
(2012) 08 GAU CK 0012
In the Gauhati High Court
Case No : MAC App. No. 63 of 2002

Rita Das and Others

APPELLANT

Vs

Oriental Insurance Company Ltd. and Others

RESPONDENT

Date of Decision : 04-08-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 158, 165, 166, 173

Citation : (2013) ACJ 2044 : (2013) 1 GLT 346

Hon'ble Judges : S.C. Das, J

Bench : Single Bench

Advocate : A.C. Bhowmik, Mr. R. Datta, Mr. S.P. Bhattacharjee and Mr. M.K. Roy, for the Appellant; P. Gautam, for the Respondent

Final Decision : Allowed

Judgement

S.C. Das, J.—This appeal, u/s 173 of Motor Vehicles Act, 1988 is directed against judgment and nil award, dated 22.04.2002, passed by learned Single Member(Motor Accident Claims Tribunal) South Tripura, Udaipur, in Case No. T.S. (MAC) 13 of 2001 u/s 166 of M.V. Act. The material facts, relevant for disposal of this appeal, may be briefly noticed thus:

Netai Das, the husband of the appellant-petitioner No. 1, father of appellant-petitioner No. 2 and son of appellant petitioner No. 3, was travelling from Maharani to Udaipur with Commander Jeep vehicle No. TR01-2936 on 27.07.1999 to attend his duty as an Assistant Teacher in the Fulkumari Senior Basic School under the Education Department of the Govt. of Tripura and on way at Hirapur on Maharani Udaipur road, at about 5-30 A.M. a group of extremists suddenly attacked the vehicle and spread bullet aiming the vehicle. Netai Das received bullet injuries and he was shifted to Tripura Sundari District Hospital, Udaipur but he succumbed to the injuries. R.K. Pur P.S. Case No. 145/99 was registered after the accident and a police investigation was taken up. The vehicle belonged to respondent No. 2, Dharendra Das and it was insured with Oriental Insurance Company Ltd. covering the risk on the date of accident and one Ajit

Baran Majumder was the driver of the vehicle at the time of accident. The deceased was aged 28 years and used to draw monthly salary of Rs. 3909/-. The petitioners were dependent on the income of the deceased and therefore, they claimed compensation of Rs. 10,00,000/- (Rupees ten lakh).

2. Respondent No. 1, the Oriental Insurance Company Ltd. contested the suit by filing written statement denying the statements made in the claim petition and further stated that the responsibility of the insurance company shall not arise to indemnify any liability of respondent No. 2, the owner of the vehicle, unless the original valid insurance policy covering the risk on the date of accident and other documents of the vehicle including valid driving license of the driver, produced and proved by the owner of the vehicle. By a separate written statement, the insurance company also prayed for allowing them to take all defence if the owner of the vehicle fails to contest the case.

3. Respondent No. 2, the owner of the vehicle also filed written statement inter alia stating that on the alleged date and time of the accident, the vehicle was on way to Udaipur from Maharani carrying passengers and near brick field of Maharani, a group of unknown extremists raised signal to stop the vehicle and accordingly, the driver stopped the vehicle. Suddenly extremists started firing on the vehicle and as a result the driver of the vehicle and some of the passengers received bullet injuries and they were taken to Tripura Sundari District Hospital, Udaipur from where they were referred to G.B. Hospital, Agartala. The relative of the petitioners died on receipt of bullet injury and since there was no motor vehicle accident for rash and negligent driving, the claimants were not entitled to get any compensation. It is also stated that the vehicle was insured with Oriental Insurance Company Ltd. at its Udaipur branch and the driver was also having with valid driving license.

4. The Tribunal, considering the pleadings of the parties, formulated the following issues for decision:-

I. Whether Netai Das died in a motor accident on 27.7.99 at Hirapur on Udaipur Maharani Road due to rash and negligent driving of the vehicle by the driver of TR01-2936 (Jeep)?

II. Whether the claimant-petitioners are entitled to get any compensation as prayed for? If so, what should be the quantum of compensation and which of the O.Ps. are liable to pay it?

III. What other relief/reliefs are the claimant entitled to?

5. In course of trial, the petitioner No. 1 examined herself as PW. 1. Respondents adduced no evidence.

The Tribunal by impugned judgment dated 22.04.2002 dismissed the claim petition observing that Netai Das died on receipt of bullet injuries and so, the petitioners were not entitled to get any compensation.

