
(2009) 09 CAL CK 0079
In the Calcutta High Court
Case No : F.M.A. No. 524 of 2008

The New India Assurance Co. Ltd.

APPELLANT

Vs

Mita Samanta and Others

RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Central Motor Vehicles Rules, 1989 — Rule 150

Evidence Act, 1872 — Section 114

Motor Vehicles Act, 1988 — Section 158(6), 166, 170

Citation : (2010) ACJ 2212

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : K.K. Das, for the Appellant; Uday Sankar Chattopadhyay, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of the Insurance Company in a proceeding u/s 166 of the Motor Vehicles Act and is directed against an award dated 18th July, 2007 passed by the Motor Accident Claims Tribunal, Fifth Court, Burdwan, in M.A.C. Case No. 27 of 2006 thereby disposing of the said proceeding by awarding a sum of Rs. 6,35,580/- in favour of the claimants with the observation that out of the said amount Rs. 5,000/- should be exclusively awarded in favour of the widow as loss of consortium with a direction upon the Insurance Company to pay the said amount within a specified date along with interest @ 9% per annum from the date of application till the entire amount was paid.

2. Being dissatisfied, the Insurance Company has come up with the present appeal.

3. In the application for compensation, the claimants, the heirs and legal representatives of the victim, alleged that the victim while driving his own motorcycle was struck from behind by a truck insured by the appellant, as a

result, the motorcycle hit the light post and the victim died. The victim was an employee of Punjab National Bank and was aged 46 years at the time of death.

4. In spite of service of notice, the owner of the offending vehicle did not appear and it was the Insurance Company who contested the proceeding after taking leave u/s 170 of the Act.

5. The specific defence taken by the Insurance Company in the written statement was that due to contributory negligence on the part of the victim, the said motorcycle had struck the light post and the truck concerned had no role to play in the accident. In other words, it was contended that the vehicle insured by the appellant was not at all involved in the accident but the said vehicle has been falsely implicated.

6. At the time of hearing of the proceeding, four witnesses including two eyewitnesses deposed in favour of the claimants while the Manager of the Insurance Company and an investigator appointed by it gave evidence in opposing the claim-petition.

7. As indicated earlier, the learned Tribunal below by the order impugned herein disbelieved the version of the Insurance Company and came to the conclusion that the offending truck was responsible for the death of the victim due to rash and negligent driving on the part of its driver.

8. The learned Tribunal below accepted the claimants' case that the victim was aged 46 years. The Tribunal below further found that the gross salary of the victim was Rs. 8,415/- a month. The Tribunal below, however, proceeded to rely upon the net salary for the purpose of calculation of compensation and after deducting one-third of the same and by the application of multiplier of 13, arrived at the figure of Rs. 6,26,080/-. Apart from the said amount, a further sum of Rs. 4,500/- was given for funeral expenses and loss of estate and further sum of Rs. 5,000/- for loss of consortium payable only to the claimant No. 1.

9. Being dissatisfied, the Insurance Company has come up with the present appeal.

10. Mr. Das, the learned advocate appearing on behalf of the appellant, has raised only the question of involvement of the truck insured by the appellant in the accident. According to Mr. Das, it will appear from the F.I.R. lodged by the brother of the victim, that there was no mention of any truck involved in the accident and it was simply stated that the victim died due to the accident as a result of collision of his motorcycle with the light post. By relying upon such statement, Mr. Das contends that the involvement of the vehicle concerned is afterthought and in such circumstances, the Court should disbelieve the alleged eyewitnesses. In other words, Mr. Das contends that if the concerned truck was really involved, there would have been the reference of such truck in the F.I.R. Mr. Das in this connection places strong reliance upon the decision of the Supreme Court in the case of General Insurance Council and Ors. v. State of

Andhra Pradesh and Ors. reported in 2007 ACJ 2006 by pointing out that the Supreme Court, after noticing this type of collusion between the claimants and the owner of the truck, directed the Government to immediately implement Section 158(6) of the Motor Vehicles Act read with Rule 150 of the Central Motor Vehicles Rules. Mr. Das, therefore, prays for setting aside the order passed by the Tribunal below.

11. The aforesaid contention of Mr. Das has been opposed by Mr. Chattopadhyay, the learned advocate appearing on behalf of the claimants/respondents. According to Mr. Chattopadhyay, in spite of the fact that the owner of the vehicle was very much made party, he having failed to appear and dispute the involvement of the vehicle in the accident, it was the duty of the Insurance Company to summon the said owner or the driver against whom the criminal case has been already started. Mr. Chattopadhyay submits that in the absence of the owner of the vehicle, the learned Trial Judge had no other alternative but to rely upon the eyewitnesses who certified the involvement of the offending truck in the accident. Mr. Chattopadhyay, therefore, prays for dismissal of the said appeal.

