(1995) 02 BOM CK 0057

In the Bombay High Court

Case No : F.A. No. 1086 of 1987 & First Appeal No. 1086 of 1987

Sakharibai Hasanali Makani and Others APPELLANT

Vs

Girish Kumar Rupchand Gadia and Others RESPONDENT

Date of Decision : 09-02-1995

Acts Referred:

Citation : (1995) 97 BOMLR 346

Hon'ble Judges : N.D. Vyas, J;M.L. Pendse, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.L. Pendse, J.—The Claimants have preferred this appeal to challenge award dated June 29, 1987, passed by the Motor Accidents Claims Tribunal, Pune, in Claim Application No. 398 of 1983. By the impugned award, the application for compensation was dismissed with costs. We must express at the outset that we are aghast with what the Tribunal has done. It surpassed our imagination as to how the Tribunal could have dismissed the application. The facts which gave rise to filing of the application for compensation of Rs. 3 lakhs by the appellants are as follows:

The deceased Hasanali, aged about 53 years was the owner of a Taxi bearing Registration No. MTD 6740. It was a Fiat Car and was used as a Taxi for carrying passengers from Bombay to Pune and vice-versa. On September 9, 1993, the deceased started from Pune by about 5.30 a.m. and was proceeding towards Bombay. The Taxi was carrying passengers including one Bhise and Ashok Mahajan. Ashok Mahajan was sitting on the rear seat. The Taxi reached near Kamshet by about 7.15 a.m. Respondent No. I is the owner of truck bearing Registration No. MTO 5070 and Respondent No. 2 was in the employment as driver of that truck. The truck was insured with Respondent No. 3. On the fateful day, the truck was proceeding from Bombay to Pune and near Kamshet, the truck went and dashed against the Taxi. The result of the dash was that the Taxi fell turtle and all the four doors came out and the roof was blown away. The photographs on record established that the taxi was entirely smashed. The truck then proceeded further and went into the adjoining field to the extent of 250 feet. The truck was fully loaded. The result of the collision was that the taxi driver Hasanali died along with passenger Bhise, while Ashok Mahajan received serious injuries.

2. The appellants who are legal representatives of the deceased taxi driver, filed application before the Tribunal claiming compensation amount of Rs. 3 Lakhs. The application sets out that the monthly Income of the deceased taxi driver was Rs. 3500/- to 3.600/-. The application sets out that the truck was driven rashly and negligently and extremely fast and dashed against the taxi resulting into the death of the driver.

Respondent No. 1 filed his written statement and merely denied that the truck was driven at an excessive speed. The fact of accident was not denied. The written statement of Respondent No. I claimed that the front tyre of the truck burst and then firstly driver lost control and dashed against taxi. Respondent No. 2- driver did not appear before the Tribunal nor filed written statement. Respondent No. 3, Insurance Company, filed written statement denying that the driver of the truck was negligent and claiming that the truck was not insured with Respondent No. 3 at the relevant time. With these rival pleadings, the Tribunal raised issues and proceeded to record evidence. On behalf of the appellants Sultan Makani, the son of the taxi driver was examined. The witness deposed that his father was earning about Rs. 3,500/" to Rs. 3,600/- per month and on an average was contributing Rs. 2.000/- per month for household expenses. The witness was not cross-examined and the claim was not disputed. The appellants also examined Ashok Mahajan who was travelling in the taxi and Who deposed that the taxi was driven on the left side of the road and the witness noticed the truck coming from opposite direction at a fast speed when the driver observed that the truck was coming directly towards the taxi. The witness claimed that the truck was at a distance of 40 fit. away when the attention of the witness was drawn for the first time towards the truck. A suggestion was made to the witness in cross-examination that he was sleeping at the time of collision. The witness denied the suggestion. The third witness examined was Suleman Shaikh who was the panch in respect of the panchanama drawn after the accident. The witness was also shown photographs which were produced at the criminal trial and the witness confirmed that the situation shown in the photographs is accurate. The photographs indicate the severity of the dash given by the truck which was fully loaded. The photographs clearly established that the truck was driven at excessive speed and the fact that the truck went into the field and proceeded for a distance of 250 ft. after collision clearly confirms the grievance of the appellants that the truck was driven at a fast speed. The doctrine of res ipsa loquitur squarely comes into play on the facts and circumstances of the case. We have no hesitation in concluding that the appellants established beyond any reasonable doubt that the truck was driven rashly and negligently and dashed against the Taxi resulting into the death of taxi driver.

