

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 68 OF 2014**

1. M/s. Kadamba Transport Corporation Ltd.,
A Company having their Registered Office
at Paraiso de Goa, Porvorim,
Goa, representing herein by their
Managing Director Shri Mr. Derrick
Pereira Neto, major, married, service,
having address at Porvorim, Goa.Appellants.

V e r s u s

1. Mrs. Anacleta Henriquina Ilda Fernandes,
w/o. Late Minguel Mariano Fernandes,
major, r/o. House o.78, Ambemol, Fatorpa,
Quepem, Goa.
2. Mr. Satendra Dessai,
S/o. Narayan Dessai,
major, driver, r/o. House No.239/1,
Ambemol, Fatorpa, Quepem, Goa. Respondents

Mr. A. R. Kantak, Advocate for the Appellants.

Mr. V. G. P. Duple, Advocate for the Respondents.

Coram :- SMT. M. S. JAWALKAR, J.

Reserved on : 4th December 2020

Pronounced on: 17th December, 2020

JUDGMENT

1. Heard Mr. A. R. Kantak, learned Advocate for the Appellants and Mr. V. G. P. Duple, learned Advocate for the Respondents.

2. The present appeal is filed by original respondent no.2 i.e. M/s. Kadamba Transport Corporation Limited, (KTC), being aggrieved by the judgment and award dated 28th April, 2014 passed by the Motor Accident Claims Tribunal, Margao, in Claim Petition No. 103 of 2012

3. The case of the claimants before the Claims Tribunal was as under :

That on 13.04.2012, at about 9.00 a.m., the deceased was proceeding to Margao from Bali for marketing and when he reached near Cuncolim Police Station, the bus bearing no. GA-01-X-049 driven by respondent no.1, came in rash and negligent manner and dashed the scooter of the deceased

bearing no. GDH 3834 from behind and the deceased was dragged along with the bus causing bodily injuries. He was shifted to GMC, Bambolim, where he expired on the same day. The claimant is the wife of the deceased, has claimed compensation of Rs.12,65,000/- on account of the death of her husband. The claimant claimed that the respondent no.1, being driver of respondent no.2 and respondent no.2 being owner of the offending vehicle, are liable to pay.

4. It is the contention of appellant that the amount awarded is exorbitant, moreover, respondent no.1 is not at fault and total fault was on the part of the deceased. The learned Tribunal while coming to the conclusion that there is 50% contributory negligence, has not taken into account the evidence led by the respondents. The learned Tribunal erred in holding that driver of the KTC bus was rash and negligent. Considering the fact that the bus had halt at Bali Bus Stop which is near the spot of accident, therefore, speed of the bus would not be more than 40 k.p.h. The learned Tribunal failed

to appreciate that the deceased was of 74 years of age and was driving the scooter and therefore his reflexes were bound to be slow.

5. It is further submitted that from panchanama, it is very much clear that scooterist was totally to his wrong side. The respondent no.1 in his evidence sufficiently established that scooterist suddenly turned to the right side without showing any signal. The sketch corroborates this fact, the spot of impact, if seen, it is 1.30 metres to the right side. No eye witness is examined by the claimant. The learned Tribunal ought to have considered that bus after negotiating a curve, suddenly found the deceased attempting to cross across the right way of the KTC bus and driver made all attempts to save an accident by taking his bus to the right hand side. It is also contended that there is nothing on record to show that earning of the deceased was Rs.20,000/- per month. There is nothing on record to show that the Bar which, is registered in the name of the deceased, was in

running condition and he was earning out of that business Rs.20,000/-. It is submitted that the Claim Petition ought to have been rejected considering the evidence on record.

