

(2016) 09 BOM CK 0041

In the Bombay High Court

Case No : First Appeal No.78 of 2009 with Cross Objection No.14 of 2009

United India Insurance

APPELLANT

Vs

Shri. Gulam Mohammad

RESPONDENT

Date of Decision : 22-09-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, Section 168

Citation : (2017) 1 ACC 383 : (2017) 1 AIRBomR 406 : (2017) 2 ALLMR 549 : (2017) 1 BCR 642 : (2016) 6 MhLJ 601 : (2016) 4 TAC 655

Hon'ble Judges : Nutan D. Sardesai, J.

Bench : Single Bench

Advocate : Shri. S.S. Kakodkar, Advocate, for the Respondent No. 1; Shri. A.R. Kantak, with Ms. R. Kantak, Advocates, for the Appellant; Shri. J. Ramaiya, Advocate, for the Respondent No. 4

Final Decision : Dismissed

Judgement

Nutan D. Sardesai, J. - This is an Insurer's appeal assailing the Award passed by the learned Motor Accident Claims Tribunal, South Goa, Margao dated 10.12.2008 pursuant to which the then learned Presiding Officer, M.A.C.T. Margao allowed the petition partly holding the first set of the respondents jointly and severally liable to pay the compensation in the amount of Rs. 7,03,356/- with interest to the claimants and exonerating the respondents no.4 and 5 from any liability arising from the same accident. The cross-objections are at the instance of the original claimant-respondent no.1 feeling aggrieved by the findings of the learned M.A.C.T. pursuant to which certain amounts were not awarded in his favour and pressing for a reversal of the impugned judgment on the limited extent by the grant of the said benefits in his favour on various heads set out in detail therein. Suffice it to say that the parties would be referred to as the Insurer, the claimant and the respondents for brevity's sake hereinafter.

2. Shri. A.R. Kantak, learned Advocate for the Insurer gave a brief account of the accident which had taken place on 10.4.2005 at 15.15 hours on NH-17-A

allegedly involving the truck insured with them and the KTC bus owned by the respondents no.5 and driven by the respondent no.4 in which the respondent no.1/claimant had suffered grievous injuries. He adverted to the judgment under challenge, referred to the Scene of the accident panchanama and the Accident Report Forms, apart from the evidence and submitted that the claimant had failed to show the rashness and negligence of the vehicle insured with them resulting in the accident. Quite on the contrary, the accident was an outcome of the fast speed, rashness and negligence of the KTC bus driver and that of the motorcycle rider which had resulted in the accident.

3. Shri. A.R. Kantak contended that on the quantum too, the learned MACT had been more than generous in granting the compensation to the claimant on the head of permanent disability even though the claimant did not suffer any impediment in his business despite the 50% permanent disability. The learned MACT had also committed an error in considering the income relied upon on behalf of the claimant which was for the Accounting Year 31.3.2004 when it should have been counted as 31.3.2005 and 31.3.2006 considering the date of the accident as 10.4.2005. These Income Tax Returns were suppressed and, therefore, an adverse inference had to be drawn against the claimant. On all these parameters, the impugned judgment on the aspect of the rashness and negligence fastened on their vehicle driver had to be released and the appeal allowed in their favour.

4. Shri. S.S. Kakodkar, learned Advocate for the original claimant adverted to the pleadings, both in the petition as well as in the written statement filed in defence and submitted that the accident was an outcome of the rashness and negligence of the truck driver and no fault could be attributed either to the claimant or to the driver of the KTC bus who was rightly exonerated by the learned MACT. His next contention was that the appeal at the instance of the Insurer was not maintainable and liable to be dismissed as no permission was sought under Section 170 of the Motor Vehicles Act, 1988, ("Act" for short). He relied in Narendra Kumar and another v. Yarenissa and others [1997 (2) T.A.C.1 (S.C.)] and Royal Sundaram Alliance Insurance Co.Ltd. v. Smt. Hanamava Yamanappa Jedi & Ors. [2014 (3) ALL MR 869].

5. Shri. S.S. Kakodkar, learned Advocate for the original claimant invited attention to the Accident Information Reports in respect of the vehicles involved in the accident particularly vis-a-vis the truck and the bus in question and submitted that the dash of the truck to the bus was amply established on the right hand side. He adverted to the sketch accompanying the panchanama, the position of the truck, post accident, and submitted that the learned MACT had examined in minute detail the evidence on record unlike requiring a decision on a preponderance of probabilities and ultimately absolved the KTC bus driver and the claimant on the aspect of the rashness and negligence in driving their respective vehicles. He relied in Kusum Lata & Ors. v. Satbir and Ors. [AIR 2011 SC 1234], Bimla Devi & Ors. v. Himachal Road Transport Corpn. & Ors. [AIR

2009 SC 2819] and Jiju Kuruvila and Others v. Kunjujamma Mohan and others [(2013)9 SCC 166] to wrap up his argument on the aspect of rashness and negligence of the truck driver.

