

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 79/2012**

Mrs. Mala Ashok Naik,
Wife of Mr. Ashok Naik,
Major in age, business,
Indian National,
Resident of Z.I.L “F” Colony,
Room No.8, Zorint,
Zuarinagar, Sancoale-Goa.

.... Petitioner

V e r s u s

1. Smt. Mangala Gawde,
Wife of late Krishna Gawde,
Aged 52 years, housewife,
Indian National,
Resident of H. No.200, Chicalim,
Vasco-da-Gama, Goa.
2. Miss Archana Gawde,
Daughter of late Krishna Gawde,
Aged 21 years, student,
Indian National,
Resident of H. No.200, Chicalim,
Vasco-da-Gama, Goa.
3. Master Abhijit Gawde,
Represented by his lawful guardian,
Smt. Mangala Gawade,
Son of late Krishna Gawde,
Aged 15 years, student,
Indian National,
Resident of H. No.200, Chicalim,
Vasco-da-Gama, Goa.
4. Shri Ramraj Bind,
Son of Indrajit Bind,
Major in age, service,
Indian National,
Resident of C/o. Ramesh Mourya,

Zuarinagar, Sancoale – Goa,
(driver of Truck bearing No.
Ga-02-U-8773).

5. Shri Kedarnath Pandey,
Son of Kashiram Pandey,
Major in age, business,
Resident of H. No.35/A,
Sasmollem, Baina,
Vasco-da-Gama-Goa.
(Owner of Truck bearing no.
GA-02-U-8773).

(In view of order dtd. 18.3.14 passed in MCA

6. The New Insurance Company Ltd.,
1st floor, Opp. Khalap Mansion,
Santa Palagia Bldg.,
Vasco-da-Gama-Goa,
(Policy No.141500/31/05/91/
00004285), valid 22/10/2006
Upto 23/10/2007.

No.353/13 respondent no.6 is expunged from the
cause title)

(In view of order dtd. 21.4.2017 respondent no.6
stands restored)

.... Respondents.

Shri Jatin Ramaiya, Advocate for the Appellant.

Shri M. S. Joshi, Advocate for the Respondent no. 1 to 3.

Mr. A. Kakodkar, for Respondent no.6.

CORAM: C. V. BHADANG, J.
Reserved on: 24th April, 2018.
Pronounced on: 4th June, 2018.

JUDGMENT:

On 9/10/2007 Krishna Gawde (since deceased) was walking on the left side of the road from I.O.C junction to Vasco Bus stand, when the fourth respondent came driving with a truck bearing No.GA-02-U-8773 in a high

speed and dashed the deceased who came under the left rear wheel of the truck, in which he sustained grievous injuries, to which he succumbed.

2. The respondent nos.1, 2 and 3 being the widow and minor children of Krishna Gawde filed a petition under section 166 of the Motor Vehicles Act 1988 (Act, for short) before the Motor Accident Claims Tribunal at Margao (Tribunal, for short) which was registered as Claim Petition No.97/2008 seeking a compensation of Rs.5.00 lakhs in respect of the death of Krishna Gawde. The petition was filed against the respondents no.4 to 6 herein claiming that the fifth respondent Kedarnath Pandey, was the owner of the vehicle. The respondent no.6/insurance company (respondent no. 3 before the Tribunal) sought its deletion on the ground that the policy of insurance, was issued on 24/10/2006 in favour of the appellant herein, on the basis of a cheque dated 23/10/2006 issued by the appellant towards the insurance premium. It was contended that the cheque was returned unpaid and as such the policy stood automatically cancelled. The claimants gave their no objection for deletion of the insurance company and the Tribunal by an order dated 2/8/2008 allowed the deletion of the insurance company. It appears that thereafter the present appellant was arrayed as the fourth respondent before the Tribunal being the owner of the offending vehicle. The appellant filed an application seeking re-impleadment of the insurance company which

was rejected by the Tribunal by a speaking order dated 3/10/2009 on the ground that on the date of the accident the policy was not in force, as the cheque issued towards the premium was dishonored.

3. Before the Tribunal, the claimants examined five witnesses and produced documents, while the appellant examined four witnesses.

4. The Tribunal by an Award dated 6/8/2010 granted a compensation of Rs.3,80,000/- along with interest at the rate of 9% p.a. from the date of the petition till realization. The compensation was granted only as against the appellant. Feeling aggrieved, the appellant is before this Court.

