
(1982) 02 RAJ CK 0012

In the Rajasthan High Court

Case No : Civil Second Appeal No. 87 of 1971

Yatayat Nigam, Udaipur

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-02-1982

Acts Referred:

Railways Act, 1890 — Section 13, 7

Citation : AIR 1983 Raj 17 : (1982) RLW 484 : (1982) WLN 273

Hon'ble Judges : S.K. Mal Lodha, J

Bench : Single Bench

Advocate : M.C. Bhandari, for the Appellant; Parmatma Saran, for Bhoj Raj Jain, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mal Lodha, J.—This appeal was allowed after hearing the learned counsel for the parties on Feb. 25, 1982 mentioning that the reasons will be record-ed later on.

2. I proceed to record the reasons.

3. This appeal is directed against the judgment and decree dated Sept. 22, 1970 of the District Judge, Partabgarh, by which he maintained the dismissal of the suit of the plaintiff-appellant.

4. Initially, the averments may briefly be summarised. The plaintiff-appellant instituted a suit against the defendant-respondent Union of India (the owner of the Western Railway Administration) for damages amounting to Rupees 9994.27. The plaintiff owns a passengers Bus No. RIY 1848, This Bus was plied on Bhilwara-Chittorgarh road-It was alleged that, near Medikheda village, the road crosses railway track. In other words, at that place, there is a public level crossing. The road is "S" like bend near the public level crossing. i.e., coming from, towards Bhilwara up to Medikheda, the road runs along the rail-way towards west of it, then it bends towards east to reach the level crossing and

having crossed again, bends towards south to continue its further course towards Chittorgarh. The road is a highway between Ajmer and Chittorgarh. The level crossing, according to the plaintiff at the relevant time, was an open and unmanned level crossing with no gate, no chain barrier, no watchman and there was absolutely nothing to caution the users of the road. On the southern border of the level crossing there was a thick hedge dotted with several big trees; a banyan tree with immense proportions and dense foliage. Along with the west of the railway track and towards the south of the level crossing, there are big trees, "Imli". "Neem" and the like. Further south, a railway quarter was under construction at the relevant time which shielded the railway track on south from the vision of anybody approaching the level crossing from towards North. The plaintiff has stated that the train coming could not be seen by a diligent road user with all care and circumspection. On Feb. 12, 1964, Bus No. RJY 1848 owned by the plaintiff, was running on Bhilwara-Chittor Road. It left village Gangrar and was going towards Chittorgarh. At about 11.45 a.m. it reached Medikheda. As the bus was crossing the level crossing track at Medikheda level crossing and when its major length had already cleared out, a goods train passed. The engine of the goods train struck against the hind part of the bus with great force. As a result of that, the hind part of the bus was pushed off and it whirled. It got entangled and it was carried along the train a few paces, jolted, swerved and then released. The bus was damaged. The body was smashed, front glasses broken front and bent, chassis bent, right, disks cracked, right tyres hursted and springs broke. The goods train coming from Chittorgarh came in silently inasmuch as there was no whistling, no warning and no sound. Even the hissing sound was not heard. The damage of the bus was the direct result of the negligence of the Railway Administration inasmuch as it failed in its legal duty to ensure reasonable safety to a user of the road at the level crossing. It failed to provide barriers, and allowed hedge, trees and railway quarter to obstruct a view of the track on south. The plaintiff has further alleged that the engine driver was negligent in driving through the level crossing at a top speed with-out even sounding a warning whistle. The plaintiff had spent a sum of Rupees 7494.27 on repairs and replacement of the damaged parts of the vehicle. It took about one month for the plaintiff to place the bus on the road, which caused a further loss of Rs. 2500/- in earning. A notice u/s 80, C. P. C. was given to the Railway Administration. The Chief Commercial Superintendent replied the notice repudiating the claim of the plaintiff. It was denied that the accident was due to any fault on the part of the Railway Administration or its staff. The plaintiff instituted the suit as aforesaid.

