

(1969) 04 MP CK 0003
In the Madhya Pradesh High Court
Case No : F. A. No. 31 of 1965

Kumari Swarnalata Kapoor and others	APPELLANT
Vs	
Jogendrapal and others	RESPONDENT

Date of Decision : 25-04-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Motor Vehicles Act, 1988 — Section 110A

Citation : (1969) MPLJ 553

Hon'ble Judges : Shiv Dayal, J; S. P. Bhargava, J

Bench : Division Bench

Advocate : R. K. Pandey, for the Appellant; Y. S. Dharmadhikari, For Respondent No. 3, A. N. Mukerji, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, J.

This is an appeal u/s 96 of the CPC from the dismissal of the suit in which the appellants claimed damages from the respondents for the death of their parents, resulting from an accident which occurred on February 16, 1959, (prior to the constitution of Claims Tribunal u/s 110-A of the Motor Vehicles Act).

On February 16, 1959, motor bus No. At. P. O. 314, belonging to M/s Patni Transport Ltd. (respondent No. 2), started from Jagdalpur for Jeypore. It was driven by Jogendrapal (respondent No. 1). Rawelchand Kapoor and his wife, Smt Rajkumari Kapoor, boarded the bus at Jagdalpur. On its way the bus dashed against a tree by the side of the road. Rawelchand Kapoor and his wife received fatal injuries and died instantaneously on the spot. The bus was insured with respondent No. 3, Insurance Company, against third party risk under the terms of the insurance policy Ex. D. 3. These facts are admitted.

The accident occurred at 7 or 8 miles from Jagdalpur. The bus was heavily loaded. It went beyond the control of the driver and dashed against a mango

tree. The appellants, through their next friend, instituted a suit for recovery of damages on the allegation that the accident occurred due to rash driving, that is, at a great speed beyond the control of the driver, or, alternatively, due to negligence of the driver in not applying brakes and allowing the bus to run astray. It was the duty of defendants Nos. 1 and 2 to see that the bus had no defect and was fit for being put on the road before it left for Jeypore. The plaintiffs alleged that their father was running a hotel and was earning Rs. 5,000 annually. Keeping aside his personal expenses, he spent Rs. 3,000 annually on the maintenance of the plaintiffs and could have done so for at least 35 years more. At the time of the accident, their father was only 36 years of age and in a healthy state of body. Due to the accident, the plaintiffs lost the protection and care of their parents. Services of a nurse had to be engaged which cost them Rs. 60 per month for some time at least. The plaintiffs claimed Rs. 25,000, as damages.

The defence was that the accident did not occur due to any rashness or negligence on the part of the driver. It was further pleaded that the accident occurred owing to sudden breakage of the main spring of the bus and that the bus had been checked up at Jagdalpur and it was found fit before it left for Jeypore. It was, however, admitted that Rawelchand Kapoor and Smt. Rajkumari Kapoor had boarded the bus at Jagdalpur, that both of them were injured in the accident and that they died instantaneously at the spot. The quantum of damages claimed was also disputed. Bar of limitation was pleaded. The maintainability of the suit was also challenged. The Insurance Company, defendant No. 2 (herein respondent No. 3) contended that its liability was limited to Rs. 2,000 only.

The learned trial Judge found that the suit was maintainable and was not barred because of the constitution of the Claims Tribunal under the Motor Vehicles Act. The accident occurred on February 16, 1959, on which date there was no Claims Tribunal constituted. It is true that before the date of the institution of the suit, though after the accident, a Claims Tribunal had been constituted for Raipur, but the right to sue could not be taken away retrospectively by constitution of a Claims Tribunal. That is what was held in *Kumari Sushma Mehta Vs. Central Provinces Transport Services Ltd. and Others*, .

The learned trial Judge further held that the suit was within limitation inasmuch as the plaintiffs were entitled to the benefit of section 0 of the Limitation Act, 1908, which was then in force as all the plaintiffs were minors.

On the merits of the case, the tribunal held that there was no rashness or negligence on the part of the driver of the bus and, therefore, neither the driver nor the owner of the vehicle was liable to pay damages. The trial Judge in a halfhearted manner dealt with issues Nos. 7 and 8 relating to the quantum of damages and held that it was not proved that the deceased Rawelchand was earning Rs. 5,000 annually and was saving Rs. 3,000 or any other sum per annum. The trial Judge did not arrive at any amount, which could be awarded to

