

(1984) 11 GUJ CK 0020
In the Gujarat High Court
Case No : First Appeal No. 1000 of 1975

Jugaldas Amritlal

APPELLANT

Vs

Harilal Talakchand and Others

RESPONDENT

Date of Decision : 27-11-1984

Acts Referred:

Carriers Act, 1865 — Section 10, 6, 8
Contract Act, 1872 — Section 151, 152, 192
Railways Act, 1890 — Section 16

Citation : (1986) ACJ 734 : AIR 1986 Guj 88

Hon'ble Judges : S.A. Shah, J

Bench : Single Bench

Advocate : S.K. Zaveri, for the Appellant; V.P. Shah, Suresh M. Shah and D.U. Shah and R.M. Vin, Govt. Pleader, for the Respondent

Judgement

1. The present appeal is filed by the appellant (original defendant 1) against whom a decree for Rs. 10,428.06 paise has been passed on 31-7-1975 by the learned Joint Civil Judge, Senior Division, Bhavnagar, in Special Civil Suit No. 77 of 1973. Respondent 1 is the original plaintiff who filed the aforesaid suit against defendants 1 to 6 (appellant and respondents 2 to 6). Since the trial Court has passed the decree only against the appellant-defendant 1, respondent 1-plaintiff has filed Cross-objections praying for a decree against all the defendants. For the purpose of this appeal the parties will be hereinafter referred to as "the plaintiff and "the defendants".

2. Plaintiff Harilal Talakchand Shah of Bhavnagar wanted to transfer his 70 bags of cotton waste worth about Rs. 10,500/- from the factory of defendant 5 Arunodaya Mills Ltd., Morvi, to his shop at Bhavnagar. The plaintiff has alleged that on 2-12-1972 he entered into a contract with defendant 1 Jugaldas Amratlal Shah for carriage of said 70 bags of cotton - waste from Morvi to Bhavnagar at the rate of Rs. 3.50 paise per bag. It was specifically agreed that defendant 1 Will bring the said goods by hi public carrier No. G. T. G. 155. It appears that on account of some difficulty, defendant 1 was not in a position to bring the said

goods by the said truck from Morvi to Bhavnagar and, therefore he assigned the said work to defendant 2 M/s. Devdutt & Co., a Transport Company, Sihor, and handed-over two chits written by the plaintiff to defendant 5 Mill-company to give delivery of the contracted goods which were to be carried by Public Carrier G. T. G. 155. The plaintiff also sent with another chit Ex. 85 a draft for Rs. 10,000/-, being the price of the contracted goods.

3. Defendant 4 Ramubhai Chhaganlal of Sihor is a partner of defendant 2-Company. He was formerly working with the plaintiff and had taken delivery of goods from the said Mill-company on previous occasions on behalf of the plaintiff. It appears that defendant 4 approached defendant 5 on 6-12-1972 for delivery of 70 bags belonging to the plaintiff and produced the aforesaid two chits Ex. 84 and 85 and the demand draft, and asked for delivery of the contracted goods.

4. At this stage it will be worthwhile to consider the contents of Chits Exs. 84 and 85. Chit Ex. 84 is a bone of contention. Admittedly, the said chit has been written by the Munim of the plaintiff on the letter-head of the plaintiffs firm. By the said chit the plaintiff has requested defendant 5 - Mill-Company to deliver the contracted goods to the bearer of the Chit in Truck No. G. T. G. 155, and requested to give him a chit showing the weight and number of bags delivered. Ex. 85 is another chit written by the Munim of the plaintiff's firm on behalf of the plaintiff informing the manager of defendant 5 that a draft for Rs. 10,000/- dt. 2-12-1972, drawn on State Bank of Saurashtra, Bhavnagar has been sent, which may be credited to the plaintiffs account, and a stamp receipt may be sent. This chit Ex. 85 does not mention the particulars regarding the truck and the name of the persons with whom the chit together with the draft had been sent.

The said chits appear to have been delivered to the Manager of defendant 5-Mill-Company by defendant 4, who was admittedly working with the plaintiff formerly.

5. On receipt of the aforesaid Chits, defendant 5 - Mill-Company, believing that defendant 4 must have brought Truck No. G. T. G. 155, delivered the said goods and also gave him a chit (bill) dt. 6-12-1972 addressed to the plaintiff. The said chit which is produced at Ex. 88, shows that the bearer of the chits sent by the plaintiff has been delivered the goods to be transported by truck No. G. T. G. 155.

6. As the evidence on record discloses, the goods in question were purchased by the plaintiff by tender and he was responsible for bringing the said goods from the premises of defendant 5 to his premises. Defendant 5 was not responsible to send the same, but the plaintiff had to collect them, and in pursuance of the said contract Chit Ex. 84 for delivery of the said goods was sent to defendant 5 with a request to despatch the said goods in Truck No. G. T. G. 155.

7. Chit Ex. 84 was given by defendant No. 4 Ramubhai to defendant 5, and that is amply proved by Gate Pass Ex. 90 given by defendant 5 and signed by defendant 4 as a person who took the delivery of the goods in question. By the said Gate Pass the watchman of defendant 5 Mill-company was instructed that

the 6 goods mentioned therein carried by Truck No. G. T. C. 2727 through Truck No. G. T. G. 155 be allowed to pass. Evidence of defendant 4 Ramubhai Ex. 106, a partner of defendant 2 who owned Truck No. G. T. C. 2727, discloses that as defendant 1 was not in a position to spare his truck No. G. T. G. 155, he transferred the work of bringing the goods in question from Morvi to Bhavnagar from defendant 5-mill company to defendant 2-firm. It is, therefore, evident that said chits Exs. 84 and 85 were produced before the Mill-company on behalf of defendant 2 firm, and the Mill-company believing that defendant 2 might be the owner of truck No G, T. G. 155, delivered the said goods to defendant 4, partner of defendant 2, and defendant 2 took the delivery of the said goods and loaded them in truck No. G. T. C. 2727 and directed his driver to take the truck to Bhavnagar at the plaintiff's place.

