Madhya Pradesh High Court
Smt. Sushma Mitra vs Madhya Pradesh State Road ... on 19 September, 1973
Equivalent citations: AIR 1974 MP 63
Author: Singh
Bench: G Singh, S Raina
JUDGMENT Singh, J.

1. This is an appeal by the plaintiff against the dismissal of her suit for damages for personal injuries sustained in a motor accident.

2. The facts that the plaintiff alleged were that on June 12, 1959 she was going in Bus No. MPJ 1690 -- belonging to the Madhva Pradesh State Road Transport Corporation, from Jabalour to Chhindwara. A truck bearing No. MPJ 9310 owned by Bakhatwarsingh, defendant No. 2. was Coming from the opposite direction-There was a head-on collision between the two vehicles at a distance of about seven miles from Jabalpur. As a result of this impact, the plaintiff received severe injuries to her right elbow causing multiple fractures. It was further pleaded that the injuries have resulted in a permanent disability of the right hand. Both the drivers, according to the case of the plaintiff, were driving the respective vehicles in utter disregard of the rules of driving and without any regard to the safety of passengers. The plaintiff claimed a sum of Rupees 73.238.80 as damages against the defendants. The first defendant in the suit is the Madhva Pradesh State Road Transport Corporation which is the owner of the bus. The second defendant is Bakhatwarsingh who is the owner of the truck. The third defendant Dhaniram was at the relevant time driver of the truck. The fourth defendant is Indian Insurance Pools Companies Association which is the insurer of the bus and the fifth defendant is the Northern India Motor Owners Insurance Co. which is the insurer of the truck.

3. The defendants 2 and 3, the owner and the driver of the truck, remained ex parte. The fifth defendant, the Northern India Motor Owners Insurance Co., Which is the insurer of the truck, pleaded that the Plaintiff projected her right elbow outside the bus in which she was travelling and sustained the injuries on account of her own fault knowing well that a vehicle was coming from opposite direction. It was further pleaded that the bus in which she was travelling occupied a major portion of the road keeping more to the right than to the left. The defendant No. 4. the insurer of the bus. Paid Rs. 2,000/- to the plaintiff. This is the maximum amount which an insurer of a bus is liable to pay in case of an injury to a passenger travelling in the bus. No defence was, therefore, put forward by defendant No. 4. The defendant No. 1, the Corporation, which is the owner of the bus. denied the plaint allegations and submitted that the plaintiff having settled with the insurer of the bus there was total discharge of liability.

4. The trial Court came to the conclusion that there was no head-on collision between the bus and truck nor any physical contact between the two. It was also held that plaintiff was protruding her elbow from the window of the bus and the elbow was hit by the truck while crossing the bus and this is how the plaintiff received the injuries. In the opinion of the trial Court, the plaintiff herself was negligent in keeping out her elbow and. therefore, she was not entitled to any damages. The trial Court, however, assessed the damages to which the plaintiff would have been entitled had the

defendants been guilty of negligence. Special damages were assessed at Rs. 8,238.70 and general damages were assessed at Rs. 15.000/-.

