

Smt. Mokshada Sundari Ghose Vs Union of India (UOI)

Court: Calcutta High Court

Date of Decision: April 20, 1971

Acts Referred: Railways Act, 1890 " Section 13

Citation: (1972) ACJ 1 : AIR 1971 Cal 480 : 75 CWN 964

Hon'ble Judges: Amiya Kumar Mookerji, J; A.C. Gupta, J

Bench: Division Bench

Advocate: Kalipada Chakrabarty and Debopam Chakrabarty, for the Appellant; Smriti Kumar Rai Choudhury and Anil Chandra Sen, for the Respondent

Final Decision: Dismissed

Judgement

Gupta, J.

On March 3, 1953 at 6-38 A. M. a man of about sixty trying to cross the railway tracks running along the eastern side of

Barrackpore Station was knocked down by a passing engine and died instantaneously as a result of the shock. The deceased, Haramohan Ghose,

who held a monthly railway ticket, was coming to renew it at Barrackpore Station from his village Dhaniapara which was to the northeast of the

railway station. He came along a road that leads up to the railway lines to the east of Barrackpore Station and was trying to walk across the lines

to reach the station when the accident took place. Struck by the right side bumper of the engine he fell on the gangway between two quad lines and

died on the spot. His widow brought the instant suit claiming a decree for Rupees 15,000/- as damages for the death of her husband. The Court

below dismissed the suit and aggrieved by the decision she has preferred this appeal. She was allowed to sue and also to prosecute this appeal in

forma pauperis.

2. In the plaint it is claimed that the people of Dhaniapara and the neighbouring villages are compelled to cross the railway lines on foot, there being

no over-bridge to the railway platform at the point where the village road ends. The plaintiff alleges that the engine that struck down her husband

came with "tremendous speed and without whistling" and attributes the accident to gross negligence and wilful default on the part of the driver of

the engine. It is pointed out by the defendant Union of India in their written statement that though there was no over-bridge, there was a level

crossing about 80 yards south of the station platform providing for safe passage across the railway lines. According to the defendant, Haramohan

Ghose was a trespasser on the defendants' property, "user of any other path across the railway lines" than through the level crossing being

unauthorised and that by trying to cross the lines he had exposed himself to the risk of accident. It is denied in the written statement that the engine

came upon the victim with "tremendous speed" or without whistling.

3. It can hardly be disputed that Haramohan Ghose walking across the lines was a trespasser on the railway property. The fact that he held a

monthly railway ticket which, it is said, he was going to renew, does not alter the position; though he had a right to renew the ticket he had no right

to be on the railway lines. The witnesses for the plaintiff speak of the distance of the level crossing possibly seeking to provide some justification for

the people of the villages on the north-eastern side of the railway lines who used to cross over to the railway station in the way Haramohan was

trying to do. Apart from whether this would make any difference in the position, the evidence of these witnesses on this aspect seems to be entirely

besides the point. According to P. W. 1 Arabinda Shome, the level crossing, referred to by the defendant, is about 3 or 4 miles away from

Dhaniapara and the neighbouring villages. P. W. 2 Daguram Ghose states that the level crossing is about a mile and half away from the villages.

The distance of the level crossing from the villages, however, is a matter wholly irrelevant in the present context. D. W. 2 Harendra Kumar Dutta,

who was the Station-master of Barrackpore Station at the relevant time, states that the level crossing is less than 100 yards from the station

platform. Ext. 4 is a map of Barrackpore Railway Station showing the site of occurrence and the surroundings, drawn to a scale of 80" to a mile;

this sketch supports the evidence of D. W. 2 and the statement made in the written statement regarding the distance of the level crossing. Thus it is

clear that from the point where the village road meets the railway lines, the distance of the level crossing is quite short.

4. It will be convenient to dispose of here an argument advanced on behalf of the appellant built on the provisions of Section 13 of the Indian

Railways Act. The learned Advocate for the appellant referred to the admitted fact that there was no barrier or fencing at the point where the

village road meets the railway lines. This omission, according to the learned Advocate, constituted a violation by the Railway Administration of the

statutory duty enjoined by Section 13 and he specially drew our attention to Clause (c) of the section. The relevant part of the section on which

reliance is placed is as follows:--

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)

(b)

(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;

5. It is difficult to see how Section 13 is of any assistance. The section only provides that on a requisition being made by the Central Government,

the Railway Administration has to erect suitable gates etc. as provided in Clause (c) of the section. No liability arises unless there is a requisition by

the Central Government. In this case it is not claimed that such a requisition had been made and the Railway Administration did not comply with it.

The fact that there was no fencing or barrier at the spot does not, therefore, afford a ground of action.

6. The principles governing a case like this are not in doubt. On the principle that a person cannot derive advantage from his own wrong, a

trespasser sustaining injury cannot recover damages if he had himself courted the accident, though the accident may have been partly due to the

negligence of the owner of the land or his servants or agents. The rule, however, is subject to the qualification that an act done in willful or wanton

disregard of the personal safety even of a trespasser is not permissible. The House of Lords in *Grand Trunk Rly. Co. v. Canada v. Walter C.*

Barnett, 1911 AC 361, states the rule as follows:--

The railway company was undoubtedly under a duty to the plaintiff not willfully to injure him; they were not entitled, unnecessarily and knowingly,

to increase the normal risk by deliberately placing unexpected dangers in his way, but 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 forward. The

general rule, therefore, is that a man trespasses at his own risk. Again, even if he be a trespasser, a question may arise as to whether or not the

injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care.

