(1874) 06 CAL CK 0001

Calcutta High Court

Case No: None

C. Halford		APPELLANT
	Vs	
The East Indian Railway Company		RESPONDENT

Date of Decision: June 17, 1874

Final Decision: Dismissed

Judgement

Sir Richard Couch, Kt., C.J.
The plaint in this suit stated that the plaintiff was the owner of a bungalow and dwelling house, with stables and out offices thereto, adjoining, at Kharmatta and the defendants were possessed of, and had the care and management of, a line of railway, called the Chord Line, running near the, said bungalow and premises, with banks belonging thereto and forming part of the said railway; and were possessed of locomotive engines containing burning substances, which engines were, used and employed by the defendants for the drawing and propelling of carriage, wagons, and trucks along the said line of railway; yet by the negligence and improper conduct of the defendants and the want of due care and management of their said line of railway, banks, and engines, the dry grass, which was allowed and permitted to be and remain upon the railway and, bank, became and were ignited by sparks of fire emitted from a locomotive engine of the defendants, which, with a goods train attached thereto, was driven along the line of railway near to the plaintiff''s bungalow and premises without proper precautions being taken to prevent the expulsion of such sparks and fire from the engine. Pontifex, J., has dismissed the suit, and this is an appeal from his decision.

2. I concur, with the learned Judge in the conclusion that it was shown that the defendants had authority to use locomotive engines on this, part of the railway. In fact the form of the plaint does not raise this question, for if the defendants had not, as was argued before us by the plaintiffs'' Counsel, and I believe before Pontifex, J., also, authority (by which I mean legal authority) to use locomotive engines on that part of the line, it was not necessary to make in the plaint the allegation of negligence which the

plaintiff made. The plaint is drawn, as it might be, expected to be, on the supposition, that the East Indian Railway. Company had, as I should think that everybody would conclude, that they had, authority, to use locomotive engines on the Chord, Line. It would be extraordinary if they had not lawful authority to do so, and had only power, to use the line as the small line in England of the Festiniog Railway was authorized to be used.

3. The real question in this case is whether there was negligence on the part of the Railway Company or their servants; and in considering this I cannot do better than quote the language of Williams, J., in Freemantle v. The London and North Western Railway Co. 31 L.J., N.S., C.P., 12, in which the subject of negligence on the part of railway companies, in cases like this, was folly considered, and there was a most careful summing up of the evidence by the learned Judge. Williams, J., after laying down that it was necessary to prove negligence, says: "Now, gentlemen, it remains to consider what is to be regarded as negligence on the part of the Company for the consequences of which they are to be held responsible. Now, as to that, the Company, in the construction of their engines, are not only bound to employ all due care, and all due skill, for the prevention of mischief accruing to the property of others, by the emission of sparks or any other cause, but they are bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided that they are such as, under the circumstances, it is reasonable to require the Company to adopt." Upon an application to the Court of Common Pleas for a new trial in that case, the learned Judges held that the summing up to the jury was quite correct, and that no fault could be found with it.

4. In a later case Sir William Erle laid down the rule as to negligence. In Ford v. London and South Western Railway Co. 2 F. & F., 730, that eminent Judge said: "A railway company is hound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have" suggested." In a still" later case before Keating, J.,--Dimmock v. North Staffordshire Railway Co. 4 F. & F., 1058--the jury found that there had been no negligence on the part of the Company, in the omission of means to prevent the emission of sparks from their engines, the means suggested being such as practical men stated would impede the engines and would not be effectual for the object. This I consider is the law as to the liability of railway companies for the emission of sparks or fire caused by the use of their engines.

5. In the present case there certainly is not evidence that the engine, which was used on this occasion, was negligently constructed and different from the engines of the best construction which are now in use, The witnesses show that it was an engine of the best construction of the kind, and that no appliances were omitted which, under the circumstances, it would be reasonable to require the Company to adopt. It appears to me that both in respect of the construction of the engine and the mode in which it was used by the servants of the Company at the time, there was no evidence of negligence which would make them liable for the consequences of the fire.

6. But the Company are bound not only to use due care in the construction and use of their engines, but also to use due care in keeping the line of railway and the land belonging to them on each side of it in a proper state. This appears from the case of Smith v. London and North Western Railway Co. L.R., 5, C.P., 98; at p. 106, which is referred to by Pontifex, J., in his judgment, where it was sought to make the Railway Company liable, not on account of any defect in the construction of the engine or of not adopting, means to prevent the emission of sparks or the falling of live cinders from the ash-pan, but because the servants of the Company had allowed dry grass to be on the land of the Company on each side of the railway in what was alleged to be a negligent manner, and that thereby the fire was caused which burnt the plaintiff"s cottage. Bovill, C.J., in his judgment in that case says: "Seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings, to remain on the banks of their railway, in a season of unusual heat and dryness, and for a time which, under these circumstances, might be fairly called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible material, and that the fire did in fact extend to the cottage, I think it is impossible to say that there was not evidence from which a jury might be justified in concluding that there was negligence, as regards the plaintiff, and that the destruction, of the cottage in which the plaintiff"s goods were was the natural consequence of their negligence."

7. Now, in considering whether there was due care in keeping the land of the Company on each side of the railway in a, proper state, we must keep in mind (as is said by Bovill, C.J.) that if the Company are using an engine which emits sparks and causes a risk of fire; it is incumbent on than, although they may be entitled to use it, to keep the line of railway in a proper state with reference to such danger. We have therefore to consider whether, on the evidence in this case, the plaintiff has shown that there was negligence on the part of the servants of the Company in the manner in which the grass had been out and the state in which it had been allowed to remain up to the time when the awe happened.

