Mst. Dhapan
v.
Ram Saran
and others
———
Bhandari, C. J.

parties, their counsel and the witnesses of the fresh dates fixed.

It may be that the petitioner in the present case did not appear in Court on the 30th August, 1954, but it must be remembered that nothing was to be done that day. The parties were to be called and the case was to be set down for hearing on another date. The Senior Sub-Judge, however, decided to take up the appeal and to dismiss it in default. It seems to me, therefore, that the learned Senior Sub-Judge did not comply with the provisions of the rule which required him to adjourn the hearing of the appeal to another date. It has been held repeatedly that where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing. *Mst. Umai-ul-Mughni Begum* v. *Salig Ram and others* (1), and *Raghunandan Lohar* v. *Bachan Singh and others* (2).

For these reasons, I would accept the petition, set aside the order of the lower appellate Court and direct that the appeal be restored and heard on merits. There will be no order as to costs. The parties will appear before the Senior Sub-Judge on the 15th January, 1957.

APPELLATE CIVIL

Before Kapur and Passey, JJ.

UNION OF INDIA,—*Defendant-Appellant*

v.

SARDARNI HARBANS KAUR AND OTHERS,—*Respondents*

Regular First Appeal No. 135 of 1950.

1956
———
17th Dec.

Public carrier—Railway—Persons travelling contrary to bye-law or a contract express or implied, whether a

(1) A.I.R. 1915 Lah. 476
(2) A.I.R. 1940 Pat. 475

passenger—Such person whether trespasser—Whether can recover damages for injuries suffered as the result of carriers negligence—Railway servant not entitled to permit a person to travel in a train under the law—Such Railway servant allowing the person to travel on the train—Such permission whether binds the Railway.

On the 10th October, 1947, S. S. N. boarded a goods train at Ambala Cantonment to Delhi. This train collided with another train coming from the opposite direction and S. S. N. died as a result of this accident. On the 8th October, 1948, widow and the children of S. S. N. filed a suit for Rs. 1,00,000 as damages against the Union of India. The claim was opposed by the Union. The Trial Court passed a decree for Rs. 10,000 on the finding that there was a collision due to the negligence of the Railway servants as a result of which S. S. N. died, that he travelled without permission and the railway did not acquiesce in his travelling. The Union of India appealed to the High Court and contended mainly that S. S. N. was a trespasser and even if there was negligence on the part of the Railway the suit for damages could not be decreed.

Held, (1) that generally speaking a passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied.

(2) that a person who travels contrary to a bye-law and against the wishes of a railway servant is a trespasser and he cannot recover damages if as a result of a negligence of the carrier he suffers injury.

(3) that if a person steals a ride on a goods train knowing that such a train is not meant for the carriage of passengers, or, even on the case made out by the plaintiffs, is meant only for refugees, then the plaintiffs at least cannot recover damages as according to their own case the deceased does not fall in that category.

(4) that a railway servant, who under the law has not the power to permit a person to travel in a railway carriage, cannot give permission to a traveller to travel by a railway train and if he does so, his act is not binding on the railway company. The act of such a railway servant

in allowing a lift to a person, if it is outside the scope of his employment, does not make the employer liable to damages because it is the performance of an act which the servant is not employed to perform ; and

(5) that in the present case it has not been proved that the servants of the railway had allowed any passenger to travel by the goods train which left Ambala Cantonment on the 10th of October, 1947, and if the deceased travelled by such a train, the railway administration is not liable.

First Appeal from the decree of the Court of Shri Ishar Singh, Sub-Judge, 1st Class, Karnal, dated the 16th day of March, 1950, decreeing the plaintiffs' suit for Rs. 10,000 with proportionate costs against defendant No. 1.

F. C. MITAL and SURINDER SINGH, for Appellant.

TEK CHAND and GURBAKHSH SINGH, for Respondents.

JUDGMENT

Kapur, J.

