**Malick Chemical Works Vs. Union of India (Uoi) Owning the Northern Rly. and ors.**

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**Court** : Chennai

**Decided On :** Aug-03-1954

**Reported in** : AIR1955Mad274

**Judge** : Panchapakesa Ayyar, J.

**Acts** : Railways Act, 1890 - Sections 72; Contract Act, 1872 - Sections 151 and 152

**Appeal No.** : C.S. No. 322 of 1950

**Appellant** : Malick Chemical Works

**Respondent** : Union of India (Uoi) Owning the Northern Rly. and ors.

**Advocate for Def.** : C. Govindaraja Iyengar, Adv., i/b., King and Partridge

**Advocate for Pet/Ap.** : Ramanujam and ;Venkataseshayya, Advs.

**Judgement** :

Panchapakesa Ayyar, J.

1. This is a suit filed by Malick Chemical Works for recovering from the Union of India owning the Northern Railway, the Central Railway and the Southern Railway, Rs. 15,120/- with subsequent interest and costs, for causing damage by fire due to their servants' negligence and misconduct, to 480 drums of turpentine, each containing five gallons, while In transit from Pathankot on the Northern Rail-way, to Salt Ootaurs, Madras, in the Southern Railway at Ramakundam Station in the Central Railway, in the Hyderabad State. The defendants strenuously contested the suit. The nature of the contentions will be clear from the issues framed in the case.

2. The issues were :

1. Is the firm of the plaintiffs registered under the Indian Partnership Act?

2. Were the goods in question consigned at railway risk or at owner's risk?

3. Was the consignment in question destroyedby fire on the 5th May 1949, as alleged by thethird defendant?

4. Was the fire, and the consequent damage to the goods, due to any wilful neglect or defaultof the 3rd defendant (present 2nd defendant,the Central Railway)?

5. Is the 3rd defendant (present 2nd defendant) guilty of misconduct or negligence amounting to' misconduct?

6. Are the plaintiffs entitled to any damage? If so, what is the amount?

7. To what reliefs are the plaintiffs entitled?

3. This suit was first tried ex parte by Ramaswami, J. who decreed the suit with costs, on 19-2-1954. The ex parte order was set aside by the same learned Judge on 15-4-1954, at the request of the defendants, on their paying the plaintiff's Advocate a sum of Rs. 250/- as costs. The defendants paid that amount, and the suit was restored to file.

4. When the suit came on for fresh hearing before me, the Plaintiffs' firm examined one of their partners, Shantilal Malick, as P. W. 1, and the defendants examined several railway servants, D. Ws. 1 to 9, Exhibits P. 1 to P. 48 were also marked.

5. P. W. 1 swore that the Plaintiffs' firm had been registered as a partnership firm and filed Ex. P.47 to show that it was registered on 27-6-1950, before the suit was filed (on 6-7-1950). He stated that in April 1949 he went to Jammu and purchased 480 drums' of turpentine from one Mahammad Amin and Company for Rs. 11,520/-and entrusted Mohammad Amin with the task of sending those drums by lorry to Pathankot, in the Northern Railway, the nearest railway station about 90 miles from Jammu. Mohammad Amin took from him 180 rupees for lorry charges, and Rs. 1,974/- for freight charges, and Rs. 6/-for loading. In all, he gave a bill for Rupees 13,680/-, Ex. P. 7. P. W. 1 had taken a draft in his name on the Punjab National Bank at Jammu with him. He cashed it and paid Rupees 13,6807- in cash towards that bill.

Mohammad Amin took the drums and loaded them in wagon No. B. A. 5596, in a goods train, at Pathankot. He executed risk notes A and Z, A being for defective packing, and Z for sending the goods at reduced 'owner's risk' rate. The railway risk rate would have been higher by Rs. 2/- per maund according to D. W. 8 the Chief Goods Clerk at Pathankot, who booked the goods. D. W. 8 stated that he showed 15 wagons to Mohammad Amin and asked him to choose his wagon, and that he chose the wagon No. B. A. 5596 which was burnt down at Ramakundam. He said that it was in a perfect and sound condition to carry these turpentine tins at the time Mohammad Amin chose it. He stated that it had an iron cover for its roofing. He added that he could not trace the risk notes, -A and Z, which he took from Mohammad Amin.

