

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 235 OF 2006**

Shri Shamba K. Gaonkar, major,
businessman, r/o H. No. 620, Gaunkarwada,
Surla, Bicholim, Goa. Appellant

Versus

1. Miss Mamta Nanda Naik, daughter of
late Nanda Anant Naik, 33 years,
spinster, unemployed,
2. Miss Maya Nanda Naik, daughter of
late Nanda Anant Naik, 34 years,
spinster, unemployed,
3. Shri Dhiraj Nanda Anant Naik, son of
late Nanda Anant Naik, 26 years,
bachelor, unemployed,
All residents of H. No. 6, Tishem,
Kothombi, Bicholim Taluka, Bicholim,
Goa.
4. Shri Mallikarjun Dasode Rama
Chinama Dasode, major, driver, r/o
opposite Roshan Bar, Usgao bye-pass
road, Usgao-Goa.
5. The National Insurance Co. Ltd.,
Bicholim Branch, Bicholim, Goa. Respondents

Mr. Dinesh Naik, Advocate for the Appellant.

Mr. Somnath Karpe with Ms. Asmita Tirodkar, Advocates for
Respondent Nos. 1, 2 and 3.

CORAM :- C. V. BHADANG, J.

RESERVED ON :- 9th August, 2019

PRONOUNCED ON :- 5th November, 2019

JUDGMENT:

The challenge in this Appeal is to the judgment and
award dated 06.05.2006, passed by the Motor Accident Claims

Tribunal at Mapusa (Tribunal, for short) in Claim Petition No. 52/2004. By the impugned award, the Tribunal has allowed the claim petition filed by the respondent nos. 1, 2 and 3, holding the appellant and the respondent nos. 4 and 5 jointly and severally liable to pay compensation in the sum of Rs.6,84,500/- alongwith interest. Respondent no. 5 has been held to be entitled to recover the amount of the award from the appellant (Insured). Undisputedly, the respondent no. 5 has paid the compensation to the respondent nos. 1, 2 and 3 and the same has been recovered from the appellant.

2. The brief facts necessary for the disposal of the Appeal may be stated thus:

The respondent nos. 1, 2 and 3 (original claimant) filed the aforesaid claim petition against the appellant and the respondent nos. 4 and 5 for recovery of compensation in respect of death of their brother Yogesh Nanda Naik, who was then aged 26 years. According to the case made out by the respondent nos. 1, 2 and 3, the deceased was working as a cleaner on the truck belonging to one Leena Parab and earning Rs.3,500/- per month, apart from bhatta charges of Rs.50/- per day. The said truck was covered by policy of insurance issued by respondent no. 5.

3. On 29.04.2004, when the truck was proceeding from Palem to Surla alongwith the deceased, on reaching at Satiya Kothombi, the driver of the said truck lost control over the said truck, due to which, the truck turned turtle on the kutchra road, some 15 metres away from the tar road. As a result of the said accident, Yogesh Naik sustained injuries, to which, he succumbed on the spot. The deceased was a bachelor and according to the respondent nos. 1, 2 and 3, they were dependent on the income of the deceased, he being the only earning member in the family. According to these respondents, the accident occurred due to rash and negligent driving of the truck by the respondent no. 4. In such circumstances, the petition came to be filed claiming compensation of Rs.7,15,000/-.

4. The appellant and the respondent nos. 4 and 5 resisted the claim.

5. It was the specific case made out by the appellant that respondent no. 4, Mallikarjun Dasode was not working as a driver on his truck, but, was working as a cleaner. On the date of the accident, one Sandeep Rawool, who was the neighbourer of Mallikarjun Dasode came to him at about 10:30 p.m. to

request to come to Palem to bring chicken. Mallikarjun Dasode informed Sandeep Rawool that he is not holding the driving licence to drive a heavy vehicle. Therefore, it was Sandeep Rawool, who took to the wheels and was driving the truck and when the truck reached Palem, the deceased jumped out of the truck, as a result of which, he sustained injuries to which, he succumbed. It was denied that the respondent nos. 1, 2 and 3 were dependents on the deceased.

6. The respondent no. 5 claimed that there was clear breach of policy conditions as Mallikarjun Dasode was not authorized to drive a heavy vehicle.

7. The Tribunal framed the following issues:

1. Whether the claimants prove that the respondent no. 1 was rash and negligent in driving the truck bearing registration no. GA-01-U-0762 ?
2. Whether the respondent no. 1 proves that he had entrusted one Sandeep Rawool to drive the vehicle on the said night ?
3. Whether the claimants prove that they are entitled to the compensation of Rs.7,15,000/- ?