12. Therefore, the only question that falls for determination in this appeal is whether in the facts of the present case, the learned Tribunal below was justified in holding that the truck insured by the appellant was involved in the accident.

13. In this case, the claim petition has been filed against the owner of the truck and the said truck being insured by the appellant, it was also made party to the proceedings for compensation.

14. The owner of the truck against whom compensation has been basically claimed was the best person to prove non-involvement of the truck by producing the garage register or movement register of the vehicle indicating the movement of the car at the relevant point of time or by producing other convincing evidence specially within his knowledge, from which it could be well established whether the vehicle was plying in a different place. Similarly, if the vehicle was really involved but his driver was innocent, such fact could also be proved by producing his driver at the witness box. In spite of being made party, if the owner decides not to defend and to controvert the allegation, according to the law of the land, adverse presumption should be drawn against such party. At this stage, we may aptly refer to the following observations of the Apex Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, where the said Court pointed out the duty of the party to a suit to appear as witness when he was the best witness to the disputed issue even if the burden of proof was on the other side:

...Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the

burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In AIR 1917 6 (Privy Council) Lord Shaw observed as follows:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough - they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

This passage was cited with approval by this Court in a recent decision - *Biltu Ram v. Jainandan Prasad* Civil Appeal No. 941 of 1965, D/- 15-41968 (SC). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Mt. Bilas Kunwar v. Desraj Ranjit Singh* 42 Ind App 202 at p. 206 : AIR 1915 PC 96 at p. 98:

But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents.

But Shah, J., speaking for the Court, stated:

The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.

15. Even in the subsequent case of the Supreme Court in the case of *Vidhyadhar Vs. Manikrao and Another*, the Apex Court took the action of a party deciding not to appear as a witness and to offer himself for cross-examination, in the following way:

Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy

Council beginning from the decision in AIR 1927 230 (Privy Council) . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh AIR 1930 Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari Vs. Radhabai Krishnarao Deshmukh, . The Madhya Pradesh High Court in Gulla Kharagjit Carpenter Vs. Nar Singh Nandkishore Rawat, , also followed the Privy Council decision in AIR 1927 230 (Privy Council) The Allahabad High Court in Arjun Singh Vs. Virendra Nath and Another, held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass Vs. Bhishan Chand and Others, , drew a presumption u/s 114 of the Evidence Act against a party who did not enter into the witness box.

16. The aforesaid principle applies with greater force when a party even does not dispute the statement made in the pleading of the other side and decides to remain ex parte. We are quite conscious that in the proceedings for compensation under the Motor Vehicles Act, when the offending vehicle is insured, the owner of the vehicle may not be interested to appear at the witness box in spite of the fact that he is a party to the proceedings. For that reason, the legislature has incorporated the provision contained in Section 170 of the Act permitting the Insurance Company to contest the proceedings on all points. Once such leave is granted, it is the duty of the Insurance Company to summon the owner of the vehicle to appear as a witness for disputing the allegation of the claimants. If the Insurance Company after taking leave of the Tribunal u/s 170 of the Act, decides not to lead any evidence by summoning the relevant witnesses including the party whose liability it has undertaken, its position in law will be just like the party who is afraid of appearing in the witness box to face the cross-examination of the claimants. It is preposterous to suggest that the Court will hold against the claimants notwithstanding the fact that in spite of the allegation of rashness or negligence against the driver, the driver or the owner of the vehicle is deliberately avoiding the Court and the claimants are unable to cross-examine the owner against whom the compensation is claimed or the errant driver whose identity has been disclosed in a civil proceeding.

17. Therefore, the Insurance Company in spite of taking leave u/s 170 of the Act having failed to summon the owner or the driver of the vehicle to disprove the allegation of the claimants of the involvement of the vehicle concerned or the rash and negligent driving, the Court is left with no other alternative but to accept the allegation of the claimants unless there is either admission of the claimants or their witness about non-involvement of the vehicle or about the contributory negligence of the victim in the accident or there exists other evidence of unimpeachable nature given by uninterested witness showing falsity of the allegation of the claimants. In this case, there is no such admission or evidence of that nature. In this case, the driver has been charge sheeted and thus, there is no reason why the Insurance Company in spite of taking leave u/s 170 of the Act should not summon the said driver to give evidence for disclosing the truth. We are unable to presume collusion between the driver and the

claimants when the driver has been indicted in the criminal proceedings. It will be a travesty of justice in the facts of the present case to disbelieve the eyewitness of the claimants when the owner and the driver are neither appearing nor are they even summoned by the Insurance Company even after taking leave u/s 170 of the Act to face cross-examination at the instance of the claimants.

