

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**FIRST APPEAL NO. 516 OF 2002
WITH
CA/12521/2005 IN FA/516/2002**

1. Maharashtra State Road Transport Corporation, Parbhani Division, Gangakhed Road, Parbhani through its Divisional Controller.
2. Machindra s/o Rambuo Puri, aged major, Occ. Driver, S.T.Depot at Parbhani, (Permanent Resident of Village Takali Samale) Taluka Parbhani. ...Appellants... (orig opponents)

VERSUS.

1. Smt Mangalabai w/o Shivaji Kale, age 28 yrs, occ. Household, Resident of Khanapur Naka, Parbhani.
2. Arun s/o Shivaji Kale, age 9 yrs, Occ. Student.
3. Pinkey d/o Shivaji Kale, aged 6 yrs, minor.
4. Parmeshwar s/o Shivaji Kale, age 1.5 yrs, minor.

Respondents no. 2 to 4 being minor under guardian of real mother respondent no.1.

5. Anusayabai w/o Dulaji Kale, age 55 yrs, Occ. Household, r/o Jod Parli,

Tq. & Dist Parbhani.

Respondents.
(orig petitioners)

...

Advocate for Appellant : Mr Anand D Wange.

Advocate for Respondents : Mr Yogesh Bolkar h/f Mr.
Umesh Shete

...

CORAM : V.K. JADHAV, J.

Dated: February 23, 2017

...

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and Award passed by the Chairman, Motor accident Claims Tribunal, Parbhani in MACP No.73/1996 the original respondent no.1 MSRTC has preferred this appeal.

2. Brief facts, giving rise to the present appeal are as follows :-

a] The accident in question occurred on 9.2.1996 near Khanapur Phata on Basmath-Road in Parbhani District. Deceased Shivaji was standing near Khanapur Naka and at that time one ST Bus bearing registration No.MH-20/D-0352 came from village Pindgali side and given dash to him. In consequence of which, deceased Shivaji sustained injuries. He was immediately taken to Civil Hospital, Parbhani, where he succumbed to the injuries on 13.2.1996, while under treatment. The Legal

representatives of deceased Shivaji approached the Motor Accident Claims tribunal, Parbhani by filing MACP No.73/1996 for grant of compensation under various heads. It has contended in the claim petition that accident had occurred on account of rash and negligent driving of driver of the S.T.Bus. He was doing labour work and earning Rs.1,500/- p.m. He was the only earning member of the family and the claimants were entirely depending on his income. Thus, the claimants have claimed compensation on all counts at Rs.3.00 lacs.

b] The appellant MSRTC has strongly resisted the claim petition by filing written statement. It has contended that on the date of accident, S.T. Bus was going from Pindgali to Parbhani and when it reached near Khanapur Naka at that time, the ST Bus driver saw one person lying on the road side and 15-20 persons were gathered around it. Therefore, he stopped S.T. Bus and made inquiry about the incident. During inquiry, he came to know that deceased Shivaji fallen on the road under the influence of liquor. Thus, he took

S.T.Bus on his route ahead. It has thus contended that, said S T Bus was not at all involved in the accident.

3. Both the parties lead their oral and documentary evidence in support of their rival contentions. The learned Member of the tribunal by its impugned judgment and award dated 28.11.2001 partly allowed the claim petition and thereby directed the appellant M.S.R.T.C. to pay Rs.1,20,000/- by way of compensation inclusive of No Fault Liability with interest @ 9% p.a. from the date of application till realization of the entire amount to the claimants. Being aggrieved by the same, the respondent MSRTC has preferred this appeal.

4. The learned counsel for the appellant MSRTC submits that, deceased Shivaji was under the influence of liquor and fallen down on the road at the relevant time. He was taken to hospital where his statement cum dying declaration was recorded by the senior clerk of Tahsil Office. Deceased Shivaji had stated in his statement cum dying declaration that he fallen down on the road under the influence of liquor and thus

sustained injuries. The learned counsel submits that the appellant MSRTC has examined said senior clerk to prove the contents of said dying declaration and accordingly statement cum dying declaration is marked at exh.34. Learned counsel submits that appellant MSRTC has also examined the driver of the ST Bus who has deposed as per the pleadings of the appellant MSRTC. He has deposed on oath before the Tribunal that S.T.Bus was not at all involved in the accident. Learned counsel thus submits that the Tribunal has erroneously recorded findings in the affirmative to issue nos 1 and 2 and thereby held that death of deceased Shivaji Occurred on account of rash and negligent driving of driver of the S T Bus. Learned counsel submits that, even happening of the accident is assumed, there is no evidence at all about rash and negligent driving on the part of the driver of the S.T.Bus.

5. Learned counsel for respondent original claimants submits that after the accident, relative of deceased Shivaji by name Laxmibai had lodged the complaint exh.26 in the police station and in the said complaint, the registration number of the S.T. bus is mentioned.

