

(1997) 04 OHC CK 0010

In the Orissa High Court

Case No : Original Jurisdiction Case No. 3299 of 1996

Parikhita Behera and Another

APPELLANT

Vs

The Divisional Railway Manager, South Eastern Railway and
Others

RESPONDENT

Date of Decision : 25-04-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Railways Act, 1989 — Section 124

Citation : (1998) ACJ 1019 : (1997) 83 CLT 781 : (1997) 2 OLR 69

Hon'ble Judges : Susanta Chatterji, J; S.C. Datta, J

Bench : Division Bench

Advocate : K. Jena and J.K. Mohapatra, for the Appellant; B. Pal, P.C. Panda, A.K. Mishra, S.K. Ojha and P. Das, for the Respondent

Judgement

Susanta Chatterji. J.

1. The petitioners are the unfortunate parents of one Susanta Behera who died by a train accident on 27.10.1994. Said Susanta Behera was a student of Class IX and he was returning to his village by a bi-cycle after attending tuition and while he was passing through the unmanned level crossing near Bari-Thangada Passenger Halt of the South Eastern Railway he was hit by Utkal Express and died at the spot.

2. It is stated that the deceased was the only son of his parents. The alleged accident occurred due to the sheer negligence of the railway authorities. The deceased had no fault of his own. It is further placed on record that in the aforesaid unmanned level crossing apart from Susanta Behera many other persons and animals have lost their lives and in spite of the public demands and repeated representations, the railway authorities did not take any step to avoid the accident at the particular spot. The details of the accident, which had occurred, have been averred in the writ petition.

3. It is contended that the railway authorities time to time assured the public to take immediate step to avoid the accident at the aforesaid level crossing and to compensate the legal representatives of the victims in order to pacify the people and enable the train to move peacefully. Many Newspaper cuttings have been referred indicating the past accidents, strike and assurance of the railway authorities.

4. The petitioners were also assured similarly while the accident of their only son took place and the railway authorities also assured to release suitable compensation in their favour but all promises were in vain. The petitioners made repeated reminders and representations but there was no reply from the other side. All these facts in greater details have been mentioned in the writ petition.

5. It is highlighted that the Railway authorities committed deliberate negligence in not taking steps to discontinue to run the train amidst busy localities and the unmanned level crossing became a great menace. No reasonable steps were taken nor there was caution board or any indicating to the pedestrians and passersby of the unmanned level crossing.

6. It is pointed out that there is an obligation on the part of the Railway authorities to ensure that whenever a train passes over a thoroughfare adequate warning should be given to the public about the passing of the train so that accidents may be avoided. No enquiry was conducted as regards the aforementioned accident in the manner provided under the Railways Act and the act of negligence on the part of the Railway authorities is an accomplished fact. Detailing all these facts and circumstances and alleging the negligence on the part of the Railway authorities, the petitioners have prayed for the following reliefs :

".....a writ of mandamus or any other appropriate writ may kindly be issued against the opposite parties to take appropriate steps in the unmanned level crossing near Bari-Thangada passenger halt by which the future accidents can be avoided and compensate the petitioners for loss of their only son to the tune of Rs. two lakhs which is the minimum liability of the Railway authorities to a passenger as per Section 124 of the Railways Act, 1989....."

7. The writ petition is opposed by filing, a comprehensive counter affidavit. It is disclosed therein that on 27.10.1994 while 2478 UP Utkal Express Ex. Nizamuddin to Puri was on run between Dhanmandal and Bayree stations, one person at Km. 379/10-11 with his bi-cycle was hit with the locomotive of the said train at about 9.15 hours. The train was stopped by the driver at Km. 380/3. The Driver, Assistant Driver and the Train Guard at Km. 379/11 found only boy aged 15 years run over and lying on the left side of the track-half portion and the cycle after having broken lying in the middle of the track. The information was given by the Train staff to Khurda Road Control Office for further action. The unruly mob of the vicinity gheraod the train due to the accident and the train was detained up to 17.55 hours on 27.10.1994 till arrival of the higher authorities of

the Railways. It is also stated that the Railway authorities have no means to certify the names and other particulars of the deceased. There was no negligence on the part of the Railways. The deceased was a trespasser into the railway track and not a bona fide passenger purchasing ticket and as such question of application of Section 124 of the Railways Act, 1989 would not apply. The compensation is payable only in respect of bona fide passengers who are injured or die in a railway accident which has been defined in the Railways Act. The death even if true in respect of and arising out of trespass of any person over railway track is not a railway accident under law and no compensation is payable.

