

Drupad Kumar Barua Vs. Assam State Trans. Corpn. and ors.

Drupad Kumar Barua Vs. Assam State Trans. Corpn. and ors.

SooperKanoon Citation : sooperkanoon.com/126460

Court : Guwahati

Decided On : Sep-29-1988

Judge : B.L. Hansaria, J.

Appeal No. : MA (F) No. 61 of 1979

Appellant : Drupad Kumar Barua

Respondent : Assam State Trans. Corpn. and ors.

Advocate for Def. : B.P. Katakya, Government Adv. and P.C. Deka, Adv.

Advocate for Pet/Ap. : D.P. Chaliha and R. Chakravorty, Advs.

Disposition : Appeal allowed

Judgement :

B.L. Hansaria, J.

1. The appellant was involved in a motor accident on 5.10.1967. He was then aged about 31 years. On the ill-fated day he was travelling from Shillong to Guwahati by a bus belonging to the State Transport Department of the Government of Assam. The accident took place about 9 miles away from Guwahati. At that place there was a collision between the bus and a truck coming from opposite direction. In the accident the appellant suffered fractures of different bones including the neck of right femur and right fibula. The injuries were so grave

that the appellant became permanently disabled. The accident has also affected his longevity. The great impact on the health of the appellant can be well imagined by the fact that though the accident took place on 5.10.1967 he could join his service only on 1.12.1973 which shows that for more than 6 years he could not regain sufficient strength to join his service which was of Claims Inspector under the Railways.

2. The appellant claimed a sum of Rs. 5.5 lakhs as compensation under the, following heads:

(1) Pain and suffering ... Rs. 10,000/-

(2) Nervous shock ... Rs. 10,000/-

(3) Loss of income

in life ... Rs. 3,00,000/-

(4) Loss on account of

shortening of life and

loss of enjoyment ... Rs. 1,50,000/-

(5) Medical expenses ... Rs. 30,000/-

(6) Personal

inconvenience ... Rs. 50,000/-

Total Rs. 5,50,000/-

2A. The learned Member of the Motor Accidents Claims Tribunal has, however, awarded a sum of Rs. 76,327.87 as below:

(1) For pain, sufferng

and nervous shock ... Rs. 20,000.00

(2) For loss of income ... Rs. 21,000.00

(3) For loss on account

of personal

inconvenience and

shortening of life ... Rs. 30,000.00

(4) For medical expenses ... Rs. 5,327.87

Total Rs. 76,327.87

This apart, the entire amount has been made payable by the owner and insurer of the truck, the insurer having been made liable to pay Rs. 20,000/- and the owner of the truck having been saddled with the liability to pay the remaining sum of Rs. 56,327.87. Nothing has been awarded against the State, which had owned the bus at the relevant time which now belongs to the Assam State Road Transport Corporation, for short 'the Corporation', inasmuch as according to the learned Member the bus had not been driven in a rash or negligent manner. Feeling aggrieved with the quantum of award and exoneration of the State to pay compensation the appellant has filed this appeal.

3. The first question to be determined is whether there was any negligence on the part of the driver of the bus. On this aspect of the matter we have on record the deposition of PW1, Bandhura Das and of OPW 3 who was the driver of the bus. The evidence of PW1 who was travelling in the bus along with the appellant is that at about 7 p.m. on 5.10.1967 when the bus was about 9 miles away from Guwahati he saw a truck coming from opposite direction which was in high speed, as was the bus. The truck hit against the right side of the bus as a result of which the timber of the body of the bus entered appellant's body and remained stuck there. The appellant became unconscious on the spot and later he was brought to

Gauhati Medical College Hospital for treatment. According to PW1 the accident would not have occurred if any of the vehicles had been driven carefully. This witness had not been cross-examined on 7.5.1976 when his evidence was recorded. He was, however, recalled for cross-examination on 16.2.1978 when he soft-pedalled his earlier evidence and stated that he had seen the truck coming from front which had not switched off the light while crossing the bus. According to the later version given by this witness the bus was being driven at a speed of 25 miles per hour; it was not in high speed. The accident took place as per the second version given by this witness due to the fault of the driver of the truck. According to this witness the bus driver could not see the road because of the light coming from front.

