The Commissioner of Income-tax, Delhi, Ajmer, Rajasthan and Madhya Bharat
v.
Shrimati Damayanti Sahni

Harnam Singh, J.

As pointed out in the Allahabad case if the Legislature had intended that the word 'individual' in sub-clause (ii) should mean only the father and not the mother there was no reason why they should not have used similar language as in sub-clause (i) and said 'from the admission of the minor to the benefits of partnership in a firm in which his father is a partner.'

With very great respect I follow the decision given in Shrimati *Chanda Devi* v. *The Commissioner of Income-tax* (1), and answer the question referred to us in the affirmative. No order as to costs.

Weston, C. J.

WESTON, C.J.—I agree.

APPELLATE CIVIL

Before Kapur and Soni, JJ.

M/S D. D. JAISHI RAM, CO.—*Plaintiffs-Appellants*

versus

DOMINION OF INDIA,—*Defendant-Respondent.*

Regular First Appeal No. 70 of 1950

1952

August, 27th

The Indian Railways Act (IX of 1890)—Section 72—Liability of the Railway for loss of goods—Effect of the execution of risk notes 'A' and 'B' by the consignor.

Four bales of cotton piece-goods were sent from Madras to Amritsar under Railway Receipt, dated 9th August 1947. These goods reached Amritsar after a long period and were taken delivery of on the 1st January 1948. At the time of the delivery of the goods it was found that one of the bales containing 186 pieces was absolutely empty. The plaintiffs who were the consignees of the Railway Receipt sued the Dominion of India for the price of the missing pieces which were valued at Rs 6,343-12-0. The consignor had executed risk notes 'A' and 'B' at the time the goods were despatched.

Held, that where risk notes 'A' and 'B' are both executed, it is not open to the consignor to agitate in a Court of law that packing was proper, because when risk note

(1) A.I.R. 1951 All. 586.

'A' is signed by the consignor he agrees that the condition of the package is not satisfactory. Therefore the consignor is not entitled to get advantage of the provisos (a) and (b) of risk note 'B'. Thus the railway administration is not liable for the loss of the goods where misconduct on the part of the railway has not been proved.

First Appeal from the decree of the Court of Shri Mani Ram, Sub-Judge, Ist Class, Amritsar, dated the 14th January 1950, dismissing the plaintiffs' suit and leaving the parties to bear their own costs.

Y. P. GANDHI and HARI CHAND BHATIA, for Appellant.

F. C. MITAL and K. C. NAYAR, for Respondent.

JUDGMENT

KAPUR, J.—This first appeal is brought by the plaintiffs against a judgment and decree of Mr. Mani Ram, Subordinate Judge, First Class, Amritsar, dated the 14th January 1950, dismissing the plaintiffs' suit for the recovery of Rs 6,343-12-0. Kapur, J.

Four bales of cotton piece-goods were sent from Salt Cotaurs (Madras) to Amritsar under railway receipt No. 23600/12, dated the 9th August 1947. These goods took a long period of time to reach Amritsar and delivery was taken on the 1st January 1948. At the time of the delivery of these goods it was found that one of the bales was absolutely empty and all the goods in it were missing. Because of this condition of the goods an open delivery was asked for which was given and it was discovered that the number of missing pieces was 186, and these have been valued at Rs. 6,343-12-0. The four bales were booked by S. M. Meera Sahib to self, and it appears that this railway receipt was endorsed in favour of the plaintiffs.

The plaintiffs wrote to the G. I. P. Railway who by their letter (P. 7) replied that they were making enquiries in regard to the goods. On the 7th January 1948, the plaintiffs gave a notice under section 80, Civil Procedure Code, in which they stated—

> " * * out of the four bales the contents of one bale were totally missing. * * *

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On examining the contents 186 pieces valued at Rs 6,343-12-0 were found to be short."

and they called upon the defendants to pay this sum of money. On the same date a similar notice (P. 9) was given to the General Manager, East Punjab Railway, Delhi, under section 77 of the Indian Railways Act and another (P. 10) to the General Manager, Madras and Southern Mahratta Railway. Notice was also given under section 80, C.P.C. Some correspondence passed, and ultimately a suit was brought for the recovery of Rs 6,343-12-0 on the 5th October 1948, alleging that at the time of taking of delivery it was discovered that the contents of one of the bales had been tampered with and 186 pieces of goods were short. The written statement of the defendants was filed through one Mr Kidar Nath Khosla, Advocate, but it is a most laconic document and does not do much credit to the Railway Administration or to the gentleman who was appearing for it. Suffice it to say that in paragraph 2 of the written statement the defendants stated that S.M. Meera Sahib had booked the consignment to self and risk notes 'A' and 'B' were executed which absolved the defendants of their liability if any. All the other allegations were denied, and it was not specifically stated whether there was any loss or there was no loss and other defences which the Railway could take were not specifically taken.

