
(1991) 09 KL CK 0028

In the High Court Of Kerala

Case No : A.S. No. 428 of 1989 and C.M.P. No. 2304 of 1991

Ulahannan Rajan

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-09-1991

Acts Referred:

Railways Act, 1890 — Section 47
Railways Rules, 1890 — Rule 130, 131, 137

Citation : (1992) 1 ACC 50 : (1992) ACJ 151 : AIR 1992 Ker 230

Hon'ble Judges : K.P. Balanarayana Marar, J

Bench : Single Bench

Advocate : S. James Vincent and D. Jameela Devi, for the Appellant; Sumathi Dandapani, for the Respondent

Final Decision : Allowed

Judgement

K.P. Balanarayana Marar, J.—Plaintiffs are the appellants. First plaintiff, his wife Pennamma and their three children were traveling from Thiruvananthapuram to Kottayam by Madras Mail on 27-1-1981. After the train stopped at Kottayam railway station, 1st plaintiff and two of the children alighted. While Pennamma was getting down from the compartment holding the third child in hand the train started moving as a result of which she and the child fell down. Her mutilated body was removed from under the train and by that time she had breathed her last. The child was seriously injured and succumbed to the injuries on the way to the hospital. First plaintiff in his individual capacity and as the next friend of the two children filed Original Petition 8/1982 before Sub-Court, Kottayam as an indigent person claiming an amount of Rs. 55,000/- as compensation. It is alleged in the petition which was subsequently converted into a suit and numbered as O.S. 319/1983 that the train suddenly moved forward without any signal or warning and as a result of the jerking Pennamma and the child fell into the track and Pennamma was run over by the train and her body was cut into pieces. The child also sustained serious injuries and died on the way to the hospital. It is further alleged that the accident occurred due to the negligence on

the part of the employees of the Southern Railway. First plaintiff claims to be an incapacitated person and deceased Pennamma was looking after him and the children. First plaintiff had undergone vasectomy operation in 1973 as a result of which he had become crippled and is not in a position to stand erect. The entire family had gone to Thiruvananthapuram for making a representation to the Government. It is alleged that the authorities had assured 1st plaintiff that Pennamma would be appointed as a Class IV employee in the Public Health Department. The unfortunate incident happened while they were on their return journey. By the death of Pennamma 1st plaintiff and his children had lost the only support apart from loss of her love and affection. Hence the claim against the Union of India represented by the General Manager, Southern Railway.

2. The suit was resisted by the defendant. It is contended that the incident happened while Pennamma attempted to get down from the train while the train was in motion. The fact that Pennamma travelled in that train along with the deceased child is admitted. Defendant disclaimed liability for the reason that there was no negligence on the part of railway employees and that the accident happened only due to negligence and carelessness on the part of the deceased.

3. Two witnesses were examined on the side of plaintiffs. Defendant did not examine any witness on their side. After hearing both sides the court below held that the incident had taken place due to the negligence of the deceased. Still the court directed defendant to make an ex gratia payment of Rs. 10,000/-. The appeal is against that decision. The appeal was filed by the 1st plaintiff alone. C.M.P. 2059/1991 was filed for amending the cause title of the memorandum of appeal by adding the names of plaintiffs 2 and 3 as additional appellants. Since the persons sought to be impleaded were already on record before the court below as plaintiffs and since they are also entitled to claim compensation, the request for amendment is allowed.

4. Heard counsel on both sides.

5. The following points arise for consideration: (1) Whether Pennamma and the child fell down on account of negligence on the part of Railway servants? (2) Whether defendant is liable to pay compensation or damages?, and (3) What is the quantum?

Points 1 and 2.

6. The main aspect to be considered is whether there was negligence on the part of Railway servants. Negligence as a tort is the breach of a legal duty to take care as a result of which damage is caused to another. In order to establish negligence the ingredients to be proved are (1) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty; (2) breach of that duty; and (3) consequential damage to be. What is meant by "duty to take care" has been spoken to by Lord Macmillan in *Bourhill v. Young* (1943) AC 92 thus:

"Duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

This has been further explained in *Glasgow Corporation v. Muir* (1943) AC 448:

"The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application subjective element. It is still left to the Judge to decide what in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen."

This Court in *Veeran and Another Vs. T.V. Krishnamoorthy and Another*, observed that in order to decide culpability it is necessary to determine what a reasonable man would have foreseen and thus form an idea of how he would have behaved in the circumstances.