8. It is pertinent to note that for going from Morvi to Bhavnagar by Highway, one has to pass through Sanala-Virpur road, at which juncture on the other side of the road a railway line (narrow guage) runs- parallel to the said road for about half to one kilometer. Furthermore, it has come in evidence that at that place the railway line and the Highway are on the same level; that there is only a distance of 3 to 4 feet between the said railway line and the Highway; that the incident in question, i.e. the goods of the plaintiff carried in the aforesaid truck caught fire as alleged due to the sparks of burning-coal that emitted from. passenger train No. 484 Down of defendant 6-Railway and perished, took place near about the aforesaid place; that the said train going from Morvi to Tankara started from Morvi exactly at 14.10 hours on 6-12-972: that the driver of the train had seen the truck burning at about 14.48 hours, and that the alleged incident took place about 10 to 15 minutes prior to 14.48 hours.

9. According to Mohan Naran Ex. 115, driver of truck No. G. T. C. 2727 belonging to defendants 2, 3 and 4, he was driving the. said truck at the relevant time. He was going in the same direction in which the train was going, and when his truck was parallel to the engine, he saw that the driver of the engine was loading the coal in the boiler of the engine, and sparks were coming out of the engine. After he overtook the engine, he saw smokes coming out from the cotton waste loaded in his truck and, therefore, he stopped the truck. At that time wind was blowing fast and within no time the goods and the truck caught heavy fire, and some of the bags of cotton waste were thrown on the railway track. The said local train was coming behind the truck. However, the train could not travel further as some cotton waste which was burning had scattered on the railway track. There is no dispute that the distance between the Highway and the railway track near about the place of incident is hardly 3 to 6 feet. The very fact that the burning cotton waste was scattered on the railway track and the train could not proceed further for about two hours, goes to show the extent of the burning cotton waste which had-spread over the railway track. According to the evidence of the truck driver, he saw the engine driver loading the coal in the boiler of the engine and sparks were coming out of the engine. At that time, in my opinion, the only course open for the truck driver was to immediately get away from near the engine by

speeding up the truck to avoid the impending danger, and that appears to have been done by him. However, in the meantime the emitting sparks from the engine of its chimney had reached the cotton waste bags, and on account of the speed of the truck and the fast blowing wind the said goods and the truck caught fire and within no time the goods loaded in the truck turned into ashes and nothing remained.

10. The plaintiff having suffered the loss on account of the damage caused to his goods, has filed the aforesaid suit against defendant 1 (original contractor) and defendant 2--firm which was actually engaged by defendant 1 for carrying the goods at the relevant time, and defendants 3 and 4 who are the partners of defendant 2-firm, defendant 5 Mill-Company and defendant 6 - Union of India owning the Western Railway. The main contentions on which the plaintiff has based his suit are :

(1) He had entered into a contract of carriage with defendant 1, and as a contracting party defendant 1 is responsible for the damage, being a common carrier.

(2) Defendant 2 is a Transport Company which had undertaken to carry the goods in question on behalf of defendant 1, and therefore defendant 2 as well as defendants 3 and 4, who are its partners, are liable for the damage caused to the plaintiff.

(3) Defendant 5 Mill-company is also liable as the plaintiff had given specific instructions to transfer his goods in Carrier No. G. T. G.,155 and not in any other carrier, and in spite of that defendant 5 delivered, the said goods to Carrier No., G. T. C. 2727, which is no delivery.

(4) The incident in question is the result of gross and culpable negligence of defendant 6 Western Railway and, therefore, Union of India is also responsible for the damage to the plaintiff.

11. In the instant case, there is no challenge, nor any argument is advanced, regarding the extent of damage and, therefore, damage to the plaintiff, as averred in the plaint, is not disputed. The learned trial Judge has found defendant 1 to be a contracting party and defendants 2 to 4 are found to be subagents and, therefore, they are not responsible for the damage to the plaintiff. Similarly, he has found defendant 5-mill company to be not responsible. So far as defendant 5 is concerned, the learned trial Judge has taken a view that it, was Mohan Naran, driver of the truck No. G. T. C. 2727 who was negligent and hence he has not found defendant 6 railway company also responsible. He, therefore, passed a decree only against defendant 1, original contracting party.

12. Mr. S. K. Zaveri, learned Advocate for the appellant-defendant 1, has raised the following contentions :

(1) There was neither the contract between the plaintiff and defendant 1 nor defendant 1 had carried the goods in question and, therefore, defendant 1 is not

responsible.

(2) Alternatively, the Transport Company (defendant 2) had taken sufficient care of the goods in question as an ordinary man of prudence would take of his own goods, and the goods having been damaged on account of the sparks emanating from the railway engine, there is no negligence on the part of the truck owner and hence nobody is responsible for the damages.

(3) The goods caught fire on account of the sparks coming out from the railway engine, and the accident is the direct result of the gross negligence of the railway and misconduct of its servants and, therefore, defendant 6 - Union of India as the owner of the Western Railway is the real party responsible for the damage caused to the plaintiff.

