

(2017) 06 BOM CK 0192
In the Bombay High Court
Case No : 782 of 2006

Divisional Controller, M.S.R.T.C. Division Officer

APPELLANT

Vs

Smt.Savita Wd/o Sheshrao Ingole, & Ors.

RESPONDENT

Date of Decision : 21-06-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 427](#),
[Section 279](#), [Section 338](#), [Section 337](#), [Section 304\(A\)](#) - Mischief causing damage to the amou

Citation : (2017) 06 BOM CK 0192

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : V.G.Wankhede, P.R.Agrawal

Final Decision : Dismissed

Judgement

1. By its judgment and order dated 19/6/2006, Additional Member, Motor Accident Claims Tribunal, Washim in M.A.C.P.No.68/2005 directed the appellant to pay compensation of Rs. 13 lakhs with future interest at the rate of 7.50% per annum from the date of petition till realisation of the amount. Being aggrieved thereby, the instant appeal is preferred.

2. Brief facts of the appeal can be stated as under: Deceased Sheshrao was the husband of respondent no.1, father of respondent no.2 and son of respondent nos. 3 and 4. He was lecturer by profession. Side by side he was also working as L.I.C. agent and was earning substantial amount of income for his livelihood and for maintaining the respondents. On 5/6/2005 he was travelling in S.T.Bus No.MH-40-9750 from Amravati-Mumbai to Nashik, the bus met with an accident at 4.00 a.m near Ozhar on Bombay-Agra road, as the bus gave dash to the stationary truck. As a result of the said collision, deceased Sheshrao, along with other passengers in the bus, sustained injuries and he succumbed to those injuries. Due to his untimely death, the respondents, having lost their only

source of income, filed the claim petition before Tribunal seeking compensation to the tune of Rs. 20,00000/from the appellant.

3. This petition came to be resisted by the appellant, contending inter alia that the cause of the accident was not the rash and negligent driving of the S.T. bus, but the fact that the truck was standing stationary on the road without parking lights or indicators. It was contended that as one vehicle was coming from the opposite direction in fast speed, due to bright lights of that vehicle, the bus driver could not see the stationary truck as the truck driver has not switched on the parking lights. Hence, the collision took place. It was thus submitted that the driver of the truck and its owner and insurance company being equally responsible for the accident that has occurred and as they were not joined in the claim petition, the claim petition has to be dismissed on this sole ground. As regards the quantum of compensation, it was submitted that the amount claimed by respondents was exaggerated and calculated without any legal basis. It was submitted that the deceased was not having permanent job and therefore it is difficult to accept that he was earning income of Rs. 1,20,000/per year. Thus, according to the learned counsel for appellant, the claim petition filed by the respondents should have been dismissed by the Tribunal.

4. In support of their claim, respondent no.1 examined herself and also adduced the evidence of two more witnesses. As against it, on behalf of appellant bus driver Sk.Sadik S/o Sk.Kadir was examined.

5. On appreciation of this oral evidence and documentary evidence produced on record by both the parties, learned Tribunal was pleased to hold that the sole cause of accident was the rash and negligent driving of the bus. It was further held that, though some negligence lies on the part of the truck driver for not displaying the indicators even then, so far as the respondents are concerned, they can claim compensation from any of the vehicle owner and insurance company, it being a case of composite negligence. As regards the quantum of compensation, learned Tribunal, after having regard to the income, which deceased was receiving from his earnings as part time lecturer, then as paper examiner and L.I.C. agent, Tribunal considered that he was a highly qualified person, having studied upto M.A.B.Ed. Hence applying the multiplier of 17, Tribunal granted to respondents total compensation of Rs. 13,00000/with interest thereon.

6. While challenging this judgment and order of the Tribunal, the submission advanced by learned counsel for the appellant is that Tribunal itself has observed that there was some negligence on the part of truck driver, as the truck was parked without indicators at night time, when the accident occurred. Hence it is submitted that it was incumbent upon the Tribunal to treat this case as a case of contributory negligence, and therefore the liability to pay entire amount of compensation should not have been fastened on the appellant alone. Second submission advanced by learned counsel for appellant pertains to the quantum of compensation. According to him, the amount of compensation has to be fair,

reasonable and depending upon the income of the deceased. In this case, it is submitted that there is no positive or concrete evidence showing that deceased Sheshrao was having any permanent source of income. Hence the compensation calculated by the Tribunal holding his monthly income as Rs. 10,000/was definitely excessive and on higher side, therefore interference is warranted in the impugned judgment and order of the Tribunal.

