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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.40 OF 2021

1. Union of India,
through General Manager,
Central Railway,
CST Mumbai.

2. The General Manager,
South East Central Railway,
RTS colony, railway colony,
Bilaspur (Chattisgarh)- 495 004.

3. DRM South East Central Railway,
DRM office compound
Kingsway road, Mohan Nagar,
Nagpur.

..... **Appellants.**

:: VERSUS ::

1. Atifiqbal s/o Abdul Rashid,
aged about 25 years, occupation : labour,

2. Kashifiqbal s/o Abdul Rashid,
aged about 25 years, occupation labour

3. Toshifiqbal s/o Abdul Rashid,
aged about 25 years, occupation labour.

4. Mr.Abdul Matin Khan Majid Khan,
aged about : major, occupation owner,
r/o Madam Chowk, Kamptee, district
Nagpur.

All the respondents from 1 to 3 are
residents of plot No.123, ward No.12,
New Yarkheda, behind Marartoli
Darga, Kalamna Road, Kamptee,
district Nagpur.

..... **Respondents.**

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Mrs.Mugdha Chandurkar, Counsel for Appellants.
Shri P.S.Mirache, Counsel for Respondent Nos.1 to 3.
Shri Alok Daga, Counsel for Respondent No.4.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 19/04/2023

PRONOUNCED ON : 05/06/2023

JUDGMENT

1. By this appeal, the appellants (the central railway) challenge judgment and award dated 26.2.2020 passed by learned Member of the Motor Accident Claims Tribunal-2, Nagpur whereby learned Member of the tribunal awarded compensation of Rs.2,73,500/- along with interest @ 7.5% per annum to the claimants.

2. Brief facts in a nutshell are as under:

The respondent Nos.1 to 3 are legal heirs (the claimants) of Abdul Rashid Abdul Hafiz (the deceased). They filed a petition under Section 163-A of the Motor Vehicles Act, 1988 (the M.V.Act) for claiming compensation on account of death of their father i.e. the deceased in a vehicular accident took place on 17.10.2007. On 17.10.2007, the deceased was driving truck bearing No.MH-40/6644. When he reached Satak railway crossing, he could not hear noise of railway

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engine and suddenly the truck collided with the railway engine resulting into the death of the deceased and cleaner of the said truck died on the spot. As per the contentions of the claimants, at the time of the accident, as precaution was not taken by the railway administration by providing a level crossing gate, the said accident took place. The railway administration has not discharged the duties and, therefore, the railway administration is responsible for the said accident. The said truck and the railway engine are involved in the said accident. Thus, the accident occurred due to the involvement of both the vehicles. Regarding the said accident, a offence was registered vide Crime No.96/2007 against the deceased. At the time of the accident, the deceased was 52 years of age and was getting income Rs.5000/- per month. The claimants have claimed compensation under Section 163-A of the M.V.Act under the principle of "no fault".

3. In response to the notice received, the respondent No.4 appeared and filed his written statement who is the owner of the said truck. He admitted the date, the time and the accident. However, he denied the income of the deceased.

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4. The appellant - Union of India, through General Manager, Central Railway, Mumbai, filed its written statement and stated that the claim cases are to be dealt by the respective zonal railways arising within their jurisdiction w.e.f. 1.4.2003 and, therefore, appellant Nos.2 and 3 were added as respondents and they filed their written statements vide Exhibit-51. As per defence of the appellant Nos.2 and 3, the deceased was not having valid driving licence with him while he was driving the said truck. The alleged accident took place due to the negligence of the deceased and, therefore, the claimants are not entitled to claim compensation under Section 163-A of the M.V.Act. Initially, the claim was decided on 15.2.2011. The appellant No.1 challenged the judgment and award by preferring FA No.56/2013 which was allowed and the petition was remitted back to the tribunal for fresh decision. In view of that the tribunal has decided the petition.

5. In order to substantiate the claim on behalf of the claimants, claimant Atifqbal s/o Abdul Rashid was examined vide Exhibit-27. The appellant No.1 adduced evidence of one Chandramohan Marshettiwar vide Exhibit-59. The appellant

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Nos.2 and 3 examined Vijay Chourasiya vide Exhibit-65 and K.Venkateshwar Rao vide Exhibit-71.