5. Learned counsel for the appellant has first argued that the finding of the trial Court that there was no collision between the bus and the truck is not correct. He has referred to us the statement of the plaintiff in this connection. The plaintiff did state that the truck collided with the side of the bus, but she further said that she did not see the truck. She also stated that the wind screen of the bus was broken from the impact and pieces of glass struck her hand. She was unable to state as to what other thing hit her hand. She further stated that her hand had fractured and she became slightly unconscious. In her cross-examination the plaintiff stated that she was sitting on the seat adjoining the window of the bus and that she was unable to say that the truck after hitting her hand had proceeded ahead. All that she could say is. that she had a child of about five or six months hi her lap and some pieces of class struck her hand and she cried that she was dying. She was also unable to state whether the truck collided with the bus in the front or from the side. From the evidence of the plaintiff it is clear to me that she did not see any impact of the truck with the bus. All that she noticed was that there was serious injury to her hand which made her cry and she became somewhat unconscious. No evidence has been produced from the side of the plaintiff to show that the wind screen of the bus had really broken or that there was any dent or scratch in the body of the bus which may have been caused by a collision with the truck. From the evidence of Moolchand (D. W. 1). who was driver of the bus, it is clear that the truck never came in contact with the body of the bus. The plaintiff received injury to her hand when the truck crossed the bus. The plaintiff was sitting in the fourth row near the window. She had received injury to her right elbow. Similar is the statement of the conductor of the bus Jahid All (D. W. 2). It is clear from the evidence of these two witnesses that there was absolutely no contact of the body of the bus with the body of the truck. The truck only hit the elbow of the plaintiff. The manner in which the accident happened goes to show that the plaintiff who was sitting near the window on the fourth row had kept her right arm on the window sill and the elbow was protruding outside the window. The truck while crossing the bus hit the elbow of the plaintiff as a result of which the elbow was fractured. On the evidence produced. I am not prepared to accept the contention that there was any collision between the bus and the truck.

6. The next point argued by the learned counsel is that even on the find-ins that the truck while crossing the bus hit the plaintiffs elbow which was protruding from, the window, the drivers of the bus and the truck both must be held to be guilty of negligence. It is further argued that in the long journey if a passenger sitting in a bus keeps his elbow out it cannot be said that he has been guilty of contributory negligence.

7. It cannot be disputed that the driver of a bus which carries passengers owes a duty of care for the safety of passengers. While driving he must have the passengers in contemplation and he must avoid acts or omissions which can reasonably be foreseen to injure them and in deciding what acts or omissions he should avoid, he must bear in mind the normal habits of passengers. It is a matter of common experience that passengers who sit adjoining a window very often rest their arm on the window sill by which act the elbow projects outside the window. The driver of the bus must have these passengers also in contemplation and. therefore, while overtaking or crossing another vehicle on the road he must not come too close to the vehicle that is overtaken or crossed and he must leave

sufficient gap between the vehicles to avoid injury to these passengers. The driver of a vehicle coming from the opposite direction owes a similar duty while crossing a passenger bus. He too must have in contemplation passengers sitting near the windows of the oncoming bus who may have their hands resting on the windows, and in crossing the bus he must not only avoid contact with the body of the bus but he must also avoid coming in contact with the elbow of any passenger that may be resting on the window and projecting outside the body of the bus. He must, therefore, take precautions to move to his near side and leave sufficient gap for preventing any mishap.

8. Even if the act of a passenger in resting his arm on the window of the bus in which he travels may be regarded a negligent or a foolish act, to which aspect. I shall come later, it cannot be held that the driver of the bus and the driver of the vehicle crossing the bus owe no duty to such passengers. This habit of passengers is so common that even if it be negligent or foolish it must enter into contemplation of a reasonable driver; for the foresight of a reasonable man, on the basis of which cases of negligence have to be solved, takes into account also common negligence in human behaviour. A reasonable driver "will guard against the possible negligence of others when experience shows such negligence to be common" and though "not bound to anticipate fully in all its forms", he is not entitled to put out of consideration "the teachings of experience as to the form those follies take:" (London Passenger Transport Board v. Upson 1949 AC 155 (HL) pp. 173 & 176). Judged from this standard it is clear that the driver of the bug in which the plaintiff was travelling and the driver of the truck which crossed the bus both! owed a duty of care for the safety of the plaintiff notwithstanding the fact that she was resting her arm on the window of the bus and her elbow was projecting outside the bus.

9. I have not been referred to any Indian or English authority in which a duty of care may have been recognised in favour of a Passenger who keeps his elbow out. But absence of a direct precedent to cover the facts of the instant case does not imply that no duty situation can be recognised in this case. As held in M. P. S. R. T. C. v. Mst Basantibai 1971 MPWR 517 when questions of this nature arise for the first time they have to be solved on the well-known principle enunciated by Lord Atkin in Donoghue v. Stevenson 1932 AC 562.

