

(1975) 06 CAL CK 0005
In the Calcutta High Court
Case No : A.F.O.O. No. 457 of 1969

Calcutta State Transport Corporation

APPELLANT

Vs

Kamal Prakash De

RESPONDENT

Date of Decision : 22-06-1975

Acts Referred:

Motor Vehicles Act, 1939 — Section 110

Citation : (1976) ACJ 58

Hon'ble Judges : Manash Nath Roy, J;Kumarjyoti Sengupta, J

Bench : Division Bench

Advocate : S.C. Bose and B.P. Banerjee, for the Appellant;F.K. Sanyal, K.C. Basu and S.K. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Manash Nath Roy, J.—The Respondent, an Architectural Draftsman in the services of planning Division, Housing Directorate under the State of West Bengal, boarded double Decker bus No. WBS 920 of route No. 10 belonging to the Appellant Calcutta State Transport Corporation, which plies from Ballygunge to Howrah on May 11, 1966. After boarding the said bus he occupied a seat just over the rear left wheels on the lower deck. The inner tyres of the said rear left wheel had a burst, as a result whereof he received bleeding injuries with comminuted fracture over both the bones of his left leg.

2. On the happening of the said accident, due to the bursting of the tyres, he on July 7, 1966 filed an application for compensation u/s 110 of the Motor Vehicles Act, 1939, in the Court of the Additional District Judge, Alipore, 24-Parganas, who incidentally is the Motor Accidents Claims Compensation Tribunal for Calcutta and 24-Parganas. The said application was registered as M.A.C. Case No. 36 of 1966.

3. In his application, the Respondent alleged that at the relevant time he was drawing a salary of Rs. 451 per month which was inclusive of all allowances. He

alleged that his normal place of residence is at Uttarpara and at the relevant time he was attending his office at New Secretariat Buildings, Calcutta-1 as a daily passenger by train and by bus. He has further alleged that on the material date he left office early in the afternoon for the purpose of attending to some private business at Koreya. He has stated that after finishing the said business, he boarded the bus in question for the purpose of going back to his residence at Uttarpara via Howrah. He has alleged that the said bus safely reached in front of Prachi Cinema, Opposite Nilratan Sarkar Hospital at about 5-30 p.m. and all the time ever since he boarded the said bus, he was sitting on the left hand side Ladies" seat which incidentally is just on the rear left side wheels of the bus. He has alleged that the said bus was overloaded and the passengers had duly alighted and boarded at the said Prachi Cinema stoppage and after it had just started and had proceeded some distance, the left side rear inner tyres of the same had burst, as a result whereof he received serious bleeding and fracture injuries on his left leg and was removed to the Nilratan Sarkar Hospital, Emergency Block.

4. He had further alleged that he received 3 days treatment at the said Hospital and thereafter his relatives obtained his discharge from the said Hospital and had his treatment continued for some time at his residence. Thereafter, he was again admitted to the P.G. Kar Medical College and Hospital and remained confined for about 2 months. In his application it has been alleged by the Respondent that on subsequent partial recovery, he had to attend his office by hiring taxi from Bally Bridge for about 3 or 4 months but soon thereafter he had to take rest at his home for occasional flare-ups. He has alleged that such flare-ups still continue and he, as a result of such accident, has acquired a permanent limp in his left leg. The Respondent has further alleged that because of the said accident he has practically lost his zest and pleasure of life and that sometimes he intends to commit suicide for his continued ill health. He has also alleged that he has spent a sum of about Rs. 3,000 out of his own resources towards his treatment and thereafter his relations came to his aid during the subsequent period of treatment and in fact the expenses for special diet which was continued for some time, had to be borne out from charities by the said relations. Taking into consideration the total impact and the loss, the Respondent in his application had claimed a sum of Rs. 75,000 by way of compensation against the Appellant herein.

5. The Calcutta's State Transport Corporation viz. the Appellant herein contested the said application and in their written objection they contended inter alia amongst others that the accident in question was an act of God or Viz major. They contended that the accident could not be foreseen and that the driver of the bus had no control over the same. They further alleged that the compensation as claimed was excessive and arbitrary. They however did not dispute the fact of bursting of the tyres.

6. On the pleadings as aforesaid, the parties to the proceeding went in trial on

the following issues:?

