

(1976) 01 OHC CK 0004
In the Orissa High Court
Case No : A.H.O. No. 36 of 1975

Sindhu Mohanty and Another

APPELLANT

Vs

Gourkrushna Mohanty and Another

RESPONDENT

Date of Decision : 14-01-1976

Acts Referred:

Evidence Act, 1872 — Section 114

Motor Vehicles Act, 1939 — Section 110B

Citation : AIR 1976 Ori 213

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : R.C. Patnaik and P.K. Misra, for the Appellant; G.B. Mohanty and N.C. Mohanty, for the Respondent

Final Decision : Partly Allowed

Judgement

R.N. Misra, J.—Arjuna Mohanty whose parents are appellants before us was returning on cycle from Puri Town to Chandanpur at about 9 O'clock in the morning on 23-11-1969 along with one Satrughna Sahu (P. W. 2). Each of them was riding a cycle and while they were near about Bira Harekrushnapur, from the opposite direction came a bus bearing registration number ORP 365 which dashed against the cycle of the deceased Arjuna. As a result of this collision Arjuna fell down and over him fell his cycle. The bus did not stop. With multiple injuries on his body the victim was removed to the hospital at Puri where he succumbed to his injuries a couple of hours after the incident. A claim was laid for compensation under the provisions of Chapter VIII of the Motor Vehicles Act of 1939 by the parents impleading the owner of the bus and the insurer of the vehicle and a sum of Rs. 50,000/- was claimed.

2. The deceased was said to be a person of 22 years of age and was employed under one Upendra Mohapatra on a monthly salary of Rs. 150/-. The father of the deceased claimed to be a person aged 63 while the mother was just above 50. They alleged that the deceased was moving on the appropriate side of the

road. At the place where the collision took place, the road was wide; on the two flanks the metalled portion of the road was about seven feet each and the black top of the road at that place was quite wide. While the victim was proceeding at a slow speed the bus was driven rashly and negligently and the driver did not take adequate precaution. The driver did not take the vehicle to his left and came too much on the right side of the road as a result whereof the collision took place,

3. Both the owner of the vehicle as also the insurer filed two separate written statements. According to the owner, the victim was on the wrong side of the road along with his friend and both the cyclists wanted to go to the left side of the road when they saw the bus approaching. P. W. 2, the friend of the deceased, who was going behind could not control the cycle and, therefore, the front wheel of his cycle dashed against the cycle and fell down. In his turn the deceased could not control his own cycle and fell down. The bus was being driven with all care and at a slow speed and, therefore, the owner of the bus cannot be made liable for any compensation. The insurer took the stand that the cycle was being driven rashly and without ringing any bell or looking towards vehicles moving on the road. The bus was coming from the opposite direction on its appropriate side and was being driven at a slow speed and horn was being blown. The deceased came negligently and dashed against the vehicle and sustained injuries due to his contributory negligence. Therefore, the insurer had no liability.

4. At the inquiry, the appellants examined three witnesses -- P. W. 1 the employer of the deceased, P. W. 2 a college student who was going along with the deceased but on another cycle and P. W. 3, the father of the deceased. On the side of the defendants, the Officer-in-charge of the Sadar Police Station at Puri who had investigated into the criminal case for rash and negligent driving was examined.

5. The Tribunal came to hold that the appellants would have been entitled to a compensation of Rs. 1,645.75 but were not entitled to any compensation as they failed to establish that the accident was due to the negligence of the driver of the motor vehicle. The appellants had appealed to this Court u/s 110-D of the Motor Vehicles Act and our learned brother Panda, J., after hearing parties sustained the order of the Tribunal. This appeal has been directed against the decision of the learned single Judge.

6. That the deceased died as a result of the several injuries sustained by him while he was coming from Puri towards Chandanpur is not disputed. While the owner of the bus has denied the allegation of collision between the cycle of the deceased and the bus in question, the insurer has accepted such a collision. P. W. 2 is the only eye-witness. Admittedly the driver of the bus was a very competent witness and if examined he could have thrown good light on the matter in controversy. For the reasons best known to the employer, the driver has been withheld from the inquiry and good evidence from a competent witness though available has not been placed before the Court. The conduct of the owner of the

vehicle in not examining the driver in the inquiry has been completely lost sight of by the Tribunal as also the learned Single Judge. We think, there is force in the contention of appellant's counsel that the driver should have been examined and for his non-examination, adverse inference should be drawn against the owner of the bus. On the admitted position as advanced by the insurer, it must be held that the cycle which the deceased was riding came in collision with the bus.

7. The next question for consideration is as to whether the incident was the outcome of negligence of the driver or resulted from contributory negligence of both the driver of the vehicle as also the victim or the driver had no blame at all and it was all on account of negligence of the deceased. The evidence of P. W. 2, the only eye witness, is to the following effect:--

"..... The width of the pitch portion of the road at the place of accident is 12 feet with metalled portion 7 to 8 feet on either side. The road is plain and straight. No other vehicle was passing on the road at that time... .. Arjuna was cycling on the pitch road one cubit inside from the margin of the pitch road. The pitch road was not watery Myself and Arjuna were cycling side by side in a parallel line. Arjuna fell down on the middle of the pitch road when the rear wheel of his cycle came in contact with the right front wheel of the bus. Arjuna fell down two cubits apart from the front wheel and his cycle fell on him....."

