1925.

RAMCHANDRA MODAK v. KING-EMPEROR.

MACPHERSON, J.

Court and also is not one such as is required under rule 3, Chapter III of the Rules of the Patna High Court. But though the objection is made out it is technical only and should not prevail at this stage even though it might have constituted good ground for refusal to issue a rule when the defective application was lodged. The rule has been heard out on the merits, also in the course of the hearing it has appeared that the facts stated in the petition, which is faultily verified, are matters of record and indeed they are not disputed on behalf of the Crown. Moreover, regard being had to the nature of the illegality in the trial and to the fact that the Magistrate had some ground for believing the petitioner to be eccentric, I should, if necessary, be disposed to treat the case as one which has come to the knowledge of the High Court otherwise than on application wherein the Court should of its own motion exercise its powers under section 439 of the Code of Criminal Procedure.

APPELLATE CIVIL.

Before Adami and Bucknill, J.J.

GREAT INDIAN PENINSULA RAILWAY

v.

DATTI RAM.*

1925.

June, 29, 30; July, 10.

Non-delivery, suit against Railway company for—onus of proving liability—Risk Note B, nature of contract arising out of—admission of theft in a running train—failure to prove allegation, effect of—Evidence Act, 1872 (*Act I of* 1872), *section* 106.

In order to be successful in an action against the Railway Company, for damages for the loss of goods consigned, based

* Second Appeal no. 126 of 1923, from a decision of A. E. Scroope, Esq., I.C.S., District Judge of Saran, dated the 24th November, 1922, modifying a decision of B. Atal Behari Saran, Munsif of Chapra, dated the 16th March, 1922.

1925.

G. I. P. RAILWAY v. DATTI RAM.

on a contract under Risk Note B, the onus of proving that the loss is due to one of the exceptions under which the defendant is responsible lies on the plaintiff.

Smith v. *Great Western Railway Company*(1) and *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2), followed.

Gillabhai Punsi v. *The East Indian Railway Company*(3) and *Jamnadas Baldevadas* v. *The Burma Railway Company, Limited*(4), not followed.

The contract under Risk Note B forms a complete special contract between the consignor and the Railway company. The plaintiff, therefore, cannot go behind his special contract with the defendant company and sue the company for damages for non-delivery under such normal statutory liabilities as are imposed upon parties to a contract under the Indian Contract Act, 1872, and upon Railways as carriers under the Indian Railways Act, 1890.

Where the Railway Company admitted "theft in a running train" but failed to prove the allegation, *held*, (i) that the admission was not of theft at large but of a specific form of theft; and (ii) that in any case the onus still lay on the plaintiff to prove neglect or theft by the servants of the Company.

Madras and Southern Mahratta Railway Company, Limited v. *B. Krishnaswami Chetty*(5), referred to.

The facts of the case material to this report are stated in the judgment of Bucknill, J.

Muhammad Hasan Jan, for the appellant.

B. N. Mitter, for the respondent.

BUCKNILL, J.—This was a second appeal from a decision of the District Judge of Saran, dated November 24th, 1922, by which he modified a decision of the Munsif of Chapra, dated March, 16th of the same year. The appellant was the Great Indian Peninsula

(1) (1922) L. R. 1 A. C. 178.
(2) (1923) I. L. R. 2 Pat. 442.
(3) (1921) I. L. R. 45 Bom. 1201.
(4) (1921) 64 Ind. Cas. 395.
(5) (1924) 79 Ind. Cas. 137.

1925.

G. I. P. RAILWAY v. DATTI RAM.

BUCKNILL, J.

Railway through its agent in India; this Company was the defendant in a suit brought by the plaintiffs (the respondents here) who are merchants of Chapra town. The plaintiffs' suit was of familiar type; their firm ordered a bale of cloth from a Bombay merchant; it is admitted it was duly sent under Risk Note B and was duly placed in the appellant Company's custody; it is also common ground that it was never delivered.

The plaintiffs sued the appellant Company for the value of the goods lost (Rs. 869-14-9), the freight (Rs. 5-15-0) and loss of profit (Rs. 75) or Rs. 948-13-0 in all. They averred that they believed that the bale had been lost through the negligence of the appellant Company's servants.

The appellant Company pleaded various defences; they admitted the loss but alleged that it was due to a " running train theft " and that therefore they were absolved by Risk Note B from liability. The appellant Company, however, called no evidence whatever in support of their allegation of " running train theft ". Whether the plaintiffs' evidence proved any negligence on the part of the appellant Company or not was a matter of difference of opinion between the Munsif and the District Judge.

