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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.93 OF 2016

National Insurance Company Ltd.
Through its Manager, having Branch
Office at 1st Floor Town Centre,
Bicholim,Goa403504.

... Appellant

Versus

1. Mr. Tulshidas L. Kerkar,
s/o Shri Laxman Kerkar,
aged 47 years, service.

2. Miss. Teja Tulshidas Kerkar,
d/o Shri Tulshidas Kerkar,
aged 21 years, Student.

3. Master Minnath Tulshidas Kerkar
s/o Shri Tulshidas Kerkar,
aged 12 years, Student.
(Being minor, represented by his
father and natural guardian the
Respondent no. 1)

All residents of House no. 46-2,
Rehabilitation Colony, Kelwade,
Ravona, Sattari, Goa.

4. Mr. Nagesh Appa Swar,
s/o Shri Appa Swar, major in age,
r/o house no. 269, Thane, Sattari - Goa.

5. Oriental Insurance Co. Ltd.
Through its Manager, Gouveia,
3rd Floor, Helidoro Salgado Road,
Panaji - Goa.

6. Md. Amer Sayeed,
s/o Md. Abdul Hakem Sayeed,
r/o Sekmaijim, Khunoll Makha,
Monuma Awang Lei Kai and presently
residing at Chandani Chowk Road,
Bangalore - 51.

7. Mr. Dhiraj D. Bhide,
s/o Damodar Bhide, r/o House No. 36,
Van, Bicholim, Goa 403504.

.... Respondents

Mr. Amey Kakodkar with Mr. P. Shirodkar, Advocate for the Appellant.

Mr. Rui Gomes, Advocate for Respondent Nos.1 to 3.

Mr. Santosh Bharne, Advocate for Respondent No.5.

CORAM: M. S. SONAK, J.

DATE : 6th OCTOBER 2022

ORAL JUDGMENT :

1. Heard learned Counsel for the parties.
2. The Appellant – Insurance Company, the insurer of Tata tipper truck bearing registration no.GA-04-T-1769 challenges the judgment and award dated 30.10.2015 in Claim Petition No.56/2011 made by the Motor Accident Claims Tribunal, North Goa, Mapusa (Tribunal).

3. By the impugned award, the truck driver, the truck owner and the Appellant–Insurance Company have been directed to pay additional compensation of ₹31,83,000/- along with interest at the rate of 9% per annum from the date of the claim petition to the claimants on account of the death of Kalpana Tulshidas Kerkar in a vehicular accident that occurred on 14.02.2011. Kalpana was travelling in a minibus bearing registration no.GA-01-U-2603. There was a head-on collision between the minibus and the tipper truck. The accident, *among other things*, resulted in the death of Kalpana Kerkar and the bus driver Doulat Rane.

4. Mr Kakodkar, learned Counsel for the Appellant, submits that the evidence on record overwhelmingly points to the negligence of Doulat Rane, the bus driver. He submits that even FIR was filed against said Rane, but no criminal prosecution could be launched because of his demise. He points out the evidence on record, which establishes how the tipper truck was on its right side and its driver was not rash or negligent. Based on all this, Mr Kakodkar submits that the finding of rashness and negligence on the part of the tipper truck driver warrants interference.

5. Mr Kakodkar submits that no adverse inference should have been drawn for the alleged failure to examine the tipper

truck driver. He points out that at least two summons were issued for his examination, but since the address furnished was insufficient, the summons could not be served. Furthermore, he submitted that even the Tata tipper truck owner did not cooperate. He proposes that upon consideration of these factors, no adverse inference should have been drawn against the Appellant.

6. Mr Kakodkar submits that a composite negligence case was made between the Tata tipper truck driver and the minibus driver Doulat Rane. Based on this, without prejudice, respondent no.5 – Insurance Company had even settled two awards in the Lok Adalat by agreeing to pay 50% of the compensation. Mr Kakodkar, in the alternate, submits that the same formula be applied in the present case as well. He relies on *Khenyei V/s. New India Assurance co. Ltd. & Ors.*¹.

7. Mr Kakodkar submits that the compensation awarded is excessive and does not represent just compensation. He pointed out that the original Claim Petition only alleged negligence against the bus driver. He submitted that by an amendment incorporated on 09.04.2013, the tipper truck owner, driver and

1 2015 9 SCC 273

Appellant were impleaded. Therefore, there was no justification for awarding interest from the date of the claim petition.

8. For all the above reasons, Mr Kakodkar submits that the impugned award warrants interference.

9. Mr Rui Gomes Pereira, learned Counsel for the claimants, submits that the findings recorded by the Tribunal may not be disturbed. He presents that even the compensation determined is just and proper. In the alternate, he submits that the Appellant be directed to pay the entire compensation amount, and after that, the Appellant may pursue its claims against respondents nos.3,4 & 5.

