

THE HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

A.S. NOs.983 AND 2489 OF 1999

COMMON JUDGMENT:

These two appeals are being disposed of by this common judgment as they arise out of the Judgment and Decree in O.S.No.473 of 1995 on the file of the III Additional Subordinate Judge at Visakhapatnam.

2. The first respondent herein filed the said suit as informa pauperis claiming an amount of Rs.5,03,000/- with subsequent interest thereon @ 18% p.a. from the date of suit till realization for the death of her son who was studying 10th class on the date of the incident.

3. It was alleged in the pleadings that her son was born on 7.6.1977 and he was eldest son to her. He was studying 10th class in Kendriya Vidyalayam, Visakhapatnam. He used to go to the school every day during the school working days from his residence by a city bus from Marripalem to N.A.D. Kotha road junction where he used to get down from the bus and proceed on foot to his school by crossing the national highway and two road over bridges. The two road over bridges are numbered as 386/1 and 386/2. They are provided with permanent RCC foot paths on either side of the bridge, which is for the pedestrians to pass. After construction of the road over

bridges, they were handed over to the Roads and Buildings department of State Government of Andhra Pradesh and they were under the control of the National Highways Circle Wing of the Government. The upkeep and maintenance of the said bridges is the responsibility of all the defendants. The foot paths on either side of the bridges have been made up of pre-slabbed R.C.C. slab pieces joined in between them with cement and mortar. There was lack of maintenance and fault in laying of the slabs. On 12.2.1992, when the plaintiff's son was returning from his school with his classmates, at about 4.00 p.m. along with the eastern foot path road over bridge No.386/2, one of the slab pieces gave way suddenly and it was broken, as a result of which, he fell down through the gap and landed on the railway track beneath it which was at a depth of 40 feet. He received serious fatal injuries. He was taken by his friends and some passers by in an auto rickshaw to a private doctor at Marripalem and there after, he was taken to C.D.R. Hospital. Since the injuries were severe, he succumbed to them at about 8.20 p.m. on the same day. It was alleged that the death of the son of the plaintiff was a direct consequence of his fall from the bridge's foot path which had a faulty design in construction and maintenance resulting in the death of the plaintiff's son. The matter was reported to the

S.H.O. 5th Town Police Station, Visakhapatnam who registered the same as FIR.No.81 of 1992 dated 13.2.1992. The Sub Inspector of Police made a local inspection of the bridge and took several photographs of the faulty bridge and in particular the foot path of the said bridge. In view of the gross negligence in laying the foot path and its maintenance, the son of the plaintiff died. It was also alleged that the plaintiff learnt that on 24.1.1992, another boy also fell down from the same foot path and he fell on the signalling line wires by the side of the track and he escaped fatal injuries, but sustained fracture of bones of both the arms. In spite of the same, no care was taken by the defendants. It was further alleged that the plaintiff issued a notice on 13.11.1992 to the defendants 1 and 3 and the 3rd defendant gave a reply on 15.12.1992 stating that the bridge was constructed by the 4th defendant and its maintenance is being done by the 4th defendant only. It was admitted that the foot path slab was not properly laid, which resulted in the accident. On receipt of the said reply, the plaintiff issued a notice to the 4th defendant on 22.12.1992 and though it was received by the 4th defendant, there was no response. In those circumstances, she filed the above suit.

4. A written statement was filed on behalf of the 3rd defendant denying the plaint averments. It was stated that the

foot path slabs were normal till the time of construction of the bridge and the width of the foot path is 2 metres having a concrete slab over and above. The bridge over railway track at km. 385/0-2 were numbered as 386/1 and 386/2 and it was constructed by the railway department prior to 1970 in the process of forming N.H. bye-pass at N.A.D. Junction at Visakhapatnam. The Roads and Buildings department generally maintains the bridge to the extent of renewing the carriage way surface and white washing to the hand rails. As per the Indian Railway General Code Volume-I Para-1121, the maintenance and lighting of the roadway of the bridge and its approaches after it's opening to public traffic is a charge against the Road Authority, while the maintenance of the Bridge structure generally (excluding the roadway) is a charge against the railway. Since the foot path slab was broken or a hole formed, it does not pertain to the 3rd defendant and the 3rd defendant was not responsible. The alleged accident took place due to the negligence of the plaintiff's son and the defendants 1 to 3 are not liable.