> "You must take reasonable care to avoid acts or omissions which you can reasonably for

> It Is this principle that I have kept in mind in reaching the conclusion that duty of ca

10. The question then is whether the plaintiff has been able to make out a case of negligence against the two drivers or any one of them. The fact that the plaintiff's elbow, which was resting on a window of the bus, was inured by coming in contact with some part of the truck itself shows that the two vehicles crossed each other leaving only a little gap in between. The plaintiff was sitting in one of the seats in the fourth row and she has hardly any idea as to how the accident occurred. The only persons who could give any reliable information as to how the two vehicles came so close resulting in the accident are the two drivers. The driver of the bus has entered the witness box, He is Moolchand (D. W. 1). He said that the truck which was coming from the opposite direction was

visible from a furlong and that he book his vehicle to his near side at the time when the truck crossed. According to this witness, the bus and the truck were both running, when they crossed each other, at a speed of about 25 to 30 miles. He does not. however, state as to how much width of the road he was covering while crossing the truck and whether he had left enough space for the truck to cross. Jahil Ali (D. W. 2) is the conductor of the bus. At the time when the accident happened he was issuing tickets to some passengers. He stated that his vehicle, i. e. the bus, was on the side of the road and two of its wheels were in the katcha Portion and the remaining two on the metalled portion of the road. This statement of the witness obviously relates to the Position of the bus when it was stopped after the accident. At the time when the accident happened he was busy in issuing tickets and he could hardly have any idea as to how much width of the road was covered by the bus. All that one can make out from the statement of these two witnesses is that the truck coming from the opposite direction was visible from a distance and that the road was wide enough for the two vehicles to cross leaving a reasonable gap to avoid any accident even though the vehicles were moving at a speed of twenty-five or thirty miles. When the vehicles came so close while crossing each other as to injure the elbow of the plaintiff, it must be inferred in these circumstances that both the drivers or one of them was guilty of negligence in coming too close while crossing each other. What were the factors that led to the accident were in the special knowledge of the two drivers. The circumstances, therefore, call for an explanation from them and if they fail to place the relevant facts before the Court, adverse inference must be drawn against them.

11. There Is ample authority in support of this line of approach. In Baker v. Market Harborough Industrial Cooperative Society Ltd. (1953) 1 WLR 1472. Denning. LJ., dealing with a case of collision, observed:

"Every day proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both, were to blame," (p. 1476) In the same case Somervell, LJ said:

"If his (the plaintiffs) difficulties are due to any failure of "A" or "B" or both to call available evidence, adverse inference may be drawn", (p. 1475) Baker's case was cited as an authority by Denning LJ in Roe v. Ministry of Health 1954-2 All ER 131 for the following general proposition:

"If an injured person shows that one or other or both of two persons inured him. but cannot say which of them it was. then he is not defeated altogether. He can call on each of them for an explanation." (P. 137) The defendants, when they are the best persons to tell the story of the accident, cannot by withholding evidence defeat the plaintiff on the abstract doctrine of burden of proof. If they do not disclose relevant information, adverse inference must be drawn and the Court may hold that both were to blame. It would be another matter if after all the available evidence is produced by the defendants the Court is vet unable to decide as to whether it was the negligence of both or A's or B's that caused the accident; in such a situation, which is possible only in exceptional cases, the plaintiff may fail; (See Baker's case p. 1475 (Somervell. LJ).)

12. Now, let us apply these principles to the facts of the instant case. As already stated, the two drivers were the best persons to give evidence as to the circumstances that led to the accident and the plaintiff had no knowledge of these circumstances. The driver of the truck remained ex parte and did not offer any evidence. The driver of the bus did enter the witness box but he did not state the relevant facts. The two drivers have thus failed to bring before the Court the circumstances relating to the accident. Presumption must, therefore, be drawn against them and it must be held that both were liable in negligence to the plaintiff.