7. Per contra, learned counsel for the respondents has supported the impugned judgment and order of the Tribunal by pointing out that, at the most this can be a case of composite negligence but cannot be a case of contributory negligence. Hence, who is at fault, whether the bus driver or the truck driver, is totally irrelevant, deceased being third party to the accident. Further, he has submitted that learned Tribunal has properly appreciated the entire evidence on record and held the bus driver alone responsible for the accident that has occurred. In the alternate, it is argued that, even assuming that there was some negligence on the part of truck driver, in that case also, it was optional on the part of the respondents from whom to claim the amount of compensation, whether from the truck driver, its owner and its insurance company or from the appellant alone, who is the owner of S.T.bus. As regards, the quantum of the compensation, it is submitted that considering the educational qualification of the deceased and income which was he was deriving from various sources, it cannot be said that the compensation awarded by the Tribunal is in any way unreasonable, exorbitant or excessive.

8. In view of these rival submissions advanced by learned counsel for appellant and respondents , the two points which necessarily arise for my consideration are as under:

(1) Whether Tribunal was justified in fastening entire liability for payment of compensation on the appellant having found that to some extent there was negligence on the part of the truck driver also?

(2) Whether the amount of compensation awarded by the Tribunal is just and fair?

9. As regards the first point, the facts in the case are not in the realm of dispute. It is an admitted fact that accident has occurred on MumbaiAgra High way at 4.00 a.m. in the night time. It is also not disputed that the truck was parked on the highway and it was without parking lights or indicators. The driver of the S.T. bus has examined himself on behalf of the appellant and in his evidence he has deposed as to how accident has occurred. According to him, truck loaded with sand was parked in the middle of highway. The indicators were not reflected. One container came from the opposite direction of the bus. As the parking lights of the truck were not switched on, he could not notice the truck, which was parked on the road. Moreover,because of the reflections of the light of the vehicle, coming from the opposite direction, he could not assess the situation properly. He tried to take bus on the left side of the road in order to avoid the dash of the

vehicle coming from the opposite direction. At that time bus conductor side dashed the parked truck and as a result the accident took place. In the crossexamination, however he admitted that for the said accident he has been chargesheeted by the police. He has further admitted that there was road divider on the highway. The respondents have also produced on record the copies of F.I.R.(Exh.17) and spot panchnama (Exh.18). The copy of the F.I.R.(Exh.17) goes to show that it was bus driver who was alone held responsible for the accident and Crime No.51/2005 was registered against him for the offences punishable under Sections 279,337,427,338,304(A) of the Indian Penal Code.

10. Learned Tribunal in its judgment has dealt in detail as to how the accident could have been avoided, if the bus driver was cautious and careful. It was held in paragraph no.8 of the judgment by the Tribunal that every driver is required to anticipate that even though there was reflection of light of the vehicle coming from opposite direction, he has to be in control of his vehicle; has to drive cautiously all the time,so that effect of reflection should not affect his sight and he does not loose his balance in driving. It is his duty to apply upper and dipper lights of his vehicle or to switch off the lights of vehicle and at the same time to control speed of the vehicle or stop the vehicle. Needless to state that, these precautions were required to be taken by the bus driver while driving on national highway line Amravati to Mumbai, he cannot presume that the road would be clear and he can drive without exercising the proper care and caution. In this case, there is no evidence to show that he had applied upper and dipper lights as per the situation, required. If one peruses the spot panchnama, then it is clear that the width of the road was 30 feet. Besides, on both sides of the road, there was 8 feet width slope of mud road. Thus, the total width of the road was 46 feet. Assuming that truck was parked without reflectors or indicators then in that event also, as per the spot panchnama, it was parked on one side of the road and hence there was sufficient portion available for the bus driver to avoid the dash with the said truck.

