

(2000) 09 CAL CK 0063

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction, F.M.A.T. No. 1116 of 2000, C.A.N. No. 5138 of 2000

Smt. Mita Gupta and Others

APPELLANT

Vs

Oriental Insurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 07-09-2000

Acts Referred:

Evidence Act, 1872 — Section 101, 102
Motor Vehicles Act, 1939 — Section 110A
Motor Vehicles Act, 1988 — Section 166
Penal Code, 1860 (IPC) — Section 279, 304A

Citation : (2002) 1 ACC 398 : (2002) ACJ 398 : (2001) 1 CALLT 305 : (2001) 1 CHN 34

Hon'ble Judges : Gorachand De, J;Altamas Kabir, J

Bench : Division Bench

Advocate : Mr. Krishanu Banik, for the Appellant; Mr. Jyotirmoy Bhattacharjee and Ms. Lopita Roy, for the Respondent

Judgement

A. Kabir, J.—While considering the appellant's application for final disposal of the appeal, the appeal itself was taken up for hearing on consent of the parties.

2. The appellants herein filed a claim against the respondents/opposite parties u/s 166 of the Motor Vehicles Act, 1988, before the Motor Accident Claims Tribunal, Burdwan, being M.A.C. Case No. 85/56 of 1996, on account of the death of one Bikash Gupta, the husband of the appellant No. 1, in an accident involving two motor vehicles on 4th December, 1995, at about 7.30 p.m., near the Saktigarh Cold Storage. A police case, being Burdwan P.S. Case No. 763 of 1995, dated 4th December, 1995, was also started in respect of the said incident under sections 279/304A Indian Penal Code on the basis of a First Information Report lodged by one Ashoke Dey.

3. According to the appellants, on 4th December, 1995, at about 7.30 p.m. while the deceased was driving truck No. W.B.I. 5221 coming from Burdwan another truck bearing No. WGA-5205 coming from Calcutta dashed against the truck of

the deceased who died on the spot. The accident being composite in nature, the claim was made against the owners and insurers of both the vehicles. Both the insurers resisted the claim and filed separate written statements denying the allegations of rash driving and contending that the accident took place due to the fault of the deceased and that the claim was, therefore, liable to be rejected.

4. While the appellant No. 1 was examined as P.W.1, one Siraj Mallick (P.W.2) was examined as an eye witness to the accident. In his evidence he has stated that on 4th December, 1995, at about 7.30 p.m. while the deceased, Bikash Gupta, was driving his truck bearing No. W.B.I. 5221 towards Calcutta near the Saktigarh Cold Storage, another lorry bearing No. W.G.A. 5205 coming from Calcutta dashed against the truck of the deceased as a result whereof Bikash Gupta died on the spot. He stated that he knew the deceased from before and that he had witnessed the accident. His evidence was, however, disbelieved as he also stated that after the accident he found that the driver of truck No. W.B.I.--5221 had died on the spot. The latter part of his evidence led the Tribunal to hold that P.W.2 had not seen the accident.

5. P.W.3, Prasanta Kr. Gupta is the owner of truck No. W.B.I. 5221 and has only disclosed the income of the deceased Bikash Gupta.

6. Except for the driving licence of the deceased, Bikash Gupta, (Exhibit 1), no other document was produced on behalf of the appellants. The learned Tribunal came to the conclusion that rash and negligent driving on behalf of the driver of truck No. W.G.A.--5205 had not been proved and dismissed the appellant's petition u/s 166 of the Motor Vehicles Act. 1988.

7. The Claimants have preferred this Appeal against the Judgment and order passed by the learned Judge, Motor Accident Claims Tribunal, 4th Court, Burdwan, on 7th December, 1999, dismissing their claim.

8. Appearing in support of the Appeal, Mr. Krishanu Banik submitted that the learned Tribunal had erred in disbelieving the evidence of Siraj Mallick as an eye-witness merely because he had stated that he had seen Bikash Gupta dead after the accident. Mr. Banik urged that even if the learned Tribunal had chosen not to believe the evidence of the sole eye-witness, P.W.2, Siraj Mallick, it should have applied the doctrine of *res ipsa loquitur* to the facts of the case instead of dismissing the appellants' claim outright.

