

(1964) 05 CAL CK 0008

In the Calcutta High Court

Case No : Appeal From Appellate Decree No. 903 of 1958

Corporation of Calcutta

APPELLANT

Vs

Naresh Chandra Chatterjee and Others

RESPONDENT

Date of Decision : 25-05-1964

Acts Referred:

Citation : 68 CWN 1161

Hon'ble Judges : T.P. Mukherji, J

Bench : Single Bench

Advocate : Saroj Kumar Chatterjee, for the Appellant; Purnendu Sekhar Basu, Monohar Chatterjee for Respondent Nos. 1 and 2 and Ram Prasanna Bagchi, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Mukherji, J.—An interesting question of law, viz., the question of onus in certain cases of claims for compensation arising out of injuries caused by the negligence of the defendant, is involved in this appeal. The plaintiff-appellant, the Corporation of Calcutta instituted a suit for reimbursement against defendants Nos. 1 and 2 who are the owners, and the defendant No. 3, the insurer of a lorry, in respect of compensation paid by the plaintiff to one of its employees who is stated to have been injured while on duty by a ring of one of the running lorry which somehow got detached and hit the employee thereby causing a fracture in his hand which was never united and which rendered him unfit for active service. Laloo was a watering mazdoor under the Corporation. The case of the plaintiff was that on 4.8.1950 at about 8 A.M. Laloo was watering the Harish Mukherjee Road when the Lorry of defendants 1 and 2 came from the north at a speed and a ring from one of its wheels got detached and rolling towards Laloo struck him on the hand. Laloo was at once sent to hospital where he is stated to have been detained for two months. He was found to have suffered a fracture of the left hand but the fracture could not be united. Laloo subsequently demanded compensation from the Corporation and the Corporation

after making the necessary enquiries paid him a compensation of Rs. 1008/- on the basis of permanent disability in terms of the Workmens Compensation Act. That was on September 17, 1951.

2. In December 1951 Corporation demanded reimbursement of this amount from defendants 1 and 2, the owners of the offending lorry. They replied asking the Corporation to write to the Insurance Company, defendant No. 3 for payment. This was done, but on February 2, 1952 defendant No. 3 denied liability. Thereafter the present suit was instituted on the allegation that the injury was caused due to the negligence of defendants 1 and 2 in the matter of proper maintenance of the lorry in question which made it possible for a ring of one of its wheels to slip out and injure Laloo.

3. Defendants 1 and 2, and defendant No. 3 filed separate written statements.

4. The incident of August 4, 1950 resulting in Laloo having been hit by a ring of the wheel of the lorry in question was not denied. But the defendants denied that Laloo sustained a fracture of the hand as alleged or that he was permanently disabled thereby or that he was entitled to the amount of compensation as is stated to have been paid to him. Their case was that the payment was gratuitous and that the plaintiff was not entitled in the circumstances of the case to recover the amount from them.

5. The learned Munsif found on an acceptance of the evidence adduced on behalf of the plaintiff that at the time of the accident the lorry was in a bad state of repairs and was being negligently driven. He further found that in the circumstances Laloo was entitled to compensation and that the amount paid to him was reasonable. On his findings he decreed the suit.

6. On appeal the learned Subordinate Judge relied on the evidence of P.W.3, the Foreman of the Motor Vehicles Department of the Corporation who was examined by the plaintiff as an expert and whose evidence was that there might be accidental bursting out of the tyres and slipping out of the ring of the wheel and that such cases would be matters of pure accident. In the absence of any evidence that the lorry was being driven at an excessively high speed, it was held that the incident was the result of an accident pure and simple and unrelated to any negligence either on the part of the driver or of the owners of the lorry. The learned Subordinate Judge further found that there was no evidence on record to show that Laloo had been sent to hospital for treatment of his injury or that he had suffered a fracture of the left hand as alleged. On these findings he allowed the appeal and dismissed the suit. Against that decree of dismissal the plaintiff Corporation has come up to this Court in Second Appeal.

7. Mr. Chatterjee appearing on behalf of the appellant urged that the incident resulting in the injury to Laloo not being in dispute, whatever evidence was adduced on behalf of the plaintiff was sufficient to attract the maxim "*res ipsa loquitur*" and if this maxim applied the onus would shift to the defendants to prove want of negligence and exercise of due diligence in the matter of proper

maintenance of the lorry and in the matter of driving the same at the time of occurrence. It was contended that the facts proved would raise a presumption of want of diligence which it was for the defendants to rebut by adequate and satisfactory evidence and that no evidence whatsoever having been adduced on behalf of the defendants in the case, the presumption above stood and the plaintiff as such was entitled to a decree. In support of his contention Mr. Chatterjee referred to certain English cases.

