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(2009) 02 GUJ CK 0021

In the Gujarat High Court

Case No : First Appeal No. 2329 of 2006

Jayaben Patel and Others — APPELLANT

Vs

Subhashbhai Viththalbhai Patel and Others — RESPONDENT

Date of Decision : 05-02-2009

Acts Referred:
Motor Vehicles Act, 1988 — Section 140, 166
Penal Code, 1860 (IPC) — Section 304A

Citation : (2009) 02 GUJ CK 0021

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Kashyap R. Joshi,s 1-3, for the Appellant; K.K. Nair, for Defendant 3, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. KR Joshi on behalf of appellant, learned advocate Mr. K.K. Nair appearing for insurance company, no appearance is filed on behalf of respondent No. 1 and 2.

2. The appellant claimant has challenged award passed by Motor Accident Claims Tribunal, Bharuch in MACP No. 573/1996 vide exh 50 dated 30/1/2006. The claim petition filed by claimants is dismissed by claims Tribunal on the ground that there was no negligence of jeep driver proved by claimants before claims Tribunal. In 166 application negligence of driver must have to be proved by claimants sine-qua-non. Therefore, claims Tribunal has rejected claim petition.

3. Learned advocate Mr. Joshi submitted that statement given by Bhanuben Prakashbhai, FIR filed by driver of Jeep and first page of charge sheet filed against Subhashbhai, who was driver of jeep suggested that accident occurred due to rash and negligent driving of jeep driver, when width of road was 22 ft then easily two vehicles can go but considering negligence of Jeep driver back portion of jeep dashed with Truck, which was coming from opposite side. He submitted that exh 32 copy of FIR, exh 33 Panchnama and exh 34 statement of

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Bhanuben Prakashbhai and vide exh 35 charge sheet are produced on record with consent of advocate of insurance company. Therefore, they all are exhibited required to be referred and relied by claims Tribunal.

4. He submitted that claims Tribunal has committed gross error in coming to conclusion that negligence of jeep driver is not proved. He also raised contention that deceased Viththalbhai was father of jeep driver, who died in said accident after receiving head injury and hand injury within twenty days from date of accident. Therefore, claims Tribunal has committed error in rejecting claim petition filed by claimants.

5. Learned advocate Mr. Nair appearing for respondent Oriental insurance company raised contention that no eye witness examined before claims Tribunal by claimants. He also submitted that even jeep driver was also not examined before claims Tribunal and there is no iota evidence on record which proved negligence of jeep driver. According to him, unless negligence is proved, owner and insurance company are not liable to pay compensation to claimants. He submitted that claims Tribunal has rightly analyzed evidence on record and rightly appreciated facts and come to proper conclusion after considering decision of Division Bench of this Court, therefore, no interference is required by this Court.

6. I have considered submission made by both learned advocates and I have also perused award passed by claims Tribunal and paper book prepared by learned advocate Mr. Joshi. The accident occurred on 28/1/1996, where deceased and his family was coming from Kadarma village to Hansot in jeep, at that occasion, from opposite side one truck was coming loaded with sugarcane dashed with backside of jeep, which resulted injury to deceased Vitthalbhai, who died subsequently. The question is that in said accident, jeep driver was negligent or not? For that, vide exh 32 FIR exh 33 panchnama, exh 34 statement of Bhanuben Prakashbhai and vide exh 35 first page of charge sheet were considered by claims Tribunal as referred in para 13. Except that there was no other evidence available before claims Tribunal to determine question of negligence of jeep driver. From evidences as referred above, it was not clear from record that there was negligence of jeep driver in said accident. On the contrary, complainant jeep driver suggested that accident occurred due to negligence of truck driver not of jeep driver, Bhanuben Prakashbhai also suggested that accident occurred due to full light of truck dashed to back side of jeep means it was negligence of truck driver, first page of charge sheet suggested that criminal case lodged against jeep driver but it was not helpful to claimant for proving negligence of jeep driver, for which independent evidence required before claims Tribunal but that evidence was also not available before claims Tribunal.

7. Therefore, claims Tribunal has examined matter properly after appreciating evidence on record and considering judgement of Division Bench of this Court and even according to Motor Vehicle Rules, there was no Postmortem carried out

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of deceased Viththalbhai, who died in accident. Vide exh 26 Dr. R. L. Rana was examined but he was not made it clear that injury received by deceased in such accident. He advised to claimants to go for postmortem but that advised was not accepted by claimants, so there was no postmortem of deceased placed on record by claimants and Dr. Rana, who has deposed before claims Tribunal vide exh 26, has not made it clear that deceased died due to accidental injury or not? According to Dr. Rana there was some injury on head but not appeared on head, so, there may be injury inside of head. He was treated deceased for injury on hand.

