

(1987) 10 KL CK 0033

In the High Court Of Kerala

Case No : M.F.A. No's. 235, 248, 260 and 265 of 1985, 655, 697, 698, 699, 700, 701, 702, 704, 705, 706, 707, 715, 716, 717, 718, 719, 720, 722, 723, 724, 725, 729, 730, 760, 761, 762, 763, 768, 769 and 770 of 1986 and Cross Appeal in 260 and 265 of 1985 and Cross

United India Insurance Co. Ltd.

APPELLANT

Vs

A. Premakumari and Others

RESPONDENT

Date of Decision : 14-10-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, 80

Motor Vehicles Act, 1939 — Section 110A, 110B, 110F, 95(2), 95(4)

Citation : (1988) ACJ 597 : (1989) 66 CompCas 818

Hon'ble Judges : K.G. Balakrishnan, J;K. John Mathew, J

Bench : Division Bench

Advocate : P.N.K. Achan and P.N. Raveendran, for the Appellant; P. Ramanujam, P. Premkumar, K.I. Mayankutty Matha, M. Cherian, Saramma Cherian, T.L. Tomy, P.K. Balasubramoni and Titus Mani, for the Respondent

Judgement

Balakrishnan, J.—These appeals have been filed against the judgments in O. P. (MV) No. 10 of 1982 and connected cases, the details of these M. F. As are given in the appendix.

2. Some of the Government servants working in the Survey and Land Records Department of Tamil Nadu State along with their dependants and others set out for a tour to visit some important places in Kerala. Their tour programme was spread over a period of 11 days. They hired a bus bearing registration No. TMX 1755 belonging to Kartheepan Tourist Bus Service owned by the second respondent, Arumughan. One Rajan was the manager of the tour programme. There was only one driver to cover the entire distance. After about five days of travel, they reached Trivandrum on May 9, 1979, and in the morning on the same day, they left for Cochin. It would appear that there was some delay and they were behind schedule and some of the passengers were finding fault with the driver for that. This caused some misunderstanding and so the driver was not

very much friendly with a section of the passengers. It is alleged that when some of the passengers teased the driver, he in turn told them that he would abandon the bus and leave the passengers in a forest. By noon they reached Cochin. They intended to visit Kalady and Guruvayoor, and so proceeded to Kalady via Angamali. They had to pass through the railway level crossing at Akaparamba to reach Kalady. The bus reached Akaparamba level crossing at about 3 p.m. It was an unmanned level crossing without any stile, handrail or gate. There was not even a proper caution board. The caution board which was already there was moth-eaten and the writings thereon could not have been deciphered by any one. The driver of the bus drove the vehicle right up to the railway track. The passengers in the bus saw the oncoming train. They shouted and cried in panic to take the vehicle away from the track. The bus remained in the track. The Jayanti Janatha Express coming from the southern side rammed into the bus. The bus was pushed off and it whirled and got entangled and was carried along with the train. The bus and the mutilated human bodies were dragged to a distance of 500 metres by the locomotive engine. Several passengers in the bus were battered into pieces. Those who survived this ghastly accident lost either their limbs or other vital organs. About 40 passengers and the driver died and some miraculously escaped with serious injuries.

3. Altogether, 32 claim petitions were filed before the Motor Accidents Claims Tribunal, Ernakulam, u/s 110A of the Motor Vehicles Act (hereinafter referred to as "the Act") for compensation. 23 claim petitions were filed by the dependants of those who lost their lives in the accident and 9 petitions were filed by injured persons. Two cases, namely, M. V. O. P. No. 10 of 1982 and 1371 of 1980 were dealt with separately and disposed of by a common judgment dated September 27, 1985. In those two cases, the Union of India represented by the General Manager of Southern Railway, Madras, was imp leded as additional third respondent (hereinafter referred to as "the railway "). The Tribunal found that the negligence of the driver of the bus as well as the Southern Railway Management caused the accident and they were held to be liable to pay compensation. M. F. A. No. 260 of 1985 and 265 of 1985 are the two appeals filed by the Railways challenging the finding of the Tribunal in these two claim petitions. MFA No. 235 of 1985 and 248 of 1985 are the appeals filed against the very same judgment by the third respondent. United India Fire and General Insurance Company (hereinafter referred to as "the insurance company").

4. The other 30 claim petitions were jointly tried and disposed of by a common judgment dated February 8, 1986. In those petitions the Tribunal held that the accident occurred as a result of the exclusive negligence of the driver of the bus and the Railways was not liable to pay any compensation. The insurance company was directed to pay the entire amount awarded. The 30 appeals are filed by the insurance company which contended before the Tribunal that they had issued only an "Act policy" to cover the minimum liability envisaged u/s 95(2) (b)(ii)(2) and (4) of the Motor Vehicles Act, 1939. The Tribunal, relying on the decision in *Motor Owners' Insurance Co. Ltd. v. Jadavji Keshavji Modi* [1982] 52

Comp Cas 454 (SC), rejected that contention and held that the company was liable to pay the full amount.