Learned counsel submits that, certified copy of the FIR is placed on record and the same is accepted by the Tribunal as appellant MSRTC has admitted the said document. Furthermore, the respondents claimants have also produced on record certified copy of the postmortem report which is also admitted by the appellant MSRTC wherein cause of death is recorded as cardio-respiratory failure due to intra-cerebral hemorrhage with spleen rupture. Rupture of a normal spleen is very rare unless caused by considerable crushing and grinding force, such as the passing of a carriage or motor car over the body, or by a crush in a railway accident, or by a fall from a very great height. In the postmortem report in paragraph no.21 a tear to the spleen is noted. An enlarged spleen becomes softened and brittle. Hence, it is liable to rupture from a fall or from violence of a very slight degree. In such a cases, the abdominal wall may not show any external injury. In column no.17 of the postmortem report external injuries in the form of abrasions also mentioned. Learned counsel submits that, the claimants thus are succeeded in proving happening of the accident. By

application of maxim res-ipsa loquitur burden shifts on the other side to prove that the accident is not occurred on account of rash and negligent driving of the driver of the ST Bus. Since the appellant MSRTC has failed to discharge said burden, the Tribunal has rightly recorded the findings to issue nos. 1 and 2 and thereby held that death of Shivaji occurred in the accident on account of rash and negligent driving of the driver of the S.T. Bus. Learned counsel submits that, so far as statement cum dying declaration of deceased Shivaji is concerned, original statement cum dying declaration was not brought before the Tribunal and xerox copy was placed before the Court and without showing the original to the witness, said xerox copy was exhibited. Furthermore, as rightly observed by the Tribunal, there was no reason for the police machinery to send the person from the Tahsil Office for recording dying declaration of deceased Shivaji when at all deceased Shivaji fallen down on the road on his own under the influence of liquor. The Tribunal has also considered the same.

6. The Senior Clerk of Tahsil Office Parbhani witness

Mr Rajeshwar Deshpande has deposed that he has not obtained endorsement of the doctor on the dying declaration cum statement before recording the same. He has deposed that he met with the Doctor, however, he asked him to go in the ward where deceased Shivaji was admitted. After recording the statement and after completing the formalities, the concerned Doctor/Medical Officer has endorsed on the dying declaration only to the effect that the statement can be taken. Said doctor has not passed endorsement that deceased Shivaji was in a fit state of mind and conscious and able to give his statement. The original statement cum dying declaration was not shown to the witness. It appears from the xerox copy Exh.34 that T.I. on the said statement cum dying declaration is also not attested. Learned Member of the Tribunal has, therefore, rightly discarded the said evidence and on the basis of the circumstances as pointed above rightly held that accident occurred on account of rash and negligent driving of the driver of the ST Bus. No interference is required. There is no substance in the appeal and the appeal is thus liable to be dismissed.

7. On careful perusal of the pleadings, evidence, and the impugned judgment and award passed by the Tribunal, it appears that, immediately after the accident one Laxmibai had lodged the complaint Exh.26 in the concerned police station and, referred in her complaint registration number of the S T Bus involved in the accident. The cause of death recorded in the postmortem report exh.21 and injuries as mentioned in the post mortem report unmistakably point out that deceased Shivaji sustained injuries in some incident and certainly not by falling on the road as pleaded and contended by the appellant MSRTC. I am not inclined to consider the statement cum dying declaration exh.34 for the simple reason that original statement cum dying declaration was not at all brought before the Tribunal. Furthermore, said Sr. Clerk witness Rajeshwar Deshpande has deposed that Doctor has not accompanied him when he went to the ward where deceased Shivaji admitted in hospital and doctor was not present with him when he has recorded said dying declaration. Endorsement on the xerox copy of said

statement indicates that doctor only endorsed that statement can be taken. There is no endorsement to the effect that deceased Shivaji was in a conscious state of mind and fit to give statement. Furthermore, as per the defence taken by the MSRTC, if deceased Shivaji fallen on the road under the influence of liquor, there was no reason for the police machinery to direct the Senior Clerk of the Tahsil office to record the statement cum dying declaration of deceased Shivaji. It has also come in the cross examination of the driver of the ST Bus that after reaching to Parbhani he has reported the incident to the Controller. There was no reason for him to report the incident to the Controller when S.T. Bus being driven by him was not involved in the accident. Thus, complaint, postmortem and other evidence as discussed above, indicates that the claimants are succeeded in proving happening of the accident. By application of maxim *res ipsa loquitur*, it is for the appellant MSRTC to prove that accident had not taken place on account of rash and negligent driving of the driver of the S.T. Bus. The burden shifts of appellant MSRTC. Though, appellant MSRTC has examined its driver failed to

discharge the same. The learned Chairman of the Tribunal has, therefore, rightly recorded findings in the affirmative to issue nos. 1 and 2 and held that driver of the S.T. Bus drove bus bearing registration No. MH-20/D-0352 in rash and negligent manner and caused death of deceased Shivaji.

8. So far as quantum of compensation is concerned, the Tribunal has awarded just and reasonable compensation. The Tribunal has considered earnings of deceased at Rs.900/- p.m. and after deducting 1/3rd towards personal and living expenses considered his income at Rs.600/- p.m. and worked out the compensation.

9. In view of the above discussion, there is no substance in the appeal. Hence, following order is passed.

O R D E R

- I] First Appeal is hereby dismissed with costs.
- II] First Appeal accordingly disposed of.
Pending Civil Application also stands

disposed of.

- III] The claimants are permitted to withdraw the amount under award if deposited before this Court alongwith interest accrued thereon.

sd/-

(V.K. JADHAV, J.)

...

aaa/-