
(1973) 02 MAD CK 0006
In the Madras High Court
Case No : A.A.O. No. 229 of 1968

Sri Cruz Machado

APPELLANT

Vs

Mrs. Periaswami Satyabama and others

RESPONDENT

Date of Decision : 13-02-1973

Acts Referred:

Citation : (1973) 02 MAD CK 0006

Hon'ble Judges : Ramaswami, J;Kailasam, J

Bench : Division Bench

Advocate : K.K. Venugopal, Peppin Fernando and S. Ramalingam, for the Appellant; K. Ramaswami, K.R. Subramania Ayyar, A. Sarojini Bai, P.C. Kurian, N. Kanakaraj and T.E. Joseph, for the Respondent

Judgement

Kailasam, J.—The appellant was the first respondent in Claim Petition No. 13 of 1967 on the file of the Motor Accidents Claims Tribunal

(Principal Subordinate Judge), Tirunelveli. The petition was filed by the wife and the children of one Periaswamy who died in a motor accident at 7

p.m. on 12th October, 1966 when he was knocked down by lorry MDT 5729 belonging to the appellant herein. The seventh respondent herein,

namely, M/s. New India Assurance Company, Tirunelveli, was the second respondent in the claim petition. The case put forward by respondents

1 to 6 was that the lorry MDT 5729 belonging to the appellant was driven in a rash and negligent manner from north to south along Tuticorin

Tiruchendur Road and while it was running to the south of Athithanar College at Tiruchendur, it knocked down Periaswamy and crushed him to

death on the spot. Periaswamy at the time of his death was the Principal of the Industrial Training Institute, Tiruchendur, aged forty and was

drawing a salary of Rs. 431/- per month. He had another eighteen years of

service with prospects of promotion, etc. The appellant and the seventh respondent contended that the accident was not due to the negligent driving on the part of the driver of the lorry. On the date of the occurrence, it was submitted that the deceased Periaswamy was coming from south towards north on his cycle without light, that Periaswamy hit a brick heap which was on the western side of the road and fell on the eastern side and hit the rear portion of the lorry which resulted in his death.

2. The trial Court after a discussion of the evidence adduced on both sides, came to the conclusion that it was on account of the rash and negligent drive on the part of the driver of the lorry at the time of the accident the victim Periaswamy was crushed by the rear right wheel of the lorry on the western edge of the road. Taking into account the pay of Periaswamy, his prospects of promotion and the loss to the dependants, the trial court fixed the compensation which respondents 1 to 6 are entitled to at Rs. 50,000/- and directed the Insurance Company, the seventh respondent herein, to pay a sum of Rs. 20,000.- and the appellant herein to pay the balance of Rs. 30,000/-. Hence this appeal by the first Respondent in the petition.

3. Mr. K.K. Venugopal, learned counsel for the appellant submitted that on the facts of the case, there is no material for holding that the driver of the lorry was guilty of any rashness or negligence. In any event, he submitted that the deceased Periaswamy was guilty of contributory negligence, and therefore, the liability of the appellant should be proportionately reduced. Lastly, he submitted that the compensation decreed is excessive.

4. On behalf of respondents 1 to 6, four witnesses were examined. P.W. 1 is the Assistant Motor Vehicles Inspector attached to the office of the Regional Transport Officer, Tirunelveli, at the time of the occurrence. On receipt of a request from the Sub-Inspector of Police on 13th October 1966 to inspect lorry MDT 5729, he inspected it and prepared the report Exhibit A. 1. He found the efficiency of the footbrake of the lorry at 40 per cent with load. If after applying the footbrake, the vehicle had stopped at a distance of eighty feet, the vehicle ought to have been run at a speed of more than thirty miles per hour. According to the witness, the normal speed for lorry is twenty-five miles per hour. In cross examination he admitted that the speed at which the lorry was driven at the time of the

occurrence would have been thirty miles an hour or a little more or a little less, and a difference of five miles may be allowed. P.W. 1 also stated that at the place of occurrence the width of the tar road was twelve feet with mud road on either side with a width of six feet.

5. P.W. 3 is a watchman in the Athithanar College, Tiruchendur. At 7 P.M. on the date of occurrence, he was about to be relieved from his duty,

and he along with the person who came to relieve him, was standing near the gate adjoining Tiruchendur-Tuticorin Road. The lorry in question was

proceeding from north to south along the road. It proceeded about fifty yards south of the place where he was standing when he heard a noise.

