
(1978) 04 KAR CK 0044
In the Karnataka High Court
Case No : M.F.A. No. 691 of 1975

Hayat Bi and Others

APPELLANT

Vs

Nissar Ahmed and Others

RESPONDENT

Date of Decision : 21-04-1978

Acts Referred:

Motor Vehicles Act, 1939 — Section 110 D, 95 (1)

Citation : (1979) ACJ 351

Hon'ble Judges : Sabhahit, J;Malimath, J

Bench : Division Bench

Advocate : R. Chandrashekharan, for the Appellant; Raghavendrachar, for N.Y. Hanumanthappa and V. Tarakaram for V.S. Sadasivan, for the Respondent

Final Decision : Allowed

Judgement

Sabhahit, J.—This appeal u/s 110-D of Motor Vehicles Act, 1939, is by the original claimants in MVC No. 4 of 1972 on the file of the Claims Tribunal, Chitradurga, and is directed against the judgment and award dated 27-6-1975 passed by the Tribunal.

2. The appeal arises this way: One Abdul Jaleel was going with three others in the lorry belonging to Respondent No. 2 from Chitradurga to Basapur. The lorry was driven by Respondent-1 Nissar Ahmed. It was insured by the third Respondent the New India Assurance Co. Ltd. It is the case of the claimants that Abdul Jaleel along with PW. 1 was going in the lorry as "HamaF for loading onions of PW. 5 being employed by the owner of the lorry. When the lorry went for some distance on the road, the driver saw another bus was going ahead It is the case of the Appellants that the driver increased the speed of the lorry and overtook the bus that was going ahead and when he was proceeding further, there was a bend in the road near Anjaneya Temple and the driver could not negotiate it and the lorry went straight in the field and hit two trees which were on the right side of the road and thus the accident happened which resulted in the death of of Abdul Jaleel, in addition to injuries to others. The wife and three

children and mother of Abdul Jaleel instituted before the Tribunal MVC No. 4 of 1972, claiming compensation of Rs. 50,000/- They have averred that the accident was the result of rash and negligent driving by Nissar Ahmed the driver of the lorry. The claim is resisted by the Respondents. Respondent No. 2 the owner of the lorry has contested that the accident was not the result of rash and negligent driving of the lorry but that it was due to mechanical defect. He has denied his liability. Similarly, Respondent No. 1 the driver has denied that the accident was the result of rash and negligent driving of the lorry. He has denied his liability for compensation. Similarly, the third Respondent the insurance company denied its liability, on the ground that the accident was not the result of rash and negligent driving of the lorry. The insurance company also contended that it was not liable under the policy. On these pleadings, the Tribunal raised the following issues:

- (1) Whether the Petitioners prove that they were the dependants and legal heirs of the deceased ?
- (2) Whether they prove that the monthly income of the deceased was Rs. 350/- to Rs. 400/-
- (3) Whether they prove that the death was caused on "account of rash and negligent driving of Respondent No. 1 ?
- (4) Whether the 3rd opponent proves that he is not liable to pay compensation for the reasons stated in para 4 of his objection statement ?
- (5) What is the quantum of compensation, if any ?
- (6) What order ?

3. During the hearing, the claimants examined 5 witnesses in support of their case and Respondents, in rebuttal, examined 3 witnesses. The Tribunal, appreciating the evidence on record, held that the accident was not the result of rash and negligent driving of the lorry but that it was due to mechanical defect viz., sudden disconnection of the drag and drop links system and as such it held that there was no cause of action for the claimants for compensation. In that view by its judgment and award referred to above, the Tribunal dismissed the claim of the Petitioners. Aggrieved by the said judgment, the claimants have come up in appeal before this Court.

4. Learned Advocate appearing for the Appellants vehemently contended that the facts of the case attract the doctrine of *res ipsa loquitur* which was not appreciated by the Tribunal and that the Respondents did not plead that the vehicle was kept in a roadworthy condition taking all care and caution. He further submitted that the Tribunal ought to have held that the Respondents failed to discharge the burden shifted on to them and as such the accident was the result of rash and negligent driving of the lorry. As against that, the learned advocate appearing for Respondents 1 and 2 submitted that since the accident was directly the result of disconnection of drag and drop links system, the Tribunal was

justified in holding that it was not due to rash and negligent driving of the lorry.

