

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ MAC.APP.No.179/2004 and CM No.5285/2008

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Reserved on : 7th September, 2012
Date of decision :12th October, 2012

NATIONAL INSURANCE CO. LTD. Appellant
Through : Mr. L.K. Tyagi, Adv.

versus

GITA BINDAL & ORS. Respondents
Through : Mr. Ravindra Narayan and
Mr. R.K. Rakesh, Advs.
for R-1 to 5.

CORAM :-
THE HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. The appellant has challenged the award of the Claims Tribunal whereby compensation of ₹18,30,200/- has been awarded to claimants/respondents No.1 to 5. The appellant seeks reduction of the award amount whereas the claimants have filed cross-objections seeking enhancement of the award amount.
2. The accident dated 13th April, 2001 resulted in the death of Sanjeev Bindal. The deceased was survived by his widow, two minor sons and parents who filed the claim petition before the Claims Tribunal.
3. On 13th April, 2001, the deceased was going from Delhi to Vaishno Devi in a car No.DL-8-CG 0794. The car was being

driven by Sumeet Sharma. When the car reached village Rapur, District Hoshiarpur, the driver hit a tree due to which the car went downhill resulting in the death of Sanjeev Bindal. Two other occupants in the car, namely, Rohit Kumar and Triyaksh Ojha survived after injuries. The claimants examined Triyaksh Ojha as PW-3 who deposed that he was sleeping when the car met with the accident. The claimants placed on record the certified copy of the record relating to the criminal case registered against the driver of the offending vehicle, namely, FIR, charge sheet, site plan, mechanical inspection report, registration cover, driving licence, postmortem report, death certificate and inquest report. The Claims Tribunal *suo moto* converted the claim petition from Section 166 of the Motor Vehicles Act to Section 163A of the Motor Vehicles Act. The Claims Tribunal took the income of the deceased as ₹8,781.40 per month, added 50% toward future prospects, deducted 1/3rd towards personal expenses and applied the multiplier of 17 to compute the loss of dependency at ₹17,95,200/-. ₹25,000/- has been awarded for pain and suffering, ₹2,500/- towards funeral expenses, ₹2,500/- towards loss of estate and ₹5,000/- towards loss of consortium. The total compensation awarded is ₹18,30,200/-.

4. The learned counsel for appellant has urged at the time of hearing of this appeal that the claimants are entitled to compensation according to the Second Schedule of the Motor Vehicles Act and therefore the amount awarded to the claimants is liable to be reduced to that extent. It is further submitted that the

multiplier be reduced from 17 to 16. It is further submitted that the rate of interest be reduced from 9% per annum to 5% per annum.

5. The learned counsel for the claimant submits that the claimants are entitled to compensation under Section 166 of the Motor Vehicles Act as the accident occurred due to the negligence of the car driver. The claimants seek enhancement on the ground that income of the deceased be taken as ₹10,032/- per month and the personal expenses of the deceased be reduced from 1/3rd to 1/4th. The learned counsel further seeks compensation towards loss of love and affection.

6. Learned counsel for the respondents has placed on record FIR, charge sheet, site plan, mechanical inspection report, registration cover, driving licence, postmortem report, death certificate and inquest report along with English translation. The FIR was registered on the statement of Triyaksh Ojha who was travelling in the offending car No.DL-8-CG 0794. Triyaksh Ojha was sitting in the rear seat along with deceased, Sanjeev Bindal whereas Rohit Kumar was sitting on the front seat next to the driver. The FIR records that the deceased was driving the car in a rash and negligent manner due to which he lost control and the car went downhill and hit a tree on the left side of the road. The police has chargesheeted the driver, Sumeet Sharma for rash and negligent driving under Sections 279, 337 and 304A of the IPC. Triyaksh Ojha appeared in the witness box as PW-3 and deposed that he was sleeping on the backseat of the car being driven by Sumeet Sharma when the car met with an accident. Sumeet

Sharma became unconscious. When he regained consciousness, he was lying on the ground near the car and was taken to the hospital. Later he came to know that Sanjeev Bindal died in the accident. The Claims Tribunal held that the rash and negligent driving was not established as PW-3 was sleeping at the time of accident. The Claims Tribunal *suo moto* converted the claim petition to Section 163A of the Motor Vehicles Act.

