

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 135/2012**
% **24th April, 2014**

UNION OF INDIA Appellant
Through: **Mr. A.S.Dateer, Adv.**

VERSUS

BIRHARAMWATI @ BIRMATI Respondent
Through: **Ms. Naveet Goyal, Adv.**

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM Nos. 5488/2012 (delay in filing) and 5489/2012 (delay in refiling)

For the reasons stated in the applications, delay in filing and refiling is condoned. CMs stand disposed of.

FAO 135/2012

1. This first appeal is filed under Section 23 of the Railway Claims Tribunal Act, 1987 by the Union of India/Railways impugning the judgment of the Tribunal dated 14.9.2011 by which the Tribunal accepted the claim petition which was filed by the respondent, who is the mother of

the deceased Sarvesh. It is the case of the respondent/claimant that the deceased Sarvesh died in an untoward incident of a fall from the train on 28.7.2010 while travelling from Shahdara to Ghaziabad in an EMU train.

2. The case of the respondent/claimant was that her son Sarvesh aged about 20 years was, on 28.7.2010, travelling from Shahdara (Delhi) to Ghaziabad in an EMU train and he fell down from the train near Shahdara Station on account of the jerk/jolt of train and thereby he died on the spot. It was pleaded that the train ticket was lost in the accident because it was contained in a bag which was with the deceased.

3. The case of the appellant/Railways before the Tribunal was that the deceased was not a bonafide passenger and that in fact no evidence has been led to show that the deceased has fallen down from the train and consequently there is an 'untoward incident' within the meaning of the expressions as found in Section 123(c) and Section 124-A of the Railways Act, 1989.

4. Admittedly, in the facts of the present case, there is no eye witness of the untoward incident which is alleged to have taken place as per the case of the respondent-claimant. The dead body was found on the tracks and such a report was made by the driver of the train no.5708 namely Sh.

Y.K.Sharma to the Deputy Station Superintendant Sh. Deepak Kumar of Shahdara Railway Station on walky talky. Mr. Y.K.Sharma informed that a body of a person who is run over is lying on the tracks at DSA-PNA i.e between Shahdara Railway Station and a panel in the north line. The document proved in this regard by the respondent is Ex.R-1/2. Sh. Deepak Kumar was examined on behalf of the Railways as RW-1. The Railway Claims Tribunal has held that since the appellant-Railways failed to examine the driver Sh. Y.K.Sharma, but only examined Sh. Deepak Kumar, this aspect should be taken against the appellant.

5. The following observations have been made by the Railways Claims Tribunal to allow the claim petition:-

“ISSUES NO.2 & 3

Since both the issues are co-related, these are taken up for consideration simultaneously for the sake of convenience.

The applicant has alleged that on 28th July 2010 here son, Sarvesh, after purchasing a ticket from Shahdara railway station boarded E.M.U.train for journey up to Ghaziabad. The applicant has also alleged that on account of jerk and jolt, her son, Sarvesh, fell down from the moving train and died on the spot. Sh.Y.K.sharma, driver of the train no. 5708, Amritsar Katihar Express, at about 16.10 informed Sh. Deepak kumar, Dy. Station Supdt. That a person between Km. 7/22 – 7/24 has cut down and his body is lying between the lines. Thereafter, necessary information was given by Sh. Deepak Kumar to the Railway protection force and General Railway Police. Sh. Suresh Kumar, Sub Inspector of Police Post Railway Shahdara was deputed to investigate in the matter. He made

