CALCUTTA HIGH COURT

B.N. Ry. Co. Ltd

Vs.

Tara Prosad Maity

(Mukerji, J.)

05.12.1927

JUDGMENT

Mukerji, J.

1. This Rule relates to a decree for damages which the plaintiff has obtained against the defendant company for having knocked down and killed a bullock belonging to the plaintiff. The incident happened on the 3rd February 1911, at about 11 a.m., when a light engine belonging to the defendant company and run by one of the company's drivers was proceeding up the railway line from Danton to Lakhannath Road, bumped against the bullock which at that particular moment happened to be on the railway line, and as a result the bullock was thrown down the embankment, sustaining injuries which resulted in its death.

2. The negligence upon which the action was founded in the plaint was set out in para. 5 thereof which ran in these words:

> That due to the negligence of the defendant company in not fencing the railway line, and in driving the locomotive to the utter disregard of public safety, life and property, and the company's servants in charge of the aforesaid engine not taking proper precautions in frightening away the unfortunate animal the plaintiff was put to the unnecessary loss of ₹ 49/- which the defendant company is bound to pay. ₹ 49/-, thus claimed, it should be mentioned, was the price of the bullock.

3. By a petition subsequently filed by the plaintiff the following words were added to the said paragraph:

> That the defendant company is bound in law and equity to erect and maintain sufficient fences on both sides of the railway line to prevent the cattle of the owners and occupiers of the adjoining lands from straying on the railway lines, and the plaintiff being the

> owners of such adjoining lands is entitled to protection against the straying of plaintiff's cattle from the plaintiff's lands where such cattle are lawfully kept by the plaintiff, etc.

4. In giving his reason for holding the defendant company liable the learned Munsif has said in his judgment:

> To my mind these three factors, viz. (1) the running of the engine at the unscheduled time, (2) the terrific and unwarranted speed at which it was proceeding, and (3) the failure to blow the whistle to avert the accident, combine to fasten the liability for the loss of the bullocks on to the defendant company.

5. There was a plea of contributory negligence set up on behalf of the defendant company. It has been overruled. The learned Munsif has found that in the cultivated lands which lie on both sides of the railway line the villagers enjoy a customary right of grazing their cattle during this particular season and that as no fencing subway or level-crossing has been provided by the defendant company for going from one side of the railway line to the other, cattle cross the line at any point they choose. He appears to have been of opinion that the bullock had apparently gone over to the west of the embankment to graze and was coming back to its shed on the east of it, when it was knocked over.

6. In the aforesaid view of the matter the learned Munsif has decreed the suit. The defendant company have obtained the present rule.

7. It will be convenient at the outset to dispose of the objection that has been raised as to the jurisdiction of the trial Court to deal with the suit as one cognizable by the Court of Small Causes, it being urged that the suit is excepted by Article 35(ii), Schedule 2 to the Act inasmuch as the allegations upon which the suit is found constitute the offence of mischief as defined in the Indian Penal Code. In my opinion the said allegations in the plaint constitute a case of negligence which even, if wilful, falls far short of those requisites which would go to make out any such intent or knowledge as is necessary to satisfy the definition of mischief as given in Section 425, I.P.C. The action, as I understand it, is founded upon negligence-negligence of the defendant company themselves as regards certain matters and negligence of their servants as regards others for which the defendant company as masters are sought to be made liable. To such an action the article in question, in my judgment, has no application.

8. The other objections that have been urged as to the validity of the decree need not be set out in detail as they cover the whole range of the reasoning of the learned Munsif and it would be more convenient to deal with the reasons themselves rather than the contentions that have been put forward against those reasons.

9. As regards the facts : it is fairly clear upon the evidence of plaintiff's witness 1 and plaintiff's witness 2 that the bullock had been taken to the west of the railway line to graze and was left

there, that before the impact it had got on to the embankment, that, at the time of the impact, it was grazing on the line, and that it was caught in the cowcatcher and was thrown over to the west receiving the injuries which resulted in its death. The finding of the Munsif that it was apparently coming back to its shed on the east may or may not be correct.

10. Of the three factors to which the learned Munsif has referred in his judgment as constituting the ground of the defendants' liability, two viz., "the running of the engine at an unscheduled time" and "the terrific and unwarranted speed at which it was proceeding," are matters which hardly come into the question. The legislature having in Ch. 4, Railways Act (9 of 1890), made provisions for the opening, closing and use of railways and it not being suggested that there was any restriction imposed on the defendants as regards their right to use locomotives only at scheduled times or at a speed less than the speed at which the engine was travelling, whatever nuisance or inconvenience may be caused to the public in general cannot be regarded as a violation of any duty which the defendants owe to them or as amounting to any negligence which may form a ground of action, so far as they are concerned. *King v. Pease*[1] has made it perfectly plain that where the legislature has authorized the formation of a railway, the circumstance of the use made by the company of their railway involving more than ordinary risk cannot justify the imposition on the company of a larger degree of responsibility than the Act of Parliament prescribes.

