
(1974) 04 OHC CK 0002

In the Orissa High Court

Case No : Misc. Appeal No's. 179 and 185 of 1970

S.K. Devi

APPELLANT

Vs

Uttam Bhoi and Another

RESPONDENT

Date of Decision : 23-04-1974

Acts Referred:

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

Citation : AIR 1974 Ori 207 : (1974) 40 CLT 663

Hon'ble Judges : K.B. Panda, J

Bench : Single Bench

Advocate : B. Ray, for the Appellant; M. Patra, for the Respondent

Final Decision : Dismissed

Judgement

K.B. Panda, J.—On 6-11-66 a boy aged about 7-8 years named Babula Bhoi studying in class I of Gopalpur, U. P. School, met with a truck accident as a result of which he received multiple injuries. The skin and the flesh of the two thighs were ripped open and the bone of the right thigh was fractured. In a senseless condition he was admitted into the S. C. B. Medical College Hospital, Cuttack where he remained in that unconscious state for certain days. In course of the treatment the injured developed various complications, ran high temperature which persisted, the fracture was plastered with screws, and finally he was discharged on 4-1-67. At that time he had not fully recovered and the plasters were still on. His father (P.W. 1) laid a claim for Rs. 16,000 as compensation impleading the owner of the truck (opposite party No. 1) and the Insurance Company (opposite party No. 2) with whom the vehicle bearing No. ORP 1292, a Bedford truck, belonging to opposite party No. 1 had been insured. The learned Motor Accident Claims Tribunal (hereinafter referred to as the Tribunal) granted a compensation of Rs. 10,530 on 25-8-70 making opposite parties 1 and 2 jointly and severally liable for the same. It also ordered future interest at six per cent till the date of payment of the sum granted under the award.

2. As against this award of compensation, opposite party No. 1, the owner, has

filed Misc. Appeal No. 179/70, and opposite party No. 2, the Insurance Company, has filed Misc. Appeal No. 185/ 70. Both the appeals are heard analogous and this judgment will bind both the appeals.

3. The facts admitted are as follows :

The injured boy was proceeding from village Gopalpur towards Cuttack, and the truck in question was also coming from the same direction from Para-dip side towards Cuttack. Village Gopalpur is at a distance of 24 miles from Cuttack towards Paradip. Near Gopalpur crossing some repair work of the road was going on, for which a machine roller was there. The time of accident is in between 2-2.1/2 P.M. in the broad day light. Admittedly the boy in consequence of the accident was thrown off with multiple injuries for which he had to be hospitalised and treated as an indoor patient. Even when he was discharged on 1-4-67 he had not recovered. During his treatment in the hospital, the husband of P.W. 1 had, on some occasions, come and seen the injured boy and had given some medicine. The father of the injured boy is not a rich man, but a labourer.

4. According to the claimant's case, the vehicle came with high speed without blowing horn and dashed against the boy who was proceeding on the left side of the road. After causing the accident it did not stop but drove fast and had to be stopped by the villagers at a distance of about a quarter mile. The injured boy in an unconscious state was removed first to a local dispensary, but thereafter to the S. C. B. Medical College Hospital, Cuttack, for treatment. The evidence of the doctor is that the boy has become permanently crippled.

5. The defence of opposite party No. 1, the owner of the truck, was vari- cms. However, for the purpose of the appeal it may be stated that according to the claimant the boy was coming up the elevation of the road as if blindly and dashed against the moving truck towards its rear part and received the injuries. By that time, according to opposite party No. 1, the cabin of the driver had passed and so he was not in a position to know the approach of the boy, who had a head-long clash with the moving vehicle towards its rear wheels. As such her case was that there was contributory negligence and whatever had happened to the boy was of his own making for which he, nor the driver, was liable.

The case of opposite party No. 2 was substantially that since the owner was not liable, the insurer was consequently not liable.

