A

UNION OF INDIA

v.

MAHADEOLAL PRABHUDAYAL

February 23, 1965.

B [K. N. WANCHOO, J. R. MUDHOLKAR AND S. M. SIKRI, JJ.]

Indian Railways Act (9 *of* 1890), *ss.* 72 *and* 77—*Risk-note in Form Z—Mode of proof of liability of railway administration—Notice under s.* 77—*When necessary.*

Out of a consignment of 60 bales of piece goods despatched by the Railway, under risk-note Form Z, only 29 bales were delivered to the respondent who was the consignee. By sending the consign-
C ment thus, the consignor got a specially reduced rate but the burden was thrown on him, of proving misconduct on the part of the railway or its servants, if there was a loss of goods. The risk-note also imposed an obligation on the Railway, to disclose how the consignment was dealt with by it, during the time the consignment was in its possession or control. The respondent wrote a letter to the Chief Commercial Manager of the Railway stating that 60
D bales were booked but only 29 bales had been delivered, and that a suit for damages would be filed. The letter was sent within 6 months of the booking of the consignment and contained the details as to how the amount of damage was arrived at. Later on, a notice was given under s. 80 of the Civil Procedure Code, 1908, and a suit was filed for damages. But, before the filing of the suit, there was no demand by the consignor for a disclosure as to how the consignment
E was dealt with by the Railway throughout the period it was in its possession or control. The Railway however, made a disclosure in its written statement as to how the consignment was dealt with throughout that period. Its defence was that, there was a theft in the running train and that was how part of the consignment was lost and not due to any misconduct on the part of the Railway or its servants. Even after the suit was filed and evidence let in at the
F trial, by the railway there was no statement by the respondent at any stage that the disclosure made by the Railway in the written statement or in the evidence, was in any way inadequate. The respondent never told the court after the evidence of the Railway was over, that he was not satisfied with the disclosure and that the Railway should be asked to make a further disclosure. The suit was dismissed by the trial court but decreed on appeal, by the High Court.

G In the appeal to the Supreme Court it was contended that, (i) the suit was barred by s. 77 of the Indian Railways Act, 1890, inasmuch as notice required therein was not given by the respondent, and (ii) under the terms of the risk-note the Railway was absolved from all responsibility for the loss of the goods consigned thereunder, from any cause whatsoever, except upon proof of misconduct of the Railway or its servants, that the burden of proving such
H misconduct was on the respondent and that the respondent had failed to discharge the burden.

HELD: (i) A notice under s. 77 of the Act is necessary in the case of non-delivery which arises from the loss of goods. Though the letter, written by the respondent to the Chief Commercial Manager, was not specifically stated to be a notice under the section it gave all the particulars necessary for such a notice and it was also given within time prescribed. Therefore, the letter was sufficient notice for the purpose of the Act. [149 D-F]

Governor General in Council v. *Musaddilal* [1961]3 S.C.R. 647 and *Jatmull Bhojraj* v. *The Darjeeling Himalayan Railway Co. Ltd.* [1963] 2 S.C.R. 832, followed. A

(ii) The view of the High Court, that there was a breach of the condition relating to complete disclosure, and that on such breach the risk-note could be completely ignored and the responsibility of the Railway judged purely on the basis of s. 72(1) of the Act, as if the goods were consigned at the ordinary rates on the Railway's risk, was not correct. [154 H] B

The responsibility of the railway administration to disclose to the consignor as to how the consignment was dealt with throughout the time it was in its possession or control arises at once, under the risk-note, in either of the cases referred to therein, and is not confined to the stage of litigation. But such disclosure is necessary only where a consignor specifically asks the railway to make the disclosure. If no such disclosure is asked for, the administration need not make it before the litigation. Therefore, if the Railway did not make the disclosure, before the suit was filed, it could not be said to have committed a breach of the term of the contract. [153 A-D] C

The disclosure envisages a precise statement of how the consignment was dealt with by the railway or its servants. If the disclosure is asked for before litigation commences and is not given, or the disclosure is given but it is not considered to be sufficient by the consignor, the dispute has to be judicially decided and it is for the court to say, if a suit is filed, whether there has been a breach of the term. At that stage, evidence has to be led by the railway in the first instance to substantiate the disclosure which might have been made before the litigation, to the consignor, or which might have been made in the written statement. When the administration has given its evidence in proof of the disclosure, if the plaintiff is not satisfied with the disclosure made in evidence, he is entitled to ask the court to call upon the railway to fulfil its obligation under the contract, and the railway should then have the opportunity of meeting the demands of the plaintiff. It is then for the court to decide whether the further disclosure desired by the plaintiff should be made by the railway, and if the court decides that it should be made, the railway has to make such further disclosure as the court orders. If the railway fails to take that opportunity to satisfy the demands of the plaintiff endorsed by the court, the railway, at that stage, would be in breach of its contractual obligation of disclosure. [153 E-154 B] D E F

