

(1992) 09 BOM CK 0012
In the Bombay High Court
Case No : F.A. No. 924 of 1984

Shakuntala Rameshchandra Sant and Others	APPELLANT
Vs	
Rajendra D. Thakkar and Another	RESPONDENT

Date of Decision : 08-09-1992

Acts Referred:

Citation : (1992) 2 ACC 642 : (1994) ACJ 1147

Hon'ble Judges : S.M. Daud, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : C.R. Dalvi, for the Appellant; A.R. Kudrolli, for the Respondent

Final Decision : Allowed

Judgement

S.M. Daud, J.—Plaintiffs, in a claim for compensation arising out of a vehicular mishap, assail the quantum fixed by the trial court.

2. The claim lodged by the appellants, who are the widow, children and the parents of the deceased Rameshchandra Sant, arises out of a collision which took place on 6.6.1974 between a car bearing registration No. GJE 5945 being driven at the time of the mishap by the deceased Rameshchandra and a truck bearing registration No. GJG 1751 owned by respondent No. 1 and being driven by defence witness No. 1, Babu Patel. The mishap took place at about 4.00 p.m. on the Bombay-Ahmedabad Road near Guljar village within the limits of village Charoli, Taluka Dahanu, District Thane. Appellant Nos. 5 and 6 are the parents of Rameshchandra, appellant No. 1 is the widow and appellant Nos. 2 to 4 are his children. At the time of the mishap Rameshchandra was in the employ of Atul Products Ltd. which company has its establishment at Atul Valsad, in the State of Gujarat. The truck was insured for third party risk with the 2nd respondent. After the mishap Rameshchandra was taken to a local dispensary for first aid and subsequently shifted to two different hospitals at Bombay. The effort to save his life was in vain and Rameshchandra expired on 16.6.1974. At the time of his death Rameshchandra was 44 years old. Appellants gave a notice calling upon

the respondents to pay compensation totaling Rs. 2,50,000/- on various grounds. The notice not having yielded any result, a suit was filed in the court of the Civil Judge, Senior Division, Thane.

3. The stand taken by the appellants/ plaintiffs was that the mishap was the result of rash and negligent driving on the part of the driver of the truck, Babu Patel, DW 1. He was on the wrong side of the road and was driving at an excessive speed. It was this which had led the truck to dash against the car at the steering wheel of which sat the staid and sober Rameshchandra Sant. Rameshchandra's death had deprived the plaintiffs of a number of benefits. The pecuniary loss occasioned to them was on account of loss of dependency and damages for pain and suffering, etc. Defendant No. 1 in his written statement denied that his driver was rash and negligent or that he was driving the truck at an excessive speed or while being on the wrong side of the road. As a matter of fact the negligent driving was on the part of Rameshchandra. But for his negligence, in being on the wrong side of the road, the mishap would not have taken place. Defendant No. 2 who are the insurers adopted the stand taken by defendant No. 1 and also pleaded that their liability could not exceed a sum of Rs. 50,000/- in all. Pleadings aforesaid gave rise to the requisite issues. Plaintiffs examined four witnesses in all and the only person examined in support of the defence was the truck driver, Babu Patel.

4. The learned Civil Judge held that the collision between the two vehicles was on account of the negligence on the part of Rameshchandra as also Babu Patel. The extent of negligence was in the proportion of 25 per cent and 75 per cent respectively. Defendant No. 1 was liable to contribute towards the compensation claimed in the proportion of 75 per cent and in monetary terms this worked out Rs. 55,000/- in all. The insurers were liable only to the extent of Rs. 50,000/- from out of the compensation payable by defendant No. 1. The decree passed in confirmity with these findings is assailed in this appeal.

5. So far as plaintiff Nos. 5 and 6 are concerned, no sum was awarded to them by the trial court and they do not make a claim on their own account in this appeal. The first point for decision is whether the trial court erred in holding that the mishap was jointly contributable to Rameshchandra and DW 1 and that their respective liabilities were in the proportion of 25 per cent and 75 per cent respectively? Mr. Dalvi contends, and rightly so, that the trial court misread the evidence, Babu, who is the only witness examined by defendant No. 1, admits that he had come to Bombay on the morning of 6.6.1974 having started on the previous day, i.e., 5.6.1974 from Karambili, Bombay was reached in the morning of 6.6.1974 and the consignment which the truck carried was unloaded at about 8.00 a.m. The journey back to Vapi began at about 11.30 to 12 hours. On the journey back the truck was empty. Mr. Dalvi argues that the statements summarised above themselves indicate that Babu had spent the entire or greater part of the night in driving the truck, that this had resulted in sleeplessness and that he must have been in a hurry to return to Vapi either to get a fresh

