

(2009) 02 GUJ CK 0073
In the Gujarat High Court

Case No : First Appeal No's. 487 and 488 of 2009 and Civil Application No's. 1153 to 1154 of 2009

New India Assurance Co. Ltd. Manek Centre Jamnagar

APPELLANT

Vs

Cargo Motors Ltd. and Others

RESPONDENT

Date of Decision : 06-02-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2009) ACJ 2771 : (2009) 2 GLR 974

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

Bench : Single Bench

Advocate : Vibhuti Nanavati, for the Appellant; None for Defendants 1-7, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. Vibhuti Nanavati for appellant insurance company in these two appeals.

2. By filing these appeals, appellant has challenged award made by MACT Jamnagar in Claim Case No. 16/07 and 49/07 dated 30th August, 2008 wherein claims tribunal has awarded compensation of Rs. 6,35,000.00 and Rs. 7,02,000.00 respectively with 9% interest thereon in favour of claimants for the accident which occurred on 30th December, 2006 wherein two persons died, one Dosmohamad Jusabbhai Sodha and Amad Dosmohamad Movar and third person received injury.

3. Learned Advocate Mr. Nanavati raised contention before this Court that driver of offending truck was not joined as a party in claim petitions filed by claimants. He submitted that driver is necessary party and because of negligence on the part of driver, vicariously, owner is becoming liable and insurance company has to indemnify owner, therefore, according to him, in absence of driver, question of negligence cannot be examined by claims tribunal. He submitted that specific

application Exh. 72 was preferred by appellant before claims tribunal that the driver should be joined as a party to claim petitions but that application was rejected by claims tribunal. As per his submission, said contention was also specifically raised by appellant in its written arguments Exh. 76 but claims tribunal has not considered it and in doing so, claims tribunal has committed an error and, therefore, interference of this Court is required. He relied upon apex court decision in case of *The Oriental Insurance Company Limited Vs. Meena Variyal and Others*, . He read before this Court para 9 of said judgment and pointed out that driver is must, in absence of driver, negligence question cannot be examined and therefore, claims tribunal has committed an error in deciding issue of negligence in absence of driver. He also raised specific contention on merits in respect to Dosmohamad. He submitted that claims tribunal has committed gross error in considering income from two sources, one is from the source of providing labour contract to employer and also having income from agricultural land for supervision, receiving two crops in a season. He submitted that claims tribunal has considered income of Rs. 5100.00 without any cogent evidence from side of claimants. He submitted that looking to age of deceased 42 to 43 years, multiplier of 15 applied by claims tribunal is on higher side and claims tribunal ought to have applied multiplier of 10 or 12 at the most and, thus, according to him, award made by claims tribunal is on higher side.

4. As regards case of deceased Amad Dosmamad, according to him, he was working as fisherman having income of Rs. 3000.00 and considering future prospective income also at Rs. 3000.00 ($\text{Rs. } 3000 \times 3 = \text{Rs. } 9000$ less Rs. 4500 = Rs. 4500 less $\frac{1}{3}\text{rd} = \text{Rs. } 3000/-$ p.m.), claims tribunal has applied multiplier of 17 by considering age 24/25 which is on higher side and multiplier of 15 ought to have been applied by claims tribunal and, thus, according to him, award made by claims tribunal is on higher side. He has relied upon decision of apex court in case of *The Oriental Insurance Company Limited Vs. Meena Variyal and Others*, and except that, no other decision has been referred to and relied upon by him before this Court.

