Privy Council Appeal No. 17 *of* 1927.

Ardeshir Bhicaji Tamboli - - - - - - *Appellant*

v.

The Agent, Great Indian Peninsula Railway Company, Bombay - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH NOVEMBER, 1927.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD CARSON.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* THE LORD CHANCELLOR.]

The appellant, who is a commission agent carrying on business in the Bombay Presidency, delivered, on the 5th February, 1920, 128 bales, and on the 7th February, 1920, 162 bales of cotton at the Amalner Station of the respondent company for transport to the appellant's business premises at Kurla. Of the 290 bales so delivered, 216 were duly put on board the respondent company's wagons and carried to Kurla, but the remaining 74 bales, together with a large number of bales belonging to other consignors, remained on the station platform at Amalner awaiting transport. On the 25th February a fire broke out in some of these bales, and, the appliances available in case of fire being inadequate, the greater part of the bales at Amalner Station, including the 74 bales belonging to the appellant, were destroyed. Thereupon the appellant brought this suit against the respondent company, alleging that the destruction of the 74 bales was due to the negligence of the company's servants, and claiming damages for his loss.

The suit was tried by the Subordinate Judge of Dhulia, who found that the respondent company's servants had been guilty

of negligence, and gave judgment for the appellant for Rs. 10,518 as damages; but on appeal by the respondents to the High Court of Judicature at Bombay, that Court, while agreeing with the Trial Judge as to the finding of negligence, held that the respondent company was protected from liability by a document dated the 3rd November, 1919, and referred to in the proceedings as a "risk-note." The question to be determined on this appeal is whether the respondent company is so protected.

The risk-note was in the following terms:—

> "Whereas all consignments of goods or animals for which the G.I.P. Railway Administration quotes both Owner's risk or special reduced rates and Railway risk or ordinary rates are (unless I/we shall have entered into a special contract in relation to any particular consignment) despatched by me/us at my/our own risk and are charged for by the G.I.P. Railway Administration at special or reduced Owner's risk rates instead of at ordinary tariff or Railway risk rates, I/we, 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 G.I.P. Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Amalner Station to Kurla Station harmless and free from all responsibility for any loss, destruction or deterioration of or any 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 transport agents or carriers employed by them) before during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignments: provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any unforeseen event or accident."

The note bore the signature of Tamboli Brothers, which is the name under which the appellant carries on business, and was witnessed by Jamsetji Tamboli and another person.

On the hearing of the appeal before this Board, the finding of negligence, which had been concurred in by both the Courts in India, was not disputed, but it was argued that on several grounds the risk-note did not protect the respondent company from liability.

First, it was said that the note did not comply with the requirements of section 72 of the Indian Railways Act, 1890, which requires that an agreement purporting to limit the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods shall in so far as it purports to effect such limitation be void unless it (*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and (*b*) is otherwise in a form approved by the Governor-General in Council. It appeared that the signature of Tamboli Brothers affixed to the risk-note was in the handwriting, not of the appellant himself, but of his nephew, Jamsetji Tamboli, and it was argued that a signature in the name of the firm was ineffective unless it appeared on the face of the document

that the signature was affixed either by the sender himself or by the hand of an agent whose agency was disclosed. In their Lordships' opinion this objection has no weight. It was plain on the evidence that Jamsetji had full authority to sign the name of the firm, and if so, it was unnecessary that he should purport to sign it as agent. If authority for this proposition is required, it will be found in the case of *France* v. *Dutton* (L.R. 1891, 2 Q.B. 208).

It was further argued that the risk-note was void as not being in a form approved by the Governor-General in Council. It was admitted that the body of the note was in the form H approved by Order in Council; but the form so approved contains at the end of it space for the attestation of the execution of the document by two witnesses, and it was said that as Jamsetji Tamboli, the first witness attesting the risk-note, was the person who executed the risk-note in the name of the firm, he was not a suitable witness to its execution. If it were an essential part of the form approved by the Governor-General in Council that the note should be attested by two witnesses, it would, no doubt, be necessary to consider whether Jamsetji Tamboli could both execute and witness the document; but in their Lordships' opinion the attestation by two witnesses is not part of the document prescribed. Paragraph (*a*) of section 72 (2) of the Act of 1890, which alone deals with the execution of an agreement of this nature, does not provide that the agreement shall be attested; and paragraph (*b*) of the same subsection, while it requires that the form shall be approved by the Governor-General in Council, does not entrust that authority with the duty of providing for the attestation of the document. This being so it cannot be held that attestation by two witnesses, although contemplated in the form as approved, was an essential part of the form. This argument, therefore, falls to the ground.

