IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 108 OF 1998

M/s Rani Constructions Pvt. Ltd.,
a Private Limited Company,
incorporated and constituted
under the Indian Companies Act, 1956,
and having its office at
49, Khadapabandh, Ponda, Goa. ... Appellant
(Orig.Defendant)

VERSUS

Shri Shaikh Abdul Kadar
(since deceased), through
his heirs and legal representatives:

(i) Smt.Mumtaz Begum
widow of late Shaikh Abdul
Kadar;

(ii) Miss Sumaiya Bi,
minor, through her mother
and natural guardian;

(iii) Miss Samiya, minor,
through her mother and
natural guardian,
all residents of
Moddicotto, Cuncolim,
Salcete, Goa. ... Respondents
(heirs of Orig
Plaintiff)

Shri Shivan Dessai, Advocate for the Appellant/.
Defendant.

Shri J.P. Mulgaonkar, Advocate for the Respondents/
Heirs of Original Plaintiff.

CORAM: N.A. BRITTO, J.

DATE: 30TH APRIL, 2004.

J U D G M E N T:

The defendant in S.C.S. No.246/92/I has filed the present appeal against the Judgment/Decree dated 6.7.1998 of the learned Addl. Civil Judge S.D.,

Margao, by which the said defendant has been ordered to pay to the plaintiff a sum of Rs. 65,040/- by way of damages.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the suit.

3. There is no dispute that the plaintiff was the owner of Truck bearing No.GA-02-T-5727 which was engaged by the defendant. The defendant had obtained a contract for excavation of mud for the Konkan Railway Project at Veroda (Sarzora site). The case of the plaintiff was that his truck was engaged at the said construction site on payment of Rs.1400/- per day.

4. On 8.4.1992 an unfortunate incident took place. It was the case of the plaintiff that when the plaintiff was employed for the purpose of carrying the earth excavated by the defendant, about 200 trucks loads of earth from the site of excavation suddenly fell on the said truck of the plaintiff as a result of which the whole truck was buried under the earth. The plaintiff stated that the said incident was caused due to the negligence of the defendant by not taking due care and diligence to see that the excavated earth did not collapse. The plaintiff stated that his truck

suffered heavy damage, for which the plaintiff lodged a complaint at Cuncolim Police Station on the same day and a panchanama was conducted by the Police.

5. The plaintiff stated that the said truck remained buried for about eight days, after which the plaintiff removed the earth on his own after taking permission from the representatives of the defendant and despite the request of the plaintiff, to remove the earth, the defendant failed and neglected to remove the same.

6. The plaintiff stated that his truck was extensively damaged thereby rendering the truck unworthy and useless for plying on the road for any profitable gain and that the plaintiff was unable to operate the same till date and would require at least another month to repair the said Tipper truck, so as to ply the same. The plaintiff claimed damages to the tune of Rs.1.68 lakhs at the rate of Rs.1400/- per day.

7. The plaintiff stated that he had addressed a letter dated 14.4.92 to the Managing Director of the defendant, requesting to pay to the plaintiff a sum of Rs.1400/- per day for the said period the truck could not be plied and the plaintiff also personally

discussed the matter with the representatives of the defendant who assured the plaintiff to compensate him for the loss and damage suffered by the plaintiff but the defendant failed and neglected to pay to the plaintiff any amount by way of damages or loss as promised and, therefore the plaintiff sent a Notice dated 7.5.92 to the defendant which the defendant did not even reply.

8. The defendant admitted the incident but stated that the portion of the earth at the said site fell accidentally and for reasons not attributable to the defendant and it so happened that the truck was caught under the heap of fallen or falling earth. The defendant stated that at that time the said vehicle was standing at a wrong place and was wrongly parked on account of which a portion of the earth fell on the said vehicle and the said portion of the earth fell on account of the negligence, recklessness on the part of the driver of the said vehicle at the relevant time in parking the said vehicle at a wrong time and at the wrong place. The defendant stated that the earth did not fall on the said vehicle due to any negligence act on the part of the defendant.