The case, however, proceeded on the usual lines: the plaintiffs tried to prove negligence on the part of the defendant Company but all that their sole witness could aver was that he supposed that the Company's servants must have been negligent because the plaintiffs had never received their bale of cloth. I need hardly say that such an assertion by itself is of no value as proof of negligence. The Munsif, therefore, holding that the plaintiffs had failed to prove any negligence, dismissed their suit with costs.

The District Judge, when the appeal came before him, thought that negligence should be inferred " from all the circumstances ": he, therefore, reversed the Munsif's decision and gave judgment for the plaintiffs

for the price of the cloth with costs but not for the alleged loss of profit which he did not consider had been proved.

It is important to ascertain on what grounds the District Judge arrived at this conclusion. In the first place he points out how impossible it was for the plaintiffs to prove what happened to the cloth when in the Railway's custody; but this, though I may say at once that it is a constant difficulty in almost every case of this type, does not relieve a plaintiff from proving negligence on the part of the Railway's servants. The District Judge next remarks that the Company alone can know what happened to the bale whilst in its custody and that, therefore, under section 106 of the Evidence Act the onus is on the Company of proving what happened to the goods: but this kindly view is contrary to all the Indian and English case law authority [vide, e.g., *Smith* v. *Great Western Railway Company*(1)]; the onus of proving negligence in these cases lies on the plaintiff; the Railway Company is not bound in law to assist the plaintiff to fasten liability on itself. The District Judge further observes that the whole consignment was lost and that, although the Railway pleaded theft on a running train, it had made no attempt to prove any such theft; and that therefore the onus of avoidance of liability lay, by this plea in defence, upon the Company: it is possible that, more closely examined, there may be some force in this reasoning but I propose to deal with this point at a later stage.

The District Judge then states that the plaintiffs could get no information from the Company as to what had happened to the cloth; but this does not, according to the authorities, relieve the plaintiffs from proving negligence. The District Judge next remarks that, from the plaintiffs' evidence and the admitted facts in the case, the only reasonable conclusion was that the loss was due to the negligence of the Company's

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

1925.

G. I. P. RAILWAY v. DATTI RAM.

BUCKNILL, J.

servants: but I have already pointed out that the plaintiffs' testimony was of no evidential value; whilst the only material admissions in the case were that the bale was duly given to the Company's custody and was lost in a running train theft; neither of which circumstances threw any liability on the Company.

Lastly, the District Judge seems to think that a plaintiff can in some manner go behind his special contract (i.e., Risk Note B) with the Company and sue the Company for damages for non-delivery under such normal statutory liabilities as are imposed upon parties to a contract under the Indian Contract Act and upon Railways as carriers under the Indian Railways Act; but this view again is, I fear, contrary to the best authority. There have been so many decisions on cases of this type reported in Indian law reports that I think it is as well to try and express very simply a few of the more important features which emerge from them.

What is known as Risk Note B is, we are informed, the ordinary and most usual contract for the carriage of goods entered into between merchants and the railway companies in India. It is very simple in its language: it forms a complete special written contract between the consignor and Railway Company. The railway takes the goods at a rate of freight lower than the ordinary rate; in consideration for so doing, the consignor undertakes to absolve the Company from all responsibility for any loss, destruction, deterioration of or damage to the goods whilst in transit from any cause whatever subject to certain exceptions. These exceptions provide that if a whole consignment (or one or more complete packages forming part of a whole consignment) is lost, then the Company will be responsible if the loss is due—

(*a*) to the wilful neglect of the railway administration, or

(*b*) to theft by its servants or agents, or

(*c*) to wilful neglect of its servants or agents.

Then there is a proviso that wilful neglect cannot be held under the contract to include—

(*a*) fire,

(*b*) robbery from a running train,

(*c*) any other unforeseen event or accident.

A, then, a merchant, consigns goods by *B*, a Railway Company to *C*, another merchant, under a contract contained in Risk Note B: the goods are never delivered to *C*; *A* (or *C* acting really on *A's* behalf or as *A's* principal for there is no direct contract between *B* and *C*) sues *B* for damages for the loss of his (*A's*) goods or, if one so likes to phrase it, for damages for breach of contract in that *B* has not delivered the goods to *C* as *B* undertook so to do. What is *A's* cause of action?; it is solely on account of a breach by *B* of the contract between *A* and *B*. What is that contract?; it is an agreement between *A* and *B* reduced into writing in the form of Risk Note B. What contract must *A* sue on? on the only contract existing betweent *A* and *B*, i.e., the Risk Note B. Can *A* ignore the Risk Note and sue *B* for damages for non-delivery basing his claim on statutory liabilities imposed generally upon those who make contracts or particularly upon a railway company under the provisions of the Indian Contract Act and the Indian Railways Act respectively? the answer is in the negative; *A* cannot do so; he has to base his claim on his existing and actual contract with *B*, i.e., the Risk Note B. *A* then sues *B* upon and for damages for breach of the contract, i.e., the Risk Note B made between them. *B*, to take the simplest case, admits the loss in the Company's statement or defence. By the express terms of the contract *B* is not liable for loss save under certain specified circumstances. Who has to prove those circumstances under which *B* is liable? clearly not *B*, for it can hardly be contemplated seriously that *B* is bound to assist *A* in fastening responsibility upon B. So it is *A* upon whom the onus falls of showing that *B* is responsible for the loss.

