

IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 116 OF 2006.

1. Shri K. J. Mohammad,
s/o late Jaffar Sab, about 52
years of age, unemployed
and his wife
 2. Smt. Saramma, about 44
years of age, housewife,
both r/o. H. No. nil, P.O.
Kammaraddi, P.C. 577125,
Thirthalli Taluk, Shimoga
District Karnataka.
- Appellants.

V/s

- | | | |
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| <ol style="list-style-type: none"> 1. Shri Ghanshyam Singh, s/o
Mr. Rampyare Singh, driver,
r/o R/4, B.R.O., United Head
Quarters No.759/B/R/ITF/
(GREF),P.O. Sada, Vasco-Da-
Gama-Goa. 2. The Unit Head, B. R. O. Unit
Head Quarters, 759/B/R/ITF
(GREF), P.O. Sada, Vasco-
Da-Gama Goa (Owner). | } | <p>The appeal Dismissed
(vide the order dated
27.1.2014 by the Ld
Registrar.</p> |
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- Respondents.

Shri V. G. Pai Duple, Advocate for the appellants.

Shri M. Amonkar, Advocate for the respondent no.2.

**CORAM : NUTAN D. SARDESSAI, J.
Reserved on 12th August, 2016.
Pronounced on:-22nd September,2016.**

JUDGMENT:

This appeal takes exception to the award passed by the learned Motor Accident Claims Tribunal ("MACT" for short hereinafter) dated 17.11.2005 pursuant to which the learned MACT dismissed the petition. It goes without saying that the appellants are the original

claimants being the parents of the deceased who had maintained the petition against the respondents for claiming the compensation in the amount of ₹4,00,000/- on the demise of their son in a vehicular accident.

2. A brief narration of the facts would not be misplaced inasmuch as the appellants who are hereinafter referred to as the claimants had carved a case that their 22 years old son was employed as a Clerk cum Manager and drawing a salary of ₹3000/- per month and was involved in a fatal accident on the main road leading from Titan towards Vasco while riding his Kinetic Honda Scooter and proceeding from Titan side towards Vasco, being hit by the driver of the tipper coming from the opposite direction. The respondents had taken a plea that the vehicle referred to was not driven by the respondent no.1 nor any other vehicle belonging to the respondent no.2 was driven by him and not involved in the accident resulting in fatal injuries to the deceased. No truck belonging to them was involved in the accident causing the death of the deceased. It was their specific case in defence that the vehicle bearing registration no.CXZ-107215 driven by the respondent no.1 was not involved in the accident which caused the death of the deceased Mansoor Ahmed on 26.11.2002. In any event the accident was caused due to his own negligent driving and not due to the fault of any other vehicle and in the process of overtaking another vehicle he had applied brakes to stop his own

vehicle to avoid a collision with the oncoming vehicle but due to the pothole ahead of him, he lost his balance and fell down and the rear wheel of the other vehicle which he was overtaking went over him and he died on the spot. They had accordingly prayed for the dismissal of the petition and which ultimately came to be dismissed by the learned Presiding Officer, MACT, Margao.

3. Shri V. G. Pai Dukle, learned Advocate for the claimants/ appellants carved a case that their son was crushed under the rear wheel of the truck driven by the respondent no.1 and they were entitled to the compensation as claimed in the petition of ₹4,00,000/- considering his income at ₹3000/- per month at the relevant time. He adverted to the evidence of the witnesses and submitted that the judgment was fraught with errors and therefore it justified interference in the appeal. He relied in **Const Hanmant Dahiphale and Another Vs. Smt. Alka Jain and others [2013(2) T.A.C. 419(Del.)]**, **National Insurance Company Ltd Vs. Rajwinder Kaur and others [(2011(3) T.A.C. 142(P& H)]**, **Saroj Bala Vs First Secretary, USSR Embassy, [(2003) 0 Supreme (Del) 21588]**, **Jaswinder Kaur Vs. Richhpal Singh [(2001) 2ACC 57]** and **Primary Land Development Bank Vs. Mangal Chand,[(1998) 0 ACJ 1312]**.

4. Shri M. Amonkar, learned Counsel for the respondents no.2 invited attention to the judgment under challenge and submitted that

assuming without admitting that there was a head on collision as was the case of the claimants, there ought to have been damages to the front right side of the Scooter driven by the deceased. However, the Panchanama and the Sketch showed the position of the body in the middle of the road and therefore further assuming without admitting that the oncoming truck had dashed against him, the position of the body at the location of the blood stains militated against the case of the claimants who had therefore failed to establish the rashness and negligence of the truck driver apart from the involvement of the truck itself.

