Shiv Nath Rai Ram Dhari And Ors. vs The Union Of India (Uoi) on 10 February, 1965

Equivalent citations: AIR1965SC1666, (1965)0PLR231, AIR 1965 SUPREME COURT 1666

Author: J.R. Mudholkar

Bench: A.K. Sarkar, K.N. Wanchoo, J.R. Mudholkar

JUDGMENT

J.R. Mudholkar, J.

1. The common question which arises in this group of appeals from 9 judgments of the High Court of Punjab which were disposed of along with 5 other appeals by a common judgment is whether the Union of India is liable to the consignees of different commodities or goods which were consigned to them by rail from various places in the country on account of their non-delivery. The appellants' consignments were admittedly being carried by a goods train, No. 35 down, assembled at Agra on or about August 28, 1949, and stabled at Asaoti, a railway station about half way between Mathura and Delhi.

2. There is no dispute that the appellants' consignments were to be delivered at Delhi and that they were in fact not delivered. According to the respondent these consignments were looted from the stabled train between the 4th and 11th September, 1947. Further according to it there being congestion in the yard at Agra the wagons in which these goods were being carried, along with other wagons carrying goods, were formed into a separate goods train at Agra which was taken to Asaoti and stabled there at the siding. In the normal course this train would have gone ahead up to Delhi but as there also the yards were heavily congested, not only this goods train but several other goods trains were stabled at different wayside stations between Agra and Delhi. This, it was said, was due to the fact that owing to communal disturbances raging in this part of the country at that time, the section of the railway between Agra and Delhi was being operated under conditions of the utmost difficulty and, therefore, the normal movement of trains was impeded.

3. The Court of first instance decreed all these suits upon the ground that the respondent had not established that the goods had been looted by lawless elements and so it was liable to make good the value of the consignments which were not delivered by the railway administration to the respective appellants. In appeal the High Court of Punjab found, on the other hand, that the defence had been fully established and dismissed the claims.

4. We are here concerned with the Indian Railways Act, 1890 as it stood before its amendments first by Act 56 of 1949 and then by Act 89 of 1961. The measure of the responsibility of the railway administration as a carrier of animals and goods is set out in Section 72. Subsection (1) of that section provides that subject to the other provisions of the Act the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by rail shall be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. Sub-section (2) provides that the railway administration could, by entering into a special contact in a form approved by the Governor General, limit its liability. Sub-section (3) provides that nothing in the common law of England or the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility of a railway-administration as defined in that section. In pursuance of the provisions of Sub-section (2) of Section 72 certain types of risk notes to be executed by a consignor which had been duly approved by the Governor General, were in vogue. One such risk note is in form B. This risk note is to be executed by the consignor who wants his consignment to be carried by the railway administration at a specially reduced rate instead of at the ordinary tariff rate chargeable for such a consignment. The consignments with which we are concerned in these appeals had been despatched under risk notes in this form. It would, therefore, be useful to reproduce the relevant portion of risk note, form "B".

> "I/We, the undersigned, do in consideration of such lower charge, agree and undertake to hold the 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 on the part of the Railway Administration or its servants; provided that in the following cases:--
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> (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 removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or fire:
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> (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 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."

While it is common ground that the railway administration in whose favour risk note B has been executed will be responsible for any loss, destination, deterioration of or damage to the consignment

only upon proof that such loss, destruction, deterioration or damage arose from misconduct of the railway administration or its servants, the parties were not agreed as to the meaning to be given to the word "misconduct". According to the appellants, "misconduct" means "bad management" or "improper conduct" and that this would include not only a positive act on the part of the railway administration or its servants but also an omission by any of them to do what was right or proper. On behalf of the Union of India it is contended that an omission to do anything or to take proper care falls outside the purview of misconduct and that the railway administration is liable for non-delivery only if it is established that the administration or any of its servants had committed a positive act which was wrong or improper. There is a sharp conflict of opinion upon the meaning to be given to the word "misconduct" amongst the various High Courts as was illustrated by the numerous decisions cited at the bar. Three views which have been taken are set out in the judgment of Venkataramana Rao, J., in N. M. Roshan Umar Karim and Co. v. M. and S. M. Rly. Co. Ltd., ILR 59 Mad 789: (AIR 1936 Mad 508), and it will suffice for the purposes of this case to refer to that judgment only. One view is that taken by Guha, J. in M. and S. M. Rly. Co. Ltd. v. Sunderjee Kalidas, ILR 60 Cal 996 at p. 1000. There the learned Judge has said:

> "It may be taken to be well settled now, that 'misconduct' is not necessarily established by proving even culpable negligence. Misconduct is something opposed to accident or negligence. It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be."

A similar view has been taken in some other cases. The second view is that expressed in Bengal Nagpur Railway Co. Ltd. v. Moolji Sicka and Co., ILR 58 Cal 585: and certain other cases. There Suhrawardy, J. has observed at p. 593 (of ILR Cal), as follows:

> "Misconduct is distinguished from accident and is not far from negligence not only gross and culpable negligence and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing or to persist in the act, failure or omission or acts with carelessness. . . . the word 'misconduct' as used in the new risk note B is wide enough to include wrongful commission and omission, intentional or unintentional -- any act which it wrongfully did or which it wrongfully neglected to do, or, to put it in another way, did what it should not have done or did not do what it should have done.....I am not inclined to accept the view that misconduct only refers to acts of gross or culpable negligence and the term does not ordinarily cover acts of mere negligence. In my judgment the word 'misconduct' denotes any unbusinesslike conduct and includes negligence or want of proper care which a bailee is to take under Section 151 of the Indian Contract Act. The immunity which the risk note brings to the railway company is by shifting the burden of proof."