11. It is also pertinent to note that recitals in the spot panchnama go to show that stones were kept around the truck, thereby indicating that to some extent the truck driver has exercised care. Moreover, the spot panchnama also shows the brake marks of the bus for the distance of 46 feet behind the truck ,thereby indicating that the bus driver could not control the speed of the bus, though he tried to do so,thereby further indicating that the bus was definitely in high speed and beyond the control of bus driver. The spot panchnama further shows that the wheel marks of the truck were found on the road upto 16 feet thereby indicating that the truck was dragged to the extent of 16 feet after the dash of the bus from the back side, which again proves forceful impact of the dash, further proving the inability of the bus driver to control the bus.

12. It is thus clear that the Tribunal has considered the entire evidence on record in its proper prospective and thereafter came to the conclusion that the cause of the accident was rash and negligent driving of the bus driver, though there may

be some negligence on the part of the truck driver in not switching on the indicators. Even accepting such negligence on the part of the truck driver, the fact remains that if bus driver could have driven his bus carefully, cautiously and not in a rash and negligent manner he could have averted the accident. The inference therefore is inevitable that the sole cause of accident was the rash and negligent driving of the bus driver. In such a situation the appellant cannot escape from the liability.

13. Moreover, as rightly submitted by the learned counsel for the respondents, even if there was some negligence on the part of the truck driver by not displaying indicators at night time while parking the truck on the road, in that case also, at the most it can be the case of the composite negligence and not the contributory negligence and in case of composite negligence the claimants can seek and get compensation from the owner and insurer of any of two offending vehicles. The difference between what is composite negligence and what is contributory negligence is explained by the Hon''ble Apex Court in the case of T.O.Anthony.. vs.. Karvarnan and others, 2008(5)Mh.L.J.7 acknowledging that how a common error is being committed by several tribunals in proceeding on the assumption that composite negligence and contributory negligence are the same. Hon''ble Apex Court has therefore in para nos. 5 and 6 of the judgment explained that in an accident involving two or more vehicles, where a third party, other than the driver and/ or owners of the vehicle involved, claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of drivers of those vehicles. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, not is it necessary for the court to determine the extent of liability of each wrong doer separately. As regards the contributory negligence it was explained that when a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence , then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence and in that case he will be entitled to recover the damages in proportion to his contributory negligence.

14. In the instant case, deceased Sheshrao was not responsible for the accident that has occurred, as he was the passenger in the bus. It was at the most a case of therefore "composite" and not "contributory" negligence even assuming that the accident has occurred due to negligence on the part of the truck driver and also the bus driver. In such a situation, it is not necessary either for this Court or even for the respondents to determine the extent of liability of each wrong doer separately. Respondents, as stated above, can claim damages, as per their choice, against the owner and insurance company of any of the two vehicles or against the owners and insurance company of both the vehicles.

15. In the instant case, respondents have, relying upon the documentary evidence like F.I.R. and spot panchnama which was clearly attributing the cause of the accident to the negligence on the part of the bus driver alone chosen to proceed against the appellant alone. Hence it is not necessary for the Court or for the Tribunal to decide the extent of liability of either the bus driver or the truck driver separately. It is apart, that the Tribunal has already arrived at the finding that the cause of accident was the rash and negligent driving of the bus driver and as the said finding being based on the evidence on record and on reappraisal of the evidence it is upheld by this Court.

16. As regards the authority relied upon by learned counsel for appellant, that of *Raj Rani and others..vs.. Oriental Insurance Co.Ltd. And others*, [2009 AC1(SC)] the facts of the said case disclose that the deceased in that case was driving the Maruti car, which met with an accident on account of dash to the truck which was found to be dragged in the midst of the road without parking light. In that case as the truck was parked without parking lights it was held that the accident has taken place on account of negligence on the part of the truck driver. The distinguishing fact, which goes to the roots of the matter, in this reported case is that in that case the deceased was driving one of the vehicles involved in the accident. Hence it was a clear case of contributory negligence. As against it, in the present case deceased was not the driver of any of the two vehicles but was passenger in one of the vehicles. Thus, it is a case of composite negligence, therefore this judgment is of no help to the appellant considering the facts of the present case.

