

(1976) 04 BOM CK 0011
In the Bombay High Court
Case No : O.C.J. Suit No. 222 of 1967

Kalavati T. Sanghvi

APPELLANT

Vs

Habib Khan Yusuf Khan

RESPONDENT

Date of Decision : 08-04-1976

Acts Referred:

Citation : (1976) 78 BOMLR 528

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Judgement

Vimadalal, J.—This is an action for damages in negligence arising out of a collision on the highway in the course of which the deceased, "who was a passenger in one of the vehicles concerned in the collision, suffered serious injuries and died five days later. The plaintiffs, who are the widow and sons of the deceased, have framed this suit under the Fatal Accidents Act, 1855, as is usually done in these Courts.

2. After issues were settled, Mr. Tijoriwala stated that he wanted to address an argument to me on the question of burden of proof as, in his opinion, in view of the admitted facts appearing on the pleadings of all the parties, this is a case in which the maxim *res ipsa loquitur* is applicable, and the burden of proof is on the defendants. It was the contention of Mr. Tijoriwala that his clients need not go into the box at all, or lead any evidence in support of their case, by reason of the applicability of the said Latin maxim. Mr. Tijoriwala addressed me for quite some time on this point, and relied on certain decisions to which I will presently refer. He was, however, unable to cite a single decision in which the maxim *res ipsa loquitur* was invoked or applied without the plaintiff leading any evidence at all in the first instance. A large number of authorities, both in the way of judicial decisions and standard works, were cited by Mr. Khambatta in reply to Mr. Tijoriwala's submissions on this point, and Mr. Bharucha also joined Mr. Khambatta in opposing the submissions made by Mr. Tijoriwala, and cited some other authorities in support of his contentions. In the view which I take, it is not

really necessary for me to go into all those authorities, and I will refer only to a few of them, because the maxim *res ipsa loquitur* is only in the nature of a rule of common sense that a Court may apply on the facts and circumstances of a particular case and is hardly a matter which can be governed by authority.

3. The first question that arises is what is the meaning of the maxim *res ipsa loquitur*. Fortunately for us, there is a very recent pronouncement of the highest Court of this country which throws considerable light on the meaning and scope of that maxim, and that is the judgment of the Supreme Court in the case of *Shyam Sunder v. State of Rajasthan* [1974] A.T.R.S.C. 890 . It may, in the first instance, be pointed out that it appears from the judgment in the said case that it was not a case in which the maxim was invoked even before any evidence was led (vide the reference to "evidence" in para. 8), as in the present case. It was a case in which evidence having been led, the question was whether an inference of negligence on the part of the driver was possible, and it is, in that connection, that the maxim *res ipsa loquitur* came in for consideration. The Supreme Court laid down (paras. 9" 1p 11) that the maxim *res ipsa loquitur* is resorted to when an accident is shown to have occurred and the cause of accident is primarily within the knowledge of the defendant, and where the accident is such as in the ordinary course of things does not happen if those who had the. management used proper care. The Supreme Court then proceeded to observe that the maxim does not embody any rule of substantive law or even of evidence and is, perhaps, not a rule of any kind but is simply "the caption to an argument on the evidence", and 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." It was ultimately observed by the Supreme Court in regard to the said maxim that the plaintiff merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it 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 evidence rebuts that probability. *Shyam Sunder's* case was followed and this maxim was also applied by the Supreme Court in the still later case of *The Krishna Bus Service Ltd. Vs. Smt. Mangli and Others*, in which the Supreme Court had no hesitation in holding, as the High Court in the said case did, that the evidence of the plaintiff's witnesses was reliable and cogent enough to establish facts which in their totality unerringly pointed to the conclusion that the accident was due to the negligence of the driver of the third defendant's vehicle (para. 14), and that buses in road-worthy condition, driven with ordinary care, do not normally overturn and the maxim *res ipsa loquitur* was attracted to such a case (para. 22). It was held (also para. 22) that the defendants in question had failed to rebut the presumption of negligence that arose from the manifest circumstances of the case. In "*Winfield on Tort*, 9th edn., p. 73, quoting from an English case, the import of the maxim has been very simply put. It is stated there that when

used on behalf of a plaintiff it is generally a short way of saying: " I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant". This statement would of course apply equally where the facts and circumstances necessary to establish a prima facie case of negligence against the defendant are admitted in which case they need not be proved.