Miss V. P. Shah, learned Advocate for respondent 1- plaintiff has opposed the contentions raised by Mr. Zaveri except the last contention that the accident took place on account of the gross negligence of the railway and misconduct of its servants and, therefore, along with other defendants, defendant 6 is also liable for the damages to the plaintiff. Miss Shah has further contended that defendants 1 and 2 were common carriers and the liability of the common carriers is just like an Insurer under the common law which has been adopted by the Carriers Act, 1865 (hereinafter referred to as "the Act"), and irrespective of the negligence of the servants of the carrier, defendants 1 and 2 are liable for the damages.

13. So far as the first contention of Mr. Zaveri is concerned, the same has not been accepted by the trial Court. Evidence on the point is Ex. 84, a chit, Which in clear terms states that the goods were to be delivered to Carrier No. G. T. G. 155, and it is not disputed that defendant 1 is the owner of the said truck. Defendant 1 is the Standing Carrier of the plaintiff, and on previous occasions also defendant 1 was carrying the goods of the plaintiff. There is evidence of defendant 4 Ramubhai Ex. 106, who is a partner of defendant 2 and who was previously working with the plaintiff. He has specifically stated that since Defendant 1 who entered into the contract with the plaintiff to transfer the goods in question from Morvi to Bhavnagar could not spare his truck, he asked defendant 2 to transfer the said goods in their truck.

According to him, this work was assigned to them by defendant 1. The very fact that defendant 4 was in possession of chit Ex. 84 and a draft of Rs. 10,000/- is sufficient evidence to prove that he was in possession of the said chit and draft for defendant 1, and it cannot be for any other purpose than to carry out the obligations of defendant 1.

14. It is true that the plaintiff himself has not stepped into the witness-box. According to the plaintiff, his brother Jayant Talakchand Ex. 62, had entered into the said contract and he was also doing such business. Defendant 1 Jugaldas Ex. 104, has also admitted that said Jayant Talakchand was dealing with the plaintiff, being his brother. It is not possible to disbelieve the evidence led by the plaintiff

that there was contract between him and defendant 1. However, the contract is an oral one, and whether such contract was entered into between them or not is based upon appreciation of oral evidence of the plaintiff, Defendant 1 and defendant 4.

15. The learned trial Judge who had the opportunity to examine the parties to the suit and their Witnesses and to mark their demeanour in the witness-box has arrived at the conclusion that there was a contract between defendant 1 and the plaintiff. Nothing is shown to me as to why this evidence cannot be accepted. Even if it is, possible to take a different view on appreciation of the evidence led by the parties, there is no reason not to accept the view taken by the trial Court, which is also a probable one. When the trial Court gives a finding of fact based upon appreciation of oral evidence, then it is not proper for the appellate Court to disturb the same.

16. In *Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others*, , the Supreme Court has observed:

"In an appeal against a trial Court decree, when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and on observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial Court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies."

In the aforesaid view of the matter, I hold that there was an oral contract between the plaintiff and defendant 1 for carriage of goods from Morvi to Bhavnagar.

17. The next important question that arises for my consideration is whether the Carrier was negligent in discharging his duties of carrying the goods from Morvi to Bhavnagar, and if so, what is the liability of the common carrier in respect of the goods consigned to it for carriage. Mr. Zaveri for the appellant defendant 1, and Mr. D. U. Shah for respondents-defendants 2 to 4 have contended that if the carrier had taken the care of the goods, as a prudent man would take care of his own goods, and if there is no negligence on their part, the carrier would not be responsible for any damage that occurs on account of negligence of some third party. However, Miss V. P. Shah for the respondent 1 plaintiff has contended that the responsibility of a common carrier is that of an insurer. According to her, the responsibility which has been laid down by common law has been accepted by our legislature and unless that responsibility is reduced under the provisions of S. 6 of the Act, liability of a common carrier as an insurer of the goods continues, and, therefore, defendants 1 to 4 are liable for the damages.

18. The first decision relied upon by Miss Shah is of the Privy Council in *Crawdad Flotilla Company, Limited v. Bugwandass*, (1891) 18 Ind App 121. In that case, an argument was advanced that a carrier is required to take care of the goods so bailed to him as defined in S. 151 of the Indian Contract Act, 1872, and that a delivery of the goods to the carrier constituted a bailment within the meaning of the term as defined in the said Act. Further, a contention was raised relying upon the decision of the Bombay High Court in *Kuverji Tulsidass v. Great Indian Peninsular Railway Company*, (1878) ILR 3 Born 109. However, the appellant in that case relied on the Full Bench decision of the Calcutta High Court in *Moothoora Kant Shaw v. India General Steam Navigation Company*, (1884) JLR 10 Cal 166. The question involved in that case was with regard to conflict of judicial opinion - whether after the enactment of the Indian Contract Act, 1872 liability of the carriers will be common law liability of the insurer or the liability of a Bailer as held by the Bombay High Court in case of *Kuverji Tulsidass* (supra). The respondent who was the owner of the goods relied upon the aforesaid Full Bench decision of the Calcutta High Court in case of *Moothoora Kant Shaw*, which came to the conclusion that the liability of the common carrier was not affected by the Contract Act, 1872. Their Lordships of the Privy Council were, therefore, called upon to determine as to which of the said authorities be preferred. Their Lordships after considering the scheme of both the Acts, and particularly the provisions of the Act (Carriers Act, 1865) which was framed on the lines of the English Carriers Act, 1830, came to the conclusion that the provisions of the Act which was based upon the English common law, wherein the liability of the carrier was that of the insurer, was not affected and, therefore, preferred the decision of the Full Bench of the Calcutta High Court. Considering the scheme of Ss. 3 to 10 of the Act, the combined effect of Ss. 6 and 8 of the Act, in the opinion of their Lordships was that in respect of property not of the description contained in the schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. In the last para of the judgment, their Lordships of the Privy Council have observed :

"These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with "the law "relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are, therefore, compelled to decide in favour of the view of the High Court of Calcutta and against that of the High Court of Bombay."

