

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.30 OF 2015

Karnataka Road State Transport
Corporation, Hubli Rural Bus Depot No.2,
Hubli, Karnataka.

... Appellant

Versus

1. Smt. Fatima Shaikh,
Major of age, housewife,

2. Kum. Taira Shaikh,
Major of age, student,

3. Kum. Kader Shaikh,
Major of age, student,
All Indian Nationals,
Residents of H.No.896,
E.W.S., Rumdamoll,
Layamati – Davorlim,
Margao, Salcete Goa.

4. Shri Maruti Badiger,
Driver- Bus No.KA-25 – F- 2106,
C/o Karnataka Road State Transport
Corporation (K. R. S. T. C.)
Hubli, Karnataka.

5. The Managing Director,
Karnataka Road State
Transport Corporation.

... Respondents

**WITH
FIRST APPEAL NO.29 OF 2015**

Karnataka Road State Transport
Corporation, Hubli Rural Bus Depot No.2,
Hubli, Karnataka.

...Appellant

Versus

1. Shri Tanvir Shaikh,
Major of age, student,
Indian National,
Resident of H.No.896,
E.W.S., Rumdamoll,
Layamati – Davorlim,
Margao, Salcete Goa.

2. Shri Maruti Badiger,
Driver- Bus No. KA-25 – F- 2106,
C/o Karnataka Road State Transport
Corporation (K. R. S. T. C.)
Hubli, Karnataka.

3. The Managing Director,
Karnataka Road State
Transport Corporation.

...Respondents

Mr. Shivan Desai, Advocate for the Appellant.
None for the Respondents.

CORAM: M. S. SONAK, J.

RESERVED ON : 18th August 2022

**PRONOUNCED
ON:** 19th August 2022

JUDGMENT

1. Heard Mr. Shivan Desai, learned counsel for the Appellant in both these appeals. The Respondents, though served, were neither present nor represented.

2. Mr. Desai agrees that a common judgment and order can dispose of both these appeals since the principal issue raised in both these appeals is common. Besides, both the appeals arise out of claim petitions concerning the late Akbar Shaikh, who died in a vehicular accident on 31.05.2008.

3. First Appeal No.30 of 2015 arises from the impugned award in Claim Petition No.214/2009. This claim petition was instituted by a widow and the two minor children of late Akbar Shaikh.

4. First Appeal No.29 of 2015 arises out of the impugned award in Claim Petition No. 215/2009 instituted by Tanvir Shaikh, son of late Akbar Shaikh, for his injuries in the above accident on 31.05.2008. Therefore, it is only appropriate that a common judgment and order dispose of both these appeals.

5. Mr. Desai made it clear that the Appellant was neither challenging the factum of the accident nor the quantum of compensation determined by the Tribunal. However, Mr. Desai submitted that the finding recorded by the Tribunal in both the matters that the accident was caused due to rashness and negligence on

the part of the bus driver is entirely perverse and unsustainable for several reasons. Mr. Desai submitted that if this finding is reversed, no liability can be imposed on the Appellant, even vicariously.

6. Mr. Desai has submitted that the finding recorded by the Tribunal on the rashness and negligence of the bus driver was hit by the principle of res judicata. He presents that in Claim Petition No. M.V.C. No.104/2009 instituted by a passenger from the Appellant's bus driven by Maruti Badiger, the MACT at Karwar, upon due consideration of the oral and documentary evidence, returned a finding that this very accident was on account of rash and negligent driving of the lorry by late Akbar Shaikh. He submits that Smt. Fatima Shaikh, the widow of Akbar Shaikh, was a party in M.V.C. No.104/2009 before the MACT, Karwar. He presents that the claimants in the two claim petitions in which the awards impugned in these appeals have been made are the legal representatives of late Akbar Shaikh. Therefore, he submits that the finding recorded by Karwar Tribunal operates as res judicata, and the MACT, North Goa (Goa Tribunal) was not justified in taking a contrary position and holding that this very accident took place due to the rashness and negligence of Maruti Badiger, the bus driver. He submits that though this plea was raised before the Goa Tribunal, the same was summarily rejected, and such rejection is contrary to law.

7. Mr. Desai submits that the principle of res judicata is based on public policy so that the parties are not vexed twice over. He submits

that the judgment and award dated 29.01.2011 made by the Karwar Tribunal was never appealed by the legal representatives of late Akbar Shaikh. Therefore, the finding about late Akbar Shaikh's rashness and negligence binds them. He submits that the award and findings therein bind the parties to the award and the persons who claim under such parties. He offers that the Goa Tribunal failed to appreciate this legal and factual position; therefore, the impugned awards are vulnerable and deserve to be set aside.

