
(1978) 07 CAL CK 0034
In the Calcutta High Court
Case No : A.O.D. No. 246 of 1969

Nilima Das

APPELLANT

Vs

Calcutta State Transport Corporation

RESPONDENT

Date of Decision : 14-07-1978

Acts Referred:

Motor Vehicles Act, 1939 — Section 110D

Citation : 82 CWN 1101

Hon'ble Judges : B.C. Ray, J;A.K. Sen, J

Bench : Division Bench

Advocate : Phanindra Kumar Sanyal and Tapa Prosad Chatterjee, for the Appellant;Soumen Bose and Sundarananda Pal, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sen, J.—This is an appeal u/s 110 D of the Motor Vehicles Act, 1939, directed against the award dated February 9, 1968, made by the judge presiding over the Motor Accident Claim Tribunal, Calcutta, 24-Parganas and Howrah in Motor Accident Claim Case No. 27 of 1065. The learned judge having overruled the claim altogether the claimant has preferred the present appeal. The case of the claimant was that on May 6, 1964, she was on board of a double-decker bus of the respondent, Calcutta State Transport Corporation plying on route No. 9 on her way to her place of work in north Calcutta. At or about 11 a.m. as the vehicle turned into Chittaranjan Avenue while coming along Bowbazar Street the tyre of a rear wheel burst and she being seated on a seat just above the said wheel suffered multiple fracture of bones on her right leg due to the air pressure. She tried to stand but could not and was removed to Medical College in a taxi by the conductor and two other gentlemen. From the hospital she was removed in an ambulance at the instance of her husband to a clinic and was put under the treatment of Dr. R.N. Mitra. She was put on plastering but since the bones did not unite under plaster she had to undergo a grafting operation which was effected three months thereafter. In that process she was cured but has suffered

a permanent damage and her leg in question has turned weak and she cannot walk freely and cannot mount steps. She had to give up her job as a teacher in a north Calcutta school.

2. On the facts, as aforesaid, on February 13, 1965, she lodged a claim before the aforesaid Claims Tribunal claiming a sum of Rs. 15,000/- on the ground of loss of earning, suffering and physical disability. Such claims was lodged in the form prescribed by the statute and is to be found at pages 9 to 11 of the Paper Book.

3. An application was filed for condonation of the delay in lodging the claim, as aforesaid, which was allowed on contest on evidence on a finding by the tribunal that the claimant was prevented by sufficient cause from filing the claim within the period prescribed. That was the order of the tribunal dated July 9, 1965. The original claim petition was thereafter registered and the present respondent filed a written statement. In this written statement it was merely pleaded that there being no averment of any negligence of the driver of the bus said to be involved in the alleged accident the claim was not maintainable and strangely a further defence was taken that they had come to learn that the bus in question was not involved in any accident on May 6, 1964.

4. On the pleadings as aforesaid, the following four issues were raised by the learned judge presiding over the tribunal.

1. Has the claimant any cause of action or right to sue ?

2. Is the case maintainable at all?

3. Did the accident occur due to any negligence or rashness on the part of the driver of the vehicle involved in accident or was there negligence or contributory negligence on the part of the victim of the accident?

4. Is the applicant entitled to get any compensation? If so, to what extent?

5. At the trial the claimant adduced evidence. She examined five witnesses in support of her claim and also relied on a few documents. Very strangely no evidence was adduced on behalf of the respondent. The claimant examined herself as P.W. 2 to prove the circumstances in which she suffered the multiple fracture of her leg while on board the disputed vehicle as a result of the tyre burst which happened at the time and in the manner referred to there in before. She also proved the damage to her leg that she suffered as a consequence thereof and she further proved loss of her job due to her physical inability. She examined Dr. R.N. Mitra who proved the nature of injuries suffered by her. On the evidence of this medical practitioner it appears that the claimant has yet not become normal and is not in a position to undertake strain. The claimant examined P. W. 3 and P. W. 5 as formal witnesses proving certain records of the Medical College and of the Clinic She also examined her husband as P. W. 4 who proved that the claimant had to spend Rs. 8,132.50 towards treatment. On the point of negligence on the part of the respondent or the respondent's driver the

only evidence led by the claimant was that the bus was crowded and that it was being driven at a terrific speed. There was no other corroborating evidence on the point and on cross-examination she failed to suggest any reason for the tyre burst.