8. Therefore, in light of evidence as referred above, claims Tribunal has rightly considered it and rightly examined it and in view of negligence of jeep driver was not proved by claimants by leading proper evidence on record, claims Tribunal has rightly dismissed claim petition. It is necessary to note that jeep driver is son of deceased Viththalbhai, who has filed complaint and in FIR it was made it clear that there was no negligence in driving of jeep at the time of accident but due to negligence of truck driver, accident occurred.

9. The facts of case on hand having identical facts in case of Oriental Insurance Co. Ltd. v. Premlata Shukla and Ors. reported in AIR 2007 SCW 3591. The Apex Court has considered that proof of rashness and negligence on part of driver of vehicle is sine-qua-non for maintaining application u/s 166. In present case facts on hand, FIR filed by Subhashbhai, driver of jeep alleging negligence upon truck driver. Registration number of truck could not be noticed by claimants and driver of truck also could not be traced. Therefore, in FIR, which was placed on record vide exh 32 where allegation made against driver of truck for driving truck rashly and negligently. Vide exh 32 FIR, exh 33 Panchnama, vide exh 34 statement given to police by Bhanuben Prakashbhai gives clear picture that accident is not occurred due to rash and negligence of jeep driver. No doubt charge sheet was filed against jeep driver but no conviction order is placed on record. In short, there was no evidence on record which proved rash and negligent driving of jeep driver. In such circumstances, claims Tribunal has dismissed claim petition. Before Apex Court also having same circumstance, claims Tribunal has dismissed claims petition. Thereafter, High Court reversed it and come to conclusion that FIR having been legally not proved driver of tempo trax should be held to be guilty of driving rashly and negligently. The Apex Court has set aside judgement of High Court and appeal filed by Oriental Insurance company allowed. The brief facts of reported decision in case as referred above recorded in para 2,3,4,5,10,13,14,15, and 16 are reproduced as under:

2. Deceased Shivnandan Prasad Shukla was travelling in a Tempo Trax for going to Allahabad from Bhopal. It collided with a truck. Registration Number of truck could not be noticed. The truck also could not be traced. A First Information Report was lodged by one of the occupants of the Tempo Trax. An investigation on the basis of the said First Information Report for commission of an offence u/s 304-A of the Indian Penal Code was registered against the driver of the said

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truck. As during investigation the truck could not be traced out, the case was closed. A Claim Petition was filed before the Motor Vehicles Accident Claims Tribunal against the driver, owner and the Insurance Company with which the Tempo Trax was insured. The Tribunal upon analyzing the materials brought on record by the parties, including the First Information Report, arrived at a finding of fact that the driver of the Tempo Trax was not driving the vehicle rashly and negligently. It, therefore, dismissed the claim petition opining:

16. On the basis of the above discussions, I come to this conclusion that the applicants on the basis of the discussions in issue No. 1, have failed to prove that the accident dated 23rd January, 2001 was caused by rash and negligent driving of tempo trax No. MP-04-H-5525. In these circumstances the driver and insurance company of tempo trax No. MP-04-H-5525 cannot be held responsible for the accident. As a result, the present claim petition is dismissed.

3. In support of its finding, the decision of this Court in Smt. Kaushnuma Begum and Others Vs. The New India Assurance Co. Ltd. and Others, which was relied upon by both the parties was referred to wherein it was held:

18. Like any other common law principle, which is acceptable to our jurisprudence, the rule in Rylands v. Fletcher 1861 73 All ER 1, can be followed at least until any other new principle which excels the former can be evolved, or until legislation provides differently. Hence, we are disposed to adopt the Rule in claims for compensation made in respect of motor accidents.

19. ''No fault liability'' envisaged in Section 140 of the MV Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the rule can be applied. It is a statutory liability created without which the claimant should not get any amount under that count. Compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the MV Act permit that compensation paid under ''no fault liability'' can be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, of the opinion that even apart from Section 140 of the MV Act, a victim in an accident which occurred while using a motor vehicle, is entitled to get compensation from a Tribunal unless any one of the exceptions would apply. The Tribunal and the High Court have, therefore, gone into error in divesting the claimants of the compensation payable to them.

4. Claimants being aggrieved by and dissatisfied with the said Award preferred an appeal before the High Court. The High Court principally relying on the depositions of Shri R.K. Sharma and Smt. Premlata Shukla, wherein allegations were made that the tempo trax was driven in a rash and negligent manner, opined that the First Information Report having been legally not proved, the driver of the Tempo Trax should be held to be guilty of driving rashly and negligently.

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5. It is to be noted that in the claim petition itself a reference was made to the lodging of the First Information Report.

10. The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application u/s 166 of the Act.

13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.

14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In Hukam Singh (supra), the law was correctly been laid down by the Punjab and Haryana High Court stating;

8. Mr. G.C. Mittal, learned Counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Ram Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the

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only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to approbate and reprobate.

16. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The Appeal is allowed. In the facts and circumstances of this case, however, there shall be no order as to costs.

10. Therefore, According to my opinion, claims Tribunal has not committed any error which require interference by this Court. Hence, there is no substance in the present appeal. Accordingly, present appeal is dismissed.

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