
(2014) 01 BOM CK 0055
In the Bombay High Court
Case No : First Appeal No. 257 of 2007

Bhukant Prabhu

APPELLANT

Vs

Ajay Guno Kerkar

RESPONDENT

Date of Decision : 18-01-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 165, 166

Citation : (2014) 3 BomCR 686

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : S.S. Kakodkar, Advocate for the Appellant; E. Afonso, Advocate for Respondent No. 3 and Shri V. Timble, Advocate for Respondent No. 5, Advocate for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and award of Claim Petition No. 318/2003 which was pending before the MACT, South Goa, Margao. The petition filed by appellant is dismissed by the Tribunal. Both the sides are heard.

2. In short, the facts leading to the institution of the appeal can be stated as follows:

The claimant is a transporter. On 25/04/2003, the claimant collected 12,000 kilo litres of diesel from Hindustan Petroleum Ltd. in the truck standing in the name of his wife and it was to be delivered at Gokak, Karnataka. The number of the truck was GA-02-T-8138. The accident took place at a place known as Durginim Mollem situated at NH-4A within jurisdiction of Mollem Police Station, Sanguem Taluka at about 14.40 hrs. It is the case of the claimant that truck bearing No. GA-01-W-6099 gave dash to the truck tanker of the claimant and the accident was caused by the driver of the truck bearing No. GA-01-W-6099 by driving the truck rashly and negligently. It is contended that another truck bearing No.

GA-02-Z-7867 which was following truck No. 6099 was also involved in the accident and it also gave dash to the truck in which the claimant was taking diesel to its destination. It is the case of the claimant that the entire diesel was lost in the accident and the value of this diesel was around of Rs. 2,68,793/- (Rupees two lacs sixty eight thousand seven hundred and ninety three only), the costs estimated by petroleum company.

3. The claim was made against the drivers, the owners and Insurance Companies of both the aforesaid trucks.

4. The Insurance Company of truck No. 6099 filed written statement and contested the matter. It is the case of the Insurance Company that there was no fault on the part of driver of truck No. 6099. It is contended that the claimant must have purchased insurance in respect of the goods and so the claimant is not entitled to get compensation from the Insurance Company.

5. The Insurance Company of other truck, original respondent No. 5 also filed written statement and it also contested the claim by contending that there was no fault on the part of driver of truck No. 7867.

6. Only the claimant gave evidence. The Claim Petition is dismissed by holding that the appellant/claimant was not the owner of the goods viz. diesel. It is also held that the claimant failed to prove that the accident took place due to the fault of the driver of the aforesaid two trucks. It is also observed that there is no convincing evidence to prove that entire diesel was lost.

7. As almost all the issues are decided against the claimant, the entire evidence needs to be discussed. For proving the fault of the driver of the aforesaid two trucks, the claimant has relied on the evidence of one Shridar Pujari/AW2, the evidence of some police officers and the record prepared by police. The claimant has no personal knowledge regarding the accident.

8. Shridar Pujari/AW2 has given evidence that he was present in the vicinity of the spot of accident and noticed that truck No. 6099 was proceeding towards the side of truck No. 8138 and truck No. 7867 was following truck No. 6099. He has given evidence that the driver of truck No. 6099 drove it rashly and negligently and caused the accident. The evidence in cross-examination shows that he knew the claimant from prior to the date of accident as he was working in the hotel of claimant. The hotel is situated at Mollem.

9. Sambaji Talwar/AW4 has given evidence that he was working as Head Constable at Mollem police station at the relevant time and he registered the offence after learning about the incident. He has given evidence that he recorded statements of cleaner of tanker No. 8138, driver of truck No. 7867 and on the basis of that record he arrested the driver of truck No. 6099. His evidence shows that he filed charge sheet against the driver of truck No. 6099, Shri Ajay Kerkar, respondent No. 1 from Claim Petition. The claimant has not produced copy of the charge sheet to show that his witness Shridhar Pujari/AW2 had approached