6. Besides the oral evidence, the claimants placed reliance on accident form AA Exhibit-30, certified copy of FIR Exhibit-31, certified copy of spot panchanama Exhibit-32, inquest panchanama Exhibit-33, and postmortem report Exhibit-34. The appellant No.2 placed reliance on copy of geographical system map of the central railway Exhibit-61, copy of map of jurisdiction of the south eastern central railway Exhibit-62. The appellant Nos.2 and 3 placed reliance on inquiry committee report Exhibit-70.

7. After appreciation of the evidence, learned Member of the tribunal held that the railway appellant Nos.2 and 3 had not provided any guard or watchman at the railway crossing and due precautions are not taken and, therefore, the said accident occurred. The claimants have claimed the compensation under Section 163-A of the M.V.Act that is under the principle of "no fault". The accident occurred due to the use of the vehicles and, therefore, the claimants are

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entitled for compensation and awarded amount of Rs.2,73,500/- along with the interest.

8. Being aggrieved and dissatisfied with the judgment, the present appeal is preferred on the ground that the evidence of loco pilot of the train is not taken into consideration by learned Member of the tribunal. The crime was registered against the deceased, the truck driver. As the the deceased, the truck driver, was a tort-feasor, the claimants, who are legal representatives, are not entitled for any compensation. Learned Member of the tribunal failed to consider the applicability of Section 163-A of the M.V.Act and misinterpreted it and awarded the compensation erroneously.

9. Heard learned counsel Mrs.Mugdha Chandurkar for the appellants/the central railway, learned counsel Shri P.S.Mirache for the claimants, and learned counsel Shri Alok Daga for the respondent No.4, the owner of the truck.

10. Learned counsel Mrs.Mugdha Chandurkar for the appellants/the central railway, submitted that a valid permit was not there with the owner to ply the truck on road. The deceased was also not holding a valid driving licence. Learned

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Member of the tribunal had not considered the enquiry report which assumes significance. The application filed under Section 163-A of the M.V.Act against the railway was not maintainable as Section 163 of the M.V.Act clearly provides that the owner of the motor vehicle shall be liable to pay compensation in case of a death or permanent disability on the basis of structured formula. Here, learned Member of the tribunal failed to consider the legal issues while deciding the claim petition and has wrongly awarded the compensation in favour of the claimants.

11. Learned counsel Mrs.Mugdha Chandurkar for the appellants/the central railway, placed reliance on the decision in the case of **Union of India vs. United India Insurance Co.Ltd., reported in 1998(1) ACJ 342** wherein it is held that the statutory duty of the conductor and the driver when the motor vehicle is to cross a railway line. In the absence of a board, statutorily requiring vehicle to stop and the conductor has to get down as a prudent person and to find out if any train was coming. In the absence of a sign board, it is certainly a duty to stop, see and hear at the unmanned level crossing and failure to do so amounts to negligence on the

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part of the driver. Here, the deceased, the truck driver was negligent and, therefore, the appellants are not liable to pay any compensation.

12. *Per contra*, learned counsel Shri P.S.Mirache for the claimants submitted that the claimants have claimed the compensation under Section 163-A of the M.V.Act which is based on the structural form. The claimants are entitled to receive compensation on the basis of "no fault liability" and, therefore, the contention of the railway is not sustainable. Learned Member of the tribunal has rightly considered the amount of compensation.

13. In support of his contentions, learned counsel Shri P.S.Mirache for the claimants placed reliance on following decisions in the cases of:

(1) United India Insurance Co.Ltd. vs. Sunil Kumar and another, reported in 2018(1) TAC 3 (SC);

(2) Riyana Ishaque Kazi and others vs. Pushpa R.Sheva, reported 2016(1) TAC 122 (Bom.);

(3) United India Insurance Co.Ltd. vs. Sunil Kumar and anr, reported in 2013 ACJ 2856;

(4) Sharad Yashwant Joshi vs. Mohamed Yusuf Nasiruddin, reported in 2008(4) AIR Bom R 369, and

(5) Surekha w/o Rajendra Nakhate and ors vs. Santosh s/o Namdeo Jadhav and ors, reported in 2020 ACJ 2516.

14. I have considered the submissions made by learned counsel appearing for the parties and perused the record. The sole question for consideration is, whether the claim petition filed under Section 163-A of the M.V.Act involving accident by motor vehicle with train was maintainable against the railway administration or not and whether the railway administration is liable to pay compensation.

