Calcutta High Court
Rural Transport Service vs Bezlum Bibi And Ors. on 14 March, 1980
Equivalent citations: AIR 1980 Cal 165, 84 CWN 616
Author: A K Sen
Bench: A K Sen, B Chakrabarti
JUDGMENT Anil K. Sen, J.

1. This is an appeal under Section 110-D of the Motor Vehicles Act (Act IV of 1939) (hereinafter referred to as the said Act) and is directed against an award dated January 3, 1974, passed by the Motor Vehicles Accident Claims Tribunal, Burdwan, in Acci-(Sent Claim Case No. 72 of 1969. The appeal raises a short but an important point as to whether contributory negligence on the part of the deceased on whose death in the accident the claim is put forward would defeat the claim. The facts are not much in dispute and are shortly set out as hereunder.

2. On October 28, 1969 one Taher Seikh son of late Isu Seikh boarded a bus run by the appellant on the route Burdwan to Nasigram via Khetia and Bhatar. He boarded at Khetia and was proceeding to Bhatar. Since the bus was overcrowded the deceased Taher Seikh along with other passengers got on to the roof of the bus as there was no accommodation available inside the bus. He took his seat on the right side. Unfortunately for him when the bus was nearing Bhatar it swerved on the right side of the road to overtake a cart on the road. The deceased Taher was struck by an overhanging branch of a tree and he fell down on the ground sustaining multiple injuries in his forehead, chest etc. He was removed to B. S. Hospital at Burdwan and there he died on the day following as a result of the injuries suffered.

3. Respondents 1 and 2 before us, the mother and the brother of the deceased lodged a claim of Rs. 20,000 by way of compensation against the appellant and the insurer, respondent No. 3 under Section 110A of the said Act with the Motor Accident Claims Tribunal, Burdwan.

4. Such claim was contested both by the appellant as also by the insurer. The appellant denied that there was any negligence on the part of the driver or the conductor and claimed that the accident was entirely due to the fault on the part of the deceased who was not supposed to travel on the roof of a bus. The insurer took a similar defence but at the same time pleaded an additional defence that when the accident occurred in respect of a passenger carried on the roof of a bus in contravention of the Motor Vehicles Act, it is not covered by the insurance policy and the insurer is not liable to pay any compensation in a case like the present one.

5. On the pleadings as aforesaid, the Tribunal framed the following issues:--

1. Was there rashness or negligence on the part of the driver of the vehicle or the conductor?

2. Is the petitioner entitled to compensation, and if so, how much?

3. Is the insurer liable to pay compensation, and if so, to what extent?

4. Is opposite party No. 1 liable for compensation? And if so, to what extent?

6. Evidence was led on behalf of the claimants who examined five witnesses. P. W. 1 Bezlun Bibi was one of the claimants,-- the mother of the deceased. In her evidence she stated that the deceased, her son was 24/25 years of age at the time of his death and was quite hale and hearty. He was a hawker by profession and used to earn Rs. 200 to Rs. 250 per month and he used to give Rs. 5 or Rs. 6 to her daily for family expenses. P. W. 2 Abdul Mannan was a fellow passenger with the deceased. In his evidence he stated that as there was no space inside the bus conductor asked him to get on to the top of the bus. His further evidence is that Taher too was asked by the conductor to get on to the roof and that there were other passengers too so travelling on the roof. The bus was running at a high speed and while overtaking a cart swerved on the right, went into the kutcha flank of the road and the deceased Taher being hit by a branch of a tree fell down from the roof. Shouts being raised the bus stopped 300 to 400 cubits ahead. Taher was bleeding from his head and was removed to hospital. In cross-examination he denied the suggestion that he and Taher got on to the roof of the bus in order to avoid purchasing ticket and he further denied the suggestion that there was no rashness or negligence on the part of the driver. P. W. 3 Nabu Seikh was co-passenger with the deceased and in his evidence he fully corroborated P. W. 2. P. W. 4 Jatindra Mohan Saha in a male nurse from the hospital who proved that the deceased was admitted in hospital on October 28, 1969. and he died on the next date. P. W. 5 Mir Anwar Hossain is a co-villager of the deceased who stated in his evidence that he came to the hospital being informed of the accident and when Taher died he removed the dead body for burial. No evidence was led on behalf of the appellant or the insurer.

7. On the evidence thus adduced on behalf of the claimants, the Tribunal found that there was positive negligence on the part of the conductor when the said conductor asked passengers to get on to the roof of the bus there being no accommodation inside the bus and but for that negligence the deceased would not have sustained the injuries resulting in his death. The Tribunal, however, further held that there was contributory negligence on the part of the deceased because had the deceased taken reasonable care about his own safety he would not have travelled on the roof of the bus. The Tribunal overruled the special defence taken by the insurer that an accident of the present nature is not covered by the insurance policy and held that both the owner and the insurer are liable to compensate. But at the same time, according to the Tribunal, contributory negligence on the part of the deceased would go to mitigate the liability of the appellant and the insurer.

