

(2011) 12 BOM CK 0165
In the Bombay High Court
Case No : F.A. No. 195 of 2002

Narayan Kalangutkar and another

APPELLANT

Vs

New India Insurance Co. Ltd. and others

RESPONDENT

Date of Decision : 17-12-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 158(3), 163A, 166

Citation : (2012) 2 ALLMR 244 : (2012) 6 BomCR 324 : (2012) 2 MhLj 803

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

Bench : Single Bench

Advocate : V.A. Lawande, for the Appellant; E. Afonso for respondent No. 3, J.P. Mulgaonkar and None, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this appeal, the appellants (hereinafter referred to as "the claimants") take exception to the Judgment and Award dated 13-12-2001 passed by the Motor Accident Claims Tribunal, Mapusa, in Claim Petition No. 1/1996 by which Tribunal has dismissed the claim petition filed by the appellants seeking compensation of Rs. 8,00,000/- (Rupees Eight lakhs only) for the death of their son Jayesh Kalangutkar in a vehicular accident which occurred on 18-9-1996 between 4.30 p.m to 5.00 p.m on the highway at Peddem Mapusa Goa. The claimants are the parents of the deceased Jayesh who met with an accident on 18-9-1996 on the highway at Peddem, Mapusa while travelling in a tempo bearing No. GA-01-V-2946 owned by respondent No. 4 and insured with respondent No. 5. The deceased was travelling in the said tempo, which was coming towards Mapusa from Sanquelim. The rear end of the tempo dashed against the mirror on the driver side of the bus bearing No. GA-01-V-2756, driven by respondent No. 2 and owned by respondent No. 1, insured with respondent No. 3. On account of the said accident, serious injuries were caused to Jayesh, who succumbed to his injuries in the hospital on the next day. It was further the case of the claimants that deceased was student of DMC college of

Commerce with brilliant academic career and he was doing carpentry work and earning Rs. 3,000/- per month. Respondent No. 3 resisted the claim petition on the ground that bus was not insured with respondent No. 3 and, as such, respondent No. 3 was not liable to pay any compensation. The claim Petition proceeded ex parte against respondent Nos. 1 and 2.

2. The case of respondent No. 5 was that the liability was governed under the terms and conditions of the policy of insurance and it was not liable to pay any compensation since deceased was travelling in the body of the tempo as passenger in contravention of the provisions of Motor Vehicles Act and Rules framed thereunder. The policy did not cover the passenger travelling in a tempo and, as such, it was not liable to pay any compensation to the claimants.

3. On the basis of the pleadings of the parties the Tribunal framed following issue :-

Whether the applicants prove that they are entitled for compensation of Rs. 8,00,000/- (Rupees eight lakhs only)?

4. The claimants examined Narayan Kalangutkar, AW1; Shrikant Naik, AW2; Dr. Silvano Sapeco, AW3; Digamber Naik, AW4 and Mohandas Naik, AW5. On behalf of the respondent No. 5, Mr. Pandharinath Anvekar, Assistant Administrative Officer of National Insurance Company was examined as RW1. The claimants and respondent No. 5 also produced documents in support of their case.

5. The Tribunal upon appreciation of the evidence led by the parties held that the claimants have failed to prove rash and negligent driving on the part of respondent Nos. 2 and 4, who were driving the two vehicles and consequently, dismissed the claim petition.

6. Mr. Lawande, learned Counsel appearing for the claimants in support of the appeal assailed the Judgment and award of the Tribunal on the following grounds :-

i. Tribunal erred in holding that the claimants have failed to prove rashness and negligence on the part of respondent Nos. 2 and 4, who were driving the two vehicles;

ii. Once it was proved that the two vehicles were involved in the accident and that the deceased who was travelling in a tempo, had died of serious injuries suffered in the accident, it has to be presumed that the drivers of both the vehicles were rash and negligent in driving the vehicles, more particularly when the drivers have not stepped in the box;

iii. Once Order u/s 140 of the Motor Vehicles Act was passed directing respondent Nos. 3 and 5 to pay compensation, the Tribunal ought to have awarded compensation after holding that respondent Nos. 2 and 4 were rash and negligent in driving the vehicles;

iv. The defence of respondent No. 3 that the bus was not insured with it, has not

been substantiated by respondent No. 3, more particularly having regard to the fact that no witness has been examined on behalf of respondent No. 3 and information submitted by the police disclosing that the bus was insured with respondent No. 3 has not been challenged in the cross-examination of AW5-Mohandas Naik, the respondent No. 3 has not discharged the burden of proving that the bus No. GA-01-V-2756 was not insured with it;

v. The claimants could not be expected to prove rashness and negligence on the part of the drivers of the two vehicles once accident was proved since it was not possible for the claimants to adduce strict proof of accident by leading cogent evidence and the panchanama and sketch tendered through AW4 Digambar Naik clearly prove that respondent Nos. 2 and 4 were rash and negligent in driving the vehicles, vi. Since two vehicles were involved in the accident and drivers of both the vehicles did not enter witness box, an adverse inference has to be drawn against them and the finding of rash and negligent driving of vehicles has to be recorded against both of them.