4. Relying on the evidence of this sole eyewitness examined on behalf of the claimant, Mr. Deka has urged that no fault can reasonably be found with the driver of the bus. Learned counsel has, therefore, supported the view taken by the Claims Tribunal to fortify which he has also referred to the evidence of the driver. Let us see what did the driver say who was examined as OPW 3. According to the driver, on the date of occurrence the bus had started from Shillong at 5 p.m. and he stated in cross-examination that normally it took three and half hours to reach Guwahati from Shillong. This shows that if the bus would have been driven in normal speed it would not have reached the place of occurrence which was only about 9 miles away from Guwahati at about 7 p.m. within about two hours of leaving Shillong. This fact itself shows that the bus was driven in high speed. It cannot, therefore, be accepted that the bus was not being driven rashly. The further evidence of the driver is that near the place of occurrence he saw two trucks coming from Guwahati towards Shillong. At the place of occurrence the second truck tried to overtake the first one as a result of which it hit against the right side of the bus. It is further stated that the truck which had tried to overtake had no light. The driver further deposed that the light of the first truck dazzled his eyes because of which he could not see anything.

5. The story of the two trucks coming from Guwahati side and one trying to overtake the other is a creation of the driver inasmuch as there is not even a whisper about it in the written statement filed on behalf of the State, in para 9 of

which while describing the manner of accident mention has been made about one truck only. Even PW1 who was cross-examined after about two years was not asked anything about the presence of two trucks near the place of occurrence. It has been contended by Mr. Chaliha that we may not accept this version of the accident given by the driver of the bus. It has also been urged by the learned counsel that if the eyes of the driver got dazzled, he should have stopped the vehicle instead of taking the risk of driving by guess, as deposed by the driver. Mr. Deka would not, however, accept negligence of the driver of the bus in causing the accident inasmuch as he submits that the bus was being driven on its own side and it was encroachment of the road by the truck driver which had caused the accident. To support him in this regard our attention has been invited to Exh. A which is a sketch map of the place of accident which shows that out of about 20 ft. width of the road the bus had occupied about 9 ft. leaving about 11 ft. for the truck. The sketch map was prepared by the Divisional Superintendent of the Corporation. If reliance on the map can be placed, the same would no doubt show that the bus was being driven on its correct side, but then that is not enough to hold that the driver of the bus was not negligent inasmuch as driving it at high speed about which reference has been made earlier would itself be a negligent act on the part of the driver. We may state here that the road connecting Shillong and Guwahati is about 64 miles and is hilly and full of curves. It may also be mentioned that according to the driver of the bus, at the relevant time the bus was coming down and the truck was climbing up. This in itself would indicate that the truck could not have been in high speed at the relevant time, whereas the bus could have well been.

6. In view of what has been stated above we are of the view that the negligence of the driver of the bus was also one of the causes of the accident. The accident was thus a result of composite negligence of the two drivers. The Corporation cannot, therefore, escape its liability in the matter.

7. Let us now see what is the extent of liability of both the tortfeasors. In so far as compensation on account of pain, suffering and nervous shock is concerned the appellant had claimed Rs. 20,000/- in all and has been awarded this amount. So, the award on this count is upheld.

8. One of the main grievances of Mr. D.P. Chaliha is related to the granting of only Rs. 21,000/- towards loss of income as against the claim of Rs. 3,00,000/-. The learned Tribunal, however, awarded Rs. 21,000/- taking into consideration the fact that the claimant who was on leave for about 74 months after the accident had been given full pay and half average pay for about two and half years with the result that he did not receive any pay for about three and half years. As the monthly salary of the claimant-appellant at the relevant time was Rs. 500/- it was concluded by the Tribunal that the claimant suffered total loss of Rs. 21,000/- during the period he was on leave without pay. Mr. Chaliha has urged that the claimant had been given leave without pay for a period of about five years one month and as such the total loss on this count was Rs. 30,500/- if the monthly loss is calculated at Rs. 500/-. We have ourselves gone through the calculation made by Mr. Chaliha and we find that this submission is correct. Thus the loss during the period the claimant was on leave comes to Rs. 30,500/-. If nothing further would have happened we would have allowed compensation of Rs. 30,500/- only on this count, but then the subsequent event which is of seeking voluntary retirement by the claimant w.e.f. 1.6.1986 cannot be overlooked or ignored inasmuch as the same was sought due to 'continuous ill health and partial disability caused in the motor accident on 5.10.1967' as stated in the letter of voluntary retirement a copy of which is filed before us. In the normal course the claimant would have reached the age of superannuation in 1994 and as such he has lost his full pay for about 8 years. At the time when he sought premature retirement the salary of the petitioner was Rs. 3,000/- p.m. and as such the annual loss comes to Rs. 36,000/-. Mr. Deka urges that from this loss the monthly pension granted to the petitioner at the rate of Rs. 1,220/- p.m. has to be deducted inasmuch as the appellant cannot claim full salary and pension at the same time. Though in this connection Mr. Chaliha has referred to *Saminder Kaur v. Union of India*, 1987 ACJ 7 (Gauhati), the same cannot assist the appellant inasmuch as what has been held in the aforesaid decision is that family pension was not deductible inasmuch as that pension would have been payable even in case of natural death. In the present case we are not concerned with family pension but with the pension of the incumbent himself which has to be deducted because as already stated above an incumbent cannot claim both full salary and pension. The monthly loss is therefore assessed at about Rs.

