

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.222/2019

1. Kusumbai wd/o Manoharrao Kuhite,
Aged about 58 years, Occ.-Household,
2. Rajendra s/o Manoharrao Kuhite,
Aged about 32 years, Occ.-Labour.

Both R/o.-Mangli, Post- Mohegaon,
Tah- Hingana, Distt-Nagpur.

...APPELLANTS
Ori. Appellants on R.A.

VERSUS

The Controller, M.S.R.T.C.,
Railway Station Road, Sitabuldi, Nagpur

...RESPONDENT
Org. respondent on R.A.

Shri B.S. Mandhare, Advocate h/f Shri P.S. Mirache, Advocate for appellants.
Mrs. Bhagyashri Reddy, Advocate h/f Shri V.H. Kedar, Advocate for respondent.

CORAM : PUSHPA V. GANEDIWALA, J.
reserved on : 05-10-2021.
pronounced on : 15-11-2021.

J U D G M E N T

Admit.

2. Heard finally with the consent of learned counsel appearing for both the sides.

3. This is the claimants appeal filed against the judgment and award dated 29-11-2016 passed by the Member, Motor Accident Claims

Tribunal-I, Nagpur in Claim Petition No.1071/2011, whereby the learned Tribunal has dismissed the Claim Petition mainly on the ground that the petitioners have failed to prove the death of the deceased-Manoharrao s/o Gulabrao Kuhite in an accident caused due to rash and negligence driving of motor vehicle S.T. bus bearing registration No.MH-12-AV-9227.

4. The facts in brief, leading to prefer the present appeal, may be stated as under :-

On 24-05-2011, deceased Manoharrao was travelling by motor vehicle S.T. bus bearing registration No.MH-12-AV-9227 from Hingna towards Mohagaon (Shilpi). It is the case of the appellants that due to the sudden application of breaks by the driver of the S.T. bus, deceased fell down from the S.T. bus and sustained injuries which later on resulted into his death on the same day. The wife and son of the deceased filed a Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (for short, 'M.V. Act'), and claimed compensation of Rs.7,21,000/-. However, the appellants restricted their claim for the purposes of Court fees at Rs. 1 lakh. It is alleged that the said accident occurred due to rash and negligent driving of the driver of the offending vehicle i.e. S.T. bus bearing registration No.MH-12-AV-9227. A crime for the offences punishable under Sections 279, 338, 304 A of

the Indian Penal Code was also registered against the driver of the vehicle. It is stated that at the relevant time, the deceased was earning Rs.70,000/- per annum from his agricultural work. He was the sole earning member of the family.

5. The respondent-Corporation in response to the notice issued to them filed their written statement at Exhibit-13. The respondent-Corporation admitted the occurrence of accident on 24-05-2011. However, the respondent-Corporation denied that the accident was occurred due to rash and negligent driving of the driver of S.T. bus in which the deceased was travelling at the relevant time. It is the specific pleading of the respondent-Corporation that the offending bus was going to Wardha from Nagpur via Hingna Road. When the aforesaid S.T. bus reached Hingna Bus Stop, three passengers boarded the S.T. bus from the front door and were standing on the front entrance of the bus. They were talking loudly and were giving kicks to each other and in that event the deceased's hand came on the handle lock of the front door of the S.T bus and due to which the front door opened and the deceased fell down on the road and sustained head injury. The respondent-Corporation further states that the said accident is occurred only due to the negligence of the deceased. The respondent-Corporation also denied the earnings of the deceased from his

agricultural work and denied their responsibility to pay compensation to the claimants.

6. On the basis of the pleadings of both the parties, the learned Member of the Tribunal framed the following issues :-

"(i) Whether the petitioners prove that Manoharrao s/o Gulabrao Kuhite died in an accident that occurred due to rash and negligent driving of S.T. Bus No.MH-12-AV-9227?