He said that after the wagon had been loaded by Mohammad Amin he put in the wagon way bill into, it, and also sealed the wagon, and affixed the usual seal card, but he could not say whether he described the goods loaded into the wagon, in the sealed card, as 'Turpentine drums' or merely as 'military stores'. The evidence of the defence, witnesses, D. Ws. 1: to 6 shows that the seal card showed the description of the goods as 'Military 'Stores', and some of the witnesses stated that by 'Military stores' they understood anything from military kit and watercans to high explosives.

D. W. 8 stated that he affixed four danger labels, on an the four sides of the wagon, with the usual clause 'not to be loose shunted'. D W. 3 a fellow railway clerk from Pathankot, corroborated him in this, though the other witnesses, D, Ws. 1 to 6, from Ramakundam, were positive that there were no danger labels at all, on this wagon, and that the seal card contained only the description 'military stores'. D. W. 8 stated

that he committed a mistake in taking risk notes A and Z instead of risk notes A and D. This would show that he was not aware of the rules regarding the affixing of danger labels, as he would not have taken the risk note Z used only for non-dangerous goods, instead of risk note D. I may add here that the risk note D is executed for sending 'dangerous goods' like petrol, kerosene and turpentine, at reduced concession rates.

6. The 480 drums were booked on 20-4-1949 at Pathankot station, and the receipt Ex. P.1, given, showing a freight of Rs. 1974/-. Then the goods train slowly wended its way down south. When it started, this wagon was the fifth from the engine. At Balharshah it was found to be fifth from the engine. It was changed into the 15th or 16th wagon from the engine, at Balharshah, by putting other wagons in between. The goods train had nearly fifty wagons when it reached Ramakundam at about 8 a.m. on 5-5-1949. There was a passenger train due to come at about the same time, from the opposite direction, and, so, this goods train had to be moved up to, make way fop the incoming. passenger train.

D. W. 6, the guard of the goods train, went into the room of D. W. 5 the Assistant Station Master on duty, in order to get his signature for some wagon intended to be left at that station, While he was having a chat with D. W. 5, D. W. 1 one of the chief porters at Ramakundam, saw smoke coming from the lower part of the wagon containing the 480 drums of turpentine. He raised a shout 'fire, fire' and he and D. Ws. 5 and 6 rushed to the wagon to see what the matter was. D. Ws. 3 and 4 also went there. D. W. 2 a pointsman, who had not seen smoke issuing from that wagon while the goods train was arriving at the station, heard the shout of D. W. 1, but went to the spot somewhat late as he had other duties to perform.

Ignoring minor contradictions, the evidence of D. Ws. 1 to 6 makes it clear that it occurred to these witnesses that the best thing to do was to uncouple the wagon and take it to the water column and let the water down into it in order to quench the fire, a foolish thing to do in the case of fire in an inflammable substance, like turpentine, but the proper thing to do if it was a fire in material like mere kit or grain. It will be remembered that the seal card showed only 'military stores' and did not describe the goods contained in the wagon as turpentine, and there were no danger labels on the wagon at that time.' The wagon was taken to the water column and water put into it in a full jet through a huge funnel. The consequence was that the smouldering flame leapt up and soon became uncontrollable. D. Ws. 1 to 6 found It difficult even to approach the wagon within a reasonable distance.

Then they threw on the burning wagon six buckets of earth kept In the station yard, as also six bucket of water kept there. These 12 buckets, kept there for fire purposes, were emptied, and then D. Ws. 1 to 6 took some 'coal ash, and some loose earth, and threw them on the burning wagon, but too late to serve any useful purpose. Then they left the wagon to burn by itself, and it burnt away for some hours. The contents of all the 480 drums were burnt out, and the wagon was also considerably damaged.

D. W. 7 the traffic inspector held preliminary enquiry into the cause of the fire. Despite his best efforts, 'he could not make out what the cause of the fire was. D. W. 6 stated, in the course of his cross-examination in this court, that the axles of the wagon became hot, and that that could have been the cause of the fire, but he did not state this before the traffic Inspector, D. W. 7 who conducted the preliminary enquiry.