5. Normally this would have been the end of the narration of facts, however, there are two more developments which need to be noticed at the outset. Although the insurance company was deleted by the Tribunal, the present appeal came to be filed arraying the insurance company as respondent no.6. The insurance company filed MCA No.353/2013 for its deletion on a similar ground namely the cheque issued towards the premium having got dishonoured and further in view of the fact that it was deleted by the Tribunal. This Court (U.V. Bakre, J) by an order dated 18/3/2014 allowed the application and directed the respondent no.6 to be deleted from the cause

title. This was subject to liberty to the appellant to take out appropriate proceedings to challenge the order dated 2/8/2008 (directing deletion of the insurance company in the claim petition) “ if permissible under and in accordance with law”. Taking a cue from the said order the appellant filed MCA No.784/2016 after more than two years from the disposal of M.C.A. NO.353/2013. Misc. Civil Application No.784/2016 was filed for amendment of the Appeal Memo in order to incorporate a challenge to the order dated 3/10/2009 and the order dated 2/8/2008 passed by the Tribunal. It appears that a notice was issued in M.C.A. No.784/2016 to the insurance company. However, on 21/4/2017 there was no appearance on behalf of the insurance company and taking a note of the no objection on behalf of the claimants, this Court (Nutan D. Sardesai, J) allowed M.C.A. No.784/2016 by an order dated 21/4/2017. The insurance company has thus again come on record as respondent no.6.

6. I have heard Shri Ramaiya, the learned counsel for the appellant and Shri Joshi, the learned counsel for the respondents no.1, 2 and 3. I have also heard Mr. Kakodkar, the learned counsel for the respondent no.6.

7. Shri Ramaiya, the learned counsel for the appellant submits that the Tribunal was in error in holding that the accident occurred due to the rash and

negligent driving of the fourth respondent. It is submitted that the negligence of the driver, is not established on record, which is the very basis of the liability to pay compensation under section 166 of the Act. It is submitted that the quantum of compensation granted is also on a higher side. It is next submitted that the insurance company could not have been deleted by the Tribunal, when admittedly the insurance company had not intimated the appellant about the dishonour of the cheque. It is submitted that in such a case the insurance company cannot abdicate its liability to indemnify the insurer/owner of the offending vehicle. It is submitted that in any case the insurance company is liable to indemnify the third parties and to satisfy the award of compensation. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court, in the case of **Oriental Insurance Company Ltd. Vs. Inderjit Kaur and others (1998) 1 SCC 371** and **United India Insurance Company Ltd. Vs. Laxmamma and others AIR 2012 SC 2817**.

It is submitted that under section 64 VB of the Insurance Act, no risk can be assumed by the insurer, unless the premium payable is received in advance. However, where an authorized insurer, issues a policy of insurance on receipt of a cheque towards payment of premium and such cheque gets dishonoured then the liability of the authorized insurer to indemnify the third parties subsists and it has to satisfy the award of compensation by reason of the provisions of Section 147(5) and 149 (1) of the Act, unless the policy of

insurance was cancelled by the authorized insurer and the intimation of such cancellation had reached the insured before the accident. It is thus submitted that the Tribunal was in error in deleting the insurance company by order dated 2/8/2008 and further refusing to re-implead the insurer by order dated 3/10/2009.

8. Shri Joshi, the learned counsel for the claimants has supported the appellant on the point of the liability of the insurer to indemnify the claimants being third parties. He, however, submits that the finding as to negligence of the driver as the cause of the accident is legal and proper. He has also supported the award on the point of quantum. He submits that no objection was given by the claimants to the deletion of the insurance company under misconception of the legal position prevailing. He submits that if in law the insurance company is liable to satisfy the award, the concession by the claimants made before the Tribunal for deletion of the insurance company, may not come in their way in claiming that the insurance company is so liable.

9. Shri Kakodkar, the learned counsel for the respondent no.6 has submitted that both the orders dated 12/8/2008 and 3/10/2009 amount to a decree which have to be independently challenged and the challenge cannot

be raised in the present appeal. Reliance in this regard is placed on the decision of the then Nagpur High Court, in the case of **Chetanlal Purshottam Singh Daoo Vs. Dau G. S. Gupta and others, AIR 1938 Nagpur 233** and the decision of the Patna High Court in the case of **Nand Kumar Sinha Vs. Rai Bahadur Pashupati Ghosh and others AIR 1941 Patna 385**. He submits that in any event the appellant as the owner of the vehicle cannot take cudgels on behalf of the claimants seeking to foist liability on the insurance company.

10. I have given my anxious consideration to the rival circumstances and the submissions made.

11. The following points arise for my determination in this appeal:

- i) Whether the appellant can be permitted to challenge the orders dated 2/8/2008 and 3/10/2009 passed by the Tribunal in this appeal?
- ii) If yes, whether the said orders need to be set aside?
- iii) If yes, what order?