KAPUR, J. This is a defendant's appeal against a judgment and decree passed by Mr. Isher Singh, Sub-Judge, 1st Class, Karnal, dated the 16th of March, 1950, decreeing the plaintiffs' suit for damages for causing the death of Sohan Singh Nanda as a result of collision between two trains belonging to the defendant.

Sohan Singh Nanda belonged to some place in the Rawalpindi District but before the partition he had come to stay in Amritsar, where he had started business, and according to the plaintiffs he was carrying on extensive business. On the 6th October, 1947, he started from Amritsar to go to Delhi and it is stated that he reached Ambala Cantonment before the 10th of October on which day he is alleged to have boarded a train which was going from Ambala Cantonment Station to Delhi. Although there is a conflict of testimony, but the evidence of the guard D.W. 3, Kundan Lal shows that the train

Union of India v. Sardarni Harbans Kaur and others

Kapur, J.

consisted of 36 wagons in all of which one was a passenger bogie, which was used for the military escort and the rest were goods wagons. Assistant Station Master Jamiat Rai D.W. 1, who was in Ambala Cantonment at the time has also stated that the train in dispute was a goods train and a passenger bogie used to be attached to such trains for the convenience of the military escort.

The plaintiffs' case is that Sohan Singh Nanda along with other relations had got into this train and there was a collision at 10-30 p.m. on the 10th of October, 1947, near mile No. 77 between Tarauri and Karnal Railway Stations. Twenty-four persons were killed and 110 were injured. The report of the accident is Exhibit D. I., which is printed at page 83 of the paper book. The train in which Nanda is alleged to have travelled was D-32 Down Goods Train and according to Exhibit D. 1, the collision occurred because both trains were started from the opposite stations and there was a single line operating.

The suit was filed on the 8th of October, 1948, in which it was alleged that Nanda who had been doing a fairly remunerative kind of business was killed as a result of an accident which was due to "the wilful misconduct, gross negligence, criminal failure to perform official duties and mismanagement of the administrators of the Eastern Punjab Railway authorities" and, therefore, the railway were "guilty of misconduct or committed gross negligence and criminal default in the performance of official duties". It was also alleged that the deceased was carrying about Rs. 5,000 cash and a cheque and they had also been lost. The plaintiffs claimed Rs. 1,00,000 as damages.

The defence was that Nanda did not travel by the train and was not killed as a result of an accident and also that even if he did travel it was

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

without authority and without payment of any fare and without permission and consent of the railway servants and in spite of warning and that he travelled at his own risk and the railway were, therefore, not liable.

The Union admitted that there was a collision which must be taken to be due to the negligence of railway servants as indeed that is the law.

On the other issues it was held that Sohan Singh Nanda did travel by the train and he died as a result of a collision, that he travelled without permission, and the railway did not acquiesce in his travelling. In other words, there was neither explicit nor implicit consent of the railway in regard to Nanda's travelling by that train. The Court held that section 82-A of the Railways Act, applied but Nanda was not travelling after obtaining a proper ticket and on the findings he decreed a sum of Rs. 10,000 which is the maximum allowed under section 82-A of the Railways Act. The Union have appealed to this Court.

Three points have been raised: (1) that there is no proof of death of Nanda in the accident, (2) that Nanda was a trespasser; he travelled neither with the consent of the railway nor at their invitation nor was he a licensee and even if there was negligence on the part of the railway the plaintiffs were not entitled to any damages, and (3) that the amount of damages decreed is excessive.

If the Union succeeds in regard to the second point raised, i.e., that Nanda was a trespasser, then it would not be necessary really to go into any other question. On this point the testimony is of certain witnesses of the plaintiffs as well as of the defendant but before I go to that question it will be necessary to give the various provisions of

Union of India v. Sardarni Harbans Kaur and others

Kapur, J.

the Railways Act which are relevant to the issue. "Carriage of passengers" is dealt with in sections 62 to 71. Under section 66 every person desirous of travelling on a railway is entitled to be supplied with a ticket on payment of the proper fare. Section 68 prohibits a person from travelling without a pass or a ticket and a railway servant can grant permission if empowered in this behalf by the railway administration to grant to a passenger a certificate that the passenger has been permitted to travel in a carriage upon condition that he would subsequently pay the fare payable for the distance travelled by him. Thus according to this section three conditions are necessary: (1) that a person should get the permission of a railway servant to travel, (2) that the railway servant should be authorized in that behalf, and (3) the condition precedent to the permission is that the person travelling shall pay the requisite fare.