4A. What arises for our consideration initially, therefore, in this appeal is whether the Tribunal was justified in holding that the accident was not the result of rash and negligent driving of the lorry. It is in evidence that the lorry suddenly left the road went on its wrong side and hit against two trees. That shows that the lorry did not go in the usual manner on the road and that it went off the road and hit the trees. That attracts the doctrine of *res ipsa loquitur* which means that the thing speaks for itself or it tells its own story. If that be so, the burden of proving negligence which is normally on the claimants, shifts on to the Respondents. They have to explain why the lorry behaved in that fashion, and further that the cause was not due to their negligence in maintaining the vehicle.

5. The Supreme Court of India in the case of *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, has observed in para 5 thus explaining the doctrine of *res ipsa loquitur*.

Apart from the positive evidence, in the present case the accident took place not on the main road, but on the offside uprooting the stone at the drain and attacking a tamarind tree 25 feet away from the said stone with such a velocity that its bark was peeled off and the bus could stop only after travelling some more distance from the said tree. The said facts give rise to a presumption that the accident was caused by the negligence of the driver. Asquith, L.J., in *Barkway v. South Wales Transport* (1948) 2 All E.R. 460, neatly summarizes the principles applicable as to onus of proof in the following short propositions:

(i) If the Defendant's omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the Defendants and the Plaintiff succeeds unless the Defendants can rebut this presumption, (ii) It is no rebuttal for the Defendants to show, again without more that the immediate cause of the omnibus leaving the road is a tyreburst, since a tyre burst per se is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the Defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie v. Raglan Building Co.* (1942) 1 K.B. 152, where not a tyreburst but a skid was involved, (iii) To displace the presumption, the Defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres".

In the instant case, it is true that Respondent No. 2 the owner of the vehicle has alleged that the accident was due to the sudden disconnection of the drag and drop links system, in other words due to a mechanical defect. But, as pointed out

by the Supreme Court, it is not enough if the contesting Respondent contends that the accident was due to a sudden mechanical defect. He must further establish that the mechanical failure occurred inspite of his taking all necessary precautions in the maintenance of the vehicle as a road worthy vehicle. In this connection, it is relevant to refer to a recent decision of the Supreme Court in the case of Minu B. Mehta v. Balkrishna Ramachandra Nayan, 1977 ACJ 118 In that case also the lorry came on the off-side and hit the right front side of a car. The Respondent contended that there was dislocation of the drag link. The Tribunal held, on the basis of the evidence, that if there was any such failure, in the normal course the driver should have come to know about it, and it was possible for him to immediately stop his vehicle. The Tribunal further held that the Respondent did not show that he took all care to maintain his vehicle in a road worthy condition. The High Court, on the question whether there was negligence on the part of the driver of the lorry found itself in complete agreement with the Claims Tribunal and observed that it was for the driver and owner to establish as to how the lorry crossed the road divider, and went on the wrong side and mounted on the fiat car coming from the opposite direction. The matter was taken up before the Supreme Court and the Supreme Court, in the course of its judgment has observed:

In this connection we may also point out that in order to succeed in a defence that the accident was due to a mechanical defect the owners will have to prove that they had taken all necessary precautions and kept the lorry in a road-worthy condition. No such attempt was made to establish that all necessary precautions were taken to keep the lorry in a roadworthy condition and that the defect occurred in spite of the reasonable care and caution taken by the owners.

Again in para 15 of the judgment, the Supreme Court has observed:

The burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden. In this case in the written statement all that is pleaded is that the axle brake ring of the lorry came out and the driver lost control of the motor lorry and that the defect can develop in a running vehicle resulting in the driver's losing control of the steering wheel. Though it was stated that all precautions were taken to keep the lorry in a roadworthy condition it was not specifically pleaded that the defect i.e. the axle brake ring coming out, is a latent defect and could not have been discovered by the use of reasonable care. This lack of plea is in addition to the lack of evidence and the fact that the defence set up has been rightly rejected by the Tribunal.