8. The respondent, Mamta Naik examined herself as AW-1 alongwith Leena Parab (AW-2), Dr. Pramod Sawant (AW-3)

and Caraciolo Po, PSI (AW-4). The appellant examined himself as RW-2 alongwith Mallikarjun Dasode (RW-1) and Sandeep Rawool (RW-3).

9. The Tribunal came to the conclusion that the appellant and respondent nos. 4 and 5 were liable to pay a compensation of Rs.6,84,500/-, however, at the same time, held that there was breach of policy conditions and therefore, allowed the insurance company to recover the compensation from the appellant. Feeling aggrieved, the appellant is before this Court.

10. I have heard Mr. Dinesh Naik, the learned Counsel for the appellant and Mr. Somnath Karpe, the learned Counsel for the respondent nos. 1, 2 and 3. None appeared for respondent nos. 4 and 5. Perused record.

11. Mr. Naik, the learned Counsel for the appellant submitted that it was Sandeep Rawool, who was driving the truck at the relevant time and not Mallikarjun Dasode. It is submitted that Mallikarjun Dasode was employed as a cleaner and not as a driver and there is absence of master servant relationship and as such, the appellant will not be vicariously

liable. It is submitted that the truck was used during the normal working hours from 6:00 a.m. to 9:30 p.m., after which the truck was parked at the premises of the loading port and the keys used to be handed over to Mallikarjun Dasode for cleaning and greasing. It is submitted that thus, Mallikarjun Dasode was not authorized to drive the truck. It is next submitted that the accident took place at about 23:45 hours, which was much beyond the working hours and thus, Mallikarjun Dasode in no case, can be held to be acting within the authority and the course of his employment, even assuming that he was driving the truck at the relevant time. He, therefore, submitted that the Tribunal was in error in fastening the liability against the appellant.

12. The learned Counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of **Oriental Insurance Company Limited Vs. Premlata Shukla & Others 2007 AIR SCW 3591** and the decision of this Court in the case of **Bainabai Gayakwad & Others Vs. K.M. Ware & Others 2009 (6) ALL M.R. 740**. The learned Counsel has also placed reliance on Section 2(21) of the Motor Vehicles Act, 1988 (Act, for short), which defines a Light Motor Vehicle (LMV) meaning a transport vehicle, the unladen weight of

which, does not exceed 7,500 kgs. It is submitted that the truck, at the time of the accident, was unladen and its unladen weight being less than 7,500 kgs., the truck answered the definition of the LMV and even assuming that Mallikarjun Dasode was driving the vehicle, Mallikarjun Dasode was authorized to drive a LMV.

13. He submitted that there is suppression of material facts by the respondent nos. 1 to 3, in as much as, the deceased had a married brother by name Anant Naik and the said brother alongwith his wife Sunanda Naik, is not made a party to the claim petition. The appellant has filed an application under Order XLI Rule 27 of the Civil Procedure Code (CPC, for short), for production of additional documents, namely, a copy of the Election Card and the Ration Card to show that the deceased has a married brother by name Anant Naik. It is submitted that the deceased was the youngest of all the siblings and thus, it is unlikely and improbable that the respondent nos. 1, 2 and 3 were dependents on the deceased. He, therefore, submitted that the Appeal may be allowed.

14. Mr. Karpe, the learned Counsel for the respondent nos. 1, 2 and 3 has supported the impugned judgment and

award. It is submitted that Mallikarjun Dasode was prosecuted for the offence of causing death by rash and negligent driving, where he pleaded guilty and paid fine and thus, the appellant cannot claim to the contrary. The learned Counsel has pointed out the evidence of Sandeep Rawool, in which, Sandeep Rawool has not supported the appellant. It is submitted that Sandeep Rawool, who is the appellant's own witness has also stated that it was Mallikarjun Dasode, who was driving the vehicle. It is submitted that the claim made by these respondents is not under the Workmen's Compensation Act, so as to invite the requirement of the accident having arisen out of the course of the employment. It is submitted that Mallikarjun Dasode was in the employment of the appellant as a driver and the accident occurred when Mallikarjun Dasode was driving the truck. It is submitted that the Tribunal has rightly accepted that the respondent nos. 1, 2 and 3 are dependents of the deceased and no case for interference is made out. It is submitted that Anant Naik was not dependent on the deceased and as such, he was not made a party. The learned Counsel pointed out that in any case, it is a dispute inter se between the respondent nos. 1, 2 and 3 and Anant Naik and it does not affect the liability of the appellant to pay the compensation.