5. Shri M. Amonkar, further submitted that the onus was on the claimants to prove the rashness and negligence of the truck driver and further assuming that the respondent no.1 was driving the truck in question, they had failed to establish any rashness and negligence on his part. He too adverted to the evidence of the witnesses referred to by the claimants, contended that the judgment in **Primary Land Development Bank** (supra) was clearly distinguishable and relied in **Mallamma Vs Balaji, [2004 0 ACJ 368]**. Shri V. G. Pai Duple, learned Advocate for the claimants in reply rebutted his case and the judgment in **Saroj Bala** (supra) and contended that the conduct of the parties was important. The postmortem report showed that the deceased had suffered crushing injury which was the outcome of being driven over by a heavy vehicle. The respondents were silent on the

size and the dimension of the potholes and even otherwise it could not be expected that this road leading to the Airport was damaged with potholes. He closed his arguments once again praying for the grant of the compensation upon allowing his appeal.

6. Considering the nature of the submissions in the light of the pleadings, it would be appropriate to advert to the evidence on record either to concur with the case carved by the claimants or conversely that canvassed by the respondents and to decide the appeal appropriately. The claimant no.1, being the father of the deceased had admittedly not seen the accident and therefore considering his fair concession in that regard, reference to his testimony would not be necessitated in the circumstances. Nonetheless, it would be apt to refer to his statement that he had learnt about the accident through one Raez Ali, resident of Sancoale and had visited the spot and noticed that the Panchanama was in progress. It would therefore be appropriate to refer to his testimony and for seeing which way the case lies.

7. Shri Raez Ali, Aw3 had given his eye witness account that he was on duty on 26.11.2002 and had left a little before 09.00 hrs since he wanted to pay a visit to the Masjid. He had seen the deceased on his Kinetic Scooter riding at a slow speed in the east west direction i.e. from Titan side towards Vasco side and at a distance of about 60

mts from the place where he was standing. In the meantime, he noticed that the Tipper truck bearing No CXE- 107215 had come from Vasco side at a fast speed, in a rash and negligent manner and dashed against the Kinetic Honda Scooter and driven by the deceased. The truck driver had halted for about 10 seconds and then fled away from the scene on the apprehension of being assaulted by the members of the public who were rushing towards the spot. He had noted the registration number of the said Tipper truck on a page. The Police had reached the spot at about 10.15 hours from Verna and he narrated to them the occurrence of the accident upon which he was requested to act as a pancha witness in respect of the Scene of Accident alongwith another pancha. The Police had taken measurements of the road, blood marks, kutcha road, brain pieces and concluded the Panchanama at 11.05 hours which was read over and explained to him by the Police Officer. The sketch was also drawn at the spot and signed by both of them.

8. Shri Raez Ali, Aw3 had revealed in his evidence that both the vehicles were not at the spot when the Panchanama was conducted and he did not know who had taken away the Kinetic Honda Scooter while reiterating that the accident had occurred due to the fault of the truck driver alone. He had accompanied the Police to the hospital and acted as a pancha to the Inquest Panchanama in their presence. He had visited the Police Station two days later to seek further information

about the action taken by the Police to locate the truck and when he was told that it was seized and parked outside the Police Station. Once again he had acted as pancha to this Panchanama too and had seen the blood marks on both the right side tyres. He had also deposed before the JMFC, Vasco in the criminal case filed against the respondent no.1 that the deceased was not at all at a fault.

9. Shri Raeez Ali, Aw3 maintained during his cross examination that the tipper driver was proceeding at a fast speed and in a rash and negligent manner and confirmed that he was barely 100 mts away from the truck which dashed against the front side of the scooter and thereafter the deceased came under its rear wheel. He had categorically denied the case that he had not witnessed the accident. He also maintained that the blood marks and part of flesh was found near the rear wheel of the truck and he had not found any damage to the truck. He had deposed before the Vasco Court with regard to the same accident in a criminal case. He was not shaken in his testimony on his presence at the spot barring a contradiction in his statement thereby inspiring confidence in his version.