7. A railway undertaking is under the same duty as other employers to take reasonable care for the safety of its employees as well as passengers. The liability of railway undertakers to persons who are not employees has been stated in *Haisbury's Laws of England*, 4th edn. at p. 622, paragraph 907 thus:

"Except in respect of persons with whom it has a contractual relationship, a railway undertaker is under the same common duty of care under the Occupiers' Liability Act, 1957 as other occupiers of premises, namely the duty to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there. A railway undertaker, as an occupier, must be prepared for children to be less careful than adults."

8. While dealing with the duty of carriers Charles worth & Percy in their treatise on Negligence 7th Edn., at p. 637 says thus:

"Railway authorities are under a duty to use reasonable care and skill in the provision and maintenance of their premises, including their carriages, the provision and maintenance of railway tracks, the provision of a proper system of signalling and the carrying on of their activities, so as to prevent accidents. They are also liable for the negligence of the signalmen and others operating the system and of the drivers and others in the driving and management of their trains."

The learned authors say that railway authorities are bound to provide reasonable means for passengers to alight at the stations where their trains stop. If the platform provided is either too high or too low having regard to the height of the carriage, it is evidence of negligence on the part of the railway authorities in not providing reasonable facilities for alighting. It is further stated that the railway authorities were liable in a case where the train was too long for the platform

and a passenger was asked by a porter to alight beyond the end of the platform, the reason being that the place and the means of descent provided were not reasonably convenient. Where a passenger has been invited to alight, either expressly or by implication, and he proceeds to do so but is injured owing to his carriage not being opposite the platform, he will be able to recover damages. Much will depend on the circumstances in deciding whether or not there has been such an invitation to alight. Regarding the stopping and starting of trains the authors say that trains must be started and stopped with reasonable care. If a train is started with a sudden jerk as a result of which a passenger is injured, there is evidence of negligence. It is further stated that a violent and unusual stopping or starting of the train which occasions injury to a passenger is prima facie evidence of negligence. It is mentioned that in such circumstances the railway authorities will have "to show both that they acted reasonably and properly in suddenly stopping the train, and also that the cause which led to the necessity of stopping the train was not brought about by any negligence upon their part." Regarding platforms it is stated that platforms must be made and kept reasonably safe for their purpose and they must be neither too high nor too low for the train's carriages.

9. If a passenger sustains injury while boarding the train or getting out of the train, it cannot be said that an accident has occurred to the train or part of the train. But it is an accident to the passenger who has been invited by the railway undertaking. A person has a duty to take reasonable care regarding the invitees. Passengers in trains and passengers at railway stations and persons accompanying them by the permission of the railway company are invitees. The meaning of the word "invitee" is given in the Shorter Oxford English Dictionary thus: "one who is invited". Stroud's Judicial Dictionary of Words and Phrases gives the definition of "invitee" thus; "an invitee means a person invited to the premises by the owner or occupier for the purposes of business or of material interests". Passengers travelling in trains are invitees and the railway undertaking has a reasonable care regarding them.

10. Learned counsel for the appellants has drawn attention to some English decisions on this aspect. The earliest is the one in *Robson v. North Eastern Rail Co.* decided on 10-11-1876, reported in 1874 All ER 1281. In that case a woman passenger travelling on the defendants' railway arrived at a small station. The carriage in which she was travelling stopped short of the platform. The only railway servant at the station was engaged with the luggage. The passenger after waiting attempted to descend without assistance and in so doing she slipped and was injured. The Court of Appeal held that there was evidence of negligence on the part of the defendants.

11. In *Taylor v. Manchester, Sheffield and Lincolnshire Rail Co.*, 1891 All ER 857 the Court of Appeal was considering a case where the thumb of a passenger was crushed owing to the negligence of defendants' porter in shutting the door. It was held that even though the plaintiff had entered into a contract with the

defendants by taking a ticket, his action for personal injury caused by the negligence or misfeasance of the defendants" servant was an action "founded on tort" and not one "founded on contract."

12. A case where a passenger was injured while the train started so suddenly was considered by the House of Lords in *Metropolitan Railway Co. v. Delaney* (1921) All ER 301. The passenger had entered the carriage and had reached the vestibule immediately inside it and was approaching the seating accommodation when the train started suddenly depriving him of his balance and throwing him against the back of the carriage. He put out his arms in an attempt to save himself from falling when the sliding door of the carriage set in motion by the starting of the train closed upon his right hand crushing and injuring it. The question to be considered was whether there was evidence of negligence proper to be left to the jury, first as to whether the train was set suddenly in motion and secondly whether it was set in motion without warning. The House of Lords by majority held that the jury were entitled to infer negligence and return a verdict for the plaintiff.

