(1990) 03 KL CK 0040

High Court Of Kerala

Case No: M.F.A. No. 626 of 1984

Bhaskaran		APPELLANT
	Vs	
Ravindran and Others		RESPONDENT

Date of Decision: March 9, 1990

Acts Referred:

- Motor Vehicles Act, 1939 - Section 82

Citation: (1990) ACJ 1032 : (1990) 2 ILR (Ker) 203

Hon'ble Judges: U.L. Bhat, J; K.P. Balanarayana Marar, J

Bench: Division Bench

Advocate: P. Santhalingam and P.V. Narayanan Nambiar, for the Appellant; B.S. Krishnan, for the Respondent

Judgement

U.L. Bhat, J.
Petitioner in MAC. No. 654 of 1981 of the Motor Accidents Claims Tribunal, Tellicherry has filed this appeal challenging the dismissal of the claim petition.

2. Appellant was injured in an accident involving bus KLC 6832 at about 8.30 a.m. on 3.2.1981. His case is that the bus stopped at Koduvally bus stop and he boarded it, the bus moved about hundred yards and when it entered the Koduvally bridge it was driven in such a rash and negligent manner that while giving way to another bus coming from the opposite direction the bus collided with the pillar of the bridge and the appellant who was still on the footboard of the bus was injured. He claimed Rs. 75,000/- from the driver, owner and insurer of the vehicle.

3. The driver and owner of the vehicle filed written statement admitting the accident in which appellant sustained injuries. According to them, bus did not stop at Koduvally junction as it had full complement of passengers and as the bus was proceeding slowly, appellant in a reckless manner attempted to board the bus and hit against the rear left side of the bus, fell down and was injured. Bus did not dash against pillar of the bridge. The accident was the result of rashness and negligence

on the part of the appellant and not of the driver of the bus. Insurer admitted existence of policy and supported the contentions of other respondents.

4. The Tribunal rejected appellant''s case for the following reasons: If the accident had taken place as alleged by the appellant, others besides the appellant would have been injured but as a matter of fact PW 1 was the only person injured. Police referred the case and appellant did not file a protest complaint. Appellant admitted that he attempted to get into the bus at the bus stop but the bus left the stop and he did not run after the bus. He also admitted that he could not get into the bus. In the claim petition it was not averred that the accident took place while giving way to another bus coming from the opposite direction, which is a new story at the stage of evidence. PW 1 also admitted that the bus and pillar of the bridge were not damaged. PW 2 who was alleged to be waiting at the bus stop to board a bus going in the opposite direction could not have seen anybody getting into the bus involved in the accident. PW 3, another independent witness, could not be believed because he deposed that PW 1 had boarded the bus at the junction though PW 1 himself had admitted that he did not get into the bus. In these circumstances, evidence of the driver examined as RW1 to the effect that he did not stop the bus at Koduvally bus stop as there was full complement of passengers in the bus and the appellant attempted to board the running bus and hit against the left side of the bus and fell down was acceptable. On this basis Tribunal rejected the contention of the appellant that the accident was the result of rash and negligent driving on the part of the driver of the vehicle and held that it was the result of rashness and negligence on the part of the appellant in boarding a running bus. These findings are seriously challenged by the appellant.

5. In the claim petition it is averred that petitioner was travelling in the bus to attend to work at Chirakkara and when it reached Koduvally bridge, due to rash and negligent driving of the vehicle it collided against the pillar of the bridge and the petitioner was injured. It is true that the claim petition did not mention that the petitioner boarded the bus at Koduvally bus stop or was on the footboard and later the bus gave way to another bus coming from the opposite direction. In the written statement filed by driver and owner of the bus they stated that the petitioner ran behind the bus with intent to board the bus and while doing so he hit against the rear side of the bus and fell down. In other words, stand taken is that he was not even on the footboard. The written statement also did not refer to driver giving way to another bus coming from the opposite direction. We do not think any adverse inference can be drawn against either party for not giving the details in their petitions.