5. The suit was contested by the defendant on various grounds. A plea was raised that the level crossing was not a public level crossing. It was asserted that the engine driver of the goods train gave whistle but the bus driver did not pay any heed and negligently tried to cross the railway track at that time. The accident, according to the defendant, was due to negligence of the bus driver and not that of the Railway Administration or driver of the goods train. It was

contended that the coming train was visible even from a distance of about 300 paces and that there was a sign post fixed at the beginning of the bend which pointed out that there is a level crossing ahead. This should have alerted the bus driver. There was no obstruction of the railway track and that there was no necessity to make any other arrangements by the Railway Administration. It was stated that the bus driver failed to exercise diligence and prudence, rather acted hastily and negligently and that was the cause of the accident for which the Railway Administration is not liable.

6. The learned Civil Judge framed necessary issues. The evidence of the parties was recorded. The learned Civil Judge found that the plaintiff had incurred expenditure amounting to Rupees 6946.65 on repairs and replacements of the parts of the bus. He however, decided issues Nos. 2 and 3 against the plaintiff relating to the negligence of the Railway Administration and failure to perform the duty to ensure reasonable safety to the user of the road at the level crossing. In view of the findings on issues Nos. 2 and 3, the learned Civil Judge, by his judgment dated Jan. 11", 1969, dismissed the plaintiff's suit. An appeal was preferred by the plaintiff and the learned District Judge, Partabgarh, by his judgment dated Sept. 22, 1970, maintained the dismissal of the suit. Hence the unsuccessful plaintiff has filed this second appeal.

7. I heard Mr. M. C. Bhandari, learned counsel for the appellant and Mr. Parmatma Saran, learned counsel for the respondent.

8. Before I deal with the points raised by the learned counsel for the appellant, I consider it proper to state the findings arrived at by the learned District Judge, which are as under :

(1) that there is a public highway going across the railway track and that on the border of the road near the level crossing, there was a hedge, a banyan tree with dense foliage and on the west of the railway track there were "Imli", and "Neem trees etc.

(2) that, it cannot be said that the Railway Administration was negligent in allowing the hedge, trees etc. to grow up or that it failed to remove them. The only thing that can be said against the Railway Administration is that though it was under the obligation to remove such alleged obstruction like hedge and the trees standing near the level crossing and obstructing the view, their duty became more or less more onerous to take precautions 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;

(3) that the proximate cause for the accident was the negligence of the bus driver and not the negligence of the Railway Administration in not fixing the gates, barriers etc.;

(4) that there was no evidence that the train driver was negligent in any way.

9. Mr. M. C. Bhandari, learned counsel for the appellant challenged the findings of the learned District Judge covering the subject-matter of issues Nos. 2 and 3 and contended that the accident, which caused damage to the plaintiff's bus was due to the negligence of the Railway Administration or its employees and, therefore, the defendant is liable to pay the damages to the plaintiff. He urged that the negligence of the Railway Administration is established even on the findings of the learned District Judge. He further contended that in the facts and circumstances of the case, the question of contributory negligence does not arise and the Railway Administration cannot be allowed to disown its liability on that account.

10. Mr. Parmatma Saran. on the other hand supported the judgment of the learned District Judge.

11. Section 7 of the Indian Railways Act (No. IX of 1890) (for short "the Act" herein) deals with the Authority of Railway Administration to execute all necessary works. u/s 7 (1) (f), of the Act, the Railway Administration is required to do all other acts necessary for making, maintaining, altering or repairing and using the railway. Under Sub-section (2) of Section 7, the exercise of the powers conferred on a Railway Administration by Sub-section (1) is subject to the control of the Central Government.

12. Section 13 of the Act is as under:--

"13. Fences, screens, gates and bars.--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,

(a) boundary marks or fences be provided or renewed by a railway administration for a railway or any part thereof and for roads constructed in connection therewith;

(b) any work in the nature of a screen near to or adjoining the side of any public road constructed before the making of a railway be provided or renewed by a railway administration for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway;

(c) suitable gates, chains, bars, stiles or hand-rails be erected or renewed by a railway administration at places where a railway crosses a public road On the level;

(d) persons be employed by a railway administration to open and shut such gates, chains or bars." The duty of a Railway Administration at a level crossing has been expressed by Mellor, J., in *Cliff v. Midland Railway Co.*, (1870) LR 5 QB 258 as follows:

"..... When Parliament authorises a company to construct a railway and to work it, it is implied in it that the company are to work it in a reasonably proper

manner, in the usual way in which railways are worked; and in crossing a footway on a level, the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling and whistling, or other ordinary precautions in the working of a railway to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway."

