

(2011) 01 BOM CK 0122

In the Bombay High Court

Case No : First Appeal No. 1447 of 2010

Smt. Usha Arjun Kavade, Kum. Aaditya Arjun Kavade, Kum.
Swapnil Arjun Kavade and Shri Dashrath Mahadeo Kavade

APPELLANT

Vs

Shri Tahil Chand Shaikh, New India Assurance Co. Ltd. and
Shri Sajan Janardan Waghmare

RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Citation : (2011) 7 ALLMR 209 : (2011) 2 TAC 584

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Vilas B. Tapkir, for the Appellant; R.V. Bansode, for the Respondent

Final Decision : Allowed

Judgement

D.G. Karnik, J.—Heard learned Counsel for the Appellant and the Respondent No. 1. None appears for Respondent Nos. 2 and 3 though served.

2. The appeal is directed against the judgment and order dated 7th December 2009 passed by the Additional Member, Motor Accident Claims Tribunal, Baramati (for short "the Tribunal") rejecting the claim application filed by the Appellants for compensation under the Motor Vehicles Act, 1988.

3. The Appellant No. 1 is the widow and the Appellant Nos. 2 and 3 are the daughters and the Appellant No. 4 is the father of Arjun Kavade (hereinafter referred to as "the deceased") who died in a vehicular accident on 27th April 2008. The Respondent No. 1 is the owner of motor vehicle bearing registration No. MH-42/B/1027 which is a utility vehicle manufactured by Mahindra & Mahindra (hereinafter referred to as "the offending vehicle"). The Respondent No. 2 is the insurance company with whom the offending vehicle was insured. The Respondent No. 3 was driving the offending vehicle at the relevant time.

4. On 27th April 2008 at about 7.30 p.m., the deceased was proceeding on his motorcycle bearing registration No. MH-42-G-5739 from Pune to Morgaon. At

that time, the Respondent No. 3 was driving the offending vehicle from Saswad to Pune. At the relevant time, when the two vehicles were near Vadkinaka, there was a head on collision between the motorcycle and the offending vehicle. The deceased who suffered severe injuries in the collision, was moved to a nearby hospital by the people who gathered there after the accident. However, soon after the admission he died. The Appellants thereafter filed a claim application for compensation before the Tribunal. The Appellants claimed that the accident occurred solely on account of rash and negligent driving on the part of the Respondent No. 3. They pleaded that the deceased was running a tea house and was earning Rs. 5,000/-per month. He was contributing at least 2/3rd of his earnings, i.e. about Rs. 40,000/-per annum, for the maintenance of the Appellants. The deceased was 35 years old at the time of his death and could have worked at least till 60 to 65 years of his age. They claimed the compensation of Rs. 6,80,000/-towards the loss of contribution to the family, Rs. 10,000/-towards loss of consortium, Rs. 5,000/-towards funeral expenses and Rs. 5,000/-towards damage to the motorcycle. In all, the Appellants claimed the compensation of Rs. 7,00,000/-

5. The Respondents appeared in the Court and contested the claim. The Respondent No. 1 filed his written statement at Exhibit-16, the Respondent No. 2 - insurance company filed its written statement at Exhibit-22 and the Respondent No. 3 filed his written statement at Exhibit-14. All of them denied the liability. The Respondent No. 1 claimed that he had sold the offending vehicle and was not liable. The Respondent No. 3 however admitted that he was driving the offending vehicle as a driver of the Respondent No. 1 at the relevant time and was so employed for a period of one year prior to the accident. He however pleaded that he was driving the offending vehicle slowly and was at the left hand side of the road when the deceased came at an excessive speed on a wrong side and gave a dash to it. He claimed that he was not negligent in driving the offending vehicle and a false case had been lodged against him by the police.

6. At the trial, certified copies of the investigation papers, including certified copies of the statements recorded by the police as also a certified copy of the site panchanama, were produced. The Appellant No. 1 examined herself to prove her claim. None of the Respondents entered the witness box and did not adduce any oral evidence. They however admitted the investigation papers and the panchanama.

7. Considering the oral and the documentary evidence, the Tribunal came to the conclusion that the Appellants have not proved that the accident was caused on account of rash and negligent driving of the Respondent No. 3. Analysing the panchanama produced on record, the Tribunal came to the conclusion that the accident was caused on account of negligent driving by the deceased himself. In this view of the matter, the Tribunal came to the conclusion that the Appellants were not entitled to any compensation save and except the compensation which was already received by them under the "no fault liability". The Tribunal

accordingly dismissed the claim application.