7. The plaintiffs' firm got bothered at the turpentine drums not arriving in Madras in time. They heard also a wild rumour that a turpentine wagon was burnt down at Rama-kundam, and they at once concluded that it must have been the wagon in which their goods were consigned. They wrote several letters to the railway authorities who were tardy in their reply, but, finally, they admitted that all the drums were burnt away at Ramakundam, while not admitting any liability for the loss, in view of the risk notes executed by the consignor and the accidental or providential nature of the fire. The 480 empty drums remaining after the fire, were, with the plaintiffs' consent, sold, and a sum of Rs. 300/- realised therefrom. It was remitted to the plaintiffs. The plaintiffs tried hard to make the railway authorities to pay them the suit amount amicably. On failing to get it, they have. filed the present suit.

8. The learned counsel on both sides addressed elaborate arguments on all aspects of the case. Now I shall give my findings on the issues :

9. Issue No. 1: Ex. P. 47 shows that the plaintiffs' firm has been registered under the Indian Partnership Act before the filing of the suit. Learned counsel for the defendants admitted this. This issue is, therefore, found is favour of the plaintiffs and against defendants.

10. Issue No. 2: There is absolutely no doubt from the evidence on record, that the goods in question were consigned at owner's risk, and not at railway risk. Ex. P. 1, the railway receipt itself, shows that the consignor had executed risk notes A and Z. The risk note Z Is executed for sending goods' at owner's risk. Of course, the proper form in which this risk not ought to have been taken is the D., form, since the goods were dangerous goods, But even the risk note in D form is only for carrying, goods at owner's risk, at reduced rate of Rs. 2/- less per maund.

11. Issue No. 3: The consignment in question was undoubtedly destroyed by fire on 5-5-1S49, at Ramakundam station, between 8 and 9 a.m. as admitted by the original 3rd defendant' (pre-sent 2nd defendant) and not disputed by the plaintiffs' firm. The plaintiffs' case was that the fire broke out at Ramakundam on account of the negligence and misconduct of the railway authorities and servants, and, so; the defendants were liable for the destruction of the goods by fire.

12. Issue No. 3 is answered in the affirmative.

13. Issues 4 to 6; These Issues may be considered jointly.

14. As the consignor, Muhammad Amin, had executed risk notes A and Z. the plaintiffs' claiming through him, had to prove, before claiming damages from the defendants or any of them that the destruction of the goods consigned was due to misconduct of the railway administration or their servants. This is clear from -- 'Roshan Umar Karim & Co. v. M. & S. M. Rly. Co. Ltd.', AIR 1936 Mad 508 (A) & other cases & from the conditions noted in risk notes A and Z, and was not disputed. The bailee's liability under Sections 151 and 152, Indian Contract Act, arising from mere, negligence not amounting to misconduct, cannot be fastened on the railway authorities, because the goods were not carried at railway risk, but at owner's risk, and were also defectively packed. So the important question' is whether destruction of the goods can be said to be due to misconduct on the part of the railway administration authorities or their servants.

15. Before proceeding further, it is necessary to make a distinction between damages claimed for the loss of the goods destroyed by fire, and the freight claimed to be refunded in respect of the goods which could never be delivered because of that fire and the defendants' negligent acts. Of course the question of costs is a third thing not connected with the other two and depending on various considerations.

16. Coining to misconduct, it is clear that misconduct is something different from mere negligence. There must be firstly proof of some wrong conduct and, secondly, proof that the destruction of the goods arose as a result of such wrong conduct. Some cases of reckless conduct and even gross negligence may very well fall within the frontiers of misconduct, as, for instance, putting goods on the top of the train (like fastening tins on the top), instead inside the wagon or putting inflammable and dangerous goods, like petrol or kerosene or turpentine, in wooden wagons, against Rule 8 of Chap. II, Appendix A, of the Indian Railways Act. But it is well settled that in the absence of proof of misconduct, leading to destruction or loss of goods, the plaintiffs cannot recover damages for goods thus destroyed or lost, though because of the Various acts of negligence not amounting to misconduct, as defined, the defendants may lose their right to claim the freight charges, and also the costs of the action.

