
(2010) 08 BOM CK 0098
In the Bombay High Court
Case No : First Appeal No. 316 of 2003

Smt. Nilima Mithel Tar

APPELLANT

Vs

Eknath Mukund Naik and Others

RESPONDENT

Date of Decision : 18-08-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A, 166

Citation : (2011) 1 TAC 122

Hon'ble Judges : F.M. Reis, J;A.S. Oka, J

Bench : Division Bench

Advocate : S.D. Lotlikar and H. Kankonkar, for the Appellant; A.R. Katak, for respondent No. 2., for the Respondent

Judgement

A.S. Oka, J.—The appellant has taken an exception to the Judgment and Award dated 10th September, 2003, passed by the learned Presiding Officer of the Motor Accident Claims Tribunal, at Mapusa, by which a claim petition filed by her u/s 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the said Act") has been dismissed.

2. The accident occurred on 16th March, 1996 at 13.30 hours. The appellant is the widow of one Mithel Chandrakant Tar who is the victim of the accident. The deceased was proceeding on his Kinetic scooter. The accident occurred at Gokulwadi, Sankhali. A bus owned by the second respondent and driven by the first respondent as well as a truck owned by the fourth respondent, gave a dash to the Kinetic scooter of the deceased. As a result of the impact, the deceased fell on the road and came under the truck owned by the fourth respondent. The allegation is that the bus of the second respondent and the truck owned by the fourth respondent were being driven in a rash and negligent manner. The appellant made a claim for compensation in the sum of Rs. 15,00,000/-. The fifth respondent is the insurer of the offending truck and the third respondent was the driver of the offending truck. Sixth and seventh respondents are the parents of the deceased. It must be noted here that the sixth and seventh respondents filed

a written statement. In the written statement, it was contended that the deceased was maintaining them by making payment of a sum of Rs. 3000/- per month. By a counter-claim, the said respondents made a claim of compensation in the sum of Rs. 8,75,000/-.

3. The second respondent filed written statement and denied the allegations made in the claim petition. The allegations made as regards negligence on the part of the driver of the bus were denied on account of want of knowledge. The first, third and fourth respondents did not file any written statement. The fifth respondent filed written statement admitting that the offending truck was insured with it on the date of the accident. The finding of the learned Presiding Officer of the Tribunal is that the appellant failed to prove the negligence on the part of the driver of the bus, as well as the driver of the truck. Therefore, the Tribunal proceeded to dismiss the claim petition of the appellant. As regards the claim made by the sixth and seventh respondents to receive 50% of the compensation, the learned Presiding Officer has observed that the question of considering the said claim does not arise.

4. The learned Senior Counsel appearing for the appellant has taken us through the pleadings, notes of evidence and other documents on record. He pointed out that neither the driver of the truck nor the driver of the bus filed written statement denying the allegations of negligence made against them. He pointed out that even in the written statement of the second respondent, the said respondent has not stated in what manner the accident took place. He submitted that the version of the first respondent in the affidavit-in-lieu of Examination-in-Chief is clearly an afterthought, inasmuch as there are no supporting pleadings in the written statement of the second respondent. He submitted that in the cross examination, the first respondent has made a complete departure from what he has stated in the Examination-in-chief. He pointed out that the theory that the deceased while overtaking the truck lost control as he was in excessive speed does not find place in the written statement of the second respondent. He pointed out that in the cross examination, the first respondent came out with another new case that his bus was stationary when the accident took place. He submitted that the evidence of the first respondent does not inspire confidence and the same deserves to be rejected. He urged that there is no written statement filed by the driver or the owner of the truck and, therefore, this is a case where there is a joint and several liability of both the truck and the bus.

5. As regards the income of the deceased, he invited our attention to various documents placed on record. He pointed out that the documents at Exhibit AW.1(collectively) show that the deceased was enlisted as a contractor with the Public Works Department and the Irrigation Department. He pointed out that the documents forming part of Exhibit AW.1 show that various Village Panchayats had given contracts to the deceased. He pointed out the Income Tax Deduction Certificate issued by the Executive Engineer, P.W.D. He submitted that the case made out by the appellant that the income of the deceased was Rs. 5,000/- per

month is reasonable. He submitted that the sixth and seventh respondents have not adduced evidence in support of their claim for compensation. He submitted that unless it is shown that they were dependents on the deceased, they are not entitled to any compensation. He submitted that the multiplier of 17 will have to be applied.