(ii) Whether the petitioners are entitled for the compensation, as prayed? "

7. In order to substantiate the claim, claimant no.1-Kusumbai wd/o Manoharrao Kuhite examined herself at Exhibit-15 and reiterated her contention as stated in her Claim Petition. She states that at the relevant time the age of the deceased i.e. her husband was 50 years and due to sudden death of her husband they have suffered financially, physically and mentally. This witness has brought on record inquest panchanama (Exhibit-18), Spot Panchanama (Exhibit-19) and *Post mortem* report (Exhibit-20).

8. The claimants also examined one Bhanudas Chivane, Head Constable from Police Station Hingna, at Exhibit-26, to prove station diary entry dated 25-05-2011(Exhibit-27) and Merg (A.D. No.34/2011) dated 27-05-2011 (Exhibit-28) from the record of Police Station

Hingna. Both the witnesses of the claimants were cross examined by the learned Counsel appearing on behalf of the respondent-Corporation.

9. On the other hand, the respondent-Corporation examined Conductor of the S.T. bus by name Durgesh Nandanwar at Exhibit-30.

10. On appreciation of oral and documentary evidence on record, the learned Member of the Motor Accident Claims Tribunal-I, Nagpur, recorded the findings that the claimants have failed to prove the negligence on the part of the driver of the offending vehicle i.e. S.T. Bus No.MH-12-AV-9227 and therefore dismissed the claim petition. This judgment of the Tribunal is challenged in this appeal by the appellants/claimants before this Court.

11. The following points fall for consideration of this Court :

- (i) Whether the claimants have proved the negligence of the driver and conductor of the offending vehicle S.T. Bus No.MH-12-AV-9227?
- (ii) Whether the claimants are entitled for compensation?

12. Heard Shri B.S. Mandhare, learned Counsel h/f Shri P.S. Mirache, Advocate for the appellants and Mrs. Bhagyashri Reddy,

learned Counsel h/f Shri V.H. Kedar, Advocate for the respondent-Corporation.

13. Shri Mandhare, learned Counsel appearing for the appellants/claimants reiterated the case of the claimants before the Tribunal and submitted that it was the duty of the conductor and driver of the S.T. bus to take care of the passengers seated in the bus. In the instant case, there was lack of co-ordination between both of them and the accident occurred due to the negligence of employees of the respondent-Corporation. The learned Counsel for the appellants/claimants drew the attention of this Court to the Station Diary entry (Exhibit-27) and submitted that the aforesaid information of accident was given by the driver of the bus to the Police Station Hingna that one passenger fallen down from the bus and sustained injuries.

14. Further, the learned counsel for the appellants read out the evidence of Durgesh Nandanwar, the conductor of the offending S.T. bus, led by the respondent-Corporation and submitted that the testimony of this witness indicates that from Hingna bus stop three passengers under the influence of alcohol boarded the bus and they were jostling near the front door and in that process one of them touched the latch of the door, due to which the door opened and

passenger fell down from the running bus. The learned Counsel further states that this witness for first time before the Court deposed that the said passengers were under the influence of alcohol. The learned counsel emphatically submitted that it was the duty of the conductor of the bus to take care of the passengers and to avoid occurrence of any untoward incident in the bus.

15. The learned Counsel for the appellants states that in the instant case the accident is caused only due to the absence of co-ordination between the conductor and the driver of the bus which itself shows the act of negligence of the driver. In support of his submission, learned counsel for the appellants relied on the following authorities of the Hon'ble Apex Court, which are as under :-

- (i) *Samir Chanda vs Managing Director, Assam State Transport Corporation. (1998(6) SCC 605).*
- (ii) *Pallavan Transport Corporation Ltd vs M. Jagannathan (I (2001) ACC 342 (SC)).*
- (iii) *Kirti and another vs Oriental Insurance Company Ltd. (2021 SCC Online SC 3)*

