PATNA HIGH COURT

Jugal Kishore Bhadani

Vs

Union of India

Letters Patent Appeal No. 71 of 1959

(S.C. Misra and G.N. Prasad, JJ.)

15.09.1964

JUDGMENT

G.N. Prasad, J.

1. Consequent upon non-delivery of a part of a consignment booked for carriage by the railway, the plaintiff consignee, who is the appellant before us, instituted the suit for recovery of damages from the defendant, attributing loss of the undelivered part of the consignment to negligence and misconduct of the railway administration or their servants.

2. The material facts which are not in dispute before us are these : On the 2nd November 1949, the entire contingment which consisted of 41 bales of cloth was duly loaded at Wadibunder in a through wagon (No. N. W. R. 4223) for carriage to and delivery at Gaya in terms of railway receipt No. 9494/20, dated the 1st November 1949. The consignor did not, however, pay the freight at the ordinary tariff rate, but booked the consignment at a special reduced or owner's risk rate, limiting the general liability of the railway administration of that of a bailee by executing risk notes in Forms 'A' and 'Z', whereby the railway administration was relieved of all responsibility for loss, destruction or damage to the goods or any part thereof arising from any cause whatsoever, except upon proof of misconduct on the part of the railway administration or its servants. The wagon in question reached Igatpuri, where it was found intact by R.M. Kharkar (D.W. 8), the Guard travelling on the goods train in question between Igatpuri and Bhusaval. The train left Igatpuri at 21.05 hours on the 3rd November 1949 and it reached Bhusaval on the following morning at 6 a.m., when on checking the train, the Guard found that the right hand side door of the wagon was open and although the seal on the left hand side door was intact, there was no rivet on it. Accordingly, the wagon was detached from the train at Bhusaval and placed in the checking shed where the contents of the wagon were checked on the 6th November 1949 by the Checking clerk (D.W. 1), in the presence of the Watchman (D.W. 9). As a result of the verification made by them, it was found that 5 bales Forming part of the consignment in question were missing. The wagon was thereafter re-sealed and riveted and dispatched to Gaya, where it arrived on the 16th November, 1949. On the 18th November, 1949, the Goods clerk (D.W. 7) of Gaya railway station delivered the remaining 36 bales to the plaintiff, in whose favour the railway receipt had been duly endorsed by the consignor. Thereafter the plaintiff preferred his

claim under Section 77 of the Railways Act, and ultimately he received a letter (Ex. 10/a), dated the 2nd December, 1950, from the Chief Commercial Manager of the then East Indian Railway, whereby he was informed that from enquiries made by the railway authorities, it transpired that the part of the consignment was lost "due to a Running Train theft between Nandgaon and Bhusaval over the G. I. P. Railway, a circumstance beyond control of the Railway Administration". The plaintiff, however, did not consider the reply from the railway authorities to be satisfactory and served a notice (Ex. 4) under Section 80, Code of Civil Procedure, upon the General Manager of the East Indian Railway and instituted Money Suit No. 12 of 1931 against the defendant on the 18th January, 1951 before the expiry of the period of sixty days contemplated by Section 80, Code of Civil Procedure. That suit proceeded to trial before the 4th Additional Subordinate Judge of Gaya, who by his order, dated the 6th May, 1952, permitted the plaintiff to withdraw the suit with liberty to sue afresh, and then the present suit was instituted by the plaintiff on the 12th May, 1952.

3. The defendant contested the claim of the plaintiff on the ground of limitation and also on the ground that there was no negligence or misconduct on the part of the railway administration or its servants, since the consignment which had been booked at owner's risk had been subjected to theft in running train between Pachoura and Bhusawal, under circumstances beyond the control of the railway administration.

4. The learned Subordinate judge, who tried the suit, negatived the plea of limitation set up by the defendant, holding that the plaintiff was entitled to the benefit of Section 14 of the Limitation Act. On the merits, however, the learned Subordinate Judge came to the conclusion that the plaintiff had failed to prove his case of negligence or misconduct on the part of the railway administration or its servants, and as such he was not entitled to recover any damages from the defendant.