5. It is on these decisions that strong reliance is placed on behalf of the appellants. The third view is represented in the judgments of Faweett, Ag. C. j. in M. and S. M. Rly. v. Jumakhram, AIR 1928 Bom 504, and Kemp, Ag. C. J. in B. B. and C. I. Rly. v. Rajnagar Spinning Co. Ltd. AIR 1930 Bom 129. In the former it was observed:

> "In any case, the expression used in the present risk-note is 'misconduct' which does not ordinarily cover acts of negligence."

In the latter it was observed:

> "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 expected of him by the rules of the company." The view taken in the latter case, therefore, suggests that an omission to abide by a rule of the railway administration would be comprised within the expression 'misconduct'.

6. If the argument advanced on behalf of the appellants is accepted the result would be that even where a risk note in form B has been executed by the consignor for obtaining the benefit of specially reduced rates, the railway administration would still continue to be liable under Section 151 of the Contract Act as a bailee for loss, destruction or damage to the consignment covered by such a note. Sub-section (2) of Section 72, however, specifically provides for the limitation of this very liability. It is, therefore, open to grave doubt whether even after the execution of a risk note such as the one in Form B which was clearly intended to limit the liability of a railway administration under Section 151, of the Indian Contact Act it would still continue to exist and that the only benefit accruing to the administration would be the shifting of the burden of proof on the consignees. On the other hand it is also a matter for consideration whether the breach by the servants of a railway administration of rules or instructions which they were expected to obey would be within the expression "misconduct" because the breach is not of any duty owed either by the administration or by its servants to the consignor. It will, however, not serve any useful purpose for us to resolve the conflict because under the amended provision, i.e., Sections 73 and 74 a railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods unless they were carried at the owner's risk. Further there is no provision in the Act as amended for the execution of a risk note like the one in form B. We would, therefore, proceed in this case on the assumption that despite the execution of the risk note the railway administration was bound to take as much care of the consignments as it would have of its own goods.

7. Even so, we cannot lose sight of the fact that we must ascertain the amount of care which it would have been possible for the railway administration to take in the particular circumstances which obtained in August-September, 1947, in this part of the country. What was happening in this part of the country during this period is a matter of which we can take judicial notice. Apart from that, that has been deposed to by witnesses including Evans who was then the Deputy Controller of Train Movements at Agra. The High Court, upon a consideration of the evidence has summarised the state of affairs at Asaoti between the 4th and 14th of September as follows:

> "The history of the attacks on the train while it was lying stabled at Asaoti is contained in the evidence of the Assistant Station Master, D. W. 5, the Station Master Ganga Saran Gupta, D. W. 10, and in the station diary for the relevant period which

contains entries by both of them. According to this evidence the first attempt to loot the train was made by few persons on the night of the 1th of September, but the Station Master managed to scare them away. Some wagons, the numbers of which are given in the entry in the station diary of the 4th of September which were found to have been tampered with were resealed. Another attack by a small party was made on the night of the 6th of September when a wagon containing oil-tins was broken and some of its contents removed, but again the robbers were driven away, an entry being made by the Assistant Station Master-in the diary of the 7th of September regarding this attack. The same wagon is alleged to have been attacked again on the night of the 8th of September and again a note was made regarding this in the diary on the 9th of September.

The most serious attack began on the night of the 11th of September by a much larger mob and this attack continued with systematic looting of the wagons right up to the 14th of September except for a few occasions during those days in which the assistance of military escorts was obtained for a short time from passing trains and the looters were driven off for a short period. It seems, however, that they invariably returned as soon as the soldiers had gone away in the trains which they were escorting. In the meantime the Assistant Station Master, Mohan Lai Mathur, quite frankly ran away on the 12th of September, as he was apparently afraid for his life. Actually it seems that he took advantage of a passing train and went away in it." What the High Court has said is based upon evidence and cannot be permitted to be questioned in these appeals.

8. It has also been found by the High Court, relying upon the evidence of Evans that there was congestion in the yard at Agra because the conditions then prevailing made normal running of trains impossible. It is also clear from his evidence that there was congestion in the yards at Delhi. It is true that Evans had no personal knowledge of the position in Delhi in the sense that he did not visit Delhi during the relevant period. But it was his duty as Deputy Controller of Movements to be always in touch with that station, amongst others, so as to facilitate his work. Information is conveyed between two stations by telephone or by telegrams and it is the peculiar duty of the Controller of Movements to seek information regarding the position in the yards of various stations to which he has to move the trains. Whether the information received by him was correct or not is irrelevant; it is enough that on that information he so directed the movement of the trains that a congestion in fact occurred at Agra and of this he had personal knowledge. He has also said that the position at Mathura was similar, besides the fact that according to his information communal disturbances were raging there. The Administration, therefore, had to find some places at which it could stable wagons which could not be kept at Agra and for which there was no special priority, as for instance, wagons not containing perishable goods or dangerous or inflammable goods or goods such as food which were urgently required for the benefit of the community at large. It is an admitted fact that no special watch and ward arrangements, in the sense of providing a separate staff for the purpose of guarding stationary trains, obtained at wayside stations. If, there-fore, the administration stabled a train containing goods of the kind which the wagons forming N. 35 down contained at Asaoti, it cannot be said to have acted in a reckless or even negligent manner. Even if

the goods had belonged to the administration itself, it would, in the circum-stances, have been forced to stable the train at Asaoti or other similar wayside station even though there might have been no watch and ward there. It would appear that where no special watch and ward establishment exists it is the duty of the normal station staff to depute some of their men for guarding a stabled train. If the administration or the station staff thought that this was sufficient to protect the wagons which, it may be mentioned, were properly rivetted, locked and sealed, it cannot be said to have acted even in a negligent manner, much less in a reckless manner. There is nothing to indicate that there were riots at Asaoti and indeed it is the appellants' case that there were no disturbances at Asaoti itself. If this is so, then the authorities at Jhansi under whom the Deputy Controller at Agra was working and the Deputy Controller himself who allowed the train to proceed to Asaoti for being stabled there could not be charged with negligence.