9. Mr. Banik submitted that there was no dispute that Bikash Gupta had died on account of the accident in which his truck and truck No. W.G.A. 5205 was involved. Hence, even if, the evidence of Siraj Mallick was discarded, the facts relating to the accident would speak for themselves, since insistence of proof of rash and negligent driving causes considerable hardship to the claimants who were not eye-witnesses to the accident.

10. In support of his submission Mr. Banik firstly referred to the decision of the Hon'ble Supreme Court in the case of Pushpabai Purshottam Udeshi and Others

Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , wherein it was, inter alia, observed that normally it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. It was observed that this hardship is sought to be avoided by applying the principle of *res ipso loquitur* which generally means that the accident speaks for itself or tells its own story.

11. Mr. Banlk also referred to a Bench decision of this Court in the case of Sri Sadhan Chandra Mondal v. Oriental Insurance Co. Ltd., reported in 2000 W.B.L.R. (Cal). 6, wherein the views expressed by the Hon''ble Supreme Court in Pushpabat's case, were reiterated in relation to the application of the doctrine of *res ipsa loquitur*.

12. Mr. Banlk then urged that since the driver of truck No. W.G.A. 5205 was the best witness of the accident, his evidence should have been brought on record by the respondents. By withholding his evidence the respondents had withhold the best evidence available of the accident, which was all the more reason why the doctrine of *res ipsa loquitur* should have been applied to the facts of the case.

13. In support of his said submission, Mr. Banlk referred to a decision of the Patna High Court (Ranchi Bench) in the case of Laxmi & Co. v. Savitri Devi Agarwal (Loyalka) & Ors., reported in 1990(2) TAC 51, wherein it was observed that there was no reason as to why the driver of the truck in question was not examined since he could have explained the situation. As the case involved an accident arising out of the negligence on the part of the driver, it was incumbent upon the owner to examine the driver of the vehicle. Mr. Banik pointed out that in the said case an adverse inference was drawn on account of non-examination of the driver.

14. Mr. Banlk submitted that the judgment of the Tribunal suffered from various infirmities and was liable to be set aside and the claim of the appellants was liable to be allowed.

15. As indicated hereinbefore, the claim of the appellants was resisted by the insurers of both the vehicles. Appearing for Oriental Insurance Co. Ltd., Mr. Jyotirmoy Bhattacharjee submitted that from the evidence it would seem that both the vehicles were coming from the same direction and the accident could not, therefore, have occurred in the manner in which it was alleged to have occurred. Moreover, Mr. Bhattacharjee pointed out that rash and negligent driving on the part of the driver of truck No. W.G.A. 5205 had not been proved.

16. Mr. Bhattacharjee urged that the facts of this case were such that the doctrine of *res ipsa loquitur* would have no application. In this regard. Mr. Bhattacharjee also referred to the decision in Pushpabai's case (supra) wherein it was observed that there are cases in which the accident speaks "for itself so

that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Mr. Bhattacharjee submitted that the facts of Pushpabai's case were such that they spoke for themselves, which was not so in the instant case. On the other hand, in the instant case rash and negligent driving on the part of the driver of truck No. W.G.A. 5205 had not been established.

17. Referring to the decision of the Madhya Pradesh High Court in the case of M.P. State Road Transport Corporation Vs. Vaijanti and Others, . Mr. Bhattacharjee submitted that it was for the claimant to implead the driver of the offending vehicle as a necessary party in the application for compensation u/s 110A of the Motor Vehicles Act, 1939. Not having done so, the onus of producing him could not be shifted to the respondents.

18. Mr. Bhattacharjee submitted that in the absence of proof that the driver of truck No. W.G.A. 5205 had in any way contributed to the accident, the learned Tribunal had rightly rejected the applicant's claim.

