

(1925) 09 BOM CK 0047

Bombay High Court

Case No: Civil Extraordinary Application No. 366 of 1924

Bhimji N. Dalal

APPELLANT

Vs

B.B. and C.I. Railway Co.

RESPONDENT

Date of Decision: Sept. 29, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115
- Railways Act, 1890 - Section 113

Citation: (1926) 28 BOMLR 443 : (1926) ILR (Bom) 215 : 94 Ind. Cas. 742

Hon'ble Judges: Norman Macloed, J; Coyajee, J

Bench: Division Bench

Judgement

Norman Macleod, Kt., C.J.

The B.B. & C.I. Railway Co., hereinafter called the Company, took out a summons in the Court of Small Causes at Bombay against the defendant to answer in an action for debt-damages according to the following particulars of demand.

Amount of fares and excess charges due and payable by you according to law, you having travelled on the plaintiff Company's Railway between church Gate and Malad and vice versa every day by First Glass from February 26, 1924, to April 1 1924, (as per statement and particulars annexed) without having with you a proper pass or ticket during the said period for the said journeys as required by law." Rs. 342, the amount claimed, represented First Class fare for Rs. 171, and excess charges for a like amount.

2. The suit was tried by the Fourth Judge who dismissed it with costs.

3. The Full Court on a rule being granted to set aside the order of dismissal and to pass a decree for the Company made the rule absolute and passed a decree for Rs. 338 and costs.

4. On the application of the defendant a notice was issued to the Company, u/s 115 of the Civil Procedure Code, to show cause why the decree of the Fourth Judge should not be restored, on the ground that the suit was for the recovery of a statutory penalty created by Section 113 of the Indian Railways Act, which being unknown to the common law could only be enforced by following the remedy provided in the said Act,
5. The defendant had purchased from the Company for Rs. 65-12-0 a season ticket or pass which entitled him to travel by First Class between Church Gate and Malad whenever and as often as he chose during the three months from January 26, 1924, to April 25, 1924.
6. The following notice was printed on the ticket: " This ticket is forfeited if transferred, and is issued subject to the Regulations of the Company, as notified in the Quarterly Time table and Railway Guide. It should be given up on the day following the date of its expiry, otherwise the amount of the deposit will be forfeited. In the event of this ticket being lost a fresh ticket will only be issued on payment of full charges and fresh deposit,
7. This ticket must be produced when required.
8. On February 25, the defendant lost his pass which was stolen from his pocket while he was travelling from Malad to Ohurch Gate. On February 28, the defendant notified the loss to the Company and said, " Since then I have been travelling without a ticket and I propose to do so until a duplicate pass is issued to me; having regard to the special circumstances of this case when on travelling on your railway my purse containing the pass had been robbed, I hope you will make it a special case in issuing a duplicate pass up to April 24, and oblige.
9. The defendant was informed by letter of March 1, that a duplicate ticket could not be issued according to the rules and he must purchase a fresh ticket
10. On March 14, the General Traffic Manager wrote to the defendant that it had been reported to him that the defendant was found travelling without a ticket and on being asked to pay the legal fare declined to do so. A demand for Rs. 42-32-0 the legal fare for railway journeys made by the defendant after he lost his ticket up to the 6th March, was made. On March 15, the defendant replied that he had paid the Company for the use of its railways full fare up to April 24, and he would like to know by what term of the contract or under what section of the Indian Contract Act bia right to travel had been taken away. The Company replied on March 18 that the defendant by failing to produce the ticket had committed a breach of the contract, and in accordance with Section 113 of the Indian Railways Act he was liable to pay the charges demanded in the letter of March 14. He was also liable to pay the excess charges prescribed in Section 113 of the Act. As the defendant continued to travel on the Company's line without paying for another ticket or pass, the Company took out the summons in the case on April 2.

11. The trial Judge said : "The only question to be determined is whether any liability attached to defendant, and, if so, what was the extent of it.