9. It was, however, said that under a certain rule a special watch and ward staff had to be provided to guard trains which had been stabled at wayside stations. As a sample one of the learned counsel for the appellants has furnished us with extracts from the North Western Railway Commercial Manual. These appear to be instructions and are as follows:

> "885. Watch and Ward.--The watch and ward staff in the goods sheds must be adequate and reliable.
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> 886. Accessibility into goods shed.--If possible, the goods shed during the night must not be accessible to any one but to inspecting staff and watch and ward staff.
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> 888. Loaded wagons and yards at night time--Such wagons standing for the night in a yard must not be left standing in isolated sidings. The patrol staff must be adequate and alert and see that the wagons are properly secured and seals are correct each time the patrol staff passes the wagon. Any unauthorized person found moving in the yard must be challenged and if unable to give a satisfactory account of himself he should be arrested and made over to the police.
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> 900. Watch and ward at stations at which watchmen are not provided.--Watchmen are only posted at such roadside stations as may be considered necessary. At all other roadside stations the duties of watch and ward must be performed by the menial staff, and Station Masters must arrange the duties."

10. The first three of these instructions are obviously not applicable to wayside stations.But the last one may apply to them. Normally, therefore, according to the last instruction, if applicable, watch and ward duties at Asaoti had to be performed only by the menial staff. We have it, however, in the evidence of the Station Master, Asaoti, that after an attempt was made to break into one of the wagons on September 1, 1947 he had telegraphically made a request to the appropriate authorities for sending a complement of watch and ward men to Asaoti, But according to him he received no reply. He has further said that after the repetition of an attempt on the next day as well as after some wagons had been broken open he made frantic efforts for the deputation of watch and ward staff to Asaoti but without success. According to him under a certain rule the authorities were required to

depute special watch and ward staff to those wayside stations at which there was no special arrangement for watch and ward to guard trains stabled there. Apart from the fact that no rule or even instruction was cited at the bar the statement of the Station Master that he had appealed for deputation of watch and ward staff is not mentioned in the diary maintained by him and by the Assistant Station Master. Assuming that he did make efforts, as deposed to by him, for deputation of watch and ward staff, it seems to us that it could not, reasonably have been possible for the authorities either at Agra or at Jhansi, even if they got his telegram, in view of the disturbed conditions and the resulting confusion which obtained at that time to spare any man for being sent to wayside stations. It was far more important for them to utilise all the available manpower for performing watch and ward duties at important stations where the yards were full of a large number of wagons containing commercial and other valuable consignments. In times of unusual stress and pressure a person whose property lying at a large number of places is exposed to looting or pilfering at the hands of lawless elements, professional wagon breakers and the like, that person would naturally concentrate more on guarding those places at which the danger is greater or the total value of the goods is greater than those where it is less. It is in this broad aspect that we must consider the duty of care which rested on the railway administration at the relevant time. Looking at it that way it would not be reasonable to conclude that the railway administration or its staff were guilty of negligence. It could perhaps be said that the administration and the staff at Asaoti with the knowledge of what took place at Asaoti on the 4th September did nothing. But even so, it would not be right to say that they were guilty of negligence. Indeed, there was nothing which the administration itself could do and so far as the staff at Asaoti was concerned, bearing in mind the fact that a large number of persons had taken part in breaking open the wagons and looting goods contained in them, the meagre staff at Asaoti could possibly have not stopped them from proceeding with their nefarious activities. Indeed, it is in evidence that some members of the staff eventually ran away for fear of their lives. This would show the state of things which then prevailed at Asaoti. The fear entertained by them could not be said to be baseless and though those who ran away from the place acted in breach of their duty to the railway administration, their action cannot be characterised as negligent. What is negligence must necessarily be judged in the light of the circumstances obtaining at that time, Indeed, the duty of care which Section 151 of the Contract Act casts upon a bailee is not an unlimited one and has to be ascertained with reference to the circumstances obtaining at the time when the loss, deterioration or damage to the goods bailed occurred. We agree with the High Court, therefore, that in the context of the conditions obtaining in this area at the relevant time, the railway administration is not liable for the loss of the consignments from wagons shown to have been broken open.

11. It was urged by learned counsel appearing for the different appellants that the diary maintained by the station staff at Asaoti is unreliable and that if that diary is rejected there is no evidence to show that the wagons had been looted. We will keep the diary out of our consideration. There is, however, in the first place the evidence of the Station Master and the Assistant Station Master to the effect that the wagons had been broken open. This evidence was, no doubt, rejected by the trial Court but was accepted by the High Court and in our opinion the High Court was justified in accepting this evidence particularly because there is corroboration to their evidence.

