

Smt. Sumitra Dev and Others Vs. Sri Iswar Chandra Samal and Another

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Court : Orissa

Decided On : Apr-15-2013

Appellant : Smt. Sumitra Dev and Others

Respondent : Sri Iswar Chandra Samal and Another

Judgement :

HIGH COURT OF ORISSA: CUTTACK. M.A.C.A.NO.679 OF 200. From a judgment dated 13.05.2009 passed by the Motor Accident Claims Tribunal (First), Balasore in MAC Case No.27 of 2007. .. Smt. Sumitra Dev & others Appellants Respondents -versus Sri Iswar Chandra Samal and another For Appellants : M/s. B.Singh, P.B.Sinha, P.Bedi & R.R.Jena. For Respondents : M/s. S.K.Swain, L.P.Swain & U.N.Sahoo-2 (R-2) ... P R E S E N T: THE HONOURABLE MR.JUSTICE B.N.MAHAPATRA Date of Judgment :

15. 04.2013 B.N.MAHAPATRA,J.This is an appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act) filed by the claimant-appellants against the judgment dated 13.05.2009 passed by the Motor Accident Claims Tribunal (First), Balasore (hereinafter referred to as the Tribunal.) in MAC Case No.27 of 2007.

2. The case of the claimant-petitioners before the learned Tribunal was that on 11.12.2006 while the deceased, Sashibhushan Dev, was proceeding from Joda to Barbil in a Bus bearing Registration not OR-09- 2 G-0993 in the capacity of helper of the said vehicle, the bus was suddenly capsized on the way near Baneikala

Basti Road due to rash and negligent driving of the driver of the vehicle. As a result of such accident, the deceased sustained grievous injuries on his head, chest and other parts of his body and died at the spot. Subsequently, the body of the deceased was removed to Barbil hospital where post mortem examination was conducted. A police case was registered bearing Joda P.S. Case No.221 of 2006 against the driver of the vehicle for having caused the death of the deceased due to rash and negligent driving. Case of the claimant-petitioners was that since the accident took place due to rash and negligent driving of driver of the vehicle resulting death of the deceased, opposite parties are liable to pay compensation to the claimants. Further case of the claimants is that at the time of death of the deceased, he was 30 years old and was earning Rs.3,000/- per month and the claimants were dependants on his income. With these pleadings, the claimant-petitioners filed claim petition claiming compensation of Rs.4,00,000/-.

3. In absence of opposite party No.1-owner of the vehicle, the claim petition was heard ex parte.

4. The insurer- opposite party No.2 filed written statement and contested the claim of the appellant/petitioners denying the accident and involvement of the vehicle therein. While disputing the fact that the accident was due to rash and negligent driving of the driver of the vehicle, it was 3 pleaded that the driver of the vehicle had no valid and effective driving licence and opposite party No.1-owner knowing full well that the driver of the vehicle did not have valid driving licence had allowed him to ply the vehicle. Therefore, opposite party No.2-Insurance Company is not liable to pay any compensation. The Insurance Company also disputed the age, income and occupation of the deceased and denied their liability to pay the compensation.

5. On the basis of the pleadings of the parties, learned Tribunal framed the following issues:(1) (2) (3) (4) 6. Whether there is any cause of action and is the case maintainable?. Whether the deceased died in a Motor Vehicular accident due to rash and negligent driving of the driver of the offending vehicle bearing Regd. not OR-09G-0993 on 11.12.2006?. Whether the driver alleged to have been driving the offending vehicle was possessing valid driving licence at the time of

accident?. Whether the petitioners are entitled to get any compensation and if so from whom and to what extent?.. The claimants examined two witnesses, who were examined as P.Ws.1 and 2 and filed seven documents, which were marked as Exts.1 to 7. The Insurance Company has examined none as witness but produced one document on its behalf, which was marked as Ext.A.

7. After taking into consideration the oral as well as documentary evidence and rival contentions of the parties, the Tribunal came to the conclusion that the claimants had cause of action to maintain the claim 4 case. It is further held by the Tribunal that though the deceased died at the spot due to the vehicular accident involving the offending vehicle, the accident was not due to the negligence of the driver of the vehicle. Placing reliance on a judgment in the case of Nain Dev Vs. Balwinder Singh, 2003 ACJ 716.the Tribunal further held that the claimant-petitioners are entitled to get a compensation of Rs.50,000/- from opposite party No.2 on account of principle of no fault liability as the vehicle was duly insured with opposite party No.2. With this finding, the Tribunal passed the impugned order directing respondent No.2-Insurance Company to pay an amount of Rs.50,000/- as compensation along with interest at the rate of 7% per annum from the date of filing of the claim petition, i.e., 12.02.2007 within two months from the date of passing of such order. The Tribunal further directed to keep Rs.40,000/- out of the compensation amount in a fixed deposit in any nationalized bank for a period of six years in the name of claimants and remaining amount of Rs.10,000/- to be paid by way of separate cheque to claimant-petitioner No.1. Hence, the present appeal.