19. At this stage it, will be useful to reproduce the following ratio of the Full Bench of the Calcutta High Court in *Moothoora Kant Shaw* ((1884) ILR 10 Cal 166) (supra) which has been in terms approved by their Lordships of the Privy Council in case of *Irrawaddy Flotilla Co. Ltd* (18 Ind App 121) (supra) to have a clear picture in respect of the liability of the carrier :

"The common law of England regulating the responsibility of common carriers, was at the time of the passing of the Carriers Act, 1865, and is still in force in

this country, and is unaffected by the provisions of the Indian Contract Act."

In that case before the Calcutta High Court the plaintiffs entrusted to the defendants who were common carriers under the Carriers Act III of 1865, certain goods which were lost in the course of their carriage on one of the defendants' steamers. On the facts it was found that the defendants took as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed; and that the loss was not occasioned by the Act of God or the Queen's enemies. There was no special contract of the nature provided for by S. 6 of the Act. It was held that Ss. 151 and 152 of the Contract Act did not apply, and that the defendants were liable for the loss of the goods. The facts of the aforesaid case before the Calcutta High Court are similar to the facts of the case before me. Even though defendants I to 4 had taken sufficient care of the goods as a man of ordinary prudence would under similar circumstances take care of his own goods, the carrier can only be discharged from the liability for the loss if the same has occasioned on account of the Act of God i.e. vis major, or by the Queen's enemies, These are the only two exceptions.

20. Miss Shah has also referred to other decisions in support of her contention that the liability of the carrier in India is not affected by the Contract Act of 1872, but the liability is that of an insurer unless the same has been reduced by -a special contract, entered into under the provisions of S. 6 of the Act. The cases. relied upon by Miss, Shah are Indian General Navigation v. Dekhari Tea Company Ltd. AIR 1924 PC 40, Hussainbhai Mulla Fida Hussain Vs. Motilal Nathulal and Another, , and Assam Roadways Vs. National Insurance Co. and Others, . No doubt, all these authorities support the, contentions of Miss Shah that in India liability of the common carrier is analogous to the liability of the common carrier under common law, and the principle of common law regarding the liability of the carrier has been kept intact and recognised by the Act. Such responsibility of the owner of the carrier does not originate in the contract, but is cast upon him by reason of his exercising public employment for reward. No doubt, under the provisions of S. 6 of the Act, the said liability can be reduced by the carrier. But even in such cases the provisions of Ss. 8 and 10 of the Act would be applicable and the common carrier would always remain liable for his negligence and misconduct of his servants, and it will not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. In the instant case, it has neither been averred nor argued that there has been any special contract within the meaning of S. 6 of the Act and that the loss and damage to the plaintiffs goods were on account of the act of God or Queen's enemies. There is, therefore, no escape from the conclusion that prima, facie at least, Defendant 1 will be responsible to the plaintiff for the damage.

21. Mr. Zaveri has contended that since Defendant 1 has transferred the contract to defendants 2 to 4, he is not liable for the loss occurred to the plaintiff, and

only defendants 2 to 4 were liable. It is no doubt true that

defendant No. 1 himself had not carried the goods in question, but actually defendants 2 to 4 were the owners of the carrier in which the goods of the plaintiff was loaded. Therefore, they would be primarily answerable for the damage of the goods. However, there is no direct contract between the plaintiff and defendants 2 to 4 and, therefore, it is the contention of Mr. D. U. Shah, learned Advocate for defendants 2 to 4, that there being no privity of contract between the plaintiff and defendants 2 to 4, the suit is not maintainable against them by the plaintiff. He has relied upon the provisions of Sections 190, 191 and 192 of the Contract Act, 1872, and contended that the contract for carriage was between the plaintiff and defendant No. 1 and they being the sub-agents are not directly answerable to the plaintiff and the decree cannot be passed against them.

22. Material part of S. 192 of the Contract Act reads :

"192.... ..

Agents responsibility for sub-agent. The agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility, The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong."

In the instant case, there is no averment regarding fraud or wilful wrong and, therefore, the agent is responsible for the acts or the acts of the sub-agent, i.e. defendant No. 1 is responsible to the plaintiff for the acts of defendants 2 to 4, whereas defendants 2 to 4 being the sub-agents are not responsible to the principal, i.e. the plaintiff.

23. In the aforesaid view of the matter, I hold that only defendant 1 is responsible to the plaintiff for the damage of his goods and not defendants 2 to 4. No doubt, defendants 2 to 4 were the common carriers to whom the goods were entrusted by defendant 5-Mill company and, therefore, they are accountable to the damage caused to defendant 1, and defendant 1 may call upon defendants 2 to 4 for reimbursement of the damage caused on account of their acts in terms of part 3 of S. 192 of the Indian Contract Act. However, in the instant case it is not possible to give any relief to Defendant 1 even though it is proved that defendants 2 to 4 were the common carriers and owners of the truck in question.