6. There are four witnesses for the claimant of whom P.W. 1 is the father of the injured boy; P.W. 2 is the doctor and P.Ws. 3 and 4 are the two eyewitnesses to the occurrence who deposed how as the boy was going on the left side of the road the truck in high speed without blowing horn dashed against the boy and without stopping drove faster, but later stopped by the villagers. The boy in an unconscious state was collected from the spot and was found to have multiple injuries with the flesh of the two thighs having come out. On the side of the opposite parties there are two witnesses of whom O.P.W. 1 is a worker under a contractor named Gokuli Ch. Kanungo, who is said to be looking after his work at

the spot. O.P.W. 2 is the husband of opposite party No. 1 and a formal witness. The learned lower court has disbelieved the evidence of O.P.W. 1, and I would say rightly so. His presence at the spot seem extremely doubtful.

7. Mr. Ray appearing on behalf of the owner contended how the accident took place due to the contributory negligence of the injured boy, and as such the owner is not liable. It was contended by Mr. Misra, learned counsel for opposite party No. 2, that the compensation should not have been awarded in the circumstances, and secondly, even if it is granted, the quantum is highly excessive.

8. Addressing myself to the question how the accident took place, one has to rely on the evidence of the two eye-witnesses to the occurrence, i.e. P.Ws. 3 and 4. Their consistent case is that the truck came with high speed without blowing horn from the rear and dashed against the boy. The driver has not been examined. It is said on behalf of opposite party No. 1 that the driver is no more in her service. It is evidently a place where there was a Busti inhabited by people named Gopalpur. It is not a free road where speed will not be a factor for consideration. As has been laid down in several cases, the responsibility of the driver while negotiating a locality is greater than while he would be driving in a free road. It has also been held that where a driver is negotiating a place frequented by boys, the responsibility is still greater, for the behaviour of children is unpredictable. A driver has the responsibility of taking that into consideration so that he can pull up the vehicle at any stage to avoid any accident. It is also the settled law that a driver owes a duty of care of pedestrians and duty is higher when the pedestrians are children of tender age since their behaviour is uncertain on the approach of a motor vehicle (see *Bishwa Nath Gupta and Others Vs. Munna*, .

It was contended that the road was under repair. The evidence is that the road was under repair at Gopalpur crossing which is not the same place as Gopalpur village. Even if there was a repair of the road and a machine roller was on one side of the road, hardly does it make any difference, the reason being that in such a situation half of the road is almost blocked, so that the other is open for the traffic where the pedestrians and the vehicles are to pass. Thus when the road has become narrowed down because of the repair, the responsibility of the driver is greater, and he should move at such a place so slow that he does not injure any pedestrians. In the instant case the theory advanced on behalf of the claimant that the boy dashed forward right on the road against the moving vehicle is something very hard to believe. Obviously the boy was not frightened nor was he blind. In such circumstances, it is unimaginable as to why he would dash against a moving vehicle. Even otherwise such a situation would not ordinarily result in the injuries that appeared on the person of Babula. It would be ordinarily the face which would be more injured than the thigh as has happened, and the flesh from that portion has been peeled off. In that view of the matter, relying on the evidence, and even otherwise, I am not persuaded to

believe the theory of contributory negligence.

In an action for negligence, the legal burden of proof, no doubt, rests on the claimant, but barring certain exceptional cases it may not be possible for the claimant to know what precisely led to the accident. This hardship to the claimant can be avoided by the application of the maxim *res ipsa loquitur* which is not a principle of law, but a rule of evidence. This is based on the theory that there are certain happenings which do not occur normally, unless there is negligence. Therefore, in the case of such happenings the claimant is entitled to rely, as evidence of negligence, upon the mere happening of such accident. Cases are to be decided on preponderance of evidence, both oral and circumstantial, with the initial burden resting on the claimant to prove negligence.

In the instant case, regard being had to the time factor, the locality, the age of the injured, the evidence of P.Ws. 2 and 3, the injuries on Babula together with the falsity of the plea of contributory negligence I am led to hold, agreeing with the learned lower court, that the vehicle in question was responsible for the injuries on Babula.

9. Thus the only question that remains for consideration is if the quantum of compensation granted in the circumstances is at all heavy. The learned lower court has discussed this aspect of the case in great detail. He has taken into consideration the status of the father of the boy and as to how if he would have become a labourer he would be getting about Rs. 4 a day and because of his crippled condition would be earning less by Re. 1 and therefore making an overall estimate has fixed the compensation at Rs. 10,530.