8. Mr. Desai, without prejudice to those above, submits that even otherwise, the evidence on record does not establish that the accident occurred due to rashness and negligence on the part of the bus driver. In this case, he submits that the police authorities chose to lodge F.I.R., not against the bus driver but the late Akbar Shaikh. He presents that the police documents, including, in particular, the scene of the accident, sketch, and panchanama, establish that the accident occurred due to the rashness of late Akbar Shaikh and not bus driver Maruti Badiger. Based on all this, he submits that the finding of rashness and negligence recorded by the Goa Tribunal in both the impugned awards deserves to be set aside.

9. Based on the contentions raised by Mr. Desai, the following principal issues arise for determination in these appeals.

(a) Whether the finding recorded by the Goa Tribunal about the accident being caused due to rashness and negligence on the part of the Appellant's bus driver – Maruti Badiger is barred by the principle of res judicata?

(b) Whether the finding recorded by the Goa Tribunal about the accident being caused due to rashness and negligence on the part of the Appellant's bus driver – Maruti Badiger, is, even otherwise, contrary to the evidence on record?

10. In both these appeals, the Appellant has raised almost identical grounds. The first ground is quite omnibus stating that the impugned award is contrary to law and evidence on record. The second and third grounds referred to non-joinder of necessary parties, i.e., the truck's owner and insurer. The fourth ground states that the extent of compensation awarded is extraneous to the settled principles of the grant of compensation under the MV Act. The fifth ground says that the Presiding Officer misconstrued the evidence on record while holding that Respondent No.1 had proved that Respondent No.2 (Maruti Badiger) drove the bus rashly and negligently at the time of the accident. The sixth ground again says that the Presiding Officer erred in concluding that the death of Akbar Shaikh was on account of rash and negligent driving of Respondent No.2 (Maruti Badiger). Finally, the seventh ground states that the Presiding Officer failed to consider that there was no other material on record to establish that the accident was caused due to the rash and negligent driving of Respondent No.2 (Maruti Badiger).

11. The eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth grounds again attack the finding about rashness and negligence on Respondent No.2 (Maruti Badiger). However, the

grounds I to XIV, nowhere even whisper the ground about the applicability of the principle of res judicata. The attack on the finding about rashness and negligence of Respondent No.2 (Maruti Badiger) is on merit or upon re-appreciation or re-evaluation of evidence on the record but not by invoking the principle of res judicata. The grounds XV to XIX attack the determination of the quantum of compensation. These grounds have no nexus with the finding of rashness and negligence or applicability of the principle of res judicata.

12. The above omission is significant because even before the Goa Tribunal, it does not appear that the plea based upon the principle of res judicata was ever raised by the Appellant or, for that matter, Maruti Badiger – the bus driver. The pleadings do not raise the plea of res judicata. This is excusable because when the Appellant and Maruti Badiger filed their written statement, Karwar Tribunal had not disposed of M.V.C. No.104/2009. The record bears out that M.V.C. No.104/2009 was instituted at Karwar Tribunal on 30.03.2009. In contrast, the two claim petitions were initiated in the Goa Tribunal on 26.10.2009. However, no plea of res sub-judice was raised in the pleadings. Even after Karwar Tribunal disposed of M.V.C. No.104/2009 on 29.01.2011, the pleadings were not amended to raise the plea of res judicata.

13. Mr. Desai referred to paragraph 16 of the impugned award in which, the Goa Tribunal, whilst evaluating the evidence of Maruti Badiger (RW1), produced the Karwar Tribunal's judgment and award

dated 29.01.2011. The Goa Tribunal observed that this judgment and award by no stretch could have any bearing on the outcome of the claim petitions instituted before it with the first point of distinction, namely of the proceedings filed before the co-extensive jurisdiction at the instance of the injured occupant of the bus against the truck driver through his legal representatives and the present Respondents with the entire thrust being to prove the rashness of the truck driver alone.

14. Based on the above observations, it can hardly be said that the plea based on the principle of res judicata was raised before the Goa Tribunal in the present claim petitions. Similarly, even the two appeal memos do not raise the plea based on the principle of res judicata, assuming that the Appellant was entitled to raise such a plea for the first time before the Appellate Court after having failed to raise such a plea in the pleadings or in the course of the arguments before the Tribunal.

