

(1974) 01 OHC CK 0014

In the Orissa High Court

Case No : Misc. Appeals No's. 11 and 18 of 1969

The Motor Owner's Insurance Company Ltd.

APPELLANT

Vs

Srimati Sarada Thacker and Others

RESPONDENT

Date of Decision : 03-01-1974

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110B, 110C, 110D, 110E
Penal Code, 1860 (IPC) — Section 279, 304

Citation : (1974) 40 CLT 176

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

Bench : Single Bench

Advocate : D. Mohanty and B. Patnaik, in M.A. 11/69 and T. Dalai, in M.A. 18/69, for the Appellant; B. Mohapatra, B. Patnaik and A. Mohanty, in M.A. 18/69, for the Respondent

Final Decision : Allowed

Judgement

K.B. Panda, J.—On 21-3-1967 at about 5.30 p.m. a boy named Atul Thacker aged about 11 years, while proceeding on a cycle on the road near Malgodown Railway Level Crossing, Cuttack met his end on the spot being run over by the right side rear wheel of a truck bearing No. ORC 6312. So, the parents (mother Petitioner No. 1 and father-Petitioner No. 2) of the deceased boy laid a claim of rupees one lakh as compensation before the Claims Tribunal u/s 110-D of the Motor Vehicles Act of 1939 (hereinafter referred to as the Tribunal), impleading the owner, insurer and the driver as opp. parties 1, 2 and 3 respectively. During the pendency of the proceeding the driver died. Finally the Tribunal on 28-10-1968 passed an award for compensation of Rs. 27,000/- out of which Rs. 20,000/- was to be paid by the Insurance Company and the rest Rs. 7,000/- by the owner of the truck with costs.

2. As against this award the owner has preferred an appeal numbered as 11 of 1969, and the Insurance Company another, numbered as 18 of 1969. The claimants also have filed cross objections in both the appeals claiming higher

compensation. All these matters were heard analogous and this order will dispose of them all.

3. According to the claimants their son who was a student of Class V of the Stewart School, Cuttack was killed by the rash and negligent driving of the truck No. ORC 6312. Opp. party No. 1 contested the claim on the ground that his driver (since dead) was not rash and negligent. His specific case was that the deceased met his end due to his own negligence. His further case was that he had sent the vehicle with the driver to obtain the fitness certificate from Cuttack with instruction to take to the Link Road and not the road where the accident took place and thus the accident not having arisen while the driver was discharging the duty of the master, he has no liability in the matter. Opp. party No. 2 also took the plea that the driver was neither rash nor negligent and the boy was run over due to his own folly.

4. The learned Tribunal framed three issues. The claimants produced 7 witnesses of whom p.ws. 1 and 4 are the eye-witnesses to the occurrence. p.w. 3 is the Doctor who held the postmortem (Ext. I). Other witnesses are not material for our purpose. On the side of the opp. parties 6 witnesses were examined of whom o.p.ws. 1 and 3 are the witnesses to the occurrence. o.p.w. 5 is the cleaner attached to the truck and o.p.w. No. 4 is the Investigating Officer who had prepared the spot map (Ext. B) and submitted a charge-sheet (Ext. 4) against the driver u/s 279/304, Indian Penal Code which was dropped due to the death of the driver. Finally, the Tribunal on an assessment of the evidence decided all the issues in favour of the claimant and passed the award as aforesaid.

5. Mr. D. Mohanty appearing on behalf of the owner contended that:

(i) under the provisions of the Act as it stood then, no compensation could be awarded against the owner;

(ii) there is no evidence that the accident took place as pleaded by the claimants; and

(iii) there is also no evidence regarding the actionable negligence on the part of the driver;

(iv) vicarious liability cannot be extended in the circumstances to the owner;

(v) there was no evidence nor it has been pleaded as to what should be the compensation and at what rate; and

(vi) compensation granted was high.

6. Mr. Mohapatra appearing for the claimants laid great stress on the fact that the truck was proceeding at a very high speed; that it was proceeding from College Road side to the Malgodown Road side, and at the junction took a sharp turn thus causing the accident for which he is responsible. His further contentions were that the defence plea was false; that the defence witnesses were got up and the compensation awarded in view of the expectancy of life of

the family to which the deceased belonged and in the way he was helping his father in a prosperous cycle business in the name of the deceased, the compensation should have been much higher.

