

Ashabai and Others Vs. Baban and Others

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Court : Mumbai Aurangabad

Decided On : Dec-05-2015

Judge : A.M. Badar

Appeal No. : First Appeal No. 257 of 2010

Appellant : Ashabai and Others

Respondent : Baban and Others

Judgement :

1. By this appeal under Section 173(1) of the Motor Vehicles Act, 1988 [**For short, hereinafter referred to as MV Act?**], appellants / original claimants are challenging the judgment and award dated 3-11-2009, passed by the learned Chairman, Motor Accident Claims Tribunal, Beed, in M.A.C.P. No. 138/2005, thereby rejecting claim for compensation led by appellants / original claimants on account of death of Kalyan Kothi in the alleged vehicular accident which took place on 9-9-2004 at Masrat Nagar, Beed. Respondent no.1 is the owner of the truck allegedly involved in the said accident; respondent no.2 is its insurer whereas respondent no.3 was allegedly working as driver on the said truck on the date of the accident. For the sake of convenience, parties shall be referred to in their original capacity.

2. Brief facts leading to the institution of the present appeal can be summarized thus:-

(a) Initially claimants who are dependent legal representatives of deceased Kalyan Kothi filed the petition under Section 163A of the MV Act, claiming compensation on account of death of Kalyan Kothi as per structured formula contending that he died because of accident arising out use of motor vehicle i.e. truck bearing registration No. MH-15/AG-1870 **[For short, hereinafter referred to as the truck?]** owned by respondent no.1, insured with respondent no.2 and driven by respondent no.3 at the relevant time. It was alleged therein that deceased Kalyan Kothi was earning monthly income of Rs. 4,000/-. After due trial, the learned Member of the Motor Accident Claims Tribunal, Beed, initially on 30-3-2007 allowed that claim petition and directed respondents to pay compensation amounting to Rs. 3,91,000/- to claimants on the basis of structured formula.

(b) Respondent no.2 - Insurance Company carried that award in appeal bearing First Appeal No. 979 of 2007. This Court by judgment and order dated 19-6-2008 was pleased to allow that appeal by holding that the social security provision as envisaged in Section 163A of the MV Act is available for a distinct class of persons whose annual income is restricted to Rs. 40,000/-. It was held that the persons of that category can only take benefit of said social security provision which was enacted by the legislature with the specific object of providing a speedy and effective remedy to that particular class of persons. As income of deceased was pleaded to be Rs. 48,000/- per annum, this Court quashed and set aside the impugned judgment and award dated 30th March 2007 and remanded the claim petition with a permission to convert the claim under Section 163A into a claim petition under Section 166 of the MV Act. The operative part of the said judgment and order needs re-production and it reads thus:-

19. Hence I pass the following order:

(i) The impugned judgment and award dated 30th March 2007 is quashed and set aside and M.A.C.P. No. 138/05 is restored.

(ii) On an application being made by the claimants, the learned Member of the Tribunal will allow the claimants to carry out necessary amendments to the claim petition for converting the claim petition into a claim petition under Section 166 of the Motor Vehicles Act, 1988.

(iii) It will be open for the respondents in the claim petition to file their written statements or to file supplementary written statements by adopting the earlier written statements which are already on record.

(iv) The claim petition shall be decided expeditiously.

(v) All contentions of the parties including various contentions raised by the appellant in this appeal are kept open.

(vi) The appeal is partly allowed in above terms with no orders as to costs.

(vii) In view of this judgment, it will be open for the appellant to withdraw the sums of Rs. 25,000/- and rs. 4,68,624/- deposited in this Court.

(viii) Pending civil applications are disposed of.?

(c) After remand, claimants were allowed to effect necessary amendments to the claim petition under orders of this Court for converting the claim petition under Section 163A of the MV Act into a claim petition under Section 166 of the MV Act. Consequently, respondent no.2 - Insurance Company also filed additional written statement. At this juncture, it needs to mention here that respondent no.1 - owner and respondent no.3 - driver remained absent before the learned Tribunal.

3. Facts in brief necessary for deciding the present appeal are thus:-

(i) According to claimants, Kalyan Kothi (since deceased) was 40 years of age at the time of his accidental death. He was doing labour work by loading and unloading the goods from trucks. Apart from this, he was also engaged as ~Munim™ (Accountant) in spare time with one Dilip Munot. Deceased was earning Rs. 4,000/- per month by working as labourer and Munim. Apart from this, the deceased was earning Rs. 12,000/- per annum from supervising the agricultural land possessed by his family.

