
(2015) 08 BOM CK 0162
In the Bombay High Court
Case No : First Appeal No. 1013 of 2011

Manisha and Others

APPELLANT

Vs

Umakant Marotrao Kolhe and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173
Motor Vehicles Act, 1988 — Section 134, 140, 161 (3) (a), 163A, 166
Penal Code, 1860 (IPC) — Section 279, 304-A, 337, 338, 427

Citation : (2016) 1 ABR 39 : (2015) 6 BomCR 640

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : S.N. Kumar, for the Appellant; P.A. Abhyankar, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J—Heard learned counsel for the rival parties. The appeal is against the judgment and order dated 29-03-2011 passed by learned member, Motor accident claim Tribunal-2 at Nagpur in Claim application no 605 of 2005 whereby the claim under Section 166 of the Motor Vehicles Act for sum of Rupees Fifteen Lakhs was dismissed.

2. Facts briefly mentioned are:-

Mr. Prakash Deorao Patil, aged 37 years, was travelling at Bina T-point from Bina Sangam by Motor Cycle bearing registration no. MH-31-AT-9769 on 07-01-2005 at about 7.30 p.m. on Road in front of Mahadeo Hedao's field House. The Motor Tata Sumo bearing Registration No.MH-31-H-2770 gave forcible dash to the motorcycle from behind it. Prakash died as result of the accident. Owner of the offending motor vehicle did not dispute the involvement of the later mentioned Tata Sumo vehicle and fact of the accident (W.S. Exhibit 18 -para No. 2). The deceased left behind his dependents viz. widow Manisha aged 29 years, son Chaitanya aged 8 years and mother Smt. Chandrabhagabai aged 63 years who

are claimants of compensation in this case. The owner of the offending motor vehicle is Umakant Marotrao Kolhe and the insurer of the offending Motor vehicle is National Insurance Company through its Dhantoli branch, Nagpur. The compensation for death was claimed in the sum of Rs. 20,65,000/-. The evidence consisted of widow of the deceased and an eye witness to the accident. No witness was examined on behalf of the Owner, driver and insurer. The Tribunal however dismissed the Claim application. In Claim Petition No. 605 of 2005 learned Member of the Motor Accident Claims Tribunal-2, Nagpur recorded the evidence of claimant Smt. Manisha wd/o Prakash Patil. She deposed about the accident which occurred on 7.1.2005 at about 07:30 p.m. near village Beena within local limits of Khaperkheda Police Station, District Nagpur. According to her, when her husband Prakash was proceeding towards Beena T-Point from Beena Sangam by motorcycle bearing Registration No.MH-31/AT/9769, at that time Tata Sumo bearing Registration No.MH-31/H/2770 came from behind and gave forcible dash to the motorcycle as a result of which her husband was seriously injured and died on the spot. Manisha deposed that the accident occurred solely due to negligence on the part of driver Parasram Bhadang of Tata Sumo.

3. The Khaperkheda Police Station had submitted Form-AA (Exh.33), in respect of the accident, which indicates that Tata Sumo bearing Registration No.MH-31/H/2770 driven by Parasram Bhadang employed by Shri Umakant Marotrao Kolhe caused accident. The offending motor vehicle Tata Sumo was covered by insurance policy dated 7.2.2005 insured with National Insurance Company Limited, Nagpur covering the date of accident.

4. Thus, although initially the offence vide Crime No. 2/05 was registered on 7.1.2005 at Khaperkheda Police Station under Sections 279, 337, 338, 304-A and 427 of the Indian Penal code read with Sections 184 and 134 of the Motor Vehicles Act, 1988 by one Sunil Parasram Bhadang (son of driver Parasram), there appears suppression of fact not disclosing name of the driver and name of the owner of offending motor vehicle. However, it appears that the police inquiry revealed name of the owner of the offending motor vehicle as well as driver thereof. The insurance policy by the National Insurance Company Limited covering the date of accident was also revealed during the investigation by the police and when the charge sheet was filed under Section 173 of the Criminal Procedure Code it does appear from Exh.39 that driver Parasram Bhadang was prosecuted on account of his negligence and rashness in driving the said Tata Sumo vehicle. Thus, learned Member of the Tribunal failed to note this fact during the course of hearing of the claim petition.