7. Mr. Mohanty did not press the first point, namely, no compensation could be awarded against the owner and so it need not be answered.

8. Regard being had to the pleadings the first point that deserves consideration is whether actionable negligence on the part of the driver has been established in this case to connect the same with the death of the boy. Obviously, this being purely a question of fact the authorities cited are of no assistance for facts of two cases are seldom identical. The present case therefore has to be judged on the oral evidence tendered and the circumstances appearing therefrom. The learned Tribunal in paragraph 8 of his judgment has dealt with the evidence of the eye-witnesses on the side of the claimant and the evidence of the eye-witnesses on the side of opp. parties in para 9, wherein the learned Tribunal has stated thus:

The evidence of O.P.Ws. 1 and 3 who claim to be eye-witnesses does not inspire any confidence. If they were really eye-witnesses, one would have thought that their names should have been included in the charge -sheet, but Ext. 4 does not mention their names. The evidence adduced on behalf of the Petitioners is specific that the cycle and the deceased boy both came under the truck and the boy fell down with the cycle in between his thighs. O.p.w. 1 also has stated that the boy had fallen with the cycle. O.P.Ws. 1 and 3 both give out that the cycle's pedal got entangled with the cycle rickshaw's wheel but they do not say a word regarding what happened to the cycle, or in what position it was in relation to the boy after the accident. It is further seen from Ext. B, the Spot Map prepared in the Police Case filed against the driver that at "A" the dead body. was lying. The distance from the left extremity of the road to "A" is (sic) and at spot "B" where the truck stopped. The distance from the left extremity of the road is 15". This indicates that the truck was moving from the left to the right and it belies the evidence of O.P.Ws. 1 and 3 that the truck had always kept to the left of the road. A close perusal of the evidence of O.P.Ws. 1 and 3 shows that either they were not present at the scene or if they were, they are not coming out with the truth. The evidence of o.p.w. 5 that he was present in the truck when the accident took place is corroborated by o.p.w. 4 who is the Prosecuting Inspector of Government Railway Police, Cuttack. O.p.w. 4 had investigated into the motor accident case and had prepared the Spot Map Ext. B. O.p.w. 5, however, does not say a word about the accident until they heard shouts of the people assembled there.

x x x

On the other hand, the eye-witnesses p. ws. 1 and 4 are both independent witnesses and their evidence is convincing. They have given out the facts in a straight forward manner and are quite consistent with each other. Although p.w. 4 has denied that he was examined by the Police, O.p.w. 4 has stated that he

had examined p.w. 4 in connection with the Criminal Case against the driver. This minor circumstance alone, however, is no reason for discarding his evidence. As already stated both p.w.s. 1 and 4 were named in the charge sheet as witnesses for the prosecution. On a careful perusal and scrutiny of the evidence in this case I find that the driver of the truck No. ORC 6312 caused the accident with the deceased boy Atul on account of his rash and negligent driving resulting in Atul's death. The evidence in the case does not lead to the conclusion that there was any contributory negligence on the part of Atul which led to the accident.

This is all the discussion in the case to fasten the liability on the Appellants. Thereafter the learned Tribunal proceeded to discuss the case law reported in AIR 1943 252 (Nagpur) which I may say is not of much significance inasmuch as that is a case where their Lordships were considering a Second Appeal of concurrent finding of facts held by the Courts below under the general law of damages, according to Code of Civil Procedure.

9. The law on the point is no more ambulatory. Provisions of Sections 110-A to 110-F do not create any new right nor even a new remedy; but the forum alone is changed. The right of the legal representatives of a deceased to claim damages in respect of the fatal accident was an actionable rests under the preexisting substantive law of torts. In an action for negligence, the legal burden of proof rests on the claimants. But, barring certain exceptional cases, it may not be possible for the claimant to know what precisely (sic) to the accident. This hardship to the claimant can be avoided by the application of the maxim (sic) which is not a principle of liability 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 happenings of such accident.