5. The insurance company has a further contention that, in any view of the case, the Railways was equally negligent in keeping an unmanned railway level crossing in a busy area having much vehicular traffic and so the Railways also should be made liable. We heard all the 34 appeals jointly and we propose to dispose of the same by this common judgment.

6. The first contention raised by counsel for the insurance company was that there was only an "Act policy " and the liability of the insurance company was only to the tune of Rs. 5,000 for each claimant, and that too subject to an overall maximum of Rs. 75,000. It was also contended that the decision in *Motor Owners' Insurance Co. Ltd. v. Jadavji Keshavji Modi* [1982] 52 Comp Cas 454 (SC), mentioned above does not apply to the facts of this case since that decision related to the interpretation of Section 95(2)(a) only as in that case the vehicle was a goods vehicle. Section 95(2), as it stood at the time of accident, read as follows:

95. Requirements of policies and limit of liability.--...(2) Subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:

(a) Where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees (other than the driver) not exceeding six in number, being carried in the vehicle.

(b) Where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,--

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers-

(1) a limit of fifty thousand rupees in all where the vehicle is registered to carry not more than thirty passengers;

(2) a limit of seventy-five thousand rupees in all where the vehicle is registered to carry more than thirty but not more than sixty passengers;

(3) a limit of one lakh rupees in all where the vehicle is registered to carry more than sixty passengers; and

(4) subject to the limits aforesaid, ten thousand rupees for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passenger in any other case."

7. In the instant case, the vehicle was a tourist bus having a seating capacity of more than 30 passengers. Therefore, the relevant provision that applies to this

vehicle was Section 95(2)(b)(ii)(2).

8. Since the decision in *Motor Owners Insurance Co. Ltd. v. Jadavji Keshavji Modi* [1982] 52 Comp Cas 454 (SC), was in respect of a goods vehicle, the principles laid down therein cannot be applied to the facts of this case. There is substantial difference between clause (a) and clause (b) of Section 95(2) of the Act. This court has noticed this difference in two decisions. In *Madras Motor and General Insurance Co. Ltd. v. V. P. Balakrishnan* [1982] ACJ 460 (Ker), a Division Bench of this court considered the decision of the Supreme Court in *Motor Owners Insurance Co. Ltd. v. Jadavji Keshavji Modi* [1982] 52 Comp Cas 454 and Khalid J., as he then was, speaking for the Bench, held that the decision of the Supreme Court had no application to a case covered by Section 95(2)(b) of the Act. In another case, namely, *M. K. Kunhimohammed v. P. A. Ahmedkutty* [1987] 63 Comp Cas 14 (Ker) again this court considered this question and held that the decision in *Motor Owners Insurance Co. Ltd. v. Jadavji Keshavji Modi* [1982] 52 Comp Cas 454 has no application to a case covered by Section 95(2)(b) of the Act and held that the liability of the insurer in respect of individual passengers is the amount specified under Sub-clause (4) to Section 95(2)(b)(ii) of the Act.

9. Learned counsel for the insurance company submitted that though Section 95(2)(b)(ii)(4) of the Act further imposes an overall limit of Rs. 75,000, as a gesture of goodwill, the insurance company is prepared to pay Rs. 5,000 for each claimant, irrespective of the ceiling put by the above section.

10. On a perusal of the policy produced in this case, we are of the view that the liability of the insurance company is limited to the extent allowed by Section 95(2)(b)(ii)(1) and 95(2)(b)(ii)(4) of the Act.

11. According to the owner of the bus and the claimants, the insurance company is not entitled to raise this plea in view of Section 96(2) of the Act.

12. The respondents-claimants contended that though the policy issued by the appellants was only an "Act policy" limiting their liability to third parties, such a plea is not available to the appellants. This contention was urged on the basis of the decision in *British India General Insurance Co, Ltd. v. Captain Itbar Singh* [1959] 29 Comp Cas (Ins.) 60. That was an appeal from the judgments in two suits for damages suffered by the respective plaintiffs as a result of the negligent driving of the cars. The insurance company which had issued a third party insurance policy was made a party. They filed written statements taking defences other than those mentioned in Section 96(2) of the Motor Vehicles Act. The plaintiffs contended that the written statements should be taken off the records on the ground that the insurer could defend the action only on the plea specified in the sub-section and on no others. The High Court upheld the plaintiff's objection. In the appeal filed by the insurance company in the Supreme Court, the question was whether the defences available to the insurer added as a party u/s 96(2) are only those mentioned therein. The Supreme Court discussed the provisions at length and rejected the argument on behalf of the insurance

company and held that an insurer is not entitled to take any defence which is not specified in Sub-section (2) of Section 96. Speaking for the Bench, A. K. Sarkar J. held (headnote of *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*,):