5. Considering the material collected during the course of investigation and the charge sheet filed under Section 173 of the Criminal Procedure Code and Form-AA submitted by the police, the Tribunal could not have in the facts and circumstances negated the claim that the deceased Prakash died in a motor vehicular accident because of rash and negligent driving of the driver of the Tata

Sumo which was covered by insurance policy of the National Insurance Co. Ltd. The preliminary facts were sufficiently proved before the Tribunal regarding death of Prakash Patil as a result of the rash and negligent driving of the offending motor vehicle. Hence, the impugned judgment appears unsustainable and contrary to law because in such cases the proof upon preponderance of probabilities required and not the stricter proof beyond reasonable doubt as is normally expected in criminal trial.

6. Witness- claimant Manisha was cross examined, however except suggestion that she had not witnessed the accident and that she had not produced the documentary evidence, nothing material could be elicited during the course of the cross examination of claimant Manisha to discredit her. Next witness examined was Roshan. He is an eye witness to the accident and deposed clearly that it was caused by offending motor vehicle Tata Sumo which came from direction of Beena Sangam and gave dash to the motorcycle from behind and driver of the Tata Sumo ran away from the spot. According to the Witness he was frightened on watching the accident. According to him, people helped the motorcycle rider and took him to the hospital. Though this witness was cross examined at length, there is nothing material to disbelieve him regarding the accident that had occurred. It may be that he did not report the accident to the police but once he is an eye witness to the accident one may not necessarily venture to go to police station for fear of being subjected to questioning and unnecessary harassment which may be caused to such witness. It is fact of common experience and knowledge that the witnesses in India do have different reactions when they are eye witnesses to any motor vehicle accident on road. Normally, reason is usual tendency of avoiding going to police station and reluctance to participate in the investigation or preliminary inquiry process by the police, one may not go to police station unless the eye witness is close friend or relative of the victim of the road accident, therefore, appreciation of such evidence require reasonable alertness, prudence to get the facts on record considering background of witnesses concerned, knowledge of normal behaviour of witnesses is required on the part of the judicial forum in such cases. Bearing in mind this, in my opinion, there was adequate evidence on the record to believe that the motor vehicular accident was caused as a result of the rash and negligent driving of Tata Sumo bearing Registration No.MH-31/H/2770 driven by Parasram Bhadang. Hence, learned Member of the Tribunal ought to have appreciated the evidence accordingly and should have answered the issues in affirmative.

7. The contention on behalf of the appellant is right that the Tribunal failed to properly appreciate the evidence on record. If evidence of an eye witness is prima facie acceptable and reliable, it cannot be overlooked in motor vehicle accident cases therefore claim tribunal ought not to have disbelieved the eye witness Roshan Narnavare (witness no.2). It must be judicially noticed that the reaction of each eye witness to the event of accident may differ. Such evidence ought to be appreciated upon the touchstone of probability as held in the ruling

in *Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others*, (2009) ACJ 1725 : AIR 2009 SC 2819 : (2009) 5 JT 515 : (2009) 5 SCALE 706 : (2009) 13 SCC 530 : (2009) 6 SCR 362 : (2009) 6 UJ 2709 : (2009) AIRSCW 4298 . Admission made in the pleading when not traversed binds the other party- i.e. owner and driver of the offending motor vehicle Tata Sumo. It is submitted that the insurer thereof did not lead the evidence to avoid liability to pay compensation. It is thus submitted that the insurer, owner and the driver were jointly and severally liable to pay the compensation demanded by the appellants.

8. Learned Advocate Shri Abhyankar for respondent No. 1 did not dispute the admission made in the written statement about the involvement of the Tata Sumo vehicle MH-31-H-2770. According to him however compensation claimed is excessive.

9. Learned counsel for the respondent No. 2 insurer disputed the liability to compensate the claimants on the ground that the Tribunal had rightly dismissed the claim application. It is contended in reply that the evidence of the witness Roshan was not the direct evidence of an eye witness to the incident. The witness may have been planted as there was no damage to the vehicle of the victim from behind and that negligence of the driver of offending motor vehicle is not proved. Exh.25 indicated that the damage to the vehicle which suffered the accident was from the front side. Therefore the theory "from behind "is unbelievable.

10. There was categorical admission by the Owner of the Offending Motor vehicle Tata Sumo about its involvement in the accident occurred on 07-01-2005, in the written statement. And also about the death of the deceased in the accident. While insurer sought to dispute its liability on the ground of breach of the insurance policy. The Tribunal failed to appreciate the material consisting of the police papers. Form AA which also indicated the involvement of the offending motor vehicle Tata Sumo giving dash to the Motor Cycle. In a summary kind of proceedings before the Tribunal the Tribunal ought to be guided by the police papers, the information reaching the police in AA form. An eye witness to the accident, though natural witness, he may be frightened of suffering harassment by the Police or exhibit reluctance to approach the police. Evidence in motor vehicle accident claim cases is to be appreciated upon touchstone of probabilities.

