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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.58 OF 2012

WITH

CROSS OBJECTION NO.8 OF 2013
IN
FIRST APPEAL NO.58 OF 2012

1. Smt. Maya S. Naik
Wife of late Sunil Naik,
aged 30 years.

2. Smt. Radhabai Y. Naik
Mother of late Sunil Naik,
aged 71 years.

3. Shri Sahil S. Naik
Son of late Sunil Naik,
aged 6 years
Through natural guardian Smt. Maya Naik

4. Shri Suyash S. Naik
Son of late Sunil Naik,
aged 4 years
Through natural guardian Smt. Maya Naik

All residents of House No.303,
Mureli waddo, Narva,
Bicholim Goa 403504 ... Appellants.

Versus

1. M/s Kavlekar Gas Service
Through its authorized representativem
Having office at Sonarbat Saligao

[2. Mr. Hiranna Malgas,
R/o Agar waddo, Calangute,
House no. (not known)]

(R.No.2 stands dismissed for want of prosecution as per Ld. Registrar's order dated 27.06.13)

3. Cholamandalam M/s General Insurance Company Ltd,
2nd Floor, Dempo Trade Centre, Patto,
Panaji-Goa 403001. ... Respondents.

Mr. Gaurish Agni, Advocate *for the Appellants*.

Ms. Barbara Andrade, Advocate *for Respondent No.1*.

Mr. James Lopes, Advocate *for Respondent No.3*.

Coram: M.S. SONAK, J.

Date: 2nd September 2021.

ORAL JUDGMENT:

1. Heard Mr. Gaurish Agni for the Appellants, Ms. Barbara Andrade for Respondent No.1 (owner of the vehicle), and Mr. James Lopes for Respondent No.3 (Insurance Company).

2. The challenge in this petition is to the Judgment and Award dated 23.11.2011 by which the Motor Accident Claims Tribunal (MACT) after determining the compensation of ₹10,24,805/-, declined to award the same to the Appellants-Claimants on the ground that the Appellants-Claimants failed to establish any rashness or negligence on the part of Respondent No.3 (driver) of the vehicle involved in the accident.

3. Mr. Agni, learned Counsel for the Appellants submits that based on the evidence on record, it was quite apparent that the accident was caused on account of rash and negligent driving of the Swaraj Mazda Tempo bearing No. GA-01-Z-0117, which not only resulted in the accident but also the instant death of Sunil Naik. He submitted that the panchanama has been misconstrued by the MACT and the inferences drawn therefrom are not legally sustainable. He submits that in this case even though the driver was duly served, he did not bother to file any written statement denying either his involvement in the accident or even the pleadings as to his rashness and negligence which resulted in the accident.

4. Mr. Agni submits that Sunil Naik was driving a two-wheeler (scooter) and Respondent No.3 was driving a Swaraj Mazda Tempo, which was a much larger and heavier vehicle. He submits that in such circumstances, the responsibility and consequently the duty of care which the law casts on the driver of the larger and heavier vehicle was much greater. He submits that this aspect has not even been adverted to by the MACT. He submits that in this case, an FIR was lodged against the driver and there is evidence that the driver was absconding. He, therefore, submits that the finding that the driver was not rash and negligent warrants interference having regard to the principle that rashness and negligence in such matters have to be proved only on the touchstone of preponderance of probabilities.

5. Mr. James Lopes, learned Counsel for the Insurance Company contests the contention of Mr. Agni. He submits that in this case there is no explanation as to why the pillion rider who could have been an eyewitness to the accident was never examined. He submits that no efforts were also made to summon this pillion rider. He submits that in such a situation, an adverse inference is liable to be drawn. He submits that the panchanama which has been considered by the MACT shows that Sunil Naik who was riding the scooter was in the center of the road. He submits that from this the MACT has drawn the correct inferences that no rashness or negligence could be attributable to the driver. In the alternate, he submits that this is a case of contributory negligence.