5. In appeal before a learned single Judge of this Court, it was contended on behalf of the plaintiff that the evidence of the Guard (D.W. 8) was not fit to be believed and that upon a proper consideration of the disclosure made by the defendant as to how the consignment was dealt with throughout the time that it was in the possession or control of the railway administration, it should fairly be inferred that the loss of part of the consignment took place on account of misconduct on the part of the railway administration or its servants. Both these contentions were overruled by the learned single Judge who, accordingly, dismissed the plaintiff's appeal. The question of limitation was not, however, re-agitated by the defendant. Being aggrieved by the decision of the learned single Judge, the plaintiff has preferred this appeal under clause 10 of the Letters Patent.

6. The first contention of Mr. S.N. Dutt who appeared in support of the appeal is that upon a proper consideration of the evidence on the record it should be held that the claim of tire Guard (D.W. 8) that he had checked the train at Pachoura is false. In course of his deposition, the Guard (D.W. 8) supported the case set up by the defendant in paragraph 5 of its written statement by saying that in the journey between Igatpuri and Bhusaval, he had checked the train at two intervening stations, namely, Niphad and Pachoura, and at both these stations, he had found all the wagons intact, D.W. 8 further said that the train had stopped for 41 minutes at Niphad and for 52 minutes at Pachoura, and he had checked the train at both these places. On the journey between Niphad and Pachoura, the train had halted for 10 minutes at Nandgaon and for 13

minutes at Chalisgaon, but he had not checked the train at these stations for want of sufficient time. The Guard further said that in between Pachoura and Bhusaval, the train had stopped at Maheji for 15 minutes, but he did not check the train there. According to the Guard (D.W. 8), Chalisgaon was not a scheduled stopping station, but Nandgaon, Pachoura and Maheji were scheduled stoppages, and Nandgaon was a seal-checking-station. The Guard (D.W. 8) had also deposed in the earlier suit which was ultimately withdrawn and it appears from his previous deposition (Ex. 12/a) that at Pachoura, the schedulded stoppage was only 20 minutes, but the train had been detained there by another 32 minutes because precedence had to be given to a Mail train. In his deposition in the present suit, the Guard stated that the Watch and Ward staff were in attendance at Nandgaon as also in the Yard at Chalisgaon, though not on the main line where his train had stopped. He further stated that there was arrangement for guarding the train also at Pachoura, but he did not ask the Station-master to give a Watch and Ward staff to him for checking the train, and there he checked the train alone. In his previous deposition (Ex. 12/a), however, to which his attention was drawn, he had said that there was no Watch and Ward arrangement at Nandgaon or at Chalisgaon or even at pachoura, As to Maheji, he said in Ex. 12(a) that there was no Watch and Ward arrangement there, and he did not depose anything to the contrary in the present suit. It is, therefore, manifest that on these important matters, his evidence in the present suit is in sharp conflict with his former deposition. Therefore, it is not possible to accept implicitly all that he has said about checking the train at Pachoura. The claim of D.W. 8 that he had checked the train at Pachoura also appeals highly doubtful on the ground that according to him, it had taken him 30 minutes to check the train, though the scheduled stoppage was only for 20 minutes. Besides, on his own showing, he had not checked the train at Nandgaon, Chalisgaon and Maheji. It seems to me, therefore, that after having checked the train at Niphad, where the wagon was found intact, the Guard (D.W. 8) had not checked the train at any of the other intervening stations, namely, Nandgaon, Chalisgaon, Pachoura and Maheji, through which the train passed at night between about 1.30 a.m. and 5 a.m., and that he has falsely stated in the present suit that there was Watch and Ward arrangement at Nandgaon, Chalisgaon and Pachoura.

