

(1956) 12 P&H CK 0005
In the Punjab And Haryana At Chandigarh
Case No : First Appeal No. 135 of 1950

Union of India (UOI)

APPELLANT

Vs

Sardarni Harbans Kaur and Others

RESPONDENT

Date of Decision : 17-12-1956

Acts Referred:

Railways Act, 1890 — Section 66, 68, 82A

Citation : AIR 1957 P&H 164

Hon'ble Judges : Passey, J;Kapur, J

Bench : Division Bench

Advocate : F.C. Mital and Surrindar Singh, for the Appellant; Tek Chand Gurbaksh Singh, for the Respondent

Final Decision : Allowed

Judgement

Kapur, J.—This is a defendant's appeal against a judgment and decree passed by Mr. Ishar Singh, Sub-Judge 1st Class, Karnal dated 16th of March 1950 decreeing the plaintiffs' suit for damages for causing the death of Sohan Singh Nanda as a result of collision between two trains belonging to the defendants,

2. Sohan Singh Nanda belonged to some place in the Rawalpindi District but before the partition he had come to stay in Amritsar where he had started business, and according to the plaintiffs he was carrying on extensive business. On 6th October 1947 he started from Amritsar to go to Delhi and it is stated that he reached Ambala Cantonment before 10th of October on which day he, it is alleged, boarded a train which was going from Ambala Cantonment station to Delhi. Although there is a conflict of testimony, but the evidence of the guard D. W. 3 Kundan Lal shows that the train consisted of 36 wagons in all of which one was a passenger bogie, which was used for the military escort and the rest were goods wagons. Assistant Station Master Jamiat Ram D. W. 1 who was in Ambala Cantonment at the time has also stated that the train in dispute was a goods train and a passenger bogie used to be attached to such trains for the convenience of the military escort.

3. The plaintiffs' case is that Sohan Singh Nanda along with other relations had got into this train and there was a collision at 10-30 p.m. on 10th of October 1947 near mile No. 77 between Taraori and Karnal Railway Stations. Twenty-four persons were killed and 110 were injured. The re-port of the accident is Exhibit D-1 which is printed at page 83 of the paper book. The train in which Nanda is alleged to have travelled was D-32 Down Goods Train and according to Exhibit D-1 the collision occurred because both trains were started from the opposite stations and there was a single line operating.

4. The suit was filed on 8th of October 1948 in which it was alleged that Nanda who had been doing a fairly remunerative kind of business was killed as a result of an accident which was due to "the wilful misconduct, gross negligence, criminal failure to perform official duties and mismanagement of the administrators of the Eastern Punjab Railway Authorities" and therefore the railway were "guilty of misconduct or committed gross negligence and criminal default in the performance of official duties". It was also alleged that the deceased was carrying about Rs. 5,000/- cash and a cheque and they had also been lost. The plaintiff's claimed Rs. 1,00,000/- as damages.

5. The defence was that Nanda did not travel by the train and was riot killed as a result of an accident and also that even if he did travel it was without authority and without payment of any fare and without permission and consent of the railway servants and in spite of warning and that he travelled at his own risk and the railway were therefore not liable. " "

6. The Union admitted that there was a collision which must be taken to be due to the negligence of railway servants as indeed that is the law,

7. On the other issues it was held that Sohan Singh Nanda did travel by the train and he died as a result of a collision, that he travelled without permission, and the railway did not acquiesce in his travelling. In other words, there was neither explicit nor implicit consent of the railway in regard to Nanda's travelling by that train. The Court held that Section 82A of the Railways Act applied but Nanda was not travelling after obtaining a proper ticket and on the findings lie decreed a sum of Rs. 10,000/- which is the maximum allowed u/s 82-A of the Railways Act. The Union have appealed to this Court.

8. Three points have been raised: (1) that there is no proof of death of Nanda in the accident, (2) that Nanda was a trespasser; lie travelled neither with the consent of the railway nor at their invitation nor was he a licensee and even If there was negligence on the part of the railway the plaintiffs were not entitled to any damages, and (3) that the amount of damages decreed is excessive.

