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SHIDDAPPA IRAPPA v. REVAPPA SOMAPPA

Madgavkar J.

Courts have held to be a nullity and one that can be taken in execution: *Jungli Lall* v. *Laddu Ram Marwari*[1]; *Anwar-ul-Haq* v. *Nazar Abbas*[2]; *Sripat Narain Rai* v. *Tirbeni Misra*.[3]

For these reasons I hold that it was the minor who was the plaintiff and the appellant and not Raghavji, the failure to appoint a next friend after the death of Raghavji and before the appellate decree was an irregularity, and that in any case it is not open to the respondent to avoid the decree in view of his own failure to have the appeal reheard after the appointment of a next friend as the appellant had applied.

The appeal must, therefore, be allowed, the order of the lower appellate Court set aside, and that of the trial Court restored with costs throughout on the respondent.

Appeal allowed.

J. G. R.

(1) (1919) 4 Pat. L. J. 240. (2) (1924) 6 Lah. 313.
(3) (1918) 40 All. 423.

APPELLATE CIVIL.

Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Murphy.

THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY, LIMITED (ORIGINAL DEFENDANTS), APPLICANTS *v.* THE RAJNAGAR SPINNING, WEAVING AND MANUFACTURING COMPANY, LIMITED (ORIGINAL PLAINTIFFS), OPPONENTS.*

1929 July 29.

Indian Railways Act (IX of 1890)—Risk note form B†—Consignment of goods—Loss in transit—Misconduct of railway administration's servants, meaning of—Burden of proof—High Court—Revisional powers.

When goods are consigned through a railway company under risk note form B, the railway administration is not to be held responsible for loss except

*Civil Revisional Application No. 289 of 1928.

†*Risk Note Form "B"*.

"Whereas the consignment of tendered by me/us, per *Forwarding Order* No. of this date, for despatch by the Railway Administration to station, and for which I/we have received railway receipt No. of same date is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment, I/we, the undersigned do, in consideration of such lower charge, agree and undertake to hold the

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upon proof that such loss arose from the misconduct of the railway administration servants. In case of pilferage the railway administration is bound to disclose how the consignment was dealt with whilst it was in its possession and if misconduct cannot be fairly inferred from such evidence the burden of proof of such misconduct lies upon the consignor.

The word "misconduct" in the risk-note suggests that a railway servant has been guilty of doing something which was inconsistent with the conduct required of him by the rules of the company. In the absence of proof that there was any breach of duty by the railway servants or any infringement of the rules which regulate their terms of employment, no fair inference of misconduct on the part of the railway administration servants could properly arise.

Khairati Lal Baboo Lal v. *B. B. & C. I. Railway*,[1] distinguished.

When the lower Court misdirects itself by taking into consideration facts which are not material to the question for its determination and bases its judgment upon them, the High Court has power to revise the findings of the lower Court.

APPLICATION to revise the decree passed by J. N. Bhat, Small Causes Court Judge at Ahmedabad, in Suit No. 1920 of 1927.

The facts are sufficiently set out in the judgment.

H. C. Coyajee, with *J. G. Mody*, for the applicants.

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said railway administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever *except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants*; provided that in the following cases :—

(*a*) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removeable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire,

(*b*) Pilferage from a package or packages forming part of the said consignment properly packed as in (*a*), when such pilferage is pointed out to the servants of the railway administration on or before delivery,

the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the railway administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

This agreement shall be deemed to be made separately with all railway administrations or transport agents or other persons who shall be carriers for any portion of the transit."

[1] (1928) 26 All. L. J. 446.

