

APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

EAST INDIAN RAILWAY COMPANY

(DEFENDANT) Appellant

versus

BABU RAM (PLAINTIFF) Respondent.

Civil Appeal No. 2094 of 1923.

Indian Railways Act, IX of 1890, section 56—Goods consigned by rail—unjustifiable refusal by railway to deliver—Detainer—Conversion—when amounts to—consignee's right to market value of goods—Risk Note B—date of execution—Appeal—Objection to validity of risk note raised for first time in Appellate Court.

128 bags of sugar consigned under separate railway receipts (as well as risk notes) half to X and half to Y arrived at destination 17 bags short, there being only 49 bags of X's consignment but 62 of Y's. X having frivolously declined to take part delivery of his consignment, the Railway thereupon refused to accept Y's offer to take the 62 bags of his consignment which had arrived, and continued so to refuse for nearly two months. Y was then notified that he could have delivery of those bags if he paid demurrage, and on his refusal to pay demurrage the 62 bags were auctioned. Y sued for the full market value of the 62 bags and also of his 2 bags which had gone astray, but having failed to prove wilful neglect on the part of the railway as regards the loss of the 2 bags, pleaded in appeal for the first time, that the Risk Note B was invalid because—contrary to its terms—it bore a different date from the corresponding railway receipt.

Held, in the circumstances, that in refusing to deliver on demand that portion of Y's consignment which had arrived, the Railway Company had been guilty of a detention coupled with neglect; and the refusal being neither qualified, reasonable, nor justifiable, amounted to conversion, entitling Y to the full market value of the 62 bags and not merely the price which was realised at the auction.

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Haryana Cotton Mills Co. Ltd. v. B. B. and C. I. Railway Co. (1), and *G. I. P. Railway v. Radhe Mal-Manni Lal* (2), followed.

Held (as regards the two bags which had gone astray) that, as it might have been possible (had Y objected in the trial Court to the validity of the risk note) for the defendant Railway Company to have shewn that the discrepancy in the dates was due to a clerical error, it would not be equitable to allow such a plea to be raised for the first time in appeal.

E. I. Railway v. Jot Ram-Chandra Bhan (3), distinguished.

Tamboli v. The Agent, G. I. P. Railway (4), and *East Indian Railway Co. v. Ram Chabila Prosad* (5), referred to.

First appeal from the decree of Bhagat Jagan Nath, Subordinate Judge, 1st class, Delhi, dated the 29th June 1923, directing the defendant to pay to the plaintiffs the sum of Rs. 6,142.

SARDHA RAM and BISHAN NARAIN, for Appellant.

KISHAN DAYAL and SHAMAIR CHAND, for Respondent.

JUDGMENT.

ADDISON J.—A Calcutta firm consigned 128 bags of sugar from Kiddarpore Docks to Delhi-Shahdara Railway Station. As 64 bags were for Babu Ram and 64 for Banwari Lal, there were separate risk-notes and railway receipts. The risk-notes for each lot were on forms A and B. The two lots were loaded in the same wagon and despatched. On the 8th October 1920 Banwari Lal went to Delhi-Shahdara Station and found that the goods had arrived. He paid Rs. 245-10-6 for the freight of his lot and commenced to load. Before he had finished, it was dis-

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(1) (1927) I. L. R. 8 Lah. 555. (3) 1928 A. I. R. (Lah.) 162.

(2) (1925) I. L. R. 47 All. 549. (4) (1928) I. L. R. 52 Bom. 169 (P.

(5) (1925) 86 I. C. 558.

