

REPORTED**IN THE HIGH COURT OF JUDICATURE AT****BOMBAY****BENCH AT AURANGABAD.****FIRST APPEAL NO.2659 OF 2013**

1. Kamalbai W/o Arjun Bhalekar,
Age 50 years, Occ.Household,

2. Sangita W/o Ramesh Bhalekar,
Age 30 years, Occ.Household.

3. Balaji S/o Ramesh Bhalekar,
Age 11 years, Occ.Household,

4. Jyoti D/o Ramesh Bhalekar,
Age 18 years, Occ.Nil.

5. Nita D/o Ramesh Bhalekar,
Age 13 years, Occ.Nil.

6. Bharat S/o Ramesh Bhalekar,
Age 7 years, Occ.Nil,

All R/o Village Manjari,
Tq. Latur, Dist.Latur.

The claimant Nos.3,5 and 6 are
minors, u/g of their mother
Appellant No.2. ...Appellants.

Versus

1. Sanjay S/o Pandhari Potbhare,
Age major, Occ.Business,
R/o Village Manjari, Tq.
and Dist.Latur.

2. The Manager,
The New India Assurance Co.Ltd.

Chandra Nagar, Near Bus
Stand, Latur.

... Respondents.

...

Mr.R.P.Adgaonkar, advocate for the Appellants.
Mr.Amit Yadkikar, advocate for Respondent No.1.
Mr.M.M.Ambhore, advocate for Respondent No.2.

...

CORAM : V.K.JADHAV, J.

Date : 04.07.2017.

ORAL JUDGMENT :

1. Heard finally with consent at the admission stage.

2. Being aggrieved by the judgment and award passed by the Member of the Motor Accident Claims Tribunal, Latur, in MACP No.323/2010 dt.2.5.2013, the original claimants have preferred this appeal.

3. Brief facts giving rise to the present appeal are as follows :

i) On 29.9.2010, in between 6 to 6-30 p.m. on Manjari Samangaon road within the limits of village Manjari, Tq. and District Latur, deceased

Arjun was hit by a tum tum auto rickshaw bearing registration No.MH-44-A-1084. Deceased Arjun was a pedestrian at the time of accident. After the vehicular accident, deceased was brought to his house in an injured condition in the same auto rickshaw. However, on reaching to the home, he was found dead.

ii) The claimants/legal representatives of deceased Arjun approached the Tribunal by filing MACP No.323/2010 for grant of compensation under the various heads. It has been contended in the claim petition that deceased Arjun at the material time was milk vendor and he was earning Rs.5,000/- (Rupees five thousand) p.m. out of the said business. He was also a part time worker in the restaurant on the monthly salary of Rs.3,000/- (Rupees three thousand). He was bread-winner of the family and the appellant-claimants were depending on his income. The appellants-claimants have therefore, claimed compensation of Rs.3,00,000/- (Rupees three lacs) on all the counts.

iii) The Respondent-owner of the auto rickshaw has strongly resisted the claim petition by filing the Written Statement. It has been contended that the claimants in collusion with the Police have falsely shown the involvement of the said auto rickshaw in the vehicular accident. It has been specifically contended that deceased was hit by un-known vehicle.

iv) The Respondent insurer has also strongly resisted the claim petition on the similar grounds and also raised plea of false involvement of the auto rickshaw in the vehicular accident. It has been denied that the said auto rickshaw hit the deceased. In addition to this, the Respondent insurer has also raised a plea of breach of terms and conditions of the policy in the form that the driver of the auto rickshaw was not holding valid and effective driving license at the relevant time.

v) The appellants-claimants have adduced oral and documentary evidence in support of the contentions. The Respondent-owner of the auto

rickshaw has examined himself to substantiate his contention. The Respondent-insurer has not adduced any evidence.

vi) The learned Member of the Motor Accident Claims Tribunal, Latur, by its impugned judgment and award in MACP No.323/2010, dismissed the claim petition. Hence, this appeal.

