APPELLATE CIVIL.

Before Tek Chand and Hilton JJ.

1929

July 3.

JAI NARAIN-LACHHMI NARAIN (PLAINTIFFS) Appellants

versus

G. I. P. RAILWAY COMPANY, BOMBAY, AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No 2291 of 1927

Indian Railways Act, IX of 1890, section 72—Risk Note H—"Robbery" (from running train)—whether synonymous with "theft"—"Wilful neglect"—meaning of.

In a suit for the recovery of the price of goods lost *en route* the defendant Railway Company pleaded Risk Note H, under which the Railway Company is liable only if "wilful neglect" has been proved, and in which there is a proviso that "wilful neglect" is not to be held to include "robbery" from a running train.

Held, that the question whether the Railway Company has been guilty of "wilful neglect" is one to be judged in the light of the circumstances of each particular case.

Held further, that the word "robbery," as used in Risk Note H, is not synonymous with "theft;" and, therefore, where there is no *robbery* from a running train, but *theft* only, the defendant Railway Company is not absolved from liability by the proviso to the Note.

Bindraban v. *G. I. P. Railway Company* (1), *Karali Prosad Dutta* v. *E. I. Railway Company* (2), *Kashi Ram-Karoo Ram* v. *E. I. Railway Company* (3), *Bengal and North-Western Railway* v. *Bansi Dhar* (4), and *Battoo Lal* v. *G. I. P. Railway Company* (5), followed.

Gulab Rai-Lahri Mal v. *E. I. Railway Company* (6), and *B. B. and C. I. Railway Company* v. *Shah Saharchand Kalidas* (7), not followed.

(1) (1926) I. L. R. 48 All. 766 (F.B.).
(2) 1828 A. I. R. (Cal.) 498.
(3) (1927) I. L. R. 6 Pat. 168.
(4) (1926) 92 I. C. 603.
(5) (1927) 105 I. C. 843.
(6) (1925) I. L. R. 6 Lah. 305.
(7) 1922 A. I. R. (Bom.) 256.

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Second appeal from the decree (on review) of Rai Sahib Lala *Ghanshyam Das, Additional District Judge, Delhi, dated the 29th April 1927 (setting aside his decree dated the 7th March 1927, decreeing the plaintiffs' suit for Rs. 964-15-0) and affirming the decree of* Lala *Kanwar Bhan, Subordinate Judge, 3rd class, Delhi, dated the 22nd April 1926, dismissing the plaintiffs' suit.*

KISHAN DAYAL, for Appellants.

ABDUL RASHID, for Government Advocate, and Nawal Kishore, for Respondents.

HILTON J.

HILTON J.—The plaintiffs are a firm of cloth merchants of Delhi who sued the Great Indian Peninsular Railway Company, the first defendant, and another firm of cloth merchants, Chhanga Mal-Mange Mal, the second defendant, for the recovery of Rs. 1,000. The suit was dismissed in the first Court but, on appeal to the Additional District Judge, was decreed to the extent of Rs. 964-15-0 against the Railway Company only. Subsequently, however, the learned Additional District Judge accepted a review application presented to him by the Railway Company and dismissed the plaintiffs' suit with costs. This is a second appeal by the plaintiffs against that decree.

One out of five bales of piece-goods, consigned on 8th September 1924 from Sholapur to Delhi under Risk Note Form H, was found missing. The plaintiffs were the endorsees of the railway receipt, the second defendant having sold them the goods. The sum of Rs. 1,000 claimed was the price of the missing bale.

One of the Railway Company's defences to the suit was that under the Risk Note Form H they were

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absolved from any liability for the loss, there having been no wilful neglect on their part or on the part of their servants and the missing bale having been stolen from the running train. The terms of the Risk Note are that the Railway Company is liable only if wilful neglect or theft by its servants is proved, and there is a proviso that wilful neglect is not to be held to include robbery from a running train. The trial Judge found that no wilful neglect on the part of the Railway servants was proved; and that, even if there had been any wilful neglect, the circumstances pointed to theft from the running train and that the Railway was not, therefore, liable under the Risk Note. He also negatived theft by the Railway servants. The learned Additional District Judge agreed with the trial Judge that there had been no theft by any Railway servant, but he was of opinion that there had been wilful neglect of the Railway by reason of the mode of fastenings of the wagon. On the question whether there had been theft or robbery from the running train, he gave no clear finding in his original judgment. He, however, accepted the appeal, and gave the plaintiffs a decree as already stated. The important point raised in the review application before him was that the finding of wilful neglect alone was not sufficient for a decree in favour of the plaintiffs; and that, even with this finding of wilful neglect, the Railway Company was absolved from liability as the loss had been due to robbery in a running train, which point the learned Additional District Judge, it was said, had not considered and decided. Upon this application the Additional District Judge gave a decision that there had been theft from the running train, and that, theft and robbery being synonymous, the Railway Company was protect-