5. I have considered submissions made by learned advocate Mr. Nanavati before this Court. I have also perused impugned award in both claim petitions. Accident occurred on 30.12.2006 at any time prior to 10.00 hours, on Malia-Pipalia Highway near village Sarvad. At that time, accident had taken place between truck No. GJ.12.U.9542 owned by M/s. Cargo Motors Ltd. and motor cycle No. GJ.J.3204 which was being driven by deceased Dosmohamad wherein driver of motor cycle Dosmohamad and pillion rider of motor cycle Amad Dosmohamad died and Siddiq Dosmohamad had received injury and, therefore, claims petitions were filed by claimants before claims tribunal. It was case of claimants before claims tribunal that on 29.12.2006, deceased Dosmohamad had come from Malia to see his family at his house at Jiragadh and on the same day, he had left for going to Balambha for his work and then for going from there to Malia for the purpose of work, he had started with aforesaid motor cycle. At that time, along with him, injured Siddique and deceased Amad were also with him as pillion

riders and at that time, he was driving his vehicle on correct side of road in compliance of traffic rules in slow speed. At that time, prior to 10.00 hours, driver of aforesaid truck coming from opposite had driven truck in his custody in full speed, rashly and endangering human life in a wrong side and dashed with the motor cycle of deceased near village Sarvad wherein two persons namely Dosmohamad and Amad lost their lives whereas claimant Siddique had received physical injuries. Criminal case has been lodged against truck driver and claim petitions were filed by claimants on 5.1.2007, 22.1.2007 and 22.1.2007.

5. Before claims tribunal, reply were filed by insurance company at Exh. 22, 19 and 19 wherein it was alleged by insurance company that insurance company is not liable to pay any compensation to claimants and there was negligence on the part of deceased Dosmohamad who was driving motor cycle. It was also alleged that the terms and conditions of insurance policy were violated by deceased and, therefore, claimants are not entitled to any amount of compensation from insurance company. After pleadings, issues were framed at Exh. 24, 32 and 32 respectively. Vide Exh. 76, written arguments were submitted by insurance company advocate and on behalf of respondents No. 1 and 3, no one had remained present and there was no representation from said respondents before claims tribunal and only insurance company had opposed claim of claimants before claims tribunal and respondent No. 1 owner had remained absent.

6. In para 7, claims tribunal has referred to certain documentary evidence produced by claimants which were admitted in evidence by claims tribunal. Applicant No. 1 Ranbaiben Dosmohanad has given her deposition on oath at Exh. 31 and on behalf of claimants, vide Exh. 68, Bokharbhai Narayanram was examined. In his deposition, vide Exh. 69, certificate in respect of commission was produced. In respect of claim petition No. 49 of 2007, applicant No. 1 Sugarabai Amad has given her oral evidence at Exh. 33 and on behalf of said claimants, vide Exh. 64, witness Savdin Habib was examined who has in his deposition vide Exh. 65, produced certificate Exh. 66 regarding issued by Nagarpalika to the effect that the deceased was fisherman. On behalf of said claimants, vide Exh. 67, witness Kasambhai Ishabhai was examined whereas on behalf of opponent No. 2 insurance company, no witness was examined nor any other evidence except the evidence referred to above was produced by either of the parties. Thereafter, vide Exh. 71 and 73, purshis were filed by claimants closing their evidence.

7. Thereafter, question of negligence was considered by claims tribunal after considering evidence on record and keeping in mind one fact that owner of the truck was not remaining present though served and no reply was filed by owner of the truck, claims tribunal considered that accident occurred due to negligence of truck driver but she was not present at the time of accident and, therefore, according to evidence of eye witness Siddique Dosmohamad Exh. 32, who was sitting on motor cycle as pillion rider and received injury in said accident, truck dashed with motor cycle and it was denied by him that deceased lost control over

