

(2002) 07 GUJ CK 0089

In the Gujarat High Court

Case No : First Appeal No's. 288 and 292 of 1983

Divisional Superintendent, Western Railway and Another

APPELLANT

Vs

Chhotubhai Shanabhai Patel and Others

RESPONDENT

Date of Decision : 09-07-2002

Acts Referred:

Motor Vehicles Act, 1939 — Section 110(1), 110A

Citation : (2002) 07 GUJ CK 0089

Hon'ble Judges : R.R. Tripathi, J

Bench : Single Bench

Advocate : Mukesh A. Patel, in First Appeal No. 288 of 1983, for the Appellant; J.M. Panchal, for Respondent Nos. 1-2 and Rajni H. Mehta, for Respondent No.5 in First Appeal No. 288 of 1983, for the Respondent

Final Decision : Dismissed

Judgement

Ravi R. Tripathi, J.—These First Appeals are filed against the common judgement and award dated 30th April, 1982 passed in group of Motor Accident Claims Petition, being 357/1980 (Main) cognate with 417/1979, 418/1979, 419/1979, 420/1979, 421/1979 and 422/1979 by the Motor Accident Claim Tribunal (Auxiliary), Nadiad.

2. The said judgement and award is challenged by filing First Appeals, except in case of two claim petitions, namely, (i) M.A.C.P. No.419 of 1979 wherein the amount claimed was Rs.5,000=00 only, against which the M.A.C.Tribunal was pleased to award Rs.1176=00 only; and, (ii) M.A.C.P. No.421 of 1979 wherein also an amount of Rs.5,000=00 was claimed and an amount of Rs.1225=00 only was awarded.

3. The First Appeal No.288/1983 arises from Motor Accident Claim Petition No.418/1979 (a case of fatal accident), wherein amount claimed is Rs.50,000=00, whereas the amount awarded is Rs.44,500=00; First Appeal No.289/1983 arises from Motor Accident Claim Petition No.357 of 1980 (a case of

fatal accident), wherein the amount claimed is Rs.1 lac, whereas the amount awarded is Rs.70,000=00; First Appeal No.290/1983 arises from Motor Accident Claim Petition No.422/1979 (a case wherein the claimant sustained fracture, a case of injury), the amount claimed is Rs.9,999=00, which is awarded; First Appeal No.291/1983 arises from Motor Accident Claim Petition No.417/1979 (a case of fatal accident), wherein the amount claimed is Rs.50,000=00, whereas the amount awarded is Rs.40,450=00; First Appeal No.292/1983 arises from Motor Accident Claim Petition No.420/1979 (a case of injury), the amount claimed is Rs.9,999=00, against which Rs.6,700=00 is awarded.

4. This group of First Appeals, filed by the Union of India, through the General Manager, Western Railways, and one Motibhai Mangalbhai Chauhan, who was the Station Master at the time of occurrence of the accident, raises one main ground that the Motor Accident Claim Tribunal has no jurisdiction when railway is involved in an accident. The other ground raised in almost all First Appeals are identical with some variation on account of facts of individual case.

5. In First Appeal No.288 of 1983, which arises from Motor Accident Claim Petition No.418 of 1979, involving a fatal accident, it is agitated that, "The Tribunal ought to have accepted the contention urged on behalf of the Railway administration that in view of the provisions of the Motor Vehicles Act, the Railway Authority cannot be saddled with any liability in respect of any mishap and the entire award is thoroughly misconceived". It is also contended that, "The Claim Tribunal had no jurisdiction to entertain the claim against the Railways".

It is also contended in the said First Appeal that, "The order and award of compensation by the Claim Tribunal is otherwise clearly erroneous in law, patently illegal, without jurisdiction and unenforceable in law.

6. In First Appeal No.289 of 1983, the contention raised is that, "The Tribunal ought to have accepted the contention urged on behalf of the Railway Administration that in view of the provisions of the Motor Vehicles Act, the Railways cannot be saddled with any liability in respect of any mishap and the entire award is thoroughly misconceived. The Claim Tribunal had no jurisdiction to entertain the claims against the Railways." The aforesaid emphasised contention is referred to and reproduced as the other contentions raised by the Railways in the Appeal Memos of First Appeals are general in nature and do not warrant any specific mention or dealing of the same.

7. It is necessary to note that in all these First Appeals, the insurance company has filed cross objections along with the owner of the truck wherein mainly it is pleaded that,

1) "The Tribunal ought to have held that the accident happened due to sole negligence of the Railways, as manned railway crossing was not closed by the Railway employee."

