ground that the Dekkhan Agriculturists', Act did not apply at the date of the sale deed, relying on the decision in *Chanbasayya* v. *Chennappgavda*[1]. Since the decision of the appellate Court in this case, the decision in *Chanbasayya* v. *Chennappgavda* [1] was over-ruled by a decision of the Full Bench[2]. Therefore there was no objection to the plaintiff's contention that he should be allowed to prove that the sale was in reality a mortgage transaction between his mother and the purchaser if the suit was one in which the question could be raised. But this is not a suit for redemption. This is a suit to set aside a sale deed. Therefore this is not a suit falling within the class of suits specified in the Dekkhan Agriculturists' Act, and the plaintiff is not entitled to take advantage of its provisions. As pointed out in *Mt. Bachi* v. *Bickchand*[3] the Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain cases which are specified in the Act. The appeal, therefore, fails and must be dimissed with costs.

Decree confirmed.

J. G. R.

[1] (1919) 44 Bom. 217.
[2] *Ganpat Chandrabhan* v *Tulsi*, (1923) 48 Bom. 214 (F. B.).
[3] (1910) 13 Bom. L. R. 56 (P. C.).

APPELLATE CIVIL.

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

THE G. I. P. RAILWAY COMPANY (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* HAJI TARMAHOMED HASAM (ORIGINAL PLAINTIFF), RESPONDENT*.

1925. *June 24.*

Railway Company, liability of—Risk Note Form B—Consignment of oil tins—Leakage of entire contents of some tins—No loss of complete package—Company not liable.

* Second Appeal No. 762 of 1923.

1925.

G. I. P. RAILWAY COMPANY v. HAJI TARMAHOMED.

A Railway Company undertook to carry 450 tins of ground nut oil for the plaintiff. The plaintiff had signed the Risk Note in Form B. In the transit the entire contents of 86 tins of oil leaked out. The plaintiff having sued to recover the loss from the Company:

Held, that the Railway Company was not liable under the terms of the Risk Note in Form B, inasmuch as there was no loss of a complete package forming part of the consignment.

B. B. & C. I. Railway Comapny v. Ambalal Sevaklal [1], followed.

THIS was an appeal against the decision of R. E. A. Elliott, District Judge at Broach, confirming the decree passed by G. D. Yajnik, Joint Subordinate Judge at Broach.

Suit to recover damages.

The plaintiff's agent at Rayampuran, a station on the M. & S. M. Railway (defendant No. 1), handed over to the Railway Company 450 tins of ground nut oil to be delivered to the plaintiff at Miyagam a station on the B. B. & C. I. Railway. The consignment was made under the Risk Note Form B. The consignment in due course came into the charge of the G. I. P. Railway (defendant No. 2), and was taken to Wadi Bunder in Bombay. The waggon was unloaded at Wadi Bunder where 20 tins were found quite empty and some more were found leaking. The consignment was then taken to Dadar where it was handed over to the B. B. & C. I. Railway. When the goods arrived at Miyagam it was discovered that the contents of 86 tins of oil had completely disappeared. The plaintiff, however, accepted the consignment under protest.

The plaintiff on November 5, 1920, filed the present suit against defendants Nos. 1 and 2 to recover Rs. 1,600 as the price of the contents of 86 tins of oil with interest at nine per cent.

The trial Court found that the loss was due to the wilful neglect of defendant No. 2 and decreed the plaintiff's claim to the extent of Rs. 957.

[1] (1909) Civil Extra. Application No. 98 of 1909 (unrep.).

The appellate Court increased the decretal amount to Rs. 1,189-12-9.

Defendant No. 2 appealed to the High Court.

Binning, with *Messrs. Little & Co.*, for the appellant.