(ii) It is case of claimants that on 9-9-2004, deceased Kalyan Kothi was engaged in loading and unloading paved flooring stones from the truck. While unloading, due to a sudden jerk, paved flooring stones escaped from the truck and crushed Kalyan Kothi. The said truck was parked in ascending position with its engine in

working condition. The accident happened as with a jerk the truck came in reverse direction causing fall of paved flooring stones from it by which deceased Kalyan Kothi was injured. Hence, according to claimants, the accident occurred due to negligence of driver of the said truck. Kalyan Kothi was declared dead at Phoenix Critical Care Centre, Beed. Report of this accident was lodged by Dilip Munot with the concerned Police Station and consequently necessary formalities were done by the Police. With these averments, claimants prayed for directing respondents to pay compensation of Rs. 4,00,000/-.

(iii) At this juncture, it is apposite to note that right from initial stage i.e. their lodging the claim under Section 163A of the MV Act, it was pleading of claimants and more particularly in para 2 of the petition that driver of the said truck failed to take proper care while parking the same as well as while loading and unloading the goods.

(iv) Respondent no.2 - Insurance Company initially filed written statement at Exhibit 10 and denied the factum of accident, hospitalization and death of Kalyan Kothi. Income of the deceased as well as mode and manner of the accident was also denied for want of knowledge. The Insurance Company contended that the Police registered accidental death case and no offence was lodged against the driver of the said truck for rash and negligent act. Hence according to respondent no.2, the incident was merely a mishap. It was further pleaded that the truck was not at public place and it was parked in the premises of house.

(v) After remand, respondent no.2 - Insurance Company filed additional written statement at Exhibit 43 and again denied the accident as well as averments of claimants that deceased Kalyan Kothi was engaged in loading and unloading paved flooring stones. It also denied the alleged fact that Kalyan Kothi died due to fall of paved flooring stones. For want of knowledge, respondent - Insurance Company also denied alleged carelessness on the part of the driver in parking the truck in ascending position with engine in working condition. Respondent " Insurance Company pleaded that Police papers in respect of accident shows that no crime was registered against the driver. The truck was in private premises. It was stationery and driver was not on its wheels. The mishap did not arise out of

use of the motor vehicle. The Insurance Company further contended that remedy of claimants is under the Employee's Compensation Act against his employer Dilip Munot. The Insurance Company further averred that driver of the said truck was not holding valid driving license.

(vi) The learned Tribunal based on rival pleadings framed issues at Exhibit 44 and the parties went for trial. It needs to be noted here that initially claimants had adduced evidence of claimant no.1 Ashabai Kothi (widow) at Exhibit 13 and also adduced evidence of Dilip Kakade (Labourer doing the work of unloading paved flooring stones at the time of happening of the accident) at Exhibit 22. After remand of the case, claimants tendered additional evidence on affidavit of claimant no.1 Ashabai at Exhibit 45 as well as that of Dilip Kakade at Exhibit 48. Parties continued to rely on certified copies of Police papers in respect of the accident in question.

4. After hearing the parties, by the impugned judgment and award, the learned Tribunal was pleased to hold that claimants proved that the accident took place on 9-9-2004 due to involvement of the truck bearing registration No. MH-15/AG-1870 causing death of Kalyan Kothi. However, the learned Tribunal further held that claimants failed to prove that the said accident took place because of rash and negligent act on the part of driver of the said truck. The learned Tribunal then assessed the compensation at Rs. 3,21,500/- but concluded that claimants are not entitled for any compensation as they failed to prove that the accident occurred because of rash and negligent act on the part of driver of the said truck. Accordingly, the claim petition came to be dismissed by the impugned judgment and award dated 3-11-2009.

5. Heard Shri Chapalgaonkar, the learned Counsel appearing for appellants / claimants. In his submission, claim under Section 166 of the MV Act can be awarded if claimants are successful in proving the fact that death occurred out of the use of motor vehicle. According to him, the casual relationship between use of motor vehicle and the accident resulting the death is not required to be direct and proximate but it can be less immediate. He relied on judgment of the Hon'ble Apex Court in the case of **Shivaji Dayanu Patil and another Vs. Smt. Vatschala**

Uttam More, reported in **AIR 1991 SC 1769**, to buttress this contention.