13. The next question is whether the defendants have proved that the plaintiff was guilty of contributory negligence. A defence of contributory negligence requires that the defendants must prove that the plaintiff failed to take reasonable care of her own safety which was a contributory factor to the accident which caused her damage: (Winfield on Tort, 8th edition p. 107). The defendants' case on this point is that in resting her arm on the window still the plaintiff failed to take reasonable care of her safety and this was a contributory factor to the accident. I have already said that it is common practice for the passengers who sit near a window to rest their arm on the window. There is no evidence that the Passengers are cautioned not to do so. On the roads outside a town the traffic is not heavy and there is usually ample space for the vehicles to pass each other without coming too close and it is rare for an accident to happen in the manner it has happened in the instant case. There is also no evidence that the truck while crossing the bus blew its horn or that the plaintiff continued to rest her elbow in the window, although she had knowledge that the truck was crossing the bus. Having regard to the speed at which the two vehicles were moving, they must have crossed each other in a split second leaving no time for the plaintiff to withdraw her hand after seeing the truck. In these circumstances. I do not think that the plaintiff can be said to have failed to take reasonable care of her safety in resting her arm on the window of the bus. After all "a reasonable man does not mean a paragon of circumspection" and if most of the passengers behave in the manner the plaintiff did, it would not be right to hold that a reasonable man would have behaved in a different manner: (See A. C. Billings & Sons Ltd. v. Riden, 1958 AC 240 at p. 2551. The learned counsel for the defendants has referred to us Foo Kok Food v. Yap Hai Chwee. 1972 ACJ 385 a case decided by the High Court of Kuala Lumpur (Malavasia). In that case It was held that while travelling in a car along a thoroughfare of the Federal Capital where traffic is heavy a passenger ought to be conscious that it is extremely dangerous to rest his arm on the door window. Two earlier cases decided by the same High Court in 1940 were distinguished on the ground that there was tremendous increase in the volume of traffic since then and the design of the motor vehicles had also been changed. It was further pointed out that in the earlier cases the accident happened outside the town where the traffic was not heavy. The considerations which prevailed in the Malayasian case of Yap Hai Chwee are hot present in the case before us. The accident here happened not in a crowded street but in the countryside where the traffic is not heavy. The design of the passenger buses here still makes the window a natural rest for the arm. For these reasons, the decision in the case of Yap Hai Chwee cannot be applied. The facts of the instant case are nearer to the facts of the two earlier Malayasian cases referred to in Yap Hai Chwee's case. I am. therefore, of opinion that the defendants have failed to prove that the plaintiff was guilty of contributory negligence.

14. The defendants have not challenged the assessment of damages made by the trial Court. The plaintiff is, therefore, entitled to recover as damages Rs. 23,238.70 She has already been paid Rs.

2,000/- by the insurer of the bus and the amount to be decreed must be reduced to that extent. The plaintiff will get a decree for recovery of Rs. 21.238.70 against all the defendants-respondents.

15. The appeal is allowed. The plaintiffs suit is decreed for a sum of Rs. 21,238.70 against defendants 1, 2, 3 and 5 who are respondents 1 to 4 in this appeal. These defendants shall bear their own costs and pay the costs of the plaintiff of both the Courts.

16. P. S.--I have read the opinion of my learned brother before its delivery and I am happy to find that the conclusion reached by us is in accord with two Indian authorities referred to by him. I, however, feel some difficulty on the question of applicability of the maxim res ipsa loquitur. The res must tell a clear and unambiguous story before the maxim is applied and it seems extremely doubtful to me that the maxim applies to a case of two or more defendants who are not in law responsible for the acts of each other and when negligence of all or any one of them could have caused the accident. Mere happening of the accident in such cases is insufficient evidence against any of the defendants. However, if defendants are the best persons to know how the accident occurred, negligence may be taken to be established against them, as in the instant case, by drawing adverse inference if they fail to disclose relevant information pr produce available evidence. But this, in mv opinion, is not the same thing as res ipsa loquitur.

