(1974) 07 CAL CK 0023

Calcutta High Court

Case No: F.M.A. No. 4 of 1973

Calcutta Insurance Co. and Another		APPELLANT
	Vs	
Rita Ganguli and Others		RESPONDENT

Date of Decision: July 4, 1974

Citation: 79 CWN 69

Hon'ble Judges: P.K. Chanda, J; A.K. Sinha, J

Bench: Division Bench

Advocate: Manick Ch. Banerjee and Miss Jaya Bose, for the Appellant;Dilip Kumar Sett, for the Respondent

Final Decision: Dismissed

Judgement

Chanda, J.

This appeal arises out of an award of compensation given by the Motor Accident Claims Tribunal, Hooghly (referred to herein as claims Tribunal) in favour of respondent No. 1, Rita Ganguly who was involved in a motor accident on 29.8.70. The Tribunal on a consideration of the evidence has found that Rita was knocked down by the public bus bearing No. WGA-3170 belonging to the O.P. No. 1 owing-to rash and negligent driving by C.P.W. 2 Provash--on the G.T. Road at about 4.30 p.m. on 29.8.70 while Rita was going to her tutor along the southern flank of the G.T. Road at Sheorafuli. The Tribunal has awarded Rs. 19,000/-as compensation including the expenses of the medical treatment. Being aggrieved by that decision M/s. Calcutta Insurance Co., with whom the bus was insured and who was arrayed as O.P. 2 in the proceeding before the claims Tribunal has come with this appeal. Mr. Banerjee appearing: on behalf of the appellant has submitted that from the materials on the record the Tribunal should have held that the accident did not occur due to rashness or negligence of the driver; that the Tribunal erred in law in not holding that Rita was guilty of contributory negligence; that the quantum of compensation is highly arbitrary, excessive and improper and it has been assessed

by the application of wrong principles of law.

2. The actual incident was witnessed by P.W.2 Upananda Banerjee who runs a tailoring shop at Sheoraphuli on the G.T.Road and P.W. 3, owner of a nearby Cabinet shop It will be pro per to refer: to the evidence of Rita (P.W. 5) before we deal with the evidences of the two witnesses because being involved in the accident She is in a better position give a correct picture of the incident After discussing the evidence the learned judge proceeded :

* * * *

3. There is no evidence of any mechanical defect in the bus. From the evidence on the record it cannot be said that the learned Judge of the Claims Tribunal'' was wrong in saying that when Rita was going from the east to the west along the southern flank of the G.T. Road i.e. along the left flank, the offending bus which was proceeding along the pitched portion, suddenly took a turn to the left, came upon the flank and knocked down Rita from behind and then the bus ran over her causing injuries.

4. Now the question that emerges for consideration is whether the injuries were due to the negligence of the driver of the vehicle involved in the accident. As earlier observed there was no mechanical defect in the bus. The driver has not said that the accident was sudden and unforeseen and could not be prevented even if he wanted to exercise due care and caution and it was inevitable. Negligence is a question of fact. The balance of probability in the instant case however is in favour of the claimant. In the case reported in Suleman Rehiman Mulani and Another Vs. State of Maharashtra, the Supreme Court has observed that there must be proof that rash or negligent act of the accused was the proximate cause of the death. There must be direct nexus between the death of a person and the rash or negligent act of the accused. The burden of proof is always upon the claimant who alleges negligence but in proper cases it shifts. In the case (11) Municipal Corporation of Delhi Vs. Subhagwanti and Others, the Supreme Court observed : --

Onus of proof is normally on the plaintiff. Where facts and circumstances make out a clear case of negligence it is for defence to prove that he was not negligent.

In Pijush Kanti Ghosh Vs. Sm. Maya Rani Chatterjee and Others, , this Court held that a claimant may, however, raise a plea of res ipsa loquitur when it is for the owner or driver to prove absence of negligence. There may not be direct evidence of negligence. It may be proved by indirect or circumstantial evidence in proper cases as has been held in (1) P. Arumullhan v. Bethnamah (1966) 1 M.L.J. 554. In (16) Mt. Sukhraji Bhuj Vs. Calcutta State Transport Corporation, where Lord Buckland was quoted-- "The real cause of accident though not proved by direct evidence may be in-ferentially established by the presence of facts too strong to be ignored." In (2) Awadh Behari Sharma Vs. State of Madhya Pradesh, in connection with a case of collusion between two trains the Supreme Court observed :

The correct approaches in a matter of this kind should be to determine the crucial issue not on a mere balance of oral evidence but no broader considerations and clear probabilities. In a matter of this kind, oral evidence is likely to be honestly discrepant and the question is not one of weighing the reliability of witnesses.