The effect of the breach however, is not to bring the contract to an end and throw the responsibility on the railway, as if the case was a simple case of responsibility under s. 72(1). The risk-note would continue to apply and the court would have to decide whether the misconduct can be fairly inferred from the evidence of the railway, with the difference that, where the railway has been in breach of its obligation to make full disclosure, misconduct may be more readily inferred and s. 114 of the Evidence Act more readily applied. But the conditions of the risk-note cannot be completely ignored, simply because there has been a breach of the condition of complete disclosure. [154 D-G] G H

Surat Cotton Spinning & Weaving Mills v. *Secretary of State for India in Council* [1937] 64 I.A. 176, applied.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 536 of 1962.

Appeal from the judgment and decree dated March 26, 1958, of the High Court at Patna in First Appeal No. 340 of 1951.

A *Niren De, Additional Solicitor-General, N. D. Karkhanis* and *B.R.G.K. Achar*, for the appellant.

Bishan Narain, P. D. Himmatsinghka, S. Murthy and *B. P. Maheshwari*, for the respondent.

The judgment of the Court was delivered by

B **Wanchoo, J.** This is an appeal on a certificate granted by the Patna High Court. The respondent sued the Union of India as representing G.I.P. Railway, Bombay and E.I.R. Calcutta for recovery of damages for non-delivery of 31 bales of piece goods, out of 60 bales which had been consigned to Baidyanathdham from Wadibundar. This consignment was loaded in wagon No. C 9643 on December 1, 1947. It is not in dispute that the consignment reached Mughalsarai on the morning of December 9, 1947 by 192 Dn goods train. After reaching Mughalsarai, the wagon was kept in the marshalling yard till December 12, 1947. It was sent to Baidyanadham by 214 Dn goods train from Mughalsarai at 6-40 p.m. on December 12, 1947 and eventually reached D Baidyanathdham on December 21, 1947. The respondent who was the consignee presented the railway receipt on the same day for delivery of the consignment. Thereupon the railway delivered 29 bales only to the respondent and the remaining 31 bales were said to be missing and were never delivered. Consequently on August 31, 1948, notice was given under s. 80 of the Civil Procedure Code E and this was followed by the suit out of which the present appeal has arisen on November 20, 1948. The consignment had been booked under risk note form Z which for all practical purposes is in the same terms as risk note form B. The respondent claimed damages for non-delivery on the ground that the non-delivery was due to the misconduct of the servants of the railway, and the claim F was for a sum of Rs. 36,461/12/-.

The suit was resisted by the appellant and a number of defences were taken. In the present appeal we are only concerned with two defences. It was first contended that the suit was barred by s. 77 of the Indian Railways Act, No. IX of 1890, (hereinafter G referred to as the Act), inasmuch as notice required therein was not given by the respondent. Secondly it was contended that the consignment was sent under risk note form Z and under the terms of that risk note the railway was absolved from all responsibility for loss, destruction or deterioration of goods consigned thereunder from any cause whatsoever except upon proof of misconduct H of the railway of its servants, and that the burden of proving such misconduct subject to certain exceptions was on the respondent and that the respondent had failed to discharge that burden. Further in compliance with the terms of the risk note, the railway made a disclosure in the written statement as to how the consignment was dealt with throughout the period it was in its possession or control. The case of the railway in this connection was that there was a theft in the running train between Mughalsarai and

Buxar on December 12, 1947 and that was how part of the consignment was lost. As the loss was not due to any misconduct on the part of the railway or its servants and as the respondent had not discharged the burden which lay on him after the railway had given evidence of how the consignment had been dealt with, there was no liability on the railway. A

On the first point, the trial court held on the basis of certain decisions of the Patna High Court that no notice under s. 77 was necessary in a case of non-delivery which was held to be different from loss. On the second point relating to the responsibility of the railway on the basis of risk note form Z, the trial court held that it had not been proved that the loss was due to misconduct of the railway or its servants. It therefore dismissed the suit. B C

