
(2010) 09 BOM CK 0032
In the Bombay High Court
Case No : F.A. No. 253 of 2002

Josiah Anthony

APPELLANT

Vs

Benjamin D'Silva and Others

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Evidence Act, 1872 — Section 145, 170
Motor Vehicles Act, 1939 — Section 16, 2(5A)
Motor Vehicles Act, 1988 — Section 14, 14(2)

Citation : (2012) ACJ 1001 : (2011) 4 TAC 694

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Anthony D'Silva, for the Appellant; E. Afonso, Advocate for the Respondent No. 3, for the Respondent

Final Decision : Allowed

Judgement

Hon'ble D.G. Karnik, J.—This an appeal directed against the Judgment and Award dated 10th June, 2002 passed by the Motor Accident Claims Tribunal South Goa, at Margao, (for short "the Tribunal") rejecting the claim application made by the appellant for compensation under the Motor Vehicles Act, 1988 (for short "the Act").

2. The appellant is the widow of late Anthony Joseph who died in a vehicular accident on 13th September, 1993. On 13th September, 1993, the husband of the appellant was travelling on a scooter bearing registration No. GA-02-B-6820 belonging to the respondent No. 2 and insured with the respondent No. 3. There is some dispute as to whether the husband of the appellant himself was driving the scooter or whether it was being driven by the respondent No. 1 and the appellant's husband was a pillion rider. I would have an occasion to refer to this aspect in the later part of the Judgment. On the way, the scooter slipped and both the persons travelling on the scooter fell down. The husband of the appellant suffered injuries and was removed to a hospital, but died within few

hours. Respondent No. 1 also suffered injuries and it appears that he was taken to Mumbai for medical treatment and he returned after a few months. Thereafter, the appellant filed a petition for compensation before the Tribunal. Respondent No. 1 who, according to the appellant, was driving the scooter at the relevant time was joined as respondent No. 1, and the owner of the scooter was joined as respondent No. 2. The Insurance Company was joined as respondent No. 3 to the claim petition. Respondent No. 1 did not file written statement. Though a joint wakalatnama was filed on behalf of respondents No. 2 and 3, respondent No. 2 (owner) did not file a written statement. Respondent No. 3 Insurance Company, however, filed a written statement and it appears that it was granted leave to defend u/s 170 of the Act. Only the Respondent No. 2 defended the claim.

3. Before the Tribunal, the appellant examined herself. She is not an eye witness to the incident and her evidence is of little assistance on the question of negligence, as also on the question whether it was the deceased or the respondent No. 1 who was driving the scooter. The appellant examined the respondent No. 1 as her own witness. In his evidence, the respondent No. 1 stated that he was driving the scooter at the relevant time. In his cross-examination it was put to him that he had previously given a statement before the police that it was the deceased who was driving the scooter. However, the statement allegedly given by respondent No. 1 before the police stating that the deceased was driving the scooter was not produced before the Court and he was not confronted with the original statement alleged to have been recorded before the police. The respondent No. 1, in the cross-examination, in answers to the questions put to him, has stated that he had stated before the police that the deceased was driving the scooter. He, however, explained the statement by saying that he was holding a learner's licence at the relevant time and since the deceased had died, he made the statement before the police that the deceased was driving the scooter out fear of prosecution. The Tribunal disbelieved the oral evidence of respondent No. 1 that he was driving the scooter on account of his previous statement allegedly made before the police that he was not driving the scooter. In my view, the Tribunal erred in holding that respondent No. 1 was not driving the scooter for the reasons indicated below. Firstly, the original statement which was allegedly made by respondent No. 1 before the police that he was not driving the scooter was not produced before the Tribunal and it was not shown to respondent No. 1 during his cross-examination. Respondent No. 1 was thus not contradicted with his previous statement u/s 145 of the Evidence Act. Assuming, however, that on the basis of the answers given by him in the cross-examination it is to be believed that the respondent No. 1 had stated before the police that he was not driving the scooter, still in my view he has explained the reasons for making such a statement before the police. He has stated that at the relevant time he was holding only a learner's licence and since the deceased had died in the accident, out of fear of prosecution and in order to escape the prosecution that he had made the statement before the police that the deceased was driving the scooter. The statement made before the police is not made on oath; while

