APPELLATE CIVIL.

Before Falshaw and Mehar Singh, JJ.

VIJAY. SHANKER,—*Appellant*

versus

UNION OF INDIA,—*Respondent.*

Regular First Appeal No. 44-D of 1952.

1957

Dec., 23rd

Tort—Owner or occupier of land or premises—Whether liable for injury caused to a trespasser—Child trespasser and adult trespasser—Whether on equal footing—Actionable negligence—Meaning of—Indian Railways Act (IX of 1890)—Section 13—Railway Administration—Whether bound to raise fence to protect the track or to maintain a gate or stile at a footway crossing or to keep a gate-keeper there.

Held, that an owner or occupier of land or premises owes no obligation or duty to a trespasser, but he must not set up a trap for him or cause wilful injury to him. A man trespasses at his own risk.

Held, that the law draws no distinction in the duty of the owner or occupier of the premises towards a child trespasser as compared to an adult trespasser.

Held, that to bring the case within the category of actionable negligence some wrongful act must be shown, or a breach of some positive duty.

Held, that the Indian Railways Act, 1890, does not impose any imperative obligation on the Railway to fence a line, but it gives power to the Central Government to require the Railway to, among other matters, provide fences and to maintain the same. Similarly, there is no duty, apart from the statute, placed upon the Railway Administration to either keep a gate or stile at a footway crossing with a fence, or to keep a watchman for the benefit of those using the same.

Case law reviewed.

Regular first Appeal from the decree of the Court of Shri Banwari Lal, Sub-Judge, 1st Class, Delhi, dated the 13th day of December, 1957, dismissing the plaintiff's suit.

S. N. ANDLEY and YOGESHWAR DAYAL, for Petitioner.

NANAK CHAND and MRS. S. GUPTA, for Respondent.

JUDGMENT

Mehar Singh, J. MEHAR SINGH, J.—The plaintiff, Vijay Shanker, who is the appellant, was on January, 19, 1947, about two years and two months old, when, at about 3 p.m., on that day, he was crossing the Railway line between Hardinge Bridge and New Delhi Railway station, opposite to residential locality of Mahabat Khan Road, New Delhi, and was run over by a Parcel Express coming from Agra to Delhi. His legs were injured and later on had to be amputated.

The Railway track, on which the accident took place, was laid some time in 1902. Between Hardinge Bridge and New Delhi Railway station, on both sides of the track, residential buildings and quarters have sprung up since about 1938 and 1939. Mahabat Khan Road quarters are on one side of the track and the plaintiff was residing with his father in No. 26-E of that Road. On the afternoon of the accident he was playing near the track. He, along with a few other children, tried to cross the track, when the Parcel Express was approaching in the direction of New Delhi, Railway station. The other children crossed the track. The plaintiff was crawling while crossing the track. According to the driver of the Parcel Express, T. D. Bose D.W. 3, when he saw the plaintiff, he whistled and applied vacuum brakes succeeding in pulling up the train at a distance of 50 to 70 yards, but before he could pull up the train the plaintiff had not been able to clear himself off the track and was run over by the train causing serious injuries to both of his legs, which as stated, had later on to be amputated near the

knee joints. The plaintiff has suffered permanent and complete disability.

The claim by the plaintiff is for a damage of one lakh rupees for the injuries sustained and for expenses of artificial limbs that he must use, but has to keep on changing at intervals as he grows up. No negligence on the part of the driver of the train has been alleged nor is there any evidence of any negligence by him. The claim is based on the negligence of the Railway of the defendant, now Union of India, in not fencing the track in front of the residential houses and quarters so as to be a barrier and prevention for the children and the public in general from crossing over the Railway track. The main defence of the defendant is that there is no such duty in law to fence the track imposed upon the defendant. This defence has found favour with the learned trial Judge, who has, though finding that the cost of the artificial limbs, during the expected life-time of about 60 years of the plaintiff, approximates to about Rs. 20,000 and damages, because of the injuries having regard to the status of the family, should be about Rs. 30,000, the total coming to Rs. 50,000, dismissed the suit, leaving the parties to bear their own costs. The decree is dated December 13, 1951, and the plaintiff appeals against the decree.