1,800/- and the yearly loss thus comes to Rs. 21,600/-. Loss for 8 years would thus be about Rs. 1,73,000/-. If to this sum we add Rs. 30,500/- which the claimant had lost during the period of his absence from duty, the total loss on this count comes to about Rs. 1,93,000/- (Sic. Rs. 2,03,000/-).

9. Mr. Deka has urged that the total loss of income of the appellant may not be taken as Rs. 1,93,000/- but should be assessed at about three and half times of the yearly salary. This submission has been made by the learned counsel on the basis of *O.P. Bhandari v. Indian Tourism Development Corporation Ltd.* AIR 1987 SC 111, wherein the multiplier of 3.33 was made applicable while deciding how much of compensation should be paid to a workman in lieu of reinstatement. In that case also the date of superannuation was more than 8 years away and therefore the claim for full salary and allowances till the date of superannuation was not held to be reasonable. We do not, however, think if the aforesaid basis of calculating compensation to be paid to a workman in lieu of reinstatement would provide a safeguard to determine compensation for a case like the one at hand. But then some deduction has to be made on account of lump sum payment and also because of uncertainty of life. According to *Him Devi v. Bhaba Kanti Das* 1977 ACJ 293 (Assam & Nagaland), which is a Full Bench decision of this court, 20 per cent has to be deducted towards uncertainty of life and 10 per cent on account of lump sum payment. If 30 per cent is deducted from Rs. 1,93,000/-, the total amount payable comes to about Rs. 1,29,000/- which can be rounded to Rs. 1,30,000/-. We shall grant this amount to the appellant on account of loss of income.

10. The next head of compensation is relatable to medical expenses. In this connection the claimant prayed for compensation of Rs. 30,000/- but as vouchers worth Rs. 5,327.87 were produced, the learned Tribunal granted this amount. It is stated by Mr. Chaliha that it was too much to expect from the claimant to preserve all the vouchers of payments made by him during the course of more than six years he was under treatment after the accident. Not only this, it appears from the evidence of PW2, Dr. Chakravorty that the claimant was in touch with the doctors even by 1977. Reference has been made to *Rukmani Devi v. Basantilal*, 1984 ACJ 548 (MP), in which on the failure of the claimant to produce receipts of medical

expenses denial of reasonable expenditure was not upheld. We are of the firm opinion that keeping in view 10 years' period during which the claimant was in constant touch with the doctor he must have incurred expenditure much more than Rs. 5,327.87. During this period the claimant was required to go to Patna on three occasions to have consultations with, and treatment of, Dr. Mukhupadhy. We are, therefore, of the view that this amount needs enhancement and we do so by fixing Rs. 20,000/- as payable on this count.

11. The last head of the amount claimed as compensation is relatable to the loss on account of shortening of life, loss of enjoyment and of personal inconvenience. A total sum of Rs. 2,00,000/- has been claimed on this count but the learned Tribunal has awarded Rs. 30,000/-. On this aspect of the case we may refer to the evidence of PW2 besides what has been deposed by the claimant himself. As per PW2 who at the relevant time was Resident Surgeon, Orthopedic Department, Silchar Medical College, the claimant's right knee and hip will never come back to normalcy and he would face much difficulty in walking. According to this witness the claimant is crippled and he will remain as such for the rest of his life. As per this witness the claimant who was around 31 years at the time of occurrence would not be able to perform normal sexual activities. The further opinion of PW2 is that the health of the claimant may deteriorate further and his longevity may be shortened. According to the claimant though before the accident he could drive his own car but after the accident he has been required to engage a driver. This is likely to continue throughout his life. The difficulty and distress caused to the claimant can well be imagined by the fact that he had to go on voluntary retirement due to ill health and partial disability. Nobody could normally like to leave his job if there be no compelling circumstances. The job was quite respectable as at the time of going on voluntary retirement he was drawing a salary of Rs. 3,000/- p.m. Keeping in view all these we are of the view that a sum of Rs. 60,000/- in place of Rs. 30,000/- awarded by the learned Tribunal can safely be awarded on this count.