G. N. Thakor, with *V. N. Chhatrapati*, for the opponents.

KEMP, Ag. C. J.:—This is a revision application against the decree of the learned Small Causes Court Judge at Ahmedabad decreeing the plaintiff's suit. The plaintiff consigned 18 bales of cotton piece-goods from Ahmedabad to Cawnpore under Invoice No. 807, Railway Receipt No. 78862 of July 27, 1926, at owner's risk in Risk Note Form B. The wagon arrived at Kasganj station by the 3-58 down train on August 1, 1926. There the seals were found missing but the rivets which had fastened the doors were intact. The door was immediately resealed and the train remained at Kasganj the whole of the night of August 1, 1926, and the next day it left at 19-20 hours. The train consisted of 33 wagons in all and the particular wagon in question was the 6th from the engine. When the train arrived at Shamsabad at about 23-27 hours on August 2, 1926, it was noticed that the door of the wagon in question was open and that the off side seal and rivets were missing. Shamsabad was not a checking station and in consequence the door was closed and resealed and a report made to the Station Master at Farukabad. On arrival of the train at Farukabad the wagon was examined and checked at the station and it was found that two bales of the consignment in suit were found missing. The wagon was reloaded, resealed and re-rivetted and sent off. No trace of the missing bales was found along the line. Under these circumstances the learned trial Judge framed certain issues of which the material ones are: Issue (1) Whether the defendant-company proves the loss of the plaintiff's consignment by theft in a running train, and Issue (4) Whether the defendant-company is exonerated from liability under the Risk Notes A and B held by it. The other issues are immaterial for the purposes of the arguments before

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us. But it is to be noted that there was no specific issue on the question, whether, the two bales having been lost by pilferage, the evidence which was adduced by the Railway administration showing how the consignment was dealt with throughout the time it was in its possession or control was sufficient to fairly raise the inference of misconduct on the part of the servants of the Railway administration. It is true the learned Small Causes Court Judge has dealt with this question of misconduct notwithstanding that the issue he framed was, whether there was a loss by theft in a running train. Presumably, the issue was put in that form because the learned Judge concluded that if the theft was not from a running train then the fact that it took place from the train when it was stationary would throw the burden upon the Railway administration of showing that there was no misconduct—that the question of misconduct could be more easily determined against the Railway administration when the train was stationary.

I turn to the risk note in question. That note clearly states that the Railway administration is not to be responsible for loss except upon proof that such loss arose from the misconduct of the Railway administration servants. But in a case of pilferage, as was the case here, the Railway administration is bound to disclose how the consignment was dealt with whilst it was in its possession and if misconduct cannot be fairly inferred from such evidence then the burden of proof of such misconduct lies upon the consignor. The finding of the learned Judge here has been that on the evidence adduced by the Railway administration he can fairly infer that there has been misconduct on the part of the Railway servants.

It is unnecessary to enter into the history of this new form of Risk Note. It may shortly be stated that it was contended at one time that under the old form

there was no necessity for the Railway Company to give any evidence at all of what it did with the goods and that at the most all that was required of it was to show that it no longer had the goods in its possession. It may be that it was to avoid the difficulty of the consignor having to show how the goods had been dealt with that the new form of risk note was introduced.

The first point raised by the respondent is that this Court has no jurisdiction to revise the finding of the learned Judge that the evidence adduced by the Railway administration raises a fair inference of misconduct on the part of the Railway Company's servants. Now, turning to the learned Judge's judgment it will be seen that much of it turns on the insufficiency of the devices and the precautions taken by the Railway Company for safeguarding goods in transit. What should fairly be attributed to the deficiencies of the administration he has, I think, taken as evidence of the misconduct of the Railway Company's servants. For example, he says that the wagon had no padlocks but mere paper seals and rivets. It can scarcely be said that this is the fault or misconduct of the Railway Company's servants. Similarly, he says that there were no watchmen or police on the train, that there was no patrolling arrangement to guard the trains at night when they stopped at stations and he holds that special precautions should have been taken by the defendant-company to see that no theft occurred in the wagon in transit. These, I think, are deficiencies, if at all, in the Railway administration and are not material to the question for our determination whether there was misconduct on the part of the Railway Company's servants. The judgment, therefore, discloses a case for revision. It is based on facts which the Judge should not have taken into consideration in coming to his conclusion. So, also, at one passage in his judgment he

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refers to the word "misconduct" as used in the new Risk Note as the same thing as the "wilful neglect" in the old form. I do not agree and I am of opinion that the two terms are not at all the same and that the learned Judge in taking them as such has misdirected himself.