6. Mr. James Lopes submitted that the Insurance Company has filed cross-objections because the payments, in this case, were effected only on 06.01.2009 and the Insurance Policy, therefore, commenced from 06.01.2009. This accident took place on 05.01.2009 and the Insurance Company was therefore not liable to indemnify the owner for the claim. He submits that since the MACT has not appreciated this aspect, the cross-objections are liable to be allowed.

7. Ms. Andrade, learned Counsel for the owner supports the contention of Mr. Lopes on the aspect of absence of evidence of rashness or negligence on the part of the driver. However, she submits that the cover-note, in this case, makes it clear that the date of issue of the policy was 03.01.2009 and the policy became effective from 10:30 a.m. on 03.01.2009. She, therefore, submits that if at all it is held that some compensation is payable to the claimants, it will be the Insurance Company who will have to bear the same.

8. The rival contentions no fall for my determination.

9. The first issue to be determined in this appeal is whether the Appellants / Claimants have succeeded in establishing that the accident which resulted in the death of Sunil Naik on 05.01.2009 when he was proceeding on his Eterno scooter bearing No. GA-04-B-2869 from Pilerne to Saligao was on account of the rash and negligent driving of the driver of Swaraj Mazda Tempo bearing No. GA-01-Z-0117.

10. There can be no dispute that the Claimants have to prove the aforesaid aspect by applying the test of preponderance of probabilities. There is no requirement in such matters for proving the aspect of rashness and negligence beyond a reasonable doubt. This position has been made clear by the Hon'ble Supreme Court in the case of ***Mangla Ram vs. Oriental Insurance Co. Ltd. & Ors.***[1]. In this case, the Hon'ble Supreme Court approved the Award made by the MACT taking a holistic view by referring to the statements of the witnesses forming a part of the charge-sheet, FIR, jeep seizure report which had stated that the jeep in question was involved in the accident.

11. In this case, neither the driver nor the owner of the Swaraj Mazda Tempo who were impleaded as Respondents before the MACT chose to file any written statement denying the allegations in the Claim Petition about the involvement of the Tempo in the unfortunate accident or for that matter about the rashness or negligence on the part of the driver. In particular, the driver, though served, did not file any written statement

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and contest the allegations of rashness and negligence. True, the mere fact that no such written statement was filed does not relieve the claimants from establishing the aspect of rashness and negligence by leading proper evidence. But the fact that no written statement was filed denying either the factum of the accident or the involvement of the vehicle is significant and the same should have been considered by the MACT in this case.

12. The MACT has quite correctly looked into the scene of the accident panchanama at Exhibit 32 and the sketch annexed to the panchanama. This material was required to be taken into consideration by the Tribunal having regard to what is set out in *Mangla Ram* (supra). However, the inferences drawn from this material do not appear to be correct.

13. The MACT has concluded that because there was a road width of 2.60 meters available for Sunil Naik to pass, there was no reason for him to drive in the middle of the road. Based on this, the MACT has concluded that it cannot be said that the offending vehicle was on the wrong side.

14. According to me, this was not the proper manner of assessment of the evidence on record. In the first place, there is a reference to a kutcha road on the side and it was not reasonable to expect Sunil Naik to drive either on the kutcha road or closer to the kutcha road. Secondly, driving on the wrong side is not the sole attribute of rashness and negligence. The material on record indicates that there was virtually a head-on collision resulting in the instantaneous death of Sunil Naik after he was crushed under the Tempo. Even the pillion rider was thrown off with substantial injuries. The scooter was also flung at some distance from the point of impact. Aii this is indicative of the rashness and negligent manner in which the tempo was driven.

15. The Swaraj Mazda Tempo is undoubtedly a much larger and heavier vehicle as compared to the Eterno scooter and therefore the duty of care that was expected from the driver of such a large and heavy vehicle was much higher. All such inferences which ought to have been legitimately drawn from the scene of accident panchanama and the sketch were not drawn by the MACT and therefore, the finding that there was no rashness or negligence on the part of the driver is required to be interfered with.

