
(1977) 02 OHC CK 0017

In the Orissa High Court

Case No : Misc. Appeals No's. 109 to 115 and 130 to 136 of 1974

Jagannath Sinha and Others

APPELLANT

Vs

Khirodini and Others

RESPONDENT

Date of Decision : 18-02-1977

Acts Referred:

Motor Vehicles Act, 1988 — Section 110A

Citation : (1977) ACJ 196

Hon'ble Judges : B.K. Roy, J

Bench : Single Bench

Advocate : K.C. Panda, for the Appellant; S.S. Basu, S.N. Mohanty and P. Roy, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Roy, J.—All the aforesaid appeals arise out of seven claim petitions u/s 110A of the Motor Vehicles Act disposed of the 2nd Motor Accidents Claims Tribunal, Cuttack and relate to one accident. In all the claim petitions the State of Orissa was opposite party No. 1, the owner of the truck bearing No. OPJ 2533 which was one of the vehicles involved in the accident was opposite party No. 3. The facts relating to the accident were common in all the claim petitions although the claimants and their claims in the petitions were different. The defence of each of the three opposite parties was practically the same in all the cases. The seven claim petitions having been allowed by the Tribunal by a common judgment opposite party No. 2 has preferred M.A. Nos. 109 to 115 of 1974 and opposite party No. 1 has preferred M.A. Nos. 130 to 136 of 1974. As all the appeals involve common questions of law and fact, with consent of the learned Counsel for both parties in each of the appeals they have been heard together and this judgment will govern all of them. In this judgment the Appellant in M.A. Nos. 109 to 115 of 1974 will be described as opposite party No. 2, the Appellant in M.A. Nos. 130 to 136 of 1974 as opposite party No. 1, the insurer in all the appeals as opposite party No. 3 and the claimant-Respondents as claimants.

2. The case of the claimants in all the seven claim cases in the court below may be stated thus: Several police officials were being taken on State duty in a police vehicle bearing No. ORG 1327 belonging to opposite party No. 1 for attending firing camp. That police vehicle, while carrying the police officials, was being driven by one Gopal Chandra Sahu in a terrific speed most rashly and negligently without blowing horn on the road. Another truck bearing No. ORJ 2533 belonging to opposite party No. 2 was coming from the opposite direction on the very same road being driven negligently and rashly in a very high speed without blowing horn. Due to rash and negligent driving of the two vehicles there was head on collision between the two on the road which was empty at the place of accident. As a result of collision, the vehicle carrying police officials was pushed inside the road-side Nayanjori. Out of the police officials occupants in the police vehicle, 3 Havildars, 3 constables and 1 police cook died as a result of the accident.

On these allegations the legal representatives of each of the aforesaid deceased persons claimed damages against three opposite parties, viz., the State of Orissa, the owner of the truck and its insurer.

3. The case of opposite party No. 1 in the court below was as follows: The accident took place between the police vehicle carrying some police officials and the truck mentioned above on the National Highway No. 5 on the northern side of the down gradient of Birupa bridge. The police vehicle was on its way to Chandikhol side while the truck was on its way to Cuttack side on the aforesaid road. After the accident the police vehicle was found lying 18 feet away from the western extremity of the road.

The impact took place on the western side of the metalled road leaving 4 feet from its western edge. As a result of the impact, the police vehicle turned off the road and rolled down. The width of the metalled portion of the road was 24 feet, the width of the eastern "non-metalled portion of the road was 5 feet and the width of the western non-metalled portion of the road was 7 feet at the place of accident. Both the vehicles got damaged as a result of the accident on their respective right sides. The front axle of the truck was broken and its two front wheels had come out. The truck was found parked at a distance of 125 feet to the south of the place of accident on the road. On seeing the truck coming from the opposite direction on the road in a rash and negligent manner covering 20 feet of the metalled road the driver of the police vehicle minimised its speed and brought it on the western non-metalled portion of the road. Even then, the truck, while crossing the police vehicle, dashed against its right side as a result where of the police vehicle rolled down. At the time of accident the truck was loaded with cement.