6. Shri Chapalgaonkar, the learned Counsel appearing for appellants, further argued that it is not necessary to go by any rules of pleading or evidence in the proceedings under the MV Act. Strict rules of pleading and evidence are not applicable to such summary proceedings. In support of this contention, he relied on judgment of the Hon'ble Apex Court in the case of **Ningamma and another Vs. United India Insurance Co. Ltd.**, reported in **2009 AIR (SCW) 4916** and contended that the learned Tribunal committed grave error in concluding that evidence adduced by claimant Ashabai and witness Dilip Kakade is contrary to their evidence given earlier in point of time when the claim under Section 163A of the MV Act was made. Shri Chapalgaonkar, the learned Counsel further argued that the learned Tribunal committed further error by holding that claimants had not specifically pleaded main avocation of the deceased as Porter with separate earning from private service. According to Shri Chapalgaonkar, the learned Counsel, going by strict rules of pleading, the learned Tribunal erred in holding that claimants came up with false case that the deceased was doing work as Porter. He has relied upon judgment of the Hon'ble Apex Court in the case of **Bimla Devi and others Vs. Himachal Road Transport Corporation and others**, reported **2009 AIR (SCW) 4298**. Shri Chapalgaonkar, the learned Counsel further argued that the learned Tribunal unnecessarily entered into the controversy as to what work the deceased was doing when the main issue before the learned Tribunal was whether the accident arose on account of use of motor vehicle in which deceased Kalyan Kothi died and whether it happened because of rash and negligent act attributable to the driver of the truck.

7. Shri Chapalgaonkar, the learned Counsel appearing for appellants, further argued that by applying principle of *res ipsa loquitur*, the learned Tribunal recorded the finding that deceased Kalyan Kothi was standing on the ground and helping Porters for unloading paved flooring stones when those fell on his person. With such finding, the learned Tribunal ought to have upheld the contention of claimants that the accident occurred because of rash and negligent act on the part of driver of the truck. In his submission, it was for respondents to demonstrate how the accident had happened as claimants had proved the factum of accident. As

respondents failed to establish that driver of the truck was not negligent, the learned Tribunal ought not to have recorded a finding that claimants failed to establish rash and negligent act on the part of the driver. In support of this submission, Shri Chapalgaonkar, the learned Counsel relied on judgment of the Hon'ble Apex Court in the case of **Pushpabai Purushottam Udeshi Vs. Ranjit Ginning and Pressing Company Private Limited**, reported in **1977 AIR (SC) 1735**.

8. Though the learned Tribunal had recorded finding that the accident happened at the public place, Shri Chapalgaonkar, the learned Counsel further relied on judgment of Kerala High Court in the case of **Rajan P. Pullan Vs. K.J. John and others**, reported in **2010(1) ALL MR (Journal) 16**, and contended that public place for the purpose of the MV Act has to be understood with reference to the place to which vehicle has access. Shri Chapalgaonkar, the learned Counsel further relied on judgments of the Hon'ble Apex Court in the case of (I) **Santosh Devi Vs. National Insurance Company Ltd. and others**, reported in **2012(3) Bom. C.R. 698**; (II) **Rajesh and others Vs. Rajbir Singh and others**, reported in **2013(9) SCC 54** and (III) **Asha Verman Vs. Maharaj Singh**, reported in **2015 AIR (SCW) 3577**.

9. As against this, Shri Upadhye, the learned Counsel appearing for respondent no.2 - Insurance Company, argued that a petition under Section 163A of the MV Act does not require pleadings regarding negligence. Those pleadings were incorporated by claimants for conversion of the claim to one under Section 166 of the MV Act. According to Shri Upadhye, the learned Counsel, perusal of evidence on record shows that no offence was registered against driver of the truck. There was no FIR of the accident. What was filed was the report of accidental death. In his submission, claimants have come up with contrary pleadings in both the proceedings and have adduced contrary evidence on two stages of the same proceedings. As such, they cannot be allowed to approbate and reprobate. Shri Upadhye, the learned Counsel, further argued that the learned Tribunal has corrected recorded the finding that deceased Kalyan Kothi was a Munim working with one Dilip Munot and as supervising the work of unloading. By pointing out evidence of Dilip Kakade, Shri Upadhye, the learned Counsel argued that in his