10. Ghanshyam Singh, Rw1 stated that he was driving the vehicle in question on 26.11.2002 for transport of material from place to place but maintained that his vehicle was not involved in any accident on that day or any other day since his transfer to Goa. He had

not seen the deceased nor his vehicle was involved in the accident. Yet, he stated that the driver of the two wheeler was overtaking another vehicle on 26.11.2002 near the Masjid at Zuarinagar and in that process and on seeing the oncoming vehicle he had applied the brakes to stop his vehicle to avoid a collision and as he could not divert his own vehicle and due to the potholes on the road ahead of him, he had lost balance and fell down and the rear wheel of the other vehicle which he was overtaking went over his head and he died on the spot. He had reported at the Police Station at the instance of the Police who inspected his vehicle but there was no trace of any blood or any part of the human flesh stuck to his vehicle. He did not deny his presence at the spot around the time of the accident but categorically denied the specific case that he had dashed against the deceased and thereafter ran away from the spot.

11. It was not put anywhere to Raez Ali Aw3 on behalf of the respondents that there were potholes on the road and which were the cause of the so called self accident at the instance of the deceased due to his fast speed and his inability to control his vehicle despite Raez Ali Aw3 having acted as a pancha witness to the Scene of the Accident Panchanama. It is only during his evidence that an attempt was made to buttress the defence plea that there was a big pothole of the depth of one feet on the road and other potholes of smaller size but which does not inspire confidence. Besides, on his own version one Gaikwad

was in the truck alongwith him and yet such a person who was a natural witness available at the relevant time was withheld from the Court inviting adverse inference for his non-examination.

12. Taking a pause, Raeez Ali Aw3 was also a pancha to the Inquest Panchanama conducted on the body of the deceased and when it was recorded by the Police that there were crushing injuries to the head and that the flesh and the brain parts were seen missing and only a skull was visible in a crushed condition. The Scene of Accident Panchanama drawn at his instance also showed the presence of brain parts lying at the spot. Moreover, the admitted Postmortem report showed that the deceased had suffered crushing injuries on the head, face, chest, abdomen which only convey the violence of the impact and leaving no scope for prevarication.

13. Ram Gopal Yadav, whose statement too was recorded and produced by Ghanshyam Singh, Rw1 had initially stated that the deceased while overtaking the B.R.O. truck had gone into a pothole, lost control and fell under the right tyres of the B.R.O truck which did not stop but continued to go after driving over the Kinetic rider. The Kinetic Honda rider had died on the spot and his brain had come out from his head which was smashed.

14. ASI Dinkar Naik, RW2 was attached to the Verna Police

Station at the relevant time when the accident was reported at the outpost at Zuarinagar telephonically and he deputed one person to the spot. He had conducted the Inquest Panchanama on the body of the deceased at the Hospicio Hospital, Margao, registered the offence against the truck driver and carried out the Attachment Panchanama of the B.R.O. vehicle at the Verna Police Station in the presence of the panchas. He had placed the truck driver under arrest on the basis of the Scene of Accident Panchanama and the statement of Ram Gopal Yadav and filed the complaint on behalf of the State. In his assessment the accident had occurred as the Honda rider was proceeding on the Birla Vasco Road and the Tata Tipper truck driven by the respondent no.1 was proceeding in the opposite direction and the scooter rider was crushed under the rear tyre of the tipper truck. His testimony had revealed that Ram Gopal Yadav had identified the respondent no.1 as the driver of the truck involved in the accident who was placed under arrest and released within a day.

ASI Naik, Rw2 had maintained that the number of the truck was disclosed to him by Ram Gopal Yadav and he learnt the name of the driver when he was brought to the Police Station on the same day. He maintained during his cross examination that there was only one eye witness namely Ram Gopal Yadav while Raeez Ali acted as a pancha witnesses not only to the Inquest Panchanama but also to the Scene of the Accident Panchanama and another. Nonetheless his investigation revealed that the two vehicles were proceedings in the

opposite directions. Ram Gopal Yadav, Rw3 had stated before the Tribunal that the Kinetic rider had overtaken him and a rickshaw and there was a truck belonging to the B.R.O. going in the same direction. The Kinetic Honda had tried to overtake the B.R.O. truck but in the meantime he could not control his scooter which went into a pothole and he was thrown in front of the rear wheel of the truck and sustained fatal injuries. This version of the witness is neither possible nor conceivable accepting his version that both were proceeding in the same direction which was nobody's case much less the claimants and the respondents. For that matter, this witness like Raeerz Ali Aw3 had stated that there was only one pothole on the road which was about 10 inches deep and half a metre in circumference and unlike his previous statement to the Police claimed that he did not notice the driver of the truck at the relevant time nor had he recorded the registration number of the truck.