7. On examination of the statement of PW-3 and the documents relating to the criminal case including FIR and chargesheet, this Court is of the view that this case is squarely covered by the principle of *res ipsa loquitur*. The Claims Tribunal gravely erred in not applying the principle of *res ipsa loquitur*.

8. In *Shyam Sunder v. State of Rajasthan*, (1974) 1 SCC 690, the Supreme Court discussed the doctrine of *res ipsa loquitur*. In para 10, the Supreme Court observed as under:

“The maxim is stated in its classic form by Erle, C.J. [*See: Scott Vs. London & St. Katherine Docks* (1865) 3 H & C 596, 601]:

.... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.”

In para 15, the Supreme Court held as follows:

"*Res ipsa loquitur* is an immensely important vehicle for importing strict liability into negligence cases. In practice, there are many cases where *res ipsa loquitur* is properly invoked in which the defendant is unable to show affirmatively either that he took all reasonable precautions to avoid injury or that the particular cause of the injury was not associated with negligence on his part. Industrial and traffic accidents and injuries caused by defective merchandise are so frequently of this type that the theoretical limitations of the maxim are quite overshadowed by its practical significance. [See: Millner: "Negligence in Modern Law" 92]."

(Emphasis supplied)

In para 16, the Supreme Court further held as under:

"Over the years, the general trend in the application of the maxim has undoubtedly become more sympathetic to plaintiffs. Concomitant with the rise in safety standards and expanding knowledge of the mechanical devices of our age, less hesitation is felt in concluding that the miscarriage of a familiar activity is so unusual that it is most probably the result of some fault on the part of whoever is responsible for its safe performance [See: John G. Fleming. The Law of Torts, 4th Ed. p. 260]."

9. In *Syad Akbar v. State of Karnataka*, (1980) 1 SCC 30, the Supreme Court held that the rule of *res ipsa loquitur* in reality belongs to the law of torts. Where negligence is in issue, the

peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. The Supreme Court held as under:

“19. ...The peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of event or accident. **It is to such cases that the maxim *res ipsa loquitur* may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. The event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. Further the event which caused the accident must be within the defendant's control.** The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. ...”

(Emphasis supplied)

10. In *Kerala State Electricity Board v. Kamalakshy Amma*, 1987 ACJ 251, a person died by accidentally coming into contact with the live wire which snapped out of the cup joint on electric post. The legal representatives of the victim instituted a suit against Kerala State Electricity Board (KSEB) for damages on account of his death alleging that KSEB was negligent in maintaining the electric line under their management. The

Division Bench of the Kerala High Court applied the rule of *res ipsa loquitur* and upheld the compensation awarded by the Trial Court. The Court held as under:-

“9. When the plaintiffs succeeded in proving that a pedestrian (in this case, the deceased) was electrocuted from a live wire hanging down from an electric post, there is a presumption of fact that there was lack of proper care on the part of those in the management or control of the power supply system at the particular place. The maxim *res ipsa loquitur* is a principle which aids the court in deciding as to the stage at which the onus shifts from one side to the other. S. 114 of the Evidence Act gives a wide discretion to the courts to draw presumptions of fact based on different situations and circumstances. This is in a way, a recognition of the principle embodied in the maxim *res ipsa loquitur*. The leading case on the subject is *Scott v. London and St. Katherine Docks Co.* (1865) 3 H & C 596. Erle C.J. in the said case has stated that, "where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care". *Evershad M. R. in Moore v. R. Fox & Sons* (1956) 1 OB 596 affirmed and followed the principle laid down in *Scott's* case. Winfield in his famous treatise on Tort, after referring to the decisions which founded the above doctrine, has mentioned the **two requirements to attract the above principle. They are, (i) that the "thing" causing the damage be under the control of the defendant or his servants and (ii) that the accident must be such as would not in the ordinary course of things have happened without negligence.** This

principle which was often found to be a helping guide in the evaluation of evidence in English decisions has been recognised in India also. The Supreme Court in *Syed Akbar v. State of Karnataka* MANU/SC/0275/1979 : AIR 1979 SC 1848 has discussed the applicability of the maxim *res ipsa loquitur* in civil as also criminal cases, in the light of the provisions of the Evidence Act. ...”

