

(1935) 12 AHC CK 0013
In the Allahabad High Court

B.B. and C.I. Ry.

APPELLANT

Vs

B. Dwarka Nath

RESPONDENT

Date of Decision : 13-12-1935

Acts Referred:

Railways Act, 1890 — Section 13

Citation : AIR 1936 All 771 : 165 Ind. Cas. 882 : 155 Ind. Cas. 631

Hon'ble Judges : Sulaiman, C.J.;Bennet, J

Bench : Full Bench

Judgement

Sulaiman, C.J.—I agree that the appeal should be allowed and the plaintiff's suit dismissed. There are two questions which arise in this case. The first is whether the Railway Company by not having taken sufficient precautions to prevent damage has been guilty of such negligence as to make it liable for the loss sustained by the plaintiff. The second is whether, even if the Company had been guilty of negligence, the plaintiff also has not contributed by his own default to the same negligence which resulted in the loss occasioned to his property. The first question is not free from difficulty. The case put forward by the plaintiff simply was that the grass within the railway fencing was set fire to when the defendant's engine passed that way and it was alleged in the alternative that either the fire originated from live sparks escaping from the engine or from live cinders falling down from the ash-pan of the engine, with the result that the dry grass within the railway fencing caught fire first and then spread to the grass outside the fencing which belonged to the plaintiff and ultimately reached the place where the plaintiff's hay stacks were located. The first Court came to the conclusion that when the engine was running at speed it was quite possible that live cinders might drop down from the ash-pan on the railway bank and it held that there was grass on the railway bank which caught fire owing to live cinders falling down from the railway engine which fire spread on to the plaintiff's land and burnt the plaintiff's pates and trees. The lower appellate Court while affirming that finding was not so definite. It came to the conclusion that there was grass on the defendant's land between the fencings on the two sides of the

railway line about one cubit and a half high and that the grass caught fire owing to sparks falling down from the railway engine and that the fire spread on the plaintiff's land and burnt his pates and trees. Both the Courts below recorded a finding that the Railway Co. should have taken reasonable care and caution but that it did nothing of the sort and that negligence on the part of the defendant was established in the case. A learned Judge of this Court has accepted this finding. On the question of contributory negligence also the finding was in favour of the plaintiff.

2. Now the question of the liability of a railway company for taking every reasonable precaution to prevent damage to owners of neighbouring lands has created a conflict of opinion even in England. In *Piggot v. Eastern Counties Ry. Co.* (1846) 3 CBR 229, it was laid down that the fact of certain premises being fired by sparks emitted from a passing engine was *prima facie* evidence of negligence on the part of the company rendering it incumbent on them to show that some precautions had been adopted by them reasonably calculated to prevent such accidents. In *Smith v. London and South Western Ry. Co.* (1871) 6 CP 14, certain workmen employed by the railway company after cutting the grass and trimming the hedges bordering the railway placed the trimmings in heaps between the hedge and the line and allowed them to remain there for some days during very hot weather; a fire broke out between the hedge and the rails and burnt some of the heaps of the trimmings and the hedge and spread to a stubble field beyond, and was thence carried by a high wind across the stubble field and over a road and burnt the plaintiff's cottage which was some 200 yards away from the place where the fire broke out. There was no definite evidence that it had been due to any spark from the engine which had passed shortly before the time. The Court held that it could be fairly presumed that as engines while passing do emit sparks the fire originated from the engine that had just passed and that there was sufficient evidence for the jury to return the verdict that the defendants were negligent in leaving the dry trimmings and that the trimmings either originated or increased the fire and caused it to spread to the stubble field and that if the defendants were negligent they were responsible for the injury that resulted.

