

(2010) 07 BOM CK 0035

In the Bombay High Court

Case No : First Appeal No. 90 of 2008

Bajaj Allianz General Insurance Co. Ltd. Sesa Ghor, 3-C and
D Patto Plaza, 3rd Floor, Panaji - Goa APPELLANT

Vs

Smt. Fiona Furtado, Kum. Lourdes Furtado minor represented
by his natural guardian and mother Smt. Fiona Furtado RESPONDENT

Date of Decision : 08-07-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25
Motor Vehicles Act, 1988 — Section 166, 170

Citation : (2010) 07 BOM CK 0035

Hon'ble Judges : F. M. Reis, J;A. S. Oka, J

Bench : Division Bench

**Advocate : E. Afonso, for the Appellant; M. S. Sonak with Mr. J. Supekar,
Advocates for Respondent Nos. 1 and 2, Mr. R. Naik Advocate for Respondent
Nos. 3 and 4, for the Respondent**

Judgement

F. M. Reis, J.—This Appeal has been preferred challenging the Judgment and Award dated 7th February, 2008, passed by the Motor Accident Claims Tribunal at Margao, in Claim Petition no. 224/2003. A Claim Petition was preferred by the Respondent nos. 1 and 2 herein, who were then the widow and minor child of the deceased, u/s 166 of the Motor Vehicles Act, 1988, for compensation. It was the contention of the said Respondents that Anil Furtado, who was then 28 years old, and Seaman in Merchant Navy, for an International Company based in United States, was earning a sum of 500 dollars per month which was equivalent to Rs.25,000/-. He was riding a pulsar motorcycle bearing registration no. GA-02-P-1559 and proceeding from Chinchinim side to Deussua on 29th May, 2003. On reaching a place known as IInd Pavlem, Chinchinim, around 14.30 hours, the Respondent no.3 who was driving a Maruti vehicle bearing no. GA-08/H-0567 and was coming on the opposite direction, dashed against the said motorcycle on account of rash and negligent driving. In view of the said accident, the said rider was thrown down and sustained grievous injuries which resulted in his

instantaneous death. In view of the said accident, the Claim Petition was filed claiming compensation to the tune of Rs.15,00,000/-.

2. The Respondent no.4, who is the owner of the vehicle, denied the involvement of his vehicle in the accident and also that it was driven by the Respondent no.3 on the relevant date. He further claimed that the deceased was riding the motorcycle under the influence of alcohol and that it was a case of pure self accident. He further alleged that his vehicle was not involved in any such accident and was surprised that the police had come to his doorstep as his vehicle was not involved in any such accident. He as such denied the liability to pay the compensation claimed by the Respondent nos. 1 and 2.

3. The Appellants also filed their written statements initially claiming breach of terms of policy on the ground that there was no valid licence in favour of the Respondent no.3 and disputed the authenticity of the licence produced by the Respondent no.3. The Appellants were permitted by the Tribunal to defend the Petition under the provisions of Section 170 of the Motor Vehicles Act, 1988.

4. After recording the evidence, the Tribunal by the impugned Judgment and Award dated 7th February, 2008, partly allowed the Petition and directed the payment of Rs.13,14,400/-to be paid to the Respondent nos. 1 and 2 together with further interest of 9 percent per annum from the date of the Claim Petition up to the date of payment. The Appellants along with the Respondent nos. 3 and 4 were held to be jointly and severally liable to pay the said compensation.

5. Being aggrieved by the Award, the Appellants who were the Insurance Company preferred the present Appeal. Shri E. Afonso, the learned Counsel appearing for the Appellant, has assailed the impugned Award and submitted that the Claims Tribunal has erroneously awarded the compensation in the impugned Judgment and Award. He submitted that there is ample evidence on record to show that the vehicle belonging to the Respondent no.4 was not at all involved in the accident. He further submitted that as the vehicle was not involved in such accident, the question of awarding any compensation to be paid to the Respondent nos. 1 and 2 did not arise at all. The learned Counsel further submitted that the Respondent nos. 1 and 2 have miserably failed to establish that the vehicle of Respondent no.4 was involved in such accident. The learned Counsel also submitted that the permission was granted to defend under the provisions of Section 170 of the Motor Vehicles Act, to the Appellants and, as such, the question of shutting the evidence of the Appellants by the Tribunal was totally unjustified. The learned Counsel has taken us through the roznama of the proceedings and submitted that there is no justification for the Tribunal to close the evidence of the Appellants as there was no material to show that the Appellants were ever deliberately delaying the proceedings. He further submitted that the impugned Award cannot be sustained inasmuch as no reasonable opportunity was given to the Appellants to defend the proceedings. He further submitted that though all measures were taken to procure the presence of the witnesses, the Tribunal has abruptly closed the evidence of the Appellants and