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covered that only 111 bags out of the two lots had arrived, that is, there were 17 short. It was further discovered that Banwari Lal's lot had been loaded in the middle of the wagon and that there were only 49 bags out of his lot of 64, that is, there were 15 short. Babu Ram's lot had been loaded at each end of the wagon. 62 bags out of his 64 had arrived, that is, there were 2 short. Banwari Lal insisted that he was entitled to take away his complete number of 64 bags and, when this was refused, the bags which he had already loaded were unloaded. Babu Ram came on the 9th October 1920, that is the next day, for his lot, and was prepared to take away the 62 bags of his consignment which had arrived; but apparently on account of the frivolous demand made by Banwari Lal, he was not allowed to do so. Finally the railway auctioned the sugar of both consignments on the 17th May 1921, and, on the 6th June 1921, Babu Ram sued the Railway Co., for Rs. 6,472, being Rs. 6,172 the purchase price and Rs. 300 interest. Later he admitted that he had made a mistake of Rs. 30 in his calculations and reduced his claim to Rs. 6,442. The trial Court disallowed interest but decreed the sum of Rs. 6,142 with proportionate costs. Against this decree the Railway Co. have appealed.

The trial Court held that 62 bags of Babu Ram's consignment arrived, that he was willing to accept delivery of this number, and that, when finally the Railway Co. offered him this number on the 30th November 1920 after the market had fallen very considerably, he was justified in refusing to take them. This amounted to a finding of conversion of the goods by the Railway. It was further held that wilful neglect by the railway in respect of the two bags which

were lost had been established. In this way the full purchase money was decreed.

On the evidence it is clearly established that 62 bags of Babu Ram's consignment arrived and that he was refused delivery, on the 9th October 1920 when he was willing to take the 62 bags which arrived. On the same day he at once telegraphed to the Traffic Manager asking him to order delivery to be made to him. Further, when a Traffic Inspector was sent to settle matters, Babu Ram was still willing, on the 26th October, to take the 62 bags of his consignment, though even then the market was falling. All this was admitted by the learned counsel who appeared for the appellant. On 1st November 1920, Babu Ram served the Railway Co. with a notice to the effect that he had repeatedly been refused delivery, that the market rate was falling and that he claimed the value of the consignment from the Railway. It was not, however, till the 30th November 1920 that the Railway notified Babu Ram that 62 bags of his were lying undelivered at his risk since the 8th October 1920 incurring demurrage charges and that if they were not removed within ten days the consignment would be auctioned as unclaimed property. This was certainly a curious letter to send, seeing that it was entirely the fault of the Railway who refused to allow Babu Ram to remove his bags. The Railway put all the blame on him and even indicated that demurrage would be charged. On this date the market rate had fallen by Rs. 8-8-0 a maund, as admitted by the Traffic Inspector in his letter, dated the 30th November 1920.

The correspondence continued in an attempt to settle the dispute and it is clear from the letters which passed that Babu Ram took the more moderate and

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proper attitude. He telegraphed on the 5th May 1921 that he was still willing to take the 62 bags if the Railway did not charge demurrage. By this time, however, the Railway appears to have taken up the untenable position, not now held by it, that each consignee was entitled to $55\frac{1}{2}$ bags and on the 12th May 1921 it wrote to Babu Ram, only offering him $55\frac{1}{2}$ bags. It is impossible to understand how the Railway came to take up this position as, in no circumstances, could half of one bag belong to one consignment and half to the other. Besides, the evidence is clear that 62 bags of one consignment and 49 of the other arrived, as found by the trial Court. That is, indeed, the position taken by the Railway.

In spite of the above facts, it was strenuously contended on behalf of the Railway that Babu Ram was bound to take delivery of the 62 bags on the 30th November 1920 when the offer of 62 bags was made by the Railway who, however, at the same time claimed demurrage, though delivery had been refused by them from the 8th October to that date, during which interval the market had been steadily falling. As against this, it was argued that the Railway was guilty of conversion of 62 bags by refusing to give them to Babu Ram throughout October and that Babu Ram was justified in giving the Railway notice on the 1st November that he would sue it for the value of the goods, if the sum claimed was not paid. It is the Railway's case that 62 bags of his consignment did arrive. In these circumstances the Railway had no right to refuse delivery in October to Babu Ram merely because Banwari Lal wrongly claimed 64 bags. The claim of Banwari Lal was frivolous and should have been ignored by the Railway. *Haryana Cotton Mills Co.*

