

(1937) 08 PAT CK 0044
In the Patna High Court

Bengal North Western Railway Co. Ltd.	APPELLANT
Vs	
Matukdhari Singh and Others	RESPONDENT

Date of Decision : 17-08-1937

Acts Referred:

Citation : AIR 1937 Patna 599

Hon'ble Judges : Courtney-Terrell, C.J;Manohar Lall, J

Bench : Full Bench

Judgement

Courtney-Terrell C.J.

1. This is an appeal from a decision of the Subordinate Judge of 2nd Court, Chapra, decreeing the suit of the plaintiffs against the B.N.W. By. Go. Ltd., for damages in respect of their negligence in running into and killing the plaintiffs' elephant. The elephant was admittedly killed by a train running into it on the line and the only question is whether the occurrence was due to negligence on the part of the Railway Company.

2. Now the line upon which the accident occurred is a single line by which trains pass east and west between Rajapatti on the east and Dighwa Dobauli Station on the west, and from east to west between those two places the line is not fenced and traverses some level-crossings. The place of occurrence is in the vicinity of a level-crossing which traverses the line from south to north and immediately to the south of this level-crossing a mela is held twice in the week and large numbers of people attend this mela and pass from the mela to villages which lie to the north of the line, by way of the level-crossing.

3. According to the story of the plaintiffs, the level-crossing is, it is true, provided with the usual gates but the gates are not supervised and it is admitted that there is no house by the level crossing to accommodate any gate-keeper. The case of the defendant Company is that they had not appointed any permanent gate-keeper for that particular level-crossing but that they had temporarily appointed a person whose normal employment was that of a keyman to take

charge of the gates and that this direction had been given about a fortnight before the incident in question. The story of the plaintiffs is that the elephant which had been taken to the mela to the south of the line was being taken across the level crossing and in doing so it passed through the southern gate which had not been closed and on the train coming from the east along a stretch of line at least half of which is perfectly straight, the elephant took fright at the noise and bolted westwards along the line which runs on a slight embankment. But the train could not be pulled up or was not pulled up in time and struck the elephant in the rear and it fell down the embankment and there died.

4. The negligence alleged is twofold, First of all, there is that which is involved in not having a gate-keeper in charge of the level, crossing and in not closing the gates on the approach of a train. Furthermore, it was contended that the driver of the train was negligent in that he did not pull up on seeing the elephant as he manifestly could have seen it for quite a long stretch of the line to the east of the level, crossing.

5. Now the accident occurred on 1st November 1932 and within a week or so of the accident, that is to say on the 10th the plaintiffs wrote a letter to the Agent of the Company stating their complaint that the elephant was passing through the level-crossing which had remained unclosed; that the passenger train reached the crossing without whistling and that it startled the elephant which moved towards, the west, and that the driver had not stopped as he should have done but it followed the elephant and collided with it. Para. 3 of the letter is quite specific and is as follows:

That at the crossing there was no gate-keeper and my clients' elephant has been killed owing to the wilful negligence of your Company's engine driver as also owing to the unclosed state of the level-crossing and absence of any gatekeeper. The driver having full view of the elephant did not stop the train or took any step to avert the accident.

6. The plaint filed on 17th June 1933 set forth substantially the same allegations and the defence filed on 31st August-denies these allegations and sets up a story that the elephant did not pass over the level-crossing at all but it remained at a place a little over a hundred yards to the west of the level-crossing under a certain pipal tree and that there, not being properly attended to, it had been startled by the approach of the train, climbed up the embankment and on to the line and there met its death through no negligence of the defendant Company; and the written statement further denied that the death of the elephant was due to any rash, negligent or tortious act of the engine-driver and also denied that the level-crossing gate was open or that the gateman was absent.

7. The plaintiffs, with a view to test the allegation of the defendant Company that there was in fact a gateman on duty on this particular occasion, asked them to produce certain documents in their possession or power. The reply by the defendant Company was that they declined to produce the documents called for

because they would not disclose the matter of the pay of the gateman or his presence, the gateman having been only appointed temporarily some fourteen days before, and secondly that the erection of the hut, meaning the gate lodge took place long after the accident, hence no bill could be produced and that the fencing was erected by the servants of the Railway and hence there was no bill.

