

(2002) 06 BOM CK 0087
In the Bombay High Court
Case No : First Appeal No. 112 of 1988

Parvatibai Savale and Others	Vs	APPELLANT
Bhagwat Rambhau Shelke and Others		RESPONDENT

Date of Decision : 27-06-2002

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A

Citation : (2003) 1 ACC 292 : (2004) ACJ 1647 : (2003) 1 ALLMR 141 : (2002) 4 MhLj 27

Hon'ble Judges : B.B. Vagyani, J

Bench : Single Bench

Advocate : A.H. Joshi, for the Appellant; B.N. Patil, For respondent No. 1, A.S. Bajaj and D.V. Soman, for the Respondent

Final Decision : Partly Allowed

Judgement

B.B. Vagyani, J.—This First Appeal is directed against the award dated 12-2-1988 passed by the Ex-officio Member of the Motor Accident Claims Tribunal, Latur in Motor Accident Claim Petition No. 15 of 1985.

2. In brief, facts giving rise to this First Appeal are as under : The appellant No. 1 Parvatibai is the mother of deceased Nandkishor. The appellant No. 2 Vijaykumar and appellant No. 4 Sunil are the brothers of deceased Nandkishor. The appellant No. 3 Miss Maya is the sister of deceased Nandkishor. The incident occurred on 21st November 1984 on Nanded-Latur road. The tractor with a trolley bearing No. 9855 and 7578 respectively was passing by the Nanded-Latur road. The time was 6.30 p.m. The tractor was going towards Nanded side. The motorcyclist came from Nanded side and was proceeding towards Ahmedpur. The trolley was carrying passengers about 25 in number. The driver of the tractor drove the vehicle at a high speed while the motorcyclist was keeping the moderate speed. The tractor did not give side and ultimately, the motorcyclist received dash of tractor. Nandkishor died on the spot.

3. Nandkishor was serving as a Clerk in Girls School at Udgir and was getting Rs. 750/- p.m. He was contributing Rs. 400/- for education of his elder brother Vijaykumar and Rs. 300/- for meeting the house rent. The claimants filed claim petition u/s 110-A of the Motor Vehicles Act 1939 for grant of compensation.

4. The claim was denied by the respondents. The claimant Parvatibai deposed at Exh. 35 and examined the eye witness Sahdeo Sabne at Exh. 36 and panch witness Anilkumar Shrivastav at Exh. 37. The respondents did not adduce oral evidence. The Tribunal, after scrutiny of the evidence, held that the driver of the tractor drove the tractor in rash and negligent manner. The Tribunal further held that there was contributory negligence on the part of the deceased Nandkishor and the contributory negligence is assessed at 50%. The Tribunal assessed the total compensation to the tune of Rs. 50,000/- . Keeping in view the contributory negligence of the deceased, the Tribunal reduced the compensation to Rs. 25,000/- and awarded Rs. 25,000/- inclusive of the amount received under the principle of no fault liability to the claimants together with interest at the rate of 10% p.a. The Motor Accident Claims Tribunal directed the respondents Nos. 1 and 2 to pay compensation to the claimants. The Tribunal, however, exonerated the Insurance Company for want of policy.

5. Feeling dissatisfied by the quantum of compensation awarded by the Motor Accident Claims Tribunal, the original claimants have preferred this First Appeal.

6. Shri. A.H. Joshi, learned counsel for the claimants vehemently submitted that the Motor Accident Claims Tribunal did not at all consider the oral evidence in its proper perspective and has arrived at a wrong conclusion with regard to contributory negligence of motorcyclist. According to learned counsel Shri Joshi, no case was made out by the respondents with regard to contributory negligence. He also pointed out that the respondents did not lead any oral evidence. According to him, the oral evidence of eye witness coupled with the recitals of spot panchanama Exh. 34 would clearly point out that the driver of the tractor was rash and negligent and because of such reckless driving, accident occurred in which a young boy lost his life. Shri Joshi, learned counsel submits that the Tribunal has awarded very meagre amount of compensation to the claimants.

7. Shri B.N. Patil, learned counsel for the driver of the tractor has, however, strongly supported the order passed by the Tribunal, He submits that the deceased Nandkishor had no valid driving licence.

8. Shri A. S. Bajaj, learned counsel for owner of the tractor submits that the spot panchanama Exh. 34 is not properly proved and, therefore, no reliance can be placed on the recitals of the spot panchanama Exh. 34. He further submits that the deceased died on account of his own negligence.

9.1 gave anxious consideration to the rival submissions advanced at the Bar. None of the respondents led oral evidence. They did not even cross examine the witnesses examined on behalf of the claimants. It is clearly seen from the record

that the Tribunal has invented the theory of contributory negligence without there being any legal evidence on record. It is to be noted that there is direct evidence of Sahdeo Sabne Exh. 36. He was present in the field at the relevant time. His field is adjacent to the Nanded-Latur road. He was hardly at a distance of 50 to 60 feet from the spot of accident. Sahdeo Sabne has testified in his evidence that the tractor was carrying 25 passengers in the trolley and was going to Nanded in high speed. According to him, the speed of the motorcycle was moderate. It has come in the evidence of Sahdeo Sabne Exh. 36 that the tractor driver did not give side to the motorcyclist and ultimately, the motorcyclist received dash of the tractor. Because of the dash of heavy vehicle, the motorcyclist was thrown on the road and died on the spot. From the oral evidence of Sahdeo Sabne Exh. 36, it is beyond doubt clear that the driver of the tractor was at fault. The evidence of Sahdeo Sabne Exh. 36 in one way suggests, even remotely, that the motorcyclist was partially responsible for accident. Sahdeo Sabne is the most natural witness. Therefore, his oral testimony requires preferential treatment.