3. In *Rex v. Pease* (1832) 4 B & Ad 30, it was held that if a statute authorised the construction of a railway parallel to an ancient highway and if by the passage of waggons, horses of the plaintiff were startled there could be no indictment for a nuisance inasmuch as the interference with such rights of the public must be taken to have been contemplated and sanctioned by the legislature. In *Vaughan v. Taff Vale Ry. Co.* (1860) 5 H&N 679 it was laid down that where a wood belonging to the plaintiff had been set on fire by sparks from a locomotive authorised by statute and it was shown that sufficient precaution had been taken by the company there was no liability. Cockburn, C.J. remarked:

When the Legislature has sanctioned and authorised the use of a particular thing and it is used for the purpose for which it was authorised and every precaution

has been observed to prevent injury the sanction of the Legislature carries with it this consequence; that if damage results from the use of such thing independently of negligence the party using it is not responsible.

4. The case therefore was an authority for the proposition that unless negligence was established independently the mere use of an authorised thing would not entitle a plaintiff to claim damages when every precaution had been observed to prevent injury. On the other hand in *Jones v. Festiniog Ry. Co.* (1869) 3 Q B 733, a company had been empowered by Act of Parliament to make and use a railway for the passage of wagons and engines and ran passenger trains drawn by locomotive steam engines and had "taken all reasonable precautions to prevent the emission of sparks." The plaintiff's hay stack was however fired by sparks from one of the engines. *Blackburn and Lush, JJ.*, held that as the company had no express powers given them by statute to use the locomotive steam engines they were liable at common law for the damage though negligence was negatived. In that case the plaintiff had failed to prove that there was a clear negligence on the part of the company. Nevertheless the Bench held the company liable under the common law. The position was re-examined by the House of Lords in *Hammersmith Ry. Co. v. Brand* (1870) 4 HL 171, which was however a case of damage caused to the plaintiff's land by the vibration caused by trains passing on the railway track. *Bramwell, B.* expressed the view that the cases in *Pease* (3) and *Vaughan* (4) were wrongly decided. But the opinion of the majority of their Lordships was to the effect that those cases were rightly decided and it was held that:

It was established by those cases that when the legislature had sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use.

5. Later in *Powell v. Fall* (1881) 5 QBD 597 the defendant company was possessed of a traction engine which was propelled by steam power. Whilst it was being driven by the defendant's servants along a highway some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. The engine had been constructed in strict conformity with the Locomotive Acts, and at the time of the accident it was being driven at a proper pace and the defendant's servants had not been guilty of any negligence whatsoever in its management. Nevertheless *Mellor, H.* whose judgment was upheld by *Bramwell, L. J.* in appeal held that the defendant was liable to compensate the plaintiffs for the injury done to the stack upon the ground that the engine being a dangerous machine an action was maintainable at Common law. The case in *Canadian Pacific Ry. v. Roy* (1902) AC 220 has been distinguished by my learned brother. I may only quote a passage from the judgment of the Lord Chancellor at p. 231:

The law of England equally with the law of the province in question affirms the maxim "*sic uteri tout alienum non laedas*", but the previous state of the law whether in Quebec or France or England cannot render inoperative the positive enactment of a statute and the whole case turns not upon what was the

company law of either country, but what is the true construction of plain words authorising the doing of the very thing complained of.

6. Their Lordships then proceeded to consider the effect of the provisions in the Dominion Railway Act. The question has been however settled in England by the enactment of the Railway Fires Act under which Railway Companies are now made liable to a limited extent even without any proof of negligence at all. In India the leading case on this subject is that of *Halford v. East India Ry. Co.* (1874) 14 Beng LR 1. The Bench in affirming the judgment of the learned single Judge made it perfectly clear that there was a certain amount of liability on a Railway Company not only for keeping a properly constructed engine but also for keeping the railway track in a proper state. At p. 17 it was stated:

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.

7. The authority for this proposition was Smith's case where the Railway Company had been made 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 the 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 thereby the fire was caused which burnt the plaintiff's cottage. Again at p. 18 it was remarked:

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 them although they may be entitled to use it to keep the line of railway in a proper state with reference to such danger.