17. Learned counsel for the plaintiffs relied on Six circumstances to prove misconduct on the part of the defendants leading unto the destruction of the goods. The first was the failure of p. W. 8 the goods clerk at Pathankot, to affix danger labels on this wagon as required by Rule 32 of Chapter II, Appendix A, of the rules framed under the Indian Railways 'Act. Rule 22 runs as follows:

'A dangerous label, I. e. a white label with a red cross on it, shall be affined to both sides of every vehicle in which dangerous goods are stored for delivery or transit, and such vehicle shall always be kept locked and sealed. The words 'not to be loose shunted' shall be printed across the 'dangerous' label in bold type'.

From the evidence, I am satisfied., that the 'dangerous' label was not affixed to this wagon at Pathonkot or at any other station till it met its doom at Ramakundam.

I am not prepared to believe the evidence of D. Ws. 8 and 9 regarding the affixture of 'dangerous' labels not only on both sides of the vehicle but on all the four sides. D. W. 8 is said to be in trouble with his superior authorities for not affixing danger labels and for not taking risk note in the D form instead of the risk note Z. A man in danger is only too likely to utter lies to save himself. His statement that he affixed four danger labels, instead of the two required by Rule 22, also rouses suspicion. It is like a man who being charged with not having purchased a ticket with the money given to him for that purpose saying that he bought two tickets, instead of one!

I am satisfied that D. W. 8 affixed no 'dangerous' labels at all on the wagon. If he had affixed those labels, he would have also noted in the seal card 'dangerous goods, turpentine drums' instead of putting the innocuous and misleading, phrase 'military stores', capable, ac-cording to the witnesses, of meaning anything from military kit and water cans to high explosives. D. W. 9 is a fellow clerk of D. W. 8 working at the very same station, and he is likely to support his brother in trouble, D. W. 8.

18. But the question is whether the omission to affix dangerous labels will amount to misconduct, and especially misconduct leading to the destruction of goods. I do not

consider that this will amount to misconduct and especially to misconduct leading to this fire, and destruction, it has been held by a Bench of the Patna High Court in -- 'Governor-General in Council v. Jamuna Das', : AIR1949Pat119 (B) that failure to affix danger labels on a wagon containing oil tins will not amount to misconduct when there was no evidence that that failure caused loose shunting leading to the breaking out of the fire. In the present case also, there is no such connecting evidence. The shunting could have taken place only at Balharshah, some 90 miles away from Ramakundam, and there was no evidence that the fire was caused because of any loose shunting of this wagon there.

Even if there had been loose shuting of this wagon at Balharshah due to the defective seat card and the absence of danger labels the fire at Ramkundam, eight hours later, cannot be traced to that loose, shunting. The pointsman, D. W. 2, had seen the goods train pass by him at Ramakundam, and he had not noticed any -signs of fire, or even smoke. Admittedly, the smoke was observed only after the goods train halted at Ramakundam, and even the guard, D. W. 6, had not noticed the smoke before D. W. 1, the head porter, noticed it and raised the shout.

I agree with the learned counsel for the de-fendants that it is impossible that the fire could have started at Balharshah, 90 miles away, by loose shunting, considering that the. goods contained in the wagon were, inflammable turpentine oil. If the fire had started at Balharahah, the drums would have burnt out. even within a very short distance after leaving Balharshah station. It is Impossible, therefore, to connect the fire at Ramakundam with any loose shunting at Balharshah. Nor can the moving of the wagon at Ramakundam, after uncoupling it, towards the water column be said to have caused the fire, as the smoke was admittedly noticed even before the wagon was moved.

Under such circumstances, the causes of the fire must be held to be unknown, even as the Traffic Inspector, D. W. 7, held after an elaborate enquiry concluded. There are some fires whose causes are undiscoverable, as the learned Counsel for the defendants urged, and the burden of proving that this fire (and the destruction of the goods by it) was due to the defendants' misconduct lies heavily, on the plaintiffs who have failed to discharge it. The non-affixture of the danger labels must, therefore, be held to be' not misconduct leading to the destruction of the goods and entitling the plaintiffs to damages.

19. The second point relied on was that the seal card attached to the wagon did not describe the goods as 'dangerous goods, Turpentine drums' but only described the goods as 'military stores', and that this would amount to misconduct. The same argument could apply to this contention also as to the first, since there is no proof that the negligence of D. Ws. 8 and 9 in not describing the goods as turpentine drums and dangerous goods, led to the fire and the destruction of the goods, and would be misconduct, though, of course, both these acts of negligence and the acts to be mentioned hereafter would be sufficient to deprive the railway administrations of their right to the freight collected by them and to coats.