16. The MACT has also failed to appreciate that this is a case where even the Police, based on their investigation deemed it appropriate to register an FIR against the driver of the Swaraj Mazda Tempo alleging rashness and negligence. Mr. Agni pointed out that there is material in this case that establishes that the driver was absconding after the accident. The medical evidence also points out the instantaneous death of Sunil Naik on the spot. The panchanama also refers to blood at the spot. Upon cumulative consideration of all such material, rashness and negligence on the part of the driver was established by the Claimants, particularly, having regard to the test of preponderance of probabilities. Therefore, the Tribunal was not justified in answering this issue against the Claimants.

17. The second issue which arises for determination concerns the cross-objections filed by the Insurance Company.

18. The Tribunal on this point has held against the Insurance Company by observing the following:-

> "*25. Issues no.4 and 5:- The respondent has not led any evidence to prove this issue. The claimant Mrs. Maya at Exb 31 has produced a cover note issued by respondent no.3, it was issued on 3.1.2001. It is also endorsed there that it is valid for issuance upto 31.1.2009. The accident occurred admittedly, on 6.1.2009 i.e. within the validity of said cover note. No other evidence is produced by the respondent no.4 to prove that policy became effective from 6.1.2009. In the absence of any evidence to that effect, it has to be held that it was valid as on the date of accident. The respondent no.4, therefore, couild have been liable under said cover note. Issues no.4 and 5 are, accordingly, decided in the negative.*"

19. With the assistance of the learned Counsel for the parties, I have perused the cover note which indicates that the Insurance Policy was issued on 03.01.2009 at 10:30 a.m. The cover note itself states that the date of commencement of the Insurance Policy is 10:30 a.m. of 03.01.2009 and such policy, was valid up to 31.01.2009. Therefore, when the accident took place on 05.01.2009, the Insurance Policy was very much in force. This is sufficient to dismiss the cross-objections on the part of the Insurance Company.

20. According to me, from the material on record, it cannot be said that this is a case of contributory negligence. Since it was the responsibility of the driver of the larger and heavier vehicle to drive with greater caution, it is difficult to return any finding of contributory negligence merely because the sketch indicates the point of impact as the center of the road. If a larger vehicle such as a Swaraj Mazda Tempo rushes against a two-wheeler from the opposite direction, the reaction of the driver of a small vehicle like a scooter can never be uniform or predictable. Therefore, based on the reasoning of the MACT, it is neither possible to hold that there was no negligence on the part of the driver of the Tempo nor can this case be one of any contributory negligence.

21. Quite correctly, there was no challenge to the determination of the compensation of ₹10,24,805/- by the MACT. This is a case where the Claimants are the widow, the mother, and the two children of late Sunil Naik who were aged three and five years respectively when the Claim Petition was filed. The determination of the compensation is based on the evidence on record including the evidence of the employer of late Sunil Naik.

22. This appeal is liable to be allowed and is hereby allowed. The Claimants are held entitled to compensation of ₹10,24,805/- together with interest thereon at the rate of 6% from the date of registration of the Claim Petition i.e. 08.01.2010 till the date of effective payment.

23. Though the owner and the Insurance Company are and held to be jointly and severally liable, it is Respondent No.3 (Insurance Company) that will have to now satisfy this Award by making payments to the Claimants within a period of a maximum of six weeks from today.

24. The compensation amount will have to be apportioned between the Claimants *inter se* in the following manner:-

a) 50% of the compensation amount will have to be paid to the widow Maya S. Naik;

b) 10% of the compensation amount will have to be paid to the mother Smt. Radabhai Y. Naik;

c) 20% of the compensation amount will have to be deposited in the name of Sahil S. Naik in a suitable fixed deposit account. This amount can be paid to Sahil S. Naik once he attains majority;

d) 20% of the compensation amount will have to be deposited in the name of Suyash S. Naik in a suitable fixed deposit account. This amount can be paid to Sahil S. Naik once he attains majority.

25. The appeal is disposed of in the aforesaid terms with no order as to costs.

M.S. SONAK, J.