8. The evidence in the case was then examined and the case was decided on the finding that the evidence was not sufficient to show that the grass was left in the state as described by the plaintiff's witnesses or in a state other than what a witness for the defendant had said might fairly and reasonably be left. The Bench therefore after considering the whole evidence came to the conclusion that the view taken by the learned single Judge was not wrong. I do not take that case to be an authority for the proposition that the Railway Company's liability ceases as soon as it is shown that there was no defect in the contrivance of the engine much less that there is no liability unless the plaintiff establishes that there was a defect in any such contrivance. Even the English cases have laid down that where damage has been caused by sparks emitting from a railway engine it is incumbent on the Company to show that there was no defect in the contrivance which might have allowed sparks to escape. No doubt in India we have the Railway Act and u/s 13 of that Act the Governor-General in Council is authorised to require certain precautions to be taken. But I do not take the enumeration of

the precautions mentioned in Section 13 as in any way exhaustive for instance defects in the contrivance of an engine are not mentioned therein and it cannot be on the authorities urged that such a defect would not make the Railway Company liable. I also think that it is not possible to give a complete catalogue of all sorts of precautions which must be taken by a Railway Company to ensure that no damage is done to owners of neighbouring lands. Each case must depend on its own circumstances and the Court has to decide on the evidence before it whether there has been negligence to such an extent as to make the company liable.

9. There is obviously no statutory duty on a Railway Company to cut all grass from the railway track and to see that at no place any grass grows or that any dry grass is allowed to remain there. At the same time this may be a reasonable precaution which a Railway Company should take as indeed the B. B. & C. I. Ry. Co. have already issued standing orders under which there is a direction that grass should be removed from the railway track. The authority given to Railway Company is not merely to run trains and use engines but to use the whole railway line for purposes of traffic. Their duty is according not confined to trains and engines only. So far as damage caused by sparks emitted from the funnel of an engine is concerned proof of negligence would depend on the defective nature of the contrivance used to prevent the emission of sparks. So far as fire caused to dry grass growing on or near the railway track is concerned the damage may be caused by the ignition of such grass by live cinders falling from the engine. It is for the Court to decide whether dry grass has been allowed to remain on the railway track so close to the rails and so high in stature as to amount to negligence on the part of the Railway Company. It would be impossible to answer this question in the abstract independently of the facts of each case. In this view of the matter I would feel very reluctant to "hold that there was no legal evidence "whatsoever before the Courts below to arrive at the finding that negligence had been established.

10. Negligence is at least a mixed question of law and fact and unless it is shown that the Court has approached the question from a wrong standpoint or that the evidence is such that there was no option but to draw the converse conclusion or unless the finding is vitiated by some other legal defect it may be difficult to upset such a finding in second appeal. I would therefore base my decision on the second point. The question of contributory negligence had been raised by the defendants in both the Courts below, though the finding was against the defendant. As has been pointed by my learned brother the utmost that can be said against the Railway Company is that they were guilty of nonfeasance in not removing dry grass from the railway track when it had grown high. It has to be conceded on behalf of the plaintiff that the plaintiff was guilty of the same omission in not removing dry grass from the vicinity of the railway line. Furthermore the plaintiff lives on the spot and was aware of the danger and could not but have known that sparks or cinders might come out setting fire to the grass within the railway fencing which would then spread to the dry grass on

his own land next to the railway fencing from which it might spread on to the hay stacks which he had put up. He took no precaution either of cutting off his grass farm from the railway fencing or even protecting his hay stacks by making any fire line. The railway company has to maintain hundreds of miles of railroad and the chance of their becoming aware that grass has grown high at a particular spot is far more remote than the definite knowledge which the plaintiff must have possessed that the grass on that part of the railway track was high and so was the grass on his own land adjacent to the railway fencing. It seems to me that the damage which has been caused to the plaintiff was not caused so much by the fire being set to the grass on the railway track as by the circumstances that it spread on to the plaintiff's own grass farm and then reached his hay stacks. If the plaintiff had taken sufficient precaution to maintain a fire line or even if he had cut the grass from the vicinity of the railway fencing first, no damage would have been caused to him at all. I would therefore allow the appeal and dismiss the plaintiff's claim on the ground that he was guilty of contributory negligence of which he was fully cognisant and that is a good defence in law which must prevail.