previous deposition, there was no whisper that engine of the truck was in motion. As such, he is not a witness of truth. Evidence of claimant Ashabai also shows that deceased Kalyan Kothi was not inside the truck. According to Shri Upadhye, the learned Counsel, the Tribunal has rightly relied on Police papers in respect of the accident in entirety and concluded that the accident had not happened because of any rash or negligent act attributable to the driver of the vehicle. He placed reliance on judgment of the Hon'ble Apex Court in the case of **Minu B. Mehta and another Vs. Balkrishna Ramchandra Nayan and another**, reported in **AIR 1977 SC 1248**, and submitted that claim under Section 166 of the MV Act can be sustained on establishing wrongful act, neglect or default of driver of the offending motor vehicle. Unless and until there is negligence of driver, owner cannot be made liable on the basis of principle of vicarious liability and as such, consequently the Insurance Company cannot be directed to indemnify the owner. He faintly argued that the accident in question occurred in the private premises of one Dilip Munot and therefore also, Insurance Company cannot be fastened with any liability to pay compensation.

10. With the assistance of the learned Counsel appearing for both the parties, I have carefully perused pleadings of the parties as well as oral evidence of Aashabai Kothi and Dilip Kakade. I have minutely gone through the documentary evidence produced on record including Police papers in respect of the accident in question.

11. Perusal of the impugned judgment and award of the learned Chairman of the Motor Accident Claims Tribunal shows that the Tribunal gave categorical finding while answering Issue No.1 in para 8 to the effect that claimants have proved that on 9-9-2004, at about 6.30 p.m., the accident took place while work of unloading of paved flooring stones from the offending truck was going on and in that accident, Kalyan Kothi died. Thus, we are having on record, finding of the Tribunal to the effect that because of accident occurred while unloading the goods from the truck in question, Kalyan Kothi died. This finding has become final because it is neither challenged by owner as well as driver of the said truck nor by respondent no.2 - Insurance Company. It is thus clear that accident resulting the death of Kalyan Kothi occurred arising out of use of the truck in question. Evidence on record

shows that labourers were loading and unloading paved flooring stones from the said truck. As such, it goes without saying that those labourers were using the truck for doing the work of unloading the paved flooring stones. Undisputedly, because of fall of paved flooring stones while unloading them from the truck, Kalyan Kothi died. Even report of Accidental Death Case No. 40/2004 at Exhibit 15 lodged by Dilip Munot which is a contemporaneous document having great probative value shows that while unloading the paved flooring stones from the truck, two stones escaped from the truck and deceased Kalyan Kothi was crushed under those stones. As such, it needs to be put on record that claimants have proved the fact that on 9-9-2004, at Masrat Nagar, Beed, Kalyan Kothi died because of accident arising out of use of the truck bearing registration No. MH-15/AG-1870 owned by respondent no.1, insured with respondent no.2 - Insurance Company while stones were being unloaded. At this juncture, it is apposite to quote para No.35 from judgment in the case of **Shivaji Dayanu Patil and another (supra)** which shows that casual relationship between the use of motor vehicle and the accident resulting the death or permanent disablement is not required to be direct and proximate. It can be less immediate. Para 35 of the said judgment reads thus:-

This would show that as compared to the expression "caused by", the expression "arising out of" has a wider connection. The expression "caused by" was used in Sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In S. 92-A, Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation under Section 92-A, the casual relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment.?

As such, unchallenged finding of the Tribunal is in consonance with evidence on record and shows that because of accident arising out of use of the truck bearing registration No. MH-15/AG-1870, Kalyan Kothi died on 9-9-2004.

12. Not, let us examine whether claimants proved that the accident arising out of use of the said truck causing death of Kalyan Kothi took place because of rash and negligent act on the part of driver of said truck. At the cost of repetition, it is noted that the learned Tribunal disbelieved evidence of claimant's witness Dilip Kakade, labourer who was alleged eye witness to the accident in question with a reason that his evidence is contrary to evidence adduced by him on earlier occasion when the claim was under Section 163A of the MV Act. With similar reasons, evidence of claimant Ashabai, though she was not an eye witness to the accident, was disbelieved. The learned Tribunal observed that there are material contradictions in evidence of these two witnesses and those shows their tendency to depose falsely. It was also observed by the learned Tribunal that if really the accident had happened because of rash and negligent act on the part of driver of the truck, either claimants or Dilip Kakade - Labourer ought to have lodged correct report to Police. This observation was made by the learned Tribunal in the wake of its finding that this accident has not resulted in registration of any crime and that only report of Accidental Death case (Exhibit 15) was registered with Police by Dilip Munot.