15. To substantiate the contention, claimant Atifiqbal s/o Abdul Rashid has adduced his evidence vide Exhibit-27 and narrated about the occurrence of the accident. Admittedly, he is not the eyewitness of the accident. Though he is cross examined, nothing is brought on record to show that the deceased was not having driving licence or there was no valid permit. Besides the oral evidence, the claimants placed reliance on police papers, Exhibit-30 to 33, the

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accident forms, FIR, spot panchanama, and the inquest panchanama. Admittedly, the crime was registered against the deceased, the truck driver. As per the investigation papers, it was the deceased, the truck driver who was negligent in driving the vehicle. The copy of permit is on record which shows that the the respondent No.4, the owner of the said truck, was having the permit to ply the vehicle, till 17.6.2012. The alleged accident took place on 17.10.2007. Thus, on the day of the accident, there was a valid permit.

16. The appellant No.1 has adduced evidence by examining Vijay Chourasiya who was the Assistant Loco Pilot on a passenger train on 17.10.2007. He also deposed that the alleged accident took place due to the negligence of the deceased, the truck driver. During his cross examination, he admitted that the spot where the accident took place was on the railway crossing and there was a road. The road was a traffic road. He further admitted that the said road was having unmanned gate.

17. The appellant Nos.2 and 3 have examined K.Venkateshwar Rao who was also loco pilot. His evidence

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also shows that there was no gate at the spot of the incident. The appellants railway also placed reliance on enquiry report which shows that during the investigation they have recorded statements of various witnesses and it revealed to them that the deceased, the driver of the truck, has not taken precautions by stopping on approach of the level crossing and dashed against the railway engine.

18. Perusal of the impugned judgment reveals that it was case of the claimants that the alleged accident has taken place at an unmanned railway crossing at Satak Railway Crossing on 17.10.2007 in which the deceased, the truck driver and the cleaner both have lost their lives. It was specifically pleaded by the claimants that the alleged accident took place as necessary precautions by providing any gate was not taken by the railway administration.

19. It has been held by the Honourable Apex Court in the case of **Union of India vs. Bhagwati Prasad** decided on 7.3.2002 in Appeal (Civil) No.431-446/1988 that once it is established that the accident had taken place involving a motor vehicle and the train, the motor accident claims tribunal

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has jurisdiction to entertain the claim petition. It has been further held that on account of the rapid development of road transport and increase in number of Motor Vehicles on the road the incidence of road accidents by Motor Vehicles having increased enormously the Motor Vehicles Act enacted by the Parliament was amended and the provisions were inserted for payment of compensation in certain cases of accidents without proof of fault or negligence on the part of the driver of the vehicle. The claim for compensation in respect of the accidents involving death or bodily injury to persons arising out of the use of Motor Vehicles as well as the insurance of the Motor Vehicles against the third party risk and the liability of the insurer are contained in Chapter VIII of the Motor Vehicles Act. The State Government has been empowered under Section 110(1) of the Act to constitute one or more Motor Vehicles Accidents Claim Tribunals by notification in the Official Gazette. Section 110-A provides for filing an application for compensation and Section 11-B is the power of the Claims Tribunal to pass an award on receiving an application for compensation made under sub-section (A) of Section 110. The procedure and powers of the Claims Tribunal

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are enumerated in Section 110-C of the Act. It is not necessary for adjudicating the point in issue to examine and notice any other provision of the Act. In the case of Union of India vs. United India Insurance Company applications for compensation had been filed either by the injured passengers or the dependant of the deceased passengers travelling in the ill- fated Motor Vehicle both against the insurer of the Motor Vehicle as well as against the Railway Administration and one of the contention which had been raised before this Court by the Railway Administration was whether a claim for compensation would at all be maintainable before the Tribunal against other persons or agencies which are held to be guilty of composite negligence or are joint tortfeasors, and if the same arose out of the use of the Motor Vehicle. On consideration of different provisions of the Motor Vehicles Act this Court ultimately came to hold that , "We hold that the claim for compensation is maintainable before the Tribunal against other persons or agencies which are held to be guilty of composite negligence or are joint tortfeasors, and if arising out of use of the motor vehicle. We hold that the Tribunal and the High Court were right in holding that an award could be