6. Claimant examined as PW1 deposed to his case. In chief-examination he deposed that the bus hit against the second pillar of the bridge and he was injured, the scene of accident being hundred yards away from the bus stop. He alone was injured in the accident and there was no damage to the bus or the bridge. He had not filed

protest complaint against the refer report of police. He admitted that he attempted to board the running bus. He stated that "I attempted to board the bus at Koduvally bus stop. Then the bus started. I did not run behind the bus. I could not get inside the bus... The bus was giving way to another bus coming from the opposite direction". It was suggested to him whether it was not true that he was injured in an accident which took place by his jumping into a running bus and he denied the suggestion. The Tribunal did not properly appreciate his evidence. Reading this evidence as a whole it is clear that he boarded the bus at the bus stop by getting on the footboard and then the bus started and at the bridge when the bus was trying to give way to another bus coming from the opposite direction it hit against the pillar and he was injured. We cannot interpret the evidence to mean that he jumped into the running bus and that he did not enter the bus which had already stopped. His evidence that he attempted to get into the bus but could not go inside the bus and immediately the bus started would clearly lead to the inference that he was on the footboard when the bus was started.

7. PW 2 is an independent witness who was waiting on the opposite side of the road to board a bus going in the opposite direction. He deposed that when PW 1 fell down from the bus he ran up and took him to the hospital. He had seen PW 1 getting into the bus. PW 2 stated that the accident took place when the bus gave way to another bus by swerving to the left side. He deposed that from where he stood persons getting into that bus could not be seen. At the same time he stated that one or two other persons followed PW 1. His evidence would show that he could not actually see persons getting into the bus but he could see these people waiting at the bus stop before the bus came and not being at the bus stop after the bus left. Therefore, he could infer that PW 1 and a few others got into the bus. There is no reason for rejecting his evidence in entirety.

8. PW 3 is a college student who claimed to have boarded the bus at Koduvally bus stop after it stopped there. According to him, PW 1 was struck by the second pillar of the bridge and the bus was driven at an excessive speed and in a rash and negligent manner while giving way to another vehicle coming from the opposite direction. He deposed that there were several standing passengers. He was almost at the back entrance. There were twenty standing passengers in front of him. According to him, ten to fifteen persons got into the bus from Koduvally bus stop. He boarded the bus after five to ten persons entered the bus and PW 1 boarded the bus after PW 3 entered the bus. He remained at the back because people did not move forward. It was hind part of the bus which hit. This witness also is an independent witness. We do not find any material contradiction between his evidence and the evidence of PWs 1 and 2.

9. RW 1, driver of the bus, deposed that he did not stop the bus at Koduvally bus stop because there were a large number of passengers in the bus and when he saw a bus coming from the opposite direction he slowed down the bus and at this stage

PW 1 tried to jump into the bus and fell down. Bus did not hit the bridge or the pillar. The attempt of the claimant to board the running bus was the cause of the accident. He deposed that there was a cleaner in the bus who was preventing people from sneaking into the bus.

10. The evidence is that the bridge is situated about hundred yards away from the bus stop. It is the case of the driver also that near the bridge a bus came from the opposite direction. So the omission to refer to this aspect of the case in the claim petition is of no significance. Going by the evidence of RW 1, PW 1 attempted to board the running bus, but did not succeed in doing so and fell down. The evidence of PWs 1 to 3 would suggest that PW 1 boarded the bus at the bus stop and he was constrained to remain at the entrance of the bus because there were a large number of standing passengers which would clearly suggest that he must have been on the footboard after he boarded the bus. Therefore, absence of specific reference to footboard in the claim petition loses significance. According to RW 1, he slowed down the bus when the bus from the opposite direction approached. That must have been very near the bridge which is about hundred yards away. It is difficult to believe that PW 1 would have run a distance of nearly hundred yards with a view to board the running bus. He must necessarily have boarded the bus when it was stationary, i.e., at the bus stop.