The House of Lords emphasised the distinction between willful or reckless disregard of ordinary humanity from a mere absence of reasonable

care. The Bombay High Court in *Ismail Haji Nana Mafat Vs. The Bombay Baroda and Central India Railway*, following the same principle held

that a railway company is not liable for damages to a trespasser for a mere error of judgment even if it amounts to negligence on the part of its

servants and that the Company will be liable only if the servant acts in willful disregard of the safety of the trespasser. The Calcutta High Court in a

case reported in AIR 1928 Gal 504 (B. N. Rly. Go. Ltd. v. Taraprosad Maity) while applying the same principle referred to certain early English

decisions which took the view that extra care should be taken to avoid causing injury to the public if they are known to frequent or cross at a

particular point though without any right. This, however, is not the statement of a new principle and the cases referred to in the Calcutta decision

are only instances of application of the principle stated by the House of Lords to their respective facts.

7. The learned Advocate for the appellant referred to a decision of the Supreme Court in *Cherubin Gregory Vs. The State of Bihar*, and drew

our attention to the following passage in the judgment: "A trespasser is not an outlaw, a *caput lupinum*. The mere fact that the person entering a

land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern

the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the

trespasser..... It is no doubt, true that the trespasser enters the property at his own risk and the occupier owes no duty to take any

reasonable care for his protection, but at the same time the occupier is not entitled to do willfully acts such as setting a trap or a naked live wire of

high voltage with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespasser.

8. The passage quoted does not indicate a departure from the rule stated by the House of Lords but is a restatement of the same principles.

9. The question for decision in this case therefore is whether on the evidence adduced by the parties, the death of *Haramohan Ghose* can be said

to have been caused by gross negligence or willful default on the part of the driver of the railway engine. The plaintiff has examined two witnesses

who claim to have seen the accident. None of them, however, states that the engine that knocked down *Haramohan* came with "tremendous

speed" as alleged in the plaint. P. W. 1, of course, says that the engine "gave no whistle" and that it struck down *Haramohan* and went away. He

says that the accident occurred when he was 10/12 cubits away from the spot. From his evidence, we find it difficult to fix the position from where

he saw the occurrence. According to him, he did not see the engine coming but saw it going away. This would seem to suggest that he was across

the lines and the accident occurred behind him; but then he further says that at that time he also "wanted to cross the railway line" which would

indicate that he was following *Haramohan* when the accident took place. This inference seems to be more probable in view of another statement he

makes that ""had I got there I must have warned Haramohan by raising an alarm but I did not get that time"". All this makes it difficult for us to rely

on his testimony. His presence at the place at that hour is also not sufficiently explained. According to him, he worked in a shop which was 10 or

15 minutes away from the spot and that his hour of duty was from 8-30 A. M. but he adds that he used to go to the shop ""earlier."" Even then it is

difficult to see what he could have been doing there about 2 hours before his duty commenced. The evidence of the other alleged eye witness, P.

W. 2 does not present such difficulties. He also says that the engine did not give any whistle. According to this witness, he was about 10 or 12

cubits behind when the engine struck down Haramohan. If the driver of the engine having seen Haramohan trying to cross the lines did not blow the

whistle, it may be possible to argue that he was guilty of gross negligence or willful default. The driver of the engine and also the guard who was in

the brake van attached to the engine have deposed as defendant's witnesses Nos. 4 and 5 respectively. The driver D. W. 4 describes the

occurrence as follows:

While I was crossing the Calcutta side level crossing of Barrackpore I blew the whistle of the engine. I blew the whistle while I was entering the

station area. While I was proceeding to Naihati leaving the station I saw two men coming from the right side. On seeing them I blew my whistle.

The younger man who was ahead passed to a safe distance but the old man who was coming behind paid no heed to it I thought that the old man

would check himself but he actually did not check himself as a result he was knocked down and he fell on the space between up quad line and

down quad line.

D. W. 5, the guard, did not see the accident as he was inside the brake van at the time. He says that he heard the driver of the engine blowing his

whistle while passing the Barrackpore station area. Considering the evidence of D. Ws. 4 and 5 carefully we find no reason why the account of the

accident given by them should not be accepted as true. On the evidence it is not possible to hold that the driver of the engine having seen the old

man trying to cross the lines made no attempt to warn him off the tracks and deliberately struck him down. The learned Advocate for the appellant

referred to the evidence of P. Ws. 1 and 2 to the effect that having knocked Haramohan down the engine went away without stopping at the place.

Both D. Ws. 4 and 5 have said that the engine stopped near the north cabin of the Barrackpore railway station. The evidence of the driver is that

having seen that the man was paying no heed to the warning whistle, he tried to slow down the engine but the movement of the engine cannot be

stopped immediately. It was suggested that he should have attempted to stop the engine from a reasonable distance so as to avoid hitting the man

on the lines. I have already referred to his evidence that he thought that the old man having heard the whistle would stop but did not. If the driver

was wrong in anticipating that Haramohan would check himself, that would be in our opinion an error of judgment at the most for which no action

would lie. It also appears from the evidence of D. W. 4 that the engine was moving at a speed of 20 miles per hour when the accident occurred.

The evidence of D. W. 6 S. C. Das, Transportation Inspector, is that the permanent speed restriction at the Barrackpore up and down quad line

was 30 miles due to sharp curves. The allegation that the engine was moving at tremendous speed, therefore, has no substance.

10. For the reasons stated above the appeal fails and is dismissed, but in the circumstances of the case without any order as to costs.

11. The appellant will pay the court-fee due on the memorandum of appeal.

12. Let a copy of this decree be forwarded to the Collector, 24 Parganas.

Amiya Kumar Mookerji, J.

13. I agree.