Section 82-A of the Railways Act provides for liability of railway administration in respect of accidents, and where there is an accident between two trains one of which is a passenger train, the railway is liable to pay compensation, in the case of death irrespective of whether the death is caused by wrongful act, neglect or default on the part of the railway administration, not exceeding Rs. 10,000 in respect of any one person. But it appears from sections 82-B to 82-H that compensation claims have to be settled by Claims Commissioners save as to cases which fall under section 82-H, but no objection was taken by either side that no suit could be brought in tort.

Chapter IX of the Railways Act deals with penalties and offences. Section 118 deals with travelling without pass or ticket or with insufficient pass or ticket or beyond authorized distances. In such a case a person contravening the provisions of section 113 is liable to an excess fare and penalty provided

by subsection (2), and provision is also made for cases where a traveller refuses to pay the excess charge. Section 113-A gives the power to the railway to remove persons from railway carriages. Section 118(2) provides—

> "If a passenger, after being warned by a railway servant to desist, persists in travelling on the roof, steps or footboard of any carriage or on an engine, or in any other part of a train not intended for the use of passengers, he shall be punished with fine which may extend to fifty rupees and may be removed from the railway by any railway servant."

Section 122 deals with trespass and refusal to desist from trespass and when quoted runs as under:—

> 122. (1) If a person unlawfully enters upon a railway, he shall be punished with fine which may extend to twenty rupees.
>
> (2) If a person so entering refuses to leave the railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he shall be punished with fine which may extend to fifty rupees, and may be removed from the railway by such servant or other person."

Thus the various provisions of the Railways Act show that a person before he enters a railway train has to offer the requisite fare and obtain a ticket and that he cannot travel in a train without such a ticket except with the permission of the railway servant who is specially empowered in this behalf and on the condition that he will pay the fare. Travelling without pass or ticket or with insufficient pass is an offence

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

which is punishable under section 113 of the Railways Act, and unlawfully entering upon a railway makes a person a trespasser. It makes such person liable to fine on conviction.

The witnesses for the plaintiffs have stated that Sohan Singh Nanda travelled by the train after permission of the railway servants, if not express then implied. The first witness on this point for the plaintiffs is P.W. 3, Manjit Singh who has stated that he and Sohan Singh Nanda went to the Assistant Station Master at Ambala Cantonment and enquired about trains going to Karnal. They were informed that there was a train standing at platform No. 1 and that no tickets were being purchased in those days as the trains were being run for the convenience of the refugees. They went to the place where the train was but it was overcrowded. They met the guard who was talking to the driver of the train and he told them that the train was going to Karnal and they should get in if they wanted to travel. There were about 40 to 50 persons travelling in the wagon in which Nanda travelled. The next witness is Jawahar Singh P.W. 4, who states that he also travelled by the same train. He stated that no tickets were being issued in those days on the ground that the trains were meant for refugees and no tickets were needed. Gurbakhsh Singh P.W. 5, who is the brother of Nanda's mother, has also supported the allegation that they travelled with the permission of the railway servants. Inder Singh P.W. 6, has also supported this part of the plaintiffs' case and so has Gurdit Singh, P.W. 7. The learned Judge has refused to accept their testimony.