Raina, J.

17. I entirely agree with my learned brother that this appeal should be allowed on the terms proposed by him in paragraph 15 and I also generally agree with the line of reasoning adapted by him but I would like to add a few words of my own.

18. This case raises some important questions of law arising in an action based on negligence. Plaintiff was travel-line in the Bus No. M. P. J. 1690 belonging to Madhva Pradesh State Road Transport Corporation from Jabalpur to Chhin-dwara. At a distance of 7 miles from Jabalpur on the Jabalpur-Nagpur road an accident took place while the Bus crossed the truck No. M. P. J. 9310 owned by Bakhtawar Singh defendant No. 2. coming from the opposite direction. It is clear that there was no collision because the evidence shows that the bodies of the two vehicles did not come in contact with each other. Plaintiff, however, sustained severe injuries to the elbow of her right hand on account of an impact with the body of the truck. Learned counsel for both the sides accepted this position. The Question for consideration is whether the defendants can be adiudged liable in these circumstances.

19. This is not a case where a passenger has been injured while stretching his arm outside the window of a moving vehicle. In that case the legal position might have been different. If the plaintiff. had stretched out her hand outside the window she was bound to sustain iniuries On her hand and fingers but from the medical evidence it is clear that the injury was to the elbow and to no other part of the body. It can, therefore, be reasonably inferred that the plaintiff got hurt by the passing truck while she was resting her elbow on the window sill. The trial Court held the plaintiff responsible for the accident in these circumstances and dismissed her claim. The view taken by him does not appear to be correct.

20. The duty of a person who drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adipining the highway. Reasonable care in' this connection means the care which an ordinary skilful driver or rider would have exercised under the circumstances. (Charles Worth on Negligence, Fifth Edition page 810. paragraph 812).

It is a well-known rule of the road that when two vehicles are approaching each other from opposite directions, each must go on the left for the purpose of allowing the other to pass. Failure to observe this rule is prima facie evidence of negligence Vide paragraphs 812 and 816 ibid.

21. The dictum of Lord Atkin in 1932 AC 562 that you must take reasonable care to avoid acts or omissions which vou can reasonably foresee would be likely to injure vour neighbour furnishes the standard of care expected of a driver of a motor vehicle or other person whenever the question of his negligence is in issue. Thus to determine when an act is negligent, it is relevant to determine whether any reasonable person could foresee that the act would cause damage. In Daborn v. Bath Tramways Motor Co. Ltd. (1946) 2 All ER 333. Asauith LJ said "in determining whether a party is negligent the standard of reasonable care is that which can reasonably be demanded in the circumstances." My learned brother has rightly pointed out in paragraph 7 that while driving the driver must have in contemplation the normal habits of the passengers and he must avoid acts or omissions which can reasonably be foreseen to injure them.

22. Resting elbow on a window sill by a passenger is an extremely common Practice. Passengers travelling in a bus on a long iourney are bound to rest their elbow on the window sill particularly when it is moving on a highway outside the town area, and this must be taken into account by any driver of a vehicle for the purpose of negotiating his vehicle in motion so as to avoid risk to the pas-iengers. In streets of big towns it is a common experience to find Rikshaws, Tongas loaded with children whose vari-ou.s limbs protrude outside the vehicle. The driver of a vehicle cannot, therefore, be absolved from negligence merely on the ground that he passed his vehicle in such a manner that its body did not come into contact with the body of another vehicle carrving passengers on the road. While driving or passing a vehicle carrying passengers it is the duty of the drivers to pass on the road at a reasonable distance from the other vehicle so as to avoid any iniurv to the passengers whose limbs might be protruding beyond the body of the vehicle in the ordinary course.

