

(1975) 08 MP CK 0020

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 48 of 1967

Balubhai Hirji Gajjar and Others

APPELLANT

Vs

Sarjubai and Others

RESPONDENT

Date of Decision : 28-08-1975

Acts Referred:

Motor Vehicles Act, 1988 — Section 110A

Citation : (1976) ACJ 118

Hon'ble Judges : S.R. Vyas, J; N.C. Dwivedi, J

Bench : Division Bench

Advocate : S.K. Dubey, for the Appellant; A.R. Naoker, for the Respondent

Judgement

N.C. Dwivedi J.

1. These two appeals? Misc. First Appeal No. 48/67 (Balubhai and 4 Ors. v. Mrs. Sarjubai and 3 Ors. and Mrs. Sarjubai and Ors. v. Balubhai and 2 Ors.) arise out of the award dated 2-5-67 of the Motor Accidents Claims Tribunal Gwalior. They are, therefore, consolidated and the judgment in Misc. First Appeal No. 48/67 shall govern the disposal of both these appeals.

2. The Accidents Claims Tribunal, by award dated 2-5-67, decreed a claim of Rs. 5,000.00 in favour of Mrs. Sarjubai and others against Balubhai (Car owner), Switzerland General Insurance Co. (Insurer) and Dattu (car Driver). The Claims Tribunal discharged Nanabhai, Manilal and Union Fire and General Insurance Co. It was directed that the insurance company would be principally liable for payment of the compensation amount.

3. Misc. First Appeal No. 48/67 was preferred by Balubhai and others against the award of compensation of Rs. 5,000-00. In this appeal, the Appellants challenged the finding of rash and negligent driving by driver Dattu as also the quantum of compensation awarded. They have also claimed that costs should have been awarded to the discharged non-applicants.

4. Misc. First Appeal No. 103/67 is preferred by Mrs. Sarjubai for raising the amount of compensation to Rs. 21,000.00 instead of Rs. 5,000.00.

5. The facts of the case are these ; Petitioners Mrs. Sarjubai and her sons and daughters who are the legal representatives of deceased Nathuram filed an application u/s 110-A of the Motor Vehicles Act for realisation of compensation to the tune of Rs. 21,000.00. They alleged that Nathuram was a utensil repairer. On 28.10.62, he had gone to Murena to attend the fair there and was returning home on 3.11.1962 on a cycle with his goods. Between Noorabad and Bamore, a car bearing No. BUM-9723 dashed against him. He suffered serious injuries and was removed to the Murena hospital where he expired. A report of the incident was lodged by Respondent No. 2 Nanalal Dharandbaria, which was recorded in Roznamcha Sanha No. 195 of which Ex. P-6 is the true copy.

6. Dr. B.N. Surange (P.W. 1) examined Nathuram on 3.11.1962 and as per report (Ex. p. 5) found 4 injuries including fractures on his person. The victim was unconscious. He was admitted in the hospital and expired there. He performed post mortem examination and as per report (Ex. p. 3), opined that cause of death was syncope due to intra and extra cerebral haemorrhage and fracture of the skull (which was the result of the injuries sustained by the victim).

7. According to the Petitioners, the car was driven in speed and negligently which caused the collision resulting in the death of Nathuram. They contended that at the time of death, Nathuram was 40 years old and was earning Rs. 250.00 p.m. and that he could ordinarily live for 20 years and maintain the Petitioners. They also contended that the average expenses per month were Rs. 75.00 and they could save Rs. 175.00 p.m., thus in 20 years, their saving could be Rs. 32,000.00, but they restricted their claim to Rs. 21,000.00 only.