5. It cannot be denied that a driver of a motor vehicle on a public through fare must drive the vehicle with reasonable care and he owes a duty of care not to imperil the safety of the pedestrains. The accident in the instant case speaks for itself. The girl was walking by the flank of the pitched road primarily meant for the pedestrains. The bus was to be driven over the pitched portion of the high way. It knocked down the girl on the flank. Not only that, it proceeded further and dashed against an electric light post. If the driver used proper care such could not have happened in the ordinary course of things. On the circumstances of this case the Res speaks and is eloquent because all these facts remain unexplained. In the case of (8) Gobald Motor Service Ltd, v. Yelu-swami, reported in AIR 1962 3.C. 1 an omnibus left the road and an accident took place on the outside. The Supreme Court held that the principle of res ipsa loquitur was at once attracted. Negligence was presumed as the cause of the event unless the defendant rebutted the presumption the plaintiff was to succeed.

6. We now turn to the amount of compensation awarded by the learned Judge. The learned Judge has awarded a sum of Rs. 19,000/- and the appellant Insurance Company has been directed to pay the amount. The claimant submitted accounts and receipts for the expenditure amounting to Rs. 2,434-89 in connection with her treatment in the hospital and the amount has been accepted by the learned Judge of the Tribunal. Apart from this amount, the learned Judge of the Tribunal. Apart from this amount, the learned Judge thought that the girl should get Rs. 17,000/- by way of general damages. While calculating the total amount, the learned Judge excluded the sum of Rs. 434-89 P. In assessing the general damage the learned Judge has said : --

Rita is an unmarried girl now (sic) 19. As a result of the accident she has been permanently disfigured and disabled. She had to walk limping. She would not be in a position to give normal delivery as the pelvis has been disfigured and her left arm has also been disfigured. Hence it is very difficult to settle herself in normal life, for it is very doubtful if any body would be prepared to marry a disfigured girl like her. Moreover, it is all the more doubtful if she would be in a position to become a mother. Even if she is married she would require perpetual help from others, for her left hand would not work and she would not get free movement. Evidently, therefore, she requires a permanent financial help either to live married or unmarried. Taking her span of life to be at least 60 years, she is expected to survive for 41 years more. If she remains unmarried she will be a burden to others and if she is married she would be a burden to her husband.

7. Section 110B of the M.V. Act provides that a claim Tribunal after completion of the enquiry may make an award determining the amount of compensation which appears to it to be just. A Division Bench of this Court in the case of (13) P.K. Ghose v. Mayarani, reported in AIR 1971 Calcutta 229 has observed that just compensation is reasonable compensation. The principles on which an appellate court will interfere with an award of damages made by a Judge are stated in a well known passage in the judgment of Greer L.J., in (7) Flint v. Lovell (1935) 1 K.B. 354 at page 360: --

In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this court should be convinced that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled." In this connection we may also " quote Lord Wright in (6) Davnes v. Powell Duffryn Associated Collieries Ltd., L.R. (1942) AC. 60:--

An Appellate Court is always reluctant to interfere with a finding of a trial Judge on any question of fact, but it is particularly reluctant to interfere with a finding of damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate.

In (10) Jaylor v. Mayor, Alderman and Burgesses of Southhampton 1952 C.A. No. 89 Lord Benning said : --

This Court does not interfere with an award by a Judge who tries a case, unless, looking at it, it is out of all proportion to the figure which this Court considers the proper award. When I heard the fact of this case, I said to myself ''good gracious me--as low as that for these injuries''.

8. It cannot be denied that injured Rita is entitled to recover resonable expenses including expenses incurred for medical treatment nursing, medical appliance and other incidental expenses. In addition she is entitled to general damages in respect of pain and sufferings which she had already suffered and is likely to undergo in future. In the instant case--

(a) It cannot be denied that she had to pass through considerable pain and suffering;

(b) The injury to the pelvis and this would affect her happiness if she is given in marriage;

(c) She does not find any strength in her left hand, feels pain the waist and she walks limping;

(d) She cannot read as before,

(e) Disfigurement of her left arm-on account of this disfigurement which has been aptly described as ''hideous'', by Kempt in his book--On the Quantum of damages, volume I, Page 289, there would be dreadful psychological reactions.

9. The observations of his Lordship in (3) Ayesha Begum v. Veerappan-- (1966) 1 M.L.J. at page 376 are quite applicable in the instant case:--

Her future is dreadful, fearful and bleak. Her marriage prospects are uncertain. Even if she is married, her marital life would be a problem both for herself and her husband. The doctor''s evidence is that she will have deficulty during child birth. It is having this horrified picture of this unfortunate child, the Court has to award compensation and not mere damages, and this compensation can only be in terms of money. But money cannot renew the physical frame that has been shattered and battered. All that the Judge and Court can do is to award sums which must be regarded as giving reasonable compensation, under the circumstances a fair compensation.

10. We cannot by arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has unrergone by reason of an accident. Award of damages as such in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases.

11. In (18) Vinod Kumar Shrivastava Vs. Ved Mitra Vohra and Others, certain rules had been laid down for assessing compensation : --

The wide discretion that the courts exercise in awarding compensation in cases of personal injuries has canalised itself into a set of rules. These rules are; (1) The amount of compensation awarded must be reasonable and must be assessed with moderation; (2) Regard must be had to awards in comparable cases, and (3) The sums awarded should to a considerable extent be conventional. It is only by adherence to these self imposed rules that the Courts can decide like cases in like manner and bring about a measure of predictability of their awards.

