

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

FIRST APPEAL NO.189/2020

The Branch Manager,
The SBI Gen. Insurance Co.Ltd.,
148, 3rd Floor, above SBI Ramdaspath Branch,
Thapar Enclave, Maharajbagh road,
Ramdaspath, Nagpur.

...APPELLANT
Ori. Res.No.2 on R.A.

VERSUS

Deceased
Ori. Peti.no.1)

1. Vasudeo Mahadeo Dhole
Aged 69 years, Occ.-Retired

(Legal heir of respondent no.1)

Amendment
carried out as
per Court's
order dated
02-08-2021

- 1A. Vijay s/o Vasudeo Dhole,
aged 42 years, Occ.-Private Business,
R/o.-House No.98, Line No.9, Jyogi Nagar,
Rameshwari Ring Road, Nagpur.

(Ori peti.
no.2 on R.A.)

2. Sheela Wasudeo Dhole,
Aged 64 years, occ.- Household,
Both Respt. 1 and 2, R/o.-98, Line No.9,
Jogi Nagar, Rameshwari Ring Road, Nagpur.

(Ori
Res.No.1)

3. Narendra P. Jichkar,
Aged about 49 years, Occu. Owner,
R/o.-9, Kinkhede Layout, In front of Hislop College,
Civil Lines, Nagpur.

...RESPONDENTS

Mrs. Mrunal Naik, Advocate assisted by Ms Meenal Patil,
Advocate for appellant.
Shri B.S. Mandhare, Advocate h/f Shri P.S. Mirache, Advocate
for resp. nos.1 and 2.

CORAM : PUSHPA V. GANEDIWALA, J.
DATE : 06-10-2021.

ORAL JUDGMENT

This is the claimants appeal, preferred against the judgment and award dated 22-07-2019 passed by the Member, Motor Accident Claims Tribunal-4, Nagpur in Claim Petition No.748/2015, whereby the learned member of the Tribunal directed the appellant-Insurance Company so also the owner of the offending Trailer bearing registration No.MH-31-CB 6244, to pay compensation of Rs. 7,84,000/- to the claimants with interest @ 7.5 % per annum from the date of petition till its realization.

2. I have heard learned Advocate Mrs. Mrunal Naik assisted by Ms. Meenal Patil, Advocate appearing for the appellant-Insurance Company and Shri Mandhare, learned Advocate appearing on behalf of the claimants/respondent nos. 1 and 2.

None appeared on behalf of respondent no.3 i.e. the owner of the offending Trailer bearing registration No.MH-31-CB 6244, despite due service.

3. Learned Advocate Mrs. Mrunal Naik appearing on behalf of the appellant restricted her argument with regard to the question of contributory negligence. It is submitted that the deceased who was

riding the motorcycle bearing registration no.MH-49-K-6681 was negligent in driving the motorcycle as he could not see the Trailer bearing registration No.MH-31-CB 6244 which was parked towards extreme left of the highway and it was the time of early morning. It is further submitted that the learned member of the Tribunal erred in holding that the accident occurred during the period between 12.00 hours and 5.00 hours on 26-03-2015. The learned Counsel for the appellant urged to record the finding that the deceased was negligent in driving the motorcycle and therefore he himself was responsible for the alleged accident.

4. In support of her submissions, the learned Counsel for the appellant relied on the following authorities :

- (i) *Shamanna and another vs The Divisional Manger, the oriental Insurance Co. Ltd. and others ((2018) 9 SCC 650)*
- (ii) *Oriental Insurance Co. Ltd vs Pritam Rajiv Shetty and another, (2006(3) Mh.LJ 237)*
- (iii) *The Oriental Insurance Co. Ltd vs Smt. Surinder Kay and others (2013 ACJ 2781)*
- (iv) *A.P.S.R.T.C. and another vs K. Hemalatha and others, ((2008) 6 SCC 767)*
- (v) *Raj Rani and others vs Oriental Insurance Co. Ltd and others ((2009) 13 SCC 654)*

5. Learned Advocate Shri Mandhare appearing on behalf of

respondent nos. 1 and 2/claimants, while supporting the impugned judgment and award of the learned Tribunal read out the relevant documents from the record and submitted that the Trailer bearing registration No.MH-31-CB 6244 was parked without parking lights or tail lights and therefore deceased could not notice the offending Trailer which was parked on road and struck on it from behind during the dark hours of the early morning and therefore negligence could not be attributed on the part of the deceased.