6. Shri. S.S. Kakodkar, learned Advocate also adverted to the other evidence on record vis-a-vis the non-consideration of the vital evidence by the learned MACT qua the different heads of entitlement of the claimant and submitted that the learned MACT had not properly appreciated his case and, therefore, his cross-objections were maintainable and necessary amounts had to be awarded in his favour. He relied in *Sarla Verma v. Delhi Transport Corporation & Anr.* [2009 (4) ALLMR 429 (S.C.)], *K. Suresh v. New India Assurance Company Limited and Another* [(2012) 12 SCC 274], *Sunil Kumar v. Ram Singh Gaud and others* [(2007) 14 SCC 61] and *Raj Kumar v. Ajay Kumar and Anr.* [2011 (1) ALLMR 402 (S.C.)], while pressing for the enhanced compensation. Shri. J. Ramaiya, learned Advocate for the respondent no.4 submitted that the learned MACT had rightly exonerated the respondent no.4 and therefore, the impugned judgment did not warrant any interference in appeal.

7. Shri. A.R. Kantak, learned Advocate for the Insurer in reply once again reiterated that the accident was an outcome of the rashness and negligence of the KTC bus driver and the claimant also by adverting to the evidence of the truck driver and the claimant. His contention further was that even in accepting the claimant's case that he was riding the motorcycle behind the bus, it was a case of a contributory negligence at his instance as otherwise it was inconceivable that the truck could dash the motorcycle after going to the wrong side of the road after dashing against the KTC bus. He relied in *United India Assurance Company Limited v. Shila Datta and others* [(2011)10 SCC 509]. He once again adverted to the Income Tax Returns and submitted that there was no evidence on the loss of income nor any basis in the Award of the learned MACT to grant the compensation towards the loss of income. There was no material available on record to entertain the cross-objections and allow the compensation on the various heads claimed by the claimant. The amounts were not rightly awarded in the absence of any bills and, therefore, the cross-objections had to be dismissed.

8. The claimant had carved a specific case that he was proceeding from the bridge towards Vasco on his motorcycle bearing registration no. GA-06-B-0710 at a moderate speed behind the KTC bus driven by the respondent no.4 and by maintaining a safe distance between the two. The tipper truck insured with the Insurer and driven by the respondent no.1 came at a fast speed, in a rash and negligent manner from the opposite direction and all of a sudden, the tipper truck went to its wrong side and brushed against the right rear portion of the body of KTC bus. The KTC bus driven by the respondent no.4 in a rash and negligent manner without even signalling suddenly slowed down the bus and in that process the claimant who was behind the bus applied the brakes of his motorcycle as a matter of precaution. However, before he could stop his

motorcycle, the right front side bumper of the truck which came brushing against the bus collided against his front wheel. His motorcycle was pushed behind which fell across the road at a distance of five mts. facing towards Panaji and its front wheel was detached. He had fallen off his motorcycle in that process and sustained injuries entitling him to the amount claimed in the petition on the various heads.

9. The driver of the truck and the owner had taken a plea that a Maruti car followed by the KTC bus and the motorcycle driven by the claimant were proceeding towards Vasco while the tipper truck was driven by the respondent no.1 and proceeding towards Cortalim. On reaching Sancoale where there is a culvert, the Maruti car which was in front of the KTC bus suddenly stopped due to which the bus slowed down and the claimant who was riding the motorcycle behind the KTC bus at a fast speed could not control his vehicle resulting in a dash to Kadamba bus in front of him on the right hand back side and slipped and dashed against the oncoming tipper truck driven by the respondent no.1. The truck was driven at a slow speed and could not pass through the culvert on the road because of the accident. In short, the respondents no.1 and 2 disputed the rashness and negligence of the truck driver in the accident.

10. The respondents no.3 who are the Insurer herein had restricted their defence to that pleaded by the respondents no.1 and 2 and restricted their liability to the terms of the Insurance Policy issued in favour of the respondent no.2. The respondents no.4 and 5 had specifically taken a plea that the bus in question was not at all involved in the accident and that it did not come in contact with the claimant's motorcycle. Rather the tipper truck coming from the opposite direction gave a dash to the motorcycle driven by the claimant and there was no contact at all between the bus and the claimant's motorcycle. The tipper truck initially gave a dash to the bus and thereafter to the motorcycle which the claimant was riding right behind the bus and he stopped the bus to see the damages caused to it. The tipper truck was driven in a rash and negligent manner, at a very fast speed due to which the driver lost control, came on the wrong side of the road and gave a dash to the motorcycle which was driven without keeping a safe distance. In short, the respondents no.4 and 5 washed off their hands qua the accident and restricted the cause of the accident to the acts of the claimant himself and the truck driver.

11. The parties had gone to trial based on the issues framed by the learned Presiding Officer and in the course of which several witnesses were examined and the documents produced to substantiate their individual cases. It would, therefore, be apt to advert to the evidence to assess whether the learned MACT had properly appreciated the material while fastening the liability on the truck driver and consequently on the Insurer to pay the compensation to the claimant. Before considering this aspect of the matter, I would deal with the issue on the maintainability of the appeal at the instance of the Insurer considering the plea raised on behalf of the claimant that no such appeal was maintainable in the

absence of any permission being granted to the Insurer by the Tribunal under Section 170 of the Act and without the insured being a party to the appeal.