On the 28th December 1948, two issues were framed by Mr J. N. Kapur, Subordinate Judge, First Class, and they were:—

(2) Whether the loss is due to the negligence or misconduct of the Railway employees and what is its effect?

(3) What is the price of the goods?

An application under Order XIV, rule 5, Civil Procedure Code, was filed by the plaintiffs—the exact date of the application is not given—in which they alleged that the defendants had not

pleaded loss, misdelivery or theft and therefore the issue with regard to loss due to the negligence or misconduct of the Railway employees did not arise. They also took objection to the plea of exclusion of liability due to risk notes 'A' and 'B' as they, the risk notes, had not been produced and even if an issue could be raised in regard to them the Railway had first to prove that there had been a loss of the goods in dispute. The learned Judge on the 30th December 1948, framed another issue, "Whether the goods were lost?" and the case then proceeded to trial.

The plaintiffs produced two witnesses by which they proved the value of the goods in dispute. The defendants produced three witnesses, and the learned Judge held that loss had occurred at the Delhi Railway Station and that the goods were booked under risk notes 'A' and 'B', and as there was no proof of misconduct on the part of the defendants or their employees, the suit was dismissed with costs. The plaintiffs have come up in appeal to this Court.

Mr Gandhi for the appellants has strenuously argued that loss of the goods has not been proved and has taken us through the evidence which he has analysed at great length. The evidence shows that the goods were despatched on the 9th August 1947, and they left Bezwada (now Vijayawada) on the 12th August 1947, in wagon No. 2626. This wagon reached New Delhi on the 3rd September 1947, at 6-30 a.m.,—*vide* D. W. 3/1 at page 31 of the printed paper book, and left New Delhi for Delhi. There this wagon was detached and the goods in dispute were transhipped into another wagon No. 23724 N.W. which was labelled for Ambala Cantonment. The entries in the yard register of Delhi Junction as shown by Exhibit D.W. 3/2 and deposed to by D.W. 3 show that this wagon remained at Delhi Junction Station up to the 29th September 1947, when it left for New Delhi. The document, Exhibit D.W. 3/2, also shows that at 7 o'clock in the morning the presence of this wagon was noted down in the yard register on the 4th to 6th, 16th to 19th and on the 29th September

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1947, and on that day the wagon left Delhi for New Delhi.

D.W.I., Goods Clerk, Delhi transit, has deposed that wagon No. 2626 arrived at Delhi on the 3rd September on which the seals were intact and the contents of this wagon were checked and the goods in dispute correctly arrived at Delhi and were put in C.R. Van No. 23724 N.W. on the same day and this wagon was sealed and sent to the yard for despatch to Ambala Cantonment and that due to communal disturbances and disorder at the Railway Station the wagon was sent to New Delhi for checking and rechecking as a checking department had been opened there. He prepared a summary of the wagon No. 23724 in which the goods in dispute had been loaded at Delhi. This summary or a copy of this summary has been produced as D.W. 1/1 and is at page 32 of the paper book which shows that 52 packages including the four bales with mark 15 were put in this wagon, but he could not say as to where this wagon remained from the 3rd September 1947, to the 11th December 1947. He had put two seals one of which is Exhibit D.1 and the other one was similar. When the goods were rechecked it was found that one of the seals was no longer there and another seal which is Exhibit D.2 was put on the wagon. This bears the date 11th September 1947. According to D.W.1 seals like Exhibit D.2, are put on if the original seal has been tampered with or is broken. In those days, according to this witness, the traffic was irregular and there was no labour available for the handling of loads.