12. In a later case the same High Court in (5) Bishwa Nath Gupta and Others Vs. Munna, held that a victim is entitled to claim damages for the loss of limb and suffering, loss of amenities and the injury itself. But from its very nature it is always an uncertainty in making an award of damages for non-pecuniary damage. In (15) Subhash Chander Vs. Ram Singh and Others, the Court has observed that after determining the loss under the different accepted heads, namely (i) special damage, (ii) loss of future earnings, (iii) additional expenses incurred as a result of injuries, (iv) damages for pain and suffering and loss of amenities of life, the Courts should consider whether the total thus worked out is a fair compensation and reduce or increase the amount accordingly.

13. In working out a fair compensation we may take into consideration the prevailing purchasing power of the rupee. In a similar case while taking into account changes in the purchasing power of money, Venkatadri, J. in Ayesha Begum''s case at page 378 of (1966) 1 M.L.J. quoted the observation of Lord Normand and Lord Moncrieff in Sands v. Devan. Lord Normand said: --

Since we must perforce measure the damages in money, we must, I think, take account of large and relatively permanent variations in the value of money.

Lord Moncrieff observed : -- "As regards what fails to be paid in money the Court must take note of changes in the value of money."

14. Mr. Sett appearing on behalf of the respondent has submitted that the appellant Insurance Company cannot challenge the quantum of damages awarded by the learned Judge of the Tribunal. In a proceeding before the Motor Vehicles Accidents Claims Tribunal in respect of the adcident arising out of the use of a Motor Vehicle an Insurer may defend the action only on any of the grounds mentioned in clauses (a) to (c) with Sub-Clauses of Section 96 of the Act unless the Insurer makes a special provision in the contract of Insurance that, the Insurer should be entitled to raise all defences in the name of the assured (9) Hukum Chand Insurance Co. Ltd. v. Subhasini Roy decided on July 10, 1970, 74 C.W.N. 879). The Madhya Pradesh High Court in the case reported in AIR 1964 M.P. 198 and the Madras High Court in the case of Ayesha Begum, reported in (1966) 1 M.L.J. 374 relying on the decision of the Supreme Court in (4) British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, held that the Insurance Company cannot be allowed to challange the quantum of compensation except when it exceeds the statutory limit, as laid down by Section 96(2) (9) of the Motor Vehicles Act. In the case of B.I.G. Insurance Company the Supreme Court repelled the contention by the Insurance Company that when an Insurer became a party to an action, he was entitled to defend it on all grounds available at law including the grounds on which the assured himself could have relied for his defence. After the decisions-referred to above, by the Amending Act 56 of 1969 Sub-Section 2A was added to Section 110-C which reads as follows: --
Section 110-C (2A)--Where in the course of any enquiry, the claims Tribunal is satisfied that--

(i) there is collusion between the persons making the claim and the person against whom the claim is made, of

(ii) the person against whom the claim is made has failed to contest the claim, it may for reasons to be recorded by it in writing direct that the Insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the Insurer is so impleaded shall there upon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made,

The amending Act 56 of 1969 came into force from March 2, 1970. The instant proceeding was started before the Motor Vehicle Tribunal on 29.9.70 i.e. after the Amending Act came into force. The right that has been conferred by the Amending Act was not available in the instant case to the Insurance Company as there was no allegation of collusion between the person making the claim and the insured and in view of the fact that the insured contested the claim. The insured filed separate written statement examined the driver, conductor, the time keeper and one of the passengers of the bus. There was no collusion between the claimant and the insured either before the Tribunal or in this appeal. The Insurance Co., in fact did not make any prayer before the Tribunal to exercise any right conferred by the Amending Act 56 of 1969. We are pursuaded to say that the appellant Insurance Company having only a limited defence before the Tribunal, cannot be permitted to raise any contention in this appeal relating to the factum of the incident or to the quantum of damages. The insurer cannot therefore prefer an appeal on these grounds. In (12) National Insurance Co., v. Rani Bai Bajaj reported in AIR 1973 P & H 104 at page 108 their Lordships observed that the Insurer is entitled to file an appeal on the ground on which it can defend the suit and also on the ground that the Act does not impose any liability on the insurer to pay the decretal amount. In (17) C.K. Subramania Iyer and Others Vs. T. Kunhikuttan Nair and Others, the Supreme Court has expressed the view that the normal rule is that no appeal lies on the quantum of damages, unless it involves a matter of principle. The same principle was laid down in (14) Sheikhupura Transport Co. Ltd. Vs. Northern India Transport Insurance Co., . The Supreme Court held in that case that if assessment made by a High Court in awarding compensation to the legal representatives of the deceased persons u/s HOB, Motor Vehicles Act, cannot be considered to be unreasonable, the Supreme Court will not interfere with the same. In the instant case we cannot say that the learned Judge acted upon some wrong principle of law or that the amount awarded is inordinately high.

We find no substance in the instant appeal. The appeal is dismissed with costs.

A.K. Sinha, J.

I agree.