This Court has a discretion to determine whether the evidence on which the learned Judge has decided the case can be said to be reasonably sufficient to justify him in drawing the inference required by the Risk Note. Looking at the evidence as a whole, I have come to the conclusion that it would be wrong to say that on the facts as proved it should be fairly inferred that the Railway Company's servants had been guilty of misconduct. I think, therefore, this Court has power to revise the finding in this case.

I have already stated the material facts. Those on which the Judge relied for his finding are, firstly, that the train remained a long time at Kasganj, and there were frequent stoppages at intermediate stations; secondly, it would have been difficult, if not impossible, for any one to have boarded the train whilst it was in motion and the guard could not have done what he said he did, viz., examined the doors on both sides of the train at every stopping place. Thirdly, the learned Judge suggests that the weight of the bales was such that they could not have been thrown from the train by one man or even two men but would have required the efforts of a number of men and this could only have been achieved with the connivance of the Railway Company's servants. It has been admitted before us that these rivets would not take perhaps more than 15 or 20 seconds to cut. I think there is nothing in the contention that padlocks or a better method of securing the doors of wagons should have been used. The Railway Company had, it seems, been trying for some time to obtain an

effective method of preventing the doors of wagons from being opened. Fourthly, the learned Judge holds that the fact that the seals were damaged at Kasganj, again at Shamsabad and, again, at Anwerganj should have put the Company on its guard to take every precaution to protect this train. As to that, it is by no means unusual for seals to be broken by the vibration of the train and what we have to consider is not what might have been done but what it was the duty of the guard and the other Railway Company's servants to do on this particular train. It is not shown that there was any breach of their duty by them or any infringement of the rules which regulated their terms of employment. I am not prepared to accept the test of the meaning of the word "misconduct" as what a reasonable man would have done under the circumstances. I think the word suggests that a Railway servant had been guilty of doing something which was inconsistent with the conduct required of him by the rules of the Company. Under all these circumstances, I think that no fair inference can be drawn on the evidence from which the Court could throw the burden on the Railway Company. It is enough to say that if on the facts in this case a fair inference of misconduct can be considered as having arisen it would mean that the Railway Company would practically be carrying goods not at owner's risk but at the risk of the Railway administration.

The case of *Khairati Lal Baboo Lal* v. *B. B. & C. I. Railway*[1] is distinguishable. There, it must be noted, the wagon was in a siding, and the place where the theft occurred was proved; and the only question for the consideration of the Court was what precautions had been taken to guard the wagon in the yard. The question here is different. The train was running from Kasganj to Shamsabad, there were frequent stoppages

[1] (1928) 26 All. L. J. 446.

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at different intervening stations, and the Railway Company are not obliged to show how the theft took place at any particular portion of the transit. Under the circumstances, I think the rule should be made absolute and the suit dismissed with costs throughout.

Order accordingly.

MURPHY, J. :—The claim here was decreed because the learned Small Causes Court Judge held, after the Railway Company had shown how the consignment had been dealt with, that misconduct of its servants could fairly be inferred from the evidence. But a perusal of the judgment shows, in my opinion, that the learned Judge has misdirected himself as to the meaning of the proviso in the Risk Note Form B which he has interpreted. In one passage he has remarked that "misconduct," as used in the new Risk Note Form B, is the same thing as the "wilful neglect" which found place in the form which it has replaced, but this can hardly be defended. I think the two terms are not equivalent, as has been assumed by the learned Subordinate Judge. His general finding is, that the evidence of the defendant-Company discloses gross irregularities which, in the circumstances of the case, must be presumed to amount to wilful neglect, or misconduct, on the part of the servants of the Railway administration. His general view of the facts was that the theft had probably occurred, not while the train was in motion between stations, but when it was held up at a station intermediate between Kasganj and Shamsabad, where it was discovered that the door of this wagon was open. The guard in charge of the train was examined and stated that on each occasion of the train stopping at a station he patrolled it to see whether the wagons were intact, or not. But he has not been believed, on the ground that it is improbable that he would do this, which was