19. Ms. Lopita Roy, who appeared for the United India Insurance Co. Ltd., adopted Mr. Bhattacharjee's submissions and added that only the interest of Shri Prasanta Kumar Gupta, the owner of truck No. W.B.I. 5221, was covered by a valid policy of insurance at the material point of time, and in the absence of the FIR, Post Mortem Report and other relevant documents, no liability could be fastened on United India Insurance Co. Ltd. on account of the death of Bikash Gupta. Ms. Roy urged that from the claim petition it would appear to be the appellant's case that the driver of truck No. W.G.A. 5205 had rashly and negligently dashed against truck No. WBI 5221 and there was no fault on the part of the latter vehicle in the accident.

20. Ms. Roy also submitted that the claim of the appellants had been rightly dismissed by the claims Tribunal and the appeal was, therefore, liable to be dismissed.

21. On consideration of the submissions made on behalf of the respective parties and the materials on record, we are unable to uphold the Judgment and the findings of the Claims Tribunal. In our view, this was a case where the doctrine of *res ipsa loquitur* should have been applied, particularly when the evidence of Siraj Mallick, the sole eye-witness, was disbelieved by the Tribunal. It has repeatedly been held that it is not possible for a claimant to prove the manner in which an accident took place unless he or she was present when the accident occurred. That an accident took place on 4th December, 1995, at 7.30 p.m. near Saktigarh Cold Storage in which truck Nos. WBI 5221 and WGA5205 were involved, and on account whereof Bikash Gupta died, has been proved by the appellants. Applying the doctrine of *res ipsa loquitur*, the learned Claims Tribunal ought to have at least come to a finding regarding contributory negligence on the part of the driver of truck No. WGA 5205 whose evidence was withheld by the

respondents.

22. The evidence of the driver of truck No. WGA 5205 was the best evidence available as to the manner in which the accident took place. By not producing him as a witness, the respondents withhold the best evidence which ought to have led the Tribunal to draw an adverse presumption in favour of the appellants.

23. The approach of the Claims Tribunal was, in our view, erroneous and contrary to the established principles of law as to how the burden of proof in a case of this nature is required to be discharged by the Claimant who had no knowledge of how the accident occurred. In our view, the contributory negligence factor on the part of the driver of truck No. W.G.A 5205 ought to have been considered by the learned Claims Tribunal before proceeding to dismiss the appellant's application u/s 166 of the Motor Vehicles Act, 1988.

24. Even if there is some manner of doubt as to how the accident occurred, by applying the doctrine of the *res ipsa loquitur* we hold that since the accident was composite in nature, it involved contributory negligence on the part of both the drivers of the two trucks involved in the accident. In fact, from a copy of the FIR produced before us, it appears that the driver of truck No. W.G.A 5205 was driving in a rash and negligent manner and dashed against truck No. WBI 5221.

25. We, therefore, set aside the Judgment and order dated 7th December, 1999, passed by the learned Judge, Motor Accident Claims Tribunal, 4th Court, Burdwan, in MAC Case No. 85/56 of 1996, dismissing the appellant's petition u/s 166 of the Motor Vehicles Act, 1986, and award a sum of Rs. 1,50,000/- to the appellants taking the age of the deceased to be about 40 years at the time of his death as suggested to PW 1 in cross examination and his daily wages to be Rs. 80/- per day, as stated by PW 3 the owner of truck No. WBI-5221, in his oral evidence. There will, therefore, be a decree in favour of the appellants for a sum of Rs. 1,50,000/- against the respondents in equal amounts of Rs. 75,000/- each. Since the appellants have already received interim compensation of Rs. 50,000/-, the balance on the basis of payment already made towards interim compensation is to be deposited by the insurers of both the trucks with the Registrar General of this Court within a period of fifteen days and the Claimants/Appellants will be entitled to withdraw the same without furnishing security in respect thereof.

There will be no separate order as to costs.

Let xerox plain copies of this judgment duly counter signed by the Assistant Registrar (Court), be given to the learned advocates of the respective parties.

G.C. De, J.

26. I agree.

27. Appeal allowed