7. The fact that the Guard (D.W. 8) has falsely claimed to have checked the train at Pachoura is also apparent from the circumstance that in the letter (Ex. 10/a), which the Chief Commercial Manager had sent to the plaintiff in December, 1950, that is to say, more than one year after the occurrence, no mention whatever was made of the fact that the wagon was found intact at Pachoura. What was stated in that letter was that the loss of part of the consignment had taken place due to a running train theft between Nandgaon and Bhusaval. The letter (Ex. 10/a) constituted the final reply of the railway administration to the plaintiff's claim, and it is expected in the normal course that every relevant fact as to how the consignment had been dealt with throughout the time that it was in the possession or control of the railway administration, had by then been fully investigated. Therefore, if really the Guard (D.W. 8) had checked the train at Pachoura and found the Wagon intact there, then the letter (Ex. 10/a) would have said that the loss to the consignment had taken place between Pachoura and Bhusaval, instead of saying that it had occurred between Nandgaon and Bhusaval.

8. In support of his claim that he had checked the train at Pachoura, the Guard (D.W. 8) relied upon his own Memo (Ex. M), which contains an entry showing that he had checked the train both at Niphad and Pachora. This document was produced in Court for the first time when D.W. 8 came to depose in this case, and it was all time in his custody. The Railway Inspector (D.W. 3)

appears to have examined the Guard (D.W. 8) in course of his enquiry, but he does not say that the Guard had shown his Memo (Ex. M) to him. In his report (Ex. F) submitted on the 28th June, 1950, the Inspector (D.W. 3) made no mention whatsoever of the fact that the Guard (D.W. 8) had checked the wagon and found it intact at Pachoura. Such a stand was taken by the defendant for the first time in its written statement. I am, therefore, inclined to accept the contention of Mr. Dutt that the claim of D.W. 8 that he had checked the train at Pachoura is false.

9. Mr. P.K. Bose appearing on behalf of the defendant-respondent contends that we are entitled to interfere with the decision of the learned single judge on any question of fact, because even though the decision was given in a first appeal, the ambit of this appeal under the Letters Patent is not more extensive than that of an appeal from a judgment in a second appeal. In support of his contention, the learned counsel has relied upon *Ramsarup Singh v. Muneshwar Singh*[1] , which is a Bench decision of this Court. In that case, Mahapatra, J., took the view that a finding of fact receded by a single Judge in dealing with a first appeal is not open to challenge within the scope of a Letters Patent appeal unless it is shown to be based on no evidence or inconsistent with any particular position in law, because

> "otherwise an absurd situation will arise, such as, the limits of interference by a High Court in a second appeal from a decree of a Subordinate Court will be much less, while the scope against a decree of a single Judge of the High Court will be wide and circumspective like that in an appeal from an original decree".

His Lordship noticed that clause 10 of the Letters Patent does not in terms impose any restriction upon the scope of interference in a Letters Patent appeal, but took the view that merely for that reason it cannot be argued that the appeal will be in respect of everything arising in that case, inasmuch as

> "the statutory canons about the scope of interference in the different appellate jurisdictions of the High Court as provided in the Code of Civil Procedure or otherwise accepted cannot be ignored while dealing with an appeal under the Letters Patent",

with great respect, I find myself unable to subscribe to the reasonings of the learned Judge. Under clause 10 of the Letters Patent, an appeal lies against a decision of a single Judge sitting on the original jurisdiction in testamentary, matrimonial or company law cases, and instances are not wanting of cases in which the decision of asingle Judge on question of fact in such matters has been reversed by a Bench dealing with a Letters Patent appeal. It is impossible to imagine that whereas clause 10 of the Letters Patent permits interference on facts with a decision of a learned single Judge sitting on the original jurisdiction of this Court, the same clause restricts the power of interference of the Letters Patent Bench to question of law only, in an appeal from a decision in a first appeal. Besides, it is well established principle of law that, unless the statute otherwise provides, an appellate Court has the same power of dealing with all questions, either of fact or of law, arising in the appeal before it, as that of the Court whose judgment is the subject of scrutiny in the appeal. It is only on account of the special provision contained In Section 100 of the Code of Civil Procedure that this Court is precluded from interfering with findings of fact arrived at by the lower appellate Court unless any of the contingencies envisaged in clauses (a),

