

(1983) 03 OHC CK 0012
In the Orissa High Court

Godabarish Satpathy

APPELLANT

Vs

Brundaban Mishra and Another

RESPONDENT

Date of Decision : 23-03-1983

Acts Referred:

Citation : (1984) 1 ACC 460

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Judgement

R.C. Patnaik, J.—On 3-10-1976 around 10 p.m. the appellant was languishing on a cot placed in front of his house by the side of the road. Vehicle bearing registration number ORP 6722 belonging to the State of Orissa (Respondent No. 2) suddenly rushed from the southern side of the road at a high speed dashed against his cot, then against the front verandah of the neighbouring house and moving along a distance of 30 to 40 cubits stopped near a public tap. The appellant was severely injured. The appellant alleged that he sustained fracture of his limbs. He was treated as an indoor patient at the head quarters hospital at Bolangir and then at the Medical College Hospital at Burla and he had almost become an invalid. At the relevant time his income was Rs. 600/- per month and he claimed Rs. 85,000/-as compensation.

2. The appellant alleged that the vehicle belonging to respondent No. 2 at the time of the accident was being driven by respondent No. 1 who was then a Joint Director of Agriculture serving under the respondent No. 2, State of Orissa.

3. Respondent No. 1 controverted the allegations and averred that the vehicle was being driven by the driver under the employment of respondent No. 2 and he was not even present in the vehicle. He pleaded that the accident was due to sudden failure of the brakes. The plea of the respondent No. 2 was that the appellant was sleeping on a cot on the public road and as respondent No. 1 was driving the vehicle unauthorisedly, the latter was not liable.

4. Respondent No. 1, however, did not choose to contest at the hearing and was

set ex parte. On behalf of the appellant, two witnesses were examined to prove that the accident was caused by the negligence of respondent No. 1. No evidence, either oral or documentary, was tendered on behalf of the respondents. The Tribunal, upon a consideration of the materials, held that the accident was due to "sudden and unexpected failure of the brakes and steering system due to the breaking of the right front wheel suspension link". It further found that the State was not liable for the unauthorised act of respondent No. 1. So holding, it dismissed the application of the appellant.

5. Mr. D. Nayak, the learned Counsel for the appellant, contended that the Tribunal was in error on both counts. He submitted that on the facts and in the circumstances of the case, the maxim *res ipsa loquitur* applied and the burden was on the respondents to show that the accident was not due to the negligence of the driver. No evidence was however, laid on behalf of the respondents. Respondent No. 1 did not choose to contest at the hearing though he had filed written statement. The respondent No. 2, owner, did neither examine the driver who was the most competent person to speak about the incident and discharge the burden nor did it adduce any evidence in support of the pleas taken in its written statement. He further submitted that the presumption was that the person driving was acting for and on behalf of the owner. The said presumption was not rebutted by the owner's failure to lead any evidence.

6. Mr. S.S. Basu, the learned Counsel for respondent No. 1, pleaded that his client could not participate in the trial for reasons beyond his control and an opportunity should be given to him to contest the matter.

7. Mr. Patra, the learned Additional Government Advocate, contended that the accident was due to the sudden mechanical failure beyond the control of the driver and in any event, having regard to the fact that respondent No. 1 was driving the vehicle without any authority from the owner, respondent No. 2, and as such respondent No. 2 was not liable for the negligent act, if any, of respondent No. 1.

8. In Halsbury's Laws of England, 3rd Edn., Vol. 28 page 77, the law relating to *res ipsa loquitur* is summarised thus:

As 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 immediately arising from them is that the injury complained of was caused by the defendant's negligence or whether 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. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine 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 being to show how the act complained of could reasonably happen without negligence on his part. Where, therefore there is a

duty on the defendant to exercise care, and 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.

9. The latin maxim *res ipsa loquitur* mitigated the hardship that was caused to the plaintiff by the application of the general rule that it was for the plaintiff to prove the negligence and not for the defendant to disprove it. In some cases, the true cause of the accident lay within the knowledge of the defendant who caused it. The plaintiff could prove the accident but he could not prove how it happened "so as to show its origin in the negligence of the defendant". The maxim applies whenever it is so improper that such an accident would have happened without the negligence of the defendant. Where the maxim applies, the mere happening of the accident affords "reasonable evidence in the absence of an explanation by the defendant" that it was due to the defendant's negligence. If the defendant gives no evidence a verdict for the plaintiff will stand. So, clearly a prudent defendant will feel obliged to offer "explanation". It is not sufficient for the defendant to show that there were several hypothetical causes consistent with the absence of negligence but he must go further and show that either the accident was due to specific cause which does not connote his negligence or that he has used all reasonable care in the matter. (See Salmond on the Law of Torts, 16th Edn., pages 242-244).