2) "It is an admitted fact that the Railway manned crossing was opened; that the

station master was to see that the railway crossing was not kept open when the engine was permitted to pass; and, that no evidence was adduced on behalf of the Railways regarding the same. In the facts and circumstances of the case, the Tribunal ought to have held that the accident happened due to sole negligence of the employee of the Railways and, therefore, the Railway authority are solely liable to comply the award."

3) "The Tribunal erred in apportioning the claim on the deceased truck driver to an extent of 10% and ought to have held that the deceased truck driver was not negligent and the Railway authorities were wholly to be blamed in the accident"

8. The Tribunal after discussing the points in common has passed award in individual claim petitions. The negligence of the opponents for which issue no.1 was raised, which reads as under :

"Whether the applicant proves that the death of the deceased was caused due to rash and negligent act of the opponents?"

The Tribunal discussed in common part of the judgement. In Motor Accident Claim Petition No.357 of 1979 filed on account of the death of the driver, the issue of negligence is answered in affirmative, qualifying the same by saying that, "Yes, regarding owner of the truck and the railways". While in other claim petitions, the issue of `negligence" was suitably modified and the aspect of the truck driver being negligent was also examined. The Tribunal in its discussion in paragraph 40 has stated that,

"The driver of the truck has died in the accident. None is examined from the side of the railway. At Exh.50 is the statement given to the police by the station master Motibhai Mangalbhai Chauhan. He has stated in the statement that the driver of the Engine was given a tablet (In Railway parlance, "tablet" means permission given by the station master to an Engineer driver) and the engine started at 13.05 hours from the Gate No. 47-C. Engine passed without taking "alright". He has also stated that because of his mistake he had not sent pointman Bakor. The accident would not have been caused if the pointman was sent to Gate No.47-C".

9. The Tribunal, after considering the evidence on record in the form of depositions of various witnesses, was pleased to hold that, `it was composite negligence of the Railways and that of the truck driver". While apportioning the said liability, the Tribunal come to the conclusion that it was 90% negligence on the part of the Railways and 10% on the part of the truck driver. The Tribunal for coming to this conclusion considered the evidence of Bachubhai Fakirbhai, Exh.36, Bhikhabhai Fakirbhai, Exh.37, and while appreciating the same, the Tribunal has noted in paragraph 42 of its judgement that, "On this point, there is no cross examination from the side of the owner or the Insurance Company. Hence, this statement of these two witnesses has to be accepted. Hence, the cause of accident which can be seen from the evidence discussed above is -

"1. the failure of the railway employees to close the gate when the engine was allowed to pass;

2. the failure of brakes of the truck."

From the facts of the case, the aforesaid finding recorded by the Tribunal is found to be not only reasonable, but also most proper. The Tribunal has also believed the case of the appellants that the level crossing was wide open at the relevant time. Apportioning the liability in the ratio of negligence which is 90:10 also free from any error as the level crossing was a "guarded one" because when a "guarded" level crossing is in open position, there is hardly any reason for any person using the level crossing to bother about the railway traffic. In fact, when the crossing is closed for any other purpose than that of passing of the railway traffic like repairing, maintenance, etc., one will take care while using the level crossing, but when "guarded" crossing is in open position, there is no reason for any one to even think that there can be railway traffic at that point of time.

10. Mr. Mukesh Patel, learned Advocate appearing for the appellants in all these appeals, strenuously submitted that the judgement and award passed by the Tribunal, under challenge in all these First Appeals, warrant interference at the hands of this Court, firstly on the point of jurisdiction, but if the Court is not with him on this point, then on the point of 'apportionment of the liability'. He submitted that the Tribunal has erred in recording a finding to the effect that that the guarded level crossing was wide open at the time when the accident took place. He submitted that the Tribunal has erred in not considering Exh.33, according to Mr.Patel, Exh.33 is a panchnama of the place of accident. He submitted that once the Tribunal would have held that the crossing was closed, there would not have been any question of apportionment because in that case, the Railways would not have been liable at all.

11. The submission of Mr.Mukesh Patel that, 'the Tribunal has erred in recording a finding to the effect that the level crossing was not closed" and therefore, apportionment of liability is also unwarranted, is devoid of any merit. It is a finding of fact recorded by the Tribunal on appreciation of evidence on record of the case which the learned Advocate for the Railways is not able to dismental.