12. The total amount payable thus comes to Rs. 2,30,000/- as below:

(1) Pain, suffering and

nervous shock ... Rs. 20,000/-

(2) Loss of income ... Rs. 1,30,000/-

(3) Medical expense ... Rs. 20,000/-

(4) Shortening of life,

loss of enjoyment

and personal

inconvenience ... Rs. 60,000/-

Total Rs. 2,30,000/-

13. The question is who should be called upon to pay this amount. It would depend upon the question whether the two drivers can be regarded as joint tortfeasors. The submission of Mr. Chaliha is that they are so, and hence the liability has to be borne jointly and severally by the owners of the truck and bus. It is settled law that in case of joint tortfeasors the liability is joint and several. In this connection we may refer to *Lakshmmamma v. C. Das* 1985 ACJ 199 (Karnataka), wherein it was stated in para 21 that in case of composite negligence it is not necessary to apportion the negligence but an award can be passed against all the joint tortfeasors making the liability joint and several. In coming to (sic). conclusion reference was made to *K. Gopalakrishnan v. Sankara Narayanan* 1969 ACJ 34 (Madras); *Golak Chandra Das v. Kousalya Nayak* 1978 ACJ 48 (Orissa); *Karunakar Pradhan v. Sarojini Mishra* 1980 ACJ 121 (Orissa); *A. Shivarudrappa v. General Manager, Mysore Road Transport Corporation* 1973 ACJ 302 (Mysore) and *K. V. Narasappa v. Kamalamma* 1969 ACJ 127 (Mysore). This view has also been adopted in *General Manager, Karnataka State Road Trans. Corpn. v. Krishnan* 1981 ACJ 273 (Karnataka); *United India Fire and General Insurance Co. Ltd. v. U.E. Prasad* 1985 ACJ 280 (Karnataka). In this connection we may also refer with profit to the observations made in para 24 of *Him Devi v. Bhaba Kanti Das* 1977 ACJ 293 (Assam & Nagaland), where it was stated that in case of composite negligence as distinguished from contributory negligence, there can be

no apportionment of damage. It was further pointed out that in case of joint tortfeasors the claimants are entitled to a decree against both the tortfeasors.

14. The same view was taken by Madhya Pradesh High Court in *Rehana v. Abdul Majeed* 1985 ACJ 193 (MP), in which case while referring to distinction between composite negligence and contributory negligence it was stated that when a person is injured without any negligence on his part but as a result of combined effect of negligence of two other persons it is not a case of contributory negligence but is what is styled as composite negligence. In such a case the persons causing injury can be sued for the whole damage. Similar views have been expressed in *Fleming's Law of Torts*, 5th Edn., pp. 239-40; and *Salmond's Law of Torts*, 17th Edn., p. 443.

15. Mr. Deka has, however, drawn our attention to a Bench decision of this court in *Jamuna Sinha v. Ram Chandra Rai* 1983 ACJ 90 (Gauhati), in which the responsibility for the accident was placed equally on both the car and truck drivers and the awarded amount was apportioned equally between the two insurers. This decision cannot really assist the respondents inasmuch as the award was passed in that case without adverting to the question posed in this case.