6. On the *exparte* evidence as above, the learned judge found that the claimant had failed to prove any negligence on the part of the respondent and since the claim is in the nature of compensation for tort, failure on her part to prove negligence of the respondent disentitles her to claim any compensation. He, therefore, overruled the entire claim by observing that when she was to prove that the accident was due to negligence of the driver and when she failed to prove such negligence she is not entitled to any compensation. The claim petition having been dismissed on a finding as aforesaid the claimant has preferred the present appeal.

7. Mr. Sanyal appearing on behalf of the appellant has strongly assailed the award as made. According to Mr. Sanyal it was sufficient for the claimant to prove the accident which she did and the same having been proved the onus lay upon the respondent to show that claimant had not suffered injury due to any act of negligence on the part of the respondent. In other words, Mr. Sanyal contended that the learned judge presiding over the tribunal should have held that in the facts the principle of *res ipsa loquitor* should have been invoked and on the application of the said principle it should have been held that when the respondent adduced no evidence to establish either (i) absence of any neglect on their part or (ii) lack of due care and caution on their part it should be presumed that the claimant suffered the injury only due to the neglect on the part of the respondent. Alternatively, it was contended by Mr. Sanyal that to sustain a claim of compensation u/s 110A it was not necessary for the claimant to prove any neglect on the part of the respondent as the cause for the injury to be compensated.

8. The points thus raised by Mr. Sanyal have been strongly contested by Mr. Bose appearing on behalf of the respondent Corporation. According to Mr. Bose the claim of compensation being in respect of a tort no claim can be sustained unless the injury suffered is due to any wrongful act on the part of the respondent or an act of neglect. It has also been contended by Mr. Bose that a claimant who prefers such a claim must prove by *prima facie* evidence that he or she had suffered the injury due to a wrongful act or an act of neglect on the part of the respondent. Where as in the present case, the claimant fails to prove the same, he is not entitled to get the compensation claimed. Mr. Bose has further contended that when the injury was suffered by the claimant due to a tyre burst and when it cannot be said that there could be no such tyre burst normally except due to an act of negligence on the part of the respondent and or its servants there is no scope for application of the principle *res ipsa loquitor*.

9. We have carefully considered the rival contentions raised before us. We are unable to accept the contention of Mr. Sanyal that a claim contemplated by

section 110 of the Motor Vehicles Act, can be sustained irrespective of any wrongful act or neglect on the part of the person against whom the claim is made. Section 110 merely authorises the State Government to constitute a special tribunal for adjudicating upon claims for compensation in respect of accidents involving death of or bodily injury to persons arising out of use of motor vehicles. This section by itself neither confers a right nor the liability in respect of compensation. That right and liability in our view arise only under the law of tort. That being the position, the basic requirement to sustain a claim of compensation in respect of a tort has to be fulfilled and it has to be proved that the injury to be compensated has been the result of a wrongful act or an act of neglect. It is of course open to the claimant to establish such wrongful act or neglect either on specific evidence or by application of a rule of presumption recognised by court where material evidence being exclusively within the control of the respondent the claimant can prove nothing more than the accident and rely upon a presumption that until the contrary is proved such an accident occurred either due to a wrongful act or an act of neglect on the part of the respondent. In this view, we are unable to sustain the alternative contention put forward by Mr. Sanyal.

10. On the evidence adduced in the present case we cannot but accept the finding of the learned judge presiding over the tribunal that the claimant had failed to prove any neglect on the part of the respondent or its servants by any positive evidence which can be said to have led to the accident. The claimant had merely said that at the time when the tyre did burst the bus was crowded and that it was moving in a terrific speed. It is not, however, her evidence that the bus was overloaded beyond its capacity and it is due to such overloading that the tyre did burst. As for her evidence to the effect that the bus was moving at a terrific speed, it appears to us that this witness was not telling the truth. Evidence on record well establishes that it was at 11 a.m. that the bus in question was taking its turn towards the both on Chittaranjan Avenue while moving out of Bowbazar Street. It is quite apparent that it could never be possible for the driver to move at a terrific speed while moving out of Bowbazar Street and taking turn into Chittaranjan Avenue at such an hour in the day. In any event, it is not the evidence of the claimant that the tyre did burst due to any such speed, more so when had it been so, there would have been every likelihood of the bus getting overturned. We, therefore, feel no hesitation in agreeing with the learned judge presiding over the tribunal below that the claimant had failed to adduce any evidence to prove any neglect on the part of the respondent.