(1) Can the Calcutta State Transport Corporation repudiate its liability on the ground that the accident was an act of God or Viz major ?

(2) Is the Petitioner entitled to claim any compensation ? If so, for what amount ?

7. On the question of repudiation of the liability by the Calcutta State Transport Corporation as mentioned in issue No. 1 above, the learned Tribunal, on consideration of the oral evidence of the Respondent himself, who deposed as P.W. 3 and one Sri Sudhir Kumar Mitra, O.P.W. 1 who is the tyres examiner of Calcutta State Transport Corporation, Howrah Depot, and other documentary evidence, came to the conclusion that the accident in question had happened due to lack of proper maintenance of the bus and as such the said issue was decided in favour of the Respondent. On the next question about the Petitioner's right to claim compensation after considering the evidence of P.W. 1, Dr. M.L. Chatterjee, Orthopedic Surgeon, associate Professor and Head of the Department of Orthopedic Surgery, Calcutta National Medical College, P.W. 7, Dr. Sailendra Bhattacharjee, Assistant Professor of Orthopedic Surgery, R.G. Kar Medical College and Hospital, Calcutta, and that of P.W. 3, the learned Tribunal found that the Petitioner was entitled to get a compensation of Rs. 13,739, 85p from the Calcutta State Transport Corporation and he awarded accordingly. From the determination, the break-ups of the said amount of compensation appears to be a sum of Rs. 7,000 on account of medical expenses and diet, Rs. 1,000 on account of transport charges, Rs. 739.85 on account of loss of salaries and Rs. 5,000 on account of future pain and sufferings.

8. From the said determination, the, Calcutta State Transport Corporation presented this Miscellaneous Appeal on February 10, 1969 and at the time of the hearing of the same Mr. Bose, the learned Advocate appearing for the Appellant, in his usual fairness, contended that he will not dispute the award of Rs. 3,000 which was made by the Tribunal on account of medical expenses incurred by the Respondent. But he made it clear that he would contest the award in so far as the same relates to an amount of Rs. 4,000, which the Respondent has alleged to have received in the shape of charities from his relatives and he would also submit that the Calcutta State Transport Corporation in the instant case has no liability to pay any amount to the Respondent on account of compensation, as there was no laches on their part and the more so when the Calcutta State Transport Corporation in the instant case has taken due and proper care in maintaining and running the services including the Bus in question and also because there is no evidence of actual repayment of the said sum by the Respondent or any demand for the same from him by the donors.

9. On the question of the amount of care which was required to be taken by the Calcutta State Transport Corporation in the instant case, for the purpose of finding out its liability in the matter of compensation and the tests required. Mr. Bose first relied on the case of Handerson v. Jenkins and Sons (C.A.) (1969) 1 All

E.R. 401 and more particularly to the determination by Sachs L.J. viz, where an accident results from a latent defect the burden of proof is on the Defendants to show that it occurred without fault on their part and that such defect could not be discovered by reasonable care. Standard practice is not conclusive in a type of case in which risks of great magnitude may result. In such a case it is essential for the Court not to be bound by the view of experts as to practice or as to what risks may be disregarded; the Court should form its own opinion on the facts. It is for the Court to decide whether the owner of the offending vehicle had taken all reasonable precautions for the safety of the public.

10. It appears that from the above determination, by the Court of Appeal, a further appeal was taken to the House of Lords in the case of *Handerson v. Henry E. Jenkins and Sons* 1970 A.C.J. 198 wherein it has been held that the Respondent viz., the owners could not rely on the defence of a latent defect not discoverable by the exercise of reasonable care unless they showed that they had taken all reasonable care in the circumstances of the case and to do so they are required to show that there were no special circumstances in the past use of the vehicle to indicate that the vehicle might have been subjected to a corrosive agent resulting in the corrosion of the pipe. As the Respondents had not adduced evidence of the past history of the vehicle, they could not rely on the defence of a latent defect and as such they had not discharged the inference that they had been negligent. Thus the views which were taken by Sachs L.J. in *Handerson v. Jenkins and Sons* (1969) 1 All E.R. 401 has been reversed and they are no longer good law. It may be mentioned further that in the later judgment it has been held that the plea of "latent defect" made by the Respondent in the given case had to be made good by them. It was for them to show that they had taken all reasonable care and despite this, the defect remained hidden.

