APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

1926.

July, 13.

KASHI RAM KAROO RAM

v.

EAST INDIAN RAILWAY.*

Railways Act, 1890 (*Act IX of* 1890), *Risk Note B—loss of part of consignment—wilful neglect—theft from a running train, whether covered by Risk Note B.*

Seventeen bags of sugar out of a consignment of 126 bags not having been delivered to the plaintiff who had consigned them to the East Indian Railway for delivery, the plaintiff sued the Company for damages for non-delivery. The Company admitted that the bags had been lost while in their custody but, relying on Risk Note B, pleaded that the loss was not due to their wilful neglect or that of their servants.

The guard in charge of the train testified that he had seen the bags falling out of the wagon in which they had been locked when the train was travelling between 10 to 15 miles an hour between two stations. He deposed that he thought the case was one of a " moving train theft " and that he had been unable to communicate with the driver and that he dared not stop the train for fear of an accident.

Held, that the company was liable, for if the guard could have communicated with the driver or have stopped the train, his omission to do so amounted to wilful neglect on his part; if he could not have done so then there was wilful neglect on the part of the company.

B. B. C. I. Ry. Co. v. *Nattaji Partapchand Firm*(1), referred to.

Under the terms of Risk Note B a Railway Company is not exempt from liability for loss occasioned by their wilful neglect: " Provided the term wilful neglect be not held to include fire, *robbery* from a running train or any other unforseen event ".

*Appeal from Appellate Decree no. 981 of 1924, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 29th May, 1924 reversing a decision of Babu Satyaranjan Prashad Sinha, Munsif of Gaya, dated the 17th September, 1923.

(1) (1925) A. I. R. (Mad.) 745.

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Held that the proviso does not apply to *theft* from a running train.

East Indian Railway v. *Nathmal Behari Lal*(1), *Great Indian Peninsular Railway Company* v. *Bhola Nath Debidas*(2) and *Gopal Rai Phul Chand* v. *Great Indian Peninsular Railway Company*(3), not followed.

Appeal by the plaintiff.

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

N. K. Prasad and *B. K. Prasad*, for the appellant.

N. C. Sinha and *B. B. Ghosh*, for the respondent.

BUCKNILL, J.—This was an appeal from a decision of the District Judge of Gaya dated the 29th May, 1924, by which he reversed a judgment of the Munsif of the same place dated the 17th September, 1923. The case was one of a claim by the plaintiff against the East Indian Railway Company; the plaintiff's case was that out of 126 bags of sugar, which were sent from Kidderpur Dock at Calcutta to him at Gaya, only 109 bags were in fact delivered. He, therefore, sued the Railway Company for damages for non-delivery of the missing 17 bags of sugar. The Munsif found in the plaintiff's favour and gave him a decree, although he did not award him quite as much damages as he claimed. The District Judge, however, reversed the decision of the Munsif.

In this instance it is fortunate that we are not so much in the dark with regard to what appears to have taken place as we are in so many of these cases. The defendant Company pleaded the usual Risk Note B; they admitted in their written statement that the goods had been lost whilst in their custody; but they alleged that they were lost without any wilful or other negligence by the Company or on their account.

(1) (1917) I. L. R. 39 All. 418. (2) (1923) I. L. R. 45 All. 56.
(3) (1924) I. L. R. 46 All. 837.