" Apart from the statute, an insurer has no right to be made a party to the action by the injured person, against the insured causing the injury. Sub-section (2) of Section 96, however, gives him the right to be made a party to the suit and to defend it. The right, therefore is created by statute and its content necessarily depends on the provisions of the statute. Sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it. When the grounds of defence have been specified, they cannot be added to. The only manner of avoiding liability provided for in Sub-section (2) is through the defences therein mentioned. Therefore, when Sub-section (6) talks of avoiding liability in the manner provided in Sub-section (2), it necessarily refers to these defences. It cannot be said that in enacting Sub-section (2), the Legislature was contemplating only those defences which were based on the conditions of the policy."

13. This court decided several cases based on the decision in *British India General Insurance Co. Ltd. v. Captain Itbar Singh* [1959] 29 Comp Cas (Ins.) 60 (See *United India Fire and General Insurance Co. Ltd. v. Kalyani* [1985] 58 Comp Cas 746 (Ker) and *New India Assurance Co. Ltd. v. O. V. Radhakrishnan* [1983] ACJ 475 (Ker)). In *Kesavan Nair v. State Insurance Officer* [1971] ACJ 219, this court held that an insurer is entitled only to those defences as are specified in Section 96(2) of the Motor Vehicles Act. There is a catena of decisions in *British India General Insurance Co. Ltd.*'s case [1959] 29 Comp Cas 60 (SC).

14. Learned counsel for the insurance company contended that in several cases, the Supreme Court restricted the liability of the insurance company in terms of the policy issued by the insurance company. Our attention was drawn to the decision in *British Indian General Insurance Co. Ltd. v. Maya Banerjee* [1987] 61 Comp Cas 359 (SC). It was contended that u/s 96(1) of the Motor Vehicles Act, the liability of the insurance company is only to satisfy the decree for any sum not exceeding the sum assured thereunder and, therefore, the insurance company is not liable to pay any amount in excess of the amount covered by the insurance policy. It was also pointed out that the grounds mentioned u/s 96(2) (a) are defences open to the insurance company to resist the decree for any amount payable "under Sub-section (1) of Section 96. Counsel for the insurance company relied on the opening words in Section 96(2) of the Motor Vehicles Act which is to the following effect:

" 96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks.--(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment, unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment so long as

execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :--" (Emphasis* supplied).

15. There is some force in this argument of learned counsel for the insurance company. However, we do not go into that question since we feel that the decision in *British India General Insurance Co. Ltd. v. Captain Itbar Singh* [1959] 29 Comp Cas 60 may not be applicable to the case in hand. The decision *British India General Insurance Co. Ltd. v. Captain Itbar Singh* (supra) makes it clear that the insurance company could have raised all the contentions if there was such a clause in the policy. On a perusal of the policy, it seems that the insurance company has reserved their right to challenge the claim on any grounds. Condition No. 2 reads as follows :

" No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of the insured without the written consent of the company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the settlement of any claim and the insured shall give all such information and assistance as the company may require."

16. This is a condition specifically empowering the insurance company to raise all contentions. A similar question arose in *Madras Motor and General Insurance Co. Ltd. Vs. Jagadeeswari and Others*, A Division Bench of the Madras High Court, after reference being made to *Captain Itbar Singh's* case [1959] 29 Comp Cas 60. held (AIR 1974 Mad 319);

"But the Supreme Court in paragraph 16 at page 1335 (at page 66 of 29 Comp Cas (Ins)), in the abovesaid decision has laid down that the insurer has the right provided he has reserved it by the policy to defend the action in the name of the assured and if he does so, all the defences open to the assured can then be urged by him. This is an important right conferred on the insurance company provided, in the insurance contract, the company has reserved by its policy the right to defend the action in the name of the assured, although such right is not conferred u/s 96(2) of the Act. In the policy issued by the appellant, there is a condition, namely, condition No. 2 which provides that no admission, offer, promise, or payment shall be made by the insured without the written consent of the company, which shall be entitled if it so desires to take over or conduct in the name of the insured the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the company may require. According to this condition, the insurance company would be entitled if it so desires to take over and conduct, in the name of the insured, the defence or settlement of any claim. Full discretion is conferred on the

insurance company in the conduct of any proceeding for settlement of any claim. The Supreme Court has held that such a clause would enable the insurance company to raise all the defences that will be open to the insured in spite of the fact that Section 96(2) does not confer any such right on the insurance company."

17. We are respectfully in agreement with the above reasoning and hold that the liability of the insurance company is only to the extent of Rs. 5,000 in each claim.