12. Narendra Kumar (supra), was an appeal by Special Leave with the group of appeals in view of the cleavage of authority, with some High Courts taking a view that a joint appeal by the Insurance Company and the owner or the driver of the offending vehicle was not competent in its entirety and the other High Courts taking a view that an appeal of the owner or the driver of the vehicle would be competent though not joint appeal i.e. the Insurer's appeal alone may be incompetent. All these appeals were arising out of a single accident which took place on 10.6.1987 wherein the taxi-car and the truck were involved in head-on-collision and all the six persons occupying the taxi-car died in the accident, five on the spot and one a little later. Their legal representatives filed the petitions before the Motor Accident Claims Tribunal, Jaipur which awarded the compensation in favour of the legal representatives of all the victims holding the owner as well as the driver of the truck liable for damages along with the Insurance Company in varying amounts and besides certain other directions were given.

13. In Narendra Kumar (supra), the owner of the truck and the Insurance Company filed joint appeals in the High Court of Rajasthan, Jaipur Bench against the Award and the claimants also filed appeals for enhancement of the compensation which were allowed by the High Court. A learned Single Judge of the High Court held that the joint appeals were not maintainable at the instance of the owner and the Insurance Company and directed their dismissal giving rise to an appeal before a Division Bench of the High Court which came to be disposed off by the judgment dated 12.4.1993 affirming the view of the Single Judge giving rise to the appeal by special leave.

14. In Narendra (supra), Their Lordships of the Apex Court considered certain relevant provisions of the Motor Vehicles Act, 1939 ("Old Act" for short hereinafter) namely Section 95 regarding the requirement of a Policy of Insurance, Section 96(1) and (2) and observed that the scheme of Section 96 to the extent relevant therefore, is that before an insurer can be saddled with the liability to pay the amount awarded to the claimants, it was necessary that he must have prior notice of the institution of the proceedings before a judgment is given so that if he has the defences set out in Clauses (a) to (c) available to him, he may seek to be joined as a party to the proceedings and raise all or any of those defences. It was, therefore, obvious on a plain reading of the aforesaid three sections of sub-section 96 that before an Insurer can be saddled with the liability to answer judgment, he must have notice of the proceedings and an opportunity to defend on all or any of the grounds enumerated in Clauses (a) to (c) of sub-section (2) of Section 96, if the same, in the facts and circumstance of the case, are available to the Insurer. Once that opportunity is made available, sub-section (6) of Section 96 contemplates that the Insurer shall not be entitled to avoid his liability to any person entitled to the benefit of such judgment

otherwise than in the manner provided by sub-section (2).

15. In *Narendra Kumar (supra)*, Their Lordships next considered Section 110-C (2-A) outlining the procedure and powers of the Claims Tribunal constituted under the Act, its powers to direct the impleadment of the insurer if it is satisfied that there is collusion between the person making the claim and person against whom it is made or the person against whom the claim is made has failed to contest the claim. Their Lordships also considered Section 110-D providing for appeals and subject to sub-section (2) any person aggrieved by an award of the Claims Tribunal may prefer an appeal to the High Court within the prescribed period. It was thus clear on a plain reading of the aforesaid provisions that the claims must be preferred against the tort-feasers and notice thereof must go to the Insurance Company and if all or any of the defences set out in sub-section (2) of Section 96 are available to the Insurance Company and it seeks to be impleaded as a party, it may be so impleaded and allowed to raise all or any of those contentions.

16. In *Narendra Kumar (supra)*, Their Lordships were equally seized of the fact that the claimants normally make the Insurance a party to the claim application which by itself may not confer a right of appeal on the Insurer. The grounds on which the insurer can defend the action commenced against the tort-feasers are limited and unless one or more of those grounds are available, the Insurance Company is not and cannot be treated as a party to the proceedings and for that reason the Courts have consistently taken a view that the Insurance Company has no right to prefer an appeal under Section 110-D of the Act unless it has been impleaded and allowed to defend on one or more of the grounds set out in sub-section (2) of Section 96 or in the situation envisaged by sub-section (2-A) and Section 110-C of the Act. The question, however, was if such a joint appeal is preferred must it be dismissed in to or can the tort-feasers, the owners of the offending vehicle be permitted to pursue the appeal while rejecting or dismissing the appeal of the Insurer. In the ultimate, it was held that in their opinion even in case of a joint appeal by an insurer and the owner of the offending vehicle if an award has been made against the tort-feasers as well as the insurer even though the appeal filed by the Insurer is not competent it may not be dismissed as such and the tort-feasers can proceed with the appeal after the cause title is suitably amended by deleting the name of the Insurer and dismissed the appeals.

17. In *Hanamava Yamanappa (supra)*, a learned Single Judge of this Court held that where the Insurance Company was made a party in the claim petition and permitted to contest the claim petition on merits but it had not obtained the permission of the Tribunal as required under Section 170(b) of the Act, held that in absence of such a permission, the appeal of the Insurance Company challenging the merits of the award would not be maintainable. In the brief facts, the Insurer was the respondent no.3 in the petition filed by the respondent nos.1, 2 and 3 claiming the compensation of Rs. 36,00,000/- on account of the death of her son and the brother of the claimants no.2 and 3 in a vehicular

accident on the stated date and time. The appellant as the respondent no.3 had denied that the deceased had died due to the injuries sustained in the accident and also denied that the deceased was the owner of the two tipper trucks and having the stated income, that the amount claimed by the claimants was excessive and exorbitant and the claimants were not entitled to the compensation as claimed in the petition though admitting that they had issued a policy in respect of the tipper truck owned by the respondent no.2.

