
(2010) 02 AHC CK 0271
In the Allahabad High Court

Smt. Vinesh Kumari and Others

APPELLANT

Vs

Shri Rajendra Kumar and Others

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 122, 166

Citation : (2010) 6 AWC 6153

Hon'ble Judges : Ram Autar Singh, J;Prakash Chandra Verma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ram Autar Singh, J.—This first appeal has arisen out of judgment and award dated 16.7.1997 passed by Shri A.K. Jain, the then Vth Additional District Judge, Bulandshahr, in M.A.C.P. No. 217 of 1993 Smt. Vinesh Kumari and Ors. v. Rajendra Kumar and Ors. wherein the above claim petition has been allowed to the extent of Rs. 25,000/- only alongwith interest at the rate of 12 % per annum from the date of presentation of the claim petition till its realisation. The opposite parties No. 3 to 5 have been held jointly and severally liable to pay the award amount of compensation.

2. A perusal of record would go to show that the claimant Smt. Vinesh Kumari and four others moved claim petition No. 217 of 1993 against the opposite parties u/s 166 of Motor Vehicles Act, 1988 for compensation of Rs. 14,10,000/- with this allegation that on 21.6.1993 Narendra Kumar was on official duty of Life Insurance Corporation of India and after audit and inspection he was coming by his Fiat Car No. UAC. 7733 from Khurja to Bulandshahr and when the car reached near village Bhalauli on the highway, it collided with parked Truck No. U.M.O. 9543 at 9.30 P.M. as it was very dark and there was no parking light or indicator on the parked truck in question to show its presence on the road at the time of accident. The driver of Fiat Car No. UAC. 7733 could not notice the said parked truck and the accident took place in which Narendra Kumar succumbed to his injuries sustained therein. The accident took place due to negligence of driver

of Truck No. U.M.O. 9543, who parked the said truck on highway without any indication or parking light. The postmortem examination of dead body of deceased Narendra Kuamr was conducted by the doctor of District Hospital, Bulandshahr, on 22.6.1993. The age of the deceased was 38 years at the time of accident and he was drawing about Rs. 5,800/- per month as salary and all the claimants were dependents on the income of deceased. The claimants claimed Rs. 14,10,000/- as compensation along with interest on account of death of Narendra Kuamr in this accident.

3. The opposite party No. 2 National Insurance Company in its written statement denied the accident and alleged that no such accident took place, and if any accident had occurred that was due to negligence of driver, who was driving the above car involved therein.

4. The opposite parties No. 3 and 4 in their written statements admitted that the deceased was in the employment of L.I.C. and on official duty on the date of accident where he was travelling in above Car No. U.A.C.7733. The accident in question took place due to negligence of the driver of above Truck No. U.M.O. 9543 and the above car was insured with Oriental Insurance Company. The opposite party No. 5 Oriental Insurance Company in its written statement alleged that the accident took place due to negligence of driver of above truck who was not impleaded as party in the claim petition. The driver of above car was also not impleaded as party and there was no registration of car and no valid driving licence of above car driver.

5. The learned tribunal framed the following issues on the basis of the pleadings of parties.

(1) Whether the accident took place on 21.6.1993 at 9.30 P.M. near village Bhalauli at Khurja Bulandshahr Road, District Bulandshahr, due to negligence of driver of truck No. U.M.O. 9543 in which Narendra Kumar died? if so, its effect?

(2) Whether the drivers of car and truck were not having valid driving licence at the time of accident?

(3) To what amount of compensation the claimants are entitled?

(4) Whether the accident in question took place due to rash and negligent driving of driver of Car No. U.A.C. 7733? If so, its effect?

(5) Any other relief, if any?

6. The learned tribunal decided issues No. 1 and 4 simultaneously holding that the claimants could not prove the negligence either on the part of truck driver or car driver. Issue No. 2 was decided against both the insurance companies with this observation that both the insurance companies failed to prove that drivers of above vehicles involved in the incident were having valid driving licence. Issues No. 3 and 5 were also decided with this observation that the claimants failed to prove negligence on the part of driver of above parked truck and driver of car

and thus the claimants would be entitled to get compensation of Rs. 25,000/- under no fault liability along with 12 % interest per annum. The learned tribunal decided the above claim petition on 16.7.1997 accordingly, aggrieved by which the appellant/claimants filed this first appeal.

