
(1993) 07 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 239 of 1922

Mahila Dhanvanti and Others

APPELLANT

Vs

Phulwant Mahendra Singh and Others

RESPONDENT

Date of Decision : 29-07-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 151
Motor Vehicles Act, 1988 — Section 173

Citation : (1994) MPLJ 674

Hon'ble Judges : S.K. Dubey, J;K.M. Pandey, J

Bench : Division Bench

Advocate : N.D. Singhal, for the Appellant; B.N. Malhotra, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

This is an appeal u/s 173 of the Motor Vehicles Act, 1988, by the claimants for enhancement of the compensation awarded by the Motor Accident Claims Tribunal, Shivpuri, (for short, the "Tribunal") in Claim Case No. 49 of 1987 vide award dated 1-4-1992.

On receipt of the notice, National Insurance Company has preferred cross-objections under Order XLI, Rule 22, CPC read with section 151 of the Code of Civil Procedure, whereby the Insurance Company

has challenged the finding of rash and negligent driving by the driver of the vehicle-tractor, M.P.H. 9754 and has also contested that as the deceased was the passenger in the tractor-trolley who was going with the marriage party, the Insurance Company is not liable to indemnify the owner/insured. Therefore, the award passed against the Insurance Company holding it jointly liable to pay the compensation awarded by the Tribunal be set aside.

The facts giving rise to this appeal are that the deceased Sitaram was 25 years

of age and was carrying on his livelihood by beating of Dhapli, a musical instrument, and was also doing the job of a labourer. On 8-5-1987, a marriage party was travelling in a trolley attached to the tractor which was going to Nayabkheda (Singhpur). At the relevant time, the tractor was being driven by Kulwant, owned by Jaswant Singh which was insured with respondent No. 3. At the place of occurrence on road, Sitaram was going ahead of the tractor as a pedestrian and was playing the Dhapli. As the tractor was in speed, because of the slope on the road near the nallah, the tractor rolled down as the driver lost control. The tractor, after dashing Sitaram, overturned, as a result of which Sitaram received multiple severe injuries. An F.I.R. (Ex. D/2-C) was lodged at the Police Station, Bhonti, District Shivpuri by one Dayaram, son of Basanta and the injured was taken to the Government Primary Health Centre at Manpura and thereafter, to Government Hospital at Shivpuri, and then to J. A. Group of Hospitals, Gwalior, where the treatment was given, but he could not be survived and died on 15-5-1987.

The widow, appellant No. 1 and the three minor children of the deceased, namely Dayaram and Bhagirath, sons and Kumari Radha, daughter and the mother Manila Chhitia, preferred a claim and claimed compensation of Rs. 2,95,000/- in various heads for the death of Sitaram, arising out of the use of the tractor. The owner/driver and the Insurance Company contested the claim. During trial, owner and driver absented who then were proceeded ex parte. The Tribunal, on appreciation of evidence adduced by the parties and the statement of the driver Kulwant Singh, who examined himself, recorded a categorical finding that at the time of the accident, the deceased was going on the road playing Dhapli and not travelling as a passenger. The Tribunal further found that as admittedly the tractor and the trolley overturned; the doctrine of *res ipsa loquitur* applies, therefore the burden was on the opposite side to prove that the accident did not occur due to the negligence of the driver and was inevitable. After holding that the driver Kulwant Singh lost control over the tractor, on the slope of the road, resulting in the accident, determined the monthly earning of the deceased as Rs. 400/- and the dependency as Rs. 200/- per month while selecting a multiplier of sixteen, determined the compensation of Rs. 38,400/- and also Rs. 2,000/- towards medical expenses. Out of the total compensation of Rs. 40,400/-, a deduction of 10% was allowed towards lump sum payment. Thus, the Tribunal awarded total compensation of Rs. 36,360/- with 12% interest per annum from the date of the application till payment and the costs. It is this award of which the claimants, by this appeal, claim enhancement and the Insurance Company, by cross-objections, claims dismissal.