15. From the evidence discussed as before it clearly emerges that the plea in defence was that the truck was travelling along the road on the stated date and time which is also the statement of Ghanshyam, Rw1, contrary to his plea in defence. No doubt the burden is primarily on the claimants to prove the involvement of the truck and followed by the rashness and negligence of its driver to entitle them to the compensation but the degree of proof is not even that of preponderance of probability as in the civil cases and lesser.

The learned Presiding Judge had found on an examination of the Panchanama of the seized truck that there were blood marks between the two right rear tyres apart from the flesh pieces in the mud guard and yet held against the involvement of the truck in the accident. It was nobody's case that there was any animal carcass lying on the road or that the truck had been driven over such a carcass during the said morning. The presence of the flesh and the blood marks on the right rear tyres of the truck would only lead to one conclusion i.e. the involvement of the truck in the accident contrary to the contention of Shri M. Amonkar, learned Advocate on behalf of the respondents no.2.

16. The learned Presiding Officer was carried away by the fact that Raez Ali Aw3 had not been examined by the Police as an eye witness and that his role simpliciter was that of the pancha of the Police in the Panchanama. It was clearly lost on the learned Presiding Officer of the Claims Tribunal that merely because he was not cited as an eye witness, non examination as such by the Police showed that he was not an eye witness to the accident. Quite on the contrary Raez Ali Aw3 in his statement before the Tribunal had clearly stated that he was available at the spot and waiting to go to the Masjid when he had the occasion to see the accident. Moreover his version appears palpably believable inasmuch as the nature and the extent of the injuries suffered by the deceased belies the version sought to be projected by Ghanshyam Singh Rw1 and Ram Gopal Yadav Rw3 that

the deceased and the B.R.O. truck were proceeding in the same direction. At one time the learned Judge observed that the findings given by the Magistrate were not binding on him for deciding the Claim Petition and it could not be looked into for accepting the case of the respective parties and on the other went off at a tangent to observe that the conduct of the respective parties was certainly required to be taken into consideration and disbelieved the version of Raeez Ali Aw3 on the premise that his was not a trustworthy version and he could not be believed.

17. The Presiding Judge took into consideration the Attachment Panchamama of the vehicle but made an observation that there were blood like marks found on the rear tyres and yet hastily concluded that it could not be assumed that the truck was involved in the accident despite the clear notings in the Panchanama that blood marks and pieces of flesh were noticed on the right rear tyres of the truck. Moreover, the learned Judge also drew an inference that such blood or flesh of any other animal and sticking to the rear tyres could not be disbelieved though it was nobody's case that there was any fresh carcass on the road in the vicinity of the accident spot so that the blood and the flesh pieces could be seen attached to the rear tyres. The learned Judge, therefore, unduly disbelieved the version brought on record regarding the involvement of the truck and held that the claimants had failed to show the involvement of the vehicle in the

accident.

18. **Const Hanmant Dahiphale** (supra) who are the driver and the owner of the truck impugned the judgment passed by the MACT awarding the compensation in favour of the respondent on the ground that there was no negligence on the part of the appellant no.1 in causing the accident and that the compensation awarded was exorbitant and excessive. It was canvassed on their behalf that there was no negligence on his part and quite on the contrary the rickshaw puller was pulling the cycle rickshaw on a slope who lost control and dashed against the truck resulting in the unfortunate accident. The learned Single Judge examined the evidence and on a preponderance of probabilities accepted the version of the witnesses and held that the finding of negligence reached by the Tribunal could not be faulted.

19. **Rajwinder Kaur** (supra), were the three appeals where the common point urged for consideration was whether the Insurance Company appellant was not liable for the claim arising out of the accident in view of the fact that the proposal had been given and a Cover Note had been obtained on 13.10.2001 at 5.00 p.m, suppressing the fact that there had been an accident earlier on the same day at 3.00 p.m and the said fact had not been revealed to the insurer. The Development Officer had been examined as Rw1 to testify the above fact of the actual issue of the Cover Note at 5.00 p.m. The time of the

accident at 3.00 p.m. was itself not in dispute. What was sought to be brought out through the evidence in the cross-examination by the Counsel appearing for the driver and the owner was that the Cover Note stipulated the commencement of the policy at 00.00 hours on 13.10.2001 and therefore, the policy must be effective to cover the risk that had arisen by the accident from the currency of the policy. Apart from the evidence of the Development Officer, the Bank Manager had examined himself as Rw2 who also gave his evidence to the effect that there was an investigation instituted and it had revealed that the accident had taken place at 3.00 p.m. and only subsequent thereto, the Cover Note had been issued.