6. The learned Counsel appearing for the second respondent pointed out to the sketch annexed to the scene of offence panchanama drawn by the police. He pointed out that the sketch shows that the bus was standing on its correct side. He pointed out the point of impact which shows that the two wheeler of the deceased came on its wrong side and gave a dash to the bus. He pointed out that there was sufficient distance between the truck which was being overtaken by the deceased and the bus of the second respondent. He pointed out that on the left hand side of the bus, there was no katcha road in existence. He pointed out that there is nothing placed on record to show that the bus was moved after the accident. He submitted that the police reached the site of the accident within few minutes after the accident and obviously, the bus was not moved. He submitted that the sketch itself shows that the vehicles were not moved after the impact. He invited the attention of the Court to the evidence of AW.3 Iqbal Aga and pointed out that he is a got-up witness and even his statement was not recorded by the police. He submitted that according to the said witness, he had telephonically informed the police about the accident. He submitted that if the said witness had really seen the accident, the police would have recorded his statement. He invited our attention to the evidence of AW2 Ramchandra Toraskar, who had drawn the scene of offence panchanama and the inquest panchanama. He pointed out that the witness stated in the cross examination that no complaint was received regarding shifting of the bus. He pointed out that his evidence discloses that there was a distance of 3.31 meters between the right hand side of the bus and the edge of the road. He submitted that the first respondent being an eye witness has deposed and in fact it was not necessary for him to file the written statement. He submitted that there is no any inconsistency between the examination-in-chief and the cross examination of the first respondent. He submitted that the deceased himself was responsible for the accident.

7. We have given careful consideration to the submissions. The appellant examined herself. Obviously she has no personal knowledge of the manner in which the accident occurred. AW.2 Ramchandra Toraskar, was the police officer who conducted the inquest panchanama and the scene of offence panchanama. He stated that he filed charge-sheet against the drivers of the bus and the truck. He stated that during the investigation he found that there was no person present at the accident spot at the time of the accident. In his evidence, the panchanama and the sketch as well as a copy of the FIR have been proved. He stated that as per his investigation, the point of accident is where the scooter had fallen. He admitted that there was a space of 3.31 metres on the right side of the KTC bus. He stated that a katcha road of about one metre width was at

the accident spot.

8. AW.3 Iqbal Aga stated that the accident occurred in front of his shop at Gokulwadi Sanquelim. In the examination-in-chief, he stated thus:

At that time I was standing at my shop and as such I have seen the accident. This accident was between KTC bus proceeding from Mapusa to Valpoi side and Kinetic Honda going in the opposite direction i.e. Valpoi to Mapusa and a truck of Maharashtra registration also proceeding from Valpoi towards Mapusa side. The KTC bus gave dash to the Kinetic Honda as result it fell beneath the truck. The KTC bus was at fast speed of 60 km. per hr. as also the truck proceeding towards Mapusa side. As a result of the accident the Kinetic Honda driver died on the spot. Due to the accident there was traffic jam at the spot and for which the vehicles were moved from the respective positions. The accident took place on the account of fault of KTC driver, as also the driver of the truck.

In cross examination he admitted that his statement was not recorded by the police. He was unable to tell the width of the road at the accident spot. In the cross examination, he stated that the bus of the second respondent had gone on its wrong side at the accident spot. He stated that on the right hand side of the KTC bus, there was no space for any vehicle to pass. In the cross examination, he stated that the vehicles were moved from the accident spot before arrival of the police and in fact, the bus of the second respondent was moved and was taken in reverse direction. He stated that though he had not given any statement to the police, he had telephonically informed the police about the accident without disclosing his name. He stated that the scooter rider was not dragged by the second respondent's bus, but he fell down by the side of the bus.