20. Before leaving this question, I may deal with a small point raised by the learned counsel for the defendants, namely, that even if damages were due to the plaintiffs for the loss of the goods, no damages could be awarded as damages should be calculated on the market value of the goods at Madras on the probable date when the drums of turpentine were to be delivered, and that there was no evidence in this case as to

what the market value then was.

The argument is unsustainable. P. W. I spoke not only to his paying for 480 drums, Rupees 11520/-, and Rs. 186/- for other items, such as lorry hire, loading charges, etc., he swore also that he would have got a profit of Rs. 1440/- by selling the 480 drums at Madras, on arrival of the goods there, as the drums were selling at Madras then 'at Rs. 3/- more per drum. He said he was giving up the Rs. 1440/-, as the drums had been destroyed by fire. His evidence was not contradicted. So I take it that the price for these drums of turpentine in the Madras market then was Rupees 1440/- more than the Rs. 11520/- paid by him at Jammu, and the Rs. 186/- paid for lorry and loading charges.

Parties take a risk in not cross-examining a witness, like P. W. 1 on points like this. When a respectable witness speaks to the profit he will be making on the cost price of the goods he buys at a distant place, he must be believed unless he is shaken in cross-examination. The defendants have not adduced any evidence regarding the market rate of the turpentine oil at Madras on the date of the probable arrival of the goods destroyed by fire, to show that the damages claimed by the plaintiffs were too high. The price of turpentine in Jammu, where the Himalayan Pine or Deodar is plentiful is bound to be lower than at Madras where only casuarina trees grow, and not the Himalayan pines producing turpentine oil. If the plaintiffs had proved their right to damages there would have been no difficulty in accepting the price claimed by them for the loss of 480 drums of turpentine destroyed by fire.

21. The third act of misconduct relied on by the learned counsel for the plaintiffs was that the Turpentine drums were allowed to be loaded by D. W. 8 in a wagon having old 'zinc sheets' for its roof, instead of an 'iron covered roofing' as required by Rule 8 of Chapter II Appendix A. I cannot agree that this would amount to misconduct leading to destruction of goods, even if it is true, and I hold that it is not proved to be true. No doubt Rule 8 says that such goods should be loaded in 'iron covered' vehicles. D. W. 8 swore that the wagon in which the goods in question were loaded was an 'iron covered' vehicle. No doubt, some of the defence witnesses from Ramakundam swore that the vehicle had old zinc sheets for its roofing.

But these witnesses are not experts in metallurgy, but ordinary country rustics using popular language without knowing its full import or implication. Indeed, even very educated persons speak of kerosene oil tins, when really those tins are made of iron, with only a slight coating of tin. So, I have no hesitation in agreeing with the learned counsel for the defendants that the so called 'zinc sheets' were only 'iron sheets' coated over with a thin layes of zinc. Pure zinc sheets would never be used for such wagons, as they would be too soft and malleable to stand the stress and strain of a journey by goods train, especially from Pathankot to Madras.

What is more, there is nothing to connect this fire with any defect in the roofing of the wagon. The fire started, admittedly, in the lower half of the wagon, and nowhere near the roof. The theory of the plaintiffs' counsel that sparks from the engine fell into the wagon, piercing the fragile zinc sheet roof and set fire to the drums containing turpentine cannot, therefore, stand scrutiny.

22. The fourth fact relied on for proving misconduct was that this wagon was put as the fifthvehicle from the engine, instead of as the 15thor the 16th, as it should have been under therules. I cannot agree. No such rule was shownto me. The evidence of

D. Ws. 5, 6 and 7 showsthat turpentine drums can be put in the fifthwagon from the engine, and need not be put asthe 15th or 16th vehicle. What is more, the evidence shows that the fire did not occur whenthe particular wagon was the fifth from theengine, but that the fire broke out only whenit was the 15th or 16th vehicle from the engine.So this alleged misconduct even if proved, hadnothing to do with the breaking out of the fireand the destruction of the drums of turpentineoil by it.