11. In considering the third ground, namely, "the failure of the defendant company to blow the whistle," I think it must be held on the facts that the whistle was not blown. The driver says that he does not recollect having knocked over anything on the day in question. He says that when cattle obstruct the way drivers always sound whistles, but he does not remember whether he did so on the day in question. He says that when whistles are sounded cattle get scared and get away. Whether the evidence of the driver is true or false it is not possible to say, but it is difficult to believe that it is wholly true. Now to render the company liable for the omission on the part of the driver to whistle it is necessary to prove that the driver has been guilty of a breach of duty or an error of judgment or that he saw the danger and failed to give warning. Failure to whistle is not the omission of any statutory precaution not only here but also under the English law, *Newman v. L. & S.W. Ry*[2] but in certain circumstances it may be reasonable to whistle and failure to do so may be evidence of negligence, e.g., *James v. N.E. Ry*[3]. *Co. Gray* **v.** *N.E. Ry. Co*[4]. *Coburn v. G.N. Ry. Co*[5]. *Davey v. L. & S.W. Ry*[6]. and *Dublin Wiclow and Wexford Ry. v. Stattery*[7] No abstract rule can be laid down as to the circumstances under which the driver would be bound to whistle notwithstanding that it is not a statutory duty to do so, but on the whole it seems that the duty arises only when the circumstances call for a warning to be given. If the duty did arise, it would not be an absolute defense to say that-the whistle if blown might or might not have scared away the bullock and it-would always be a matter for the jury the Court not being bound to presume as a matter of law that the whistle' would have been useless: *Barker v. L. & S.W. Ry. Co*[8]. In the present case nothing has been proved to indicate that the driver had in point of fact noticed the bullock and still did not whistle. It is unnecessary, therefore, to discuss the liability of

the defendant company on the footing of such a state of things. If the driver did not notice the bullock can it be said that he was guilty of negligence; "Negligence," as Alderson, B., said in *Blyth v. Birmingham Waterworks Co*[9]. is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent man would not do.

12. The standard of care ordinarily required in each particular case has to be determined and the question to be considered is whether such a standard has been attained; the standard being founded upon a consideration of the ease which would be observed by a prudent and reasonable man *Metropolitan Ry. v. Jackson*[10] A driver who is running an engine on the lines of a railway is expected not to disregard any signals

[1][1832] 4 B & Ad. 30 [3][1867] 2 C.P. 634 [5][1891] 8 T.L.R. 31n
[2][1891] 55 J.P. 375 [4][1883] 48 L.T. 904 [6][1884] 12 Q.B.D. 70
[7][1879] 3 A.C. 1155 [9][1856] 11 Ex. 781
[8][1891] 8 T.L.R. 30 [10][1878] 3 A.C. 193

or disobey any rules. He is expected also to be cautious as regards the safety of the locomotive and the rolling stock, and of passengers, invitees, licensees and the like. Even as regards trespassers it maybe conceded, though there seems to be some divergences of opinion in this respect, that extra care should be taken not to injure the public if they are known to frequent or cross at a particular point though without any right. Omission to take such extra care under the last mentioned circumstances has sometimes been held to afford a ground of action while at others not, e.g., such cases as *Bilbee v. L.B. & S.C. Ry*[11]. *Lowery v. Walker*[12] and *Murley v. Grove*[13] There is, however, no principle or authority which demand that a driver running an engine on the open lines at places where there are no level crossings or which are not known to be ordinarily used for purposes of crossing the rails is bound to be on the look out to see if any trespassers are on the lines. A railway company allowing persons to cross the line otherwise than by a level crossing is not in duty bound to use care to protect such persons : *Harrison v. N.E. Ry. Co*[14]. but if it is such a place where persons are in the habit of crossing, the Company has to take reasonable precautions in the use of the spot, even though there is no right of way there : *Barrell v. Midland Ry. Co*[15]. The evidence such as it is in the present case, shows that there is no bend at or near the spot and the lines run straight. There is ample authority for the view that if the driver was unaware of the danger and had no reason to anticipate it the liability would not arise : *Simon v. London General Omnibus Co*[16]. *Hase v. London General Omnibus Co*[17]. I am unable to hold on a consideration of all the surrounding circumstances that the omission to notice the bullock and failure to blow the whistle amounted to negligence on the part of the driver.

13. The question whether the Railway Company are bound to provide level-crossings or subways does not really arise in the present case, as it is not the plaintiff's case that any public road was being used by the bullock that was killed. The law relating to the obligation of the Railway Company to provide for the safety of the public crossing the line at level-crossings will have no bearing on the present case.

14. It is not alleged that the defendants have failed to comply with any statutory provision or carry out a requisition in this respect made by a competent authority or even by the public or any particular individual. The omission to provide them, if they are necessary, may have caused inconvenience to the public and may be taken to have formed a legitimate ground of complaint bat for the purposes of the present suit the matter is irrelevant. On this head the more important question is whether the defendants knowing as they must have, that-men and cattle are likely to cross the* lines were not bound to make and maintain proper fences to prevent the cattle-from straying on to the lines. Under the English law the Railways Clauses Consolidation Act, 1845 (8 & 9 Vic. c. 20) has imposed a statutory duty on a Railway Company to make and at all times to maintain proper fences between the railway and adjoining land, and, as pointed out by Lush, J., in *Buxton v. N.E. Ry. Co*[18].