9. The defendant stated that the vehicle received incidental damage on account of the falling of the

earth but it could have been easily removed from the site immediately, but the plaintiff for certain oblique reasons and ulterior motives, deliberately kept the said vehicle under the debris for a period of eight days despite the request to remove the same and despite the offer of all cooperation in the matter by the defendant. The defendant stated that the vehicle continued on the site in order to force out the said amount from the defendant and the said vehicle remained there for reasons solely attributable to the plaintiff and not on account of any act of falling of earth. The defendant stated that in case the vehicle was removed immediately and within a reasonable time, the same would not have received much damage and the vehicle received damage more on account of the fact that the same was kept at the place for a period of a week unnecessarily and under debris of the fallen earth. The defendant stated that the plaintiff continued the said vehicle on the site and allowed it to be further damaged with ulterior motives, but the extent of damage to the said vehicle was not known and the plaintiff had been put to strict proof thereof.

10. The defendant admitted having obtained the contract for excavation of mud for the Konkan Railway Project. The defendant admitted the acquiring of the said vehicle, but stated that it was at the rate of

Rs.700/- per day and Rs.70/- per hour. The defendant denied that about 200 truck loads of earth fell on the said truck. However, the defendant stated that on account of the wrong parking of the said truck by its driver, at a wrong point and at the wrong place that the said vehicle came under the falling earth, which suddenly gave way, for reasons not attributable to the defendant and by virtue of the fact that it was a pure accident. The defendant stated if the driver of the truck had been careful and diligent, no earth would have fallen on the said truck. The defendant stated that due care and diligence was taken to see that the excavated earth did not collapse and further stated that the said truck came under the falling earth on account of wrong parking of the said truck. The defendant denied that the truck was extensively damaged or that it was rendered unworthy and useless for plying on the road for profitable gain and in case it remained unworthy it remained for reasons that are solely attributable to the plaintiff.

11. The defendant denied that they had not committed any negligent act. The defendant denied that the vehicle would require four months' time to completely repair the vehicle and the present suit was instituted well after a period of three months from the date of incident and in case the said truck was

extensively damaged, as alleged, the plaintiff would have repaired the same and quantified the repairs. The defendant stated that in the Notice sent on 7.5.92 the plaintiff had claimed an amount of Rs.1.68 lakhs and the same amount has been claimed as late as on the date of institution of the suit and therefore it is apparent that the claim is without any basis and is without imagination and surmises. The defendant denied that the plaintiff had suffered loss and damage to the tune of Rs.1.68 lakhs. The defendant stated that it is not responsible nor in any way contributed to the accident which took place on 8.4.92. The defendant denied having assured the plaintiff to compensate him.

12. The learned trial Court initially framed two issues on 11.6.1983 and later on re-cast the same on 6.5.98. However, the issue whether the said incident by which the truck of the plaintiff was buried under the debris due to the negligence of the defendant was never framed. The learned trial Court assessed the damage payable to the defendant at the rate of Rs.542/- per day and there is no dispute about the same being made on behalf of the defendant by learned Advocate Shri Dessai. The learned trial Court assessed the said damage for a period of four months and the said period has been disputed on behalf of the

defendant.

13. Although no issue on the point of negligence on the part of the defendant was framed by the learned Trial Court, the fact remains that both the parties went to trial fully knowing that the plaintiff had claimed damages alleging that earth from the excavation site had collapsed and fallen on the truck of the plaintiff due to the negligence of the defendant. The Hon'ble Supreme Court in the case of **Nedunuri Kameswaramma v. Sampati Subba Rao** (A.I.R. 1963 S.C., 884) has stated that in a case where no issue was framed, and the issue which was framed, could have been more elaborate, in case the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that that there was a mis-trial which vitiated proceedings and in such a case the suit cannot be dismissed on this narrow ground nor it could be remitted as the evidence which has been led in the case is sufficient to reach the right conclusion. In the case at hand also both the parties have agreed that the appeal be decided based on the evidence led by them notwithstanding that no formal issue regarding the negligence of the defendant was framed by the

trial Court.