7. In support of his submissions, Mr. Lawande placed reliance upon following judgments:-

- i. Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others, .
- ii. Shivchandra Vishwanathappa Karaknale and Another Vs. Balaji Madhavrao Karaknale and Others, .
- iii. United India Insurance Co. Ltd. Vs. Smt. Suryakantabai Patle, Mr. Sahasram Rahangadale and Mr. Laxman Baghale, .
- iv. Indubai Bhiyalal Dube and anr. vs. Sanjay Kawaduji Mowale and ors., 2010(5) BCR 17.
- v. R.K. Malik and Another Vs. Kiran Pal and Others, .

8. Mr. E. Afonso, learned Counsel appearing for respondent No. 3 submitted that claimants have not proved rashness and negligence on the part of the drivers of the two vehicles and, as such, Tribunal has rightly dismissed the claim petition. According to the learned Counsel, the claimants have not proved that the bus, which was driven by respondent No. 2, was insured with respondent No. 3 and as such, respondent No. 3 cannot be held liable to pay any compensation. Mr. Afonso further submitted that the appeal as against respondent Nos. 1 and 2 having been dismissed, no award can be passed against respondent No. 3 inasmuch as liability of respondent No. 3 is co-extensive with that of respondent No. 1. According to learned Counsel, report in terms of section 158(3) of the Motor Vehicles Act has not been produced by the claimants and as such adverse inference has to be drawn against the claimants. Mr. Afonso, relied upon the judgment in the case of Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another, .

9. Mr. Mulgaonkar, learned Counsel appearing for respondent No. 5 submitted

that the claimants have not been able to establish rashness or negligence on the part of respondent No. 4 and, as such, respondent No. 5 cannot be held liable to pay any compensation to the claimants. According to learned Counsel, policy of the insurance issued by respondent No. 5 in respect of the tempo owned by respondent No. 4 did not cover any liability to a passenger travelling in a tempo and as such, the claimants are not entitled to any compensation from respondent No. 5. According to learned Counsel, the judgment in the case of Bimla Devi (supra) relied upon by Mr. Lawande is not attracted in the present case. Mr. Mulgonkar further submitted that although claimant No. 1 in his evidence has named four persons travelling in the tempo, the claimants have chosen not to examine any one of them to prove rashness and negligence on the part of respondent Nos. 2 and 4. According to learned counsel, neither the contents of the panchanama nor sketch have been proved by the claimants which would prove negligence on the part of respondent No. 2 and/or respondent No. 4 and the mere fact that the charge-sheet was filed against respondent Nos. 2 and 4, is not sufficient to hold that there was rashness and negligence on their part in driving the two vehicles. According to Mr. Mulgaonkar, evidence of RW1 Pandarinath Anvekar, clearly establishes that the passenger travelling in a tempo is not covered by policy and, as such, the Tribunal was justified in rejecting the claim petition filed against the respondents, more particularly against respondent Nos. 4 and 5.

10. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

11. In view of the rival submissions, the following points arise for determination in the appeal:-

- i. Whether the claimants have proved rashness and negligence on the part of respondent No. 2 and/or respondent No. 4 in driving the vehicles i.e. bus and tempo respectively and that the death of Jayesh was caused on account of rashness and negligence on the part of respondent No. 2 and/or respondent No. 4?
- ii. Whether the appeal as against respondent No. 3 is liable to be dismissed in view of the dismissal of the appeal against respondent Nos. 1 and 2?
- iii. Whether the respondent No. 5 is liable to pay compensation to the claimants?
- iv. Whether the appeal as against respondent No. 5 is liable to be dismissed in view of the dismissal of the appeal as against respondent Nos. 1 and 2?
- v. Whether the respondents are liable to pay any compensation? If yes, to what compensation claimants are entitled and from whom?

12. As stated above, Tribunal has dismissed the claim petition on the ground that the claimants have failed to prove rashness and negligence on the part of the drivers of the two vehicles. Therefore, it would be necessary to find out whether the claimants have been able to establish rashness and negligence on the part of

the drivers of the two vehicles or any one of them resulting in the accident, which ultimately led to the death of Jayesh, the son of the claimants.