> If the fence is not sufficient and in consequence the cattle in the adjoining field stray on to the line and are killed, the company are answerable to the owners whether they are guilty of negligence or not.

[11][1865] 34 L.J.C.P. 182 [13][1882] 46 J.P. 360 [15][1888] 1 F. & F. 361
[12][1910] 1 K.B. 173 [14][1874] 29 L.T. 844 [16][1907] 23 T.L.R. 463
[17][1907] 23 T.L.R. 616 [18][1868] 3 Q.B. 549

15. There is no duty in a Railway Company to fence their line of railway as towards passengers or persons already on the line; the duty in them is towards persons off the line to prevent the latter from getting or straying upon it per Bramwell, B, in *Harrold v. G.W. Ry. Co*[19]. The duty thus cast upon the Railway Company by the statute is the shifting but not varying of the obligation, that is imposed on ordinary tenants by the common law and is co-extensive with that obligation and does not go further than the prescriptive liability of a servant tenement. Such fences separate the land taken for the use of the railway from the adjoining land not taken and protect such lands from trespass or the cattle of the owners or occupiers thereof from straying thereon by reason of the railway. It is a duty which they owe only to the owners and occupiers of the adjoining lands or persons claiming through them and not the world in general. So where the plaintiff's sheep escaped from his close through his own defect of fences and escaping thence on the defendants' railway were killed, it was held that the defendants were not liable : *Ricketts v. East and West India Docks*[20] In that case Jervis, C.J., speaking of the old prescriptive common law obligation said:

> The rule upon the subject is well laid down in notes to *Promfret v. Ricroft*[21] The general rule of law is, that I am bound to take care that my beasts do not trespass on the land of my neighbour, and he is only bound to take care that his cattle do not wander from his land, and trespass on mine, *Tenant v. Goldwin*[22] *Churchill v. Evans*[23]and *Boyle v. Tamlyn*[24] and, therefore, this kind of action will only lie against a person who can be shown to be bound by prescription or special obligation to repair the fences in question for the benefit of the owner or occupier of the adjourning land. And no man can be bound to repair for the benefit of those who have no right. Therefore, the plaintiff cannot recover for the damage occasioned to his cattle by their escape from the adjoining close through the

defect of the defendant's fences, unless the plaintiff had an interest in that close, or a license from the owner to put them there, so also would no action lie even where the cattle had escaped from an adjoining highway unless they were lawfully using the highway that is passing and re-passing there :

Dovaston v. Payne[25] A customary right of grazing on the lands adjoining the railway lines has been proved in this case, but there is no statutory liability here in this respect. In England, apart from statute, there is no common law liability to put up a fencing enclosing the lines where there is no highway adjoining and on the facts disclosed in the present case an action for trespass would have been maintainable by the Railway Company against the owner of the cattle if the cattle strayed on the line and committed damages. Ridley, J., in *Holgate v. Bleazard*[26] in stating the law on the subject said:

In Bullen and Leake on Pleading, Edn. 3, p. 329...it is laid down that the "general rule of law is that the owner of cattle is bound to take care that they do not trespass on the land of others." In other words that it is his duty as a general rule of law to keep his fences in such a condition as will prevent them from trespassing. The passage continues : "But the owner of the land" that is, the other owner upon whose land the trespass is committed "may be bound by prescription or otherwise to maintain and repair a fence for the benefit of the owner of the adjoining land who may have a corresponding right to have the fence so maintained and repaired.

[19][1866] 14 L.T. 440 [21][1666] 1 Wmo. Sound 321 [23] [1809] 1 Taunt. 529
[20][1852] 12 C.B. 160 [22][1700] 6 Mod. 311 [24][1827] 6 B. & C 329
[25][1795] 2 H. Bl. 527 [26][1917] 1 K.B. 443

16. The present case is similar in all cardinal respects to the case of *Henry Conder v. Ballaprosad Bhagwandin*[26] in which Sir Charles Sargent, C.J., and Pulton J., dealing with a claim for compensation for the loss of a buffalo which strayed, while grazing, on to the railway line and was killed said:

The obligation imposed on railway companies of fencing their railway by Section 21, Act 18, 1854 was repealed by Act 23 of 1871, and in lieu thereof there was substituted the power to the Governor-General or Local Government to mike rules for fencing as provided by Section 21 of the Act.... Nor have any rules been issued to the company under the Acts 4 of 1879 or 9 of 1890, and on the finding that the company was under no obligation statutory or otherwise, to fence the line and there being no evidence that the accident was caused by any negligence on the part of the driver of the train the company was held not liable.

17. The view of the defendant's liability taken by the learned Munsif, in my opinion, is not correct. The rule must be made absolute and the plaintiffs' suit dismissed with costs in the trial Court as well as in this Court. Hearing-fee in this rule is assessed at one gold mohur.

[26][1895] U.P.J.H.C. 91