8. The plaintiff"s witness, Aboo Khan, said, that "when the grams was out, about two feet from the root were left, and the top only was out. When the grass was cut, it was about the height of a man. It was cut to thatch bungalow, and for what other purpose I don"t know." In another part of his evidence he said; "The rail way grass has been out about two months before the fire; about two feet wave left; the top was cat off. It was dead, and was dry grass." The next witness, the Malee, said, that "the grass fine jungly grass "straw--stumps of ungly grass, of which the top had been cut off; about two feet was the height of the stamps." The other witnesses for the plaintiff, Bolakee, Jeetun Mundle, and Doolub Roy, all depose to the same effect. In fact there was a similarity in this respect in the evidence of the plaintiffs witnesses, which is not at all unusual in this country.

9. A witness for the defendants, the engine-driver, said, "the grass was from six inches to a foot High." Browsmith, the guard, spoke of it as about two feet high. As to him, part of

his evidence is such that it cannot be believed. When he spoke about the fire, he wished it to be believed that it had actually broken out before the train arrived at the spot. That part of his evidence is, to my mind, utterly untrustworthy. It is, however, possible that when he spoke of the height of the grass, he was saying what he believed to be true.

10. Mr. Roberts, a very important witness, the gentleman who had charge of that part of the line, said on this subject,--"at the time the fire took place the grass on the Bail way Company''s land was from six to eight inches long as far as the fence. On the steep slope, it was six to eight inches long. On the right slope it was eaten down by eattle. The grass on the embankment had been cut before,--about a fortnight before. I don''t know personally who out it. I had given leave to my Baboo to cut it." The Baboo was not called. It would hate been were satisfactory if we had heard what he had to say. But Mr. Roberts appears to me to be a gentleman whose evidence may be fully trusted, and Pontifex, J., remarks in his judgment, that he did not appear to be in any way hostile to the plaintiff. It would not be right to infer from his being a servant of the Railway Company, and holding the position which he did at this time, that his evidence is given more in favor of the Railway Company than he justly believed is should be. I place considerable reliance on what Mr. Roberts has said. Than Mr. Prestage, who is a gentleman of considerable experience, and whose evidence on this matter is from his position very valuable, says, that the Railway Company could not engage at reasonable cost to keep the bank free from glass" He showed that the question re at what height the grass should be allowed to remain after it has been out; and said that on his Railway the grass would he left at from six to eight inches in height. This is what Mr. Roberts speaks to, and is the height at which in my opinion is was left aft this place. There is another Witness whom I have not yet noticed, who may help us in coming to a conclusion on this point,--Mr. ''William Halford, the brother of the plaintiff, who went to the place five days after the fire. It occurred on the 21st of March, and he says that he arrived at the place on the 29th. Now I think it cannot be supposed from the evidence in the case that the fire had burnt the grass on the line of railway in every place so completely that it; as the plaintiff''s witnesses say, it was left two feet high, there would not have been on some parts of the bank,--perhaps not close to where the plaintiff''s bungalow had been, but in other parts,--grass of that height. It is not likely that in cutting the grass they would only leave that part of it which was near the bungalow, and where the fire happened, two feet high and out it lower in other parts. It appears to me improbable that if, on the 29th of March, when Mr. William Halford went to the spot, there had been any appearance of the grass having been in the stator which the plaintiff''s witnesses describe, he would not hare noticed it. It is possible that he might not; but it appears to me improbable that when, he came down to look at the effects of the fire which had destroyed his brother''s property, and which would be immediately supposed to have, arisen from an engine on the railway, he would not have observed any appearance, if there were any, of negligence on the part of the Railway Company in the state in which the grass had been left. He said fairly that he did not recollect noticing anything of the kind. He said: "The cleared remain which I saw at the railway premises appeared to me to hare been grass; I don''t recollect what

was the length of the grass which was not burnt. There was no appearance of any grass having been burnt on the road. As far as appearances went, it appeared that there were two distinct fires altogether, one on the railroad and another on our premises." This agrees with the evidence that there was a portion of land, where the road was, which was free from grass, or on which the grass was so slight that there would not be any appearance of fire. It appears to roe therefore that Mr. William Halford, in this absence of any recollection of the appearance of the grass where it had not been burnt, confirms the evidence which Mr. Roberts gave as to the state in which the grass was left. It was incumbent on the plaintiff, who charges that the fire was caused by the negligence of the defendants, to satisfy the Court that there was negligence. And if the case is left in such a state, and the evidence is so evenly balanced, that it is impossible for the Court to say that there was negligence, we should not be justified in making the defendants liable. We must be satisfied that they were guilty of negligence before we can make them liable for the consequences of the fire, however unfortunate that may be for the plaintiff. We cannot help sympathizing with a gentleman who has suffered a loss like this, but still we must see whether it is made out by the evidence there was negligence on the part of the defendants. I think it has not been made out. The evidence does not satisfy me that the grass was left in the state which is described by the plaintiff''s witnesses or in a state other than what Mr. Prestage says it might fairly and reasonably be left. And the fact that we are asked to reverse the decision of the Judge who tried the case, must not be left out of consideration, upon the whole, therefore, after carefully going through the evidence in this case, and considering it, I am unable to say that the decision of Pontifex, J., is wrong, and I think that the appeal ought to be dismissed with costs.