6. Having aggrieved, the present appeal was filed challenging the judgment and nil award, passed by the Tribunal.

7. Heard learned senior counsel, Mr. A.C. Bhowmik assisted by learned counsel, Mr. A. Bhowmik for the appellants and learned counsel, Mr. P. Gautam for the respondent No. 1 (Oriental Insurance Company).

8. Respondent Nos. 2 and 3 chosen to remain absent.

9. It is submitted by learned Sr. counsel, Mr. Bhowmik that the accident is admitted. The extremists fired on the vehicle while it was in use. Written statement of the respondent No. 2 shows that driver stopped the vehicle seeing the stop signal of the extremists and thereby facilitated the extremists to open fire on the vehicle resulting death of Netai Das. If the vehicle was not stopped seeing the signal of the extremists, the accident could have been avoided and that amounts to negligence on the part of the driver and therefore, the petitioners were entitled to get compensation, but, the Tribunal rejected the prayer summarily without considering the merit of the claim.

10. Learned counsel, Mr. Gautam for the respondent insurance company refuted the argument stating that it was a clear case of extremists attack and there was no motor vehicle accident for rash and negligent driving of the vehicle and so, the Tribunal rightly refused the claim petition. He has also submitted that the insurance company has no liability since the owner of the vehicle failed to produce any documents showing insurance of the vehicle covering the risk on the date of accident.

11. It is an undisputed rather an admitted fact that Netai Das while travelling with commander jeep vehicle No. TR01-2936 on 27.07.99 at about 5-30 a.m. received bullet injury at Hirapur on Maharani Udaipur road and consequently died. The petitioner No. 1 in her deposition stated that she was not an eye witness of the accident and she came to know about the accident from the local people that her husband while was travelling with commander jeep vehicle bearing No. TR01-2936 from Maharani to Udaipur, received bullet injury fired by the miscreants near Hatimura in the vehicle and consequently died. In her deposition she stated that she submitted copy of FIR, death certificate, salary certificate, age proof certificate etc. and those were marked as Exbt. 1 series. But the L.C. records received from the Tribunal does not consist any such document. The Registry received the L.C. Records in two files. File "C" consists of 31 sheets of documents, namely, order sheets (3 sheets), application u/s 166 of M.V. Act (6 sheets), written statement (13 sheets), issue (1 sheet), deposition (1 sheet) and judgment (7 sheets). File "D" consists of total 41 sheets of documents namely, Vakalatnama, petition, hazira etc. If the documents were exhibited as reflected in the deposition of the petitioner recorded by the Tribunal, it was the duty of the Tribunal to send the same along with the L.C. Records to this court for consideration. However, I have considered the case on the basis of the pleadings and the deposition of the petitioner on record.

12. Let us first see, whether there was a motor vehicle accident and whether such a claim petition u/s 166 of M.V. Act filed by the appellant-petitioners was justified Section 165 of the Motor Vehicles Act Prescribes constitution of Claims Tribunal which reads thus:-

Claims Tribunals.--

(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification 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, or damages to any property of a third party so arising, or both.

(2) A Claims Tribunal shall consist of such number of members as the State Government may think fit to appoint and where it consists of two or more members, one of them shall be appointed as the Chairman thereof.

(3) A person shall not be qualified for appointment as a member of a Claims Tribunal unless he--

(a) is, or has been a Judge of a High Court, or

(b) is, or has been a District Judge, or

(c) is qualified for appointment as a High Court Judge [or as a District Judge].

(4) Where two or more Claims Tribunals are constituted for any area, the State Government, may by general or special order, regulate the distribution of business among them.

13. Section 166 prescribes the procedure of filing an application for compensation which reads thus:-

Application for compensation.--

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be.

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal

representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed.

Provided that where no claim for compensation u/s 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3)...

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section

(6) of section 158 as an application for compensation under this Act.

14. A careful reading of the above provisions it makes clear that in the event of death or bodily injury to a person is caused because of accident arising out of the use of motor vehicles, the person injured or the legal representatives of the deceased may present an application claiming compensation.

15. The word, "accident" is not defined in the Motor Vehicles Act. This expression generally means some unexpected event, happening without design. In the case of Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another, , the apex Court while deciding a case under the Workmen's Compensation Act had the occasion to define the word "accident" stating that the expression "accident" has not been defined in Workmen's Compensation Act. It can be said that the expression "accident" has been used in a popular and ordinary sense, the "mishap" or "untoward event not expressed or designed".