Then followed an appeal by the respondent to the High Court. The High Court apparently upheld the finding of the trial court on the question of notice under s.77. But on the second point the High Court was of opinion that there was a breach of the condition of disclosure provided in risk note Z under which the consignment had been booked, and therefore the appellant could not take advantage of the risk note at all and the liability of the railway must be assessed on the footing of a simple bailee. It therefore went on to consider the liability of the railway as a simple bailee and held on the evidence that the railway did not take proper care of the wagon at Mughalsarai and that in all probability the seals and rivets of the wagon had been allowed to be broken there and all arrangements had been completed asto how the goods would be removed from the wagon when the train would leave that station and this could only be done either by or in collusion with the servants of the railway at Mughalsarai. In this view of the matter the High Court allowed the appeal and decreed the suit with costs As the judgment was one of reversal and the amount involved was over rupees twenty thousand, the High Court granted a certificate. and that is how the matter has come up before us. D E F

We shall first deal with the question of the notice. We are in this case concerned with the Act as it was in 1947 before its amendment by Central Act 56 of 1949 and Central Act No. 39 of 1961 and all references in this judgment must be read as applying to the Act as it was in 1947. Now s. 77 *inter alia* provides that a person shall not be entitled to compensation for the loss, destruction or deterioration of animals or goods delivered to be carried by railway, unless his claim to compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway. There was a conflict between the High Courts on the question whether non-delivery of goods carried by railway amounted to loss within the meaning of s. 77. Some High Courts (including the Patna High Court) held that a case of non-delivery was distinct from a case of loss and no notice under G H

A s. 77 was necessary in the case of non-delivery. Other High Courts however took a contrary view and held that a case of non-delivery also was a case of loss. This conflict has now been resolved by the decision of this Court in *Governor-General in Council* v. *Musaddilal* (1) and the view taken by the Patna High Court has been overruled. This Court has held that failure to deliver goods is the consequence B of loss or destruction and the cause of action for it is not distinct from the cause of action for loss or destruction, and therefore notice under s. 77 is necessary in the case of non-delivery which arises from the loss of goods. Therefore notice under s. 77 was necessary in the present case. It is true that the respondent stated in the plaint in conformity with the view of the Patna High Court C prevalent in Bihar that no notice under s.77 was necessary as it was a case of non-delivery. But we find in actual fact that a notice was given by the respondent to the railway on April 10, 1948 to the Chief Commercial Manager, E.I.R. in which it was stated that 60 bales of cloth were booked for the respondent but only 29 bales had been delivered and the balance of 31 bales had not been D delivered. Therefore the respondent gave notice that if the bales were not delivered to him within a fortnight, he would file a suit for the recovery of Rs. 36,461/12/-, and the details asto how the amount was arrived at were given in this notice. It is true that the notice was not specifically stated to be a notice under s. 77 of the Act but it gave all the particulars necessary in a notice under E that section. This notice or letter was sent within six months of the booking of the consignment. A similar case came up before this Court in *Jetmull Bhojraj* v. *The Darjeeling Himalayan Railway Co. Ltd.*(2) and this Court held that the letter to the railway in that case was sufficient notice for the purpose of s. 77 of the Act. Following that decision we hold that the letter in the present F case which is even more explicit is sufficient notice for the purpose of s. 77 of the Act. We may add that the learned Additional Solicitor General did not challenge this in view of the decision in *Jetmull Bhojraj's case*(2).

This brings us to the second question raised in the appeal. G We have already indicated that the High Court held that as the burden of disclosure which was on the railway had not been discharged there was a breach of one of the terms of the risk note Z and therefore the risk note did not apply at all and the responsibility of the railway had to be assessed under s. 72 (1) of the Act. This view of the law has been contested on behalf of the appellant H and it is urged that after the risk note is executed either in form Z or in form B, the responsibility of the railway must be judged in accordance with the risk note even if there is some breach of the condition as to disclosure. It may be mentioned that risk note form Z and risk note form B are exactly similar in their terms insofar as the responsibility of the railway is concerned for risk note

(1) [1961] 3 S.C.R. 647.
(2) [1963] 2 S.C.R. 832.

form B applies to individual consignment while form Z is executed by a party who has usually to send goods by railway in large numbers. Risk note form Z is general in its nature and applies to all consignments that a party may send after its execution. It is proved that the consignment in this case was covered by risk note form Z. The main advantage that a consignor gets by sending a consignment under form Z or form B is a specially reduced rate as compared to the ordinary rate at which goods are carried by the railway and it is because of this specially reduced rate that the burden is thrown on the consignor in a suit for damages to prove misconduct on the part of the railway or its servants in the case of loss etc. of the goods, subject to one exception.

