

(1967) 12 KAR CK 0001

In the Karnataka High Court

Case No : Second Appeal No's. 732 of 1963 and 37 of 1964

K.V. Narasappa

APPELLANT

Vs

Kamalamm and Others

RESPONDENT

Date of Decision : 07-12-1967

Acts Referred:

Citation : AIR 1968 Kar 345 : (1968) 2 MysLJ 26

Hon'ble Judges : A.R. Somnath Iyer, J

Bench : Single Bench

Judgement

1. Defendant 1 in the suit out of which these appeals arise, was a building contractor in Shimoga. Under an agreement executed between him and the State Government on March 22, 1957, he undertook to construct a new receiving station in the electric colony at Shimoga. This construction involved the casting of a reinforced cement concrete beam 60" in length, and for this purpose two stone pillars were erected at each end, and the casting of the beam commenced at 9 a.m. in the morning on November 29, 1957. At 6 p., in the evening after the casting had been completed over a length of 45" and when the top layer with respect of to the remaining 15" was being laid, the beam came down pulling down along with it one of the stone pillars on which it was intended to be rested. Three workmen who were employed by the defendant in the casting of the beam were killed, when the pillar came down upon them and Venkatarmiah was one of those workmen.

2. The suit out of which the appeal arises was then brought by Venkataramiah's wife who is plaintiff 1 and his two sons who are plaintiffs 2 and 3 for the recovery of a sum of Rs.10,000/- as compensation. The suit was brought against defendant 1 and against defendant 2 which is the Mysore State Electricity Board to which the Department of Electricity of the State Government was transferred by an order made by Government on September 27, 1957 under the provisions of the Electricity Supply Act.

3. The plaintiffs imputed negligence to both the defendants. They stated that the

beam came down on account of the defective material and carelessness in the construction of the beam. But the defendants resisted the suit on the ground that every reasonable precaution had been taken by both the defendants for the construction of the beam. The State Electricity Board, in addition, raised a contention that the accident was "due to the sudden coming down of the lintel beam during concreting" and that the contractor defendant 1 was exclusively responsible to pay the compensation which could properly be claimed by the plaintiff

4. The Civil Judge dismissed the suit on the ground that the negligence imputed to the defendant was not established. But in appeal, the District Judge reversed the decree and gave the plaintiffs the decree which they wanted. In support of that decree, he depended on the maxim *res ipsa loquitur*. From this decree, the contractor and the Board appeal. The contractor's appeal is R. S. A. 732 of 1963 and the appeal of the Board is R. S. A. 37 of 1964.

5. Mr. Manjappa appearing for the contractor and Mr. Ramappa appearing for the Board maintained that the maxim *res ipsa loquitur* on which the District Judge placed complete dependence was plainly inapplicable to the present case. Mr., Manjappa, in addition, submitted that even otherwise, since the contractor was not an independent contractor but was obliged to carry out the instructions and directions issued by the officers of the Board from time to time in the construction of the beam as also in respect of every other part of the construction, he stood completely exonerated from any liability for negligence. Mr. Ramappa for the Board maintained that even if there was negligence, liability to pay compensation was wholly that of the contractor to the exclusion of the Board's.

6. In his written statement, the contractor made the allegation that the beam came down since Venkataramiah, the husband of plaintiff 1, and the father of plaintiffs 2 and 3, ran forwards and backwards on the beam even before it was completely set, and when it was being laid. But that allegation was not believed either by the Civil judge or by the District Judge. The District Judge was persuaded to take the view that the cause of the accident was unknown, and in that context he said this:

"The evidence of D. Ws. 3 and 5 the relevant portions of which I have quoted above, clearly shows that they are at a loss to find out how the accident took place."

D.W. 3 was a Supervisor of the Board and D. W. 5 was their Assistant Engineer. The District Judge is right in taking this view since that view receives complete support from the written statement of the Board and from the evidence given by the Assistant Engineer D. W. 5. In paragraph 4 of the Board's written statement, it stated that the accident resulting in the death of the three persons was attributable "to the sudden coming down of the lintel beam during concreting causing the pulling down of the stone pillar". Giving evidence as D. W. 5, the

Assistant Engineer said this:

"The collapse is due to the accidental yielding of the supports."

Although Mr. Acharya appearing for the plaintiffs submitted an argument in this court that there was positive evidence establishing actionable negligence on the part of the defendants, that is not the ground on which the District Judge rested his decree. The finding of the District Judge clearly means that the cause of the accident was unknown, and that finding which is a finding on a question of fact, receives support from the evidence to which I have already observed.