8. Respondents 1, 2, 4, 5 and 6 filed separate written statements, though their contentions were more or less the same. They contended that the car was driven by Respondent No. 6 Dattu and was occupied by Respondent No. 5 Manilal Gujrati and others. They contended that Respondents 1 and 2 were going ahead in the jeep bearing No. GJO-2340 and the car bearing No. BMU-9723 was following it. Respondent No. 6 saw the deceased on the road and sounded his horn. The deceased, however, turned to the right (wrong side) instead of left, lost its control and collided against the car. Respondent No. 6 immediately applied the brakes, but the cycle and the deceased fell down because of the impact and sustained the injuries as a result of fall. The Respondents denied that the accident took place on account of the rash or negligent driving by Respondent No. 6. They further contended that when after going a little ahead, the jeep did not notice the car following, they returned back. Respondents 1 and 2 picked up the injured and took him to the Murena hospital in the jeep. The Respondents contended that the car was driven with normal speed of 30 miles per hour and it was the deceased who with his cycle having heavy load of utensils and other implements of repairs, could not balance himself and moved towards the right without controlling the speed of his cycle and collided against

the car with a heavy impact. They denied that Naturam was earning Rs. 250.00 p.m. or was 40 years of age at the time of the accident and could save Rs. 175/- p.m. The Respondents denied the quantum of compensation claimed by the Petitioners.

9. Before us, both the parties did not dispute the following facts:

(i) Between Noorabad and Bamore, the deceased Nathuram was going on a cycle with load of utensils and implements towards Gwalior.

(ii) The car bearing No. BMU-9723 was also going towards Gwalior, (iii) The car was driven by Respondent No. 6 Dattu.

(iv) The car collided against Nathuram who fell down, was injured and ultimately died.

(v) The car was insured with Respondent No. 4, Switzerland General Insurance Co.

(vi) Respondent No. 1 Balubhai was the owner of the car.

10. The points for determination in these appeals are:?

(i) Whether the accident occurred due to the negligence of Respondent No. 1, the driver of the car ?

(ii) Whether the accident occurred on account of the deceased's action in not listening to the horn of the car and in suddenly turning to the right and thus losing control over his cycle ?

(iii) What would be the proper compensation payable to the Petitioners ?

11. Before we discuss the evidence on record, we would state the law. In Ram Dulare Shukla Vs. Madhya Pradesh State Road Transport Corporation and Others, it is held that in case of an injury caused by an accident, the burden of proving negligence is on the claimant without the proof of which neither the owner nor its insurers are liable. It is further held that *res ipsa loquitur* is not a rule of law. If the facts are sufficiently known, the question ceases to be whether the facts speak for themselves, and the only question is whether on the facts as established, negligence is to be inferred or not. The doctrine of *res ipsa loquitur* does not, therefore, apply when the cause of the accident is known. In Smt. Sushila Devi and Others Vs. Ibrahim and Another, it was held that, the test in ascertaining whether the doctrine of *res ipsa loquitur* applies in a case of a motor accident is that, where the thing is shown to be under the management of the Defendant owner or his servant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by Defendants that the accident arose from want of care.

12. We will now discuss the evidence whether Respondent No. 6 Dattu was driving the car negligently or not. According to the Petitioners, the car was

coming from Murena to Gwalior, while the deceased Nathuram was also coming from Murena to Gwalior on a cycle. The Petitioners further alleged that the car was being driven in high speed and the driver did not drive the car with care with the result that collision took place injuring the deceased which ultimately resulted in his death.

13. According to the Respondents, the driver Dattu did not drive the car in speed, nor was he negligent in driving the same. They alleged that the deceased was carrying heavy luggage and lost his control resulting in the collision. They further alleged that the deceased was going in the middle of the road and hearing the horn of the jeep, he moved on the left to give way for it. After the jeep went away, the deceased came on the road could not balance himself, moved to the right without controlling the speed of the cycle and collided against the car with a heavy impact. We would, therefore, scrutinise the evidence of both the parties.

14. On behalf of the Petitioners, Ramdayal (P.W. 5) and Ramnarayan (P.W.6) are the eye witnesses. Both the witnesses have fields near the 11 milestone and, therefore, their presence near the place of the incident was natural. Ramdayal (P.W.5) stated that he saw the car coming with speed without blowing horn and dashed against the deceased Nathuram. He further stated that the deceased was on the left and was going from the extreme end of the cement road. He denied that the deceased got frightened or he lost balance over his cycle. His evidence established that the deceased Nathuram was coming towards Gwalior on his left side and the car driven by Respondent No. 6 came from behind without blowing the horn and dashed against him.