10. In this case, having regard to the manner in which the accident took place, there can be little doubt that the maxim applied and a presumption can be drawn that the accident happened due to the negligence of the driver. No evidence has been adduced to overcome the presumption.

11. Respondent No. 2 took the defence that the appellant was responsible for what happened as he was sleeping on a cot on the road. This plea cannot relieve the respondent No. 2 of the consequences of the tortious action. Moreover, it is clear on the evidence that the cot was placed not on the road but away from it, in between the house and the road.

12. Reliance was placed by the respondents and the Tribunal on a report of the Motor Vehicle Inspector which has been marked as Ext. 3. The author of the report has not been examined. So, the report has little evidentiary value. In it, it is stated that the foot brake was out of order, the hand brake was ineffective, the steering system was out of order and the cause of the accident was "due to sudden brake and steering system failure after breakage of right front wheel suspension link".

13. In *Henderson v. Henry* 1970 A.C.J. 198 (H.L., England) the brake of a motor lorry failed all of a sudden due to sudden development of a hole in the brake pipe

carrying the brake fluid. Such a sudden development of the hole was in that part of the pipe which would not be visible even on inspection. There had been periodical visual inspection of the brake system. Lord Denovan observed:

The plea of "latent defect" made by the respondent had to be made good by them. It was for them to show that they had taken all reasonable care and that despite this, the defect remained hidden.

They proved that the pipe in question was visually inspected in situ once a week, that the brake pedal was on these occasions depressed to check for leaks from the pipe and none seen; that nothing more than such visual inspection of the pipe was required by Ministry of Transport rules or the maker's advice...It is obvious that visual inspection of the pipe in situ, however, frequent could not disclose corrosion on bidden part of it. The question, therefore, suggests itself at once; did not reasonable care require the removal of the pipe at suitable intervals so that the whole of it could be inspected? It is equally obvious that the answer to this question must depend partly on the age of the vehicle, partly on the mileage it had done, and partly on the load it had been carrying. All these things affected the measure of reasonable care which that respondents had to exercise.

14. In *Barkway v. South Wales Transport* (1950) 1 All E.R. 392 there was an accident due to sudden tyre burst. There was evidence about periodical inspection of the tyres of the vehicle. The House of Lords pointed out that it was not enough for the defendants to show that there had been periodical inspection of the tyres, that in spite of such inspection the defect could not be found out and that the defendants should be held to be negligent in not having instructed their drivers to report heavy loss to tyres likely to cause impact fractures.

15. In *Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another*, the Supreme Court held (as per head-note):

In order to succeed in a defence that the accident was due to a mechanical defect, the owners have prove that they had taken all necessary precautions and kept the lorry in a roadworthy condition, and that the defect occurred in spite of the reasonable care and caution taken by the owners. In order to sustain a plea that the accident was due to technical defect the owners must raise a plea that the defect was learnt and not discoverable by the use of reasonable care. The owner is not liable if the accident is due to latent defect which is not discoverable by reasonable care. The burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such are the defect remained hidden.

As we have seen, the plea was not raised by the owner; but by respondent No. 1, the person alleged to have been driving the vehicle at the time of accident. There was no plea that there as a latent defect or that the defect was not discoverable by use of reasonable care. It was neither in the plea nor in evidence. The burden, therefore, remains undischarged.

16. There is overwhelming evidence on record that respondent No. 1 was driving the vehicle. The question is on whom would the liability be fastened. In *Ormrod v. Crosville Motor Services Ltd.* 1953 2 All E.R. 753 Lord Denning stated:

It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. This is not correct. The owner is also liable if the driver is with the owner's consent, driving the car on the owner's business or for the owner's purposes.

This was accepted by the Supreme Court in *Sitaram Motilal Kalal v. Santanu Prasad Jaishanker Bhatt* 1966 A.C.J. 89 (S.C.) and the Supreme Court held that the test was whether the act was done on the owner's business or that it was proved to have been impliedly authorised by the owner. There is a presumption that a vehicle is driven on the master's business and by his authorised agent or servant but the presumption can be met (see *Sitaram's case*). (supra).

17. In *Pushpabai Purshottam Udeshi v. Ranjit G. and P. Co.* 1977 A.C.J. 343 (S.C.) the Supreme Court observed:

It is now firmly established that the master's liability is based on the ground that the act is done in the scope or course of his employment or authority.

It has been found that respondent No. 1 was driving the vehicle at the time of accident. The presumption which under the law arises is, that he was driving the vehicle for and on behalf of the owner, has not been rebutted by any evidence laid by respondents (see *Joginder Nath v. Shanti Devi* 1967 A.C.J. 150 (Punj.) and *Mohinder Singh v. Gurdial Singh* 1978 A.C.J. 279 (P. and H.) nor has the driver of the vehicle been examined to state in what circumstances respondent No. 1 was at the wheel. Adverse inference is liable to be drawn from the non-examination of the driver.