9. If the Union succeeds in regard to the second point raised, i.e. that Nanda was a trespasser, then it would not be necessary really to go into any other question. On this point the testimony is of certain witnesses of the plaintiffs as well as of the defendant. but before I go to that question it will be necessary to give the various provisions of the Railways Act which are relevant to the issue. "Carriage

of- passengers" is dealt with in Sections 62 to 71." u/s 66 every person desirous of travelling on a railway is entitled to be supplied with a ticket on payment of the proper fare.

Section 68 prohibits a person from travelling without a pass or a ticket and a railway servant can grant permission if empowered in this behalf by the railway administration to grant to a passenger a certificate that the passenger has been permitted to travel in a carriage upon condition that he would subsequently pay the fare payable for _the distance travelled by him. Thus according to this section three conditions are necessary: (1) that a person should get the permission of a railway servant to travel, (2) that the railway servant should be authorized in that behalf, and (3) the condition precedent to the permission is that the person travelling shall pay the requisite fare.

10. Section 82-A of the Railways Act provides for liability of railway administration in respect of accidents, and where there is an accident between two trains one of which is a passenger train, the railway is liable to pay compensation, in the case of death irrespective of whether the death is caused by wrongful act, neglect or default on the part of the railway administration, not exceeding Rs. 10,000/-in respect of any one person. But it appears from Sections 82B to 82H that compensation claims have to be settled by Claims Commissioners save as to cases which fall u/s 82-11, but no objection was taken by either side that no suit could be brought in tort.

11. Chapter IX of the Railways Act deals with penalties and offences. Section 113 deals with travelling without pass or ticket or with insufficient pass or ticket or beyond authorized distances. In such a case a person contravening the provisions of Section 113 is liable to an excess fare and penalty provided by Sub-section (2), and provision is also made for cases where a traveller refuses to pay the excess charge. Section 113A gives the power to the railway to remove persons from railway carriages. Section 118(2) provides

"If a passenger, after being warned by a railway servant to desist, persists in travelling on the roof, steps or footboard of any carriage or on an engine, or in any other part of a train not intended for the use of passengers, he shall be punished with fine which may extend to fifty rupees and may be removed from the railway by any railway servant," Section 122 deals with trespass and refusal to desist from trespass and when quoted runs as under :

"122. (1) If a person unlawfully enters upon a railway, he shall be punished with fine which may extend to twenty rupees.

(2) If a person so entering refuses to leave the railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he shall be punished with fine which may extend to fifty rupees, and may be removed from the railway by such servant or other person."

12. Thus the various provisions of the Railways Act show that a person before he

enters a railway train has to offer the requisite fare and obtain a ticket and that he cannot travel in a train without such a ticket except with the permission of the railway servant who is specially empowered in this behalf and on the condition that he will pay the fare. Travelling without pass or ticket or with insufficient pass is an offence which is punishable u/s 113 of the Railways Act, and unlawfully entering upon a railway makes a person a trespasser. It makes such person liable to fine on conviction.

13. (After discussion of the evidence adduced by both sides His Lordship proceeded:) I agree with the findings of the learned Judge on the question of permission of the railway servants. All the railway servants have deposed that the deceased Nanda did not travel with their permission and that both at Ambala as well as at Kurukshetra attempts were made to get the wagons emptied but various persons got into the wagons in spite of the prohibition of the railway servants. Even the plaintiffs witnesses have stated that the train was meant for refugees but they go a little further and state that they travelled with permission. In any case there is no evidence that the Station Master was authorised to give permission to the persons to travel by that goods train or that the provisions of Section 68 were complied with. The deceased roust therefore be taken to be a trespasser and in those circumstances the question arises whether the plaintiffs are entitled to any damages. .

14. Assuming; though not deciding, that Sohan Singh Narida travelled by the train D-32 Down going to Delhi, it must be held that he was a trespasser and was committing an offence u/s 122 of the Railways Act. Can it be said that a trespasser, who travels by a train without permission of the railway and in spite of the attempt of the rail-way servants to stop him from travelling, i.e. not only without permission but against the directions of the railway servants, can recover damages for an accident due to the neglect of railway servants?