In support of cross-objections, Shri B. N. Malhotra, learned counsel for the Insurance Company, contended that in F.I.R. Ex. D/2-C, lodged by one Dayaram, not examined in the Court, it is clear that the deceased, at the time of accident, was not playing Dhapli, but was travelling in the tractor. A criminal case u/s 304-A was registered at Police Station, Bhonti. PW 2, R. S. Yadav, made an investigation of the offence who, during investigation, found that the deceased

was not going on the road ahead of the tractor, while playing Dhapli. The deceased was sitting in the trolley as a member of the marriage party and received injuries because the driver of the tractor lost control as a consequence of that, the tractor-trolley overturned. It was submitted that F.I.R. being a public document, it did not require any formal proof. Reliance was placed on a decision of the Rajasthan High Court in Mehta Printing Industries Vs. Lila Devi, A decision of this Court in the case of Ashok Kumar Gupta vs. Kishanlal Gupta and others, 1991 (1) T.A.C. 71, was also pressed in service to support the well-established proposition of law that onus lies on the claimant to prove his own case that not only there was an accident, but the tortfeasor was negligent in driving the offending vehicle which gave rise to the cause of action in the claim and that has to be proved by adducing reliable and legal evidence.

True, to prove rash and negligent act of a tortfeasor, the burden lay upon the claimants and to discharge that, the claimants have examined PW 2, Dhaniram who was a member of the marriage party. The fact of accident and overturning of the tractor was not denied either by the owner or by the driver. The driver has appeared as a witness as DW 1 who simply stated that he was not driving the tractor rashly and negligently, but he tried to save the deceased who was going on road, tried to stop the vehicle and took it downwards side on one side, as there was slope, in doing that balance of the tractor was lost, which resulted in the accident. This statement of the driver is in variance with the defence taken in the written statement. It is not the defence in the written statement that to save the deceased who was going ahead on the road playing Dhapli, he tried to avert the dash by stopping the vehicle and taking it towards downward side of the road. Therefore, the manner in which the accident occurred, the plea of act of God or the accident was inevitable for no fault of the driver, in the circumstances of the case, is not established.

Even assuming for the sake of argument that the driver was not negligent, in the facts and circumstances of the present case, we can safely apply the doctrine of *res ipsa loquitur*, which is a rule of evidence departing from the normal rule that it is for the plaintiff to prove the negligence, but in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him, but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident, but cannot prove how it happened to establish negligence. This hardship is to be avoided by applying the principle *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more and the present case is like that where the accident speaks for itself. See, Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, as also State of M.P. and Another Vs. Ashadevi and Others, Therefore, on the application of the doctrine, the burden shifted upon the respondents/defendants to explain the accident. From the evidence on record, we are not satisfied that the driver has discharged the burden by

pleading and proving that he was not negligent, and as such, the respondents cannot escape their liability by preferring hypothetical explanation, howsoever plausible, of the accident.

It is also well-established principle of law that in an appeal against a trial Court decree, when an issue turns on oral evidence, appellate Court must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict in oral evidence on any matter in issue and its result turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court, to prevail unless it clearly appears that some special feature about the evidence of particular witness has escaped the notice of the trial Court or there is a sufficient balance of improbability to disbelieve its opinion as to where the credibility lies. If any authority is needed, see, *Madhusudan Das Vs. Smt. Narayanibai (Deceased)* by Lrs. and Others,

Reliance on the decision of this Court in *Ashok Kumar Gupta's* case (*supra*) is of no help as in that case, there was an accident between two vehicles where there was no question of applicability of the doctrine of *res ipsa loquitur*.