15. It is well settled that the plea based on the principle of res judicata is a mixed question of fact and law. Therefore, it has to be specifically pleaded, and the party relying on the principle of res judicata should place before the Court all material particulars which would be sufficient to find whether the case is barred by the principle of res judicata [See *Krishna Chandra Naik & Ors. Vs Nilakantha Mohanty & Ors.*, AIR 1996 Orissa 1, and *Madhukar D. Shende Vs Tarabai Aba Shedage*, AIR 2002 SC 637].

16. In *V. Rajeshwari Vs T. C. Saravanabava*¹, the Hon'ble Supreme Court has explained that the rule of res judicata does not strike at the root of the jurisdiction of the Court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation, and no one should be vexed twice for the same cause. The basic method to decide the question of res judicata is first to determine the case of the parties as put forward in the respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment.

17. The Hon'ble Supreme Court further held that the plea of res judicata is founded on proof of specific facts and applying the law to the facts so found. Therefore, the foundation for the plea must be laid in the pleadings, and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the trial stage would not be permitted to be raised for the first time at the appeal stage. The Court held that not only must the plea be taken, but it also has to be substantiated by producing copies of the pleadings, issues, and judgment in the previous case. The plea depending upon the facts of a given case is capable of being waived if not properly raised at an appropriate stage and in an appropriate manner. The party adversely

¹ (2004) 1 SCC 551

affected by the plea of res judicata may proceed on the assumption that his opponent had waived the plea by his failure to raise the same.

18. In *V. Rajeshwari* (supra), the plea for res judicata was not raised in the trial Court and the First Appellate Court by raising necessary pleadings. In the First Appellate Court, the plaintiff sought to bring on record the judgment and decree in the previous suit, wherein his predecessor-in-title was a party, as a piece of evidence. He wanted to urge that not only had he proved his title to the suit property by the series of documents, but the previous judgment related to a part of very suit property had also upheld his predecessor-in-title, which emboldened his case. However, the Respondent, thereat apprised of the documents, still did not choose to raise the plea of res judicata. In such circumstances, the Hon'ble Supreme Court held that the High Court should not have entered into the misadventure of speculating what was the matter in issue and what was heard and decided in the previous suit.

19. Considering the law as explained by the Hon'ble Supreme Court of India and other High Courts as above, the Appellant cannot be permitted virtually for the first time to raise the plea of res judicata without having raised such a plea in the pleadings before the Goa Tribunal or in the course of the arguments before the Goa Tribunal. Such a plea was not even found in the grounds urged in the two appeal memos.

20. Moreover, such a plea cannot be permitted to be raised to defeat the rights of a widow and two minor children who have been awarded compensation of hardly ₹13,90,450/- for the death of their husband/father in a vehicular accident. Such a plea also cannot be permitted to be raised to deny the compensation of ₹7,36,400/- to a minor son whose right leg below the knee has to be amputated due to the injuries he sustained in the vehicular accident. If the plea had been raised at the appropriate stage, the claimants could have appealed the Karwar finding. The Karwar award had directed payment of hardly Rs. 16500/-, which the Insurance Company would pay. Therefore, based on a liberal construction of the grounds in the appeal memo, if such a plea is permitted to be raised at this stage, severe prejudice will occasion the Claimants crying for compensation since 31.05.2008.

21. Mr. Desai however, relied on *New India Assurance Vs Dr. Vikas Sethi and others*², *New India Assurance Co. Ltd., Vs Mohanbhai Galabhai Makwana and others*³, *Satyadyan Ghosal and others Vs Deorajin Debi and Another*⁴, *Arjun Singh Vs Mohindra Kumar and others*⁵ and *Gulabchand C. Parikh Vs State of Gujarat*⁶ to submit that the principle of res judicata will apply to the proceedings under the MV Act. He offered that an issue once determined cannot be left open for leading evidence before another

² 2020 SCC Online All 921

³ 2014 SCC OnLine Guj. 5804

⁴ (1960) 3 SCR 590

⁵ (1964) 5 SCR 946

⁶ (1965) 2 SCR 547

forum of equal jurisdiction, which otherwise may frustrate the purpose of the finality of a judgment in the preceding case, and the decree would otherwise lose the essence of sacredness. He submitted that the principle of res judicata is based on the need to give finality to judicial decisions. Further, the scope of principles of res judicata is not confined to what is contained in Section 11 but to a more general principle/application.

