

(1975) 02 OHC CK 0006

In the Orissa High Court

Case No : First Appeal No's. 89 and 90 of 1971

Collector

APPELLANT

Vs

Chandrama Das and Others

RESPONDENT

Date of Decision : 18-02-1975

Acts Referred:

Citation : AIR 1975 Ori 205 : (1975) 41 CLT 480

Hon'ble Judges : G.K. Misra, C.J.;N.K. Das, J

Bench : Division Bench

Advocate : Advocate General, for the Appellant; A.K. Tripathy and A. Rath, (in F.A. No. 89 of 1971) and A.K. Tripathy, (in F.A. No. 90 of 1971), for the Respondent

Final Decision : Dismissed

Judgement

Misra, C.J.—First Appeal No. 89 of 1971 arises out of Money Suit No. 46 of 1970 and First Appeal No. 90 of 1971 arises out of Money Suit No. 47 of 1970. Both the suits were analogously tried in the court of the Subordinate Judge, Berhampur, as they arise out of the same facts. These two appeals have been analogously heard by us.

2. In Money Suit No. 47 of 1970, plaintiff No. 1 is the widow, plaintiffs 2 and 3 are the sons and plaintiffs 4 and 5 are the daughters of deceased Nirakar Sahu. In Money Suit No. 46 of 1970 plaintiff No. 1 is the widow and plaintiffs 2 and 3 are the sons of deceased Suma Das. Nirakar Sahu and Suma Das died in the morning of 5-9-1969 as a result of the fall of the southern cantilever portico slab of the out-patient block of the Maharaja Krishna Chandra Gajapati Medical College Hospital. Berhampur Plaintiffs in both the suits have claimed compensation from the State of Orissa.

Nirakar Sahu was the Cashier in the office of the Superintending Engineer, Electrical, at Berhampur. He was getting Rs. 270/- per month as pay and D. A. at the time of his death. He was born on 23-2-1926 and was appointed in

Government service on 24-9-1949. The Medical College is a Government institution. Nirakar was quite hale and hearty. His life expectancy was more than sixty years. He had been to the Medical College Hospital on a cycle for treatment. He got down from the cycle under the cantilever portico. While he was there the cantilever portico slab fell down on him and he died immediately on the spot. The place where he got down is intended for parking of vehicles to get into the out-patient block of the Medical College Hospital. The portico fell down due to inherent defect. Nirakar would have received pay and emoluments of Rupees 37,788/- till retirement and the plaintiffs would have been the beneficiaries of the income. The plaintiffs, however, claimed Rs. 25,000/- by way of compensation.

Deceased Suma Das was a rickshaw puller. He used to earn Rs. 8/- to Rs. 10/- per day and the plaintiffs in M. S. No. 46 of 1970 used to depend upon his income for their maintenance. He carried a passenger to the out-patient block of the Medical College Hospital and parked the rickshaw underneath the portico. The passenger went inside the block and while Suma Das was about to leave the portico it fell down and killed him at the spot. The plaintiffs claimed a sum of Rs. 15,000/- as compensation.

Defence in both the suits was almost identical. Death of Nirakar and Suma Das by fall of the cantilever portico is admitted. It was, however, asserted that the Chajja was not meant for parking of vehicles underneath. It was meant only to prevent rainfall and sun entering the entrance room. The Chajja stood for 21 months and no defect was visible during that period it was handed over to the Principal, M. K. C. G. Medical College, Berhampur, in November, 1968. Had there been any defect the structure would have fallen just after the centering was removed. As it stood for a long period and withstood the unprecedented cyclone in October, 1968 and heavy intensity of rainfall in 1969 it cannot be said that the portico fell down due to defective construction. It must have collapsed for reasons beyond the control of anybody and must be due to sudden heavy rain accompanied by thunder and lightning which must have resulted in heavy vibration causing heavy bending movements for which the normal design does not provide. The death of the two persons was due to vis major and the defendants were not liable to pay any compensation.

3. The learned Subordinate Judge decreed both the suits. In M. S. No. 46 of 1970 he granted a decree for Rupees 10,000/- while in M. S. No. 47 of 1970 the decree was for Rs. 25,000/-. It is against these decrees that the first appeals have been filed by the Collector of Ganjam representing the State of Orissa.