18. The next point that would arise for consideration is whether the Railways were really negligent. Learned counsel for the Railways, Sri. M. G. Cherian, very vehemently contended before us that the accident was exclusively due to the negligence of the bus driver and the Railways were in no way responsible. It was also contended that the Motor Accidents Claims Tribunal had absolutely no jurisdiction to entertain a petition for compensation against the Railways and the proper forum would have been a civil court. It was further contended that in the first two cases the Railways were impleaded only at a belated stage and that too without proper notice to them. Another contention is that the claim against the Railways could not have been entertained without a notice u/s 80, Civil Procedure Code.

19. According to learned counsel for the Railways, a petition u/s 110A of the Act would not lie against any person other than the owner, driver or insurer of a motor vehicle. In other words, the Tribunal has no jurisdiction to entertain an application u/s 110A against a third party like the Railways and even if the Railways were negligent, the proper forum for claiming compensation is a civil court. It was further submitted that u/s 110B of the Act, the Tribunal can pass an award only against the insurer, owner or driver of the vehicle involved in the accident. Reference was made to the pro forma for filing an application u/s 110A of the Act wherein the name and address of the driver, owner and the insurer alone need be filled and this indicated that the Tribunal has no jurisdiction to entertain an application against any person other than these three categories of persons. We are not inclined to accept this contention.

20. The Motor Vehicles Act is a comprehensive code and the Claims Tribunals have been constituted to entertain all claims in respect of accidents arising out of the use of motor vehicles in public places. When death or bodily injury is caused as a result of the negligence of the driver or owner of the motor vehicle, the claimants would be entitled to file applications for compensation before the Tribunal u/s 110-A of the Motor Vehicles Act. Section 11 OF of the Act clearly states that no civil court shall have jurisdiction to entertain any question relating to any claims for compensation which may be adjudicated upon by the Claims Tribunal. Therefore, it is clear that adjudication of all claims for compensation in respect of the accident arising out of the use of motor vehicles is to be done by the Motor Accidents Claims Tribunal. Even though u/s 110B the driver, owner and the insurer are mentioned, it does not curtail the power of the Tribunal to award compensation against any third party whose negligence caused the accident, or who was also negligent along with others. Section 110B cannot be construed as

restricting the ambit of Section 110A. Section 110B of the Act only gives a guiding principle to the Tribunal that in the event of a finding that the owner, driver or the insurer of the vehicle were liable to pay compensation, the Tribunal is given the power to specify the amount which shall be paid by the insurer, or owner or driver of the vehicle, as the case may be, as in some cases the insurer of the vehicle may not be liable to pay the entire amount of compensation.

21. Counsel for the Railways relied on *Madan Lal Jain v. Delhi Municipal Corporation* [1985] 57 Comp Cas 782 (Delhi), to contend for the position that a claim against a person other than the owner, driver and the insurer of the vehicle is not maintainable before the Tribunal. That was a case where a scooterist preferred a claim u/s 110A of the Motor Vehicles Act, before the Tribunal alleging that the Delhi Municipal Corporation failed to maintain roads properly and the petitioner fell in a pit on the road and the scooter overturned and he sustained grievous injuries. The respondents challenged the maintainability of the petition u/s 110A. The court held that a claim of that nature could not be entertained by the Tribunal since the accident had not arisen on account of the use of a motor vehicle. It was held that the Municipal Corporation of Delhi had no connection with the scooter of the appellant. The respondents therein were not involved in any motor vehicle accident and as such the claim against them could not be entertained by the Tribunal under the Act. The remedy, if any, against the respondents for the damages suffered on account of their negligence in maintaining the roads lay only before a civil court and not before the Tribunal. This decision has no bearing on the points involved in this case.

22. In *Jyoti Prasad Dixit v. Bitan Devi* [1986] 59 Comp Cas 348 (All), the claimants wanted to implead the Union of India. The claim for compensation therein arose out of an accident where a bus was hit by a railway engine at an unmanned level crossing. This prayer was disallowed for the reason that the Railways were not negligent on the facts disclosed in that case. Whether a petition u/s 110A of the Act was maintainable or not was not considered by the court.

23. In *Union of India v. Bhagwati Prasad* [1984] 56 Comp Cas 396 (All), a Division Bench of the Allahabad High Court considered this question in detail and held that the Claims Tribunal has jurisdiction to entertain a petition against a third party such as the Railways. A Full Bench of the Punjab and Haryana High Court in *Rajpal Singh v. Union of India* [1986] ACJ 344, considered the question in detail and held that if it is a case where the claim has been filed against the Railway authorities alone alleging that the accident took place entirely because of their carelessness and the negligence of the driver of the train and the gateman, there being no allegation that the motor vehicle in any way contributed to the cause of the accident, it cannot be said that the same had arisen out of the use of the motor vehicle. Therefore, the court held that the claim could not have been entertained by the Tribunal and instead would be competent only in a civil court.