8. It is very dear that the seriousness of the plaintiffs' allegation that the defendant Company were negligent in not providing a gateman was thoroughly understood by the Company. Their explanation in Court was that a person whose normal duty was that of a keyman had been put on duty to look after the gate under verbal orders a fortnight before, but the person alleged to have given the verbal orders was not called and the utmost that the defendant Company could do to endeavour to establish their defence on this point of the case was to call an individual named Ambica Ojha who was the last witness called by them. He stated in his evidence that he was the gateman at the level-crossing on the day of the accident. that he was a keyman and had been deputed as watchman and he purported to describe the occurrence according to the story of the defendant Company that the elephant was left under the pipal tree and that when the engine arrived at the level-crossing, the driver whistled and that the elephant was startled and had crossed the line, and he further stated that he had looked up the gates and stood there before; the arrival of the train. To my mind, it is manifest that this story of the elephant; standing under the pipal tree has been invented for the purpose of getting over the story of the animal having approached the railway line through the level-crossing. It was manifest that if the elephant had approached the railway line by means of the level-crossing and had been killed by the passing train, the story of the shutting of the gates for some considerable period as would be necessary before the arrival of the train at the level crossing must be untrue; and it was for that reason that this story of the pipal tree was invented.

9. The story of the elephant being under the pipal tree and having approached the line from that place at least a hundred yards away from the level-crossing, is untrue is shown by the evidence of a witness who attempted to support the tale. I forgot to say that one of the undisputed facts is that at the time of the collision between the train and the animal, a mahut was perched on the back of the elephant. If the defendant Company's story were true, the mahut must have been present under the pipal tree; but, Ambika Ojha, the person who is supposed to have been the gate-keeper, says that when under the pipal tree neither the mahut nor the malik was near the elephant; it was standing alone under the pipal tree and it was not tied down. The improbability of an elephant being left in such a position unfastened is manifest. The fact is that the unfortunate mahut, who was injured while actually riding on the elephant, is not accounted for, and I have not the slightest hesitation in saying that the story of Ambika Ojha is absolutely false and that the elephant approached the line by means of the level crossing.

10. Now the case was conducted on both sides with the utmost extraordinary incompetence in that in a case like this the evidence of the witnesses could have been tested by simple cross-examination, notably of the individual witnesses who claimed to have witnessed the accident; but no real cross-examination took place on behalf of either side and the evidence of these witnesses can only be tested by what they stated in examination in chief without reference to any irrelevant evidence which they gave in answer to questions put in cross-examination. The person who was in charge of the elephant states that the animal had been in the fair, that he had directed the mahut to take it by means of the level-crossing on to the other side of the line. Two mahuts support him in this statement, one was on foot and the other was riding on the elephant at the time.

11. The witnesses for the plaintiffs were evidently under the impression that the case they had to make out on behalf of the plaintiffs was the negligence of the engine-driver and therefore every one of them concentrated his attention on the alleged callous behaviour of the engine-driver who drove the engine on to an innocent elephant that was standing on the line and that he made no attempt to slow down the speed; and according to one of the witnesses for the plaintiffs the engine driver actually accelerated the speed of his engine so that the elephant was run over and killed in a callous manner. That the engine-driver did all that lay in his power to avoid the accident is clear. He caught sight of the elephant very shortly before he arrived at the level crossing which corroborates that part of the story given by the plaintiffs' witnesses that the gates were not closed--for at least half a mile eastward of the line the level-crossing would be in full view along a perfectly straight strip of road, and the fact that the driver did not see the elephant until shortly before the accident indicates to me that it came on to the line through the level-crossing. Had the gates been closed as they should have been, when the train was half a mile or a quarter of a mile away from the station, the accident could never have occurred.