On the other hand the argument on behalf of the respondent is that the view taken by the Patna High Court is right and it is the duty of the railway administration under the risk note, as soon as there is non-delivery and a claim is made on the railway for compensation, to disclose how the consignment was dealt with throughout while it was in its possession or control and that its failure to do so results immediately in breach of the contract with the result that the responsibility of the railway has to be judged solely on the basis of s. 72 (1) of the Act ignoring the risk note altogether.

Section 72 (1) defines the responsibility of the railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway to be the same as that of a bailee under ss. 152 and 161 of the Indian Contract Act, 1872, subject to other provisions of the Act. Sub-section (2) of s. 72 provides that an agreement purporting to limit the responsibility under s. 72 (1) can be made subject to two conditions, namely, (i) that it is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and (ii) that it is in a form approved by the Governor-General. Sub-section (3) of s. 72 provides that nothing in the common law of England or in the Carriers Act 1865 regarding the responsibility of common carriers with respect to carriage of animals or goods shall affect the responsibility as in this section defined of the railway administration. So the responsibility of the railway for loss etc. is the same as that of a bailee under the Indian Contract Act. But this responsibility can be limited as provided in s. 72 (2). For the purpose of limiting this responsibilty risk notes form B and form Z have been approved by the Governor-General and where goods are booked under these risk notes the liability is limited in the manner provided thereunder. It is therefore necessary to set out the relevant terms of the risk note, for the decision of this case will turn on the provisions of the risk note itself.

The risk note whether it is in form B or form Z provides that where goods are carried at owner's risk on specially reduced rates, the owner agrees or undertakes to hold the railway administration

A "harmless and free from all responsibility for any loss, deterioration or destruction of or damage to all or any of such 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". Thus risk notes B and Z provide for complete immunity of the railway except upon
B proof of misconduct. But to this immunity there is a proviso and it is the construction of the proviso that arises in the present appeal.

The proviso is in these terms:—

"Provided that in the following cases:—

C (a) Non-delivery of the whole of a consignment packed in accordance with the instruction laid down in the tariff or where there are no instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to train or to fire;

D (b) ... ...

"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
E 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"

It is not in dispute that the present case comes under cl. (a)
F of the risk note. An exactly similar provision in risk note form B came up for consideration before the Privy Council in *Surat Cotton Spinning & Weaving Mills* v. *Secretary of State for India in Council*, (1) and the law on the subject was laid down thus at pp. 181-182:

G "The first portion of the proviso provides that the Railway Administration shall be bound to disclose to the consignor 'how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary to give evidence thereof, before the consignor is called upon to prove misconduct'. In their Lordships'
H opinion, this obligation arises at once upon the occurrence of either of cases (a) or (b), and is not confined to the stage of litigation. Clearly one object of the provision is to obviate, if possible, the necessity for litigation. On the other hand, the closing words of the obligation clearly apply to the litigious stage. Asto the extent of the disclosure, it is confined to the period during which the

(1) [1927] L.R. LXIV I.A. 176.

consignment was within the possession or control of the Railway Administration; it does not relate, for instance, to the period after the goods have been theftuously removed from the premises. On the other hand, it does envisage a precise statement of how the consignment was dealt with by the Administration or its servants. The character of what is requisite may vary according to the circumstances of different cases, but, if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, their Lordships are of opinion that evidence before a Court of law is contemplated, and that, as was properly done in the present suit, the Railway Administration should submit their evidence first at the trial.

"At the close of the evidence for the Administration two questions may be said to arise, which it is important to keep distinct. The first question is not a mere question of procedure, but is whether they have discharged their obligation of disclosure, and, in regard to this, their Lordships are of opinion that the terms of the Risk Note require a step in procedure, which may be said to be unfamiliar in the practice of the Court; if the consignor is not satisfied with the disclosure made, their Lordships are clearly of opinion that is for him to say so, and to call on the Administration to fulfil their obligation under the contract, and that the Administration should then have the opportunity to meet the demands of the consignor before their case is closed; any question as to whether the consignor's demands go beyond the obligation should be then determined by the Court. If the Administration fails to take the opportunity to satisfy the demands of the consignor so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure.

