

CALCUTTA HIGH COURT

Indian Trade General

Vs

Union of India

(G Mitter , J.)

06.12.1955

JUDGMENT

G.K. Mitter, J.

1. This is a suit for recovery of Rs. 4096/8/- for damage caused through fire to a consignment of jute despatched from the railway station Bhabta on the East Indian Railway to Cossipore Road Station. The consignor as well as the consignee was one Saraogi Trading Co., a firm carrying on business at 46, Strand Road, Calcutta, On the 5th January, 1950 the said firm delivered 84 bales of jute weighing 294 maunds to the Railway Administration at Bhabta under railway receipt No. 105356 dated the 5th January, 1950. The goods were despatched, under railway risk. The wagon containing the goods was attached to a goods train 743 Up, which was on its way to Kri-shnapur, at a distance of 140 miles from Calcutta. Bhabta is situate at a distance of 108 miles from Cossipore Road. It is the case of the railway that smoke was noticed coming out from the doors of the wagon when it was about to get into Cossimbazar Station. The train was stopped at a distance of 100 yards outside the said station and it was then taken to the said station where the wagon containing the jute of Saraogi Trading Co. was disconnected and the bales of jute were unloaded from the said wagon and the fire extinguished by the appliance of water and cinders which lay on the platform.

2. Apparently Saraogi Trading Co. knew nothing about the fire and on going to take delivery of the jute at Cossipore Road Station they found a part of the goods in damaged condition. On the 17th February, 1950 the defendant issued what is known as a short certificate showing that some of the goods had been damaged. In the said certificate it is stated that damage was assessed at 30 per cent. Thereafter Saraogi Trading Co. took delivery of the goods and called upon the plaintiff with whom the goods had been insured to pay up Rs. 3894/- alleged to be 30 per cent of the total value of the consignment. The plaintiff paid the said sum of Rs. 3894/- to Saraogi Trading Co. on or about the 20th April, 1950 and had a document executed in its favour described in this suit as a deed of subrogation. Thereafter the plaintiff purported to serve notices under Section 77 of

the Indian Railways Act and Section 80 of the Code of Civil Procedure and filed this suit on the 5th January, 1951 claiming Rs. 38947- together with interest on the said sum at 6 per cent up to the date of the suit, amounting to Rs. 202/8/-.

3. The defendant filed its written statement on the 20th March, 1951 contending thereby that reasonable care of the goods had been taken by the defendant, its servants and agents, and due diligence exercised in respect of the said consignment; that the fire which had taken place was purely accidental and/or was an inevitable accident and was unforeseen and could not have been avoided by taking any reasonable precaution. With regard to the certificate of damage the defendant states that it was issued without prejudice to its rights. The defendant has not admitted the value of the said goods or its liability to pay any sum of money to the plaintiff.

4. The following issues were settled for determination :

1. Did the consignment of jute bales in suit catch fire due to negligence or misconduct of the defendant and/or its servants or agents?

(a) Did the defendant fail to take care of the said goods as a person of ordinary prudence would under similar circumstances take of the said goods, if they were his own?

2. What was the value of the goods booked by Sarawgi Trading Co? What is the damage caused to the said goods?

3. Has the plaintiff become subrogated to the rights of Messrs. Sarawgi Trading Co. in respect of the said goods?

4. Has the plaintiff any cause of action against the defendant?

5. Is the suit maintainable by the plaintiff?

6. Has the Court jurisdiction to try this suit?

7. What relief, if any, is the plaintiff entitled to?

5. Before dealing with the oral testimony adduced it will be useful to take note of the relevant documents disclosed.

6. The opening lines of the insurance policy issued by the plaintiff are as follows :

"Be it known that Messrs. Sarawgi Trading Co. as well in their own Name as for and in the Name and Names of all and every other person or persons to whom the same doth may or shall appertain; in part or in all, doth make Assurance with Indian Trade & General Insurance Company Limited, and cause themselves and them and every of them to be insured, lost or not

lost, at and from Bhabta to Cossipore Road, upon any kind of Goods and; Merchandises and also upon the Body, Tackle, Apparel, Ordinance, Muniton Artillery, Boat and other Furniture, of and in the good ship or Vessel called the per Bail under R/R No. 105356 of 5-1-50-whereof is' Master under God for this present Voyage."

The goods are described as "1949/50 Bhabta "M" Tossa Mud 294 Mds. 84 Bales of Jute (Hand Pressed Katcha Bales) valued at Rs. 12,980/- only insured against Rail risk as per Clauses attached." This insurance was claimed to be a marine insurance within the meaning of Section 135A of the Transfer of Property Act.

7. There is nothing much of importance in the Risk Note excepting that it shows that the goods were booked under railway risk and the responsibility of railway for the loss, destruction or deterioration of the articles, was subject to the provisions of Section 72 of the Indian Railways Act.