Bennet, J.

11. This is a Letters Patent appeal brought by the defendant the B. B. & C. I. Ry. Co., against the judgment of a learned single Judge of this Court dismissing its appeal. The two lower Courts have granted a decree against the defendant awarding the plaintiff Rs. 600 damages under the following circumstances: The plaintiff brought a suit alleging that his land consisting of waste and jungle lands with patel grass growing on it and timber and fruit trees adjoins the railway, and that in the month of April 1930 the patel grass had been partly cut and stored in heaps and part was standing, that on 13th April 1930 the passenger train of the defendant company passed, along the line and sparks of fire escaped from the engine and dropped on to the railway patri just close to the rails. Paras. 5 and 6 of the plaint are as follows:

That the patri was not clear but covered with grass which had not been removed owing to the utter negligence and carelessness of the servants of the defendant and therefore the grass on the patri immediately caught fire and from there the fire at once spread over the plaintiff's jungle lands burning the standing patel and its heaps along with some 16 nim and shisham trees worth Rs. 700 all belonging to the plaintiff.

That it was the duty of the defendant company to keep the patri quite clear and free from any grass and other combustible substance and to take full precautions to prevent the setting up of fire to the adjoining jungle lands of the plain biff which it failed to do.

12. These were the only paras in the plaint alleging negligence and it is to be noted that the only negligence alleged was the negligence of the railway company in not keeping the patri quite clear and free from grass, etc. The

defence of the railway company was to put the plaintiff to proof of the fact that the fire had been caused as he alleged and further the railway company pleaded in paras. 13 and 14 of the additional pleas as follows:

That the defendant company will rely on the principle, "ex non cogit ad impossibilie" (the law does not compel a man to do that which he cannot possibly perform) as affording a complete answer to the plaintiff's claim. The defendant company maintains that the fire if any was due to the negligence of the plaintiff in keeping the grass in the state alleged in para. 3 of the plaint near the railway track whereon to the knowledge of the plaintiff locomotive steam engines of the defendant railway company were authorized by statute to pass and repass day and night.

13. This pleading was further amplified by a statement of the advocate for the defence on 8th June 1931 part of which was as follows:

The plaintiff should himself take care of the grass on his land. If he did not take care there was contributory negligence on his part.

14. The only issue framed on negligence was issue 5:

Whether there was any negligence on the part of the defendant in not removing the grass if any and in not keeping the land between the fire lines clear.

15. The finding of fact as to the cause of the fire in the trial Court was:

I hold that there was grass on the railway banks which caught fire owing to live cinders falling down from the railway engine which fire spread on to the plaintiff's land and burnt the patel and the trees.

16. The Court also stated that on the plaintiff's evidence the fire originated in live sparks escaping from the engine and in live cinders falling down from the ash-pan of the engine. The Court inspected the engine but did not find that there was anything defective in the type or working of the engine and no such defect was alleged. The trial Court found that there were 12 stacks of patel grass burnt valued at Rs. 420, and standing patel grass burnt which was valued at Rs. 100 and certain trees burnt valued at Rs. 80, and therefore the total amount of compensation awarded was Rs. 600. The trial Court also found:

It is the duty of the defendant to keep the fire line clear of grass, etc., specially during the hot season when the grass becomes dried up.

