

(1928) 06 CAL CK 0024
In the Calcutta High Court

Secretary of State

APPELLANT

Vs

Kali Brahma Chatterjee

RESPONDENT

Date of Decision : 11-06-1928

Acts Referred:

Citation : AIR 1928 Cal 571 : 114 Ind. Cas. 662

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—The question raised by this rule is one of considerable importance. This rule was obtained on behalf of the Secretary of State for India, who is the defendant in the action, and was issued on the plaintiff opposite party to show cause why the decree of the Small Cause Court Judge of Jangipur in his favour should not be set aside. The rule relates to an action commenced by the plaintiff opposite party for recovery of a certain sum as damages on the allegation that on the 18th February 1927 his house and of her properties were destroyed by fire caused by sparks coming out of the engine attached to Sahebgunge Howrah passenger train (Down train No. 56) and that the said damage was caused by the neglect of the E.I. Ry. Co. and its agents or servants for which the defendant Company is liable. To this action the Agent of the E.I. Ry. and the Secretary of State for India in Council were made parties. The Agent's., defence was that as the administration of the E.I. Ry. had been taken over by the Government he was not a necessary party. The Secretary of State rested his defence on several grounds, viz., (i) the fire was not caused by spark emitting out of the engine; (ii) damage, was not caused by any act on the part of the Railway Administration or its servants; (iii) the engine attached to the passenger train was an A class engine and was fitted with fire arrester and perforated damper and it was not possible for sparks to remain alive and set fire to a house situated at a distance of 115 feet from the railway line where the fire is said to have originated; (iv) the plaint was vague as it did not disclose particulars of the negligence of the Railway Administration or its servants, which. had resulted in the fire. The plaintiff was asked by the Court to furnish particulars of acts of negligence on the part of the

Railway Administration or its servants. No such particulars of negligence or carelessness were furnished. On the day of hearing when witnesses were being examined on plaintiff's side a new case was made out to the effect-that the engine fire was poked by the driver and sparks were emitted.

2. On these pleadings, the Munsif, after taking evidence, found in favour of the plaintiff and reached the following conclusions:

(i) I believe the evidence of plaintiff and, his witnesses to be true and hold that the fire : to Hari Maji's house was caused by the spark of the engine due to poking by the driver or the fireman who has not been examined to give, a denial and that the fire spread to the huts of the plaintiff;

(ii) In this case plaintiff has proved that though there was dry wind blowing and though, there were straw huts lying near the railway line the driver or the fireman poked the fire of the engine against rules and was guilty of negligence or carelessness. It was due to this act of carelessness that he fire spread from Hari Maji's house to plaintiff's house.

(iii) The engine of 56 down train was a C class engine fitted with spark arrester and perforated damper.

(iv) It is admitted that even in a 0 class engine it is possible for sparks to come out if the fire is poked by a driver or fireman, but that spark is not potent to cause the damage and to run at some distance.

3. The second finding above referred to is challenged on behalf of the Secretary of State and it is said that there was no rule which forbade the driver from poking the fire of the engine, and this finding that the driver poked the fire against rules is based on no evidence. No rule to that effect was produced before me. It was also not produced before the Munsif. This finding, therefore, must be set aside. The question which therefore arises is whether a Railway Company which had been, authorized to run locomotive engines on its line of railway, under the statutory powers given to it, is liable for damages caused by fire which had escaped from its engine although the Company took all reasonable care to provide against such fire by the use of engine of the best construction fitted with fire arrester and perforated damper. The argument of the learned Standing Counsel, who appears for the Secretary of State is that as the E.I. Ry. Co., have got statutory powers to use locomotive for hauling their trains, the necessary use of fire in them, and the occasional escape of sparks from them, must have been anticipated, and therefore if every reasonable precaution is taken against such escapes the Railway Companies are relieved of the consequence of any fires resulting from sparks accidentally escaping. It is argued that the lower Court was wrong in holding that the poking was against rules and that on the other hand the lower Court should have held that poking was necessary for maintaining the necessary steam for running the train. If, as it has been shown in this case that the Railway Company ran an engine provided with fire arrester, etc, the defendant is relieved of liability if notwithstanding these precautions fire escaped.

4. It is contended on the other hand, on behalf of the opposite party that it was no defence that all possible care and skill had been used in the construction of the engines to prevent the escape of sparks and the burden was on the Railway Company to show that there was no negligence on their part. In support of this contention reference has been made to *Powell v. Fall* [1880] 5 Q.B.D. 597 and to *Smith v. L. & S.W. Ry. Co.* [1871] 6 C.P. 14.

5. In the case of *Powell v. Fall* [1880] 5 Q.B.D. 597 the defendant was held liable for damage caused by the escape of fire from locomotive steam engines used by them, and, it is true, that it was held to be no defence that all possible care and skill had been used in the construction and management of these engines to prevent the escape of sparks. But the fact which distinguishes the present case from that is that in that case the engine was not used under any statutory authority which granted any protection against the ordinary rule of liability at common law. It seems clear that that is not a case of absolute liability for fire at all, but is merely illustrative of the familiar principle that if any operation cannot be carried on without causing damage by the escape of deleterious or dangerous things the carrying on of that operation is an actionable nuisance and it is no defence that all possible care and skill were used to prevent the injury or damage done by it.