10. At the outset, Mr S. Bharne, learned Counsel for respondent no.5, points out that the widow and minor children of Doulat Rane, the bus driver, had instituted Claim Petition No.56/2011. There, based on the evidence of the two eyewitnesses, who have deposed in the present matter, the Tribunal held that the Tata tipper truck driver drove the truck rashly and negligently and, therefore, was responsible for the accident. He points out that this award dated 30.10.2015 was produced in this matter. He points out that the Appellant–Insurance Company has not challenged this award and thereby

accepted the finding of negligence recorded therein. He relies on *Machidranath Kernath Kasar v/s. D.S. Mylarappa & Ors.*² and *Bajaj Allianz General Insurance V/s. Shri Sharad Chandrakant Raikar & Anr.*³.

11. Mr Bharne submits that even otherwise, the evidence on record establishes that the accident occurred due to the negligence of the Tata tipper truck driver. He states that the two Lok Adalat matters involved amounts of hardly ₹20,000/- to ₹30,000/-, and the settlement was specifically without prejudice. He, therefore, submits that this appeal may be dismissed.

12. Mr Kakodkar, by way of rejoinder, points out that the amount involved in Claim Petition No.49/2011 was only ₹6,00,000/- or thereabouts. Besides, no application was filed under Section 170 of the MV Act. Therefore, no appeal may have been lodged against the award in Claim Petition No.49/2011.

13. Mr Kakodkar also relied upon *Bijoy Kumar Dugar V/s. Bidya Dhar Dutta & Ors.*⁴ to submit that in the case of a head-

² 2008 ACJ 1964 (SC)

³ First Appeal No.83/2010
decided on 09.06.2015

⁴ (2006) 3 SCC 242

on collision, it is reasonable to conclude that both vehicles were equally responsible for the accident.

14. The rival contentions now fall for determination.

15. Upon consideration of the rival contentions and the material on record, the following points arise for determination in this appeal:

(a) Whether the finding of rashness and negligence of the Tata tipper truck driver warrants interference.

(b) Whether the compensation determined represents "just compensation"?

(c) Whether the Tribunal was justified in awarding interest at the rate of 9% per annum from the date of the claim petition qua the Appellant, who was impleaded in the claim petition only on 09.04.2013, that is, almost two years after the date of its institution.

16. On the first aspect, at the outset, two significant circumstances need to be noted:-(a) The Appellant did not examine the Tata tipper truck driver even though it is now forcefully urged that this truck driver was not responsible for the accident; (b) The Appellant did not appeal the award dated 15.10.2014 in Claim Petition No.49/2011 instituted by the wife

and minor children of Doulat Rane, the bus driver when it is the case of the Appellant that it was Doulat Rane, who was exclusively responsible for the accident. In the award dated *15.10.2014*, the Tribunal relied upon the evidence of two eyewitnesses, who have also deposed in the present matter and held that the accident was caused due to the negligence of the Tata tipper truck driver and not Doulat Rane.

17. If the Appellant – Insurance Company was indeed serious about its case that the accident occurred due to the negligence of Doulat Rane, the bus driver and not the Tata tipper truck driver, then the minimum that was expected of the Appellant was to examine the Tata tipper truck driver. Ultimately, this was the driver engaged by the owner of the Tata tipper truck, which the Appellant-Insurance Company insured. Merely because two summons may have been issued, the Appellant–Insurance Company cannot escape the consequences of failure to examine the Tata tipper truck driver. Accordingly, the Tribunal, in this case, has correctly drawn an adverse inference against the Appellant for its failure to examine the Tata tipper truck driver.

18. The evidence of the two eyewitnesses inspires confidence. Merely because these witnesses in their deposition admitted to

knowing the bus driver, no inference can be drawn that they were got up witnesses, or their testimonies were not truthful. Even in the cross-examination, no serious dent has been made in their testimonies.

19. Even though an FIR may have been filed against Doulat Rane or even though in the Claim Petition as originally filed, the claimants would have alleged negligence of the bus driver, the evidence on record is sufficient to conclude negligence on behalf of the Tata Tipper truck. Besides, the allegation in the original claim petition was not exclusive to the bus driver. Therefore, the pleadings in the Claim Petition, even before its amendment, are construed entirely; it is not as if the claimants had given any clean chit to the Tata tipper truck driver. However, because the claimants may have initially found it convenient or may have been advised, they impleaded the bus owner, driver and the Insurance Company.