A goods clerk of New Delhi, D.W.2, has stated that wagon No. 23724 was received at New Delhi on the 11th December 1947 from Delhi transit. It had two seals, Exhibits D.1 and D.2. The wagon was checked on the 11th December in the presence of the Railway Police and Watch & Ward Department and the goods were checked. An entry in regard to this was made in the check register a copy of which has been produced as Exhibit D.3 which shows that on one side there

was the 'T' seal and on the other side 'T.B.' *kacha* seal. The wagon was opened and checked and it was found that instead of 52 bags there were only 47 and one of the bales out of the goods in dispute marked 15/4 was quite empty. On the same day a telegram was sent to the Railway Police and Watch & Ward Department, New Delhi Railway Station, by hand which gave all this information which was contained in Exhibit D.3. This telegram is marked Exhibit D.4 Really, it was only a communication sent from one station to another by hand. He also deposed that according to the procedure a copy of the summary was placed in the wagon and when that wagon was rechecked at New Delhi Station, remarks would be made on the summary found in the wagon and it would be replaced in the wagon itself. This is all the evidence that there is on the record.

From this evidence the learned Judge concluded that there was a loss, and with this finding I agree. Up to the time that wagon No. 2626 reached New Delhi there was no evidence of any tampering, and when the goods were taken out from that wagon they were found in proper condition. They were then loaded in wagon No. 23724 N.W. A summary was prepared showing that four bales were loaded. Exhibit D. W. 3/1 to Exhibit D. W. 3/3 show the position of the wagon in the Delhi yard and also that it remained there up to the 29th September 1947. when it was sent to New Delhi. Originally there were two seals, one of which is Exhibit D.1 and another one was of a similar kind. On the 11th September 1947, another seal was put on which is marked Exhibit D.2 which according to the evidence was put when the original seal was broken. From the 11th September to the 11th December 1947, there is no evidence that anybody interfered with the wagon. It was opened on the 11th December 1947, when one of the bales of the plaintiffs was found to be empty. It was marked 15/4, and immediately information of this loss was given to the Watch & Ward Department and the Railway Police, New Delhi. There is

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also evidence to show, and it is within the knowledge of every one, that in the first and the second weeks of September 1947, there were communal disturbances in Delhi and there was influx of a large number of refugees. Whatever happened to the goods in dispute must have happened between the 3rd September 1947, and 11th September 1947, when Exhibit D. 2 was put on as the date of this document shows. There is no allegation, still less proof, that the goods are being withheld by the Railway or any of the servants of the Railway. All that has been proved is that when the wagon was reopened on the 11th December 1947, one of the bales was found to be empty. On this evidence I am of the opinion that the finding given by the learned Judge that the goods had been lost should, as I have said before, be sustained.

The next question to be decided is what is the liability of the Railway under these circumstances. The finding of the learned Judge of the Court below is that the goods were booked under risk notes 'A' and 'B'. Apart from the fact that there does not seem to have been any controversy on this subject in the Court below nor was a specific ground taken on this point in the grounds of appeal in this Court, it has been held in this Court by a Division Bench in R.F.A. 232 of 1947, a judgment of the Chief Justice and myself, dated the 4th March 1952, and in R.F.A. 73 of 1948, again a D.B. judgment of the Chief Justice and myself, that if it is shown that the railway receipt itself refers to risk notes, the goods must be taken to have been despatched under those risk notes unless it is shown by the consignor or the consignee that the risk notes were not executed by him. I would therefore hold that the goods were despatched by the consignor under risk notes 'A' and 'B' as shown in the railway receipt.

The next question to be decided is what is the effect of the goods having been sent under risk

notes 'A' and 'B'. Before the amendment of 1949 section 72 of the Indian Railways Act was—

> " (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.
>
> (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, and
>
> (b) is otherwise in a form approved by the (Central Government).
>
> (3) Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration."

I have already held that the goods were sent under risk notes 'A' and 'B'. Risk note 'A' is used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The relevant words of this risk note are—

> "I/We, the undersigned, do hereby agree and undertake to hold the said Railway Administration over whose Railway the said goods may be carried in transit from.....station to.....station

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harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at 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's servants."

Risk note 'B' is used when the sender despatches goods at a "special reduced" rate or at "owner's risk", and the relevant words of this note are—

"I/We, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the Railway Administration or its servants; provided that in the following cases :—

(a) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accident to trains or to fire.

(b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway

Administration on or before delivery,

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

Mr Gandhi's argument was that this is a case of non-delivery and therefore the proviso in risk note 'B' applies and as there has not been a proper disclosure by the Railway Administration as to how the consignment was dealt with throughout the time it was in their possession he was not bound to prove any misconduct which in this particular case, at any rate, could be fairly inferred from the evidence of the defendants. He has referred to several cases which I will deal with presently.