6. Learned Counsel Mr. Kantak for the appellant has relied on the following citations:

(i) ***CDJ 2004 KAR SC 483*** in the case of ***Shrimanti & Ors. vs. Krishna Deva Madiwal & Ors.***, (contributory negligence)

(ii) ***The Manager, Reliance General Insurance Company Ltd., Salem, vs. Selvi & Ors.*** decided on 15.06.2017 passed in CMA No.2815 of 2015. (Madras High Court)

(iii) ***National Insurance vs. Pranay Sheti & ors. (2017) 16 SCC 680.***

(iv) ***(2013) 6 BCR 783 - Pukhraj vs. Jagannath Atchut Naik***

7. As against this, learned Advocate for respondent no.1/original claimant, Shri V. G. P. Duple, submitted that the

learned Tribunal erred in holding 50% contributory negligence on the part of the deceased without there being any evidence on record. It is also pointed out that learned Tribunal framed additional issue on the day of judgment itself about the contributory negligence and, therefore, there was no opportunity to lead any evidence on the said issue. Thus, it cannot be said that the said issue was tried as per Order 41 Rule 22 of the Civil Procedure Code and therefore, the matter is liable to be remanded. Learned Counsel submitted that this finding of learned Tribunal, he can challenge without filing any cross objection or appeal because the learned Tribunal without any opportunity, recorded its finding 50% of negligence of the deceased. It is also submitted that on perusal of the evidence in the criminal matter, nobody has shown the spot of accident. Only on the basis of Tyre marks of the bus and scratch mark, the spot of impact is decided at 1.30 metres to the right side of the road. It is also contention of the Counsel for the respondent no.1 that driver and conductor are not independent witnesses and there are

variations in the written statement of respondent no.1 and in his deposition. The story put-forth by respondent no.1 driver that he was not at all rash and negligent is having no substance in the light of statement made in written statement "*that it is the case of contributory negligence*". There is nothing on record to show that the spot of accident is near Bali bus stand. The conductor admitted in cross that he was standing in the middle of the bus and distributing tickets. It is submitted that in view of this statement, he had no occasion to see the accident and false story is put forth. In view of various stories put forth by driver about the occurrence of accident, one will have to apply principle of "*Res ipsa loquitur*"

8. Learned Counsel Shri Duple, relied on the following citations:

(i) ***The Managing Director vs. Ramasamy & Ors.*** of the Madras High Court, decided on 15.04.2014 passed in CMA Nos.1122 and 1123 of 2014.

(ii) ***The New India Assurance Company Limited vs. Smt. Phoollmati & Ors.,*** of Allahabad High Court, decided on 27.02.2019 passed in First Appeal No.59 of 2001 and

(iii) ***Gopalkrishna Mitharam Chandnani vs. Gujarat State Road Transport Corporation.,*** of Ahmadabad High Court, decided on 21.02.1992 passed in Civil Appeal No.943/1981.

9. Learned Counsel also relied on judgments ***Shri Ravinder Kumar Sharma vs. State of Assam & Ors.*** and ***Anil Kumar vs. Municipal Corporation,*** obtained from Indian Kanoon site, however, the text forwarded on email does not bear any number of the matter, nor head-notes nor paragraph and inspite of requests to the Counsel to send authenticated report of the said judgment, it was not placed and, therefore, they are not discussed.

10. On contributory negligence, learned Counsel Shri Kantak, submitted that the claimant examined herself by filing her affidavit in evidence. Respondent no.1, driver of the

Kadamba vehicle, examined himself and also examined the conductor of the bus. It is pointed out from the evidence that driver who examined himself clearly deposed that scooterist suddenly turned to his right side without showing any signal which caused the accident. He was at total fault and due to his negligence accident occurred. He has also tried to his level best to avoid the accident by taking his bus to the right side. His deposition is supported by the conductor of the bus. There is no witness examined by the claimant in support of the fact that deceased was not at all negligent and driver of the kadamba was rash and negligent. Moreover, what is deposed by driver is also supported by panchanama and sketch placed on record. The learned Tribunal erred in concluding that contribution of driver to the said accident is 50%. It is also submitted that the deceased was 74 years of age and was driving a scooter and if point of impact is seen, definitely it was right side of the road. Learned Tribunal ought to have considered this fact the bus driver was carrying passengers in his bus. It has also come in evidence that they

had a halt at Bali bus stop which is near to the spot of accident. As such, bus must not be in high speed.

11. Learned Counsel Shri Kantak, relied on ***Pukhraj*** (supra) matter, wherein Hon'ble Apex Court upheld the award of Tribunal dismissing Claim Petition as claimant failed to prove rash and negligence on the part of the respondent-driver.

