
(1970) 08 CAL CK 0016
In the Calcutta High Court
Case No : Suit No. 1417 of 1954

Marry Vincent

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 14-08-1970

Acts Referred:

Motor Vehicles Act, 1939 — Section 110, 110A, 110F

Citation : (1971) 1 ILR (Cal) 621

Hon'ble Judges : Deb, J

Bench : Single Bench

Advocate : Somnath Chatterjee and S.K. Dutt, for the Appellant; M.M. Sen, S.K. Hazra and Archana Sen Gupta, for the Respondent

Judgement

Deb, J.—In the year 1953, the State of West Bengal used to carry on business of transporting passengers by omnibuses in Calcutta for reward and was the owner of a double-decker bus bearing Police registration No. WBS 1108. The Plaintiff at that time was a girl of 9 years. Her brother Gilbert was then about 7 years old. They used to read in the Holy Child Institute at Convent Road, Calcutta, which was managed by Sisters of Charity. They used to go to that school and come back home by the same rickshaw which was pulled by Aziz.

2. In the noon of April 27, 1953, the Plaintiff and her brother, at or about 12-30 hours, were coming back home from the school in the rickshaw pulled by Aziz. They were coming from the northern direction along the eastern side of Lower Circular Road and they were to cross the tramway lines, which were nearly at the middle of that road, for going home by a lane on the western side of that road. After they had crossed the tramway lines and had proceeded about 10 ft. towards the west of that road the said omnibus driven by an employee of the State came from the southern direction along the western side of that road and dashed against that rickshaw and smashed it to pieces.

3. Due to the said collision the Plaintiff was thrown away about 30 ft. from the place of collision and was landed near the footpath on the western side of that

road and lost her sense. Her brother was killed on the spot and his dead-body was thrown away about 20 ft. from the place of the said collision. Aziz was also injured and was thrown near the place where the Plaintiff was landed and he died in the hospital within two hours of the collision.

4. When she regained her sense she found her ears were bleeding and she again: lost her sense on the road. She was removed to the Emergency Department of Sir Nilratan Sircar Hospital where she was treated by Dr. Bijoy Kumar Sengupta. In the hospital she felt immense pain all over her body after regaining her sense and she was confined to that hospital for her treatment from where she was discharged on May 10, 1953.

5. After coming back home from the hospital .she could not. move about for about a month and had to undergo further medical treatment.

6. On May 11, 1954, she being a minor filed this suit through her father as next friend against the State claiming Rs. 30,000 as general damages and Rs. 500 as special damages on the allegation that the said collision was caused due to gross negligence and extreme rash driving of the driver of the, said omnibus. She gave particulars of such negligence and injuries suffered by her in the plaint.

7. Counsel for the Defendant admitted that the State instituted a criminal proceeding against the driver of that bus for rash and negligent driving of the said vehicle. The State called many witnesses to prove the negligence of the omnibus driver and one of the witnesses for the prosecution was Dr. Sengupta. The driver was convicted by the learned Magistrate on the evidence adduced by the State and was sentenced to imprisonment. In the written statement, the State, however, denied the allegation of Negligence made against the driver and further pleaded that the said accident was caused solely due to the negligence on the part of Aziz and denied its liability to pay the damages.

8. On June 15, 1960, The Calcutta State Transport Corporation was constituted under the Road Transport Corporation Act, 1950 and it took over all. the assets and liabilities of the State in relation to the said business of carrying passengers by omnibuses. There after, the plaint was amended by substituting. The Calcutta State Transport Corporation as the Defendant in place of the State. The present Defendant, in its written statement has reiterated the statements made in the written statement of the State and has further pleaded that this Court has no jurisdiction to try this suit.

9. The Plaintiff has since attained majority and she was married on June 7, 1967, to Mr. Alley. She is now about 25 years old, and on February 19, 1970, she was examined de bene esse as she was residing with her husband who was working in Bokaro Steel Plant. Dr. Sengupta was called by the Plaintiff as witness and he was also examined de bene esse on the same day the Plaintiff was examined.

10. At the time of hearing of the suit the following issues, raised by the counsel for the Defendant, were settled by me:

(1) Was the driver of the omnibus bearing No. WBS. 1108 negligent on April 27, 1953, at about 12.30 in the afternoon in the manner alleged in para. 3 of the plaint?

(2) Was the accident complained of caused solely due to the negligence of the deceased rickshaw-puller as alleged in para. 5 of the written statement?

(3) Can the loss of the Plaintiff be assessed at Rs. 500 and Rs. 30,000 as claimed?