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Now it is clear, from the evidence which was produced by the defendant Company, that, when the goods train (of which the wagon or truck containing these goods was an unit) left Asansole on the East Indian Railway on the 4th February, 1922, the wagon, in which the goods lost were placed, was in good order and sealed up. The guard of the train, a Mr. Gown, deposed that between 7 and 8 o'clock in the evening he observed that some doors of some trucks were open whilst the train was actually in motion between Asansole and Sitarampur; he states that he actually saw a quantity of parcels of goods falling or being ejected from one or more these wagons. He could not exactly tell how or why they were falling out and he did not see any person actually engaged in tossing out the bags from the trucks. Now, when the train arrived at Sitarampur, the doors of three wagons were found to be open; they were then sealed up and at a station further on named Jhajha the contents of the wagons were checked and the losses ascertained. It was then discovered that these missing goods consigned to the plaintiff were not there. The guard himself, although he could not see any person actually throwing the goods out, considered that there must have been some person doing so and that it was a case of what he calls "running train *theft*". The Munsif, however, came to the conclusion that it was perhaps more likely that, owing to faulty padlocks or fastenings of the wagons and the jolting of the train, the doors of these wagons became unfastened and that the bags fell out owing to the movement of the train; presumably the packages were piled up high in the wagon one over the other and they fell out when the doors of the wagons flew open. The Munsif, therefore, came to the conclusion that upon this line of reasoning he should draw the inference that there had been wilful negligence on the part of the Railway Company or its servants in not ensuring that the doors were properly fastened. The District Judge scouts this theory of the Munsif. He came to the conclusion that there was

nothing to indicate that the doors had been badly fastened and swung open owing to the jolting of the train and that, consequently, no wilful negligence of the Company or of its servants had been satisfactorily proved; and, further, that, in any case, it being, what he calls, a "running train *theft*" the Company under the specific provisions of the Risk Note B was not liable.

The learned Advocate for the appellant has raised in these connections points of some interest. In the first place he contends that the evidence which was adduced on behalf of the defendant clearly showed wilful negligence on the part of the Company or of its servant in the person of this guard. It is evident from the guard's evidence that his position in the train was a surprising one and to my mind extremely unsatisfactory. He deposed that, though he could see these doors open and the goods falling out of the train, he was nevertheless unable to communicate with the driver of the engine or with any one; that he dared not stop or attempt to stop the train and that he was in fact completely helpless. The learned Advocate suggests that, if he *was* able to take any step to stop the train and recover the goods, he ought to have done so and that, if he *was* able to do so and did *not* do so, there was undoubtedly wilful neglect on his part. I must admit that I am inclined to agree. The learned Advocate also, alternatively, contends that, if it is true that the guard *was* really unable to stop or slow down the train or to communicate with the driver of the engine in any way or to do anything effective (whilst he could see the goods falling out of the wagons) then such a condition of affairs shows wilful neglect on the part of the Railway Company in not providing the train with some better facilities. Here again I am bound to say that I am inclined to agree with the learned Advocate. To have to contemplate a position in which a guard at the rear of a train is utterly unable to communicate with the driver or any one or to do anything effective in the event of his observing

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anything wrong with the train in front of him seems to me to be a miserable condition of affairs. What, one might ask, would happen supposing the guard saw a truck on fire? Would he through the lack of facilities for communication with the driver or for bringing the train to a standstill have to remain a passive spectator of what might be a serious catastrophe? It may be noted that this guard states that he *dared* not stop the train whilst it was running; but it will be observed that it was only moving, according to his own account, at the rate of some 10 to 15 miles an hour; a speed which appears to me to be most moderate. In re-examination, this guard added that had he stopped the train there would have been a serious accident. We have no information as to what this means. Why there should have been a serious accident if the train had been stopped by the guard, I do not know; but it would appear that he had some kind of means of putting a brake on the train. It seems difficult to understand why he should not have put the brake on and have brought the train to a standstill in view of the fact that the train was, according to his own statement, only moving at between 10 to 15 miles per hour. Under these circumstances, I am of the opinion that enough has been shown to indicate that there was wilful negligence; either on the part of the guard or of the Company. On the part of the guard if he could have taken any effective step but did not. See in this connection the case of *B. B. C. I. Ry. Co.* v. *Nattaji Partapchand Firm*(1), where it was held that where a train was in motion and the guard observed that the doors of two wagons, in one of which certain goods were kept but subsequently lost, were open and did not stop or try to stop the train, but allowed the train to run on to the next station where the matter was enquired into, there was wilful neglect on his part and consequently that the Railway Company was liable. Or on the part of the Company for, even supposing that it is strictly correct that he was for some

(1) (1925) A. I. R. Mad. 745.