8. On the 13-1-1950 Saraogi Trading Co. wrote to the Superintendent, Chitpore Area, East Indian Railway to the effect that the consignment of jute had been damaged beyond recognition owing to a fire in transit and as such the same could not be taken delivery of. The firm further called upon the Railway Administration to assess the damage. On the 17-1-1950 the said firm wrote to the Chief Commercial Manager, East Indian Railway, 3 Koliagot Street, Calcutta, demanding payment of Rs. 12,980/- as the value of the goods. There Was a letter from the said firm to the Goods Supervisor, E. I. Railway, dated the 30th January, 1950 of which no special mention is necessary. On the 17th February, 1950 the defendant issued a document headed "Certificate of damages and shortage" which was marked Ex. A. In this document the condition of packages at the time of survey, is given as-

"29 bales intact, slightly burnt, wet inside and 55 bales wet inside damaged."

Extent of damage is given at 30 per cent. This document bears the signature of some one on behalf of the Railway Administration over the rubber stamp "Goods Supervisor, E. I. Railway, Cossipore Road". At the left-hand bottom corner of this document there appear in print the words "I agree to the above without prejudice" and immediately below the same the word in print "Consignee", Some one on behalf of Saraogi Trading Co. put his signature in the place marked for the consignee. On the 23rd February, 1950 Saraogi Trading Co. requested" the Chief Commercial Manager of the East Indian Railway in writing to issue a pay order for Rs. 3)894/-.

9. In the Brief of Documents which was by consent parked as Ex. B there is a document bearing date 23rd February 1950 with the signature of three persons employed by the defendant, one of Whom described himself as the President and the two others as members. The document reads as follows :-

"We the undersigned having carefully considered all the evidence do find that the fire in BNGG 3292 loaded with jute all dry booked Ex : BFT to CED under Invoice No. 58 of 5-1-50 was purely accidental and nobody is responsible for this."

It should be noted that BNGG 3292 is the wagon in which the goods in question were loaded. BFT Is the railway code word for Bhabta and CED stands for Cossipore Road. Among other documents disclosed by the defendant there is one styled "The missing and damaged goods return" In this document the nature of shortage, damage etc. is described, in the same way as in the short certificate already referred to and it is also mentioned therein that the goods had been delivered on assessment on 18-2-50 at 30% without prejudice. This document also shows that the condition of seals, rivets and/or locks was intact as at the time of the accident and under the heading "Exact remarks under which taken over unloaded appear the words-

"Received 61 bales partly burnt and wet, 3 bales burnt and 2 bales wrapped with gunny."

Against the query "Was wagon examined or tested lay station staff/T.X.R.? Forward his report with this form", appears the remark "Yes, copy of TX.R. Certificate enclosed herewith." It is admitted that the words T. X. R. mean the Train Examiner. In the column "Particulars of delivery" there is a clause "Cause of delay in effecting delivery". Against this there is the remark "for assessment of the whole consignment" and against the clause "Exact remarks under which consignment delivered" appears the remark.

"29 bales in tact slightly wet inside and 55 bales wet inside, damaged, assessed at 30 per cent without prejudice."

At the foot of this document there is an endorse-ment reading "Original Railway Receipt, 2 pieces seal labels, 1 Demurrage, 1 Short certificate, 1 T.X.R. certificate etc. sent herewith."

10. The document described as the deed of subrogation is in the following terms:--

"We hereby acknowledge receipt of the sum of Rupees Three thousand eight hundred and ninety four only (Rs. 3894/-) which you have paid us and which we accept in settlement of our claim in res-

pect of Fire Loss under Policy No. KM 5/3728 (P) for Rs. 12980/- covering 84 bales of Jute.

"We place on record that by virtue of such, payment the Underwriters concerned became subrogated to all our rights and remedies in and in respect of the subject matter insured in accordance with the laws governing the Contract of Insurance.

"We also record that they have authority to use our name to the extent necessary effectively to exercise all or any of such rights and remedies that we will furnish them with any assistance they

may reasonably require of us when exercising such rights and remedies; whilst on their part, they will indemnify us against liability for costs, charges and expenses arising in connection with any proceedings which they may take in our name in the exercise of such rights and remedies."

11. The underwriters carried on correspondence with the Railway Administration and by letter dated the 18th May, 1950 informed the latter that no pay order had been received in spite of repeated reminders. To this the defendant replied on the 1st July, 1950 to the effect that the claim had been repudiated already. On the 4th July, 1950 the Underwriters addressed a long letter to the Superintendent, E. I. Railway, Chitpore Area, and requested the said officer to furnish the underwriters with information regarding the date and place of fire. No reply thereto seems to have been given. Finally after giving the defendant notice under Section 80 of the Code of Civil Procedure through its solicitor on the 19th July, 1950 the plaintiff instituted this suit.