13. Counsel has also cited the decision in *Schlarb v. London & North Eastern Railway Co.*, (1936) 1 All ER 71. The plaintiff in that case descended the staircase of a railway station and was proceeding cautiously forward on the platform when she fell over the edge. The foot of the staircase was within three yards of the edge of the platform, but the latter was marked by a white line painted along it. There was no guard rail. It was held that defendants were negligent and there was no evidence of contributory negligence on the part of the plaintiff. It is observed that defendants knew that passengers coming down the stairway would go on to the line and they knew or ought to have known that the lighting was wholly inadequate on that particular night. She was not given any warning by any person. There was no curved rail to help a passenger and the stairway was half-way across the platform. It is observed that there is a breach of duty on the part of the defendants and plaintiff was entitled to succeed in her action for damages.

14. Attention is also drawn to the decision in *Hare v. British Transport Commission* (1956) 1 All ER 578. The plaintiff in that case had gone to the railway station to see her husband off. As the train moved off she remained standing close to the train facing the direction in which it was moving and waving to him. After the train had travelled some 60 yards she was struck from behind by the open door of the guard's van. She had not moved appreciably from the position she was in when the train started. It was held that the defendants were negligent because the door of the guard's van should not have been allowed to remain open while the train travelled so great a distance although the rules of the railway, being designed for the protection of passengers, did not require a guard of a passenger train to be in his van with the door closed at the moment when the train started. It was further held that plaintiff was not guilty of contributory negligence.

15. Rules had been framed under the Indian Railways Act for all open lines of railway in India for the guidance of railway servants. The rules provide for precautions before starting train. Rule 115 says that the guard in charge of a train shall not give the signal for starting the train from a station at which it has stopped until he has received permission from the Station Master. The guard shall not give the signal for starting until he is satisfied himself that no passenger is getting into or out of the train, that no person is riding outside a carriage, and that, except in accordance with special instructions, no person is travelling in any compartment or vehicle not intended for the carriage of passengers. A driver shall not start the train from a station without the authority to proceed and until the guard in charge of the train has given the signal to start (vide Rule 120). Rule 130 stipulates that the driver shall start and stop his train carefully and without a jerk. It is provided in Rule 131 that the driver shall always sound the engine whistle, except under special instruction, before putting an engine in motion, when entering a tunnel and at such other times as may be prescribed by special instructions. Every guard has to give his best assistance to passengers entraining and detraining. Rule 137 says that when a train carrying passengers has been brought to a stand at a station, whether alongside, beyond, or short of the platform, the driver shall not move it except under orders of the guard in charge of the train or to avert an accident.

16. The evidence adduced in the case has now to be analysed in the light of the rules mentioned above and the principles enunciated in the judicial pronouncements. First plaintiff who was travelling in the same train and who alighted first had spoken about the circumstances in which the accident occurred and his wife and child died. As P.W. 1 he stated that the train began to move while his wife was getting down (from) the compartment. There was no warning or signal before the train started. That part of the train stopped short of the platform. The rail which was formerly of meter gauge had been converted into broad gauge. It is spoken to by P.W. 1 that the level of the platform has not been raised so as to facilitate detraining from a broad gauge compartment. P.W. 2 is a porter of Kottayam Railway Station. Though he had not been issued a badge by the authorities, he was taken as a porter one year before the accident. He also deposed that the train started without signal and suddenly moved forward. That resulted in the accident. According to him the train stopped with a jerk about 10-20 ft. away. He would say that the train stopped at the station for 10 minutes after the accident. Ordinarily signal will be given before starting. But in this case there was no such signal. According to the defendant no report of this casualty had been received at the Kottayam Railway Station on that day. It is their specific case that Pennamma fell down while she attempted to get down from the moving train. If that be so, that would have been noticed by the rear guard and other railway employees. The incident happened at the railway station itself. It is therefore too much to believe that the employees of the railway were not aware of the fall on that day. No evidence was adduced on the side of the defendant to prove negligence on the part of the passenger or the circumstances in which she

met with the accident. Evidently she fell while the train began to move after stopping at the station for some minutes. Since the accident had happened immediately after it began to move, there is every possibility of the Station Master, the Guard and other employees witnessing the same. The testimony of P.W. 2 that the train stopped at the station for about 10 minutes after the accident appears to be true in the circumstances. If that be so, the burden is heavy on defendant to examine one of the railway servants to speak about the negligence attributed to the passenger. No attempt was made in that direction with the result there is only the testimony of P.Ws. 1 and 2. It may be said that P. W. 1 is interested, he being the husband of deceased Pennamma. But no interested ness has been attributed to P.W. 2 who is porter attached to that railway station. He has stated in clear terms that the train began to move without blowing whistle or giving any signal. There is evidence only one way i.e. regarding the negligence of the railway servants. The rules enumerated above have not been followed by them. The level of the platform has not been raised after converting the rail to broad gauge. The compartment had stopped short of the platform. Under these circumstances the employees had an additional duty to see that all passengers had got down from the compartment and all intending passengers had got into the train. The evidence would suggest that the guard, the driver and other employees had not bestowed the care expected from them and were negligent in their duties.