police and his statement was recorded by police. Evidence is not given by aforesaid Investigating Officer and other police officer Uday Naik (PSI) that Shridhar Pujari/AW2 had witnessed the accident and the statement was recorded by police. Shridhar Pujari/AW2 is an interested witness. In view of the circumstance that nothing is produced on record to show that Shridhar Pujari/AW2 had approached police to inform about the accident or his statement was recorded during investigation, this Court holds that the evidence of Shridhar Pujari/AW2 cannot be used against the respondents. The evidence of Sambaji Talwar/AW4, ASI shows that on the basis of inquiry made by him with the witnesses, the report was given and the crime was registered against respondent No. 1 from Claim Petition. The charge sheet was also filed against respondent No. 1. The evidence shows that the truck bearing No. 6099 was overtaking other vehicle and the accident took place due to such overtaking. He has given evidence that truck bearing No. 6099 gave dash to tanker bearing No. 8138 and also the other truck.

10. Uday Naik/AW6, other Investigating Officer has given evidence on the investigations made by him. His evidence shows that all the three vehicles were involved in the accident.

11. Devidas Sukhthankar/AW5, photographer is examined by the claimant to prove the photographs of the three vehicles taken by him. In his evidence, the photographs and negatives are produced at Exhibit 56.

12. The spot panchanama shows that three vehicles were involved in the accident. The spot panchanama and the photographs show that all the three vehicles were damaged in the accident. Truck bearing No. 6099 and 7867 had overturned after the accident. The truck tanker of the claimant was on its wheels and the right side portion of the diesel tank was in damaged condition.

13. The hand sketch map prepared at the time of preparing spot panchanama and the other record show that the tanker of claimant was initially proceeding from Dharbandora side, but after the impact it was again facing towards the Dharbandora side. After the impact it was found on left side of the road proceeding to Dharbandora. The distance between its rear wheels and the edge of the road of right side was around 10 feet and the road had width of 18 feet.

14. In addition to the width of 18 feet there were side patties of 2 feet width on either side of the road. No tyre marks were noticed at the spot. Only truck tanker bearing No. 8138 was fully loaded and even after the impact it was on its wheels. Only due to this circumstance and presence of blood on the spot it can be inferred that the accident took place at the point where tanker bearing No. 8138 was found standing at the time of spot panchanama. The truck No. 6099 was lying on right side of road proceeding to Dharbandora and it was found on wrong side. In ordinary course, this truck ought to have been on left side of the road proceeding to Dharbandora. It was at a distance of more than 80 metres from the point of impact. From the photographs it is not possible to say as to which

portion of truck No. 6099 was damaged due to impact but there is some description in spot panchanama in that regard. Spot panchanama shows that complete driver's cabin was in damaged condition and there was damage to both the front and back wheels. The damage was of Rs. 1,00,000/- (Rupees one lac only). Spot panchanama shows that front portion of chasis of truck No. 7867 and its left cabin door were in damaged condition. It was noted that the right side portion of tanker No. 8138 was in damaged condition. Some green colour of the tanker was found on front portion of the truck No. 7867.

15. The accident took place at about 2.00 p.m., in day light. The tanker totally turned to opposite side due to the impact as truck No. 6099 and 7867 were coming from opposite direction. Inference is easy that either of this two trucks first gave dash to the right side of the tanker and then the other truck was also involved and it also gave dash to the tanker. There could have been other possibility like the truck which first gave dash to the tanker also gave dash to the other truck as stated by the Investigating Officer. However, the presence of green colour of tanker on the body of truck No. 7867 shows that it had also given dash to tanker bearing No. 8138.

16. Police found that truck No. 6099 was overtaking truck No. 7867 and in that attempt it first gave dash to the tanker of claimant. The material collected by police and discussed above shows that there is a possibility that truck No. 6099 first gave dash to the tanker, then it went ahead up to a distance of 80 to 90 metres and then it overturned. The second truck bearing No. 7867 was found hardly at a distance of 14 feet from tanker No. 8138. This circumstance shows that truck No. 6099 was being driven with extensive speed. It was attempting to overtake truck No. 7867 and in that attempt it first gave dash to the right side portion of the tanker and then the other truck also came in contact with the tanker. As the complete portion of the cabin of truck No. 6099 was in damaged condition such inference is possible.