8. The first case referred to is that of (1) *Scott v. The London & St. Katherine Docks Company*, reported in 159 English Reports, page 665. In that case a Customs Officer while passing along a stone pavement in the Docks of the defendant company was hit by sugar bags which were being lowered by a crane. The maxim "*res ipsa loquitur*" as being applicable to the case is not mentioned in so many words in the judgment but the appeal court held that where the thing (the crane) is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who had the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

9. The next case cited is that of (2) *Halliwell v. Venables*, reported in 1930 Law Journal Reports K.B. 353 which applied the dictum in the case above. The plaintiff in the case sued the driver of the car in which her husband was travelling when the car overturned and killed her husband. It was held that the mere happening of the accident unexplained may be and often is in itself evidence of negligence without going back to find out how or why the accident happened. The doctrine of "*res ipsa loquitur*" was applied to the case and the onus of proving want of negligence in the matter of driving the car was thrown on the defendant.

10. The case (3) *Barkway v. South Wales Transport Company Limited*, (1948) II All England Reports 460 considered the question of presumption expressed in the phrase "*res ipsa loquitur*". In that case an omnibus while running burst one of its tyres, left the road, rode on the pavement and then fell down an embankment killing the plaintiff's husband who was one of the four passengers killed. It was observed that "if the facts without more are proved then "*res ipsa loquitur*", there is a presumption of negligence on the part of the defendant" and it was further held that it is no rebuttal of the presumption to show again without more that the immediate cause of the bus leaving the road is a tyre burst, since a tyre burst per se is a neutral event consistent both with negligence as well as with due diligence. It was held that the defendants will in such a case have to prove that the tyre burst was due to a specified cause which does not connote negligence or they can prove that they took all possible care with their tyres.

11. Another case referred to by Mr. Chatterjee is (4) *Moore v. R. Fox & Sons*, reported in 1956 L.R.(1) Q.B. 596. There the administratrix of the deceased sued the defendant for the death of the deceased in an explosion in defendant's cellulose and bronzing factory. It was observed "it cannot be doubted that if the

plaintiff can rightly assert as regards this accident, *res ipsa loquitur*, the onus is then thrown upon the defendant to show that there was no negligence on their part or at least to give an explanation of the accident which is consistent with want of negligence on their part.

12. Certain other English decisions were referred to in this connection but it is unnecessary to enter into the same as the same principle as above is enunciated therein.

13. So far as decisions of our courts are concerned, Mr. Chatterjee referred to the case (5) *Parameswari Das & Ors. v. Sm. Soman Devi & Another*, AIR (1960) Pun 392. There the respondent's husband was killed as the result of an accident involving the car of the appellant wherein he was travelling and in a suit for damages, the rule of "*res ipsa loquitur*" was applied and the necessary presumption of negligence was drawn.

14. The rule above was noted and discussed with reference to some of the English decisions in the case (6) *E. P. Province v. Modern Cultivators*, AIR (1960) Pun 66. It is found that the learned Judges stated in paragraph 9 at p. 70 of the judgment that "there is no legal presumption of negligence even when "*res ipsa loquitur*" applies," but this proposition was watered down by the observation that followed ".....in fact all that the rule means is that on the proof of certain set of facts, the Court may be justified in drawing an inference, unless the contrary is proved, that the accident was not likely to occur except through the negligence of the defendants" and this is a total acceptance of the interpretation of the rule as in the English decisions referred to earlier.

15. The rule "*res ipsa loquitur*" embodies a salutary and necessary rule of evidence in many cases where the true cause of an accident lies wholly within the knowledge of the defendant and it may well-nigh be impossible for the plaintiff to prove negligence. All that the plaintiff might be able to prove is the happening of the accident but how it happened would be within the special knowledge of the defendant and if the accident be such as to attract the rule, a rebuttable presumption of negligence will be justified.

16. The principle that emerges from the decisions discussed above is that if evidence adduced on behalf of the plaintiff, on whom certainly lies the initial onus, shows that the doctrine of "*res ipsa loquitur*" is attracted to the case and this is approved by proof of the following two facts viz.,

(1) that at all material times the thing that caused the accident was under the management of the defendant,

and (2) that in the ordinary course of events, accidents such as what took place do not happen,--a presumption of negligence and want of due diligence would arise and the onus would be thrown on the defendant to rebut that presumption.