7. The learned Counsel for the appellants contended that the learned tribunal recorded a finding that the claimants could not prove the negligence of either of the drivers of truck or car in this accident, in which Narendra Kumar succumbed to his injuries as he was occupant of car. The principle of *res ipsa loquitor* should have been applied to the accident in question which was evident to show that due to negligence of driver of truck, who parked the same on the road during night without any indicator or light, the accident in question took place, but the learned tribunal recorded erroneous and perverse findings in this regard. The learned tribunal recorded the finding that no driver was negligent when the accident took place, but if the driver of truck would have taken due care and caution, accident would not have occasioned.

8. The learned Counsel for the appellants further contended that the facts emerging out of the story of accident would go to show that the car collided with parked truck and the truck driver did not switch on parking light and other arrangements when the truck was parked on the middle of road. Had the driver of car noticed the truck, the accident would not have occurred but as a result of the said accident not only Narendra Kumar died but car driver also died. The learned Counsel contended that the learned tribunal ought to have awarded compensation u/s 166 of Motor Vehicles Act in view of proposition of law laid down by the Hon"ble Apex Court on the basis of salary being drawn by the deceased at the time of accident and also keeping in view further promotion of deceased and thus the learned tribunal committed factual and legal error in recording findings.

9. In the claim petition the learned tribunal recorded the finding about the testimony of P.W.3 Umesh Gautam, who claimed to have witnessed the occurrence and supported the story of claimants that car in question collided with parked truck on 21.6.1993 at about 9.30 P.M. The learned tribunal held that this witness did not see the actual occurrence because in his cross- examination he stated that Fiat Car overtaking him went ahead and he could see the accident from a distance of 200 meters, which was not possible at all. The learned tribunal further held that the claimants did not examine any other witness in order to prove the factum of negligence and P.W.3 Umesh Gautam did not see the actual scene of accident. The learned Counsel for the appellants has relied on the decision of Smt. Rajkumari Arora and Ors. v. Raja Ram and Ors. 2006 (1) T.A.C. 680 (M.P.), wherein the Madhya Pradesh High Court has held that eye witness cannot be disbelieved merely on the ground that he could not remember registration number of scooter driven by the deceased.

10. The learned Counsel for the appellants has further contended that the learned tribunal should have applied maxim of "*res ipsa loquitor*" in this petition.

The deceased was occupant of the Car at the time of accident, therefore the accident speaks itself and thus the principle of *res ipsa loquitor* is applicable to the present case. The learned tribunal got confused in recording its findings as to who of the drivers was responsible for causing accident.

11. The learned Counsel for the appellants has relied on the decision of *R.S.R.T.C. v. Ramesh Chand and Ors.* 2006 (3) T.A.C. 373 (Raj), wherein the Rajasthan High Court has observed that both according to AW 2, Jai Singh, and AW 3, Hardayal Singh, on 1st February, 1997 while respondent No. 1 was repairing the telephone wire a Roadways bus came and struck the said pole. Consequently, the respondent No. 1 fell from the pole and sustained injuries. Both these witnesses are independent witnesses. Their testimony has not been shaken in the cross-examination hence, there is no reason for disbelieving their testimony. It is only Than Singh, the driver of the bus, who has denied the occurrence of the accident. However, as Than Singh needs to save his own skin, it is natural for him to deny the accident. Since Than Singh has a personal interest in denying the accident, we are not inclined to believe his testimony. As it is the bus which collided with the pole, the doctrine of *res ipsa loquitor* can certainly be applied in this case. The accident itself speaks about the rash and negligent driving of Than Singh. Hence, it is not a case of contributory negligence. But, it is a case where the negligence of the driver is writ large.