15. The law relating to the liability of carriers and railways has been stated in Clerk & Lindsell on Torts, eleventh edition at pp. 362-363. It is stated that collision of two trains belonging to the same owners is evidence of negligence on the part of those owners : See *Skinner v. London, Brighton & South Coast Ry. Co.* (1850) 5 Ex 787 (A), and *Ayles v. South Eastern Ry. Co.* (1868) 3 Ex 146 (B), and although a carrier of passengers owes a duty to take reasonable care for the safety of passengers during the carriage, but the duty is owed only to persons who are accepted as passengers and therefore no such duty is owed to a trespasser, whether he knows he is a trespasser or not. Reference is there made to two cases. *Twine v. Bean's Express, Ltd.* (1946) 1 All ER 202 (C), and *Grand Trunk Ry. Co. of Canada v. Barnett* 1911 AC 361 (D). In the former case under an agreement between Bean's, Limited, and the Post Office Savings Bank, Bean's Limited, provided a commercial van and a driver for the Bank.

There was an express instruction to the driver that no one was to be allowed to travel in the van but owing to the driver's negligence T. who was an unauthorised passenger in the van was injured. It was held that the duty of

Bean's, Limited, as employers of the driver, to take care in the driving of the van was only to persons who might reasonably be anticipated by Bean's, Limited, as likely to be injured by negligent driving of the van and as T. was a trespasser in the van in relation to Bean's Limited, they owed no duty to T. to take care in the driving of the van.

16. The next case 1911 AC 361 (D), is of some importance. The plaintiff in that case claimed that he was a passenger on a train which was owned and operated by the Pere Marquette Railway and that when the train was moving reversely it collided with the defendants van owing to the negligence of the defendants or their servants and thereby the plaintiff sustained injuries. The negligence imputed was in leaving the van 011 a siding foul of the main line when the switch was set for the main line. The plaintiff in that case came into the Grand Trunk station and got into a train which was reversing and going to the Pere Marquette yard He jumped on to the platform at the rear end of a car and stood with one foot on the platform and the other on the step. He was aware that the train was not in use as a passenger train and he had no ticket and had received no invitation to travel by that train. He was also disobeying a by-law of the railway in standing on the platform of the car.

The Privy Council held that the plaintiff in those circumstances was a trespasser both on the premises of the Grand Trunk Railway Company as well as on the train. In that case it was not suggested that the brakesman of the train had authority -to give permission. It was also found that the plaintiff was not an invitee and the case proceeded on the footing that the plaintiff was a trespasser and the question for decision was whether under those circumstances he had any right against the railway. Lord Robson said at page 369 :

"In order to make good a case of actionable negligence against them he must show some breach of a duty on their part towards himself." It was also held that the Railway Company was under a duty to the plaintiff not wilfully to inure him or to increase the normal risk by deliberately placing unexpected danger in his way, but thereby a trespasser could not be equated to the position of a person who is carried for reward. Lord Robson .. observed at page 369 :

"* * * to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as, for instance, by a charge to cover insurance against the risk), for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises for a trespasser seeks no leave and gives no notice.

The general rule, therefore, is that a man trespasses at his own risk. This is shown by a long line of authorities, of which *Great Northern Ry. Co. v. Harrison*

(1854) 10 Ex 376 (E); Lygo v. Newbold (1854) 9 Ex 302 (F) and Murley v. Groulfi (1882) 46 JP 360 (G), are familiar examples." Thus according to the Privy Council in a case the facts of which are almost similar to those of the one before us it is to be held that vis-a-vis a railway company the position of a trespasser could not be the same as that of a person whom the railway has undertaken to carry after receiving the proper fare.

17. In (1854) 156 ER 130 (F), the plaintiff contracted with the defendant to carry certain goods for her in his cart. The plaintiff, by the permission of the servant of the defendant, but without defendant's authority, rode in the cart with her goods and as a result of the cart breaking down the plaintiff was thrown out and severely injured. It was held that the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. Pollock; C. B., said at page 130 :

"On the present occasion, the plaintiff brought this accident wholly upon herself. She was of full age, and she got up into the defendants' cart without any right to do so. She ought to have known that she had no authority to do that, and she must, therefore, take all the consequences of her own culpable conduct." See also Lowery v. Walker (1910) 1 KB 173 (H).