4. The case of opposite party No. 2 in the court below was thus: The driver of the truck was driving it without the knowledge and consent of opposite party No. 2, the owner, and the driver was solely responsible for the accident. Opposite party No. 2 was not aware as to how his truck was hired for carrying cement. According to opposite party No. 2, his driver was driving the truck with due

caution and care, and so, he was not at fault. The driver of the police vehicle was negligent and the accident took place due to his rashness and negligence. If compensation is found to be payable to the claimants both by the owner of the truck and the owner of the police vehicle, since the truck was insured with opposite party No. 3, opposite party Nos. 1 and 3 will only be liable to pay compensation and not opposite party No. 2.

5. Opposite party No. 3 in its counter to the claims of the claimants, while denying in a general way the facts alleged in the claim petitions relating to the manner in which the accident took place, has controverted the statements made by the claimants regarding the age of the deceased persons and their contributions from their pay for the maintenance of the claimants. Lastly, opposite party No. 3 has said that its total liability, if any, cannot exceed Rs. 50,000/-

6. During hearing of the claim cases by the Tribunal 1 witness for each set of claimants has been examined, besides one common witness who is P.W. 8. P.W. 8 has only proved the pay each of the deceased persons was drawing just before his death and the period of service each of them had still to render had not death intervened. The opposite parties have not examined any witness on their behalf. The drivers of the two vehicles who were driving them at the time of accident have not been examined. Opposite party No. 1, although in its objection has given a vivid description as to how the accident took place and how the two vehicles were found just after the accident has not proved the facts alleged in its counter by production of any record.

7. The Tribunal has recorded the finding that the drivers of both the vehicles were guilty of rash and negligent driving at the time of the accident. While arriving at this finding the Tribunal has said that the claimants not being present at "the time of accident are not in a position to say how the accident took place. It has further said that the drivers of both the vehicles being alive it was incumbent on opposite party Nos. 1 and 2 to examine them as they would have been competent persons to depose as to how exactly the accident occurred. Non-examination of the two drivers without any explanation from opposite party Nos. 1 and 2, according to the Tribunal, is bound to raise an adverse inference against the two opposite parties. On the aforesaid conclusion the Tribunal has awarded compensation of Rs. 23,800/- to the claimants in Misc. Case No. 57 of 1973 giving rise to M.A. Nos. 109 and 130 of 1974 ; of Rs. 23,800/- to the claimants in Misc. Case No. 58 of 1973 giving rise to M.A. Nos. 110 and 131 of 1974; of Rs. 24,480/- to the claimants in Misc. Case No. 59 of 1973 giving rise to M.A. Nos. 111 and 132 of 1974 ; of Rs. 19,270/- to the claimants in Misc. Case No. 60 of 1973 giving rise to M.A. Nos. 112 and 133 of 1974; of Rs. 12,240/- to the claimants in Misc. Case No. 61 of 1973 giving rise to M.A. Nos. 113 and 134 of 1974; of Rs. 26,520/- to the claimants in Misc. Case No. 62 of 1973 giving rise to M.A. Nos. 114 and 135 of 1974 and of Rs. 28,610/- to the claimants in Misc. Case No. 63 of 1973 giving rise to M.A. Nos. 115 and 136 of 1974. Besides the

aforesaid compensation the Tribunal has awarded interest at the rate of 6% per annum to the claimants from the date of application till the date of realisation. Apart from interest, the Tribunal has also granted consolidated cost of Rs. 400/- to each set of claimants in each Misc. Case, except in Misc. Case No. 61 of 1973 in which a consolidated cost of Rs. 200/- to the claimants has been granted. Of the compensation so awarded by the Tribunal as per its award, half of it has to be paid by the owner of the truck and the other half by the owner of the police vehicle, viz. the State of Orissa. As the truck was insured with opposite party No. 3 it has paid Rs. 50,000/- to the claimants with interest which is its statutory liability.

8. The records of Misc. Appeal No. 114 of 1974 reveal that the same has been dismissed against Respondent Nos. 2 and 3. As a result of this, M.A. No. 114 of 1974 by opposite party No. 2, the owner of the truck has abated as a whole.