15. I have considered the circumstances and the submissions made. There is no dispute as to the occurrence of the accident involving truck bearing registration no. GA-01-U-0762 belonging to the appellant. It is also not in dispute that Yogesh Naik, who was one of the occupants of the truck at the relevant time, sustained injuries to which, he succumbed on the spot. It is a matter of record that an offence of rash and negligent driving was registered against the respondent no. 4, Mallikarjun Dasode. It is further a matter of record that he pleaded guilty and accordingly, he was convicted. According to the appellant, the truck at the relevant time, was driven by Mr. Sandeep Rawool (RW-3). Mr. Sandeep Rawool was examined as a witness by the appellant. However, he deposed to the contrary saying that Mallikarjun Dasode was driving the truck. In spite of this, no steps were taken by the appellant to declare him as a hostile witness and to subject him to cross examination. Thus, it is not possible now to accept that the truck was not driven by Mallikarjun Dasode and it was driven by Mr. Sandeep Rawool. Insofar as the aspect of negligence is considered, it has come on record that there was no other vehicle involved in the accident. In a dispute of the present nature, the issue of negligence has to be decided on

preponderance of probability in consonance with principle of *res ipsa loquitur*. Considering the overall circumstances and further having regard to the fact that the respondent no. 4 has pleaded guilty before the learned Magistrate, no exception can be taken to the finding recorded by the Tribunal that the accident occurred due to rash and negligent driving of the respondent no. 4.

16. It is also not possible to accept that there is no master-servant relationship between the appellant and the respondent no. 4. The appellant also admitted that he had not informed the Labour Office of the employment of the respondent no. 4 (respondent no. 1 before the Tribunal) as a cleaner. As rightly submitted on behalf of respondent no. 6, unlike in a case where the claim for compensation is made under the provisions of the Employee's Compensation Act, 1923, where there is a requirement of the accident having arisen out of or in the course of the employment, in a claim under the Motor Vehicles Act, the basis of the liability, is the act of rash and negligent driving of the offending vehicle. The liability to pay the compensation under the Motor Vehicles Act, arises out of the tortuous act of negligence.

17. None of the parties have addressed on the issue of quantum of compensation granted. Even otherwise, I have gone through the reasoning articulated by the Tribunal in para 26 and I do not find that the computation of the compensation suffers from any infirmity.

18. It has come in the evidence of PSI, Caraciolo Po (AW-4) that as per the driving licence, respondent no. 4 was not authorized to drive a transport vehicle and was only authorized to drive a light motor vehicle. The truck was admittedly a goods carrying vehicle. Thus, no exception can be taken to the finding recorded by the Tribunal that there was breach of policy condition as the respondent no. 4 was not authorized to drive the truck. The contention based on Section 2(21) of the Motor Vehicles Act, thus, to my mind, cannot be accepted.

19. Insofar as the contention that one of the married brothers of the deceased has been left out is concerned, this ground was not raised before the Tribunal. Had it been so raised, the Tribunal could have taken appropriate steps to join the brother as party respondent. That apart, the claim for compensation, in this case, is based on loss of dependency and unless and until it is shown that the brother, who has been left

out, was dependent on the deceased, at this stage, it is not possible to accept the contention as raised on behalf of the appellant. In any event, the said brother of the deceased has not come forward to stake any claim. In the given circumstances, I am not inclined to accept the contention at this stage, particularly when the claim petition is of the year 2004, wherein the Insurance Company after the compliance with the impugned award has also recovered the amount from the appellant.

20. The case of **Premlata Shukla & Others** (supra) turned on its own facts. In that case, the FIR was brought on record and the Hon'ble Supreme Court held that the party bringing the same on record, cannot be permitted to contend that the contents of the FIR had not been proved. In that case, the FIR was brought on record for proving the factum of the accident. The Hon'ble Supreme Court, on facts, held that the same could also be relied upon to fix the liability of the owner of the offending vehicle as well.

21. In the case of **Bainabai Gayakwad** (supra), this Court, on facts found that the accident, in which, the deceased lost his life was not due to rash and negligent driving of the

truck and in that view of the matter, the First Appeal filed by the claimants came to be dismissed.

22. I have carefully gone through the impugned judgment and award passed by the Tribunal and I do not find that it suffers from any infirmity so as to require interference. The Appeal is without any merit and is accordingly dismissed, with no order as to costs. Award be drawn accordingly.

C. V. BHADANG, J.

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