

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 124 OF 2010**

Bajaj Allianz General Insurance
Co. Ltd. Sesa Ghor, 3-C & D,
Patto Plaza, 3rd Floor, Panaji - Goa

... Appellant.

Versus

1. Shri. Ramanlal Patel,
Son of Shri Nanjibhai Patel,
aged 49 years, business,
r/o Halvad, District Surendranagar,
Gujrat.
2. Smt. Kamlaben Patel,
wife of Ramanlal Patel,
aged 45 years, housewife,
r/o. Halvad, District Surendranagar,
Gujarat.
3. Sachin Dadu Sawant
Son of Dadu Babu Sawant
Driver, major in age;
resident of H.No.222/12,
Borda, Fatorda, Margao – Goa 403 602
4. Dadu Babu Sawant
Son of Babu Sawant
owner of the vehicle, major in age,
resident of H.No.222/12,
Borda, Fatorda, Margao – Goa 403 602
5. Sebastiao Mello,
Son of Joao Jose Mello,
Driver of the bus, major in age,
resident of H.No.615, Poreibhat,
Verna, Salcete – Goa.
6. Inacio Manuel Ferreira,
Owner of the bus, major in age,
Business, resident of H. No.147,
Poreibhat, Verna, Salcete, Goa
7. National Insurance Co. Ltd.
Varde Valaulikar Road,
Margao, Salcete – Goa

... Respondents.

Mr. E. Afonso, Advocate for the appellant.
Mr. U. R. Timble, Advocate for the respondent No.7.

Coram :- K. L. WADANE, J.

Reserved on :- 23 April 2015.

Pronounced on :- 09 June 2015.

JUDGMENT :

The present appeal is preferred by the original respondent No.3 against the Judgment and award passed by the learned Presiding Officer, M.A.C.T., Salcete, Margao in Claim Petition No.163/2014 dated 24 July 2008, by which the claim petition is partly allowed and the respondent Nos.2, 3 and 5, 6 were directed to pay compensation of Rs.5,61,600/- to the claimants in proportion of 40/60 along with 9% interest.

2] Brief facts of the case may be stated as follows :

(Parties are referred to their original status)

The claimants – parents of the deceased Dinesh filed the application under provision of 166 of the Motor Vehicle Act.

On the day of accident i.e. on 12/02/2004 deceased Dinesh was proceeding from Verna to Margao on the vehicle bearing registration No. GA 01 / P 7153 (hereinafter referred to as 'motorcycle'). At the relevant time a mini bus bearing registration No. GA 02 / T 4199 (hereinafter referred to as 'bus') was coming in rash and negligent manner from opposite side. One Maruti Alto Car bearing registration

No. GA 08 / A 0553 (hereinafter referred to as 'car') was ahead of motorcycle. The bus came from opposite side in very high speed, due to which it missed dash to car and gave dash to motorcycle of the deceased, due to which deceased came under rear wheel of the bus. Consequently, motorcycle skided and dashed to the car. After the accident bus went ahead about 32 mts. and car went ahead up to 11 mts. According to the claimants, the accident occurred due to negligence of the bus driver.

3] The respondent No.1 was driver, respondent No.2 was owner and respondent No.3 was insurer of the car. Respondent No.4 is the driver, respondent No.5 is owner and respondent No.6 is insurer of the car. Respondents No.1 to 3 have not filed their written statement. The respondent No.6 – National Insurance Company has resisted the claim petition by filing written statement. It has denied almost all contents of the petition including the income of the deceased. However, it has admitted the insurance of the bus. It is further contended that the respondent No.4 was not holding driving licence. Therefore, the respondent No.5 violated the terms and conditions of the policy. The respondent Nos.4 and 5 have filed the written statement at Exh.40 and denied the income of the deceased. They have further contended that the compensation claimed by the claimant is excessive. Respondent No.4

was driving the bus from Margao to Verna when he saw the car followed by the motorcycle driven in rash and negligent manner, consequently, motorcycle dashed to the car on rear side and after the dash deceased came under rear wheel of the bus. So, there was sole negligence on the part of the deceased. Considering the rival pleadings of the parties, Presiding Officer has framed issues as Exh.20. First issue relating to the negligence of the respondents No.1 and 4 and others are as usual issues. To establish the claim of the claimants the Power of Attorney of the claimants has filed his affidavit at Exh.34 and relied upon the following documents :

Exhibit 36 - death certificate

Exhibit 35 - General Power of Attorney

Exhibit 37 - FIR

Exhibit 39 - inquest panchnama

Exhibit 40 - memorandum of autopsy.