12. The learned Counsel for the appellants has further relied on the decision of *Smt. Suman Lata and Ors. v. Madan Mohan Sonkar and Ors.* 2006 (3) T.A.C. 623 (All), wherein it has been observed that a perusal of the judgment impugned in the appeal shows that a categorical finding has been recorded by the Tribunal that the deceased was going on his scooter while the jeep, which had been running with a high speed and in negligent and careless manner, hit the scooterist from behind. The finding, which is based on correct and proper appraisal of the evidence makes the maxim of *res ipsa loquitor* applicable to the facts of present case because the things are so apparent that the question of contributory negligence does not arise. The plea of contributory negligence can be raised only, where both the parties were in some respects negligent, when there are the findings in unambiguous and clear terms that the deceased was hit by the jeep from behind, then no question of contributory negligence on the part of the deceased arises and the things being obvious, apparent and self speaking, there was no question of any contributory negligence on the part of the deceased.

13. The learned tribunal did not record any categorical findings with regard to applicability of the maximum of *res ipsa loquitor* to the facts of the present case. The things are so apparent and the above principle should have been applied to the present case. The *res ipsa loquitor* means the things speak itself. A person can tell a lie but the circumstances may show the things as to how the accident took place. Under these circumstances, the learned tribunal committed error in recording the clear findings in this regard.

14. The learned Counsel for the appellants further contended that the learned

tribunal recorded its findings to this effect that opposite parties No. 3 and 4 admitted the fact of accident and the death of Narendra Kumar therein, but the claimants failed to prove the postmortem examination report of Narendra Kumar by way of examining the doctor, who conducted the postmortem examination of deceased. The claimants examined P.W.4 Ashfak Ahmad, record keeper, who proved copy of G.D. dated 22.6.1993 of P.S. Kotwali Dehat, in which it was mentioned that Fiat Car No. U.A.C. 7733 collided with the left side of the parked truck and the said G.D. was prepared on the basis of F.I.R. lodged by Ganesh Mahendra, Personal Manager of L.I.C. The learned Counsel for the appellants has further relied on the decision of Hazarilal and Ors. v. Lakhanpratap and Ors. 2006 (3) T.A.C. 183 (M.P.), wherein it was held that postmortem examination report being public documents would be admissible in evidence to know the nature of injury as well as cause of death. Thus, the Madhya Pradesh High Court categorically observed that postmortem examination report being public documents would not be required to be proved by examining the doctor concerned and report being public documents would be admissible in evidence on the basis of which nature of injury of deceased could be known. In view of above, the learned tribunal committed error of law in recording the findings in this regard that the claimants failed to prove postmortem examination report.

15. The Motor Vehicles Act is a social legislature in which the provisions of Evidence Act will not apply directly and the claim petition is liable to be decided in summary procedure. Section 169 of the Motor Vehicles Act provides the procedure and powers of Claims Tribunals which are reproduced below:

(1) In holding any inquiry u/s 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunals shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

16. The Division Bench of this Court in the case of Oriental Insurance Co. Limited v. Poonam Kesarwani and Ors. 2009 (4) T.A.C. 816 (All.), has made certain observations to this effect that burden of proof will be on the Insurance Company to prove that the driving licence of the driver of the offending truck is fake, in view of Rule 221 of the Uttar Pradesh Motor Vehicles Rules, 1998. Only some of the provisions of the CPC will be applicable to the summary proceedings pending before the Motor Claims Tribunal. Section 26(1) of Motor Vehicles Act, 1988 read with Rule 29 of Central Motor Vehicles Rules, 1989, state register of driving licences being a public record is a public document as defined in Section 74 of Evidence Act.

17. In view of above proposition of law non-examination of doctor to prove the

postmortem examination report will not affect the rights of the claimants in this case. The record keeper has also proved the G.D. and the F.I.R. was lodged by above person in respect of the accident in question. Moreover the respondents have admitted the accident in this case. Consequently the learned tribunal has further committed mistake in recording its finding on this point that the claimants have failed to prove F.I.R. and postmortem examination report. Moreover the petition filed under the provisions of Motor Vehicles Act, 1988 are liable to be tried in summary manner, in which all the provisions of Evidence Act are not applicable and in absence of strict proof above documents are not required to be proved, in accordance with the provisions of Evidence Act., because certified copies of F.I.R., postmortem examination report and other documents are public documents which are admissible in evidence.