4. The conditions for the applicability of this maxim as emerging from a review of judicial authorities, have been very lucidly stated in Clerk & Lindsell on Torts, 13th edn., p. 569, para. 967. It is stated there that the doctrine of *res ipsa loquitur* applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence; and (3) there must be no evidence as to why or how the occurrence took place. It is further stated there that if there is evidence, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence. The position, therefore, is that, as stated by a single Judge of the Calcutta High Court in the case of Madhuri Chaudhuri and Others Vs. Indian Airlines Corporation, the cases indicate that the question as to whether the maxim *res ipsa loquitur* applies depends on the nature of each accident, and that even on the same fact, eminent Judges have differed as to whether the maxim was applicable. To the same effect are the observations of Birkett L.J., sitting in the Court of Appeal in England, in the case of France v. Parkinson [1954] 1 W.L.R. 581 , at page 583. It is, therefore, not of much use for a Court to discuss the various cases in which the maxim may have been invoked for, as far as facts and inferences of facts are concerned, one case cannot be an authority for deciding another. Indeed, one case can hardly be on all fours with another in all respects. I do not, therefore, propose to discuss the large number of cases that were cited by either side before me. In my opinion, what is, however, pertinent to find out is in what cases the maxim was not invoked or applied. In that connection also, instead of referring to the various cases, I may refer to the result of the English cases as summed up in Charlesworth's standard work on Negligence, 5th edn., p. 594, para. 985, where it is stated that one of the classes of cases in which *res ipsa loquitur* has sometimes not been applied is of collision on the highway, because every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control, and where both parties are moving and have a right to move prima facie the mere fact that those moving bodies run into each other is not evidence of negligence. The second class of cases referred to in Charlesworth (p. 592, para. 980) in which it has sometimes not been applied is where an object of operation was under the control of two persons, not in law responsible for the act of each other, the reasoning being that in such a case the *res* does not speak of negligence against either person individually. To the same effect are the observations in the respective judgments of Shelat J. and Raju J. in the decision

of the Division Bench of the Gujarat High Court in the case of Municipal Corporation of City of Ahmedabad Vs. Gandhi Shantilal Girdharlal and Another, . Mr. Tijoriwala, sought to place strong reliance on the view taken by Denning L.J. in the case of Baker v. Market Harborough Industrial Co-operative Society Ltd [1953] 1 W.L.R. 1472, That case was, however, a peculiar case which stood on its own facts in which the drivers of the two vehicles involved in collision who alone knew what had happened had both died in the crash, and Denning L.J. took the view that, in the absence of any evidence enabling the Court to draw a distinction between them, it should hold them both to blame, and equally to blame. That decision has been explained by Lord Denning himself in the later case of Davidson v. Leggett (1969) 113 Solicitors' Journal 409 as not being confined to cases where both the drivers were dead, but as being applicable also where the plaintiff was a passenger in the car, or one of the drivers, and both were alive and could give evidence. That was, however, actually a case in which it had been established that a collision had occurred in the middle of the road and the Court could not decide which of the two drivers was to blame and, therefore, held that the blame must be equal. Turning to the facts of the present case, in the light of the above legal discussion, in my opinion, the maxim *res ipsa loquitur* is not applicable in the present case because, (1), this is what may be called a highway case, and I prefer the view taken in some of the English cases in which the maxim has not been applied to accidents on the highway in which every vehicle has to adapt its own behaviour to the behaviour of other persons using the road; (2) I also prefer the view of some English Judges that when an operation is under the control of two independent persons, the maxim does not apply, because in such cases the *res* does not speak as to which of them was negligent; (3) this is not a case in which the third condition mentioned in Clerk & Lindsell on Torts, which is a negative condition, is fulfilled, in so far as plaintiffs Nos. 1 and 3 were in the car and could not be unaware of what had happened. It could not be said that if their evidence is led, the Court would still not be in a position to find out which of the defendants is liable. The Court cannot, therefore, merely proceed to apply the maxim and hold both the drivers and their respective owners liable; (4) it is admitted by the plaintiffs themselves, and also by the defendants who have filed their written statement, that there was oil on a considerable part of the road at the place where the incident occurred, with the result that there is reasonable scope for an explanation by way of inevitable accident in regard to the *res* as appearing in the pleadings themselves; and (5) the pleadings do not show any admitted spot on the road at which the incident occurred, or on which side of the road it occurred, a factor which is very important for the purpose of the *res* to speak as to who is liable. For these reasons, I hold that the maxim *res ipsa loquitur* cannot be applied to the admitted facts and circumstances of the present case as appearing in the pleadings. Evidence must, therefore, be led on behalf of the plaintiffs in support of their case before the defendants can be called upon to explain how the collision occurred.