12. Following the decision of Jessel. M.R. in *West v. Downman* (1880) 14 Ch.D. 111 that it was a settled rule that, if a statute created a new right and gave a particular remedy for enforcing it, there was no other remedy, he held that the plaintiff had come to the wrong forum for a claim under that section. The section, however, did not exclude the Company's right to sue the defendant for breach of the contract. It was not suggested that defendant had transferred his ticket, and as no time tables or guides had been published after the war, there was no obligation on the defendant to look for the regulation in other places.

13. With regard to the obligation to produce his ticket when required, the defendant was only required to produce his ticket on three occasions and failed to do so, but for such a breach of his contract the defendant was not liable to pay damages. Apart from the terms of the contract, the defendant having paid for his right to travel for the period in suit, there was no obligation at common law for him to pay again, if he lost his ticket.

14. Section 68 of the Indian Railways Act, IX of 1890, provides that no person shall, without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

15. And by Section 69 it is provided that every passenger by railway shall, on the requisition of any railway servant appointed by the railway administration in this behalf, present his pass or ticket to the railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued or in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the railway servant.

16. The Judge pointed out that the same statute which imposed the duty imposed by Section 69 created u/s 113 a remedy in favour of the railway company, and the three sections had to be read together. Section 113, Sub-section (1), provides that if a passenger travels in a train without having a proper pass or a proper ticket with him, or being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefore u/s 69, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge thereinafter in this section mentioned in addition to the ordinary single fare for the distance which he has travelled.

17. And by Sub-section (4) if a passenger liable to pay the excess charge and fare mentioned in Sub-section (1), fails or refuses to pay the same on demand being made therefor, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be

recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered, be paid to the railway administration. The Judge thought that there was nothing in Section 68 to entitle the railway company to make a passenger, travelling without a ticket with him, even when he had paid for it before starting on the journey, pay a second time.

18. The Chief Judge was of opinion that on the terms of the contract with the defendant contained in the ticket, if the ticket was lost, the relative amount paid for its purchase was lost and the contract terminated. If the defendant wished to continue travelling on the company's railway he was bound to purchase a fresh ticket, or render himself liable for the consequences which would follow on his travelling without a ticket, that is to say, as provided by Section 113(1), he would have to pay the ordinary fare and a certain excess fare.

19. The Chief Judge then considered whether the remedy provided by Section 113 (4) was cumulative or exclusive, and pointed out that in Halsbury, Vol. XXVII, p. 189, paras 370 and 373, it was stated that in the case of statutes of the third class referred to, in which a new obligation was created and a special remedy provided, when a particular mode of enforcing a new obligation was specified, such obligation as a general rule could be enforced in no other manner. He seemed to consider that the words as a general rule" implied that there were exceptions. In the *Crystal Palace Gas Company v. Idris & Co.* (1900) 82 L.T. 200 the distinction is made clear. The company brought an action for negligence against the defendant owing to one of their lamps having been broken by the negligent driving of one of their servants. The defendant relied on Section 20 of the Gas Works Clauses Act, 1847, which directed that persons carelessly or accidentally damaging a lamp belonging to the undertakers or under their control should pay for the damage done a sum not exceeding 51., as any two justices or the sheriff should think reasonable.

20. The Court held there was nothing in that section to oust the ordinary remedy for negligently knocking down a lamp. So under the section before us there is nothing which ousts the jurisdiction of the Court in an action by the railway company to recover the fare from a passenger who has not paid it. But it is quite clear that there is no jurisdiction in the Court to decree the penalty provided by the section. Once the difficulty in determining whether a particular statute comence within the third class is solved then the rule applies.

21. Thereafter by means of an argument, which I am unable to follow, the Chief Judge considered that the defendant's contention, that as three demands only had been made, he was liable to pay for three journeys only, had been disposed of. It would have been more advisable, he thought, for the plaintiff to have made proper demands for the whole amount sued for either orally or by letter. However, it might be taken that the suit was a demand and its resistance was a refusal.

22. Though the cause of action was framed on the basis of the liability incurred under a, 113 (1) it sounded in damages. As the defendant had lost his ticket and so put an end to the contract, he was not entitled to avail himself of it, and so for all journeys at which he was unable to produce a ticket for inspection he was liable to pay. The jurisdiction of a civil Court not having been taken away he could be sued in the Court of Small Causes.