9. Coming to the merit of the appeals it appears that the assertions in the claim petitions to the effect that as a result of the accident the police vehicle was thrown off the road; that being so thrown off, it rolled down into the road side Nayanjori and that after having rolled down it was found lying at a distance of 18 feet from the place of accident are admitted by opposite party No. 1 in its counters. The rest of the averments in the counters of opposite party No. 1 as to how the accident happened and who was responsible for the accident it have remained as assertions only not having been proved. Neither the driver of the police vehicle who is alive nor any of the occupants in the said vehicle at the time of accident who is alive has been examined by opposite party No. 1 to prove the averments in its counters that the driver of the truck was alone responsible for the accident which took place due to his rash and negligent manner of driving. The Motor Vehicle Inspector who must have visited the spot, prepared a spot map and submitted a report about the accident has also not been examined. Even, his report and map have not been brought into the record. The Collector, Cuttack has verified the counters filed by opposite party No. 1 in the seven claims cases. The verification shows that the facts mentioned in the counters are based on official records. This shows that official records were available to support the assertions made in the counters. No explanation is forthcoming as to why the official records have not been produced before the Tribunal. Two inferences are deducible for non-production of the official records. One is that the records if produced, will not support the case of opposite party No. 1 as made out in its counters, and the other is that there are no such records to show that the driver of the truck alone was responsible for the accident. In paragraph 14 of the counters of opposite party No. 1 it has been stated that the front axle of the truck was completely broken and both the front wheels had come out as a result of the accident. It is argued by the Respondent-claimants that this being the damage it cannot be believed as mentioned in the counters of opposite party No. 1 that the truck was found standing at a distance of 125 feet from the place of accident on the road. Therefore, according to the learned Counsel for the Respondent-claimants, the case as made out in the counters of opposite party

No. 1 cannot be accepted. It is not possible to accept this arguments, because it is just possible that as a result of the impact, of the accident the front axle of the truck got damaged, but the front wheels did not come out immediately. It was only when the truck moved to a distance of 125 feet from the place of accident with the damaged axle after meeting with the accident the damaged axle gave way and the front wheels came out. But after all, these are only surmises. In the absence of any direct evidence as to how the accident occurred, it is not possible to accept the story as given by opposite party No. 1 in its counters and throw the responsibility solely on the driver of the truck. The position is also the same with opposite party No. 2. He has not examined the driver of the truck. So, the story given by opposite party No. 2 in his counters that the accident was caused due to the negligence of the driver of the police vehicle only remains as a story without being proved. In a case of this nature where the cause of accident is not known the maxim *res ipsa loquitur* must be held to come to the aid of the Respondent claimants.

In the decision reported in *Shyam Sunder and Others Vs. The State of Rajasthan*, , *K.K. Mathew, J* of the Supreme Court speaking for the court observed as follows:

The maxim *res ipsa loquitur* is restored to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the Defendant.

The Plaintiff merely proves a result, not any particular act or omission producing the result. If the result, makes it more probable than not that it was caused by the negligence of the Defendant, the doctrine of *res ipsa loquitur* is said to apply, and the Plaintiff will be entitled to succeed unless the Defendant by the evidence rebuts that probability.

Over the years, the general trend in the application of the maxim has undoubtedly become more sympathetic to the Plaintiffs. Concomitant with the rise in safety standards and expanding knowledge it is felt in concluding that the miscarriage of a familiar activity is so unusual that is most probably the result of some fault on the part of whoever is responsible for its safe performance.

The maxim of *res ipsa loquitur* has always been applied to a case where the thing is under the management of the Defendant and the accident is such as in the ordinary course of things does not happen if those who have the management exercise proper care and there is absence of explanation by the Defendant. If these facts are established courts have invariably held that they afford reasonable evidence that the accident arose for want of care of the Defendant.