What then must be Defendant do to discharge this burden? This question is answered in Winfield on Torts in these words:

This is a problem which as given rise to difference of opinion and even now the Law cannot be regarded as settled. Two things however can be said with some confidence: (1) If the Defendant shows how the accident actually occurred and the explanation is consistent with the diligence on his part, then he is not liable. (2) Even if he cannot explain the accident if the Defendant shows that there was no lack of reasonable care on his part or on the part of the person for whose negligence he is responsible, then he has again exonerated himself from the liability.

10. In view of the Jaw enunciated above let me now turn to the facts of the case and evidence not referred to by the learned Tribunal. Admittedly, the accident took place beyond the level crossing towards Malgodown side.

According to p.w. 1 the deceased was riding a cycle meant for adults. The Bedford truck involved in the accident was coming from the College Road

towards the Level Crossing:

At high speed and when it took a wide turn, the front portion of the truck hit Atul who fell down and the rear wheel of the right side of the truck went over him. The deceased died on the spot. The truck did not apply brakes or "stop when its bumper hit the boy. Further according to p.w. 1 though the deceased was not using a small cycle yet his legs were fully reaching the pedals and he was going at a normal speed as a rickshaw was in his front. When the truck took the turning, the rickshaw was in front of the truck and Atul was to the left of the rickshaw. The rickshaw avoided the truck by taking a turn to the left. Atul did not follow the rickshaw but as he was trying to take a turn the left (Katei), he was hit. There was not much rush at that time. The truck came from the College side at high speed on the road from College Chhak to Malgodown and Level crossing, took a turning and dashed against Atul. Atul fell down and the truck proceeded and stopped after 7 to 8 cubits. The driver ran away from the scene. p.w. 4 has seen the rear wheel of the truck running over the head of the boy.

The cycle used by the deceased was in between the deceased's legs and the front wheel of the cycle was sent.

x x x x

P.w. 4 has also stated that there was a cycle rickshaw in front of deceased Atul who was to the left of the cycle rickshaw. The truck did not hit the cycle rickshaw as it went out of the way. p.w. 4 denied that the deceased had gone in between the, cycle rickshaw and the truck.

x x x

P w. 5 had seen the dead body lying at about 7 cubits behind the truck.

From the above evidence and the spot map (Ext. B), as will be discussed hereafter, the conclusion arrived at by the Tribunal does not appear legitimate. Obviously, the case has to be decided on preponderance of evidence both oral and circumstantial with the initial burden resting on the claimants to prove negligence. Out of the two witnesses i.e. p.w.s. 1 and 4, p.w. 4 had given earlier a different story before the Investigating Officer (o.p.w. 4) - which is not the case of the claimants. His earlier statement was that the truck in question was coming from Malgodown side, and not from College Chhak side. If so the question of taking a "short turn" or wide turn (as stated differently) does not arise.

The learned Tribunal says not to attach too much importance to this statement but hardly that is correct. There is no reason why o.p.w. No. 4 would falsely record it like that supporting the defence. That apart the circumstances are such that they out-weigh the feeble oral evidence in this case. I would in this context refer to some salient admitted features of the case. The first one is the spot map (Ext. B); secondly the fact that the accident took place on the crown of the road and thirdly that the dead body was lying only 8 feet from the rear wheel of the

truck involved in the accident.

This spot map shows that the road at the place of accident was 33 feet broad. The junction of College Road and Malgodown Road (point "C") is 21 feet behind the place of accident. The place where the truck stopped was also in the middle of the road leaving 18 feet to the right and 15 feet to the left including breadth of the truck which is 5 feet and 10 inches. The junction is quite broad and there are no obstructions from either side from which any proceeding from Railway crossing side to Malgodown side or any body coming from the College Chhak side to the Malgodown side cannot see each other. Regarding being had to the place of the accident at A in the spot map it is immaterial whether the truck was coming from College Chhak side to Malgodown side or straight from Malgodown side. At one stage the case of the claimants, as quoted above, was that the front wheel of the cycle dashed against the front side bumper of the vehicle and the impact was so great that the front wheel of the cycle got twisted. Were it so, two consequences were only possible either the boy would have been thrown clean off the cycle or would have fallen along with it. In the first case he would not have been run over by the truck and more so by the rear wheel. In the second case he would have been smashed under the front wheel and so too the cycle. Not unlikely both might have been dragged to a certain distance also. Evidently that has not happened. This falsifies the story that the boy struck against the front bumper of the vehicle. Even then, conceding that it happened like that, it was on the mid-road which was 33 feet broad with a metal portion of 20 feet.

