

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.85 OF 2016

Mr. Santan Fernandes,
Son of late Mr. Hipolito Fernandes,
Aged 45 years, married,
r/o No. 133, Bandh, Aradi,
Santa Cruz, Ilhas Goa.

... Appellant

Versus

1. Mr. Amjad Mujaavar,
Son of Mr. Kassim Mujawar,
r/o Manaswada, Kundaim,
Ponda Goa.
Driver of the Tempo Bearing
Registration No. GA-O7-F-1676).

2. M/s Aakaash Manufacturing Company
Pvt. Ltd. Represented by its Director,
With office at Sukerkar Mansion,
M.G. Road, Panaji Goa.
(owner of the Tempo bearing
Registration No. GA-07-F-1676)

3. Iffco-tokio General Insurance
Company Ltd. Panaji Goa.
(Insurance Company of the Tempo
bearing Registration No. GAO7-F-1676).

.... Respondents

**Mr Vivek Rodrigues with Mr S. Malik, Advocates for the
Appellants.**

Mr Vilas Pavithran, Advocate for Respondent No.2.

Mr Clayton Fonseca, Advocate for Respondent No.3.

CORAM: M. S. SONAK, J.

DATE : 25th NOVEMBER 2022

ORAL JUDGMENT :

1. Heard Mr Vivek Rodrigues, who appears along with Mr S. Malik for the Appellant, Mr Vilas Pavithran for respondent no.2 (owner of the Tempo) and Mr Clayton Fernandes for respondent no.3 – Insurance Company (insurer of Tempo).
2. The Appellant challenges the judgment and award dated 28.06.2016 dismissing his Claim Petition No.24/2014.
3. The Claim Petition No.24/2014 arose from a vehicular accident on 30.08.2012 between Maruti Omni van bearing registration No.GA-01-S-6563 (Omni) and Tempo bearing registration no.GA-07-F-1676 (Tempo) driven by respondent no.1, owned by respondent no.2 and insured by respondent no.3.
4. One Mr Gabisab Chauragasthi, who was in the front seat along with the Appellant in the Omni when the accident occurred, also sustained injuries in the same vehicular accident. Therefore, Gabisab instituted Claim Petition No.58/2014 in which, amongst others, he impleaded the Appellant – Santan and

his wife Rehata (Owner of the Omni) as the respondents (respondent nos.4 &5)

5. Though the present Appellant - Santan, and his wife, Rehata, were duly served in Claim Petition No.58/2014, they chose to remain ex-parte. Accordingly, the Tribunal, by judgment and award dated 28.06.2016, disposed of Claim Petition No.58/2014, holding that the vehicular accident occurred entirely due to rash and negligent driving by the Appellant - Santan. Thus, regarding the very same vehicular accident, there is a finding recorded by the Tribunal about the negligence of the Appellant – Santan and the liability of his wife, Rehata. However, the Tribunal rejected the contention about any negligence on the part of the Tempo driver.

6. Admittedly, the judgment and award dated 28.06.2016 in Claim Petition No.58/2014 were never challenged by Santan or, for that matter, any of the parties in Claim Petition No.58/2014. Thus, at least between the parties to Claim Petition No.58/2014, the finding about Appellant – Santan's rashness and negligence attained finality.

7. Now, in the impugned award, which is also dated 28.06.2016 made in Claim Petition No.24/2014, the Tribunal

has reiterated its finding in Claim Petition No.58/2014 and dismissed Appellant – Santan's Claim Petition.

8. Since the Appellant – Santan chose not to challenge the finding of rashness and negligence recorded against him in Claim Petition No.58/2014, there is no question of allowing the Appellant – Santan to urge that such a finding should be reversed in the present appeal. If that is allowed, there would be contradictory findings on the same issue.

9. In similar circumstances, the Hon'ble Supreme Court, in the case of *Machindranath Kernath Kasar V/s. D.S. Mylarappa & Ors.*¹ has held that such an anomalous situation cannot be countenanced. Instead, the Court should apply the comity, amity, or principles analogous to that. The discussion on this issue is in paragraphs 22 & 23. Accordingly, paragraphs 22 and the relevant extract from paragraph 23 are transcribed below for the convenience of reference.

"22. Appellant was fully aware of his legal liability. He was involved in the criminal case. He deposed in the claim applications filed by the injured persons who were travelling in the bus. He was fully aware that unless he proves his innocence in regard to the charge of rash and

¹ (2008) 13 SCC 198

negligent driving, he would be held liable therefore, particularly when he himself had filed the claim petition. It might have been a matter of sharing of liability between him and the driver of the truck. He was aware that his plea that he was not negligent has been negated. He, for all intent and purport, therefore, was a party to the earlier proceedings. If he intended to get rid of the findings recorded by the Tribunal, he could have preferred an appeal there against. He did not choose to do so.

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."

10. In almost identical circumstances, this Court in ***National Insurance Company Ltd. V/s. Mr. Tulshidas L. Kerkar***², applied the above principle and dismissed the Insurance Company's contention on the issue of rashness and negligence. Regarding the same accident, the Tribunal in Karnataka had recorded a finding about the negligence of the insured vehicle's driver. The Insurance Company never challenged this finding. Yet, in an award made in another Claim Petition arising out of the same accident, the Insurance Company sought to contend that the insured vehicle's driver was not negligent. It was held that the Insurance Company could not be permitted to do so because otherwise, there would be contradictory findings on the same issue.

11. To a similar effect are observations in ***New India Assurance Company Ltd. V/s. Vikas Sethi & Ors.***³. The learned Single Judge of the Allahabad High Court held that the

² First Appeal No.93/2016
decided on 06.10.2022

³ 2020 DGLS (Alld.) 630

finding on the issue of rashness and negligence in the other proceedings would operate as *res judicata*.

12. Thus, applying the above principles to the facts of the present case, this appeal will have to be dismissed. The Appellant – Santan, cannot be permitted to urge that he was not rash or negligent when he chose to suffer such a finding in Claim Petition No.58/2014 and did not even bother to challenge the same.

13. For the above reasons, this appeal is liable to be dismissed and is hereby dismissed. Accordingly, there shall be no order for costs.

14. Mr Rodrgiues states that some liberty should be granted to the Appellant to pursue an alternate remedy if available. If any alternate remedy is available, then mere dismissal of this appeal would not come in the Appellant's way of availing such alternate remedy. However, it is clarified that all parties' contentions would be kept open should any such alleged alternate remedy be available and resorted.

M. S. SONAK, J.

NITI K HALDANKAR
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