No negligence on the part of the driver of the train is either pleaded or proved. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: per Willes J., as cited at page 405 of *Latham* v. *R. Johnson and Nephew Limited* (1). The question then is what breach of positive duty has been committed by

(1) (1913) 1 K.B. 398.

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the Railway or wrongful act done by it in so far as this case is concerned? There is no evidence that children were permitted to be on the track by the Railway or not stopped from being there thus implying permission on its part and bring them in the category of licensees. The plaintiff was a trespasser on the Railway track. An owner or occupier of land or premises owes no obligation or duty to a trespasser, but he must not set up a trap for him or cause wilful injury to him. In *Latham* v. *R. Johnson and Nephew Limited* (1), at page 410, Hamilton L.J., observed :

> "Where a question arises, not between parties who are both present in the exercise of equal rights *inter se,* but between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognised three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured. The cases down to 1864 are collected in *Sullivan* v. *Waters* (2). Contractual obligations of course stand apart. The lowest is the duty towards a trespasser. More care though not much, is owed to a licensee-more again to an invitee. The latter term is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or of material interest. Those who are invited as guests, whether from benevolence or for social reasons, are not in

(1) (1913) 1 K.B. 398 page 405—410.
(2) (1864) 14 I.C. L.R. 460.

> law invitees but licensees * * * * * * * * The rule as to trespassers is most recently indicated in *Lowery* v. *Walker* (1), and is stated and discussed in *Grand Trunk Railway Company of Canada* v. *Barnett* (2). The owner of the property is under a duty not to injure the trespasser wilfully; "not to do a wilful act in reckless disregard of ordinary humanity towards him"; but otherwise a man "trespasses at his own risk".

This was approved by the House of Lords in *Robert Addie and Sons Limited (Collieries) Limited* v. *Dumbreck* (3). This being the law with regard to trespassers, the question then arises whether there is any difference in the case of a child trespasser as compared to an adult trespasser? The law draws no distinction in the duty of the owner or occupier of the premises towards either category of trespasser. At page 407 of *Latham* v. *R. Johnson and Nephew Limited* (4), Farwell L. J., said—

> "I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the license ought not to be held to extend to such a child unless accompanied by a competent guardian."

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(1) 1911 A.C. 10.
(2) 1911 A.C. 361.
(3) 1929 A.C. 358.
(4) (1913) 1 K.B. 398.

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In *Robert Addie and Sons (Collieries) Limited* v. *Dumbreck* (1), is referred to, with approval by Viscound Dunedin, the following dictum of Scrutton L. J.—

> "If the children were trespassers, the land owner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

The learned counsel for the plaintiff has pressed the claim of the plaintiff on the ground, as has been averred in the plaint, that as the Railway track runs between residential houses and quarters on its both sides, it was the duty of the defendant to provide adequate and effective fence to protect and prevent the house-holders and the children of the house-holders from trespassing or crossing over the Railway track and thus sustaining injury. Section 13 (a) of the Indian Railways Act, 1890, (Act No. IX of 1890), provides,—

> "Section 13. The Central Government may require that, within a time to be specified in the requirement, or within such further time as it may appoint in this behalf,
>
> (a) boundary marks or fences be provided or renewed by a railway administration for a railway or any part thereof and for roads constructed in connection therewith; * * * * *"

(1) 1929 A.C. 358.