11. On the next question of the amount of Rs. 4,000 which was received by the Respondent in the shape of charities from his relatives and which was included for the purpose of awarding special damages to him on the allegation that he was under the moral and not legal duty to refund that sum. Mr. Bose submitted that since there was no obligation of the Respondent to refund the said sum to the persons from whom such charities were received and when no specific averment was there to prove that the Respondent had actually refunded the said sum, the Tribunal should not have made the award for the said sum of Rs. 4,000. In support of his argument and for the principles, Mr. Bose first relied on the case of *Dennis v. London Passenger Transport Board* (1948) 1 All. E.R. 779 In that case the Plaintiff, who was injured due to the negligence of the Defendant, received no wages during the period of his disability, but the Minister of pensions and his employers paid to him, in pension and sick pay, amounts which together equaled his wages. It further appears that in the said case which was an action for damages for negligence, liability was admitted and the sole question for determination was the amount of damages and it was held that the amount of wages lost by the Plaintiff should be included in the special damages awarded to him although he was under only a moral, and not legal duty to refund that sum.

The argument advanced by Mr. Bose on the question of charities as mentioned hereinabove appears to us to be of no effect or avail in view of the Bench decision of this Court in the case of *The Motor Owners' Insurance Co. Ltd. and Another Vs. Hrishikesh Das and Others*, . In that case two appeals were preferred from two applications, one by the husband and the other by the wife, for the recovery of compensation based on the same accident, when the bus in question knocked down both of them causing serious injuries. The husband preferred a claim for Rs. 10,000 and the wife laid her claim at Rs. 35,000. Both the applications were heard analogously on the same set of evidence by the Tribunal which ultimately awarded a sum of Rs. 5,600 toward the compensation of the husband and a sum of Rs. 13,681 for the wife. Against the said award and decree, two appeals as mentioned hereinbefore were preferred and there were cross objections, fn that decision a point arose as to the interpretation of Section 110 of the Motor Vehicles Act and it has been held that the compensation under the said section will include all the amounts inclusive of payments made by a third party. There is no legal obligation of any third party to pay the amount. The cardinal principle to be followed in such cases is that the wrong doer must pay, whether the third pays or not.

12. On the next question of the amount of care, due diligence and onus, apart from relying on the English Cases as mentioned hereinbefore, Mr. Bose also relied on the case of *Madhya Pradesh State Road Transport Corporation Vs. Sudhakar and Another*, In that case the question of rash and negligent driving resulting in accident and the manner of proof thereof, the presumption of negligence and the applicability of the doctrine of *res ipsa loquitur* came up for consideration. In that case a bus was going on a clear and visible road at high speed and there was no traffic near the place of accident. The bus took a turn to the left for no apparent cause went off the road and after dashing against two trees overturned. As a result of that some passenger died and others received severe injuries. The Appellants in that case contended that the doctrine of *res ipsa loquitur* could not be applied. It has been held in that case that the doctrine of *res ipsa loquitur* only means that an accident by its nature be more consistent with its being caused by negligence for which the Defendant is responsible than by other causes. In such a case the mere fact of the accident will be *prima facie* evidence of such negligence. The burden is on the Defendant to explain and to show that the accident occurred without any fault on his part. Thus, the applicability of the doctrine to such cases is merely a rule of evidence relating to proof and nothing more. The doctrine is not a rule of law but no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by Defendant are at the outset unknown to the Plaintiff and are or ought to be within the knowledge of the Defendant. Thus, the doctrine does not apply when the cause of the accident is known. In that case it was also held that there was no apparent reason for the accident nor was the reason extraneous or patent. The circumstances and apparent facts relating to the accident were only

consistent with the theory of rash and negligent driving on the part of the driver. In such a case the doctrine of *res ipsa loquitur* would be applicable and hence, in the absence of any explanation on the part of the Appellant to disprove negligence, the Court could infer negligence on his part.