taken up the matter for final disposal. He, in any event, submitted that the amount awarded was exorbitant and no evidence has been adduced for the Tribunal to award the compensation as awarded in the impugned Award. The salary of the deceased have not been established and, consequently, the question of awarding such compensation does not arise at all. He, as such, submitted that the Appellants should in any event be permitted to adduce evidence and the matter can even be remanded to enable the Appellants to adduce such evidence in the interest of justice.

6. On the other hand, Shri Sonak, learned Counsel appearing for the Respondent nos. 1 and 2 has joined issued with the contentions advanced by the learned Counsel for the Appellants. He submitted that there was ample evidence on record for the Tribunal to come to the conclusion that the vehicle of Respondent no.4 was involved in the accident. He took us through the evidence of witnesses which disclose that the vehicle of Respondent no.4 in fact was involved in the accident. He further submitted that the said Respondents had produced cogent evidence to establish the wages/salary of the deceased and, as such, the Tribunal was justified in awarding the compensation as awarded in the impugned Award. He further submitted that the records disclose that the Appellants were indulging in dilatory tactic to delay the disposal of the Claim Petition and, as such, the Tribunal was justified to close the evidence of the Appellants. He took us through the records and tried to justify that ample opportunity was given to the Appellants to adduce evidence. As such, he submitted that there is no substance in the present Appeal and the same deserves to be rejected.

7. Having heard the learned Counsel and without going into the submissions advanced by both the Counsel with regard to the merits in the award of compensation, we would first consider whether the Appellants were given reasonable opportunity to adduce evidence to substantiate their allegation that the vehicle of Respondent no.4 was not involved in the accident. The records reveal that on 25th September, 2007, an Order was passed on Exhibit 35, whereby the permission sought by the Appellants u/s 170 of the Motor Vehicles Act, was allowed. Thereafter, on 18th October, 2007, the deposition of Aw.3/ Joaquim Silva was recorded and the Respondent nos. 1 and 2 closed their evidence on the said day. The matter was thereafter posted to 17th November, 2007 for evidence of the Appellants. On 30th October, 2007, an application was filed by the Appellants to issue summons to the Respondent no.3 as a witness on deposit of Batta charges. The summons were accordingly issued and when the matter was taken up on 17th November, 2007, it was revealed that the report disclosed that the Respondent no.1 was overseas and was not likely to return before June, 2008. The evidence of Appellants was closed on the said date and the matter was posted for final arguments on 23rd November, 2007. On 19th November, 2007, an application was filed by the Appellants praying to issue summons to the witness and, in view of the no objection of the Respondents, the application was allowed and summons were issued on deposit of Batta charges. Such charges were deposited on 26th November, 2007 and notices were issued

to Digambar Rane and L. V. Narulkar on 26th November, 2007. On 8th January, 2008, the evidence of Digambar Rane was recorded and the evidence of the Appellants was closed. The records reveal that though the summons were duly served to L. V. Narulkar, his evidence was not recorded. The matter was posted for final arguments on 23rd January, 2008. The matter was accordingly heard and disposed of by the impugned Judgment and Award.

8. On perusal of the records referred to hereinabove, we find that the Respondent no.3 could not be examined as he was overseas. No fault can be attributed to the Appellants for his non-examination in the said proceedings. In fact, on perusal of the impugned Award, the Tribunal has taken exception on account of his non-examination of such witness. The Tribunal, as such, ought to have given a reasonable opportunity to the Appellants to adduce such evidence. Besides that, after the examination of said witness, Shri Rane, the Tribunal was not justified to close the evidence of the Appellants on the same day on account of the non appearance of the other witness who was duly served. Once the Appellants have taken necessary steps to effect the service of summons on the witnesses, no fault can be attributed to the Appellants in case such witnesses have not been present. The law provides measures to procure the witnesses in case of their deliberate absence. The Tribunal having not exercised such options and no deliberate delay can be attributed to the Appellants for non-examination of such witnesses, the Tribunal ought to have given another reasonable opportunity for the Appellants to allow them to examine the witnesses which they desired. The Tribunal on the same day has closed the evidence of the Appellant and, as such, caused great prejudice to the defence of the Appellants to the Claim Petition. Considering that there was total denial about the involvement of the vehicle of Respondent no.4 in the accident, we find that the ends of justice would be met in case the Appellants were permitted to examine the witnesses in support of their such contentions, as such findings would be essential for a just decision in the above appeal on merits.

