
(2009) 09 CAL CK 0035
In the Calcutta High Court
Case No : F.M.A.T. No. 291 of 2008

Bandana Mondal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Evidence Act, 1872 — Section 106, 114
Railway Claims Tribunal Act, 1987 — Section 16
Railways (Amendment) Act, 1994 — Section 124A
Railways Act, 1989 — Section 124A

Citation : (2009) 09 CAL CK 0035

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Parimal Kumar Diwan and Kazi M. Rahaman, for the Appellant; Soumendra Nath Das and S. Chatterjee, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a claimant in a proceeding u/s 16 of the Railway Claims Tribunal Act, 1987 and is directed against an award dated 25th January, 2008 passed by the Vice-Chairman of Railway Claims Tribunal, Kolkata Bench, in Case No. U/840/2004 thereby dismissing the claim- application on the ground that the claimant could not prove that the victim was a passenger of the train with valid ticket or that he died due to accidental fall from a running train by adducing any evidence of the eyewitness.

2. Being dissatisfied, the claimant, the mother of the victim, has come up with the present appeal.

3. It appears from record that the appellant before us filed an application u/s 16 of the Railway Claims Tribunal Act thereby claiming compensation for the death of her son, one Chhatu Mondal, aged 16 years, by occupation student, on the allegation that on 6th May, 2002 the said Chhatu Mondal at 6 p.m. with some persons of his area was traveling Ex-Sainthia to Ahmedpur with valid second

class ordinary ticket by the overcrowded 3018 Dn. Ganadevata Express and accidentally fell down from the running train in between Bataspur M/L No. 2 and 3 at KM Post No. 62/9-10 near Cabin Bataspur Signal and succumbed to his injury.

4. The proceeding was contested by the General Manager, Eastern Railway, by filing written statement and the defence of the Railway may be summed up thus:

(a) The application was a misconceived one and not maintainable and at the same time, was barred by limitation. The applicant was required to prove her allegation made in the claim-application which was not admitted by the Railway Authority for want of knowledge.

(b) As in the claim-application, the particulars of the alleged accident were insufficient and there was no iota of evidence that the compartment in the said Express train was overcrowded or that there was jostling and jerking in the train and consequently, the victim fell down, the claim-application was not maintainable.

(c) Although the police-report indicated that the victim fell down but such report was required to be proved by the police personnel who signed the report and the legal and relevant papers were not annexed with the claim- application. According to the station-report, one unknown male person aged about 16-18 years was dashed by 3018 Dn. Express train and killed and it was not a case of falling down from a train which attracted Section 124A of the Railways Amending Act, 1994. The applicant was, therefore, not entitled to get any compensation. At the time of hearing, the appellant alone gave evidence by asserting that she herself purchased one general class express ticket from Sainthia Railway Station ticket counter Ex-Sainthia to Ahmedpur and then handed over the same to her son who was going to her mother's house and after few minutes, the Dn. Ganadevata Express reached the platform No. 4. The appellant further stated that the general compartment was overcrowded but anyhow, her son boarded into the general compartment and stood near the gate, as a result, she asked him to go inside the compartment. The appellant further stated that after the train left, she came back home but as till 8 p.m. he did not return, she went to the Sainthia Railway Station and came to know from a hawker that a boy aged about 16/17 years fell down from the running Ganadevata Express near Bataspur Railway Station. According to the appellant, she immediately made a telephone call to her mother at Ahmedpur and got information that Chattu did not reach there. She returned home and sent her brother-in-law to Sainthia G.R.P. to collect information regarding the incident. The said brother-in-law came to know from the G.R.P., Sainthia that a boy named Chattu Mondal fell down from Dn. Ganadevata Express. Then he went to Bataspur with the G.R.P., Sainthia and took the dead body of Chattu at Sainthia by Biswabharati Express. The dead body was sent to Rampurhat S.D. Hospital for holding post-mortem.

5. In cross-examination, she reiterated her statement that she went to Sainthia

Station and purchased the ticket and returned home after seeing off her son and that thereafter, when the son did not return she went to Sainthia Station for searching and subsequently, sent her brother-in-law and ultimately, came to know that the son was lying dead in the G.R.P. office. No suggestion was given to her in cross-examination that she did not purchase such ticket or that she did not go to the station to see her son off or that her son did not travel the train on that day.

6. No person, at the same time, gave evidence on behalf of the Railway Authority either asserting that the victim did not fall down from the running train, as contended in the written statement, or that he was merely an outsider run over by the train. Although in the written statement it was specifically stated that he was not a bona fide passenger, no material was placed before Court indicating what materials were found with him when his dead body was detected on the railway track.

7. It appears from the investigation report u/s 174 of the Criminal Procedure Code that the police officer filed the case on the ground that there was no foul play in it and the death occurred either due to the fact that he had fallen down from the running train or had struck with the post by the side of the train.

8. As the accident occurred within the premises of the Railway Authority, it was the first and foremost duty of the Railway Authority to produce evidence before the Tribunal disclosing the materials those were found with the body of the victim at the time of accident. No person from the side of the Railway came forward to reveal such facts. In a Railway accident when the Railway Police admittedly took custody of the dead body of the victim, it is the duty of the Railway to come forward with the specific plea that at the time of accident, the victim had no ticket found with him and the person making such statements must take the responsibility of such allegation. The person who actually made inventory of the articles found with the dead body should come forward to face cross-examination by the claimant. It appears that in paragraph 7 of the claim- application, the claimant specifically pleaded purchase of ticket by the victim but in paragraph 5 of the written statements the following averments were made:

That in reply to para 7 the applicant is put to strict proof that the deceased was a bona fide passenger.