12. Then there is the evidence of D. W. 1 Pannalal Head Trains Clerk, Agra. He has stated that the wagons which were later found to have been broken open at Asaoti were received on different dates at Agra and that every one of those wagons was then duly rivetted and sealed. He has also deposed that when these wagons were despatched on August 28 by N. 35 Down they were "intact and in the same condition in which they were, when they were received." There is nothing vague in his evidence, which sets out the numbers of each of those wagons. In addition to this there is the evidence of B. P. Pande, D. W. 6, Asstt. District Commercial Inspector, G. I. P. Railway who was posted at Agra at the relevant time. He says that he had made a list of the property looted and also of the property not looted from the wagons which had been broken into. He inspected these wagons between September 27 and 29th and he has stated that some of those wagons had been completely looted while some were looted partly and many others were intact. He had brought with him a list made by him but the trial Court refused to permit its production in evidence on the ground that it had not been relied on earlier. In our opinion the trial Court went wholly wrong in refusing to admit this document. In any case there is the evidence of this person and we see no reason for not accepting it. We are satisfied that the High Court was perfectly right in holding that the consignments were lost as a result of looting.

13. In so far as C. A. No. 505 of 1962 (Jeet Singh v. Union of India) is concerned, Mr. Agarwala has brought to our notice that neither in the evidence of the Station Master nor in that of any other witness has it been established that the wagon in which the consignment of the appellant therein was being carried has been shown to have been broken open. That is indeed so. But Mr. Patwardhan. appearing for the respondent says that since the incident itself that is of the looting of the wagons, had been established and since the evidence clearly shows that the wagons had been broken open the mere non-mention of the number of the particular wagon in which the appellant's consignment was being carried has not been specifically deposed to by any one would make little difference. He also points out that (here is evidence to show that amongst the articles looted were consignments of turmeric and the consignment of the appellant was of turmeric and, therefore, this is an additional reason for holding that the loss of the appellant's consignment was because it had been looted. In our opinion, there is no substance in his argument. It cannot be assumed that because the other consignments were lost as a result of looting even this one which was not delivered could be said to have been lost through the same circumstance, that is, by reason of its being looted. Again, there is nothing to show that the other wagons did not contain turmeric.

14. We, therefore, uphold the decrees of the High Court in all these appeals except the above mentioned appeal. We, therefore, dismiss them with costs. There will be only one hearing fee. In so far as that appeal is concerned we allow it, restore the decree of the trial Court and direct that costs therein shall be paid by the respondent.

K.N. Wanchoo, J.

15. I regret I am unable to agree.

16. These nine appeals on certificates granted by the Punjab High Court raise common questions and will be dealt with together. The main question that arises in these appeals is the liability of the

railway administration to the consignees of various consignments on account of non-delivery of the goods consigned to them from various places in India. The appellant's consignments were admittedly being carried by a goods train No. N-35 Dn. assembled at Agra n or about August 28, 1947 and stabled at Asaoti railway station about half way between Mathura and Delhi. There is no dispute that these consignments were to be delivered in Delhi and that they were not in fact delivered. According to the respondent Union of India these consignments were looted from the stabled train between September 4/11, 1947. The respondent's case was that there was congestion in the goods yard at Agra. Consequently, the wagons in which these consignments were consigned along with other wagons carrying other goods were formed into a separate goods train at Agra. This goods train was taken to Asaoti and stabled there at the siding. Normally this train should have proceeded to Delhi but as there was congestion in the goods yard at Delhi also, this train along with several other goods trains was stabled at different wayside stations between Agra and Delhi. The further case of the respondent was that owing to communal disturbances raging in this part of the country at that time, the section of the railway between Agra and Delhi was being operated under conditions of utmost difficulty and in consequence the normal movement of trains was impeded.

17. All the suits had been brought at the instance of the appellants, and the first Court decreed them on the ground that it had not been established that the goods train had been looted by lawless elements and so the railway administration and the Union of India were liable to make good the loss suffered by the appellants. In appeal, the High Court found that the defence had been fully established and dismissed the suits.

18. in the present appeals we are concerned with the Indian Railways Act, IX of 1890. (hereinafter referred to as the Act) as it stood before its amendment by Central Act No. 56 of 1949 and Central Act No. 39 of 1961. The extent of responsibility of railway administrations as carriers of animals and goods is set out in Section 72 of the Act. That section at the relevant time was as follows:-

> "(1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 151. 152 and 161 of the Indian Contract Act, 1872.
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> (2) An agreement purporting to limit that responsibility shall, in so far as purports to effect such limitation, be void, unless it---
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> (a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and
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> (b) is otherwise in a form approved by the Central Government.
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> (3) Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

Thus it will be seen that the responsibility of the railway administration was the same as that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, No. IX of 1872; but that responsibility could be limited under Sub-section (2) by an agreement complying with the conditions of that Sub-section.

19. In pursuance of the provisions of Sub-section (2), various kinds of risk notes to be executed by a consignor were in use in the railways after approval by the Governor-General. One such risk-note is in form B. This risk-note is to be executed by the consignor who wants his consignment to be carried by the administration at specially reduced rates instead of at the ordinary tariff rate chargeable for such consignment. All the consignments in these appeals had been des-patched under risk-notes in this form. It is, therefore, necessary to set out the relevant portion of risk-note B which reads as follows:--

> "Whereas the consignment of.....
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> tendered by me/us.....for despatch.....is charged at a specially reduced rates 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 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 on the part of the Railway Administration or its servants:
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> Provided that in the following cases-
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> (a) Non-delivery of the whole of the consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instruction laid down in the Tariff or where there are no such instructions, protected otherwise than by paper or other packing, readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or fire:
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> (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 misconducts 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."

20. Two questions arise in the present appeals. The first is what is the meaning of the word "misconduct', and the second is, whether on the evidence produced in this case it can be said that there was misconduct within the meaning of that word. According to the appellants, "misconduct" means "bad management or "improper conduct", and that this would include not only a positive act

on the part of the railway or its servants but also an omission by any of them to do what was right or proper. On the other hand, the Union of India contends that an omission to do anything or to take proper care falls outside the purview of misconduct and that the railway administration is liable for non-delivery only if it is established that the administration or any of its servants had committed a positive act which was wrong or improper.