12. The plaintiff examined two witnesses, the first being one Adi Nath Das Gupta, as assistant in the firm of Sarawgi Trading Co. He said that the invoice in respect of the goods had been surrendered to the Railway and the price stated in that invoice was Rs. 12,980/-. He stated that on the 13th January, 1950 when he had gone to take delivery of the goods at Cossipore Road Station he found that some of them had been wasted and, some soaked in water. He proved the certificate of damage already referred to. On being asked about the value of the jute consigned, all that the witness could say was "at that time the controlled price of jute was Rs. 39/- per maund and Re. 1/-more for that particular quality of jute which is called Tossa" & that, calculating at Rs. 40/- per maund the value of the jute came to Rs. 11,760/-to which had been added some other sums. He said that the insurance company, the present plaintiff, had paid Sarawgi Trading Co. Rs. 3894/- and had the deed of subrogation executed in respect thereof. In cross-examination the witness said that at the time when he had gone to Cossipore Road Station he found a portion of the goods, inside the wagon and another portion outside it lying on the ground. He admitted that after taking delivery of the goods they , had been sold by Sarawgi Trading Co and that the Insurance Company had made the payment to Sarawgi Trading Co. by a cheque issued from the Insurance Company's office.

13. Sunil Kumar Bose, the second witness on behalf of the plaintiff was an Assistant Accountant in the Indian Trade & General Insurance Co. Ltd. He said that his duties were to keep account of the premia received, to attend to parties, to see that policies and other documents were despatched in proper time and to examine the claims put in by the parties. The witness stated that the consignment of jute had been insured on the 9th January, 1950 and the premium paid later on. On being asked as to whether he had made enquiries about the approximate price of the goods, the witness said that he had enquired about the then pre-

vailing market rate. Asked to give the market price of jute at that time, the witness said that the

controlled price was Rs. 39/- with Re. 1/-extra per maund for Tossa quality, In cross-examination the witness admitted that the plaintiff was entitled to the salvage, but in this case there was no question of salvage as the goods had been , burnt out. He added, however, that he had not seen the goods himself and that jute was not necessarily damaged because it had got wet.

14. The defendant examined three witnesses, the first being one Sudhangsu Bhusair Das who described himself as the Assistant Booking Clerk at Bhabta at the relevant time. He said that there were only two officers at that station, i.e., the Station Master and the witness himself. The Station Master at that time was one Jasoda Kumar Roy. The witness did not know where he was but stated that he had retired about 3 years ago and left the services of the defendant. He proved a document described as a Forwarding Note Register containing an entry dated the 4th January, 1950, showing the requisition of wagon made by Sarawgt Trading Co. on that date. He said that the wagon was provided on the 5th January, 1950 and the goods loaded the same day before 6 in the evening. The wagon as already mentioned was despatched on 7-1-50 and taken up by Train No. 743 Up. The wagon according to the witness had come up from Naihati. He attempted to prove the practice of the Railway with regard to the allocation of wagons and delivery of the goods and the despatch of goods in wagon loads. He said that when a wagon came to the station it was first inspected by the railway officers themselves and then by them along with the party's representative and if the wagon happened to be dirty, it was cleansed before goods could be allowed to be put inside. After the goods were loaded the doors of the wagon were closed, a receipt made out, two labels affixed on either side of the wagon and a rivet fixed to each side so that the wagon could not be opened. These labels and rivets, according to the witness, were generally put on by the pointsman on duty. The pointsman in this case was one Aswini Kumar Sardar who was said to be dead. In cross-examination the witness admitted that he had no knowledge of the whereabouts of Jasida Kumar Roy and that he could not be sure whether at the time when the loading of the jute in question was going on, he himself was present or the Station Master was there supervising the loading. Looking at the railway receipt the witness said that it had been issued by Jasoda Kumar Roy. The witness was further compelled to admit that the entries in the Wagon Register and Forwarding Note were also in the handwriting of the same person. The witness admitted further that the forwarding register did not contain any entry in his handwriting and he could find no date when the goods in question were loaded. It would, therefore appear that this witness really did not have anything to do with the loading of the goods or the supervision of the same and what he had been stating was merely from his memory or the usual practice followed at Bhabta.

15. The next witness on the defendant's side was one Bangesh Chandra Gupta, the guard of the train 743 Up. He produced his memo book and by reference thereto said that the train had started on January 7, 1950 from Chitpore and was to go up to Krishnapur: that the train had reached