12. It is the contention of the learned Counsel Shri Dukle for respondent/claimant, that additional issue of contributory negligence was framed by the Claims Tribunal before passing of judgment and, therefore, it is not tried in view of order 41 Rule 22 of the CPC. It is also contended that the learned Tribunal without there being any evidence had come to the conclusion that deceased contributed 50% in occurrence of accident and, therefore, matter is required to be remanded back to try and hear on this specific issue.

13. Learned Counsel Shri Dukle relied on ***Gopalkrishna***

(supra) in support of his contention that when there is a defence, that the scooterist was also negligent then the driver of the bus cannot take plea that there was no fault or negligence on his part.

14. In reply to this contention of Shri Dukle, learned Advocate Shri Kantak for the appellant, relied on ***Shrimanti*** (supra), wherein Hon'ble High Court of Karnataka held at paras 41 and 42, that :

"41. The core issue that arises for consideration is whether the deceased motorcyclist had caused or could be said to have contributed to the occurrence of accident. Before dealing with that aspect it is necessary to advert to another argument that was advanced on behalf of the claimants. It was contended that the absence of a specific plea in the objections to the effect that the deceased had himself contributed to the occurrence of the accident ought to prevent the respondent Corporation from contending that he indeed had so contributed. It is common ground that objections filed by the

respondent Corporation did not raise a plea of contributory negligence of the deceased. What the Corporation had alleged was that the accident in question had taken place entirely due to negligence of the deceased motorcyclist. That plea was in my opinion sufficient to entitle the Corporation to argue that the accident had occurred, if not wholly, at least in part on account of the negligence of the deceased himself. The fact that the objections did not in specific terms attribute 'contributory negligence' to the deceased did not make any material difference. The defence taken by the Corporation being wider in scope, any plea of contributory negligence sought to be urged on its behalf, was implicit and, therefore, open to it at any stage.

42. That apart, the question which the Tribunal was called upon to answer and which arises even for the consideration of this court is whether the accident had taken place on account of the fault of the driver of the bus as alleged by the claimants or on account of the fault of the motorcyclist as stated by the respondent

Corporation. While examining the said question, the court could in my opinion legitimately come to the conclusion that the accident had taken place neither on account of the fault of the driver of the bus nor that of the deceased motorcyclist but on account of the contributory negligence of both the drivers involved in the accident. The absence of a specific defence based on contributory negligence could not preclude the court from finding the driver of the bus guilty of negligence and the deceased having contributed to the occurrence of the accident to the extent the evidence on record established the same. It is trite that an argument based on contributory negligence has to be substantiated by the party who advances that argument, but it is equally true that for discharging that burden, the party concerned need not lead evidence. As observed by the Division Bench of this court in Sharada Bai v. Karnataka State Road Transport Corporation, 1988 ACJ 490 (Karnataka), contributory negligence can be-and very often is- inferred from the evidence adduced on the claimants' behalf or from the perceptive facts either admitted or found established, on a

balance of probabilities in the case. The absence of a specific plea may not therefore be conclusive of the matter nor can the argument that the deceased motorcyclist had contributed to the occurrence of the accident be rejected summarily only because a specific plea in that regard, was not raised in the objections.”

15. Learned Counsel Shri Kantak further submitted that, in the present matter, in written statement itself, there is defence of contributory negligence also. Therefore, there is nothing surprising for the claimant. In view of this citation, even if the issue of contributory negligence is framed or not, the Tribunal has ample power to infer from the evidence on record that which party contributed to the occurrence of accident and in which proportion.

16. So far as application of principle ***res ipsa loquitur***, it is submitted that it has no application in the present case as driver entered into the witness box and explained how the accident occurred. Learned Counsel relied on the judgment

of Madras High Court in ***The Manager, Reliance*** (supra). The Hon'ble Madras High Court discussed meaning of ***res ipsa loquitur*** in various dictionaries and also judgment of High Courts and Apex Court. It is held that normally, it is for the claimant to prove the negligence on the part of the driver but as in some cases, considerable hardship is caused to the claimant as the true cause of the accident is not known to them, but is solely within the knowledge of the driver who caused it, the claimants can prove it but cannot prove how it happened to establish negligence on the part of the known claimant/driver. This hardship is sought to be avoided by applying the principles of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story.