11. Section 82 of the Motor Vehicles Act, 1939, states that "No person driving or in charge of a motor vehicle shall carry any person or permit any person to be carried on the running board or otherwise than within the body of the vehicle". In the case of a bus, conductor is also in charge of the vehicle since it is his duty to admit passengers and issue tickets. It is the duty of the driver and conductor to see that footboard passengers are not allowed in the bus and to see that bus is not set in motion when there are passengers on the footboard. Driver may not be in a position to observe if there are passengers on the footboard. It is the duty of the conductor to give appropriate directions to the driver. Where the conductor gives signal for the bus to move or the driver starts the bus without waiting for such an instruction, the starting and moving of the bus with passengers on the footboard is a rash and negligent act. Taking the bus to the extreme left side on a bridge which has pillars is fraught with danger and risk to passengers on the footboard. It was the duty of the driver to have ensured passage of the bus without any harm to passengers. If such passage could not be secured, it was his duty to stop the bus to allow the bus from the opposite direction to pass by. Swerving the bus to the extreme left side of the road on a bridge with pillars on it when there are footboard passengers in the bus, is by itself a rash and negligent act. Such rash and negligent driving of the bus casts vicarious liability on the owner of the bus in an action for compensation by persons injured in an accident caused by such driving. The contra-finding of the Tribunal cannot stand.

12. It is argued by learned counsel for respondent Nos. 1 and 2 that even if it was the rash and negligent driving of the bus which caused the accident, appellant must be held to be guilty of contributory negligence. It is argued that the driver or other person in charge of the vehicle is statutorily barred from carrying any person or permitting any person on the footboard. Footboard passenger must be aware of the risk he is taking in travelling on the footboard. Passenger of a bus, though he has no duty to take care of others, has a duty to take care of himself, that is by refraining from travelling on the footboard of a bus. Travel on footboard by the passenger has contributed to the accident as well as nature and extent of the injury. Learned counsel for the appellant rebuts this argument and contends that the footboard passenger cannot be regarded as having contributed to the accident or the injuries.

13. Our attention is invited to some decisions which indicate that sitting in a bus with elbow on the window-sill which is injured ultimately by an accident cannot amount to contributory negligence. [See State of Punjab v. Guranwanti 1958 ACJ 110 (Punjab); Delhi Transport Undertaking and Another Vs. Krishna Wanti and Another, ; G.R. Shetty and Another Vs. Unnikrishna Nair and Others, and State of Haryana and Another Vs. Ram Pal and Another, . See also Radley v. London Passenger Transport Board 1942 (1) All ER 433 and London Passenger Transport Co. v. Upson 1949 (1) All ER 60]. These decisions proceed on the basis that it is common knowledge that passengers generally put their arms outside the bus and driver who is conscious of this must take requisite care to avoid injury to such passengers while overtaking or giving way to another vehicle. Placing elbow on the window-sill is a comfortable way of sitting and as long as passengers were not warned at the appropriate time they cannot be regarded as guilty of contributory negligence. We do not think the same principle can be ordinarily applied to passengers on footboard of buses. That is because ordinarily a passenger gets onto the footboard with the intention of moving inside the bus and taking a seat. Even when a person boards a bus having standing passengers his intention is to move inside and be a standing passenger and not to continue on the footboard or travel as a footboard passenger. Before boarding the bus he cannot be expected to know the number of standing passengers inside the bus, and the number of standing passengers allowed by the permit. It is the duty of the conductor to keep track of the number of standing passengers and warn the intending passengers that there will be no seats or space for standing and that they should not board the bus. As intending passenger ordinarily gets onto the footboard with intent to move forward and if the bus starts before he moves in or before he realises that there is no room for standing passengers inside the bus and decides to get out of the bus, he cannot be held to have contributed to the accident.

14. In Kuldip Lal Bhandari and Others Vs. Umed Singh and Others , where a passenger boarded the bus and was still on the footboard, the bus started on the signal of the conductor, the accident was held to be the result of rash and negligent driving on the part of the driver. In Ishwar Devi Malik and Others Vs. Union of India