The lorry was moved a little to the east of the road. Then he and the other person went to the place and saw the injured. He was lying on the

western edge of the road. His head was crushed and he was dead on the spot. His cycle was then lying to the west of his body. There was an

electric post twenty feet east of the place where his dead body was lying. This witness did not see the lorry knocking the cyclist.

6. P.W. 4 was the Sub-Inspector of Police, Tiruchendur at the time of the occurrence. He received the complaint Exhibit A-13 and visited the

scene of occurrence at 9:30 P.M. on 12th October 1966. He prepared the observation mahazar Exhibit A-14 and drew the rough plan Exhibit A-

15. He held the inquest and examined witnesses during the inquest. He found the dead body of the victim lying on the western edge of the tar road.

The cycle was then lying to the west of the tar road, that is, on the western edge of the road. He also noticed tyre marks of the cycle to the left of

the road. The lorry was stationed on the eastern side of the road. There was no cycle light in the cycle when he recovered the cycle. There was no

bloodstains on the front wheel of the lorry and he found hair sticking to the exhaust pipe of the lorry. The dead body and the cycle were lying to the

east of brick stack.

7. On behalf of the appellant and the seventh respondent, the driver of the lorry was examined as R.W.1. R.W.1 stated that he was driving the

lorry from north to south, that there was no traffic near the scene of occurrence, that the road took a slight turn towards south-west at the scene of

occurrence and that then he was driving the lorry at 20 or 25 miles per hour sounding the horn. The witness would state that the victim was riding

on his cycle from south towards north along the left side of the road, that is, on the western side, that there was no light in the cycle, and that the victim was then having a basket in one hand and was holding the handlebar of the cycle with the other hand. As the road turned south-west near the place of occurrence, he turned the lorry a little towards west. There was a brick heap to the west of the road. According to the witness, the deceased Periaswamy and his cycle knocked against the brick heap and his cycle went towards west and the deceased fell to the east of the brick heap. He fell near the rear wheel of the lorry. According to the witness, the front wheel and the mudguard of the lorry did not touch the deceased. On account of the accident, he heard some noise and hence he stopped the lorry at a distance of fifteen feet. According to him, when he turned the lorry towards west along the road, the distance between the brick heap and the lorry was three feet. He stated that he was not responsible for the accident.

8. In cross examination, R.W. 1 stated that the headlights of the lorry were quite all right, and he saw the deceased first on his cycle while he was at a distance of ten feet in front of the lorry. He was all along driving the lorry only at twenty five miles per hour. He applied the brake only after the accident and not before he heard the noise. He further stated that at the time of the accident, the lorry and the right wheels of the lorry were on the western edge of the road. He did not see the brick heap near the place of accident before the accident took place.

9. It will be seen that there is no eye witness speaking to the impact of the lorry on the cycle. The only witness who was near about the scene of occurrence is P.W. 3, the watchman of the Athithanar College, Tiruchendur. He also did not see the impact. He was standing in front of the College and saw the lorry when it had proceeded about fifty yards from the place where he was standing. He then heard a noise and proceeded to the scene. He found the victim lying on the western edge of the road with his head crushed. The burden of proving that the driver of the lorry was guilty of rash or negligent driving is on the claimants.

10. Mr. K.K. Venugopal, learned counsel for the appellant, submitted that in the absence of direct evidence on the side of respondents 1 to 6, the claim ought to have been straightaway dismissed. This contention cannot be

accepted. Though there is no direct evidence as to how the accident took place, it is admitted that at the time of the accident, the right wheels of the lorry were on the western edge of the road, that is, on the wrong side of the road. The evidence of the Sub Inspector of Police is that the dead body of the victim was found lying on the western edge of the tar road. The width of the tar road was twelve feet, and the mud portion of the road on either side is six feet each. The body was seen at the western edge of the tar roads. Since at the time of the accident the right wheels of the lorry were on the western edge of the road and the body of the victim was also found on the western edge of the road which is the wrong side of the road so far as the lorry is concerned, the driver of the lorry is bound to explain as to how the lorry came to the extreme right of the road. The position of the lorry and the dead body at the time of the accident would prima facie afford evidence of want of due care and caution on the part of the lorry driver. Under such circumstances, the doctrine of *res-ipsa loquitur* could be invoked, as normally the lorry could not have been on its extreme right, and it affords reasonable evidence, in the absence of explanation by the driver, that the accident arose for want of due care by the driver of the lorry.