13. Narayan Kalangutkar, AW 1 deposed that deceased Jayesh was studying in XIth standard in DMC College Mapusa and was earning Rs. 50/- to Rs. 80/- per day. He further deposed that he was told that his son was coming in a tempo after work when his vehicle was collided with a bus and he was injured. He further deposed that he was informed that there were other persons in the tempo namely Tulshidas Palyekar, Santosh Pole, Tilu Naik and Arun Govekar. He has denied the suggestion that his son was not earning Rs. 50/- to Rs. 80/- per day as a carpenter. Shrikant Naik, AW2 has been examined to establish that deceased was earning Rs. 60/- to Rs. 70/- per day. The evidence of AW3, Dr. Silvano Sapeco only proves that Jayesh had sustained injuries on account of vehicular accident, which took place on 18-9-1996 and that he expired on 19-9-1996. The deceased had fracture in left ulna bone at elbow joint region and death was due to haemorrhage and shock as a result lacerated injury caused to left elbow which had damaged muscle and blood vessel. His evidence establishes that these injuries could have been caused by vehicular accident.

14. Digamber Naik, AW4, has deposed that he was pancha for scene of offence panchanama at Peddem on 18-9-1996. He further stated that panchanama was drawn at the site. He produced copy of the panchanama and the sketch at Exh. AW4/A colly. He further stated that the deceased was his neighbour and was working as a carpenter with Shrikant Naik. Mohandas Naik, AW5 deposed that he was attached to Mapusa Police Station as Police Sub-Inspector and he had carried out investigation but the scene of offence panchanama was drawn by ASI Volvoikar. He stated that both the drivers of the vehicles were charge-sheeted by him for rash and negligent driving. He has identified copy of FIR at Exh. AW5/A and also identified copy of inquest panchanama at Exh. AW5/B. In cross examination, he has stated that the two vehicles involved in the accident were tempo and bus bearing registration Nos. GA-01-V-2946 and GA-01-V-2756 respectively. He further stated that on the policy of the bus the owner has given his address as 292, Abdul Rehman Street, Bombay. Both the accused were prosecuted before JMFC, Mapusa Court. In cross-examination, in reply to the suggestion that the tempo driver was acquitted he could not say anything but he added that deceased was sitting in the body of the tempo at the time of the accident. In reexamination, he stated that he had furnished to the appellants/claimants the information regarding two vehicles. He identified his signature at point "X" on the document at Exh. AW5/C.

15. From perusal of the above evidence, it is clear that the only evidence led by the claimants is that at the time of the accident the bus was driven by respondent No. 2 which was owned by respondent No. 1 and insured with respondent No. 3, and tempo was driven and owned by respondent No. 4 and was insured with respondent No. 5.

16. Indisputably, the claimant No. 1 was not present at the time of the accident.

Digambar Naik, AW2, who was pancha to the scene of offence panchanama and the sketch though produced the same, did not depose as to contents of the panchanama or the sketch. It is well settled by a catena of decisions that the panchanama or the sketch in any accident are not substantive evidence by themselves and can be used to corroborate the oral evidence of the pancha witness. The evidence of AW5 Mohandas Naik establishes that chargesheet was filed against the drivers of both the vehicles and FIR, Exh.AW5/A was filed in connection with the accident. The witnesses have not deposed as to in what manner the accident had occurred or as to the location of the two vehicles after the accident. Mere production of the FIR or mere fact that the charge-sheet was filed against both the drivers by itself would not be sufficient to hold that there was rashness and negligence on the part of both these drivers or anyone of them.

17. In the case of Minu Mehta (supra), relied upon by Mr. Afonso, the three Judge Bench of the Apex Court set aside the judgment of this Court holding that it was not necessary to prove rashness and negligence on the part of the driver in a case where injury is caused on account of accident involving use of the vehicle. The Apex Court held that the concept of owner's liability without any negligence is opposed to the basic principles of law and the proof of negligence remains the linchpin to recover compensation. The Apex Court further held that the right to receive compensation can only be against a person, who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to compensate anyone else. The Apex Court further held that in order to succeed in an action for negligence the plaintiff must prove that:-

(i) that the defendant had in the circumstances a duty to take care and that duty was owed by him to plaintiff, and

(ii) there was a breach of that duty and that as a result of the breach damage was suffered by the plaintiff. The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his employment. The liability of the owner of the car to compensate the victim in a car accident due to the negligent driving of his servant is based on the law of tort.

18. Therefore, this judgment clearly holds that in order to succeed in claim petition arising out of vehicular accident, a claimant has to prove rashness and negligence on the part of the driver of the vehicles and only if negligence of the driver is proved, the owner and insurer of the vehicle are liable to pay compensation to the victim or legal representatives of deceased in case of death.