consignment or to go back and rest. The only other occupant of the truck was the cleaner of the vehicle. In other words, the entire operation of driving a fairly heavy vehicle rested on Babu. With this as the background we proceed to consider the further recitals appearing in the testimony of Babu. He goes on to say that drizzling had begun when the truck reached the Charoli Naka. This was the first rain in the area and that had made the road wet. Judicial notice can be taken of the fact that the first shower has the effect of making the roads slushy. Babu says that his truck was going at a moderate speed and at the time of the mishap was in the third gear. This statement is difficult to believe when we look into the panchanama of the scene of offence. This panchanama is at Exh. 62 and it has been duly proved by PW 4, PSI Dhamdhere. Dhamdhere had gone to the site immediately after the receipt of information about the mishap from Babu himself. Babu invents a story of having been detained at the Police Station and his not having accompanied PSI Dhamdhere when the panchanama was drawn up. It is not possible to believe Babu's version for Exh. 62 shows that Babu was very much present when the panchanama was drawn up and in fact he was used by the police for the shifting of the truck from the place where it was, so that the held up traffic could resume using the road. It is not possible to believe that despite the absence of Babu, Dhamdhere so worded Exh. 62 as to record a completely false version in so vital a matter, as to the presence or absence of truck's driver, when the document was drawn up. The panchanama at Exh. 62 shows that the car, which was driven by Rameshchandra, was seriously damaged. Both its headlights had broken and also broken was the bonnet of the engine, the radiator, the battery, coils inside, glass on the front show, etc. The door of the car on the driver's side had been dented and the damage in terms of money to the vehicle was near about Rs. 20,000/-. As against this, the truck had suffered little or no damage and in fact, was in working condition. The other features of the panchanama leave no room for doubt about the truck having hit the car and hit it hard. The inferences flowing from the panchanama are corroborated by the deposition of Shapurji Dutia, PW 3. He was coming behind in another car of Atul Products which car was headed for Bombay Airport to receive the husband of one of the persons travelling by the car. This person was Mrs. Johari. No vehicle intervened between the car being driven by Dutia and that which had Rameshchandra at the steering wheel. The possibility of Rameshchandra being rash or negligent is further lessened by the presence of two elderly females in his car. These ladies were his own mother and the mother of his wife, who is appellant No. 1 in the appeal before us. The contrary version of Babu Patel can hardly be accepted. He has made a number of assertions which go contrary to the statements recorded by Dhamdhere immediately after the occurrence. Babu had gone to the police station and given a report. Dhamdhere who recorded the statement has proved the contradictions almost sentence by sentence. This suffices to establish the unreliability of Babu. It is not necessary to labour over the point and we hold that the trial court was in error in holding that the mishap had been contributed to by Rameshchandra and that the degree of his responsibility was 25 per cent. In fact the entire responsibility for the

mishap lay in the rash and negligent driving on the part of Babu. He was on the wrong side of the road and had been driving at an excessive speed. There is no truth in the laboured explanation given by him for his vehicle having been found on the wrong side of the road.

6. Having reached the above finding, we have now to see what the quantum of damages payable to the appellant Nos. 1 to 4 should be. The learned trial Judge assessed the dependency and loss of consortium at Rs. 2,98,000/-. Therefrom he deducted Rs. 2,14,000/-. This deduction represents insurance money received from the four policies of deceased, 3 of them being self-financed and one being company-financed. So far as the benefit flowing from the company-financed policy is concerned, we do not see how that would lessen the compensation to which appellant Nos. 1 to 4 are entitled. The premiums payable on this policy were so payable by the employer of Rameshchandra. Rameshchandra would have got the benefit of the policy after the expiry of the policy period. The benefit flowing from that policy is in the nature of a perquisite. The sum payable is thus not an item deductible from the compensation payable by the tortious act of defendant No. 1's employee. In regard to the self-financed policies, the same numbered three and had a currency of 25 years. During these 25 years the assured would have had to contribute premium totalling Rs. 20,000/-. This sum will have to be deducted from the benefits received by the heirs of the deceased. In this view of the matter, the sum payable under these policies would not be wholly deductible, but only to that extent which represents the excess above the premium payable. That comes to about Rs. 20,000/-. Ex gratia payment made by the company cannot be taken into account for these are payments made having regard to the pitiable condition in which the widow and children of Rameshchandra have been left consequent to the mishap which took away the sole bread-winner of the family. Ex gratia payment so made cannot be adjusted as if it were on the credit side of the tortfeasor. The other mistake made by the trial court is in relation to the extent of the insurer's liability. Counsel representing the 2nd respondent fairly concedes that the insurance company's liability would be to the extent of Rs. 50,000, the interest payable thereon and the corresponding costs. The rate of pendente lite and future interest will not be 9 per cent but 12 per cent per annum. Thus, deducting the aforesaid sum of Rs. 20,000/- from the total sum claimed which is Rs. 2,50,000/-, we hold that appellant Nos. 1 to 4 would be entitled to a total sum of Rs. 2,30,000/-. The apportionment shall be as under:

Rs. 65,000/- to appellant Shakuntala. Rs. 55,000/- each to appellant Nos. 2, 3 and 4.

The liability of the insurance company, respondent No. 2, shall be Rs. 50,000/- plus the corresponding costs and interest payable on that sum. The pendente lite and future interest shall be at 12 per cent per annum and that on the total sum payable by way of compensation. The appeal is allowed and the order passed by the trial court is substituted by one in the following terms:

Respondent No. 1 do pay to the plaintiff Nos. 1 to 4 a total sum of Rs. 2,30,000/- and the corresponding costs. Decretal sum excluding costs shall carry interest at 12 per cent per annum from the date of suit till satisfaction. The liability of respondent No. 2/defendant No. 2 shall be limited to Rs. 50,000/-, the costs corresponding to that figure as also interest on the said sum reckoned at the rate of 12 per cent per annum from the date of suit till realisation.

The decretal amount to be apportioned between plaintiff Nos. 1 to 4 as follows:

Plaintiff No. 1 - Rs. 65,000/-

Plaintiff Nos. 2, 3 and 4 - Rs. 55,000/-each.

Costs and interest on the said sum shall also be apportioned in the same proportion between plaintiff Nos. 1 to 4. Order in relation to costs to government proceedings as above in both the courts. Respondents to bear their costs throughout.