The railway has produced the Assistant Station Master Jamiat Rai who has stated that nobody came to ask his permission, that no passenger trains ran from Ambala to Delhi via Karnal on the 10th of October, 1947, that the railway had given no permission

Union of India
v.
Sardarni
Harbans Kaur
and others
———
Kapur, J.

for the use of goods trains for transport of passengers and that train No. D 32 Down was a goods train and no passenger had been permitted to travel by that train, nor was he competent to permit any person to do so. He also stated that the train D-32 was drawn from the marshalling yard and was brought at platform No. 1 and the empty wagons were full of travellers who got into them at the yard. He got these trucks emptied with the help of the military and no person was allowed "to entrain himself from the platform side". He also stated that in those days nobody was allowed to travel by goods train and unauthorised persons were detrained. D.W. 2 Salig Ram, Chief Booking Clerk, stated that on the 10th of October no tickets were issued to any passengers for stations on the Delhi section. D.W. 3, Kundan Lal was the guard of the train. He stated that when the train was brought to the platform at Ambala Cantonment it was full of travellers. He asked the Assistant Station Master D.W. 1 Jamiat Rai to get the unauthorised persons removed which was done with the help of the station staff and the military escort. At Kurukshetra also he got the unauthorised travellers to detrain with the help of the military escort. He also deposed that neither he nor the Assistant Station Master allowed anybody to travel by that train. In cross-examination he stated that when they removed the unauthorised persons from the train these people re-entered and some did so while the train was in motion. The next witness for the railway is D.W. 5, Kanshi Ram who was Station Master at Karnal. In cross-examination he stated that refugees trains were going up to Panipat in those days and some non-refugees persisted in travelling by such trains in spite of the warnings and prohibition and there was a note to that effect in the record. This is the evidence on the record from which the learned Judge came to the conclusion that the deceased was travelling in a goods train without proper

Union of India v. Sardarni Harbans Kaur and others

Kapur, J.

ticket and he neither had express nor implied permission of the railway servants, nor did the railway acquiesce in his travelling.

I agree with the findings of the learned Judge on the question of permission of the railway servants. All the railway servants have deposed that the deceased Nanda did not travel with their permission and that both at Ambala as well as at Kurukshetra attempts were made to get the wagons emptied but various persons got into the wagons in spite of the prohibition of the railway servants. Even the plaintiffs' witnesses have stated that the train was meant for refugees but they got a little further and stated that they travelled with permission. In any case there is no evidence that the Station Master was authorised to give permission to the persons to travel by that goods train or that the provisions of section 68 were complied with. The deceased must therefore, be taken to be a trespasser and in those circumstances the question arises whether the plaintiffs are entitled to any damages.

Assuming, though not deciding, that Sohan Singh Nanda travelled by the train D-32 Down going to Delhi, it must be held that he was a trespasser and was committing an offence under section 122 of the Railways Act. Can it be said that a trespasser, who travels by a train without permission of the railway and in spite of the attempt of the railway servants to stop him from travelling, i.e. not only without permission but against the directions of the railway servants, can recover damages for an accident due to the neglect of railway servants?

The law relating to the liability of carriers and railways has been stated in Clerk and Lindsell on Torts, eleventh edition at pp. 362-363. It is stated that collision of two trains belonging to the same owners is evidence of negligence on the part of those

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

owners: see *Skinner* v. *L.B. and S.C. Railway* (1), and *Ayles* v. *S.R. Railway* (2), and although a carrier of passengers owes a duty to take reasonable care for the safety of passengers during the carriage, but the duty is owed only to persons who are accepted as passengers and, therefore, no such duty is owed to a trespasser, whether he knows he is a trespasser or not. Reference is there made to two cases, *Twine* v. *Bean's Express, Ltd.,* (3), and *Grand Trunk Railway* v. *Barnett* (4). In the former case under an agreement between Bean's Limited, and the Post Office Savings Bank, Bean's Limited, provided a commercial van and a driver for the Bank. There was an express instruction to the driver that no one was to be allowed to travel in the van but owing to the driver's negligence T. who was an unauthorised passenger in the van was injured. It was held that the duty of Bean's Limited, as employers of the driver, to take care in the driving of the van was only to persons who might reasonably be anticipated by Bean's Limited, as likely to be injured by negligent driving of the van and as T. was a trespasser in the van in relation to Bean's Limited, they owed no duty to T. to take care in the driving of the van.