The same observations hold good on the facts of the present case also. In the statement of objections, all that is mentioned by owner is that the accident was the result of a mechanical defect. He has not even stated that he took all care to see that the lorry was maintained in a roadworthy condition. He has not entered the box to give evidence to show that the lorry was maintained in a roadworthy condition and that the mechanical failure occurred in spite of such care taken by

him. The learned advocate appearing for the Respondents, no doubt, invited our attention to the evidence of the driver. The driver had joined service of the lorry owner only about 12 days prior to the happening of the accident. All that he has stated in the cross-examination is that before leaving he had checked the vehicle and was satisfied that the brakes of the vehicle were in good condition. He has further stated that he is not even aware of the model of the lorry and in the cross-examination it is further elicited specifically thus:

I did not get the vehicle checked at the work shop, I myself did the checking. I do not know whether the vehicle had been checked at the workshop prior to my employment under the owner of that vehicle.

Thus, it becomes manifest that the owner and the driver have signally failed to discharge the burden that was shifted on to them to prove that they took all care and precaution to maintain the vehicle in a roadworthy condition and as pointed out by the Supreme Court it is no explanation to say merely that the accident occurred due to a mechanical failure ; the Respondent has to further prove that the mechanical failure occurred in spite of care and caution exercised by them. As the Respondent has failed to rebut the presumption, we hold that the accident which resulted in the death of Abdul Jaleel is attributable to the negligence of the Respondent.

6. We state so because it is in evidence that the lorry driver overtook the bus which was going ahead and that clearly shows that he increased the speed of the lorry when he was approaching a bend ; he was not in a position to negotiate the curve and the lorry went off the road and hit the trees. It is true that the Motor Vehicles Inspector examined as RW. 2 has stated that in all probability there was the disconnection of the drag link before the accident happened. But, in the cross-examination, he has stated thus:

Depending upon the impact and the speed with which the vehicle was driven and the place of contact, the drop and drag link system can get disconnected after impact.

Thus, there is no clinching evidence to show that this disconnection was the cause of the accident. It may as well be the result of it. The Motor Vehicles Inspector has no doubt, stated in his evidence that he did not observe any damage to that part. But, in the chief-examination he has stated that he observed damage to all the front portion of the lorry. He has stated inter alia that the steering wheel column, the tie rods were found damaged. Thus it is probable that the disconnection of the drag and drop links occurred as a result of the impact of the lorry. The evidence shows that the lorry driver was driving the vehicle with such great speed that he could not safely negotiate the bend with the result that the vehicle left the road and hit against the trees. This is also sufficient to hold that the accident was the result of rash and negligent driving. Viewed therefore either way, we are satisfied that the accident was the result of rash and negligent driving of the lorry and the Tribunal failed to consider these

aspects in coming to the conclusion that the accident was not the result of rash and negligent driving of the lorry but that it was due to mechanical defect viz., the disconnection of drag and drop links system.

7. That takes us to the quantum of compensation to which the claimants are entitled. It is in evidence that the deceased was travelling in the lorry as a hamal under the owner of the lorry and further that he was earning about Rs. 10 to Rs. 15 per day. It is on that basis that the Petitioners claimed compensation of Rs. 50,000/-.

8. The first point that arises for consideration is as to whether the deceased was going as a hamal in connection with his employment in the lorry. On this point, we have the evidence of PW. 1, another hamal, who was travelling in the lorry. He has clearly stated that himself and the deceased were travelling in the lorry being employed by the owner to load onions of PW. 5. In the cross-examination at para 5 he has stated:

The owner of the lorry was T.M.K. Peer Saheb. The driver and the sons of the proprietor engaged us that day. We did not get the coolies that day. Peer Sab's son was in the lorry.

PW. 5 who was to supply onions has deposed in similar terms. His evidence is not seriously challenged in the cross-examination. In para 2 of his deposition PW. 2 has stated thus:

On that day I was taking the empty lorry to Basapura to load my onions in that lorry on that day. I had fixed up the rate including the loading and unloading with the owner Respondent No. 2 at the rate of Rs. 2-50 per bag of onion. Five hamals were travelling in that lorry.