the plaintiffs as damages, in case they were found entitled to damages from the defendants. All that he held was that the plaintiffs could not prove the amount that they claimed. As regards the liability of the Insurance Company, the learned trial Judge held that it was liable only to the extent of Rs. 4,000. S, The learned trial Judge has decided the question of negligence against the plaintiffs on the findings that: (1) The plaintiffs could succeed on their own strength and not on the weakness of the defendant, though the defendants tried to show that they were in no way rash or negligent. (2) From the evidence on record, it is not established that the driver was driving fast or that he was driving with divided attention. Admittedly, he was not driving on the wrong side. The road was clear and without any obstruction. The driver did not expose himself to any risk, nor did he commit any breach of duty imposed by law. (3) The accident was due to the breakage of the main spring and it was a case of pure accident. (4) No presumption could be drawn that it was due to rashness or negligence of the driver. The learned trial Judge observed; "such a presumption would be ill-founded as great many such occurrences are due to accident beyond the control of the driver." (5) "It also finds place in the evidence of Jogendrapal that before the bus left the Motor Stand, it was checked by the Booking Clerk and was not over loaded."

Thus, in substance, the trial Judge came to the conclusion that the bus was not being driven at an excessive speed, nor with divided attention, nor on the wrong side of the road; the learned trial Judge thinks that rashness or negligence consists only in these things. We shall presently point out that the evidence produced by the defendants was unreliable and the defendants could not prove want of negligence. The learned trial Judge took into consideration the report of the Motor Vehicles Inspector, who was not produced as a witness. He was summoned twice and served, but did not appear, and the defendants then gave him up.

Now, the plain facts are these. The bus, while it was running, suddenly went off-side the road and struck against a tree. Almost every passenger in the bus got some injury. Both the parents of the appellants died instantaneously. It is in evidence that one of the legs of Rawelchand was cut off and was hanging. It was not as if there was any obstruction on the road or that there was an imminent danger in front, which the driver had to avert. *Res ipsa loquitur*, the event speaks for itself. It is obvious enough that the bus struck against a tree with a great velocity. Otherwise, two passengers sitting inside the bus could not die instantaneously, apart from the fact that almost every passenger would not have received injury. The presumption is that the bus must have been driven in such a manner that it was not under the control of the driver.

The law is clearly this: (1) Where an omnibus leaves the road and an accident takes place on the off-side and this is proved without more, then the principles of *res ipsa loquitur* is at once attracted. Negligence will be presumed as the cause of the event. Unless the defendant rebuts this presumption, the plaintiff

succeeds. (2) To merely point out what the immediate cause of the bus leaving the road was, e. g., there was a tyre burst or that it went into a skid is by itself no rebuttal of the presumption. (3) To displace the presumption, the defendant must prove, or must show from the evidence, either that the immediate cause was due to a specific cause, which does not connote negligence on his part but points to its absence as more probable, or he must show that all reasonable care in and about the management of the vehicle was taken. (4) The burden, in the first instance is on the defendant to disprove his liability.

Lord Sumner succinctly said in *British Columbia Electric Rail Co. Ltd. v. Loach* (1914) All E R Rep. 426 :-

The inquiry is a judicial inquiry. It does not always follow the historical method and begins at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a casual agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purpose they are remote.

It must at once be remarked that the learned trial Judge did not bear in mind the principles laid down by their Lordships in *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, . It is necessary to bear in mind the facts of that case and the principles laid down in it, because that decision applies to the present case on all fours. In that case, it was found that the central bolt of the left rear spring suddenly gave way, while the bus was running. The accident took place not on the main road but on the off side uprooting a stone of the drain and attacking a tamarind tree 25 feet away from the said stone, with such velocity that its bark was peeled off and the bus could stop only after travelling some more distance from the said tree. Their Lordships observed:-

The said facts give rise to a presumption that the accident was caused by the negligence of the driver.

In *Barkway v. South Wales Transport* (1948) 2 All E R 460. the immediate cause of the omnibus leaving the road was tyre burst. The following propositions were laid down:-

(i) If the defendant's 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 the 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 burst, since a tyre burst per se is a natural 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 the decision in *Laure v. Raglan Building Co.* (1942) 1 KB 152. where not a tyre-burst but a skid was involved, (iii) To displace the presumption, the defendants must go further and prove (or must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote 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.

These principles were fully approved and adopted by the Supreme Court in *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, .

Their Lordships also quoted 23 Halsbury (Simonds) 671, para graph 956, which read thus: -

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 immediately arising from them is that the injury complained of was caused by the defendants' 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. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies a presumption of fault is raised against the defendants, 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 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 each a case, if the injurious agency itself and the surrounding circumstances are 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.

In the present case also, these principles directly apply. Here also, the bus went off-side and struck against a tree. It must have been with great velocity, otherwise, it was not possible that two passengers would have died instantaneously on the spot.

15 The defence is that the accident was caused due to the sudden breakage of a main spring. It may first be seen whether the breaking of the spring was the cause of the accident or was its effect. The function of the springs is to support the body of the vehicle to avoid jerks when it is in motion. It has no connection either with the steering wheel or the brakes. Therefore, it is patent enough that the spring broke as a consequence of the vehicle striking against a tree.