24. The last contention on behalf of the plaintiff and defendants 1 to 5 that requires consideration is whether the damages to the suit goods had occurred on account of the negligence and/or misconduct of the railway or its servants, and if yes, whether defendant 6 - Union of India, who is the owner of the said Railway, is responsible for the damage to the plaintiff and other parties.

25. In paras 13,14 and 15 of the plaint, the plaintiff has in terms averred that when the truck of defendant 2 loaded with the goods in question was passing

between Sanala-Virpur road on Morvi-Bhavnagar Highway, burning coal emitted from the locomotive engine of Passenger Train No. 484 Down going from Morvi to Tankara fall on the said goods, as a result of which the goods caught fire, and perished. It is further stated in para 14 of the plaint that Sanala-Virpur road and the railway line are adjacent to each other, and the train was passing parallel to the said truck, and in view of the aforesaid circumstances, it was the duty of the engine driver to take sufficient care to see that burning coal or sparks from the engine may not be emitted. In para 15 of the plaint it is averred that on account of the negligence and omission of the engine driver, 70 cotton bags loaded in the said truck caught fire, and for such negligence defendant 6 was responsible. Other defendants have also supported the case of the plaintiff on this issue.

26. Respondent 6 Union of India has filed its written statement and has denied that the said fire was the result of emission of burning coal or sparks from the engine of the said train. It is also denied that any spark had emitted from the engine. It is also denied that defendant No. 6 or its servants were negligent or there was any misconduct on the part of the engine driver. In para 5 of the written statement, defendant 6 has admitted that on 6-12-1972, i.e. on the day of the incident, train No. 484 Down, was bound for Tankara from Morvi, and when the said train arrived at KM. 7 between Sanala and Virpur, both, the driver and the Guard of the train saw the truck burning at some distance on the road which runs parallel to the railway. They also saw some cotton lying on the track. It is further stated that engine No. 567 of 484 Down train was fitted with Spark Arrester and, therefore, there was no possibility of sparks emitting from the engine, as alleged by the plaintiff. It is further stated therein that the cause of fire cannot be attributed to the negligence or misconduct of the Railway Administration.

27. According to the evidence of Mohan Naran Ex. 115; driver of truck No. G.T.C. 2727, in which the goods in question were being carried from Morvi to Bhavnagar, they left with the truck from Morvi at 1.30 p.m., and the accident took place to their truck between Sanala and Tankara. Sanala is 5 miles away from Morvi. He had seen the train starting from Sanala Railway Station. It was a narrow gauge local passenger train. Sanala-railway station is on the left hand side while proceeding from Morvi to Rajkot. At that place the railway line and the Highway tar road run parallel to each other, and the tar road is about 9 ft. 6 inches wide. His truck passed by the train. At that time he saw the engine driver loading the coal in the boiler of the engine. He also saw that sparks were coming out of the engine. He, therefore, took the truck ahead of the engine. When he had hardly travelled a distance of about half a mile, he saw from the side mirror of the truck smoke coming out from the rear side of the truck. He, therefore, immediately stopped the truck and tried to extinguish the fire. But due to the stormy winds the fire spread all over the truck. Then he went to Morvi to make provision for water to extinguish the fire, but when he returned, the truck had already burnt. At that time he saw that the train had halted there for about 3 to 4 hours. Thereafter, the police came and drew the panchnama of the place in his

presence. He told the police that the accident took place due to the spark of the engine falling on the rear side of the truck. When the accident took place, the engine was 3 to 4 feet away from the truck.

28. Now, the following circumstances are very material in order to decide this issue

(1) The Highway and the railway track are passing side by side and parallel to each other up to a distance of about one mile, and the left side of the highway is hardly 3 to 4 feet away from the railway track.

(2) It is also in evidence that the railway track and the highway are at the same level, and therefore the height of the cotton bags (Bora) loaded in the truck and the height of the Chimney of the locomotive engine while passing side by side would be practically same.

(3) The distance between the truck driver and the engine driver was 3 to 4 feet, and according to the evidence of engine driver also, the train could not pass by the burning truck as the distance in between was two to three feet.

(4) Burning cotton waste was lying on both sides of the railway track.

First of all the question to be considered is whether tire incident took place on account of the sparks of burning coal emitted from the railway engine. The learned trial Judge has, not given any definite finding on this point. He has, however, stated that there was no negligence on the part of the railway administration, and in arriving at that conclusion he has relied upon the evidence that fire-arrester was fitted by the railway to prevent such sparks.- This is the only reason given by him. This finding given by the learned trial Judge does not appear to be satisfactory and, therefore, it is necessary to consider the evidence on this point minutely.

29. One fact is very certain, and which cannot be disputed, that within 5 to 10 minutes the train had reached the burning truck. Therefore, the train was behind the truck. The speed of the truck is generally much more than the speed of a narrow gauge train, and this fact can be deduced by referring to Driver's Note Book Ex. 122, produced by Kanji Khoda Ex. 121, who was the driver of the train at the relevant time. On 6-12-1972, the said train started from Morvi at 14.10 hours, i.e. 2.10 p.m. and reached the place of accident at 14.48 hours, i.e. after 38 minutes, travelling a distance of about 5 to 7 Kms. only. When the train reached the burning truck, the time noted by the driver in his aforesaid note book Ex. 122, is 14.48 hours.

