1923.

LAL BEHARI SINGH v. GUR PRASAD SINGH.

rate up to the date of decree and for four months thereafter and after that the entire amount will carry interest at 6 *per cent. per annum*. The defendant No. 11 (respondent) is entitled to the costs of this appeal.

DAS, J.—I agree.

Decree modified.

REVISIONAL CIVIL.

Before Mullick and Bucknill, J. J.

1923.

Jan. 31.

GREAT INDIAN PENINSULAR RAILWAY COMPANY

v.

*JITAN RAM.**

Railways Act, 1890 (*Act IX of* 1890), *sections* 72, 15, 152—*Risk Note Form B—Consignment of goods at owner's risk—loss of part of consignment—suit for compensation for non-delivery*—onus probandi—*Contract Act*, 1872 (*IX of* 1872), *section* 161.

Where a person who had entrusted three bales of twist to a railway company for carriage at owner's risk (Risk Note Form B), sued the Company for compensation for non-delivery of one of the bales, *held*, that the suit was on the contract and not in tort.

Held, further, on a plea that the company was exonerated from liability for the loss by the terms of the contract, (*i*) that the burden of proof lay in the first instance upon the company to prove that the loss was such as was contemplated by the contract, and that when this had been done it shifted upon the plaintiff to shew that the loss was due to the wilful neglect of the company or its servants;

(*ii*) that the loss referred to in the contract was loss to the owner, and, therefore, that delivery to a person other than the consignee was such a loss as was contemplated by the contract;

* Civil Revision No. 236 of 1922, against a decision of Mr. A. N. Mitter, Second Subordinate Judge of Gaya, dated the 27th March, 1922.

Changa Mal v. *Bengal and North-Western Railway Company*(1), not followed.

Hill Sawyers and *Company* v. *Secretary of State*(2), *Madras and Southern Marhatta Railway Company* v. *Haridas Banmalidas*(3), *Madras and Southern Marhatta Railway Company* v. *Mattai Subba Rao*(4) and *Great Indian Peninsular Railway Company* v. *Ramchandra Jagarnath*(5), followed.

Morrit v. *North-Eastern Railway Company*(6), *Smith, Limited* v. *Great Western Railway Company*(7), *Curran* v. *Midland of Great Western Railway Company of Ireland*(8), referred to.

(*iii*) that the inability of the company to give any account of the manner in which the lost bale had disappeared did not give rise to a presumption that it was still in the company's possession and that it was not necessary for them to call evidence in support of their plea that it was not still in their possession.

Ghelabhai Punsi v. *East Indian Railway Company*(9) and *Jamnadhar Baldevadas* v. *Burma Railway Company, Limited*(10), not followed.

(*iv*) the *quantum* of evidence required for the purpose of shewing that the loss has been occasioned by the wilful neglect of the company varies according to the nature of the goods lost.

East Indian Railway Company v. *Kalicharan Ram Prasad*(11), referred to.

Application by the defendants, first party.

The facts of the case material to this report were as follows :—

The plaintiff filed the suit out of which the present application arises, in the Court of the Subordinate Judge of Gaya, alleging that on the 22nd October, 1920, his agent at Bombay delivered to the first party defendants, the Great Indian Peninsular Railway

(1) (1897) P. R. 6.
(2) (1921) I. L. R. 2 L. 133.
(3) (1918) I. L. R. 41 Mad. 871.
(4) (1920) I. L. R. 43 Mad. 617.
(5) (1919) I. L. R. 43 Bom. 386.
(6) L. R. (1876) Q. B. D. 302.
(7) (1921) L. R. 2 K. B. 237; (1922) I. A. C. 178.
(8) (1896) 2 Ir. Rep. 183.
(9) (1921) I. L. R. 45 Bom. 1201.
(10) (1921) 64 Ind. Cas. 395.
(11) (1919) Cal. W. N. (Pat.) 156

1923.

GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

Company, seven bales of twist for despatch by goods train to Gaya, a station belonging to the second party defendants, the East Indian Railway Company; that out of these seven bales one bale, valued at Rs. 406-4-0, was not delivered at Gaya, and that the plaintiff believed that it was lost within the jurisdiction of the second party defendants. He accordingly claimed for the value of the goods and for the estimated profits and for interest, a total sum of Rs. 485 as compensation.

