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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.57 OF 2019

Mr. Sayyed Nadaf,
S/o. late Zamalasab Nadaf,
35 years of age,
r/o. House No.214/9,
Muslimwada, Bhoma,
Ponda-Goa.Appellant

Versus

1. Mr. Vishnu Khodginkar,
s/o. Surya Khodginkar,
major in age, driver, r/o. Pilgao,
Bicholim – Goa.

2. Mr. Gaurish Tulshidas Govenkar,
Major in age, owner, r/o. H.No.09,
Sonarpeth, Bicholim – Goa.

3. Bajaj Allianz General Insurance
Company Ltd., Having its Branch Office
at 3 C-D, Sesa Ghor, 20, Patto Plaza,
EDC Complex, Panaji-Goa.Respondents

Ms C. Afonso, Advocate for the Appellant.

Ms G. Borkar, Advocate for Respondent No.3.

CORAM: M. S. SONAK, J.

DATE : 8th DECEMBER 2022

ORAL JUDGMENT :

1. Heard Ms C. Afonso for the Appellant and Ms G. Borkar for respondent no.3 – Insurance Company.

2. The challenge in this appeal is to the judgment and award dated 30.07.2018 made by the Motor Accident Claims Tribunal (Tribunal) dismissing the Appellant's Claim Petition No.118/2015, mainly on the ground that it was the appellant-bus driver, who rashly and negligently drove minibus bearing registration no.GA-01-T-5930, thereby causing an accident with a tanker bearing registration no.GA-01-U-3536.

3. Ms Afonso submits that the Appellant's conviction entirely influenced the Tribunal in Sessions Case No.54/2014, by which he was convicted for offences under Sections 304 (II), 337, 338 and 279 of IPC and even sentenced to undergo imprisonment for five years and pay fines. Ms Afonso points out that this Court ultimately reversed this conviction in Criminal Appeal No.19/2017. She, therefore, submits that the finding about the Appellant's rashness and negligence is vulnerable and warrants interference.

4. Ms Afonso states that if the evidence on record is independently assessed, it is apparent that the accident was caused due to rashness and negligence of the tanker driver and not the Appellant. Accordingly, she submits that the Tribunal was duty-bound to consider the evidence and determine the compensation amount payable.

5. Ms G. Borkar, the learned Counsel for the Insurance Company, submitted that the acquittal by the High Court by its judgment and order dated 21.10.2022 was by extending the benefit of the doubt to the Appellant. She points out that, in any case, the standard of proof in criminal proceedings differs from the standard before the Tribunal determining the issue of rashness and negligence.

6. Ms Borkar submitted that in Claim Petition nos. 43/2013, 88/2013, 89/2013 and 90/2013, the passengers from the minibus the Appellant drove were awarded compensation after recording a finding about rashness and negligence on the part of the Appellant. She pointed out that though the Appellant was a party to all these proceedings, the Appellant did not bother to challenge the awards made in these Claim Petitions.

7. Ms Borkar submits that, as a consequence, the finding about the Appellant's rashness and negligence has attained finality. She submits that the doctrine of res judicata clearly applies in such circumstances. In support, she relied on *Machindranath Kernath Kasar V/s. D.S. Mylarappa & Ors.*¹, *Mr. Santan Fernandes V/s. Mr. Amjad Mujavaar & Ors.*² and *Karnataka Road State Transport Corporation V/s. Smt. Fatima Shaikh & Ors.*³.

1 AIR 2008 SC 2545

2 FA No.85/2016
decided on 25.11.2022

3 FA No.30/2015
decided on 19.08.2022

8. Ms Borkar submits that the Insurance Company did prefer appeals challenging the awards in Claim Petition No.43/2013 and two other matters. However, the appeals were dismissed for want of leave under Section 170 of the MV Act. Accordingly, for all the above reasons, Ms Borkar submits that this appeal may be dismissed.

9. By way of rejoinder, Ms C. Afonso submits that the principles of *res judicata* would not be attracted in the peculiar circumstances of the present case. She submits that the passengers of the minibus or their dependants had lodged claims based upon the composite negligence of the tanker driver and the Appellant. She submits that in such circumstances, the doctrine of *res judicata* will not apply with all its rigour. She relies on a decision of the learned Single Judge of Allahabad High Court in ***Dharam Veer & Ors. V/s. Kamal Singh & Ors.***⁴.

10. The rival contentions now fall for determination.

11. The records bear out, and this position was not even denied, that the passengers of the minibus, which the Appellant was driving or their dependents where the passengers died, had instituted *inter alia* claim petition nos.43/2013, 88/2013, 89/2013 and 90/2013, before the Tribunal claiming for compensation. One of the issues involved in

4 (2020) 12 ADJ 25

the said Claim Petitions was the rashness and negligence, *inter alia*, of the Appellant.