8. Mr.Singh, learned counsel appearing on behalf of the appellants submitted that the Tribunal has committed grave error of law in holding that the death of the deceased was caused not due to negligent driving of the vehicle and, therefore, the claimants are entitled to get compensation of Rs.50,000/- as provided under Section 140 of the M.V. Act. The appellants preferred claim petition under Section 166 of the M.V. Act. Without any 5 justifiable reason, the Tribunal illegally and arbitrarily awarded compensation under Section 140 of the M.V. Act. Mr. Singh further submitted that law is well-settled that when mechanical failure is pleaded, onus is on the driver and the owner to satisfy the conscience of the Court that such mechanical failure of the vehicle has resulted not due to lack of care and

caution on their part which they had to undertake from time to time to keep the vehicle in road-worthy condition. In other words, it must be proved as to what type of care was taken to make the vehicle roadworthy, how old the vehicle was, how much mileage the vehicle has covered and at what interval it was checked up or which was the last occasion when it was found fit and proper and by whom. Neither the owner nor the insurer has adduced any evidence to that effect. Therefore, it cannot be said that the accident was caused not due to the negligence of the driver of the vehicle. The Tribunal has committed gross illegality by ignoring the documentary evidence i.e., Exts. 1 and 2 on record, which clearly reveal that the vehicle was driven in a rash and negligent manner for which the accident was caused, whereafter charge-sheet has been submitted under Sections 279/304-B of I.P.C. against the driver of the vehicle. Concluding his argument, Mr. Singh submitted that this is a fit case where claim petition is maintainable under Section 166 of the M.V. Act and compensation should have been awarded under Section 168 of the M.V. Act

9. Per contra, learned counsel, Mr. S.K. Swain, appearing on behalf of respondent-Insurance Company submitted that in absence of any supporting material on record, the Tribunal is justified to hold that the death of the deceased was not caused due to rash and negligent driving of the driver of the offending vehicle and the claimants are entitled to get compensation on the principle of no fault liability under Section 140 of the M.V. Act. Therefore, he prayed for dismissal of the appeal.

10. On the rival contentions raised by the parties, the only question that falls for consideration by this Court is whether the Tribunal is justified to hold that the death of the deceased was not caused due to negligent driving of the driver of the offending vehicle and the claimants are entitled to be awarded with compensation under Section 140 of the M.V. Act on account of principle of no fault liability as the claim petition under Section 166 is not maintainable.

11. Section 140(1) of the M.V. Act provides that where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles the owner of the vehicle shall, or as the case

may be, the owners of the vehicles shall jointly and severally be liable to pay compensation in respect of such death or disablement. Amount of compensation payable under sub-section (1) is in accordance with the provisions of sub-section (2) of Section 140. To claim compensation under sub-section (1), the claimant shall not require to plead and establish the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person. The claim for compensation under sub-section (1) of Section 140 shall not be defeated by reason of any wrongful act or negligence or default of the person in respect of whose death or permanent disablement the claim has been made. The compensation awarded under Section 140 of the Act is in the nature of an interim award. Such payment of interim award or its acceptance is subject to final decision in the main claim case. The owner of the vehicle who is liable to pay compensation as provided under sub-section (2) of Section 140 is also liable to pay compensation under any other law for the time being in force provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under Section 140 or under Section 163A of the M.V. Act.

12. Section 163A provides special provisions as to payment of compensation on structured formula basis. Under Section 163A of the M.V. Act specified class of persons whose annual income is up to Rs.40,000/- are covered. The owner of the motor vehicle or the authorized insurer shall be liable to pay, in the case of death or permanent disablement due to accident arising out of use of motor vehicle, compensation as indicated in the 2nd schedule to the legal heirs or the victim, as the case may be. In case of claim, 8 for compensation under Section 163A, the claimant shall not be required to plead or establish that death or permanent disablement, in respect of which claim has been made was due to any wrongful act or negligence or default of the owner of the vehicle or vehicles concerned or of any other person.

13. While Section 140 and Section 163-A of the M.V. Act relate to claim on the basis of no fault liability, Section 166 of the Act provides for a complete machinery for laying a claim on fault liability. Claims for compensation under Section 166 of

the M.V. Act are required to be determined in terms of Chapter XII of the Act. The Honble Supreme Court in the case of Deepal Girishbhai Soni and others vs. United Insurance Co. Ltd., Baroda, 2004 (II) OLR (SC) -266, held as under:

67. ...In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to Rs.40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act.

