1949 *Present:* **Nagalingam J. and Gratiaen J.**

SANGARALINGANADAN, Appellant, *and* THE ATTORNEY-GENERAL, Respondent.

S. C. 328—D. C. Jaffna, 2,367 M

Railways Ordinance (Cap. 153)—Section 15—Contract of carriage—" Misconduct " of servant—" Place of despatch ".

In a contract of carriage entered into between the plaintiff and the Ceylon Government Railway it was agreed that the Railway should not be held liable for any loss to plaintiff's goods except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants. It was proved that plaintiff suffered loss of goods in consequence of certain shunting operations carried out by a Railway guard. It was also proved that the Railway guard, although it was brought to his notice that what he was doing might seriously endanger the goods in question, wilfully persisted in proceeding with his shunting operations against which he had been warned.

Held, that the Railway guard was guilty of " misconduct " within the meaning of the term in section 15 of the Railways Ordinance.

Held further, that the " place of despatch " as contemplated in section 15 (*b*) of the Railways Ordinance was the place where the goods were first handed over to the Ceylon Government Railway for carriage, and not the source at which they had originally been delivered to some other carrier under a contract to which the Railway was not a party.

APPEAL from a judgment of the District Court, Jaffna.

H. W. Tambiah, with *S. Thangarajah*, for the plaintiff appellant.

N. D. M. Samarakoon, Crown Counsel, for the defendant respondent.

Cur. adv. vult.

December 21, 1949. GRATIAEN J.—

This is an action against the Attorney-General as representing the Crown. The first cause of action relates to a consignment of five hundred tins of groundnut oil which had been despatched by rail from Madura in South India to Jaffna. The consignee named in the relative documents is a person called Sithambaram, but it is now common ground that the goods had been imported on the plaintiff's account. Learned Crown Counsel agreed that the plaintiff may for the purposes of this appeal be regarded as the consignee under the contract of carriage entered into for his benefit with the Railway authorities.

The consignment was transported by rail from Madura by the South Indian Railway Company Ltd., and on arrival at Talaimannar it was taken over by the Ceylon Government Railway for transport from that station to Jaffna. The rights and obligations arising from the contract of carriage with the Indian Railway authorities for the first part of the journey, and with the Ceylon authorities for the final trip are contained in a single document which, in effect, constitutes a series of separate contracts entered into with each respective carrier. (*Vide* the current Indo-Ceylon Goods Pamphlet jointly issued by the South-Indian Railway

Company Ltd. and the Ceylon Government Railway.) The document describes the goods as being transported "at owner's risk" and the contractual position is regulated by the following clauses:—

"1. This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit.

2. We (that is, the consignee) agree and undertake to hold the Railway Administration over whose Railway the said goods may be carried in transit from station to station harmless and free from all responsibility for the condition in which the goods may be delivered to the consignee 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.*"

It will be necessary to examine the language of this second clause more closely at a latter stage. For the present, it is sufficient to state that the liability of the Ceylon Government as a carrier of goods by rail is, apart from contract, limited *inter alia* by the provisions of Section 15 of the Railways Ordinance (Chapter 153) to cases where loss or damage has been occasioned by "negligence" or "misconduct" on the part of the agents or servants of the Railway. The measure of liability is also restricted so as not to extend in any event beyond *the actual value at the time and place of despatch* of any article in respect of which compensation is claimed. In the case of the plaintiff's consignment the limitations and restrictons placed by statute have been further reduced by contractual agreement, and the plaintiff is precluded from claiming damages unless *misconduct* (as opposed to mere negligence) is established against a servant or agent of the Railway. Carriers of goods, if not prohibited to do so by statute, may contract themselves out of liability for the negligence of their servants provided that the exemption is stipulated in express, clear and unambiguous terms. (*Peek v. North Staffordshire Railway*[1]; *Price v. Union Lighterage Co.*[2].)

In the present case the plaintiff's consignment, having arrived at Talaimannar, was transported by rail to the Jaffna Station on 4th May, 1945. The tins were stacked in a waggon together with similar tins belonging to other consignees. Checker Thankithurai was in charge of the unloading of the goods after the waggon had been shunted to the Goods Shed for the purpose. Before the unloading was completed, however, other waggons were, under the direction of a Railway guard named Namasivayam, shunted to the same Goods Shed for unloading and it so happened that this operation necessarily involved the waggon containing the plaintiff's consignment being jolted with consequential risk of damage to the tins of oil. The inevitable result followed. Checker Thankithurai had warned Guard Namasivayam of this danger. To quote his own words in describing what occurred:

"The waggon cantaining five hundred tins of groundnut oil was shunted on to the Goods Shed for the purpose of unloading. The tins were arranged in the waggon one upon the other. There were

[1] *(1863) 10 H. L. C. 473.*

[2] *(1904) 1 K. B. 412.*

no vacant spaces in the waggon before unloading. The contractor's labourers started unloading the tins of groundnut oil from the waggons. The tins in the centre of the waggon were first unloaded. The guard told me that he wanted to shunt the waggon on that line. I told the guard that it was not possible to move the waggon. *I told him that if it was moved the tins of oil would fall down.* The guard told me that somehow or other the waggon had to be pulled. I think he said that one waggon had to be taken to the waybridge where it was to be weighed. I told the guard that I would first get the tins stacked to the sides of the waggon to the centre and that thereafter he could pull the waggon. *If those tins were not brought down to the centre the tins on top would fall.* Then I sent two of the contractor's labourers and Paramananthan (the plaintiff's agent) into the waggon for the purpose of bringing down the tins which were piled on top to the centre. Vallipuram, Kassipillai and Paramananthar were taking the tins piled on the top and putting them down on the floor of the waggon. Some tins had been removed from the centre. *As the tins were being brought down another waggon came and dashed against this stationary waggon.* The tins piled on the sides of the waggon fell into the centre and the labourers inside the waggon sustained minor injuries. I saw the oil falling out."

