming a decree of Shambhu Dayal Singh, Munsif of Mirzapur, dated the 18th of June, 1930.