18. This principle had been applied in Ismail Haji Nana Mafat Vs. The Bombay Baroda and Central India Railway, In this case the Privy Council case 1911 AC 361 (D), was followed. The plaintiff went to the goods yard of the Dohad Railway Station of the defendant's railway and was crossing the railway lines and was injured as a result, of which his two legs had to be amputated. The Court held that it was impossible to infer against the railway company a licence to the plaintiff to walk across the railway lines on the terms that he should be protected from any passing or moving trains. At page 831 reference was made to the Grand Trunk Ry.- case (D), and after referring to the passage from that judgment which I have quoted, the learned Chief Justice said: "I think that that principle of law applies in this case." Mr. Tek Chand in trying to distinguish this case submitted that the decision is based on contributory negligence of the plaintiff but the judgment of Beaumont C. J. shows that that was not the ratio decidendi. At page 831 (of Bom LR) & (at p. 454 of AIR) the learned Chief Justice said:.

"The plaintiff, as I have said, must be regarded as a trespasser and in my judgment the law is that a railway company is not liable to a trespasser for a mere error of judgment, even amounting to negligence, on the part of its servant which causes damage to the trespasser. If the railway company is liable in such circumstances, then their liability to a trespasser is practically on the same footing as their liability to an invitee--an ordinary passenger on the railway who has paid the company for their services."

19. Another case in which the liability towards a trespasser was canvassed and decided is Caitano De Mello Vs. The Meridian Electrical Engineering Co., In that case a workman went to the house of a customer of defendant No. 1 and without

any authority from defendant No. 1 undertook to repair the electric installation, and in doing so he was electrocuted due to the shock. In a suit for damages it was held that defendants owed no duty to the deceased who was a trespasser on their line.

20. Mr. Tek. Chand submitted that in the circumstances of this case the deceased was accepted as a passenger and it is not necessary that there should have been a contract, and he relies upon a passage from Charlesworth on Negligence, second edition, at page. 103 where it is stated:

"In the cases cited above the plaintiff has been in the vehicle under a contract, although not a contract to which he was a party. It is not necessary, however, that there should be a contract, provided that the plaintiff is accepted as a passenger." But to the facts of the present case this passage has no application because we have already found in this case that the deceased was a trespasser and had not been accepted as a passenger or as an invitee. He also relied upon a passage at page 218 where the dictum of Law Lord Atkin has been quoted.

"I know of no duty to a trespasser owed by the occupier of land other than, when the trespasser is known" to be present, to abstain from doing an act which if done carelessly must reasonably be contemplated as likely to injure him, and, of course, to abstain from doing acts which are intended to injure him."

But that dictum is wholly inapplicable to the facts of the present case, nor is applicable the statement "of the law that it is the duty of an occupier of land not intentionally to inflict injury on a trespasser because there is no question of intentional injury in the present case. But in the very next passage it is stated relying on 1911 AC 361 (D):

"Accordingly, a trespasser on a railway train who was injured in a railway collision caused by the negligence of the railway company's servants was held to be" unable to recover." It has also been held in French v. Hills Plymouth Co. (1908) 24 TLR 644 (K)r

"Where a person in attempting to cross a railway line by means of a track, not a highway, crawled under a line of trucks and was killed owing to the trucks being moved without warning, the railway company were held, to be under no duty to have a man stationed to warn people likely to use the track that the line was being used for traffic."

21. Reference was made to Clerk & Lindsell on Torts at page 691 of the eleventh edition and also to page 613 of Halsbury's Laws of England, Hailsham edition, volume 23, and to Pollock on Torts at page 125 to page 127, but none of these passages is of any help because they deal with different circumstances. In the present case the deceased was a trespasser as he was on the train without permission and against the express directions of the railway servants, and the case, in my opinion, falls within the rule laid down by the Privy Council in 1911 AC 361 (D).