Mr Fakir Chand Mital on the other hand has submitted that the fact that risk note 'A' was executed conclusively proves that the packing was defective and as it is a case of loss the proviso given in risk note 'B' does not apply and also that it is not a case of non-delivery of the whole of the consignment or of the whole of one or more packages forming part of the consignment nor is it a case of pilferage from a package or packages which were properly packed as required by clause (a) of this risk note.

In my opinion the contention raised by counsel for the defendants-respondents must be accepted. I shall deal first with risk note 'A'. When this risk note is signed by a consignor he agrees with the Railway Administration that the

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condition of the package is not satisfactory. When he does so, I cannot see how he later on can turn round and object in a suit brought against the Railway Administration that the packing was in fact in a sound condition. The term of the risk note must, in my opinion, prevail.

In *the Great Indian Peninsula Railway Company* v. *Messrs Chakravarti Sons & Company and others* (1), it was held by a Division Bench of the Calcutta High Court that when a consignor agreeing with the Railway Company that the condition of the packages is not satisfactory, signs a risk note in the form 'A', it cannot afterwards be made a matter of objection in a suit upon the contract that the packages were in a sound condition. The risk note will prevail.

In *Mafat Lal Gogal Bhai* v. *B.B. & C.I. Ry. Co. Ltd. and another* (2), it was held that if the consignor of goods agrees that the condition of the packages is not satisfactory, he cannot afterwards turn round and say that the packages were in good condition.

Gupta, J., in *Dominion of India* v. *Guruprosad Ram Gupta and others* (3), held that where the consignor has executed risk note 'A' it must be taken that the consignor admits the defective packing and in such a case it is the bounden duty of the Court to take into consideration the provisions of this risk note, and as by risk note 'A' the consignor admits defective packing the proviso (b) of risk note 'B' does not come into operation.

In *Bhupendra Kumar Choudhury* v. *Indian Union and others* (4), it was held by Roxburgh, J., that by executing risk note 'A' a consignor recognises that the package was defective.

I am in respectful agreement with this view and hold that where a consignor does execute

(1) 32 C.W.N. 53.
(2) A.I.R. 1931 Cal. 489.
(3) A.I.R. 1949 Cal. 679.
(4) 55 C.W.N. 251.

risk note 'A' he admits that the packing is defective, and he cannot, in my opinion, when a suit is brought by him on the basis of that contract, turn round and say that the defect in packing did not fall within the ambit of risk note 'A'.

The question then arises whether the proviso to risk note 'B' applies in a case where risk note 'A' has been signed. In the present case there is no allegation that the whole of the consignment has not been delivered nor that any whole package out of this consignment has not been delivered. The case for the plaintiffs at its highest would be that out of the four bales that were sent from Salt Cotaurs (Madras) three whole bales have been delivered and in the fourth bale 186 pieces were missing. I have already held that it has been proved that the goods were lost at the Delhi Railway Station. On that finding the proviso would not be applicable, but even if that finding was not there, in cases where risk notes 'A' and 'B' are both executed, we have to start with the premises that the packing of the consignment was defective so as to come within risk note 'A'. Proviso (a) to risk note 'B' comes into operation only when the non-delivery is of the whole of the consignment or of the whole of one or more packages packed in accordance with the instructions laid down in the tariff. In the present case, as I have held that the packing was defective and that this fact cannot be agitated in this suit, therefore, this proviso cannot be applicable. In *Bhupendra Kumar Choudhury* v. *Indian Union and others* (1), it was held that the execution of risk note 'A' takes the case out of the exception in proviso (a) of risk note 'B' which only operates if the consignment is packed in accordance with the instructions laid down in the tariff.

The combined effect of risk notes 'A' and 'B' has been discussed at some length by Meredith, J., in *Governor-General in Council* v. *Thakursi Das* (2). In that case the consignor had consigned certain bales of cloth from Ahmedabad to Darbhanga executing risk notes 'A' and 'Z'.

(1) 55 C.W.N. 251.
(2) A.I.R. 1948 Pat. 45.