11. This leads us to consider the other important point raised by Mr. Sanyal. According to Mr. Sanyal, even if the claimant had failed to adduce positive evidence to prove negligence on the part of the respondent yet such negligence should have been presumed on the application of the principle *res Ipsa loquitur* by proof of the accident itself. Strong reliance is placed by Mr. Sanyal on a number of reported decisions upholding the application of the aforesaid principle.

The leading case on the point is *Scott -v- London and St. Katherine Docks* (1861-73) All England Reports page 246 where it was laid down :

There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things, does not happen if those who have the management of machinery used proper care, it affords reasonable evidence, in absence of explanation by the defendant that the accident arose from want of care.

12. Two things emerge from the principle thus enunciated, namely, (i) primarily the onus lies on the claimant who claims compensation in respect of a tort to adduce reasonable evidence of negligence resulting in the injury and (ii) there may be an exception where such negligence can be presumed when the accident is such that in ordinary course of things it could not have happened if the person in management of the machinery had taken due care and precaution. This rule of presumption and the circumstance where such a presumption can be raised was further considered in the case of *Barkway -v- South Wales Transport Company* 1948 (2) AER 460 and the observations of Asquith, L.J., was approved by the Supreme Court in several decisions. Reference may be made to the cases of *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, and *The Krishna Bus Service Ltd. Vs. Smt. Mangli and Others*, . Though the majority decision of the Appeal Court in the case of *Barkway v. South Wales Transport Company* was reversed by the House of Lords (1950 (1) AER 392) the principles relating to the application of the rule of *res ipsa loquitur* was not disapproved by the House of Lords and as a matter of fact the principles so laid down appears now to be settled law. The difficulty, however, as pointed out by Salmond is in the application of the principle. It is nothing but a rule of evidence of which the essence is that an event which in ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence. Now let us apply this principle to the present case. According to Mr. Sanyal when the claimant suffered injury due to the tyre burst and when ordinarily and normally tyres do not burst except due to some negligence by way of use of worn-out tyres or overloading of bus, the mere proof of the tyre burst should have been considered as evidence by itself of such negligence. Whether or not we can accept this contention of Mr. Sanyal depends upon the answer as to whether we can accept the position that in ordinary course of events the tyre of a bus as in the present case is more likely than not to have suffered the burst because of negligence on the part of the respondent. Taking judicial notice of the fact of the state of utter disrepair of the roads in Calcutta it is not possible for us to accept the position that ordinarily there could have been no tyre burst except due to an act of neglect, as suggested by Mr. Sanyal, on the part of the respondent Corporation. It would be matter of interest to point out that in the case of *Barkway v. South Wales Transport Company* the court of appeal while considering the case of tyre burst had observed :

"Tyre burst per se is a neutral event consistent, and equally consistent with negligence or due diligence on the part of the defendants." In the said very decision, Scott, L.J. observed : "I feel by no means convinced that the prevention of a tyre burst is within the control and management of a omni bus company in any sense or degree comparable with the case of the occupier of a upper floor in a warehouse with an open doorway in its external wall abutting on a public road on to which a barrel, if not controlled, can roll out and fall. If such is the ordinary position with tyre burst, in our considered opinion on the condition of road prevailing in Calcutta it would hardly be reasonable for us to presume that ordinarily there could be no tyre burst except due to some negligence on the part of the respondent Corporation. Our inability to hold as such necessarily negatives the application of the principle *res ipsa loquitor* based on the fact of bursting of the tyre itself.