14. Undisputed facts are that the deceased died at the spot in the vehicular accident involving the offending vehicle while he was working in the capacity of a Helper in the said offending vehicle. The Tribunal on the basis of the evidence of PWs 1 and 2 came to a conclusion that the accident did not take place due to rash and negligent driving of the driver. The relevant portion of the finding of the learned Tribunal is extracted herein below: Petitioners in support of their case not only examined the wife of the deceased (P.W.1) but also 9 independent witness (P.W.2). Admittedly, the wife of the deceased has not seen the accident and as such she is incompetent to speak under what circumstances the accident was taken place. Coming to the testimony of independent witness (P.W.2), he deposed that on 11.12.2006 at about 12 noon while Bus Soudagor bearing Regd. not OR-06 G993 was going towards Barbil from Joda, the front wheel axle was broken for which the Bus was capsized. Consequently, the deceased fell down and sustained injuries and met spot death. Though there is no serious cross-examination to this witness, I should say his evidence discloses that the accident was not taken place due to rash and negligent driving of the driver, but on account of sudden breakage of the vehicle. According to him, the Bus was capsized for the reason that the front wheel axle was broken. If that be so, capsize of the Bus cannot be attributed to the negligence of the driver.

15. From the above, it reveals that P.W.2 in his evidence stated that the accident took place on account of sudden breakage of front wheel axle of the vehicle and the bus was capsized. Nothing reveals from the impugned order that the opposite party/respondent owner has proved that mechanical failure has resulted in the accident despite due care and caution taken by the owner and/or the driver from

time to time to keep the vehicle in roadworthy condition. It has not been proved by any evidence as to what care was taken by the owner of the vehicle to make the vehicle roadworthy; how old the vehicle was?. How much mileage had it covered and at what interval it was being checked or which was the last occasion when it was found fit and proper and by whom. In the instant case, neither the owner nor the insurer has adduced any evidence to that effect

16. At this juncture, it will be beneficial to rely on some of the judicial pronouncements of the Honble Supreme Court and some of the High Courts.

17. The Honble Supreme Court in the case of Minu B. Mehta and another Vs. Balkrishna Ramchandra Nayan and another, AIR 1975 SC 124, held as under: 14. The burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden. In this case in the written statement all that is pleaded is that the axle brake ring of the lorry came out and the driver lost control of the motor lorry and that the defect can develop in a running vehicle resulting in the driver's losing control of the steering wheel. Though it was stated that all precautions were taken to keep the lorry in a roadworthy condition it was not specifically pleaded that the defect i.e. the axle brake ring coming out, is a latent defect and could not have been discovered by the use of reasonable care. This lack of plea is in addition to the lack of evidence and the fact that the defence set up has been rightly rejected by the Tribunal.

18. The Honble Supreme Court in the case of Pushpabai Purshottam Udeshi and others Vs. M/s Ranjit Ginning and Pressing Co. and another, 1977 A.C.J.343 held as under : 6. The normal rule is that 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. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general 11 purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. 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. Salmond on the Law of Torts (15th Ed.) at p. 306 states: "The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care. Applying the principles stated above we have to see whether the requirements of the principle have been satisfied. There can be no dispute that the car was under the management of the company's manager and that from the facts disclosed by P. W. 1 if the driver had used proper care in the ordinary course of things the car could not have gone to the right extreme of the road, dashed against a tree and moved it a few inches away. The learned counsel for the respondents submitted that the road is a very narrow road of the width of about 15 feet on either side of which were fields and that it is quite probable that cattle might have strayed into the road suddenly causing the accident. We are unable to 12 accept the plea for in a country road with a width of about 15 feet with fields on either side ordinary care requires that the car should be driven at a speed in which it could be controlled if some stray cattle happened to come into the road. From the description of the accident given by P.W.1 which stands unchallenged the car had proceeded to the right extremity of the road which is the wrong side and dashed against a tree uprooting it about 9 inches from

the ground. The car was broken on the front side and the vehicle struck the tree so heavily that the engine of the car was displaced from its original position one foot on the back and the steering wheel and the engine of the car had receded back on the driver's side. The car could not have gone to the right extremity and dashed with such violence on the tree if the driver had exercised reasonable care and caution. On the facts made out the doctrine is applicable and it is for the opponents to prove that the incident did not take place due to their negligence. This they have not even attempted to do. In the circumstances we find that the Tribunal was justified in applying the doctrine. It was submitted by the learned counsel for the respondents that as the High Court did not consider the question this point may be remitted to the High Court. We do not think it necessary to do so for the evidence on record is convincing to prove the case of rash and negligent driving set up by the claimants.

