Bombay High Court
The Madras And Southern Maratha ... vs Jumakhram Parbhudas on 18 June, 1928
Equivalent citations: (1928) 30 BOMLR 1104, 118 Ind Cas 241
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Bench: C Fawcett, Kt., Mirza
JUDGMENT Charles Fawcett, Kt., A.C.J.

1. The plaintiff brought this suit against the Madras and Southern Maratha Railway Co. to recover a sum of Rs. 180-6-0 as damages in respect of five tins of ghee which were consigned to the defendant company at Sangli for conveyance to the plaintiff and which were wholly lost during transit. The goods were sent under a risk note inform (H), which has been amended so that in certain cases it is provided that 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." An issue was raised accordingly whether the plaintiff proves loss arising from misconduct of Railway servants. The First Class Subordinate Judge found that such misconduct was not proved by the plaintiff, but that it could be "fairly inferred" from the evidence given in accordance with the proviso in the risk-note, and he decreed the plaintiff's claim. This decree is challenged by a revision application under Section 25 of the Small Causes Courts Act 1887, which enables us to call for the record of the case and satisfy ourselves, whether the decision is one according to law.

2. The first question that arises is as to the limits of our jurisdiction to interfere in a case like the present. It has been laid down that this Court will ordinarily interfere only to remedy substantial injustice, i. e., when a clear error of law is (shown, or there is obvious perversity in the decision of a question of fact : cf. Poona City Municipality v. Ramji (1895) I.L.R. Bom. 250 and Mohunlal v. Jivan-lal . Primarily, whether there was such misconduct would be a question of fact, On the other hand, when there is no direct evidence of such misconduct, e. g., of some one who saw a railway servant taking the ties, so that the conclusion rests purely upon an inference to be drawn from the circumstances under which the goods were consigned, carried and found to have disappeared, then the question of the proper inference to be drawn can be said to be a question of law : cf. Laohmeawar Singh v. Manowar Hossein (1891) I.L.R. 19 Cal. 253, p.c. and Ramgopal v. Shamshhaton (1892) 25 Bom. L.R. 93 p.c. Bat there are obvious objections to this Court being called upon under Section 25 to go into decisions of Small Cause Courts as to what is a fair inference in a particular case under this proviso, as if a right of appeal lay to this Court, We should not, I think, interefere, unless it is shown that the inference is not one that can legitimately (or it is perhaps batter to use the exact word of the proviso, viz., "fairly") be drawn from the facts, as was for instance the case in G.I.P. Railway v. Himatlal . That case no doubt related to a different form of risk-note from the one under consideration here; but it serves to give a useful illustration of justifiable interference under Section 25, in regard to an inference of misconduct of railway servants that did not fairly arise from the facts found.

3. Then again, if the evidence proves facts strongly preponderating in favour of an inference that goes against the view that there was misconduct on the part of the railway servants, this might justify interference under Section 25; for this would moan that the inference of such misconduct clearly was not a 'fair' one, and thus the decision was unjust and not 'according to law.' I take the words "strongly preponderating in favour of" from a passage in the judgment of Bankes L J. in Smith, Ld., v. G. W, Ry. Co [1920] 2 K.B. 237, 243 which has been cited in Central India Spinning & Weaving Go. v. G, I.P. Ry (1921) 24 Bom. L.R. 272, 280.

4. In the same judgment Bankes L.J. says (p. 244):

If the facts are snob that no reasonable man could draw a particular inference from them, or if the particular inference is such as to be equally consis-teat with non-liability ail with liability, that the party who relies on the inference to discharge the onus of proof of establishing liability fails.

5. The first hypothesis has been dealt with, and I have given reasons for holding that such a case would justify interference under Section 25. But does this apply equally to the second hypothesis, where the inference to be drawn is doubtful? In my opinion, the answer is in the negative, In Smith, Ld, v. G.W. Ry. Co., their Lordships were dealing with a risk-note, under which the railway company were only liable "upon proof that" the loss "arose from the wilful misconduct of" the railway servants (See at p. 238 of the report.) The quotation from Pomfret v. Lancashire and Yorkshire Railway [1903] 2 K.B. 718, 721 therefore, applies, viz (p. 721):

The burden, and the while harden, of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, lie has not discharged the onus which lias upon him.

6. But the risk-note here does not require such misconduct to be "proved" (i. e., with tins collusiveness or preponderance of probability kid down in Section 3 of the Indian Evidence Act), but only that such misconduct can be "fairly inferred" from the evidence. This entirely alters the test to be applied, in judging whether interference in revision is justifiable, Even as regards the case of a second appeal from a decree (where interference is justifiable on the ground of a simple error of law), this Court has laid down that (p. 94) "where...the legal inference to be deduced from facts is doubtful, it is not open to this Court in second appeal to interfere with the findings of the lower Court." per Farran C J. in Rajaramj v. Ganesh Hari Karlchanis (1895) I.L.R. 21 Bom. 91.

7. This is of importance in this case, because 1 have come to the conclusion that there is no clear prepondsrancs of probability shown against the theory of a theft by some railway servant or servants, and that the highest at which the case of the applicant can be put is that the probabilities for and against such a theory are about equally balanced. Nor it is a case where it can be said that there is no evidence justifying the inference that is drawn by the Judge.