"The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the Administration; if so, the consignor is absolved from his original burden of proof. But, in this case, the decision of the Court may be given when the evidence of both sides has been completed. It is clearly for the Administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair "inference of misconduct". They will doubtless keep in mind the provisions of s. 114 of the Indian Evidence Act".

With respect we are of opinion that this exposition of the law relating to risk note B applies also to risk note Z and we accept it

A as correct. Thus the responsibility of the railway administration to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control arises at once under the agreement in either of the cases (a) or (b) and is not confined to the stage of litigation. But we are not prepared to accept the contention on behalf of the respondent that this responsibility B to make full disclosure arises immediately the claim is made by the consignor and if the railway immediately on such claim being made does not disclose all the facts to the consignor, there is immediately a breach of this term of the contract contained in the risk note. It is true that the railway is bound to disclose to the consignor how the consignment was dealt with throughout the time it was C in its possession even before any litigation starts; but we are of opinion that such disclosure is necessary only where the consignor specifically asks the railway to make the disclosure. If no such disclosure is asked for, the administration need not make it before the litigation. In the present case there is no proof that any disclosure was asked for in this behalf by the consignor at any D time before the suit was filed. Therefore if the railway did not disclose how the consignment was dealt with throughout before the suit was filed, it cannot be said to have committed breach of this term of the contract. The disclosure envisages a precise statement of how the consignment was dealt with by the railway or its servants. If the disclosure is asked for before the litigation commenE ces and is not given or the disclosure is given but it is not considered to be sufficient by the consignor, the dispute has to be judicially decided and it is for the court then to say if a suit is brought whether there has been a breach of this term of the contract.

After this, comes the stage where the consignor or the conF signee being dissatisfied brings a suit for compensation. At that stage evidence has to be led by the railway in the first instance to substantiate the disclosure which might have been made before the litigation to the consignor or which might have been made in the written statement in reply to the suit. When the railway administration has given its evidence in proof of the disclosure and G the plaintiff is not satisfied with the disclosure made in the evidence, the plaintiff is entitled to ask the court to call upon the railway to fulfil its obligation under the contract and the railway should then have the opportunity of meeting the demands of the plaintiff before its case is closed. Thus in addition to the evidence that the railway may adduce on its own and in doing so the railH way has necessarily to keep in mind the provisions of s. 114 of the Indian Evidence Act, the plaintiff can and should draw the attention of the court if he feels that full disclosure has not been made. In that case he can ask the court to require the railway to make further disclosure and should tell the court what further disclosure he wants. It is then for the court to decide whether the further disclosure desired by the plaintiff should be made by the railway, and if the court decides that such further disclosure

should be made the railway has to make such further disclosure as the court orders it to make on the request of the plaintiff. If the railway fails to take the opportunity so given to satisfy the demands of the plaintiff, endorsed by the court, the railway would be in breach of its contractual obligation of disclosure. It is at this stage therefore that the railway can be truly said to be in breach of its contractual obligation of disclosure, and that breach arises because the railway failed to disclose matters which the court on the request of the plaintiff asks it to disclose. The question then is what is the effect of this breach.

It is remarkable that the Privy Council did not lay down that as soon as the breach is made as above the risk note comes to an end and the responsibility of the railway is that of a bailee under s. 72 (1) of the Act. In the observations already quoted, the Privy Council has gone on to say that after this stage is over, the question may arise whether misconduct may be fairly inferred from the evidence of the railway. It seems to us therefore that even if there is a breach of the term as to full disclosure it does not bring the contract to an end and throw the responsibility on the railway as if the case was a simple case of responsibility under s. 72(1) of the Act; the case is thus not assimilated to a case where the goods are carried at the ordinary rates at railway risk. The reason for this seems to be that the goods have already been carried at the reduced rates and the consignor has taken advantage of that term in the contract. Therefore, even though there may be a breach of the term as to complete disclosure by the railway the consignor cannot fall back on the ordinary responsibility of the railway under s. 72 (1) of the Act as if the goods had been carried at railway's risk at ordinary rates, for he has derived the advantage of the goods having been carried at a specially reduced rates. The risk note would in our opinion continue to apply and the court would still have to decide whether misconduct can be fairly inferred from the evidence of the railway, with this difference that where the railway has been in breach of its obligation to make full disclosure misconduct may be more readily inferred and s. 114 of the Indian Evidence Act more readily applied. But we do not think that the conditions in the risk note can be completely ignored simply because there has been a breach of the condition of complete disclosure. The view of the Patna High Court that as soon as there is breach of the condition relating to complete disclosure the risk note can be completely ignored and the responsibility of the railway judged purely on the basis of s. 72 (1) as if the goods were carried at the ordinary rates on railway's risk cannot therefore be accepted as correct.