This aspect in his evidence is not seriously challenged in the cross-examination. It is true that the driver examined as RW. 3 has stated that he did not ask the hamals to come. But, the fact remains that the owner and the son of the owner who was said to be travelling in the lorry have discreetly desisted from entering the box. Hence, we have no hesitation to hold that the deceased was travelling in the lorry being employed by the owner to load onion, on that fateful day.

9. It is in the evidence of PW. 1 that they as hamals were earning Rs. 10 to Rs. 15 per day. PW. 2 the widow of the deceased has deposed that her husband was earning Rs. 15 to Rs. 20 per day. Apart from their interested say, there is no other reliable evidence to hold that the deceased was earning Rs. 15 to Rs 20 per day. It is a matter of common knowledge that they are not likely to get work everyday and in the absence of any other evidence, it will be safe to take that on an average the deceased was earning Rs. 5/- per day i.e. Rs. 150/- per month. PW. has deposed that her husband was aged 30 years at the time of his death. This version is not challenged in the cross-examination. Therefore, we hold that the deceased was about 30 years of age at the time of his death. His widow has given her age as 21 years at the time of her deposition and the other three

Petitioners are minors.

10. Having regard to the age of the deceased, it could be held that he could earn as a hamal till he attained the age of 55 years. Out of Rs. 150/- he was earning, some amount was necessary for his personal living and expenses. For this, we are inclined to deduct Rs. 60/- per month. That gives Rs. 90/- per month, multiplying Rs. 90/- by 12 months, Rs. 1,080/- would be the annual loss of dependency. We have stated that he could earn up to 55 years. For 25 years, therefore the total loss would be Rs. 27,000/-.

11. For lumpsum payment and uncertainties of life, we consider it reasonable to deduct 25 per cent of it i.e., Rs. 6,750/-. Thus, the amount to which the claimants are entitled as loss of dependency comes to Rs. 20,250/-.

12. Under general damages, the Petitioners are also entitled for loss of expectation of future happy life of the deceased. Normally a conventional figure is awarded under this head; we fix it at Rs. 4,000/-.

13. The first claimant is also entitled for damages for loss of consortium as she has lost her husband at a young age. Under this head, we deem it proper to award her Rs. 1,000/- having regard to her chances of remarriage which is common in the community to which she belongs. We hold that the claimants are entitled to Rs. 25,250/- as damages.

14. The second Respondent is the owner of the lorry and the first Respondent is the driver. The first Respondent is primarily liable to pay compensation as he is the chief architect of" this misfortune. The second Respondent is vicariously liable as he is the owner of the goods vehicle and the driver was driving the vehicle under his employment.

The third Respondent-insurer's liability is limited to what is stated in the proviso to Sub-section (1) of Section 95 of the Motor Vehicles Act, as the deceased was carried as a "Hamal" in the lorry. It limits the liability of the company to the extent contemplated under the Workmen's Compensation Act, 1923 and under the Workmen's Compensation Act, if an employee getting a salary of Rs. 150/- p.m. dies, his legal representatives would be entitled to compensation of Rs. 7,000/- only. Hence, the insurance company--the third Respondent is liable to make good the compensation to the extent of Rs. 7,000/-. The rest of the amount of compensation shall have to be paid over by Respondents 1 and 2, the driver and the owner of the lorry.

15. In the result, this appeal is allowed and the impugned order of dismissal passed by the Tribunal is hereby set aside. The claimants are awarded compensation of Rs. 25,250/- with interest thereon at 6 per cent per annum from the date of the award and also the costs of this proceeding. From out of this, claimant-5 the mother of the deceased who was already 60 years of age at the time of the petition, shall be paid over Rs. 2,000/- as compensation. Rs. 6,000/- including the compensation awarded for loss of consortium along with

the costs of this proceeding and the interest on the entire sum awarded shall be paid to the first claimant-Hayath Bi, the widow of the deceased. The remaining amount when recovered shall be kept in fixed deposit in a scheduled bank in the names of the minor children with Petitioner-1 as their guardian, till the minors attain the age of majority. The first Petitioner is entitled to recover interest on the said fixed deposit and spend the same for the welfare of the minors. The liability of the insurance company, as stated above, is limited to Rs. 7,000/- which shall be paid by it along with interest thereon and costs of the proceeding. The rest of the amount shall be recovered from Respondents-1 and 2. Respondents shall bear their own costs.