12. Mr.Patel submitted that from reading of Exh.33-panchnama, it is clear that the level crossing was closed. Exh.33 on record of the First Appeals is not a panchnama, but, it is a list, by which three documents were produced, namely, (1) Inquest Report dated 10th May, 1979 of the deceased Usmangani Hasanbhai Mansuri; (2) Panchnama dated 9/5/1979 of the place of the accident and the vehicle; and, (3) Panchnama dated 10/5/1979 of the place of accident. In the margin, there is an endorsement that, "Nos.2 and 3 may be exhibited; No.(1) is not admitted". The endorsement is purported to be made by the learned Advocate appearing for the opponent. The signature is illegible. The date of list - Exh.33 is 09/11/1981. On perusal of the record, it is noticed that both these documents are not exhibited as the next exhibit, Exh.34, is an order passed by

the learned Member of the M.A.C. Tribunal (A), Nadiad dated 16/01/1982 in M.A.C.P. No.357/1980.

Mr.Patel wanted this Court to look into the documents marked as 33/2 and 33/3 from the record and proceedings of the case, which is before this Court. The document, which Mr.Patel referred as Exh.33, is not exhibited and does not bear any exhibit number. The document bears only mark number i.e. `33/2", which is a stage prior to of being exhibited.

13. Mr.Mehta, learned Advocate appearing for the insurance-company, submitted that this document cannot be looked into as it is not exhibited. Mr. Mehta submitted that as against this, there is a document on record at Exh.50 - a statement of Station Master of Kathana Railway Station, Shri Motibhai Mangalbhai Chauhan. In his statement, he has stated that according to the Railway Rules, whenever a train is to pass or when a train is coming from outside, at that time, the pointman at the gate has to give `alright" suggesting `line clear". Only when such `alright" is given, the train can be started and can be allowed on the platform. If `alright" is not given by the pointman, the train cannot be started.

In his statement, it is also stated that one Mr.Maheshbhai P. was the driver on Engine No.WDB 218356. He has also stated that he does not know the name of the Assistant. This engine started at 13.05 hours. Before that, he did not send any person at Gate No.47(C). Thus, from Gate No.47(C), without obtaining `alright", the engine was allowed to start. In fact, only after having received `alright" from Gate No.47(C), the engine should have been allowed to start, but due to inadvertence on his part, he did not send the pointman Bakor to Gate No.47(C). He has further deposed that if he had sent pointman to Gate No.47(C), the accident would not have taken place. Thus, it is very clear from this statement of the Assistant Station Master of Kathana Railway Station that the level crossing was not closed.

14. The submissions of Mr.Patel to the effect that the level crossing was closed and that the liability is wrongly fastened on the Railways is without any substance. Mr.Patel is not able to point out anything except so-called panchnama, which according to Mr. Patel, is Exh.33. While considering the finding recorded by the Motor Accident Claims Tribunal in the First Appeal, it is to be borne in mind that the learned Member, after careful appreciation of the material on record, has derived its findings. This Court finds no reason to disagree with the findings recorded by the learned Member particularly on the aspect of the crossing being open.

15. Mr. Mukesh Patel, learned Advocate for the appellants, submitted that the quantum awarded in various Motor Accident Claim Petitions is also unreasonable and excessive. He submitted that in three First Appeals, namely, First Appeal Nos.288, 289 and 290 of 1983, arising from fatal accidents, the Tribunal has erred in awarding excessive amount, which according to him is on much higher

side. The amount claimed in MACP No.418 of 1979 (First Appeal No.288 of 1983) was Rs.50,000=00, against which Rs.44,500=00 is awarded, the amount claimed in MACP No.357 of 1980 (First Appeal No. 289 of 1983) was Rs.1 lac, wherein Rs.79,000=00 is awarded, while the amount claimed in MACP No.417 of 1979 (First Appeal No. 291 of 1983) was Rs.50,000=00, in which Rs.44,450=00 is awarded.

16. Mr.Patel submitted that the Tribunal has erred in granting multiplier of 15 years in MACP No.418 of 1979. The quantum aspect is considered in paragraph nos.66 to 71 by the learned Member qua the deceased Ganpatbhai Chhotubhai-labourer. The father of the deceased Ganpatbhai, namely, Chhotubhai Shankerbhai, was examined at Exh. 39. From the evidence, it is borne out that the age of the deponent on the date of the deposition, that is, 17th February, 1982, was 50 years. The accident had occurred in the year 1979. So, at that time, the age of the deponent was 47 years. In paragraph-68, the Tribunal has discussed the yearly dependency of the petitioner which is assessed at Rs.1,200=00 per annum for the parents and for the wife, Taraben, at Rs.1,800=00 per annum. The petitioner no.1, Chhotubhai, father of the deceased, was 50 years old and the petitioner no.2, mother of the deceased, was 48 years old and, therefore, the multiplier of 10 years was rightly allowed for the petitioners, while the multiplier of 15 years was rightly adopted for the wife-Taraben. From this discussion, it can be appreciated that the Tribunal was conscious of the fact that a uniform multiplier is not warranted to be adopted. The parents of the deceased and wife of the deceased are awarded Rs.12,000=00 and Rs.27,000=00 respectively. This shows that the Tribunal has taken all due care while adopting the multiplier. Therefore, the contention raised by Mr.Patel that in no circumstances multiplier higher than 12 could have been adopted by the Tribunal is without any substance, hence rejected.