At the trial the plaintiff did not press his claim against the second party defendants. The suit therefore proceeded against the first party defendants only, who, among other things, pleaded that as the goods were booked at owner's risk under a risk note in *Form B*, as prescribed in the Indian Railways Act, the plaintiff was not entitled to any compensation at all. They further contended that there was no wilful neglect on their part or theft by any of their servants.

The Subordinate Judge held that as the suit was one for compensation for non-delivery of goods he was bound by the decision in *East Indian Railway Co.* v. *Kalicharan Ram Prasad* (1), and he decreed the claim, less the sum of Rs. 40 claimed for profits, that is to say, he gave a decree for Rs. 445, exclusive of costs.

The present application was made under section 25 of the Provincial Small Cause Courts Act by the first party defendants.

Noresh Chandra Sinha and *Shivanarain Bose*, for the applicants.

Siveshar Dayal and *Brijkishore Prasad*, for the respondent.

MULLICK, J., (after stating the facts of the case as set out above, proceeded as follows) :—

It is clear that this is not a suit in tort; it is a suit in contract and the only question is what is the liability of the defendant carrier.

Under sections 151 and 152 of the Indian Contract Act, read with section 72 of the Indian Railways Acts,

(1) (1919) C. W. N. (Pat.) 150.

the liability of the Railway Administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried by railway is that of an ordinary bailee; that is to say, if the Railway Administration take as much care of the goods bailed to them 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 bailed, they will not, in the absence of special contract, be responsible for the loss, destruction or deterioration of the goods.

Section 161 of the Indian Contract Act prescribes that if by the default of the bailee the goods are not returned, delivered or tendered at the proper time the bailee is responsible to the bailor for any loss, destruction or deterioration of goods from that time.

Further, the Indian Railways Act of 1890 by repealing section 7 and 10 of the Carriers Act (Act III of 1865) and by also enacting in section 72(3) that nothing in the common law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility of a Railway Administration, leaves no room for doubt that the liability of the railway company must be measured and determined solely by the tests formulated in sections 151 and 152 of the Indian Contract Act.

The onus, therefore, being upon the bailee to show that he is exonerated from the liability for loss to the bailor, the question is whether there is any special contract here which relieves him from such liability.

The bailee pleads such a contract, namely, the risk note in *Form B*, the execution of which by the consignor has been established. It is in the form prescribed by the Indian Railways Act, and the material portion runs as follows :

Risk Note Form B.

I the undersigned do in consideration of such lower charge agree and undertake to hold the said railway administration harmless and free from responsibility for any loss, destruction, of deterioration or damage

1923.

GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

MULLICK, J.

to the said consignment from any cause whatsoever 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, provided that the term wilful neglect be not held to include fire, robbery from a running train, or any other unforeseen event or accident.

It is clear that upon this special contract the burden of proof lies in the first instance upon the defendants, that is to say, they must first prove that there was such loss as is contemplated by the first part of the risk note, and when they have done so the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendants or their servants as provided in the latter part.

An attempt has been made to show that by suing for compensation for non-delivery, the plaintiff has taken the case out of the risk note which applies only to loss by the bailee and involves the notion of an involuntary or unwilling parting with the thing with reference to which the word is used, and that the goods cannot be said to be lost if the carrier detains them wrongfully or wilfully or negligently delivers them to another. Reliance is placed for this view upon *Morrit* v. *North-Eastern Railway Co.* (1) and *Changa Mal* v. *Bengal and North-Western Railway Co.* (2).

Now, the English decisions do not apply because they are based either upon the common law or the English Carriers' Act and are not in *pari materia* with the Indian Railways Act, and as for *Changa Mal* v. *Bengal and North-Western Railway Co.* (2) the point for decision there was whether the period of limitation was governed by Article 30 or Article 31 of Schedule II of the Indian Limitation Act of 1908 which enactment also was not in *pari materia*.

Moreover, *Changa Mal's* case (2) has now been overruled. In that case a division of the Punjab Chief Court held that the term "loss" in Article 30 of the Indian Limitation Act, Schedule II, contemplates an actual losing of the goods by the carrier himself,

(1) L. R. (1876) Q. B. D. 302. (2) (1897) Punj. Rec. 6.

and, therefore, when the carrier delivers the goods to a wrong person it cannot be said that he has lost the goods; and they also held that Article 31 did not apply because misdelivery was not non-delivery. But the recent Full Bench decision of the same Court in *Hill Sawyers & Co.* v. *Secretary of State* (1) is authority for the view that mis-delivery is loss within the terms of section 80 of the Indian Railway Act, and it supports the view that the loss referred to in section 72 and other relevant sections of Chapter VII of the Indian Railways Act is the loss suffered by the consignor or the true owner whether such loss occurred by reason of misdelivery or non-delivery.