4. The learned Advocate-General does not dispute the quantum of damages. The relevant materials in that regard need not, therefore, be discussed. The learned Subordinate Judge found that there was no vis major and that the cantilever portico did not fall on account of heavy rain, thunder or lightning. This finding is not also assailed before us.

5. With regard to whether there was inherent defect in construction the learned Subordinate Judge gave a somewhat confused finding. While at one stage he held that there was no defect in construction, he ultimately concluded that it was due to inherent defect that the portico fell down.

6. Before examining the correctness of the conclusion of the learned Subordinate Judge it would be appropriate to indicate the relevant law applicable to the facts of this case. The law has been laid down in paragraphs 79 and 80 of Halsbury's Laws of England, 3rd Edition. Vol. 28. Those two paragraphs may be extracted:

"Res Ipsa Loquitur

79. Inference of defendant's negligence. An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence "tells its own story" of negligence on the part of the defendant, the story so told being clear and unambiguous. The plaintiff cannot rely upon an inference of negligence unless he has alleged in the pleadings and proved at the trial the facts from which the inference is to be drawn. To these cases the maxim *res ipsa loquitur* applies.

80. Effect of application" of maxim *res ipsa loquitur*. Where the maxim *res ipsa loquitur* applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence. The burden on the defendant is to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part- Where, therefore, there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance on the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate. If the surrounding circumstances are not wholly within the defendant's control, or the injurious agency is animate, there is frequently no certain inference, and the plaintiff will not have discharged the burden without proof of some negligent act or omission on the part of the defendant. Injuries to animals do not give rise to any certain inference if the facts are consistent with the animals having injured themselves."

7. The law so laid down was approved in *Municipal Corporation of Delhi Vs. Subhagwanti and Others*, . In that case it was found that the Clock Tower in Delhi which collapsed causing loss of life was exclusively under the ownership and control of the Municipal Corporation or its servants and it was 80 years old. It was found that having regard to the kind of mortar used, the normal life of the

structure of the top storey of the building, could be only 40 or 45 years. There evidence of the Chief Engineer was that the collapse was due to thrust of the arches on the top portion and the mortar was deteriorated to such an extent that it was reduced to powder without any cementing properties. It was not the case of the corporation that there was any earthquake or storm or any other natural event which was unforeseen and which could have been the cause of the fall of the Clock Tower. Their Lordships held that the mere fact that there was fall of the Clock Tower told its own story in raising the inference of negligence so as to establish a prima facie case against the corporation.

8. The same view was taken in *Shyam Sunder and Others Vs. The State of Rajasthan*, . Therein their Lordships held that the maxim *res ipsa loquitur* does not embody any rule of substantive law nor a rule of evidence. The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. Though the parties' relative access to evidence is an influential factor it is not controlling. The fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him, if the odds otherwise point to his negligence. The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on common sense and its purpose is to do justice when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. (See paragraph 10).

9. The facts of the case may now be examined in the light of the aforesaid tests. On the admitted case of the defendants the building of the M. K C. G. Medical College was handed over to the Principal after construction in November 1968 and the portico fell down on 5-9-1969 -- hardly within one year. The collapse of the cantilever portico which was newly constructed speaks its own story. There was no earthquake, thunder or lightning by which it fell down. The fall must be ascribed to the inherent defect in the construction. Public honesty has very much deteriorated in recent times. It is more or less a matter of common knowledge that contractors do not give the requisite quantity of cement and iron in the construction of buildings which would guarantee safety. Obviously there must have been bad design. We are not prepared to accept the evidence of the engineers examined on behalf of the defendants that there was no defect in the construction. If there was no defect it is difficult to imagine that the portico of such a costly building would collapse within two to three years of its construction. The maxim *res ipsa loquitur* fully applies to the facts of this case. It was exclusively within the special knowledge of the defendants to explain how the

portico of a new building collapsed. They have failed to do so by any satisfactory account. The engineers examined on behalf of the defendants who were in charge of the construction are bound to say that there was no defect in the construction. They shall have to justify their own stand: otherwise, they are liable to departmental action. In this view of the matter it is unnecessary to discuss in detail their evidence which has not been rightly accepted by the learned Subordinate Judge.

10. It was stated in the written statement that the two deceased persons had no business to come under the portico. The contention is so fantastic that it needs no notice. Patients in ordinary course of business are to have access to the hospital and they have to pass through the portico to have entry inside.

11. We find no merit in both the appeals which are dismissed with costs.

Das, J.

12. I agree.