8. It is emphatically denied that there was no negligence on the part of the Railways as the train had to pass over the railway track. The Railway is not at all responsible and any person who crosses the railway line at such level crossing is completely responsible. There are several unmanned level crossings. It is submitted that the accident caused due to trespass into the unmanned level crossing is not an accident and no statutory liability is with the Railways to compensate the unfortunate legal representatives of the victims of such accident, and the writ petition is thus misconceived. All allegations of the petitioners are controverted.

9. Having heard the learned lawyers for the petitioners as also for the Railway authorities and on perusal of the pleadings, we find that the accident is an admitted fact, existence of an unmanned level crossing at the spot is there for years together and a large number of accidents, had taken place at the aforesaid unmanned level crossing. The only question arises in this writ petition is to decide whether there was deliberate negligence on the part of the Railway authorities and/or whether there was any contributory negligence on the part of the victim. It has to be decided whether the Railway authorities are liable to pay compensation to the petitioners being the parents of the victim boy and the question of compensation has to be ascertained.

10. The facts remain undisputed. The points of law are to be looked into to decide the issues and to adjudicate the matter.

11. Mr. Pal, learned counsel appearing for the Railways has strongly emphasised that the victim was not a passenger. No provisions of the Railways Act for claiming compensation is there. The victim boy had trespassed into the railway track and the claim of compensation is misconceived. He has referred to the purported enquiry report dated 23.5.1996 made by CH.D.T.L, South Eastern Railway, Bhadrak submitted to the Senior D.S.C./KUR, South Eastern Railway vide Annexure - A to the counter affidavit. He has strongly submitted that the Railway authorities are not responsible in this case and cannot be blamed for such accident even if there is an unmanned level crossing. The only remedy available to the petitioners is under Law of Torts and there is an alternative remedy to file suit in the proper forum and the writ Court cannot help the petitioners under any circumstances.

12. Considering the submissions made on behalf of the petitioners and also the Railway authorities, we are of the view that the alternative remedy is not an absolute bar to the maintainability of the writ petition. If the statutory authority is found to have committed deliberate act of negligence it would not be prudent for the High Court to refuse to exercise jurisdiction under Article 226 of the Constitution of India in view of the fact that there is an alternative remedy. The Apex Court in a judgment reported in Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, found the writ petition maintainable and not barred because of availability of alternative remedy. The present writ petition has been entertained and materials on record have been placed. We do not feel it prudent to ask the petitioners to seek redress by filing a Civil Suit by indicating the grievances as the Law on Torts permits.

13. In an appropriate case the Court discharging Constitutional duties can pass an order for payment of money in the nature of compensation consequential upon the deprivation of a fundamental right to life and liberty of a petitioner. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this Country as it has perished in some others too well-known to suffer mention it is necessary to educate ourselves into accepting that respect for the rights of individuals is the true bastion of democracy. The State must repair the damage done by its officers to the petitioner's right. Reference may be made to Rudul Sah Vs. State of Bihar and Another, .

14. In a recent judgment delivered by the Himachal Pradesh High Court in the case of Kumari Seemu alias Seema Vs. Himachal Pradesh State Electricity Board and Others, , the writ Court granted the reliefs to the petitioners claiming damages for injuries arising out of negligence of Electricity Board. While sufficient evidence of negligence was available on record, the petition was found maintainable and the damages were granted. The concept of Torts, negligence, electrocution by law hanging high tension wire, teen age of the victim girl were considered and there was direction for payment of Rs. 2 lakhs as compensation. In an earlier decision reported in Smt. Kalawati and Others Vs. State of Himachal Pradesh and Another, there was payment of compensation due to negligence of Government Hospital staff. The concept is very clear that the writ Court is not debarred from awarding reasonable sum by way of compensation if there is a deliberate act of negligence on the part of the statutory authority and/or to help in protecting, preserving and enforcing the fundamental right to life and necessary directions are made.

