
(2011) 06 BOM CK 0003
In the Bombay High Court
Case No : F.A. No. 120 of 2006

Kamalkant Chari	Vs	APPELLANT
Cajetan Manuel Dourado and Others		RESPONDENT

Date of Decision : 17-06-2011

Acts Referred:

Citation : (2011) 4 TAC 471

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : S.S. Kakodkar, for the Appellant; E. Afonso, Advocate., for the Respondent

Final Decision : Allowed

Judgement

F.M. Reis, J.

1.The above appeal challenges the judgment and award dated 1st March, 2005, passed by the learned Presiding Officer of the Motor Accident Claims Tribunal, South Goa, Margao, in claim petition No. 117/2000.

2. The appellants filed the claim petition claiming, inter alia, that they are the parents of the late Nitin Chari, who expired in view of the injuries sustained by him in a road accident on 24.06.1999 at 2.45 p.m. at Gudi Paroda, in Quepem Taluka. It was their case that on the said date, their said son was travelling from Quepem to Margao in a mini Bus bearing No. GDZ/2723, whereas another bus bearing No. GA-02/T-4179, which was overtaking the mini bus was driven in a rash and negligent manner and gave a violent date to the mini bus. Consequently, the mini bus was thrown off the road and the said deceased fell out of the mini bus and succumbed to the injuries. It was further their contention that the deceased was 24 years of age and he was earning ` 6,000/- per month and, consequently, claimed the compensation to the tune of ` 3,00,000/-.

3. The Respondent No. 3 filed their written statement and denied the claim put forward by the Appellants. They also denied that the accident had occurred due

to the fault on the part of the Respondent No. 1. It was further their case that the accident occurred due to the rashness and negligence on the part of the driver of the mini bus bearing No. GDZ/ 2723, who took the said vehicle out of the road and fell into the paddy field. It was their case that the Respondent No. 1 did not possess a valid driving licence at the time of the accident.

4. After framing the issues and recording of evidence, the learned Presiding Officer by the impugned judgment dated 1st March, 2005, came to the conclusion that the appellants have failed to prove that they were entitled to the said sum of ` 3,00,000/- claimed by them in the claim petition and, consequently, rejected the claim petition filed by the Appellants.

5. Being aggrieved by the said judgment, the appellants preferred the present appeal.

6. Shri S. S. Kakodkar, the learned Counsel appearing for the appellants has assailed the impugned Judgment and pointed out that the finding of the learned Judge that the driver of the mini bus was rash and negligent in driving the vehicle is totally erroneous and cannot be borne out from the records. The learned Counsel further submitted that there is cogent evidence on record to establish that the Respondent No. 1 was driving the bus in a rash and negligent manner which resulted in the said accident. The learned Counsel has taken me through the sketch of the accident site and pointed out that considering the position of the mini bus which had fallen in the paddy field and the bus driven by the Respondent No. 1, it is quite obvious that the accident had occurred on account of the rashness and negligence on the part of the Respondent No. 1. The learned Counsel further submitted that the evidence discloses the manner in which the accident has occurred and concluded that the rashness and negligence is to be attributed to the Respondent No. 1. Without prejudice, the learned Counsel Shri S. S. Kakodkar submitted that, in any event, even assuming there is any negligence on the part of the driver of the mini bus, the Tribunal ought to have ascertained whether there was any composite negligence on the part of both the drivers of the vehicles and decided the matter. The learned Counsel has taken me through the impugned Judgment and pointed out that the finding of the learned Judge is totally erroneous and has to be quashed and set aside. In support of his submissions, Shri Kakodkar, the learned Counsel for the Appellants, has relied upon the Judgments in the case of Vidhyadhar Vs. Manikrao and Another, and Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, .

7. On the other hand, Shri E. Afonso, the learned Counsel appearing for the Respondent No. 3 supported the impugned Judgment. The learned Counsel has submitted that the evidence discloses that the driver of the mini bus was rash and negligent in driving the vehicle which resulted in the said accident. The learned Counsel further submitted that there is no explanation given by the Appellants as to why the driver and the owner of the mini bus were not impleaded in the proceedings and, consequently, the question of directing any

payment of compensation to the Appellants would not arise. The learned Counsel submitted that the evidence discloses that the driver of the mini bus was driving the vehicle in a very fast speed and after losing control, dashed against the bus driven by the Respondent No. 1 and fell into the paddy field which resulted into the death of the deceased son of the Appellants. The learned Counsel further submitted that considering the evidence on record, there is no question of any interference by this Court in the impugned Judgment.