The next case, *Grand Trunk Railway* v. *Barnett* (4), is of some importance. The plaintiff in that case claimed that he was a passenger on a train which was owned and operated by the Pere Marquette Railway and that when the train was moving reversely it collided with the defendants' van owing to the negligence of the defendants or their servants and therby the plaintiff sustained injuries. The negligence imputed was in leaving the van on a siding foul of the main line when the switch was set for the main line. The plaintiff in that case came into the Grand Trunk station and

(1) (1850) 5 Ex. 787
(2) (1868) 3 Ex. 146
(3) (1946) 1 A.E.R. 202
(4) 1911 A.C. 361

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

got into a train which was reversing and going to the Pere Marquette yard. He jumped on to the platform at the rear end of a car and stood with one foot on the platform and the other on the step. He was aware that the train was not in use as a passenger train and he had no ticket and had received no invitation to travel by that train. He was also disobeying a by-law of the railway in standing on the platform of the car. The Privy Council held that the plaintiff in those circumstances was a trespasser both on the premises of the Grand Trunk Railway Company as well as on the train. In that case it was not suggested that the brakesman of the train had authority to give permission. It was also found that the plaintiff was not an invitee and the case proceeded on the footing that the plaintiff was a trespasser and the question for decision was whether under those circumstances he had any right against the railway. Lord Robson said at page 369—

> "In order to make good a case of actionable negligence against them he must show some breach of a duty on their part towards himself".

It was also held that the Railway Company was under a duty to the plaintiff not wilfully to inure him or to increase the normal risk by deliberately placing unexpected danger in his way, but thereby a trespasser could not be equated to the position of a person who is carried for reward. Lord Robson observed at page 369—

> "* * * to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in

Union of India
v.
Sardarni
Harbans Kaur
and others
———
Kapur, J.

> such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as, for instance, by a charge to cover insurance against the risk), for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.

The general rule, therefore, is "that a man trespasses at his own risk. This is shown by a long line of authorities, of which *Great Northern Railway Company* v. *Harrison* (1), *Lygo* versus *Newbold* (2), and *Murley* v. *Grove*, (3), are familiar examples".

Thus according to the Privy Council in a case the facts of which are almost similar to those of the one before us it is to be held that *vis-a-vis* a railway company the position of a trespasser could not be the same as that of a person whom the railway has undertaken to carry after receiving the proper fare.

In *Lygo* v. *Newbold* (2), the plaintiff contracted with the defendant to carry certain goods for her in his cart. The plaintiff, by the permission of the servant of the defendant, but without defendant's authority, rode in the cart with her goods and as a result of the cart breaking down the plaintiff was thrown out and severely injured. It was held that the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his

(1) (1854) 10 Ex. 376
(2) (1854) 9 Ex. 302
(3) (1882) 46 J.P. 369

Union of India v. Sardarni Harbans Kaur and others

Kapur, J.

authority, he was not liable for the personal injury she had sustained. Pollock, C.B., said at page 180—

> "On the present occasion, the plaintiff brought this accident wholly upon herself, she was of full age, and she got up into the defendant's cart without any right to do so. She ought to have known that she had no authority to do that, and she must, therefore, take all the consequences of her own culpable conduct."

See also *Lowery* v. *Walker* (1).

This principle had been applied in *Ismail* v. *The Bombay Baroda and Central India Railway* (2). In this case the Privy Council case, *Grand Trunk Railway* v. *Barnett* (3), was followed. The plaintiff went to the goods yard of the Dohad Railway Station of the defendant's railway and was crossing the railway lines and was injured as a result of which his two legs had to be amputated. The Court held that it was impossible to infer against the railway company a licence to the plaintiff to walk across the railway lines on the terms that he should be protected from any passing or moving trains. At page 831 reference was made to the *Grand Trunk Railway case* (3), and after referring to the passage from that judgment which I have quoted, the learned Chief Justice said—

> "I think that that principle of law applies in this case".