Bhabta at 10-30 hrs. and was detained there for 20 minutes. Within that period 7 wagons were attached to the train, the wagon in question being the fifth from the engine. He said that he had inspected the wagons before attaching them to the train and that such inspection was necessary for ensuring that the seals and rivets were properly affixed. The next station to which, the train went was Sargachi where it stopped for another 20 minutes. The station after that was Berhampore Court and then Cossimbazar. He stated that the train had stopped at about 1 p.m. at a distance of about 100 yards from Cossimbazar station because smoke was seen issuing through the doors of this particular wagon. He added that on being informed thereof by the driver he got down and inspected the wagon and asked the driver to proceed with the train to the next station. He saw smoke coming out on both the sides of the wagon although the seals and rivets were intact. At Cossimbazar the witness asked for the Station Master and in his presence had the affected wagon isolated and unloaded. The affected wagon, according to witness, was put in a siding and there the goods were unloaded from the wagon. A portion of the goods, being about 8 to 10 bales, were found partially burnt. The witness said that no flame could be seen. The method of extinguishment of the fire was the application of water by bucket on the burnt goods and covering the same up with cinder. According to witness it took 5 to 7 minutes to put the fire out. The witness could not explain why 29 bales had been described as slightly burnt in the short certificate. It was suggested to the witness that the fire might have been the result of a hot axle but to this the witness did not agree adding that in case of a hot axle there would have been a sound peculiar to it. The witness drew a sketch of the railway lines through Bhabta station and the siding attached thereto and said that there being only one set of lines with the siding in such a peculiar position with respect to the said lines, wagons could be affixed to the train in the up direction. There was confirmation on this point by the production of a diagram of the lines at Bhabta station at a later stage. The witness admitted that although wagons could not be attached except in the up direction at Bhabta there was no difficulty about shunting in both direction at Berhampore Court station which was situated at a distance of 8 miles from Bhabta. The witness further admitted that even before the train reached Berhampore Court it was possible to detach the wagon at Sargachi which was a big station capable of effecting a crossing, It was admitted that as a matter of fact 3 wagons had been detached at Sargachi from 743 Up but none attached to the said train. At Berhampore Court three wagons had been detached and one attached. The witness gave the names of the drivers of the train as one Mansha and one Ram Sevak. He was cross-examined about the entry made by him in his memo book with regard to the fire which shows that the wagon was detached at Cossimbazar and the fire extinguished with the help of the Station Master and his coolies, the position of the wagon being fifth from the engine, and further that the train had been detained two hours 30 minutes, the driver on duty being one Ram Sevak Singh. The witness stated that these remarks had been made by him at Cossimbazar after the fire had taken place. He said that the entire contents of the wagon had been unloaded and two

separate stacks made, one of the affected portion and another of the unaffected part. He stated that so far as he remembered, the unaffected part had not suffered any damage at all and no water had been applied thereto. He admitted that there were no fire-fighting appliances at Cossimbazar station but he added that it was not a serious outbreak of fire, having taken only 7 or 8 minutes for extinguishment.

16. The last witness on the defendant's side was Ram Chandra Mukherjee the Station Master of Cossimbazar at the relevant time. He said that when the train 743 Up came into the station he noticed smoke coming out from one of the wagons. He stated that the wagon was detached as quickly as possible and there being no water available at the place where the train had been brought to a halt, the wagon was brought to that side of the station where water could be had. Water, according to the witness, was contained in some buckets in the station premises and water could also be fetched from the tank quite close to the station. He stated that the seals and rivets were found intact and the same had to be unfastened before the wagon could be unloaded. The unloading of the wagon, according to this witness, did not take more than 10 to 12 minutes. He said further that there being only six water buckets cinders had to be used to put the fire out. He also said that the detached wagon was sent to the siding and the Train Examiner brought down from Krishnapur for making the necessary examination. So far as the witness's recollection went, the goods were sent on to Cossimpore three or four days after the occurrence of the fire as it was necessary that some inspection should take place. In cross-examination the witness admitted that there was such an enquiry but he did not remember who were the officers who dealt with the matter. He said that he would have nothing to do with the inspection report and he added that he himself had to submit a report and that he had done so in this case, but that he did not know why the said report had not been disclosed.

17. The first issue was the one on which the bulk of the evidence was adduced involving the examination of a number of witnesses. But before scrutinising the evidence adduced it is necessary to consider the question of law as to the liability of the Railway Administration and the onus of proof of relevant facts. The statutory provisions in respect of the goods booked under railway risk are to be found in Sections 72 and 76 of the Indian Railways Act. Section 72. Sub-section (1) provides:

"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 Ss 151, 152 and 161 of the Indian Contract Act, 1872." Sub-section (3) provides:

"Nothing in the Common Law of England or in the Carrier's 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." Section 76 lays down that-

"In any suit against the railway administration for compensation for loss, destruction, or deterioration of animals or goods delivered to a railway administration for carriage by railway. It shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused." Section 151 of the Contract Act is as follows-

"In all cases of bailment the 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." Section 152 provides-

"The bailee in the absence of any special contract is not responsible for the loss, destruction or deterioration of the things bailed, if he has taken the amount of care described in Section 151." Section 161 lays down-

"If for the default of the bailee the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

18. Along with these provisions must be borne in mind the provisions of Sections 106 and 114 of the Indian Evidence Act. Section 106 provides that-

"When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

And under Section 114 the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Illustration (g) to the section, which is to be treated as part of it, provides-

"That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

19. The responsibility of the railway administration, therefore, is that of a bailee under the provisions of Section 151 of the Contract Act. It has to take as much care of the goods bailed to it as a man of ordinary prudence would, of his own goods of the same bulk, quality and value, and by virtue of the provisions of Section 152, is not to be responsible for any loss, destruction or deterioration if it has taken the care which Section 151 enjoins upon it. The result of the statutory provisions, therefore, may be summarised as follows;

1. The railway administration must take as much care of the goods while under its control as a

man of ordinary prudence would take of such, goods if they were his own.