12. Again, there is no dispute that the Appellant was impleaded as a respondent in all those Claim Petitions. Moreover, the Appellant appeared in all those Claim Petitions and even contested the same. Ultimately, by awards made on 30.08.2018 and 31.08.2018, the Tribunal returned a clear finding that the Appellant's rashness and negligence were solely responsible for the accident. Based on the same, the Appellant and respondent no.3 - Insurance Company were held jointly and severally liable to pay the compensation amount.

13. Though the Appellant was very much a party in all those Claim Petitions, the Appellant chose not to challenge the awards dated 30.08.2018 and 31.08.2018 made in those Claim Petitions. Thus, in so far as the Appellant is concerned, the finding about his rashness and negligence attained finality.

14. The contention about the finding of rashness and negligence made by the Tribunal in the impugned judgment and award being entirely based upon the Appellant's conviction may not be correct. The Tribunal considered the evidence on record and returned the findings after that. The evidence on record, *inter alia*, included the oral evidence of some of the passenger victims and other witnesses. The documentary evidence on record included the lodging of the FIR,

the charge sheet, and the order convicting the Appellant for rashness and negligence.

15. After the impugned award was made, it is correct that by judgment and order dated 21.10.2022, this Court in Criminal Appeal No.19/2017 reversed the conviction and acquitted the Appellant. However, on perusal of the said judgment and order, it is clear that the Appellant was extended the benefit of the doubt.

16. It is well settled that the standard of proof in criminal and civil proceedings differs. In criminal proceedings, the prosecution has to establish the charge/guilt beyond a reasonable doubt. However, in civil proceedings, including in particular proceedings before a Tribunal under the MV Act, the standard of proof is only that of a preponderance of probabilities.

17. Therefore, the fact that independent investigating agencies deemed it appropriate to lodge an FIR against the Appellant, followed by a charge sheet, was sufficient to return a finding of negligence in the absence of any proper evidence to conclude otherwise. Further, this was a case where one Court found that the Appellant was guilty of rash and negligent driving beyond a reasonable doubt. The Appeal Court disagreed with this Court because the proof may not have been beyond a reasonable doubt. However, since the standard of proof before the Tribunal is only that of a preponderance of probabilities,

there was no error on the part of the Tribunal in referring to the conviction of the Appellant by the Sessions Court.

18. In any case, the principle of *res judicata* would apply to the facts of the present case. As noted earlier, the finding about rashness and negligence on the part of the Appellant has attained finality. There is no explanation why the Appellant chose not to challenge the said finding recorded in no less than four awards made by the Tribunal, particularly since the Appellant was pursuing his Claim based upon the premise that he was not rash or negligent.

19. If in the present proceedings, a finding is to be rendered that the Appellant was rash and negligent after all, then such a finding would conflict with a finding rendered in no less than four other matters, which have already attained finality. Therefore, the principle of *res judicata* would apply regarding rashness and negligence.

20. In similar circumstances, the Hon'ble Supreme Court, in the case of *Machindranath Kernath Kasar V/s. D.S. Mylarappa & Ors.*⁵ has held that such an anomalous situation of contradictory findings 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

⁵ (2008) 13 SCC 198

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 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 negatived. 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."

21. Again, this Court in ***National Insurance Company Ltd. V/s. Mr Tulshidas L. Kerkar***⁶ 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 from 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.

22. To a similar effect are observations in ***New India Assurance Company Ltd. V/s. Vikas Sethi & Ors.***⁷ The learned Single Judge of the Allahabad High Court held that the finding on the issue of

6 FA No.93/2016

decided on 06.10.2022

7 2020 DGLS (Alld.) 630

rashness and negligence in the other proceedings would operate as *res judicata*.

23. The ruling in the case of *Dharam Veer & Ors.* (supra), again rendered by a learned Single Judge of the Allahabad High Court is distinguishable on facts. That was a case of composite negligence, and the Court found that the Tribunal had not bifurcated or stated the extent of composite negligence with precision.

24. In the present case, in the four awards referred to above, the Tribunal did not find any negligence on the part of the tanker driver. Therefore, this was not a case of any composite negligence of the Appellant and the tanker driver. Thus, the ruling in *Dharam Veer & Ors.* (supra) would not apply. In any case, even assuming that there is any conflict in *Dharam Veer & Ors.* (supra) and the decisions of the Hon'ble Supreme Court or this Court referred to above, the view taken by the Hon'ble Supreme Court or this Court would prevail.

25. Thus, for all the above reasons, this appeal fails and is hereby dismissed.

26. There shall, however, be no order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

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