23. A decree was then passed for Rs. 338, Rs. 4 less than the amount demanded, and costs thereon.

24. I granted a rule as it seemed to me an open question whether defendant could satisfy this Court that the case came within the provision of Section 115, Civil Procedure Code, on the ground that the Small Causes Court had exercised a jurisdiction not vested in it.

25. When the rule came on for hearing, it was first contended by the Advocate-General appearing for company that the rule was not competent.

26. The question whether a Subordinate Court has exercised a jurisdiction not vested in it by law is always a difficult one to determine, when the Court, by the construction it has put on a particular Statute, has held it has jurisdiction to decide the matter before it, and the question has been rendered more difficult by the somewhat confused reasons by which, with all due respect, the Chief Judge has justified his decision. If the suit was a suit for damages for breach of contract then the Court had jurisdiction. The Chief Judge said that though the suit was framed on the basis of the liability incurred u/s 113 (4), it sounded in damages and thereby appears to have deceived himself into thinking he was entitled to pass a decree for damages, the measure of damages being prescribed by Section 113(4) In the first instance it is necessary to draw a very definite line between the realm of contract and the realm of statutory obligation. The defendant by paying the proper fare had entitled himself to travel according to the particulars mentioned in his ticket. He was bound to produce it when required, and, if he lost it, he could not get another without paying for it. But if he did not produce his ticket, or lost it, the contract of carriage did not thereby come to an end. A passenger who pays for his accommodation but has not with him a proper pass or ticket cannot be sued, if he completes the journey without a demand being made upon him for his ticket, on an implied contract that if he travels by the plaintiff's railway he undertakes to pay for the accommodation, because he has already paid. Having no pass or ticket he may be a trespasser, but then he is only liable to the penalties imposed on trespassers.

27. Chapter IX of the Act which contains Section 113 deals with penalties and offences.

28. Before the penalty imposed by Section 113(1) can be enforced under sub-section 4, there must be requisition on the passenger u/s 69, and a failure or refusal to present for examination or to deliver up his pass or ticket, Then there arises a

liability to pay the ordinary fare plus an excess charge. The liability to pay does not arise from the contract but from the Statute, and the Statute prescribes the method by which the amount the passenger is liable to pay can be recovered.

29. In any event, the liability to pay only arose on three occasions on which payment was demanded and refused. It is impossible to view the filing of a suit as the demand which is required by Section 113(1), and the resistance to the suit as the refusal. Obviously, it is the refusal which creates the right of action, if there is such a right, and that must have occurred before the suit is filed. But clearly it is intended by Section 113(1) that the demand should be made by a railway servant on the company's premises before the passenger has departed therefrom. If the Court had confined itself to passing a decree for the fare on the ground that the original contract had come to an end, and that if the defendant had travelled by the Company's railway an obligation arose upon him to pay for the accommodation, it might have been difficult to contest the decision u/s 115 of the Civil Procedure Code, but the Chief Judge has clearly considered that the Small Causes Court was entitled to pass a decree for the penalties imposed by Section 113 of the Indian Railways Act.

30. Such a suit could not be a suit for debt or damages, it would, be a suit to recover penalties provided by a special Act, and unless jurisdiction has been given to the Small Causes Court to try a suit for the recovery of the penalties which can be exacted u/s 113 of the Indian Railways Act concurrent with the Magistrate's jurisdiction under Sub-section 4, the Small Causes Court has no jurisdiction.

31. In my opinion, therefore, the rule must be made absolute and the suit dismissed with costs throughout.

Coyajee, J.

The facts of this case are fully set out in the judgment of my Lord the Chief Justice. The B. B. & C.I. Railway Co. sued the defendant in the Court of Small Causes at Bombay to recover the sum of Rs. 342 according to the following particulars of demand : " amount of fares and excess charges due and payable by you according to law you having travelled on the plaintiff's company's railway between Church Gate and Malad vice versa every day by First Class from February 26, 1924, to April 1, 1924, as per statement and particulars annexed without having with you a proper pass or ticket during the period for the said journeys as required by law." The company brought the claim u/s 113 of the Indian Railways Act, 1890. The defence was that the plaintiff company was seeking to enforce a statutory right, and as the Act had prescribed the manner in which it should be enforced and also indicated a special tribunal for that purpose, the Court of Small Causes had no jurisdiction to entertain the suit. The trial Judge accepted the contention and dismissed the claim. His decree was reversed by the Full Court. The learned Chief Judge said : "The cause of action is framed no doubt on the basis of the liability incurred u/s 113(1), but it sounds in damages. The remedy given by Clause 4 of that section is not as against an offence, where the aggrieved party should proceed by indictment." The Full Court

held that the Act did not oust the jurisdiction of the ordinary Courts, and they passed a decree for Rs. 338 in favour of the company.