G. N. Thakor, with *M. K. Thakore*, for the respondent.

MACLEOD, C. J.:—The plaintiff sued to recover Rs. 1,600 as the price of the contents of the plaint tins of oil, with interest. The trial Court decreed the plaintiff's claim to the extent of Rs. 957. The appellate Judge increased the decretal amount to Rs. 1,189-12-9. The Railway Company have appealed. It is curious to note that in so many of these Risk Note cases, the parties fail entirely to realise what are the real issues in the case, and in second appeal they endeavour to remedy the defects which have occurred in the proceedings in the Courts below. The third issue in the trial Court was: "Is the Risk Note set up by the defendant Railway Company duly proved"? That was found in the affirmative. Then the second part of the issue was: "If so, are the defendants absolved from any liability"? Under the terms of the Risk Note the defendants would only be liable, in any event, for the loss of a complete package or of a consignment consisting of a complete package or packages, and if a package or packages were missing, then the defendants would only be liable, if plaintiff could prove wilful neglect as mentioned in the Risk Note. The trial Court held that the defendants were not absolved from liability, apparently on the ground that plaintiff had proved that the loss had occurred by the wilful neglect of the defendant.

The question whether the defendants were liable at all, because they alleged that no complete package had

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been lost, does not appear to have been raised in the issues. The Judge considered that the Railway Company were responsible for the oil that disappeared from the plaintiff's tins, and decreed the plaintiff's claim. There was no question also in the trial Court, whether there had been a deviation of the route, or whether the unloading or reloading of the tins at Wadi Bunder by the defendants was unjustifiable.

In appeal, the same faults of procedure also occurred. The same issues were raised while the vital points in the case do not seem to have been discussed. It is difficult then to consider them if they are questions of fact, in second appeal.

The first question really is whether any of the plaintiff's packages have been lost. We have been referred to the decision in *East Indian Railway Company* v. *Nilkanta Roy* [1], in which it was held that if in the case of tins of oil the tins are delivered, then there is no loss of a package even although the tins contain no oil when delivered to the consignee. The decision of Mr. Justice Fletcher to that effect depended on a decision of this Court, which has not been reported. However we can quite understand how it came to pass that the Railway Companies asked the Legislature to sanction a form of Risk Note so as to absolve them from liability, except in the case of a loss of a complete package. If a tin of oil disappears entirely, then undoubtedly it is lost. But a question would arise, if the contents are partly lost and the tin is there, how much oil should be left in a tin so as to constitute delivery of the package. Other complicated questions might arise, and the solution of the difficulties was found by absolving the Company from liability unless the package has disappeared entirely.

[1] (1913) 41 Cal. 576.

We have now got the decision of this Court in *B. B. & C. I. Railway Company* v. *Ambalal Sevaklal*[1] delivered on November 11, 1909, which says:—

"In this case we think it is quite clear that there has been no loss of a complete package forming part of the consignment. All the tins forming separate packages in the consignment were delivered to the consignee. The fact that all the contents of some of the tins were lost does not make the Railway Company liable under the terms of the Risk Note in Form B."

That therefore would dispose of the case, unless it could be found that the defendants had committed a breach of their contract. It was never alleged that there was such a breach of the contract as to make the defendants liable, apart from the terms of the Risk Note, for any loss of the goods, and therefore, we are not in a position to say that the conduct of the defendants in unloading the goods at Wadi Bunder and reloading them again, itself amounted to a breach of contract.

There is no question of deviation in this case because the goods came to Bombay, as they would ordinarily come to Bombay, and it would not make any difference if they were unloaded at Wadi Bunder and reloaded again for being carried on to B. B. & C. I. Railway line. On the question whether it would be more convenient from an administration point of view that the goods should go to Dadar, instead of to Wadi Bunder, there is no evidence, so that we are unable to hold that there is any foundation for saying that the Company was guilty of a breach of contract under the terms of the Risk Note.

We think that the decision of the Court below was wrong and the appeal will be allowed and the suit dismissed with costs throughout.

Appeal allowed.

R. R.

[1] (1909) Civil Extra. Application No. 98 of 1909 (unrep.).