

The Managing Director, Vs. Zikar Hazi S/O Mohammad Akhar

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Court : Mumbai

Decided On : Mar-16-2009

Reported in : 2009(5)BomCR378; 2009(111)BomLR1843; 2009(4)MhLj527

Judge : B.P. Dharmadhikari, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 162

Appeal No. : First Appeal No. 225 of 1994

Appellant : The Managing Director, ;The General Manager and the Vice President, Ellora Paper Mills

Respondent : Zikar Hazi S/O Mohammad Akhar

Advocate for Def. : N.S. Talmale and ;Solao, Advs.

Advocate for Pet/Ap. : V.D. Muley, Adv.

Disposition : Appeal dismissed

Judgement :

B.P. Dharmadhikari, J.

1. Special Civil Suit No. 54 of 1989 filed by the respondent for recovery of damages of Rs.1,99,650/- has been decreed by the Joint Civil Judge, Senior Division, Bhandara, on 24th February 1994. This judgment also dismissed counter

claim of appellant complaining about damages of Rs.8,10,993/- and for recovery of amount of Rs. Three lakhs. The present First Appeal challenges this judgment and decree.

2. On 2.5.1989, there was a fire in Rice-hay staking yard of the appellants. In that fire a truck having registration No. MHG . 7535 was destroyed. The haystack stored by the appellants for manufacturing paper was also destroyed. The plaintiff claimed damages from defendants for his truck while defendants through counter claim sought to recover damages sustained by them. After deducting the insurance claim as received by them, the defendants claimed decree of three lakhs against the plaintiff.

3. I have heard Shri Muley, learned counsel for the appellants - defendants and Shri Talmale with Shri Solao, learned counsel for the respondent . plaintiff.

4. Shri Muley, learned counsel has contended that there was no privity of contract between defendants and plaintiff. The contract to supply rice-haystack (Tanis) was given by the defendants to one Razzaque and plaintiff alleged that Razzaque employed truck of plaintiff for said purpose. Shri Muley, learned counsel states that therefore, the suit ought to have been filed either by Razzaque or then Razzaque ought to have been joined as necessary party. It is further contended that in plaint as also in evidence, the plaintiff has stated that he (was) an owner of truck thereby implying that the said truck was owned by him earlier and hence it was not owned by him at the time of incident. In view of this pleading, it is contended that it was obligatory for the plaintiff to prove his ownership by producing some relevant document like registration book or other papers from RTO and that has not been done. It is argued that the plaintiff himself did not enter the witness box and his brother Haroon, who claimed to be managing the transport business of plaintiff deposed in the matter. The said brother also could not produce any document to show that truck belonged to the plaintiff. It is pointed out that said brother runs a grocery shop and the funds for truck which was claimed to have been purchased for Rs.1,19,000/- for the plaintiff were in fact provided for by said shop. It is pointed out that amount of Rs.1,19,000/- was outstanding in the accounts of shop against the plaintiff as per cross examination of Haroon. It is stated that, therefore, truck

did not belong to the plaintiff and suit for compensation could not have been filed by him.

5. In order to point out that the defendants were not negligent in any way and were not responsible for the fire caused, attention is invited to evidence of driver of truck Anwarkhan, Cleaner of truck Nilkanth and Security Supervisor Pannalal with the defendant. It is stated that evidence clearly shows that the action of cleaner in trying to move the truck resulted in sparking from its silencer side and said sparking ignited the haystack lying near the truck. For that purpose, attention is also invited to statements of Nilkanth and Anwarkhan recorded by the police and material omissions which have been brought on record vis-avis those statements. It is contended that in view of this evidence on record, the preponderance of probabilities lean in favour of present appellants/ defendants and their contention as to how the fire occurred needed to be accepted. It is pointed out that insofar as quantum of loss sustained by defendants is concerned it is not in dispute & attention is invited to the statement of Shri Annamalai, Manager and absence of cross examination about this quantum. Shri Muley, learned counsel, contends that approach of trial Court is, therefore, erroneous and suit deserves to be dismissed and counter claim needs to be allowed.

