
(1980) 12 RAJ CK 0020

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 215/74

Smt. Kaushliya Bai and Others

APPELLANT

Vs

Balmukand Ramsingh and Others

RESPONDENT

Date of Decision : 22-12-1980

Acts Referred:

Motor Vehicles Act, 1988 — Section 110D

Citation : (1980) WLN 490

Hon'ble Judges : S.N. Deedwania, J;M.C. Jain, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.N. Deedwania, J.—Appellants-petitioners have filed this civil misc. appeal u/s 110-D of the Motor Vehicles Act against the award, dated August 27, 1974 of learned Member" Motor Accident Claims Tribunal (District Judge), Ajmer, whereby, their claim for compensation was dismissed.

2. Briefly stated the facts as alleged by the appellants were these. Deceased Kailashchandra was the husband of appellant Kaushalyabai. Appellants Kumari Manju Kumari Sarda and Kumari Urmila are daughters of Kailashchandra and appellant Godawaribai is the mother. On 19-2-71, Kailashchandra went to Nasirabad with Ladliprasad, Inspector of Co-operative Societies. They were returning from Nasirabad to Ajmer by bus No. RDR 4991. The owners of the bus are respondents No. 1 to 4 and respondent No. 5 was the driver of the bus and respondent No. 6 the insurer. Kailashchandra boarded the bus from the front door on the left side of the driver's seat. The bus was over-crowded and he had to stand near the door along with many passengers. Ladliprasad also boarded the bus from the back door. When the bus reached near village Makhupura, it had to negotiate a sharp curve and the bolts of the left door opened. Kailash Chandra was thrown out of the bus and he received grievous injuries and succumbed to them on 20.2.71. It is further the case of the appellants that the bolts of the door of the bus were not in proper order and, therefore, because of

the sharp curve and fast speed of the bus, the door flew open and consequently Kailashchandra fell down. Compensation to the tune of Rs. 1,70,000/- was claimed. Kailash Chandra was serving in the office of Sub-Registrar, Co-operative Societies as a Lower Division Clerk and was drawing monthly salary of Rs. 297/- per month. Just before his death, he had been promoted as Upper Division Clerk but had not joined the post. The defence of the respondents was that there was no negligence on the part of bus-owners or the driver. The bolts of the door were in proper working condition and it was pure accident that the door flew open. Deceased Kailashchandra was guilty of negligence and in any case of contributory negligence and accident occurred because of him. It was also asserted that Kailashchandra was not a passenger for reward or hire, he was never issued a ticket. The further defence of respondent No. 6 was that its liability was limited to the amount of compensation provided by the Statute. Various issues were raised on the pleadings of the parties. Learned Member of the Tribunal came to the finding that the accident not occur due to negligence of respondents No. 1 to 5 and thus served:

The jerk at the curve is natural phenomenon and when a person takes risk of boarding a over-crowded bus and remaining standing at the gate the possibility of his hand falling on the handle and the door opening, thereby, cannot be over-ruled. Hence the issue stands decided in the way that there was an accident by opening of the door but it could not be substantiated whether it was due to the reason that the bolts were not in proper order.

Learned Member further held that Kailashchandra had purchased the ticket. The compensation was determined at Rs. 26,000/-. The claim petition was dismissed as the finding was that there was no negligence on the part of respondents No, 1 to 5.

3. I have heard learned Counsel for the parties and perused the record of the case carefully.

4. The first point for determination is whether the presence of the deceased in the bus was lawful. The respondents examined driver Bherulal and Suganchand an employee of the owners of the bus. The driver of the bus stated that no tickets were issued from Nasirabad. He could not say whether Ladliprasad and Kailashchandra were issued tickets. He admitted that the tickets Ex. 2 and 3 were of the said bus. Suganchand also deposed similarly and further produced counter-foils of tickets book No. 45201 to 45400. He stated that this book contained tickets issued from 17.2.71 to 20.2.71. He also admitted that Ex. 2 and 3 are the tickets of the bus No. RDR 4991. According to the witness, these tickets were issued on a later date. He also produced Ex. A/2, Rajasthan Passengers and Goods Taxation register and referred to page 30, where it is mentioned that these tickets were issued on 3.3.71. Ladliprasad was examined on behalf of the appellants and he clearly stated that the tickets Ex. 2 and 3 were issued to him. In these facts, the learned Member believed the testimony of Ladliprasad and I see no reason to take a contrary view. The counter-foiles of

tickets Ex. 2 and 3 were not produced by the respondents and their explanation that the counter-foil was destroyed, was rightly disbelieved by learned Member. That apart, Ex. P/2 appears to be suspicious, in as much as such page of it, had not been correctly serially marked. In any case there are no reasons to disbelieve the statement of Ladliprasad that he had paid the fare for himself and Kailashchandra. It is importable that the conductor and the bus-driver would permit Kailashchandra and Ladliprasad to board the bus without payment of hire. I, therefore, see no reason to take a different view than the arrived at by learned Member of the Tribunal.

5. As regards the compensation at the time of death Kailash Chandra was drawing a salary of Rs. 297/- per month and his age was about 29 years. Evidently, Kailashchandra would have remained in service of 26 years. Learned Member observed that Kailashchandra would have spent Rs. 50/- towards his wife for period of 25 years and thus would have spent the amount of Rs. 15,600/-. It was further held for the daughters that the calculation should be up to the age of 18 years, their marriagable age and fixed Rs. 25/- per month for each daughter. Appellant Manju was of age 6 years, the amount payable to her was Rs. 5600/- and to Sarda Rs. 4500/- and to Urmila Rs. 5400/- In view of the other assests and benefit of service of Kailashchandra, the amount Rs. 15,500/- was reduced to Rs. 12,000/- and amount in respect of each daughter was reduced to 3000/-, 4000/ and 5000/- respectively.