9. The first respondent examined himself by filing an affidavit-in-lieu of Examination-in-chief. The version of the first respondent is in paragraphs 4 to 6, which reads thus:

4. I say that at the relevant time, the deceased who was driving his scooter bearing Registration No. GA-01-Q-7737 proceeding from Valpoi towards Bicholim, attempted to overtake the Truck which was on a downslope, at a very excessive speed and from the wrong half of the road.

5. I say that at this point of time, the deceased on seeing the oncoming Kadamba Bus could not control his scooter and was unable to negotiate the overtaking, as a result of which the scooter of the deceased gave a dash to the KTC Bus resulting in the fall of the scooter and the deceased to the ground. The deceased at that point of time rolled beneath the tyres of the Truck and therefore, came to be dragged by the Truck for nearly 10 metres which resulted in the death of the deceased.

6. I say that the side of the road towards KTC side, had a level depth of nearly 3.00 meters and it was therefore not possible for the KTC Bus to move any further towards its left.

However, it will be interesting to note his cross examination. In the cross examination, he has stated thus:

I had not filed any statement if I correctly recall. I now say that I do not recall if I have filed any statement. I saw the Kinetic for the first time when it was 2 metres away from my bus. The road at the accident spot is not straight. It is not true that the said road is straight. I saw the truck for the first time when it was a metre away. My bus was stationary when the accident took place. I have stated in my affidavit that the bus was stationary. It is stated in my affidavit that the bus was stationary. Attention of the witness is drawn to his affidavit para 5 and he is given opportunity to explain. I admit that I have not so stated. The road at the accident spot is 3 to 4 metres wide.

(underlined supplied)

In examination-in-chief, the first respondent came out with a case that the truck owned by the fourth respondent came from the opposite direction. He came out with with case that there was a slope from the opposite direction. He stated in the examination-in-chief that the scooterist attempted to overtake the truck at very excessive speed and he could not control the scooter and gave a dash to the bus. He came out with the case that it was not possible for him to turn the bus towards the left. In cross examination he came out with the case that he could see the Kinetic scooter for the first time when it was at a distance of only 2 metres from his bus and he saw the truck for the first time when it was a metre away. The version in examination in chief is that he could see the scooterist overtaking the truck. Obviously, if what is stated in the cross examination is true, the first respondent could not have seen the scooterist trying to overtake the truck. According to his version, he could see the truck for the first time when it was at a distance of only one metre from the bus. Thus, the case made out in the examination in chief has been completely destroyed in the cross examination. It is, therefore, very difficult to rely upon the version of such a witness. Hence, the evidence of the first respondent will have to be discarded. There is no written statement filed by him, as well as by the driver and owner of the truck.

10. Even if evidence of AW.3 is ignored, the only conclusion which can be arrived at is that the defence of the first respondent cannot be accepted. AW.2 Ramchandra who was the Officer of the police stated that on investigation he found that the drivers of both the truck and the bus were guilty of negligence. The driver and the owner of the truck have chosen not to defend the claim petition. The manner in which the accident occurred was within the knowledge of the first respondent. But he has not chosen to come out with the correct version. In the circumstances, it will have to be held that the accident occurred due to rash and negligent driving on the part of the drivers of both the bus and the truck. The learned Presiding Officer has committed a gross error by accepting the evidence of the first respondent by completely overlooking the fact that the case made out in the cross examination, is clearly contrary to what is stated in the

examination-in-chief and, therefore, the finding of the learned Presiding Officer on the issue of negligence will have to be set aside.