and Others, , when a passenger who boarded the bus was still on the footboard with part of his body outside the bus, conductor gave signal and the bus driver started the bus and moved it too close to a stationary bus and the footboard passenger was sandwiched between the two buses and was injured. The court held that the safety of the public who travel by public conveyance like the bus in question is the primary concern of the conductor and the driver who are in charge and control of the vehicle and when the conductor knew that deceased was boarding the bus and was yet on the footboard he should not have given the signal for the bus to start and was guilty of rashness and negligence. The conduct of the driver in driving the bus so closely to the parked bus was also a rash and negligent act. In Varadamma Vs. H. Mallappa Gowda and Others, , the conductor inadvertently gave signal without ensuring that all the passengers had alighted. A child on the footboard slipped and was run over. Accident was held to be due to the negligence of the conductor making owner also liable. It was observed that the conductor controls movements of the bus by giving instructions to the driver. In Mrs. Nanibai and Another Vs. Dasbrath Lal and Others, , when the bus reached a muddy patch, passengers were requested to alight and board the bus after the bus crossed the muddy patch. After crossing the muddy patch driver set the bus in motion before all the passengers including the deceased boarded the bus. Deceased was thrown out and crushed under the rear wheel. The court held that driver was negligent in view of his failure to keep the bus stationary till every passenger had boarded the bus and it was observed that permitting overcrowding also would amount to negligence. In Municipal Corporation of Greater Bombay v. Akatai Tataba Hankare 1982 ACJ 284 (Bombay), an off duty conductor of the BEST transport organisation who was entitled to free ride in any bus of the company while off duty if he travels in the space of the footboard at the rear, was thrown off and was injured when the driver applied brakes suddenly. The court held that it was common knowledge that even passengers on payment of fare are allowed to travel on footboard on account of too many passengers being compelled to travel in too few buses and the fact that there was a passenger on the footboard would cast duty on the undertaking to carry him safely. On the facts it was held that contributory negligence was not proved. In Makbool Ahmed and Others Vs. Bhura Lal and Others, , it was held that at a bus stop it was the duty of the conductor to stand at the opening of the door to ensure that passengers who wanted to get down have got down and those who wanted to board the bus have boarded it and only thereafter he can give signal for the bus to move. If he gave signal when passengers were still on the footboard, he would be guilty of dereliction of his duty exhibiting rashness and negligence. In that case it was found that there were many passengers standing on the footboard for want of seats inside the bus and the conductor was busy issuing tickets without caring to discharge his duty towards the passengers. In Radhika Devi Vs. U.P. State Road Transport Corporation and Another, , it was held that driver''s conduct in suddenly starting the bus when an intending passenger was boarding the bus when the bus was stationary is guilty of negligence. [See also Swaraj Motors Private Ltd., Kottayam Vs. T.R. Raman Pillai

and Another, .

15. A slightly different view has been taken by the Calcutta High Court in Gobinda Prosad Mukherjee Vs. Sujit Bhowmick and Another, . A student aged 14 tried to board a bus at the bus stop, holding books in one hand. Before he could board, conductor gave signal and the bus started moving. The boy lost his balance, fell down and was run over by the rear wheel. It was held that accident occurred on account of the negligence of the conductor who gave signal when the boy was trying to board the bus. The court held that boy was also guilty of contributory negligence since he was trying to board the over-crowded bus with books in one hand.

16. The correct principle appears to be what we have already indicated. It is the duty of the conductor to see that the bus is set in motion only after all alighting passengers have alighted and passengers intending to travel in the bus board the bus. Boarding a bus does not mean merely entering the footboard. Boarding the bus means getting inside the bus and either sitting in a seat or standing in the space reserved for standing passengers. A conductor has a statutory duty to see that there are no footboard passengers. If a passenger is on the footboard and there is no space at all for him to sit or stand inside the bus, he must be asked to get down and the bus can be set in motion only after he alights. When there is sitting or standing space inside the bus, it is the duty of the conductor to see that a passenger who is on the footboard gets inside the bus and seats himself or stands in the space reserved for standing passengers before giving signal for the bus to start. This corresponds with the driver''s duty to ensure that bus is moved only after ensuring safe travel conditions. In the discharge of his duty he is largely guided by the instructions of the conductor. If a bus with no vacant seat and no standing space is started when a passenger is on the footboard and he is not asked to alight from the bus or not cautioned against travel on footboard and accident takes place and the footboard passenger sustains injury, wholely or partly on account of his position on the footboard, he cannot be held to be guilty of contributory negligence. It may be that if he refuses to alight in spite of the direction by the conductor or if he is cautioned about the risk he is undertaking by travel on footboard, it is not possible to absolve him of the responsibility in the accident. We, therefore, hold that the claimant was not guilty of contributory negligence.