Mr. Tek Chand in trying to distinguish this case submitted that the decision is based on contributory negligence of the plaintiff but the judgment of Beaumont C. J. shows that that was not the *ratio*

(1) (1910) 1 K.B. 173
(2) 34 Bom. L.R. 826
(3) 1911 A.C. 361

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

decidendi. At page 831 the learned Chief Justice said—

> "The plaintiff, as I have said, must be regarded as a trespasser, and in my judgment the law is that a railway company is not liable to a trespasser for a mere error of judgment, even amounting to negligence, on the part of its servant which causes damage to the trespasser. If the railway company is liable in such circumstances, then their liability to a trespasser is practically on the same footing as their liability to an invitee, an ordinary passenger on the railway who has paid the company for their services."

Another case in which the liability towards a trespasser was canvassed and decided is *Caitano De Mello* v. *The Meridian Electrical Engineering Company* (1). In that case a workman went to the house of a customer of defendant No. 1 and without any authority from defendant No. 1, undertook to repair the electric installation, and in doing so he was electrocuted due to the shock. In a suit for damages it was held that defendants owed no duty to the deceased who was a trespasser on their line.

Mr. Tek Chand submitted that in the circumstances of this case the deceased was accepted as a passenger and it is not necessary that there should have been a contract, and he relies upon a passage from Charlesworth on Negligence, second edition at page 103, where it is stated—

> "In the cases cited above the plaintiff has been in the vehicle under a contract, although not a contract to which he was a party. It

(1) 29 Bomb. L.R. 402

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

is not necessary, however, that there should be a contract, provided that the plaintiff is accepted as a passenger."

But to the facts of the present case this passage has no application because we have already found in his case that the deceased was a trespasser and had not been accepted as a passenger or as an invitee. He also relied upon a passage at page 218 where the dictum of Law Lord Atkin has been quoted—

> "I know of no duty to a trespasser owed by the occupier of land other than, when the trespasser is known to be present, to abstain from doing an act which if done carelessly must reasonably be contemplated as likely to injure him, and, of course, to abstain from doing acts which are intended to injure him".

But that dictum is wholly inapplicable to the facts of the present case, nor is applicable the statement of the law that it is the duty of an occupier of land not intentionally to inflict injury on a trespasser because there is no question of intentional injury in the present case. But in the very next passage it is stated relying on *Grand Trunk Railway* v. *Barnett* (1)—

> "Accordingly, a trespasser on a railway train who was injured in a railway collision caused by the negligence of the railway company's servants was held to be unable to recover."

It has also been held in *French* v. *Hills Plymouth Company* (2)—

> "Where a person, in attempting to cross a railway line by means of a track, not a

(1) 1911 A.C. 361
(2) (1908) 24 T.L.R. 644

highway, crawled under a line of trucks and was killed owing to the trucks being moved without warning, the railway company were held to be under no duty to have a man stationed to warn people likely to use the track that the line was being used for traffic".

Union of India
v.
Sardarni
Harbans Kaur
and others
——
Kapur, J.

Reference was made to Clerk and Lindsell on Torts at page 691 of the eleventh edition and also to page 613 of Halsbury's Laws of England, Hailsham edition, volume 23, and to Pollock on Torts at page 125 to page 127, but none of these passages is of any help because they deal with different circumstances. In the present case the deceased was a trespasser as he was on the train without permission and against the express directions of the railway servants, and the case, in my opinion, falls within the rule laid down by the Privy Council in *Grand Trunk Railway* v. *Barnett* (1).

It is then contended that Sohan Singh Nanda was a passenger within section 82-A of the Railways Act and the plaintiffs are, therefore, entitled to damages, and reliance is placed on *Nur Muhammad* v. *King Emperor of India* (2). In that case the accused travelled on the footboard of a first class compartment and while he was talking to the Civil Surgeon who was travelling by the same compartment he went on standing for 400 yards while the train was in motion, when he jumped down and "escaped rather badly" and on proceedings being forwarded to the Chief Court it was held that such a person was a passenger. It was held that he had no ticket and "was a trespassing passenger, but by remaining on the footboard after the train had started, he made himself a passenger". The facts in that case seem to be different.