the investigation and submitted his report on 28.7.2010. During the investigation, the Sub-Inspector on the basis of the Identity Card of the deceased, which was recovered, informed the applicant about the dead body of the deceased through the Beat Constable, P.S. Khajoori Khas. Sh. Suresh Kumar, Sub-Inspector, in his report, which is document, AW-1/3, has mentioned that it appears that the deceased fell down from the moving train and died on account of the injuries sustained in the accident. On 29th July 2010, the Station Supdt. Delhi- Shahdara also prepared a report of untoward incident in form-1, as provided under Rule 4 of Railway passengers (Manner of Investigation of Untoward Incidents) Rules 2003 and the Station Supdt. In the said report has mentioned that it is a case of run over. The application has examined herself by filing an affidavit and she was also cross-examined by the respondent. In the cross-examination, she has stated that Sarvesh was going to Ghaziabad on the date of the accident, and, I have not seen Sarvesh purchasing the ticket, as I was not travelling with him. She has also admitted in the cross-examination that she was informed about the accident by the police. The applicant has also examined Sh.Satish Kumar, who is the uncle of the deceased, as a witness in the instant case, and, he has deposed that the deceased was going to Ghaziabad on 28th July 2010 and that he was also present at the Station when Sarvesh purchased the ticket for Rs.3.00. On behalf of the respondent, Sh. Deepak Kumar, who received the information on walky-talky instrument, from the driver of the train no. 5708, Amritsar Katihar Express, was examined as a witness. He was cross-examined by the learned counsel for the applicant and in the corss-examination he has stated that Sh.Y.K.sharma, driver of the train no. 5708, informed him that one person has cut down from the train & his body is lying between the lines. According to the respondent, it is a case of run over, and, if it is a case of run over, the crucial witness of the incident Sh.Y.K.Sharma, driver of train no. 5708, was not examined by the respondent for the reasons best known to them. Sh. Deepak Kumar is admittedly not an eyewitness and he has deposed on the basis of the information received from Sh.Y.K.Sharma, the drive of the train no. 5708. If Sh. Sarvesh, while crossing the railway track came in front of the moving train no. 5708 and cut down, it was the moral duty of the driver of the train no. 5708 to stop the trainimmediately. Sh. Y.K.Sharma, the driver of the train no. 5708 has informed only this much that a body between DSA-PNA at Kms. 7/22 – 7/24 is lying which has cut down from the train. In the statement of Sh.Deepak Kumar and the information received from Sh.Y.K.Sharma, driver of

the train 5708, there is contradiction and it is not the case of the driver of the train no. 5708 that one person has cut down from his train. Admittedly, there is no eyewitness to the incident and Sh.Suresh Kumar, Sub Inspector of Police Post railway Shahadara, who made the spot inspection from where the body of the deceased was recovered is of the opinion that the deceased fell down from the moving train. When two views are possible, basing on the evidence, the view which is favourable to the applicant is to be adopted since the object of the Act is to alleviate the suffering of the victims or dependants of the victims of untoward incidents. The death of the deceased is covered within the expression of 'accidental falling' of a passenger from a train carrying passengers, which is an untoward incident, as defined in Section 123 © of the Railways Act 1989. Whether the deceased was a bonafide passenger or not? Both the Parties have led evidence in support of their case. From the possession of the deceased, an Identity Card was informed about the death of the deceased and the Body of the deceased was identified by Sh.Tilak Ram and Ramesh Chand. The case of the applicant is that the deceased was also having a bag, which was not recovered on the spot. There are all possibilities that the bag must have lost in the accident. The submission of the learned counsel for the respondent that no railway ticket was found on the spot or recovered from the possession of the deceased would be of no consequence in the absence of any evidence on behalf of railway administration to prove that the deceased was not bonafied passenger of any train. The body of Sarvesh was recovered from the Railway track and for all practical purposes, it will be presumed that the deceased fell down from the moving train and died on the spot. As the body of the deceased, Sarvesh, was recovered from the railway track and there is no evidence led by respondent to prove that he has committed suicide, the evidence adduced by the applicant to the effect that Sarvesh on 28.7.2010 boarded the train from Shahdara railway station cannot be disbelieved. I, therefore, hold that the deceased was a bonafide passenger of the train. The Issue no.2 & 3 are decided in favour of the applicant. (underlining added)