5. The written statement of the 3rd respondent was adopted by defendants 1 and 2.

6. The 4th defendant filed a separate written statement stating that the suit was not maintainable without issuing a

separate notice Under Section 80 of CPC. The averments in the plaint were denied in general terms and it is stated that there are two road over bridges on the national high way No.5 and they are provided with permanent R.C.C. foot paths on either side of the bridge. It was stated that the said ROB was constructed during 1969 and completed in December, 1969. It was open for public in 1970 by the Marshalling Yard Construction department at the request of the R&B department and it was being used by public. As per Para 1809 of the Indian Railways' code for Engineering Department, 1982, the necessity for a road way for other than the Railway Traffic on a Railway Bridge etc., will be decided by the State Government and the cost of such construction will be shared by the parties. The road over bridge will be constructed after entering into an agreement with the railways but the 4th defendant is not aware as to whether such an agreement was executed by the road authorities who were the owners of the road ways like the national high way. Hence, the R&B department alone is liable for the damages. The bridge main structure is to be maintained by the railways and foot path and road surface are to be maintained by the road authorities. The accident took place due to lack of maintenance by the concerned R&B department who are responsible for periodical inspection as

well as upkeep of road surface and foot path slabs as per the codal provisions. The accident would have been avoided if the 3rd respondent took proper precaution. There was no fault in the design of the structure as the foot path slabs have lasted for 22 years. It was further stated that the railways have no knowledge about the mishap occurred on 24.1.1992 with regard to another boy who fell down from the same foot path of the same bridge. As per the provisions of the draft agreement, the R&B authorities are responsible for the maintenance of road surfacing, foot paths within the railway land. The main structure beneath the bridge portion is to be maintained by the railways and the other surface structures and foot paths etc., are to be maintained by the R&B department. If there was any defect noticed in the design, it should have been brought to the notice of the railways after opening of the bridge by the R&B department.

7. On the above pleadings, the following issues were framed by the Trial Court:

- “1. Whether this court has got jurisdiction to try this suit?
2. Whether the son of the plaintiff died due to the negligence of defendants?
3. Whether the plaintiff is entitled for suit amount?
4. To what relief?”

8. Before the trial Court, the plaintiff examined herself as PW1 and examined PWs.2 to 4 on her behalf. She got marked Exs.A.1 to A.15. DW1 was examined on behalf of 4th defendant but no documents were filed.

9. On the basis of the above pleadings, oral and documentary evidence, the trial Court by its Judgment and Decree dated 21.9.1998, directed the defendants 1 to 4 to pay the plaintiff a sum of Rs.3,63,000/- together with subsequent interest @ 12% p.a. on Rs.3,63,000/- from the date of filing of the suit i.e., 3.3.1993 till the date of realization.

10. The defendants 2 and 3 filed A.S.No.983 of 1999 whereas the 4th defendant filed A.S.No.2489 of 1999 challenging the said Judgment and Decree.

11. There is no dispute that the son of the plaintiff who was studying 10th class on the date of accident on 12.2.1992, died due to injuries sustained by him due to his fall on the railway track due to giving way of the slab of the foot path of the fly over bridge bearing No.386/2 while he was walking over the said foot path along with his friends. The 1st issue, with regard to the trial of the suit was not contested by the defendants and accordingly, the 1st issue was answered in favour of the plaintiff. With regard to the 2nd issue, the trial Court held that the defendants 1 to 3 as well as the 4th defendant are negligent

and it resulted in causing death of the son of the plaintiff. With regard to the quantum of damages, the trial Court opined that the deceased boy would have contributed an amount of Rs.1,000/- per month to his parents and he would have survived for another 30 years at least after attaining the age of earning. Accordingly, it came to the calculation of Rs.3,60,000/-. In addition to that, an amount of Rs.3,000/- was awarded towards medical and funeral expenses. Thus, the total amount of Rs.3,63,000/- was awarded.

12. Learned counsel for the appellants in A.S.No.983 of 1999 submits that the accident occurred due to faulty design of the 4th defendant whereas, learned counsel for the appellant in A.S.No.2489 of 1999 submits that the maintenance is to be carried out by the defendants 2 and 3 and the 4th defendant is not liable to pay any amount. He further submitted that no notice was issued to the 4th defendant and on this ground, the suit is liable to be dismissed. He further submitted that Under Section 106 of the Railways Act, the claim has to be made within six months and the claim is barred by limitation.

13. It is the case of the 4th defendant that before constructing the bridge, an agreement would be entered and in the written statement it was stated that the agreement was not available. But however, the 4th defendant in the written statement gave

extracts of the provisions of the Indian Railways Code for Engineering Department, 1982 and it reads as follows:

“Maintenance of ROB should be considered under two heads viz., (i) the General upkeep of the Bridge structure excluding the permanent way and ballast but including planting of girders, repairs to piers, protection and training work etc., which are essential both for the Railway and the Road.

(ii) The upkeep of the Road surface as well as the annual charges for gate-man, lightnings, signalling etc., which have to be provided.

Item (i) above will be carried out by the Railway Administration and Item (ii) will be borne entirely by the Road Authority.”

14. The extracts of the draft agreements were also cited in the written statement and it reads as follows:

“Para-4:

The Railway will maintain the Bridge structure proper across the Railway tracks. No charges will be levied for the maintenance of the Bridge structure across the Railway track upto two lane traffic, equivalent to 24’ width, for which the Railway shares the cost. However, if any extra width of Road way is provided at the request of the State Government, on

deposit terms, its maintenance cost will be recovered from the party.

Para-8:

The Road authority will be responsible for the maintenance of the road surface and foot paths within the Railway land including the wearing cost to the complete satisfaction of the Railway, at the cost of the Road authority.