17. Mr.Patel made a bald statement that the Apex Court has laid down a universal proposition of law that in no case a multiplier higher than that of 12 can be granted. When enquired of the citation, Mr.Patel submitted that he does not have the citation readily available with him, but, then this is his impression that the Apex Court has laid down such a proposition of law that in no case, the Tribunal shall adopt a multiplier higher than that of 12. In absence of any authority to support his contention, the same deserves nothing else than rejection by this Court.

18. It is important to note that the Railway Authorities did not choose to cross examine the witnesses. The stand of the Railways is understandable. The contention of the Railway Authorities was that the Motor Accident Claims Tribunal has no jurisdiction and on that short ground, they contested all these claim petitions. Not only that, even in First Appeals, as discussed hereinabove, the main contention of the Railway Authorities is 'no jurisdiction'. It is only in view of the decision of the Apex Court in the matter of Union of India (UOI) Vs. United India Insurance Co. Ltd. and Others, , which is also reported in AIR 1998 SC 640

and Union of India (UOI) Vs. United India Insurance Co. Ltd. and Others, , wherein the Apex Court, while discussing the relevant provisions of the Motor Vehicles Act, 1939, is pleased to hold that,

"46. For all the above reasons, we hold that the claim for compensation is maintainable before the Tribunal against other persons or agencies which are held to be guilty of composite negligence or are joint tort feasons, and if arising out of use of the motor vehicle. We hold that the Tribunal and the High Court were right in holding that an award could be passed against the Railways if its negligence in relation to the same accident was also proved. We find that there has been a conflict of judicial opinion among the High Courts on the above aspect. The Andhra Pradesh High Court in The Oriental Fire and General Insurance Company Ltd. and Another Vs. Union of India (UOI), , took the view that the claims before the Tribunal are restricted to those against the driver, owner and insurer of the motor vehicles and not against the Railways. But, on facts the decision is correct inasmuch as though it was an accident between a lorry and a train at a railway crossing, it was a case where the driver, cleaner, etc., travelling in the lorry were injured and there was no claim against the lorry owner. ... "

"47. We are of the opinion that the view taken by the Andhra Pradesh High Court, by way of obiter and the views of the Gauhati, Orissa and Madras High Courts are not correct and that the view taken by Allahabad, Punjab and Haryana, Gujarat, Kerala and Rajasthan High Courts is the correct view. Further, as pointed by the Gujarat High Court, claims where it is alleged that the driver/owner of the motor vehicle is solely responsible for the accident, claims on the basis of the composite negligence of the driver of the motor vehicle as well as driver or owner or any other vehicle or of any other outside agency would be maintainable before the Tribunal but in the latter type of case, if it is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding, the claim would go out of section 110(1) of the Act because the case would then become one of exclusive negligence of Railways. Again if the accident had arisen only on account of the negligence of persons other than the driver/owner of the motor vehicle, the claim would not be maintainable before the Tribunal."

The aforesaid judgement of the Apex Court came up for consideration before the Larger Bench of the Apex Court consisting of three Honourable Judges in the matter of Union of India Vs. Bhagwati Prasad and Others, . The Apex Court, while considering the aforesaid judgement in the case of Union of India v. United India Insurance Co. Ltd. & Ors. (supra), observed as under :

"... Once such an application is held to be maintainable and the tribunal entertains such an application, if in course of enquiry the tribunal comes to a finding that it is the other joint tort-feasor connected with the accident who was responsible and not the owner or driver of the motor vehicle then the tribunal