17. Contributory negligence cannot be attributed to the deceased. She was travelling along with her husband and children. Her husband had already got down from the compartment along with two children. There would have been some difficulty in getting down from the compartment which stopped short of the platform. The deceased would have therefore felt some difficulty in getting down the" compartment with the child in hand. This could have been noticed by the guard and the driver if necessary attention has been given by them. In the circumstances the plea of contributory negligence is not available to the defendant.

18. On a consideration of the evidence tendered on the side of the plaintiffs, the rules to be followed by the railway officials and the decisions relied on by the appellants the only conclusion possible is that the accident occurred on account of the negligence on the part of the railway servants and that there was no negligence on the part of the deceased. The court below was therefore wrong in finding that the accident had occurred due to the negligence of the deceased. That finding is set aside and defendant is found to be negligent. Having found so plaintiffs are entitled to get compensation.

Point No. 3.

19. The main claim is for pecuniary loss sustained by plaintiffs. Non-pecuniary loss is also been claimed, but that claim cannot be sustained since 1st plaintiff's wife and the child met with instantaneous death. The claim for compensation for pain and suffering is therefore disallowed.

20. The pecuniary loss sustained is on account of deprivation of earnings of the deceased woman and the loss sustained on account of the death of the child. Though the claim has not been properly worded in the plaint, the claim for an amount of Rs. 22500/- made by the 1st plaintiff appears to be towards the loss of earnings. The head under which that amount is claimed is towards the "loss of company and married life and support and nursing the 1st plaintiff. Similarly an amount of Rs. 10,000/- is claimed on behalf of plaintiffs 2 and 3. For the loss of the child the claim made is for Rs.2500/-. The only aspect to be considered is whether these claims are sustainable and, if so, what is the amount to be awarded by way of compensation.

21. First plaintiff at the time of his examination in Court was aged 40. He would have been aged about 37 at the time of the accident. He stated that his wife was aged 32 at the time of the accident. The age of plaintiffs 2 and 3 is not disclosed either in the plaint or in the appeal memorandum. As P.W. 1 1st plaintiff stated that his wife used to go for coolie work and was earning Rs. 15/-per day. She used to get work for 10 to 25 days in a month. P.W. 1 is a disabled man. Plaintiff alleges that he became disabled after a vasectomy operation. This fact was spoken to by him at the time of evidence. The entire family had been to Thiruvananthapuram seeking employment for the deceased. These facts are not disputed by the respondent. 1 Since P.W. 1 is not in a position to do any work, the entire family would have been depending on the earnings of the wife of 1st plaintiff and by her death that source of livelihood is also lost to them. In the circumstances it is safe to conclude that deceased Pennamma was maintaining 1st plaintiff and her children. The testimony of P.W. I regarding the income can be accepted. On the basis of his evidence the income would be about Rs. 300/- per month if she gets work for at least 20 days in a month. Deducting an amount of Rs. 50/- for her personal expenses, the amount she was spending for the family can be taken as Rs. 250/-. Having estimated the annual dependency amount, the total loss can be ascertained by applying a proper multiplier. First plaintiff was aged only 37 at the time of the accident and in the normal course he would live for another 30 years. Though the age of the children is not disclosed, it would appear from the evidence that they are children of tender age. Taking into account the age of the 1st plaintiff and the age of the two minor children, the multiplier can be taken as 12, in which case the total compensation will work out to Rs. 36000/-. Plaintiffs have claimed only Rs. 32500/- under this head which in any case appears to be reasonable. They are entitled to get a decree for this amount. For the loss of the child only an amount of Rs.2500/- has been claimed which also is reasonable. On the whole plaintiffs are entitled to get an amount of Rs. 35000/ - towards compensation.

In the result the appeal is allowed and in reversal of the judgment and decree of the Court below the suit is decreed and respondent-defendant is directed to pay an amount of Rs.35000/- to appellants-plaintiffs towards compensation. In case any amount has been paid already the same can be deducted from the amount decreed. Plaintiffs are entitled to get interest on the amount decreed at the rate

of 12% per annum from the date of plaint till realisation. Defendant is liable to pay the costs incurred by the plaintiffs here as well as in the Court below. The Court-fee due to the State shall be collected from the amount so deposited.