17. It also found that no case of contributory negligence was proved against the defendant on issue 9 as it held that there was no evidence to show that the arrangement made by the plaintiff for disposing of the patel was such as to amount to negligence on his part. The defendant company appealed and the lower appellate Court came to practically the same-findings as follows:

I therefore accepting the plaintiff's evidence hold that there was grass on the defendant's land between the fencing on either side of the railway line 1 to 11/2

cubit high; that that grass caught fire owing to sparks falling down from," the railway engine and that fire spread on to the plaintiff's land and burnt his patel and trees.

18. Further it was found:

It was the duty of the railway company to keep the fire lines clear of grass especially during" the hot season when the grass becomes dried up:

and that "it might be inferred" from the statement of a railway official that

from 1927 the plaintiff was claiming compensation for damages caused to his jungle by the sparks of the defendant company's engines. The railway company should have taken reasonable care and caution but it did nothing of the sort; rather it allowed the grass to remain on the banks of the railway line. Under the circumstances it can be reasonably inferred; that there was negligence on the part of the defendants.

19. On the question of contributory negligence the Court found as regards the plaintiff's grass. The heaps of patal were lying at a sufficient distance from the railway fencing. No doubt the standing patel extended up to the railway fencing; but it cannot be said that there was any contributory negligence on the part of the plaintiff. Now as regards the reference in this finding to the fire lines this appears to be based on some instructions given by the railway company that fire lines should be cut in the grass on the patris. The lower appellate Court is not quite clear whether it considered that the duty of the railway company was to keep these fire lines cut or to cut the whole of the patris. The learned single Judge of this Court refers to a few rulings on the subject and considers that the railway company had the duty alleged and were guilty of an actionable negligence. The only point of contributory negligence argued before the learned single Judge was that the servants of the plaintiff did not take steps to put out the fire when they saw it begin. The grounds of contributory negligence which had been argued before the lower appellate Court do not appear to have been argued before him, that is, in regard to the arrangement of the plaintiff for the cutting of the crop. Now when the case came in the Letters Patent appeal the first ground taken was that the suit as brought was not maintainable and that the railway company was not legally liable for the damage because there was no actionable negligence on the part of the railway company and that the mere existence of growing grass about a foot and a half high within the railway fencing was legally no evidence at all.

20. Further it was argued in ground No. 5 that by allowing the grass on his own land to grow high right up to the railway fencing the plaintiff had been guilty of negligence and was not entitled to the relief claimed. There are, therefore, two points of law in this appeal: firstly whether there was a duty of the railway company to cut the grass within their fencing and secondly whether the plaintiff was guilty of contributory negligence. Now the railways in this country are run under the authority of Act 9 of 1890, the Railway Act. That Act provides certain

precautions in different sections and particularly in Section 13 it is laid down that the Governor-General in Council may require that within a time to be specified in the requisition or within such further time as he may appoint in this behalf certain precautions shall be taken by a railway company. These precautions include the fencing and a screen adjoining the side of public roads to prevent horses and other animals being frightened and suitable gates, chains, bars, stiles or hand rails to be erected or renewed at crossings and persons to be employed by the railway administration to open and shut these gates, chains or bars. Now if the legislature had intended that a railway company should have the duty of cutting the grass within its fencing it appears that Section 13 would have made a provision for the Governor-General in Council to issue orders on the subject.

21. The length of the line of a company like the defendant company is often very considerable and extending to thousands of miles. The cutting of grass within that area, if it is a duty of a railway company, is a very considerable matter and one which would entail a very large amount of expenditure. It is, therefore, a matter which would certainly attract the attention of the legislature in passing an act like the Railways Act and it is strange that if such a duty were to exist on a railway company in India there would be no provision in the Railways Act of 1890 for the framing of rules on the subject. It is true that in the present case it is shown that the railway company itself issues some instructions in regard to the cutting of grass, but the fact that the company does issue instructions on this subject does not show that there is a legal obligation on the company to cut the grass during the whole length or any part of the length of its railway system. The rulings on the subject which have been brought forward are as follows: In *Halford v. East India Ry. Co.* (1874) 14 Beng LR 1 there was a case before a learned single Judge in Calcutta which was taken in appeal before a Bench of the Calcutta High Court. In that case the plaintiff claimed damages on the ground that the company had allowed grass of too great a length to remain on the railway banks and had driven an engine along the line without due precautions being taken to prevent the expulsion of sparks.