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Risk note 'Z' is for all purposes identical with risk note 'B'. The consignment arrived in a suspicious condition and an open delivery was taken and it was found that there was a shortage worth Rs 66. The learned Judge held that where risk note 'Z' applies, the Railway Administration has to make the necessary disclosure and if the consignor is not satisfied with this information disclosed and wants evidence, the Railway Administration must first submit their evidence at the trial, and if the consignor is satisfied that full disclosure has been made, then he must discharge the onus upon him and he can do so either by showing that misconduct may be inferred from the evidence led by the Railway Administration or he can lead affirmative evidence which will establish misconduct. If the disclosures made do not satisfy the consignor, then it is his duty to call upon the Railway Administration for further and better disclosures, and if he does so, it will be for the Court to decide whether his demand has or has not gone beyond the obligation which lies on the Railway Administration under the proviso, and if the Court is so satisfied, the Railway Administration need go no further and there can be no inference against them from that fact and the plaintiff has to discharge his burden, and if the Court holds that the demand is reasonable and in spite of the Court's direction the Railway Administration does not disclose any further particulars, a presumption will be drawn against them under section 114(g) of the Evidence Act. But if the Railway Administration has made further particulars and no inference can be drawn from the evidence disclosed, then the burden is still on the plaintiff, and he has to discharge it before he can succeed. In this case the observations of Lord Thankerton in *Surat Cotton Spinning and Weaving Mills, Limited* v. *Secretary of State* (1), were followed. It was also held that:—

(i) Where, both risk notes 'A' and 'Z' have been executed, the Railway Administration can take advantage of

(1) 64 I.A. 176.

either of the risk notes exempting it from liability. It can take advantage of risk note 'A' which exempts the Railway Administration from liability even further than the risk note 'Z'.

(ii) The plaintiff having chosen to execute risk note 'A' it is not open to him at the trial to claim that the package was perfect.

(iii) So far as risk note 'A' is concerned there is unconditional burden upon the plaintiff to prove misconduct before he can hope to succeed.

(iv) When risk note 'A' has been executed, there is no duty cast upon the Railway Administration to disclose anything as was the case under the proviso to risk note 'Z', and therefore there can be no penalty for non-disclosure.

In a later case, *Governor-General of India in Council v. Firm Bishundayal Ram Gourishankar* (1), the same learned Judge discussed the meaning of the word "loss" as used in risk note 'A' and section 72 of the Indian Railways Act and held that the word "loss" cannot refer to the loss of the goods but refers to the loss arising from the condition in which the goods are delivered. In other words, risk note 'A' has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and, therefore, the Railway Administration cannot plead the execution of this risk note in bar to a claim based on non-delivery. But this was a case where a consignment of *biris* was despatched in seven packages and two packages were found broken and there was a shortage of 39 seers. But in this case there was only risk note 'A', and, therefore, the provisions of risk note 'B' did not come into play, and it was in these circumstances that these observations were made and even these were

(1) A.I.R. 1948 Pat. 48.

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really obiter as the suit was decided on the ground that no revision lay under section 115 of the Code of Civil Procedure.

The effect of a combined operation of risk notes 'A' and 'B' was discussed in a case to which I have already referred, *Dominion of India* v. *Guruprosad Ram Gupta and others* (1), and it was held that where the consignor has executed both risk notes 'A' and 'B', by the execution of risk note 'A' the consignor admits defective packing, and as he admits defective packing, the case does not come within proviso (b) to risk note 'B', and hence, in such a case, there is no scope for making the presumption against the Railway Company, because of the non-disclosure by the Company as to how the consignment was dealt with throughout the time it was in their possession.

In support of his argument Mr Gandhi has referred to the following cases : The first is *East Indian Railway Company* v. *Piyare Lal-Sohan Lal* (2). That was a case where the consignment was booked only under risk note 'B' and it was held that wilful neglect on the part of the Railway Company was established as goods were sent in a wagon which was sealed only with tin shackles but not locked. It appears that this was a case under the previous risk note 'B' and not the one that is now in force.

In *Ganesh Das-Bisheshwar Lal* v. *East Indian Railway Company* (3), it was held that when a Railway Company relies on risk note 'B' it must admit loss in its pleadings and then the onus will be on the plaintiff to prove that the loss was due to the wilful neglect of the Company. It was held in that case that the words "loss, destruction or deterioration" used in risk note do not cover the case of "non-delivery". But, as I have said, this case being only under risk note 'B' is of no assistance.

(1) A.I.R. 1949 Cal. 679.
(2) I.L.R. 10 Lah. 360.
(3) I.L.R. 6 Pat. 189.

Reference was then made to a judgment of Gentle, J., in *Raigarh Jute Mill Limited* v. *Commissioners for the Port of Calcutta* (1). It was again a case where there was only risk note 'B'.

Gangadhar Ram Chandra v. *Dominion of India* (2), was a case of risk note 'A' but the leakage in transit had been due not to bad packing but to cuts in the bags caused through a flap door gap. Whether this case lays down good law or not, it is not necessary to consider for the simple reason that it is only under one risk note.