2. The railway administration is liable for the loss, destruction etc. if it happens by its default or negligence.

3. When loss, destruction etc. occurs, it is not for the plaintiff to prove, in the first instance, as to how it happened.

20. The burden of proof of the issue as to negligence ultimately rests with the plaintiff. The plaintiff has to satisfy the Court that the defendant was negligent but the duty of showing how the consignment was dealt with during transit lies on the railway administration, as a matter within its special knowledge. As the law does not cast on the plaintiff the obligation of proving how the loss arose and as it imposes on the defendant the duty of showing how the goods were dealt with while under its control, the latter must first adduce evidence disclosing its treatment on the goods and the plaintiff may rely on that evidence in addition to any tendered by him to show that the loss had occurred by reason of defendant's default or negligence or that the loss could not have occurred but for such default or negligence. If the defendant does not adduce all the evidence at its command the plaintiff may, in proper cases, ask the Court to make a presumption under Section 114(g), and to come to the conclusion that the evidence which has been withheld, would have gone against the defendant.

21. I shall now refer to the important decisions to which my attention was drawn. The first case was that of *Lakhichand Ramchand v. G.I.P. Ry. Co.*, reported in ILR 37 Bom 1 (A). In this case a consignment of 99 bales of cotton belonging to plaintiff, was put in a wagon along with other consignments belonging to a different consignor. The wagon was attached to a train, being placed next to the engine. On the arrival of the train at Varangam Station the said bales of cotton were found to be on fire. The wagon was immediately detached and placed on a siding; the doors were opened, and 37 bales extracted. The engine driver having unsuccessfully tried to put out the fire with water from his boiler, took the rest of the train on to Bhusaval, a station 8 miles distant. In the absence of sufficient appliances for extinguishing the fire, the remaining bales continued to burn in the wagon until completely consumed. On the evidence adduced Scott, C. J. came to the conclusion that the defendant had taken all reasonable precautions to obviate preventable risks but there was negligence on their part in dealing with the fire after it was noticed and on that ground the learned Chief Justice held that the plaintiff was entitled to succeed. Batchelor J. who agreed with the view taken by the learned Chief Justice delivered a separate judgment. According to him-

"The question whether the company have, or have not, taken the care prescribed is to be answered by reference to the entire evidence on the record."

His -Lordship held that the occurrence of the fire while the goods were in their sole possession might be, and in his Lordship's judgment was, prima facie evidence that due care was not taken, but the inference thus suggested might be repelled and the contrary inference established on adequate evidence to this effect being given by the Company. His Lordship went on to observe that it would be open to the railway company to exonerate themselves by satisfying the Court of their carefulness, both generally and in respect of the plaintiff's goods, notwithstanding that they were unable to prove the exact cause of the fire. On the evidence adduced His Lordship held that the defendants had exonerated themselves quo ad the outbreak of the fire but not quo ad the steps taken to extinguish it.

22. In *Hirji Khetsey & Co. v. Bombay Earoda & Central India Ry. Co.* ILR 39 Bom 191 : (AIR 1914 Bom 154) (B) the plaintiff made a similar claim for damages suffered through fire to a consignment of cotton. The goods were loaded on a bogie open truck for conveyance from Ujjain to Colaba. Beaman. J., who tried the suit, held that-

"When anyone has entrusted goods to a railway company for carriage and those goods are lost, damaged or destroyed while in the possession end under the control of the railway, the fact of the loss, damage or destruction is enough to erst upon the company the burden of proving that that loss was not due to any negligence on its part. In every case it is open to the bailee to satisfy the Court, if he can, that although he does not know how the goods came to be lost, damaged or destroyed, it certainly was not owing to any want of ordinary care on his part. And this was actua'lv done in the recent case of *Lakhichand Ramchand v. G.I.P. Ry Co.* (A)".

23. According to his Lordship *Lakhichand's* case (A) was an authority for the proposition that "a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it, the moment it admits that it is unable to assign the vera causa of the loss."

His lordship further held that in cases of this type two main questions arose, viz., "(1) Has the defendant company proved that it took as much care of the goods from the time they came into its possession to the time when they caught fire as an ordinary person would have taken of the goods of like quality and quantity of his own?

(2) When the goods were found to be on fire did the defendant company take as much care of them, that is to say, did it exert itself as strenuously having regard to the means at its disposal and all the circumstances to put the fire out and save the goods as an ordinary person might have been ex-cepted to do if the goods had been his own?"

24. As regards discharge of onus which lay OH the defendant His Lordship observed that-

"The company as bailee is primarily liable for the loss but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that the cause could not possibly be attributable to itself, that in other words it was altogether external and beyond the company's control *** But in cases of loss, it might very well be that the bailee might show that he had taken all reasonable care of the goods and yet that some person unknown had stolen them, and so they had disappeared."