(b) and (c) of that section is found to exist. Therefore, second appeals stand on an exceptional footing merely because of the special provision contained in Section 100 of the Code. The law of procedure does not contemplate any other restriction on the power of an appellate Court. Therefore, on general principles, every question of fact or of law, except in cases to which Section 100 of the Code applies, must be deemed to be at large and amenable to the decision of the appellate Court. In the normal course, the decision in Ramasarup Singh's case, AIR 1964 Patna 76, would have been binding upon us, being a decision of a Division Bench. But a perusal of the Judgment of Mahapatra, J. : itself shows that his Lordship elaborately considered the evidence upon which the finding of fact of the learned single Judge of this Court was based in that case. His Lordship declined to interfere with the finding of fact observing :

> "When the documentary evidence is in support of the plaintiffs, their oral testimony gains substantial corroboration. Viewed in that light, the learned Judge's acceptance of the oral evidence given on the side of the plaintiffs cannot be assailed".

It will thus appear that his Lordship did not dismiss the appeal in limeline and, therefore, the observation of his Lordship as to the scope of a Letters Patent appeal arising from a decision in a first appeal are in the nature of obiter dictum. Further, it will be noticed that Tarkeshwar Nath, J., who was the other member of the Bench expressed his concurrence with the views of Mahapatra. J., with a note in the following terms :

> "Finding of fact arrived at by a learned Judge while deciding a First Appeal should not be interfered with unless there is a gross error in the judgment. The main question which arose for consideration in this case was as to whether plaintiffs 10 to 15 had taken settlements of the lands in question. Learned Judge on a consideration of the oral and documentary evidence believed their case of settlement and possession and that conclusion is supported by the evidence referred to by my learned brother."

It is manifest that his Lordship Tarkeshwar Nath, J., was not inclined to equate a Letters Patent Appeal from a decision of a single Judge of this Court in a first appeal with an ordinary second appeal, because in a second appeal, an interference on a question of fact is not permissible, howsoever gross the error on the point of fact may be. I am, therefore, of the opinion that we are not bound by the decision in Ramsarup Singh's case, AIR 1964 Patna 76; and that it is open to us to arrive at our own conclusion on all questions of fact, as of law, arising in this case.

10. The learned single Judge while dealing with the evidence of the Guard (D.W. 8) observed in general terms that it has been corroborated by the documentary evidence adduced in this case. But he has not noticed the contradictions between his evidence and his former deposition (Ex. 12/a), to which I have made reference above. The learned Judge has also not noticed the fact that in the letter (Ex. 10/a), nothing was said that the wagon was checked and found Intact at Pachoura. The learned Judge has also not investigated the fact whether Watch and Ward arrangements had been provided or not at the various intervening stations Nandgaon, Pachoura and Maheji, which were all scheduled stoppages, and among them Nandgaon was a seal checking station. The goods train in question had passed through these stations during the night time and, therefore, it was a moot question for consideration as to whether the failure to provide

for Watch and Ward arrangement at these intervening stations had any bearing upon the other question arising in this case, namely, that of misconduct on the part of the railway administration or its servants. In these circumstances, with respect, I do not feel bound to accept the appraisement of the evidence, particularly of the Guard (D W 8) made by the learned single Judge. My own conclusion on this part of the case is that throughout the journey between Niphad and Bhusaval, the Guard had signally failed to check the wagon at any point. He had not cared to check the wagon even at Nandgaon which was a seal-checking station; nor had he performed this duty at Pachoura where the train had halted for not less than 52 minutes. Since the Guard was responsible for the safety of the consignments put under his care, it was undoubtedly his duty to check the seals even Chalisgaon and Maheji, where the haltages were for 13 minutes and 15 minutes, respectively, because if it was his duty to check the seals at Nandgaon, where the haltage was for 10 minutes only, there was no reason why he had not sufficient time to check up the wagons at the two other stations, where the haltages were for more than 10 minutes. Since the journey was performed during the night time, when thieves and bandits are usually more active, and Nandgaon, Pachoura and Maheji were scheduled stoppages, ordinary prudence enjoined upon the railway administration to provide for Watch and Ward arrangement at all these stopping stations in order to keep proper guard upon the wagons of the train.