Forty tins of oil belonging to the plaintiff's consignment toppled over and were completely emptied of their contents. (I accept the finding of the learned Judge that an additional complaint to the effect that thirty other tins were partially emptied is unconvincing.) The question for decision is whether these facts establish that the plaintiff's loss has been occasioned by "misconduct" on the part of Guard Namasivayam within the meaning of the contract which I have already quoted and which regulated the obligations of the Railway authorities.

The learned District Judge rejected the plaintiff's claim on this cause of action because he was "unable to come to the conclusion that there was any impact between the waggons over and above the normal impact which one exptcts during shunting operations". In my opinion, however, this is not the proper angle from which the incident calls for examination in the present case. The real question is whether, having regard to the warning of the special risks involved to the tins of oil in the waggon which was being unloaded at the Goods Shed, Guard Namasivayam was not guilty of "misconduct" in deliberately disregarding those risks and subjecting the waggon to any impact whatsoever which might arise from even "normal shunting operations".

It is first necessary, I think, to consider generally what is meant by the term "misconduct" in the clause which limits the liability of the Ceylon Government Railway as a carrier under the contract. The Courts in England have in many cases interpreted agreements in terms of which carriers had contracted themselves out of their common law liability for damage except in cases of "wilful misconduct" on the part of their servants, and in applying those decisions I am content, in fairness to Namasivayam, to assume (although I do not so decide) that "misconduct"

and " wilful misconduct " are really synonymous terms. In *Lewis v. The Great Western Railway Company* [1], Bramwell L.J. said, " What is meant by *wilful misconduct* is misconduct to which the will is a party, it is something opposed to accidental or negligent; the *mis* part of it, not the *conduct*, must be wilful. If a person knows that mischief will result from his conduct, then he is guilty of wilful misconduct if he so conducts himself. Further, I think that it would be wilful misconduct if a man misconducted himself *with an indifference to his duty to ascertain whether such conduct was mischievious or not* ". Similarly, Brett L.J. said, " If a servant of the Railway Company knows that what he is doing will seriously damage the goods of a consignee, *or if it is brought to his notice that what he is doing or omitting to do may seriously endanger the goods, and he wilfully persists in doing that thing against which he has been warned, careless whether he may be doing damage or not*, then he is intentionally doing a wrong thing; that is, he is guilty of wilful misconduct ". Cotton L.J. arrived at the same conclusion. In my opinion these observations are very appropriate to Namasivayam's deliberate decision to disregard the checker's warning and to proceed with his shunting operations before the plaintiff's consignment had been removed out of harm's way. In taking this line of action, regardless of the consequences, he was guilty of wilful misconduct. *A fortiori*, if the term " misconduct " connotes something less, he was guilty of misconduct. *Vide* also *Forder v. Great Western Railway Co.* [2] I am therefore of opinion that the plaintiff is entitled to claim compensation for the damage which he has sustained by the loss of the entire contents of forty tins of groundnut oil consigned to him. It is true that the oil was being transported in second-hand receptacles and that some small leakage in the course of transit was only to be expected. The fact remains, however, that all the tins of oil had, as far as I can judge, arrived at their ultimate destination having reasonably withstood the normal perils of transit. But for the mishap the primary cause of which was Namasivayam's conduct, they would have reached their owner as merchantable goods capable of being sold in the open market. There is no evidence that some oil detected on the floor of the waggon before the mishap was solely traceable to the plaintiff's consignment.

It remains to assess the plaintiff's damage on the first cause of action. His evidence to the effect that the value of the oil which he lost works out at the rate of Rs. 21.40 per tin was not seriously challenged and was certainly not contradicted. Learned Crown Counsel pointed out that under Section 15 (*b*) of the Railway Ordinance the liability of the Government " shall not extend beyond *the actual value at the time and place of despatch* " of the goods in question. In my opinion the " place of despatch " for the purposes of this statutory limitation of liability is clearly the place where the goods were first handed over to the Ceylon Government Railway for carriage, and not the source at which they had orginally been delivered to some other carrier under a contract to which the Railway was not a party. If this be the correct view, it has not been suggested that the value of groundnut oil was any less at Talaimannar on the relevant date than it was in Jaffna on 4th May, 1945. I therefore think that on the first cause of action the plaintiff was entitled to claim a sum of Rs. 856

[1] *(1877) 3 Q. B. D. 195.*

[2] *(1905) 2 K. B. 532.*

worked out at the rate of Rs. 21.40 per tin. To this extent the plaintiff's appeal against the judgment of the learned District Judge must I think succeed.

On the second cause of action the learned Judge awarded the plaintiff a sum of Rs. 96.86 as the balance sum due to him on account of the non-delivery of certain other goods consigned to him on a separate contract of carriage. I see no reason to interfere with this part of the decree, and the respondent's cross appeal, which was not very seriously pressed before us, should be dismissed without costs.

In the result I would vary the decree of the lower Court and enter judgment in favour of the plaintiff, on both causes of action, in the aggregate sum of Rs. 952.86. He is also entitled to his costs of appeal and to the costs of trial.

NAGALINGAM J.—I agree.

Decree varied.