3. Mrs. Agarwal, learned Counsel appearing on behalf of the Insurance Company submitted that the accident occurred as the front tyre of the taxi burst. It is impossible to accede to the submission. This suggestion was made to Ashok Mahajan who was travelling in taxi and the witness denied the same. The driver of the truck did not enter the witness box. The written statement filed by Respondent No. I who was the owner of the truck states that the tyre of the truck burst and then the driver lost control. Mrs. Agarwal submitted that it was a typographical mistake in the written statement that the tyre of the truck burst and it should have been that the tyre of the taxi burst. We do not attach any importance to the submission. The Insurance Company did not care to step into the witness box nor the owner of the truck, and it was not open for the Counsel for the first time in the appeal to suggest that there was an error in the written statement. Mrs. Agarwal then submitted that the panchanama indicates that the taxi was facing Bombay side and Ashok Mahajan had deposed that the truck was coming in its right side and if that is so, then it cannot be concluded that the driver of the truck was negligent. The submission is merely to be stated to be rejected. The panchanama and the testimony of the panch if perused would show that the truck had left tar road and entered into the adjoining field by 250 ft. and was in oblique direction. The perusal of the panchanama confirms the fact that the truck driver was extremely negligent and was driving the truck at an excess speed. The submission of Mrs. Agarwal that truck was not insured with Respondent No. 3 cannot be accepted as Insurance Company did not examine any witness to deny on oath that truck was insured. The mere averment in written statement is not evidence.

It surpasses our imagination how on these set of facts the Tribunal could have ever come to the conclusion that the accident was caused on account of bursting of tyre of the taxi and it was an act of God-vis major. In our judgment the finding is not worth even consideration, as it is entirely perverse and unsustainable.

4. Mr. Surana, learned Counsel appearing on behalf of appellants submitted that the testimony of Sultan Makani, son of the taxi driver establishes that the deceased was contributing Rs. 2.000/- per month for household expenses. The learned Counsel submitted that the deceased would have driven taxi till age of 80 and the compensation of Rs. 3 lakhs should be awarded on that basis. It is not possible to accede to the submission. It is undoubtedly true that the claim of Sultan Makani that the deceased was contributing Rs. 2.000/- per month for household expenses was not challenged in the cross-examination. The cross-examiner did not even think it necessary to question the claim of Sultan that the deceased was earning Rs. 3,500/- to 3.600/- per month. Mrs. Agarwal submitted that initially the appellants had claimed that the deceased was earning Rs. 1.500/- to Rs, 1,600/- per month and it was only by subsequent amendment that the claim was made that the deceased was earning Rs. 3.500/- or more. We do not find any merit in the contention that the amendment should not have been granted. The contents of the application are not the evidence and substantive evidence is only deposition of the witness entering into the witness

box. The Respondents did not challenge the claim in cross examination and, therefore, it is futile to say that the deceased could not have contributed Rs. 2,000/- per month for household expenses. We accept the claim of Sultan and hold that the annual dependence was to the extent of Rs. 24.000/-. This raises the question as to what multiplier should be applied. The. deceased was 53 years old at the time of accident and could have driven taxi not for a long time. Taking into consideration all the facts and circumstances, in our judgment, the proper multiplier should be 7 and ''that the compensation payable would come to Rs. 1,68,000/- Some amount is required to be deducted for accelerated payment and in our judgment, deduction of Rs. 18,000/- would be appropriate. Consequently the compensation payable by the Respondents is Rs. 1,50,000/-. The Respondents are naturally bound to pay interest on the said amount at the rate of 12% p.a. from the date of the filing of the application till realisation.

5. Accordingly appeal is allowed. The award passed by the Tribunal is set aside and the following award is declared:

The Respondents are directed to pay compensation of Rs. 1,50,000/- to the appellants along with interest at the rate of 12% p.a. from the date of the application i.e. November 7, 1983 till realisation. The Respondents shall also pay proportionate costs of the appellants throughout. The amount of compensation is payable only to appellant No. 1, who is the widow, as Appellant Nos. 2 to 5 are major sons and daughters and are settled in life. The amount paid towards no fault liability will be given credit.

