1913

RAJANI BENODE CHAKRA-VARTI v. ALL-INDIA BANKING AND INSURANCE CO.

Chittagong. We do not think that section 185 warrants interference by this Court merely upon the ground of convenience. The decision of the High Court, within the local limits of whose appellate jurisdiction the offender actually is, can only be sought when a doubt arises as to the Court by which an offence should be enquired into or tried. To our mind, there is no doubt that, on the allegations of the prosecution, the Courts at Chittagong and Lahore are equally competent to exercise jurisdiction in this matter. We have no doubtful question to decide, and in this view this Rule must be discharged.

E. H. M. *Rule discharged.*

LETTERS PATENT APPEAL.

Before Jenkins C.J., and Mookerjee J.

1913

July 9.

BENGAL PROVINCIAL RAILWAY CO.

v.

GOPI MOHAN SINGH.*

Contributory Negligence—Railway Company—Collision—Damages.

The plaintiff's carriage was damaged by a train of the defendant Company running into it at a level-crossing where the gate had been left open;

Held, that, on the findings of fact by the lower Appellate Court, negligence on the part of the defendant Company had been established, and that contributory negligence had not been proved.

LETTERS PATENT APPEAL by the defendant Railway Company from the judgment of D. Chatterjee J.

The suit was for compensation for damages caused to the plaintiff's carriage in a collision with a running

* Letters Patent Appeal, No. 35 of 1912, in Appeal from Appellate Decree, No. 1868 of 1910.

railway train at a level-crossing. The Court of first instance found that the defendant Company was guilty of negligence in leaving the gate open, but dismissed the suit mainly on the ground that plaintiff was guilty of contributory negligence. He held that the plaintiff's coachman was bound to exercise reasonable care while crossing the line, that he should have looked up and down the line to see if any train was approaching and that if he had done so, he would have seen the train approaching and could have avoided the accident. The plaintiff appealed. The lower Appellate Court held on the evidence that the gate at the level-crossing was left open when the accident took place and that the proximate cause of the accident was the running of the train against the carriage and not the running of the carriage across the line, there being no obstruction at the time it was passing. The result was that the appeal was allowed with costs. Thereupon, the defendant Company preferred a second appeal to the High Court. The second appeal was heard by D. Chatterjee J., sitting singly. The appeal being dismissed with costs, the Company filed this appeal under clause 15 of the Letters Patent.

Babu Prabhash Chandra Mitter (with him *Babu Jatindra Nath Sen*), for the appellants. The question of contributory negligence is a matter to be decided by the Judge and not by the jury: see Halsbury's 'Laws of England,' vol. 21, p. 444, *Davey* v. *The London and South-Western Railway Company* (1), *The Directors, etc., of the Metropolitan Railway Company* v. *John Julian Jackson* (2). The want of ordinary care and reasonable caution on the part of the plaintiff's coachman was the sole cause of the accident here.

(1) (1883) 12 Q. B. D. 70. (2) (1877) 3 App. Cas. 193.

1913

BENGAL PROVINCIAL RAILWAY CO. v. GOPI MOHAN SINGH.

Although the gate was open, the coachman should have looked this way and that when crossing the line. If he had, he would have seen the train coming: Act IX of 1890, s. 124; *Stubley* v. *The London and North-Western Railway Company* (1). The railway company was not legally bound to keep the gate closed. The English statute is different in this respect.

[*Babu Hiralal Sanyal*, for the respondent. The notification under the Railway Act makes it clear that the Company is bound to keep the gate closed.]

Neglect of self-inflicted duties is not actionable: *Skelton* v. *London and North-Western Railway Company* (2). Omission to fasten the gate does not amount to an invitation to come on the line. Even if the plaintiff be not guilty of contributory negligence, the Company is not liable.

[*Babu Hiralal Sanyal*. If the coachman was misled by the defendant's conduct into the belief that the line was safe, there could be no contributory negligence: *The Directors, &c., of the North-Eastern Railway Company* v. *Robert William Wanless* (3). You cannot demand the same degree of care of a man whom you have led to believe that everything is safe.]

Supposing the company was negligent; mere proof of that gives no cause of action. The plaintiff must prove in such cases that there was no contributory negligence on his part: *Wakelin* v. *The London and South-Western Railway Company* (4). Here the facts point out that there was contributory negligence on the part of the plaintiff. If there is no clear finding in the point, the case should be sent back. Further, the plaintiff here failed to prove by legal evidence the damage awarded to him.

(1) (1865) L. R. 1 Ex. 13.
(2) (1867) L. R. 2 C. P. 631.
(3) (1874) L. R. 7 H. L. 12.
(4) (1886) 12 App. Cas. 41.

1913

BENGAL PROVINCIAL RAILWAY CO. v. GOPI MOHAN SINGH.

Babu Hiralal Sanyal, for the respondent, was not called upon.

JENKINS C.J. This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Digambar Chatterjee confirming the decree of the lower Appellate Court.

The suit was one brought by the plaintiff against a Railway Company for damages. The cause of action alleged was that a train of the defendant Company ran into and damaged the plaintiff's carriage as it was crossing the defendant Company's line. The question therefore turns upon whether or not there was negligence on the part of defendant Company, and, if so, whether or not there was contributory negligence on the part of the plaintiff. As this case comes before the High Court by way of second appeal, we cannot disturb any finding of fact, if there was any evidence to support it. The Judge of the lower Appellate Court has come to the conclusion that the proximate cause of the damage to the plaintiff's carriage was the running of the train against the carriage, and he finds that there was negligence on the part of the defendant Company. The evidence shows that there was a gate at this level-crossing where the accident occurred, and that this gate was left open. There was thus an invitation to all comers to cross the line and an intimation that it could be crossed with safety. There is, therefore, ample evidence to support the finding of negligence against the defendant Company, and it cannot be disturbed.

Then, was there contributory negligence on the part of the plaintiff? There again we have the finding of the lower Appellate Court that there was not, for the learned Judge of that Court excludes the running of the carriage across the line, as he terms

1913

BENGAL PROVINCIAL RAILWAY CO. v. GOPI MOHAN SINGH.

JENKINS C.J.

it, as being a cause of the accident, and that expression in the context in which it appears amounts to a negation by the Court of any contributory negligence on the part of the plaintiff.

The result then is that we have negligence proved to the satisfaction of the lower Appellate Court on materials which justify that finding, and contributory negligence on the part of the plaintiff not proved to the satisfaction of that Court. The result is that the claim in the suit is established.

There remains to be seen whether damages are proved. The evidence in support of those damages has been criticised before us, and it has been suggested that there has been no damage. We have not gone through the evidence; nor is it necessary that we should do so, because we accept the finding of the lower Appellate Court that Rs. 316 has been proved to have been spent by the plaintiff in repairing his carriage. This clearly establishes damages resulting from the tort of the defendant Company.

This appeal, therefore, in my opinion, must be dismissed with costs.

MOOKERJEE J. concurred.

S.M. *Appeal dismissed.*