30. At this stage it will be worthwhile to refer to the evidence of Mohan Naran Ex.115, driver of the truck, and Kanji Khoda Ex. 121, driver of the engine. Truck Driver Mohan has stated that he left Morvi with the truck, and the accident took place between Sanala and Tankara. Sanala is about 5 Kms. from Morvi. According to him, he had seen the train starting from Sanala Railway Station towards Tankara, and the accident in question took place after the train left

Sanala. According to the evidence of Engine Driver Kanji Ex. 121, on 6-12-1972 he started the passenger train from Morvi at 2.10 p.m. for Tankara. He reached Shaktipara at 2.15 p.m. and Sanala at 2.39 p.m. So, there is absolutely no discrepancy between the evidence of these two drivers. Kanji has admitted that from Sanala the tar road and the railway line are parallel to each other up to a distance of about a quarter kilometer, and then they become separate. The tar-road is a Highway and many public carriers pass on that road. Those carriers are from Rajkot and Kutch. According to Kanji, the trucks would be loaded with grass, petrol, oil, cotton., etc. He has further stated that when he stopped the train at a distance of about 100 ft. from the truck, the truck was 3 to 4 feet away from the railway track. He has also admitted that Sanala is 5 to 6 kilometers from Morvi. Between Morvi and Tankara, at some place the road and railway line are parallel, and at the place of incident the road and railway line are parallel. The road is about 10 to 11 feet wide, and two trucks can pass on that road from opposite directions only. The place of incident is 11/2 to 2 Kms. from Sanala. He has further admitted that from the place of incident the road and the railway line are parallel up to a distance of about 1 km. towards Rajkot. In cross-examination by Mr. Mehta for the plaintiff, he has admitted that coal was inserted at Sanala Station when the train had not yet started. Then after the blower was stopped the train was started. According to him, when coal is loaded in the engine and blower is started, smoke would come out but the sparks would not come out.

31. Laxmiprasad Ambashanker Dave Ex. 123, Guard of the said train at the relevant time, has supported the evidence of Engine Driver Kanji. He has admitted that the road which runs parallel to the said, railway line connects Kutch and Rajkot, and there would be full traffic on that road mostly of petrol tankers; diesel tankers and trucks carrying grass, etc. He has further stated that the railway line between Shaktipura and the place at a distance of half a kilometer from Sanala is parallel to the road, and from Sanala station again the road becomes parallel to the railway line up to a distance of half a kilometer. Then according to him, after the train left Sanala and travelled a distance of about half a kilometer, he heard six whistles of the railway engine. He, therefore, came out and saw a truck burning at a distance. The driver stopped the train after whistling. He has further deposed that bales on fire were lying on both sides of the railway line and, therefore, the train was kept at a distance of about 150 feet behind the truck on fire. He has also admitted that the truck was 3 feet away from the railway line.

32. From the conspectus of the aforesaid evidence, it appears that the train had stopped at Sanala where additional coal was loaded and thereafter the train was started. In the meantime the truck in question over-took the engine of the train, and immediately within 5 minutes, the truck was found burning, so much so that some burning cotton bags were found lying on the railway track. There is, therefore, no escape from the conclusion that the cotton bags loaded in the truck in question caught fire only about five minutes back, and since the truck was moving at a speed and the goods were loose cotton, it immediately caught fire

and the driver of the truck had to stop the truck, and in order to save the other cotton bags and the truck, the burning cotton bags were thrown on the railway track which was hardly 3 to 4 feet away from the road. It is significant to note that neither the driver of the engine nor the Guard of the train had seen the truck burning when it overtook the train. If fire had taken place prior to the overtaking, attention of the driver and the guard must have been drawn, because both, the train and the truck, were travelling in the same directions at a distance of hardly 3 to 4 feet in between. The train was a passenger-train and, therefore, some of the passengers must have also seen the truck burning if fire had taken place earlier. The distance between the railway track and the road, the time limit within which the accident took place, the fact that the truck and the train were travelling in the same direction and at the same time; that when the truck overtook the train no fire was seen in the truck either by the engine driver, guard or any of the passengers, and immediately within five minutes the train was stopped on account of the fire in the truck. All these factors go to show that fire has direct proximity with the train and the sparks of the burning coal emitting from the engine. I am, therefore, of the opinion that the fire on the truck was the result of the sparks of the burning coal emitted from the engine of the train. There is nothing in the evidence to suggest that at that time there was any other reason due to which the truck caught fire to such an extent. There is also no suggestion or evidence worth the name to show that there was any inherent defect in the truck or any misconduct on the part of the driver or the cleaner of the truck. In these circumstances, it can safely be inferred that when the truck overtook the train there was no fire, but as soon as it overtook the engine, within no time it caught fire when it had hardly travelled a distance of half or one kilometer, at which time the engine driver and the guard saw the truck ablaze from a distance.

33. In my opinion, two things can be attributed to this calamity, (1) the highway and the railway line are on the same level and parallel to each other, and therefore, the height of the chimney of such a narrow gauge engine and the height of the cotton bags loaded in the truck would be practically the same; and (2) the distance between the railway engine and the truck was hardly 3 to 4 feet and, therefore, there was every possibility of the cotton bags catching fire if sparks of burning coal escaped from the engine or its chimney. The learned trial Judge has not correlated the events properly and has thus arrived at an erroneous finding.

34. The next question which requires consideration is regarding the responsibility of the Railway Administration to the plaintiff. On this point the Railway Administration has tried to impress upon the Court that a spark arrester was fitted to the engine in question and, therefore it cannot be said that there was any negligence on its part. In my opinion, this argument is totally misconceived. Evidence on record clearly points out that the Railway Administration has not taken proper precautions and care for averting such accidents which are imminent under the following circumstances:

(1) The railway engine in question which was manufactured in year 1925 A.D. has exhausted its utility.