(4) Has this Hon^{ble} Court jurisdiction to try this suit?

(5) To what relief, if any, is the Plaintiff entitled?

11. The Defendant did not call any witness and the documents disclosed by the Defendant were not even proved. A plan disclosed by the Defendant was, however, exhibited at the time of examination of the Plaintiff which shows the place of the accident including the spot where the Plaintiff and Aziz were thrown out and the place where the dead-body of Gilbert was lying.

12. The Plaintiff in her evidence said that there was a bus stop on the western side of the road before the crossing of European Asylum Lane and Lower Circular Road which was at a distance of about 150 ft. from the place of the said collision and the omnibus driver was to stop at that bus stop and was also to cross the said junction before proceeding further towards north. When Aziz turned the rickshaw for going to that lane on the western side of that road, they saw that the said double-decker DUS was coming at a great speed from south to north along the western side of that road from a distance of about 150 ft. The driver did not stop the bus at that bus stop nor did he slow down the speed of the vehicle near the crossing of European Asylum Lane and Lower Circular Road.

13. She said that Aziz raised his hands to stop the bus which was still at a distance of about 150 ft. from the rickshaw, but the omnibus driver did not pay any heed to it and did not even blow the horn. She became frightened and caught hold of her little brother. She screamed and raised her other hand to stop the bus, but the bus driver did not even check the speed of the vehicle and turned it towards the rickshaw and dashed against it which was smashed to pieces. She further said that it seemed to her that the driver did not apply the brake at all even when they raised their hands.

14. She further said that she was thrown at a long distance due to the said impact and lost her sense. After regaining her sense she did not find her brother but saw the broken pieces of the rickshaw scattered all over the street. She said that blood was coming out of her ears and she again became unconscious. She was removed to hospital where she regained her sense and felt immense pain on her head, hand and all over her body. She was confined to hospital for her treatment upto May 10 and after coming back home she could not walk for about a month.

15. She said that she was a studious girl before the said accident, but since then she could not concentrate in her studies and was unable to succeed in her Senior Cambridge examination. She is still suffering from intermittent headache and was all through being treated even upto 1968. She said that she had lost her power of concentration and was unable to concentrate in anything for a long time.

16. After showing the marks of injuries on her left hand she said that she was unable to hold any heavy article in her left hand and she was still suffering from such a defect. She further said that she was still unable to use her left hand properly and demonstrated her difficulties in raising her left arm in Court and I have no doubt in my mind that she has sustained a permanent injury in her left hand. In answer to my question she identified the place of collision as shown in the plan and has further said that the said collision was caused due to the negligence of the driver who was rashly driving the said omnibus at a great speed.

17. Dr. Sengupta, in his evidence, proved the injuries suffered by the Plaintiff. In Q. 22, Dr. Sengupta was asked, "Can you remember what were the injuries due to ?" And he replied, "Such injuries are caused being violently knocked down by heavy moving vehicle with speed". Dr. Sengupta said that he had treated her and also identified the marks of injuries appearing on her left hand and the left ankle. I am satisfied on the evidence about injuries suffered by her and I hold that she has suffered those injuries as stated in para. 4 of the plaint.

18. Hazards of the streets of Calcutta and its suburbs are too well-known to be recalled here. Index of road accidents in Calcutta and its vicinity for the last 20 years and the rate at which it is still going up is a matter of grave concern for this State and the society. The Court cannot ignore the fact that the streets of Calcutta and its suburbs are dangerous to the users. Driving of a motor vehicle at a high speed in this city and its vicinity is itself a dangerous operation.

19. Greater degree of care is required from a driver of a motor vehicle while driving in this city and its suburbs than from a driver of a vehicle driving in lonely and uncrowded national or State highways of this country. Every man and woman driving a motor vehicle owe a duty to take care to the other users of streets who are likely to be injured by rash and negligent driving of the vehicle. If they create a potential danger by their own negligence or recklessness they cannot escape from the consequences of causing injuries to the other users of streets. Similarly, the other users of streets owe a corresponding duty not to create a potential danger by their own follies or negligence and they owe a duty to take care for themselves and a similar duty to the drivers of motor vehicles.

20. The Court shall take a judicial notice of the rules of the roads and the rules of all civilized nations enjoin the drivers of motor vehicles to slow down the vehicle while approaching the cross-roads. Moreover, an omnibus driver is also required to slow down the speed of the vehicle while approaching a bus stop and, if required by any passenger, he must stop the vehicle in such a stop. These

fundamental duties of the omnibus drivers must be observed by them, and if they violate their duties or the traffic rules by their rash and careless driving, they must be held to be negligent in a civil action.