15. Ramnarayan (P.W.6) stated that the deceased Nathuram was driving his cycle on the left side of the road. The car came from behind without blowing the horn and struck against the cycle. He further stated that at this time, the road was clear and there was no other bullock cart or person on the road and the road was straight. The road was 12" wide of cement, on both sides of the road, there was tar road 4 or 5" wide and thereafter there was Kachchi patri 4" or 5" wide. He denied that the Cyclewala looked behind. He denied that he had become nervous. He denied that Cyclewala moved to the right and the car also moved to the right. He denied that the Cyclewala, in nervousness, came on the right side and dashed against the car.

16. As stated above, both these witnesses have their fields close to the place of the incident and, therefore, their presence in their own fields was natural. Both the witnesses are independent and have no interest in the Petitioners and no animus against the Respondents. Ramnarayan (P.W.6) is the village Patel. Simply because these two witness either did not contact the police or were not produced before him could not discredit their presence. It will be seen that the Petitioners were suspicious about a fair investigation. Therefore, they lodged a report (Ex. P. 2) with superior State Officers that the police was not investigating the matter properly because high officials were involved. The statement of Baboolal (P.W. 8)

shows that he had approached the police for proper investigation, but the police did not take any interest and, therefore, he had to lodge a complaint with the Superior Officers. It is possible that there was lack of proper investigation. It is also possible that the two witnesses did not themselves approach the police. However, they are independent witnesses and their presence near the place of incident is quite natural. We, therefore, feel that Ramdayal (P.W. 5) and Ramnarayan (P.W. 6) are truthful witnesses and their evidence could be relied upon. Their evidence established that the deceased was driving his cycle on the left side and the car did not blow the horn. The incident took place during day time. The road was clear and the car coming from behind dashed against the cyclist from the left. There is evidence that there was damage to the left portion of the car which established that the left side of the car had dashed against the cyclist. In the circumstances, we are of the view that there was clear visibility and the road was clear on which the cyclist was visible to the driver from a distance and the cyclist, being on his proper side, the dashing of the car from the left side in such circumstances clearly indicated that the driver did not take proper care and precaution and the collision took place due to his negligence.

17. Reports of Dr Surange (P.W. 1) and Dr. P.N. Pathak (P.W. 1) established that the deceased was unconscious at the time of admission and did not gain consciousness. He had sustained fractures and other injuries. Death occurred due to syncope on account of extra cerebral haemorrhage on account of fracture of the skull. These injuries were caused by dash with force. This shows that the deceased sustained serious injuries on account of the impact with force. The report (Ex. D. 5) about the condition of the car shows that the car had suffered damage on the left side. This could only be as a result of serious dash. In the circumstances, we are of the view that the driver who had a clear vision of the road and who could see the deceased from a distance, dashed forcefully against the deceased because he could not control his vehicle properly.

18. We would now refer to the evidence of the Respondents. We would first refer to the evidence of Respondent No. 2 Nanalal Dharandharia (D.W.6). He admitted that he had lodged a report, Ex. P. 6 is its true copy. He tried to disown this report saying that its recitals are to some extent correct and to some extent wrong. We are not inclined to accept this explanation. The report shows that the car dashed against the cyclist who fell down sustaining injuries. This was the earliest report of the occurrence. There is mention that the Cyclewala was coming from Murena to Gwalior and the car dashed against him. There is no mention that the Cyclewala suddenly came to the right or lost his balance or himself dashed against the car. On the other hand, the earliest version shows that the car had dashed against him. The absence of circumstances which according to the Respondents resulted in the accident from the earliest version given out in Ex. P-6 throw doubt on the story as put forth by the Respondents. We think that the story put forth regarding the circumstances which resulted in the accident is clearly an afterthought.

19. The story given in the evidence by the Respondents' witnesses is contradictory on material particulars. Nanalal Dharandharia (D.W. 6) did not witness the actual collision. He stated that when the jeep gave horn, the Cyclewala was conscious to be on the left side and hearing the horn of the jeep he moved to the left. We find no explanation why a person who could move to the left on hearing the horn of jeep will not move again to the left if the horn was given by the car. This indicated that the car had not blown the horn.