25. After discussing the evidence adduced. His Lordship came to the conclusion that the railway company was liable both in respect of the origin of the fire as well as the entire resulting loss.

26. Within two years after the above decision the case of Dwarkanath Paimohan Chaudhuri v. Rivers steam Navigation Co., Ltd., was decided by the Judicial Committee of the Privy Council reported in 27 Cal LJ 615: (AIR 1917 PC 173) (C). In this case the plaintiff-appellants brought their action in respect of two parcels of jute laden on board the flat "Jatrapore" for carriage from Bera to Ruttolla Ghat at Calcutta, and lost by reason of fire. It appeared in evidence that the said flat "was moored with head up river outside another flat called the "Coleroon" which was fast to the same buoys. There were other flats further in shore."

A fire broke out on board the "Coleroon" and spread to "Jatrapore" before the latter could get clear or be separated from the former. The suit was tried by Chitty, J. who found against the defendant company for the full amount of the loss. According to the Judicial Committee the learned Judge had wrongly placed the onus on the defendant and had gone wrong in holding that it was incumbent on the defendant to satisfy that it had, taken as much care of the goods as a man of ordinary prudence would take of his own goods. Their Lordships observed: see (at p. 619 Cal LJ): (at p. 175 of AIR) :

"It is true that under the Law of Evidence Act of 1872, Section 106, when any fact is especially within the knowledge of any person, the burden of proving that fact is on him'; and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seem to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence, of the servants of the defendant company. It may be for the company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill, and nerve "

The judgment of Chitty, J. had been reversed in appeal by this Court and the further appeal to the Judicial Committee was dismissed. The Court in appeal had taken a different view of the facts to that taken by Chitty, J.

27. The case does not lay down what conclusion the Court is to come to when material evidence has been withheld by the defendant. This point was, however, considered by this Court in the case of Secretary of State v. Ramdhandas Dwarka Das .

Their Lordships Mukerji and Nag, JJ. observed that the dictum of the Judicial Committee in the case just referred to was not easy to reconcile with other pronouncements of no lesser authorities, but the principle enunciated in it must be applied. According to their Lordships:

"it is for the defendant to place all material evidence that may be available before the Court and if there is failure on the defendant's part in this respect, the plaintiff may ask the Court to presume that, if produced, such material would have gone against the defendant; and that upon such materials as may be produced by the defendant the plaintiff has to show, as all plaintiffs must, in order to establish a liability on the defendant, that there was want of diligence or that there was negligence on the part of the latter or his servants or agents, or, in other words that the requirements of Section 151 of the Contract Act have not been fulfilled."

28 Turning to the evidence before me I have come to the conclusion that the defendant has not produced all the evidence it should have done. I cannot help remarking that some of the persons who should have been called as witnesses have not been produced and documents which undoubtedly were in existence, have not been forthcoming. No satisfactory explanation is given of such non production. As I have already observed, it was not Sudhansu Bhusan Das but Jasoda Kumar Roy who was responsible for supervising the loading of the goods and, if called, he might have given evidence about the condition of the Wagon at the time when it was loaded. I do not know whether the Engine Driver Ram Sevak who was on duty or his associate Monsha who first noticed smoke coming out of the wagon could have adduced any useful evidence. But there is no explanation before me as to why the Train Examiner whose duty it was to investigate the cause of the fire and who it appears, had made such investigation in this case was not produced in Court. As regards the documents comment was rightly made on the absence of the report of the Station Master of Cossimbazar and the Train Examiner's report. It would also appear from defendant's document No. 6 which I have set out in extenso that there was some sort of enquiry held by three railway officers, who had carefully considered all the evidence and come to the conclusion that the fire was accidental. There is no explanation as to why these persons who had considered such evidence were not called in this case nor do I know as to What was the evidence which was placed before them to lead them to the conclusion that the fire was accidental. In any event it clearly was incumbent on the defendant to call all these witnesses and produce all the documents. The defendant, in my opinion, has not adduced any evidence to show that the cause of the fire was external to itself. It is nobody's case that jute is spontaneously combustible. No such theory having been advanced before me on the evidence of the Guard and the Station Master of Cossimbazar, I must hold that the fire was not caused by a hot axle.