6. Shri Talmale, learned counsel, on the other hand, states that in written statement itself ownership of plaintiff has been accepted and hence the argument of Shri Muley, learned counsel, in this respect is misconceived. It is further contended that in cross examination of PW-1, the fact that truck belonged to plaintiff has also been brought on record. It is contended that thus, it is an admitted position that truck belonging to the plaintiff has been destroyed in fire caused in the factory premises of the appellants and therefore the plaintiff is entitled to damages. He points out that quantum of damages has been proved by leading clinching evidence in support thereof with necessary documents. It is further contended that the alleged statements recorded by the appellants are not proved to be the statements of Driver . Anwarkhan or cleaner Nilkanth and in view of the provisions of Section 162 of Criminal Procedure Code, the trial Court has correctly refused to look into those statements. The learned counsel contends that the story that the Cleaner tried to move the truck and at that time there was sparking from

silencer, is not established and there is no evidence to support it. He, therefore, argues that the trial Court has correctly appreciated the evidence on record and the view taken by it, does not call for any interference in this appeal.

7. After hearing learned counsel, I find that the following issues fall for my consideration in this appeal:

1. Whether, the plaintiff has proved that truck MHG . 7535 belonged to him ?
2. Whether the plaintiff has proved that he is entitled to damages for destruction of said truck in fire in industrial premises of defendants on 2.5.1989 ?
3. Whether the defendants/ appellants established that the fire was caused because of sparking from the truck and, therefore, they are entitled to compensation for loss suffered by them as raised in Counter Claim ?
4. Whether the judgment and decree of trial Court calls for any interference ?.

8. The perusal of written statement as filed by the present appellants shows that the contract of supplying rice-haystack was given to Abdul Razzaque of Pohara and on 2.5.1989 said Razzaque had engaged the truck in question for carrying haystack to the industry/ factory of defendants. The defendants have stated that Abdul Razzaque hired the truck of the plaintiff for said purpose on terms and conditions decided between them only. In view of this express admission in written statement, it is difficult to accept the contention of Shri Muley, learned counsel that the plaintiff has not proved that the truck belonged to him. The use of word .was. i.e. past tense by the plaintiff in his plaint is only because of the fact that the truck itself was completely destroyed on 2.5.1989 and was not in existence thereafter. Though the grievance has been made that Razzaque was necessary party and contract of supply of haystack was between defendants and said Razzaque, the cause of action here is not arising out of said contract and it arises out of fire which occurred on 2.5.1989. Though it has been brought on record that Razzaque was present at the time when the fire occurred, it appears that both the parties have chosen not to examine said Razzaque as witness. The appellants have contended that burden was upon the plaintiff to prove loss to him and to show that fire was

not caused because of his negligence and therefore the plaintiff should have examined Razzaque. The plaintiff has argued that the defendants made the Counter Claim and hence burden was upon them. The question of onus becomes irrelevant after the parties led their respective evidence. It is to be noted that both the parties, for the reasons best known to them, did not find it necessary to examine said Razzaque.

9. The fire dated 2.5.1989, which took place in the yard of industry of appellants is not in dispute. The destruction of MHG . 7535 is also not in dispute. The destruction of property of the appellants themselves is also not in dispute. The question is, who is responsible for this fire. It is not the plea or case of the appellants that the plaintiff or his driver/cleaner in any way violated any security instructions given to them. In fact precautions, if any & if prescribed . to be followed while unloading such inflammable material directly in yard where it was already stored in huge quantity are not brought on record.