21. Whether a driver of the motor vehicle in Calcutta and its suburbs will come within the rule of *Rylands v. Fletcher* (1868) 3 H.L. 330 in their present condition is a question to be decided in an appropriate case on which I refrain from expressing any opinion as it is unnecessary in this case.

22. It must not be lost sight of that the question of negligence is always a question of fact, and every Plaintiff in this form of action must prove the negligence on the part of the driver of the motor vehicle before he can succeed. The Court will consider whether such a collision could be caused by a prudent driver had a reasonable foresight been used by him. Once negligence is, however, proved, the onus shifts on the Defendants to prove affirmatively as a fact that the accident was caused due to the negligence of the Plaintiff or his driver or that the Plaintiff or his driver was guilty of contributory negligence in order to succeed in his defence. When two persons are involved in an accident it becomes a pertinent question as to who had created the potential danger and who had the last opportunity to avoid it and these questions have to be determined on the proved facts and the surrounding circumstances including the nature of the accident.

23. Before going to the relevant facts of the instant case, which have already been stated above, the very first thing to be remembered is that the evidence given by the Plaintiff on the negligence of the omnibus driver remains unchallenged and uncontradicted. It must also be remembered that the Defendant did not adduce any evidence whatever to show that the said omnibus driver was driving the said vehicle prudently and had used reasonable foresight. It was not even suggested to the Plaintiff that the said accident was caused due to the negligence of Aziz. The counsel for the Defendant did not even whisper to the Plaintiff that Aziz had the last opportunity in avoiding the said collision though the Plaintiff expressly said that the said collision was caused due to extreme negligence and rashness on the part of the omnibus driver. Moreover, there is no evidence on record even to suggest that Aziz created any potential danger by his folly or carelessness which was not even put to the Plaintiff.

24. The Plaintiff has taken upon herself to prove the negligence on the part of the omnibus driver and she has given cogent evidence on this aspect. She was not even cross-examined as to what she said about the negligence of the omnibus driver and, moreover, the Defendant did not call any witness to contradict her evidence.

25. In *A.E.G. Carapiet Vs. A.Y. Derderian*, , delivering the judgment of the Court of Appeal, P. B. Mukharji J. (as he then was) said:

Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed

that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the Plaintiff's account in its entirety.

26. The law laid down by the Court of Appeal with greater force is applicable to the case before me. Here the Plaintiff was not even cross-examined on her evidence relating to the negligence of the driver. Here it was not even put to her that the driver of the omnibus was not negligent. It was not even suggested to her that Aziz was responsible for causing that collision nor it was put to her that Aziz had the last opportunity to avoid that accident. Moreover, the plan disclosed by the Defendant and exhibited at the time of examination of the Plaintiff has a far-reaching effect in this case.

27. The very fact that the Plaintiff was thrown at about 30 ft. from the place of the collision conclusively shows at what a great speed the said omnibus was being driven by that reckless driver. The facts that the said rickshaw was smashed to pieces on the spot and that Gilbert was killed in no time and Aziz died within two hours of the said accident conclusively prove the nature of the accident and the impact of the said collision. The facts that the bus driver did not stop at that bus stop and did not slow down the speed of the vehicle near the said cross-roads and came from a distance of about 150 ft. with a great speed without blowing the horn and without paying any heed to the signals given by the Plaintiff and Aziz and dashed against the rickshaw, in my opinion, conclusively prove the extreme rashness and negligence on the part of the driver in causing that collision.

28. Moreover, the Defendant has accepted the evidence adduced by the Plaintiff as true and correct by not cross-examining her on her evidence relating to the negligence of the driver, and hold that the said omnibus driver by his rash and negligent driving of that vehicle caused that collision and injured the Plaintiff severely.

29. It was contended by the counsel for the Defendant that Aziz contributed to the negligence of the omnibus driver, but there is not a whisper of such a suggestion in the cross-examination of the Plaintiff. Moreover, this case was not even put to the Plaintiff. The Defendant did not adduce any evidence and has accepted the evidence of the Plaintiff. In these circumstances, I overrule this contention which has no substance at all.

30. The Plaintiff has proved that the said collision was caused due to the extreme negligence of that omnibus driver. She has further proved that she has suffered permanent injuries. She can not use her left hand properly and with great difficulties she raised it while demonstrating in Court. These injuries caused to her more than 17 years ago, had left permanent marks on her left hand and ankle and her intellect has been considerably reduced due to the injuries caused to her brain by that collision.