6. Learned counsel for the appellant argued that there is no untoward incident and there is no fall from the train as is the case of the

respondent/claimant because not only no train ticket was found from the person of the deceased, and no eye witness is found of fall from the train, but also, the accident is very much near the Shahdara Station and from where the deceased was alleged to travel to Ghaziabad. It is argued that evidence led of the uncle of the deceased namely Sh. Satish Kumar as AW-2 lacks credibility because why should for a very short distance of travel from Shahdara (border of Delhi) to Ghaziabad (U.P), an uncle should come to the Railway Station to drop a 20 year old boy, who was admittedly, also doing some private job. Learned counsel for the appellant also points out to the contradiction in the deposition of AW-1/mother Smt. Birharamwati and AW-2 Sh. Satish Kumar, the uncle, because whereas the mother said that the deceased was going to see his Mama alongwith the paternal uncle (chacha), but AW-2 Satish Kumar deposed that the deceased was going to meet his maternal uncle but there is no mention of the deceased travelling with his paternal uncle.

7. In my opinion, in view of the following reasons, I am persuaded to accept the appeal and set aside the impugned judgment:-

(i) No doubt, a train ticket is lost in many cases of an untoward incident, but the facts of each case have to be examined to find out that whether at all

the deceased was a bonafide passenger or that the deceased in fact fell down from the train. If a train ticket is not found on the person of the deceased, no doubt, this will not in itself weigh against the deceased not being a bonafide passenger but this aspect can be taken with the other aspects so as to determine at all the deceased was a bonafide passenger. Tribunal has erred in holding two views possible because neither the train travel is proved by the recovery of a ticket nor any eye witness has stated that the deceased fell from a train.

(ii) Admittedly, there is no eye witness of fall from the train and if the deceased had fallen down from the train, it is expected that someone would have pulled the chain of a train or in any case, the possibility would be that someone or the other in the train which was filled with passengers would have reported the matter to someone or other in the Railway authority. Admittedly, neither the chain was pulled nor is there any report of any passenger or any Railway official of the deceased Sarvesh falling from the train. Therefore, it cannot be said that merely because the body of the deceased was lying on the tracks, in the facts of the present case, it should be taken on account of fall from a train while travelling in the train.

(iii) In the present case, accident took place near the Shahdara Railway Station ie station from where the deceased was to travel to Ghaziabad. Therefore, it is very much possible that it could not be that deceased was crossing the tracks near the Shahdara Railway Station and in which process he got run over.

(iv) It is very strange that for a travel of a few kilometers from Shahdara, near the border of Delhi to Ghaziabad (U.P) which is the town adjacent to Delhi ie in the NCR, the deceased was seen off at the station by his uncle Satish Kumar, AW-2. Obviously, the deposition of AW-2 is a false deposition and only to make a basis of travel of the deceased Sarvesh on the train.

(v) The Tribunal has erred in holding that adverse inference should be drawn because Sh. Y.K.Sharma, the train driver was not called as a witness by the appellant/Railways inasmuch as the person to whom Sh. Y.K.Sharma reported to namely Deepak Kumar(Station Superintendant) came and deposed for the appellant. Tribunal has wrongly held that Sh. Y.K.Sharma ought to have stopped his train because it is not the report of Sh. Y.K.Sharma that a person was run over by his train and Sh. Sharma had only

reported of a body lying on tracks and not on the tracks of the train he was piloting.

8. A civil case is decided on the balance of probabilities. The preponderance of probabilities show that the deceased has not been proved to be a bonafide passenger because no train ticket was recovered from the person of the deceased. There is also no eye witness as regards a fall of the deceased from the train. Also, as stated above, it is a bit difficult to accept that no one in a train filled of passengers pulled the chain, if the deceased had really fallen down from the train and that not even a single person reported the untoward incident of fall of the deceased from the train if there had happened one. The aforesaid aspects have to be taken with the fact that the body of the deceased is found lying just near Shahdara Railway Station and the fact that the testimony of AW-2 Satish Kumar (uncle) lacks credibility because for a short distance of travel no one comes to leave a passenger to the railway station.

9. In view of the above, the appeal is allowed, the impugned judgment of the Tribunal is set aside. Since the respondent has already received the statutory compensation of Rs.4 lacs alongwith pendente lite

interest, the appellant is entitled to take steps to recover the same in accordance with law. Parties are left to bear their own costs.

APRIL 24, 2014
ib

VALMIKI J. MEHTA, J.