7. If the cause of the accident is unknown and it was more likely than not that the accident would not have happened had there been the exercise of that care which the defendants were under a duty to take, it is clear that the accident spoke for itself and the maxim *res ipsa loquitur* became applicable. This principle is clearly and authoritatively summed up in Halsbury's Laws of England III Edition, Volume 28, at pp. 79 and 81 thus:

"The maxim *res ipsa loquitur* applies only where the causes of the accident are unknown but the inference of negligence is clear from the nature of the accident, and the defendant is therefore liable if he does not produce evidence to counteract the inference".

There can be no doubt that this is a case in which the accident spoke for itself. Whether it was the duty of the Board or of the contractor to exercise the necessary care or skill over the construction of the beam, it is plain that that beam would not have come down had it been properly constructed and had there been no negligence. The fact that it did collapse raises a presumption of negligence which should have been disproved by the person who was under a duty to counteract the inference emanating from the nature of the accident. The defendants were not able to explain how the accident happened and, all that was stated by the Assistant Engineer D. W. 5 and by the Board in its written statement was that the beam suddenly collapsed. The presumption is that if there was no negligence, it could not have so collapsed, and so it became the duty of the defendants whoever was under the duty to produce it, to offer reasonable explanation for the accident. But neither the contractor or the Board offered any such explanation. The only explanation offered by the contractor was disbelieved and there was no other explanation the truth of which remained to be investigated.

8. In support of the argument preferred by Mr. Manjappa that the maxim *res ipsa loquitur* did not apply, he made two submission. The first was that the plaintiffs themselves came forward with a specific charge of negligence. He pointed out that in the plaint the accusation made against the defendant was that he employed inferior materials and that there was carelessness in the construction of the beam. But the fact that those allegations were made in the plaint does not exclude the application of the maxim if on the scrutiny of the evidence the court comes to the conclusion that the cause of the accident is unknown and if it

accepts what was mentioned by the Board itself in its written statement that the accident was sudden. That would also be the position arising from the fact that the evidence of the Assistant Engineer D. W. 5 was believed.

9. The second submission of Mr. Manjappa rested on the decision of the court of appeal in *Walsh v. Holst and Co. Ltd.* 1958 3 All ER 33. But that decision far from supporting the postulate that the maxim *res ipsa loquitur* was inapplicable, makes it clear that to a case like the present one that maxim is clearly applicable. The pronouncement in that case in favour of the defendant was founded on the acceptance of the explanation by the defendant, who, it was pointed out, was under a duty to counteract the inference of negligence authorised by the maxim. I therefore do not accede to the contention that there was a misapplication of the maxim *res ipsa loquitur* by the District Judge.

10. The discussion so far made takes me to the other ground on which the decree of the District Judge was assailed by Mr. Manjappa and by Mr. Ramappa. During this branch of the argument, the endeavour made on behalf of the contractor was to transmit exclusive liability to the Board in the same way in which Mr. Ramappa, on behalf of the Board, attempted to maintain that the contractor and not the Board was liable to pay compensation. For the contractor, Mr. Manjappa asked attention to the relevant provisions of the agreement executed between the contractor and the State Government under which the contractor was under a duty to carry on the construction in obedience to directions and instructions which may be imparted to him from time to time by the Officers of the State Government. Clause 14 of the agreement reads:

"The contractor is bound to conform to all the legitimate instruction of the Superintendent/Chief Electrical Engineer or his authorised representative in respect of the above conditions or such other matters as may effect the safety and expedition of the work or safety of workmen, failing which that officer is empowered, after giving ten days notice in writing to take the work entirely into his own hands.

11. The principle to which Mr. Manjappa appealed on the foundation of this clause of the agreement was that defendant 1 was not an independent contractor and that the State Government whose place was taken by the Board and who gave instructions in obedience to which the beam was constructed, could alone be proceeded against for negligence. On the contrary, the competing postulate placed by Mr. Ramappa was that defendant 1 was an independent contractor who had undertaken the construction of the beam and on whom devolved sole and exclusive responsibility for the entire construction, and that the Board was not liable for the negligence of the contractor. The appeal made in support of this argument was to the rule that no other person is liable for the negligence of an independent contractor.

12. Now the maxim *res ipsa loquitur* raises a presumption of negligence. The question is whether the negligence which I should infer, is the negligence of the

contractor or of the Board. It was urged for the contractor that so long as the construction of the beam was not under the sole and exclusive management of the contractor, the negligence of the contractor could not be presumed under the maxim and that what could be presumed is only the negligence of the Board. That conclusion is, according to Mr. Manjappa, what emerges from the decision of the Supreme Court in *Municipal Corporation of Delhi Vs. Subhagwanti and Others*, in which the question was whether the municipal corporation which owned a clock tower which collapsed was responsible for damages for loss of life caused by patent or latent defects. In the discussion of the question, the Supreme Court applied the maxim *res ipsa loquitur*, and observed that the normal rule was that plaintiff should prove negligence and that the maxim which was an exception to that rule became applicable "where the circumstances surrounding the thing which causes the damages are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part".