17. It is vehemently argued by Advocate Shri Duple, that even though driver entered into the witness box and also examined conductor, both are interested witnesses. Learned Counsel relied on the citation ***Ramaswamy*** (supra), wherein

doctrine of ***res ipsa loquitur*** applies by Madras High Court inspite of the fact that there was evidence of the driver on record. The respondent could have examined any passenger in the bus. However, I do not see any substance in the said contention of non-examination of passenger.

18. I find substance in the contention advanced by the learned Advocate Shri Kantak. So far as contention of Shri Dukle that additional issue was not tried is having no substance in view of the fact that Claims Tribunal is empowered to decide the percentage of fault and negligence of either party and the proportion thereof. Moreover, on perusal of roznama dated 28.04.2014, it is clear that after framing of additional issue, opportunity was granted to lead evidence, if any, however, parties submitted that they do not wish to lead any further evidence and, therefore, the judgment was pronounced. Thus, there is no substance in the submissions made by learned Advocate for the respondent, Shri Dukle, that additional issue in respect of contributory

negligence is not tried.

19. So far as another contention of Shri Dukle that principle of *res ipsa loquitur* is required to be made applicable, I am of the considered opinion that even if driver entered into the witness box, there are variations in the story put forth by driver while filing written statement and also in oral evidence. At one point, he has stated that the scooterist skidded and therefore caused injuries to himself. At one place he has stated that he suddenly took right turn and at one place he deposed that his scooter got entangled in the tyre of the bus. It is also contention of the driver that he was slowly driving his vehicle. However, by applying maxim of *res ipsa loquitur*, one has to look into the spot panchanama and sketch of the spot. It is contended by learned Advocate Shri Dukle that from record of criminal proceeding which is produced by appellant themselves, it can be seen that both the panch witnesses deposed that they have not shown the spot of accident. Therefore, point of impact shown in the sketch

cannot be treated as spot of accident. In my considered opinion, there is no substance in this contention. These documents i.e. panchanama and sketch are placed by the claimant himself on record and also relied on.

20. On perusal of sketch map, it can be seen that the road is passing from Canacona to Margao having width of 6.50 metres tar road and around 1.10 metre each side of the tar road there is a katcha road. The point of impact is 1.30 metres on right side of the tar road which shows that there was space of around 5 metres to the left side of the road. It also appears that there are scratch marks and tyre marks. The scratch mark are of the scooter and tyre marks of the bus up to 11.5 metres.

21. From the position of the bus and scooter, there cannot be any doubt that accident occurred on the right side of the road which shows that the scooterist was not on his left side. It is well settled that although contributory negligence does not depend on a duty of care, it does depend on foresee-

ability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

22. Learned Tribunal while holding that deceased as well as respondent no.1 contributed to the occurrence of accident, observed that both the panchanama and the sketch corroborates Rw.1 and Rw.2, i.e. driver and conductor. It is observed, thus :

"It shows that at the relevant point of time, the deceased was riding the motorcyucle on the wrong side of the road. It is a two way road and the deceased could not have ridden his scooter on the right hand side of the road while proceeding to Margao. At the same time, the respondent no.1 who was driving the bus,

should have taken the precautions to stop the bus if the deceased had come in front of the bus. The facts and circumstances of the case show that the deceased who was rider of the motorcycle has contributed to the happening of the accident to an extent of 50%"

23. True, it is not discussed by the learned Claims Tribunal in detail, however, it is difficult to hold either to deceased wholly or respondent no.1 of guilty of rash and negligence. On careful perusal of the sketch it is very clear that spot of accident is substantially to the right side of the road. Though it is claimed that near the spot of accident, there is a bus stop at Bali where the bus had stopped and it could not be in a high speed, still there is nothing on record to show that how much Bali bus stand is far away from the spot of accident. Moreover, if bus would have been in slow speed looking to the scooterist turning to right side, the bus driver could have stopped the same by applying brakes and could have avoided further serious consequences. The spot where the accident appears to be occurred is to the right side of the

road that shows that the scooterist crossed that much distance. It is also a matter of record that deceased was 74 years of age and this possibility also cannot be ruled out that his reflexes might be weak. Considering the age of deceased and as he was riding scooter, he had to be more careful. It shows that he was on the right side and tyre marks of the bus of 11.50 metres clearly show that bus was also in a high speed otherwise driver of the bus also could have avoided the accident. The driver of the bus moving behind ought to have controlled his vehicle as scooterist appears to be crossed around 80% of the road. In the photograph, if seen, it appears that there is no sharp curve so that one can't see suddenly any vehicle if come in front of the bus. It has also come on record that the said bus while going to the right side, banged to the compound wall of Cuncolim Police Station and also caused damaged to the electric pole. So, in my considered opinion, deceased as well as the driver of the bus, both have contributed equally to the occurrence of the accident. One cannot say that the accident occurred entirely

due to the fault of the bus driver or of the deceased. Accordingly, I confirm the finding of the learned Claims Tribunal of 50% contributory negligence on the part of the deceased.