16. Admittedly, vehicle No. TR01-2936 was in use on the alleged date and time, carrying passengers from Maharani to Udaipur. Netai Das received bullet injury while travelling with the vehicle. There is no doubt that it was an accident. Now the point to be decided as to whether it was because of any rash or negligent act on the part of the driver of the vehicle. In the written statement, respondent No. 2, the owner of the vehicle clearly stated that the extremists from way side raised stop signal and the driver in obedience thereof stopped the vehicle when the extremists fired on it. There is no evidence before us as to whether the accident could be avoided had the vehicle not stopped in obedience to the stop signal given by the extremists. Under such circumstances, definitely the welfare legislation should be interpreted in favour of the claimants.

17. In the case of Rita Devi & Ors. Vrs. New India Assurance Company Ltd. & Anr. reported in 2000 ACJ 801, the Supreme Court examined the actual legal

import of the words, "death due to accident arising out of the use of motor vehicle." In that reported case the fact was that the deceased driver Dasarath Singh was waiting with his auto-rickshaw at Dimapur station and some passengers hired the vehicle, and subsequently, neither the auto rickshaw nor the driver was traceable. On the following day, dead body of Dasarath Singh was recovered, who died a homicidal death but the auto-rickshaw was missing forever. The Tribunal considering the facts awarded compensation and the judgment was set aside by the High Court. The Supreme Court restored the order of the Tribunal and observed that the death was caused accidentally in the process of committing theft of the vehicle while it was in use. The Apex Court while deciding that case classified "murder simplicitor" and "accidental murder". In paragraph 10 of the judgment, the Apex Court observed thus:

10. The question, therefore, is can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But, there are also instances where murder can be by accident on a given set of facts. The differences between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killings is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

18. The law laid down in the case of Rita Devi (supra) may be applied in the facts and circumstances of this case. The pleadings and evidence what is placed on record clearly emerges that the intention of the extremists was not to kill a particular passenger, but was to attack the vehicle and to let loose a reign of terror in the passengers travelling in the vehicle and in the neighbourhoods. Therefore, considering the facts and circumstances and the legal position, as already settled by the Apex Court, we may safely arrive at a conclusion that the death of Netai Das was an accidental murder and was not a murder simplicitor.

19. While adjudicating upon claims for compensation in respect of accident involving the death or badly injury to persons arising out of "use of motor vehicles" it is required to be established and the burden lies on the petitioners to prove that the motor vehicle was in use while the accident occurred. In the case at hand, it is an admitted fact that the vehicle was in employment when the extremists spread bullet on the vehicle and the deceased received the bullet injury. This issue has been settled by the Apex Court in the case of Samir Chanda Vs. Managing Director, Assam State TPT. Corpn., . In that reported case the appellant was a passenger in a bus vehicle belonging to the respondent-Corporation and when the bus reached the last stoppage and the passengers were alighting from the bus, a bomb exploded inside the bus, as a result of

which, the appellant sustained injuries on his leg and other passengers also sustained injury on their persons. The Tribunal awarded compensation in favour of the appellant but on appeal that decision was reversed by the High Court. On appeal by the appellant the Apex Court set aside the judgment passed by the High Court and allowed compensation holding that it was an accident because of negligence on the part of the driver/owner of the vehicle and the accident occurred while the vehicle was in use. In paragraphs 13 and 15 of the judgment, the Court held thus:

13. This Court while repelling various arguments put forward, repudiating the claim, held as follows:-

26. These decisions indicate that the word "use" in the context of motor vehicles, has been construed in a wider sense to include the period when the vehicle is not moving and is stationary, being either parked on the road and when it is not in a position to move due to some breakdown or mechanical defect. Relying on the above mentioned decisions, the appellate bench of the High Court has held that the expression "use of a motor vehicle" in Section 92-A covers accidents which occur both when the vehicle is in motion and when it is stationary. With reference to the facts of the present case, the learned Judges have observed that the tanker in question while proceeding along National Highway 4 (i.e. while in use) after colliding with a motor lorry was lying on the side and that it cannot be claimed that after the collision the use of the tanker had ceased only because it was disabled. We are in agreement with the said approach of the High Court. In our opinion, the word "use" has a wider connotation to cover the period when the vehicle is not moving and is stationary and the use of a vehicle does not cease on account of the vehicle having been rendered immobile on account of a breakdown or mechanical defect or accident. In the circumstances, it cannot be said that the petrol tanker was not in the use at the time when it was lying on its side after the collision with the truck.