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passed against the Railways if its negligence in relation to the same accident was also proved." The Court also came to hold that the views expressed by Gauhati, Orissa, and Madras High Courts to the effect that no award can be passed against others except the owner/driver or insurer of the motor vehicle are not correct, and on the other hand the view taken by the Allahabad, Punjab and Haryana, Gujarat, Kerala and Rajasthan High Courts to the effect that the claim lies before the Tribunal even against another joint tortfeasor connected with the same accident or against whom composite negligence is alleged. We are in respectful agreement with the aforesaid conclusion of the Court in the aforesaid case. Having said so it was further held that if it is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of other parties/agencies then on that finding the claim would go out of Section 110 of the Act because the case would become exclusive negligence of Railways and again if the accident had arisen only on account of the negligence of persons other than the driver/ owner of the motor vehicle the claim would not be maintainable before the

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Tribunal. It is this observation of the Court in the aforesaid case which is strongly relied upon by Mrs. Indira Sawhney , the learned counsel appearing for the Railway Administration and it is this observation with which the two learned Judges hearing the appeal did not prima facie agree with for which the reference has been made to this larger Bench. The question that arises for consideration, therefore, is whether an application filed before a Claims Tribunal for compensation in respect of accidents involving the death or bodily injury to persons arising out of the use of Motor Vehicle and the claim is made both against the insurer, owner and driver of the motor vehicle as well as the other joint tortfeasors, if a finding on hearing is reached that it is solely the negligence of the joint tortfeasor and not the driver of the Motor Vehicle then would the Tribunal loose the jurisdiction to award compensation against the joint tortfeasor. It is not disputed, and as has been already held by this court in the case of Union of India vs. United India Insurance Co. Ltd.(supra) that a claim for compensation on account of the accident arising out of the use of a Motor Vehicle could be filed before a Tribunal constituted under the Motor Vehicles Act not only

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against the owner or insurer of the Motor Vehicle but also against another joint tortfeasor connected with the accident or against whom composite negligence is alleged. A combined reading of Section 110, 110-A, which deal with the Constitution of one or more Motor Accidents Claims Tribunal and application for compensation arising out of an accident, as specified in sub-section (1) of Section 110 unequivocally indicates that Claims Tribunal would have the jurisdiction to entertain application for compensation both by the persons injured or legal representatives of the deceased when the accident arose out of the use of Motor Vehicle. The crucial expression conferring jurisdiction upon the Claims Tribunal constituted under the Motor Vehicles Act is the accident arising out of use of Motor Vehicle, and therefore, if there has been a collision between the Motor Vehicle and Railway train then all those persons injured or died could make application for compensation before the Claims Tribunal not only against the owner, driver or insurer of the Motor Vehicle but also against the Railway Administration. Once such an application is held to be maintainable and the Tribunal entertains such an application, if in course of enquiry the Tribunal comes to a

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finding that it is the other joint tortfeasor connected with the accident who was responsible and not the owner or driver of the Motor Vehicle then the Tribunal cannot be held to be denuded of its jurisdiction which it had initially. In other words, in such a case also the Motor Vehicle Claims Tribunal would be entitled to award compensation against the other joint tortfeasor, and in the case in hand, it would be fully justified to award compensation against the Railway Administration if ultimately it is held that it was the sole negligence on the part of the Railway Administration. To denude the Tribunal of its jurisdiction on a finding that the driver of the Motor Vehicle was not negligent, would cause undue hardship to every claimant and we see no justification to interpret the provisions of the Act in that manner. The jurisdiction of the Tribunal to entertain application for compensation flows from the provisions contained in Section 110-A read with sub-section (1) of Section 110. Once the jurisdiction is invoked and is exercised the said jurisdiction cannot be divested of on any subsequent finding about the negligence of the tortfeasor concerned. It would be immaterial if the finding is arrived at that it is only other joint tortfeasor

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who was negligent in causing accident and not the driver of the Motor Vehicle. In our considered opinion the jurisdiction of the Tribunal to entertain application for claim of compensation in respect of an accident arising out of the use of Motor Vehicle depends essentially on the fact whether there had been any use of Motor Vehicle and once that is established the Tribunal's jurisdiction cannot be held to be ousted on a finding being arrived at a later point of time that it is the negligence of the other joint tortfeasor and not the negligence of the Motor Vehicle in question. We are therefore, of the considered opinion that the conclusion of the Court in the case of Union of India vs. United India Insurance Co. Ltd. (supra) to the effect "It is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding, the claim would go out of Section 110(1) of the Act because the case would then become one of the exclusive negligence of Railways. Again if the accident had arisen only on account of the negligence of persons other than the driver/owner of the motor vehicle, the claim would not be maintainable before the

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Tribunal" is not correct in law and to that extent the aforesaid decision must be held to have not been correctly decided.