22. All the judgments relied upon by Mr. Desai say that the principle of res judicata, being based on public policy, will apply even to the proceedings where the provisions of the C.P.C. may not be expressly applicable. There can be no difficulty whatsoever with this proposition. However, it is equally well settled by the Hon'ble Supreme Court of India that the rule of res judicata does not strike at the root of the jurisdiction of the Court trying the subsequent suit. Further, a plea of res judicata involves a mixed question of fact and law. Therefore, if such a plea is not at all raised or properly raised, then the Court is not bound to permit raising such a plea. Further, in this case, as discussed hereafter, even the ingredients of the plea of res judicata were not fulfilled. Therefore, the decisions relied upon by Mr. Desai will not assist the Appellant's case.

23. Mr. Dessai contended that strict rules of pleadings do not apply to summary proceedings seeking compensation under the M.V. Act. This is correct. However, it is necessary to note that the principle about pleadings not being very strictly construed before such Tribunals

is a principle that has evolved for the benefit of claimants, considering that such provisions are beneficial provisions for the welfare of victims of the road accident. Therefore, the Appellant may not be entitled to take advantage of this principle, and that too, for prejudicing the interests of the claimants and denying them compensation.

24. Even if the Appellants were to be permitted to set up a plea of res judicata at this stage, such a plea could not succeed in the facts and circumstances of the present case. To make good a plea of res judicata, in terms of Section 11 of C.P.C, a party has to establish the following:-

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit.

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation VI is to be read with this condition.

(iii) The parties as aforesaid must have litigated under the same title in the former suit.

(iv) The Court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Explanation II is to be read with this condition.

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Explanation V is to be read with this condition.

25. In the present case, it is arguable whether the matter directly and substantially in issue in the claim petitions before the Goa Tribunal were the same, which were directly and substantially in issue either actually or constructively before the Karwar Tribunal. In any case, the proceedings before the Karwar Tribunal were instituted by a bus passenger in the Appellant's bus alleging injuries sustained by her in the accident on 31.05.2008 were due to the rashness and negligence on the part of late Akbar Shaikh, the driver of the lorry. It is only because Akbar Shaikh had died in the said accident that his widow Fatima was impleaded as a Respondent before the Karwar Tribunal. The other legal representatives of Akbar were never impleaded.

26. Therefore, the proceedings before the Karwar Tribunal and the proceedings before the Goa Tribunal were not between the same parties or the parties under whom they claim. This is also not a case where the parties had litigated under the same title in the former proceedings. The parties were different, and in any case, their capacities were different. Therefore, while it is doubtful whether condition (i) above was fulfilled in this case, it is evident that conditions (ii) and (iii) were not fulfilled. Therefore, even if the Appellants were permitted to raise the plea of res judicata, based on the same, no case was made out to uphold such a plea and upset the finding of fact recorded by the Goa Tribunal on the issue of rashness and negligence.

27. Mr. Desai's contention about Akbar Shaikh's widow Fatima having not appealed against the Karwar Tribunal's judgment and award dated 29.01.2011 has to be examined and appreciated from the context referred to hereinafter.

28. Fatima had lost her husband Akbar Shaikh in the accident on 31.05.2008. She was left with the responsibility to provide for her three minor children. One of them had to suffer the amputation of his leg due to the injuries in the same accident. True, she was impleaded as a Respondent before the Karwar Tribunal in a claim petition instituted by a bus passenger. However, she did manage to file a written statement opposing the claim petition. Still, after that, it was not possible for her to effectively participate in the proceedings before the Karwar Tribunal.

29. Possibly after the loss of her husband and the responsibility to look after her three minor children, including one minor son whose leg had to be amputated due to the injuries sustained by him in the very same accident, she had neither wherewithal nor financial resource to contest the proceedings before the Karwar Tribunal. Ultimately, the Karwar Tribunal ordered the Respondents, including Fatima, to jointly and severally pay the compensation of only ₹16,500/- to the bus passenger. Since the lorry was insured, this compensation, in all probabilities, was paid by the Insurance Company. Therefore, expecting Fatima to appeal against the Karwar Tribunal's award dated 29.01.2011 is somewhat unrealistic, if not insensitive. The legal

niceties apart, at least in this jurisdiction, this Court cannot be oblivious to such ground realities and proceed to non-suit the road accident victims based upon such belated pleas. This Court would fail to do its duty if it were to overlook such ground realities and deny the victims just compensation.