20. In **Rajwinder Kaur** (supra), the evidence of the Development Officer was emphatic on the three aspects namely that the accident had taken place at 3.00 p.m., the proposal of the Cover Note had come about subsequently at 5.00 p.m. and thirdly at the time when the proposal for the policy was given or when the Cover Note was issued, they had not been informed that an accident had already taken place with reference to the same vehicle. The suggestion was only with reference to one aspect of the case that the Cover Note had assumed the risk from 00.00 hours and not from 5.00 p.m. as stated by the Development Officer and the Bank Manager. This fact was taken by the Tribunal as completely governing the issue to make the insurer liable. The learned Counsel appearing for them relied on the judgment

of the Hon'ble Apex Court in **J. Kalaivani Vs. K. Sivashankar, [(2007) 7 S.C.C.792]** where the Hon'ble Apex Court held that the liability of the Insurance Company would commence from the time when a specific mention of time is made in the absence of such time, the policy would become operative from the previous midnight when bought. Another important aspect of the insurance law was that the contract of insurance is a contract of uberrimae-fidei (utmost good faith) and if there had been a suppression of the material fact, the policy would be vitiated.

While dealing with **Rajwinder Kaur** (supra) the Hon'ble Supreme Court considered the judgment in **Kalaivani** (supra), wherein that case Their Lordships had occasion to consider only one issue relating to the commencement of the risk and it had no occasion in that case to deal with the situation of suppression of the material fact which was in the case at large. In such set of circumstances the learned Single Judge found that where the insurer had given evidence through two witnesses that the owner had suppressed the fact of the involvement of the vehicle in an accident even before the risk was undertaken by the Insurance Company and the owner avoided the witness box to explain whether he had given information, the liability for the claim arising out of the accident shall under the circumstances fall on the shoulders of the owner of the vehicle only. After observing that the non-examination of the owner in the case assumes enormous

significance an adverse inference had to be drawn and if he had to be examined himself he would have had to admit that the Cover Note had to be made only subsequent to the accident and the fact that the accident itself was not disclosed to the insurer.

21. **Saroj Bala** (supra) was an appeal at the instance of the original claimant whose petition has been dismissed for compensation filed upon the death of Narinder Kumar Malhotra, husband of the first appellant and the father of the second in a road accident alleged to have been caused due to the rash and negligent driving of a car belonging to the USSR Embassy. In the brief facts, the deceased Narinder was riding his motorcycle from Chanakya cinema side on Vinay Marg when a car belonging to the USSR Embassy and bearing distinct registration number came from the opposite direction and hit his motorcycle. The car was allegedly driven by its driver in a rash and negligent manner due to which he suffered fatal injuries giving rise to this petition filed before the MACT. The Insurance Company did not deny the factum of the accident but stated that there was no rashness and negligence of the Embassy car driver but there was rashness and negligence of another vehicle. The Tribunal framed issues accordingly which were partially answered in favour of the appellant by the Tribunal and holding that the appellant was entitled to the compensation of ₹1,08,000/- in case they had to succeed in the petition. However, the Tribunal held that the appellant had failed to prove that the accident

was caused due to the rash and negligent driving of the Embassy car driver and no compensation was awarded in their favour giving rise to the appeal.

22. In **Saroj Bala** (supra), the Tribunal while holding that the accident was not caused due to the rash and negligent driving of the Embassy car had not believed the statement of the two witnesses who claimed to have seen and given a graphic description thereof. It was contended on behalf of the appellants that there was no material to disbelieve their testimonies and the Tribunal had based its finding only on assumptions and presumptions. The learned Judge held that the Tribunal had gone wrong in holding that the accident was not caused due to the rash and negligent driving of the Embassy vehicle driver and even examining the investigation file produced before the Tribunal which disclosed that a message was received telephonically about the accident that the car after hitting the motorcycle ran from the spot. Even in the FIR it was mentioned that when the Investigating Officer reached the spot the car with which the accident had taken place was not found to be available. It was only subsequently that the First Secretary of the USSR embassy informed the Police about the involvement in the accident.