(unexplained) reason unable to put his brake on to bring the train to a standstill, nevertheless if he was as a guard in a position in which he was unable to communicate with the engine driver or any one in any effective manner and was compelled to remain a passive and helpless spectator of such disorders as were taking place in the train which he purports to be guarding, then I think there is wilful negligence on the part of the Railway Company in not providing him with better facilities and owners of goods on the train with better safeguards.

The next point which arises is one which has to be approached with some caution in view of the fact that there appears to be in the Allahabad High Court a short series of decisions upon the question. It is argued by the learned Advocate who has appeared for the Railway Company that, it being presumed that this was an abstraction by some person of the goods from the train in motion, it was a " running train *theft* " and that, therefore, under the terms of the Proviso to Risk Note B the Company under such circumstances cannot be held liable. The Proviso reads as follows :

" Provided the term wilful neglect be not held to include fire, *robbery* from a running train or any other unforseen event or accident ".

Now, the learned Advocate for the appellant has urged that the word " robbery " is not synonymous with the word " theft " which is used in an earlier portion of the selfsame Risk Note B. It will be seen that only a few lines above the passage which I have quoted from the proviso to the Risk Note B there occur the words—

" or to *theft* by or to the wilful neglect of its servants ".

The learned Advocate suggests that the word " *theft* " and the word " *robbery* " are used with the meanings which are attached to them in the Indian Penal Code; or, at the lowest, that the word " *robbery* " is used in its normal legal sense as indicating

" the unlawful and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear " (e.g., as in Wharton's Law Lexicon, 11th Edition, p. 752).

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The learned Advocate suggests that when one examines the proviso, which I have quoted, one sees that the exemptions which are there grouped constitute events over which the Company or its servants cannot be regarded as having any possible control and he contends that what is meant by "*robbery*" from a "running train" is a violent or forcible abstraction of goods therefrom.

The learned Advocate for the respondent Company has, however, drawn our attention to certain cases in the Allahabad High Court which negative the suggestion put forward by the learned Advocate for the appellant. The first of these cases is *East-Indian Railway* v. *Nathmal Behari Lal*(1). In that case Richards (C.J) and Banerjee (J.) at page 422 observe. "The learned Small Cause Court Judge thought that the expression "*robbery*" from a "running train" did not mean an ordinary *theft* in a running train, but had reference to "*robbery*" as defined in the Penal Code. It is perhaps unnecessary for the decision in the present case, but we doubt very much whether the expression "*robbery* from a running train" in the contract means anything else than an ordinary "*theft*."

This case was followed by another decision in Civil Revisional jurisdiction by Ryves, (J.) in the case of *Great Indian Peninsular Railway Company* v. *Bhola Nath Debidas*(2). In this case Ryves, (J.) definitely held that the word "*robbery*" in the Risk Note (B) is not used there in the strict legal sense as defined in the Indian Penal Code but means merely *theft* from a running train. In the course of a short judgment he observes—"The learned Judge of the Small Cause Court has given the plaintiff a decree on the ground that the Railway administration were liable. It seems to me that the learned Judge has mis-directed himself. He says—"In short what the

(1) (1917) I. L. R. 39 All. 418. (2) (1922) I. L. R. 45 All. 56.

Risk Note means is supernatural causes or reasons over which the Railway servants in charge of train may not have any control. It would seem that whilst the loss of goods from a running train by reason of any supernatural cause or *robbery* would not be construed as due to ' wilful neglect ' of the servants of the Railway, any other cause short of the above would be so construed. Therefore simple *theft* from a running train would be construed as due to the wilful neglect of the Railway servants. The reason is clear. It is that it may not be possible for the Railway, which is after all a human institution, to fight against the supernatural; and similarly whether owing to the seriousness of the attack, or the odds being against the Railway servants, the latter might find themselves powerless to resist a band of ' *robbers* '. In other words, the learned Judge seems to think that *robbery* from a running train means something very much more serious than *theft* from a running train. It seems to me that *robbery* there is used as synonymous with *theft* and not in the sense as defined by the Penal Code ".