Whether it was caused by sparks from the engine finding their way Inside the wagon through any cleavage or openings either in the doors of the wagon or in its roof, must remain a matter of conjecture. No evidence was adduced about the condition of the wagon. Shunting operations were going on at all stations after file train had left Bhabta and it is likely that during such operations the engine had passed quite close to the wagon containing the goods in question. But there is no means of knowing whether during the course of such shunting sparks or glowing cinders from the engine had fallen on any of the bales of jute contained in the wagon. My conclusion is that the cause of the fire remains unaccounted for,

29. Mr. Dutt, learned counsel for the plaintiff, argued that there was some evidence of negligence on the part of the defendant in this case inasmuch as it had without any good cause failed to despatch the wagon by shortest route. The distance from Bhabta to Cossipore Road being only 108 miles, Mr. Dutt contended that the wagon should not have been attached to the train in the upward direction, i.e., away from Calcutta and that if it was so attached, it should have been detached at Berhampore or Sargachi. It was argued that the risk which the goods would run in a transit of 108 miles from Bhabta to Calcutta was certainly much less than what it would have to face if the wagon was taken along a longer route, i.e., from Bhabta to Krishnapur and from Krishnapur to Calcutta which would entail an additional journey of 64 miles. In support of his contention Mr. Dutt drew my attention to the case of *B. N. Ry Co. v. Haji Latif Abdulla*, . There Jack, J. held that taking the goods by a longer route, unless it was unavoidable, amounted to misconduct and it was contended that what was misconduct would certainly afford evidence of negligence. No explanation has been given in this case as to why it was necessary for the defendant to take the wagon all the way up to Krishnapur and why it could have been detached at the station next to Bhabta and attached to a down train coming towards Calcutta. In my opinion there is evidence of negligence on the part of the defendant and I cannot help remarking that there has been no valid explanation given of the nonproduction of documents and the failure to examine necessary witnesses. In the circumstances I must draw the presumption which the Court is permitted to do under Section 114(g) of the Evidence Act and come to the conclusion that the defendant was negligent in dealing with the goods of Sarawgi Trading Co. Mr. Dutt also argued that the evidence disclosed that there was no proper fire fighting appliances available at Cossimbazar station and that the mode in which the fire was dealt with must lead one to conclusion that the defendant was negligent in this respect. According to the evidence of the Station Master of Cossimbazar, only six buckets were available for the purpose of applying water to the fire and out of these six buckets two were kept filled with sand. I cannot however ignore the evidence adduced by the said Station Master and the Guard that the fire was put out within a few minutes and as such although the defendant might not have had sufficient fire-fighting equipment at Cossimbazar Station, I cannot hold that the lack of such equipments had caused any damage to the goods which could have been avoided. I answer Issue No. 1 as follows:--

The cause of the fire is unknown. The defendants, its servants and agents were- negligent in dealing with the jute bales entrusted to it for transit to Cossipore Road Station and failed to take as much care of the goods as a person of ordinary prudence would have taken under similar circumstances if the said goods were his own.

(30-31) Issue No. 2: The onus of proving this issue was on the plaintiff and in my opinion the plaintiff has signally failed to do so. No evidence was adduced of the value of the goods beyond reference to the Jute Price Control Order. It is admitted that Sarawgi Trading Co. had booked the goods from Bhabta. Therefore, they should have been in a position to adduce evidence of the price of the goods at which the same was purchased at Bhabta. It is further admitted that the goods had been sold by Sarawgi Trading Co. after the occur.

rence of the fire and therefore Sarawgi Trading Co. could, if it chose, have given evidence of the price fetched by such sale. If proper evidence on these two points had been adduced, the plaintiff would have discharged the onus which lay on it in this respect. Reference to the Jute Price Control Order, in my opinion, is of no help: The said Order merely shows the maximum prices which could be charged in respect of jute coming under different categories. But the minimum is nowhere fixed by the Order and therefore one does not know what was the value of the goods in question. As regards the question of damages too, I think the plaintiff is in similar difficulty. The only evidence of damage which the plaintiff had was the Short Certificate. In my opinion the Short Certificate does not prove the exact amount of damage suffered. According to the plaintiff's witnesses it was not all the bales which were burnt but some of them were burnt. According to the defendant, 29 bales were intact, slightly burnt and wet inside and 55 bales were wet inside, damaged. It does not appear from the Certificate of Damage as to whether the 30% which was mentioned as the extent of damage related to 29 bales which were slightly burnt or to the entire 84 bales. It should have been easy enough for the plaintiff to prove the exact amount of damages suffered in this case. In my opinion the plaintiff has not been able to prove either the value of the goods booked by Sarawgi Trading Co. or the extent of the damage caused to the goods.

32. issue No. 3: It was argued on behalf of the defendant that the plaintiff as underwriters had no right to institute this suit. It was first contended that a mere right to sue could not be transferred and therefore the deed of subrogation could not vest the plaintiff with any right to sue. As against this Mr. Dutt urged that the insurance was a marine insurance & as such Section 135A of the Transfer of Property Act could be called in aid by the plaintiff. Section 135A provides as follows:--

"(1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to

make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the Insured persons as from the time of the casualty causing the loss, in so far as the Insured person had been indemnified by such payment for the loss.

(4) Nothing in Clause (e) of Section 6 shall affect the provisions of this section." Mr. Ganguli contended that the insurance in this case could not possibly be a marine insurance inasmuch as the transit did not involve any journey by water and that it was absolutely essential before an insurance could be called a marine insurance, that part of the transit should be by water. What marine insurance is has not been defined by the Transfer of Property Act. But the definition of 'marine Insurance business' is to be found in the Indian Insurance Act. Section 2, Sub-section (13A) of the Insurance Act defines marine insurance as meaning "the business of effecting contracts of insurance upon vessels of any description, including cargoes, freights and other interests which may be legally insured, in or in relation to such vessels, cargoes and freights, goods wares, merchandise and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit, and includes any other risks customarily included among the risks insured against in marine insurance policies."