We may point out that in *Surat Cotton Spinning and Weaving Mills Limited's case*, (1) the plaintiffs wanted the guard of the train to be examined and he was undoubtedly a material witness. Even

(1) [1957] L.R. LXIV I.A. 176.

A so the witness was not examined by the railway. Finally therefore the Privy Council allowed the appeal with these observations at p. 189:—

> "While their Lordships would be inclined to hold that the respondent, by his failure to submit the evidence of Rohead, was in breach of his contractual obligation to
B give the evidence necessary for disclosure of how the consignment was dealt with, they are clearly of opinion that the failure to submit the evidence of Rohead, in the circumstances of this case, entitles the court to presume, in terms of s. 114 (g) of the Evidence Act, that "Rohead's evidence, if produced, would be unfavourable to the res-
C pondent, and that, in consequence, misconduct by complicity in the theft of some servant, or servants of the respondent may be fairly inferred from the respondent's evidence".

These observations show that even though there may be a
D breach of the obligation to give full disclosure that does not mean that the risk note form Z or form B can be ignored and the responsibility of the railway fixed on the basis of s. 72 (1) as a simple bailee. If that was the effect of the breach, the Privy Council would not have come to the conclusion after applying s. 114 (g) of the Evidence Act in the case of Rohead that misconduct by complicity
E in the theft of some servant or servants of the railway may be fairly inferred from the railway's evidence. The appeal was allowed by the Privy Council after coming to the conclusion that misconduct by the servant or servants of the railway might be fairly inferred from the evidence including the presumption under s 114 (g) of the Evidence Act. It seems to us clear therefore that even
F if there is a breach of the obligation to make full disclosure in the sense that the railway does not produce the evidence desired by the plaintiff in the suit even though the request of the plaintiff is endorsed by the court, the effect of such breach is not that the risk note is completely out of the way, the reason for this as we have already indicated being that the consignor has already taken ad-
G vantage of the reduced rates and therefore cannot be allowed to ignore the risk note altogether. But where there is a breach by the railway of the obligation to make full disclosure the court may more readily infer misconduct on the part of the railway or its servants or more readily presume under s. 114 (g) of the Evidence Act against the railway. This in our opinion is the effect of the
H decision of the Privy Council in *Surat Cotton Spinning and Weaving Mills Limited's case*[1]. As we have already said we are in respectful agreement with the law as laid down there.

So far as the present appeal is concerned, there was no demand by the consignor for disclosure before the suit. Even after the suit was filed there was no statement by the respondent at any

(1) [1937] L.R. 64 I.A. 176.

stage that the disclosure made by the appellant in the evidence was in any way inadequate. The respondent never told the court after the evidence of the railway was over that he was not satisfied with the disclosure and that the railway be asked to make further disclosure by producing such further evidence as the respondent wanted. In these circumstances it cannot be said in the present case that there was any breach by the railway of its responsibility to make full disclosure. In the circumstances we are of opinion that the risk note would still apply and the court would have to decide whether misconduct on the part of the railway can be fairly inferred from the evidence produced by it. If the court cannot fairly infer misconduct from the evidence adduced by the railway, the burden will be on the respondent to prove misconduct. That burden, if it arises, has clearly not been discharged for the respondent led no evidence on his behalf to discharge the burden. We therefore turn to the evidence to see whether from the evidence produced by the railway a fair inference of misconduct of the railway or its servants can be drawn on the facts of this case.