(underlining is mine)

As regards the level crossing over a public carriage road, the Railway Administration must employ persons to open and shut the gates, chains or bars and such gates etc. must be kept constantly closed against the roads on both sides of the railway, except when horses, cattle or vehicles are crossing and must be closed again as soon as such traffic has passed. The persons employed by the Railway Administration to open and shut the gates are, before opening them, bound to see that the railway is safe for the purpose of crossing, and if they open the gate when it is unsafe to cross, they do so at the Railway Administration's peril.

13. In *Union of India v Lalman Badri Prasad*, AIR 1954 Vindh Pra 17, the learned Judicial Commissioner observed as under (at p. 20) :

"A level crossing is on the one hand a danger spot in view of the possible movement of trains, and on the other is an invitation to the passerby. This is a public crossing and not merely one by private accommodation. Therefore it is the legal duty of the railway to assure reasonable safety. The most obvious way of doing it is to provide gates or chain barriers and to post a watchman who should close them shortly before the trains pass.

But failure to do so is not by itself an act of negligence provided that the railway had taken other steps sufficient in those circumstances to caution effectively a passerby of average alertness and prudence. At a reasonable distance on either side, prominently written boards can be affixed, asking the road-users to beware of trains. If the track on either side is visible from near the caution board or within a short distance from the crossing, this would be sufficient because a diligent road-user could look round and see the train. On the other hand, if there is a bend on the track or there are trees or bush in between, or the road on either side of the crossing is very far below the level of the railway track, or for any other similar reasons the track is not visible beyond a short distance, then even the caution boards are useless. In that case gates are indicated. Similarly boards may be affixed along the railway, say half to three-fourth of a mile in either direction calling upon the engine driver to whistle. A whistle by the driver can supplement, but cannot replace gates or caution boards as a device to protect the users of a crossing"". On the facts of that case the learned Judicial Commissioner found that there was negligence on the part of the railway in the maintenance of the level crossing and that having opened an unmanned crossing without any barrier, the railway did not take all the necessary steps to safeguard

the users.

14. A somewhat similar question, which I am called upon to determine in this appeal, also arose in *Swarnalata v. Union of India*, AIR 1963 Ass 117, wherein it was observed as under (at pp. 121 & 122) :--

"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 obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that happened in this case could not occur."

15. It was further observed as under (para 16):--

"In such circumstances it was the obvious duty of the Railway Administration to have taken adequate steps to warn the public of the approaching trains, so that accidents might be avoided. We consider that this is a clear case of negligence on the part of the Railway Administration and it was this that, obviously has resulted in the accident in question.""

16. The learned District Judge has found that it was a public highway between Ajmer and Chittorgarh. There were hedge, banyan tree with dense foliage and on the west of the railway track there were "Imli" and "Neem" trees etc. and that they shielded coming of the railway from the persons coming on the road. The learned District Judge made a wrong approach while considering the implied and inherent duty of the Railway Administration in regard to level crossing when he said that the obstructions were not created by the Railway Administration and that it was not under obligation to remove them 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 for chains or bars or gate. No person was employed as a watchman to warn the user of the road regarding approaching of the trains on the track of the level crossing. This amounted to negligence on the part of the Railway Administration.

17. The learned District Judge has said that the negligence of the Railway was not the proximate cause of the accident, for, it was the result of the negligence of

the bus driver and not that of the Railway Administration in not fixing the gates. In other words, he has made out the case of contributory negligence. In Swarnalata's case (AIR 1963 Ass 117), it was held that a defence based on contributory negligence proceeds on the assumption that the person raising the defence was himself negligent and that that negligence would not afford a cause of action to the plaintiff, either because of its remoteness to the accident or because the plaintiff who had the last opportunity to avoid the accident, did not do so or that he did not act with reasonable care and prudence and that this negligence of the claimant was the direct cause of the accident but for which the accident would not have taken place.