It is not wholly without significance that the bus was running down a slope (per evidence of *Natrajan D. W.* 3).

But assuming (though not holding) that the spring broke before the impact, the burden was still on the defendants to prove want of negligence. It was for them to prove that reasonable care had been taken in spite of which the spring broke. Neither the driver, nor the mechanic (and this was the only evidence produced by the defendants) gives the cause of the breaking of the spring; for instance, that there was a big boulder or some such other obstruction on the road which struck against the spring and broke it. All that the driver and Sub-Inspector of Police state is that there was a sound like "Thak" but neither of them says that the spring struck against any heavy article or obstacle. If the defence hypothesis were to be accepted, the only possible cause of the breaking of the spring was that it was worn out due to age. This also would mean negligence because the spring was not replaced by a new one even when it had run for 10 years. Neither the mechanic, nor the driver says that the original spring had been replaced by a new one. See also *Machine v. Maunder* (1920) 37 T L R 72,

Jogendrapal {D. W. 9), the driver of the bus, says that while the bus was running on the 7th mile, there was a sound like "Thak", and there was a skid. He applied the brakes and tried to bring back the vehicle on the road, but it struck against a tree. He says that the main leaf of the spring had broken so that it was not possible to keep the vehicle under control. He admits that there is no direct connection between the main spring and the brakes. He denied that the defect of the spring caused the vehicle strike against the tree. He even denied that the bus struck against the tree with great force. His evidence is unreliable.

S. L. Dubey (D. W. 2) who is a Sub-Inspector of Police stated that he was a passenger in that bus. When it reached the 7th mile from Jagdalpur towards Jeypore, there was a skid all of a sudden and the bus struck against a mango tree. He says that before the skid, there was one sound like "Kat Kat" and from this the witness inferred that some part had broken. He says that almost all the passengers received injuries. He also got an injury below an eye. He filed a challan regarding this accident, although the investigation was done by another Sub-Inspector. This witness says nothing about the speed at which the bus was running. Almost all the passengers received injuries, which itself shows that the bus must be running at a high speed and must have attacked the mango tree with a very great force. He does not say that the main spring broke.

Natraj (D. W. 3) was produced by the defendants to show that the bus had been checked up. He was a Foreman in the employment of defendant No. 2. He says that the bus had left for Jeypore at 2 P. M. and at midday he had checked up the bus. It was in perfect order and there was no defect. But he does not give the details of the checking. He does not specific ally say that he had checked the springs. He says that after the accident he went to the spot. He saw that the front, main spring of the right side had broken. He says that when the spring breaks, the vehicle skids and goes out of the control of the driver. The bus was of 1949 model and the accident occurred in February 1959. Thus, a thorough check up was every time necessary, as the vehicle was 10 years old. This witness

stated that there was a slope where the accident occurred and that the speed of the bus should not have been more than 15 to 20 miles per hour. These things the driver himself did not say. Then this witness says that when brakes are suddenly applied, the vehicle could skid to 5 to 10 feet, but according to the driver himself, it had gone at least 15 feet off-side. It is thus clear that the evidence of this witness is useless.

On this analysis, it must be said that the defendants did not prove that the vehicle had been thoroughly checked up and all that was necessary to do was done, to ensure that the spring would not break, as was required of them having regard to the fact that it was used for carrying passengers.

Shri Dharmadhikari contended that the burden had shifted to the plaintiffs. He relied on *Hughes v. Lord Advocate* (1963) 1 All E R 705. *R. v. Imurge* (1961) 2 All E R 688. In our opinion, these decisions do not help the respondents in this case. It is in evidence of the driver and the mechanic, both produced by the defendants, that the danger was foreseeable. The driver was aware of the tendency of the vehicle to skid and to go out of control, if the main spring broke. The facts of the latter case, relied on by Shri Dharmadhikari are not apposite.

Recalling the dicta in *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, it must be said here also that it is evident from the picture of the accident that the bus must have been driven at a high speed. Thus, the defendants are clearly liable and the finding reached by the trial Court must be set aside.

24 Adverting now to the question of quantum of damages, the Supreme Court has restated the principles laid down by *Viscount Simon v. British Columbia Electric Railway* 1951 A C 601. which may be summed up thus: (1) The expectation of the life of the deceased has to be estimated having regard to his age, bodily health and the possibility of premature intermination of his life by later accidents. (2) Having regard to the amounts which the deceased used to spend on his dependants during his lifetime, and having regard to other circumstances, the amount which is required for future provision of the dependants is to be estimated. (3) The estimated annual sum must be multiplied by the number of years of the estimated span of life of the deceased and that must be balanced by any pecuniary advantage which, from whatever source, comes to the dependants by reason of the death. (4) The burden is on the plaintiffs to establish the extent of their loss.