17. In the present case there is no dispute that the ring of the wheel of the lorry in question somehow got detached while the lorry was running and that the

same rolled towards Laloo with force and struck him. Such slipping out of the ring of a wheel from a running vehicle does not ordinarily happen. It has also been proved that the offending lorry belongs to defendants 1 and 2. In my opinion, the facts of the case are so patent and loquacious as to attract the doctrine of *res ipsa loquitur* thereby raising a presumption of negligence and throwing the onus of proving want of negligence and the exercise of due diligence in the matter of proper maintenance of the lorry on the defendants respondents. The defendants not having adduced any evidence in the case that presumption remained un rebutted. The defendants in order to avoid liability could have shown that the accident or the incident was due to a specified cause unrelated to any negligence on their part or that they had taken all reasonable care in the matter of keeping the lorry in proper repairs. But no evidence having been adduced in this regard, the onus that lay on them has remained undischarged in the case. As the evidence stands, *res ipsa loquitur*, that is, the thing speaks for itself and it speaks of want of due diligence and negligence on the part of the owners of the lorry due to which it was possible for a ring of one of its wheels to get detached and to cause injury to the injured.

18. Mr. Basu, appearing for respondents 1 and 2, argued that any presumption of negligence or want of due diligence that might arise in the case has been rebutted by the evidence of plaintiff's own expert P.W.3 according to whom the slipping out of the ring of a wheel from a running lorry is purely accidental. An accident is an incident that does not ordinarily happen and the fact that a happening is an accident does not necessarily mean that it was destined to happen and could not be averted. If it was destined to happen and could never be averted, the maxim *res ipsa loquitur* would not be attracted to it. The case (7) *Hunter v. Wright*, reported in 1938(II) All England Reports 621 is a case in point. The question is whether as a matter of fact the incident in the instant case could be averted or not.

19. It may be that the slipping out of the ring of a wheel from a running motor vehicle is a matter of pure accident, but the question is whether such an accident would happen if the vehicle were kept in proper order and that is a matter which the defendant has to prove by positive evidence. The evidence of P.W.3 is at best neutral evidence, because the accident may be consistent both with negligence as well as with due diligence. Such being the case it was for the defendants to prove that the slipping of the ring was due to a specific cause which does not connote negligence or they could prove that they took all possible care with the wheels of their vehicle. In this view of the matter I cannot hold that the evidence of P.W.3 has exonerated the defendants from adducing any evidence in rebuttal of the presumption of negligence and want of due diligence that the plaintiff's evidence has raised in the case. I cannot agree with the finding of the lower appellate court that negligence and want of due diligence was not proved in the case.

20. The next question is whether the plaintiff is entitled to reimbursement of the

amount paid by it to its employee as compensation for the injuries sustained. The learned Subordinate Judge has found that there is no acceptable evidence on record to show either that Laloo was admitted into hospital for treatment of his injuries or that as a matter of fact he did sustain a fracture of the left hand which remained disunited as alleged. There is on record some oral evidence to show that Laloo was admitted into the Sambhu Nath Pandit Hospital, but the records were not called for from the hospital to prove his admission or the nature of the ailment for which he was treated there nor was any doctor examined to that end. In order that the plaintiff might be entitled to get reimbursement from the defendants it will have to be proved that the payment made to Laloo was payable to him. If the defendants were not liable to make payment in law, that is, if payment of compensation could not be enforced against them by suit, the plaintiff would not be entitled to recover the amount from them although the Corporation might have made the payment on its own. In order to make the defendants liable a foundation has to be laid and for that it has got to be proved that Laloo was entitled to compensation because of the injury sustained by him as alleged. If the evidence on record has not been able to prove to the satisfaction of the court that Laloo had sustained a fracture of his hand which remained disunited and which entitled him under the Workmens Compensation Act to obtain compensation from his employer on the basis of permanent disability in accordance with the provisions of schedule I of the Act, the present suit for reimbursement would not lie. I find that as the necessary facts in this regard were not proved, the plaintiff is not entitled to reimbursement as claimed.

21. It was urged on behalf of respondent No. 3 that the plaintiff is not entitled to reimbursement from them on account of the payment having been made without the authority of the Commissioner of Workmens Compensation in view of the fact that if a proceeding was initiated before the Commissioner, they would have been entitled to appear and contest their liability and the extent thereof. As the suit is going to be dismissed on other grounds it is not necessary for me to enter into the question in this appeal. The appeal must accordingly be dismissed. In the facts and circumstances of the case, however, the parties should bear their own costs of the entire proceeding. The appeal is dismissed. The judgment and decree of the learned Subordinate Judge are affirmed. Parties will bear their own costs throughout.