17. The learned Counsel for Insurance Company of truck No. 6099 submitted that the doctrine of *res ipsa loquitur* cannot be used in this case as the claimant avoided to examine driver of truck No. 8138. This proposition is not acceptable. The doctrine can be used by this Court if there are facts as discussed above and when there is no other possibility. When the Court decides to use the doctrine, it becomes necessary to find out whether there is any plausible explanation from the other side, driver of the offending vehicle. When there are circumstances like filing of charge sheet against the driver of offending truck like truck No. 6099, the burden is on the owner of such truck to explain the circumstances. No witness is examined either by the owner of the truck No. 6099 or its Insurance Company. In view of this circumstance, this Court holds that adverse inference needs to be drawn against the owner of truck No. 6099. In the case reported at *Dulcina Fernandes and Others Vs. Joaquim Xavier Cruz and Another*, , when there were similar circumstances, the Apex Court held that the filing of charge sheet is a relevant circumstance and this circumstance needs to be considered by the

Tribunal for ascertaining the fault.

18. Learned Counsel for the appellant/claimant has placed reliance on some reported cases like; Sakharibai Hasanali Makani and Others Vs. Girish Kumar Rupchand Gadia and Others, , Madhav Sakharam Shilotri and Others Vs. State of Maharashtra and Others, , Smt. Usha Arjun Kavade, Kum. Aaditya Arjun Kavade, Kum. Swapnil Arjun Kavade and Shri Dashrath Mahadeo Kavade Vs. Shri Tahil Chand Shaikh, New India Assurance Co. Ltd. and Shri Sajan Janardan Waghmare, . These cases are on the point of burden of proof and the use of doctrine of res ipsa loquitor. The facts and circumstances of each case are different and it is up to the Court to decide whether doctrine can be safely used. In the case reported as Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , the Apex Court has discussed the circumstances in which the doctrine can be used and need of its use. It is observed that in some cases accident speaks for itself or tells its own story and in such cases the claimant can be asked to prove only the facts of the accident and nothing more. It is observed that in such cases it is for the other side to establish that the accident took place due to other cause and not the causes mentioned in the papers as discussed above. This Court has already considered and discussed relevant facts. This Court holds that the doctrine of res ipsa loquitor needs to be used in this case.

19. The learned Counsel for the respondent/Insurance Company of Appeal No. 32/2013. The facts of this case were totally different.

20. In view of the discussion made above, this Court holds that the accident took place due to the fault of driver of truck No. 6099 and the Tribunal has committed error in holding that the fault of driver of truck No. 6099 was not proved. This finding and decision needs to be set aside.

21. To prove the loss sustained by the claimant, the claimant has examined himself and he has examined more witnesses like the employee of petroleum company and police officers. He has given evidence that he is the transporter and on 24/05/2003 12,000 kilo litres of diesel was collected by him as a transporter from Hindustan Petroleum, Vasco in truck No. 8138 and the said diesel was to be delivered at Gokak, Karnataka. He has deposed that in the accident, he lost the entire diesel. He has given evidence that the petroleum company directed him to deposit the value of the diesel viz. Rs. 2,68,793/- (Rupees two lacs sixty eight thousand seven hundred and ninety three only) which includes the duty and other charges and accordingly paid such amount to the petroleum company.

22. The documents like spot panchanama at Exhibit 28 and photographs at Exhibit 56 show that due to the diesel which had come from the tanker the portion of the road had become wet and the diesel had further gone towards left side of road taking towards Dharbandora. There is specific mention in the spot panchanama that the diesel had come out of the tanker and it was informed to

the police during preparation of spot panchanama that the value of the diesel was around Rs. 2.8 lac. The evidence of such loss is given by both the police officers examined by the claimant and the evidence is consistent with the record. The submission of learned Counsel for the Insurance Company that the possibility that some diesel was still there as there were four compartments to the tanker cannot be accepted. The Tribunal has observed that the possibility that some diesel was salvaged after the accident cannot be ruled out. This Court finds no force in the submission. The record is sufficient to prove that damage was caused to the tanker containing diesel and the diesel had come out of the tanker. Further there is more evidence on the actual loss sustained by the claimant.