the statement made before the Court is a statement made on oath. In view of the statement made on oath by respondent No. 1 before the Tribunal and good explanation given by him for making inaccurate statement before the police that the deceased was driving the scooter at the relevant time, the Tribunal ought to have believed his statement made on oath before it. The respondent No. 3, despite several opportunities given to it, did not examine any witness. There was no other evidence to disbelieve the oral deposition given on oath by the respondent No. 1. I, therefore, reverse the findings of the Tribunal and hold that the respondent No. 1 was driving the scooter at the relevant time and the deceased was the pillion rider.

4. The Tribunal has then observed that even if it was held that the respondent No. 1 was driving the scooter, still the Insurance Company was not liable on the ground that the respondent No. 1 was possessing only a learner's licence at the relevant time. Learned Counsel for respondent No. 3 supported the decision of the Tribunal and submitted that as the respondent No. 1 was holding learner's licence he was not allowed to take the deceased pillion rider as he did not hold a valid driving licence. In support of his contention, he relied upon a decision of the Supreme Court in the case of *New Indian Assurance Co. Ltd. Vs. Mandar Madhav Tambe and others*, and upon another decision of Delhi High Court in the case of *Jeet Singh Vs. National Insurance Co. Ltd. and Others*.

5. The aforementioned contention of the learned Counsel for the respondent No. 3 is based upon a finding of fact recorded by the Tribunal that at the time of the accident, the deceased did not hold a valid driving licence. It is, therefore, necessary to examine the correctness of this finding. The appellant had placed on record the original driving licence of the deceased. The driving licence was issued by the Regional Transport Officer, Trivandrum, Kerala in the year 1984 and the licence shows that the deceased was licensed to drive a motor cycle, and a light motor vehicle under the licence. The licence was initially valid from 7th November, 1984 to 6th November, 1989. The licence was renewed on 8th January, 1990 and its validity was extended from 8th January, 1990 to 23rd March, 1996. However, the original licence shows that the year 1996 has been encircled and the figure "1993" has been written below the encircled figure "1996". There is no endorsement as to who made the encircling of figure "1996" and put the figure "1993" below it. However, on the basis of this encircling of the figure 1996, the Tribunal came to the conclusion that the licence was valid only from 8th January, 1990 to 23rd March, 1993. According to the Tribunal, therefore, on the date of the accident i.e. on 13th September, 1993, the deceased did not possess a valid driving licence to drive the motor cycle/scooter. This finding of the Tribunal cannot be sustained for the reasons more than one. Firstly, the assumption of the Tribunal that the period of driving licence was curtailed from 23rd March, 1996 to 23rd March, 1993 is based on a conjuncture. The encircling of the year 1996 and putting of the figure 1993 does not bear initial of any person. One, therefore, cannot conclude that the period of validity of the licence was reduced from 23rd March, 1996 to 23rd March, 1993. There

was no reason for doing so. Secondly, it may be noted here that the licence which was initially obtained in the year 1984 was, admittedly, renewed in January, 1990 i.e. after coming into force of the Motor Vehicles Act, 1988. The licence mentions the date of the birth of the deceased to be 24th March, 1956. In view of Section 14 of the Act, the renewal of a licence which was made in January, 1990 was to be effective for a period of 20 years from the date of renewal or until the date on which the person (licence holder) attained the age of 40 years, whichever was earlier. Clause (b) of sub-section (2) of Section 14 of the Act provides that in the case of a licence other than a learner's licence, or a licence to drive a transport vehicle, shall be valid either originally or on renewal thereof for a period of 20 years from the date of issue or renewal or until the date on which such person attains age of forty years. The words "forty years" have been replaced by words "fifty years" by further amendment made in the year 1994. Thus, on the date of renewal i.e. 8th January, 1990, it could be renewed upto the date of the deceased attaining age of 40 years i.e. upto 23rd March, 1996. It is upto this date that the licence was renewed in January, 1990. The Act does not prescribe that the period of licence which has been renewed upto the age of 40 years could be curtailed by 3 years. It is not the case that the licence of the deceased was suspended/revoked or the period was reduced by way of any penalty for any breach of the Act or the Rules or for violation of any of the conditions of the licence. Consequently, the finding of the Tribunal that the deceased did not possess valid driving licence on the date of the accident is required to be set aside and is, accordingly set aside.