12. **Point no.1:**

The contention of Mr. Kakodkar, the learned counsel for the respondent no.6 is that the order dated 2/8/2008 would amount to a

decree/award and the appellant having failed to challenge the same in a regular appeal, cannot challenge that order (and the consequent order dated 3/10/2009) in this appeal by taking recourse to section 105 of C.P.C. Reliance in this regard is placed on the decision of the then Nagpur High Court in the case of **Chetanlal Purshottam Singh (supra)**.

In that case a lambardar had brought a suit against certain persons for recovery of the amount paid by him to the Government and a charge on the property in their hands. The trial court framed a preliminary issue and decided the same on 19/4/1934 that no charge could be claimed against defendants nos.3, 4 and 5 and discharged them. The suit proceeded against the defendant nos.1 and 2 and was later decreed against them. The plaintiff filed an appeal asking for enhancement of the amount and also for charge against the entire property and therefore, impleaded the defendant nos. 3, 4 and 5 also in the appeal, although they were not parties to the decree, having already been discharged from the suit. The appellate Court enhanced the amount of decree, however, refused to lay a charge on the property in the hands of the defendant nos.3, 4 and 5, which was subject matter of challenge before the High Court. A preliminary objection was raised on behalf of the defendants that the order dated 19/4/1934 amounted to a decree within the meaning of section 2 (2) of C.P.C and as no appeal was filed against it, the

appeal before the first appellate Court was a superfluity against the three defendants and therefore, no appeal can lie before the High Court.

13. This Court took note of two divergent views on the point one taken by Subhedar A.J.C in 26 N L R 24, in which it was held that an order passed in almost identical circumstances amounted to a decree and as such, was appealable. There was a contrary view taken by Findlay A.J.C which was not published in the authorized reports. This Court in the case of Chetanlal preferred to go by the view taken by Subhedar A.J.C. One of the reasons why the Court preferred that view was that the reason why the three defendants were discharged was because the Court had considered there was no charge and that was the most important point in issue between the plaintiffs and these defendants and, in fact, between all the parties to the suit. In other words, it was found that the defendant nos.3,4 and 5 were discharged on merits holding that there was no charge against the property in their hands and therefore, there was nothing more left to be done and the order was obviously a final one. Findlay A.J.C had held that since Order 1, Rule 10 (2) uses the word “order” and not a “decree”, an adjudication under the said order cannot be a decree. Be that as it may, there were two contrary views which were noticed in the case of **Chentanlal** and the one on which reliance is placed by Mr. Kakdakar was preferred for the reason that the defendant

nos.3 to 5 were already discharged on merits and nothing more was left to be done and therefore that order amounted to decree.

In the case of **Nand Kumar Sinha** (supra), the Patna High Court, the names of some of the defendants were struck off from the suit on the ground that the suit was held not maintainable against them. It was in these circumstances held by the Patna High Court that the order striking off the names of those defendants, against whom the suit is held to be not maintainable is a decree within the meaning of section 2 (2) of C.P.C. The High Court while so holding has observed that the substance rather than the form of the order should be looked into while determining the provisions of law under which such order falls. It can thus be seen that the case of **Nand Kumar Sinha** also turned on its own facts, where unlike in the present case, on merits it was found that the suit was not maintainable against some of the defendants.

14. Coming to the present case, the order dated 2/8/2008 simply appears to have been passed on the basis of concession/ no objection by the original claimants. There was no adjudication of any dispute or liability of the Insurance company in the context of the claim that the cheque towards the premium was dishonored. In the subsequent order dated 3/10/2009 the Tribunal has relied upon the fact that the receipt towards the premium was

issued subject to realization of the cheque. In para 12 of the said order, the Tribunal has observed that the issue that will arise in the proceedings is whether the insurance company is liable to indemnify the appellant (respondent no.4 before the Tribunal) and not whether the notice of dishonour of cheque was received by the respondent no.4 or not. It is difficult to understand as to how the issue whether the company is liable to indemnify the appellant could be decided in the absence of the insurance company. In any event, the fact remains that the initial order dated 2/8/2008 was not passed on merits and thus in my humble opinion, the present case would be distinguishable and the decision in the case of **Chentanlal** would not come to the aid of the respondent no.6. There is one more reason why I would prefer to say so. This is because unlike in the case of **Chentanlal** where there was a suit, we are concerned with an appeal arising out of an award of the Tribunal under the Motor Vehicles Act, where the provisions of the C.P.C are not applicable with the same rigor.