24. The other ground for filing this appeal is the amount of compensation awarded is exorbitant. Learned Counsel for appellant relied on ***Pranay Sethi's*** (matter) and submitted that the amount towards funeral, loss of estate and consortium is required to be re-assessed and reduced. There is nothing on record to show that the deceased was earning Rs.20,000/- per month and, therefore, the assessment of compensation by the Claims Tribunal is erroneous. Only because there is registration of Bar in his name, it is not sufficient to establish that his income was Rs.20,000/- per month.

25. Learned Counsel Shri Duple relied on ***Phoolmati*** (supra) in support of his contention that even if there is no appeal against the award by the claimant, he can claim

enhancement of awarded amount in the appeal filed by respondent in original claim. It is submitted by learned Advocate Shri Dukle that even if Tribunal considers that it is a case of contributory negligence, the percentage of contribution to the occurrence of accident by the deceased is at the most 10% and, in view thereof, the amount so awarded is required to be enhanced.

26. The learned Tribunal considering the location of Bar owned by deceased which is situated on a highway, its registration is in the name of the deceased and renewal thereof holds that income of the deceased must be Rs.20,000/- per month. I do not see any reason to interfere in the said finding of the Tribunal.

27. The Tribunal assessed loss of income as Rs.12,00,000/- for five years and after deducting one-third amount towards his personal expenses, it comes to Rs.8,00,000/-. As held earlier, the deceased contributed to the accident to the extent of 50%. In view thereof, amount of

Rs.4,00,000/- is deducted properly. It appears that amount towards funeral expenses and loss of estate appears to be awarded more than what is claimed and what is regarded as reasonable in ***Pranay Sethi's*** matter i.e. Rs.15,000/-. Tribunal awarded Rs.25,000/- towards funeral expenses whereas claimant claimed Rs.10,000/- only. No amount towards loss of estate claimed. However, considering the guideline in ***Pranay Sethi's*** (supra) matter, I am inclined to award Rs.15,000/- each on these two heads. It also appears that amount of Rs.1,00,000/- is awarded towards consortium which is also not reasonable in view of ***Pranay Sethi's*** (supra) matter. Thus, the award is required to be reassessed and reduced to that extent.

28. Accordingly, the award of the Claims Tribunal is required to be modified. Thus, claimant is entitled for following amount towards compensation :

1	Loss of Earnings	Rs. 4,00,000.00
2	Loss of Consortium	Rs. 40,000.00
3	Funeral Expenses	Rs. 15,000.00
4	Loss of Estate	Rs. 15,000.00
	TOTAL	Rs. 4,70,000.00

29. Accordingly, I proceed to pass the following:

O R D E R

1. The appeal is partly allowed.
2. The Award passed in Claim Petition No. 103 of 2012 by the Claims Tribunal, Margao, dated 28th April, 2014, is modified as under :

(i) The Claim Petition is partly allowed with proportionate cost.

(ii) The claimant is entitled for an amount of compensation to the tune of Rs.4,70,000/- (Rupees Four Lakhs Seventy Thousand only),

(inclusive of amount awarded under Section 140 of the M.V. Act) and respondents are jointly and severally liable to pay the same. The amount of compensation shall carry interest at the rate of 9% per annum from the date of filing of petition till its realisation.

(iii) Award be drawn accordingly.

3. If any amount paid or deposited by any of the respondents as per the Award dated 28.04.2014 of the Claims Tribunal, Margao, the said respondent is entitled to get refund of amount over and above the amount of compensation of Rs.4,70,000/- awarded with proportionate interest accrued thereon.

4. Appeal is disposed off accordingly.

M. S. JAWALKAR,J.

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