16. *Per contra*, learned Counsel Mrs. Reddy appearing on behalf of the respondent-Corporation, while reiterating the defense of the Corporation in their written statement submitted that the claimants

have failed to prove the negligence on the part of the conductor and driver of the bus. As the Claim Petition is filed under Section 166 of the M.V. Act, it is necessary for the claimants to first establish the negligence on the part of the driver and conductor of the bus to claim any compensation. The learned Counsel for the respondent-Corporation further submits that the passengers who were boarded in the bus from Hingna bus stop were under the influence of alcohol and they were pushing each other and in the said process, the hand of the deceased came on handle lock of the bus of the front door, due to which the front door got opened and the passenger fell down. In these circumstances, according to the learned Counsel, negligence of the deceased cannot be attributed to the driver and conductor of the bus. The learned Counsel in support of her submissions placed reliance on the following authorities :-

- (i) *Surinder Kumar Arora and another vs Dr. Manoj Bisla and others* (AIR 2012 SC 1918).
- (ii) *Pukh Raj Bumb vs Jagannath Atchut Naik and others.* (2014(4) M.L.J. 447).
- (iii) *Andrew Fernandes vs Pandurang Datta Chodankar and another* (2010(5) Mh.L.J. 156).
- (iv) *Kalpna Rajendra Kothari and others vs Santosh Arvind Jangam and another,* (2020(2) Mh.L.J. 561).

17. I have considered the submissions made on behalf of both

the sides. At the outset, there is no dispute with regard to occurrence of the accident involving motor vehicle S.T. Bus No.MH-12-AV-9227 and the death of the deceased. The question would be whether in the facts and circumstances of the present case, the claimants would be responsible to prove the negligence on the part of the employees of the respondent or whether the respondent-Corporation has to prove that the conductor and driver on the bus at the relevant time were not negligent, the facts being in their special knowledge.

18. The claimant no.1, who examined herself, admittedly, is not the eye witness to the incident. Her testimony is only relevant on the aspect of death of the deceased, age and income of the deceased. The testimony of the witness of the respondent-Corporation i.e. the conductor who was attending the bus at the relevant time, is infested with doubt for more than one reasons; firstly he being the conductor, he would not assert negligence on his part. Secondly, the story he tried to make believe this court that the three passengers under the influence of alcohol boarded the bus, for the first time he deposed in the court on 07-11-2016 while the date of accident is of 24-05-2011 i.e. after five years. A perusal of the station diary entry (Exhibit-27) would indicate that the driver of the bus informed the Police Station Hingna about the occurrence of accident on 24-05-2011 that one passenger fell down from the bus and he was admitted in the hospital. There is nothing

recorded in the police papers during marg enquiry about the story as narrated by the witness before the court. Thirdly, apart from the respondent's witness i.e. conductor of the bus by name Durgesh Nandanwar (Exhibit-30), the respondent-Corporation has not examined any other witness. It is not expected from claimant no.1 i.e. the widow of the deceased, who was neither the eye witness of the incident nor connected with the respondent, to bring before the Court any evidence which is not within her knowledge. She could only bring before this Court the Police papers. She is absolutely unaware of the cause of the accident. The circumstances under which the accident had occurred are within the special knowledge of the driver and conductor of the bus. Therefore, the presumption of negligence is running against them on the principle of *res-ipsa-loquitur*. Normally, the passengers do not fall from the running bus. The conductor is always there as an attendant and in-charge of the bus to take care of any untoward incident in the bus. It is for the Corporation to prove that the driver and the conductor were not negligent in performing their duties. No supporting evidence has been adduced by the Corporation to rebut the presumption. Neither driver of the bus nor any passenger who was travelling at the relevant time, have been examined by the respondent-Corporation in support of their defense. The testimony of the conductor-witness is highly doubtful. In this context, it would be relevant to take note of the case of

***Krishna Bus Service Ltd. v. Mangali*, (1976) 1 SCC 793 at page 796**

wherein the Hon'ble Supreme Court with approval recorded the observation of the High Court, which reads thus:

"9. The High Court further reinforced its finding with an adverse inference against the defendants drawn from the fact that the driver (Defendant 3) who knew best the relevant facts, did not appear in the witness-stand to explain the circumstances in which the accident occurred. In this connection it observed:

"Buses do not, in such circumstances, normally and in the ordinary course, turn turtle. The transaction thus speaks for itself: in other words res ipsa loquitur, and in the absence of explanation by Defendant 3 and his employer, Defendant 1, the established facts and circumstances accompanying the fatal injury caused to the deceased clearly raise a presumption or at least permit an inference of negligence on the part of Defendant 3. The court below was thus clearly wrong in negating negligence on the part of Defendant 3

I would accordingly reverse the conclusion of the court below on this point and hold that the accident was due to the negligence of Defendant 3 and was not inevitable which could not be obviated by ordinary care, caution and skill on his part."

19. Furthermore, it is the case of the Corporation that the deceased was under the influence of alcohol. A perusal of post mortem report at Exhibit-20, does not indicate the presence of alcohol in the stomach or intestine of the deceased. The trial court has rightly noticed this fact in the impugned judgment. The conductor of the bus is supposed to be the in-charge of the bus. His testimony is silent as to what due diligence he had shown or as to what reasonable care he had

taken to avoid the accident when he noticed three passengers under the influence of liquor were jostling each other, near the front door of the bus. In this context, the question for consideration before the Hon'ble Apex Court in **Pallavan Transport Corporation Ltd** (supra) was-

"whether on the facts and circumstances of this case, conductor and driver were negligent or not which resulted into injury of the claimant".

20. The Hon'ble Apex Court has observed that-

"It is always important to have coordination between the conductor and the driver, whenever passengers start getting down or are led to get down, to see that before any signal is given by the conductor, in any form, as normally there is bell in most of the buses which conductor rings signaling the driver to start the bus, the driver should not restart the bus. In the absence of coherence or lack of coordination between the two it is bound to result into accident, which has happened in the present case."

21. The police papers which were prepared on the report of the accident by the driver of the vehicle, are absolutely silent on the aspect of the negligence on the part of the deceased. The claimants, on the basis of material on record i.e the station diary entry (Exhibit-27) and other Police papers could prove their case on the touch-stone of preponderance of probabilities. The defence as put forth by the respondent-Corporation for the reasons stated above, appears to be

doubtful. Even assuming that three passengers were jostling each at the front of door of the bus, it was the duty of the conductor to report the same to the driver, in fact, the front door being beside the driver's seat, he could have immediately taken steps and could have avoided the accident. It appears that neither the driver nor the conductor of the S.T. bus acted diligently to avoid the accident. This fact clearly indicates negligence on their part. The respondent is liable to pay the compensation. The authorities cited by the learned counsel for the respondent are distinguishable on facts and law. None of the authorities discuss the aspect of principle of *res ipsa loquitor*.

22. Now, the question is with regard to the amount of compensation the claimants are entitled to. The appellants/claimants claim that the deceased was earning Rs. 70,000/- per annum from his agricultural field. The learned member of the Tribunal has not considered the issue of age and income of the deceased at the relevant time, as the learned member answered the issue of negligence against the deceased. This Court has discussed in the earlier part of this judgment that the respondent Corporation has failed to prove that its employees were not negligent for the impugned accident and therefore it is necessary for the Tribunal to record the finding on the age and income of the deceased to ascertain the earning capacity of the deceased and then to calculate the conventional and non-conventional

heads in terms of the judgments of the Hon'ble Apex Court.

23. In the result, appeal succeeds and is allowed.

1. The judgment and award of the Motor Accident Claims Tribunal is quashed and set aside.
2. The matter is remanded back to the learned member of the Tribunal, Nagpur to decide the amount of compensation in accordance with law and the material on record.
3. The same shall be decided within a period of one month from the date of communication of this order to the learned member of the Tribunal.
4. The parties to appear before the learned Member of the Tribunal on 1st December, 2021.
5. In the above terms, the appeal stands disposed of. No order as to costs.

JUDGE