1925.

G. I. P. RAILWAY v. DATTI RAM.

BUCKNILL, J.

There have, it is true, been cases—even of quite recent date—in which it has been held that it is not sufficient for *B* to admit the loss in his statement of defence but that *B* must adduce evidence to prove such loss [e.g., *Ghelabhai Punsi* v. *East Indian Railway Company*(1), and *Jamnadas Baldevdas* v. *Burma Railway Company, Limited*(2)] , but these were decisions given prior to the case of *Smith* v. *Great Western Railway Company*(3); and it is difficult to understand why *B* should be called upon to prove what he expressly admits: the point also has been fully discussed and dealt with in this Court in the decision of Mullick, J., and myself in *G. I. P. Railway Company* v. *Jitan Ram Nirmal Ram*(4) in which we held that the contention was incapable of support. *A*, who may know nothing, and indeed is not likely in most instances to know anything, as to how or where his goods vanished or why they were not delivered, can aver in his statement of claim what he pleases; he can state if he wishes that the loss was due to any or all of the exceptions under which alone *B* is liable; but, assuming that *B* admits the loss, *A*, if he is to be successful in his claim, must prove that the loss was in fact due to one of the exceptions under which *B* is responsible. It is often asked how he can do so; it is obviously not an easy task as it may well frequently be that *B*, at the mercy of any unscrupulous member of its staff or the victim of clandestine theft by outsiders, knows no more as to the disappearance of the goods than *A* himself: *A's* only chance would appear to lie in the administration of searching interrogatories and the calling of servants of *B* as his (*A's*) witnesses. If he proves nothing his claim must fail: *B* need not say or do anything beyond admitting the loss.

All the above points have been dealt with at length in the recent decision of Mullick, J., and myself to which I have referred above. But it is frequently

(1) (1921) I. L. R. 45 Bom. 1201.
(2) (1921) 64 Ind. Cas. 395.
(3) (1922) 1 A. C. 178.
(4) (1923) I. L. R. 2 Pat. 442.

observed that if the law is as above stated it seems very hard as the position of *A* is almost hopeless. The answer to this comment is very simple; it is that the contract is itself a hard one but that *A* has a complete remedy in his own hands, namely, not to seek to have his goods carried at a reduced rate and under the terms of such a hard contract as Risk Note B but pay a higher freight and have his goods carried under another form of contract under the terms of which *B* has to assume a far fuller responsibility.

I mentioned at an early stage of my judgment that one of the reasons why the District Judge thought that the appellant should be held responsible was that the railway company had pleaded in its defence that the loss was due to a running train theft but that it made no attempt to prove that allegation. There seemed at one stage to be some force in the argument which was thus put forward in support of this part of the District Judge's decision. It was contended for the respondent that this admission by the appellant Company was an admission that there had been a theft and that as the Company failed to prove that it was a theft on a running train (satisfactory evidence of which would clearly have permitted the Company to escape any liability) it might be inferred that the theft was committed by the appellant's agents or servants; or, at any rate, that, as they had admitted a theft it was incumbent upon the appellant Company to show that it was not theft by their own agents or servants but theft either as pleaded on a running train or at any rate by some outsiders not in their service or not their agents. It is, however, impossible upon further consideration to come to the conclusion that this argument is a sound one. In the first place the admission or plea is not of theft at large but of a specific form of theft, i. e. on a running train. In the second place, even if the defendant Company failed to prove or to adduce any evidence in support of such an allegation, it cannot be held that a necessary inference must be drawn that the theft was committed by the

1925.

G. I. P. RAILWAY v. DATTI RAM.

BUCKNILL, J.