Finally, in a Second Appeal, *Gopal Rai Phul Chand* v. *Great Indian Peninsular Railway Company*(1), a Bench of that Court [Daniels and Neave (J J)] undoubtedly held, referring to the two previous cases which I have quoted, that the word " *robbery* " in the Risk Note was synonymous with *theft*.

This is undoubtedly a somewhat formidable body of opinion but with every respect to the learned Judges of that Court I find myself in considerable difficulty in arriving at the same conclusion. It is said (althogh no case has been quoted to us) that a similar view to that expressed in the Allahabad High Court has been held some years ago in this Court. But unfortunately we have not been favoured with any direct reference to such a decision. It is, however, striking that within

(1) (1924) I. L. R. 46 All. 837, 839.

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a few lines from each other in this Risk Note B the two words which in legal parlance undoubtedly have very distinct meanings and even in non-legal and ordinary parlance have somewhat different meanings should be used. It is suggested that the two words are inter-changeable and were loosely inserted without any particular thought; but this document has to be construed by this Court and I am bound to say when I see in close concatenation the words "*theft*" and "*robbery*" used in the same document, I cannot but think that it was intended that there should be some difference in the meaning of the two. To any ordinary person the word "*robbery*" undoubtedly carries a more sinister meaning than the word "*theft*;" to those accustomed to the Penal Law of India the marked distinction between the two phrases as defined in the Indian Penal Code is of course obvious. Then again, apart from the distinction which I cannot but think should be drawn between the meaning of the two words, we do observe that in the Proviso there are exemptions which undoubtedly contemplate circumstances over which it cannot be expected that the Company's servants or the Company itself could have any effective control, such as an outbreak of fire, an unforseen event or accident or, as I take it, a robbery, (that is to say, a violent or forcible abduction of goods from a running train under circumstances under which the servants of the Company were more or less in a position of helplessness).

Under these circumstances I think that the contention of the learned Advocate for the appellant in this case must be accepted. I am of the opinion that the circumstances indicate that, whether on the part of the guard or whether on the part of the Railway Company or of both, there were in this case facts from which a clear inference of wilful neglect must be drawn. I also with all deference believe that the term "*robbery*" does not mean the same as the term "*theft*"; and we have it in the evidence of the guard

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that there was no intimidation, force or violence and that the theft (if it was a theft) was carried out by some person or persons whom he never even saw.

Under the circumstances I think that the appeal should be allowed; the judgment and the decree of the learned District Judge set aside and that of the Munsif restored. The appellant will be entitled to his costs in this Court and in the Courts below

BUCKNILL, J.

JWALA PRASAD, J.—I agree.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Dawson Miller, C.J. and Foster, J.

RAMBIRICH AHIR

v.

KING-EMPEROR.*

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 109——"*taking precautions to conceal his presence*", *whether continuous act of concealment is contemplated.*

Under section 109(*a*) of the Code of Criminal Procedure, 1898, when a magistrate receives information "that any person is taking precautions to conceal his presence within the local limits of such magistrate's jurisdiction and that there is reason to believe that such person is taking such precautions with a view to committing any offence", he may call upon such person to execute a bond with sureties for his good behaviour. *Held*, (*i*) that clause (a) is not limited to cases in which the person proceeded against has not been brought under arrest: (*ii*) that it is not necessary, in order to bring a person within the operation of that clause, to show that he has followed a continuous course of conduct in taking precautions to conceal his presence.

*Criminal Revision No. 880 of 1926, from a decision of A. N. Mitter, Esq., Sessions Judge of Saran, dated the 10th May, 1926, affirming a decision of Pushkar Thakur, Magistrate, 1st Class, of Chapra, dated the 26th April, 1926.