To the same effect are *Madras and Southern Marhatta Railway Co.* v. *Haridas Banamalidas* (2), *Madras and Southern Marhatta Railway Co.* v. *Mattai Subba Rao* (3) and *Great Indian Peninsular Railway Co.* v. *Ramchandra Jagarnath* (4).

It has been argued that if loss to the owner was meant then there was no necessity for any reference to liability for destruction of the goods. This is true. Destruction must always be included in loss and the draftsman of the risk note has merely availed himself of the device of first stating the generality and then without prejudice thereto reciting the particulars. The word destruction is surplusage but it does not alter the sense. In my opinion, therefore, the risk note will apply not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever, and I cannot admit that by merely suing for compensation for non-delivery the plaintiff can take the case out of the risk note. He seeks, however, to ground an argument on Article 31 of Schedule II of the Indian Limitation Act and points out that if "non-delivery" had been included in "loss" there would have been no necessity for

(1) (1921) I. L. R. 2 Lah. 133.
(2) (1918) I. L. R. 41 Mad. 871.
(3) (1920) I. L. R. 43 Mad. 617.
(4) (1919) I. L. R. 43 Bom. 396.

1923.

GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

MUKERJI, J.

amending this article in 1899, so as to cover both non-delivery and delay in delivery. Apart from the objection that the Indian Limitation Act can afford no guide for construing the Indian Railways Act there was clearly some necessity for the amendment as the object of the legislature was to prescribe the same period of limitation for claims for non-delivery as Article 30 which referred to suits against carriers for losing goods and which could not cover suits for non-delivery.

Although in the present case the English authorities cannot be of great assistance, there is one recent case which is both pertinent and instructive. I refer to *Smith, Ltd.* v. *Great-Western Railway Co.*(1) In that case six pairs of boots were forwarded in a package weighing 19 lbs. for carriage by railway from Birmingham to Wilton. The parcel was consigned to the defendant railway company but was not delivered. The risk note runs as follows :

> " In consideration of your charging such lower rate we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay, or detention of or to such goods except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention arose from the wilful misconduct of your servants. "

The railway company declined to account for the loss, and the appeal Court held that such refusal did not justify the Court in inferring that the loss arose from the wilful misconduct of the defendant's servants. That decision was affirmed by the House of Lords and the following passage from the judgment of Lord Buckmaster in *Smith, Ltd.* v. *Great-Western Railway Co.* (2), might almost have been delivered in respect of the present risk note : " It has been suggested on the part of the appellant that it must be read as though it contained exceptions in favour of the railway company with a proviso reserving to the consignor rights in a certain event and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified facts and when that

(1) (1921) L. R. 2 K. B. 227. (2) (1923) L. R. 1 Ap. Cas. 178.

1923.

GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

MULLICK, J.

was proved it would become necessary for the consignor to establish that he had the benefit of the proviso, or, in other words that the loss had arisen owing to the wilful misconduct of the company's servants. I am unable so to regard this clause; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. 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 between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. 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. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company." Both in the Court of Appeal and in the House of Lords the plaintiffs, Smith & Co., strongly relied on *Curran* v. *Midland & Great-Western Railway Co. of Ireland* (1) and contended that there was a *prima facie* presumption that the goods were in the possession of the carrier till he showed the contrary and that the unexplained detention would be wilful misconduct for which an action would lie. Now, in *Curran's* case (1) the railway company undertook to carry some pigs from Sligo to Manchester and failed to deliver some of them. There was a risk note which recited that the company shall be free from liability including liability for loss, injury or delay unless such injury or delay shall be

(1) (1896) 2 Ir. Rep. 187

1923.

GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

MULLICK, J.

occasioned by the intention or wilful neglect or misconduct of their servants, and the Court held that burden of proof was in the defendant and the inference from non-delivery and refusal to give any explanation was that the pigs were still in the possession of the defendant and that there was wilful misconduct. In discussing this case Lord Buckmaster proceeded as follows: "Now, my Lords, in that case there had been no answer given at all on the part of the railway company to the request for information as to what had happened, but in the present case the evidence that was before the learned County Court Judge included the answers to interrogatories, in which the defendant company had said that they had no knowledge as to whether the goods had been handed to them at Wilton, and they believed that the same were lost and never arrived at Wilton. It is impossible to place such evidence on an exact parallel with the evidence which warranted the Chief Baron in assuming the possession of the pigs as a fact in the custody of the defendants, and then inferring from that possession that the refusal to give any explanation of their whereabouts or their existence was an act of wilful misconduct. My Lords, I desire to say nothing further about that authority, because for these reasons I do not think that it deals with the same facts as those in the present case, and it may be that on some later occasion the actual words of that judgment may come up for consideration."

Lord Sumner and Lord Wrenbury following Lord Buckmaster agreed that if it were necessary to discuss *Curran's* case (1) on any future occasion it would have to be examined with great care.

In my opinion *Risk note B* is no less harsh than that to which Lord Buckmaster was referring. It may perhaps be not inequitable inasmuch as the trader enters into the contract with his eyes open and in consideration of a cheaper rate but it cannot be denied that he undertakes in most instances a crushing and almost insuperable burden.

(1) (1896) 2 Ir. Rep. 183.

The learned Vakil for the plaintiff, next takes a point for which there is some recent authority. He urges that it is not sufficient for the defendant to plead; he must call evidence to satisfy the Court that the goods are not still in the possession of the defendant and in support he cites *Ghelabhai Punsi v. East Indian Railway Co.* (1) and *Jamnadhar Baldevadas* v. *Burma Railway Co., Ltd.* (2). It is true that in both these cases the Court held that a mere pleading was not sufficient, but with very great respect I think that the decisions were based on the authority of *Curran's* case (3) which was distinguished, if not doubted, by the House of Lords in *Smith, Ltd.* v. *Great Western Railway* (4). Indeed the matter really does not turn on evidence. It is a question of the construction of the risk note, and, if loss due to non-delivery is covered by the document, then there is an end of the matter and nothing further is required from the defendant. The general rule is that where a contract contains an exception and a proviso the party who desires to take the benefit of the former must not only plead it but prove it, and that when that has been done, the other party who desires to take the benefit of the proviso, which is in reality an extrinsic covenant by way of defeasance, must prove that the subject-matter is not within the exception. That, however, is not the position in the present case.

Moreover, in the present case the plaintiff admits in his plaint that the goods have been lost, and as the defendant does not in any way repudiate the contract but on the contrary sets up the risk note in his defence, no presumption can arise that the goods are still in his possession simply because he says that he cannot give any account of the manner in which they have disappeared.

The question that remains, therefore, is, has the plaintiff satisfied the burden which rests upon him to

(1) (1921) I. L. R. 45 Bom. 1201.
(2) (1921) 64 Ind. Cas. 395.
(3) (1896) 2 Ir. Rep. 183.
(4) (1922) L. R. 1 Ap. Cas. 178.

1923.

GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

MULLICK, J.

show that the loss has been caused by the wilful neglect of the defendant. The quantum of evidence required for this purpose must necessarily vary according to the nature of the goods, and it has been observed elsewhere that the loss of an elephant might be difficult to explain except on the hypothesis that there had been wilful neglect; but in the present case our task is simplified because there is clear and apparently reliable evidence that while the goods were lying on the platform at Bombay the plaintiff's agent asked a subordinate in the service of the first party defendants to remove them into the godown but was told in reply that after a railway receipt had been given to the consignor he had no business to make any such request. There is also evidence that after the institution of the suit a goods' clerk informed the plaintiff that one of the bales had not been despatched. There is no rebutting evidence on the side of the defendants and, in my opinion, it has been established that there was wilful neglect on their part and therefore the plaintiff is entitled to a decree.

The application will, therefore, be dismissed with costs.

BUCKNILL, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Adami, J.J.

1923.

Feb., 6.

FORBES

v.

HANUMAN BHAGAT.*

Lease—construction of—bemiadi, *lease—landlord's consent to erection of* pakka *buildings, effect of.*

* Appeal from Appellate Decree No. 363 of 1921, from a decision of Babu Ashutosh Mukherji, Subordinate Judge of Purnea, dated the 3rd September, 1920, confirming a decision of Babu Braj Bilas Prasbad, Munsif of Araria, dated the 31st July, 1919.