PATNA HIGH COURT

Dwarka Prasad

Vs

Sushila Devi

Appeal from Original Order No. 336 of 1976

(Hari Lal Agrawal and Krishna Ballabh Sinha - JJ.)

02.02.1983

JUDGEMENT

Hari Lal Agrawal, J.

1. This is an appeal under Section 110-D of the Motor Vehicles Act by the owners of a private Ambassador Car No. WBF 7613, against the judgment and order of the District Judge, Bhagalpur, awarding a sum of Rs. 20,000/- as compensation to the respondents for the accident which took place on 20-6-1970 at about 4 p.m. by their car on Anand Chikitsalaya Road in the town of Bhagalpur in front of the house of one Mahabir Prasad.

2. With respect to the facts, there was a small controversy between the parties. Whereas according to the case of the claimants, the accident took place while appellant No. 2 was driving the car, according to the defense case the car was standing in front of the house of the appellants and the driver was cleaning it. The driver, however, went to take tea leaving the key in the car by mistake and in the meantime some unknown boy, of the locality started the car which caused severe injuries to Ramratan Singh (38 years) who succumbed to his injuries on way to the hospital.

3. In the application for compensation filed by the widow of the deceased and his minor children a sum of Rs. 40,000/- was claimed as compensation.

4. Two witnesses were examined on behalf of the claimants and seven on behalf at the appellants. It is not necessary to advert to their evidence on the record as the learned counsel for both the parties did not challenge the findings recorded by the learned District Judge. He accepted the case of the appellants regarding the manner of occurrence, namely, that the car was started by some unknown person unnoticed by anybody and in course of the movement of the car it knocked the deceased against a wall resulting in his death as already said earlier.

5. By applying the rule of res ipsa loquitur the learned Judge has rightly put the burden of proof on the appellants. The doctrine of res ipsa loquitur is well known in law, which is an exception to the normal rule that it is for the plaintiff to prove negligence and not for the defendant to disprove

it. Exception applies where the circumstances surrounding the thing which causes the damage are, at the material time, exclusively under the control and management of the defendant on his servant and the happening is such as does not occur in ordinary course of things without negligence on defendant's part. In other words, where the facts and circumstances make out a clear case of negligence it is for the defense to prove otherwise. Salmond in his Law of Torts says that this doctrine applies whenever it is so improbable that such an accident would not have happened without the negligence of the defendant. Halsbury's Laws of England explains this principle in the following terms :

> "Where the doctrine applies, presumption of fault is raised against the defendant which, if he has to succeed in his defense, must be overcome by contrary evidence, the burden of the defendant being to show how the act complained of could reasonably happen without negligence on his part."

In essence the doctrine of res ipsa loquitur is a rule of evidence effecting the burden of woof, and, therefore, the learned counsel for the appellants rightly did not advance any argument to avoid the liability for the accident. The trial Court taking into account the earning capacity of the deceased, namely, Rs. 350/- per month, has awarded a sum of Rs. 20,000/- as compensation against appellant No. 1. It, however, exonerated the Insurance Company on the ground that its liability could arise only in case where the car was driven by a licensed driver and inasmuch as according to the very defense version, the car was driven by someone else, the insurer was not liable.
The amount of compensation also has not been challenged and, therefore, we are not bothered on this question, particularly when there is no fixed rule for calculating the quantum of compensation and the learned Judge has estimated by balancing the pecuniary loss to the claimants on the death of the earning member of the family. This is the right test for awarding compensation to the dependents as laid down in several cases (see *Gobald Motor Services Ltd. v. R.M.K. Veluswami*[1]*,).*

6. The only question that has been canvassed before us on behalf of the appellants is as to whether their liability could be shifted upon the Insurance Company which has since been taken over by the National Insurance Co. Ltd., added as respondent No. 7, on account of the nationalisation of the Insurance companies.

7. The contention of the learned counsel appearing for the Insurance Company was that under Section 96(2) of the Act the liability of the insurer would arise only when the vehicle was driven by a licensed driver; in other words, be supported the reasoning of the trial Court. He also placed reliance on the case of *Sardar Nand Singh v. Abhyabala Debi*[2]*,* In that case the driver of the truck which was being driven in course of the business of the owners thereof, allowed a person to drive the same having no licence and it was held that the liability would rest with the owners of the truck for the negligence of their servant (driver). In this regard Section 84 of the Motor Vehicles Act is also relevant to be seen which lays down that no person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is any driver, duly licensed to drive a vehicle and unless
the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver and in

such a case the owner becomes vicariously liable.

8. On the facts of the present case it is obvious that here the driver had not permitted anybody to drive the vehicle. He might not even be expecting such an eventuality, but nonetheless his omission in not taking the precautions just mentioned above would be a negligent act (see *Pushpabai Parshottam Udeshi v. Ranjit Ginning and Pressing Co. Pvt. Ltd*[3]*.,* and *K. Jayaraja Ballal v. Alfred Quadres*[4]*,).* The argument of Mr. Ghose on the aforesaid facts was that once negligence of the driver was found, as in the present case it must be found, the owner of the vehicle, who had taken a policy of insurance against third parties, would certainly be entitled to be indemnified by the insurer. This contention finds full support from the case of *Minu B. Mehta v. Balkrishna Ramchandra Nayan*[5]*,* where with reference to Section 95(1)(b)(i) it was observed that the said provision required that the policy of insurance must be a policy which insures a person against any liability which may be incurred by him in respect of the death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in the public place. The Insurance policy is only to cover the liability of a person which he might have incurred in respect of such an accident, i.e., for which the owner or the insured is liable. In the case of a motor accident the owner is only liable for negligence and on proof of his vicarious liabilities for the acts of his servant.

9. From the above discussions it is clear and was not disputed that the liability of appellant No. 1 for the negligent act of his driver is there. If appellant No. 1 being the owner of the car is liable, then I do not see why if the insurance was taken to cover third party risk, the Insurance company cannot be fastened with the liability. The appellant had taken an insurance policy to cover the risk against third party. Clause (b) of Section 95(1) ensures the person against the liability incurred by him in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle in public place. In view of this cover the appellant No. 1 appears to me to be certainly entitled to shift the burden of the compensation awarded against him on the Insurance company which, in this case the car being a private one, is unlimited. I would, therefore, accept the argument of Mr. S.C. Ghose that on the facts and in the circumstances discussed above the liability of appellant No. 1 should be shifted from him to the National Insurance Co. Ltd., respondent No. 7.

10. In the result, the appeal is dismissed with the modifications indicated above. The Insurance Company, respondent No. 7, must pay the compensation to the claimants within a period of three months from today, subject to its liability to all statutory interests etc. In the circumstances, I shall make no order as to costs and this will make the appellants also bear the suffering to some extent.

K. B. SINHA, J.

11. I agree.

Appeal dismissed.
Cases Referred.

[1] AIR 1962 SC 1
[2] AIR 1955 Ass 157

[3] AIR 1977 SC 1735
[4] AIR 1979 Kar 134
[5] AIR 1977 SC 1248