11. Considering the evidence led in this case the Tribunal erroneously misled itself to dismiss the claim. The evidence led consisted of the witnesses.

12. In the ruling in *Kusum Lata and Others Vs. Satbir and Others*, (2011) ACJ 926 : AIR 2011 SC 1234 : (2011) 162 PLR 490 : (2011) 2 RCR(Civil) 379 : (2011) 3 SCALE 74 : (2011) 3 SCC 646 : (2011) 2 SCC(Cri) 18 : (2011) 3 SCR 480 : (2011) 2 TAC 1 : (2011) AIRSCW 1593 : (2011) 2 Supreme 207 the Apex Court observed thus:-

"Admittedly, the facts were that the brother of the deceased, Ashok Kumar while walking on the road heard some noise and then saw that a white colour tempo

had hit his brother and sped away. Immediately, he found that his brother, being seriously injured, was in an urgent need of medical aid and he took him to the hospital. Under such circumstances it may be natural for him not to note the number of the offending vehicle. That may be perfectly consistent with normal human conduct. Therefore, that by itself cannot justify the findings reached by the Tribunal and which have been affirmed by the High Court".

13. In the ruling in *Saroj and Others Vs. Het Lal and Others*, (2011) ACJ 552 : AIR 2011 SC 671 : (2011) 1 JCC 344 : (2011) 164 PLR 131 : (2011) 3 RCR(Civil) 203 : (2011) 1 SCC 388 : (2011) 1 SCC(Cri) 414 : (2011) 1 TAC 271 it is observed thus :

"On considering the rival arguments, it must be said that the petition could not have been dismissed in totality. Presuming it to be a hit and run case, the appellants were entitled to at least Rs. 25,000/- as per the provisions of Section 161 (3) (a) of the Motor Vehicles Act. Therefore, both the Courts below have obviously failed to note this provision. But that is not the end of the matter. In our opinion, both the Courts below have completely erred in giving the finding that it was a hit and run case and that the concerned vehicle belonging to respondent No. 2 was not involved in the accident. Insofar as that finding is concerned, it was an admitted position in the pleadings of respondent No. 2 that firstly, the Tata Sumo vehicle bearing registration No. HR-38-L/6592 was involved in an accident with the motorcycle bearing registration No. HR-26-P/9413 which took place on 16.9.2005 at 3.30 p.m. and secondly, the said vehicle was being driven by respondent No. 1. This admission in the pleadings which we have quoted in the order was itself sufficient to hold that the concerned traversed by respondent No. 2 and, thus, there was no occasion to hold that the said vehicle was not involved and that it was a hit and run case. It is surprising that not only the Tribunal but the High Court also should have ignored the vital admission on the part of respondent No. 2. It was nobody's case that this admission of respondent No. 2 was in collusion between respondent No. 2 and appellant's vehicle belonging to respondent No. 2 was involved in the accident. Once this position is clear, there is no occasion for holding that the vehicle was not involved in the accident and on that count exonerating the three respondents."

In principle therefore, an admission / averment of fact in pleading, if not denied or traversed would bind the party making it..

14. In the ruling in *Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others*, (2009) ACJ 1725 : AIR 2009 SC 2819 : (2009) 5 JT 515 : (2009) 5 SCALE 706 : (2009) 13 SCC 530 : (2009) 6 SCR 362 : (2009) 6 UJ 2709 : (2009) AIRSCW 4298 it is observed thus :

"In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the

touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties." Claimants in the Motor vehicle accident claim cases triable in summary manner and expeditiously by the special Tribunals constituted under the law, need to establish their case upon preponderance of probability not like a criminal trial beyond reasonable doubts.

15. In *Pallavan Transport Corporation Vs. Saroj Goyal and Others*, (2003) ACJ 475 : (2001) 2 LW 292 : (2001) 1 MLJ 383 in paragraph No. 8 observed thus :

"Likewise, merely because the eyewitness did not inform the police nor made any specific complaint did not diminish his statement before the court regarding the manner of accident. If the evidence of the said witness is cogent, natural and probable, even in the absence of the fact that he did not inform the police regarding the manner of accident, can safely be accepted. In this regard learned Counsel appearing for the claimants very much relied upon *Natchathiram and Others Vs. Jayasekaran and Others*, (2000) ACJ 902 : (1998) 3 MLJ 603 . The learned Judge in a similar circumstance has held, (10) The mere fact that he has not given any complaint to the police will not diminish the credibility of the witness to any extent as observed by the Tribunal...