23. In **Saroj Bala** (supra), the learned Judge had found that the site plan prepared by the Police at the spot did not in any manner

indicate that the motorcyclist had gone on the wrong side and had dashed against the Embassy car. Once it was admitted that the Embassy car was involved in the accident it was for the driver of the car to prove as to how the accident had taken place. No witnesses were examined on behalf of the owner and the driver to prove as to how the accident had taken place and in the absence of any evidence being produced on their behalf, the Tribunal in its opinion had clearly erred in holding that the accident was caused on account of the motorcyclist having gone on the wrong side of the road. It was further observed that even assuming that Pw5 and Pw6 were not the eye witnesses, the only eye witness of the accident was the driver of the Embassy car who had admittedly not appeared before the Tribunal and besides, the driver of the car after the accident fled away from the spot. If he was not guilty of the accident, there was no reason for him to run away from the spot. Besides, the fact that the car had been removed from the scene clearly showed that the driver of the car had tried to destroy the evidence which might have proved his guilt. In these circumstances in his opinion the Tribunal ought to have drawn an adverse inference against the owner and the driver of the Embassy car and ought to have held that the accident was caused entirely due to the rash and negligent driving by the driver of the car while ultimately holding that the accident was caused entirely due to the rash and negligent driving of the Embassy car by its driver.

24. In **Jaswinder Kaur** (supra), Their Lordships of the High Court of Madhya Pradesh held in their opinion in the peculiar facts and circumstances of the case that the learned Tribunal had committed an error in dismissing the claim application of the applicant. It was admitted that on 10.1.1996 the two trucks had collided with each other near P.S. Hindoli wherein Gurupal Singh, the driver of the truck bearing No. MIF 0195 was killed. Jaswinder Kaur also deposed that her husband was driving the truck of Richhpal Singh and the other truck dashed against it as a result of which her husband met with death. A copy of the FIR was in support of her version besides the other respondents had not produced any evidence in rebuttal and there was no evidence of any eye witness to the accident available on record. In such a situation the doctrine of *res ipsa loquitur* was applicable. The claimant could prove the accident but could not prove as to how it occurred and to avoid this hardship, said maxim was applied as the accident itself tells its own story.

25. In **Jaswinder Kaur** (supra), in such circumstances, the burden shifted on the non-applicant to prove that the accident did not occur due to the rash and negligent driving of his vehicle and the accident had occurred due to other reason. Unfortunately, in this case, the drivers of both the vehicles had died in the accident. The appellant had not examined the Investigating Officer who had prepared the spot map of the accident. However, it could not be disputed that if the

vehicles were driven carefully on the road on their respective sides, they would not collide. The collision of the vehicles on the public road at 7.00 a.m, gave rise to an inference that this accident had occurred due to the rash and negligent driving of one or both the vehicles. The deceased was driving the truck at the time of the accident and therefore it was a case of contributory negligence and held that the negligence of the drivers was 50:50. The learned Tribunal had therefore committed an error in dismissing the claim application of the applicant on the ground of non-availability of the evidence.

26. In **Primary Land Development Bank** (supra), the Division Bench of the Punjab and Haryana High Court dealt with the Letters Patent Appeal impugning the judgment of the Single Judge by the appellant Bank. It was their case that the identity of the driver of the hired jeep was not positively established and no documentary evidence was adduced by Brij Lal and that he was handed over on the request of the Manager. Thus the vehicle was driven by a person who was not the employee of the Bank and the Tribunal had erroneously held the applicant vicariously liable. The Honble Single Judge after appreciating the evidence came to the conclusion that the respondent was the owner who had hired the jeep to the Bank so the fact that the Bank having taken the jeep on hire was admitted by the Bank Manager Shri Paras Ram Rw2. There could not be any better evidence than the admission of the appellants' Manager who also admitted that the

vehicle taken on hire remained in the custody of the Bank till the time they were not required. The vehicle remained on hire with the Bank for 2 ½ months though an attempt was made that in spite of the jeep being under the control of Bank yet the owner of the jeep was vicariously liable for the compensation for this accident.