20. The provision of Section 163-A of the M.V.Act is a special provision as to payment of compensation on structured formula basis. In the claim petition filed under Section 163-A of the M.V.Act, the claimants are not required to establish wrongful act or negligence or default of the owner of a vehicle or vehicles concerned or of any other person. It is meant for such cases where there is no sufficient evidence to establish negligence on the part of the offending vehicle. The provision is meant for above such cases where the accident due to which permanent disability or death occurred is ascertained, however, there is no sufficient evidence to establish the wrongful act or negligence or default of the motor vehicles involved.

21. The contention of the railway is that the deceased, the truck driver, was not having valid driving licence. The next submission made on behalf of the railway is that it was the statutory duty of the conductor and driver to ascertain by getting down from the vehicle whether any train is coming.

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The Honourable Apex Court had considered this issue in case of **Union of India vs. United India Insurance Co.Ltd.** cited *supra* and dealt with the question whether there can be any breach or a common law duty on the part of the Railway if it does not take notice of the increase in the volume of rail and motor traffic at the unmanned level crossing and if it does not take adequate steps such as putting up gates with a Watchman so as to prevent accidents at such a point? What is the extent of care required at common law has also been decided and held that in several cases the need to have a constant appraisal of increase in volume of rail and road traffic at level crossings has been treated as a requirement of the common law. The Honourable Apex Court referred the judgment in the case of **Smith Vs. London Midland & Scottian Railway Co. (1949 S.C. 125)**, Lord Cooper wherein it is emphasized that the railway should take all precautions which will reduce the danger to the minimum and should take into account the nature and volume of such traffic reasonably to be anticipated. In **Lloyds Bank Ltd. Vs. Railway Executive 1952 (1) All E. R. 1248 (CA)**, Denning and Romer, L.JJ wherein it is stated that the railway authorities were bound to

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take steps from time to time by considering the increase in the rail and road traffic at the level crossing. In the case of **Union of India vs. Lalman S/o Badri Prasad AIR 1954 V.P. 173** it is has been held that even if the car driver knew that there was a crossing, the road users should be alerted at the proper movement by the boards and it is not the case for remote knowledge, but "one for immediate alertness".

22. By discussing the catena of decisions, the Honourable Apex Court in the case of **Union of of India vs. United India Insurance Co.Ltd.** cited *supra* held that if it is ultimately found that there is no negligence on the part of the driver of the vehicle and there is no defect in the vehicle, but the accident is only due to the sole negligence of the parties, agencies, then on that finding, the claim would go out of Section 110(1) of the M.V.Act because the case would then become one of exclusive negligence of railways.

23. In view of the above principles laid down by the Honourable Apex Court, here, admittedly, the evidence of witnesses examined on behalf of the railway shows that no gate was provided though there was a road of heavy traffic at

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the spot of the incident. The evidence showing that no watchman was deputed at the said place is sufficient to show that the railway administration has not taken proper precaution of safety of the people by providing precautionary measures. Admittedly, the claimants have claimed the compensation under Section 163-A of the M.V.Act. The principles enumerated therein is under the principle of "no fault liability" wherein the claimants are not under obligation to prove negligence. However, they are entitled to claim the compensation under the structured formula on the ground of use of the motor vehicles. Learned Member of the tribunal has considered the said principles under Section 163-A of the M.V.Act and awarded the compensation. Learned Member of the tribunal, after considering the submissions, held that the claimants are entitled for the compensation under the structured formula.

24. In the light of the above, I am of view that the liability to make compensation under Section 163-A of the M.V.Act is on the principles of "no fault" and, therefore, the question as to who is at fault is immaterial and not required to be dealt with in an enquiry under Section 163-A of the

Judgment

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M.V.Act. I, therefore, find that the appeal is devoid of merits and liable to be dismissed and the said is dismissed. No costs.

(URMILA JOSHI-PHALKE, J.)

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