10. The grievance made by learned counsel Shri Bajaj, with regard to formal proof of spot panchanama Exh. 34 is not well founded. The claimants have examined panch witness Anilkumar Shrivastav Exh. 37. He has testified in his evidence that he was present when the spot panchanama Exh. 34 was prepared. The evidence of panch witness has also gone unchallenged. Under the circumstance, it cannot be said that there is no formal proof tendered by the claimants to prove the spot panchanama Exh. 34. In my view, the spot panchanama Exh. 34 is duly proved.

11. Besides the direct evidence, the recitals of spot panchanama Exh. 34 would clearly go to show that the driver of the tractor was negligent. The blood stains of deceased were found at a distance of one and half feet from the edge of the tar road. Near the blood stains, the tyre marks of the tractor were also noticed. The width of the tar road is 18 feet. From the recitals of the spot panchanama, it is beyond doubt clear that the tractor went to wrong side and gave dash to the motorcyclist. It is not explained by learned counsel Shri Patil as to how the tyre marks of tractor were noticed near the blood stains, which were found hardly at a distance of one and half feet away from the edge of the tar road. It is also not pointed out as to how the blood stains were seen on the tyres of the tractor, if at all the tractor did not give dash to the motorcyclist.

12. The Tribunal has invoked the principle of *res ipsa loquitur* and has concluded that none from the drivers of the respective vehicles took care to accommodate each other. When there is direct evidence of Sahdeo Sabne Exh. 36, the Tribunal should not have invoked the principle of *res ipsa loquitur*. In the absence of direct evidence, some times the claimants find it very difficult to prove negligence of the driver of the vehicle involved in the accident. The claimants do not know as to how accident occurred. For want of direct evidence if the claims are rejected, a serious hardship would be caused to the claimants and it is to avoid such

hardship, the doctrine of *res ipsa loquitur* is to be pressed into service. Where the fact of accident is admitted but cause of accident is doubtful, then only the doctrine of *res ipsa loquitur* comes into play. In this manner, burden of proof shifts on the offending driver. If the burden is not discharged, there is a presumption that accident is caused by negligence of respondent. In case in hand, the negligence of driver of tractor is proved by direct evidence of witness Sahdeo Sabne Exh. 36. The cause of accident is well known. Therefore, there is very little scope to press into service the doctrine of *res ipsa loquitur*. In the present case, however, the principle of *res ipsa loquitur* is invoked for the purpose of imposing contributory negligence on the part of deceased which is not at all justified. When there is direct evidence of the eye witness, the Tribunal should not have invoked the principle of *res ipsa loquitur* for the purpose of abrogating the legitimate claim of the claimants for compensation. Even otherwise, the recitals of the spot panchanama Exh. 34 would clearly point out that the driver of the tractor was solely responsible for the incident. If there is need to invoke the principle of *res ipsa loquitur*, the benefit must go to the claimants rather than the driver and owner of the tractor.

13. At the cost of repetition, I would like to mention that it is not explained by the driver and owner of the tractor as to how the brake marks of tyre of the tractor were noticed near the blood stains of deceased which were hardly at a distance of one and half feet from the edge of the tar road. Without there being any legal evidence, the Tribunal has wrongly concluded that the motorcyclist was also at fault. Therefore, the finding of the Tribunal in this respect is liable to be set aside.

14. No doubt, the respondent Nos. 1 and 2 have raised a defence in the written statement that Nandkishor had no valid driving licence. The burden is on the respondents to prove by positive evidence that the deceased had no valid driving licence. This burden is not at all discharged by the respondent Nos. 1 and 2. The respondent Nos. 1 and 2 did not even step in witness box. They did not place on record any documentary evidence in order to show that the motorcyclist had no valid driving licence on the day of the accident. I, therefore, reject the objection raised by learned counsel Shri B. N. Patil.

15. The deceased was in service. This fact is not at all disputed seriously. He was earning Rs. 750/- p.m. The deceased was contributing Rs. 700/- towards family and on the basis of his monthly contribution, the Tribunal has rightly assessed the loss of contribution to the tune of Rs. 43,200/-. The Tribunal has also awarded Rs. 7,000/- for suffering and pain on account of death of a young man, particularly pain and suffering of mother claimant No. 1 Parvatibai. Therefore, the Tribunal has assessed the total compensation of Rs. 50,000/- which is proved to be just compensation. The evidence placed on record does not at all support the theory of contributory negligence on the part of the deceased. Therefore, the reduction of Rs. 25,000/- on that count made by the Tribunal is not at all justified. Therefore, the claimants are also entitled to get Rs. 25,000/-.

16. The demand of complainants for additional compensation is not worthy of acceptance. Financial assistance required for Vijaykumar is for short span of time. The claimant Parvatibai has in all three sons. In near future she would receive some kind of financial assistance from other sons. Moreover, she herself is in the employment as a teacher. There is no scope for modification. Therefore, the claim for additional compensation stands rejected.

17. Thus, the appellants are entitled to get Rs. 50,000/- by way of compensation. They have already received Rs. 15,000/- on the basis of principle of no fault liability. Now, they are entitled to receive Rs. 35,000/- from the respondent Nos. 1 and 2 together with interest.

18. In the result, First Appeal is partly allowed. The respondent Nos. 1 and 2 are held liable to pay compensation of Rs. 35,000/- together with interest at the rate of 10% p.a. from the date of presentation of claim petition till the date of realization. There shall be no order as to costs.