motor cycle as they in all three were riding on motor cycle and, therefore, accident had taken place because of negligence of deceased Dosmohamad. After considering evidence of said eye witness, claims tribunal considered FIR Exh. 40 filed by Rafikbhai Jusabbhai against driver of truck having 10 wheels and it was also alleged therein that operator of said truck had driven his truck rashly and negligently and on wrong side of road and charge sheet was also filed at Exh. 42 wherein also police had come to the conclusion that at the time of accident, truck was driven on wrong side and after considering aforesaid oral as well as documentary evidence, claims tribunal has come to the conclusion that accident took place solely because of negligence and careless driving of driver of truck and there was no any negligence on the part of deceased Dosmohamad and claims tribunal not accepted plea of insurance company that there was negligence on the part of deceased Dosmohamad. Decision reported in AIR 2003 Karnataka page 258 was relied upon by insurance company and said decision was distinguished by claims tribunal by relying upon decision of this Court reported in AIR 1980 Guj 46 (S.M. Vyas v. Shrimati Sudhaben Sukeshu Sutaria wherein scooter driver was driving scooter with three pillion riders and in that case, it was held by this Court that merely because four persons were riding on scooter, by that itself, it cannot be said that there was negligence of person driving scooter, therefore, relying upon said decision, claims tribunal held that merely because three persons including driver of scooter deceased Dosmohamad were riding motor cycle, by that itself, negligence of motor cycle driver deceased Dosmohamad cannot be inferred unless it is proved by cogent evidence against them. Claims Tribunal has also consider FIR, Panchanama, evidence of Siddique and thereafter held that truck driver was driving truck from opposite side rashly, negligently and on wrong side and dashed with motor cycle and, therefore, it is a clear case of sole negligence on the part of truck driver and, thereafter, claims tribunal has come to the conclusion after considering decision of this Court reported in S.M. Vyas and Another Vs. Sudhaben Sukethu Sutaria and Another, and therefore, clear findings have been given by claims tribunal after considering aforesaid oral and documentary evidence from claimant side and owner remained absent and insurance company also not cared to examine driver of truck and thereafter, claims tribunal considered insurance policy Exh.70 and held that at the time of accident, policy was in existence and accordingly answered issue No. 1.

8. As regards contention raised by learned Advocate Mr. Nanavati that in absence of driver, question of negligence cannot be examined by claims tribunal and the decision in case of Meena Variyal (supra), para 9 as relied upon by learned Advocate Mr. Nanavati, in para 9 of said decision, apex court has come to the conclusion that if the driver is not joined in claim petition, then, claim petition become fatal, I have considered said decision of apex court. In said decision, apex court has observed as under in para 9:

9. Before we proceed to consider the main aspect arising for decision in this Appeal, we would like to make certain general observations. It may be true that

the Motor Vehicles Act, insofar as it relates to claims for compensation arising out of accidents, is a beneficent piece of legislation. It may also be true that subject to the rules made in that behalf, the Tribunal may follow a summary procedure in dealing with a claim. That does not mean that a Tribunal approached with a claim for compensation under the Act should ignore all basic principles of law in determining the claim for compensation. Ordinarily, a contract of insurance is a contract of indemnity. When a car belonging to an owner is insured with the insurance company and it is being driven by a driver employed by the insured, when it meets with an accident, the primary liability under law for payment of compensation is that of the driver. Once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the insurance company. A third party for whose benefit the insurance is taken, is therefore entitled to show, when he moves u/s 166 of the Motor Vehicles Act, that the driver was negligent in driving the vehicle resulting in the accident; that the owner was vicariously liable and that the insurance company was bound to indemnify the owner and consequently, satisfy the award made. Therefore, under general principles, one would expect the driver to be impleaded before an adjudication is claimed u/s 166 of the Act as to whether a claimant before the Tribunal is entitled to compensation for an accident that has occurred due to alleged negligence of the driver. Why should not a Tribunal insist on the driver of the vehicle being impleaded when a claim is being filed? As we have noticed, the relevant provisions of the Act are not intended to jettison all principles of law relating to a claim for compensation which is still based on a tortious liability. The Tribunal ought to have, in the case on hand, directed the claimant to implead Mahmood Hasan who was allegedly driving the vehicle at the time of the accident. Here, there was also controversy whether it was Mahmood Hasan who was driving the vehicle or it was the deceased himself. Surely, such a question could have been decided only in the presence of Mahmood Hasan who would have been principally liable for any compensation that might be decreed in case he was driving the vehicle. Secondly, the deceased was employed in a limited company. It was necessary for the claimants to establish what was the monthly income and what was the dependency on the basis of which the compensation could be adjudged as payable. Should not any Tribunal trained in law ask the claimants to produce evidence in support of the monthly salary or income earned by the deceased from his employer Company? Is there anything in the Motor Vehicles Act which stands in the way of the Tribunal asking for the best evidence, acceptable evidence? We think not. Here again, the position that the Motor Vehicles Act vis-a-vis claim for compensation arising out of an accident is a beneficent piece of legislation, cannot lead a Tribunal trained in law to forget all basic principles of establishing liability and establishing the quantum of compensation payable. The Tribunal, in this case, has chosen to merely go by the oral evidence of the widow when without any difficulty the claimants could have got the employer company to produce the relevant documents to show the income that was being derived by the deceased from his employment. Of course, in this case, the above two