23. The fifth act of misconduct relied on was that D. Ws. 1 to 6 turned the water funnel in full force on this burning wagon, and ensured its complete destruction by such a foolish procedure and so the defendants must pay the damages. I cannot agree. No doubt, it is true that throwing water on burning oil or ghee or turpentine will cause the flames to leap up, and such an act will not be done by a person aware of the action of water on different kinds of fire. But, here, there are two factors. D. Ws. 1 to 6 cannot be termed persons knowing all about the properties of fire and turpentine and, secondly, they did not know that the wagon contained drums of turpentine, as there was no dangerous label on the wagon showing the contents and there was no indication on the seal card about the nature of the goods loaded in the wagon. D. Ws. 1 to 6 threw Water at first on the burning wagon, and later on they poured coal ash and earth. They did so as they had no knowledge of the contents of the wagon. In spite of their best efforts to quench the fire they could not succeed. So, while holding that their act of throwing water on the burning wagon containing turpentine oil is not commendable, it will be an exaggeration to say that they fanned the flre or ensured the destruction of the goods by fire. These circumstances will only disentitle the defendants to the freight or to costs.

24. The further argument that D. Ws. 1 to 6 should have (opened?) the wagon and rolled out the burning drums, so that they could save the rest of the drums from catching fire, strikes as Gilbertian. To expect porters and others like D. Ws. 1 to 6 to open the wagon which was on fire, select the burning drums of oil, and roll them out, in order to save the other drums from destruction, is to ask for the impossible. Besides, turpentine being inflammable, each burning drum will communicate its fire to the neighbouring drum in no time, and will make the above operation misconduct on the part of the railway servants futile.

25. The last circumstance relied on for the misconduct on the part of the railway servants was that the railway authorities were guilty of gross negligence nad jack of consideration towards customers, and therefore of misconduct, in that fife extinguishers' were not provided in the Chief guard's and wider-guard's compartments in the goods trains just as they are provided in the guards' compartments in the mall and passenger trains, and that this ' act of misconduct would justify the claim for damages since if the fire extinguishers had been provided in the particular goods train, they would have been readily available for putting out the fire in the wagon, and would have saved the drums. I cannot agree with- this contention. Fire exinguishers are provided in mail and passenger rains, and not in goods trains, obviously because the authorities rightly consider that the lives of human being are more valuable than mere foods, and that they should be saved from fire f by chance the carriages happen to catch fire. It may be desirable that the goods trains are also equipped with such fire extinguishers. But, first Uiings first. On account of the fact that human lives are more valuable, the mail and. passenger', trains carrying them must be given preference in tills respect to the goods trains. As and when fire extinguishers become easily available, and reasonably cheap, I am sure even goods trains will be provided with such appliances. Their absence in goods

trains how cannot be held to amount to misconduct. Further, there is no certainty that the fire extinguishers, would have put out this blazing fire in the wagon containing turpentine oil drums. Even if there were fire extinguishers available in the goods trains for fighting the fire, by the time they were taken out of the guard's compartment and deployed on the burning wagon, the turpentine must have created a fierce fire too strong to be controlled.

26. The learned counsel for the plaintiffs asked what was the cause for the breaking out of this fire in the wagon containing these drums of turpentine oil. Learned, counsel for the defendants replied. that It was not part of the defendants' duty to find out the cause of every fire, as the cause in some cases cannot be found out. . He suggested that It might have been purely an accidental providential fire. He also suggested that some of the drums, due to the defective packing proved by the risk note A, might have leaked, and the leaking oil might have caught flre more easily.

Learned counsel for the plaintiffs relied on a statement made by D. W. 6 that the axles of this wagon might have got hot and that might have caused the flre. It is nob likely, as the axles of the other 49 wagons did not get heated as they should have if this were true. D. W. 6 is only a guard, and not a fire expert. The reason he - gave for the outbreak of this fire, namely, due to hot axles, was only given on the spur of the moment. Perhaps he considered it his duty to explain everything which happens to a train or wagon when it is under his control. No axle expert has been examined; nor did any other witness speak to the axle getting hot and the flre breaking out on account of that. Nor did even the plaintiffs state in their plaint that it was because of hot axles that the flre broke out.