6. The learned Counsel for respondent nos. 1 and 2 relied on the following authorities in support of his contention:

- (i) *Bharti Aza General Insurance Company Ltd vs Smt. Alka wd/o Rajesh Pillewar and others (2020(1) Mh.LJ 887)*
- (ii) *Divisional Manager, National Insurance Company Limited vs Shafinjaha d/o Jakirkhan (2019(1) An.WR 527)*

7. I have considered the rival submissions canvassed on behalf of both the learned Counsel.

8. The only point falls for consideration of this Court is as under :-

"Whether the contributory negligence can be attributed to the deceased?"

9. At the outset, there is no dispute with regard to the occurrence of the accident involving offending Trailer bearing registration No.MH-31-CB 6244 and the death of the deceased in the said accident which was occurred on 26-03-2015. Secondly, the appellant-Insurance Company also does not dispute that at the relevant time the offending Trailer bearing registration No.MH-31-CB 6244 was insured with them.

10. The claimants are the parents of the deceased who was 28 years old at the time of accident and was performing job with Sahas Vyasan Mukti Kendra, (Sahas De-addiction Centre), Manewada and earning Rs.6000/- per month. The witness/claimant i.e. mother of the deceased namely Sheela Dhole (Exhibit-22), admittedly is not the eye witness to the incident. As per the Police record, the report of the accident was lodged with Police Station Sonegaon at 5 o'clock on 26-03-2015 against the driver of the offending Trailor for the offences punishable under Sections 279 and 304-A of the Indian Penal Code. The contents of the spot panchanama (Exhibit-27) which was performed at 5.15 hours on 26-03-2015 would indicate that the spot of incidence is north-south central road i.e. National Highway, in front of Shere Punjab Dhaba and on the spot one Trailer bearing registration No.MH-31-CB 6244 is found parked towards western side. The *panchas*

and the police did not notice any reflector or parking lights to the offending vehicle/Trailer. The driver of the offending Trailer was not present on the spot. Injured was found with jaw and head injuries. The injured (i.e. deceased) was later on sent to one private hospital at Khapri. The injured succumbed to injuries during treatment.

11. The Inquest panchanama (Exhibit-28) reflects the head injury. The *Post Mortem* report (Exhibit-29) reveals the cause of death as "Injury to vital organs". The First Information Report was lodged at 5 o'clock. This would indicate that the accident must have occurred prior to 5.00 am in the morning. The offending vehicle was parked without any indicator or parking lights open. There was no attendant to the vehicle. The learned Member of the Tribunal rightly observed that the offending vehicle was parked towards left side of the National Highway and the deceased would also have driven towards left and therefore he could not have noticed the parked vehicle and dashed against the vehicle from behind. I do not find any infirmity in the conclusion reached by the learned Member of the Tribunal that the accident must have had occurred during 12.00 hours to 5.00 am in the morning. The submission of the learned counsel Mrs. Naik appearing on behalf of the appellant-insurance company that there was a broad day light and the deceased should have taken reasonable care while driving the vehicle, cannot be accepted. The findings recorded by the

learned Member of the Tribunal do not appear to be perverse or contrary to the evidence brought on record.

12. The judgments (*cited supra*) relied on by the learned Counsel appearing on behalf of the appellant-Insurance Company are distinguishable on facts. In the case of **Raj Rani and others** (*supra*) there was no issue that the accident had occurred during dark hours of the night/early morning on the fateful day. In the said case, the Hon'ble Apex Court has laid down the ratio that "negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence", it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an author of his own wrong".

13. In the case of ***Shamanna*** (*supra*) there was no issue of contributory negligence and the discussion in the judgment is only on the point of "pay and recover". Therefore, this case would not be of any help to the learned counsel for the appellant. In the present case, considering the facts which have been brought on record, as stated earlier, the contributory negligence cannot be attributed to the deceased.

14. The reliance is placed by learned Counsel Shri Mandhare for the respondent nos. 1 and 2 on the ratio in the case of **Bharti Axa General Insurance Company Ltd** (supra), wherein this Court in the similar facts and circumstances recorded that the precaution as required was not taken by the truck driver when truck was parked on the road and in this case also the trailer was parked on the road without any attendant and as noticed by the Police in the spot panchanama, the parking lights and the reflectors were also not on. Therefore, considering the observations made in this judgment so also the overwhelming evidence brought on record against the driver of the offending trailer, the contributory negligence as alleged by the learned counsel cannot be attributed against the deceased. I do not find any merit in this appeal. The learned member of the Tribunal has correctly appreciated the evidence on record and correctly reached the finding of negligence on the part of the driver of the offending vehicle. No interference is warranted.

15. For the reasons stated above, the First Appeal fails and the same being bereft of any merit deserves to be dismissed, which stands dismissed accordingly. No order as to costs.

JUDGE