18. In Ramesh Chandra Dutt Vs. Union of India(UOI), the question of contributory negligence came up for consideration. It was held that where a railway line crosses a busy road at such a point that the incoming train is not visible until the passer is on the railway track, there is no question of contributory negligence, in case of accident, inasmuch as the first duty in such a case is cast on the railway authorities to arrange for the safety of the passers and that it would be the obvious duty of the railway administration, whether as inviters or licensors, to take adequate steps either to fix there a gate or a chain or at least to post a man to warn the drivers of the vehicles of an approaching train.

19. Ramesh's case was followed in Union of India(UOI) Vs. Supriya Ghosh and Others, wherein it was held that it is an invitation to cross; person going across meeting with accident is not guilty of contributory negligence and is entitled to compensation. The principle of contributory negligence is that plaintiff's negligence has contributed in part to his own harm and thus reduces the damages payable to him and as such it affects the measure of damages. In the present case, the negligence of bus driver was not pleaded by the defendant. No issue was framed by the trial court covering contributory negligence. No evidence was led and, therefore, the learned District Judge went wrong when he made out a new case in regard to contributory negligence. Apart from this, failure on the part of the Railway Administration to take adequate steps to forewarn the persons or vehicles coming on Ajmer-Chittorgarh road near railway crossing would not exonerate from his liability on the ground of the contributory negligence, for. as held in Swarnalata's case (AIR 1963 Ass 117). Ramesh Chandra Dutt Vs. Union of India(UOI), and Union of India(UOI) Vs. Supriya Ghosh and Others, that necessary precautions or adequate arrangements if made, would not have resulted in the accident, which caused damage to the plaintiff's bus.

20. Mr. Parmatma Saran, however, invited my attention to Rule 121 (c) of the Rajasthan Motor Vehicles Rules, 1981. which deals with the duties of the driver and the conductor of public service vehicles. Material portion of Rule 121 is as follows:--

"121. Drivers and conductors of public service vehicles -- duties of -- The driver

and the conductor of a public service vehicle-

(c) wherever a public service vehicle approaches an unmanned railway crossing, the vehicle shall be stopped by the driver and the conductor shall get down and see the railway track on both sides and shall make sure that the way is clear. The conductor shall then give signal to the driver to cross the railway track"

21. The argument of Mr. Bhandari is that Rule 121 (c) is not at all relevant for the present purpose for determining whether there was any negligence on the part of the Railway Administration, which has resulted in accident causing damage to the plaintiff's bus. In the present case, I am concerned with the negligence of the Railway Administration viz. whether the failure of the Railway Administration to provide any warning of the approaching trains tantamounts to negligence on its part,

22. For the reasons aforesaid, the finding recorded by the learned District Judge regarding issues Nos. 2 and 3 cannot be sustained and they have to be reversed. The negligence of the Railway Administration in this connection is established and this negligence is the proximate cause of the accident, which resulted in the damage to the plaintiff's bus.

23. The learned Civil Judge while deciding issue No. 4 held that the plaintiff is entitled to compensation amounting to Rs. 6946.65. This finding was not reversed by the learned District Judge in appeal. This was even not assailed before me by the learned counsel for the respondent. It follows, therefore, that the plaintiff is entitled to the compensation amounting to Rs. 6946.65.

24. No other point was pressed by the learned counsel for the parties.

25. I, therefore, allow the appeal, set aside the judgment and decree dated Sept. 22, 1970 of the District Judge, Partabgarh and pass a decree in favour of the plaintiff and against the defendant (respondent) for a sum of Rs. 6946.65 only. The rest of the claim of the plaintiff is dismissed. The plaintiff-appellant shall be entitled to the costs of all the courts on the amount of Rs. 6946.65.