30. For all the above reasons, the first point for determination will have to be decided against the Appellant.

31. The next issue which arises for determination is whether the evidence on record before the Goa Tribunal was sufficient to sustain the finding that the accident in which Akbar Shaikh died was on account of rashness and negligence of the bus driver – Maruti Badiger. The Goa Tribunal has analyzed in some detail the documents like the scene of accident panchanama, F.I.R., etc.

32. The Tribunal has noted that the scene of the accident panchanama reveals that Akbar Shaikh and his minor son Tanvir were trapped inside the cabin, which was completely damaged after the accident. The scene of the accident panchanama referred to the Appellant bus being seen facing the east, i.e., the Kumta side with its tyres on the northern edge of the tar road. The front show of the bus was completely damaged, and there were damages to the front right-hand side mudguard and the bumper. The minor son Tanvir, who was an eyewitness, has deposed to the genesis of the accident.

33. Tanvir (AW2) maintained that the accident occurred due to the rash and negligent driving of the Karnataka bus driver in which he lost his father and one of his legs. Because Tanvir could not remember the timing when they set out from Goa or such other trivial matter, there is no case to doubt or disbelieve Tanvir's testimony about the genesis of the accident. Tanvir maintained that the bus driver dashed against the truck driver's side door and stoutly denied the suggestion that the truck had gone on the wrong side of the road or that the bus was on the right side at the time of impact. Instead, Tanvir maintained that the Karnataka bus had gone to the wrong side, i.e., in their lane, and dashed head-on in front of their truck resulting in a violent impact. All this evidence was not available to the Karwar Tribunal.

34. Maruti Badiger (RW1), the Appellant's bus driver, also deposed in this matter. His thrust was that the police had registered an offense against Akbar Shaikh; therefore, it was Akbar Shaikh who was responsible for the accident. RW1 also relied upon Karwar Tribunal's judgment. RW1 stated that he saw the truck for the first time at a distance of one kilometer since it was a straight stretch. He maintained that he could see the bus from a distance of one kilometer.

35. The Tribunal has quite justifiably expressed surprise for such a testimony of RW1. The Tribunal quite correctly wondered how RW1 could not only see the truck from a distance of one kilometer but also note that it was a light brown color. In the cross-examination, RW1

changed his colors and tried to retract, stating that he could not mention the truck's color from such a distance.

36. RW1 shifted his version on the genesis of the accident. At one stage, he spoke of the head-on collision. However, at another stage, he talked about the truck driver going to the wrong side of the road and dashing against his bus. At yet another stage, RW1 spoke about the truck being driven in a zigzag manner which he noticed from a distance of 30-35 meters. This version was again retracted in cross-examination.

37. The Goa Tribunal, on evaluation of testimonies of Tanvir and Maruti Badiger, not to mention the documentary evidence, quite correctly held that the testimony of RW1 hardly inspires confidence. The Goa Tribunal also held that RW1 was trying to take undue advantage of the truck driver's death soon after the accident and lodging a complaint at Ankola Police Station to precipitate an offense registered against the truck driver. The Goa Tribunal noted that even if RW1's testimony was to be believed about his slowing down the bus speed after noticing the truck from a great distance coming in a zigzag manner, there was no explanation forthcoming from RW1 as to why he could not bring the bus to complete halt.

38. Therefore, even after evaluating the evidence on record, there is no case made out to disagree with the finding returned by the Tribunal on the issue of rashness and negligence of the bus driver. Accordingly,

even the second point for determination will have to be answered against the Appellant.

39. The Tribunal has been quite conservative in determining the compensation amount. The Tribunal has held that even Akbar Shaikh contributed to the accident by approximately 10%. Since there is no merit in the grounds pressed in support of these appeals, these appeals will have to be dismissed, and the same are hereby dismissed.

40. If the Appellants have deposited the awarded amounts, the claimants are allowed to withdraw the same by furnishing identity documents and bank details. However, the amounts must be transferred directly into the claimants' bank accounts. The member secretary, GLSA, is requested to see that the victims receive compensation soon.

41. If the Appellants have not deposited the amounts, they should do so within six weeks from today after due intimation to the Member Secretary, GLSA.

42. Both these appeals are dismissed. However, there shall be no order for costs.

M. S. SONAK, J.