18. So far as the question of reliance to be placed on testimony of eye witness is concerned, the Punjab and Haryana High Court in the case of Nikki and Ors. v. Darshan Singh and Anr. 2006 (1) T.A.C. 945 (P & H), has observed that the veracity of the eye witness, who has been examined by the claimants, cannot be discarded merely because there are some minor discrepancies in his statement, which are bound to occur as the accident has taken place on the date mentioned in petition and his statement has been recorded after an elapse of sufficient time. The omission of names of the witnesses in F.I.R. is insignificant and cannot shake the weighty evidence in the shape of prompt lodging of the F.I.R. and the impounding of the truck from the spot. Non-examination of the witness, who is the first informant and the author of the F.I.R. can also not shake the said clinching evidence.

19. In view of this unshakable evidence produced on behalf of the claimants in the present case, we do not feel any hesitation in holding that it is the truck, which was parked by its driver on a middle road and this act of negligence of driver of the truck is to be considered in the present case, in which driver of car collided with truck in view of the fact that there was no parking light and any other signal present on the truck in order to show its parking on the said place. The conduct of driver of the truck has contributed negligence, as a result of which driver of the car could not notice the parked truck in absence of any light or signal and collided the car with parked truck. Narendra Kuamr sitting in the car also succumbed to his injuries sustained in the accident. In the case of Oriental Fire & General Insurance Co. Limited, New Delhi and Ors. v. Chuni Lal and Ors. 1969 A.C.J. 237, it was held that minor discrepancies in the statements of witnesses are generally the result of different observations from different situations and are therefore immaterial. These authorities are squarely applicable to the facts appearing in the present case.

20. This contention of learned Counsel for the appellants that the learned tribunal recorded a wrong finding to this effect that the claimants could not prove the negligence of either of driver of car or truck in the accident, in which Narendra Kumar succumbed to his injuries as he was occupant of car, is liable to

be considered in view of fact and circumstances of the case. Applying the maxim of *res ipsa loquitur* it has been found on the basis of evidence that due to negligence of the driver of truck, who parked the same on middle of road during night without any signal or light, the accident in question took place. In such case the learned tribunal should have decided the percentage of contribution of negligence of the driver of truck as well as the driver of car and the amount of compensation should have been calculated accordingly, but the learned tribunal instead of deciding this fact straight way arrived at this conclusion that the claimants failed to prove the negligence of truck driver and car driver.

21. The Division Bench of this Court in the case of Smt. Suman Lata and Ors. v. Madan Mohan Sonkar and Ors. 2006 (3) T.A.C. 623 (All.), has observed that the plea of contributory negligence can be raised only where both the parties are found negligent in some respect. In this case the deceased was going on his scooter while the jeep, which had been running with a high speed and in negligent and careless manner, hit the scooterist from behind. The finding, which is based on correct and proper appraisal of the evidence is to be accepted, because the things are so apparent that the question of contributory negligence does not arise.