A B C D

It is not in dispute in this case that the wagon containing the consignment arrived intact at Mughalsarai on December 9, 1947. Besides there is evidence of Damodar Prasad Sharma, Assistant Trains Clerk, Mughalsarai, P.W. 14, who had the duty to receive trains at the relevant time that 192 Dn. goods train was received by him on line No. 4 and that there were two watchmen on duty on that line for examining the goods train and they kept notes of the same. He also produced the entry relating to the arrival of the train and there is nothing in the entry to show anything untoward with this wagon when the train arrived at Mughalsarai. His evidence also shows that the train was sent to the marshalling yard on December 11, 1947. Finally there is the evidence of Chatterji (P.W. 8) who is also an Assistant Trains Clerk. It was his duty to make notes with respect to goods trains which left Mughalsarai. He stated that this wagon was sent by train No. 214 on December 12, 1947 in the evening. He also stated that the wagon was in good condition and produced the entry relating to this wagon. It appears however from his evidence that rivets and seals are examined by the watch and ward staff and they keep record of it. Apparently therefore he did not actually inspect the wagon before it left though he says that it was in good condition. The relevance of his evidence however is only this that in his register showing the despatch of trains there is no entry to the effect that there was anything wrong with this wagon when it was despatched.

E F G H

The most important evidence however is of the guard of the train, Ram Prasad Ram (P.W. 2). He stated that before the train started from Mughalsarai he patrolled both sides of it and the place from where the train started was well lighted and watch and ward staff also patrolled the area. He also stated that the rivets and seals of all the wagons in the train were checked at Mughalsarai and there was apparently nothing wrong with them. Now if

A the evidence of the guard is believed it would show that the wagon containing the consignment was intact at Mughalsarai upto the time 214 goods train including this wagon left Mughalsarai. If so there would be no reason to hold that anything was done to the wagon before the train left Mughalsarai. It may be mentioned that the trial court accepted the evidence of the guard while the High B Court was not prepared to believe it. On a careful consideration of the evidence of the guard we see no reason why his evidence should not be believed. It is obviously the duty of the guard to see that the train was all right, when he took charge of it. It appears that in discharge of his duty the guard patrolled the train on both sides and looked at rivets and seals to see that they were intact. It C is, however, urged that the guard's evidence does not show that the seals which he found intact were the original seals of Wadibundar and the possibility is not ruled out that the original seals might have been tampered with and new seals put in while the train was in the marshalling yard at Mughalsarai for two days, as the evidence of the watch and ward staff had not been produced. It D would perhaps have been better if the evidence of the watch and ward staff had been produced by the railway; but if the evidence of the guard is believed that the seals and rivets were intact when the train left Mughalsarai, the evidence of the watch and ward staff is not necessary. It is true that the guard does not say that the seals were the original seals of Wadibundar but it appears from the evi- E dence of Jagannath Prasad (P.W. 9) who was the Assistant Station Master at Dildarnagar that he found when the train arrived there that the northern flapdoors of the wagon were open while southern flapdoors were intact with the original seals. This evidence suggests that the original seals could not have been tampered with when the train left Mughalsarai and that the guard's evidence that seals and F rivets were intact shows that nothing had happened to the wagon while it was at Mughalsarai. Further it is also in evidence that there is ample light in the marshalling yard at Mughalsarai and that watch and ward staff is posted there as well. So the chances of tampering with the seals and rivets in the marshalling yard in the circumstances are remote. As such the evidence of the guard that G the seals and rivets were intact when he left with the train on the evening of December 12, would apparently exclude the possibility that there was any tampering with the wagon before it left Mughalsarai. It is true that on the last day when the evidence for the railway was recorded and the guard had been recalled for further cross-examination it was suggested to him that the railway servants at H Mughalsarai had removed the bales and were responsible for the theft. He however denied that. But it is remarkable that if the respondent was dissatisfied with the evidence of the guard which was to the effect that the wagon was all right when he left Mughalsarai with the train on December 12, it did not ask the court to order the railway to produce the evidence of the watch and ward staff with respect to this wagon while it was in the marshalling yard at Mughalsarai. The respondent could ask for such disclosure. If the court

had accepted the request and the railway had failed to produce the evidence of the watch and ward staff it may have been possible to use s. 114 of the Evidence Act and hold that the watch and ward staff having not been produced their evidence, if produced, would have gone against the railway. But in the absence of any demand by the respondent for the production of the watch and ward staff which he could ask for, we see no reason why the statement of the guard to the effect that seals and rivets of the wagon were intact when he left Mughalsarai with the train should not be accepted. In the absence of any demand by the respondent for the production of watch and ward staff his mere suggestion that the railway servants at Mughalsarai might have committed the theft cannot be accepted.