12. Now the law of negligence is perfectly simple. Where there is a level-crossing and more particularly where there is a level-crossing in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level-crossing by means of gates and the duty of closing gates in sufficient time before the approach of a train is cast on the Railway Company, and if the Railway Company leave the gates open, it is an invitation on the part of the Railway Company for passengers and traffic to approach the line. In this country where slow moving traffic such as bullock carts and elephants is common, the gates should be closed and kept closed for a sufficient interval of time before the approach of a train and while the train is at a sufficient distance to prevent the possibility of any accident. It is hardly necessary to say that, notwithstanding the duty on the part of the Railway Company, it is the duty of passengers who use the level-crossing, to conduct themselves as reasonable beings and if they are guilty, notwithstanding the fulfillment of the duty by the Railway Company, of stupid and unreasonable conduct, the negligence of bringing about an accident is theirs and not of the Railway Company.

13. The law was thoroughly explained by Lush, J. in a well-known case *Mercer v. South Eastern and Chatham Rail-way Companies'* Managing Committee, (1923) 2 KB 549. In that case, a wicket-gate had been provided at a level-crossing by the Railway Company but on the occasion of the accident in question the wicket-gate had been left unlocked. A person coming to the gate of the level-crossing found it open and, as he was entitled in law, treated it as an invitation to come on to the railway line. The learned Judge explained the law in this way:

On the occasion in question, owing to the neglect of the signalman, the gate was unlocked at a time when a train was approaching. To those who knew of the practice this was a tacit invitation to cross the line.

14. Then at page 553 he said:

I should certainly hesitate to hold that if in a case of this kind a person wishing to use the level crossing were, merely because he found the gate unlocked, to omit to look and see whether the way was clear "when there was nothing to prevent him from doing so, and were to walk on, reading a newspaper, for example, he could make the company liable if he were run down by a train that he could easily have seen or heard. The railway company may have tacitly invited him to cross the line, but they did not invite him to leave his common sense behind him. There are however special circumstances in this case, inasmuch as, owing to the position of the down train, the plaintiff could neither see nor hear the up train.

15. The same special circumstances are present in this particular case. To drive an elephant requires concentration on the behaviour of the animal and it takes all the driver's attention to see that the animal pursues the straight path in which he is guiding it and behaves reasonably towards wheel traffic and pedestrians, and seeing the level-crossing gate open, it was not at all an unreasonable act on the part of the mahut of the elephant to urge it forward on to the line and cross it and he could hardly be expected either to depute some one else to come down to the line and watch in case a train was coming, nor would it be reasonable for him to dismount and ascertain the fact for himself. He was justified in crossing the line having regard to the way being left open.

16. Now the Railway Company clearly neglected their duty in this case. The evidence produced by the defendant Company to try to establish that their gateman (or Ambika Ojha who was said to be that gateman) was on duty on 1st November is of the feeblest character. They called a Mr. S. Ghosh, the Assistant Engineer to the Railway, He said that he had been told by his predecessor, a Mr. Hypher, that a gangman had been deputed to act as gateman, but Mr. Hypher was not called. In cross-examination, Mr. Ghosh stated that he took over charge in succession to Mr. Hypher but it was not until 2nd November, that is to say the day after the accident, that he went over the line and then Ambika Ojha the temporary gateman was in office. This evidence leads to the impression in my mind that Ambika Ojha was really appointed on the day following the accident;

but whether he had been a temporary gateman or not, it is perfectly dear that he had not done the duty of a gateman in closing the level-crossing at a sufficient interval of time before the train was expected.

17. In these circumstances, the allegation of negligence against the unfortunate driver -or the guard of the train need hardly be considered. The learned Subordinate Judge was of opinion that the driver was guilty of negligence but how he could have "been expected to pull up his train suddenly or how he could have been expected to hear the alleged entreaties of by-standers that he should not pursue an innocent elephant in this cruel manner, I fail to see. The real negligence of the company--and in respect of that there is, to my mind, no answer at all--is in leaving the gates open and so offering an invitation to the mahut of the elephant to take his animal across the line. The story about the elephant not having approached the line by means of the level crossing but having got on to it from the pipal tree is, in my opinion, fantastic and was only invented for the purpose of getting over the danger constituted by the failure of the Railway Company to provide a watchman for properly closing the gates.

18. I would therefore dismiss this appeal with costs. The value of the elephant, namely Rs. 5,000 is not disputed and therefore no question of the amount of damages arises.

Manohar Lall, J.

19. I entirely agree.