Unlike section 68 of the English Railway Clauses Consolidation Act (8 and 9 Vict., c. 20) 1845, the Indian statute does not impose any imperative obligation on the railway to fence a line, but it gives power to the Central Government to require the railway to, among other matters, provide fences and to maintain the same. In this case there is no material to say that any such requirement has been made by the Central Government for fence on both sides of the Railway track for the benefit of the residents of the adjoining houses and quarters, where the accident took place. There is evidence that a few accidents did take place earlier and once the matter was a question of interpellation in the Central Assembly, but then the Central Government did not move to require the Railway to put up fence on either side of the track in the particular locality. There was no statutory obligation on the part of the Railway to maintain fence on either side of the track at or about that place. The question then is whether under the general law there is any such obligation on the Railway to fence the Railway track and particularly if more than 20 years, as in this case, after the track was laid residential houses and quarters have sprung up on either side of the track near and about the particular place where the accident occurred. There appears to be no such obligation, apart from statute, under the general law. In *Cliff* v. *The Midland Railway Company* (1), at page 264, Lush, J. observes thus—

> "Now, it seems to me that the company would have no obligation to do either the one thing or the other, no obligation to divert the road, because the Act authorizing them to do so is merely permissive, and no obligation to fence off the road, or to employ any one there to warn

(1) (1870) L.R. V. Q.B. 258.

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persons coming on the road, because no such obligation is imposed by the legislature; and I do not see in this case, supposing anything a railway company could do would create an obligation,—that the company have done anything here to create that obligation."

In *Robert and Sons (Collieries) Limited* v. *Dumbreck* (1), Viscount Dunedin said—

> "Some thing has been said about fencing. There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees."

In this connection *Jenkins* v. *Great Western Railway* (2), is a somewhat parallel case. In that case the plaintiff, a child, was two and a half years old. The child's parents lived in a house close by a branch of one of the main lines of the Great Western Railway Company. On the northern side of the main line there was what is called a relief line, or an avoiding line. Beyond that there was a siding with some carriages on it. Beyond that in one particular place there were some stacks of timber which were within a distance of two and a half inches from the fence, that space was, of course, obviously insufficient for a child of two and a half years to get through. The fence was in perfectly good repair. It was a fence with rails three inches thick, narrower at the bottom-four inches at the bottom, next four and a half, next five, next nine, and next ten. On the north side of the fence there was a public road. The child got on to the main line of the railway and was knocked down and seriously injured, and in

(1) 1929 A.C. 358.
(2) (1912) 1 K.B. 525.

respect of that a claim for damages was brought. Cozens Hardy, M.R., at page 531, said that the findings most favourable to the plaintiff amount to this, that the railway authorities must be taken to have known that children did get on to the stacks of timber, which were, in fact, adjacent to the fence two and a half inches off is, of course, nothing and they must be taken to have given permission or leave and license to go there and get over the fence on to the stacks of timber, and to play there. But the jury negatived expressly that the railway authorities had any knowledge at all of any leave or license to any children to go on to the main line. Upon these findings the argument advanced on behalf of the plaintiff was that the negligence was in this that if any one got on to the stacks of timber, the leave and license which the railway company gave imposed upon them a duty to fence off that stack of timber from every thing to the south, to prevent children going to this place and getting into danger zone where trains might be passing. This argument was not accepted and it was held not to be a case of negligence on the part of the railway not to have fenced the main line from a place within its yard where children played as licencees. The learned Master of Rolls observes—

> "Even apart from that, can it be said that a child, who was permitted to go to the stacks of timber, and play on the stacks of timber, is entitled to say against the railway company: "You ought to have fenced off that stack; you ought to have been aware that the invitation to children to trespass is irresistible, and to go on to the railway to play in the zone of danger and meet with an accident"? I cannot follow that."

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So that on authority too the plaintiff has no case of negligence against the defendant because the Railway did not fence the track for the benefit of the adjoining house-holders.