14. The first submission of Shri Dessai, the learned Advocate for the defendant is that the incident was a pure case of accident for which the defendant cannot be held liable. The incident itself has been admitted. Learned Advocate Shri Dessai has placed reliance in support of his submission on the case of **Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum and others** [(1997) 9 S.C.C. 552].

15. On the other hand, Shri Mulgaonkar, learned Advocate for the plaintiff, has submitted that the defendant had admitted the incident but had pleaded some sort of contributory negligence on part of the plaintiff. Shri Mulgaonkar has placed reliance on the same case of **Rajkot Municipal Corporation** (supra) and has further submitted that at the excavation site landslides do not usually occur and in the case at hand it was the duty of the defendant to ensure that such landslides did not occur and cause harm to other persons or those who were engaged in excavating the mud.

16. In the case of **Rajkot Municipal Corporation** (supra) the Hon'ble Supreme Court has observed that careless breach of duty will vary from case to case

and it should not be unduly extended or confined or limited to all situations. The attending circumstances require evaluation and application to a particular set of facts of a given case. The standard of care also varies in a particular fact situation. The defendant must be under duty of care not to create latent source of physical danger/damage to the person or property of third party whom he ought to have reasonably foreseen as likely to be affected thereby. Those latent defects cause physical danger to the person or the property giving cause of action and the defendant then is liable to pay damage for tortious liability. It must, therefore, be the essential element to establish that there is positive act or duty and the defendant is under that duty. The court is not to create, by process of interpretation, latent source of physical danger to the person or property of third party when the Act does not envisage that the defendant ought to have reasonably foreseen him as likely to be affected thereby.

17. The plaintiff had clearly averred in his plaint that the said incident was caused due to the negligence of the defendant in not taking due care and diligence to see that the excavated earth did not collapse. In reply to the said averments the defendant had stated that the defendant had taken due

care and diligence to see that the excavated earth did not collapse and that the truck came under the falling earth on account of the wrong parking of the said vehicle.

18. In the case at hand the incident itself is admitted, but it was stated by the defendant that the incident took place for causes not attributable to the defendant. Then, for for whom were the causes attributable? In the words of D.W.2 Anil about 36 truck loads of mud fell on the plaintiff's truck. D.W.2 Anil, being the defendant's Engineer, has not at all explained as to how the said landslide occurred in the process of excavation of mud by the defendant. This is a fit case to invoke the doctrine of res ipsa loquitur. The general purpose of the words res ipsa loquitur is that the accident itself speaks its own story and as to how it happened was within the knowledge of the defendant and therefore it was for them to explain as to how the landslide of such a magnitude had taken place in the process of excavation of earth. The inference which could be drawn is that no proper care and caution was taken by the defendant while excavating the mud and therefore for that reason the landslide occurred damaging the truck of the plaintiff. It had to be noted that the landslide had taken place in summer season and not even during

monsoons and that would indicate the degree of carelessness by which excavation of mud was being done. The defendant had taken some sort of plea by which it was alleged that the plaintiff had contributed to the negligence by pleading that the vehicle was wrongly parked at a wrong place. However, the defendant had failed to substantiate the said plea. The evidence on record clearly showed that the said landslide occurred at a time when the said plaintiff's truck was moving away with mud to the dumping site. This has been stated by P.W.1 Sheik Abdul Kadar apart from P.W.4 Yeshwant S. Dessai. The defendant's witnesses namely DW.1 Prakash Shetty also admitted that at the time of the incident, the truck of the plaintiff was loaded with earth and was going towards the dumping site. DW.2 Anil also admitted that the landslide occurred when the truck after loading the mud, was going towards the dumping site. It is true that DW.2 Anil also stated that while proceeding towards the dumping site the truck was on the wrong side and in case it had maintained to its right side or the centre of the road, the damage would have been less. However, these statements of DW.2 Anil who is the defendant's Project Engineer are at variance from the plea taken by the defendant and therefore has got to be rejected. In the absence of an explanation from the defendant as to how the

landslide occurred while they were executing the contract of removal of mud, the only inference which could be drawn was that the mud was being removed without due care and caution and for that reason the said landslide occurred. It has been admitted on behalf of the defendant that the excavation and the maintenance of the site was that of the defendant and being so the defendant must be exclusively held responsible for the said landslide which occurred while carrying out the excavation without proper care and caution.