11. This brings us to the second question which arises for our decision in this appeal, that is to say, whether upon the facts as found above, the liability for the loss of part of the consignment can be fastened upon the railway administration. For determination of this question, we have to look to the provision of Section 72 of the Railways Act (Act No. IX of 1890) as it stood in November, 1949. That section, so far as it is material to our present purposes provided :

> "72(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 Section 151, Section 152 and 161 of the Indian Contract Act, 1872.
> (2) An agreement purporting to limit that responsibility 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,
> (b) is otherwise in a form approved by the Central Government, and
>
> (C) ....."

Among the forms envisaged in Sub-Section (2) (b) of Section 72, quoted above, were the Form "A" (Ex. H) and Form "Z" (Ex. H/I) which were executed by the authorised agent of the consignor in relation to the consignment in question. Section 72 was amended by the Amendment Act (56 of 1949) which came into force with effect from the 1st August, 1950, and again by the Amendment Act (39 of 1961) which came into force with effect from the 1st January, 1962. But we are not concerned with these amendments of the section because they were made subsequent to the transaction which we are considering in this case. Under risk note "A" (Ex. H), the railway administration was absolved from all responsibility "for the condition" in which the consignment might be delivered to the consignee at the destination and "for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the

railway administration or its servants". The other risk note in Form "A" (Ex. H/1) provided that in consideration of being charged freight "at special reduced or owner's risk rates instead of at ordinary tariff or railway risk rates", the consignor agreed and undertook" to hold the said railway administration harmless and free from all responsibility for loss, destruction or deterioration of or damage to all or any of such consignments from any cause whatsoever, except upon proof that such loss, destruction, deterioration of or damage arose from the misconduct on the part of the Railway Administration's servants" Risk note "Z" is in the same terms as risk note "B". The position in law, therefore, is that whereas in the absence of these two risk notes the plaintiff could have held the railway administration liable for loss of the part of the consignment upon proof of failure on its part to take the same care of the consignment as a man of ordinary prudence is expected to take of his own goods, or in other words upon proof of the fact that the loss occurred by reason of the negligence of the railway administration or its servants, the plaintiff cannot in face of these two risk notes succeed in the action unless he proves whether, from the facts disclosed by the railway administration or from his own evidence, that the loss arose from misconduct on the part or the railway administration or its servants. This legal position is so well settled that it is unnecessary to cite any decision on the point. The whole question, therefore, if whether the plaintiff has succeeded in proving that it was a case of misconduct on the part of the railway administration or its servants.

12. This brings to the fore the question as to what constitutes misconduct. It is well known that misconduct is not the same thing as negligence, because there may be negligence which is not necessarily misconduct. Misconduct may involve an element of negligence, but it is something more than mere negligence. In the *Governor-General in Council v. Jamuna Das*[2], Sinha J. (as he then was), adopted the following concept of misconduct laid down by a Bench of the Calcutta High Court in *Ralliaram Dingar v. Governor General of India in Council*[3],

> "Misconduct on the part of the Railway Administration or its servants contemplated by risk note Form B under the Railways Act is not synonymous with negligence; for an act to amount to misconduct there must be a greater degree of wrong than is required for negligence. Misconduct is something in the nature, of improper behaviour and is not merely wrongful commission or wrongful omission. An act of misconduct can well be negligence, but a negligent act by itself is not misconduct. Misconduct involves the passing of a moral judgment on the part of the person concerned however slight may be the lapse from rectitude which provokes it."