13. There is, however, another important aspect which was wholly lost sight of by the learned judge presiding over the tribunal below. The uncontroverted evidence of the claimant is that she suffered the fracture on her leg when the air pressure resulting from the tyre burst damaged the cover over the wheels and then caused the fracture to the leg while she was sitting on a seat over the said wheel. In our considered opinion, it would not be unreasonable to hold that ordinarily the cover of such a wheel on which the respondent provided for passengers' seats should be so secured as not to suffer a damage in case of an accidental tyre burst and the fact that in the present case the cover gave way would certainly entitle us to hold that in ordinary course of events no passenger sitting on a seat over the wheel would suffer an injury as in the present case in case of a tyre burst if the respondent had taken due care and caution to see that the cover over the wheel was properly secured and did not suffer from any structural failure or defect. Such being the position, though we cannot presume any negligence from the bursting of the tyre itself as against the respondent Corporation we do raise such a presumption from the fact of the cover of the wheel giving way to the air pressure as a result of the tyre burst. In this sphere, Mr. Sanyal can rightly invoke the application of the principle of *res ipsa loquitor* and when admittedly no evidence was adduced on behalf of the respondent Corporation how such an accident could happen resulting in the injury to the claimant we cannot but hold that the injury suffered by her was due to an act of negligence on the part of the respondent Corporation. The respondent Corporation had not only adduced no evidence in support of its pleading but it had not taken any specific plea that the accident occurred due to any act of God. The respondent even did not plead any absence of negligence on its part and put up a false defence that the bus in question was not involved in any accident whatsoever. Such being the position, we hold that the claimant is entitled to compensation.

14. We will now proceed to assess the compensation payable to the appellant, since on our finding made hereinbefore she is entitled to the same. The tribunal had not assessed the compensation because in the opinion of the tribunal, the

appellant is not entitled to any compensation at all. The appellant in her application claimed a lump sum compensation of Rs. 15,000/- of which a sum of Rs. 2,961/- was claimed as medical expenses. In her evidence before the tribunal she claimed the said lump sum amount of Rs. 15,000/- as compensation but failed to furnish any particulars as to how the said amount was assessed. So far as her physical disability is concerned, it has been proved by the medical evidence, that she suffered fracture of her right leg which required long time to heal and that she had to undergo bone grafting operation. According to the orthopaedic surgeon, though she is cured, yet she is not normal, she feels pain and is limping. According to the evidence of the appellant she still feels pain in the damaged portion of the leg, she cannot walk freely and cannot mount steps. She was a teacher in a north Calcutta School and had to give up such service due to her disability. On such evidence it cannot be said with certainty that she had suffered any permanent injury or that she would not become normal in some more time. In any event no total disability has been proved. In assessing the compensation for the disability suffered, if we look to the provisions of Workmen's Compensation Act, it would appear to us that her monthly income on her own evidence being Rs. 105/-, amount of compensation in case of permanent total disability would have been Rs. 16,128. The disability not being total and in view of our doubt as to whether it would be permanent, her loss of earning capacity may be assessed at 20%. Compensation worked out on that basis amounts to Rs. 3,225.00. Assessing the compensation from another angle we come to a near figure. She is 48 years in age and was earning Rs. 105/- per month. Taking her age of superannuation at 58, she would have earned another sum of Rs. 12,600/- if she was not to give up her job. But though she has given up her job at North Calcutta, it cannot be said that she will not be able to secure a similar or suitable job elsewhere. Nor is there any certainty that she would have continued in her old job for the entire 10 years. In view of such uncertain factors we may deduct 50% of the possible loss and another 20% for the lump sum compensation now being paid to her. On such deduction, the reasonable compensation payable to her amounts to Rs. 3,700/-. In the light of above calculation we assess the compensation payable to the appellant on her disability at Rs. 3,300/-. To this we must add the medical expenses. Though on the evidence of the appellant's husband such expenses amounted to Rs. 3,132.50; the amount claimed by the appellant in her application is Rs. 2,961/-. Claim in this respect as lodged with the opposite party by the appellant amounts to Rs. 2,781.50. In that view we are unable to sustain any claim in this account beyond the sum lodged with the opposite party and assess the same at Rs. 2,700/. Therefore, in our view the appellant is entitled to a total compensation of Rs. 6000/- and we assess the compensation at that figure. In the result, we allow this appeal. The judgment and award as passed by the tribunal is set aside. We make an award for a sum of Rs. 6,000/- towards compensation in favour of the appellant and her claim is allowed to the extent as above. Parties do bear their respective costs throughout.

B. C. Roy, J.

I agree.