24. In the present case, the contention of the claimants is that the accident occurred as a result of the composite negligence of the driver of the tourist bus and the Railway administration. The accident arose out of the use of the motor vehicle in a public place and the Tribunal has jurisdiction to entertain a petition of this nature u/s 110 of the Act. Section 110F of the Act. clearly prohibits a civil court from entertaining any question relating to claim for compensation which may be adjudicated upon by the Claims Tribunal. Therefore, the Tribunal alone has jurisdiction to entertain the claim petition. Since the claimants alleged that there was negligence on the part of the Railways, they are also necessary party to the claim petition. If the claim against the Railways is to be filed in a civil court, there will be two parallel proceedings in respect of claims arising out of the same accident. That would only lead to multiplicity of proceedings and may result in conflicting findings and the claimants will be put to undue hardship. Section 110A of the Motor Vehicles Act does not expressly prohibit any claim petition being filed against persons other than the driver, owner and the insurer. Therefore, we are of the opinion that in a case where the allegation is that the accident occurred as a result of the composite negligence of either the driver or owner of the motor vehicle and the Railways, the Motor Accidents Claims Tribunal alone has got jurisdiction to entertain a claim for compensation.

25. The next point that arises for consideration is whether the Railways were in any way negligent in causing the accident. The term " negligence " has been explained in Halsbury's Laws of England, Fourth Edition, volume 34, at para 1.

" Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. "

26. In *Blyth v. Birmingham Waterworks Co.* [1856] 11 Exch. 781 : 25 LJ Ex. 212, it was held : " negligence is the omission to do something which a reasonable man guided upon the considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."

27. It is a question of fact whether the defendant has failed to show reasonable care in a particular circumstance. The law lays down the general principles which determine the standard of care applicable to its finding of facts so as to decide whether the defendant has attained that standard. "The legal standard is not that of the defendant himself, but that of a person of ordinary prudence or of a person using ordinary care or skill. It is no defence that a person acted to the best of his own judgment, if his best is below that of a reasonable man ". In a case of alleged negligence, the court will have to decide whether the defendant was negligent or not, applying this general principle after determining the standard of care required in the particular circumstance of that case. To make the negligence on the part of the Railways actionable, it is necessary that there

should be a duty owed by them to the claimants to take due care, and the failure to perform that duty in fact gives the right to the claimants to bring a claim for damages.

28. u/s 13 of the Indian Railways Act, 1890, the Central Government may require that, within a time to be specified in the requisition, or within such further time as it may appoint in this behalf, suitable gates, chains, bars, stiles or handrails be erected or renewed by the Railway administration at places where a railway crosses a public road on the level. Section 13 only provides for making a requisition by the Central Government to the Railway administration to erect suitable gates, etc., as provided under Clause (c) of Section 13. It may be remembered that the Railways Act was enacted when the Railways were being run by companies. Now, since the Central Government is running the railways, it is the duty of the Government to give effect to this section.

29. In *Yatayat Nigam, Udaipur v. Union of India* [1983] ACJ 312 (Raj), a question of similar nature came up for consideration and the court held (at page 317):

" There was an obligation on the part of the Railway administration to ensure that wherever the railway passes over a thoroughfare, adequate warning should be given to the public of the passing of the trains so that accidents may be avoided. The duty in this respect, though not statutory, is implied and inherent in the functions to be discharged by the Railway administration in the matter of running their trains. In this case, the Railway administration did not take adequate steps to warn the public of approaching trains. The Railway administration failed to take steps by providing chains or bars or a gate. No person was employed as a watchman to warn the user of the road regarding the approaching of trains on the track of the level crossing. This amounted to negligence on the part of the Railway administration."

30. A similar question came up for consideration before a Division Bench of the Assam High Court in *Swaranlata Barua v. Union of India* [1958] ACJ 365 : AIR 1963 GAU 117. That was a case where a train dashed against the rear side of a truck at a level crossing. Railways contended that there was no negligence on the part of the Railway administration. The court considered the question in detail and held (at p. 121 of AIR):

" We are clearly of opinion that there is an obligation on the part of the railway company or administration to ensure that whenever the railway passes over a thoroughfare, adequate warning should be given to the public of the passing of the trains at the time they pass so that accidents may be avoided. This duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the Railway administration in the matter of running their railways. There is no doubt and it is not disputed that had the Railway administration taken the precaution of either putting up a railway gate and keeping it closed at the time the train was due to pass or put up some other construction, which could prevent the public from passing over the level crossing

giving them information and notice of the approaching train, and the accident of the kind that happened in this case could not occur."