18. In *Hanamava Yamanappa (supra)*, the Tribunal found the evidence inspiring and held that the claimants had proved the rashness and negligence of the truck driver insured with the appellants and granted the compensation in their favour. The driver and the owner of the offending vehicle had not challenged the judgment and award and the appeal was filed by the Insurer alone when an objection was raised on behalf of the claimants to the maintainability of the appeal filed by the respondents no.3-Insurance Company. Reliance was placed on the judgment of the Apex Court in *National Insurance Company Limited v. Nicolletta Rohtagi*, [2002 (4) ALLMR 874] on behalf of the claimant amongst other while reliance was placed in *United India Insurance Company Limited v. Shila Datta and others* [(2011) 10 SCC 509] on behalf of the Insurer.

19. In *Hanamava Yamanappa (supra)*, the learned Judge considered *Nicolletta Rohtagi (supra)*, where the question for consideration was where an insured had not preferred an appeal under Section 173 of the Act against an award given by the Tribunal, whether it was open to the insurer to prefer an appeal against the award passed by the Tribunal questioning the quantum of compensation, as well as the finding on the negligence of the offending vehicle. The Three Judge bench of the Hon'ble Apex Court in *Nicolletta Rohtagi* held that unless the conditions precedent specified in Section 170 of the Act were satisfied, an Insurance Company had no right of appeal to challenge the award on merits. However, in a situation, where there was a collusion between the claimants and the insured or the insured did not contest the claim and further the Tribunal did not implead the Insurance Company to contest the claim, in such cases it was open to an insurer to seek the permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim had been made. If the permission is granted and the insurer is allowed to contest the claim on merits in that case it is open to the insurer to file an appeal against an award on merits if aggrieved. This judgment was however, pending consideration before the Apex Court in a large number of cases.

20. In *Shila Datta (supra)*, the correctness of the judgment in *Nicolletta Rohtagi (supra)* was assailed on the premise that the liability of the insurer to reimburse the insured on two premises namely 1) compensation and 2) whose liability would be to pay, as envisaged under sub-section (1) of Section 149 vis-a-vis the right of the aggrieved persons to prefer an appeal in terms of Section 173 of the Act, had not been considered in the backdrop of the history in which sub-section (1) of the Section 149 was enacted. In view of these questions raised in the

matter, Their Lordships were of the opinion that it was a fit case where the matter should be referred to a larger Bench and directed accordingly so that the records of the case be placed before the Hon"ble the Chief Justice of India for appropriate orders.

21. In *Shila Datta* (supra), their Lordships also formulated questions which arose for their consideration in regard to the position of an insurer under the Act namely the insurer can contest the Motor Accidents Claim on merits, in particular, in regard to the quantum, in addition to the grounds mentioned in Section 149(2) of the Act for avoiding liability under the policy of insurance and whether an insurer can prefer an appeal under Section 173 of the Act, against an award of the Claims Tribunal, questioning the quantum of compensation awarded. In view of the points urged by the insurer, Their Lordships considered the relevant legal provisions namely Sections 149, 147, 163(A), 168, 170 and 173 of the Act and observed that the reference to these provisions were to show that an award by the Tribunal could not be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.

22. In *Shila Datta* (supra), the point of maintainability of a joint appeal by the owner of a vehicle and the insurer came up for consideration. Their Lordships observed that there was no dispute that when an award is made by the Tribunal, the owner of the vehicle, being a person aggrieved, can file an appeal challenging his liability on any ground or challenge the quantum of compensation. An appeal which is maintainable when the owner of the vehicle files it, does not become non-maintainable merely on account of the insurer being a co-appellant with the owner. When the insurer becomes a co-appellant, the owner of the vehicle does not cease to be a person aggrieved. This question had come up for consideration in *Narendra Kumar v. Yarenissa* [1998 (9) SCC 202] where it was held that even in the case of a joint appeal of the insurer and the owner of the offending vehicle if an award has been made against the tortfeasor as well as the insurer, even though an appeal filed by the insurer was not competent, it may not be dismissed as such. The tortfeasor can proceed with the appeal after the cause-title is suitably amended by deleting the name of the insurer.

23. In *Shila Datta* (supra), Their Lordships also considered the judgment in *Chinnama George and others v. N.K. Raju and another* [(2000)4 SCC 130] where it held that a joint appeal would not be maintainable and specifically observed that this issue did not arise for consideration of the three Judge Bench in *Nicolletta Rohtagi* (supra), as the question therein was whether an insurer could file an appeal. Their Lordships on a careful consideration were of the view that the decision in the *Chinnama George* (supra), to the extent it holds that a joint appeal is not maintainable, did not lay down the correct law. As observed in *Narendra Kumar* (supra), the owner of the vehicle does not cease to be an aggrieved person merely because the insurer was ultimately liable under the

terms of the policy or under Section 149 of the Act. If the owner by himself, can file an appeal as an aggrieved person and such an appeal is maintainable, we fail to understand how the presence of the insurer as a co-appellant would make the appeal not maintainable. Whether the owner joins the insurer or the insurer joins the owner makes no difference to the fact that the owner continues to be a person aggrieved. When a joint appeal is filed, to say that the insurer is not an aggrieved person and the owner of the vehicle would not be an aggrieved person, would lead to an anomalous situation and border on an absurdity. Without entering in the question whether an insurer is an aggrieved person, Their Lordships made it clear that on account of the insurer being a co-appellant, would not affect the maintainability of the appeal.