2. The defendant has applied to us, u/s 115 of the Code of Civil Procedure, asking for a revision of that decision on the ground that the said Court had erroneously assumed a jurisdiction which was not vested in it by law. In my opinion the application is competent. Where upon an erroneous construction of a statute, a Subordinate Court assumes a jurisdiction which does not belong to it, the High Court has the power to revise its decision. In 22 CWN 50 (Privy Council) their lordships referred to Section 115 and said. (p. 267): " It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." The case before us is a case of an illegal assumption of jurisdiction by the lower Court.

3. On the claim as made by the railway company, the remedy is to be found in Section 113 Sub-section (4) of the Act. The claim was in respect of "fare and excess charges" due and payable by the defendant according to law, he having travelled without having with him a proper pass or ticket. The company relied on the following notice printed on the ticket: (1) " In the event of this ticket being lost, a fresh ticket will only be issued on payment of full charges and fresh deposit": and (2) "This ticket must be produced when required."

4. It is necessary to refer to the relevant provisions of the Act, which, for this purpose, are Sections 68, 69 and 113. The first two sections come under Chapter VI which deals with the "Working of Railways " Section 68 is in these terms:-

No person shall, without the permission of railway servant, enter any carriage on a railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

5. Then Section 69 says :-

Every passenger by railway shall, on the requisition of any railway servant appointed by the railway administration in this behalf, present his pass or ticket to the railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued, or, in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the railway servant.

6. The consequences of a breach of these statutory obligations are made known in Section 113, It falls under Chapter IX which treats of " Penalties and Offences." The material portion of Section 113 runs thus: "(1) If a passenger travels in a train without having a proper pass, or a proper ticket with him" [this apparently has reference to Section 68] "or, being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefore u/s 69, he shall be liable to pay, on the demand of

any Railway servant appointed by the Railway administration in this behalf, the excess charge hereafter in this section mentioned, in addition to the ordinary single fare for the distance which he has travelled," Sub-section (3) deals with the excess charge referred to in Sub-section (1). By subsection (4) it is enacted that " If a passenger liable to pay the excess charge and fare mentioned in Sub-section (1)...fails or refuses to pay the same on demand being made therefor...the sum payable by him shall, on application made to any Magistrate by any Railway servant appointed by the Railway administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered, be paid to the Railway administration," The defendant had admittedly purchased from the railway company for the sum of Rs. 65-12-0 a ticket or pass which entitled him to travel on the company's railway in a first class carriage between Church Gate and Malad whenever and as often as he chose during the three months from January 26, to April 25, 1924. The company, however, alleges that the defendant has committed a breach of the obligation contained in Sections 68 and 69 and that he has rendered himself liable to a further payment u/s 113(1); it accordingly claims Rs. 342 for the fare and for the excess charge. This claim the company could enforce only in the manner prescribed by the Act, For, "the general rule of law (or rather of construction) is that where a general obligation is created by statute and a specific statutory remedy is provided, that statutory remedy is the only remedy" (Craies' Statute Law, 2nd Edition, p. 224). The defendant's liability to pay the ordinary fare and an excess charge arises not from the contract but from the statute. And I agree with the trial Judge when he says: " To my mind the defendant having already paid for all these journeys is not liable to the plaintiff under the common law for travelling without a ticket with him ". The plaintiff company has clearly brought its claim u/s 113 of the Act; the Act provides a particular remedy for enforcing it; and the plaintiff company should follow that remedy.

7. For these reasons, I agree to the order proposed by my Lord the Chief Justice.