4. The learned counsel for the appellants/claimants submits that on the very next day of the accident the appellant/claimant No.1 had lodged the complaint in the concerned Police Station and on the basis of her complaint, Crime No.65/2010 came to registered against the unknown vehicle. The learned counsel submits that though the said crime was initially registered against the driver of the unknown vehicle, it has been specifically mentioned in the complaint that deceased Arjun was brought to his house in injured condition in auto rickshaw by its driver Ajay Kaka Potbhare. The learned counsel submits that Investigating Officer has thoroughly investigated the crime and submitted

the charge-sheet Exh.27 against the said Ajay Kaka Potbhare. The learned counsel submits that the appellants-claimants have succeeded in proving the involvement of said vehicle auto rickshaw in a vehicular accident and in the facts and circumstances of the case the maxim "*Res ipsa loquitur*" squarely applies to the case. Deceased Arjun was a pedestrian and he was given dash by motor vehicle. In the post mortem report Exh.29 the cause of death is due to intracranial haemorrhage due to head injury. Learned counsel submits that the said maxim is resorted to when an accident is shown to have occurred and the cause of accident primarily is within the knowledge of the Respondent-owner. The learned counsel submits that the Respondent-owner had not examined his driver Ajay Kaka Potbhare to explain as to how deceased Arjun had sustained the injuries and as to why he was brought to his house in injured condition in said auto rickshaw. Learned counsel submits that said Ajay Kaka Potbhare, the driver was in the management of the vehicle auto rickshaw and as such by application of said maxim burden shifts on the Respondent-

owner to prove that the driver was not negligent in causing the death of deceased Arjun in a vehicular accident. The learned counsel submits that the Tribunal has not given thought to the said maxim and dismissed the claim petition in toto.

5. The learned counsel for the appellants-original claimants in order to substantiate his contention placed reliance on following cases :

i) **"Maharashtra State Road Transport Corporation Vs. Mr.Sahadev @ Sadu Aba Pore and others" First Appeal No.956 of 1997 dt.14.12.1998;**

ii) **"Jagannath Narahari Naik Vs. Vasudev Datta Malik and other" First Appeal No.197 of 2009 dt.4.1.2017;**

iii) **"Kusum Lata and others Vs. Satbir and others" reported in A.I.R. 2011 Supreme Court 234;**

iv) **"Shyam Sunder and others Vs. The State of Rajasthan" reported in A.I.R.1974 Supreme Court 890;**

- v) **"Kamalkant Chari Vs. Cajetan Manuel Dourado and others"** reported in **2011 Legal Eagle (Bom) 2796;**
- vi) **"Pushpabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Company Private Limited"** reported in **1977 (2) SCC 745;**
- vii) **"Ravi Kapur Vs. State of Rajasthan"** reported in **2012 AIR (SC) 2986;**
- viii) **"Managing Director, North East K.R.T.C. Vs. Devidas Manikrao Sadananda"** reported in **2006 AIR (SCW) 4770;**

6. The learned counsel for the Respondent-owner submits that there is a reference in the FIR to the effect that deceased Arjun was brought to his house in injured condition by one Ajay Kaka Potbhare. Merely on the basis of said recital in the First Information Report, nothing can be concluded. The Respondent-owner has also denied the involvement of his vehicle in the accident and in order to substantiate his contention also examined himself before the Tribunal. Though the appellants claimants have placed on record the certified copy of charge-

sheet Exh.27, the appellants-claimants have not examined any eye witness to the said accident or the Investigating Officer to substantiate their contention about the involvement of the vehicle in the alleged incident. The learned counsel submits that as such the evidence as adduced by the appellants-claimants fall short to attract the said maxim "*Res ipsa loquitur*". The learned Member of the Motor Accident Claims Tribunal has therefore, rightly dismissed the claim petition for want of evidence about the involvement of the vehicle owned by Respondent No.1 in the alleged accident. The learned counsel submits that the peculiar circumstances constituting the event or accident should have been brought on record by the appellants-claimants. There is no evidence about the involvement of the said vehicle in the accident and in absence of the said evidence, there is no question of tendering a reasonable explanation as to the cause of the said accident by the Respondent-owner. The learned counsel has referred the Law Lexicon by writer Ramanatha Aiyar, wherein the meaning of the said maxim has been given. The application of the said maxim

always pre-supposes that some part of the casual process is known, but what is lacking is evidence of its connection with the defendant's act or omission. The learned counsel submits that no satisfactory line can be drawn between "*Res ipsa loquitur*" cases and those where it does not apply. In the instant case in absence of any evidence about the involvement of the vehicle in vehicular accident, the Respondent-owner can not be called upon to explain the cause of the accident by applying the said maxim.