(1) 1911 A.C. 361
(2) 31 P.R. 1905

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

The accused had gone to the railway station and was talking to a Civil Surgeon who was travelling in the first class and when the train started he also got on to the train. It may be that for purposes of that case he was a passenger but this is no authority for the proposition that anybody who travels against the injunctions of the railway officials in a train which is not meant for carrying passengers but goods can also be called a passenger. In *The Lion* (1), which was a case under the Merchant Shipping Act of 1854, the Captain of a ship carried his wife and father-in-law in the knowledge of the owners. It was held that they were not passengers within the meaning of the Merchant Shipping Act. Sir Robert Phillimore who decided the case in the lower Court said—

> "* * * the payment of fare would appear to be a necessary incident for the constitution of a passenger in the legal sense of the term, both as to his rights and duties'".

(*See* L.R. 2A. and E. 102). But the correctness of this view has been doubted and at page 2110 of Stroud's Judicial Dictionary it is stated—

> "An ordinary payment of fare would, of course, be clear proof that a voyager was a passenger; but it is submitted that a voyager (other than the officers and crew) is a passenger, though he pays no fare, if the owners of the ship carry him in pursuance of an obligation or duty (Judgment of P. C., *The Lion,* sup.) (1)".

Reference may now be made to some Amercian cases which deal with persons travelling on goods

(1) L.R. 2 P.C. 525

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

trains. In all these cases it has been held that a person travelling as an invitee or a licensee can be a passenger but not otherwise. In *Candiff* v. *Louisville, N. O. and T. Railway Company* (1), it was held that a brakeman employed on a goods train has no implied authority to bind the company by a contract of passage, and his permission to a person to ride does not make such a person a passenger. In *Simmons* v. *Oregon Railway Company* (2), it was held that a conductor of a goods train having authority to receive and carry persons on his train will make the carrier liable to such persons, as passengers, for injury from negligence of operators of the train. At page 1023 Bean, J., said—

> "Generally speaking, a passenger is one who travels in a public conveyance, by virtue of a contract, express or implied, with the carrier; and a carrier of passengers is one who undertakes to carry persons from place to place gratuitously, or for hire".

In another Amercian case *Gardner* v. *St. Louis Railway Company* (3), Bland, P. J., said—

> "The defendant had the right to carry or not to carry the plaintiff, or any other passenger, on its freight trains, but when it agreed to carry plaintiff upon such trains at any and all times, when he should desire to travel thereon, as to him it was a common carrier of passengers".

The following passage from the judgment of Felt, J., in *Vandalia Railway Company* v. *Darby* (4), is important:—

> "However, a person who becomes a passenger on a freight train assumes the risks and

(1) 108 Northeastern Reporter 778
(2) 7 Southern Reporter 601
(3) 69 Pacific Reporter 1022
(4) 93 Southern Reporter 917

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

inconveniences necessarily and reasonably incident to such means of transportation, when he voluntarily chooses the same".

In *Chesapeake and O. Railway Company* v. *Smith* (1), it was held that one riding in the caboose of a freight train under agreement of the conductor to so take him, in consideration of his assistance in loading and unloading freight, is a passenger, as regards liability of the company for injury thereon.

I may revert to *Simmons* v. *Oregon Railway Company* (2), where it was held that a railroad company may separate its passenger and freight businesses providing certain trains in which passengers may be carried and others devoted to the exclusive transportation of freight, and in such a case the conductor of a freight train had no implied authority to receive passengers thereon or to bind the company by his conduct in so doing.

In another Amercian case *Gray* v. *Columbia River Railway Company* (3), the servant of contractor who had entered into contract with the Railway Company to have his servants transported in the Company's trains travelled by a tank car and was injured. It was held that he was a passenger because he was permitted to ride by the conductor of the train. A person having a ticket for passage upon a railroad, who boards a train which does not carry passengers believing the ticket to be good on that train, is to be treated as a passenger and is not a trespasser [*Boggess* v. *Chesapeake and Ohio Railway Company* (4)]. At page 779 Brannon, J., said—

> "Having a ticket, and getting aboard a wrong train, believing his ticket would entitle

(1) 172 South Western Reporter 1088
(2) 69 Pacific Reporter 1022
(3) 88 Pacific Reporter 297
(4) 23 L.R.A. 777

him to ride upon it, he is not a trespasser, but a passenger."