Coming to the other contention that the deceased was travelling as a passenger and, therefore, the Insurance Company was not liable to pay any compensation, it has also no merit. True, the F.I.R. (Ex. D/2-C) and the statement of the Investigating Officer gives a version which support the case of the Insurance Company, but even assuming that the F.I.R. is a public document, but it is the rule of law that it is not a substantive piece of evidence. It can be used only for the purposes of corroboration or contradiction of the maker only. The maker having not been examined by either side, the statement of A. S. Yadav carries no weight as he only investigated the occurrence. He is not an eye-witness to the occurrence. His testimony is of hearsay evidence, therefore, the conclusions which he drew after investigation cannot be taken into consideration unless supported by proper material. It is well-settled proposition of law that evidence recorded in criminal Court and the findings arrived at thereon should not be used in claim cases. Such evidence, for the purposes of claim cases is inadmissible. See, *Shabbir Ahmad and Another Vs. M.P.S.R.T.C., Bhopal and Others*,

The fact that the deceased, at the time of accident, was travelling on the trolley or was going as a pedestrian, playing Dhapli, has to be judged on the evidence adduced before the Tribunal which is not only proved by the claimants, but is admitted by the driver himself. It is not the case of the Insurance Company that the owner/driver have colluded with the claimants so as to get the compensation from the Insurance Company. Even if, for argument's sake it is assumed that the driver has stated so to save the owner and himself from liability, there is material on record that the finding arrived at by the Tribunal by rightly not taking into consideration the F.I.R., and the statement of the Investigating Officer as no eye-witness to the occurrence was examined and no other independent legal and

cogent evidence was produced to support the plea of Insurance Company, the interference in appeal in the finding recorded by the Tribunal is not warranted. Accordingly, the cross-objections have no merit and are dismissed.

Coming to the appeal of the appellants/claimants for enhancement, on evidence, the Tribunal has recorded a finding that the deceased was earning Rs. 400/- per month who was maintaining wife, three minor children and widowed mother. Hence, he could not have afforded to spend on himself 50% of his earning. Therefore, in our opinion, the dependency, in the facts of the case, cannot be less than Rs. 300/- per month which yearly comes to Rs. 3,600/-, multiplied by the multiplier rightly selected by the Tribunal of 16, in the light of Ashadevi's case (supra), the dependency comes to Rs. 57,600/-. It is settled that when multiplier is selected for determining the compensation, no deduction can be made for lump sum payment.

The Tribunal has not awarded compensation for pain and suffering of the deceased which he suffered after the accident, which becomes the estate of the deceased to which the claimants are entitled. Admittedly, the accident occurred on 8-5-1987. The deceased suffered pain and suffering, mental agony till the date of his death, i.e., 15-5-1987; Therefore, the appellants are entitled for Rs. 5,000/- which we take as nominal figure in this head. The Tribunal has also not awarded a conventional figure of consortium. This Court, recently, in the case of Fizabai and Others Vs. Nemichand and Others, has taken the view that a conventional figure in the head of loss of consortium to the widow has also to be awarded. Following the said decision, we fix a conventional figure of Rs. 5,000/- of consortium.

As a result of the above, the claimants/appellants are entitled to total compensation of Rs. 57,600/- towards dependency plus Rs. 5,000/- towards deceased's pain and suffering, plus Rs. 5,000/- for consortium and Rs. 2,000/- towards expenses incurred in medical treatment, in all Rs. 69,600/- to which the claimants are entitled which shall be payable by the Insurance Company with interest at the rate of 12% per annum from the date of application till payment. Of course, any deposit made by the Insurance Company under the award shall be given due adjustment. The Insurance Company shall deposit the amount within a period of six weeks from today. It is made clear that in the award of the Tribunal, name of Bhagirath son of Sitaram does not appear who is also one of the claimants, in all there are six claimants who shall be entitled to compensation, interest and costs which shall be disbursed by the Tribunal specifying the amount payable out of the total compensation to each of the claimants keeping in mind the interest of the minors.

In the result, the appeal is allowed with costs. Cross objections are dismissed. Counsel's fee Rs. 750/- if pre-certified.