Some half-hearted argument has been addressed that at or near the place of accident there is a foot-way crossing on the railway track and that places the Railway under an obligation and duty to maintain a gate or stile there, with fences, and also a gate-keeper. It is not stated in the plaint that the accident took place on any such foot-way level crossing. Of the plaintiff's witnesses Kharaiti Ram P.W. 8, and Nathu Ram P.W. 9, both witnesses to the accident, say that there is no level crossing at the place where the accident occurred. The driver of the train, D. T. Bose, D.W. 3, did not notice any foot-path on the track nearabout the place of accident. Station Master, Hans Raj Bhandari P. W. 2, who visited the place of the accident a few days later, also says that he did not notice any foot-path crossing the track. Some days after the accident Sant Ram D.W., D.I.T., prepared a site plan of the place of accident and it is he who says that "an authorised *pagdandi* (foot-path) existed which crosses the Railway track at the place of accident". The evidence on both sides discredits the observation of this witness. There is no satisfactory proof that any foot-way crossing on the level existed near or about the place of the accident. Assuming for the moment that there is such an authorised foot-way level crossing at the place, there is no material on the basis of which it can be found that that level crossing was provided and maintained by the Railway in consequence of the requisition of the Central Government according to section 13(c) of Act No. IX of 1890. It means that no such foot-way level crossing was being maintained under a statutory obligation by the

Railway. The only other position for consideration can be that the Railway voluntarily provided such a foot-way level crossing, and then the question is what is the duty of the Railway with regard to the same? In *Stubley* v. *The London and North Western Railway Company* (1), it has been held that "there is no general duty on the railway companies to place watchmen at public foot-ways crossing the railway on a level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the railway". In that case the railway line could be seen for 300 yards each way from the foot-way crossing and it was held that there was no evidence of negligence on the part of the company when a woman crossing the line was run down and killed by a train. In the present case, there is some evidence of a curve at some distance from the place where the accident occurred but there is no evidence that the view of a person on the track is obstructed by any thing on either side and if so, from what distance. *In Cliff* v. *The Midland Railway Company* (2), at page 264, Lush J., observed:—

> "I think that where the legislature authorises a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But, it may be, and I am inclined to think that it is, a sound principle that if the railway company, in the construction of the works so authorised,—in the exercise of

(1) (1865) L.R. I. Ex. 13.
(2) (1870) L.R.V.Q.B. 258.

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the discretion which the legislature has vested in them,—do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them."

In the present case the railway has done nothing in the shape of construction work which has prevented persons crossing over the line from taking care of themselves and has exposed them to greater peril than is ordinarily incident to a level crossing. It thus appears that, though it is not the case here, even if it is accepted that there is a level foot-way crossing near where the accident occurred, no duty, apart from the statute, is placed upon the Railway administration to either keep a gate or a stile there with a fence, or to keep a watchman for the benefit of those using the same. Reference must, however, be made to *Williams* v. *The Great Western Railway Company* (1), in which case the English Railways Clauses Consolidation Act, 1845, section 51, required the railway company to erect a gate or a stile at a public foot-path on the level but the railway company did not do so. A child of four and a half years old having been sent on an errand, was shortly, afterwards found lying on the level crossing, a foot having been cut off by a passing train. It was held that there was evidence to go to the jury that the accident was caused by the neglect of the defendants

(1) (1874) IX Ex. 157.

to fence. There was no evidence to show how the child came on the foot-way level crossing. In the first place, in that case there was a statutory duty of which there was breach, which is not the case here. And secondly, in that case the child was found lying on the level crossing, but here the evidence is definite that the child was not found lying on any level crossing and in fact the preponderance of evidence is that at or near the place of the accident there is no such thing as a foot-path crossing on the level. This argument is, therefore, devoid of substance.

It has been said lastly on behalf of the plaintiff that the railway or rather a railway train is a 'dangerous thing' but for a thing to be a 'dangerous thing' it has to be dangerous in itself, or, in other words, inherently or essentially dangerous. This can hardly, in these days, be said either of railway or of a railway train. If such a thing could be said to be 'a dangerous thing', it was only then that the question of any obligation or duty, to persons coming on a railway track, on the part of the railway administration could be said to arise, but even then in the case of a trespasser there could hardly be any obligation or duty unless it could at the same time be found to be either a trap or something set up by the railway administration wilfully to injure persons coming on the railway track.

In consequence, the appeal fails and is dismissed, but this is not a case for the award of costs and so the parties are left to their own costs in this appeal.

FALSHAW, J.—I agree. Falshaw, J.

B.R.T.