In the decision reported in *Smt. Sushma Mitra Vs. Madhya Pradesh State Road Transport Corporation and Others*, where the Plaintiff alleged that while she was going in a bus a truck was coming from the opposite direction and that there was a head on collision between the two, as a result of which, she who was sitting in the bus at the time of accident with her elbow projecting outside the window of

the bus got injured resulting in a permanent disability, her claim for damages against the owners of both the vehicles succeeded. Raina, J., in the decision observed as follows:

In a case like this, in my view, the legal maxim *res ipsa loquitur* can usefully be applied. This doctrine is usually employed in action for injuries due to negligence where patent facts concerning the case are by themselves sufficient to establish negligence. The literal meaning of the maxim is that the things speak for itself. The doctrine does not apply where the cause of accident is known. The *res* can only speak so as to throw the inference of fault upon the Defendants in some cases where the act of the Defendant is unexplained.

It was held in that case that it was a matter of common experience that passengers who sit adjoining a window very often rest their arm on the window-sill by which act the elbow projects outside the window. It was further held that the driver of the bus must have those passengers also in contemplation while overtaking or crossing another vehicle on the road. He must not come too close to the vehicle that is overtaken or crossed and must leave sufficient gap between the vehicles to avoid injury to those passengers. While coming to such a conclusion reliance was placed on the following passage of Lord Atkin in *Donoghue v. Stevenson* (1932) A.C. 562 :

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seem to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in questions.

A passage at page 47 of the book "Bingham's Motor Claim Cases", 7th Edition by J. A. Taylor may be extracted below for reference:

The doctrine of *res ipsa loquitur* means that an accident may by its nature be more consistent with its being caused by negligence for which the Defendant is responsible than by other causes, and that in such a case the mere fact of the accident is *prima facie* evidence of such negligence. In such a case the burden of proof is on the Defendant to explain and to show that it occurred without fault on his part.

Subba Rao J. speaking for the Court in the decision reported in *Gobald Motor Service v. Veluswami* AIR 1962 S.C I relied upon the following passage from judgment of Asquith, L.J. in the case reported in *Barkway v. South Wales Transport* (1948) 2 All E.R. 460 wherein the rules of *res ipsa loquitur* has been clearly summarised:

(i) If the Defendants omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the Defendants, and

Plaintiff succeeds unless the Defendants can rebut this presumption

(ii) It is no rebuttal for the Defendants to show, again without more that the immediate cause of the omnibus leaving the road is a tyre-brust, since a tyre brust per se is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the Defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of decision in *Laurie v. Raglan Building Company* (1942) 1 K.B 152 where not a tyre-brust but a skid was involved.

(iii) To displace the presumption, the Defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the brust itself was due to a specific cause which does not connect negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres.

In an action for damages for inundation of Plaintiff's land due to breach of a canal in the management of the Defendant, it was held in the decision reported in *State of Punjab Vs. Modern Cultivators, Ladwa*, the rule of *res ipsa loquitur* would apply because canal banks are not breached if those in management take proper care and the breach itself would be *prima facie* proof of negligence unless the Defendant can show that the breach was due to act of God or to act of a third party or any other thing.

In *State of Orissa Vs. Archana Naik and Others*, S.K. Ray, J. speaking for the Court has observed as follows:

The first task of a Tribunal, therefore should be to ascertain with reference to evidence on record as to which of the drivers or both the drivers were rash or negligent. In such a case the burden of the proof of the alleged negligence or rashness is in the first instance on the Plaintiff. There is, however, an exception to this general rule which arises where-ever 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.

In the present case, the facts established reveal that there was a head on collision between the police vehicle and the truck. Both the vehicles have been seriously damaged. In view of the law discussed above, it must be held that the facts speak for themselves in the absence of any explanation of the two drivers driving the vehicles at the relevant time. The rule of *res ipsa loquitur* must apply to the case, because the collision between the two vehicles raises an inference of negligence on the part of both the drivers and the onus is on the drivers driving them (see at page 49 of "*Bingham's Motor Claims Cases*" 7th Edition by J. A. Taylor.) I, therefore, hold that the Tribunal has rightly held that the cases of the

Respondent-claimants have been proved against the owners of the two vehicles and the owners are liable to pay damages.