13. Let us examine what is standard of proof are applicable to the summary proceedings for claiming compensation under the MV Act. In the case in hand, after conversion of claim from Section 163A to Section 166 of the MV Act, undoubtedly claimants will have to prove that the accident in question took place because of rash and negligent act of driver of the said truck. Claim under Section 163A of the MV Act is based on principle of no fault liability whereas, claim under Section 166 is based on fault liability. Such claim of fault liability can be sustained for reason of a fault, such as, wrongful act, neglect or default on the part of driver of the offending vehicle. At this stage, one needs to keep in mind so far as Section 163A is concerned, claimants in such proceedings are not required to plead and prove that death or injury was caused due to any wrongful act or neglect or default of the owner of the vehicle or any other person. In claims under Section 163A, if

accident is proved to have occurred arising out of use of a motor vehicle, claimants are entitled for compensation as per structured formula. This distinction will have to be kept in mind while construing pleadings as well as evidence of parties because initially claimants sought remedy under Section 163A of the MV Act and thereafter with permission of this Court by making necessary amendment, claim petition was converted into claim under Section 166 of the MV Act. Initially as per beneficial provisions of Section 163A, they were not all required to plead and establish death of Kalyan Kothi due to any wrongful act, neglect or default and as such pleadings of claimants and their evidence was in tune with such requirements of Section 163A of the MV Act. However, upon conversion, claimants are undoubtedly required to establish fault of the servant of the owner making the owner vicariously liable. Shri Upadhye, the learned Counsel appearing for respondent - Insurance Company rightly relied on ruling of the Hon'ble Apex Court in the case of **Minu B. Mehta and another (supra)**. Para 29 thereof reads thus:

A person is not liable unless he contravenes any of the duties imposed on him by common law or by the statute. In the case of a motor accident the owner is only liable for negligence and on proof of vicarious liability for the acts of his servant, the necessity to provide effective means for compensating the victims in motor accidents should not blind us in determining the state of law as it exists today. ?

14. Reverting back to the standard of proof in claim cases under the MV Act, far back in the year 1977, in the case of **Pushpabai Purushottam Udeshi (supra)**, Hon'ble Apex Court has set out the standard of proof in accident claims and held that if claimants proves the accident, it will be for respondents to establish that the accident happened due to some other cause than their own negligence. Applicability of principle of *res ipsa loquitur* was considered and in para 6 of the judgment, it is held thus:-

The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it

happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states : "The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus : "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the case was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care.? "

15. Point as to whether strict rules of pleading and evidence are applicable to accident claims was considered by the Hon'ble Apex Court in the case of **N.K.V. Bros. (P) Ltd. V. M. Karumai Ammal**, reported in **1980 ACJ 345 (SC)**. It is held therein that Accidents claims Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. It is further held that the Court should not succumb to niceties, technicalities and mystic maybes. In the case of **Ningamma and another (supra)**, Hon'ble Apex Court has held thus in para 23:-

Recently, this Court in the case of Raj Rani and Ors. v. Oriental Insurance Co. Ltd. and Ors., [C.A. Nos. 3317-3318 of 2009 @ SLP(C) Nos. 27792-27793 of 2008 pronounced on 06.05.2009], wherein one of us (Hon'ble Justice S.B. Sinha) has taken the view that it is not necessary in a proceeding under the MVA to go by any rules of pleadings or evidence. Section 166 of the MVA speaks about "Just Compensation". The court's duty being to award "Just Compensation", it will try to arrive at the said finding irrespective of the fact as to whether any plea in that behalf was raised by the claimant or not. It was further observed in the aforesaid case that although the multiplier specified in the Second Schedule appended to the MVA are strict sensu not applicable in a case under Section 166 of the MVA, it is not of much dispute that wherever the court has to apply the appropriate multiplier having regard to several factors in mind. The Court has placed reliance on earlier judgment of this court in Nagappa v. Gurudayal and Ors., (2003) 2 SCC 274, wherein it was observed as follows in para 7:

7. Firstly, under the provisions of the Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case, where from the evidence brought on record if the Tribunal / court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. The only embargo is -- it should be "just" compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the MV Act. Section 166 provides that an application for compensation arising out of an accident involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; or (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. The other important part of the said section is sub-section (4) which provides that "the Claims Tribunal shall treat

any report of accidents forwarded to it under subsection (6) of Section 158 as an application for compensation under this Act". Hence, the Claims Tribunal in an appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed. ?

16. It is thus clear that in proceedings under the MV Act, where procedure is a summary procedure, there is no need to go by strict rules of pleading or evidence. Document having some probative value, the genuineness of which is not in doubt can be looked into by the Tribunal for getting preponderance of probable versions. As such, it is by now well settled that even FIR or Police papers, when made part of claim petition can be looked into for giving a finding in respect of happening of the accident and for reaching conclusion about negligence. In other words, evidence of claimants is required to be examined in broader probabilities of their case, in order to achieve object of social welfare legislation. As held in the matter of **Bimla Devi and others (supra)**, preponderance of probabilities is the touchstone for arriving at a conclusion regarding rashness and negligence as well as mode and manner of happening of the accident.

17. Let us scan evidence of claimants keeping in mind the principles of appreciation of evidence in accident claims in order to determine whether accidental death of Kalyan Kothi is attributable to rash and negligent act on the part of driver of the truck. Brief resume of contemporaneous document at Exhibit 15 i.e. report dated 9-9-2004 of Accidental Death case No. 40/2004 lodged by Dilip Munot shows that construction work of his new house was going on and the deceased was supervising that work. This report further shows that the truck came at site with paved flooring stones. Deceased Kalyan Kothi called 4 - 5 Hamals and started the work of unloading. The report of Accidental Death case further shows that deceased Kalyan Kothi was helping Hamals when all of a sudden two stones escaped from the truck and the deceased was crushed beneath them. This document makes it clear that deceased Kalyan Kothi had also undertaken the work of unloading stones along with Hamals (Labourers).

18. Another contemporaneous document is the spot Panchanama recorded on the day of accident itself. It is at Exhibit 16. Perusal of spot Panchanama shows that along with other labourers, Dilip Kakade was also doing the work of unloading the stones. In fact, this Dilip Kakade had shown the exact spot of occurrence to Police. Claimants have examined none else than this witness in order to prove rash and negligent act of the driver of the truck. Presence of Dilip Kakade on the spot at the time of accident is established from the contemporaneous document of ante litem motam nature available on record.

19. Before going to the evidence of Dilip Kakade, let us keep in mind the position of pleadings of parties. Though not required even in their claim under Section 163A, claimants had averred that driver of the truck failed to take proper care while parking the truck and loading and unloading of goods therefrom. In its both written statements, respondent - Insurance Company showed ignorance about the mode and manner of happening of the accident. Para 9 of the written statement dated 17-7-2009 makes this aspect clear.

20. Evidence of Dilip Kakade prior to remand is at Exhibit 22.

Para 4 from this evidence reads thus:-

That, the driver of truck was not parked vehicle properly. It was in ascending position. While unloading it, suddenly truck came in reverse direction and paved flooring stones escaped from truck and crushed the deceased. Alleged accident occurred due to negligence of truck driver. Hence truck driver is responsible for the accident and death of deceased Kalyan Kothi.?

Thus, even in claim under Section 163A of the MV Act, this was the version of the eye witness about the actual incident.

21. After remand and conversion of the claim to one under Section 166 of the MV Act, again evidence on affidavit of Dilip Kakade is tendered by claimants at Exhibit 48. This witness maintained his earlier version in chief examination but with little more details as the claim was converted to the fault liability. After remand, it is seen from the evidence of this witness that when the work of unloading stones

from the truck was going on, all of a sudden there was forceful jerk to the truck and it came in reverse direction. The truck was at the ascending position and its engine was in working position. This witness Dilip Kakade further stated that because of jerk to the truck, stones from the truck escaped and crushed Kalyan Kothi.