15. In course of argument an analogy has been made to appreciate the awarding compensation in the case under the Motor Vehicles Act and the situation in which the victim can ask for such quantum of compensation. There may not be any specific statute to provide compensation to the persons who may not be bona fide passengers but if there is no fault on their part and if the Railways have

committed negligence, the writ Court will shut its eyes and the relief would be denied in the appropriate case.

16. Attention of the Court has been drawn to a case reported in 1995 (I) T.A.C. 689 (XAVIER v. State of Tamilnadu and Ors.). In the said case a blind boy studying in 6th standard while passing by an electric pole fell down on the footpath and in the impact his left hand hit the open junction box touching an unprotected live wire and was electrocuted instantly. In fact junction box was not properly looked and sealed and earthing was also not correctly done. The death of the deceased occurred due to the negligence on the part of the respondents in not maintaining the electric poles efficiently and the deceased being the only son of the petitioners there was directions to pay compensation as a palliative measure.

17. There was also reference to the decision reported in Smt. Kumari Vs. State of Tamil Nadu and others, . In this case the death had occurred to a six years" old child due to falling down in an "uncovered sewerage tank". High Court dismissed the petition as it was not possible to determine, as to which authority was responsible for the negligence, in the writ judiscition. But the Apex Court, however, directed the State to pay Rs. 50,000/- as compensation with liberty to initiate appropriate proceedings against the concerned authority.

18. A Division Bench of this Court in its judgment reported in Padma Behari Lal Vs. Orissa State Electricity Board and Another, considered the case according to Law of Torts vis-a-vis negligence due to the death of a cyclist driving on a public road in the dead of night in a stormy wheather by coming in contact with a live hanging wire detached from the electric pole. It was found that the Electricity Board was responsible and there was direction for payment of proper compensation.

19. The learned lawyer for the writ petitioner has cited several other reported decisions of different High Courts on this point reported in AIR 1996 Raj 81 (Rajmal v. State of Rajasthan and Anr.) AIR 1963 Gau 117 (Swarnalata Barua v. Union of India and Ors.), . Ramesh Chandra Dutt Vs. Union of India(UOI), and Union of India(UOI) Vs. Supriya Ghosh and Others, . In particular the Patna High Court considered the case of negligence relating to, railway level crossing gates and unmanned gates opened. It is pointed out that it is an invitation to cross a person going across meeting with accident is not guilty of contributory negligence and is entitled to compensation. The earlier decisions reported in Union of India(UOI) Vs. Supriya Ghosh and Others, followed.

20. In the decision reported in Krishna Goods Carriers (P) Ltd. Vs. Union of India, there is consideration of negligence arising out of accident at railway level crossing and the motor truck cellided with the goods-train. Negligence of railway servant, liability for damages, breach of statutory duty of railway and the plea of contributory negligence were considered.

21. Regard being had to the materials on record and the provisions of law as

discussed above, we find that in the instant case where a railway line crosses the Highway and public path, reasonable protection must be taken to reduce the damage to the public to the minimum. The railway authorities for years together cannot help their eyes closed or can ignore the recurring accident due to unmanned level crossing. For more than two decades the railway authorities cannot remain unconcerned, not taking effective steps in manning the level crossing at the spot in question. The facts convince us that the railway authorities were negligent in keeping the unmanned level crossing open which became an accident spot and suitable steps ought to have been taken. It is also not appreciated as to why the railway authorities have backed out after giving promises and making assurance to pay suitable compensation to the parents of the victims. Minimum expectation was betrayed. The human aspect cannot be overlooked for this bureaucratic attitude to deal with life and liberty of human being which is well protected by the Constitution of this Country. The facts of the case convince us that the writ petitioners are well justified to move this writ Court for the apathy shown by the railway authorities as the stand taken by them is found to be not only misconceived but deliberate attempt to add salt to the injury. The relief of compensation is found to be well justified.

22. For the foregoing reasons, we allow the writ petition in part holding that the railway authorities have committed the act of negligence and there was no contributory negligence on the part of the victim boy. Regard being had to the age of the victim boy and considering his potentiality and other relevant factors it will be justified if the Railway authorities are directed to make payment of compensation of Rs. 1,00,000/- (Rupees one Lakh) to the petitioners. The Railway authorities should take such steps to release the amount within a period of six weeks from the date of communication of the order and appropriate writ be issued accordingly. There will be separate cost of Rs. 5000/- .

S.C. Datta, J.

23. I agree.