Even this guard D. W. 7 had not stated anything with regard to the axle getting not and Causing the flre, when he was examined by the Traffic Inspector, P. W. 7, who held a preliminary enquiry soiely for the purpose of finding out the cause of the fire. So I am not prepared to hold that the axles of. this wagon got hot and caused the fire. It was only 8 a.m. at the time the wagon caught fire, and Ramakundam though it is in the neighbourhood of Vijayawa and Guntur, would not have got so hot, so. early, as to immediately set flre to the turpentine oil dripping' from the. wagon and the dripping was due to the defective packing of the plaintiffs.

27. It follows, from the several circumstances narrated above, that the plaintiffs cannot get any damages, for the value of the turpentine drums lost by them, on account of the are, as they have failed to prove that the fire broke out on account of such recklessness or gross negligence on the part of the authorities of the Railways as to amount to misconduct. So, the defendants will not be liable to pay to the plaintiffs the value of the 480 drums of turpentine lost on account of the are in the wagon In which they were loaded, or for the lorry hire, and load-ing charges. The value of the burnt drums sold in auction by the defendants, with the plaintiffs' consent, and already paid to the plaintiffs, will, Of course, be kept by the plaintiffs as they are the owners of those drums. The defendants should also refund the Rs. 1974/- received by them by way of freight charges in respect of the 480 drums of turpentine despatched from Pathankot.

Learned Counsel for the defendants demurred to this, and stated that at least the freight. charges for the distance covered from Pathankot upto Ramakundam, roughly two thirds of the total freight collected, might be allowed to be retained by the defendants. I cannot agree to this request. People who carry goods not in the way,

they should carry them, should not be given any freight charges, whenever they lose the goods partly due to such negligent carrying. Thus, I dp not think that Railway administration can claim freight from a ticketless passenger who is allowed to sit on the top of a carriage of a train and travel, and who falls down half way and is killed, on the ground that the train carried him half the way and so the Hallway is entitled to claim at least half of the charges from the heirs of the person who was thus killed. Such a claim, based on quantum meruit, will not carry conviction to any Court.

So also, In the present case, the defendantscontend, that the goods were carried by the goodstrain from Pathankot upto Ramakundam andclaim partial freight. The defendants carried thegoods in a wagon with no danger labels, and noseal card indicating that the wagon containedturpentine or inflammable goods as required bymandatory Railway rules themselves, and becauseof such absence of danger labels or correct description of the goods, the flre was sought to-be quenched at first with water, instead of withearth or sand, and the goods were completelydestroyed by flre and the plaintiffs lost nearlyRs. 12,000/-.

Learned counsel for the defendnts contended that the Railway Administrations had also lost an equal sum, because of the wagon being damaged completely by the same fire. We have to judge the question of freight from the point of view of justice, equity and good conscience. After considering the matter carefully, I hold that the plaintiffs should bear the loss of the turpentine on account of the fire whose cause cannot be traced, and the defendants the loss of the wagon themselves. There is absolutely no reason why the defendants should be allowed to keep the freight'charges of Rs. 1974/- collected from the plaintiffs, In view of the various acts of commission and omission and negligence committed by the servants of the defendants, though they might . not amount to misconduct sufficient to enable the plaintiffs to claim damages ior the loss of their goods. I find Issues 4 to 6 in the negative.

28. Issue No. 7: In the result, a decree will issue in favour of the plaintiffs and against the defendants for Rs. 1974/- the freight amount, with interest thereon at sis per cent per annum from today till the date of payment, and the rest of the plaintiffs' suit will stand dismissed. The plaintiffs and the defendants will bear their entire costs of the suit themselves, owing to the many untenable contentions they raised.

29. Learned counsel for the defendants urged that at least the cost of the present third defendant (Southern Railway) ought to be directed to be paid by the plaintiffs, as that Railway was neither the contracting Railway nor the Railway within whose jurisdiction the fire occurred. I cannot agree. The fact remains that the Union of India owns all the three Railways, and that the third defendant would get its own proportionate share of the freight charges out of the sum of Rs. 1974/- collected from the plaintiffs, in advance by the 1st defendant.

When all the three defendants were necessaryand proper parties to the suit, and the thirddefendant had not shown to be either a necessary or a proper party to the suit, it is unreasonable to put the third defendant's case forcosts on a higher footing than the case of theother two defendants. Time for payment of theamount decreed, three months.