6. It is argued by the learned Counsel for the appellants that the compensation arrived at was much less than the amount, which should have been arrived at. The learned Member did not take into account that Kailashchandra would have drawn progressively an increased salary as a U.D.C. and also it did not consider his chances of further promotion. The argument is correct to some extent. It was further argued that no provision for marriage expenses for the three daughters was made. I am inclined to agree with this submission but do not propose to increase the amount of compensation arrived at by the learned Member because I am of the view that Kailashchandra was at least guilty of contributory negligence. The proposed increase in compensation would be off-set by the deduction for contributory negligence of Kailashchandra.

7. The most essential question that remains to be determined is whether the accident was the result of negligence of the driver and the bus-owners. The admitted facts are that the bus was over-crowded. It is also admitted that Kailashchandra was standing near the front door, which flew open due to jerks, while the bus was negotiating a sharp curve. The facts which are disputed before me are whether the bus was travelling at a fast speed and whether the bolts of the door were loose.

8. It is argued by learned Counsel for the respondent No. 6 that there was no allegation in the petition that the bus negotiated a sharp curve at a fast speed, therefore, no evidence can be looked into in this regard. It may be mentioned that respondents No. 1 to 5 did not turn up to present their case in this Court

inspite of service. It is true that this defence or argument is not open to respondent No. 6. It is also true that it is not mentioned in the petition that the bus negotiated the sharp curve at a fast speed. However, the parties have led evidence on this aspect and, therefore, they were very much aware of their respective cases. Respondents No. 1 to 5 were not prejudiced in their defence because of this omission in the petition. In these circumstances, I am of the opinion that enquiry can certainly be made whether the bus negotiated a sharp curve at a fast speed. It was thus observed in *Bhagwati Prasad Vs. Shri Chandramaul*,

If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleading would be purely formal and technical and can not succeed in every case. What the court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce consideration of prejudice, and in doing justice to one party, the court cannot do injustice to another.

PW. 3 Ladliprasad stated that the bolts of the bus were loose and it negotiated the sharp curve at a fast speed. The driver and Suganchahd deposed that the bus negotiated the curve at a speed of not more than 10 k. m. per hour. The bolt of the door was in proper condition. Learned Member observed that the possibility can not be ruled out that because of the jerks, hand of Kailashchandra fell on the handle of the bolt and the door thereby opened. In my opinion, this finding is purely conjectural. There are no reasons to hold that hand of Kailash Chandra fell on the handle of the bolt and thereby the door opened. While negotiating a sharp curve jerks are only possible when the bus is running at a speed greater than the one at which the curve should be negotiated. Violent jerks, therefore, would indicate the fact that the bus was travelling at an excessive speed. I am also inclined to believe the statement of Ladliprasad that the bolt of the door was loose. Properly bolted door would not have opened merely because of the pressure of the jerk. The probability therefore, is that the bolt of the bus was loose. In these facts, it is obvious that the accident was atleast as a result of the negligence of the respondents No. 1 to 5, in as much as, it was not taken care of that bolt of the door was in proper condition. The

driver was further negligent as he negotiated the sharp curve at a speed greater than the one at which the sharp curve ought to have been negotiated. The jerks, which the passengers received are strongly suggestive of this fact. I am, therefore, of the view that learned Member was in error in arriving at a conclusion that there was no negligence on the part of respondents No. 1 to 5 and possibly of the accident was due to the fact that the hand of Kailash Chandra fell on the handle of the bolt of the door. The driver has not stated anything about the hand of Kailashchandra falling on the door. The evidence of Suganchand is that when the bus was taking a turn, some papers fell down from the hand of Kailashchandra and when he stepped down to pick them, then his hand fell on the bolt. Suganchand is an interested witness and it is difficult to imagine that while the bus was receiving the jerk, he would have observed the hand of Kailash Chandra. Learned Member also did not believe the statement of Suganchand but yet even in the absence of evidence arrived at the conjecture that the hand of Kailashchandra might have fallen on the handle. Learned Member failed to deduce the necessary inferences about the speed of the bus and opening of the door in the manner indicated above.

9. Kailashchandra was obviously guilty of contributory negligence. Even if, he boarded an over-crowded bus, he had no reason to stand near the door of the bus.. Further it was also his duty to see that the door was tightly secured and the bolt was in proper condition. To this extent, I am of the view that Kailashchandra was also guilty of contributory negligence. Various authorities were cited before me on the question of negligence and contributory negligence but no reference need be made because negligence and contributory negligence would depend upon the facts of each case.

10. It was sought to be argued that the liability of the Insurance Company, respondent No. 6 was not limited to its statutory liability as it did not produce the Insurance policy. I am not inclined to agree with this contention. Respondent No. 6 came out with a clear case that its liability was limited to its statutory liability. This stand in its reply was not demurred to by the appellants. No issue was raised on this point, otherwise, Insurance Company would have easily produced the policy. It was also not alleged in the petition that respondent No. 5 liable to a greater liability than the statutory one. Therefore, I do not agree with the contention of learned Counsel for the appellants as the initial onus was on the appellants to prove that the liability on respondent No. 6 was greater than its statutory one.

11. In the result the appeal is accepted the judgment of the Tribunal is set aside and the claim of the appellants is decreed for a sum of Rs. 26000/-. The respondent No. 6 is, however, liable to pay the amount to the extent of its statutory liability only.