20. As the evidence proceeded, the claimants applied for and were granted leave to amend the claim petition. As a result of the amendment, they impleaded the Tata tipper truck owner, driver and insurer. The Appellant never challenged this amendment at any stage. The amendment was necessary and was rightly allowed.

21. Further, what is significant is the award dated 15.10.2014 in Claim Petition No.49/2015 made by the Tribunal. This Claim Petition was instituted by the wife and minor children of Doulat Rane. In this petition, the entire allegation was that the accident occurred due to the rashness and negligence of the Tata tipper truck driver. The two eyewitnesses who have deposed in this matter have also deposed in the said Claim Petition.

22. The Tribunal, upon assessing the evidence, made an award dated 15.10.2014 in Claim Petition No.49/2011. The bus insurer produced this award through their witnesses. However, despite the production of this award on record, the explanation now offered by Mr Kakodkar was not provided in the course of the trial. In fact, it was the Appellant-Insurance Company's duty to have produced the award in Claim Petition No.49/2011 and then offered an explanation, if any, in not challenging the same. Even after such an award was produced in evidence, no explanation was provided for not challenging such an award through appeal.

23. The principle in *Machindranath Kernath Kasar* (supra) will apply in the above circumstances. Accordingly, paragraph 23 of this decision reads as follows:

*"23. This case gives rise to an anomalous situation.
The Corporation has been found to be liable to pay*

the amount of compensation claimed by the passengers of the bus only because the Appellant was found to be rash and negligent in driving. The law cannot be construed in such a manner so as to lead to such a conclusion as the same court in this case which was being heard simultaneously held that he was not negligent and the driver of the truck was negligent so as to fasten the liability also on the owner of the truck. When an accident has taken place, the court was required to hold either the driver of the bus or the truck responsible; no case of contributory negligence having been made out. The result would be that the Corporation would be liable to pay compensation in both the cases although findings in each of them were contradictory to or inconsistent with each other. Similar would be the position of the driver of the truck. In one case, he for the same act would stand exonerated and in another case, liability to pay compensation would be fastened on him. Precisely that was the purpose for which the Tribunals heard both the matters together and also delivered judgments one after the other. It was necessary to apply the comity or amity or the principles analogous thereto."

24. To the same effect are certain observations in *Bajaj Allianz General Insurance Company Ltd.* (supra). The decision in *Bijoy Kumar Dugar* (supra) relied upon by Mr Kakodkar will not apply in the above circumstances.

25. For all the above reasons, there is no case made out to disturb the findings recorded by the Tribunal on the aspect of rashness and negligence on the part of the Tata tipper truck driver.

26. On the quantum of compensation, some modifications will have to be made considering the law laid down in *National Insurance Company Ltd. V/s. Pranay Sethi & Ors.*⁵. The determination of ₹28,08,000/- towards dependency is just and proper. Further towards consortium, an amount of ₹40,000/- each will have to be awarded to each claimant. Thus, the total compensation towards the consortium would come to ₹1,20,000/- and not ₹1,00,000/- as determined by the Tribunal.

27. However, towards loss of estate and funeral expenses, compensation of only ₹15,000/- each will have to be awarded, not ₹1,00,000/- and ₹25,000/- as determined by the Tribunal. Similarly, there is no basis for awarding ₹1,00,000/- for each of the two minor children towards love and affection. This award is subsumed in the award towards the consortium. Thus, the total compensation, in this case, will have to be worked out to ₹29,58,000/-.

5 (2017) 16 SCC 680

28. The second point for determination is answered accordingly.

29. On the issue of interest, Mr Kakodkar is justified in contending that interest should be made payable from 09.04.2013 and not from 01.10.2011. Although the amendment can date back to the institution, in the peculiar facts of the present case, where the Appellant - Insurance Company was not even impleaded as a party to the original claim petition, nor was any notice served upon the Appellant – Insurance Company, interest at the rate of 9% per annum, qua the present Appellant will run from 09.04.2013 and not the date of the Claim Petition.

30. The appeal is accordingly partly allowed. Thus, the compensation amount is reduced from ₹32,33,000/- to ₹29,58,000/-. The interest will have to be paid on this compensation amount at 9% per annum, effective from 09.04.2013. The impugned award is modified accordingly.

31. The claimants will be entitled to withdraw the compensation amount and interest as determined above by furnishing identification and bank details. The Registry to ensure that the amounts are directly deposited in the bank account of the claimants, now that even the minor claimants have attained

majority. If the claimants have withdrawn any amounts, the same must be suitably adjusted. The Appellant – Insurance Company can withdraw the balance amount. The claimants and the Appellant will be entitled to the proportionate interest that shall have accrued on the deposited amount.

32. The appeal is disposed of in the above terms. Accordingly, there shall be no order for costs.

M. S. SONAK, J.