Union of India
v.
Sardarni Harbans Kaur and others

Kapur, J.

None of these cases which I have quoted above makes a trespasser a passenger and in every case it was held that the passenger was one who travelled either with the permission of a conductor of a train or one who travelled under a contract with the railway company, whether the contract was entered into between him or between the master and the railway company, or was a person who travelled by a train under a wrong ticket believing that it was available for the train he was travelling by. In none of these cases was it ever held that a trespasser who insisted on travelling without permission, without payment of fare or an intention of paying fare was a passenger.

It is not, of course, necessary that there is a contract for carriage or a contract to which the plaintiff injured and demanding damages is a party; it is sufficient if the plaintiff is accepted as a passenger (*See* Charlesworth on Negligence, third edition, page 114). But even this passage does not indicate that a person can be passenger without a contract, without being accepted and against the express injunctions of railway servants.

Counsel for the respondents strongly relied on the following passage from Charlesworth on Negligence, third edition, at page 115 :—

> "If the passenger has got on to the vehicle fraudulently intending not to pay his fare, or to pay only part of his fare or to pay only third-class fare while travelling first class, he has still been accepted as a passenger and is entitled to sue for injuries caused by negligence."

But the authority on which this passage is based is not given. The cases which are quoted in the various text books deal with passengers who have travelled in a first class compartment and have paid only third

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

class fare, or the case of a child who was travelling with his mother without having paid the fare. In every case which has so far been decided was the case of a traveller who had been accepted as a passenger even though it may be by fraud. To the case of persons who in breach of a bye-law and without the permission of the railway company travel on a train which, to their knowledge, is not a passenger train and are injured as a result of the negligence of the railway company's servants, the rule laid down in *Grand Trunk Railway* v. *Barnett* (1), applies because in that case they are trespassers. If a servant without the authority of his master and acting outside the scope of his employment allows a person to become a passenger, the master is not liable to him because that person is a trespasser: see *Twine* v. *Bean's Express, Ltd.*, (2), a case which I have already referred to. *Conway* v. *George Wimpey and Company Ltd.*, (3), is a case of a similar kind.

A review of all these authorities shows—

(1) that generally speaking a passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied;

(2) that a person who travels contrary to a bye-law and against the wishes of a railway servant is a trespasser and he cannot recover damages if as a result of negligence of the carrier he suffers injury;

(3) that if a person steals a ride on a goods train knowing that such a train is not meant

(1) 1911 A.C. 361
(2) (1946) 1 A.E.R. 202
(3) (1951) 2 K.B. 266

Union of India
v.
Sardarni
Harbans Kaur
and others

Kapur, J.

for the carriage of passengers, or even on the case made out by the plaintiffs, is meant only for refugees, then the plaintiffs at least cannot recover damages as according to their own case the deceased does not fall in that category;

(4) that a railway servant, who under the law has not the power to permit a person to travel in a railway carriage, cannot give permission to a traveller to travel by a railway train and if he does so, his act is not binding on the railway company. The act of such a railway servant in allowing a lift to a person, if it is outside the scope of his employment, does not make the employer liable to damages because it is the performance of an act which the servant is not employed to perform; and

(5) that in the present case it has not been proved that the servants of the railway had allowed any passenger to travel by the goods train which left Ambala Cantonment on the 10th of October, 1947, and if the deceased travelled by such a train, the railway administration is not liable.

In view of my finding as to the liability of the railway to a trespasser it is not necessary to discuss any other point and I would, therefore, allow this appeal, set aside the judgment and decree of the Court below and dismiss the plaintiffs' suit but in the circumstances of the case the parties will bear their own costs throughout.

Passey, J.

PASSEY, J.—I agree.