24. In *Hanammava Yamanappa* (supra), the learned Judge of this Court considered the judgment of the Three Judge Bench of the Hon"ble Apex Court in *Shila Datta* (supra), where the questions were framed for consideration namely whether the insurer could contest the claim on merits in particular with regard to the quantum in addition to the grounds mentioned in Section 149(2) of the Act for avoiding the liability under the Policy of Insurance and whether the insurer could prefer an appeal under Section 173 of the Act against the award of the Tribunal questioning the quantum of compensation awarded. The Hon"ble Apex Court held that when an Insurer is impleaded as a party respondent to the claim petition as contrasted from merely being a noticee under Section 149(2) of the Act, its rights were significantly different. The Act did not require the claimants to implead the insurer as a party respondent. But if the claimants chose to implead insurer as party, not being a noticee under Section 149(2) of the Act, the insurer could urge all the grounds and not necessarily the limited grounds mentioned in Section 149(2) of the Act. If the insurer is already a respondent it need not seek the permission of the Tribunal under Section 170 of the Act to raise grounds other than those mentioned in Section 149 (2) of the Act. It further observed that if the insurer is only a noticee and not a party respondent, having regard to the decision in *Nicolletta Rohtagi* it could defend the claim only on the grounds mentioned in Section 149 (2) and not any grounds relating to the merits available to the insured respondents.

25. In *Hanamava Yamanappa* (supra), the learned Single Judge of this Court also considered the case of *Rekha Jain v. National Insurance Company Ltd. and Ors.* [2013 ALL SCR 2833] where the insurer was impleaded before the Tribunal as a party respondent and the Division Bench of the Apex Court relying on the judgment in *Nicolletta Rohtagi* held that the Insurance Company could not have challenged the finding without obtaining the permission as required under Section 170(b) of the Act, to avail the defence of the insured to contest the case. For that matter, the learned Judge also considered the judgment in *Josphine James v. United India Insurance Co. Ltd. and another* [2013 SAR (Civil) 1143] where the insurer was impleaded before the Tribunal as a party respondent and the Division Bench of the Hon"ble Apex Court considering the judgment in *Nicolletta Rohtagi* as well as that in *Shila Datta*(supra), held that the ratio of

Nicolletta Rohtagi would still be applicable in the present case. In the ultimate it was held that the appeal at the instance of insurer was not maintainable.

26. Considering these judgments in Nicolletta Rohtagi and Shila Datta of the Three Judge Bench of the Hon''ble Apex Court, the appeal of the insurer is maintainable without any leave being sought of the Tribunal under Section 170 of the Act.

27. In Kusum Lata (supra), the Two Judge Bench of the Hon''ble Apex Court held that where a vehicle driven rashly hit the victim and sped away it was natural for the brother of the victim who was seriously injured and requiring medical aid not to note the number of the offending vehicle and therefore, the involvement of the offending vehicle in the accident could not be doubted. Bimala Devi (supra), held that the claimants have to establish their case merely on the touchstone of the preponderance of probability and the standard of proof beyond reasonable doubt could not be applied.

28. Jiju Kuruvila (supra), held that the mere position of the vehicle after the accident as shown in the scene mahazar cannot give substantial proof as to the rashness and negligence on the part of one or the other. When two vehicles coming from the opposite directions collide, the position of the vehicles and its directions etc., depends on a number of factors like the speed of the vehicles, the intensity of the collision, the reason for the collision, the place at which one vehicle hit the other etc. From the scene of the accident one may suggest or presume the manner in which the accident was caused but in the absence of any direct or corroborative evidence, no conclusion could be drawn as to whether there was negligence on the part of the driver and in the absence of such or direct corroborative evidence, the Court cannot give any specific finding about the negligence on the part of an individual.

29. The claimant had examined himself setting out his case as pleaded in the petition and produced the documents namely the Scene of accident panchanama along with the sketch apart from the extract of the Station Diary and materially the Accident Report in support of his case on the issue of rashness and negligence. He had remained unshaken in his cross-examination that he was at a distance of seven mts. behind the KTC bus which had stopped and seeing which he had applied the brakes. At that time the tipper truck came from the right hand side, dashed against the KTC bus on the right hand side and thereafter gave a dash to him. He clarified that the tipper truck gave a dash to the rear right side of the KTC bus and thereafter dashed against his motorcycle. He had categorically denied the suggestion put to him at the instance of the truck driver and the owner apart from the Insurer that he could not control his motorcycle and gave a dash to the KTC bus resulting in the accident.