8. Considering the evidence as to income of the deceased the Tribunal found that the deceased must have been earning Rs. 100 per month and had been contributing at least 50% thereof to his mother for the maintenance of the family. The Tribunal further assessed that since the deceased was only 25 years of age at the time of his death and was of good health it could be expected that he would have lived at least for another 30 years so that he assessed the estimated loss of the claimants at Rs. 50 x 12 x 30 -- Rs. 18,000. He deducted Rs. 2,000 out of the said amount since the compensation is being paid in lump and deducted 50% of the reduced amount on account of contributory negligence on the part of the deceased and thus assessed the compensation at Rs. 8,000. In awarding such compensation to the claimants the Tribunal directed that a sum of Rs. 2,000 is to be paid by the insurer and the balance Rs. 6,000 by the appellant, the owner of the vehicle. There is no appeal by the insurer but the owner of the vehicle has preferred the present appeal challenging the award so

made.

9. The learned advocate appearing in support of this appeal has raised two points. In the first place, he has contended that the Tribunal went wrong in finding that there was any negligence on the part of the appellant's employees resulting in the accident and the consequent death of the deceased Taher. Secondly, it has been contended by him that upon the finding of the Tribunal the deceased being guilty of contributory negligence, the appellant could not have been made liable for any compensation whatsoever because the liability being one in tort, a person guilty of contributory negligence is not entitled in law to claim any damages. Both the points raised on behalf of the appellant have been contested by the learned advocate for the claimants/respondents before us.

10. So far as the first point raised on behalf of the appellant is concerned, it appears to us that negligence on the part of the appellant's employees is well established by the evidence on record. We feel no hesitation in accepting the evidence of P. Ws. 2 and 3 that the bus at the relevant time was so overcrowded that there was no accommodation inside the bus and it was the appellant's conductor who invited passengers to travel on the roof. A suggestion that the passengers travelling on the roof were so travelling of their own to avoid paying for the journey has been stoutly denied by P. W. 2. That was not even suggested to P. W. 3 and the conductor had not been examined to support any such suggestion. We agree with the tribunal below that inviting passengers to travel precariously on the top of an overcrowded bus is itself a rash and negligent act and that apart when passengers were being made to travel on the roof a greater amount of care and caution on the part of the driver was called for so that his leaving the metallic track by swerving on the right so close to a tree with over-hanging branch for overtaking a cart while in speed is also a rash and negligent act. We, therefore, affirm the finding of the Tribunal that the deceased Taher died in an accident which resulted from the rash and negligent act of the driver and the conductor of the appellant.

11. The amount of compensation assessed has not been challenged before us and in our view the assessment is so moderate that it can hardly be challenged at all. The deceased was a hawker by occupation and on the evidence of the mother the Tribunal could rightly assess his monthly income at Rs. 100 per month so that the contribution to the family was Rs. 50. At the time of the death he was merely 25 years in age and was quite hale and hearty so that the Tribunal could rightly hold that the deceased could be expected to be alive and earning the same income making the same contribution to the family for another 30 years. Therefore, the assessment of the loss at Rs. 16,000 after a deduction of Rs. 2,000 for lump sum payment is in our view a very moderate assessment and if there is any error that is against the claimants.

12. Next we proceed to consider the more important point which has been raised on behalf of the appellant. The Tribunal has found that there was contributory negligence on the part of the deceased and on such a finding in awarding compensation he has deducted 50% assessing the deceased's liability to contribute at that figure. The learned advocate for the appellant, however, has strongly contended that when the liability is one in tort, the entire claim should fail on the finding that there was contributory negligence on the part of the deceased because no claim of damages is sustainable where contributory negligence is established. The point thus raised arises an important question as to how far the English common law rule in this regard which has since been abrogated in

that country is applicable in India with regard to cases of present nature involving claims on fatal accidents.

13. The principle underlying the doctrine is application of the maxim 'In pari deficto potior est conditio defendentis' which means when both parties are equally to blame, neither can hold the other liable. That indeed was a part of the English common law so that in claims for damages for tort if the plaintiff was in any degree responsible for the injury sustained being guilty of contributory negligence his claim failed. But even in England the courts found that application of such a rule produced hardship where one of the two negligent parties suffered the greater loss although his negligence was not the major cause of the accident. English Courts, therefore, tried to modify the rigour of the Rule by introducing the principle of last op-j portunity (Davies v. Mann (1842) 10 M & W 546). This enabled the plaintiff to recover notwithstanding his own negligence, if upon the occasion of the accident the defendant could have avoided the same while the plaintiff could not. No doubt House of Lords later questioned the correctness of this innovation (See Admiralty Commissioner v. North of Scotland (1947) 2 All ER 350 (HL)). But the fact remains the courts in England found that application of the rule was often resulting in inequitable results and the legislature had intervened to alter the same by enacting the Law Reform (Contributory Negligence) Act 1945, Section 1 whereof provides:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the Court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damages."