19. The Honble Supreme Court has rendered a decision in the case of Kaushnuma Begum and others Vs. New India Assurance Co. Ltd. and others, 2001(1) T.A.C. 649 (S.C.), wherein the vehicle involved in the accident was a jeep. It capsized while it was in motion. The cause of capsize was attributed to bursting of the front tyre of the jeep. In the process of capsizing, the vehicle hit against one Haji Mohammad Hanif who was walking on the road at that ill-fated moment and consequently that pedestrian was crushed and subsequently succumbed to the injuries 13 sustained in that accident. In that case, the Honble Supreme Court held as under:¹¹. It must be noted that the jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. Negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of the use of motor vehicles. There are other premises for such cause of action.

12. Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident?. This question depends upon how far the Rule in Rylands v. Fletcher (1861-73 All ER (Reprint)

1) (supra) can apply in motor accident cases. The said Rule is summarised by Blackburn, J. thus : "The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

20. The Honble Supreme Court in the case of Samir Chand Vs. M.D., Assam State Transport Corporation, 1998 (2) T.A.C. 643 (SC) held as under:15. After going through the judgment of the High Court, we are of the view that the High Court was not right on facts that there was no negligence on the part of the owner or the driver of the bus especially when the appellant has specifically pleaded about the negligence 14 which was accepted by the Tribunal in the light of the pleadings and of the evidence produced before it. The explosion took place inside the bus is an admitted fact and the usual police escort was not there. The High Court, except observing that there was no negligence, has not upset the finding of the Tribunal that the atmosphere during the period of accident was so polluted requiring care on the part of the conductor and driver of the bus. There cannot be any doubt that the accident arose out of the use of the motor vehicle justifying the claim of the appellant. We are satisfied with the assessment of the Tribunal in quantifying the compensation in a sum of Rs.1,20,000/- with interest at the rate of 12%.

21. The Gauhati High Court in the case of Mafisuddin Khadim Vs. National Insurance Company Ltd., 2011 (2) T.A.C. 396 (Gau.) held as under:22. As revealed from the record, there is nothing on record to find that the injured, who was driving the vehicle had any negligence or lapse on his part. Admittedly, the tree had suddenly fallen on the top of the vehicle and due to falling of the tree on the said vehicle, which was used by the appellant, the appellant sustained the injuries. Had he not used the vehicle at the relevant time, he would not have sustained the injuries. So, it can be held that he sustained the injuries only because, unfortunately, he had used the said vehicle. Therefore, he sustained the

injuries during the course of the use of the vehicle aforesaid. In view of the above, considering the entire aspect of the matter and in the light of the principles laid down in the above cited decisions and the statutory provisions prescribed by the Motor Vehicles Act, I have no hesitation in holding that the claimant sustained the injuries while using the vehicle and as such the injuries sustained by him was caused due to accident arising out of the use of the said vehicle. Therefore, the only conclusion would be that the claimant sustained the injuries in a vehicular accident.

23. In view of the above discussion, I am of the considered opinion that the learned trial Judge 15 committed error by holding that the injuries sustained by the claimant, due to fall of a tree on the vehicle, did not amount to a vehicular accident. Accordingly, it is held that the vehicle used by the claimant met with an accident on the relevant date and as such the claimant sustained the injuries in a vehicular accident involving the said vehicle.

24. In view of the above discussion, there is sufficient merit in this appeal. Hence, the appeal is allowed. The impugned judgment and order is set aside and quashed. The matter is remanded back to the Motor Accident Claims Tribunal, Agartala for fresh disposal in the light of the above observation, after giving opportunities to both the parties. As the claim case relates to the year 2000, the learned Member, Motor Accident Claims Tribunal, West Tripura, Agartala is directed to dispose off the matter within a period of three months from the date of receipt of copy of this judgment and order.

22. In view of the above, this Court is of the opinion that the Tribunal is not correct in holding that the death of the deceased was not caused due to negligent driving of the driver of the offending vehicle. Hence, the claim petition filed under Section 166 of the Act, 1988 is maintainable and the same needs to be adjudicated afresh. From the impugned order, this Court finds that since the claim application of the appellant-petitioners for award of the compensation was rejected on the ground that there was no rash and negligent driving on the part of the driver, other issues relating to age and income have not been adjudicated by the learned Tribunal.

23. In the fact situation, the impugned judgment and order is set aside. The matter is remanded back to the Motor Accident Claims Tribunal (First), Balasore for disposal afresh in the light of the observation made above 16 and keeping in mind the various judicial pronouncements cited hereinbefore after giving opportunity to both parties. Since the accident took place in the year 2006, learned Tribunal is directed to dispose of the matter within a period of four months from the date of receipt of a copy of this judgment.

24. In the result, the appeal is allowed to the extent indicated above. .
B.N.Mahapatra,J.Orissa High Court, Cuttack, The 15th April, 2013/ss.

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