23. In extremely crowded areas of the town it is no doubt necessary for the vehicles to cross or overtake other vehicles at very close quarters but if this is done slowly after cautioning the passengers in the other vehicle by blowing horn, the driver of the vehicle may not be ad-judged guilty of negligence if in spite of this some one gets hurt. Passengers travelling in motor vehicles in crowded areas no doubt owe a responsibility to keep their limbs within the motor vehicles but on long journeys it would be too much to expect a passenger not to allow any part of his body to protrude at all bevond the body of the vehicle. Resting of elbow on a window sill, as stated above, is extremely common even for passengers of reasonable prudence and. therefore, the plaintiff cannot be held guilty of contributory negligence.

24. Contributory negligence is an expression meaning negligence on the part of the plaintiff materially contributing to the injury. It does not mean breach of any duty on the part of the plaintiff. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. (Charles Worth on Negligence. Fifth Edition. Paragraph 1004, page 1003).

25. The standard of care in contributory negligence is what is reasonable in the circumstances and this in most cases corresponds to the standard of care in negligence. A. C. Billings & Sons Ltd. v. Riden, 1958 AC 240. Although contributory negligence does not depend on a duty of care it does depend on foresee ability. Just as actionable negligence requires the fore-seeability of harm to others. So contributory negligence requires the foresee ability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man he might hurt himself, in doing a particular act. (Vide Clerk & Lindsell on Torts. Thirteenth Edition, Page 984. Contributory negligence, must involve a risk that is unreasonable under all the circumstances and the conduct of the plaintiff is to be evaluated in its setting in the circumstances of each case allowing the plaintiff to make assumptions that are reasonable. The plaintiff may expect that the defendant will act as a reasonable man. Reasonable expectations of safety are just as much a part of ordinary prudent conduct as are expectations of danger. The scope of the risk engendered by the plaintiff's conduct must not be assessed with undue refinement. It must be approached in a spirit of healthy common-sense,

26. In State of Punjab v. Smt. Guranwanti, AIR 1960 Puni 490, the Puniab High Court dealt with a case of a somewhat similar nature where a passenger travelling in a bus was iniured while resting his elbow on the window. The following observations in paragraph 11 of that case are pertinent.

"It is well known that often passengers travel with their elbows resting on the window of the car. There is no prohibition against it. The plaintiff at that time of the morning considering the state of traffic cannot be said to have failed to use reasonable care for her safety by resting her elbow on the window."

27. A similar view was expressed by Rajasthan High Court in Roormal v.

Jankilal ILR (1962) 12 Ral 128. In that case the plaintiff was held to be not guilty of non-excusable negligence when he got injured while keeping his hand slightly outside the window of a moving bus at the time of the accident It would be pertinent here to refer to the following statement of law in Halsbury's Laws of England 3rd Edition. 28 Volume (1959) at page 90 which was relied upon in that case :

"A person is guilty of contributory negligence if he ought reasonably to have foreseen, if he did riot act as a reasonably prudent man, he might hurt himself. Tha plaintiff is not usually bound to foresee that another person may be negligent unless experience shows a particular form of negligence to be common in the circumstances. If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best a matter of doubt, the defendant alone is liable."

28. It was observed at page 140 in that case that it is a question of fact in each case to determine whether the want of knowledge by the plaintiff of an existing danger was so unreasonable in what he did that it constituted contributory negligence.

29. Bearing in mind the principles referred to above it is clear that the plaintiff cannot be held to be guilty of contributory negligence in the circumstances of this case. It is true that in crowded streets of big towns the passengers, who are adult are expected to keep their limbs within the carriage and contributory negligence may be inferred in certain circumstances if they fail to take this safety measure but here we are dealing with a case where the plaintiff was iniured while moving on a highway outside the limits of the town. In such a case even a man of ordinary prudence would rest his elbow on the window sill and he cannot be expected to foresee any harm to himself in doing so. The learned trial Judge was, therefore, in error in holding that the plaintiff was negligent in resting her elbow on the window sill and this was the proximate cause of the accident.

