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Indian Limitation Act. The application was, therefore, not barred by limitation.

The order of the Courts below must be set aside and the case remanded for re-trial on merits. The petitioners are entitled to the costs of this application.

MACPHERSON, J.—I agree.

Order set aside.
Case remanded.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, JJ.

GREAT INDIAN PENINSULA RAILWAY COMPANY

v.

FIRM GURDAYAL.*

1926-27.

Dec., 2, 3; Jan., 4.

Railway Company—Risk Note B—part of consignment lost by theft—strike of railway servants, whether amounts to wilful neglect.

Under the terms of Risk Note B a railway company is liable for wilful neglect either on their own part or on the part of their servants. A strike of the railway's employees in breach of their contract is evidence of wilful neglect on the part of such employees.

East Indian Railway Company v. *Goberdhan Das*(1), *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2), *Pantland Hick v. Raymond and Reid*(3), *and Sims and Company* v. *Midland Railway Company*(4), referred to.

Such evidence, in the absence of proof that the company took adequate precautions to protect their wagons against the risks created by the strike, is sufficient to establish the liability of the company for the loss of goods consigned under Risk Note B, and stolen from the wagons.

*Appeal from Appellate Decree no. 794 of 1924, from a decision of Babu Krishna Sahay, Additional Subordinate Judge of Bhagalpur, dated the 9th April 1924, reversing a decision of Babu Rabindra Nath Ghosh, Munsif, 1st Court, Bhagalpur, dated the 28th May 1923.

(1) (1926) 7 Pat. L. T. 140.
(2) (1923) I. L. R. 2 Pat. 442.
(3) (1893) L. R. Appeal Cases, 22.
(4) (1913) L. R. K. B. 1.

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G. I. P. Ry., Co. v. Firm Gurdayal.

Appeal by the defendants.

Under risk not Form B the plaintiffs, on the 24th January, 1922, booked four bales of cloth from Victoria Terminus station in Bombay to be delivered to his agents at Sultanganj in the district of Bhagalpur. Two bales were not delivered and the plaintiff sued for Rs. 1,765-3-0 as damages. The goods were carried first of all by the Great Indian Peninsula Railway Company and then by the East Indian Railway Company. The suit was brought against the former Railway Company. Two written statements were filed by the defendants. In the second written statement, which amplified the first written statement, the defendants stated that the goods reached Moghulserai, a station on the East Indian Railway Company, and that a railway strike took place and the East Indian Railway Company considered it inexpedient to allow the wagon containing the goods to proceed further, and that while they were at Moghulserai seven persons unconnected with the Railway stole the contents of the two bags and that they were subsequently convicted of the theft. The defendants pleaded that as there was no wilful neglect on their part they were protected by the risk note.

The trial Court dismissed the suit on the ground that the risk note applied and that as there was no evidence that the theft took place by reason of wilful neglect on the part of the defendants or their servants the defendants were not liable.

In appeal the Subordinate Judge found that wilful neglect was proved and decreed the suit.

This second appeal was preferred on the ground that there was no legal evidence upon which wilful neglect could be found.

N. C. Sinha and *S. N. Bose*, for the appellants.

S. S. Bose, for the respondent.

Cur. adv. vult.

4th Jan. 1927.

Mullick, J (after stating the facts set out above, proceeded as follows:) The plaintiff sued for non-delivery which is the same thing as detention. This means that the goods have been lost to him. The defendants in effect plead that they have been lost both to the plaintiff and to the defendants and that the risk note applies. In *East Indian Railway Company* v. *Goberdhan Das*(1) it was held by this Court that loss to the plaintiff by detention is loss within the meaning of the risk note. In *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2) it was pointed out that risk note B contained a contract with an exception and a proviso and that the defendants who set up the exception must not only plead but prove that the exception applies and that the burden of proof will then be shifted upon the plaintiff to prove that there was wilful neglect within the terms of the proviso. If a railway company pleads the exception but does not give any proof that the goods have been lost to him, the plaintiff will be entitled to a decree on the ground that though there has been loss within the meaning of the risk note he is entitled to a finding that the goods are being wrongly withheld in the possession of the railway company and therefore there was wilful neglect in not delivering the goods to him. If the railway company gives evidence or the parties are agreed that the goods have been lost to the defendants also, the burden of proof will be shifted upon the plaintiff to prove wilful neglect. In a contract based upon risk note B a mere allegation that the cause of action is non-delivery will not suffice to take the case out of the risk note.