9. In our opinion, according to the law of non-traverse of pleadings, the aforesaid statement does not tantamount to the denial of the allegations in the claim-application.

10. We are quite conscious of the position of law that as provided in Section 106 of the Evidence Act, if a fact is within the special knowledge of a person, the burden of proving such fact is on that person and as provided in illustration (b) of that section, if a person is charged with travelling on a railway without a ticket, the burden of proving that he had a ticket is upon him. But such principle is not applicable to a case of a dead person whose dead body was found on the railway

track and whose body was taken in custody of the Railway Police. In such a situation, it is the duty of the Railway Authority to first give evidence that he was without a valid ticket and if such evidence is given, the onus shifts upon the claimants to prove that he was a bona fide passenger having a valid ticket. In this case, as no person on behalf of the Railway has given any such evidence nor has any person come forward to disclose what articles were found with the victim, we conclude that the initial burden of proving such fact had not been discharged. We cannot lose sight of the fact that one is not entitled to enter even the platform of a railway station without having a valid platform ticket and one takes the risk of criminal prosecution by boarding a train without ticket. In such circumstances, in the absence of any evidence of the Railway Authority asserting absence of a valid ticket, we are of the opinion, there is no just reason for totally discarding the evidence of the PW-1, the mother of the victim, who deposed and asserted that it was she who purchased the ticket for her son, handed over the same to him and saw him off at the railway station. We have already mentioned that in cross-examination, no suggestion was even given to her denying those assertions.

11. At this stage, we may aptly refer to the following observations of the Apex Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, where the said Court pointed out the duty of the party to a suit to appear as witness when he was the best witness to the disputed issue even if the burden of proof was on the other side:

...Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In AIR 1917 6 (Privy Council) Lord Shaw observed as follows:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough - they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition." This passage was cited with approval by this Court in a recent decision - Biltu Ram v. Jainandan Prasad Civil Appeal No. 941 of 1965, D/-

15-41968 (SC). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Mt. Bilas Kunwar v. Desraj Ranjit Singh* 42 Ind App 202 at p. 206 : AIR 1915 PC 96 at p. 98:

"But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents". But Shah, J., speaking for the Court, stated:

The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.

12. Even in the subsequent case of the Supreme Court in the case of *Vidhyadhar Vs. Manikrao and Another*, , the Apex Court took the action of a party deciding not to appear as a witness and to offer himself for cross-examination, in the following way:

Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in AIR 1927 230 (Privy Council) . This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh* AIR 1930 Lahore 1 and the Bombay High Court in *Martand Pandharinath Chaudhari Vs. Radhabai Krishnarao Deshmukh*, . The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter Vs. Nar Singh Nandkishore Rawat*, , also followed the Privy Council decision in AIR 1927 230 (Privy Council) The Allahabad High Court in *Arjun Singh Vs. Virendra Nath and Another*, held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass Vs. Bhishan Chand and Others*, , drew a presumption u/s 114 of the Evidence Act against a party who did not enter into the witness box.

13. In our opinion, the aforesaid observations appropriately apply to the facts of the case before us where the Railway Protection Force has removed the dead body of the victim and taken the same to its own custody and nobody is coming forward on behalf of the Railway Authority to dispute the assertion of the claimant by producing the various documents relating to the death of the victim admittedly in its custody including the report of the enquiry, if at all,

independently done by the Railway Authority and offering its employees who had played some role in the official capacity relating to those documents in connection with the death of the victim for examination and cross-examination.

14. We, therefore, hold that in this case, it has been proved from the uncontroverted testimony of the PW-1 that the victim was a bona fide passenger of the overcrowded Dn. Ganadevata Express on the day of the accident with a valid general class ticket and that his dead body having been also found from the railway track at the relevant time and removed by the Railway Authority, it should be presumed that he died due to fall from the train. The Railway authority having failed to produce any evidence controverting the allegations of the PW-1 in her evidence, or pointing out that the victim did not die of any railway accident, the learned Tribunal below erred in law in dismissing the claim-application by not following the well-settled principles mentioned above and by not drawing adverse inference against the Railway Authority for non-production of the relevant evidence in its possession. The defence sought to be raised by the Railway Authority that the victim was run over by the said Train is not tenable when the fact that he boarded that train has been proved. In this case, no evidence has also been adduced on behalf of the Railway to show that the case comes within any of the instances specified in the proviso to Section 124A of the Railways Act, 1989.

15. Once we find that it is a case of death and comes within the purview of "untoward incident" within the meaning of Section 124A of the Railways Act, the claimant is entitled to get Rs. 4 lakh as provided in the Schedule to the Railway Accidents and Untoward (Incidents) Compensation Rules, 1990 and accordingly, we direct the Railway Authority to pay a sum of Rs. 4 lakh to the appellant within two months from today with interest at the rate of 8% per annum from the date of filing such application till actual payment.

16. We also do not find any justification on the part of the learned Tribunal below in questioning the maintainability of the claim-application or the identity of the claimant because of the fact that the claim-application was filed by her along with her husband, named, Biswanath Mondal, whereas in the affidavit-in-chief, she has been described as widow of Biswanath Mondal. It necessarily follows that subsequent filing of the application, she lost her husband. Apart from the said fact, she being the sole heir of her unmarried son as a Hindu mother is entitled to file the application for compensation even without her husband. Moreover, no suggestion was given to her in cross-examination disputing her identity or the relationship with the victim.

17. In the fact and circumstances, there will be, however, no order as to costs.

18. I agree.