(2) Though documentary evidence regarding the fitting of spark arrester was available, the same has not been produced.

(3) According to the evidence of the Railway Fitter, he was in employment of the railway since last 18 years at Morvi, and during his tenure of service the fire arrester to the said engine had not been fitted. So, even if there was a fire arrester fitted to the said engine, the same must have been fitted in year 1925 when the engine was manufactured. Fire arrester is made of steel, and it can safely be presumed that it can get worn out due to heat, atmospheric effect and lapse of time. Nobody is in a position to say about the useful life of the fire arrester or the engine.

(4) It is an admitted position that the Highway is hardly 11 feet in width, and it runs parallel to the railway track at several places, so much so, that a truck going from Morvi toward Rajkot at the left side of the road will be at a distance of hardly 4 to 5 feet from the railway track.

35. Furthermore, when the railway track is passing through such a long narrow strip, and when admittedly highly inflammable articles like petrol, diesel, cotton, grass, etc., loaded in tankers or trucks are mainly passing on that Highway, it is the duty of the Railway Administration either to construct a wall or some partition in between the railway line and the Highway so as to prevent the sparks or burning substances emitting from the railway engine which may cause accidents like the present one. It is an admitted position that coal is used as a fuel in locomotive engines, and one can imagine the efficiency of an engine manufactured in year 1925 A.D. and used for last 47 years. Use of such engine can never be said to be safe on such a railway track. One should not also forget that such unguarded railway tracks on which passenger trains are run are subject to all the calamities of the passengers in the train as well as the Highway traffic which mostly carry highly inflammable articles like petrol, diesel, cotton, grass, etc. All these circumstances leave no doubt in my mind that running of passenger-trains with locomotive engine on such a narrow track without proper partition or fence for the safety, both of the train passengers as well as road traffic, is a clear act of negligence and total disregard to the lives and properties of the passengers of the train and the highway traffic.

36. The Railway Administration has tried to highlight their act of fitting the fire-arrester to the engine in question. But unfortunately no date has been given as to when the said fire-arrester was fitted and what was its condition at the relevant time. The Railway Administration has not led any evidence to show that they had taken sufficient care for the safety of the road traffic at the place where the road and the railway line run parallel to each other at a very short distance of about 3 to 4 feet and where there is likelihood of imminent danger to the lives and properties of the passersby. The Railway Administration has also not led any

evidence regarding the life of the engine, nature of its performance and the condition in which it was maintained.

37. Assuming for the sake of argument that fire-arrester was fitted to the engine in question, even then that would not absolve the Railway Administration from its responsibility, because such fire- arresters are fitted with every locomotive engine. It is a matter of common knowledge that all the locomotive engines are emitting sparks, but owing to safe distance kept between the railway lines and the roads at most of the places, such sparks do not result into accidents. However, in the instant case, the train and the Highway traffic are passing side by side at a distance of about 3 to 4 feet and, therefore, merely because fire-arrester was fitted to the engine in question is no ground for the Railway Administration to non-suit the plaintiff when now a days, numerous scientific instrument and gadgets have been invented, In a way, I am not convinced that a worm out locomotive engine manufactured in year 19125 with fire-arrester fitted with it is safe to be utilised in such a place where the railway line and the highway are running side by side at a distance of only about 3 to 4 feet, and where on the highway trucks and tankers carrying highly inflammable articles are passing all the day. In my opinion, therefore, under the facts and circumstances aforesaid, Railway Administration can be said to be negligent.

38. Miss Shah submits that the accident in question is within the special knowledge of the Railway Administration, and, therefore, in such a case maxim of *res ipsa loquitur* must be applied. Site further submits that when it is found dial the said accident was due to the sparks or burning coal emitting from the engine, that negligence can be inferred and it is for the Railway Administration to prove that they had taken sufficient care and were not negligent, In support of her contentions Miss Shah has relied on the decision of the Supreme Court in *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, ,* wherein it has been observed in para 6 as under :

"The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words "*res ipsa loquitur*" is that the accident speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence." In the instant case, it is not necessary to go to the extent suggested by Miss Shah. The accident in question speaks for itself. I have already discussed above the factors which lead to the inevitable conclusion that the fire was the result of emission of burning coal or sparks from the engine.

39. Mr. R. M. Vin, learned Government Pleader, appearing on behalf of

Respondent No. 6 (defendant 6) has contended that railway locomotive engines and rolling-stock propelled by using coal as a fuel are used by the Railway Administration with the previous sanction of the Central Government as required under S. 16 of the Indian Railways Act, 1890 and, therefore, they had the authority to run the engine in question and they will not be liable the damage occurred to a third party resulting from use of such engine. In order to appreciate the argument of Mr. Vin, it would be necessary to refer to the provisions of S. 16 of the Indian Railways Act., It reads:

"16. (1) A railway administration may, with the previous sanction of the Central Government use upon a railway locomotive engines or other motive power, and rolling~ stock to be drawn or propelled thereby,

(2) But rolling- stock shall not be moved upon a railway by steam, or other motive power until such general rules for the railway as may be deemed to be necessary have been made, sanctioned and published under this Act."

It would thus be seen that rolling-stock can be moved upon a railway by steam or other motive power after general rules for the railway as deemed necessary have been made, sanctioned and published under the Indian Railways Act. In spite of my query and time being given, the learned Government Pleader has not brought any rules made u/s 16 of the said, Act.