9. In such circumstances, we find that in exercise of powers under Order 41 Rule 25 of the C.P.C., the Appellants should be permitted to adduce further evidence on that count and invite a fresh finding by the Tribunal on issue nos. 1, 2, 4 and 5. To avoid any further delay, we called upon the learned Counsel for the Appellant to disclose the names of the witnesses which he desires to examine. Accordingly, the learned Counsel has submitted the following names of the witnesses :

1. Conrad Covaco
2. Dr. Avinash Pujari
3. Manjunath Dessai (P.I.)
4. L. V. Narulkar, Head Constable 3148
5. Head Constable, HC 2882

6. Ramchandra Naik (Panch Witness)

7. Casmiro Coutinho

8. Villa Coutinho

9. Buno Rosario

10. Alivero Ferrao

10. The Tribunal as such shall permit the Appellants to examine the aforesaid witnesses and allow the Respondent nos. 1 and 2 to lead rebuttal evidence if they so desire in accordance with law. After recording such evidence, the Tribunal shall decide afresh issue nos. 1, 2, 4 and 5 on the basis of the evidence which has already been produced along with the evidence to be adduced by the Appellants and the Respondent nos. 1 and 2 in accordance with law as expeditiously as possible within the time stipulated herein. In case the Appellants deliberately delay the proceedings, the Tribunal will be at liberty to take measures in accordance with law to ensure that the proceedings are disposed of within the time stipulated herein.

11. Considering that the matter is pending for a long time and as the disposal of the above Appeal would be further delayed, we find that in the interest of justice, it would be preferable that the Respondent nos. 1 and 2 be permitted to withdraw part of the compensation which has been deposited by the Appellants in this Court. For that purpose, we called for a report from the Registry and find that the amount which has been deposited is invested in Fixed Deposit with the Bank and the amount is due to mature in September, 2011. Accordingly, the learned Counsel appearing for the Respondent nos. 1 and 2 has consented that the said Fixed Deposit be allowed to be encashed prematurely, to enable part withdrawal of the amount. The learned Counsel further submitted that the Respondent nos. 1 and 2 are not in a position to give any Bank Guarantee for such withdrawal.

12. In the facts and circumstances of the case, we find that, in the interest of justice, the Respondent nos. 1 and 2 are hereby permitted to withdraw a sum of Rs.1,50,000/-without prejudice to the rights and contentions of the parties on furnishing an undertaking by the Respondent nos. 1 and 2 to the effect that in case any adverse Order is passed against the said Respondents at the time of final disposal of the Appeal, the amount shall be returned/refunded as per such final Judgment. We make it clear that the above Appeal shall be disposed of after the findings are received from the Tribunal in accordance with what has been stated hereinabove and we have not considered the rival submissions of both the Counsel on merits. In view of the above, we pass the following order :

ORDER

(i) The matter is remanded under Order 41 Rule 25 of the CPC and the Tribunal is directed to permit the Appellants to lead further evidence and examine the

witnesses as stated in paragraph 10 herein above.

(ii) After the examination of such witnesses, the Respondent nos. 1 and 2 are permitted to lead rebuttal evidence if they so desire.

(iii) After the recording of evidence, the Tribunal shall try the issue nos. 1, 2, 4 and 5 afresh on the basis of the evidence which has already been adduced and the evidence which shall be adduced and return the evidence together with findings thereon and the reasons thereof in accordance with law.

(iv) The Tribunal is directed to complete such exercise within six months from the date of receipt of this Order. The parties are directed to appear before the Tribunal on 3rd August, 2010 at 10 a.m.

(v) The Registrar shall permit the withdrawal of Rs.1,50,000/-by Respondent nos. 1 and 2 on furnishing of an undertaking as stated hereinabove and invest the remaining amount deposited in Fixed Deposit initially for a period of one year and to be renewed from time to time until the disposal of the Appeal.

(vi) The Registry is directed to transmit the Records and Proceedings in Claim Petition no. 224/2003 to the concerned Tribunal.

(vii) Fix the above Appeal for further hearing after receipt of compliance of this Order by the Tribunal.