8. The remaining Respondents though served, failed to remain present at the time of hearing of the Appeal.

9. Having heard the learned Counsel and on perusal of the records, I find that the following point for determination arises in the present Appeal:

POINT FOR DETERMINATION

1. Whether the learned Tribunal was justified to refuse the claim petition filed by the Appellants on the ground that the accident occurred as the driver of the mini bus was solely rash and negligent ?

10. On perusal of the evidence on record, in support of their claim for compensation, the Appellants have examined Laxmi Chari, who was the Appellant No. 2. In her deposition, she has stated that her son was going to Margao to purchase some articles on the relevant date and was travelling in the mini bus and that the said bus was given a dash by another bus as a result of which her son fell off the road and died on the spot. She has also produced the evidence in support of her claim for compensation.

In her cross-examination, she denied her suggestion that the mini bus due to the high speed fell into the paddy field.

11. The next witness examined is AW.2, who was the punch witness of the spot panchanama. He has stated that one bus bearing No. GDZ-2723 was fallen on the left side of the road facing Margao in one paddy field which was a mini bus while the other bus was in front on the main tar road both facing Margao side. The said bus was also on the left side of the road and it was a big bus. He has further stated that all the four tyres of the mini bus were facing towards the sky. He has further stated that he was informed that the mini bus had initially fallen on its left side and he was present when the bus was overturned by pushing it so as to rescue the passengers who were trapped in the bus. He has further stated that Nitin Chari had fallen below the bus. In his cross-examination, he has stated that he was present when the police came to the spot. He has further stated that in the presence of the police, the bus was pushed over.

12. The next witness examined is Smt. Santana Carvalho, who has stated in her affidavit that she boarded the mini bus to go to Margao and that she reached at Gudi, Paroda, at about 2.45 p.m., in the process of overtaking the mini bus, the driver of the bus bearing No. GA-02/T-4179 gave a dash to the mini bus and that after the said dash, the driver of the mini bus shouted that he was not in a

position to control the vehicle. She has further stated that some of the passengers were injured.

In her cross-examination, she has stated that her bus was proceeding in a normal speed and that she works in the paddy field. She has also stated that the mini bus drivers drive in a fast speed to collect passengers due to competitions. She has further stated that the accident took place when the big bus dashed on the mini bus and went off the road. She further stated that she could not say anything to the suggestion that the accident occurred as the mini bus was trying to overtake on the wrong side. She has further stated that she could not say anything to the suggestion that the accident occurred due to the fault of the driver of the mini bus.

13. The Respondents on their behalf have examined Manuel Afonso, who is working in the Directorate of Transport and he has stated that the Respondent No. 1, Cajetan Dourado was holding a motorcycle driving licence issued on 8th April, 1982 and valid upto 13th October, 2010. He has further stated that the said licence was also endorsed for light motor vehicle on 20th August, 1996 to 19th July, 1999. The licence was also endorsed for driving heavy vehicles on 28th April, 1997. He has further stated that as per the records, the said Cajetan Dourado did not possess a valid licence on 24th June, 1999.

In his cross-examination, he was shown a certified copy of the licence of the Respondent No. 1 disclosing that the same was valid from 8th April, 1992 to 28th June, 2002 for motorcycle light motor vehicle and heavy motor vehicle. The said licence is at Ext. 22. He has also produced a duplicate licence disclosing that the licence was renewed from 29th June, 1999 to 28th June, 2002.

14. The learned Judge whilst passing the impugned Judgment disbelieved the evidence of A.W. 3 that she was travelling in the mini bus at the relevant time. The learned Judge found that there were scratches to the mini bus below the driver's side. The learned Judge also noticed that there were scratch marks on the left rear side of the corner of the bus and came to the conclusion that the mini bus was trying to overtake the big bus from the wrong side. The learned Judge as such came to the conclusion that there was no evidence that the mini bus was dashed from behind by the other bus and, consequently, came to the conclusion that the Appellants had failed to establish that the accident took place due to rash and negligent driving on the part of the respondent No. 1. The learned Judge also came to the conclusion that the respondent No. 1 was holding a valid driving licence and rejected the contention of the respondent No. 3. Accordingly, the claim petition came to be rejected.