A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contract is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes--although improper modes--of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so

connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authorised to do at all." (See Salmond on the Law of Torts, 16th Edn. page 474).

At page 475, the learned author states:

...There are, however, cases in which it has been held that a servant who is authorised to drive a motorvehicle, and who permits an unauthorised person to drive it in his place, may yet be acting within the scope of his employment. The act of permitting another to drive may be mode, albeit an improper one, of doing the authorised work. The master may even be responsible if the servant impliedly, and not expressly, permits an unauthorised person to drive the vehicle, as where he leaves it unattended in such a manner that it is reasonably foreseeable that the third party will attempt to drive it, at least if the driver retains national control of the vehicle.

18. Even express prohibition does not protect the master. The author states at page 477:

Even express prohibition of the wrongful act is no defence to the master, if that act was merely a mode of doing what the servant was employed to do. Thus in *Limpus v. London General Omnibus Co.* 1862 158 E.R. 993 the defendant company was held liable for an accident caused by the act of one of its drivers in driving across the road so as to obstruct a rival omnibus. It was held to be no defence that the company had issued specific instructions to its drivers not to race with or obstruct other vehicles; the driver whose conduct was in question was engaged to drive and the act which did the mischief was a negligent mode of driving for which his employers must answer, irrespective of any authority or of any prohibition. So in *Canadian Pacific Rly. v. Lockhart* (1942) 2 All E.R. 464 the employers were held liable where their servant in disobedience to orders not to use uninsured motor cars drove his own uninsured car whilst on a journey for the purpose of the work he was employed to do...

19. In *Ricketts v. Thos, Tilling Ltd.* (1915) 1 K.B. 644 the driver of an omnibus had permitted the conductor of the omnibus to drive the bus. The bus met with an accident. Buckley, L.J. held the master liable on ground that the driver's act in entrusting the driving of the bus to the conductor was in itself a negligent mode of the performance of his duty as a driver.

20. In *Uttar Pradesh Government Vs. Ram Milan and Others*, All the driver had permitted a mechanic to drive the bus. It was held that the tortious act was so connected with the employment of the servant as to have a causal relation with the same or to be an incidental result of it. The occasion for the tortious act was provided by the authorised act with the result that one becomes ancillary to the other. If the driver permitted another person to drive the car, the act of the driver

in permitting another person to be in charge of the car would itself be a negligent act relating to the scope of his authority. It was further held following Rickett's case, (supra) that the Government would still be liable even though it might have issued instructions injuncting the driver not to delegate his duties.

21. So, the plea taken by the respondent No. 2 is unsound in law. It is vacariously liable for the tortious act committed by respondent No. 1.

22. It has been repeatedly brought to the notice of the subordinate courts and Tribunals that where a decision is appealable, the subordinate courts and Tribunals should answer all the issues so that remand is avoided and the appellate court has the benefit of the views of the subordinate courts or Tribunals. Regrettably, in this case the Tribunal has not quantified the compensation payable.

23. It has been alleged that the claimant was earning Rs. 600/- a month, He was a stamp-vendor, a cultivator and a priest. He possessed a good physique. The accident has made him almost an invalid. He was kept as an indoor patient at Bolangir Hospital for seven days and was then referred to Medical College Hospital at Burla. After the accident his income came down to Rs. 300/- to Rs. 350/-. He was no longer able to carry heavy load or to do cycling. He felt pain in his right hand, if he wrote for a long period. He spent about Rs. 7,000/- to Rs. 8,000/- over his medical treatment. He was cross-examined by respondent No. 2, but nothing material has been brought out.

24. Taking the fact that the appellant was aged 55 years at the time of the accident and other facts and circumstances of the case into consideration. I assess the compensation at Rs. 25,000/- payable by respondent No. 2 towards the expenses that the appellant may have incurred for his treatment and the loss of income which he has suffered and bodily pain and inconvenience that he is and would be passing through due to the accident. The appellant shall be entitled to interest at the rate of 10 per cent per annum from the date of the application on the amount awarded. If the amount is not paid or deposited within two months from today, the amount shall carry interest at the rate of 18 per cent per annum thereafter.

25. A cross-objection has been filed by respondent No, 1 to certain findings recorded by the Tribunal. Strictly it is not a cross-objection contemplated by Order 42, Rule 22 of the CPC as no part of the decree was against respondent No. 1. The objection is to the finding of the Tribunal that respondent No. 1 was driving the vehicle. I have already held, agreeing with the Tribunal, that the conclusion is irresistible on the overwhelming evidence that he is the person who was driving the vehicle at the relevant time.

26. In the result, the appeal is allowed with costs. Hearing fee is assessed at Rs. 100/- (one hundred only).