

(1960) 11 MP CK 0014
In the Madhya Pradesh High Court
Case No : First Appeal No. 25 of 1958

Sadaram Kanhaiya and Others

APPELLANT

Vs

Sobharam Sadaram Kalar and Another

RESPONDENT

Date of Decision : 30-11-1960

Acts Referred:

Evidence Act, 1872 — Section 101

Citation : AIR 1962 MP 23 : (1961) ILR (MP) 90 : (1961) 6 MPLJ 526

Hon'ble Judges : T.C. Shrivastava, J; S.P. Bahrgava, J

Bench : Division Bench

Advocate : A.P. Sen, for the Appellant; V.P. Verma, for the Respondent

Final Decision : Dismissed

Judgement

Shrivastava, J.

This first appeal has been filed by the defendants against whom a decree for damages has been passed by the 1st Civil Judge, Chhindwara.

On 27-11-1954, a truck (bearing No. MFC 447) was being driven by appellant No. 1 Sadaram from Bamhori towards Bhajipani. The truck belonged to appellant No. 2. The Shaw Wallace and Co. Ltd., Parasia. Appellant No. 3 is the Insurance Company with which the truck was insured. Respondents are parents of Ramsingh who came under the truck while it was crossing a culvert. As a result, Ramsingh died.

The plaintiffs' case was that the truck was driven rashly and negligently by Sadaram at the time of the accident which resulted in the death of Ramsingh. They claimed Rs. 6,000/- as damages.

The defendant Sadaram pleaded that the truck was being driven carefully by him. At the time he was about to cross the culvert he saw two boys playing on the right side of the road. One of the boys ran away and the other started going towards the culvert. After he had crossed half the culvert, he heard a cry that the

boy was crushed. Under the impression that the boy to the right side may have been crushed, he turned his truck towards extreme left with the result that the front left wheel went out of the road. The truck stopped and on getting down he found that the body of Ramsingh was stuck up between the left front wheel and the tool box. Ultimately, Ramsingh died. On behalf of defendant No. 2 company it was pleaded that Sadaram was not acting in the course of his employment at the time of the accident and therefore the company was not liable as an employer.

The trial Court found that the accident was due to the negligence of Sadaram driver, that he was acting in the course of his employment and therefore both Sadaram and the employer were liable for damages as also the insurance company. The damages were assessed at Rs. 4,560/-.

Shri A.P. Sen for the appellants has not disputed the quantum of damages. He has urged only two points in support of the appeal, viz.,

(1) That the accident was not due to the negligence or rashness of Sadaram driver; and

(2) That appellant No, 2 company is not liable for damages as employer of Sadaram, as Re he was not acting during the course of employment at the time of the accident.

Before we proceed to consider the question whether the death of Ramsingh was due to the rash and negligent driving by Sadaram. We may state the law on the point. Charlesworth on Negligence in paragraph 59 on page 35 (Third Edition) states:

""The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed"".

Further:

"The plaintiff, however, is not bound to give evidence negating contributory negligence on his part; once the plaintiff has given evidence showing a prima facie case of negligence on the part of the defendant, the burden of proof of contributory negligence is on the defendant. This, of course, is not the case if the plaintiff's evidence itself shows contributory negligence on his part".

On page 36 the learned author states:

"It is not necessary for a plaintiff to give direct evidence of negligence. He may prove his case partly by direct and partly by indirect or circumstantial evidence. In some cases the facts of an accident are unknown, and the plaintiff to succeed must then prove facts from which an inference of negligence on the part of the defendant may be reasonably inferred."

On the question of burden of proving inevitable accident, the learned author states on page 547: "In an action based on negligence it is, of course, open to a defendant to prove that there was no negligence on his part, and he will then succeed in the action. If, however, the facts proved by the plaintiff raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts negating his liability, and one way in which he can do this is by proving inevitable accident." It is thus clear that it is for the plaintiff claiming damages to establish negligence of the Defendant in the first instance. Direct evidence is not necessary for establishing negligence. It may be inferred from the circumstances of the case. Once a prima facie case of negligence has been made out by the plaintiff, it is for the defendant to prove that the incident was a result of inevitable accident or contributory negligence on the part of the plaintiff.

Explaining how the accident occurred the defendants in paragraph 19 of their written statement state as follows:

"That the accident in which Ramsingh died took place on a bridge in Bhamori. Defendant No. 1 was driving the truck which was in perfect order, along with Dr. Karkarey and some other persons. As he approached the bridge, another truck crossed Mm. Perforce he had to slow down. Some boys were playing on the right hand side of the road and so he was blowing his horn continuously. When he came on the bridge, there was nobody on it. He had crossed more than half the bridge when he heard shouts and thinking that one of the boys on the right might have come near the truck he applied his brakes and swerved the truck to the left, as a result of which the left front wheel went off the bridge. It was then learned that the deceased Ramsingh had come under the left footboard and tool box."

As D. W. 1, Sadaram gives the following version of the accident:

"I stopped the truck while crossing a bullock-cart. I restarted the truck on the first gear. It was moving not more than five to ten miles per hour. On the east of the culvert I saw two boys playing. I blew the horn. One of the boys ran aside the road and the other started moving towards the culvert. I do not know where that boy went, but while I was on the culvert, someone from behind shouted that the boy had been crushed. I thought that the boy on the right might have come under the truck and so turned the truck to the left. The front left wheel went down the road On alighting, We saw that Ram Singh was under the truck."

