the peon, under section 99 they would not have been able to plead the right of private defence of property as a justification because the peon was acting in good faith under colour of his office, though his attachment of the cattle may not have been justifiable by law.

After careful consideration I am of opinion that in the circumstances of this case, the conviction of the petitioners under section 186 should not be upheld, and I would set aside the conviction and sentences and acquit them.

BUCKNILL, J.—I agree.

Convictions set aside.

APPELLATE CIVIL.

Before Das and Ross, J.J.

EAST INDIAN RAILWAY CO., LTD.

v.

KISHUN CHAND KASARWANI.*

1925.

Oct., 27.

Railways Act, 1890 (*Act IX of* 1890), *section* 72(2)(*a*), *meaning of—Risk Note B, execution of, by person delivering the goods—contract, effect of, against the sender.*

Section 72(2) of the Railways Act, 1890, declares that an agreement purporting to limit the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to it to be carried by railway, shall, in so far as it purports to affect such limitation, be void, unless it: "(*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods".

Held, that the sub-section does not contemplate that the sender of goods must necessarily be the person delivering them to the railway administration.

* Appeal from Appellate Decree no. 638 of 1923, from a decision of Rai Bahadur Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 9th April, 1923, affirming a decision of B. Narendra Lal Bose, Munsif of Palamau, dated the 13th February, 1922.

1925.

E. I. RY. CO., LTD. v. KISHUN CHAND KASARWANI.

Where, therefore, *N*, delivered the goods on behalf of the sender and executed the risk note B, *held*, that the case was covered by section 72(2)(*a*), and that the contract was effective as against the sender.

This was an appeal by the East Indian Railway Company against a decision of the Subordinate Judge of Ranchi affirming a decision of the Munsif in a suit brought by the plaintiff-respondent for damages for the loss of one bale of cotton piece-goods. It appeared that two bales of cloth were despatched from Bombay to Daltonganj on the East Indian Railway and only one bale was delivered. The goods were despatched under risk note in Form B.

The Subordinate Judge held that as the risk note was executed by one Narsing, who was not the sender of the goods nor an authorized agent of the sender, the risk note was not an effective contract. He was further of opinion that as the railway company defendant had not pleaded loss, it was not necessary for the plaintiff to show that the non-delivery was due to wilful negligence on the part of the company's servants.

N. C. Sinha, for the appellant.

B. N. Mitter, for the respondent.

ROSS, J. (after stating the facts set out above, proceeded as follows): In my opinion the decision of the learned Subordinate Judge is wrong on both points. It was found as a fact by the Munsif that the goods were delivered to the railway administration by Narsing, who signed the risk note. This finding has not been reversed by the Subordinate Judge; and it must be taken that the risk note was executed by the person delivering the goods to the Railway administration. This comes within the language of section 72 (*2*) (*a*); and, in my opinion, the learned Subordinate Judge was wrong in construing that section as meaning that the person sending and the person delivering the goods are necessarily the same. If Narsing delivered the goods on behalf of the sender to the railway administration, then he was the agent

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Ross, J.

for executing the risk note under which the goods were despatched. In this view of the case it is unnecessary to deal with the further argument advanced on behalf of the appellant that the plaintiff had ratified the act of Narsing by taking delivery of one bale of goods under this risk note.

With regard to the second point, it is clear that this is a case of loss. The plaintiff in his plaint alleged that only one bale was delivered and that there was shortage. The railway company in their defence pleaded that there was no wilful negligence by reason of which the company was liable for any loss sustained by the plaintiff. The case was clearly a case of loss on the pleadings; and, in view of the terms of risk note in Form B, it was for the plaintiff to prove that the loss of one complete package was due to negligence on the part of the company's servants. No such proof was offered and the plaintiff's claim must therefore fail.

The appeal is allowed and the suit of the plaintiff is dismissed with costs in both the Courts below, but in the circumstances of the case there will be no costs of the appeal in this Court.

DAS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

BHATU RAM MODI

v.

FOGAL RAM.*

1925.

May, 5; Nov., 3.

Mesne profits, application for ascertainment of, whether can be dismissed—decree-holder, right of, to apply to Court to ascertain mesne profits—limitation.

* Appeal from Original Decree no. 98 of 1922, from a decision of B. Pramatha Nath Bhattacharji, Subordinate Judge of Hazaribagh, dated the 21st January, 1922.