(Emphasis supplied)

11. In *State of Gujarat v. Purnimaben*, MANU/GJ/0340/2000, the Division Bench of the Gujarat High Court explained the rule of *res ipsa loquitur* as under:-

“18. In the realm of tort negligence, at times, it becomes difficult to establish the nexus, with the result or the consequence or the cause thereof by leading direct evidence. In order to mitigate such a contingency, a very interesting concept and philosophy of doctrine of 'res ipsa loquitur' has been evolved in English Law and we have also followed in tort negligence. Rule of 'res ipsa loquitur', in reality, belongs to law of tort. Where negligence is in issue, peculiar circumstances constituting the event or accident in a particular case might themselves proclaim in concordant, clear, consistent and unambiguous basis the negligence of somebody as a cause of the event or the accident. The primary facts, constituted from the record would give a rise to such a concept if cause of accident is unknown and no reasonable explanation as to its cause is coming forth from the opposite party. In such a fact situation, the maxim of 'res ipsa loquitur' comes into play.

19. It is, therefore, necessary to invoke such a doctrine in examining, determining and adjudicating upon the claim of compensation founded upon the tort negligence. **The event or the accident must be a**

kind which would not happen in ordinary course of event or nature or thing if those who have the management and control of the thing has exercised due, appropriate and reasonable standard of care and caution. Further, the events are caused, the accident must be within the control of the defendant or the adversary. The reason for second requirement is that where the defendant or the adversary has the control of the thing which caused the injury, he was in a better position than the plaintiff to explain as to how the incident or the accident has occurred. Moreover, 'res ipsa loquitur' must not be speaking negligence but pin it on the defendant. In our country, the rules of evidence are governed by the Evidence Act, 1872, under which the general rule is with the burden of proving negligence as to the cause of the accident is on the party who propounds it. In order to lighten this burden, there are certain provisions and the doctrines, namely,

- (1) permissive presumption,
- (2) presumption of fact,
- (3) rebuttable presumption of law
- (4) irrebuttable presumption of law.

20. Presumptions of fact are inferences on fact patterns drawn from the experience and experiments. It is, therefore, the discretion of the Court to draw an inference about the existence on certain factual situation, if primary facts brought out on record warrants such presumption. In fact, doctrine of 'res ipsa loquitur' could only create an aid in evaluation and analysis and assessment of evidence on record. **When such a doctrine is applied properly to the facts, the burden of proof, initially, rests with the victims of the tort or their heirs or legal representatives is lightened or reduced as the Court would be able to presume certain things and therefore, it will be for the defendant or the adversary to explain or rebut such a presumption.**

No doubt, this doctrine could be invoked where direct evidence is not obtainable. ...”

* * *

“23. The rule that it is for the plaintiff to prove negligence and not the defendant to disprove it, in some cases, is one of the considerable hardship to the plaintiff because, it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its genesis or origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the principle of 'res ipsa loquitur'. To sum up, the effect of the doctrine of 'res ipsa loquitur' depends on the cogency of the inference to be drawn, and will vary from case to case, if for instance, a vehicle mounts to pavement, this is evidence of negligence, but reasonable men may differ about the inference to be drawn from it, so that a verdict of no negligence would not be upset although a withdrawal from the jury would be - yet something may fall from the defendant's window in such circumstances that only an inference of negligence can be drawn, whereupon a verdict of no negligence might be set aside.

24. Truly and plainly speaking, **the effect of doctrine of 'res ipsa loquitur' is to shift the onus to the defendant in the sense that the doctrine continues to operate unless the defendant calls credible evidence which explains how the accident or mishap may have occurred without negligence**, and it seems that the operation of the rule is not displaced merely by expert evidence showing, theoretically, possible ways in which the accident might have happened without the defendant's negligence. The doctrine of 'res ipsa loquitur', therefore, plays a very significant role in the law of tort and it is not the relic

of the past, but the living force of the day in determining the tortious liability.”