22. It was held that the defendant company was authorised to run locomotive engines on the line of the railway constructed by the company under the statutory powers given to it and, therefore the company was not liable for damage caused in making the line under such statutory powers without proof of negligence. It was held also on the evidence that neither in the construction of their engines nor in the condition of the railway banks was any negligence shown on the part of the company. The plaintiff's land was separated from the railway by a fence and there was a stable and some other constructions and a bungalow and two heaps of thatching grass were lying on the plaintiff's land. The Eastern Bank of the railway and the cutting was covered with growing grass. On p. 7 reference was made to evidence to the effect that the grass was only 6 to 8 inches long and on the other hand the evidence of the plaintiff was that it was six feet in length and had been cut and two feet of the grass was left standing after cutting. The Court found that the grass was about a foot high and that the

existence of grass of that height would not be evidence of negligence against the railway company. The company had left trimmings of cut grass along the place where the grass was cut. The Bench on appeal upheld the finding of the learned single Judge that the existence of grass in that condition did not amount to negligence. Now it is to be noted that in the present case the railway company had not cut the grass.

23. In the Calcutta case (9) there was a case of alleged misfeasance, that is that the railway company had cut the grass in a manner which was negligent by allowing too much grass to remain after cutting and by allowing certain grass which had been cut to remain lying on the spot. In the present case the plaintiff has a weaker case as he has alleged non-feasance on the part of the railway company and he has to show that the railway company had a positive duty to cut the grass between the fencing. The only case of this High Court to which reference has been made is a case of civil revision reported in *Secy. of State v. Dwarka Prasad* 1927 25 ALJ 336. In that case there was no question of grass but the trial Court had held that there was negligence on the part of the railway company because the drivers of two engines were negligent in racing and further the Court held that it was not established that spark protectors had been used on the engines. On this finding of negligence the decree for damages was upheld. That case however is distinguished from the present case that there was any negligence on the part of the driver or that the engine was in any way defective in construction. Learned Counsel attempted to remedy this defect in his plaint by arguing that there might be some such defect in the construction. But in the absence of any such allegation in the plaint and any evidence before the Courts below it is much too late to make a new suggestion of this kind in Letters Patent appeal. In *Smith v. London and South Western Rly.* (1870) 5 CP 98 there was a claim against the railway company because the servants of the company had allowed cut dry grass to be on the line of the company on each side of the railway in what was alleged to be a negligent manner and thereby fire was caused which burnt the plaintiff's cottage.

24. This however was a case of allowing cuttings and trimmings of grass to remain after the grass had been cut on the banks of the railway in a season of unusual heat and dryness and *Bramwell, C.J.* in his judgment, held that this might be evidence from which a jury might presume negligence. In the present case the plaintiff does not allege that there was any cut grass lying on the path which might have caused the fire, but his complaint is that there was standing grass which had not been cut. In England the question of claim against a railway company has been settled to a certain extent by the *Railway Fires Act, 1905* and in that Act it is provided that negligence need not be proved against a railway company where damage is done to agricultural lands or agricultural crops by sparks or cinders from the railway engine and where a sum of money not exceeding ₹100 is claimed provided due notice is given to the railway company. But in cases where damage exceeding ₹100 is claimed then it is necessary for the plaintiff to prove negligence on the part of the company. In India there is no

provision of law similar to the Railway Fires Act and therefore it is necessary for the plaintiff in the present case to prove negligence. In *Canadian Pacific Ry. v. Roy* (1902) AC 220 there was a case before their Lordships of the Privy Council from the province of Quebec in Lower Canada where the plaintiff had suffered damage caused by sparks escaping from a locomotive engine. It was held that because the civil Court of Lower Canada and the Dominion Railway Act did not impose any liability of this nature on a railway company acting within its statutory powers therefore the railway company was not liable for the damage caused by the sparks from their engine. The judgment proceeded on the ground that it was necessary to establish definitely negligence on the part of the railway company. At p. 231 the Lord Chancellor stated:

The legislature is supreme and if it has enacted that a thing is lawful such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty.