Company's servants or agents; for, although there might have been a theft, it might have been by persons who were or were not the servants or agents of the Company; whilst, in order to prove that the Company was liable to the plaintiffs for the loss, it was primarily necessary (the onus being upon the plaintiffs) for the plaintiffs to show that the theft (whether or not committed on a running train) was effected by the Company's servants or agents; and this of course the plaintiffs made, and no doubt could make, no attempt to do. Lastly, it was quite unnecessary, according to the authorities, for the railway company to do anything more than to prove or admit the loss; and, having done that, the onus of proving that that loss was occasioned under one of those exceptions contained in the contract under which alone the Company could be held responsible lies upon the plaintiffs. As a matter of fact this very point appears to have been dealt with by Odgers, J., in the Madras High Court in the case of the *Madras and Southern Mahratta Railway Company, Limited* v. *B. Krishnaswami Chetty*(1). That case was one in which there appeared, superficially, to exist considerably greater reasons for drawing an inference that the theft had been committed by the Railway Company's servants than would be justifiable in the present case now before this Court. In the case decided by Odgers, J., the Railway Company pleaded in defence robbery from a running train and actually produced evidence in order to try and prove that allegation. The Company, however, failed to prove that the theft was one committed on a running train although they did show that when the train carrying the goods arrived at a certain station the guard found the doors of one of the covered vans open and the plaintiffs' bale of goods missing from it. The learned Judge in his decision remarks, "One is very much tempted to think that where the Railway Company has 5 or 6 of its servants travelling in the train it is not necessary to look to any outside agency to found a case of theft.

(1) (1923) 79 Ind. Cas. 137.

1925.

G. I. P. RAILWAY v. DATTI RAM.

BUCKNILL, J.

But I cannot say that that has been established by evidence. In a similar case [*B. B. & C. I Railway Company* v. *Ranchodlal Chotalal and Company*(1), which also arose on this Risk Note B the learned Judges point out that though the defendants have failed to prove theft from the running train, the onus is, of course, still on the plaintiff to prove neglect or theft by railway servants. This, they point out, should have been done before any question is reached of robbery from a running train as that, namely, robbery from a running train, is an exception to wilful neglect. It has also been established in *Narayana Aiyar* v. *The South Indian Railway Company, Limited*(2), that the onus is upon the plaintiff to establish how the loss or deterioration was caused though there the Risk Note was Form H. The case of *Madras and Southern Mahratta Railway Company, Limited* v. *Mattai Subha Rao*(3), cited by the learned Counsel for the defendant does not seem to me to touch the case. I am, therefore, with great reluctance constrained to come to the conclusion that the plaintiff has no remedy on this Risk Note B on the evidence as it stands. The suit must, therefore, be dismissed. The question is whether I should inflict costs on the plaintiff. The defendant, as stated, attempted to prove loss by robbery from a running train and assumed that onus at the trial and failed. This is, as I pointed out, wrong. I do not think that the plaintiff suffered any prejudice from that procedure, but, on the whole, I am inclined to dismiss the suit without costs."

The first judgment referred to by Odgers, J., [*B. B. & C. I. Railway Company* v. *Ranchodlal Chotalal and Company* (4)] is precisely to the same effect as that of the learned Judge.

Under these circumstances I fear that this appeal must be allowed and the decree of the District Judge

(1) (1919) I. L. R. 43 Bom. 769.
(2) (1923) M. W. N. 731; 75 I. C. 260.
(3) (1920) I. L. R. 43 M. 617.
(4) (1921) I. L. R. 43 Bom. 769.

1925.

G. I. P. RAILWAY v. DATTI RAM.

BUCKNILL, J.

of Saran set aside and that of the Munsif of Chapra restored.

One can only observe once again that, although it may seem that the decision in these cases bear hardly upon those whose goods are carried by Railway Companies in this country under Risk Note B, the contract is one which involves those who thus confide their goods for carriage to a Railway Company in the greatest difficulty in recovering compensation in the case of their loss; the substantial remedy against such a state of affairs lies, however, in the hands of the individual, who is in no way bound to enter into a contract of such a type which in effect places him at the mercy of the Railway Company with which he enters into such an agreement.

ADAMI, J.—I agree.

LETTERS PATENT.

Before Mullick, A.C.J. and Kulwant Sahay, J.

1925.

July, 14, 15.

RADHE LAL

v.

EAST INDIAN RAILWAY COMPANY, LIMITED.*

Railway Company, suit against—Agent impleaded as defendant—Suit whether maintainable—bona fide mistake, whether cures the defect—plaint, construction of.

In the case of a Railway Company, the proper name under which the Company should be sued is the name and style under which it carries on its business; and if a plaintiff deliberately chooses to sue, not the Company, but the Agent, he cannot by any decree which he obtains in the suit bind the Company. Where, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant, then the suit may proceed against the Company.

* Letters Patent Appeal no. 16 of 1925.