31. She was a child when she met with that accident. Her only brother was killed on the spot. She has suffered terrible nervous shock and bodily pain, and while recalling those horrible incidents even after 17 years she completely broke down in the witness-box. She is still being haunted by those terrible incidents and cannot sleep properly which she had said in her evidence.

32. Hands come just after the face to a young Indian lady and it is really a shocking sight to see her left hand. Her left ankle is no better than her left hand. By the very sight of those marks of injuries and the great difficulty she had to encounter in raising her left hand in the Court, even the cross-examining counsel, being herself a young lady refrained from cross-examining the Plaintiff on those permanent disfigurements and permanent injuries which she will have to bear throughout her life due to the extreme negligence and rashness of the omnibus driver.

33. She has claimed Rs. 500 as special damages for her medical treatment, but her counsel rightly said that she was not entitled to this sum as it was spent by her father and not by her.

34. She is fortunate to be married to a young man who is working in Bokaro Steel Plant, but that is no compensation for her permanent injuries, and I reject this outrageous suggestion of the counsel for the Defendant.

35. The Plaintiff has claimed Rs. 30,000 as damages for suffering bodily pain, for injuries to her person, for her mental agony and for loss of expectation of life. The counsel appearing for the Defendant said that the Plaintiff is entitled to some damages which should be assessed by me. Respective counsel for the Plaintiff and the Defendant rightly said that in assessing the damages in these cases the Court will take into account the nature of the injuries suffered by the Plaintiff including her mental agony and bodily pain. Evidence, however, does not show that the Plaintiff's life was shortened due to the said accident and, in my opinion, she is not entitled to damages for loss of expectation of life. After considering the facts and circumstances, including the evidence on record, I assess the quantum of damages on the following heads:

(a) Rs. 2,500 for permanent disfigurement of her left hand and ankle.

(b) Rs. 5,000 for permanent injury caused to her left hand.

(c) Rs. 2,500 for injury caused to her brain which has resulted in diminishing her power of concentration.

(d) Rs. 5,000 for her bodily pain, mental agony and nervous shock.

36. It was contended by the counsel for the Defendant that this Court has no jurisdiction in view of Sections 110, 110A and 110F of the Motor Vehicles Act, 1939. Section 110 of the Act empowers the State Government to constitute one or more Motor Accident Claims Tribunal for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles. Section 110A of the Act, inter alia, provides that an application for such compensation may be made by the person who has sustained injury and such an application shall be made to the Claims Tribunal within whose area the accident took place. It further provides that such a claim shall be made within 60 days of the occurrence of the accident and the Tribunal is empowered to extend the said period if it is satisfied that the Applicant was prevented by sufficient cause from making the said application within 60 days. Section 110F of the said Act, inter alia, provides that where a Claims Tribunal has been constituted for an area, no civil Court shall have any jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area.

37. But, when it was pointed out to the counsel for the Defendant that by a notification published in the Calcutta Gazette dated August 24, 1961, the State Government for the first time constituted a Claims Tribunal for Calcutta area, it was rightly conceded by him that these sections of this Act cannot have any application in the instant case. Apart from this concession, in "my opinion, Sections 110, 110A, 110F have no application in the facts and circumstances of this case. The said accident occurred in the year 1953. The suit was filed claiming compensation in the year 1954, and at that time no Claims Tribunal was even constituted by the State Government. The above sections clearly show that they have no retrospective operation and do not affect the pending proceedings and, in my opinion, the present Claims Tribunal for Calcutta area cannot adjudicate upon the claims for compensation made by the Plaintiff in this suit for the simple reason that it was not even in existence in the year 1953 and the said provisions of the Act have no retrospective operation. In the view that I have taken it is wholly unnecessary to decide whether jurisdiction of this Court has at all been actually ousted as prima facie no new statutory right or remedy is created by this Act.

38. After considering the evidence on record and all the contentions of the counsel for the Defendant my answer to the issues are as follows:

Issue No. 1: Yes.

Issue No. 2: No.

Issue No. 3: Plaintiff is not entitled to Rs. 500 as special-damages claimed by her, but she is entitled to Rs. 15,000 as damages as stated hereinbefore.

Issue No. 4: Yes.

Issue No. 5: Plaintiff is entitled to Rs. 15,000 and the costs of this suit.

39. The Plaintiff has succeeded in this suit and, therefore, there will be a decree for Rs. 15,000 with costs against the Defendant. The Plaintiff will also get all reserved costs, if any, from the Defendant Certified for two counsel.