22. It is then contended that Sohan Singh Nanda was a passenger within Section 82A of the Railways Act and the plaintiffs are therefore entitled to damages, and reliance is placed on *Nur Muhammad v. King Emperor* 31 Pun Re Cr 1905 (L). In that case the accused travelled on the footboard of a first class compartment and while he was talking to the Civil Surgeon who was travelling by the same compartment he went on standing for 400 yards while the train was in motion, when he jumped down and "escaped rather badly" and on proceedings being forwarded to the Chief Court it was held that such a person was a passenger.

It was held that he had no ticket and "was a trespassing passenger, but by remaining on the footboard after the train had started, he made himself a passenger." The facts in that case seem to be different. The accused had gone to the railway station and was talking to a Civil Surgeon who was travelling in the first class and when the train started he also got on to the train. It may be that for purposes of that case he was a passenger but this is no authority for the proposition that anybody who travels against the injunctions of the railway officials in a train which is not meant for carrying passengers but goods can also be called a passenger.

In *The Lion* (18G9) 2 PC 523 (M), which was a case under the Merchant Shipping Act of 1854, the Captain of a ship carried his wife and father-in-law in the ship without the knowledge of the owners. It was held that they were not passengers within the meaning of the Merchant Shipping Act. Sir Robert Phillimore who decided the case in the lower Court said :

" * * the payment of fare would appear to be a necessary incident for the constitution of a passenger in the legal sense of the term, both as to his rights and duties."

(See LR 2 Ad and E 102 (N)). But the correctness of this view has been doubted and at page 2110 of Stroud's Judicial Dictionary it is stated;

"An ordinary payment of fare would, of course, be clear proof that a voyager was a passenger; but it is submitted that a voyager (other than the officers and crew) is a passenger, though he pays no fare, if the owners of the ship carry him in pursuance of an obligation or duty (*Judgment of P. C., The Lion* (M), sup.)."

23. Reference may now be made to some American cases which deal with persons travelling on goods trains. In all these cases it has been held that a person travelling as an invitee or a licensee can be a passenger but not otherwise. In *Candiff v. Louisville, N.O. & T Ry. Co.*, 7 Southern Rep 601 (O), it was held that a brakeman employed on a goods train has no implied authority to bind the company by a contract of passage, and his permission to person to ride does not make such a person a passenger.

In *Simmons v. Oregon Railway Company*, 69 Pacific Rep. 1022 (P), it was held that a conductor of a goods train having authority to receive and carry persons

on his train Will make the carrier liable to such persons, as passengers, for injury from negligence of operations of the train. At page 1023 Bean J. said :

"Generally speaking, a passenger is one who travels in a public conveyance, by virtue of a contract, express or implied, with the carrier; and a carrier of passengers is one who undertakes to carry persons from place to place gratuitously, or for Hire." In another American case *Gardner v. St. Louis Railway Company*, 93 Southwestern Rep 917 (Q), Bland, P. J., said:

"The defendant had the right to carry or not to carry the plaintiff, or any other passenger, on its freight trains, but when it agreed to carry plaintiff upon such trains at any and all times, when he should desire to travel thereon, as to him it was a common carrier of passengers."

24. The following passage from the judgment of Folt, J., in *Vandalia Ry. Co. v. Darby* 108 Northeastern Rep 778 (R) is important:

"However, a person who becomes a passenger on a freight train assumes the risks and inconveniences necessarily and reasonably incident to such means of transportation, when he voluntarily chooses the same."

In *Chesapeake & O. Ry. Co. v. Smith*, 172 Southwestern Rep 1088 (S), it was held that one riding in the caboose of a freight train under agreement of the conductor to so take him, in consideration of his assistance in loading and unloading freight, is a passenger, as regard liability of the company for injury thereon.

25. I may revert to *Simmons v. Oregon Railway Co.*, 69 Pacific Rep 1022(P), where it was held that a railroad company may separate its passenger and freight businesses providing certain trains in which passengers may be carried and others devoted to the exclusive transportation of freight, and in such a case the conductor of a freight train had no implied authority to receive passengers thereon or to bind the company by his conduct in so doing.

