

(2017) 06 BOM CK 0039
In the Bombay High Court
Case No : 765 of 2010

The National Insurance Co. Ltd.

APPELLANT

Vs

Jagannath s/o Vasant Borikar, & Ors.

RESPONDENT

Date of Decision : 08-06-2017

Acts Referred:

Citation : (2017) 06 BOM CK 0039

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : V.P. Maldhure, M.H. Pathade

Judgement

1. This appeal takes an exception to the judgment and award dated 03.05.2010 passed by Motor Accident Claims Tribunal, Nagpur in M.A.C.P. No.980/2006. The appellant is insurance company and along with the owner of the vehicle is held jointly and severally liable to pay the amount of Rs.2,75,000/inclusive of no fault liability as compensation to respondent No.1 and 2 with interest at the rate of 7.5% per annum from the date of petition till realization of the amount.

2. Briefly stated, facts of the appeal are as under: Deceased Sanchit, aged 17 years was the son of respondent Nos.1 and 2. On the date of incident on 30.08.2006 he was driving motorcycle bearing MH-27 J-8700 and proceeding from his college towards home along with his friend sitting as pillion rider. When the motorcycle came in front of Coco Cola Factory, M.I.D.C. Wadi, Nagpur the bus bearing No.MH-40- 4385 came from opposite direction in high speed and gave dash to the motorcycle of the deceased. As a result, deceased sustained injuries and succumbed to the head injury. Respondent Nos.1 and 2, who are the parents of the deceased therefore, were constrained to file the petition for compensation. According to them, deceased was a student of Polytechnic 1st year and he would have become Class I Officer and earned income of Rs.10,000/ per month. However, due to his untimely death the petitioners had suffered psychological and monetary loss. The luxury bus which gave dash to the deceased being owned by respondent N.3 and the appellant being insurance

company of the said luxury bus, respondent Nos.1 and 2 claimed compensation of Rs.7 lakh from them jointly and severally.

3. This petition was resisted by the present appellant vide written statement at Exh.14, contending inter alia that the deceased was not holding driving licence and the accident has occurred due to his negligence; therefore, the insurance company cannot be held liable to pay any amount of compensation.

4. In support of their petition respondent No.1 led oral evidence and on appreciation of the said evidence, the learned Tribunal allowed the claim partly to the tune of Rs.2,75,000/, along with interest and proportionate costs thereon.

5. The only ground on which the judgment and award of Tribunal is challenged in this appeal is that, it was a case of contributory negligence, as deceased was not holding valid licence for driving the motorcycle. It is submitted by learned counsel for appellant that the respondent No.1 himself has admitted that deceased was aged 17 years and he was not having valid licence for driving motorcycle. According to learned counsel for the appellant, the deceased was also chit chatting with the pillion rider. Hence, some negligence needs to be attributed to the deceased for the accident, which has occurred resulting into his death.

6. As this is the only ground on which the impugned judgment and award is challenged, it is necessary to see what is the legal position. In this respect, learned counsel for the respondent, has relied upon the authority of *Sudhir Kumar Rana v. Surinder Singh and others* reported in 2008 ACJ 1834. In the facts of that case also, there was collusion between minitruck and twowheeler motorcycle. It was proved that the minor, who was driving the motorcycle, was not holding valid driving licence. The question raised before the Apex Court was, whether the scooterist can be held responsible for contributory negligence and it was observed as follows:

6. A contributory negligence may be defined as negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. The question of contributory negligence would arise only when both parties are found to be negligent.

7. The question is, negligence for what? If the complainant must be guilty of an act or omission which materially contributed to the accident and resulted in injury and damage, the concept of contributory negligence would apply".

Reliance was placed on para 6 of the judgment in *T.O. Anthony v. Karvarnan* reported in 2008 ACJ 1165 as under:

"Composite negligence" refers to the negligence on the part of the two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of composite negligence of those wrongdoers. In such a case, each wrongdoer, is jointly and severally liable to the injured for payment of the entire damages and the injured

person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand, where a person suffers injury, partly due to negligence on the part of another person or persons and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence".

Thus it was held that:

"(7) Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider as to whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

It was further held that, "if a person drives a vehicle without the licence he commits an offence. The same by itself may not lead to a finding of negligence as regards accident. It is one thing to say that the deceased was not possessing any licence, but no finding of fact has been arrived that at that time he was driving two wheeler rashly and negligently. If he was not driving rashly and negligently, which contributes to the accident we fail to see as to how, only because he was not having a licence he would be held guilty of contributory negligence."

7. In the instant case also, the evidence on record clearly shows that the first information report was filed against the luxury bus driver. Thus, in the police investigation also the cause of accident was attributed to the bus driver. No other evidence is produced on record by the appellant-insurance company by examining the driver of the luxury bus or any other eye witness to the incident, to show that the deceased was driving the scooter in a rash and negligent manner. In the absence of such evidence, merely because deceased was not having a valid licence, the case of contributory negligence cannot be attributed to him, considering the legal position as laid by the Apex Court in the above said authority.

8. Even as regards the contention that deceased was driving his motorcycle while chit chatting with the pillion rider, except for the allegation to that effect in the written statement, no other evidence is adduced by the appellant to support or prove the alleged act of chit chatting. Hence, it cannot be said that the Tribunal has committed any error, in the casting liability for the accident on the respondent No.3, and directing insurance company of paying the compensation to the claimant.

9. Another argument advanced by learned counsel for appellant is that multiplier applied by the Tribunal is not proper. According to him, the correct multiplier would be 11, whereas the Tribunal has applied the multiplier of 13. According to learned counsel for respondent No.1 however having regard to the age of the deceased and the age of the claimants the proper multiplier would be 18 in view of the judgment of the Apex Court in *Sarla Verma and others v. Delhi Transport Corporation* and another reported in 2009 ACJ 1298.

10. Having regard to the fact that deceased was of the age of 17 years, whereas his parents were of the age of 50 years at the time of filing the claim petition, in my considered opinion, no interference is warranted in the impugned order on this count also as multiplier of 11 cannot be said to be incorrect having regard to the age of the parents and the deceased being unmarried.

11. As no other issue or question is raised by the Court apart from the ones discussed above, the appeal needs to be dismissed and accordingly stands disposed of. The respondent Nos.1 and 2 are permitted to withdraw the balance of compensation which is deposited in this Court after appeal period is over.