ed from liability under the Risk Note. On this finding, he then dismissed the plaintiffs' suit.

It is contended before us by Mr. Kishan Dayal for the appellants that the learned Additional District Judge erred in law in reviewing his own order upon grounds which, it is argued, are not recognized by Order XLVII, rule 1, Civil Procedure Code. There had, however, been no clear decision by the learned Additional District Judge concerning the correctness or otherwise of the trial Court's finding that theft from the running train had occurred, and that the Railway Company had thereby been absolved from liability. Thus there was a mistake or error apparent on the face of the record, or at any rate a sufficient reason for review analogous to such an error, in that the decree of the trial Court had been reversed without that finding of the trial Court being displaced. The argument against the legality of the review order is not, in my opinion, a strong one.

It was next argued that " robbery " and " theft " are not synonymous terms as used in the Risk Note. The learned Additional District Judge had based his finding that robbery is equivalent to theft upon *Gulab Rai-Lahri Mal* versus *E. I. Railway Company* (1). It is true that such was the finding in that case, but it was based solely on the ground that the matter had been concluded by authority. Four cases constituted the authority therein followed. One of these *B. B. and C. I. Railway Company* versus *Shah Saharchand Kalidas* (2), assumes that " theft " and " robbery " are synonymous, but does not discuss the point. The other three are judgments of the Allahabad High Court, which that same High Court has subsequently

(1) (1925) I. L. R. 6 Lah. 305. (2) 1922 A. I. R. (Bom.) 256.

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rendered obsolete by a Full Bench judgment *Bindraban* versus *G. I. P. Railway Company* (1), in which the view taken by the majority of learned Judges was that "robbery" and "theft" are not synonymous. The latest pronouncement of the Calcutta High Court, *Karali Prosad Dutta* versus *E. I. Railway Company* (2), of the Patna High Court, *Kashi Ram-Karan Ram* versus *E. I. Railway Company* (3), of the Oudh Chief Court, *Bengal and North-Western Railway* versus *Bansi Dhar* (4), and of the Judicial Commissioner, Nagpur, *Battoo Lal* versus *G. I. P. Railway Company* (5), are in consonance with the Full Bench judgment of the Allahabad High Court in laying down that "robbery" and "theft" are not synonymous terms as used in these Risk Notes. It is thus clear that the question is now concluded by authority against the view which the learned Additional District Judge adopted, and where there is no "robbery" from the running train, but theft only, the defendant Railway Company is not absolved from liability. That must be the view to be adopted in this case, provided that the learned Additional District Judge's finding of wilful neglect by the Company's servants stands intact.

Mr. Abdul Rashid for the Railway Company has sought to impeach this finding of wilful neglect. The matter, however, is one to be judged in the light of the circumstances of each particular case. In the circumstances of this case, I do not think that the learned Additional District Judge was unjustified in holding that the sending of goods in a wagon fastened with paper, string and wax amounted to wilful

(1) (1926) I. L. R. 48 All. 766 (F.B.).
(2) 1928 A. I. R. (Cal.) 498.
(3) (1927) I. L. R. 6 Pat. 168.
(4) (1926) 92 I. C. 603.
(5) (1927) 105 I. C. 843.

neglect, and I see no sufficient reason to disturb his finding on this point.

On the above grounds, I would accept the appeal of the plaintiffs, and, setting aside the review order of the learned Additional District Judge of 29th April 1927, would restore his judgment and decree of 7th March 1927, and would grant the plaintiffs a sum of Rs. 964-15-0 with costs in all Courts against the first defendant only.

The plaintiffs have not pressed their appeal against the second defendant, and they should, therefore, pay the costs of the second defendant in this Court.

TEK CHAND J.—I concur.

TEK CHAND J.

N. F. E.

Appeal accepted.