8. I do not propose to discuss the evidence in detail, I think that on the evidence, as it stands, the Judge could fairly hold it improbable that the theft was committed by strangers, while the train was

at a station, or by railway thieves while the train was running between Tasgaon and Koregaon, where the theft was discovered, which was the theory put forward for the Hallway Administration. There is a conflict of testimony whether the wagon, from which the tins disappeared, had a bent bar, or other attachment, by which the thief could get up and open the doors of the wagon, while the train was running. The guard (defendant's 4th witness) no doubt deposes that there was a bent bar by which a man could stand up with the support of the door chain; but on the other had the nurabar-taker (defendant's 5th witness) says there was no step attached to a wagon with two doors, such as this are was. The plaintiff also deposed that there was no bent iron bar attached to a wagon of that description. It A cannot be said to have been clearly proved that a railway thief l928 could have got on to this wagon while the train was in motion and committed the theft. Nor has reliable evidence been adduced that there has been a similar running-train thefts between Tasgaon and Korogaon, The evidence of the guard on this point as to one or two such thefts hiving been committed is vague and mere hearsay. Nor has it been shown that the trains, owing to a climb, have down between these two stations as to make it possible for parsons to board the train easily. Though 1 do not say that all the facts found as against the theory of a running train theft, there are, in my opinion, reasonable grounds on which the lower Court could fairly draw the inference it did.

9. Accordingly, I do not think we should interfere in this case.

10. There are two points, however, which I may refer to, before I close this judgment. The first is that it might be thought that the case of Central India Spinning & Weaving Co. v. G.I.P. Ry. (1921) 21 Bom. L.R. 272 goes against the view I have taken about this Court not going into the absolute correctness of the inference drawn by the Judge in the Court below; but that was a decision in an ordinary second appeal, and Macleod C.J. was careful to say (P. 281):-

We are not restricted to finding whether there was any evidence which Could reasonably if accepted be the basis of the conlusion of the learned Judge In the Court below. It is competent to us to find that on the facts proved the inference drawn was not the right one.

11. The second point is this. Mr. Bamji for the opponent, in the course of his arguments, supported the lower Court's decision on the further ground that, in any case, the sending of the goods in a wagon sealed merely with paper, seal and was, amounted to evidence of "misconduct" on the part of the Railway Administration, in the meaning of the risk-note, No doubt it has been held by the Allahabad High Court that this constitutes "wilful neglect" under a risk-note in form B : see Balram Das, Fakir Chand v. The Great Indian Peninsula Railway Company (1925) I.L.R. 47 All. 721 and Bindraban v. The Great Indian Peninsula Railway Company. (1926) I.L.R. 48 All. 76. But it may well be doubted, if these decisions are consistent with the Privy Council view in Ardeshir v. G.I.P. Railway (1927) 30 Bom. L.R. 275, 281. p.c. that "wilful neglect" means an act done deliberately, and not by accident or inadvertence. 1q any case., the expression used in thy present risk-note is "misconduct," which does not ordinarily cover acts of negligoncs: cf. Stroud's Judicial Dictionary, Railway 2nd Edition, Vol. II, p. 1207. Therefore, as at present advised, I agree with the view of the Judge below that such neglect is not covered by the word "misconduct."

12. I would accordingly dismiss the application with costs Mirza, J.

13. I agree. The trial Court has inferred from the evidence before it that the loss of the respondents' consigment was due to the misconduct of the applicant's servants. The applicants' liability for the total loss of the consignment is governed by the of a risk-note in form II which requires the applicants to disclose to their consignor how the consignment was dealt with throughout the time it was in their possession or control. For this purpose the applicants adduced certain evidence. The respondent gave no evidence of misconduct on the part of the applicants' servants but relied upon the evidence given on behalf of the applicants for a fair inference that there had been such misconduct. Under the terms of the risk-note the consignor is not called upon to prove misconduct unless it cannot fairly be inferred from what the applicants are bound to disclose. The applicants contend that the inference drawn by the lower Court against them is not justified by the evidence.

14. Under Section 25 of the Provincial Small Cause Courts Act (IX of 1887) no doubt we have ample discretion to interfere with the orders of the Small Cause Courts, but, as was pointed out in Poona City Municipality v. Ramji (1895) I.L.R. Bom. 250 it is not the practice of this Court to interfere under Section 25 of the Act when there are no substantial merits in the case of the applicant, This Court interferes only to remedy injustice.

15. Can it be said that the inference drawn by the lower Court from the evidence is perverse or so manifestly unfair that it has resulted in injustice to the applicants? The Court had before it evidence which went to show that the consignment was lost between Tasgaon and Koregaon railway stations. From a consideration of the probabilities the Court came to the conclusion that the loss could not be due to a running theft, or by strangers while the train was at a railway station, but must be attributed to the misconduct of the applicants' servants. From the evidence the Court could legitimately draw such an inference.

16. At any rate, there does not appear to be a preponderating balance of evidence against such inference. In my opinion no error of law leading to injustice is shown to have been committed which would justify our interference in revision with the judgment of the lower Court. I agree that the application should be dismissed with costs.