There is the further evidence of the guard as to what happened between Mughalsarai and Buxar. It appears between these two stations the train stops only at Dildarnagar. The evidence of the guard however is that the train suddenly stopped between the warner and home signals before it reached Dildarnagar. He therefore got down to find out what the trouble was. He found that the hosepipe between two wagons had got disconnected and this resulted in the stoppage of the train. The evidence further is that the hosepipe was intact when the train started from Mughalsarai. He made a note of this in his rough memo book which was produced. It is noted by him that the northern flapdoor of this wagon was open. He reconnected the hosepipe and went up to Dildarnagar. There he reported the matter to the station staff. His further evidence is that there were three escorts with the train and that they were guarding the train when the train was standing between the warner and the home signals before it reached Dildarnagar. Nothing untoward was reported to him by these escorts. It was at this stop between the two signals that the guard noticed that the rivets and seals of this wagon on one side had been broken. The case of the railway is that there was theft in the running train between Mughalsarai and Buxar and that is how part of the consignment was lost. The evidence of the guard does suggest that something happened between Mughalsarai and Dildarnagar and then between Dildarnagar and Buxar. In addition to this the evidence of the station staff at Dildarnagar is that the flapdoors of this wagon were found open when the train arrived at Dildarnagar. The contents were not checked at Dildarnagar as there was no arrangement for checking at that station. The wagon was resealed at Dildarnagar, and the fact was noted in the station master's diary. It may be mentioned that the evidence of the station staff was that the wagon was resealed though the guard says that it was rivetted also at Dildarnagar. The entry in the guard's rough memo. however is only that the wagon was resealed. The guard certainly says that it was rivetted also at Dildarnagar but that is not supported by the station staff and the entry in the guard's rough memo. It seems that the statement of the guard may be due to some error on his

A part. That may also explain why, when the train arrived at Buxar, the flapdoor again was found open, for it had not been rivitted at Dildarnagar. Then the evidence of the Buxar station staff is that the northern flapdoors of this wagon were open when the train arrived at Buxar. It was then resealed and rivetted and was detached for checking. The checking took place on December 14th at Buxar.
B It was then found that one side had the original seals of Wadibundar while the other side had the seals of Buxar. On checking the wagon, 27 bales were found intact, covering of one bale was torn and one bale was found loose and slack. This evidence asto what happened between Mughalsarai and Buxar thus makes it probable that there was theft in the running train between Mughalsarai and
C Buxar and that may account for the loss of part of the consignment.

It is however contended on behalf of the respondent that no evidence was produced from Mughalsarai asto what happened while the wagon was in the marshalling yard and that the seal
D book which is kept at every railway station containing entries of re-sealing when a wagon is resealed was not produced from Mughalsarai and an adverse inference should be drawn from this non-production. We are however of opinion that the evidence of the guard to the effect that the seals were intact when he left Mughalsarai with the train is sufficient to show that the wagon was in-
E tact with the original seals when it left Mughalsarai and therefore it is not possible to draw any adverse inference from the non-production of the watch and ward staff or the seal book of Mughalsarai in the circumstances of this case. It would have been a different matter if the respondent had asked for the production of the seal book as well as the evidence of the watch and ward
F staff. But the respondent contented itself merely with the suggestion that a theft might have taken place at Mughalsarai which was denied by the guard and did not ask the court to order the railway to produce this evidence. In these circumstances in the face of the evidence of the guard and the fact that one seal on the southern side of the door was of the original station, we do not think that it
G is possible to draw an adverse inference against the railway on the ground that the evidence of the watch and ward staff and the seal book at Mughalsarai were not produced. The seal book would have been of value only if the wagon had been resealed at Mughalsarai but there is in our opinion no reason to think that the wagon had been resealed at Mughalsarai after the evidence of the guard that
H he found the seals and rivets intact when he left Mughalsarai with the train. On a careful consideration of the evidence therefore we are of opinion that a fair inference cannot be drawn from the evidence of the railway that there was misconduct by the railway or its servants at Mughalsarai during the time when the wagon was there. If the evidence of the guard is accepted, and we do accept it, there can be no doubt that the loss of the goods took place because of theft in the running train between Mughalsarai and

Buxar. There is no evidence on behalf of the respondent to prove misconduct and as misconduct cannot fairly be inferred from the evidence produced on behalf of the railway, the suit must fail. A

We therefore allow the appeal, set aside the judgment and decree of the High Court and restore that of the Additional Subordinate Judge. In the circumstances of this case we order parties to bear their own costs throughout. B

Appeal allowed.