15. After going through the judgment of the High Court, we are of the view that the High Court was not right on facts that there was no negligence on the part of the owner or the driver of the bus especially when the appellant has specifically pleaded about the negligence which was accepted by the Tribunal in the light of the pleadings and of the evidence produced before it. The explosion took place inside the bus is an admitted fact and the usual police escort was not there. The High Court, except observing that there was no negligence, has not upset the finding of the Tribunal that the atmosphere during the period of accident was so polluted requiring care on the part of the conductor and driver of the bus. There cannot be any doubt that the accident arose out of the use of the motor vehicle justifying the claim of the appellant. We are satisfied with the assessment of the Tribunal in quantifying the compensation in a sum of Rs. 1,20,000 with interest at the rate of 12 percent.

20. In the case in hand, admittedly, the vehicle was in employment or in use when the extremists fired on the vehicle and the deceased Netai Das received

the bullet injury in course of employment of the vehicle. It is on record, that the driver stopped the vehicle in obedience to the stop signal given by the extremists and thereby made opportunity to the extremists to open fire on the passengers. Such act definitely amounts to negligence on the part of the owner cum driver, and therefore, the ingredients of rash and negligent act as contemplated in Section 166 of M.V. Act, brought on record, on the part of the claimants, may be accepted to have been established.

21. Admittedly, the accident occurred because of the act of a stranger. The common law principle of the rule of strict liability propounded in *Rylands Vs. Fletcher*, 1861-73 All ER 1, is applicable to our jurisprudence. This issue has been considered by the Apex Court in the case of *Smt. Kaushnuma Begum and Others Vs. The New India Assurance Co. Ltd. and Others*, . The fact of that case was that a jeep vehicle while in motion got imbalanced for sudden burst of front wheel of the vehicle and the vehicle turned turtle crashing to death of a person working on the road. The Tribunal held that there was no rash or negligent driving of the vehicle and refused compensation and that order was confirmed by the High Court, which was challenged before the Apex Court and in that case the Apex Court held that the accident occurred when the vehicle was in use and that the rule of strict liability propounded in *Rylands Vs. Fletcher* is applicable in claims for compensation made in respect of motor accident. The Apex Court held thus:-

Jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. Negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of the use of motor vehicles. There are other premises for such cause of action. Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? Like any other common law principle which is acceptable to our jurisprudence, the rule of strict liability propounded in *Rylands v. Fletcher*, 1861-73. All ER 1, can be followed at least until any other new principle which excels the former can be evolved, or until legislation provides differently. Hence, we are disposed to adopt the rule of strict liability in claims for compensation made in respect of motor accidents. "No fault liability" envisaged in section 140 of the Motor Vehicles Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the rule can be applied. It is a statutory liability created without which the claimant should not get any amount under that count. Compensation on account of accident arising from the use of motor vehicle can be claimed under the common law even without the aid of the statute. The provisions of the Motor Vehicles Act permit that compensation paid under "no fault liability" can be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, of the opinion that even apart from section 140 of the Motor Vehicles Act, a victim in an accident which

occurred while the motor vehicle was in use, is entitled to get compensation from the Tribunal unless any one of the exceptions would apply. Winfield has elaborated seven defences recognized in common law against action brought on the strength of the rule in *Rylands v. Fletcher*. They are: (1) Consent of the plaintiff, i.e., *volenti non fit injuria*; (2) Common benefit, i.e. where the source of the danger is maintained for the common benefit of the plaintiff and the defendant, the defendant is not liable for its escape; (3) Act of stranger, i.e., if the escape was caused by the unforeseeable act of a stranger, the rule does not apply; (4) Exercise of statutory authority, i.e., the rule will stand excluded either when the act was done under a statutory duty or when a statute provides otherwise; (5) Act of God or *vis major*; (6) Default of the plaintiff; and (7) Remoteness of consequences.

22. In the present case in hand, we find presence of stranger i.e. the extremists beside the deceased in one side and the owner/driver of the vehicle on the other side. Had the extremists not fired on the vehicle the accident would not have occurred. The third defence as recognized in *Rylands v. Fletcher* is not applicable in the present case, since the respondent-driver stopped the vehicle in obedience to the signal of the extremists and thereby facilitated the extremists to open fire on the passengers as a result of which deceased Netai Das received bullet injury and consequently died. Therefore, the defense as propounded cannot be applied in the case. The ratio of decision of *Kaushnuma Begum* (supra) may therefore be gainfully applied in the facts and circumstances of the case.

