APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., and Mr. Justice Shah.

GHELABHAI PUNSI AND OTHERS, JOINTLY TRADING AS LALJI PUNSI AND CO., (ORIGINAL PLAINTIFFS), APPLICANTS *v.* THE EAST INDIAN RAILWAY COMPANY AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS*.

1921. *January* 19.

Contract—Delivery of goods to Railway Company—Risk note, Form B—Goods lost in transit—Admission of loss by Railway Company—Mere admission not sufficient to entitle Railway Company to protection of risk note—Definite proof of loss required.

The plaintiff consigned certain bags of rice to Bombay from Dubrajpore under Risk Note Form 'B'. The consignment being short delivered, the plaintiff sued the defendant Railway Companies for the value of the missing bags. The second defendant Railway Company admitted the loss but sought to escape liability under the risk note. The trial Judge, on the admission of the defendant company and without recording any evidence regarding the loss of goods, dismissed the plaintiff's suit.

The plaintiff having applied to the High Court,

Held, remanding the case for retrial, that it was necessary for the defendant Company to prove that the goods were lost, a mere admission in their own favour being insufficient.

APPLICATION under Extraordinary Jurisdiction, praying for reversal of the decision of the Full Court of Small Causes at Bombay, in Suit No. 4501 of 1919.

Suit to recover goods or their value.

The plaintiff consigned 250 bags of rice to Bombay from Dubrajpore, which were delivered to the first defendant Railway Company at Dubrajpore to be delivered by the second defendant Railway Company at Wadi Bundar, Bombay. Two bags being short delivered, the plaintiff sued the defendant Railway Companies on two alternative counts (1) recovery of two bags of rice or (2) the sum of Rs. 30 for compensation for value thereof at the rate of Rs. 15 per bag.

*Application No. 192 of 1920 under Extraordinary Jurisdiction.

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The defendant Company denied conversion but admitted loss, and on the admission claimed exemption from liability for the same under the contract embodied in the risk notes, Forms A and B.

The trial Judge, without calling upon the defendant Railway Company to prove how the loss occurred, held that as the plaintiff had signed the risk note in Form 'B', there was a complete indemnity in all other cases except the case of loss of a complete package due to wilful neglect of the Railway servants; that the onus lay on the plaintiff to prove the neglect but he failed to discharge it. He, therefore, dismissed the suit.

On appeal, the Full Court confirmed the decision of the trial Judge, giving reasons as follows :—

"Plaintiffs argue that even in spite of the contract embodied in the risk note defendants continued to be bailees and they have therefore to show that they took proper care of the goods, at least by leading evidence formally to show that they were put on a truck, that the same was locked and sealed and that in spite of this care, the goods disappeared. This contention runs counter to many decided cases, out of which we would mention only two: viz., *Moheswar Das* v. *Carter*, I. L. R. 10 Cal. 210; and *Toonya Ram* v. *East Indian Railway Company*, I. L. R. 30 Cal. 257 where it has been distinctly held that the Railway Company ceases to be a bailee, on the execution of the risk note. If that be so, then no onus lies on them to show that they took proper care of the goods.

Further we fail to see how making the Railway Company lead any evidence to prove the loss would avail the plaintiffs. Loss includes loss by misappropriation by Railway servants or abstraction by a stranger, loss in course of carriage, loss by *mislaying, and* such other forms. The risk note itself is framed in the widest terms possible; it includes loss from any cause whatever, whether during or after transit; so that as soon as the Railway Company shows that the goods started on their way, or were received by them for being consigned (and which can be shown by means of the relative Railway receipts or consignment notes) and were not delivered at destination, the presumption arises that they were lost during or after transit.

We think that section 58 of the Evidence Act has also something to do with the case. It says that a fact admitted by parties need not be proved. Thus plaintiffs allege loss to themselves because of the goods being lost by

the Railway Company....That Railway Company admits the loss, and that is sufficient proof of it But still if the Court is not satisfied as to the fact it has got power to call upon the Railway Company to prove it, and thus stop the mischief, to which plaintiffs allege, a wide door would be opened, if the Railway Company would be allowed to rest content with merely admitting it.

The case of *Mulji Dhanji* v. *S. M. Railway Company*, 14 Madras Law Journal, p. 396, distinctly says that the Railway Compay is not bound to show by affirmative evidence that it has lost the goods.

The Irish case of *Curran* v. *Midland G. W. Company of Ireland* (1896), 2 Irish Report, p. 183, was a case where pigs were consigned under risk notes, similar in the substance of their conditions as here. Two pigs were short delivered, and in a suit being filed against them for the loss thus sustained, on the proof of the special contract, the Company asked for a verdict in their favour. Plaintiffs contended that the Company's failure to lead any evidence whatsoever as to what had happened to the pigs while in their charge amounted to misconduct, and the suit was decreed. The attitude of the Railway Company was this: 'We absolutely decline to give you any account of your goods....We absolutely decline to give you any reason whatsoever (for the short delivery). We decline to tell you what has happened to the goods. We may or we may not have the property in our possession, but we shall not tell you. We remain absolutely silent, and the law allows us to do so.' Is that the attitude of the Railway Company here? We say, No. The Railway Company does give a reason for the non-delivery. It pleads loss. It says we have lost the goods and hence cannot deliver. It does not take up the attitude of entire silence as in that case."