10. As the fire broke out in the factory yard or premises in control of defendants, it is apparent that burden was upon them to explain why and how fire broke out. Inflammable material belonged to them & was being handled at their instance. The evidence on record shows that the place where truck full of dried haystack was being unloaded was meant for unloading haystack only and haystack brought earlier was lying there in heaps of height of about 15' and width of about 20' or 25'. It is also on record that this old dried tanis/ haystack was at a distance of 7.8 feet from the truck which was being unloaded. The contention of defendants is that there was sparking from the silencer pipe and this is the specific case in their counter claim. It is argued that as the regular Driver i.e. Anwarkhan was required to go to answer nature's call, he was not available and in his absence Cleaner had tried to start the engine in order to move the truck and then the spark emitting from silencer caused the fire. When the evidence on record is perused for said purpose, the suggestion in this respect is not given to regular Driver PW2- Anwarkhan, on the contrary Anwarkhan has stated that when he was sitting in front of truck at a distance of about 40 to 50 feet, he saw fire at the back of the truck and labourer started running. He further mentioned that Cleaner . Nilkanth was sitting with him. His police statement reveals that when he came back after answering nature's call

hurriedly due to the shouts of fire, he tried to move the truck but truck did not start. He has not stated that Nilkanth had tried to start it earlier or had moved the truck earlier. The said police statement even if presumed to be of Anwarkhan, does not support the present appellants in any way.

11. The cleaner Nilkanth has been examined as PW-5 by the plaintiff. He has also deposed that he himself and Driver were in front of truck at a distance of about 40 to 50 feet and then the fire was seen at the back of the truck. He has stated that fire was caught by old tanis at the back of truck. He has further stated that Driver tried to move the truck but truck also caught fire and driver could not remove it. In cross examination, he denied that he had moved the truck little away after it was half unloaded. He denied that when he started the truck, there was sparking. His police statement again does not show that when he started the engine, fire broke out. It only mentions that when he was cleaning Engine etc. and he got down, he saw fire at a distance of 3 to 4 feet behind the truck. It is to be noticed that direct questions appearing in these statements have been put to these witnesses i.e. Anwarkhan without asking them whether documents from which these portions were put to them were their police statements or not. Even if this lacunae is ignored, I find that the police statement by itself does not help the appellants in any way. The evidence of witnesses also do not show that the fire started when Cleaner tried to move the truck. Their witness No. 2 . office Manager P. Annamalai has not seen the fire. Pannalal , Security Supervisor claims to have been present when the fire occurred. He has in para 3 of his deposition stated that when he was taking round, he found that the Cleaner of disputed truck was trying to move the truck by raising accelerator and at that time, he saw there was sparking and tanis caught fire and he states that at that time, Contractor Razzaque and some coolies were present there. It is to be noticed that even if Pannalal.s statement is recorded by police authorities, that statement has not been brought on record by the defendants. In his cross examination, it has come on record that the dried tanis - haystack was lying in the area of 20 to 22 Acres and he saw fire at the distance of 20 to 25 feet. He stated that old tanis was lying 3 to 4 feet away from disputed truck and old tanis at left side of the track was at a distance of about 7 to 8 feet away from it. The said stock was about 15 feet in height and its breadth was about 30 feet. He has also stated that Tanis heap kept at right hand side of the truck was

of the same height and breadth. He has also admitted that the length of the heap of tanis was 3 to 4 feet more than the length of the truck. All this cross examination has been carried out only to show that back of truck or sparking, if any, could not have been seen by that person. He has further stated that haystack kept in the truck caught fire and labour jumped away. Thus, his evidence only shows that the stock stored in the yard caught fire. The deposition that Cleaner of the disputed truck was trying to move the truck by raising accelerator cannot be accepted. Shri Talmale, learned counsel has rightly pointed out that said witness has also stated that he had lodged report with his employer after the incident and that report is not produced by the appellants/ defendants. In view of this material, it is difficult to accept that the Cleaner tried to move the truck and at that time there was sparking which caused fire.