18. The evidence given by the two witnesses of the Insurance Company are neither relevant nor worthy of credence for the following reasons:

19. The D.W.1 is the Branch Manager of the Burdwan Branch of the Insurance Company who stated that D.W.2 was appointed as investigator regarding the accident and he submitted a report and it revealed from the report that the victim while driving the motorcycle dashed to the electric post as a result he died and the truck was not at all involved in the accident. In his cross-objection, he has admitted that apart from the contents of the report he had no personal knowledge relating to the accident.

20. D.W.2 is the investigator who was appointed by the Insurance Company to investigate and report about the accident. According to the said witness, he after enquiring from various witnesses came to the conclusion that the truck in question was not at all involved in the accident. In his cross-examination, he admitted that he was not a witness to the occurrence and he did not file any document to show that he had interrogated several witnesses.

21. In our opinion the report submitted by the investigator and his evidence regarding cause of accident are worst piece of hearsay evidence because he investigated long after the accident and according to his claim, he based his report on the information he gathered from various persons whose identity was not disclosed in the report. Unless the persons who informed to the investigator about the details of the accident are examined in Court and the claimant gets opportunity of cross-examining those witnesses, the contents of the report cannot be admissible in evidence.

22. Therefore, on behalf of the Insurance Company virtually no evidence was given.

23. It appears that the eyewitnesses of the incident have deposed that the truck in question had really struck the victim while he was driving his motorcycle as a result he collided with the light post standing by the side of the road. We do not find any substance in the contention of Mr. Das, the learned advocate for the appellant, that simply because in the F.I.R. there was no reference of any truck that statement is binding upon the claimants. The person who made the F.I.R. is not an eyewitness. After coming to know that his brother died, he reported to the police about the death due to the accident and it is the definite case of the claimant that the truck had run away immediately after the accident. In such circumstance, unless the owner of the truck or the driver thereof comes forward before the Court to defend themselves the Tribunal was left with no other alternative but to accept the testimony of the eye witnesses. We have gone

through their depositions; there is nothing to disbelieve their version.

24. We, thus, find that the claimants have proved the involvement of the truck in the accident.

25. The case of General Insurance Council and Ors. v. State of Andhra Pradesh and Ors. 2007 ACJ 2006, relied upon by Mr. Das, is one where on a writ application filed before the Supreme Court, the prayer was made for a direction upon the State Governments and the Union Territories to ensure that the mandate of Section 158(6) of the Motor Vehicles Act was complied without exception. It was contended before the Supreme Court that Section 158(6) of the Act casts a statutory obligation on the concerned police officers to forward a copy of the report to the Claim Tribunals having jurisdiction about the death of or bodily injury to any person so recorded in the police station. It was contended that a duty was cast to send copy thereof to the concerned insurer and the owner of the offending vehicle was obliged to forward the report to the Claims Tribunal and the insurance. The Apex Court accepted the contention of the writ petitioner that the aforesaid provision was mandatory and consequently, directed that all the State Governments and the Union Territories should instruct, if not already done, all the concerned police officers about the need to comply with the requirement of Section 158(6) keeping in view the requirement indicated in Rule 150 and Form 54. It was further directed that periodical checking should be made against the errant officials. Similarly, the Department of Road Transport and Highways should make periodical verification to ensure that the action was being taken and in case of any deviation, attention should be drawn to the concerned State Governments or Union Territory so that necessary action could be taken against concerned officials.

26. Since the Supreme Court of India has already passed such direction, there is no necessity of giving further direction in this regard and thus, we find that the said decision does not help the appellant at least in this case. Once we find that the owner of the vehicles in spite of being involved in the accident did not comply with the aforesaid direction of the Supreme Court and at the same time, did not care to attend the court in spite of the knowledge of the serious allegations against his vehicle, we should draw adverse inference against him.

27. Mr. Das lastly relied upon three decisions, two of the Supreme Court and the third one of a Division Bench of this Court and submitted that those decisions would help his client in the facts of the present case.

28. We propose to deal with those decisions.

29. In the case of Bimala Devi and Ors. v. Himachal Road Transport Corporation and Ors. reported in 2009(2) T.A.C 693 (SC), a police constable died of an accident. The owner of the bus, the alleged errant vehicle, disputed the involvement of the bus and the driver and the conductor of the bus in evidence stated that they found the dead body wrapped in a blanket even before they started the bus and went to inform the police. The Tribunal disbelieved the

statement of the driver and the conductor and by relying upon the evidence of the eyewitnesses held that the victim died due to rash and negligent driving of the bus. The High Court on an appeal by the owner set aside the award on the ground that in the post mortem report there was no indication of any detail of crush injuries with the mark of tyre and thus, the victim might have died due to some accident but not due to the said road accident alleged. On appeal to the Apex Court, the said Court set aside the judgement of the High Court and restored the award of the Tribunal. While allowing the appeal, the Supreme Court held that although occurrence of an accident is a sine qua non for maintaining an application u/s 166 of the Act, the evidence of accident could not be disbelieved by relying upon the post mortem report. It was further held that the standard of proof required for proving a claim-application is not that of beyond reasonable doubt but the Court should follow the principles of preponderance of probability. We fail to appreciate how the said decision can be of any help to the appellant when in this case, the Tribunal has relied upon the evidence given by eyewitnesses and the owner in spite of service did not come forward to dispute the allegation. The said decision rather supports the claimants.