33. Mr. Ganguli argued that the insurance, to be a marine insurance, must be in respect of goods consigned by some kind of vessel which a railway wagon could not be and that transit must be at least partly by land and partly by water. But I do not take the same view. The insurance may be on cargoes, freights and other interests which may be legally insured and it may be in relation to cargoes, freights and goods and the transit may be by land or water or both. Therefore, it cannot be said that insurance must be by a vessel which can only move on water, (sic) Although the definition is somewhat involved, nevertheless I do not think that the Legislature meant to lay down that transit by land could not be the subject-matter of a marine insurance. But even if that were so, I think that the plaintiff cannot call the provisions of Section 135A to his aid. The plaintiff is not suing on the policy and therefore whether or not the policy was assigned has not got to be considered. Sub-section (1) of Section 135A of the Transfer of Property Act has no

application. Sub-section (2) also, to my mind, does not apply as there was no total loss either of the whole of the goods or any apportionable part thereof. At least there is no evidence to that effect before me. In my view Sub-section (3) would be the proper statutory provision applicable to this case. The insurer before me has paid for a partial loss and he therefore acquires no title to the subject-matter, but is subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss.

34. According to Lord Cairns subrogation means that "when one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." *Simpson v. Thompson*, 1877-3 AC 279 (P). For a fuller definition reference may be made to the judgment of Brett LJ in *Castellain v. Preston*, 1883-11 QBD 380 at p. 388 (G).

35. The question remains, does such subrogation either in law or on the terms of the deed before me entitle the plaintiff to sue in his own name. In my opinion it does not. The rights which pass to the insurer by virtue of subrogation have been carefully summarised in Welford and Otter-Barry's *Fire Insurance*, 4th Edn. at pages 362 to 365. In this respect the law of fire insurance is the same as in the case of other insurance. The learned author sums up the result of the decision in the following words:

"The mere fact of subrogation does not entitle the insurers to enforce the rights in their own names: To enable them to do so, it is necessary that a statute should confer upon them a right of action, or that the assured should make a formal assignment to them of his rights of action in respect of the subject matter." Dealing with the obligations of the assured to the underwriters after payment the learned author states that "the assured must assist the insurers in enforcing any claims which he may have against third persons in respect of the loss..... Thus, it is his duty to permit them to use his name in any action which they may desire to bring for this purpose; and if he refuses, the Court may compel him to do so upon receiving an indemnity in respect of the costs to be incurred. He must also, in the cases in which they cannot make use of his name, take the requisite measures to enforce the claim himself",

36. The matter is dealt with by Arnould in his *Treatise on Marine Insurance*, see Vol. II, 12th Edn. page 1650 as follows-- "First it is clear that the underwriter is only entitled to the benefit of such remedies, rights, or other advantages, as the assured would himself be able to enjoy. The underwriter has no independent rights of his own and cannot even sue in his own name," and reference is made to the case of *Nelson (James) & Sons Ltd. v. Nelson Line, Liverpool Ltd*, 1906-2 KB 217 at p. p 222 (H). Mr. Ganguly referred me in this connection to the case of *King v. Victoria Insc. Co. Ltd.* 1896 AC 250 at p. 256 (I). Delivering the judgment of the Privy Council Lord Hobhouse observed: "Subrogation by act of law, would not give the insurer a right to sue in

a court of law in his own name." The principle has been followed in India in the case of K. V. P. Marakkayar & Sons v. Banians & Co. . In my opinion the deed of subrogation in this case gave the plaintiff nothing more than what he would have under Section 135A, Sub-section (3) of the Transfer of Property Act, The words used in the said document are 'subrogated to all our rights and remedies' and it is important to note that the deed expressly provides that the plaintiff would have the authority to use the name of Sarawgi Trading Co. to the extent necessary effectively to exercise all or any of such rights and remedies. I cannot hold that there was any assignment of the subject matter of insurance in this case by the document. The answer to Issue No. 3, therefore, is that the plaintiff had become subrogated to the rights of Messrs. Sarawgi Trading Co. in respect of the said goods. But this did not entitled the plaintiff to file a suit in its own name.

37. Issue No. 4: In view of the above the answer must be that the plaintiff has no independent cause of action against the defendant,

38. Issue No. 5: The suit is not maintainable by the plaintiff.

39. Issue No. 6: Although an issue as to jurisdiction was raised, it was not seriously pressed, nor am I convinced that there is any substance in this point.

40. The result is that the suit will stand dismissed. But in view of the fact that the protracted hearing of the suit was caused by the trial of 'Issue No. 1 decided against the defendant, I shall make no order as to costs.