31. Under common law, it is the duty of the Railways to take all reasonable precautions to reduce the danger to a minimum and at level crossings the Railways must ensure safe crossing. (See *Thomas v. British Railways Board* [1976] QB 912 : [1976] 3 All ER 15 (CA). In that case, a child aged two years wandered on the line and suffered injuries since the stile fixed at the crossing of the railway and the public path had fallen. It was held that the Railway Board was liable both for breach of Section 61 of the 1845 Act and at common law as well. In *Smith v. Railway Executive* [1948] WN 276 : 1 CIC 8234 ; the court held that it was the duty of the Railways under common law to render crossings safe and in particular to see that there was nothing in the nature of a trap at level crossings.

32. Where there is railway crossing at which vehicular traffic is passing, it is the duty of the Railways either to fix a gate or a chain or at least to post a man to warn the drivers of vehicles, of an approaching train. Caution boards have to be fixed at a reasonable distance asking the road drivers to be beware of the trains. The whistling by the driver of the train can only be a supplement, but cannot replace the gates or caution board as a device to protect the users of the crossing.

33. In the instant case, there were no gates, chains or handrails on either side of the railway track. It is said that there was a caution board, but the evidence is to the effect that the writings therein were not decipherable as the board was eaten away by white ants. The level crossing is situated in a busy area. Admittedly, the railway track was an important one where more than half a dozen express trains were passing every day. The Bombay-Trivandrum Jayanthi Janatha Express is usually running at a speed between 70 and 80 kilometres per hour. At the relevant time, the train was running at a speed of 75 kilometres per hour. The driver saw the bus at a distance of 100 feet and he is alleged to have applied the brake and the braking distance of the train was about 500 to 600 metres and, therefore, he could not avert the accident. The driver of the railway engine also deposed that he had blown the whistle at that time and there was no negligence on his part. It is true that the accident was beyond the control of the engine driver. Moreover, an engine driver's duties are entirely different from those of the road driver. The engine driver is driving on a fixed track and he is supposed to watch for the signals and he has to adhere to the time schedule. Even so he must take all reasonable steps to ensure the safety of the passengers in the train and, to the extent possible, the travellers on the road who cross the railway line. Exhibit B-3 is the enquiry report by the Railway Enquiry Commissioner who conducted the enquiry. In exhibit B-3, Commissioner held that the driver was not negligent.

34. It was contended by counsel for the Railways that the accident happened entirely due to the negligence of the driver of the bus. It is true that there is

some evidence to the effect that when the bus reached the railway track, the passengers cried out aloud to remove the vehicle immediately. It is important to note that the conductor of the bus could not say whether the engine of the bus was working at that time. It is quite possible that the engine suddenly stopped and the driver might have taken all steps to restart the engine to remove the vehicle from the track and before he could do so, the train came and hit the bus. The evidence adduced in this case is not sufficient to hold that there was criminal negligence on the part of the driver of the bus and that he deliberately allowed the bus to be smashed by the train. The conductor, B, Vittal, and the manager, Rajan, were not in a position to say whether there was any mechanical trouble and the bus remained in the track, despite the best efforts of the driver to remove the vehicle from the railway track. Evidence is wanting on this particular aspect. Therefore, the finding of the Tribunal that the accident is the result of the sole negligence of the driver of the bus is without any basis. It is true that there was negligence on the part of the driver and he ought to have been very cautious when he realised that the bus was crossing a railway track. But it is quite likely that he might have made a miscalculation and thought that he could cross the railway line before the train reached the crossing. It was contended on behalf of the Railways that when the bus approached the unmanned railway level crossing, he should have stopped the vehicle and the conductor of the bus ought to have got down from the bus and ascertained whether the railway track on both sides was Clear as provided in Rule 121 of the Motor Vehicles Rules. But it may be noted that the bus driver was a person hailing from Tamil Nadu. He had no familiarity with the place of accident. There was no caution board or any other obstruction in the road to show that the road was cutting across a railway line. There were no gates or handrails to alert the passerby. Therefore, it is quite possible that the driver might have sped the bus without really knowing the impending danger.

35. In M. V. O. Ps Nos. 10 of 1982 and 1371 of 1980, a person residing very close to the place of accident was examined as PW-2. He has deposed that the road was a busy road where about 300 vehicles used to ply in a day. He also stated that there were shrubs and bushy growth on either side of the track causing some obstruction to seeing the oncoming train. According to him, he saw the accident by standing at a distance of 300 feet.

36. Had the Railways taken some precautionary measures, such as erecting handrails or gates, a serious calamity like this could have been averted. In the absence of a gate and a caution board, the level crossing was in the nature of a trap. Taking the entire evidence and circumstances into consideration, we are of the view that the Railway administration was also negligent in causing this accident. Accordingly, we hold that the accident occurred as a result of the composite negligence of the Railway administration and the driver of the bus TMX 17SS belonging to the second respondent, Arumugham.