40. Miss Shah has drawn my attention to S. 47 of the Indian Railways Act which pertains to General Rules. Relevant portion of it for our purposes reads :

"47(I). The Central Government or in the case of a railway administered by a railway company, the railway company shall make general rule consistent with this Act for the following purposes, namely, -

(a) for regulating the mode in which, and the speed at which rolling-stock used on the railway is to be moved or propelled."

Unfortunately, no rules have been shown to me by Mr. Vin in spite, of time being given to him. In any view of the matter, and assuming for the sake of argument that the Railway Administration has a statutory right to use the rolling stock, thereby not to be responsible for the damage to the person or property of other persons by such use, it cannot be gain said that they can mis-use this power and act negligently. Even the statutory powers conferred upon an authority have to be exercised with due care and caution, and if any damage is the result of negligence or unreasonable exercise of statutory power, resulting into injury or damage to the third parties, then in that case, in my opinion, such authority is answerable to such acts. If the authority is empowered by a statute, no doubt, it can exercise that power, but if in -exercise of such power injury or damage is incidentally caused, the same may not be answerable under a common law, though at common law it would be an actionable nuisance to use such engines which are source of danger to the lives and properties of third parties.

41. In support of his contention, Mr. Vin has also relied on the statements made

in paragraph 501 under the caption "Sparks from railway" by learned author Charlesworth in his book entitled "Negligence", 5th Ed. (page 500). The said para reads :

"....No liability is imposed upon railway authorities for fire caused by sparks emitted from a locomotive where the railway is operated under statutory authority unless there has been negligence and the burden of proving negligence is on the plaintiff and is not on the railway authorities. However, the Railway Fires Acts 1905 and 1923 modified the law to a limited extent by providing that statutory authority is no defence when damage is caused to crops of agricultural land from fire which arises from sparks or cinders emitted from a railway engine, when the claim does not exceed 200/-."

This passage, no doubt, helps Mr. Vin, only to a limited extent. As stated earlier, even in a case of statutory authority reasonable use or exercise of power might be a defence, but when the power is used negligently, such authority will definitely be liable. Therefore, this passage will not help Mr. Vin when it is proved that the damage is the result of the negligence of the Railway Administration.

42. On this point, there is a binding decision of, the Bombay High Court in His Highness the Gaekwar Sirkar of Baroda v. Gandhi Katcharabhai Kasturchand, (1900) 2 BLR 357. The facts in that case were that a suit was brought against the Bombay, Baroda and Central India Railway Company for damages and also for an injunction. The material allegations on which the suit was based and set out in the plaint were :

"A portion of the said railway line is lying within the limits of the village of Kokta under Viramgaum, and this portion and the culverts that are constructed in this portion are constructed with so much carelessness and negligence that, though the water of the villages of His Highness the defendant No. 1 in the Kadi Pragana formerly passed by Kariana on to the west, and though never did the water of the said villages of His Highness the defendant No. 1 in the Kadi Pragana pass into the village of Kokta, still, by the construction of the aforesaid railway line and the culverts and, furthermore, by the culverts often giving way in each monsoon, the water does not go along the way it used to go at first, but in the rainy season, the rain water collects itself to the east of the Viramgaum-Mehsana Railway line, near Kariana, turns to the south and runs into my fields in the sim of the village of Kokta, and a portion of the water passes through the culvert of the said railway line situate within the limits of the village of Dabhla towards the villages of Chanothia and Jaxi in the west, and turning again to the south towards the village of Kokta runs into my fields in the sim of Kokta, so that a considerable quantity of water gets collected in my said fields in the sim of Kokta."

Defence as taken by Mr. Vin before me was taken by the Railway Administration in that case. The Division Bench observed :

"Where the legislature sanctions and authorises a Railway Company the use of a

particular thing and it is used for that purpose. the sanction carries with it the consequence that if damage results from it the Company is not responsible. But an action lies even for authorised acts if they are done negligently; hence, if the damage could have been prevented by the reasonable exercise of the powers conferred, an action can be maintained."

Therefore, the aforesaid decision clearly provides that if the statutory permitted acts are done negligently, then the Railway Administration will be responsible. In the instant case, as stated above, there is clear evidence that the Railway Administration has acted very negligently in spite of clear knowledge that most of the traffic which is passing by that narrow passage carries highly inflammable articles, and by using the locomotive which was manufactured in year 1925 A.D., i.e. 47years ago, which passes at a distance of 3 to 4 feet at the same level parallel with the Highway, the Railway Administration has acted negligently and, therefore it is liable for any damage that occurs to the person or property of the passers-by in that narrow passage. In the aforesaid view of the matter, I hold that the Railway Administration is liable to the damage caused to the property of the plaintiff.

43. In the result, the appeal as well as the Cross-objections are partly allowed. The decree passed by the learned trial Judge against the appellant-defendant No. 1 is maintained, and a decree in the same terms be also passed against respondent-defendant 6 - Union of India, with proportionate costs all throughout. The appeal and cross-objections against respondents defendants 2 to 5 are dismissed. However, looking to the peculiar facts and circumstances of the case, respondents-defendants 2 to 4 shall bear their own costs because they were the parties in custody of the goods in question when the same were damaged and, were necessary to be joined as defendants. Respondent-defendant 5 was unnecessarily joined as a party to the suit by the plaintiff and. therefore, the plaintiff shall bear the costs of respondent-defendant 5 all throughout.

44. Appeal partly allowed.