8. The evidence of the Appellant No. 1 is of not much assistance for the purpose of proof of negligence. She was not present at the time of the accident and has no personal knowledge about the accident. There was no eye witness to the accident. The only person who had seen the accident is the Respondent No. 3. He was driving the offending vehicle at the relevant time. He had filed the written statement but did not enter the witness box. In the facts and circumstances of the case, it was bounden duty of the Respondent No. 3 to enter the witness box and offer himself for cross examination. He was driving the offending vehicle. He knew exactly how the accident happened, what was the speed of his vehicle and to which side of the road he was driving the vehicle, whether he was in the left half of the road or whether he had crossed the center of the road and had gone on the wrong side. He could have gauged the speed of the motorcycle on which the deceased was riding and whether it was on the left side of the road or had crossed the center of the road and had come on the right side before the collision. It was then that the Appellants could have cross examined the Respondent No. 3 and brought to light the true facts. But he wanted to escape the cross examination and face the searching questions which could have been put to him in the cross examination and therefore he did not enter the witness box.

9. Learned Counsel for the Respondent No. 1 submitted that the burden of proving how the accident occurred and that it occurred on account of negligence on the driver, viz. Respondent No. 3, was on the Appellants. Since that burden was not discharged, there was no duty on the Respondents to examine the Respondent No. 3, the driver of the offending vehicle. The abstract concept of "burden of proof" must yield to the principle that the party knowing the facts of the case must enter the witness box to explain and submit to the cross examination. In *Sardar Gurbaksh Singh v. Gurdial Singh*, 1927 Vol. 29 Bom. L.R. 1392, the Privy Council has held that it is the bounden duty of the party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross examination. His non-appearance as a witness would be a strongest possible circumstance going to discredit the truth of his case. In that case, the High Court had accepted the case of a party by observing as follows:

It is true that she has not gone into the witness box, but she made a full statement before Chaurhri Kesar Ram (the Assistant Collector) and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement.

Criticising this, the Privy Council observed:

Their Lordships disapprove of such reasoning. The true object to be achieved by a Court of Justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the

suspicions attaching to it. The story can then be subjected in all its particulars to cross examination.

10. The submission of learned Counsel for the Respondent No. 1 that the statement of Respondent No. 3 - driver was already recorded before the police and a certified copy thereof was already before the Court and therefore it was not necessary for him to examine himself on oath before the Court, cannot be accepted. It was his duty, as he had personally witnessed the accident as the driver of the offending vehicle, to examine himself on oath and face the cross examination. It is highly improbable that any driver of a vehicle involved in an accident resulting into death of another, in a statement before the police, would admit that he was negligent in driving. Therefore, his statement made before the police that he was not negligent and it was the deceased who was negligent in driving the motorcycle has no value. The Respondent No. 3 was not disabled for any other valid reason for appearing before the Court and examining himself and offering himself for cross examination. The Tribunal therefore ought to have drawn an adverse inference against the Respondent No. 3 - the driver of the offending vehicle, on account of his failure to examine himself on oath. If such an inference had been drawn, the Tribunal would have come to the conclusion that the Respondent No. 3 was negligent in driving the offending vehicle.

11. Learned Counsel for the Respondent No. 1 then submitted that the Respondent No. 1 had already transferred the offending vehicle. The offending vehicle only nominally stood in the name of the Respondent No. 1 as the purchaser had not taken care to register the transfer. If he had sold and transferred the offending vehicle, he ought to have entered the witness box and adduced the evidence about the transfer of the vehicle. He had not entered the witness box and had not give any evidence of the alleged transfer. On this ground also, the adverse inference would have to be drawn to reject his defence that he was not liable as he had already transferred the offending vehicle and was not the owner thereof on the date of the accident.

12. As regards the amount of compensation, unfortunately the Tribunal has not examined what is the appropriate amount of compensation that the Appellants would be entitled. In the circumstances, the remand is inevitable. Hence, I pass the following order:

(i) The appeal is allowed. The finding of the Tribunal that the Appellants had not proved that the Respondent No. 3 was negligent in driving the offending vehicle, is set aside and it is held that the Respondent No. 3 was negligent in driving the vehicle at the relevant time. Further, the defence of the Respondent No. 1 that he had already sold the vehicle and was not the owner thereof on the date of the accident and as such was not liable is rejected. The matter is however remanded back to the Tribunal for determining the amount of compensation that the Appellants would be entitled to.

(ii) Taking into consideration the fact that the accident had occurred more than 4

years ago, the Tribunal is directed to expedite the hearing and decide the claim of the Appellants expeditiously and in any event within 6 months.

(iii) The Respondent No. 3 shall pay to the Appellants costs of this appeal which are quantified at Rs. 10,000/-. If the costs are not paid/deposited in the Tribunal within 10 weeks, the Tribunal may recover the same from the Respondent No. 1 and shall also be entitled to strike out his defence for non-compliance of this order.