4] The claimants have examined AW-2 Mr. Vernekar, Investigating Officer at Exh.52, who drawn the panchnama of scene of offence with sketch. As against this respondent No.1 deposed at Exh.56 and respondent No.4 deposed at Exh.59. Considering the rival pleadings of the parties and evidence on record the learned Presiding Officer has determined the negligence of the deceased to the extent of 20% and

negligence of the respondents No.1 and 4 to the extent of 40/60 respectively. Hence, the present appeal.

5] I have heard the arguments of Mr. E. Afonso, the learned counsel for the appellant and Mr. U. R. Timble, the learned counsel for the respondent No.7.

6] Considering the evidence on record and upon hearing both sides following point arise for my determination.

	Points		Findings
1)	Whether the claimants or the respondent No.6 proved that there was negligence on the part of respondent No.1 while driving the car ?	...	'In the negative'
2)	What order ?	...	'Appeal partly allowed'

7] **As to point No.1 :**

The respondent No.3 – Insurance Company of the bus filed this appeal mostly on the ground that, it has no liability to pay the compensation irrespective to its percentage because neither the claimants nor the respondents have pleaded / claimed that there was negligence on the part of respondent No.1 while driving the car.

8] Looking to the grounds of the appeal and the respective

contentions as referred the claimants have to establish that there was negligence or some negligence on the part of respondent No.1. It is pertinent to note that the claimants have not claimed / pleaded in their petition that at the relevant time of accident there was some negligence on the part of respondent No.1 while driving the car. Therefore, in absence of a pleading, there cannot be an evidence to that effect. In the pleading and the evidence of AW-1 there is no whisper about the negligence of the respondent No.1 still the respondent No.1 has entered into witness box and deposed that at the time of accident the mini bus was in a fast speed proceeding in the middle portion of the road. As against this the respondent No.4 – driver of the bus deposed that he was driving the bus from left side of the road. So both the driver are claiming to be innocent and were not negligent at the relevant time of the accident.

9] The respondent No.1 has deposed that he noticed that mini bus coming from opposite direction at a fast speed and almost in the middle of the road and seeing which he slowed down the speed of car. The mini bus passed by him and soon thereafter he heard the sound of some impact then he went a little ahead stopped his vehicle and looked behind and after getting down he noticed that a motorcycle was lying behind his car diagonally and one person lying by the side. The oral evidence of

this witness find support from the contents of the spot panchnama coupled with the sketch. From the sketch it reveals that the car was proceeding from Verna to Margao from its left side and the bus was proceeding from Margao to Verna. The width of the road is 6 mts. and exact point of impact is shown towards correct side of car as well as motorcycle and after the impact bus went up to 32 mts. ahead towards left side to some extent and stopped. This is clear from the dotted line between the motorcycle and the bus. So this situation appearing from the sketch is contrary to the evidence of respondent No.4 which falsified the evidence of the respondent No.4 that he was proceeding on a road from its left side. Further, it is seen that, after the impact car went up to 11 mts. naturally so because the car and motorcycle were proceeding in the same direction. Further, sketch shows 13 mts. single break mark which indicates that it is break mark of a motorcycle. So, the contents of the panchnama of scene of offence and the situation appearing from the sketch, it appears that it supports the evidence of respondent No.1. Hence, there was no negligence on the part of the car driver. In fact, neither the claimants nor the respondent No.6 have pleaded so. Therefore, the issue relating to the negligence of respondent No.1 was without pleading therefore the learned Presiding Officer has wrongly hold that there was some negligence on the part of the respondent No.1. Therefore, that part of reasons / order is requires modification. In any

way, the claimants or the other respondents have not proved the negligence of respondent No.1. Hence, point No.1 is answered accordingly. Therefore following order.

10] Appeal is partly allowed.

11] The Judgment and award passed against the respondent Nos. 2 and 3 is set aside and the respondent Nos. 5 and 6 are held to be liable to pay the entire compensation of Rs.5,61,600/- to the claimants with 9% interest from the date of petition till its realization.

12] With this modification the appeal is disposed of.

K. L. WADANE, J.

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