20. Mansukhlal (D.W. 8) stated that the Cyclewala, after the jeep passed ahead of him, came to the middle of the road. Hearing the horn, the Cyclewala attempted to go on his side and the cycle became unsteady with the result that instead of going to the left, it started moving towards the right. The driver, in order to save him, took the car to the right. The car and the Cyclewala went on the kachcha side of the road and the Cyclewala, losing his balance, collided against the left mudguard. We do not find this story as truthful. The deceased appeared to be a good driver of his cycle, because he was moving all right with his load of utensils and was conscious of the road sense inasmuch as both the times he moved to the left. We find no explanation why all of a sudden the deceased would lose balance and how his cycle, while moving to the left, would start going towards the right. Mansukhlal admitted that the cyclist was visible from a distance of half or one furlong. He also admitted that when the jeep passed him, he had turned to the left side. He admitted that there was no other person or bullock cart on the road.

21. Contrary to the evidence of Mansukhlal (P.W. 8), the driver Dattu Pandu (P.W. 9) gave a different story. He stated that the Cyclewala was driving to his left. When he gave horn, the Cyclewala came on the middle of the road. Then he again gave a horn, but the cycle became unsteady and the Cyclewala came to the left. Then he stated that on his first horn, the Cyclewala went to the left side of the road and then he came on the right side. The theory of giving two horns is not given out by Mansukhlal (P. W. 8). The story of the Cyclewala first moving to the left is not given out by Mansukhlal. We thus find that the story of Mansukhlal (P.W.8) and Dattu Pandu (P.W. 9) is contradictory. In the circumstances, we feel reluctant to place reliance on the circumstances resulting in the accident as given out by them.

22. From the above discussion, we hold that the deceased Nathuram was on his left side and the car, without blowing horn, dashed against him with forceful impact. When the road was wide and visibility clear and there was no intervening object between the cyclist and the car, the driver, in the ordinary course of things, Could have taken away the car by the side of the cyclist as was done by the jeep, if he had used proper care. The explanation offered by the Respondent is not reasonable and proper and in the absence of proper explanation, we are of the view that the accident arose from want of care.

23. Now we would refer to the law.

In *Indian Trade and General Insurance Co. Ltd. and Others Vs. Madhukar Govind Rao Bhagade*, it has been laid down as under:

As between a cyclist and a driver of a motor vehicle, undoubtedly, the latter's responsibility to use care and diligence is greater. The duty to use care increases proportionately with the danger involved in dealing with a particular type of vehicle. It is found that the negligent act or omission of a driver was the proximate and efficient cause of an accident, it will not be valid defence to say that the person injured was also negligent unless it is shown that the person injured had made it extremely difficult for the other to avoid the accident.

24. In *Gyarsilal v. Sitacharan Dubey* 1963 M.P.L.J. 162 it is observed as follows:

It is axiomatic that when two persons are so moving in relation to one another as to involve a risk of collision, each owes to the other a duty to move with due care no matter whether they both are in control of vehicles, or both are proceeding on foot or whether one is on foot and the other is a moving vehicle. If the one party is negligent in driving his car, owing a duty to the other side to take and exercise due and proper care while driving the car and the other side suffers injury, he is liable to damages to the sufferer.

25. In *Seethamma v. Benedict D'sa* 1966 A.C.J. 178 it is observed as follows:

A person driving a motor vehicle on a highway must drive the vehicle with reasonable care, strictly observing the traffic regulations and the rules of the road, so as not to imperil the safety of other persons whether they are pedestrians or cyclists or others who have a similar right to use the highway on which he drives it....

A person driving a motor vehicle must keep a good look-out in all directions of the road, on the sides and on the stretch of the road in front of him....

26. In *Champalal Jain and Others Vs. B.P. Venkataraman*, it is held:

The driver must keep a proper lookout for pedestrians or other users of the road. He must, whenever expedient, give warning of his approach as at cross roads. Even if another user of the road is negligent, he must exercise due skill in trying to avoid the consequences of that negligence.

27. We have scrutinised the evidence in the light of the law as above and the submissions made before us. We do not find any substantial ground to differ from the conclusions of the first Court that there was negligence on the part of Respondent No. 6. We hold that the negligence of Respondent No. 6 has been fully established.