It was contended by Mr. Misra that there is no evidence that the boy had become so crippled as not to have a normal life. According to him, boys do get fractures often but they get cured and move in the society as normal persons fitting into all avocations of life. In this case mere fracture was nothing so serious as to justify granting of a compensation of Rs. 10,530 to that boy. In this context Mr. Misra relied on *The Bihar Co-operative Motor Vehicles Insurance Society Ltd. Vs. Rameshwar Raut and Others*, . It is a case where a mother and a child were run over and met their end. while tending cattle, by an accident, and a compensation of Rs. 6,000 was granted, which on appeal was modified and Rs. 3,000 was granted towards the death of the mother and Rs. 2,600 for the child. According to Mr. Misra the principles enunciated in this citation have been lost sight of by the learned lower court and he has granted a higher compensation. I do not think this contention can prevail. Law is well settled that on appeal the quantum of damages will not be disturbed unless either (i) the Tribunal had applied a wrong principle of law, or. misdirected itself, or (ii) the amount awarded either was so inordinately low or was so inordinately high that it must be held as erroneous. The normal rule therefore was that no appeal lay on the quantum of damages unless it involved a matter of principle. The principles and criteria for ascertaining the amount of compensation have not been laid down in the Motor Vehicles Act, but the Claims Tribunal can make an award determining the amount

of compensation which appears to it to be just and reasonable, and it has to specify the person or persons who shall be paid and the amount as well which shall be paid by the insurer. In this context he drew my attention to an observation made therein that the guiding principles for fixing a reasonable amount by way of damages have been thoroughly discussed and Laid down by the House of Lords in *Benham v. Gambling* 1941 AC 157 wherein Viscount Simon, L. C. observed certain things which need not be quoted here.

In the instant case I would rather hold that the learned lower court has been very conservative in his approach and has viewed as though a labourer's son would be always a labourer. Even though the father was a labourer yet he had taken the pains of sending his seven-year old boy to an U. P. School and was giving him schooling. Nobody can predict the future of a child. In the case at hand the learned lower court has calculated the compensation on the basis that as a labourer's son he would earn, after attaining majority, Rs. 4 per day, and because of his crippled condition his earning will be less Re. 1, and if he thus earns till his 55th year he will be earning certain amount which will be less if he would have been a normal man, and thus he has taken that to be the basis, and even from that has slashed a portion for all contingencies. As has been already indicated, it was said that the fracture was nothing so serious, but in that context the evidence of the doctor P.W. 2 is very clear that the fracture had to be fixed with plates and screws and he has opined thus :

"I identify Babula in court. I find that the fractured bone is bent with a sinus and has become a cripple for good."

It was argued that nobody was going to ask the doctor to give his opinion in court about the condition of the injured boy. True, it might be so, but all the same in cross-examination it has been elicited and has confirmed it saying that by examining the boy in court he has said that he has become a cripple for life. When that was the positive evidence from the side of the claimant, in the absence of anything to the contrary there is no justification for not believing the doctor and accepting his version that the injured boy has become crippled for life.

Death in certain cases is preferable to a lingering death of a crippled being :

"It is a settled principle that in disablement cases the compensation awards are always higher than even in cases of death because the compensation has to be given to a living victim, both for his personal loss and for the economic loss. The principles laid down in such cases can be summarised in three propositions as under; (1) Bodily injury is to be treated as a deprivation which entitles a plaintiff to damages, and that the amount of damages varies according to the gravity of the injury; (2) deprivation may bring with it three consequences loss of earnings or earning capacity, expenses of having to pay others for what otherwise he would do for himself and loss of enjoyment of life or a diminution in full pleasures of living; (3) in considering the deprivation, the court should have regard to the gravity and degree of the deprivation, that is to say, whether one or more limbs

has been lost, the duration of the deprivation, and the degree of awareness of the deprivation,"

"Both in England and in this country the settled pattern of awards in personal injury cases is not to award merely token damages but to grant substantial amounts on both the head of personal loss as well as economic loss....."

(1972) 13 Guj LR 662.

10. To conclude, therefore, I would hold that the compensation grant-ed is not at all exorbitant in the case to justify interference. The two points raised having been answered against the appellants, both the appeals fail on merit The Insurance Company is only liable to pay the compensation. The respondents will get one set of costs in both the appeals.