Para-9:

The Road Authority will be responsible for the damages and losses of any fittings of the Bridge structure proper due to the movement of road vehicles and will reimburse the Railway the cost of repairs to the damages and replacement of the fittings as assessed by the Railways.”

15. DW1 in his oral evidence stated that the foot paths of fly over would be under the maintenance of the concerned R&B department. He further stated that the laying of the road on fly over and its maintenance is done by the R&B department but the pillars of the bridge and approach bunds are under the maintenance of Railways. He has been deposing on the basis of Railway Engineering Code. But, in the cross-examination, he admitted that the design and construction of the fly over including on footpath on either side and railings were done by the Railways. The flyover bridge was constructed by the

construction department of the Railways and the width of the footpath on the fly over bridge is about 2 metres. He further stated that on the last adjournment, he went to the location and there was railway track underneath the fly over bridge and above the same signalling wires were passing. He stated that he does not know whether there were pre-stressed concrete slabs at the place of foot paths of fly over bridge on the date of incident. He noticed that the said slabs on the foot paths were perpendicular and they were found to be new. He stated that there was no specific agreement between the railway department and R&B department to the effect that the road and foot paths of the fly over bridges should be maintained by the R&B department, but he added that in the Railway Engineering Code, there is no separate agreement. He admitted that the original of Ex.A8 was got issued by the plaintiff to 4th defendant and it was received by the 4th defendant on 28.12.1992 vide Ex.A.9 Postal Acknowledgement. Though he stated that the design of the flyover bridge was available in the office of the 4th defendant(Chief Engineer) the same was not filed.

16. Though the 4th defendant placed reliance on the Indian Railways Code for Engineering Department, 1982 and that of the draft agreement, those documents were not filed before

the lower Court. In spite of the same, the trial Court, while deciding issue No.2 considered the said plea and observed that unless the record with regard to the construction of bridge is produced before the Court, there cannot be any opportunity to the plaintiff to point-out whether laying of pre-stressed concrete slabs in a parallel manner in stead of perpendicular manner was justified or not. With regard to the role of the R&B department also, it was observed by the trial Court that the R&B department ought to have made periodical checkings with regard to the foot paths and no evidence was let in on behalf of defendants 1 to 3 to show that they have taken any such precautions or made periodical inspections. In view of the absence of such evidence on behalf of the defendants, the trial Court came to the conclusion that the son of the plaintiff fell from the foot path of the railway bridge due to faulty design of railway department and also for improper maintenance by the R&B department. The said finding recorded by the trial Court in the absence of evidence on behalf of the defendants, cannot be said to erroneous. As pointed out by the trial Court, PW1 was a house wife and she is not the custodian of the records of the 4th defendant. No negligence of the son of the plaintiff was proved by the defendants and in the absence of evidence to the contra, it has to be presumed that the son of the plaintiff

died due to negligence of the defendants in maintaining the foot path. This aspect of the matter was also considered by the trial Court and held that the incident did not take place due to careless act of the deceased son of the plaintiff.

17. Learned counsel for the appellant/4th defendant pointed out that Under Section 106 of the Railways Act, 1989, a person shall not be entitled to claim compensation unless a notice there of is served within a period of six months. This statement of the learned counsel for the appellant/4th defendant is misconceived. The relevant provision of Section 106 reads as follows:

“106. Notice of claim for compensation and refund of overcharge – (1) A person shall not be entitled to claim compensation against a railway administration for the loss, destruction, damage, deterioration or non-delivery of goods carried by railway, unless a notice thereof is served by him or on his behalf, --

(a) to the railway administration to which the goods are entrusted for carriage; or

(b) to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurs, within a period of six

months from the date of entrustment of the goods.

18. A reading of the above provision makes it clear that it is applicable only to the claims made in respect of the goods carried by railways but the instant case is not one such case. This is a claim arising out of negligence in maintaining the bridge by the defendants and consequential death of the son of the plaintiff. This is a tortious liability. On this ground also, the appeal fails.

19. Coming to the quantum of compensation awarded, the contribution of the deceased to his family was taken as Rs.1,000/- p.m. and that the method of multiplier applied to the Motor Vehicles Accident cases is applied and the quantum of compensation was arrived at. Hence, the award of an amount of Rs.3,63,000/- towards damages for the death of the son of the plaintiff and for medical and funeral expenses, cannot be held to be arbitrary. However, with regard to the interest of 12% p.a. on the said amount, this Court feels that the said interest is on higher side and it requires to be reduced to 9% p.a. as the same percentage is being applied in respect of Motor Vehicles Accident cases.

20. Hence, the Judgment and Decree passed by the trial Court awarding an amount of Rs.3,63,000/- in favour of the plaintiff against the defendants 1 to 4 is upheld, but the

interest of 12% p.a. is modified to 9% p.a. on the amount decreed. In view of the involvement of two departments namely the State Government and the Railways, the amount awarded shall be paid by defendants 2 and 3 on the one hand and the 4th defendant on the other hand equally, namely 50 : 50.

21. The appeals are thus, partly allowed.

Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

Date: 4.4.2018

KPM

A. RAMALINGESWARA RAO,J