In the present case although the plaintiff based his claim merely upon non-delivery and although the defendants, while pleading the risk note, did not call any evidence to prove the theft by which the goods were lost to them, yet it appears that at the trial it was assumed that the goods were lost both to the plaintiff and to the defendant and that the risk note

(1) (1926) 7 Pat. L. T. 140. (2) (1928) I. L. R. 2 Pat. 442.

1926-27.

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applied and that the decision depended upon the plaintiff's discharging the burden of showing that there had been wilful neglect on the part of the defendants. The omission of the defendants, therefore, to prove the theft is now immaterial.

MULLICK, J.

The next question is whether the Subordinate Judge's finding that there was wilful neglect is based on legal evidence. It was assumed that there was a strike at Moghulserai in consequence of which the wagon could not be forwarded to its destination. There is no evidence to show whether the strike was partial or general and how many days, if any, the wagon was detained by reason of it. The Subordinate Judge appears to have taken the view that the strike in this case was evidence of wilful neglect on the part of the railway servants concerned. He was evidently of opinion that by striking they had broken their contracts with their employers. I cannot say that he was wrong in this view, and indeed the case argued before us here is that even though the servants broke their contracts the employers cannot be held liable. That is a proposition which cannot be sustained. The risk note in terms provides that the company shall be liable for wilful neglect either on their own part or on the part of their servants. A servant's refusal to work, if in breach of his contract, is evidence of wilful neglect upon his part. *Pantland Hick* v. *Raymond and Reid*(1) and *Sims and Company* v. *Midland Railway Company*(2) have no application. Therefore the general proposition that the company is not liable for the consequences of a strike fails.

But the learned Advocate for the appellants puts an alternative argument and says that even if it is assumed that there was wilful neglect on the part of the employees there is nothing to show that the employers did not take adequate precautions to guard the wagon against the risks created by the strike, and

(1) (1893) L. R. A. P. Cas. 22. (2) (1913) L. R. K. B. 1.

that it may well be that the defendants took the precaution of engaging fresh men as watchmen or of seeking the assistance of the police. If the defendants did take any such precautions, it was easy for them to give proof; but they did not, and I think, though with some hesitation, that the evidence of wilful neglect on the part of the strikers coupled with the theft was legally sufficient in the absence of rebutting evidence, to raise the inference that the loss occurred through that wilful neglect of the servants. That, being so, the learned Subordinate Judge's finding is conclusive, and the plaintiff is entitled to succeed. He is, however, not entitled both to interest and profits and the sum of Rs. 100 under the latter head must be deducted from his claim. The decree of the Subordinate Judge will, therefore, be modified and the claim will be decreed for a sum of Rs. 1,665-3-0 with interest pendente lite and till the date of realisation at 6 per cent. per annum together with costs throughout.

KULWANT SAHAY, J.—I agree.

Decree modified.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

RAJA BRAHASUNDER DEB

v.

BHABAN SAHU.*

1926

Dec., 14.

Court of Wards Act, 1879 (*Bengal Act IX of* 1879), *sections* 3, 6(*e*) *and* 51—*loan by ward—suit for recovery against ward under guardianship of manager—whether suit properly framed—suit decreed—appeal by ward, whether competent—rules of the Patna High Court, Chapter VI, rule* 5.

* Circuit Court, Cuttack. Appeals from Original Decree nos. 9 and 10 of 1925, from a decision of Babu Brajendra Kumar Ghosh, Subordinate Judge of Cuttack, dated the 29th April, 1925.