19. In the case of Bimla Devi (supra) relied upon by Mr. Lawande, the Apex Court has held that in a claim petition strict proof of the accident may not be possible to be given by the claimants and the claimants have to establish their case on preponderance of probability and standard of proof beyond reasonable doubt is not applicable. In the said case, the deceased was a constable and postmortem

report suggested that deceased died of brain injuries and place of accident was near the police station. In this factual background, the Apex Court held that it was difficult to believe the driver of the bus that he slept in the bus and he found the dead body wrapped in a blanket. In the said case, the postmortem report discloses head injuries to the deceased. In this factual background, the Apex Court held that strict proof of accident caused by particular bus may not be possible. However, in the present case, the claimant No. 1 in his evidence has deposed that he was informed that there were four persons along with the deceased in the tempo. However, he did not choose to examine anyone of them to establish the manner in which the accident had occurred. Moreover, the claimants examined the pancha as well as the investigating officer, but none of them deposed as to the contents of the panchanama, sketch or FIR. For the sake of repetition it has to be stated that mere production of the documents by the witness does not prove the contents of the documents and this principle applies even to a claim petition filed u/s 166 of Motor Vehicles Act. Therefore, in the present case, although the claimants led evidence in support of their claim, they have not led any evidence to establish rashness and negligence on the part of respondent Nos. 2 and 4 or either of them.

20. The judgment in the case of Shivchandra (supra) relied upon by Mr. Lawande, does not advance the case of the claimants inasmuch as in the said case, the claimants have examined an eye witness, who had deposed as to how the accident occurred. In the said case, High Court set aside the findings of the Tribunal, that since no visible damage was seen to the truck it could not be inferred that there was negligence on the part of the driver of the truck.

Therefore, this judgment also does not advance the case of the appellants/claimants.

21. Thus, upon re-appreciation of the evidence led by the claimants, I am of the considered opinion that the finding of the Tribunal that the claimants have not been able to establish rashness and negligence on the part of the drivers of the bus and the tempo, cannot be faulted. I am unable to accept the submission of Mr. Lawande that since two vehicles were involved in the accident, and drivers of both the vehicles did not enter witness box, an adverse inference has to be drawn against them and the finding of rash and negligent driving has to be recorded against both of them. It was for claimants to lead evidence in support of rashness and negligence on the part of the respondent Nos. 2 and 4 or either of them. Merely because two vehicles were involved in the accident it is difficult to hold that both of them were rash and negligent. It may be that accident had occurred on account of rash and negligent driving of either respondent No. 2 or respondent No. 4. In such an eventuality, only the concerned driver of the said vehicle and owner and the insurer of said vehicle can be held liable to pay compensation. Therefore, I do not find any merit in the submission of Mr. Lawande that driver of both the vehicles should be held liable for rash and negligent driving of their respective vehicles resulting in an accident. I do not

find any merit in the submission of Mr. Lawande that since respondent Nos. 3 and 5 were held liable to pay compensation by the Tribunal in an application filed by the claimants u/s 140 of the Act, the insurance companies are liable to pay compensation in an application u/s 166 of the Act. It is axiomatic that liability of the insurance company to pay compensation u/s 140 of the Act is based on "no fault liability" whereas liability to pay compensation in an application u/s 166 of the Act arises only upon proof of the rashness on the part of the driver of the vehicle involved in the accident. Therefore, respondent Nos. 3 and 5 cannot be held liable to pay any compensation merely on the ground that they were ordered to pay compensation to the claimants in an application u/s 140 of the Act.

22. In view of the finding given by me regarding rashness and negligence of drivers, it is evident that claim petition filed by the claimants has been rightly dismissed by the Tribunal and therefore, no interference is warranted with the impugned judgment and award.

23. Since the claimants have not been able to prove rashness and negligence on the part of respondent Nos. 2 and 4 or either of them, I do not deem it necessary to record any finding on the other points for determination, which are in relation to liability of the insurance companies, more particularly, respondent Nos. 3 and 5 and amount of compensation to which claimants are entitled.

24. Indisputably, the claim petition was filed u/s 166 of the Motor Vehicles Act. Therefore, it was necessary for the claimants to prove rashness and negligence on the part of the drivers of the two vehicles or either of them in order to succeed in a claim for compensation. Unfortunately, the claimants have not led evidence required under the law to prove rashness and negligence on the part of the drivers of two vehicles resulting in dismissal of claim petition. For the reasons best known to the claimants, they have chosen not to file the application u/s 163A of the Act. But in terms of the settled law as laid down by the Apex Court in the case of *Minu Mehta (supra)*, the claimants cannot be awarded any compensation on account of death of their son Jayesh resulting from a vehicular accident.

25. In view of the finding given on the point of rash and negligent driving, I do not deem it necessary to refer to other authorities relied upon by Mr. Lawande, which are in relation to the liability of the respondent to pay compensation and also in relation to quantum of compensation to be awarded in a case arising out of vehicular accident. In the result therefore, I do not find any merit in the appeal. Consequently, the appeal stands dismissed with no order as to costs.