28. In another American case *Gray v. Columbia River Railway Co.*, 88 Pacific Rep 297 (T-U), the servant of contractor who had entered into a contract with the Railway Company to have his servants transported in the Company's trains travelled by a tank car and was injured. It was held that he was a passenger because he was permitted to ride by the conductor of the train. A person having a ticket for passage upon a railroad, who boards a train which does not carry passengers believing the ticket to be good on that train, is to be treated as a passenger and is not a trespasser (*Bogges v. Chesapeake & Ohio Ry. Co.*, (1894) 23 LRA 777(V)). At page 779 Branuon, J., said --

"Having a ticket, and getting aboard a wrong train, believing his ticket would entitle him to ride upon it, he is not a trespasser, but a passenger.""

27. None of these cases which I have quoted above makes a trespasser a passenger and in every case it was held that the passenger was one who

travelled either with the permission of a conductor of a train or one who travelled under a contract with the railway company, whether the contract was entered into between him or between the master and the railway company, or was a person who travelled by a train under a wrong ticket believing that it was available by the train he was travelling by. In none of these cases was it ever held that a trespasser who insisted on travelling without permission, without payment of fare or an intention of paying fare was a passenger.

28. It is not, of course, necessary that there is a contract for carriage or a contract to which the plaintiff injured and demanding damages is a party; it is sufficient if the plaintiff is accepted as a passenger (see Charlesworth on Negligence, third edition, page 114). But even this passage does not indicate that a person can be a passenger without a contract without being accepted and against the express injunctions of railway servants.

29. Counsel for the respondents strongly relied on the following passage from Charlesworth on Negligence, third edition, at page 115:--

"If the passenger has got on to the vehicle fraudulently intending not to pay his fare, or to pay only part of his fare or to pay only third-class fare while travelling first class, he has still been accepted as a passenger and is entitled to sue for injuries caused by negligence"

but the authority on which this passage is based is not given. The cases which are quoted in various text books deal with passengers who have travelled in a first class compartment and have paid only third class fare, or the case of a child who was travelling with his mother without having paid the fare. In every Case which has so far been decided was the case of a traveller who had been accepted as a passenger even though it may be by fraud.

To the case of persons who in breach of a bye law and without the permission of the railway company travel on a train which, to their knowledge, is not a passenger train and are injured as a result of the negligence of the railway company's servants, the rule laid down in 1911 AC 361 (D), applies because in that case they are trespassers. If a servant without the authority of his master and acting outside the scope of his employment allows a person to become a passenger, the master is not liable to him because that person is a trespasser: see (1946) 1 All ER 202 (C), a case which I have already referred to *Conway v. George Wimpey & Co.* (1951) 2 KB 266 (W), is a case of a similar kind.

30. A review of all these authorities shows--

(1) that generally speaking a passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied;

(2) that a person who travels contrary to a bye law and against the wishes of a railway servant is a trespasser and he cannot recover if as a result of negligence of the carrier, he suffers injury;

(3) that if a person steals a ride on a goods train knowing that such a train is not meant for the carriage of passengers, or, even on the case made out by the plaintiffs, is meant only for refugees, then the plaintiffs at least cannot recover damages as according to their own case the deceased does not fall in that category;

(4) that a railway servant, who under the law has not the power to permit a person to travel in a railway carriage, cannot give permission to a traveller to travel by a railway train and if he does so, his act is not binding on the railway company. The act of such a railway servant in allowing a lift to a person, if it is outside the scope of his employment, does not make the employer liable to damages because it is the performance of an act which the servant is not employed to perform; and

(5) that in the present case it has not been proved that the servants of the railway had allowed any passenger to travel by the goods train which left Ambala Cantonment on the 10th of October 1947, and if the deceased travelled by such a train, the railway administration is not liable.

31. In view of my finding as to the liability of the railway to a trespasser it is not necessary to discuss any other point and I would therefore allow this appeal, set aside the Judgment and decree of the Court below and dismiss the plaintiffs' suit but in the circumstances of the case the parties will bear their own costs throughout.

Kesho Ram Passey, J.

32. I agree.