37. Learned counsel for the Railways seriously urged before us that there were

no allegations of negligence against the Railways, by the claimants in any of the claim petitions and the claimants only alleged negligence against the bus driver. It was contended that in the absence of pleading, the finding of the Tribunal in M.V.O.Ps. Nos. 10 of 1982 and 1371 of 1980 was unwarranted. We do not find any force in this argument for the reason that in a claim petition, there is only an initial burden of proof on the claimants. Of course, the burden of proof in an action for damages for negligence rests primarily on the claimants who, in order to maintain the action, must show that he was injured by the negligent act or omission for which the defendant, in law, was responsible. If the claimants prove injury resulting from conduct which can reasonably be explained only by attributing it to the defendant or it points prima facie to a breach of duty on the defendant's part, the burden to prove otherwise is shifted and it is for the defendant to show that he has taken all reasonable precautions to avert the act complained of.

38. In the instant case, the claimants proved that the bus was smashed by the train and the entire accident happened in a level crossing. Claimants also proved that the level crossing was unmanned and there were no gates or handrails or a proper caution-board to warn the users of the vehicles. The claimants have satisfactorily discharged their initial burden and it was for the Railway administration to prove that they had taken all reasonable precautions to avoid the accident. Moreover, all the parties before the Tribunal were aware of the contentions of both sides and adduced evidence accordingly. Mere absence of pleading, if any, is not a valid ground to reject any claim which is otherwise proved by satisfactory evidence. It is also important to note that in proceedings before the Motor Accidents Claims Tribunal, there need not be strict adherence to the rules relating to pleadings. The contention of the Railways that the claimants had not specifically pleaded negligence of the Railways is without any merit.

39. Another contention urged by counsel for the Railways was that no. notice was sent to the Railways claiming damages and notice u/s 80, Civil Procedure Code, should have been issued before initiating the proceedings before the Motor Accidents Claims Tribunal. Section 80, Civil Procedure Code, is applicable only in case a suit is filed against the Railways before a court. An application or a petition u/s 110A of the Motor Vehicles Act for compensation is not in the nature of a regular suit and it is not filed before a civil court. Therefore, Section 80, Civil Procedure Code, has no application.

40. Learned counsel for the Railways, Shri M. G. Cherian, pointed out that in these cases the insurance company alone has filed an appeal and no cross-objections have been filed by the claimants challenging the finding of the Tribunal, and, therefore, this court may not alter the decision of the Tribunal and enter a finding regarding negligence on the part of the Railway authorities. u/s 110C(2), the Claims Tribunal shall have all the powers of a civil court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material

objects. It has also been made clear that the Claims Tribunal shall be deemed to be a civil court for all purposes and the provisions of the CPC are made applicable to all the proceedings before the Tribunal. Under Rule 21 of the Motor Accidents Claims Tribunal Rules, 1977, certain provisions of the CPC are made applicable to the proceedings before the Claims Tribunal. In the case of appeals, the provisions contained in Order XLI of the CPC is applicable.

41. Order XLI, Rule 33, gives the parameters of the powers of the appellate court. Order XLI, Rule 33, is as follows:

" 33. Power of Court of Appeal.--The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order, as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the appellate court shall not make any order u/s 35A in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

42. The Supreme Court had occasion to consider the scope and ambit of Order XLI, Rules 22 and 33 of the CPC in *Pannalal Vs. State Bombay and Others*, and held (headnote):

" The wide wording of Order 41, Rule 33, was intended to empower the appellate court to make whatever order it thinks fit not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require". If there was no impediment in law, the High Court in appeal could, therefore, though allowing the appeal of the defendant-appellant by dismissing the plaintiff's suits against it, give the plaintiff-respondent a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the rule make this position abundantly clear, the illustration puts the position beyond argument.

43. If a party who could have filed a cross-objection under Order 41, Rule 22, has not done so, it cannot be said that the appeal court can, under no circumstances, give him relief under the provisions of Order 41, Rule 33.

44. In *Srisailam Devasthanam v. Bhavani Prameelamma* [1985] 58 Comp Cas 816, the High Court of Andhra Pradesh held that Order XLI, Rule 22, was applicable in an appeal preferred against the judgment of a Claims Tribunal. That

was a case in which the maintainability of the cross-objection was challenged. The same reasoning applies in cases where the applicability of Order XLI, Rule 33. Civil Procedure Code, is also challenged.