13. The maxim *res ipsa loquitur* means that the accident talks or the things speak for themselves. There may be certain accidents which are patent and self-speaking that they will shift the burden of proof on the Defendant. It is no doubt, a reputable presumption. Before a Tribunal to succeed in an action against the owner or driver of the vehicle, the claimant has to establish some negligence or a breach of duty by the Defendant towards him and its causal connection with the injuries sustained by the claimant.

14. Where the accident occurs due to bursting of tyres, as in the instant case, the duty of the injured or the heirs of the deceased is initially to allege and prove facts leading to negligence of the owner or driver of the vehicle. Then the duty of the driver and the owner arises to show whether there was absence of negligence and all possible care and precaution was taken to avert the accident. The plea of inevitable accident can certainly be raised. Bursting of tyres generally does not take place in new tyres. Old tyres beyond a maximum capacity should not be used and a driver should be vigilant when he runs the vehicle and see if any impediment is on the way. Every case requires the care of a prudent and reasonable man. Before starting, -machinery has to be tested. An owner guarantees the soundness of the vehicle to his passengers as in the case of trains. Thus in all cases of enquiry before the Tribunal or the Court, as the case may be, in investigating the matter of negligence, the elements and principles of tort have to be invoked and the defence open in the cases of tort is open in the case of negligence. What is negligence depends upon determination of various factors. There are three basic elements of tort:

(1) an act or omission on the part of the Defendant.

(2) intention or negligence or the breach of a strict duty on the part of the Defendant and

(3) damages resulting to Plaintiff from the wrongful act of the Defendant which is not too remote.

An act would mean doing of a positive act and omission means breach of duty. In each case it will be duty of the Plaintiff to connect the wrongful act with the damages accruing and show that the Defendant was negligent. Inevitable accident is an accident such as that the Defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances he was placed.

15. Applying the aforesaid tests to the facts and circumstances of the case and more particularly after scanning the evidence, it appears that the award as was made was due, proper and reasonable. P. W. 1 Dr. M.L. Chatterjee has

established that there was a comminuted fracture over both bones of the left leg of the Respondent with an evidence of old operation, upper fractured tibia having united but the lower fracture remained un-united and in his opinion the Respondent has suffered a permanent partial disablement to the extent of 40%. He has further opined that the Respondent who was an Architectural Draftsman and who is required to perform his duty mostly standing would not be in a position to discharge his normal functioning because of the accident in question. He has further opined that the movement of the left ankle joint of the Respondent was 50% of the normal i.e. about 40° instead of 90° which would mean that there would be restriction in sitting and squatting by the injured and furthermore there would also be some limping. He has further proved that the Respondent was very much mentally depressed and he will have considerable difficulties in discharging his duties of Architectural Draftsman, who as mentioned hereinbefore is required to perform his work standing, because of the shortness of his leg due to the accident. He has further established that because of these difficulties there may be occasional flare-ups of the Respondent and his life shortened due to repeated flare-ups which may cause pain and pus formation leading to almoned degeneration of the liver and anemia. It further appears that the Respondent herein has also established by cogent and reliable evidence about the expenses which he has incurred in the instant case. The learned Tribunal has found that the Respondent has succeeded in establishing the expenses on account of Doctor's fees and medicines to the tune of Rs. 3,000 which was spent by himself and a further sum of Rs. 4,000 which he received as charities from his relatives. The main evidence of the Calcutta State Transport Corporation, for the purpose of establishing the fact that all due diligence and reasonable care was taken, was sought to be led through O.P.W. I, Sri Sudhir Kumar Mitra the tyres examiner of Calcutta State Transport Corporation, Howrah. His evidence is that he was employed with the Appellant for about 12 years and he took special training in Messrs. Dunlop & Co. He has deposed that the offending vehicle W.B.S. 920 was a double Decker Leyland bus and the rear tyres of the same are of smaller size than those of the front wheels. He has further deposed that reasonable expected life of a new tyres is about 80,000 kms. of running service in the streets of Calcutta and the history of each of the tyres as are used in the vehicles of the Calcutta State Transport Corporation, are maintained. He produced a chart Ext. A for the purpose of proving that the tyres in question on the material date had done only 48,694 kms and he himself had checked it pressure and the condition before the same was fitted in the offending vehicle on 2nd April, 1966. He has further deposed with reference to the chart in Ext. A that the said tyres was first fitted in vehicle No. W.B.S. 1514 on June 1, 1965. It further appears from his evidence that this witness, who claims to be an expert in the matter of examination of tyres, is only a Matriculate and took his training with Messrs. Dunlop & Co., as to manufacture, repairs and maintenance of tyres and such training lasted for 5 days only. The chart Ext. "A" according to us has not been duly proved because the said O.P.W. 1 has not as it appears from the record, been able to testify to all the entries in the said chart to be