This is contrary to claimants' evidence that the boy was 2 to 3 cubits from the left side edge of the road. Since according to the claimants there was no such traffic at the time, there was enough space in the left hand side of the road for the cyclist to avoid the truck that was coming from the opposite direction. It was broad day light and the driver of the vehicle as well as the deceased could very well see the approaching truck and the cycle. As admitted by the claimant's witnesses there was a cycle-rickshaw going in front of the boy which could avoid the truck but not the boy. This is something significant. The opposite parties case is that the cycle rickshaw avoided the truck but the boy rushed in between, the paddle of the cycle struck the wheel of the rickshaw he lost balance, attempted to catch hold of the body of the truck but failed and fell with the result that the rear wheel ran over his skull. The circumstances of the case, fit in more with the defence theory than the claimants case. A driver is expected to be alert and circumspect about the traffic. But the traffic that comes from the opposite direction, after it crosses the line of vision of the driver obviously the driver cannot look back to ensure their safety. A case of negligence would arise in such a situation only when the vehicle is of such a formation that the front portion is of less width and the rear portion is of greater width or it would be carrying materials projecting outside the body of the truck. Evidently that is not the case here. Therefore the evidence on the opposite side that they did not know of the accident until people shouted that somebody was run over is quite natural, for it was the rear wheel that ran over the skull of the boy. The very fact that in a

riding posture, with cycle in between the thighs the boy was crushed, only indicates that in a riding posture he had fallen below the body of the truck, which is ordinarily at a height of about 3 feet or more, and there after the rear wheel had run over him. Such a situation is incompatible with the theory advanced by the claimants that the front wheel of the cycle hit against the bumper and the boy fell and was run over by the rear wheel. The fallacy in this argument has already been indicated.

11. Coming to the alleged high speed about which much has been made of, there is no positive evidence as to what was the speed. But it can be well judged from the admitted fact disclosed from the spot map that the rear wheel of the truck had crossed only 8 and stopped from the dead body. So the total distance the truck covered after the accident is only 8 feet. It was alleged from the side of the claimants that no brake was applied which can be dismissed as false and frivolous for if the truck was at a high speed it could not have stopped immediately after the accident within a distance of 8 feet only even if brakes were applied effectively and more so when it was empty. Obviously also the truck had no defect which had, that very day, obtained the fitness certificate. There is also no M.V.I.'s report to that effect nor that is the case of the claimants. The driver was proceeding on the tar portion of the road leaving enough space on either side of the truck for pedestrians, cyclist and other conveyance to pass. From the above admitted features of the case I am not at all impressed that the death of the boy can be attributed to the actionable negligence on the part of the driver. The driver, as is expected of any driver, had cleared the traffic safely till they were within the line of his vision and if anything happened thereafter, and some body for some reason or other gets below the chassis and is run over by the rear wheel it is not the fault of the driver. The driver is helpless against such unforeseen situations and that can hardly come under the defect of actionable wrong. The discussion therefore of the Tribunal in fastening the responsibility on the Driver is not convincing. The witnesses may lie and waver but circumstances do not. In the instant case the surrounding circumstances discussed above are so telling that they not only out-weigh but falsify the case of the claimants. Merely because the boy has met his end does not necessarily imply that the driver was rash or negligent. The circumstances as they appear, it is the boy who ran under the body of the truck and got crushed rather than the truck ran over him. In that view of the matter, I would hold that the claim is not at all sustainable. That being my finding, the other two questions, namely, quantum or vicarious liability do not arise for consideration. If I had decided the main issue in favour of the claimants, I would not have disturbed the finding on the other two issues over vicarious liability and quantum. In the result, the appeals Misc. Appeal No. 11 of 1969 and Misc. Appeal No. 18 of 1969 are allowed. "The award is set aside and the cross objections are rejected. In the circumstances, parties will bear their own costs.