30. In the case of Oriental Insurance Company Ltd. v. Premalta Shukla and Ors. reported in 2007 AIR SCW 3591, the deceased, viz. Shivnandan Prasad Shukla was travelling in a Tempo Trax for going to Allahabad from Bhopal. It collided with a truck. Registration Number of truck could not be noticed. The truck also could not be traced. A First Information Report was lodged by one of the occupants of the Tempo Trax. An investigation on the basis of the said First Information Report for commission of an offence u/s 304-A of the Indian Penal Code was registered against the driver of the said truck. As during the investigation the truck could not be traced out, the case was closed. A Claim Petition was filed before the Motor Vehicles Accident Claims Tribunal against the driver, owner and the Insurance Company with which the Tempo Trax was insured. The Tribunal upon analyzing the materials brought on record by the parties, including the First Information Report, arrived at a finding of fact that the driver of the Tempo Trax was not driving the vehicle rashly and negligently. It, therefore, dismissed the claim petition with the following observations:

On the basis of the above discussions, I come to this conclusion that the applicants on the basis of the discussions in issue No. 1, have failed to prove that the accident dated 23rd January, 2001 was caused by rash and negligent driving of tempo trax No. MP-04-H-5525. In these circumstances the driver and insurance company of tempo trax No. MP-04H- 5525 cannot be held responsible for the accident. As a result, the present claim petition is dismissed.

31. Against the said order, an appeal was preferred before the High Court which principally by relying on the depositions of Shri R.K. Sharma and Smt. Premlata Shukla, who alleged that the Tempo Trax was driven in a rash and negligent manner, opined that the First Information Report having been legally not proved, the driver of the Tempo Trax should be held to be guilty of driving rashly and

negligently. It is to be noted that in the claim petition itself a reference was made to the lodging of the First Information Report.

32. In such a case, the Supreme Court set aside the judgement of the High Court observing that the factum of an accident could also be proved from the First Information Report and once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. According to the Supreme Court, both the parties having relied upon the said document and the same having been marked as an Exhibit, the learned Tribunal could not be said to have committed any illegality by relying upon the other part, irrespective of the contents of the document been proved or not. The Court further held that if the contents had been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

33. By relying upon the said decision, Mr. Das tried to impress upon us that in the FIR, there being no reference of the truck, we should not only disbelieve the evidence of the eyewitnesses but also should not draw adverse inference against the owner or the Insurance company. We have already pointed out that the brother of the victim who lodged FIR was not an eyewitness; he simply drew the attention of the police that his brother while travelling in the motorcycle met with an accident resulting in death by colliding with the light post. The mere absence of the allegation that such collision occurred due to the striking of the truck from behind for which he lost control in the FIR cannot be fatal when it is the definite case of the claimants that the truck had immediately after the accident run away. We find no reason to disbelieve the version of the eyewitnesses coupled with the fact that the owner of the truck and the driver did not appear to deny such allegation. The view taken by the Supreme Court in the facts of the said case where the criminal case was closed cannot have any application to the present case where the involvement of the truck has been proved by overwhelming evidence on record and the criminal case is pending. Moreover, the Supreme Court did not lay down any proposition of law that mere absence of involvement of the errant vehicle in the FIR made by a person who was not an eyewitness would absolve the owner and the driver of the offending vehicle of their liability even if subsequently the rash and negligent driving as the cause of death is detected in investigation and is corroborated by the evidence of eyewitnesses. We, therefore, find that the appellant cannot be benefitted in any way by the said decision.

34. In the case of Smt. Mita Gupta and Others Vs. Oriental Insurance Co. Ltd. and Others, , a Division Bench of this Court in an appeal preferred against dismissal of an application for compensation, drew adverse inference against the respondents for not producing the driver of the vehicle in the witness box and allowed the appeal. Therefore, the said decision rather supports the claimants in

this case.

35. We, therefore, find that the abovementioned three decisions do not help the Insurance Company in anyway.

36. Apart from aforesaid point, Mr. Das did not raise any other point nor did he dispute the quantum of damages assessed by the Tribunal. We find that the amount is quite reasonable having regard to the proved age of the victim and his monthly income.

37. We, thus, find no reason to interfere with the award passed by the Tribunal. The appeal is, thus, dismissed.

38. In the facts and circumstances, there will be however, no order as to costs.

39. I agree.