22. Witness Dilip Kakade was subjected to searching cross examination by respondent - Insurance Company on both occasion. It was elicited from his cross examination that he was not working on the truck of respondent no.1 as coolie and was not travelling in it. However, this material cannot be construed to mean that witness Dilip Kakade was not unloading stones from that truck. What he meant thereby was that he was not regularly employed as labourer with the owner of the said truck. He had merely undertaken the task of unloading the stones along with other labourers. Even otherwise presence of this witness on the spot is vouched from the Police papers.

23. The learned Tribunal disbelieved witness Dilip Kakade with a reason that his evidence prior to remand does not disclose that engine of the truck was in working condition whereas after remand, he has stated that engine of the truck was in motion when it was in parked condition. This was considered to be a material contradiction in his version in order to discard the same.

24. In my view, the learned Tribunal committed grave error in appreciation of evidence of eye witness Dilip Kakade. His evidence even prior to remand when the claim was under Section 163A was crystal clear to attribute rash and negligent act to the driver of the said truck. His unshattered testimony at Exhibit 22 prior to remand of the case is to the effect that while he along with deceased Kalyan Kothi and 3 - 4 other labourers were unloading the stones from the truck, the accident occurred due to negligence of the truck driver. At that time, witness Dilip Kakade has categorically stated that driver of the truck did not park the truck properly and it was parked in ascending position. Witness Dilip Kakade at Exhibit 22 has clearly stated that the truck suddenly came in reverse direction because of which while unloading, stones escaped from the truck and crushed deceased Kalyan Kothi. On second occasion after remand at Exhibit 48, same version of witness Dilip Kakade came on record. In addition, he has just stated that engine of the truck was in on

condition at the time of the accident. Even if this fact is omitted from the version of Dilip Kakade, then also, inescapable conclusion is that, the accident happened because of rash and negligent act of the driver of the truck in parking it in ascending position while unloading the stones thereby causing the accident. Because of parking in ascending direction, with a jerk, the truck came in reverse direction while work of unloading of stones was going on causing the accidental death of Kalyan Kothi. As a prudent driver, considering the nature of loaded goods i.e. paved stone tiles and keeping in mind that those were required to be unloaded, driver of the truck ought not to have parked it in ascending position so as to cause its reverse journey due to jerk caused while unloading of goods. Reasonable inference which follows from this evidence is that the truck might have shaken in the process of unloading the goods causing slip of gear to neutral position. The truck therefore came in reverse direction as it was parked in ascending position.

25. There is one more angle to view and assess evidence of Dilip Kakade. True it is, that in his evidence recorded on 23-2-2007, he had not mentioned that engine of the truck was in motion while it was parked. At the time of his cross examination when he entered in the witness box on second occasion after remand, his attention was not drawn to his previous statement recorded on 23-2-2007. On second occasion, when Dilip Kakade entered in the witness box to face cross examination, his explanation was not sought on this aspect by confronting him with his earlier recorded evidence dated 23-2-2007. Probably he might have come up with some explanation for this inconsequential omission in his earlier testimony. Unless and until such opportunity was accorded to witness Dilip Kakade, the learned Tribunal ought not to have branded him as a witness having tendency to depose falsely. This is particularly so when this statement of witness came on record after conversion of the petition to one under the fault liability. Considering the overall consistent version of Dilip Kakade on both occasion, non-disclosure of the fact that engine of the truck was kept in on condition when it was parked, does not amount to material improvement in version of Dilip Kakade so as to discard his entire evidence. Overall scrutiny of evidence of labourer Dilip Kakade undoubtedly shows that the accident happened because of rash and negligent act on the part of driver of the truck in not parking the same at safe position in order to enable the labourers to undertake the work of unloading safely. The truck driver has not taken

reasonable care expected from a person of ordinary prudence is parking it.

26. Claimants had examined claimant Ashabai - widow who is undoubtedly not an eye witness to the accident in question. The learned Tribunal also noted this fact and concluded that her evidence about alleged rash and negligent act of the driver is of no use. However, she was also branded as a witness having tendency to depose falsely as in her evidence after remand, she has additionally stated that there was sudden jerk to the truck which was parked in ascending position. Evidence of claimant Ashabai is not relevant for determining mode and manner of happening of the accident.