11. The question now is whether the driver of the lorry has offered any explanation, and if so, whether that explanation could be accepted. The explanation offered by the driver is that the deceased Periaswamy and the cycle knocked against the brickheap and the cycle went towards west and the deceased fell on the eastern side and near the rear wheel of the lorry. The case of the driver is that the road was clearly visible and that his headlights were in good order. If so, the driver of the lorry could have seen the cyclist at some distance. The explanation of the driver that when the lorry was about to pass the cyclist, he knocked himself against a brick heap and fell near the rear wheel of the lorry resulting in his being run over by the rear wheels of the lorry is too artificial to be accepted. The theory of the cyclist knocking himself against the brick heap and falling down just at the time when the lorry passed the cyclist cannot be accepted. The driver of the lorry had no right to occupy the entire tar portion of the road and the cyclist cannot be found guilty of any negligence for travelling on the tar portion of the road, especially when there was obstruction on

the left side of the road. The plea of the driver that the accident was due to the fact that the victim knocked himself against the heap of bricks on

the western side of the road and fell on the eastern side near the rear wheels of the lorry is puerile and has to be rejected. The result is that it has to

be found that the driver has not discharged the burden which has been shifted on him on the doctrine of *res ipsa loquitur*.

12. It was contended by Mr. K. K. Venugopal that there was no sign of the front portion of the lorry having hit the cyclist and that the recovery of

hair sticking to the exhaust pipe would indicate that the deceased was crushed by the rear wheel of the lorry. It is difficult to say which part of the

lorry hit the cyclist, for even if the front portion of the lorry hit the cyclist, the lorry would not have any dent. The fact that there was no damage to

the cycle was also relied on. But here again, if the impact was on the cyclist, the cycle would have been thrown out and there would not be any

damage to the cycle. From the circumstances, we are unable to accept the theory that the accident was due to the cyclist himself falling near the

rear portion of the lorry. Whether it was the front portion of the lorry or the rear portion of it that knocked the cyclist is immaterial, for, the driver

of the lorry had no justification for going to the western extremity of the road at the time of the accident.

13. It was next contended by Mr. Venugopal that even if it is held that the driver of the lorry was negligent in driving, the deceased cyclist also

contributed towards the accident and therefore, the compensation payable should be proportionately reduced. This argument is based on the fact

that the police officer, when he came to the spot at 9:30 p.m. did not see any cycle light. From this it is submitted that the cyclist was riding the

cycle without a light. From the mere fact that no cycle light was recovered, it cannot be positively asserted that the cyclist was riding without a

cycle light. The accident was at 7 p.m. and the Police officer came to the spot only at 9:30 p.m. and the possibility of somebody taking away the

cycle light cannot be ruled out. Even assuming that the cyclist did not have a light in his cycle at the time of the accident, it cannot advance the case

of the appellant. The plea put forward by the learned counsel for the appellant is that the conduct of the cyclist in riding a cycle without a lamp

would *prima facie* amount to negligence. In support of his contention, the learned counsel relied on the decision in *Hill-Venning v. Besant* (1950) 2

A.E.R. 1151 and submitted that the presence of an unlighted vehicle at night on a dark road where there was no street light was held to be prima facie evidence of negligence on the part of the person responsible for the vehicle. Two of the three Lord Justices took the view that the presence of an unlighted vehicle on the road is prima facie evidence of negligence on the part of the driver, and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic. In the case referred to, the facts are that the plaintiff, who had his headlight dipped, failed to observe the defendant's motor cycle in time to avoid it, and he came into collision with it. In the circumstances, the Court found that the defendant, by failing to remove his motor cycle off. The highway, was also negligent. On facts, the present case is different from the ruling cited, as the evidence of the driver is that his headlights were properly working. He could have seen the cyclist at a very safe distance. It is not the plea of the driver that he dipped his light and he was not able to see the cycle before the impact. The decision, therefore, cannot be relied on in support of the contention of the learned counsel for the appellant.