28. We would now consider the quantum of compensation awarded by the first Court. The lower court considered the question of compensation in para 13 of its Award. It has held that Nathuram was 45 years of age at the time of his death and would have normally lived upto the age of 60 years. Looking to the status of the deceased, his income, expenditure, sufferings, normal expectancy of life and

also the sufferings of the Petitioners, it felt that Rs. 5,000/- was the proper compensation. It also held that the monthly income of the deceased was Rs. 150/- p.m. and the family being large, the deceased could spare not more than 25.00 or Rs. 30.00 p.m. for his family in these times of high prices. We have perused the evidence and agree with the Court below that the deceased was 45 years of age could have lived upto the age of 60 years. Regarding the age of the deceased at the time of accident, the evidence of Dr. P. N. Pathak (D. W. 1) also shows that the victim was of 45 years of age or even more than that. The evidence of Mrs. Sarjubai (P. W. 4), widow of the deceased, shows that the deceased could have lived for 10 or 12 years. There is no evidence adduced by the Petitioners to show the normal longevity of life of the family on the evidence, therefore, we agree with the Court below that the deceased was 45 years old when the accident took place and he could have lived for 15 years.

29. Regarding his income, we are also inclined to agree that it could not be more than Rs. 150.00 p.m. There is overwhelming evidence that at the place where the deceased worked, accounts were maintained. There is also evidence that the deceased himself maintained accounts. When documentary evidence was available, its suppression meant that the Petitioners did not produce best evidence. We, therefore, find no reason to take a contrary view and hold that the monthly income of the deceased Nathuram was Rs. 150/- p.m.

30. The deceased was a petty contractor. He must be spending substantial amount in his business and must be purchasing articles necessary for repair of utensils. In the absence of account books, we cannot find the exact amount which the deceased was spending on his business. But this would take away a substantial part of his income. Further, even according to the Petitioners, the deceased was spending over himself Rs. 75.00 p.m. Thus looking to the evidence as it stands, we agree with the Court below that the deceased could not have spared more than Rs. 25.00 or Rs. 30.00 p.m. for his family members.

31. The principles for determining compensation have been laid down in 1974 A.C.J. 150 cited supra. One of the standards is that while in so far as the lump sum of damages is still unspent, it will be earning interest and damages and interest together will be adequate to last out for the period. The reason is that a prudent person receiving a lump sum to make good his loss over a period is expected to invest it and to use it up gradually. Keeping in view the principle governing award of damages for death, we are inclined to hold that in the circumstances of the case, the amount of compensation awarded (Rs. 5000/-) appears to be proper.

32. We do not find that the trial court acted upon some wrong principle of law in determining the amount of compensation or that the amount awarded was extremely high or too low. We, therefore, do not feel inclined to interfere with the quantum of damages awarded to the Petitioners.

33. The Respondents, in their appeal, also contended that the Court below

exonerated the Respondents Nos. 2, 3 and 5 from their liability, but did not award costs to being in the discretion of the Court below, could not be interfered with, more so when the Petitioners could have no personal knowledge about the Respondents and their insurance company. We do not feel inclined to interfere in the discretion of the lower court and maintain its order that the discharged Respondents shall bear their costs as incurred.

34. For the reasons given above, we dismiss Misc. First Appeal No. 48/67 (Balubhai and Ors. v. Mrs. Sarjubai and Ors.) and confirm the award of compensation of Rs. 5,000/- against Respondent No. 1 Balubhai (car owner), Respondent No. 4 (Switzerland General Insurance Co.) and Respondent No. 5 Dattu (car driver).

35. We dismiss Misc. Appeal No. 103/67 (Mrs. Sarjubai and Ors. v. Balubhai and Ors.) and maintain the amount of compensation of Rs. 5,000/- awarded to the Petitioners.

36. We further order that the costs of lower court shall be borne by the parties as ordered therein.

37. We further order that since we are dismissing both the appeals, we direct that the parties shall bear costs of both the appeals as incurred by them. Hearing fee Rs. 400-00 in each appeal.