17. Learned counsel for respondent Nos. 1 and 2 places reliance on two decisions to contend for the position that even where the claimant is not guilty of contributory negligence, he can be awarded only reduced damages. Froom v. Butcher 1975 (3) All ER 520, is a case of collision of cars on account of negligence of the defendant. Plaintiff who was in the front seat of the other car was not wearing seat belt fitted to the car seat. He was injured on the head, chest and left finger on account of the accident. Lord Denning, MR speaking for the Court of Appeal, Civil Division, consisting of himself, Lawton and Scarman, LJJ held:

In the ordinary way the driver or front seat passenger in a motor vehicle who failed to wear a seat belt and was injured in an accident had to bear some responsibility for those injuries, even though he was not responsible for the accident, if the injuries would have been avoided or their extent reduced, by wearing a seat belt. Since the plaintiffs injuries to the head and chest would have been avoided by the wearing of a seat belt the damages on that account should be reduced by 25 per cent. A distinction was drawn between cause of accident and cause of damage. Cause of accident is bad driving of the driver. Bad driving which causes the accident also causes damage. Ordinarily, bad driving which causes the accident also causes damage and in part by the failure of the plaintiff to wear the seat belt. Cause of accident is one part and cause of damage is another part. While the accident is caused by the bad driving of the driver, cause of damage is on the part of the driver and in part by the plaintiffs failure to wear the seat belt, even though wearing of seat belt is not compulsory in law. If anyone does not wear the seat belt, he cannot be penalised. But it is not a sensible thing to do. If he does not wear it, it is his own fault. Prudence requires everyone to wear seat belt. Driver must bear greater share of the responsibility as it was his negligence which caused the accident. Plaintiff must bear a smaller share of the responsibility. A decision has to be arrived at having regard to the particular factor, its blame-worthiness and what is just and equitable. If on evidence it is seen that there was no failure of the plaintiff to take precaution, there will be no reduction in damages.

18. Exh. A-4 shows that claimant sustained fracture of left clavicle, fracture of left ribs 6th, 7th and 8th and hemothorax (left). It is clear that he must have sustained violent fall on account of the impact of the bus with the pillar of the bridge. We are not impressed by the argument that PW 1 deposed that there was no damage to the bus or the pillar. At that moment he was not in a condition to observe those matters. The injuries sustained are very serious. Nature and seriousness of the injuries was determined by the fact that he was on the footboard and exposed to such dangers which he must have been aware of. As a person who owes a duty to take care of himself he should not have travelled on the footboard or should have at least tried to move inside. His own action must necessarily have contributed to the gravity of the injuries. We therefore hold that damages must be reduced by 25 per cent on this count.

19. Claim put forward by the appellant was for Rs. 75,000/-, the break-up being as follows: loss of earnings Rs. 1,796.61, transport expenses to hospital Rs. 400/-, expenses for extra-nourishment Rs. 4,600/-, compensation for pain and suffering Rs. 20,000/-, compensation for continuing and permanent disability Rs. 33,203.39, compensation for loss of earning power Rs. 15,000/-. The Tribunal fixed the compensation payable as Rs. 615/- for incidental expenses, Rs. 400/- for transport charges, Rs. 2,000/- for pain and suffering, Rs. 308.33 for loss of past earning, total being Rs. 3,620.84. It is urged by the appellant that the estimate is wrong.

20. The injuries sustained by the appellant are fracture of ribs, fracture of left clavicle and hemothorax (left), all of which are grievous injuries. He was hospitalised for 41 days. His claim for loss of future earning power and permanent partial disability was disallowed because PW 1 admitted that both before and after the accident he was earning a salary of Rs. 700/-. This is in spite of the fact that the court fixed his income as Rs. 250/- per month. Tribunal ignored the fact that even after a few years his salary did not increase. Petitioner is working as a turner which requires some amount of physical exertion. No disability certificate has been produced. No medical evidence has been adduced to show the extent of permanent disability, if any. Considering the nature and extent of injuries, we are of opinion that there may be some discomfort or slight disability of permanent nature. Some compensation ought to have been allowed on this score. The amount awarded as compensation for pain and suffering also appears to be too low. So also the amount awarded for medical and other expenses. Having regard to all these circumstances, we fix aggregate amount of Rs. 20,000/- as compensation for the injuries sustained and pass an award for 75 per cent of the same, namely, Rs. 15,000/-, which shall be paid by the third respondent insurer with interest at 10 per cent per annum from date of accident till payment and costs before the Tribunal and in this court. The appeal is allowed accordingly.