7. The learned counsel in order to substantiate his contention also place his reliance on the case "**Shyam Sunder and others Vs. The State of Rajasthan**" reported in **AIR 1974 Supreme Court 890** and "**Syad Akbar Vs. State of Karnataka**" reported in **AIR 1979 Supreme Court 1848**.

8. The learned counsel for the Respondent-insurer submits that the appellants-claimants have failed to prove the involvement of the vehicle auto rickshaw in the accident and as such

the Tribunal has rightly dismissed the claim petition. The learned counsel submits that there is no dispute that the strict proof of the accident may not be required to be given by the claimants and the claimants may prove their case by preponderance of probabilities. However, merely on the basis of recital in the FIR Exh.26 and filing of charge-sheet is not sufficient to draw inference that the vehicle owned by the Respondent No.1 came to be involved in the accident. The appellants claimants have not examined any eye witness or Investigation Officer to substantiate their contention.

9. The learned counsel for Respondent No.2 however, to substantiate his submissions placed reliance on the following cases :

i) **"New India Assurance Company Ltd. Vs. Laxman S/o Dadarao Karpe and others" First Appeal No.2973/2013 dt. 28.7.2015(CORAM :A.V.NIRGUDE,J.)**

ii) **"Bajaj Allianz General Insurance Co.Ltd. Vs. Meera W/o Raju Choudhary and others"**

**First Appeal No.1921/2013 dt.17.2.2014 (CORAM;
K.U.CHANDIWAL,J.),**

iii) **"Pukhraj Bumb Vs. Jagannath Atchut Naik
and others"** reported in **2014(4) Mh.L.J.447;**

iv) **"Faridabegum Shaikh Yousuf and others
Vs. Daulat Khan S/o Sardar Khan (D) through L.Rs.
and another"** reported in **2014(5) All MR 696;**

v) **"M/s La'BuilDe Corporation Vs. Union of
India and others"** reported in **2014 (5) ALL MR
699;**

vi) **"K.E.Basavarajappa Vs. H.Chandrappa"
Misc. First Appeal No.1822/2010 dt,9.1.2012.
(CORAM: A.S.PACHHAPURE,J.);**

vii) **"North West Karnataka Rd.Transport
Corporation Vs. Gourabai and others"** Civil Appeal
No.3171/2009 arising out of SLP (C) No.15070/2007
dt.1.5.2009;

viii) **"Shabbeer Khan Vs. Gaurav Sharma and
another"** reported in **2015 (4) TAC 439(Raj.).**

10. On careful perusal of the evidence and
the impugned judgment and award passed by the
Tribunal, I find that the evidence in this case
falls short to attract the said maxim "*Res ipsa*

loquitur". Though the FIR Exh.26 came to be filed on the very next day of the accident, the said FIR was lodged against the driver of unknown vehicle. Though the name of the Ajay Kaka Potbhare was mentioned in the FIR as a person who brought deceased Arjun in injured condition to his house, the appellant-claimant No.1 who has lodged the said complaint, has not even expressed her doubt about the involvement of the said vehicle in which deceased Arjun was brought in injured condition to his house, however, after due investigation, the Investigating Officer has submitted the charge-sheet Exh.27 against said Ajay Kaka Potbhare. The appellants-claimants have not examined any eye witnesses nor the Investigating Officer to substantiate their contention about the involvement of the vehicle in the accident. The Respondent has specifically denied the involvement of his vehicle in the said accident.

11. In Law Lexicon by writer P Ramanatha Aiyar, it has been quoted that :

"The phrase "res ipsa

loquitur" is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."

It has been further quoted :

"It is said that "res ipsa loquitur" does not apply if the cause

of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the casual process is known, but what is lacking is evidence of its connection with the defendant's act or omission. When the fact of control is used to justify the inference that defendant's negligence was responsible it must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply"

It is difficult to draw line between "res ipsa loquitur" cases and those where it does not apply.