G.A. Jolli v. *The Dominion of India* (3), was again a case of risk note 'B' alone. Chatterjee, J., in that case held that the term "loss" in section 72 of the Railway Act and in the risk note means loss of goods by the Railway and does not mean pecuniary or monetary loss to the consignor or the owner, that the Railway must have lost possession of the goods and the Railway for the time being must have been unable to trace them and that proof of non-delivery or misdelivery is by no means conclusive evidence of loss. It was further held that "loss" means the disappearance of the goods and there can be no loss when the goods are not in fact lost but are actually in existence and are available to the Railway for delivery to the consignee. Non-delivery or misdelivery *simpliciter* cannot constitute a loss. But even there the learned Judge held that it depends on the facts and circumstances of each case and non-delivery or misdelivery may be due to loss or it can be due to other causes.

Reliance was then placed on a judgment of Mukerjee, J., in *Governor-General in Council* v. *Patal Paul and Company* (4). That was a case where risk notes 'A', 'B' and 'C' were executed. At the time of delivery it was found that nine bags had been cut and there was shortage of

(1) A.I.R. 1947 Cal. 98.
(2) A.I.R. 1950 Cal. 394.
(3) A.I.R. 1949 Cal. 380.
(4) A.I.R. 1952 Cal. 285.

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goods. The learned Judge held that the words "defectively packed" do not necessarily mean "not packed according to the instructions laid down in the tariff" and as the tariff rules and their existence or non-existence are matters within the special knowledge of the Railway authorities, the mere execution of the risk note 'A' does not necessarily change the onus under the proviso to risk note 'B'. With great respect I am unable to agree with this last portion of the learned Judge's opinion. I have referred to cases and have held that where risk note 'A' is executed it is not open to the consignor to challenge that the packages were not properly packed. The case was really decided on its peculiar facts, and I do not think it is of much assistance to the plaintiffs-appellants.

Janeshwar Lal-Rajeshwar Lal v. *Dominion of India* (1), again was a case of risk note 'A' alone.

Governor-General in Council v. *Hari Ram* (2), was a case where two bales of cotton were sent under risk notes 'A' and 'Z'. On delivery there was a loss in weight in one of the consignments and it was proved that some Railway servants had pilfered the contents of the bales. The plaintiff had accepted the burden of proof and had discharged it by circumstantial evidence. Where the plaintiff establishes misconduct on the part of the Railway servants the Railway Administration does become liable in spite of the language of the risk notes. This case, therefore, again cannot help the plaintiffs.

I hold therefore—

(i) that on the evidence which has been produced it has been proved that the goods in dispute were lost at Delhi Railway Station between the 3rd and the 11th September 1949 and that no misconduct on the part of the Railway has been proved ;

(1) A.I.R. 1951 Punjab 383.
(2) I.L.R. 1950 All. 472.

(ii) that where risk notes 'A' and 'B' are both executed, it is not open to the consignor to agitate in a Court of law that packing was proper ; and

(iii) that because the appellants have executed risk notes 'A' and 'B' they are not entitled to get advantage of the provisos (a) and (b) of risk note 'B'.

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In the result, this appeal fails and is dismissed with costs.

SONI, J.—I agree.

Soni, J.

CIVIL REVIEW

Before Khosla and Falshaw, JJ.

SUBA SINGH,—*Defendant-Petitioner*

versus

NEKI AND OTHERS,—*Plaintiffs-Respondents.*

1952

August, 29th

Review Application No. 37 of 1951

Code of Civil Procedure (V of 1908), sections 114 and 151—Review—Order passed by High Court in Letters Patent appeal—Whether can be reviewed.

Held, that the wording of section 114, Civil Procedure Code, covers an order passed in a Letters Patent appeal. There can be no doubt that judgments, passed in Letters Patent appeals are recognised by the Code of Civil Procedure, under section 109, Civil Procedure Code, they being appealable to Supreme Court or not so appealable. The fact that the Letters Patent appeal is filed under the provisions of the Letters Patent and not according to the procedure laid down in Civil Procedure Code makes no difference whatsoever to the petition for review. If the judgment under review is appealable it falls under section 114 (a) and if it is not so appealable it falls under section 114 (b).

Held further, that if an error patent on the record could not be corrected under section 114, Civil Procedure Code, it could be corrected by entertaining an application for review under the inherent jurisdiction of the Court.