cannot be held to be denuded of its jurisdiction which it had initially. In other words, in such a case also the Motor Vehicle Claims Tribunal would be entitled to award compensation against the other joint tort-feasor, and in the case in hand, it would be fully justified to award compensation against the railway administration if ultimately it is held that it was the sole negligence on the part of the railway administration. To denude the tribunal of its jurisdiction on a finding that the driver of the motor vehicle was not negligent, would cause undue hardship to every claimant and we see no justification to interpret the provisions of the Act in that manner. The jurisdiction of the tribunal to entertain application for compensation flows from the provisions contained in section 110-A read with sub-section (1) of section 110. Once the jurisdiction is invoked and is exercised, the said jurisdiction cannot be divested of on any subsequent finding about the negligence of the tort-feasor concerned. It would be immaterial if the finding is arrived at that it is only other joint tort-feasor who was negligent in causing accident and not the driver of the motor vehicle. In our considered opinion the jurisdiction of the tribunal to entertain application for claim of compensation in respect of an accident arising out of the use of motor vehicle depends essentially on the fact whether there had been any use of motor vehicle and once that is established, the tribunal's jurisdiction cannot be held to be ousted on a finding being arrived at, at a later point of time that it is the negligence of the other joint tort-feasor and not the negligence of the motor vehicle in question. We are, therefore, of the considered opinion that the conclusion of the Court in the case of *Union of India v. United India Insurance Co. Ltd.* (supra) to the effect :

"It is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding, the claim would go out of section 110(1) of the Act because the case would then become one of the exclusive negligence of railways. Again if the accident had arisen only on account of the negligence of persons other than the driver/owner of the motor vehicle, the claim would not be maintainable before the tribunal" is not correct in law and to the extent, the aforesaid decision must be held to have not been correctly decided."

19. Mr.Mehta, learned Advocate, also pointed out that in all these matters, the insurance company and the owner had filed cross objections and while filing these cross objections, there was a delay of 39 days and for condonation of the same, the insurance company and the owner were required to file Civil Application/s. It was only after the condonation of delay that the cross objections were taken on record. This is required to be mentioned because Mr. Patel, learned Advocate for the appellants, at one stage, mentioned that cross objections filed by the insurance company and the owner are not separately numbered. The orders dated 3/2/1984 are passed by this Court (Coram : M/s. Justice N.H.Bhatt and Justice R.A. Mehta) in Civil Application No.4654 of 1984 in First Appeal No.288 of 1983 Civil Application No.4655 of 1984 in First Appeal No.289 of 1983, Civil Application No. 4656 of 1984 in First Appeal No.290 of

1983, Civil Application No.4657 of 1984 in First Appeal No.291 of 1983 and Civil Application No.4658 of 1984 in First Appeal No.292 of 1983. The Civil Applications were also filed for stay and this Court (Coram : M/s. Justice N.H.Bhatt and Justice R.A.Mehta) passed the following order :

"Rule. M/s. Panchal and Bhatt waives service. The ad interim stay in C.A. No. 736/83 is made absolute on condition that the Railway shall deposit 90% of the amount awarded with costs and interest and the insurance co. to deposit the remaining 10% with proportionate costs and interest. The investment and disbursement to be made as per the order of the Tribunal. Rule made absolute accordingly. This C.A. as well as C.A. No. 736/83 disposed of accordingly."

Similar orders were passed in other Civil Applications filed in other First Appeals also.

20. Mr.Mehta, learned Advocate appearing for the insurance company and owner, submitted that in fact, the apportionment of the liability by the Tribunal in the ratio of 90:10 is not just and proper. Mr.Mehta submitted that when a guarded level crossing is kept open, the public at large is bound to take it for granted that it is safe to cross the level crossing and if at that point of time, an accident takes place due to passing of a train or engine, it has to be held that it was 100% negligence on the part of the Railways and not the passenger who was crossing the level crossing. Mr. Mehta submitted that had it been the case of unguarded level crossing, the question of apportionment would have arisen, but in the present case, the crossing being a guarded crossing the apportionment of the liability between the Railways and the truck driver was uncalled for.

21. The submissions of Mr.Mehta, though attractive, cannot be accepted for the simple reason that even while crossing a guarded level crossing, which may be on account of negligence or mistake on the part of the Railways remained open, the passersby do not close their eyes while crossing the level crossing and more particularly, when the railway traffic is bound to have sound to the tune which can be taken note of even from a far distance and, therefore, this submission of Mr. Mehta is not accepted and the same is rejected.

22. It is reported by the learned Advocates appearing in the matter that when the matters were placed before the Lok Adalat on 25th December, 2001, the claimants were present before the Court and they had complained that they have received only meagre amount which runs in few thousands of rupees. Taking that into consideration, it is felt necessary that the Tribunal be directed in this matter to verify the amount received by each of the claimant by calling them in person and the Tribunal shall make a report mentioning specifically that what amount is received by each of the claimants and when.

23. In view of the aforesaid discussion, these First Appeals are dismissed. The finding of the Tribunal about the apportionment of the liability, quantum and cross objections stands. No order as to costs.