30. The accident in this case must necessarily be presumed to be as a result of the negligence of the drivers of either or both the vehicles in question.

31. In a case like this, in my view, the legal maxim res ipsa loquitur can usefully be applied. This doctrine is usually employed in action for injuries due to negligence where patent facts concerning the case are by themselves sufficient to establish negligence. The literal meaning of the maxim is that the thing speaks for itself. The doctrine does not apply where the cause of accident is known. The res can only speak so as to throw the inference of fault upon the defendants in some cases where the act of the defendent is unexplained. The maxim does not mean that negligence is to be inferred merely because someone is hurt. It means that the circumstances are so to speak eloauent of the negligence of somebody which brought about the state of things which are complained of.

32. In M. P. State Road Transport Corporation v. Munnabai, 19GS Jab LJ 153 It was held that the applicability of the doctrine is merely a rule of evidence relating to burden of proof. Thus in parti-cular cases the facts which are established may be shown clearly suggestive of the Inference that unless the defendant is able to satisfy the Court that accident was not attributable to his negligence, the finding would 20 against him.

33. In this case too it is clear that the accident was due to the fact that two motor vehicles crossed each other at a very close range so as to cause hurt to the appellant. Now an accident of this nature can be due to the negligence of the driver of either vehicle or of both. While crossing, the usual practice of a careful driver is to move his vehicle to the left leaving sufficient space for the other vehicle to pass at a safe distance. In the instant case there is no map of the spot and. therefore, It is not possible to sav which of the drivers was at fault. Moolchand (D. W. 1), the driver of the bus in which the appellant was travelling entered the witness box but did not say anything which may suggest that the driver of the truck was at fault. He testified that he could see the truck from a distance of one furlong and had moved his vehicle to his side. But it is difficult to ascertain clearly from his evidence whether the driver of the truck was at fault in passing at close range because it would appear from the testimony of the conductor of the bus. namely. Jahi-dali (P. W. 21 that the metalled portion of the road at the point of crossing was only 12 feet. Evidently both the vehicles

could not, therefore, cross each other without leaving the road sufficiently by moving the vehicle into the Kuchcha portion, because otherwise there would have been a collision, the average width of the vehicle being 8 feet. The testimony of the conductor is not of any value for the purpose of determining as to which of the drivers was negligent because it appears from his evidence that immediately before the accident he was busy in issuine tickets. His attention, was drawn towards the vehicle only after the accident. He no doubt says that two of the wheels of the bus were in the Kuchcha and two on the Pucca portion of the road but this by itself is not sufficient to show that there was no neglisence on the part of the bus-driver unless we know as to what extent the bus had moved into Kuchcha portion, as the metalled portion of the road was too narrow being only 12 feet wide.

34. As for the truck-driver, he has not entered the witness box to explain the circumstances of the accident.

35. As neither the bus-driver nor the truck-driver has placed any material before this Court to come to a conclusion that there was no negligence on their part the conclusion is irresistible that both were negligent. It appears that the road being narrow both of them were reluctant to leave the road sufficiently with the result that they crossed each other at a very close range with the result that the appellant who was resting her elbow on the window sill got injured.

36. My learned brother has cited two English decisions namely. Baker v. Market Harborough Industrial Cooperative Society Ltd (1953) 1 WLR 1472 and Roe v. Ministry of Health (19541 2 All ER 131 wherein it was held that when the defendants are the best persons to tell the story of the accident, they cannot by withholding evidence defeat the plaintiff on the abstract doctrine of burden of proof. The principle laid down in these cases appears to be a salutary one and must be accepted. Where the circumstances of the accident point to the negligence of the defendants who are the best persons to say how it occurred and they on their part do not place any materieal before the Court to absolve them of the responsibility for the act, it must be held that both are negligent. I, therefore, agree with my learned brother (Singh J.) that the drivers of both the vehicles must be held responsible for the accident and the appeal must be allowed on the terms proposed by him.