16. Important question is whether the present was a case of causing injury to the claimant as joint tortfeasors or were the wrongdoers several tortfeasors. A reference to standard textbooks on Law of Torts shows that a tort is imputed to several persons as joint tortfeasors in at least three instances, viz., (1) agency, (2) vicarious liability, and (3) concerted action. For the case at hand the first two instances are not applicable. As to the third the critical element is that those participating in the commission of the tort must have acted in furtherance of a common design. To put it differently there must be 'concerted action to a common end', not merely 'a coincidence of separate acts which by their conjoined effect cause damage'. Broadly speaking this means a conspiracy with all participants acting in furtherance of the wrong though it is probably not necessary that they should realise that they are committing a tort. This is how the law has been put at page 237 of *Fleming's Law of Torts*, 5th Edn. In *Salmond's Law of Torts* this aspect has been dealt with at page 442 of 17th Edn. As per Salmond persons are

deemed to be joint tortfeasors whenever they are responsible for the same tort, that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases, namely, agency, vicarious liability and concerted action, i.e., where a tort is committed in the course of a common action; a joint act is done in pursuance of a concerted purpose. For example, in *Brooke v. Bool*, (1928) 2 KB 578, the defendant, accompanied by one Morris, entered premises occupied by the plaintiff in order to search for an escape of gas. The defendant examined a gas pipe with a naked flame. Morris followed his example and the resultant explosion damaged the premises. The defendant was held responsible for the act of Morris. Thus in order to be joint tortfeasors there must be concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by the conjoined effect cause damage.

17. In the *Law of Torts by Street*, four categories of joint tortfeasors have been mentioned (see page 473 of 7th Edn.):

(a) master and servant in those cases where the master is vicariously liable for the tort of the servant;

(b) where one person instigates another to commit a tort;

(c) where there is a breach of duty imposed jointly on two or more persons, e.g., two occupiers are joint tortfeasors if they are sued by a visitor for failure to take reasonable care in respect of the premises jointly occupied by them; and

(d) where persons take 'concerted action to a common end', and in the course of executing that joint purpose, any one of them commits tort.

18. According to Street, several or separate or independent tortfeasors are of two kinds, either those whose tortious acts combine to produce the same damage, or those whose acts cause different damages to the same plaintiff. As an illustration of the first, reference has been made to the case of *Drinkwater v. Kimber*, (1952) 2 KB 281, where a passenger in a motor car was injured in a collision between that car and another. Morris, LJ. said that the two drivers both of whom were negligent

were separate tortfeasors whose concurrent acts caused injury to the female plaintiff. *Thompson v. London County Council* (1899) 1 QB 840, furnished another example of tortfeasors who were not joint, but several, concurrent tortfeasors. In that case the plaintiff's house was damaged when its foundation subsided. This was caused by (1) negligent excavation by D-1, and (2) D-2, a water company, negligently allowing water to escape from their main. We lastly refer to *Law of Torts* by Winfield and Jolowicz (10th Edn.). The question of joint and several tortfeasors has been dealt with at pages 545-6. Joint tortfeasors are those persons when their separate shares in the commission of the tort are done in furtherance of a common design. Reference was made to *Brooke v. Bool* (1928) 2 KB 578. But where two ships collided with each other because of the independent acts of negligence of each of them, which were the facts in *Kurask* (1924), p. 140, and one of them then without further negligence collided with a third. It was held that owner of the third ship had independent cause of action against the two negligent ships.

19. The law relating to joint tortfeasors may thus be explained by stating that except in case of agency or vicarious liability or imposition of joint duty, the tortfeasors must act in furtherance of common design or concerted action to a common end to be regarded as joint tortfeasors. To give an analogy which is well-known in criminal law joint tortfeasors would be one who acts as stated in Section 34, Indian Penal Code in furtherance of the common intention or in prosecution of the common object of which mention has been made in Section 149, Indian Penal Code.

20. In the present case none of the aforesaid elements is present. Two drivers cannot, therefore, be regarded as joint tortfeasors but they are in law several tortfeasors. So, for the acts of one the other cannot be held liable jointly or severally.

21. This being the legal position, it has to be seen as to what was the degree of negligence of each of the two concerned drivers. From the facts stated above, we hold that they were equally liable and so we fasten the liability of each of the two tortfeasors in the ratio of fifty-fifty, that is to say, that the owner of the truck shall

pay a sum of Rs. 1,15,000/- (50 per cent of Rs. 2,30,000/-) of which amount the insurer of the truck shall pay Rs. 20,000/-. Remaining sum (Rs. 1,15,000/-) shall be paid by the Corporation. This apart, both the parties including the insurer shall pay interest at the rate of 6 per cent per annum from the date of filing of the claim petition, which was 5.8.1968 till today. The interest would run at the rate of 12 per cent per annum from today. In the result, the appeal is allowed as indicated above.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com