6. The facts of the case of *Smith v. L. & S.W. Ry. Co.* [1880] 5 Q.B.D. 597 are distinguishable from the facts of the present case. In that case the servants of the defendant Company during exceptionally dry weather, cut the grass and hedges along the line, and left the cuttings lying there in heaps for a fortnight. A spark from a passing train ignited these cuttings and a high wind sprang up and carried the fire across a stubble field and a public road to the plaintiff's cottage situated 200 yards from the railway. There it was held that it was for the jury to decide what the defendants' servants ought as reasonable men to have contemplated as the result of leaving the cuttings and trimmings where and as they did. Now it can scarcely be doubted that the defendants were bound in such a manner knowing that trains were passing from which sparks might fall on them to remove these heaps of trimmings, and at any rate it was a question for the jury whether it, was not negligent for them not to do. In this case the liability was based on the negligence of the Railway Company in leaving combustible matter along the banks of the railway-likely to be ignited by sparks from the engine although they used properly equipped engines in a proper manner.

7. The true rule applicable to the present case is that which had been laid down in the case of *Vaughan v. Tuff Vale Ry. Co.* [1860] 5 H. N. 679 where the defendant Company having statutory authority to use locomotive steam engines was held not liable for a fire caused by an escape of the sparks, it being proved that the engines were constructed with all due care and skill and that it was wholly impossible to prevent the escape of sparks. At common law it would have been an actionable nuisance to use engines which were such a source of danger; and it would have been no defence that they had been made as safe as they

could be: see *Jones v. Festiniog Ry. Co.* [1869] 3 Q.B. 733. This last case is of the same type of cases as *Power v. Fall* above referred to where the engines were not run under some statutory authority. Statutory protection is, however, possessed by railway companies in respect of various nuisances which are necessarily incident to the management of their business, e.g., noise and vibration. See *Hammersmith Ry. Co. v. Brand* [1869] 4 H.L. 171 and *London Brighton Ry. Co. v. Truman* [1885] 11 A.C. 45.

8. The case of *Power v. Fall* [1880] 5 Q.B.D. 597 relied on by the learned advocate for the opposite party lays down this principle that where the defendants make use of locomotive engines without having obtained the necessary authority of the law and the plaintiff suffers damage by reason of fire proceeding from the same they are liable though not guilty of any negligence in the management of the engines and the case of *Vaughan v. Tuff Vale Co.* [1860] 5 H. N. 679 illustrates the rule that in the same case they would not have been liable had they had the proper authority. This latter case was followed by the Privy Council in *Canadian Pacific Ry. Co. v. Roy* [1902] A.C. 220 where their Lordships of the Judicial Committee of the Privy Council laid it down that a railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted, is not responsible in damages for injury not caused by negligence but by the ordinary and normal use of its railway or, in other words, by proper execution of the power conferred by statute. It is true that in that case there was no question of the appellants having been guilty of negligence in the management of their engine or its appliance being defective.

9. It is a significant circumstance in the present case that the fact of the poking of the fire either by the engine driver or the fireman did not form any item of the particulars of negligence on which the claim of the plaintiffs was founded, and, yet it is upon this the Munsif has founded his judgment on the question of the negligence of the defendant company's servants.

10. My decision proceeds, however, on the assumption that there was poking of the fire by the driver and that such poking was necessary in the ordinary course for maintaining steam. In poking the fire the servants of the company did nothing more than what was necessary for the running of the train and if notwithstanding all precautions known to science taken by the railway company to prevent damage by fire occurring the sparks were emitted, the company cannot be held liable. This principle has been lucidly expounded by Lord Hatherley in the case of *Geddis v. Proprietors of Baun Reservoir* [1878] 3 A.C. 438, thus:

If a company, in the position of the defendants there has done nothing but that which the Act authorized-nay may in a sense be said to have directed-and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him

compensation or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers. My Lords, I say the proper mode of executing those powers because it appears to me that it is very neatly and appositely put by Mr. Baron Fitzgerald, in giving his judgment in the Court of Exchequer Chamber, in this form, Mr. Baron Fitzgerald says: "The substantial question raised on the pleadings in the first and second counts of the declaration, appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence.

11. The view which I take is supported by the case of *Port Glasgow and Newark Sail Cloth Co. v. Caledonian Ry.* [1893] W.N. 29, in which it was held that the legislature by authorizing the use of steam engines or railway has impliedly indemnified railway companies against the consequence of the use of such engines, provided they are of the best construction, and that the proper safeguards are used for minimizing the risk of fire damage.

12. I think this rule must be made absolute. The decree of the Small Cause Court Judge must be set aside and plaintiff's suit must be dismissed.

13. I fully sympathize with the plaintiff in his distress in the loss of his house by fire but I have to administer the law as I find it. I am convinced that the principle for which the Secretary of State contends is supported by English jurisprudence by which Courts in India are governed in all cases in which there is no codified law. In England, however, the *Railway Fires Act 1905* 5 Edw. 7 C. 11) has been enacted this Act has to some extent altered the law as laid down in *Vaughan v. Tuff Vale Ry. Co.* [1860] 5 H. N. 679 for it provides that, railway company shall be liable, notwithstanding their statutory authority to the extent of ₹100 at the most for damage done to agricultural land or crops by the escape of sparks and cinders from locomotive engines; but there is no such legislation here in India and the rule in the leading case of *Vaughan v. Tuff Vale Ry. Co.* [1860] 5 H. N. 679 must govern the present case. I can find no facts which can distinguish the present case from that of the *Vaughan* case. *Vaughan* was the proprietor of a plantation adjoining the embankment of the *Tuff Vale Railway Company*. One day the plantation was discovered to be on fire, and eight acres of it were burnt. It was not disputed that it had taken fire from a spark from one of the defendants' engines, but they contended, and it was decided, that they were not responsible as they were authorized to use such engines, and had adopted every precaution that science could suggest to prevent injury : *Vaughan v. Tuff Vale Ry. Co.* [1860] 5 H. N. 679.

14. I have given my most anxious consideration to this case and for the reasons I have given this Rule must be made absolute, but, in the circumstances of the present case, there will be no order as to costs.