But misconduct is not confined to immoral conduct and misconduct may also arise from wilful neglect. It will be noticed that the Risk Notes contemplate misconduct not only of the railway servants but also of the railway administration. Therefore, if misconduct were to be confined to immoral conduct or improper behaviour, then it is difficult to imagine how an inanimate body like the railway administration could ever be guilty of misconduct. That is why I think that misconduct may also arise from wilful neglect. In *Durga Datt Shri Ram Firm v. Secretary of State*[4], a Bench of this court held that misconduct means nothing short of wilful neglect. In *Firm Wajid Ali Mohemed Rafiq v. B. and N. W. Railway Co*[5]., it was pointed out that the expression "wilful neglect" means that the act was done deliberately and intentionally and not by accident or inadvertence, so that the mind of the person who does the act goes with it. In *M. and S. M. Rly. Co. Ltd, v. Sundarjee Kalidas*[6], Guha, J. observed :

> "Misconduct is something opposed to accident or negligence. It is the intentional doing of something winch the doer knows to be wrong, or which he does recklessly, not caring what the result may be : "

A similar view was taken by a Bench of this court in *Sheochand Prasad v. Dominion of India*[7], wherein it was observed :

> "Misconduct does not connote anything less than wilful neglect. 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 he. Misconduct as such means 'wilful neglect' and amounts to malfeasance, as opposed to non-feasance."

It may be noted that the expression "wilful neglect, misappropriation, theft, etc." occurred in the old risk note form until they were substituted by new form in 1924, in which the word "misconduct" was used for the first time. It was pointed out by Tames J. in *B. N. Rly. Co. v. Hukum Chand*[8], *(2)* that :

> "I do not consider that there is any necessity for discriminating between the meaning of the term 'misconduct' in the new form and the terra 'willful neglect' in the old. After all, willful neglect is misconduct.....The reasonable view is to hold that the term 'misconduct' means 'willful neglect' including a fortiori anything more culpable and rendering it unnecessary to complicate the form unduly by mentioning theft or criminal misappropriation or criminal breach of
> trust."

In *B. B. and C. I. Rly. Co. Ltd. v. Rajnagar Spinning Weaving Manufacturing, etc. Co. Ltd*[9]*.,* a Bench of Bombay High Court did not approve of the view consistently taken by three Benches of this court in ILR 9 Pat 733 : AIR 1930 Patna 559 (2) and 1957 BLJR 451, that wilful neglect amounts to misconduct. But I prefer to follow the Patna view which, apart from being binding upon us, is in accord with my own view. It will be noticed that even the learned Judges of the Bombay High Court were not prepared to restrict .the meaning of the word "misconduct" to immoral conduct. One of the learned Judges, Kemp Acting C.J. took the view that "the word "misconduct" 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 other learned Judge, Murphy, J. observed that the word "misconduct" implies some action wherein the servants of the railway have done wrong, or have omitted to take a precaution imposed on them by the rules under which they work, and a very general view of railway arrangements and of the duties of the railway administration is not really relevant in a case under the risk note "B". In *B. N. Railway Co. Ltd. v. Dhanjishah*[10]*,* (Sic) Mukerji, J. observed that :

> "Culpable negligence or gross negligence, as distinguished from ordinary negligence, may amount to 'misconduct'".

Upon the authorities, therefore, it is manifest that acts of wilful neglect or of gross negligence may also amount to misconduct. But as pointed out by Raj Kishore Prasad, J. in Sheochand Prasad's case, 1957 BLJR 451 no cut and dried formula can be laid down for general application to all cases and that the question whether misconduct has been established or not, depends on the facts and circumstances of each case. We are, therefore, driven back to the facts and circumstances of the present case in order to decide whether the omission of the railway administration to provide for Watch and Ward arrangements at the various stations through which the good train in question travelled during the night and the failure of the Guard (D.W. 8) to perform his duty of checking the wagons at the various stoppages between Nandgaon and Bhusaval did or did not amount to misconduct.