21. There has been sharp conflict of opinion as to the meaning to be given to the word "misconduct" among the various High Courts in India as is clear from numerous decisions on the point. Three views have generally prevailed as to what "misconduct" means for the purposes of risk-note form B. The first view was taken by Guha, J. in ILR 60 Cal 996:) in these words at p. 1,000 (of ILR Cal): --

> "It may be taken to be well settled now, that misconduct is not necessarily established by proving even culpable negligence....Misconduct is something opposed to accident or negligence. . . .It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be."

The second view was expressed by Suharawardy, J. in in these words:-

> "Misconduct is distinguished from accident and is not far from negligence not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct oil his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing or to persist in the act, failure or omission or acts with carelessness the word "misconduct" as used in the new risk-note B is wide enough to include wrongful commission and omission, intentional or unintentional, of any act which it wrongfully did or which it wrongfully neglected to do, or, to put it in another way, did what it should not have done or did not do what it should have done..... I am inclined to accept the view that misconduct only refers to acts of gross or culpable negligence and the term does not ordinarily cover acts of mere negligence. In my judgment the word 'misconduct' denotes any unbusinesslike conduct and includes negligence or want of proper care which a bailee is to take under Section 151 of the Indian Contract Act. The immunity which the risk-note brings to the railway company is by shifting the burden of proof."

22.The third View was taken by Fawcett, Actg. C. J., in AIR 1928 Bom 504, and elaborated by Kemp, Actg, C. J., in AIR 1930 Bom 129, in these words:--

> "In any case, the expression used in the present risk-note is 'misconduct' which does not ordinarily cover acts of negligence: M. and S. M. Railway's case, AIR 1928 Bom 504 "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 expected of him by the rules of the company: B. B. and C. I. Railway's case, AIR 1930 Bom 129."

In this view misconduct would depend upon whether there were rules made by the railway administration to cover a particular situation and presumably the learned Judge meant that even omission to follow the rule may amount to misconduct.

23. These three views were considered in an elaborate judgment by Venkataramana Rao, J. in ILR 59 Mad 789: (AIR 1936 Mad 508), and he accepted the view of Suharawardy, j. and pointed out how the Indian railway risk-note forms were different from the English risk-note forms, where words used were "wilful misconduct" while in the Indian forms the word was only "misconduct". He held that there must be some difference between 'wilful misconduct' and "misconduct" and on that basis he accepted the view of Suharawardy, J.

24. Section 72 (1) makes the responsibility of the railway the same as that of a bailee under Sections 151, 152 and 161 of the Contract Act; but this is subject to the exception provided in Sub-section (2) where the responsibility can be limited after there is a written agreement between the consignor and the railway administration and that agreement is in a form approved by the Central Government. Sub-section (2) clearly envisages that the responsibility cast on the railway administration by Sub-section (1) may be reduced if an agreement in the manner provided in Sub-section (2) is made between the railway administration and the consignor. In the present case the agreement between the railway administration and the consignor was in risk-note form B which had been approved by the Central Government and under which the consignor obtained the benefit of specially reduced rates. Therefore, it may be accepted that the intention behind risk-note form B was to limit the liability of the railway administration and it would certainly be less than what it would have been under Section 72 (1). Under Section 151 of the Contract Act, a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. As, however, risk-note form B providing for specially reduced rates was meant to limit the responsibility of the railway administration, as provided in the risk-note itself, it may not be open to apply the criterion contained in Section 151 without regard to the provisions in the risk-note with respect to the responsibility of the railway administration. It is, therefore, necessary to see exactly how the responsibility was limited by the words used in the risk-note form B and it is in that connection that I have set out the three views prevalent in this behalf.

25. Now there is no doubt that the railway administration is responsible under risk-note B only on proof of misconduct. Misconduct must here mean more than mere negligence. It will in my opinion be a question of fact in each case where mere negligence ends and misconduct begins. I cannot, however, accept the view of Guha, J. that there must be a positive act which the doer knows to be wrong or which he does recklessly not caring what the result may be, as the criterion for judging whether there is misconduct. In this view negligence, however, serious, and even disregard of rules howsoever gross, would never amount to misconduct on the part of the railway administration or its servants. That in my opinion would be taking too narrow a view of the meaning of the word "misconduct" as used in risk-note form B. It is remarkable that the word is "misconduct" and not "wilful misconduct" and that also has a bearing on the meaning to be attached to it Misconduct must be something less serious than wilful misconduct and this must be borne in mind in construing the word "misconduct" as used in risk-note B. Nor is it possible for me to accept the view taken by the

Bombay High Court in B. B. and C. I. Railway's case, AIR 1930 Bom 129, that those omissions were misconduct which were inconsistent with the rules of the company but all other omissions were not. That in my opinion would be putting too great a premium on the rules framed by the railway administration which can avoid the responsibility by not framing rules at all. It seems to me, therefore, that when the word "misconduct" was used in form B it not only included positive acts of the type envisaged by Guha, J. but also omission or negligence where such omission or negligence can in the particular circumstances of a case be said to amount to misconduct. 1 would not go so far as Suharawardy, J. seems to have gone for he appears to have taken the view that the responsibility will be exactly the same under risk-note form B as under Section 151 of the Contract Act, for in that view the limitation provided by Sub-section (2) would become meaningless. Therefore, even if a case of negligence or omission is covered by Section 151 it may not throw any responsibility on the railway administration for loss, etc., unless the Court can say in the circumstances of a particular case that such negligence or omission also amounts to misconduct.

