

Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of The East Indian Railway Company v. Kalidas Mukerjee, from the High Court of Judicature at Fort William in Bengal; delivered 21st February 1901.

Present :

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[Delivered by the Lord Chancellor.]

IN this case the plaintiff, who is entitled to bring the action, sues the Defendant Company for the death of his son, who was killed by an explosion in a railway carriage. The explosion was caused by the bringing into the carriage of a quantity of fireworks. The carriage was one in which smoking was permitted; and a small charcoal stand was there for the accommodation of the smokers. The two persons responsible for bringing in the combustibles, themselves became the victims of the explosion; but the action is brought against the Railway Company upon the allegation that they were guilty of negligence in permitting the explosives to be brought into the carriage.

No precise evidence was given as to the course of business at the station at which the two persons in question got in. The fact that the fireworks were brought in was clear. But it is contended that it was the duty of the Company to see that dangerous articles, such as fireworks, should not be permitted to be brought into a

passenger train. That it would be negligence knowingly to permit such articles to be carried in a passenger carriage is obvious enough, but it is not suggested, so far as the Railway Company, or their servants, are concerned, that they were knowingly permitted to be brought in.

The sole question is whether, upon such facts as are here proved, their Lordships can find reasonable evidence of a neglect of duty on the part of the Company, in not detecting the nature of the parcel or parcels which it is presumed that one, or both, of the persons who brought the fireworks to the train had with them when they passed the ticket barrier at the station at which they got into the train.

No evidence is given by anyone of the appearance, or even the bulk, of the parcel, or parcels. No evidence is given by the Railway Company of any inspection of any passenger's luggage at the station in question. The parcel, whatever it was, was placed under the seat of the carriage; and some expert evidence was given that the extensive explosion which occurred, and in which the two people responsible for carrying the fireworks were themselves killed, might be caused by half a dozen bombs such as are usually used on such an occasion as these fireworks were intended for, namely, a Hindu marriage; and these bombs are described as being about the size of ordinary cricket balls.

There is no evidence, direct or indirect, of the dimensions of the parcel or parcels; and it seems to have been assumed on both sides that the practice of passengers carrying some of their own parcels into the carriages in which they travel prevails in India as in England.

The question then is reduced to this; whether there is any proof that the parcels carried by the two passengers exhibited such signs of their real nature as ought to have called the attention of

the railway servants to them, and thus prevented such dangerous goods being carried. Their Lordships can find none. If one puts into plain words the duty, the neglect of which is relied on, it at once discloses the absence of evidence on the part of the plaintiff. The duty is to prevent dangerous goods from being carried. What evidence is there that any servant of the Company knew, or had any opportunity of knowing, or enquiring, what these parcels contained? It has been already pointed out that there is no evidence of what they looked like, or whether any part of them was so uncovered as to suggest danger to anyone.

Their Lordships cannot think that the Railway Company were under the obligation to disprove what was not proved, *i.e.*, to disprove that these were dangerous looking parcels, when not a shred of evidence has been given that they were dangerous looking. It was not indeed contended, as it could not be, that it was the duty of the Company to search every parcel which every passenger carried with him.

One source of error which their Lordships think has been committed in the Judgments below is an apparent misunderstanding of what has been decided in the Courts of this country as to the true obligation which exists on the part of a Railway Company towards its passengers. The learned Judge, Ameer Ali, in terms says:—
 “Now it may be regarded as settled law that,
 “in the case of carriers of passengers under
 “statutory powers, there exists an express
 “duty, independently of any implied contract, to
 “carry them safely.” Their Lordships observe that in the course of Mr. Asquith’s argument yesterday, he used the same phrase; that the extent of the obligation of a Railway Company is to carry safely; in short, that they are common carriers of passengers. That is not the law. It

appears to have given rise to the impression that, that being the state of the law, it was for the Railway Company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because if they were carriers of passengers in the sense of being common carriers they would be responsible, quite independently of any question whether there was negligence, or not. It would be enough to show that the passenger had not been carried safely, which would at once establish liability. The learned Judge appears to have been misled by an observation of Lord Campbell in the case that he quotes, of *Collett v. The London and North Western Railway Company* 16 Q.B., p. 984. That turned upon the duty of the Railway Company, which was set out in the Declaration, to carry a Post Office clerk under certain provisions of Railway Legislation. It was demurred to, upon the ground that there was no contractual relation between the Post Office clerk and the Railway Company. The Judgment upon Demurrer is sufficiently explained if one looks at the allegations in the Declaration, and the Judgment upon it. But unfortunately Lord Campbell used a phrase which the learned Judge Ameer Ali quotes; that the Railway Company were under an obligation to carry safely, which their Lordships think has been the origin of the error. Lord Campbell says:—"I am of opinion that there is no difficulty in the question which has been raised. The allegation that it was the duty of the Company to use due and proper care and skill in conveying is admitted," admitted, that is to say, by the Demurrer. "That duty does not arise in respect of any contract between the Company and the persons conveyed by them, but is one which the law imposes. If they are

“ bound to carry, they are bound to carry “ safely.” That, probably, is the origin of the error which their Lordships think the learned Judges below have fallen into. What Lord Campbell is saying there is that they are not relieved from the ordinary obligations which would exist by contract because by statute they were compelled to carry the Post Office clerk; and he goes on to say that the obligation is not satisfied by carrying a man’s corpse, and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all; and he practically says, “ You must take “ as much care of him as if he was a passenger “ who contracted with you.” Whatever may be the difficulty that arises about such a phrase in Lord Campbell’s mouth, there is no difficulty whatever if one looks at the Declaration and the Assignment of the breach of duty, where the duty is set up, as, indeed, Lord Campbell, in the earlier parts of his Judgment, points out, to carry with reasonable care and diligence; and the allegation in the Declaration, corresponding to the duty which exists, is that they did not do so; and then the assignment of breach is not that the man was not carried safely, which according to the argument would be sufficient, but the allegation is that they did not use proper care and skill in the carrying. If one looks at that, as indeed at the two other cases which the learned Judge, Ameer Ali, quotes as justifying the onus that he throws upon the Railway Company, it is intelligible enough. In the one case it was a child under three years of age, between whom and the Railway Company, of course, there was no contract, and the other is a case of the same character. It is important, perhaps, to observe what runs through the Judgments, and to observe that Mr. Asquith, naturally enough, used the same

phrase yesterday in his argument as enforcing the necessity of the Railway Company discharging themselves by any conceivable evidence by saying that their contract was to carry safely. Their Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that, in their Lordships' judgment, there is no such obligation on the part of the Railway Company.

Their Lordships will therefore humbly advise His Majesty that the Judgments appealed from must be reversed, and Judgment entered for the Defendants in both Courts below; but, having regard to what fell from Counsel at their Lordships' Bar, without disturbing any directions given in India as to costs.