15. On perusal of the evidence on record, I find that the Respondent No. 1 was not even examined in the said proceedings. It is not disputed that the deceased Nitin expired on account of an accident involving a motor vehicle. The evidence discloses that the accident has occurred in view of the involvement of two vehicles one being the mini bus and the other being the bus driven by

Respondent No. 1. The Apex Court in the case of Pushpabai Parshottam Udeshi & Ors. v. M/s, Ranjit Ginning & Pressing Co. Pvt. Ltd. & anr., (supra) has held at para 6 thus :

6. The normal rule is that it is for the plaintiff to prove negligence but as 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 on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *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. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Edn.) at p. 306 states: "The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Edn., Vol. 28, at p. 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged; a negligence "tells its own story" of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care. Applying the principles stated above we have to see whether the requirements of the principle have been satisfied. There can be no dispute that the car was under the management of the company's manager and that from the facts disclosed by PW 1 if the driver had used proper care in the ordinary course of things the car could not have gone to the right extreme of the road, dashed against a tree and moved it a few inches away. The learned Counsel for the respondents submitted that the road is a very narrow road of the width of about 15 feet on either side of which were fields and that it is quite probable that cattle might have strayed into the road suddenly causing the accident. We are unable to accept the plea for in a country road with a width of about 15 feet with fields on either side ordinary care requires that the car should be driven at a speed in which it could be controlled if some stray cattle happened to come into the road. From the description of the accident given by PW 1 which stands unchallenged the car had proceeded to the right extremity of the road which is

the wrong side and dashed against a tree uprooting it about 9 inches from the ground. The car was broken on the front side and the vehicle struck the tree so violently that the engine of the car was displaced from its original position one foot on the back and the steering wheel and the engine of the car had receded back on the driver's side. The car could not have gone to the right extremity and dashed with such violence on the tree if the driver had exercised reasonable care and caution. On the facts made out the doctrine is applicable and it is for the opponents to prove that the incident did not take place due to their negligence. This they have not even attempted to do. In the circumstances we find that the Tribunal was justified in applying the doctrine. It was submitted by the learned Counsel for the respondents that as the High Court did not consider the question this point may be remitted to the High Court. We do not think it necessary to do so for the evidence on record is convincing to prove the case of rash and negligent driving set up by the claimants.

16. The Apex Court in another Judgment reported in *Basthi Kasim Saheb Vs. The Mysore State Road Transport Corporation and Others*, , has held at para 8 thus :

8. The evidence in the case indicates that there was no traffic on the road at the time of the accident. No untoward incident took place like sudden failure of the brakes or an unexpected stray cattle coming in front of the bus and still the vehicle got into trouble. In absence of any unexpected development it was for the driver to have explained how this happened and there is no such explanation forthcoming. In such a situation the principle of *res ipsa loquitur* applies. The petitioner, in the circumstances, could not have proved the actual cause of the accident, and on the face of it, it was so improbable that such an accident could have happened without the negligence of the driver, that the Court should presume such negligence without further evidence. The burden in such a situation is on the defendant to show that the driver was not negligent and that the accident might, more probably, have happened in a manner which did not connote negligence on his part, but the defence has failed to produce any evidence to support such a possibility. We, therefore, agree with the finding of the trial Court on this issue and set aside the judgment of the High Court.

17. Considering the well settled principles in the said Judgment, I find that the Tribunal has not at all appreciated the evidence on record in a proper prospective to come to the conclusion that the rashness and negligence on the part of Respondent No. 1 was not established by the Appellants. The fact remains that the deceased was travelling in the mini bus and succumbed to the injuries sustained in the accident involving the motor vehicle. It was imperative upon the Respondent No. 1 to enter the witness box and explain the manner in which the accident had occurred. Considering the positions of the vehicles, I find that the learned Presiding Officer has not at all applied his mind to the well settled principles of law which contemplate that in such matters the decision is arrived at in a touchstone of preponderance of all probabilities. The scratches found on both the vehicles do not by itself exclude the possibility that the bus driven by the

Respondent No. 1 had obstructed the path of the mini bus. As such, I find that in the interest of justice, the evidence deserves to be re-appreciated and that the matter deserves to be remanded to the learned Tribunal.

18. At this stage, Shri Kakodkar, the learned Counsel appearing for the Appellants submitted that he intends to file an appropriate application to implead the owner and the driver of the mini bus as well in the above proceedings. In case such an application is filed, the same shall be considered by the Tribunal on its own merits in accordance with law. Considering the facts and circumstances of the case, I find that the matter deserves to be remanded to the Tribunal to decide the claim petition afresh after giving liberty to the parties in the light of the observations made hereinabove in accordance with law. All the contentions of the parties are left open.

19. Accordingly, I pass the following :

ORDER

1. The Appeal is partly allowed.
2. The impugned Judgment and Award dated 1st March, 2005, is quashed and set aside.
3. The matter is remanded to the Tribunal to decide the claim petition No. 117/2000 afresh in the light of the observations made hereinabove in accordance with law. All contentions of both the parties are left open.
4. Appeal stands disposed off accordingly with no order as to costs.
5. The parties are directed to appear before the learned Tribunal on 3rd October, 2011 at 10.00 a.m.