17. Now, once it is held that Tribunal has rightly fastened the entire liability for payment of compensation upon the appellant, the next question arising for consideration is whether the amount of compensation granted by the Tribunal is just and proper? On this aspect also, it is not disputed that at the time of accident deceased was aged 35 years. Learned counsel for the appellant has fairly conceded that he is not disputing the multiplier of "17" which is applied by the Tribunal. His real grievance is in respect of the amount of income which Tribunal has considered to be the earning of the deceased. In this respect the Tribunal has relied upon the evidence of not only the respondent no.1 but also the evidence of two other witnesses, examined by the respondents. It is deposed by the respondent no.1 Savita that her husband was post graduate having passed M.A.B.Ed. He was doing the work of paper checking in Yashwantrao Chavan Open University Nashik. He was also working as L.I.C. agent and earning commission of Rs. 87,666/per year. He was also working on honorary basis as a lecturer in N.N.Mundada Jr.College, Malegaon and in Savitribai Phuley Mahila Mahavidyalaya, Washim. He was also working as a guide in the study center of the Yashwantrao Chavan Open University, Nashik. Further, he was working as part time lecturer in Arts College, Lakhala, Washim. Thus, his total earnings from all the sources was Rs.1,20,000/per annum. According to her, he was likely to be engaged as senior lecturer in the near future. Except for putting a suggestion that deceased was not working as a part time lecturer, nothing is brought on

record in her crossexamination to disbelieve her evidence.

18. The respondents have also examined the witness by name Shashikant Madanrao Dandwate, the Development Officer of L.I.C. Washim, to prove that deceased was working as L.I.C. agent. This witness has produced on record the certificate at Exh.21 stating that deceased was getting amount of RS. 87,666/per year towards the commission. No doubt, in crossexamination he has admitted that for a limited period legal heirs of the deceased may continue to get commission. But the fact remains that the amount of commission is bound to be reduced, with the passage of time.

19. Then the respondents have led the evidence of witness Prakash Pandurang Rathod who was working as manager in Yashwantrao Chavhan Open University and in the study center of the Savitribai Phuley. According to him, deceased was earning Rs. 15,000/to 20,000/per year as honorarium for giving lectures on hourly basis. Thus this is not a case where absolutely no evidence is led by the respondents to show that there was substantial earning of the deceased from various sources.

20. Therefore if one considers the qualification of the deceased, who was M.A.B.Ed. and also having regard to the fact that he was taking lectures on hourly basis in two colleges and also doing the work of checking answer sheets in university and in spare time was also working as L.I.C. agent, it is needless to say that deceased was someone who has good future prospects. He did not remain satisfied with only one source of income, like working as lecturer in study center or working as LIC agent alone. He was an active person who wanted to explore various sources of earnings. Hence, considering therefore his future prospects, apart from the income of which he was earning at the time of his death, if the Tribunal has considered his total income to the tune of Rs. 10,000/per month, then it cannot be said that it was assessed on higher side. Thus, income of Rs.10,000/per month appears to be the just and reasonable amount assessed by the Tribunal.

21. Learned counsel for the respondents in this respect has placed reliance upon the judgment of Hon"ble Apex Court in the case of Neeta and others..vs.. Divisional Manager, Maharashtra State Road Transport Corporation 2015 ACJ 598 to submit that the Hon"ble Apex Court has, even in the case of death of a carpenter, enhanced his income from Rs. 6,000/per month as assessed by High Court to Rs. 12,000/per month. Here in the case therefore when deceased was a highly qualified person, the financial loss suffered by the respondents on account of his untimely death has to be calculated accordingly, keeping in mind his future prospects. Therefore the compensation amount awarded by the Tribunal to the tune of Rs.13,00,000/can, in no way be said as unreasonable so as to warrant interference therein, especially if this Court considers that the Tribunal has not awarded any amount towards loss of love and affection, loss of consortium, loss of estate and funeral expenses. In my considered view therefore absolutely no case is made out by the appellant to interfere in the impugned judgment and

order of the Tribunal. The appeal therefore holds no merits and stands dismissed.