45. This court in *Vijayaraghavan v. Velu* [1973] KLT 333 considered the scope of Order XLI, Rule 33. This court held that although an appeal under the Workmen's Compensation Act can be filed only on a substantial question of law, once the appeal is filed, the whole case is before the High Court and the court can go into questions of law and fact. In exercising that power, the person who has not been made liable or who has been exonerated from liability can be made liable, if he is a party to the appeal and was given an opportunity to show cause against it. This court further held that in exercise of the power of the civil court under Order XLI, Rule 33 of the Civil Procedure Code, it is open to a court of appeal while granting relief to the appellant to pass a decree in favour of a non-appealing respondent against another respondent in case the circumstances justify such a course. It may be noted that u/s 110D of the Motor Vehicles Act, an appeal shall lie against any award of Claims Tribunal, if the amount in dispute in the appeal is more than Rs. 2,000. The right to file an appeal is not restricted to cases wherein a substantial question of law is involved. The powers of this court under Order XLI, Rule 33, are wide enough to pass any appropriate order or direction in these appeals. This court has taken a similar view in *A. R. Sudhakaran v. M. K. Varghese* [1984] 55 Comp Cas 592.

46. In view of the provision contained in Order XLI, Rule 33, this court is fully empowered to find that the Railways is liable to pay compensation even though the claimants have not come forward with cross-appeals. The pleas raised by the appellants herein are sufficient to consider the respective liabilities of the joint tortfeasors.

47. In MFA No. 770 of 1986, the claimants have filed cross-objections. The claimants have sought for a compensation of Rs. 56,000. The Tribunal had granted only Rs. 31,000. The details of the heads of the claim are not specified in the award. This is a case in which the compensation is claimed for the death of the father of the claimants R-1 to R-3. The claimants have claimed Rs. 20,000 as compensation for the loss of guidance and affection. It is important to note that the claimants herein have lost their father and another in the accident. Therefore, the Tribunal ought to have granted compensation for loss of affection and we hold that Rs. 10,000 would be a reasonable amount and, therefore, the compensation amount of Rs. 31,000 is enhanced to Rs. 41,000.

48. In MFA No. 699 of 1986, the claimants have filed a cross-objection. A sum of Rs. 6,000 was claimed as compensation for pain and suffering. The Tribunal granted only a consolidated amount of Rs. 25,000. The claimants have only prayed for a reasonable amount of Rs. 30,000. Therefore, the compensation of Rs. 25,000 in MFA No. 699 of 1986 is enhanced to Rs. 30,000.

49. We have found that the accident happened as a result of the negligence of

the driver of the bus and also due to the failure of the Railway administration to give protection and precaution at the railway level crossing. This is a case where the accident happened as a result of the composite negligence of the driver of the bus and the Railway administration. In such circumstances, the claimants are entitled to recover the entire amount from any of the joint tortfeasors and there could be one decree against all of them. This view has been expressed by some of the authors on the law of torts. In Anand and Sastri's Law of Torts, Fourth Edition, at page 727, it is said that where an injury has been occasioned by the wrongful act of two parties, the plaintiffs are not required to strictly analyse the proximate or immediate cause of the event so as to find out whom he could sue. The plaintiff may sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons.

50. In the book "Clerk and Lindsell on Torts", 15th edition, at page 585, at para. 11-94, it has been stated :

"If there is more than one defendant, a blameless plaintiff is entitled to full damages and the defendants share the amount by way of contribution or indemnity. If he has been contributorily negligent, then he is entitled to a portion of the damages reduced according to his share of the responsibility, and the amount is divided between the defendants according to their share of responsibility. If these are unequal and one defendant is insolvent (and hence not worth suing), then the other will have to pay the whole sum to which the plaintiff is entitled, which may exceed his own share. On the other hand, to limit the plaintiff's claim against each defendant to the sums representing their respective shares of the responsibility, might create injustice the other way. For, if the more responsible defendant were insolvent, the plaintiff only would get a small sum from the other less responsible defendants. Additional difficulties arise if, in this kind of situation, the plaintiff and defendant have claims inter se. "

51. Therefore, we uphold the findings of the Tribunal regarding the compensation and in the two cases where cross objections have been filed the compensation amount is enhanced as indicated in paragraphs 39 and 40.

52. In MFA Nos. 265 of 1985 and 260 of 1985, the claimants have filed cross-objections. Both these cross-objections have been filed on "the allegation that the Tribunal went wrong in apportioning the liability of the Railway administration and the owner of the motor vehicle. These cross-objections are allowed. In all other claim petitions, the compensation amount awarded by the Tribunal is confirmed.

53. Since this is a case of composite negligence by the respondents in the claim petitions, the award of the Motor Accidents Claims Tribunal is modified and we pass awards for compensation in each claim petition jointly and severally against Arumugham, son of Kuttappa, the owner of bus TMX 1755, and the Union of India represented by General Manager, Southern Railway, and the insurance

company. However, the liability of the insurance company is limited to Rs. 5,000 for each claimant by virtue of the policy issued by them. The claimants are entitled to withdraw the amount deposited in the Tribunal. If any amount is due from the insurance company by way of principal decree amount or interest, the same shall be paid within a period of two months from the date of this judgment.

54. The MFAs are disposed of as above. Considering the facts and circumstances of the cases, the parties are directed to bear their respective costs.