

In form and in substance the appeal was disposed of, when it was dismissed.

Without expressing any opinion on the merits of the application for review in the District Court, the appeal from order must be allowed. Accordingly I concur in the order proposed by the Chief Justice.

Appeal allowed.

J. G. R.

1921.

SHIVAPPA
v.
RAM-
CHANDRA.

APPELLATE CIVIL.

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

B. B. & C. I. RAILWAY COMPANY (ORIGINAL DEFENDANT), APPLICANT v. DAYARAM BECHARDAS, MANAGER OF THE FIRM OF BECHARDAS NAROTTAMDAS (ORIGINAL PLAINTIFF), OPPONENT*.

1921.

March 2.

Railway—Goods consigned for carriage—Risk note, form H.—Loss of goods—Wilful neglect—Robbery from running train—Burden of proof.

Where a consignment of goods handed over to a Railway Company for carriage under risk note, form H, had been short-delivered in respect of six complete packages, and the Company, when sued, adduced practically all the available evidence :

Held, that, though the effect of the evidence was not definitely to establish the suggested fact of robbery from a running train, yet the theory of wilful neglect on the part of the Railway servants, which might have been established by cross-examination, had been sufficiently excluded.

Per MACLEOD, C. J. :—"Strictly speaking, he [*sc.* the plaintiff] would have to show that there was wilful neglect before the Company have the liability thrown on them to prove that the loss is due to a theft in the running train."

APPLICATION under Extraordinary Jurisdiction praying for reversal of a decree passed by P. M. Bhat, First Class Subordinate Judge at Broach, in Small Cause Suit No. 200 of 1920.

Suit to recover money.

*Civil Application under Extraordinary Jurisdiction No. 279

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The plaintiff consigned 16 bags of sugar from Carnac Bridge Railway Station, Bombay, to be carried to Broach. The goods were entrusted for carriage on the terms of a risk note in form H. The material terms of the risk note were as follows :—

“I the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the Bombay Baroda and Central India Railway Administrationfree from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants.....provided the term 'wilful neglect' be held not to include fire, robbery from a running train or any unforeseen event or accident.”

The goods were carried in a covered wagon. Six of the sixteen packages being lost during transit, the remaining were delivered to the plaintiff. The plaintiff thereupon filed a suit to recover the value of the six packages which were short delivered alleging that the loss was due to the wilful neglect of the Company's servants.

The opponent Company pleaded the goods were lost owing to robbery from a running train and hence the Company was not liable.

The Subordinate Judge held that the goods were lost through the wilful neglect of servants of the Railway Company. His reasons were as follows :—

“It is urged by the Railway Company that there was a robbery in the running train. This fact is not well established. The guard Mr. Edward is examined by the defendant Railway Company. He took charge of the goods train from Bulsar. He was accompanied by two Police armed constables.

“They patrolled the train and found all right at Ankleshwar and also at the Narbada bridge where the goods train was detained to receive the Kathiawar Express. At Broach Station this guard found the seal broken and the door of the wagon open. He made no report ab theft or robbery. No police

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report was submitted and no police investigation. In brief the plea of robbery put forth as a defence is not well established. The loading clerk of Carnac Bridge is examined by the Railway Company. He says that he loaded 16 bags of sugar under the risk note form H, under through covered wagon. This statement is falsified by the Guard that the wagon was bound for Miagaon. Any way according to the evidence of Railway Company employees nothing happened after the Narbada bridge. Now Broach Railway Station is on the bank of the Narbada river and the Guard noticed the door open when the train was standing in Broach Railway premises. The Railway Company was in full charge and control of the goods and while that control was lasting the loss of entire packages has happened.

"The Railway Company is in duty bound to give some line of indications how the loss has occurred. It is urged by the pleader for the Railway Company that the Company is free from liability for any cause whatsoever. If this be so, it makes the proviso ineffective in its purpose. In case of complete loss of packages forming part of the consignment, the Railway Company is liable. The plaintiff proves by his stringent evidence that the loss is due to the wilful neglect of the Railway employees."

The Subordinate Judge, therefore, allowed the plaintiff's claim.

The defendant Company applied to the High Court under its Extraordinary Jurisdiction.

B. J. Desai, instructed by *Crawford Bayley & Co.*, for the applicant.

H. V. Divatia, for the opponent.

MACLEOD, C. J. :—The plaintiff sued the Railway Company for the loss of six bags of sugar which were consigned from Bombay to Broach. There is no doubt that six bags out of sixteen were delivered short. The consignor plaintiff had signed the risk note in the form H, so, if the goods were short delivered, he had to prove that the loss was due to wilful neglect on the part of the Railway Company's servants. Undoubtedly there is often a difficulty in proving wilful neglect, because the only evidence of wilful neglect is the evidence which can be extracted in cross-examination from the witnesses for the defence. The guard of the

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train proved that the seals of the wagon were intact at Ankleshwar and also at the Narbada bridge cabin where the train stopped to let the Express pass. When he got to Broach he found the seals broken. He re-sealed the wagon which was taken off at Broach, but he did not make any report to the Station Master. The Judge finds on that evidence that it was an undisputed fact that the loss of sugar occurred at Broach station. Therefore the plaintiff proved by his evidence that the loss was due to wilful neglect of the Railway employees.