Ltd. v. B. B. & C. I. Ry. Co. (1) is a somewhat similar case. In it the Railway had failed to deliver machinery handed over to it for conveyance and was sued for the value of the goods. In reply the Railway pleaded that the goods were now ready for delivery without alleging that they had ever gone astray. It was held that as the Railway Co. had not lost the goods but had been guilty of a detention coupled with neglect or refusal to deliver them up after demand made, that refusal or neglect amounted to conversion and that the plaintiffs were entitled to the full price of the goods as damages. Another somewhat similar case is *G. I. P. Ry. v. Radhe Mal Manni Lal* (2). In it the consignment was for 9 bags. 7 bags arrived along with 2 of another consignment. Delivery of 7 bags of the consignment proper was twice refused by the Station-master, but on two subsequent occasions the Railway asked the plaintiffs to remove the 7 bags which were theirs. The plaintiffs refused to do so and the bags were auctioned. It was held that the Railway Co., after refusing to deliver the 7 bags, retained them at their own risk and the plaintiffs were entitled to recover the market value of the goods and not merely the price which they had realised at the auction.

Generally speaking, a refusal* to deliver goods amounts to a conversion though a qualified, reasonable and justifiable refusal may not. On the Railway's own case, it had no right of any kind to refuse delivery to Babu Ram. Its refusal to deliver was neither reasonable nor justifiable. In my judgment this case is governed by the authorities already mentioned, with which I am, with respect, in full agree-

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ment. I would therefore, dismiss the appeal in respect of the 62 bags of the consignment which arrived at Delhi-Shahdara, and delivery of which was refused by the Railway.

As regards the two bags, which were lost, it was argued that there was no evidence of wilful neglect, and that the Railway Co. was, therefore, not liable. It is correct that there is no evidence to establish wilful neglect on the part of the Railway. As against this it was argued on behalf of Babu Ram that the risk note B was invalid as it bore date the 28th September 1920 whereas the railway receipt was dated the 29th September 1920, and that it thus could not afford immunity to the Railway from its liability as bailee in case the goods were lost. In this respect reliance was placed on a decision of a learned Judge in Chambers *E. I. R. v. Jot Ram-Chandara Bhan* (1). The argument turns on the fact that the risk-note B commences as follows:—"Whereas the consignment of 64 bags white sugar for which I/we have received Ry. Receipt No. of same date is charged at a special reduced rate I/we, the undersigned do, in consideration of such low charges, agree, etc." The form has to be approved by the Governor General in Council and the words "*of same date*" do occur in it. Whether these words are an essential part of the form (see *Tamboli v. The Agent, G. I. P. Railway Co.* (2) or merely descriptive and whether the plaintiff can be heard when he alleges that the risk-note is invalid when his cause of action is based on the railway receipt which clearly mentions that the goods were being carried on risk-notes A and B by reason of which a much reduced rate

(1) 1928 A. I. R. (Lah.) 162. (2) (1928) I. L. R. 52 Bom. 169 (P. C.).

of freight was being charged (see *East Indian Railway Co. v. Ram Chabila Prasad*) (1) are questions which need not be discussed now. This point was not taken in the trial Court but was only raised before us in the appeal. If it had been taken at the trial, it would have been possible for the railway to show that the risk-note was given to it on the 29th September and that there was a clerical error as regards the date of the risk-note. I would decline therefore, to allow this new case to be set up as it would be most inequitable to do so. The result is that the plaintiff is not entitled to anything for the two bags lost, and the appeal must succeed in this respect. The amount decreed must, therefore, be reduced by the sum of Rs. 192.

For these reasons I would accept the appeal to the extent of reducing the sum decreed to Rs. 5,950 with costs to the plaintiff on that amount in both Courts.

BHIDE J.—I concur.

N. F. E.

Appeal accepted in part only.

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