30. The claimant for that matter had categorically denied the case that after his impact with the KTC bus his motorcycle went on the right side and dashed against the oncoming tipper truck and denying altogether the suggestion that the

tipper truck was not driven in a rash and negligent manner or that he was at fault and responsible for the accident. He was equally unshaken on his statement about the impact of the truck with the KTC bus and denied the suggestion that there was no impact between the two. The Scene of accident panchanama reveals the position of the vehicles involved in the accident namely the truck and the motorcycle which were more than ten mts. apart and the motorcycle at a distance of five mts. behind the KTC bus on the road of the width of eight mts. The Panchanama also reflects that there was a dent to the right rear portion of the KTC bus on account of the impact of the truck bumper. There was also a dent to the front right bumper of the truck.

31. The Accident Report of the tipper truck reveals that there were scratch marks on the front bumper on the right hand side and a dent on the front right hand side of the wheel mudguard fender cover. There was a dent on the right side of the fuel tank of the motorcycle and the front head light was broken while there was a dent on the rear mudguard on the right hand side and materially a dent on the body panel on the right hand side above the rear bumper at approximately 1.3 mts. from the ground level to the KTC bus in question. In that context, it was the contention of Shri. Kantak, learned Advocate for the Insurer that the contact of the truck with the KTC bus was completely ruled out on an appraisal of the damages seen on the rear right hand side of the bus. His contention howsoever appealing does not stand to reason in the face of the very location of the dent marks and in the absence of any history of these dents being pre-existing i.e. prior to the accident. Moreover, the learned MACT had apprised itself of the evidence led by the claimant and his witnesses and clearly come to a finding that the accident was an outcome of the rashness and negligence of the truck driver with no fault of the claimant and/or the driver of the KTC bus.

32. Parvez (Aw2) examined by the claimant in support of his case had reiterated in his affidavit that while he was returning towards Vasco he had noticed his friend standing at the main four-road junction and given a lift to him. On reaching Sancoale he had noticed the motorcyclist riding his motorcycle ahead of him by 10 mts. at a moderate speed in the direction of Vasco and he followed the motorcycle for about half a minute or so and maintaining the same distance while driving his vehicle at a speed 40-45 kms. per hour. He noticed the KTC bus in front of the motorcycle at a distance of 15-20 mts. ahead of his car suddenly stop as a tipper truck came from the opposite direction at a fast speed which gave a dash on the right side of the KTC bus and he clearly heard the sound of the impact.

33. Parvez (Aw2) had noticed the motorcycle rider riding at a safe distance behind the KTC bus who managed to stop his motorcycle but nonetheless the tipper driver who dashed the KTC bus suddenly turned more to the right and dashed against the motorcycle. There was clear visibility to him from his car and the motorcycle apart from the KTC bus and immediately he had applied the brakes and stopped his car on the extreme left-side of the kutcha portion of the

road to avoid any collision with the oncoming tipper truck. He noticed the motorcyclist fall off his vehicle on the road and his motorcycle pushed behind to some distance and only then did he realise that the motorcycle was of his father and the rider lying injured on the road was none other than his father. The police had arrived at the spot shortly thereafter and arranged to shift his father to the Chicalim Cottage Hospital.

34. There was no reason for the learned MACT to disbelieve his testimony considering also the fact that on his version his father was riding the motorcycle with a helmet and in that situation it is quite understandable that the witness would not have recognised his father riding the motorcycle ahead of him. He categorically denied the suggestion that due to the sudden stopping of the KTC bus, his father who was riding at a fast speed gave a dash to the bus and in that process skidded and dashed against the truck coming from the opposite direction. From his testimony too, the Insurer was not able to show that there was any fault either of the KTC driver or of the claimant himself resulting in the accident.

35. The original respondents had examined the registered owner of the truck who merely stated that there was no fault of the truck driver in the accident and against whom the police had not even filed a charge sheet. The truck driver was examined as Narayan (Rw2) who buttress his case that the Maruti car was followed by the KTC bus proceeding towards Vasco while he was driving the truck towards Cortalim. On reaching Sancoale where there was a culvert, the Maruti car ahead of the KTC bus suddenly stopped and due to which the bus slowed down and the motorcycle driven by the claimant behind at a fast speed could not control his vehicle and dashed against the right rear side due to which the motorcycle slipped and dashed against the truck driven by him. He was not at fault and the accident was solely due to fault of the motorcycle rider.

36. The respondents no.4 and 5 had examined their driver Dilip (Rw3) who stated during the cross-examination that the impact of the truck was on the right rear side of the bus from the right rear side of the truck while maintaining that the truck was driven at a fast speed. Shri. Katak, learned Advocate for the Insurer picked on this statement at random to show that the case of the claimant was further improbabilised on the rashness and negligence of the truck driver but which cannot be read in isolation in the face of the other clinching material on record. This witness had maintained that the accident had taken place exactly at the spot where there was a Five Star Laundry and maintained that the truck was driven at a fast speed though he could not spell out its speed. He had categorically denied the case put to him on behalf of the claimant that he had stopped his bus without showing any signal or that there was any negligence on his part. Rather he had maintained that while he was in the process of taking the bus to the bus-stop towards his left, the oncoming truck had dashed against his bus.