12. It is to be noted that haystack was stored by the defendants. The inflammable nature of haystack was known to them. What precautions they have taken to avoid such incidents, has not been brought on record. When the truck was allowed to be taken near the haystack where haystack was stored in about 25 to 30 acres, it is apparent that the necessary precautions for unloading the haystack brought were not taken. The truck obviously was to be started and its ignition was to be turned of & on for said purpose & for unloading. Pannalal never found anything objectionable about presence of truck in haystack yard though it was practically covered by old dry hay on all its sides. The trial court has also not examined this aspect but from the material on record, it appears that when haystack was stored in the factory yard of appellants and they were importing haystack and it was being unloaded from the truck, the burden to take necessary precautions to avoid fire was upon them. Mere starting of truck by anybody can not be presumed to be negligent act here. The evidence, therefore, ought to have been brought to show that when the truck loaded with haystack came, it was examined & was found to meet safty requirements and therefore, it was allowed to proceed to the yard where haystack was to be unloaded. The starting of engine of a truck may or may not result always in spark but then DW-2 - Pannalal stated that he had seen some such spark from the other trucks on road. In any case petrol or diesel in truck is itself an inflammable substance. I, therefore, find that as the premises belonged to appellants and the haystack i.e. commodity which was inflammable also belonged

to them and they invited the truck to unload it, the responsibility was therefore, on the appellants to supervise the loading & unloading through trained staff and after observing necessary precautions. It is obvious that as the appellants/ defendants did not take proper precautions, the accident occurred. Mere starting/moving of truck whether by its driver or then by some unauthorised person is not determinative in present facts.

13. In : [2001]1SCR8 S. Kaushnuma Begum v. New India Assurance Co. Ltd., Hon'ble Apex Court holds:

12. Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? This question depends upon how far the Rule in Rylands v. Fletcher 1861-73 All ER (Reprint) 1 (supra) can apply in motor accident cases. The said Rule is summarised by Blackburn, J. thus:

The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

13. The House of Lords considered it and upheld the ratio with the following dictum:

We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequences of vis major or the act of God;

but, as nothing of this sort exists, here, it is unnecessary to inquire what excuse would be sufficient.

14. The above Rule eventually gained approval in a large number of decisions rendered by Courts in England and abroad. Winfield on Tort has brought out even a chapter on the 'Rule in Rylands v. Fletcher'. At page 543 of the 15th Edn. of the calibrated work the learned author has pointed out that 'over the years Rylands v. Fletcher has been applied to a remarkable variety of things: fire, gas, explosions, electricity, oil, noxious fumes, colliery spoil, rusty wire from a decayed fence, vibrations, poisonous vegetation...'. He has elaborated seven defences recognised in common law against action brought on the strength of the rule in Rylands v. Fletcher (1861-73 All ER (Reprint) 1). They are: (1) Consent of the plaintiff i.e. *volenti non fit injuria*. (2) Common benefit i.e. where the source of the danger is maintained for the common benefit of the plaintiff and the defendant, the defendant is not liable for its escape. (3) Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply. (4) Exercise of statutory authority i.e. the rule will stand excluded either when the act was done under a statutory duty or when a statute provides otherwise. (5) Act of God or *vis major* i.e. circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility. (6) Default of the plaintiff i.e. if the damage is caused solely by the act or default of the plaintiff himself, the rule will not apply. (7) Remoteness of consequences i.e. the rule cannot be applied *ad infinitum*, because even according to the formulation of the rule made by Blackburn, J., the defendant is answerable only for all the damage 'which is the natural consequence of its escape.

14. The argument of Shri Muley, learned counsel that the fire broke out because of act of God also cannot be accepted because of specific defence that the fire broke out due to spark from the silencer of the truck. The contention that cost of truck has not been proved on record also cannot be accepted because in cross examination of Haroon, it has been brought on record by the plaintiff that the amount of Rs.1,19,000/- was shown as outstanding in his accounts of grocery shop and he had to recover the same from the plaintiff. He has stated that he has not charged any interest on said amount of Rs.1,19,000/- but then that by itself is

not sufficient to doubt the contract or arrangement between two brothers. The ownership of the truck is accepted and in these circumstances, I find that the acceptance of amount of Rs.1,19,000/- as cost of the truck cannot be said to be erroneous or arbitrary.

15. In view of this discussion, I find that the issues as framed above need to be answered against the appellants/ defendants and in favour of plaintiff. With the result, I find that no case is being made out warranting any interference in the judgment and decree passed by the trial Court. First Appeal is, therefore, dismissed. However, in the circumstances of the case, there shall be no order as to costs.

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