26. In Webster's New International Dictionary the word "misconduct" means to "manage badly" or "mismanage". In the Shorter Oxford English Dictionary, "misconduct" means "bad management" or "mismanagement". Therefore, omission or negligence which may come within the meaning of Section 151 of the Contract Act may not be misconduct unless the Court is further able to say that negligence or omission is such as can be called bad management or mismanagement in a business sense. Thus where negligence consists of omission to follow a rule, misconduct may be easy to infer. Again where negligence is of such a persistent kind as a prudent man of business will not permit there may again be an inference of misconduct. Therefore, mere omission to take as much care as the person would of his goods may not amount to misconduct for the purpose of risk-note form B. But if the omission is such that a businessman would call it mismanagement or bad management it would amount to misconduct within the meaning of risk-note form B. I am therefore, disposed to accept the view taken by Suharawardy,]. subject to this rider, namely, that mere negligence or omission would not be enough but that negligence or omission should be such that a businessman would say that it amounted to bad management or mismanage ment.

27. The next question is whether there was misconduct on the part of the railway administration or its servants which resulted in the loss of the consignments. In this connection reference may again be made to risk-note form B which throws the responsibility of proving misconduct on the consignor subject to this that the railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time in which it was in its possession or control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct. The risk-note also provides that 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.

28. In view of this provision in the risk-note, the railway administration led evidence as to how the consignments were dealt with till the loss .occurred. There is no dispute that upto the time the consignments were received in Agra, they were intact. Further the evidence of Evans, Deputy Controller, Agra Cantonment, shows that there was congestion in the goods yard at Agra, and Mathura Consequently, certain trains were made up and stabled in various sidings on wayside

stations between Mathura and Delhi. Some goods trains were stabled in the sidings at Kitham, Palwal, Farah, Chhata and Ballabhgarh. The particular goods train with which we are concerned was stabled at Asaoti. Evans also stated that the stabled train could not be moved forward or backward due to communal disturbances and New Delhi was also not in a position to accept the trains freely. Further, though Evans stated that the situation towards the end of August and beginning of September was bad on account of communal disturbances, he admitted that no looting had taken place upto the time when this train was stabled at Asaoti and everything was normal there. It may, therefore, be accepted that the reason for stabling this train at Asaoti was the congestion in the yards at Agra, Mathura and New Delhi. Evans also stated that there was no watch and ward staff at Asaoti and he could not say if any watch and ward staff was assigned at Asaoti when the train was ordered to be stabled there. He further stated that normal staff at Asaoti in those days was about 12. He admitted that it anything unusual happened at a particular station, the station staff informed him about the same and he in his turn contacted the movement officer and conveyed the same to him for orders. He also admitted that if he got any unusual information from any station, he made a note of it in his diary. He also said that nothing unusual was reported to him from Asaoti till September 13, 1947 and he had no information before that date that the train stabled at Asaoti had been looted. There is telephone connection between Asaoti and Agra and the station staff at Asaoti could contact him by telephone. He further admitted that no member of the station staff at Asaoti was injured and no personal loss of any of the private property of the station staff was reported. Finally he admitted that Kosikalan, Palwal and Ballabhgarh were quite normal in those days and that watch and ward staff is deputed when the Station Master gives information that such staff is required at a particular station where it does not exist.

29. Before I consider the evidence of the staff at Asaoti as to what happened there between August 28 and September 13, 1947, I must refer to what amounts to judicial notice having been taken by the High Court of the prevailing emergency that arose in August and September 1947. In consequence the High Court seems to have assumed that during that emergency there were attacks by mobs bent on looting railway trains stabled at wayside stations. Now it may be accepted that in August and the entry in the diary and the oral evidence of the two witnesses from Asaoti that the military-authorities were advised and arrived and took action in the manner suggested. It seems extraordinary that robbers should have carried on even when there was firing by military.

30. There were two main witnesses from Asaoti in this connection, Mohanlal who was then Assistant Station Master at Asaoti and Gangasaran Gupta who was then Station Master there. Besides that the Union of India relied on the station diary of Asaoti Ex. DW-5/1. I may in this connection mention that the High Court seems to have mistakenly thought that this diary was produced by Evans. That is. how□ever, not correct and Evans had nothing to do with this diary. I agree with the High Court that the evidence of Evans is reliable but it only gives the reason for stabling the goods train at Asaoti and that may be taken to be a good reason. But Evans also admitted that some provision for watch and ward had to be made for a stabled train according to railway rules.

31. Now it was admitted by the two wit□nesses that no arrangement for watch and ward was made for this train because no such arrange□ments were available at the station, meaning thereby that

there was no watch and ward staff specifically assigned to Asaoti. The course of events is said to be recorded in the diary Ex. DW5/1. The two witnesses from Asaoti had given evidence practically on the basis of that. I shall, therefore, refer to the entries in the diary to get an idea of how the railway staff acted between the 4th and 15th September when the looting is alleged to have taken place.

32. On 4th September, one Tarachand of the station staff noticed that some thieves were opening doors of wagons of the stabled train,and shouted from there. The Station Master sent another member of the station staff and some passengers of a passenger train which was at the station and they saw ten men running away. Some doors of wagons were found open and were resealed. On this date there is no note of any looting and it is remarkable that it is said that thieves had come to steal from the stabled train and had run away on being dis□covered. This cannot certainly be said to be looting by mobs bent on looting the stabled train.

33. On 7th September, it was noted that a mob of villagers attacked the stabled load and broke seals of one wagon and "robbed" away oil tins from it. The station staff shouted and chased them in the field and found broken tins which were brought back and put into the wagons. The mob had come from Dig and Pahladpur and run off towards that side. The entry also shows that a wire was sent to all concerned. Here again it does not appear that there was looting by a mob bent upon com□mitting dacoity for the persons in the mob ran away on the shouts of the station staff. The number of persons who composed the mob is not mentioned in the diary and it seems to me that the descriptions in the diary were becoming more and more lurid as time went on.