13. On the basis of this enunciation, it was asserted that the circumstances surrounding the thing which caused the accident in the present case were not exclusively under the control or management of the contractor and that that feature is what excludes the application of the maxim. The elucidation made in the *Book on Torts* by Clerk and Lindsell, twelfth edition in para 796, it was said, also supported this submission. That elucidation reads:

"The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control;

(2) the occurrence is such that it would not have happened without negligence."

14. It does not appear to me that the decision of the Supreme Court in *Municipal Corporation of Delhi Vs. Subhagwanti and Others*, can take the case of the contractor very far since the statement of the law in that case does not absolve the contractor from his liability. That he was under clause 14 of the agreement bound to carry out the instructions imparted to him from time to time, did not denude the contractor of the sole and exclusive control of the construction of the beam which it was his duty to construct. The officers of the Board who could under the agreement give him directions and instructions, had no control or management over construction of the beam as such. The construction was entirely the responsibility of the contractor.

15. Moreover, the decision in that case depended upon the facts of that case in which the question was whether the maintenance of the clock tower which had become older than its normal span of life, was under the sole and exclusive control and management of the municipal corporation in the sense that it was its exclusive duty to attend to the repairs of reconstruction such as were necessary to prevent its collapse. The question as to the ambit of the maxim in a case

where there was more than one person who had control and management over the circumstances surrounding the thing which caused the damage did not arise and was not discussed.

16. The statement applicable to a situation of that description is what is found in the book on Torts by Clerk and Lindsell. The principle which that elucidation incorporates is that the doctrine applies not only to a case where the thin that inflicted the damage was under the sole management and control of the defendant but also where it is under the sole management and control of some one for whom he is responsible or whom he has a right to control. So, if the contractor was responsible to the Board even on the assumption that the Board had the sole management and control, the maxim becomes equally applicable in the same way in which if the Board which had the right to control the contractor comes within the orbit of the maxim.

17. In the case before me, the management and control of the thing or of the circumstances surrounding the thing which inflicted the damage was dual. While the Board retained the power to impart directions and instructions which the contractor could not disobey, the contractor had sole control and management of the construction. Although he was by the terms of agreement subject to the directions of the Board, he was, apart from the contract, his own master as to the manner and time in which the work shall be done. It was his duty to engage and pay workmen or other servants on his own behalf and not as the agent of the Board, and these are the features surrounding the legal relation created by the Board and the contractor which produce legal liability both on the part of the contractor and the Board. It is so because defendant 1 is no independent contractor being subject to the directions of the Board. Similarly, the contractor cannot dispute that he had sole and exclusive management of the construction.

18. In *M'Laughlin v. Pryor* (1842) 4 M. & G. 48 Tindal C. J. made the enunciation that the general rule is that all persons acting together at the time of the commission of a wrongful act are equally liable. In the context of that enunciation, he said this:

"The general rule is, that all persons acting together at the time of the commission of a wrongful act, are presumed to assent thereto, and are considered in law as equally trespassers, and are all looked upon as principals."

19. In *Baker v. Market Harborough Industrial Co-operative Society Ltd.* 1953 1 WLR 1472, the accident was the result of a collision between two motor vehicles proceeding in opposite directions when both the drivers were killed. The question was whether the driver of the one or that of the other was to blame. Denning L. J. expressed the view that in the absence of any evidence which could enable the court to draw the distinction between them, they must both be held to blame and equally to blame, and in this content he said this:

"Now take this case where there is no passenger, but both drivers are killed. The natural inference, again, is that one or the other was, or both were, to blame.

The Court will not wash its hands of the case simply because it cannot say whether it was only one vehicle which was to blame or both. In the absence of any evidence enabling the court to draw a distinction between them, it should hold them both to blame, and equally to blame.