(Emphasis supplied)

12. The principle of *res ipsa loquitur* laid down in the aforesaid four judgments is summarized as under:

i. *Res ipsa loquitur* means that the accident speaks for itself. In such cases, it is sufficient for the plaintiff to prove the accident and nothing more.

ii. Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.

iii. There are two requirements to attract *res ipsa loquitur*, (i) that the "thing" causing the damage be under the control of the defendant and (ii) that the accident must be such as would not in the ordinary course of things have happened without negligence.

iv. *Res ipsa loquitur* is an exception to the normal rule that mere happening of an accident is no evidence of negligence on the part of the driver. This maxim means the mere proof of accident raises the presumption of negligence unless rebutted by the wrongdoer.

v. In some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him, but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident, but cannot prove how it happened to establish negligence. This hardship is to be avoided by applying the principle of *res ipsa loquitur* is that the accident speaks for itself or tells its own story.

There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more.

vi. The effect of doctrine of '*res ipsa loquitur*' is to shift the onus to the defendant in the sense that the doctrine continues to operate unless the defendant calls credible evidence which explains how the accident or mishap may have occurred without negligence, and it seems that the operation of the rule is not displaced merely by expert evidence showing, theoretically, possible ways in which the accident might have happened without the defendant's negligence. The doctrine of '*res ipsa loquitur*', therefore, plays a very significant role in the law of tort and it is not the relic of the past, but the living force of the day in determining the tortious liability.

vii. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the knowledge of the defendant.

viii. The doctrine of *res ipsa loquitur* has been applied by the Courts in the following cases:-

- Where victim was sleeping on a cot placed in front of his house by the side of the road when the offending vehicle dashed against the cot and injured the claimant.
- Where a bus had dashed against a tree, causing death of a passenger.
- Where a vehicle negotiating a sharp “U” turn dashed against a tree, moved away to a distance of 150 feet from the road and then overturned.

- Where a vehicle went-off the road, hit against the tree and rolled down killing a passenger.
- Where a truck dashed against the victim standing by roadside.
- Where a truck came at breakneck speed without blowing horn and dashed against a 9 years old boy, who was walking on the extreme left side of the road, from behind resulting in instantaneous death.”

13. In the present case, the deceased was travelling in car No. DL-8-CG 0794 being driven by Sumeet Sharma. The deceased was sitting on the rear seat. The car was in the exclusive control of its driver, Sumeet Sharma and the accident would not have happened in the ordinary course of events without the negligence of its driver. The deceased has not in any manner contributed to the accident. This case is squarely covered by the principle of *res ipsa loquitor*. The facts of this case raise a presumption of negligence which has not been rebutted by its driver. In the facts and circumstances of this case, it is held that the accident occurred due to rash and negligent driving of the offending car by its driver and the claim petition is treated under Section 166 of the Motor Vehicles Act. The contrary finding of the Claims Tribunal and conversion of the claim petition to Section 163 of Motor Vehicles Act is set aside.

14. The deceased was aged 35 years at the time of the accident and was working as a Computer Operator with Govt. of India Press, Minto Road, New Delhi drawing a monthly salary of ₹10,032/-. The witness from Govt. of India Press appeared as PW-

2 and proved the salary Ex. PW2/B according to which the monthly salary of the deceased was ₹10,032/-. The witness also produced Form 16 in which the total income of the deceased was shown as ₹1,25,318 per annum (₹10,443.16 x 12) and the taxable income of the deceased was computed as ₹1,05,137/- per annum after standard deduction of ₹20,000/-. The Claims Tribunal took the taxable income of the deceased as ₹1,05,137/- per annum which is clearly erroneous. The standard deduction for the purposes of calculation of Income Tax is not to be deducted for computing the total income of the deceased. The income of the deceased is taken as ₹10,032/- per month as per the salary certificate Ex. PW-2/B.

15. The Claims Tribunal has added 50% towards future prospects of the deceased which is upheld. The Claims Tribunal has deducted $\frac{1}{3}^{\text{rd}}$ towards the personal expenses. Considering the deceased has left behind five legal representatives, the appropriate deduction according to the judgment of the Supreme Court in *Sarla Verma v. DTC*, (2009) 6 SCC 121, is $\frac{1}{4}^{\text{th}}$. The personal expenses of the deceased are, therefore, reduced $\frac{1}{3}^{\text{rd}}$ to $\frac{1}{4}^{\text{th}}$.

16. The Claims Tribunal has applied the multiplier of 17 whereas the appropriate multiplier is 16 according to the judgment of the Supreme Court in *Sarla Verma v. DTC* (supra). The multiplier is, therefore, reduced from 17 to 16.