15. Here is a case where there are two sets of orders, one each passed before the Tribunal and the other before this Court.

Before the Tribunal, the insurance company was discharged mainly on the concession by the original claimants. When this order was passed, the

appellant was not a party respondent, inasmuch as at the relevant time, it was claimed that one Kedarnath Pandey was the owner of the vehicle. The present appellant came to be subsequent arrayed as respondent no.4. By the second order, the Tribunal refused to re-implead the insurance company. The reasoning in para 12 of the said order which I have already noticed, in my considered view cannot be accepted. A perusal of the said order shows that an alternate prayer was made in the reply to the application for re impleadment in which the insurance company had said that if it is impleaded, it should be given an opportunity to cross examine the witnesses whose evidence was already recorded. Be that as it may, when the appeal came to be filed before this Court, the insurance company was again arrayed as respondent. This Court (Bakre, J) discharged the insurance company on 18/3/2014, however with a liberty to the appellant to take out appropriate proceedings to challenge the order dated 2/8/2018. In a subsequent application being M.C.A. No.784/2016, the insurance company was noticed, however, preferred not to remain present. On 21/4/2017 this Court (Nutan D. Sardesai, J) allowed the said application whereupon the insurance company came to be re-impleaded.

16. It is significant to note that in none of the two orders passed by the Tribunal, the Tribunal has considered the effect of the decision of the Supreme Court in the case of **New Indian Company Ltd. Vs. Rula &**

others in SLP (c) Nos. 3396-3398 of 1999 dated 7/3/2000. It appears that the said decision was also not brought to the notice of this Court when the insurance company came to be discharged by order dated 18/3/2014 in M.C.A. No.353/2013.

17. It is now well settled that the provisions of the Motors Vehicles Act as to determination of the compensation are a beneficial piece of legislation aimed at ameliorating the plight of the hapless victims of the accident or their legal representatives/dependents. The Tribunal has a statutory duty to determine the just compensation and the insurance company has a statutory duty to indemnify the owner or to honour the award in favour of the third parties subject to a right of recovery from the owner depending upon the facts and circumstances of each case. Here is a case where prima facie it appears that the insurance company had issued the policy and assumed the risk by accepting the premium by a cheque. At this stage there is nothing on record as to whether the policy was canceled and if yes, whether the intimation of such cancellation was communicated to the owner before the date of accident. There would also be a question as to what is the liability of the insurance company towards third party in such a case. All these aspects have not at all been adverted to or decided on merits. Considering the overall circumstances, I find that this is a case, which needs to be remitted back to

the Tribunal for deciding it fresh in accordance with law after affording an opportunity to the insurance company to contest the petition on such grounds as are available to it in law. As I am inclined to remit the petition to the Tribunal, I am not expressing any opinion on the liability of the insurance company at this stage and it will be for the Tribunal to decide the same after hearing the parties.

18. In view of the fact that the matter is being remitted back to the Tribunal I do not propose to examine the contentions on merits as to the negligence and quantum of compensation. It will be open to the parties to address the Tribunal on all such issues.

19. Shri Kakodkar, the learned counsel for the respondent no.6 had submitted that if the petition is remanded at this stage, there would be a question of grant of interest and the date from which such interest needs to be granted. I find that Shri Kakodkar is justified in his submission.

20. In such circumstances, in the event the Tribunal passes an award against the issuance company, it shall take into consideration the circumstances as set out above (namely, about the deletion and re-impleadment of the insurance company), while deciding the date from which

the interest is to be granted, which is payable by the insurance company. Subject to this, the points no.1 and 2 are answered in the affirmative and the following order is passed:

O R D E R:

- (i) The appeal is partly allowed.
- (ii) The impugned award as also the orders dated 12/8/2008 and 3/10/2009 are hereby set aside.
- (iii) The claim petition no.97/2008 is restored back to the file of the Motors Accidents Claims Tribunal at Margao for disposal according to law.
- (iv) It will be open to the respondent no.6 insurance company to file reply/written statement raising defence as may be permissible under the Act. The respondent no.6/insurance company shall also be entitled to cross examine the witnesses already examined on ground as may be permissible under the Act. The parties would be at liberty to lead such evidence, if any and as may be advised in the matter.
- (v) The Tribunal shall decide the petition on its own merits as expeditiously as possible.
- (vi) The parties to appear before the Tribunal on 25/6/20018 at 10 a.m.
- (vii) Decree be drawn accordingly.

C. V. BHADANG, J.

Ap/-