20. In *Roe v. Minister of Health* 1954 2 QB 66 in which there was a claim based on negligence and there was an appeal to the doctrine of *res ipsa loquitur*, Denning L. J. thought that his earlier decision was equally applicable to that claim. That was a case in which two patients in a hospital were operated on the same day. After the operations both the patients developed severe symptoms of spastic paraplegia caused by phynol, which had percolated into the ampoules through invisible cracks or molecular flaws, resulting in permanent paralysis from the waist down. Actions for damages for personal injuries were brought by both the patients against the Minister of Health as successor in title to the trustees of the hospital, and against the anesthetist. The anesthetist carried on a private anaesthetic practice but was under an obligation, with another anesthetist, to provide a regular service for the hospital. The hospital claimed immunity on the ground that they had engaged a qualified anesthetist, and in the context of that defence. Denning L. J. said this:

"I went into the matter with some care in *Cassidy v. Ministry of Health* 1952 2 KB 343 and I adhere to all I there said. In the second place. I do not think that the hospital authorities and Dr. Graham can both avoid giving an explanation by the simple expedient of each throwing responsibility on to the other. If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation."

21. So, in the case before me in which Venkataramiah was killed in consequence of the accident, and the thing which inflicted the injury was the collapse of the beam which was under the control and management of the defendant 1 in one sense and also under another form of control of defendant 2 and the cause of the accident is not known and is not explained the Board cannot successfully hope to fasten the liability exclusively on the contractor and the contractor cannot disclaim liability for negligence which I should presume. The negligence which I should presume is the negligence on the part of both of them, and the Board and the contractor are equally liable to pay compensation.

22. That view receives support from the decision in *Clayton v. Woodman & Son, Ltd.* 1961 3 All ER 249. The plaintiff in that case was a bricklayer employed by a builder who was defendant 1 who had contracted with a regional hospital board to construct a lift, and the hospital board was defendant 2. Defendant 3 was a firm of architects employed by the hospital board to prepare a specification and working drawings for the lift shaft and the motor room. The building contract between the builder and the hospital board provided for the works to be carried out in accordance with the architects' directions. A stone gable on which the plaintiff was working collapsed. He claimed damages from the builder, the

hospital board and the Architects. The builder resisted the claim on the ground that he acted only under the instructions of the Architects and the hospital board asserted that since the builder was an independent contractor, there was no liability on its part. The architects contended that they did not owe any duty to the plaintiff. Salmon J. absolved the board from liability on the ground that it had employed a builder who was an independent contractor. But he had no doubt in his mind that the builder and the architects were both liable to pay the compensation. In his opinion, the liability of the builder arose from the fact that he employed the plaintiff, and on page 252 he said this:

"In my view the first defendants have no defence to this action. It was their duty as the plaintiff's employers to take reasonable care for his safety. They knew that the work had reached a stage when a chase was about to be cut in the gable. They should have appreciated that this would be a highly dangerous operation unless the gable were supported by strutting or shoring." The liability of the architects was founded upon the principle that the particular relationship between the architects and the plaintiff gave rise to the duty to take care, and dependence was placed upon the enunciation made by Lord Macmillan in *Donoghue v. Stevenson* 1932 AC 562 which reads:

"What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows, and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy, and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed".

23. The conclusion which Salmon J. reached on the basis of this exposition reads:

"Can anyone doubt that the reasonable man would conclude that the particular relation between this architect and this bricklayer gave rise to a duty to take care?"

24. On the application of this principle to the present case, it is abundantly manifest that in the circumstances in which the contractor employed Venkataramaiah to participate in the construction of the beam, the Board, whose officers had taken upon themselves the responsibility of giving directions and instructions, became charged with the duty to take care, and that duty arose from the particular relation which existed between the Board and Venkataramaiah which fastened upon the Board the duty to take care.

25. The discussion so far made makes it clear that in respect of the negligence, which could be inferred on the basis of the maxim *res ipsa loquitur*, both the contractor and the Board were liable to pay compensation.

26. The District Judge made the quantification of the compensation at Rupees 10,000/- and this estimation was not subject to any criticism in this court.

27. So I dismiss these appeals with costs.

28. But there are a few matters which require elucidation. The District Judge has made a direction that the court fee payable on the plaint and on the memorandum of appeal should be recovered by the plaintiffs from the defendants and then paid to Government I delete this directions and substitute a direction that the court-fee payable on the plaint and on the memorandum of appeal in the lower appellate court shall be paid by the defendants in equal shares.

29. The Advocates for defendants 1 and 2 ask me to make an apportionment of the liability under the decree. Mr. Acharya has no objection to an apportionment being made which does not result in a deprivation of the right of the plaintiffs to proceed against either of the defendants for the recovery of the whole of the decretal amount. The direction to which all the three Advocates consent is that half the decretal amount shall be paid by defendant 1 within three months from this date and the remaining half by defendant 2, subject to the condition that if defendant 1 does not deposit his share of the decretal amount in court within three months from this date under the decree which is joint and several the plaintiffs will be at liberty to proceed against either of the defendants for recovery of the whole of the decretal amount. The decree will incorporate a direction to this effect.

(30) Appeal dismissed