14. Though it is true that on matters not governed by statutory provisions, courts in India have generally invoked rules of English common law adopting such rules as principles of justice, equity and good conscience but it has been so done keeping in view the time and condition of the Indian Society and prevailing circumstances. As such there are many instances where English common law rules had not been followed because of the reason that it would not be just and equitable to do so in India. In Waghela Rajsanji v. Sheikh Mashiuddin (1887) 14 Ind App 89 the Privy Council pointed out "The matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian Society and circumstances." Therefore, we are not to follow the English rule of contributory negligence blindly particularly when even in England the legislature intervened to abrogate application of the rule for its inequitable consequences. As observed by Stone C. J. "When one finds a rule has been abrogated by legislature that rule becomes an unsafe guide." In the case of Secretary of State v. Rukhminibai, AIR 1937 Nag 354, the Division Bench of the Nag-pur High Court presided over by Stone C. J. in answering in the negative the question as to whether the doctrine of common employment prevails in India in cases that in England would come under the Employer's Liability Act referred to them upheld the view that a court in India which takes recourse to the common law of England cannot afford to ignore the extent to which the common law itself stands abrogated by statute, Moreover Section 110B provides that the tribunal is to hold an enquiry into the claim and make an award determining the amount of compensation which appears to it to be just. Hence the Tribunal is not left to be guided entirely by

the old common law rule but is directed to determine just compensation, i. e. compensation which would be just, in the prevailing facts and circumstances and also considering the change with the time in the concept of justness.

15. This is the reason why courts in India have applied the principles underlying the Law Reform (Contributory Negligence) Act 1945 in holding that contributory negligence would only mitigate the liability to the extent of negligence that can be attributed but would not debar the claim altogether. Reference may be made to State v. Lal Man Badriprasad, AIR 1954 Vindh Pra 17, Sindhu v. Gour Krishna, , Yoginder Paul Chowdhury v. Durga Das Punj, 1972 Acc CJ 483 (Delhi) and Punjab State v. Jaswant Kaur, 1973 Acc CJ 213 (Punj). Judicial decisions on the point are uniform and our attention had not been drawn to any decision taking the contrary view. Hence, we must hold that the tribunal was right in apportioning the liability on its finding as to the deceased being guilty of contributory negligence.

16. In considering the above plea raised on behalf of the appellant, it would be useful to consider another aspect which the Tribunal had failed to do. Looking at the matter from that aspect the finding of the Tribunal that the deceased was also guilty of contributory negligence cannot be sustained. Here, on the evidence it has been established that the deceased was travelling seated on the roof of the bus. Such travelling by itself has been held by the Tribunal below to be an act of contributory negligence. But the Tribunal below failed to appreciate that the evidence also establishes the position that not only the deceased but a number of passengers were invited by the appellant's employees to travel in that manner. Being invited to do so it would be reasonable to think on the part of such passengers that they would be safely carried to their destination, the bus being driven with such care and caution so as to ensure a safe journey for them. Where the passengers including the deceased were made to travel in that fashion on such an assurance, contributory negligence would be no defence because the deceased was not bound to take such care as the defendant contends but had a right to assume that the defendant would do things rightly and carefully so as to ensure a safe journey for him. In the case of General Cleaning Contractors v. Christmas, (1952) 2 All ER 1110 a window cleaner being injured owing to the negligence of the employer to provide hook and safety belts claimed damages; the employer took the defence that the plaintiff could have avoided the injury by equipping himself with safety belt. The House of Lords negatived the plea of the employer and held him liable on the ground that where an employee works in the usual manner as the employer expected him to do it and the employer has failed to take steps necessary to keep the system reasonably safe, the employer cannot contend that the employee could have avoided injury by himself taking precautions. He has the right to expect the system to be reasonably safe having regard to the dangers necessarily inherent in the operation. In our view, this principle is equally applicable in the present case because the deceased having been invited to travel on the roof of the bus and such travelling having been adopted as a common method for passengers at the instance of the employees of the appellant, the passengers had a right to expect that such travelling would be reasonably safe in the hands of the appellant's employees. Viewed from this angle, the appellant could not have succeeded in his plea at all. Similar was the view taken by the Kerala High Court in the Bench decision in the case of Swaraj Motor Pvt. Ltd. v. T. R. Hainan Pilial, 1968 ACC CJ 127. But be that as it may for reasons given, we agree with the tribunal below that even if the deceased was guilty of contributory negligence that would only mitigate the liability of the

appellant and to the extent as assessed by the tribunal below.

17. The appeal, therefore, fails and is dismissed. There will be no order for costs.

B.C. Chakrabarti, J.

18. I agree.