made and prepared and maintained by him. The other evidence of the driver and conductor of the offending vehicle, who are O.P. Ws 2 and 3 respectively were also placed before us by Mr. Bose. Their evidence shows that at the time when the tyres had a burst, the bus was not overloaded, the vehicle was not in a high speed and the condition of the road at the relevant time, as usual with Calcutta streets of the present day, was precarious. Be that as it may, the evidence of the said two witnesses could not be of much help and assistance in the facts and circumstances of the instant case. The bursting of the tyres has been conceded by the Appellant and it is also an admitted fact, that the Respondent concerned, had received multiple injuries including fractures in his left leg as a result where of he has suffered and is bound to suffer in future. It has been found in the case of Madhya Pradesh State Road Transport Corporation Vs. Sudhakar and Another, that where the deceased is an earning member of the family, on whom other members might be dependent, the basis for calculating the pecuniary loss to the dependants may depend upon data which may not be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. The pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefits and on the other any pecuniary advantage which from whatever source comes to them by reason of the death. Thus, the loss and the gain have to be ascertained and to be adjusted against each other. The burden will certainly be on the claimant to establish the extent of the loss. But it will not be sufficient for him to prove that by the death of the deceased he lost a mere speculative possibility of pecuniary benefit. To succeed, he must prove a reasonable probability of pecuniary advantage. Thus, in a case of fatal accident it is the loss of benefit to be balanced by the loss of gain that has to be assessed as damages. Where merely badly injury is caused resulting in permanent physical disability, the pecuniary loss might be assessed on the disadvantages suffered by the person for the rest of the life. In the case of child, the loss of probable benefit that the child might have been able to render may be in the region of conjecture, but some nominal damages ought to be given even in the case of death of a young child. Where a non-earning member of the family is killed, the trend of decisions has been to award only nominal damages. But the damages to be awarded in the case of injuries resulting in permanent physical disabilities ought to be based on the consideration so as to set off the disability suffered for the rest of the life. As regards the other injuries not resulting in permanent physical disability, lesser damages commensurate with injuries and suffering might be awarded in suitable cases.

16. In the instant case we are of the view that the onus to disprove the claim of the Respondent has not been duly discharged by the Appellant Calcutta State Transport Corporation authorities and admittedly the Respondent herein has suffered some loss and damages. In fact on the evidence as available, it is clear that he will have to suffer such loss and damages for life. Since compensation has been assessed and awarded by Tribunal concerned after duly taking into consideration the evidence on record and the tests as mentioned in the Madhya

Pradesh judgment, we are not inclined to interfere with such findings in this jurisdiction. On the existing materials we however find that the Appellant could not rely on any latent defect, which as sought to be argued by Mr. Bose could not be discovered by the exercise of reasonable care, as the evidence of due care as has been alleged to be taken and sought to be proved, is unsatisfactory and unreliable. It is the duty and obligation of the owner in a case like this to prove and establish by reliable evidence that all the necessary precaution and due care was taken for maintaining and offering proper and efficient services to the traveling public, here the Respondent, but they have signally failed to discharge the said onus. Furthermore, on the facts of the case it has also been duly established that apart from spending Rs. 3,000 the Respondent was required to spend another sum of Rs. 4,000 on account of his sufferings due to the accident, which sum was received by him in the shape of help, assistance and charities from others and it is of immaterial consideration in the facts of the case whether such amount was repaid or even repayment of the same was demanded. When the Appellant in the instant case is the owner of the offending vehicle then they must be held to be liable to make the payment even in the absence of any evidence of repayment or any demand for the same.

17. In view of the above the points as raised and urged by Mr. Bose fail, consequently the appeal also fails and as such the same is dismissed with costs assessed at 20 Gold mohurs.

Let the records be sent down at an early date.

Kumarjyoti Sengupta, J.

18. I agree.