22. In identical case of Anjanaben Hasmukh Chandra Shah (MRS) and Ors. v. Bholanath Panna Lal Jain and Ors. 2006 (3) T.A.C. 893 (Bom) , on 18.11.1983, Hasmukh Chandra Somechand Shah was travelling in a Car No. MRX-5840 from Pune to Satara on Bombay Bangalore on N.H. Road. When the said car reached near Kikvi village at about 9.00 p.m., the driver required to turn the car to the left side to avoid accident due to heavy flood light from the on-coming vehicles and in that process dashed into a stationed truck-tanker bearing No. NITT-8032, owned by Labhsigh, respondent No. 2, which was parked on the left side of the road but in reverse direction and without any light or signals. The deceased received serious injuries. He was removed to the Sasson Hospital, Pune, where he was declared dead. The Oriental Insurance Company Limited by its written statement resisted the claim and admitted their liability to some extent in respect of third party personal injury. They resisted the claim on the ground that the driver of the car was negligent as the car dashed to the stationed truck. They further submitted that there was enough street light, apart from the parking light of the tanker. The appellant No. 1 Anjanaben, wife of the deceased led evidence in support of the claims to this effect that at the relevant time there was no parking signal or any such indicator to the parked tanker. The driver could not see the stationed tanker from distance. The driver saw the stationed tanker only after reaching near to it. Therefore, as in order to save the collision, the driver of the car had dashed the stationed tanker. The Bombay High Court discussed various aspects of the accident in question that there was an undisputed position on the record that the tanker was stationary in the middle of the road at the relevant time. There was no parking light or any other indicator as required. The said tanker, therefore, admittedly was stationed. This was nothing but "leaving vehicle in a dangerous position" as contemplated u/s 122 of the Motor Vehicles

Act, 1988. The term "leaving vehicle in a dangerous position" has been further explained in Sheokaran and Others Vs. Surjit Kaur and Others, In absence of any contrary evidence, the evidence of injured witness is liable to be accepted. In such matters, the evidence of one witness is sufficient to consider the claim of the legal representatives of the deceased. In Shakuntala Gajanan Naik and Ors. v. Tushar v. Rajadhyax Major and Ors. 1995 (2) T.A.C. 406 (Bom), a similar view has been expressed that there is no reason to disbelieve the case of the claimants. The driver of the car required to swirl the car to avoid collision. The driver of the car also could not control the speed of the car at that particular moment. As the stationed tanker was without any indicator or any parking lights and was stationed in the middle of the road, the car dashed/hit the said tanker and resulted into the accident on 18.11.1983 at about 9.00 p.m. There is no material brought on the record, even though pleaded by opponents that the road lights were on and the visibility was clear and the driver, therefore, could have avoided the accident. The Bombay High Court has accepted the statement of eye witnesses examined on behalf of the claimants in absence of any material on record. It was a dark night. The driver should have taken care of the speed of the vehicle while driving on such road, specially when there were no road lights as contended. The driver, in such circumstance, knowing fully the traffic of incoming vehicle with heavy flood lights and/or could have driven the vehicle in controlled speed. The controlled vehicle in such circumstances could have avoided the accident. The contribution of negligence of the driver in question, therefore, cannot be overlooked. He could have in a given case, had the vehicle in controlled speed, avoided the accident. The driver/owner of the vehicle (stationed tanker) should have parked the vehicle by keeping its signals and/or any indicator on as required, for such stationed vehicle, on such busy road.

23. The Bombay High Court observed that the claim tribunal was wrong in rejecting the total claim of the appellant/claimants by observing "nobody can be blamed for this accident, either the driver of the stationed tanker or the car. This is an act of God, i.e. vis major for which nobody can be held responsible and liable for paying compensation". The learned tribunal further committed error in rejecting the testimony of sole eye witness. Her evidence was rejected on the ground that she was interested in getting as much as possible and exaggerate the story in favour of the appellants. The non-examination of the other passengers including the relatives and trustees was held adversely against the applicants. The learned tribunal was wrong further by observing that there was no mistake on the part of the car driver and/or the driver of the tanker and therefore they were not negligent.

24. The Apex Court in The Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and Another, , interpreting the term "composite negligence", observed as under:

But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise. Where a person is injured

without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of "contributory negligence" in that sense. It is a case of what has been styled by Pullock as injury by composite negligence (see Pullock on Torts, 15th Edn., P.361).

25. In view of this as per the Apex Court decision in Municipal Corporation of Greater Bombay (Supra), the composite negligence is different for contributing negligence.

26. A Division Bench of Punjab and Hariyana High Court in Rashmi Chhabra and Ors. v. Vijay Kumar Ahuja and Ors. 1995 (2) T.A.C. 556 P&H), while considering the aspect of negligence and apportionment, observed that a truck parked in the middle of the road without any parking lights, indicator or any sort of precaution and Matador coming from behind struck against the right portion and caused a heavy impact, the claimant deceased crushed and died on the spot. In that case both the drivers were held negligent in causing the accident.