23. Sunil Nandankar/AW3 was employee of Hindustan Petroleum, and on 25/04/2003, as per the invoice, diesel was filled in his tanker for transportation. He has given evidence that as the diesel was lost in the accident correspondence was made with the claimant and the loss was reimbursed by the claimant. He has referred to the record to show that 12,000 kilo litres of diesel was filled in the tanker. A copy of transport agreement is produced to show that it was the responsibility of the carrier, claimant to reimburse the loss. Record like invoice, correspondence and the cash receipt show that the claimant did deposit the amount of Rs. 2,68,793/- (Rupees two lacs sixty eight thousand seven hundred and ninety three only) with the petroleum company. This Court has no hesitation to hold that the evidence given by the claimant on the loss is more than sufficient. Thus, the claimant was required to pay to the aforesaid petroleum company and he sustained loss due to accident, due to fault of driver of truck No. 6099.

24. The learned Counsel for respondent/insurance company submitted that the evidence given by the employee of petroleum company and the record show that petroleum company was the owner of the diesel and so the claimant cannot claim compensation under Motor Vehicles Act (MV Act, for short). He took this Court through the provisions of Section 166 of MV Act. Section 166 of MV Act reads as under:

166. Application for compensation - (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made -

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be :

Provided that where all the legal representatives of the deceased have not joined

in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

25. It appears that the Tribunal has also considered such technicalities and held that the claimant cannot be considered as the owner of the diesel.

26. The MV Act is a social and beneficial legislation and the interpretation of the provisions needs to be made to see that the purpose behind the enactment is served. When the insurance company admits that the petroleum company could have claimed compensation for aforesaid loss, it is not open to the insurance company to say that the claimant who actually sustained loss cannot claim the compensation. By examining petroleum company, the claimant has proved that he paid the value and other charges in respect of the diesel and he actually sustained loss and so such defence is not available to the insurance company. In such a case the claimant stands in the shoes of "owner" mentioned in Section 166 of MV Act.

27. The learned Counsel for Insurance Company submitted that the provisions of Carriers Act, 1865 need to be applied in such a case and the only remedy available for the claimant is to approach Civil Court. This submission is also not acceptable. The Carriers Act shows that it is made to enable the carrier, to limit his liability for loss and also to declare his liability for loss or damage to the property which was given in his custody. Thus, the purpose of the Act is to see that procedure is given for redressal of dispute between the common carrier and the person who had handed over the property to the common carrier. Further, when under MV Act remedy is given to the person to whom loss is caused, to third party, in motor vehicle accident it is open to such person either to approach the Tribunal u/s 166 of the MV Act or to go to Civil Court. Thus, there is no force in the submission made by the learned Counsel for the Insurance Company. This Court holds that the transporter like the claimant whose liability is fixed under the agreement with the owner of the goods and who actually reimburses loss sustained by the owner in motor vehicle accident can file proceeding u/s 166 of MV Act and get compensation.

28. The learned Counsel for Insurance Company relied on the definition given of "property" in Black's Law Dictionary. This Court has already observed that the interpretation of the provisions of MV Act needs to be made to serve the purpose of the Act and while doing so the Court is expected to keep in mind that it is social and beneficial legislation.

29. In view of the discussion made above, this Court holds that the decision given by the Tribunal needs to be set aside and the claim petition needs to be allowed. In the result, the appeal is allowed. Judgment and order of MACT, South Goa, Margao delivered in Claim Petition No. 318/2003 is hereby set aside. The Claim Petition is allowed with costs. Respondents No. 1 to 3, the driver, owner

and the Insurance Company of truck No. GA-01-W-6099 will jointly and severally pay the amount of Rs. 2,68,793/- (Rupees two lacs sixty eight thousand seven hundred and ninety three only) as compensation amount on the principle of fault to the claimant with the interest at the rate 9% p.a. The interest will be payable from the date of the petition till the date of realisation. The amount is to be deposited with the Tribunal and the amount is to be given to the claimant by account payee cheque. The award is to be prepared accordingly.