27. In **Primary Land Development Bank** (supra), once it was held in view of the admission that the jeep was on hire with the Bank and under its control was a necessary corollary, it would be reasonable to assume or hold that the driver of the jeep at the relevant time was within the control of the Bank though he may be in the regular employment or not. It was for the appellant bank and the burden lay on the appellant to prove that the person who was driving the vehicle was not under the control of the Bank but however for the reasons best known to the Bank, no evidence was adduced to show under what circumstances the vehicle was being driven by a person who was not in the bank employment when concedingly it was on hire with the Bank. In those circumstances, the Division Bench did not find any ground to differ with the finding of the Honble Single Judge since the Bank was in control of the jeep and was in the custody of the jeep at the relevant time of the accident and the Bank was vicariously liable. Even if the identity of the driver was not established, it would not absolve the Bank of its liability in view of the tortious act committed by a person within the control and command of the Bank.

28. In **Mallamma** (supra), the deceased was taking the bullocks of his master Ramanna to plough the land on the extreme left side when a milk van came at a high speed, in a rash and negligent manner driven by the respondent no.1 and dashed against the deceased and the bullocks. Consequently, he sustained fatal injuries and died on the spot and the bullocks also sustained injuries. The appellant-claimant being the mother filed the petition before the MACT, Gulbarga and the learned Tribunal on recording the evidence and hearing the arguments dismissed the claim petition on the ground that the appellant had not proved the rash and negligent act of the driver of the lorry which was involved in the accident giving rise to the appeal and taking a plea that the principle of *res ipsa loquitur* was very much applicable to the facts of the present case.

29. In **Mallamma** (supra), it was contended on their behalf mainly that the strict provisions of the Evidence Act need not be applied when the respondents themselves admit the involvement of the vehicle in the accident in question and the burden of proof shifted on them and therefore the non-examination of any independent eye-witness to prove the negligence was not a factor to the case of the claimant. Besides the Police who had registered the case against the driver of the lorry had filed a chargesheet against him for the offences punishable under

Sections 279 and 304-A of IPC which itself was a prima facie case to prove the case of actionable negligence and therefore the reasons appeared to be not correct. It was also contended on their behalf that the respondents had taken a plea in their written statement that the accident if any occurred was not due to the negligence of the driver of the vehicle but due to the negligence of the deceased himself. This fact had to be proved by the respondents by examining either the driver or any independent witnesses and therefore the principles of res ipsa loquitur had to be applied and the appeal had to be allowed. Quite on the contrary it was contended on behalf of the respondents that the claimant-appellant was not an eye-witness to the incident and she had not examined either Ramanna, who had lodged the complaint against the lorry driver or Virupaksha Gaddeger who happened to be an eye-witness on behalf of the claimant to prove the actionable negligence and therefore the learned Tribunal had rightly dismissed the petition and the appeal too was liable for dismissal in limine with costs.

30. In **Mallamma**(supra), there was no dispute of the fact that the deceased had died on the spot in the vehicular accident which had occurred on the early morning of 9.4.1997 at Chittapur-Shahabad road and the respondents had also not disputed that the bullocks had sustained injuries. The appellant being the mother of the deceased had deposed before the Tribunal that her son had died an accidental death

in that motor accident while he was going to the field of Ramanna and which took place on account of the fault of the lorry driver. She was not an eye-witness and had not examined any other witness but had relied upon the documentary evidence namely the FIR and the complaint and which fact had not been seriously disputed by the respondents about the involvement of the vehicle. There was a chargesheet filed by the PSI against the respondent no.3 for the offences punishable under Sections 279 and 304-A of the IPC. The respondents had not stepped into the witness-box to rebut the oral evidence of the appellant and the documentary evidence and thus had not proved their contention by examining either the driver of the lorry or any independent eye-witness.

31. In **Mallamma** (supra), the learned Judge found that the appellant was a rustic village lady who had not examined Viru-Pakshappa Gaddeger who was said to have informed Ramanna but which was not fatal to her case. Though initially the burden lay on the claimant but when the respondents themselves had taken a specific plea that the deceased was himself responsible for the accident and his death, the burden automatically shifted on them. Moreover the accident had occurred on the highway and that too in the early morning hours and it was not proper to accept the evidence of any eye-witness that the deceased was an agricultural labourer whose duty was to take the

bullocks of his master to go to the agricultural land and to plough the same. Such being the case it was not proper to expect any eye-witness to the accident. Thus having regard to the date, time, place of the accident and the manner in which he had sustained fatal injuries and died on the spot apart from the injuries sustained to the bullocks it was just and proper to hold that the principle of *res ipsa loquitur* was very much applicable to the case at hand.