his duty, in the dark. No other reason for disbelieving the evidence of this official is given. Again, the learned Judge thinks that the goods train, which consisted of 33 wagons, was much too long, and he says :—

"The wagon containing the plaintiff's consignment was 6th from the engine and 27th from the brake van of the guard. The guard was at such a distance that he could not notice the wagon of the consignment from his van. There was absolutely no watchman or police in the train. Cotton piecegoods are a valuable commodity. The wagon had no padlocks, but mere paper seals and rivets. The defendant-company had a warning from thieves as it were, in the nature of breaking of seals at Kasganj where seals of three wagons were found broken. Nevertheless the defendant-company did not rouse itself and take action for special protection."

It seems to be the case from these remarks, and others which are to be found throughout the judgment, that in his view what really caused the liability to fall on the Railway was that the administration had not provided sufficiently, in a general way, for the safety of the goods which it carried, and that this being so, it follows that any loss which may occur in transit must necessarily be attributed to the misconduct of the Railway administration's servants, who are given an opportunity, by the lack of proper arrangements, of stealing goods from the wagons. But I do not think that this view can be supported. The terms of the Risk Note are that after the Railway has shown the manner in which the consignment from which loss occurred has been dealt with, if misconduct of its servants cannot fairly be inferred from this evidence, it has to be proved by the consignor. It is not, as seems to be the opinion of the learned Small Causes Court Judge, that misconduct must be inferred, when the precautions adopted by the Railway are insufficient for the protection of the goods of the consignor. I think the Risk Note implies by "misconduct" some action wherein the servants of the Railway have done wrong, or have omitted to take a precaution imposed on them by the rules under which they work, and that the very general view taken by the

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learned Judge of Railway arrangements and of the duties of the Railway administration, is not really relevant in a case under this Risk Note. In the present case the evidence discloses no misconduct whatever, as far as I can judge, on the part of the Railway Company's servants, and it cannot fairly be inferred from the evidence which they have led. The plaintiff made no attempt whatever to prove any misconduct on their part, and the learned Judge's findings seem to be wrong. I agree, therefore, with the order proposed by the learned Chief Justice, that the rule should be made absolute and the claim in the suit dismissed with costs.

Rule made absolute.

B. G. R.

CIVIL REFERENCE.

Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Murphy.

PARSU DHONDI, APPLICANT *v.* THE TRUSTEES OF THE PORT OF BOMBAY, OPPONENT.*

1929 July 31.

Workmen's Compensation Act (VIII of 1923), section 2, (1) (n); Schedule II, item (V)—Workman employed in docks—Injury sustained while arranging bales in godown—Workman not entitled to compensation—Interpretation of words "for the purpose of."

The joint effect of section 2 (1) (*n*) read with item (*V*) of Schedule II of the Workman's Compensation Act, 1923, is that the workman, who claims compensation, must be employed for the purpose of loading, unloading or coaling a ship when the injury occurred.

A workman employed to unload bales from a railway wagon standing in a dock and to take them to a shed adjoining the wharf and stack them there, is not entitled to compensation if he is injured, while arranging the bales in the shed, by a bale which fell down.

REFERENCE made by J. F. Gennings, acting Commissioner for Workmen's Compensation, Bombay, under section 27 of the Workmen's Compensation Act, VIII of 1923.

Parsu Dhondi was employed by the Bombay Port Trust on June 23, 1928, to unload bales of cotton from

*Civil Reference No. 18 of 1928.