In these two statements, one point has to be noticed. In the written statement, the slowing down of the truck was attributed to the crossing of another truck, while in the deposition Sadaram says that the truck had to be stopped as he had to cross a bullock-cart. The defendant's own witness "Rajendranath (D. W. 2) states that the truck was not stopped while crossing the bullock-cart. It appears to us that the story about the slowing down of the truck on account of crossing a truck Or a bullockcart is not true. Further, Sadaram admits that when he was

about to cross the culvert, he saw that the road was clear.

Chholibi (P. W. 3) and Fatehyab Mohammad (P. W. 4), who Were present at the time of the accident near the culvert, state that the truck was moving at a high speed and the horn was not blown. As against this, the defendants examined Sadaram driver (D. W. 1), Rajendranath (D. W. 2) and Dr. Karkare examined on commission. They state that the truck was being driven at a speed of five to ten miles per hour and the horn was being constantly blown. The trial Court has found that the witnesses for the defendants were interested.

It is true that Dr. Karkare is no longer in the employment of appellant No. 2 company; but he was in their service at the time when he deposed in the criminal Court. Naturally, therefore, he could not go against his own deposition. We do not consider the observations of the trial Court regarding the interestedness of the defendants' witnesses as unreasonable and agree that on the evidence of the plaintiffs' witnesses Chhotibi (P.W. 3) and Fatehyab Mohammad (P.W. 4) it must be held that the truck was being driven at a fast speed and the horn was not blown.

Excopt Chhotibi (P.W. 3), none of the witnesses on either side has actually seen how the accident occurred. Chhotibi states that Ramsingh was moving on the culvert facing towards Bhajipani when the truck came from behind and the front wheel hit Ramsingh who came under the truck. She then shouted that the boy had been crushed and the truck soon after halted on the left side of the road.

It appears that the witness was holding her shop in a hut and was facing towards the flour-mill with the culvert on her back. From the spot inspection note recorded by the Judge, however. It appears that it was possible for her to have a look at the culvert. This circumstance alone, therefore, is not enough to render her deposition false. Further, she had stated before the criminal Court that her attention was attracted when the boy shouted; but she denies this statement in this case. Even if she had made the statement, it is quite possible that the boy must have shouted Just when he found the truck too near him. It does not necessarily follow from this admission that she had not seen the accident at all.

As we have said, the witnesses for the defendants did not see how the boy came under the truck. They all support Sadaram on the point that there were two boys playing to the right side of the road and one of them had run towards the culvert. Further, from the statement of Sadaram it appears that the boy was not on the culveri actually when the truck came on it. It is not, therefore, possible to hold that the accident occurred because the attention of the driver was diverted towards the right side of the road and he was trying to save the boy on the right by turning to the extreme left. In fact, he admits that he steered to the left after he heard the shout that the boy was crushed. This shows that the accident had nothing to do with the turning of the truck to the left which was an event subsequent to the boy coming under the wheels.

From the evidence it appears that the front. wheel had not passed over the boy.

This is also apparent from the fact that such injuries as would be caused by the passing of a truck were not present on the body of the deceased. As his body was caught between the front left Wheel and the tool box, the statement of Chhotibi (P.W. 3) that the boy was first hit on the right shoulder by the front wheel (probably she means mud-guard) seems to be correct. More likely the boy was hit by the projecting portion of the body of the truck. It is common knowledge--and this is also supported by the photograph of the truck (No. 2)--- that the rectangular wooden body of the truck used, for carrying goods, projects about nine to twelve inches beyond the structure containing the engine and the driver's seat. Struck by this projection, the boy must have fallen in front of the tool box and carried along.

Dr. Karkare on whose statement the appellants placed great reliance frankly admits that he did not see Ramsingh before the accident and cannot say how he came under the truck. Considering the evidence of Chhotibi and the position in which the boy was found after the accident, it seems to us prima facie that the accident occurred on account of want of sufficient care on the part of the driver. There is nothing to show that before the accident he was trying to save the boy on the right, as alleged by him. It was his duty to keep a look-out to the left side also and had he done so, he would have seen that a boy was crossing the culvert. We are unable to hold that the death of Ramsingh was due to an inevitable accident. No question of contributory negligence on the part of the boy arises, as it is highly improbable that he dashed against the truck while he was trying to cross the road from the left to the right as suggested.

The next question is whether the driver Sadaram was acting in the course of his employment and appellant No. 2 Shaw Wallace and Co. are liable for damages. It is not denied that Sadaram was in service of the company engaged for driving the truck. Sadaram as D.W. 1 states that at that time he was doing the duty assigned to him by his master. It was stated in the pleadings that the persons sitting in the truck were going to attend a meeting; but there is no evidence about this fact. It does not follow from the mere fact that the truck was used for carrying passengers instead of goods that the driver was not working in the course of employment. Rajendranath (D.W. 2) has admitted that under the orders of the employer, the truck was used for taking foot-ball players occasionally. As the driver was in the employment of appellant No. 2, the presumption is that he was acting in the course of employment. There is no evidence to prove the contrary. We agree with the trial Court that the driver was acting in the discharge of his duties in the employment of appellant No. 2. Accordingly, appellant No. 2, also is liable for damages.

In the result, the appeal fails and is dismissed with costs.