19. As far as the quantum of damages is concerned, the plaintiff had pleaded that the plaintiff was unable to operate the truck till the date of filing of the suit and would require at least a month to complete its repairs so that it could be plied for useful gain. At the same time, the plaintiff pleaded that the truck would not be operated for any useful gains for more than four months thereby causing loss and damage to the plaintiff to the tune of Rs.1.68 lakhs. On the very face of the said pleadings I find it difficult to believe that the plaintiff had filed the suit even before the plaintiff's truck had come out of the garage where it was taken for repairs. In his evidence, the plaintiff stated that the garage owner had told him that least 3 to 4 months would be

required for repairing the truck but actually he took about six months to repair his truck. The learned Trial Court rightly observed that the said statement of the plaintiff was not supported by any documentary evidence and it has now been submitted by Shri Dessai, learned Advocate for the defendant, that the best evidence the plaintiff could have produced was that of the garage owner and in the absence of examination of the said garage owner, adverse inference has got to be drawn against the plaintiff. I am entirely in agreement with the submission of learned Advocate Shri Dessai. The garage owner would have been the best person who could have deposed as to the time taken by him to repair the said truck, and, the plaintiff has not produced the best evidence available to him. The learned Trial Court referred to plaintiff's letter dated 14.4.1992 (Exh.PW1/C) and observed that the plaintiff had claimed that he would claim damages for a period of about four months. However, it is to be noted that the plaintiff in his said letter had stated that he would require about four months time to buy a new vehicle and complete the insurance formalities. The plaintiff's witness P.W.2 Abdul who is the nephew of the plaintiff stated that the truck had remained in the garage for about 4 to 5 months for the said repairs. But here again the said statement of P.W.2 Abdul was not supported by any evidence and was also

not in conformity with the statement of the plaintiff himself. It is the submission of learned Advocate Shri Dessai that it is the defendant who is being directed to pay the damages to the plaintiff, and, in the absence of definite proof the conclusion that the truck was idle for about four months could be accepted. It has been submitted by learned Advocate Shri Mulgaonkar that there is nothing on record to the contrary to show that the period for repairs was less than four months and since the truck was extensively damaged, it would have required that much time.

20. The plaintiff had also stated that he had taken photographs of his truck which was buried beneath the earth, but the plaintiff did not produce the said photographs. The said photographs might have shown the extent of damage suffered by the plaintiff and the probable time it would have taken to repair the same. The accident took place on 8.4.1992 and the suit was filed on 28th July, 1992 i.e. within a period of less than 4 months. I have already noted that I am not inclined to believe that the plaintiff would have filed the suit even before the truck was repaired and was made road worthy. I am therefore inclined to believe that the repairs of the truck would not have taken more than three months and consequently I am inclined to reduce the damages awarded to the

plaintiff for a period of three months only. The said damages which have been assessed by the learned trial Court at Rs.542/- per day and regarding which there is no dispute raised, work out for a period of three months to Rs.48,780/-.

21. In his evidence before the Court, the Plaintiff admitted that the truck was removed within 2 to 3 days. DW.1 Prakash conceded that until and unless the insurance officials inspected the place, the truck is not removed. Hence both the parties could not be blamed for not removing the truck immediately. The actual damages incurred by the Plaintiff were paid for by his insurer and there is no dispute regarding the same.

22. In the circumstances, therefore, I partly allow the appeal. The Judgment and decree dated 6.7.1998 of the learned Trial Court shall stand modified and the plaintiff would now be entitled to a sum of Rs.48,780/- to be paid by the defendant by way of damages caused to the plaintiff by way of depriving the plaintiff of the use of the said truck.

N.A. BRITTO, J.

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