6. In the case of *New India Assurance Company Ltd. v. Mandar Madhav Tambe and Ors.*(supra), the Insurance Company contended that on the date of the accident the driver only had a learner's licence which did not entitle him to drive the vehicle and therefore, he did not possess a valid driving licence. Consequently, the Insurance Company was not liable. In that case, it was held that u/s 2 (5-A) of the Motor Vehicles Act, 1939 (the Old Motor Vehicles Act), the driving licence only meant the document issued by a competent authority, authorizing a person specified therein to drive the motor vehicles. A person holding a learner's licence was required to be accompanied by an instructor. It was further held that Section 16 of the old Motor Vehicles Act, 1939 required a person holding learner's licence to be accompanied by an instructor holding valid driving licence. In the present case, the deceased was accompanying the respondent No. 1 on the scooter and was holding a valid permanent driving licence. Thus, the test of the learner being accompanied by a person holding a valid driving licence acting as an instructor was satisfied. It was contended by the Counsel for respondent No. 3 that even if it is held that the deceased was holding a valid driving licence, he could not be said to be an instructor as there was no evidence that he was giving instructions to respondent No. 1 at the time of the accident. This submission is based upon the decision of the Delhi High Court in the case of *Jeet Singh v. National Insurance Co. Ltd. and Ors.* (supra). It may be noted that in the present case, the respondent No. 3 Insurance Company

had not taken a defence that the deceased did not possess a driving licence nor had it taken a defence that he was not an instructor. Whether the deceased was accompanying the respondent No. 1 as an instructor or not is a question of fact which is required to be raised in the pleadings. In the absence of such pleadings by the respondent No. 3 that the deceased was not an instructor, the defence cannot be allowed to be taken up for the first time in appeal. In fact, the defence that the deceased did not hold a valid driving licence also was not taken before the Tribunal and the Tribunal has considered the aspect of the deceased being a licence holder or not, suo motu. This is clear from paragraph 18 of the decision of the Tribunal wherein it is observed that "There is another aspect which is required to be looked into notwithstanding the fact that no plea has been taken by respondent No. 3 nor submissions made on behalf of both the parties." After noting this, the Tribunal has considered whether the deceased was holding a valid driving licence suo motu. In my view, in the absence of any defence taken by the respondent No. 3 that the deceased did not have a valid driving licence, the Tribunal ought not to have embarked upon the task of finding out whether the deceased was possessing a valid driving licence and was capable of being an instructor, suo motu. If such a defence was taken by the respondent No. 3, the appellant could have produced the necessary evidence regarding the deceased being an instructor.

7. Since the respondent No. 1 himself has admitted that he was driving and that there was negligence, the Tribunal ought to have recorded a finding of negligence of the respondent No. 1 and awarded the compensation. In the later part of the Judgment, the Tribunal has held that the compensation, if payable, would work out to Rs. 3,92,400/-. No cross objection has been filed as against this finding, nor did the Counsel for the respondent No. 3 address any argument on the question of quantum of compensation. In the circumstances, the said finding is confirmed.

8. Learned Counsel for respondent No. 3 raised a contention that the deceased husband of the appellant was a pillion rider and was not a third party and, therefore, the appellant was not entitled to any compensation. Again, this point was not raised before the Tribunal and the respondent No. 3 cannot be allowed to raise the point for the first time in the appeal.

9. For these reasons, the appeal is allowed and the following order is passed:

The impugned judgment and award is set aside. The respondent Nos. 1, 2 and 3 shall jointly and severally pay to the appellant compensation in the sum of Rs. 3,92,400/-, together with interest thereon at the rate of 9 % per annum from the date of the claim application, till payment and costs of this appeal.