aspects become relevant only if we find the insurance company liable. If we find that only the owner of the vehicle, the employer of the deceased was liable, there will be no occasion to further consider these aspects since the owner has acquiesced in the award passed by the Tribunal against it.

9. Thus, in aforesaid judgment of apex court, apex court has observed that therefore under the general principle, one would expect driver to be impleaded before adjudication of his claim u/s 166 of the Act as to claimant before tribunal is entitled to compensation for accident that has occurred due to alleged negligence of driver. Why should not tribunal insisted driver of vehicle being impleaded when claim is being filed? It was also observed by apex court that " As we have noticed, the relevant provisions of the Act are not intended to jettison all principles of law relating to a claim for compensation which is still based on a tortious liability. The Tribunal ought to have, in the case on hand, directed the claimant to implead Mahmood Hasan who was allegedly driving the vehicle at the time of the accident. Here, there was also controversy whether it was Mahmood Hasan who was driving the vehicle or it was the deceased himself. Surely, such a question could have been decided only in the presence of Mahmood Hasan who would have been principally liable for any compensation that might be decreed in case he was driving the vehicle. "

10. So, aforesaid observations have been made by apex court on the basis of fact that two persons were travelling in the car owned by company and both persons were employee of company and they are not employee or workmen covered by the provisions of Workmens compensation Act and in light of those facts, apex court has considered that car was driven by one whether by deceased or other person who was travelling in the car, therefore, in such controvertial situation, it was necessary to implead driver who was driving at the relevant time.

11. In facts of this case, there is no such controversy between the parties about driver of truck owned by Cargo Motors Ltd. Owner was joined as party who is basically vicariously liable for the act committed by its agent namely driver of truck and owner has to be indemnified by insurance company in accordance with terms and conditions of policy of insurance. Owner himself has remained absent and had not appeared and has not filed written statement and in such circumstances, question is whether if driver is not joined as party, whether claim petition can be considered to be fatal, answer of this Court is that the claim petition would not become fatal and this view has been taken by Kerala High Court in Simon Pathrose Vs. United India Insurance Co. Ltd. and Another, wherein Kerala High Court was considering question of non impleading of driver and maintainability of claim petition. Claimant had sustained injuries while boarding a bus. Claim petition was dismissed by claims tribunal as not maintainable for want of person against whom negligence is alleged namely driver and it was held by Kerala High Court that non impleading of driver is not fatal to the maintainability of claim petition. Relevant discussion made by Kerala High Court in para 7, 8 and 9 is reproduced as under:

7. In the instant appeal filed by the claimant, the main contention urged before me was whether the finding of the Tribunal that the petition is not maintainable for non-joinder of the driver of the bus is correct or not. Having heard learned Counsel for the appellant and learned Counsel appearing for the respondents, I am of the view that the question is no longer *res integra*. In this connection, it has to be noted that both driver and owner are joint tortfeasors. In a motor accident the primary liability is that of the driver and once the driver is found negligent, the owner will be vicariously liable for the negligent, the owner will be vicariously liable for the negligent act of the driver. In other words, the liability of the driver and owner, being joint tortfeasors, is joint and several and any person who sustained any injury in a road traffic accident is entitled to sue either the driver of the vehicle or its owner. It may be true that the person against whom the award is passed and who is made liable to pay the amount as damages is entitled to recover the same from the other joint tortfeasor, but that will not disentitle the claimant injured from suing any one of the joint tortfeasors. It has been so held by two Division Bench decisions of this Court reported in *United India Fire & General Insurance Company Limited v. Varghese* 1989 ACJ 472 and *United India Insurance Co. Ltd. v. Ratnamma* 1988 ACJ 435. In the later case, it was observed as follows:

The owner and driver are joint tort-feasors and, therefore, absence of one of them will not be a bar for a suit for compensation. This does not mean that the negligence of the driver need not be proved. Even in the absence of the driver evidence regarding the negligence of the driver can be adduced. Take, for example, a case where the driver also died in the accident without leaving any legal representative. That will not preclude the injured from claiming compensation against the owner or the insurer. The owner and driver are joint tortfeasors, whose liability is joint and several. Each may be sued alone or jointly and each will be liable for the whole damage.

The principle has been followed in a recent Division Bench decision of this Court in *Anuradha Varma v. State of Kerala* 1994 ACJ 353, wherein it was held that the non-joinder of the driver is not fatal to a claim petition.

8. In the light of the above discussion, I have no hesitation in holding that the driver is not a necessary party to the proceedings and absence of the driver will not be a bar for a petition claiming compensation.

9. Having considered the question whether the driver is a necessary party to the proceedings, the next aspect to be considered is the question of negligence, namely, whether the accident as alleged by the claimant was caused by the rash and negligent conduct on the part of the driver or the conductor, as the case may be. It so happens that in many cases the driver himself may die in the accident or he may die during the pendency of the proceedings or he may not appear at all even though he is arrayed as a party respondent before the Tribunal. In all such cases it does not mean that the negligence of the driver need not be proved. The negligence of the driver can be proved even in the absence of the

driver on the party array. In the instant case only the owner and the insurer alone are impleaded by the claimant. Even so, it was open for the first respondent owner to take appropriate steps to examine before the Tribunal the driver and conductor of the bus who are none other than his own employees to prove his case as set out in the written statement. But I find that apart from making the averments in the written statement, no independent evidence has been adduced by the first respondent owner to prove these statements. It is the specific case of the claimant that before he could make a complete entry into the bus, the conductor gave the bell pursuant to which the driver drove the bus in a rash and negligent way thereby throwing the claimant out of the bus through the door. In support of this version, the claimant entered the witness-box as PW 1 and gave evidence. He has categorically sworn that the bus was set in motion by the driver before he could make a complete entry into the bus and as a result thereof he fell down from the bus sustaining injuries. He has given the nature of the injuries sustained by him as also the treatment undergone by him after the accident. Having perused the testimony of the claimant as PW 1, I am inclined to believe that his version is true. Had the vehicle been set in motion after he made a complete entry into the bus, then even assuming that he lost balance because of the rash and negligent driving of the bus at the curve ahead, he would have fallen down inside the bus itself rather than being thrown out. The fact that the claimant was thrown outside the bus probabilises his case that the conductor gave the bell and driver drove the bus before he could make a complete entry into the bus. Therefore, I have no hesitation in holding, that both the driver and conductor who are the servants of the first respondent owner are primarily liable for the accident as both of them were negligent in their conduct-the conductor in giving the bell before the claimant could enter the bus completely and the driver in driving the bus without proper care and caution. Therefore, I set aside the finding of the Tribunal on the question of negligence and find that the driver and conductor were guilty of negligence which caused the accident resulting in injuries to the claimant.