37. Dilip (Rw3) had further stated that he had covered a distance about 1.5 mts.

from the culvert which was from the rear portion of his bus and moreover there were slight scratches on his bus due to the brushing of the truck on the rear side of the bus. Shri. A.R. Kantak, learned Advocate for the Insurer tried to split hairs on the premise that his statement on the bus having covered only 1.5 mts. from the culvert belied the case of the claimant that the truck was driven at a fast speed, in a rash and negligent manner as otherwise the truck driver would not have been in a position to manoeuvre the truck and halt it on its left side on the culvert and at barely 10.5 mts. distance from the motorcycle. Howsoever appealing this argument, it is inconceivable in the facts borne out from the records. His other contention that the motorcycle rider could have been overtaking the bus from behind is also not tenable inasmuch as there was no plea in defence to that effect and, therefore, such a contention hypothetically carved out in the course of arguments cannot stand the test of legal scrutiny.

38. Suffice it to say that he too was unshaken on his version that he was not instrumental in the accident and even otherwise on the aspect of any rashness or negligence of the motorcycle rider. The learned MACT therefore, on a consideration of the material at large before her had fairly concluded that the case of the claimant appeared more probable and that the negligence and rashness of the truck driver was established and materially there was no rashness and negligence of the bus driver. This finding of the learned MACT does not call for any interference at the instance of the Insurer. What would, therefore, remain for consideration is the challenge to the Award on the quantum of the compensation awarded in favour of the claimant and conversely whether the claimant is entitled to the enhanced compensation on the premise that certain heads of expenses were erroneously not awarded in his favour by the learned MACT.

39. In K. Suresh (supra), the Hon"ble Apex Court reiterated the concept of just compensation and made a clear distinction on the payment of the amount towards the permanent disability and the misconception that no further amount could be awarded relating to the loss of earning capacity. Their Lordships held that the view of the High Court that no compensation can be granted towards the permanent disability once the compensation is computed for the loss of earning capacity and loss of future earning was unsustainable. It considered the judgment in R.D. Hattangadi v. Pest Control (India) (P) Ltd. [(1995) 1 SCC 551] where it had held that damages could be under the head of pecuniary damages and non-pecuniary damages and ultimately holding that the loss of earning capacity had also to be compensated apart from the loss on account of the permanent disability.

40. In Sunil Kumar (supra) Sunil Kumar was driving his truck towards Bargi with one Ramesh when a dumper truck came from the opposite direction in a rash and negligent manner and hit the mini truck driven by the appellant due to which he sustained grievous injuries on his leg and suffered three fractures including one at the tibia. An F.I.R. was lodged and the claim was filed against the owner of

the dumper truck apart from the Insurance Company before the MACT claiming the compensation of Rs. 8,20,000/-. The Tribunal awarded the compensation of Rs. 45,000/- for the 45% permanent disability and other amounts with interest till payment giving rise to the appeal before the High Court of Madhya Pradesh at Jabalpur and dismissed by the impugned order. It was contended on his behalf that he could not pursue his vocation of driving any longer and the Tribunal as well as the High court grossly erred in not awarding the compensation towards the loss of his earning capacity. Their Lordships found substance in the submission put forth on his behalf vis-a-vis the Tribunal and the High Court had not awarded the compensation towards the loss of future income. This is besides observing that the disability suffered by him would surely reduce his earning capacity and, therefore, requiring to be compensated for the loss of earning. Thus, considering his income, the extent of permanent disability, the total loss of income was computed at Rs. 2,59,200/- apart from the interest.

41. In *Rajkumar (supra)*, Their Lordships of the Apex Court held that for assessment of just compensation the principles which may be summarised are that all injuries or permanent disabilities do not result in a loss of earning capacity, the percentage of permanent disability with reference to the whole body of a person cannot be assumed to be the percentage of loss of earning capacity and the doctor who treated an injured claimant and who examined him subsequently to assess the extent of permanent disability can give evidence only with regard to the permanent disability and the loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in its entirety and finally that the permanent disability may result in different percentages of loss of earning capacity in different persons depending upon the nature of profession, occupation or job, age, education and other factors.

42. Coming to the quantum, the claimant had examined himself and brought on record the fact that he had suffered 50% permanent disability as per the ALIMCO Scale on account of the restrictions in the movement of the right knee. This aspect of his testimony was corroborated by the examination of Dr. S.S. Nadkarni (Aw8) who had certified that the patient would face difficulty in brisk walking, climbing, squatting as well as grasping objects in the left upper limb. Nonetheless he had maintained that such a person would show improvement with physiotherapy and that the claimant had informed that he had undergone physiotherapy. The claimant had besides stated that due to nature of the injuries suffered by him he had undergone massage treatment with Dr. Abhilash Mony and incurred an expense of Rs. 48,000/- and with Dr. Sayad Hasan for physiotherapy and incurred an expense of Rs. 55,500/- apart from incurring the expenses on transport of Rs. 63,450/- and the heads of attendant charges, hospital bills, medical bills etc.

43. The claimant had produced bills to substantiate his case and even otherwise there was no singular dispute despite his cross-examination on the nature and

extent of the injuries suffered by him, the treatment undertaken and the expenses incurred under various heads but for the bare suggestion that he had not incurred the expenses and was not entitled to the compensation in the amount claimed by him. He had examined Dr. Hasan (Aw3) who had stated that he was running a Physiotherapy and Orthocare Centre at Vasco Vasco being an Orthopaedic Consultant and Physiotherapist and the claimant was regularly attending the physiotherapy treatment with him from 18.5.2005. The claimant had paid him the total amount of Rs. 55,500/- as his Consultancy charges in two instalments of Rs. 28,500/- and Rs. 27,000/- and he had issued him the receipts in the nature of the Certificate. He too was unshaken on the amounts received by him from the claimant and the claimant having undergone the physiotherapy treatment with him.