32. Considering the evidence and the law on the point, it is evident that there was no proper consideration of the evidence on record by the learned Presiding Officer and the inference drawn was contrary to the material appearing on record. The learned Presiding Officer therefore on an assessment of the evidence and the judgment relied upon *supra* clearly erred in holding that the burden was on the appellants to prove that the accident was caused due to the involvement of the truck and on account of the rashness and negligence of its driver. It must further be recorded that the learned Presiding Officer therefore fell in error to hold against the appellants that they had not proved the involvement of the truck and the rashness and negligence of the truck driver. Rather on the basis of the assessment it must fairly be concluded that the claimants had amply demonstrated the involvement of the truck and the rashness and negligence of its driver and therefore, the issue is answered affirmatively in their favour.

33. The learned Presiding Officer of the MACT had short circuited the issue on the aspect of the compensation which the appellants would be entitled to merely on the basis that they had failed to establish the rashness and the negligence of the truck driver. Nonetheless this exercise has to be undertaken by this Court and in that context, the evidence would have to be examined to arrive at a finding appropriately.

34. Mohammad Ali Aw1 the appellants' attorney had stated that he had gathered the information that the deceased aged 22 years was employed at Saukar Freezers at Sancoale Industrial Estate, and drawing a salary of ₹3000/- per month as a clerk cum manager. He was the sole earning member of the family and they were totally dependent on him. They were therefore entitled to the reasonable compensation of ₹4,00,000/- which the respondents had to pay to them. He produced the Certificate issued by Saukar Freezers to substantiate his case on the employment of the deceased amongst other documents and categorically denied the suggestion that the claimants were not entitled to the compensation as claimed in the petition.

35. Hasanabba Ali-abba Aw2 stated that he knew the deceased who had died in the vehicular accident at Birla Zuari Nagar being employed in the factory premises at Sancoale Industrial Estate. He was

employed as a clerk cum manager and paid a gross salary of ₹3,000/- per month inclusive of all the allowances. The deceased was appointed on 1.8.2002 and was on duty on the date of the accident namely 26.11.2002. He had issued a Certificate to the deceased at request of their parents but had inadvertently not mentioned the salary paid to him. Besides, the deceased was working in the other neighbouring factories for nearly about 1 ½ years before he came to be appointed in their factory. He was a honest and hard working staff. He duly identified the Certificate of salary Article "A" at Exh.36 being issued by him and conceded that the deceased had not submitted any application for the post of a clerk cum manager nor had he issued any appointment letter to him. In any event and assuming at the highest that his testimony did not inspire confidence, it has to be considered that a young, able bodied person like the deceased would easily earn ₹3,000/- per month if not more and therefore i have no hesitation to accept his earnings at ₹3,000/- per month. Besides Mohammad Ali, Aw1 was unshaken in his testimony that the appellants were 51 and 42 years old being the parents of the deceased and who was barely 22 years old at the time of the accident.

36. Raez Ali Aw3 had further stated that the deceased Mansoor was employed with Saukar Freezers in which his father Hasanabba Ali-Abba was a partner. The deceased Mansoor was working as a clerk cum manager in the factory and was paid a gross salary of

₹3,000/- per month to his personal knowledge. There was no particular rebuttal of his testimony on the employment and the earnings of the deceased Mansoor.

37. The appellants who were the parents of the deceased were aged 51 and 45 years and therefore applying the principle laid down in **Sarla Verma(Smt) and others Vs Delhi Transport Corporation and another [(2009) 6 SCC 121]** that there would be an increase in the earnings of the deceased in course of time had he not to succumb to the vehicular injuries by 40% giving due weightage to his age at 22 years, deducting 50% towards the personal expenses having died a bachelor and applying the multiplier of 18, the dependency would work out to ₹4,53,600/-. The claimants are awarded an amount of ₹1,00,000/- towards the loss of love and affection on the sudden demise of their son and ₹25,000/- towards the funeral expenses taking the total compensation to ₹5,78,600/- being the just compensation in the circumstances of the case.

38. In the result, i pass the following:-

ORDER

- (i) The appeal is allowed holding the respondents jointly and severally liable to pay the compensation in the amount of ₹5,78,600/- to the appellants which shall carry interest @ 9% per annum from the date of the application till the

decision in this appeal and further interest at the same rate till payment apart from the costs of the petition and the appeal.

- (ii) The appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

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