25. The case of Canada is therefore distinct from the case of England because in Canada there is a Dominion Railway Act. In England there is no general Railway Act, but the different companies obtain statutory authority provided by Acts of Parliament. In India the case is similar to the case of Canada because there is a general Act, the Railways Act of 1890. This judgment therefore is some authority for the proposition that in default of a provision in the Railways Act of 1890 the company cannot be liable for exercising its statutory powers of running railway engines on its lines. None of the rulings which have been laid before the Court show that there is any duty of a railway company either in England or in India to cut the grass on the banks of its railway lines. In the absence of any authority of this nature it is difficult to hold *prima facie* on proper considerations that there is such a duty of the railway Company. The Courts below and the learned single Judge of this Court have not indicated where the legal duty is imposed on a railway company to cut the grass on its banks. The absence therefore of any authority for such a proposition makes it difficult to accept the findings of the Courts below that there was negligence by a breach of the railway company of this assumed duty.

26. Now the other part of the argument of learned Counsel for the appellant based on ground No. 5 is that even if there was negligence on the part of the railway company in committing a breach of the assumed duty still the plaintiff cannot re-cover damages because the plaintiff was guilty of contributory negligence. This argument has been based on the admission of the plaintiff that he was aware since the year 1927 that there had been occasionally such fires caused by sparks from the railway engines. In spite of that knowledge the plaintiff allowed his patel grass, which is grass of a considerable height about 6 or 8 feet, to grow up to the railway fencing. It would have been open to the plaintiff to keep certain area about 10 feet wide free from grass and such an area parallel to the railway fencing would have acted as a fire line, and if a fire had started on the grass inside the railway fencing such a fire could not have spread

to the patel crop of the plaintiff. There was further negligence of the plaintiff in the method which he adopted in cutting his field. He cut the field in the part remote from the railway and stacked 12 stacks of grass amounting in value to Rs. 420. At the same time he left the patel crop standing adjacent to the railway line. There was therefore a means of communication of the fire between the railway line and his stacks of patel grass which are found by the Courts to have been 50 or 100 yards from the railway fencing.

27. It is obvious that if the plaintiff had adopted the sensible method of cutting his patel grass adjacent to the railway line first then it would not have been possible for the fire to spread to his stacks of patel grass. Learned Counsel for the respondent has not been able to explain why the plaintiff did not adopt this simple precaution. This does appear to amount to contributory negligence on the part of the plaintiff and accordingly this furnishes another reason why the decree of the Courts below should be reversed. The Courts below do not appear to have approached the subject from this point of view. Where a man is well aware that a danger may result from the use of railway engines in a statutory manner, and where that man grows a crop of an inflammable nature close to the railway line, it is a matter of ordinary precaution for him to place a fire line between his crop and the railway fencing. Learned Counsel addressed some arguments for us that the omission to grow patel grass on a fire line 10 feet broad would cause a large amount of loss to the plaintiff. That argument is however shown to be incorrect; by a consideration of the value of the crop and the area on which it is grown. Patel is not at all a valuable crop and the omission of a small area would be a matter of no importance from the financial point of view. For these reasons I consider that this Letters Patent appeal should be allowed and the suit of the plaintiff should be dismissed.

28. The appeal is allowed, the decrees of all the Courts are set aside and the suit of the plaintiff is dismissed. In the circumstances we direct that the parties should bear their own costs throughout.