In the present case, there is positive evidence of *Bansilal* (P. W. 1), who is the brother of the deceased. He says that the deceased was doing hotel business in partnership with one *Shaligram*. The income of each of them was Rs. 500 per month. There was an argument constructed on the language used by the witness: "DONO KI MASI K AMADANI 500 THI" and it was argued for the respondents that Rs. 500 per month was not the income of each of the partners but of both the partners. But this interpretation is not correct when the

immediately following sentence is read. The witness says: "SAL KA DO-DHAI HAZAR RUPAYA RAWELCHAND APANE HISSE MEN SE BACHATA THA". If the income of both had been Rs. 6,000 a year, calculated at Rs. 500 per month, then the share of Rawel Chand would have been only Rs. 3,000 annually and he could not save Rs. 2,500 out of it. Thus, the correct reading of the deposition will be that the income of each of them was Rs. 500. In ordinary parlance the expression "DONO KI AMADANI 1,000 HAI", is sometimes used to mean that the income of each of them is Rs. 1,000. The statement of Bansilal, and the manner in which we have read the above statement, is supported by the evidence of Shaligram (P. W. 2). He says that he and Rawelchand were running the New Punjab Hotel. The share of each was half. They were also carrying on business in bakery within the hotel. From the bakery and the hotel business, both of them were earning Rs. 900 to Rs. 1,000 per month. Rawel Chand had a good standard of living. He used to get between Rs. 500 and Rs. 600 a month, and from it he used to spend about 250 on his children and himself, and used to save Rs. 250 per month. They both lived in the same house separately.

The age of Rawel Chand was 36 years at the time of the accident. The youngest child Suresh Kumar (appellant No. 4) was in the mother's lap. His age was six months at the time of the accident, and the age of the eldest daughter was about 9 years. In between them is a boy, whose age was 6 years at that time, and a girl whose age at that time was 4 years.

The plaintiffs are thus two brothers and two sisters, their ages being 9 years, 6 years, 4 years and 6 months respectively. In this accident they lost both their parents. There is evidence of Bansilal that Rawel Chand was in a healthy state of body and that he would have lived at least for 30 to 35 years more. In our opinion, this was a fair estimate of the span of Rawel Chand's life. But we need not go to that extent and it would be sufficient to calculate the loss of the plaintiffs owing to the death of their father on the basis that each of them would have had the benefit of financial support from him till each of them completed education and the girls were married. Roughly we will put the age at 23 for this purpose. Now, it will be only a reasonable and modest estimate that having regard to his standard of living, Rawelchand would have spent and would have continued to spend Rs. 50 per month on each child. Thus, the loss to plaintiffs was as follows: -

- (1) Plaintiff No. 1 at Rs. 600
per year for 13 years. .. Rs. 7,800.00
- (2) Plaintiff No. 2 for 16 years
at Rs. 600 per year. .. Rs. 9,600.00
- (3) Plaintiff No. 3 for 18 years
at Rs. 600 per year. .. Rs. 10,800.00

(4) Plaintiff No. 4 for 21 years

at Rs. 600 per year. .. Rs. 12,600.00

Total Rs 40,800.00

Calculating this at Rs. 40 per month per child, it comes to Rs. :32,640. In this mode of calculation, we have ignored that the deceased would have spent more on the marriages of the children and that they would have continued to get something from him even after attaining the age of 22 years.

In the present appeal, the appellants have claimed Rs. 24,000 only. Even after taking into consideration the fact that by depositing the lump sum amount, they would get interest, we are of the opinion that the amount claimed is, from every angle, reasonable compensation.

As regards the liability of the Insurance Company, since the bus involved in the accident was insured against third party risks and since both the parents of the appellants were travelling in that bus, the insurance company, by virtue of section 95 (2) (b) (second part), is liable to pay Rs. 2,000 as compensation for each of the two passengers.

Shri Dharmadhikari, learned counsel for the Transport Company (respondent No. 2), urged that the insurer had charged extra-premium of Rs. 95. This appears to be so from the statement of the premium charged as entered in the policy, but that merely shows that it was in respect of limited liability for 38 passengers at Rs. 2-8 0 per head. But, Shri Dharmadhikari could not show either from the policy, or from any other evidence, that by charging this additional premium, the liability became unlimited as provided in section 95 (2) (c).

The appeal is allowed. The judgment and decree passed by the trial Court are set aside. Instead, a decree for Rs. 24,000 and costs in both the Courts shall be passed in favour of the appellants against Jogendrapal, the driver, and M/S. Patny Transport Ltd., the owner of the vehicle (respondents Nos. 1 and 2 respectively) jointly and severally. The Insurance Company, (respondent No. 3) shall be liable jointly and severally to the extent of Rs. 4,000 out of the decretal amount.