23. This Division Bench of this Court in the case of *Bipal Bashi Das* (supra) in paragraphs 11, 16 and 17 has held thus:

11. A close reading of the decision reached in *Managing Director, Assam State Transport Corporation* (supra), clearly reveals that the Division Bench of this Court did not agree with the Tribunal's conclusion that when the atmosphere is polluted and there is possibility of internal or external endanger to the vehicle, however, remote the cause might be, an extra vigilance and care is necessary even when the vehicle is found, properly parked and in stationary conditioned that the driver and conductor were bound to take extra care, which were found lacking in the case ; what on the other hand, the Division Bench held was that when there was a bomb, blast and the accident as caused due to bomb blast, it could not have been regarded as a case of negligence on the part of the owner or the driver of the vehicle inasmuch as such an incident of bomb blast is an incident over which the owner or the driver had no control and that such an accident can not be said to be the result of negligence or failure to do some duty. The conclusions go reached by the Division Bench, were impugned in an appeal before the Supreme Court.

16. From a careful reading of the above observations made in the case of *Samir Chanda* (supra), it is abundantly clear that when on account of a particular prevailing situation, an extra care is required to be taken before or while using a vehicle at a public place and when, in such a grave situation if the owner or the

driver as the case may be, does not take the required care and on account of the omission or failure of the owner or driver to take such care an injury is caused to, or death takes place of, a passenger, such injury or death must be held to have been caused on account of accident arising out of the use of the vehicle and such an accident would justify claim for compensation under the M.V. Act.

16. In the light of the law clearly laid down in *Samir Chanda*, (supra), when we consider the case at hand, as pleaded by the claimant, we notice that there was absolutely no dispute that Amarpur-Teliamura road at Pathar Quarry was, at the relevant point of time, infested by extremists and possibility of attack by them on public vehicles very high. Placed in such situation, the passengers of the vehicle, in question, including the claimant's husband, Kartik Das, had requested the driver to proceed towards Udaipur from Taidubazar via Amarpur and from Amarpur to Teliamura via Agartala, for, the road to Teliamura from Amarpur via Agartala was free from extremists' attack. As the route, so suggested by the passengers, was a longer one the driver of the said vehicle, opted to follow Amarpur-Teliamura road merely because the same was a shorter road. Driving the vehicle with his mind affected by consideration of distance alone and ignoring the care, which he as a driver, ought to have taken in the situation prevailing in the area aforementioned, when the driver was taking his vehicle through Patthar Quarry, the vehicle was attacked by the extremists, which led to the causing of injuries to the passengers and death of the claimant's husband. Omission to take requisite care in the use of the vehicle by its driver, thus, amounted to rash and negligent driving of the said vehicle and the death of the claimant's husband must be held to have been caused in the accident arising out of rash and negligent driving of the said vehicle by its driver.

The case of *Bipal Bashi Das* (supra) and the case in hand are almost of similar nature and the law laid down in that case is therefore applicable in the facts and circumstances of this case.

24. It is, therefore, established that Netai Das died due to an accident arising out of the use of motor vehicle No. TR01-2936 and the accident occurred for the negligence of the driver of the vehicle. The appellants-petitioners, therefore, are entitled to get compensation under the Motor Vehicles Act.

25. The liability of the insurance company will arise in the event a valid certificate of insurance covering the risk on the date of accident is produced and proved on behalf of the owner of the vehicle. On going through the L.C. records, it is found that the owner of the vehicle along with the written statement filed photocopies of documents of the vehicle namely tax token, registration certificate, copy of driving license in the name of one Dharendra Kumar Das, route permit, fitness certificate etc. and a copy of the certificate of insurance issued by United India Insurance Company covering the risk from the period 26.03.2000 to 25.03.2000. The Oriental Insurance Company though has been made a party but no document placed on record to involve the said insurance company.

26. To decide the claim of compensation, the documents which were marked as exhibit 1 series as reflected in the deposition of P.W. 1 (petitioner), are necessary. Under the circumstances, since those documents are not on record, I think it proper to remand the case to the Motor Accident Claims Tribunal at Udaipur to decide the claim of compensation and the responsibility in respect of payment of such compensation i.e. issue no. 2 of the claim petition.

27. Accordingly the appeal is allowed.

28. The judgment and order dated 22.04.2002 passed by the Motor Accident Claims Tribunal, South Tripura, Udaipur is set aside. The Case is remanded back to the Motor Accident Claims Tribunal, Udaipur, to decide issue No. 2 and 3 giving opportunity to the parties to adduce additional evidence if any, and to dispose the matter within 3 months from the date of receipt of the L.C. Record.