34. On 9th September, I find an entry in which it is said that last night thieves again tackled the stabled train and robbed contents of oil tins from the same wagon which had been broken open on September 7. Here again there is no mention of any mob bent upon looting and all that is said is that thieves tackled the same wagon which had been broken open two days earlier.

35. Then one September .10, there is an entry to the effect that robbers attacked the stabled train at 11 p.m. and took away goods, namely, oil tins, matches, copra, timber, iron safe, etc., and that the military was advised. They arrived and opened fire and robbers then ran away. After sometime they again came and started looting. This entry certainly shows a conceited attack by robbers who were so bold as not to be worried by the firing by the military. It may be mentioned that besides this entry and the statement of the two witnesses from Asaoti there is no other evidence to show that any wire was sent to the military authorities or the military authorities came and opened fire.

36. Then there is an entry on September 11 to the effect that robbers started looting the stabled train at 6-30 p.m. Military authorities were advised and a detachment of military per□sonnel arrived by motor truck at 8-45 p.m. and started firing and caught three men, one of whom was wounded. This man was taken away by car next morning at 7-30 a.m. The diary also records that 37 wagons were attacked by the robber. Again there is no evidence besides the entry In the diary and the oral evidence of the two witnesses from Asaoti that the military authorities were advised and arrived and took action in the manner suggested. It seems extraordinary that robbers should have carried on even when there was firing by military.

37. On 12th September, there is an entry to the effect that the military escort arrived by passenger train at 8-35 p.m. and fired two/three times on the robbers who were looting goods from the stabled train. They killed one and captured four with the looted property. One wounded man was caught and one bullock was also captured. The dead body and the injured man were removed by train and the four men and one bullock were taken by railroad at about 7-50 next morning. The diary further records that as soon as the military escort left, a mob of 500 men came and started looting the stabled train and removed all kinds of commodities (such as copra, matches, groundnut oil, iron safe, timber, rafter, turmeric, groundnut, seed, tinsheets, glasses etc.). Messages were then sent and military escort arrived again at 3-15 p.m. and left at 5-30 p.m. They fired many rounds but nobody was found killed or wounded. Here again there is no evidence that anybody was killed or there was any firing by the military except what is to be found in the diary and the statements of the two witnesses from Asaoti. As I said before, as time went on the descriptions in the diary became more lurid and what was theft was later shown as determined looting by a mob numbering 500.

38. This was apparently the last looting for on 15th September there is an entry to the effect that additional police armed guard arrived to protect the station. The military authorities searched Asaoti village and recovered many things out of the looted property. Here again there is no other evidence besides the entries in the diary in this connection.

39. The trial Court was not impressed by the truth of the statements contained in the diary. It is difficult to agree with the view of the High Court about the diary based on the misconception that it was produced by Evans. Evans had nothing to do with this diary though he undoubtedly was a witness of truth. It seems to me, however, that this diary is unreliable and the trial Court was right in not relying upon it, particularly with reference to what is recorded in it as having happened on 9th, 10th and 11th September. There is no evidence besides the entries in the diary or oral evidence of the two witnesses from Asaoti that any one was killed or there was firing by the military a number of times. I am, therefore, not prepared to place any reliance on the facts entered in this diary.

40. I turn now to the evidence of the two witnesses from Asaoti. Station Master, Gangasaran admitted that on September 4 there were only ten persons and these persons ran away as soon as he reached the spot. On 6th and 7th September, only four/five persons came and they also fled away when the Station Master arrived. On 8th and 9th September again five/ ten persons came and they also fled away when the Station Master arrived on the spot. This clearly shows that there was no attack by any mob bent upon looting upto 9th September. The Station Master further stated that he sent telegrams on August 29, 1947 to Inspector, Watch and Ward at Jhansi to arrange for watch and ward and repeated the request on the next day but nothing was done. He, however, admitted that he did not remember if troops came to Asaoti on 8th and 9th September. The real looting, according to him, took place between 11th and 14th September. But even on the night between 11th/12th September, when the mob was said to be only 50, they ran away when the Station Master arrived at the spot. The Station Master further slated that he sent telegrams to police Palwal, Divisional Traffic Manager, Jhansi, and that he sent such telegrams on each occasion when the stabled train was attacked. He further admitted that no polite arrived on any day from 11th to 14th September 1947. He stated that the troops arrived at the fourth looting, i.e., on the night between Llth/12th September but he did not remember if they arrived in the night or the next morning. He admitted