But the principal argument put forward on behalf of the appellant was, that the risk-note did not attach to the 74 bales in question at all. It was pointed out that the note, by the terms of the recital contained in it, applies to goods despatched by the sender and charged for by the railway administration at reduced rates, and it was said that until goods had been loaded on wagons for transport, or at all events until the railway company had given a receipt for the goods specifying that they were to be carried at the reduced rate, the risk-note had no application to them, and the railway company were mere ordinary bailees of the goods. In their Lordships' opinion this contention cannot be supported. The appellant, in his plaint, pleaded that the 290 bales were "given in the possession of the defendant at the Amalner Station on the 5.2.1920 and 9.2.1920, respectively, for being carried to Bombay," and that "the defendant took them in his charge on or about the aforesaid dates as for being carried to Bombay." This pleading is fully supported by the consignment-notes signed by the appellant on the dates of the delivery of the goods, namely, on the 5th and the 7th February; for, by each of these consignment-notes he requested the railway company to receive the goods

therein described and forward them by goods train to Kurla. Further, the conditions endorsed on each of the consignment-notes provided that, when articles were delivered for conveyance, the responsibility of the railway for the loss, destruction or deterioration of the articles should be subject to the provisions of section 72 of the Indian Railways Act, 1890. In these circumstances it appears to their Lordships that the goods were delivered to the railway company for carriage and were so accepted and that consequently the responsibility of the railway company for each parcel of goods accrued forthwith on the delivery of the goods and the acceptance of such delivery—that is to say, on the 5th and 7th February—and accordingly that the risk-note attached to them immediately on such delivery and acceptance. Reliance was placed on the provision contained in the risk-note which prevented the note from attaching if the sender " shall have entered into a special contract in relation to any particular consignment," and it was suggested that in view of this provision, which was referred to as an option to the sender to enter into a special contract, the note did not attach until the goods were actually despatched. The answer is that no such special contract had been entered into, or indeed proposed, as to these particular goods, and accordingly that they fell under the general provisions of the risk-note. This contention, therefore, also fails.

Lastly, it was argued on behalf of the appellant that the loss of the 74 bales was due to the wilful neglect of the railway administration or its servants, and accordingly that the case fell within the express exception contained in the risk-note. Upon this point their Lordships find themselves in agreement with the opinion of Mr. Justice Madgavkar, which was expressed as follows :—

> " The remaining question is whether any wilful neglect on the appellant's part was proved. It appears upon the evidence that the means of extinguishing fire were not as they ought to be in the case of a large cotton exporting station such as Amalner. One hydrant was certainly not working and the water was not at sufficient pressure. Probably, on the whole, this was neglect, but not, I think, wilful neglect within the meaning of risk-note form H, so that the company should be made liable merely on this account."

In support of this view reference may be made to the cases of *R.* v. *Downes* (L.R. 1875, 1 Q.B.D. 25), and *R.* v. *Senior* (L.R. 1899, 1 Q.B.D. 283), in the latter of which cases Lord Russell interpreted the expression " wilful neglect " as meaning that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. In the present case there was ample evidence of neglect, but no evidence or finding of wilful neglect; and accordingly it is unnecessary to consider the effect of the final proviso to the risk-note which declares that " wilful neglect " shall not include fire.

For these reasons their Lordships agree with the decision of the High Court of Judicature at Bombay, and they will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

In the Privy Council.

ARDESHIR BHICAJI TAMBOLI

v.

THE AGENT, GREAT INDIAN PENINSULA RAILWAY COMPANY, BOMBAY.

DELIVERED BY THE LORD CHANCELLOR.

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