12. In a case **"Shyam Sunder and others Vs. The State of Rajasthan"** reported in **AIR 1974 Supreme Court 890**, relied upon by the learned counsel for appellants-claimants as well as counsel for Respondent-owner. In para 10,11 and

12, the Supreme Court has made the following observations :

"10. The maxim is stated in its classic form by Erie, C.J.:

... Where the thing is to shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

11. The maxim does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. Lord Shaw remarked that if the phrase had not been in Latin nobody would have called it a

*principle See Ballard V. North
British Railway Co. AIR 1923 S.C.43.*

The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing on the matter are at the outset unknown to him and often within the knowledge of the defendant. But though the parties' relative access to evidence is an influential factor, it is not controlling. Thus the fact that the defendant is as much at a loss to explain the accident or himself died

in it, does not preclude an adverse inference against him if the odds otherwise point to his negligence (see John G. Fleming, The Law of Torts, 4th ed., p.264). The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on common sense and its purpose is to do justice when the facts bearing on the causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant.

12. The plaintiff merely proves a result, not any particular act or omission producing the result. If the result in the circumstances, in which he proves it, makes it more probable than not that it was caused by the negligence of the, defendant, the doctrine of "res ipsa loquitur"

is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability."

13. In a case of **"Syad Akbar Vs. State of Karnataka"** reported in **AIR 1979 Supreme Court 1848**, relied upon by the learned counsel for Respondent-owner, in para 19, 20 and 26 the Supreme Court has made the following observations:

"19. As a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim "res ipsa loquitur" may apply, if the cause of

the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasise the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But, according to some decisions, satisfaction of this condition alone is not sufficient for res ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which "tell their own story" of being offsprings of negligence, are furnished by cases,

such as where a motor vehicle mounts or projects over a pavement and hurts somebody there or travelling in the vehicle; one car ramming another from behind, or even a head-on-collision on the wrong side of the road.

20. Thus, for the application of the maxim "*res ipsa loquitur*" no less important a requirement is that the *res* must not only bespeak negligence, but pin it on the defendant."

26. From the above conspectus, two lines of approach in regard to the application and effect of the maxim "*res ipsa loquitur*" are discernible. According to the first, where the maxim applies, it operates as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on the plaintiff. In this view, if the nature of an accident is such that the mere happening of it is evidence of

negligence, such as, where a motor vehicle without apparent cause leaves the highway or overturns or in fair visibility runs into an obstacle; or brushes the branches of an overhanging tree, resulting in injury, or where there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course ensue, the burden shifts or is in the first instance, on the defendant to disprove his liability. Such shifting or casting of the burden on the defendant is on account of a presumption of law and fact arising against the defendant from the constituent circumstances of the accident itself, which bespeak negligence of the defendant. This is the view taken in several decisions of English Courts."

14. In view of the observations made by the Supreme Court in the above two cited cases and in the facts and circumstances of the present case, I do not think that the said maxim "*Res ipsa loquitur*" can be made applicable. However, it is a fact that deceased Arjun who was grazing his cattles by the side of the road met with an accidental death. He was on his foot and as per the probable cause of death given in the post mortem report, deceased Arjun died due to intracranial haemorrhage due to head injury. In the circumstances, it would be just and appropriate if the appellants-claimants would be given one more opportunity to prove their case before the Tribunal by leading additional evidence. The Respondents are also at liberty to adduce evidence in rebuttal in case the appellants-claimants adduce the evidence before the Tribunal after remand of the matter. Hence, the following order :

ORDER

i) First Appeal No.2659/2013 (Kamalbai W/o

Arjun Bhalekar and others Vs. Sanjay S/o Pandhari Potbhare and others) is hereby partly allowed.

ii) No costs.

iii) The Judgment and award passed by the learned Member of the Motor Accident Claims Tribunal, Latur, in MACP No.323/2010 dt.2.5.2013 is hereby quashed and set aside. The matter is remanded to the Tribunal with following directions :

a) To readmit the MACP No.323/2010 under its original number and the Tribunal shall proceed to determine the claim petition afresh.

b) The evidence recorded during the original trial shall be the evidence during the trial after remand.

c) The appellants-claimants are at liberty to adduce additional oral/documentary evidence in support of their case and the Respondents are at liberty to adduce the evidence in rebuttal. The learned Member, Motor Accident Claims Tribunal,

Latur, shall dispose of the claim petition within six (6) months from the date of appearance of the parties. The parties are hereby directed to appear before the Tribunal on 4.8.2017.

d) The appeal is accordingly disposed of.

Sd/-

(V.K.JADHAV, J.)

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