According to this witness, the bus was running at a speed of about 40 miles per hour while the cycles were moving at a speed of 5 to 6 miles per hour. The police officer who measured the road during investigation of the criminal case has stated that the" road at the particular place is about 45 feet wide and the metalled portion had gradually sloped where it met the non-metalled portion. In view of the fact that the police officer has actually made measurement, his evidence should be preferred and it must be held that the road was 45 feet. Leaving the two flanks of 7 feet of metalled portion out of consideration, the pitch part of the road was about 30 feet. There was thus enough space for the bus to negotiate while crossing the two cyclists. If the driver had taken minimum of precaution, the bus could not have come in collision with the cycle.

8. The story advanced by the bus owner that the cyclists were on the wrong side of the road and seeing the bus approaching they tried to go to their own left does not seem to be true. In fact, both the Tribunal as also the learned single Judge have not accepted that part of the story. On the evidence, we think, that is the appropriate conclusion to reach. It must, therefore, be held that the cyclists were on their left side though they were not in the metalled portion. In fact, P. W. 2 has admitted that they were going in a parallel line i. e. side by side. He has further stated:--

"... .. Even if we saw the Bus coming from the opposite direction, we did not become more careful to move to our further left We moved in the same line as before"

The witness has added:--

"When a Bus comes from our behind, we cyclists become careful and move to the further left, but we do not do so when a Bus comes from the opposite direction"

There seems to be truth in the stand of the insurance Company that the accident was more or less the outcome of contributory negligence. Though the insurer wanted to maintain that the contributory negligence was alone of the cyclist, we think, on the evidence indicated above, it is appropriate to hold that both the driver of the vehicle as also the victim cyclist contributed to the making of the incident. Taking into consideration the width of the road at the place of collision, the size of the bus and the space required for it to pass, the fact that there was no pressure of traffic on the road at the time of the incident (excepting the two cycles coming from the opposite direction), the manner of the happening of the incident, the withholding of the driver from the witness box, the conduct of the driver in running away from the scene without stopping after the collision etc., we would hold that the driver of the bus also contributed by his negligence to the incident and if he had acted carefully, the collision could have been avoided. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each one owes to the other a duty to move with due care and this is true whether they are both in control of vehicles or one is moving with a vehicle of automation and the other with a vehicle like a cycle (See *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) AC 601 (All)). The general rule of law with respect to negligence is that although there may have been negligence on the part of the plaintiff, yet unless he could by exercise of ordinary care have avoided the consequences of defendant's negligence, he is entitled to recover damages. The view which has weighed with the Tribunal and our learned brother in this Court appears to be that the deceased was the author of his own wrong and by ordinary care he might have avoided the collision. While such a view is supported by the dictum in the case of *Davies v. Mann* (1842) 152 ER 588, Salmond has indicated:--

"The contributory negligence of the plaintiff is to defence if the defendant had a later opportunity than the plaintiff of avoiding the accident by reasonable care, and at the time either knew or ought to have known of the danger caused by the plaintiff's negligence. Combining this rule with the general principle of contributory negligence, we reach the following result : when an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care, and who then knew or ought to have known of the danger caused by the other's negligence."

In the facts of the present case, we are of the view that the driver of the vehicle was primarily responsible for the accident and, therefore, the appellants had a cause of action against the owner of the vehicle as also the insurer thereof. In the case of *Vanguard Fire and General Insurance Co. Ltd. Vs. Sarla Devi and*

Others, , it has been indicated that if for a running down accident the driver of the vehicle is mainly responsible, & suit for damages lies against the owner of the vehicle. To the facts presented in this case, we think, the aforesaid dictum well applies. On the evidence of P. W. 2 indicated above, we are prepared to hold that the unfortunate incident is the outcome of contributory negligence on the part of the driver. It has always been held that the contributory negligence mitigates damages. We would accordingly conclude the discussion on the point by saying that the appellants are entitled to damages for the loss of life of Arjuna as a consequence of the incident, but while assessing damages, the contributory negligence of the victim must be borne in mind.

9. There is no scope for disputing the assertion of the appellants that the deceased was earning an income of Rs. 5/- a day. This fact has been supported by the employer (P. W. 1) and has been reiterated by P. W. 3. The average monthly income on the basis of such daily wages, taking into account all human factors, would be around Rs. 125/-. The requirements of the deceased to look after himself would be in the minimum of Rs. 90/-. This would have left a surplus of about Rs. 35/- which it can be safely assumed that the appellants were utilising for their living. Appellant No. 1 was aged 63 when he lost the support of the deceased. In normal course, he can be expected to live up to 70. Similarly, appellant No. 2, mother of the victim, can be expected to live up to the age of 65 or so. Taking into account the normal factors which are taken into consideration for computing damages and keeping in view the fact that the deceased contributed to the incident by his own negligence, we think it appropriate to fix the damages at a net amount of Rs. 3,000/- (three thousand). . The claim of the appellants must be allowed to that extent. Under the provisions of the Motor Vehicles Act, the insurer will be liable to the tune of the said amount.

10. We accordingly allow the appeal in part and direct that the claim raised by the appellants be decreed to the tune of Rs. 3,000/- only. The amount shall bear interest at nine per cent from today until date of payment. Parties are directed to bear their respective costs throughout.

Das, J.

11. I agree.