11. As far as quantum of compensation is concerned, the appellant has stated that her husband was running a metal quarry at Saleli in Sattari Taluka and was earning Rs. 5,000/- per month. It is stated that he was doing work of construction of road by taking contracts from PWD. The documents produced at Exhibit AW.1 (Collectively) show that in the year 1995, the deceased was enlisted as a contractor of PWD as well as Irrigation Department, Government of Goa. In 1996, the enlistment of the PWD was renewed. A letter dated 15th June, 1994 issued by the State Bank of India, Honda Branch shows that the deceased had borrowed a sum of Rs. 1,25,000/- for construction of a road leading to a quarry. A certificate dated 5th September, 1994 issued by Gram Panchayat Honda shows that a NOC was issued by the said Gram Panchayat for starting a stone crusher. A licence was granted for constructing the stone crusher unit with ancillary building. Another certificate dated 31st January, 1996 of the same Panchayat shows that the deceased was granted contract of asphaltting of the road having cost of Rs. 45,304/-. A certificate issued by the Executive Engineer, WD. XXIII, P.W.D., Panaji on 29th February, 1996 shows that certain civil work was entrusted to the deceased. Work order dated 24th February, 1996 issued by the Village Panchayat of Pissurlem shows that a work of construction was entrusted to the deceased. There is no evidence as regards the actual income of the deceased, but the aforesaid documents which are exhibited without any objection by the respondents clearly show that the deceased was carrying on business as a contractor.

12. In the second schedule read with Section 163A of the said Act, for non-earning persons, notional income has been taken at Rs. 15,000/- per year. In the present case, the deceased was earning. Though the respondent came out with a case that he had taken loan for the business of the deceased from a Bank, there is no evidence adduced in that behalf and the sanction letter dated 15th June, 1994 is in the name of M/s. Sai Metal Industry which is the name under which the deceased was carrying on business. In the circumstances, the income of the deceased can be reasonably taken at Rs. 3,000/- per month. However, in the absence of any documents, it is very difficult to consider the future prospects of increase in the earnings of the deceased. Therefore, for the purpose of calculating multiplicand, income can be taken at Rs. 3,000/- per month.

13. The date of birth as reflected from the birth certificate at exhibit Aw1-D is 16th March 1965. Thus on the date of the accident, the age of the deceased was 31 years. In view of the decision of the Apex Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , the appropriate multiplier will be 16. For calculating the multiplicand, one third amount out of yearly income of Rs. 36,000/- will have to be deducted. Thus, the multiplicand will be Rs. 24,000/-. Applying multiplier of 16, the compensation amount will be Rs. 3,84,000/-. To that amount, an amount of Rs. 16,000/- will have to be added

towards loss of consortium etc. As far as interest is concerned, during last few years, the rates of interest applicable to the fixed deposits with nationalized banks have been considerably reduced. Therefore, interest at the rate of 7.5 % will have to be awarded from the date of claim petition till realisation or deposit of the amount with the Tribunal.

14. It is pointed out that the parents of the deceased (sixth and seventh respondents herein) had claimed 50% of the compensation amount. However, no evidence has been adduced by them to establish the dependency. The appellant stated in her deposition that the parents of the deceased were not dependent on the deceased. There is no cross- examination of the appellant made by the sixth and seventh respondents on this aspect. The suggestion given to her in cross-examination is that the deceased was working in the shop of the sixth respondent and he caused loss of Rs. 3,00,000/-. The appellant responded by stating that even before her marriage with the deceased, he was having a truck. She stated that the deceased was working in the shop of sixth respondent only for a period of one year after her marriage. She denied the suggestion that any loss was caused by the deceased. She also denied the correctness of the suggestion that her father-in-law had obtained loan from Bank of India in connection with business of the deceased. However, even a suggestion is not put to the appellant that the sixth and seventh respondents were dependents on the deceased. Hence, the entire compensation amount will have to be paid to the appellant.

15. Hence, we dispose of the appeal by passing the following order:

- (a) The impugned Judgment and Award is quashed and set aside.
- (b) The claim petition is partly allowed. The respondents No. 1, 2, 4 and 5 shall jointly and severally pay to the appellant a sum of Rs. 4,00,000/- (Rupees four lakhs only) together with interest thereon at the rate of 7.5% per annum from the date of filing of the claim petition till realisation or deposit of the said amount with the Tribunal.
- (c) The appellant shall be entitled to proportionate costs throughout from the respondents.
- (d) Time of three months is granted to the respondents to comply with the Award.
- (e) The appeal is partly allowed in above terms.