44. Dr. Moni (Aw5) had reiterated that the claimant was under his treatment from 16.6.2005 till 20.2.2006 and besides the treatment, he was supplying Ayurved medicines to the claimant, who had paid him the total amount of Rs. 48,000/-. He maintained during his cross-examination that he had given treatment to the claimant who had difficulty in the movement of his leg and that he had received the money from him towards the oil massage. Dr. Alberto (Aw7) had confirmed that the claimant was examined in the Apollo Victor Hospitals where he was attached as a Consulting Orthopaedic Surgeon and who had reported with a history of road traffic accident with injuries to the right knee, injury to the right popliteal artery and open wounds to the left elbow and long segment avulsion of the left radial artery. He had vascular injury to the left upper limb and right lower limb and there was complete disruption of the right knee joint with global instability. He was unshaken on the manner and the extent of the injuries suffered by the claimant and the treatment undertaken at the Apollo Victor Hospitals, Margao. In that backdrop, the learned MACT had referred to the testimony of Dr. Alberto (Aw7), held that his testimony was unshaken in the cross-examination and allowed the amount under the head of medical expenses.

45. The learned MACT had however disbelieved the version of the claimant that he had undergone physiotherapy treatment despite the fact that he was not required to plead his evidence and the fact that he had produced two receipts by the examination of Dr. Sayad Hasan. The learned MACT also chose to disbelieve his version on the premise that the claimant had not produced any reference letter from the Apollo Victor Hospitals to Dr. Sayad Hasan and on that premise disallowed the amount towards the physiotherapy costs incurred by him. The learned MACT ought not to have taken a hypertechnical view and disallowed the claim of the claimant on that head when there was no singular dispute of the fact that he had suffered 50% permanent disability. To that extent therefore, the claim of the claimant is allowed in the amount of Rs. 55,500/- towards the head of physiotherapy treatment juxtapositioned with the nature and the extent of the injuries suffered by him.

46. The learned MACT was also in error not to grant him the charges towards the

oil massage treatment and assuming that the said amount was on the higher side, nothing should have prevented the learned MACT to have made a rough estimate and awarded a considerate amount on that head. In that context, the claimant is awarded an amount of Rs. 20,000/- towards the massage treatment incurred by him having found the amount of Rs. 48,000/- on the higher side and excessive. The claimant had examined one Shahjahan (Aw6) who had stated that he had suffered injury to his right knee and was walking with the help of crutches with great difficulty. His taxi was hired by the claimant to take him to the hospital and back and also to the physiotherapy clinics etc., and that for all these purposes he was paid an amount of Rs. 60,000/- in eight instalments towards which he had issued separate receipts to the claimant.

47. Shahjahan (Aw6) had spelt out the particulars of the vehicle owned by him, assured to produce the ownership documents and was materially unshaken that his taxi was hired by the claimant to take him to the hospital and back and for physiotherapy and related treatments. It was completely lost on the learned MACT that the claimant had suffered lower limb injuries for which he could not be expected to travel by public transport and that he would be required to engage a private vehicle to take him, back him and forth. There was no basis therefore for the learned MACT to disallow the bills towards travelling and which are accordingly awarded in the claimant's favour.

48. The claimant had produced the Income Tax Returns showing his income at Rs. 1,09,711/- for the Accounting Year 31.3.2004. The contention of Shri. A.R. Katak, learned Advocate for the Insurer was that he had failed to prove the income for the subsequent Accounting Years and therefore the learned MACT was in error to give weightage to these Returns and to award compensation accordingly in his favour. I am unable to subscribe to the contention of Shri. A.R. Katak, learned Advocate inasmuch as the earnings of the claimant prior to the accident would be relevant and a guiding consideration for computing the loss of income. The learned MACT had considering 50% disability and the earnings of the claimant computed his entitlement on that count to Rs. 4,38,845.68 which in my assessment cannot at all be faulted.

49. The learned Tribunal, however, ought to have considered the loss of income considering the nature and the extent of these injuries and the resultant disability. The claimant is, therefore, awarded a reasonable amount of Rs. 2,00,000/- on that head. The learned MACT took a very restricted view and despite the extent of permanent disability suffered by him, the various treatments undergone from time to time awarded him a measly sum of Rs. 5000/- towards the pain and suffering which is enhanced to Rs. 50,000/- being just and reasonable in the circumstances of the case. Therefore, the claimant is held entitled to an amount of Rs. 11,08,855.54 rounded upto Rs. 11,09,000/- being the just compensation in the circumstances of the case. To that extent the cross-objections of the claimant are found tenable and accordingly partially allowed raising the compensation to Rs. 11,09,000/- from that awarded amount

by the Tribunal of Rs. 7,03,356/- with interest.

50. In the result, therefore, Insurer's appeal is dismissed and the cross-objections are partly allowed.