We are in agreement with the view expressed by the learned Judge."

16. *Shri Paunikar*, learned counsel on the other hand relied upon the ruling in *The Oriental Insurance Company Limited Vs. Meena Variyal and Others*, (2007) ACJ 1284 : AIR 2007 SC 1609 : (2007) 137 CompCas 116 : (2007) 5 JT 65 : (2007) 5 SCALE 269 : (2007) 5 SCC 428 : (2007) 4 SCR 641 . In paragraph No. 27 it is observed thus :

"We think that the law laid down in *Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr.* (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section

163A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

17. The eye witness to the accident cannot be blamed in the peculiar situation of sudden motor vehicle accident for not remembering the exact registration number of the offending motor vehicle. The depositions on record, accident form, police inquiry/ investigation papers may assist the Tribunal to apply its mind to the facts and circumstances revealed from the record and proceedings for reaching logical and correct finding to decide the claim upon preponderance of probabilities. The Tribunal cannot overlook or ignore the evidence or material on record, if available, as stated above. The intention in such cases ought to be to appreciate the material made available as a result of the investigation/inquiry made by the Police and to rely upon the acceptable and reliable evidence on record for restoring back the victim or his/her dependents to the pre-accidental position as far as possible.

18. I have considered the evidence on the record in the light of citations and considering the aforesaid well-established principles of appreciating evidence in the cases of the Motor vehicle accidents, in my opinion in the facts and circumstances of the case the Tribunal committed error of law and failed to properly appreciate the evidence led on record.

19. Next point is regarding compensation to be awarded to the claimants. It is argued on behalf of the claimants, that the annual income of late Prakash Patil was Rs. 1,16,000/- per annum. This argument is supported by documentary evidence previous Income Tax returns filed by late Prakash Patil to which compensation for prospective increases in income at the rate of 50% when added the annually claimed total income rises to the sum of Rs. 1,74,000/- per year. Deducting one -third amount which the deceased would have spent notionally towards self-expenses at least Sum of Rs. 1,16,000/- was annually available to the dependents of the deceased. That being the annual loss of dependency and applying the appropriate multiplier 15 the pecuniary Compensation comes to Rs. 17,40,000/-. To this sum we will have to add non-pecuniary damages claimed on behalf of the dependents such as Rupees One Lakh for Loss of consortium for widow of the deceased Prakash, Rupees One lakh for loss of love and affection for dependents, Rupees One lakh as loss of Father's valuable guidance for children during their formative years, Rs. 30,000/- towards funeral expenses including conveyance charges. Total compensation awarded as just is Rs. 20,70,000/- together with Rs. 9% interest per annum upon the sum from the date of the claim till the actual payment.

20. Reliance is placed upon the ruling in Smt. Darshana Ganesh Kanavaje and Others Vs. Maharashtra State Road Transport Corporation, Shri Maruti Subhanrao Nikam and Shri Sandeep Yashwant Pawaskar, (2014) 1 ABR 429 : (2014) 3 ACC 80 : (2014) ACJ 882 : (2014) 1 ALLMR 1 : (2014) 1 BomCR 801 : (2013) 6 MhLj 779 decided by this Court. The principles and guidelines were mentioned with

reference to the rulings by the Apex Court. In the result, therefore, the appeal must be allowed. The compensation accordingly can be claimed by the dependents as just, reasonable and proper to meet their needs in life for the otherwise monetarily uncompensatable loss of their near and dear family head and bread earner in the family. Compensation inclusive of pecuniary and non-pecuniary losses on account of death of Late Prakash Patil in the motor vehicle accident must be paid accordingly.

21. The appeal is therefore allowed accordingly with costs. The impugned judgment and order is set aside. In the facts and circumstances the respondents are jointly and severally liable to pay compensation in the sum of Rupees Twenty Lakhs and Seventy thousand 20,70,000/-inclusive of no-fault liability under Section 140 of the M.V. Act, together with interest upon the unpaid sum of compensation at the rate of Rs. 9% per annum from the date of the Claim application till full payment is made to the claimants. The amount of compensation be paid to the Widow of the deceased and then shall be distributed equally amongst the dependent claimants. Record and proceedings be sent back to the Tribunal for execution of the Award.