27. The learned Tribunal discarded version of witness Dilip Kakade on the ground that because report was of accidental death, either claimants or said Dilip Kakade ought to have lodged another report reflecting correct facts to Police. At this juncture, it needs to be observed that the learned Tribunal totally lost sight of standard of appreciation of evidence in claims under welfare legislation. In a case at hand, claimants and particularly widow is a rustic woman. Witness Dilip Kakade is a labourer doing the work of loading and unloading trucks. They cannot be said to be aware about the niceties of law and procedure. One needs to keep in mind that even well to do person shies of approaching Police. As such, non-lodging the FIR by either claimants or witness Dilip Kakade is of no consequence.

28. The finding of the learned Tribunal to the effect that claimants failed to prove rash and negligent act on the part of driver is wholly perverse. The learned Tribunal went beyond the evidence on record while determining this aspect. The learned Tribunal by travelling beyond the evidence, recorded perverse finding to the effect that deceased Kalyan Kothi was not habitual to do the work of Porter and he must not be having any experience of such work. The learned Tribunal further recorded the finding that probably because of negligence of deceased Kalyan Kothi the accident took place. The learned Tribunal further inferred that the accident might have taken place because of negligence of deceased Kalyan Kothi in handing over paved flooring stones to other labourers. Such inferential findings are without there being any such evidence on record and result of surmises and conjunctures.

29. As against truthful and trustworthy eye witness account of rash and negligent act on the part of driver of the truck coming on record from the mouth of witness Dilip Kakade, respondents have chosen not to enter into witness box. Owner and driver of the truck did not participate in the proceedings. Respondent no.2 - Insurance Company did not examine driver of the said truck in order to bring on record that the accident happened due to some other cause than his own negligence. In this factual backdrop, by accepting evidence of claimant's witness Dilip Kakade which is duly corroborated by contemporaneous Police papers such as report of Accidental Death case and spot Panchanama, it needs to be held that the accident in question happened because of rash and negligent act of driver of the said truck. Resultantly, claimants being dependent legal representatives of deceased Kalyan Kothi are entitled for compensation.

30. The learned Tribunal while answering Issue No.4 has undergone the task of assessment of compensation to which claimants are entitled. Appellants / claimants are not disputing the quantum of compensation assessed by the learned Tribunal while answering Issue Nos. 3 and 4 by this appeal. As such, said assessment of compensation payable to appellants / claimants has attained finality. Claimants are found to be entitled for total compensation of Rs. 3,21,000/- by the learned Tribunal. It is not in dispute that the truck involved in the accident was duly insured with respondent no.2 - Insurance Company.

31. Considering the fact that claim under Section 163A was subsequently converted to one under Section 166 of the MV Act, the learned Tribunal held that claimants are entitled for interest from 2-2-2009 i.e. from the date when by effecting amendment the claim was converted to one under ~fault liability™. This is perfectly in consonance with observations of this Court while deciding First Appeal No. 979 of 2007. Discretion of awarding interest from the date of conversion of the claim does not appear to be arbitrary. It is perfectly reasonable and according to law. However, the learned Tribunal erred in assessing the rate of interest at the rate of 7 % per annum. Considering all relevant aspects, Hon'ble Apex Court in the cases of **Amresh Kumari Vs. Niranjana Lal Jagdish PD. Jain and others**, reported in **2015(4) SCC 433** and **Mohinder Kaur and others Vs. Hira Nand Sindhia (Ghoriwala) and another**, reported in **2015(4) SCC 434**, awarded interest

at the rate of 9 % per annum for compensation payable.

Hence, I hold that present appellants / original claimants are also entitled for interest at the same rate.

32. In the result, the appeal is allowed.

(a) Impugned judgment and award is modified by holding that on proof of rash and negligent act of driver of the truck causing death of Kalyan Kothi, claimants are entitled for compensation of Rs. 3,21,000/- along with interest at the rate of 9 % per annum from 2-2-2009 till realization of the entire amount of compensation.

(b) Accordingly, it is directed that respondents do jointly as well as severally pay compensation amounting to Rs. 3,21,000/- with interest at the rate of 9 % per annum from 2-2-2009 till realization of amount to claimants. The amount of compensation, if any paid to claimants earlier, shall be adjusted as on the date of payment.

(c) Appellants / claimants are entitled for equal share in the amount of compensation.

33. The First Appeal is disposed of accordingly.

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