

(2010) 05 DEL CK 0172
In the Delhi High Court
Case No : F.A.O. No. 508 of 2003

New India Assurance Co. Ltd.

APPELLANT

Vs

Rohinee Michigan and others

RESPONDENT

Date of Decision : 10-05-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A, 166

Citation : (2011) ACJ 2135

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Pankaj Seth, for the Appellant; A. Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.

C.M. Appl. No. 1049 of 2003:

This is application for condonation of delay of 32 days in filing the present appeal. In view of the submissions made therein, the application is allowed and the delay in filing this appeal is hereby condoned. The application stands disposed of.

F.A.O. No. 508 of 2003:

1. The present appeal has been preferred by the insurance company on the grounds that the Tribunal failed to take into consideration the fact that the accident took place due to rash and negligent driving of the jeep by its driver and that the Tribunal erred in making insurance company liable to pay compensation in respect of the death of the deceased. The Tribunal failed to understand the ratio of Kaushnuma Begum v. New India Assurance Co. Ltd., 2001 ACJ 428 (SC) and failed to take into consideration the law laid down by the Supreme Court in Minu B. Mehta v. Balkrishna Ramchandra Nayan, 1977 ACJ 118 (SC).

2. Brief facts relevant for the purpose of deciding this appeal are that on

15.10.1998 a Tata Sumo jeep bearing No. UP 14-H 7092 insured by the appellant, being driven by the driver, met with an accident. There are two versions of the accident, one version given by the occupants of the jeep that when the jeep reached little ahead of Badhkot, the road was found relatively free from traffic and the driver started speeding the vehicle. He did not lower the speed despite repeated requests of occupants and drove the vehicle rashly, negligently and recklessly and lost the control of the jeep. The jeep fell into a deep gorge on the side of the road as a result of which the occupants received injuries. The other version given by the driver's side is that on that day it was raining while on the way to Navgaon (Uttarkashi) and all of a sudden a dog came on the road. In order to save the dog, the driver swerved the vehicle to one side and in that process the driver lost control of the vehicle as a result of which the vehicle fell into the gorge on the side of the road.

3. The learned Tribunal after considering the evidence of two versions came to conclusion that the driver side version was more probable. However, the Tribunal had observed that the doctrine of *res ipsa loquitur* was not applicable in the present case. The Tribunal also observed that in view of Kaushnuma Begum's case (*supra*), the rashness or negligence of the driver had lost importance.

4. I consider the Tribunal went wrong in observing that in view of Kaushnuma Begum's case (*supra*), the issue of rashness or negligence of driver has lost importance. If the claim of the claimant had been u/s 163-A of the Act, the issue of rashness or negligence would not have been there before the court. The case of Kaushnuma Begum (*supra*) is one u/s 163-A of the Act where involvement of the vehicle was sufficient to get an order of compensation without proof of negligence. Thus, the principles laid down in that decision cannot have any application to a claim petition u/s 166 of the Act.

5. I consider that the Tribunal wrongly came to the conclusion that since vehicle was moving at a speed of 25-30 kmph at the time of accident, there was no question of vehicle being driven in a rash and negligent manner by the driver and the accident took place since the driver had to swerve the vehicle to one side of the road as a dog had come in front of the vehicle all of a sudden. It was the claim of the driver and it had also come in evidence of PW 3 that at the time of accident, it was raining and track was full of pine leaves and the road had become slippery as malba was falling down on the road from mountain in the shape of small landslides. When such was the weather and the track on which vehicle was being driven was hilly area, on one side was mountain and on other side was deep gorge, every driver drives very slowly, maybe at the speed of 10 kmph, so that if he had to apply the brakes, the vehicle stops immediately. The very fact that on seeing a dog the driver instead of applying brakes swerved the vehicle towards edge of the road with the result that vehicle fell into the gorge would show that the driver was driving in a gross negligent manner and his speed was much more than what was required in the weather of rainy season when road was full of pine leaves and mud. The speed of 20 or 25 kmph on hilly

tracks is the normal speed of vehicles when weather is clear and there is no rain and the road has no pine leaves or mud. A speed of 25-30 kmph in hilly area during rainy season, when the road is full of pine leaves and landslide mud, has to be considered as a dangerous speed. The Tribunal seems to be oblivious of the conditions of driving on hilly roads and that seems to be the reason that it made observation that it was not the negligence of driver. Even otherwise for saving life of a dog, you cannot throw your vehicle full of passengers into a gorge, that itself is a negligent driving. When your vehicle is full of passengers, you cannot take the risk of swerving the vehicle to one side of the road more so when it is raining and road is narrow and slippery. The only option available with the driver was to apply the brake and bring the vehicle to a stop but it seems that speed of the vehicle was such that application of brakes would have also resulted into toppling the vehicle and that is how the driver tried to save the dog by swerving the vehicle thereby endangering the life of the occupants. Thus, it is clear that the accident took place due to negligence of the driver.

6. In the case of Basthi Kasim Saheb v. Mysore Road Trans. Corpn., 1991 ACJ 380 (SC), a bus driven at a fast speed while crossing a bullock cart left stationary on the left flank of the road went on to the kacha flank of the right side and its wheel sank in the soil and the vehicle toppled on its right side causing injuries to its passengers. In such circumstances, the Apex Court applied the doctrine of *res ipsa loquitur* on the ground that the driver should have been aware of the fact that in the rainy season when it was actually raining, the unmetalled portion of the road is rendered slushy and muddy and as such, he should be held negligent for bringing the bus with fast speed to that portion of the road.

7. I, therefore, consider that Kaushnuma Begum's case (*supra*) was wrongly applied by Tribunal. It is a case where the driver was negligent and the principle of *res ipsa loquitur* would be squarely applicable and for the negligent driving of the driver, the owner would be liable and since the risk of the owner was insured, the insurance company would be liable to pay the award amount.

8. I find no force in the appeal. The appeal is hereby dismissed