13. Mr. P.K. Bose contended that the omission to provide for Watch and Ward arrangement at the different stopping stations was at best a deficiency in the railway administration which cannot amount to misconduct, as pointed out in the Bombay case, ILR 54 Bom 105 referred to above. But the Bombay case is distinguishable on facts from the present case. There the evidence of the Guard which was accepted by their Lordships was that on each occasion of the train stopping at a station, he had examined the doors of the wagons on both sides of the train and patrolled the train to see whether the Wagons were intact or not. Therefore, the deficiency arising from the lack of watch and difficiency arising from the lack of watch and ward arrangement was in some measure offset by the vigilance of the Guard who was not guilty of breach of his duty in the matter. In the instant case, the Guard was undoubtedly wholly unmindful of his obvious duty of keeping a watch over the wagons of the
train. The rules of the Railway Administration undoubtedly required the Guard to
perform this obvious duty. The necessity for the negligence of the Guard was all the greater on account of the fact that there was no other arrangement for guarding the train at any of the stopping stations particularly when it was the night time. The inference is irresistible that the Guard acted recklessly in the discharge of his duty in not caring what the result might be of his failure to keep watch over the wagons of the train at the different stoppages. The guard was so reckless that he did not check the seals of the wagons even at Nandgaon which was a Seal checking station. He was not less reckless in the performance of his duty when he failed to check up the seals or the wagons at Pachoura, where the train had halted for no less than 52 Minutes. In my opinion. the disclosure made by the Railway Administration itself shows that the wagon in question was left to its fate and not guarded at all even at the scheduled stoppages at Nandgaon, Pachoura and Maheji, after the last check which was at Niphad, and the Guard (D.W. 8) displayed gross negligence amounting to willful neglect of his duty by not taking the least precaution for the safety of the consignment at any of, the stations at which the train had stopped for a sufficiently long time during the night. Upon the materials on the record, I am, therefore, of the opinion that the loss of the part of the consignment must be attributed to the misconduct of the Railway Administration's servants, particularly the Guard (D.W. 8).

14. Mr. Bose relied upon AIR 1949 Patna 119; *Dominion of India v. Ado Shaw Aklu Shaw*[11], and two unreported Bench decisions of this Court, one in Second Appeal No. 2153 of 1948 decided on the 20th July 1954 and the other in F. A. No. 429 of 1958 decided on the 28th November 1961, in all of which the Railway Administration was absolved from liability on the ground that misconduct had not been established. But these decisions are really of no assistance in the decision of the present case, because they all proceeded upon their own facts and circumstances which were not parallel to the facts and the circumstances of the present case. As pointed out by

Rajkishore Prasad, J., in 1957 BLJR 451, the question whether misconduct has been established or not depends on the facts and circumstances of each case, and on facts no two oases are identical. It is, therefore unnecessary to examine the various decisions cited by Mr. Bose for arriving at a decision in the present case. As I have said, upon the facts and the circumstances of the present case, it must be held that the loss to part of the consignment was due to the gross negligence or wilful neglect of the Guard (D.W. 8) amounting to his misconduct within the meaning of the risk note "Z" (Ext. H/1). It follows that the defendant is liable to the plaintiff for the loss suffered by him by reason of non-delivery of the part of the consignment.

15. The plaintiff has laid his claim at Rupees 7,626/1/-, which includes Rs. 508/2/- on account of profit and Rs. 721/10/- on account of interest, both calculated at the rate of 9 per cent. The rest of the claim is on account of the value of the five bales besides excise duty paid thereon and cost of notices under Section 77 of the Railways Act and Section 80 of the Code of Civil Procedure . Mr. Dutta concedes that the claim on account of profit, and for interest for the period prior to the institution of the suit, is not admissible and the claim to that extent must be disallowed. Mr. Dutta, however, contends that the plaintiff is entitled to interest pendente lite and future interest, and that appears to me to be reasonable.

16. The result, therefore is that the judgment and decree of the learned Single Judge and of the trial court are set aside and the suit is decreed for a sum of Rs. 6,396/5/- with interest pendente lite and until realisation at the rate of 6 per cent per annum. The appeal is accordingly allowed with proportionate costs in all the three courts.

Misra, J.

17. I agree.

Appeal allowed.

Cases Referred.

[1] AIR 1964 Pat 76
[2] AIR 1949 Pat 119
[3] 48 Cal WN 554
[4] ILR 9 Pat 733
[5] AIR 1941 All 164
[6] ILR 60 Cal 996
[7] 1957 BLJR 451
[8] AIR 1930 Patna 559
[9] ILR 54 Bom 105
[10] ILR 57 Cal 634
[11] AIR 1957 Pat 219, 1957 BLJR 451