10. Coming to the quantum for damage, the only contention raised by the learned Standing Counsel is that the court below in assessing the compensation payable to the claimants has not taken into consideration the pension which the widows are receiving after the death of their respective husbands. The Supreme Court in its decision reported in AIR 1962 S.C, I (supra) which is a case under Fatal Accidents Act has observed as follows:

Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other, any pecuniary advantage which from whatever source comes to them by reason of the death, that is the balance of loss and gain to a dependent by the death must be ascertained.

The words "any pecuniary advantage which from whatever source comes to them by reason of the death" in the aforesaid passage came up for consideration in a decision of Delhi High Court reported in Bhagwanti Devi and Others Vs. Ish Kumar and Others, The following passage from that decision is extracted below:

It thus appears that there is considerable judicial authority both in England and in this country in favour of exclusion of benefits received by the policy representatives on account of life insurance policy, pension, gratuity, provident fund and other such benefits from consideration in determining the amount of compensation which appeared to the Tribunal to be just on account of loss of pecuniary benefit arising out of death and this exclusion would appear to me to be just and reasonable because these are benefits for which the deceased had paid. These benefits are in the nature of quid pro quo and have relation to the savings effected by the deceased besides having their genesis either in the contract or in the past service and good conduct and these benefits could not be said to be benefits arising out of the death of a person in the sense in which the action for damages or inheritance could be related to such an event. There would be no justification, therefore, to give the benefit of these payments to the wrong doer who, by his negligent act, has caused the death of a person. Such a conclusion would be justified even if the principles enunciated by the Supreme Court in the case of Gobald Motor Service (supra) were to regulate the determination of compensation under the Act because even on the application of the aforesaid principles, it appears to me that there is a clear distinction between benefits received on account of death and those that are merely payable on the death of a person. The former arise out of death and would not have been available without it, while the latter are benefits which are available independently of death but are payable on death. The deduction made by the Tribunal on these counts must, therefore, be ignored in computing the compensation to which the dependant would be entitled.

That passage goes to show that his Lordship Anand, J., while accepting the

authoritative pronouncement of the Supreme Court in the decision reported in Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, has said that pension is not a benefit accruing to the legal representatives of the deceased who has died in an accident by reason of death. Pension is the fruit of services rendered by an employee in the past and is in the nature of deferred wages payable under a contract of employment for past services. Hence, it is difficult to hold that the pension that a widow gets on the death of her husband is a benefit which accrues to her by reason of her husband's death in an accident. The principle for payment of compensation laid down by the Supreme Court in the decision reported in Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, was reiterated in a later decision of that court reported in Sheikhpura Transport Co. Ltd. Vs. Northern India Transport Insurance Co., although the question whether the compensation under the Motor Vehicles Act has to be fixed on the same basis as is required to be done under the Fatal Accidents Act was left open.

In the decision reported in Raja Mohktar Bin Raja Yaacob v. Public Trustee, Malaysia 1971 A C.J. 309 pension was held to be an ex-gratia payment made by Government to its employees in respect of their past conduct and service and hence the same could not be taken into consideration in determining compensation for injuries sustained in an accident.

This being the position of law, the Tribunal is right in not reducing the compensation determined by it on account of pension the widow-claimants were supposed to get on the death of their husbands in the accident. The decision reported in Prem Devi Pandey and Others Vs. Dayal Singh and Others, is one of the very same Delhi High Court in which another Single Judge Dilip Kapur, J. has not accepted the view of Anand, J. of Delhi High Court reported in Bhagwanti Devi and Others Vs. Ish Kumar and Others, The later decision has not met the reasonings given in the former's decision. After going through the judgment reported in Prem Devi Pandey and Others Vs. Dayal Singh and Others, the reasonings given therein do not appeal to me. I would therefore, prefer the views expressed in the decision reported in Bhagwanti Devi and Others Vs. Ish Kumar and Others, That apart, there is practically no evidence about the pension which each of the widow-claimants is getting. This being the state of evidence, the contention of the learned Standing Counsel has to be rejected as without any force even assuming that there is merit in his contention on the question of law.

11. In the result, therefore, I do not find any merit in these appeals which are accordingly dismissed. Parties are to bear their own costs of this Court.