14. Reliance was also placed on the decision in *Device v. Swan Motor Co. Ltd.* (1949)-1. A. E. R. 620 wherein the Court held that though the driver of the omnibus was guilty of negligence, the deceased man was guilty of contributory negligence as he was standing where he did on the lorry in breach of a duty which he owed to the driver of the omnibus not to render more difficult the passing of the lorry by the omnibus and so increased the risk of a collision. In discussing the rule, Evershed, L.J. observed that as a doctrine, the "last opportunity" rule has suffered a demise independently altogether of the Act of 1945. Denning, L.J. commenting on the doctrine of "last opportunity" observed as follows:

I do not myself believe that there is any difference in kind between negligence after seeing the danger and negligence in not seeing it. Nor do I believe that negligence in creating a dangerous obstruction ceases if the driver of the on coming vehicle sees it. Even when he sees it, it may still be one of the causes of the accident. It all depends whether it is a significant factor in producing the damage or not.

With respect we adopt the test laid down, namely, that even when the driver sees the obstruction, the conduct of the defendant may be one of the

causes of the accident. The question will be whether the defendant's conduct is a significant factor in producing the damage or not. As already

observed, on the facts of the present case, even assuming that the vehicle was ridden without a light which we do not however accept, the cycle

without the light was not the cause of the accident, as the driver of the lorry should have seen the cycle at a safe distance. This plea also cannot be

accepted and the submission that the compensation payable should proportionately be reduced has to be rejected.

15. The only other question that has to be considered is with regard to the quantum of compensation. Accepting the evidence of P. W. 2, the first

respondent herein, the lower Court found that the deceased Pariaswamy was a gazetted officer selected by the Tamil Nadu Public Service

Commission and was the Principal of the Industrial Training Institute, Tiruchendur, in the pay scale of Rs. 350-25-600. In September, 1966 he

was drawing a salary of Rs. 443/- and was aged 40 years. He would have retired in his 58th year and drawn pension thereafter. He had a good

record of service, and in his scale of pay, he would have reached the maximum of Rs. 650/- after thirteen years of service and would have

continued in that pay for five more years till his retirement. His promotion to a higher scale of pay could also be reasonably expected. The evidence

of P.W. 2, the first respondent herein, is that Periaswamy was sparing at least Rs. 250/- a month to her towards family expenses, and this was

accepted. As the scale of pay increased, the contribution to the family would also have increased. Taking all the circumstances into account, the

Court below fixed the compensation which the family would receive at Rs. 80,000/- and granted a compensation of Rs. 50,000/- taking into

account the fact that a lump sum payment is made. In Hindustan Ideal Insurance Co., Madras v. Kanakammal C.M.A. 83, 94, and 225 of 1968

and others, this Court considered at length the various decisions on the method of computing compensation payable. It is unnecessary to reiterate

the principles at length except to state that the Court will have to take into consideration the benefits which the dependants were getting from the

deceased, the number of years the deceased would have lived but for the accident the possibility of the deceased not living the normal expected

span of life, the dependants ceasing to be dependants in the course of time, etc. While awarding a lump sum compensation, the Court will also

have to take into consideration the interest that may accrue on the lump sum paid, and also the fact that the capital also has to be utilised for the purpose of the compensation payable and not intended to be left in tact with the dependants at the end of the period of life expectancy of the deceased. Bearing all these facts in mind, we are satisfied that the sum of Rs. 50,000/- awarded by the lower Court cannot be said to be excessive. The order of the lower court is confirmed.

16. The liability of the Insurance company, the seventh respondent herein, is restricted to Rs. 20,000/- and the balance will be paid by the appellant herein. The amount of Rs. 30,000/- will be deposited into the lower Court by the appellant within eight weeks from today. Out of the total amount the first respondent will be permitted to withdraw Rs. 10,000/- towards her share. The balance of the amounts will be paid equally to respondents 2 to 6. As respondents 2 of respondents 4, 5 and 6 will be deposited in one of the nationalised banks, separately in their names for such period till each one of them attains majority. The interest accruing year after year on the amounts of the minors so deposited will be paid to the and 3 have attained majority, their shares will be paid to them. The shares first respondent every year for the maintenance of the three minor children. In the event of the marriage of respondent 5 and 6 before they attain majority, they can apply to the court for the withdrawal of the amounts deposited in their names. The appeal is dismissed with costs.