27. In Mohammed Mumtaz and Others Vs. S. Ravindranatha and Others, the Karnataka High Court has also considered this point and held that driver of the vehicles were composite negligent as the van driven in a fast speed during night dashed against rear side of mini lorry parked partly on tarred and partly on mud road resulting in death of 3 persons travelling in the van.

28. The Bombay High Court in above case observed that there was contributory negligence, ratio of liability to be 50% to the car and 50% to the truck tanker, because the negligence of two drivers had caused the accident and that resulted death of the third person i.e. the deceased. The third person was injured without any negligence on his part. This is called the composite negligence. Therefore, the owners of the respective vehicles are basically jointly and severally liable to pay the compensation. However, it is subject to the terms and conditions of the insurance policy.

29. The Section 122 of the Motor Vehicles Act, 1988 provides the following provisions which are reproduced below:

Leaving vehicle in dangerous position.-No person in charge of a motor vehicle shall cause or allow the vehicle or any trailer to be abandoned or to remain at rest on any public place in such a position or in such a condition or in such circumstances as to cause or likely to cause danger, obstruction or undue inconvenience to other users of the public place or to be passengers.

30. In the present case the owner/driver of truck parked the said truck on the middle of the road without any indicators or lights and it was dark night when the accident took place. Thus the owner of driver of the truck left the said truck on the middle of public road in such a position or in such a condition or in such circumstance as to cause or likely to cause danger, obstruction or undue inconvenience to the users of public road or to the passengers. Under these circumstances the owner/driver of the truck would also be responsible for the

accident in question as they contributed negligence in causing the said accident.

31. A Division Bench of this Court in the case of Union of India, through General Manager, North Eastern Railway, Gorakhpur v. Virendra Bharti and Anr. 2009 (3) T.A.C. 67 (All), has observed that equity tilts sharply in favour of deceased and law values strong presumption. This Court has further held that cause of self-inflicted injury is not proved beyond doubt as alleged, judgment and order of tribunal awarding compensation of Rs. 4 lacs is liable to be upheld.

32. In view of the facts and circumstances of the case, the learned tribunal has committed mistake in deciding issues No. 1 and 4 to this effect that the claimants could not prove negligence either on the part of truck or car driver. As discussed above, the driver of truck has been found negligent in parking the said truck on middle of road without any indicators or lights, as a result of which the driver of car could not notice, the said truck parked therein and collided the said car with the same and Narendra Kumar sitting in car sustained fatal injuries and ultimately he died due to injuries sustained by him in the accident. Thus, both the drivers have been found negligent in causing accident and composite negligence has not been looked into by the learned tribunal. The percentage of negligence is liable to be assessed in deciding the amount of compensation and liability of the owners and drivers of truck and car. The learned tribunal has wrongly held that no driver has been found negligent in the accident. In case the driver of car would have taken due care and caution in driving the same, accident could have been avoided.

33. The driver of truck committed negligence in parking the said truck in dangerous position and violated provisions of Section 122 of Motor Vehicles Act. The learned tribunal should have assessed the percentage of composite negligence of both drivers and calculated amount of compensation with regard to the same, on the basis of salary being drawn by deceased at the time of accident. Consequently the findings recorded by the learned tribunal on issues No. 1 and 4 suffers from factual inaccuracy, illegality and irregularity. As discussed above, the judgment and award passed by the learned tribunal is perverse and liable to be set aside and the case is liable to be remanded to the court below in order to decide the claim petition afresh in the light of above discussions and on the basis of the evidence on record as well as circumstances attending to the case.

34. This first appeal is allowed and the judgment and award dated 16.7.1997 passed by Sri A.K. Jain, the then Vth Additional District Judge, Bulandshahr, is set aside. The case is remanded back to the court below for deciding the claim petition afresh in the light of above observations made in this judgment.