[See : State of Maharashtra Vs. Gulabi Sudhu and Others, (2) Shri Radha Kishan Sachdeva and others Vs. Flt. Lt. L.D. Sharma and another, (3) Hargo Rubber Industries Pvt. Ltd. v. Mukesh Sharma and Ors. reported in ; (4) Anuradha Varma and Ors. v. State of Kerala reported in 1994 ACJ 353 ; (5) Vaddepalli Rajesham Vs. Andhra Pradesh State Road Trans. Corpn.,

12. In view of the aforesaid observations made by Kerala High Court and also considering aforesaid decision of apex court in case of Meena Variyal (supra), according to my opinion, there is no decision given by apex court to the effect that in absence of driver, claim petition become fatal to claim of claimant and there is bar against maintainability of claim petition. Apex court only considered that it would be expected normally that driver is joined as party to claim petition. It is necessary to note one important aspect, no doubt according to learned Advocate Mr. Nanavati, in Exh. 76 written arguments, specific contention was raised by insurance company regarding non joining of driver as a party to claim

petition but after perusal of entire award passed by claims tribunal, no where such contention is finding place in award. Even Exh. 72 application as referred to in written argument also does not find place in impugned award. Therefore, looking to award as it is, these two contentions raised by learned advocate Mr. Nanavati in award. Apart from that, this being legal contention, same has been examined by this Court after considering decision of apex court in case of The Oriental Insurance Company Limited Vs. Meena Variyal and Others, and decision of Kerala High Court, this Court is of the view that driver is not necessary party because driver and owner both are being joined as tortfeasor and if owner is there and there is no any controversy as to who was driving vehicle like apex court decision and, therefore, contention of learned advocate Mr. Nanavati in that regard cannot be accepted and same is therefore rejected.

13. As regards quantum, in both cases, according to my opinion, claims tribunal has right to draw certain inference on the basis of evidence on record to find out income of deceased. For assessing income of deceased, whatever evidence available on record has been considered by claims tribunal. It was not a case of no evidence. There was enough evidence on record and on the basis of said evidence as referred to above, claims tribunal has rightly inferred that how much is income of deceased at the relevant time in both cases and claims tribunal has rightly assessed income on the basis of evidence on evidence of witness Exh. 31 and certificate Exh. 69 and revenue record Exh. 50 which proved that deceased was holding agricultural land ad measuring 1.27.27 having well in land and therefore, on that basis, claims tribunal has rightly assessed income of deceased in both cases which is quite reasonable, just and proper and not on higher side in any manner whatsoever. Looking to multiplier applied in both cases in light age of deceased persons died in accident. According to my opinion, whatever amount awarded by claims tribunal is reasonable, not on higher side in any manner and multiplier is also proper and rightly applied by claims tribunal in accidental death wherein two persons lost their lives because of negligence of driver of truck who was not examined by insurance company before claims tribunal. Though insurance company was contending that claimant has not joined driver, but it has not taken care to examine driver of offending truck for controverting allegation of negligence of truck driver. Why details of driver were not obtained by it from owner by insurance company and why not examined driver? Efforts required to be made by insurance company were not made by it and it remained silent after raising technical contention about non impleading of driver and according to my opinion, it is not open for insurance company to avoid its liability on the basis of such technical contention when involvement of truck owned by owner is proved as per FIR and Chargesheet and, therefore, according to my opinion, contentions raised by learned advocate Mr. Nanavati are required to be rejected and same are therefore rejected.

14. According to my opinion, compensation awarded in both cases is just and proper as well as reasonable and not on higher side in any manner and multiplier is also rightly applied by claims tribunal after considering age of deceased in both

cases. Claims tribunal has not committed any error in making award in question and reasoning given by claims tribunal cannot be considered to be vitiated or baseless and perverse and, therefore, there is no substance in the appeals and, therefore, both appeals are dismissed.

15. Today, this Court has dismissed first appeals, therefore, no order is required to be passed in civil applications for stay, therefore, civil applications for stay are disposed of accordingly. Amount if any deposited by appellant in registry of this Court be transmitted to claims tribunal concerned immediately.