The plaintiff applied to the High Court under its Revisional Jurisdiction.

Jinnah with *Indranarayan Brijmohanlal*, for the applicants.

Coltman instructed by *Messrs. Little & Company*, attorneys, for the opponents.

MACLEOD, C. J. :—The plaintiffs in this case consigned 250 bags of rice to Bombay from Dubrajpore, which were delivered to the 1st defendant Railway Company at Dubrajpore to be delivered by the 2nd defendant Railway Company at Wadi Bundar, Bombay. The plaintiffs only received delivery in Bombay of 248

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bags, and in consequence demanded from the Railway Company either the two bags of rice or their value.

The case came on for hearing before the learned Third Judge of the Small Cause Court, when it was stated by the 2nd defendant that the goods were lost on the railway line ; that the defendants had taken the proper amount of care imposed by law on them, and that the loss was due to causes beyond their control. A commission was directed to issue to the District Court at Birbhum to examine evidence, but that evidence was confined to the issue whether the risk note was signed by the plaintiff consignor. The learned Judge held that as the plaintiff had signed the risk note in Form 'B' there was a complete indemnity in all other cases except the case of loss of a complete package due to wilful neglect of the Railway servants. In consequence the suit was dismissed. The plaintiff took the case to the Full Court where the question was argued whether it was sufficient for the defendants merely to admit that the goods were lost without leading evidence to show that they were lost. None of the Indian cases cited really deal with this particular question, which certainly did arise in the Irish case of *Curran* v. *Midland Great Western Company of Ireland*[a]. In that case two pigs consigned by the plaintiff were short delivered and the Railway Company sought to escape liability under the risk note drawn up in very similar form to the present risk note 'B.' The suit was decreed clearly on the ground that although the Company admitted the loss, they did not lead any evidence as to how the pigs came to be lost. I cannot agree with the reasoning of the learned Judges of the Full Court of the Small Causes Court differentiating the present case from that case. If the

[a] [1896] 2 I. R. 183.

present contention of the defendants were right, the consignor whose goods were short delivered, would have no remedy even although, as a matter of fact, if evidence were taken, he might show that his case came within one of the exceptions in the risk note. If the plea of the Company that the goods are lost were sufficient, then all that evidence is excluded.

In *Mohansing Chawan* v. *Henry Conder*[2], a claim was made for the price of certain bags not delivered. The suit was decided in the lower Court in favour of the plaintiff, but in first appeal this decree was reversed on the ground that the claim was barred under Article 30 of Schedule II of Act XV of 1877. In second appeal this decree was reversed, and although the issue in the suit was mainly one of limitation, there is a dictum of Mr. Justice West which is directly pertinent to the question before us :—

"The Railway Company in this case were bound to deliver the particular bags which they received from the plaintiff's firm for carriage. They did not deliver them, nor did they, so far as the evidence goes, announce their inability to deliver them on account of having lost them either in transit or by misdelivery to some one not entitled....The natural presumption under such circumstances is that all the goods arrived, and that the Railway Company was in a position to deliver them. We are asked to infer from the mere non-delivery that they could not be delivered, because they were lost ; but that is an affirmative fact of which the company ought to have given evidence. *Prima facie*, the responsibility rested on the company, and the non-delivery of the goods might arise from other causes than loss. Had the company announced to the plaintiff that his goods were lost, that might have helped the defendants' case ; but no such announcement was made, and the plaintiff could only tell that goods received and carried for him were not delivered."

A point seems to have been made before the Full Court that the plaintiff sued on the basis of conversion of his goods by the defendants, in which case undoubtedly the onus would lie on the plaintiff to prove that the goods had been converted. But that was clearly

[2] (1883) 7 Bom. 478 at p. 480.

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an error on the part of the plaintiff's pleader in drawing up the statement of the claim, and there is no reason why the plaintiff should be prevented from having the case tried, as it ought to be tried, namely, as a suit for compensation for non-delivery of goods entrusted to the Railway Company for carriage.

We must, therefore, make the Rule absolute, set aside the decree of the Full Court of the Small Cause Court, and remand the case for a retrial, when the defendant company will have to prove that the goods were lost, as a mere admission in their favour that the goods were lost is not sufficient. It may very well be that the defendants can prove very easily that the goods were lost, but still although it may be only a formal matter, it is a matter of principle, and the plaintiff would be entitled to cross-examine the defendants' witnesses in order to show that they were not protected by the risk note.

The petitioners will have costs in this Court. The costs of the Small Causes Court will abide the result of the case at the retrial.

SHAH, J. :—I agree.

Rule made absolute.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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January 20.

VITHOBA MAHIPATI DHABADE AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BALKRISHNA SAKHARAM KULKARNI, MINOR, BY HIS GUARDIAN KHANDO GOVIND KULKARNI (ORIGINAL DEFENDANT), RESPONDENT*.

* Second Appeal No. 578 of 1920.