17. The Claims Tribunal has not awarded any compensation for loss of love and affection. However, the Claims Tribunal has awarded ₹25,000/- towards pain and suffering which is not a permissible head in death cases. The compensation of ₹25,000/-

awarded under the head of pain and suffering is treated as compensation for love and affection.

18. The Claims Tribunal has awarded interest @ 9% p.a. which does not warrant any reduction in view of the judgment of the Supreme Court in *Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy*, AIR 2012 SC 100 in which the Court has awarded interest @ 9% p.a. to the victims of Uphaar Tragedy.

19. The Claimants are entitled to total compensation of ₹22,01,912/- as per breakup given hereunder:

Income of the deceased	:	₹	10,032/-
			per month
Add : Future prospects (50%)	:	₹	5,016/-
Less : 1/4 th towards personal expenses of the deceased	:	₹	3,762/-
Annual loss of dependency (₹11,286 x12)	:	₹	1,35,432/-
Total loss of dependency (₹1,35,432 x16)	:	₹	21,66,912/-
Compensation towards loss of love and affection	:	₹	25,000/-
Compensation towards funeral expenses	:	₹	2,500/-
Compensation towards loss of estate	:	₹	2,500/-
Compensation towards loss of consortium	:	₹	5,000/-
Total	:	₹	22,01,912/-

20. For the reasons as aforesaid, the appeal is dismissed, the cross-objections are allowed and the award is enhanced from ₹18,30,200/- to ₹22,01,912/- along with interest @ 9% p.a. from the date of filing of the claim petition till realization.

21. The appellant has deposited a sum of ₹4 lacs in terms of order dated 4th May, 2004 which was released to the claimants vide order dated 26th April, 2005. The said amount shall be adjusted against the interest on the award amount. The appellant is directed to deposit the balance amount in terms of this judgment with UCO Bank, Delhi High Court Branch by means of a cheque drawn in the name of UCO Bank A/c Gita Bindal within a period of 30 days.

22. Upon the aforesaid amount being deposited, UCO Bank is directed to release 10% of the said amount to respondent No.1 by transferring the same to her Saving Bank Account. The remaining amount be kept in the fixed deposit in the following manner:

- (i) Fixed deposit in respect of 10% of the amount in the name of respondent No.5 for a period of one year.
- (ii) Fixed deposit in respect of 10% of the amount in the name of respondent No.4 for a period of two years.
- (iii) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of three years.
- (iv) Fixed deposit in respect of 10% of the amount in the name of respondent No.5 for a period of four years.
- (v) Fixed deposit in respect of 10% of the amount in the name of respondent No.1 for a period of five years.

- (vi) Fixed deposit in respect of 20% of the amount in the name of respondent No.2 till he attains the age of majority.
- (vii) Fixed deposit in respect of 20% of the amount in the name of respondent No.3 till he attains the age of majority.

23. The interest on the aforesaid fixed deposits shall be paid monthly by automatic credit of interest in the Savings Account of respondent No.1.

24. Withdrawal from the aforesaid account shall be permitted to the beneficiary after due verification and the Bank shall issue photo Identity Card to the beneficiary to facilitate identity.

25. No cheque book be issued to the beneficiary without the permission of this Court.

26. The original fixed deposit receipts shall be retained by the Bank in the safe custody. However, the original Pass Book of the Fixed Deposits shall be given to the beneficiary along with the photocopy of the FDRs. Upon the expiry of the period of each FDR, the Bank shall automatically credit the maturity amount in the Savings Account of the beneficiaries.

27. No loan, advance or withdrawal shall be allowed on the said fixed deposit receipts without the permission of this Court.

28. Half yearly statement of account be filed by the Bank in this Court.

29. On the request of the beneficiaries, Bank shall transfer the Savings Account to any other branch according to their convenience.
30. The beneficiaries shall furnish all the relevant documents for opening of the Saving Bank Account and Fixed Deposit Account to the AGM, UCO Bank, Delhi High Court Branch, New Delhi.
31. The pending application stands disposed of.
32. The statutory amount deposited by the appellant be refunded back to the appellant through counsel after deposit of the award amount in terms of this judgment.
33. Copy of this judgment be sent to the AGM, UCO Bank, Delhi High Court Branch, New Delhi.

J.R. MIDHA, J

OCTOBER 12, 2012

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