that the railway has made rules that watchmen should be arranged for a stabled train; but apparently no arrangement for watch and ward was made by the Station Master. According to the comparable rule in the Northern Railway Commercial Manual, which we are told is exactly the same in the Central Railway also, the position with respect to stabled trains is that at such roadside stations where watchmen are not posted, the duty of watch and ward must be performed by the menial staff and Station Master must arrange for it. But it does not appear from the evidence if the Station Master bad arranged for the duty of watch and ward by his menial staff while the stabled train was at Asaoti. He certainly says that he sent telegrams to the authorities for sending a complement of watch and ward staff to Asaoti. He also says that he gave information to the authorities whenever looting took place. But it is curious that the evidence of Evans is--and I have no reason to doubt that--that he had no information till the 13th September that anything untoward had happened at Asaoti. It seems, therefore, difficult to accept that the Station Master had really sent messages for help as he makes out in his oral statement, as well as in the entries in the diary. In any case taking either view of the situation it seems to me that there was gross negligence on the part of the railway administration or its servants in this case. In the first place it was the duty of the Station Master when the goods train was stabled at Asaoti to provide for watch and ward as best as he could from the menial staff, and this was not done. In the alternative, if the Station "Master could not do this out of his staff and sent messages for help and they were not heeded, the railway administration would be responsible for gross negligence in not heeding the messages. It is not as if the so-called serious looting had started at once; from 4th to 9th on the evidence of the Station Master and the tatties in the diary for whatever they are worth, there was only attempt at minor pilferage again and again. This was within the knowledge of the Station Master and he seems to have done nothing to provide watch and ward staff from his station staff as required by rules. Further if he sent information to the higher authorities they seem to have done nothing to help him. In either case there was negligence of the station staff as well as of the higher authorities if they had information--though the evidence is that they had no information till the 13th September. Besides, I am satisfied on the evidence of the two witnesses from Asaoti that there was no large scale looting by a large mob in spite of whatever might have been written in the diary on 11th and 12th September, and I have a grave suspicion that the station staff was perhaps involved in the pilferage that took place or connived at it and that is why no information seems to have been sent to the higher authorities till September 13, for this is what Evans says. It is difficult to believe that if the higher authorities had been repeatedly approached before 11th September they would have ignored the so-called frantic efforts of the Station Master to get help, in spite of the unusual situation that might have been prevailing due to congestion in the yards at Agra, Mathura and New Delhi.

41. As for the Assistant Station Master he certainly says that he ran away on 12th September but admitted that the higher authorities had not given any such advice. He also admitted that there was no communal tension in Asaoti at the end of August. The Station Master on the other hand prevaricated and said that he did not remember if the authorities had advised him that the staff should save their lives, though he practically admitted that he did make such a statement in another case relating to the looting at Asaoti. There is nothing to show that the higher authorities ever gave such advice and the Assistant Station Master admitted it.

42. Therefore, as I read the diary and the evidence of the Station Master and the Assistant Station Master I cannot accept that the case of the Union of India has been made out that there was widespread lawlessness in that part of the country and that mobs were going about bent upon looting goods trains, and that it was in those extraordinary circumstances which were beyond the control of the railway administration that the goods from this stabled train were looted. On the other hand it appears to me on a review of the entire evidence led on behalf of the Union of India that no arrangements were made for watch and ward of this stabled train by the Station Master at Asaoti as he should have done as required by rules. Further if the diary is to be believed there were a number of attempts at thieving from 4th to 9th September, 1947 from this stabled train. Even in spite of this nothing was done by the Station Master for the watch and ward of the train as best as he could. There was, therefore, persistent negligence in the matter of watch and ward of this stabled train. Further if the statement of the Station Master is true that he gent appeals to the higher authorities for help and they were not heeded in spite of information as to what had happened between 4th and 9th September it must be held that there was persistent negligence of the higher authorities also. In this case, therefore, on the evidence of the railway administration there is disregard of the rule as to watch and ward and if the diary is to be believed there was persistent negligence in providing for proper watch and ward both by the Station Master and by the higher authorities in case the Station Master's statement is true that they had been informed of the incidents which took place between 4th and 9th of September. Such disregard of rules would, therefore, amount to misconduct in the circumstances within the meaning of that word in risk-note form B. Besides such persistent negligence after the events of 4th to 9th September must amount to mismanagement even from the point of view of a businessman of ordinary prudence. I am not prepared to believe that there was a kind of dacoity committed on this stabled train between 11th and 12th of September by lawless elements who were bent upon looting the goods train. It seems to me that at the very best the station staff looked on supinely while the goods from the trains were stolen or it may be that they were themselves privy to the theft. It is true that theft was on a somewhat large scale and that may be responsible for the defence that there was looting and what amounts to a dacoity committed on the train. But on the evidence I am not satisfied that that was really so. All that seems to have happened was that the goods were stolen from the wagons day after day because there was no arrangement for watch and ward in spite of the warnings that the station staff and the higher authorities--in case they were informed had to take from what is recorded in the diary from 4th to 9th September even if it is true. On a careful consideration of the entire evidence for the railway administration I am satisfied that this is not a case where the train was looted by a large lawless mob bent upon looting goods train on account of the communal situation preceding the division of India in 1947. I cannot take judicial notice of there being such large mobs going about the country side bent on looting goods trains. All that a Court can take judicial notice of is that there were communal disturbances in those days which is a very different thing from general lawlessness resulting in looting of goods trains indiscriminately in that part of the country. The very fact that Evans had no information of any looting till 13th September seems to suggest that all this happened because of the station staff either looking on supinely or perhaps actually being involved in the thefts. That may also explain why at least the Assistant Station Master ran away on 12th to give colour to the story of lawlessness and looting. But the attempt to show that this was done at the instance of the higher authorities has failed; and there is no reason to suppose that the theft of goods which took place from this train could not be avoided if the rule as to watch and ward had been

followed and if there was no persistent negligence assuming that the incidents between 4th and 9th September as recorded in the station diary were correct. I, therefore, hold on the evidence produced by the railway administration that the loss took place on account of the negligence of the railway administration or its servants and thus the Union of India -

would be liable to make good the loss even on risk-note form B in the circumstances of these cases.

43. I would, therefore, allow all the appeals and set aside the judgments and decrees of the High Court and restore those of the Subordinate Judge with costs throughout.

ORDER

44. In accordance with the opinion of the majority, Civil Appeals Nos. 497 to 504 of 1962 are dismissed with costs. There will be only one hearing fee, Civil Appeal No. 305 of 1962 is allowed with costs.