It appears to me that the plaintiff could very easily have proved wilful neglect on the part of the Railway employees, if there had been any, by putting proper questions to the defendants' witnesses. The guard was not cross-examined beyond being asked whether his journal mentioned anything about a theft or robbery, and whether there was any police inquiry about the missing goods. A great deal of information might have been obtained by further questioning the guard as to the time when the train arrived at Broach, what was the position in the train of this particular wagon, how long after he arrived at Broach he inspected the wagon, and other questions of that sort which would go to elucidate the question whether the theft could possibly have been committed while the train was standing at the Broach station. It would not be likely that the theft occurred at the Broach station before the wagon was taken off the train. But after the wagon was taken off and stood in the goods-yard, it was quite possible that theft might have taken place. But the evidence of theft having taken place when the wagon was in the goods-yard would depend on the evidence of the goods clerk, as his duty would be to look after the goods which would arrive from the consigning stations, and his evidence would show whether the

seal was intact or whether there was any indication that the theft had been committed in the goods-yard. The goods clerk was called as a witness but he was not cross-examined at all. Therefore it may be taken that there is no evidence to show that the theft took place after the wagon was taken off the train.

Then all that is left is that the theft must have taken place either between the Narbada bridge cabin and the Broach station or while the wagon was in the station before it was taken to the goods-yard. It seems to me extremely unlikely that the theft could have been committed after the train reached the station as the risk of discovery would be too great. There is nothing improbable in it having taken place between the cabin and the station. For the train was detained at the cabin to allow the Express train to pass, and either while the train was standing there or while the train was approaching the Narbada bridge there would be ample opportunity for a thief to get on to it considering that it was pitch-dark night, while after crossing the bridge the train would be going very slowly before reaching the station. Therefore all these possibilities are in favour of the theft having taken place before the train got to the station, and the possibilities of the theft having taken place when the wagon was taken off the train were practically excluded by the fact that the goods clerk was not examined on this point. It appears to me, therefore, that the plaintiff has failed entirely to throw the liability of the loss on the Railway Company by proving that it was due to wilful neglect of the Railway Company's servants. Strictly speaking, he would have to show that there was wilful neglect before the Company would have the liability thrown on them to prove that the loss was due to a theft in the running train. I do not think, therefore,

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that the Judge, although he is right in his law, has properly considered the evidence before him with reference to that law. Therefore, I think that the rule must be made absolute and the suit dismissed with costs.

SHAH, J. :—I feel some difficulty in this case, because after all it seems to me to be a question of fact as to whether the loss was due to the wilful neglect of the Railway servants, and whether under the circumstances the reasonable possibility of the loss being due to robbery from the running train is sufficiently excluded. The learned Judge has observed in his judgment with reference to the question of theft from a running train that the fact is not well established. It seems to me that this finding is rather halting. Apart from that consideration, however, it seems from his judgment that he has not appreciated the importance and the bearing of the evidence regarding the theory of robbery from the running train. There is the evidence of the goods clerk at Carnac Bunder which shows distinctly that this theory of robbery from a running train was put forward by the Railway authorities. The mere fact that the telegram is not produced is not sufficient to negative the importance of that evidence. The goods clerk at the Broach station was not examined in detail by the plaintiff though he was available for cross-examination, and no facts were elicited which would show that the theory was not put forward in time or that it was not reasonable under the circumstances. The evidence of the guard also seems to suggest the same theory. Though we are slow to interfere with a finding of fact in revision, in this case, I think the finding of the lower Court that the goods were not lost in consequence of robbery from a running train is opposed entirely to the weight of the evidence, which is in favour of that theory. In

this case the Railway Company has adduced practically all the available evidence and has made a definite suggestion supported by evidence as to robbery from the running train. I do not say that the fact is established; but the theory of wilful neglect on the part of the Railway servants is sufficiently excluded. I agree, therefore, that the decree of the lower Court should be set aside and the plaintiff's suit dismissed with costs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

NARAYAN MORESHWAR WELANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* WAMAN MAHADEO KULKARNI (ORIGINAL DEFENDANT), RESPONDENT^c.

1921.

March 3.

Hindu law—Widow inheriting as a gotraja sapinda to a female—Widow takes absolute estate.

Under Hindu law in the Bombay Presidency a widow inheriting as a *gotraja sapinda* from a female takes an absolute estate which would go on her death to her heirs and not revert to the heirs of the last female owner.

Gandhi Maganlal v. Bai Jadab ⁽¹⁾, relied on.

SECOND Appeal against the decision of N. S. Lokur, Assistant Judge of Satara, confirming the decree passed by V. P. Raverkar, First Class Subordinate Judge at Satara.

The facts material for the purposes of this report are sufficiently stated in the judgment.

K. H. Kelkar, for the appellant.

P. V. Kane, for the respondent.

^c Second Appeal No. 441 of 1920.

⁽¹⁾ (1899) 21 Bom. 192.