
(2011) 11 BOM CK 0150
In the Bombay High Court
Case No : First Appeal No. 1731 of 2010

The New India Assurance Company Limited	APPELLANT
Vs	
Sitaram Devidayal Jaiswal and others	RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:

Maharashtra Motor Vehicles Rules, 1989 — Rule 259, 260, 260(1), 260(2)
Motor Vehicles Act, 1988 — Section 149, 158, 158(4), 158(6), 166

Citation : (2012) ACJ 2647 : (2012) 2 ALLMR 429 : (2012) 5 BomCR 285 :
(2012) 2 MhLj 710 : (2012) 2 TAC 156

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : D.S. Joshi, for the Appellant; T.J. Mendon for Respondent No. 1., for the Respondent

Judgement

A.S. Oka, J.—One of the issues involved in the present first appeal is whether the driver of the offending vehicle against whom negligence has been alleged is a necessary or proper party in a claim petition u/s 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the said Act").

2. By this appeal, the Appellant - Insurer has taken an exception to the judgment and award dated 29th June, 2010 passed by the learned Member of the Motor Accident Claims Tribunal. The claim petition was filed by the Respondent Nos.1 and 2 u/s 166 of the said Act. The Respondent Nos.1 and 2 are the parents of the deceased who was a victim of the accident. The accident occurred on 21st November, 2005 at about 02:00 am at N.S.Road, Mumbai under a Flyover Bridge. It is alleged that when the deceased was crossing the road, a car owned by the Respondent No. 3 came in a very high speed which was being driven in rash and negligent manner and gave a dash to the deceased. Though the deceased was admitted to a hospital, he succumbed to the injuries sustained in the accident. The car was insured with the Appellant on the relevant date.

3. The claim petition was contested by the Appellant by filing a written

statement. One of the contentions raised was that the driver of the car was a necessary and proper party and that as he was not impleaded as a party, the claim petition was not maintainable. The Tribunal held that the negligence on the part of the driver of the car was established. The Tribunal proceeded to grant compensation of Rs.2,90,000/- with interest at the rate of 7.5% per annum.

4. The first submission of the learned counsel appearing for the Appellant is that the driver of the car insured with the Appellant was a necessary and proper party to the claim petition as the allegation of negligence was against the said driver. His submission is that though the Respondent No. 3 - owner is alleged to be vicariously liable, unless the negligence on the part of the driver is proved, the Respondent No. 3 cannot be held vicariously liable. He submitted that unless the driver was made a party, no finding could be recorded of negligence against him. He has relied upon various decisions to which a reference is made in the subsequent part of this judgment. He submitted that a claim petition u/s 166 of the said Act is an action under the law of torts and therefore, compensation is payable only if the negligence on the part of the driver of the offending vehicle is proved. He submitted that for proving the negligence, the driver against whom negligence is alleged is a necessary and proper party. He submitted that in the present case, negligence has not been proved. Moreover, he submitted that as the deceased was a bachelor, 50% of his income ought to have been deducted on account of his personal expenditure and therefore, the Tribunal has committed an error by deducting only 1/3rd amount on account of personal expenditure.

5. The learned counsel appearing for Respondent No. 1 submitted that apart from the fact that there was no issue framed on the basis of the contention regarding non-joinder of necessary party, the law laid down by various decisions of the Apex Court as well as this Court is that a driver is not at all a necessary party to a claim petition u/s 166 of the said Act. He has relied upon several decisions. He submitted that a claimant in a claim petition is under no obligation to make any person as a party to the claim petition and it is for the Tribunal to issue notice to the appropriate parties on the basis of the claim petition. He submitted that negligence on the part of the driver was proved and the compensation granted is reasonable.

6. I have given careful consideration to the submissions. The first issue is whether the driver was a necessary and proper party. In the case of *Sikhandar Khan Rashid Khan Vs. Ansar Baig Sabdar Baig and Others*, , a learned Single Judge of this Court has held that the driver was not a necessary party to a claim petition. Paragraph No. 8 of the said decision reads thus:

8. Section 166 of the Act enables the victim of a motor accident to make an application for compensation. Section 158(6) of the Act imposes a duty on the officer-in-charge of a police station to forward a copy of any information regarding any accident involving death or bodily injury to any person recorded by him to the Claims Tribunal having jurisdiction in the area. Sub-section (4) thereof says that the Claims Tribunal shall treat any report of accident forwarded to it

under sub-section (6) of Section 158 of the Act as an application for compensation under the Act. If the report of a police officer is to be treated as an application for compensation, obviously such application cannot be dismissed even if it (the police report) does not name the driver who may in some cases be absconding and whose name and address may not be known. If there would be no requirement of naming the driver in the report of the police officer u/s 158(6) of the Act, different rules and standards cannot be applied for a claim application made by the victim against the owner of the motor vehicle. Thus, in my view, the law relating to the requirement of joining the driver of a motor vehicle as a party to the claim application which arises under the common law of torts and the principle of the owner's liability being only vicarious the owner cannot be liable unless the driver is a party to the petition stands modified so far as the claim application under the Motor Vehicles Act is concerned. The claim application against the owner of the motor vehicle cannot be dismissed merely on the ground that the driver of the motor vehicle involved in the accident was not joined as a party to the application.

(Underline supplied)

In the case of United India Insurance Co. Ltd. Vs. Smt. Ratna Popat Patil and Mr. Prakash Shivram Patil, , another Single Judge of this Court has taken a contrary view. In paragraph No. 13 of the said decision, the learned Judge has held thus:

13. Apparently, there is substance in the submissions advanced by the learned Counsel Shri Gatne appearing for the appellant Insurance Company and in view of the judgment of the Apex Court in driver of the offending vehicle would be a proper party or he should at least be examined as a witness on the allegations of rash and negligent driving on his part and without his involvement, no adverse finding in respect of negligence can be made against him and if such findings are recorded in his absence, same would vitiate the proceeding. However, in the instant case, the driver namely Rajesh Shivaji Wagh, of the offending vehicle has not been impleaded as party to the claim petition by the petitioner and the adverse findings in respect of his negligence have been recorded behind his back and in his absence by the Tribunal by the impugned judgment and award, and therefore, same would be vitiated, and therefore, on the said ground itself, present appeal deserves to be allowed partly quashing and setting aside the impugned judgment and award and the matter deserves to be remanded back to the Tribunal on the ground that there is noncompliance of the mandatory provisions of Rule 260(1) and (2) of the Maharashtra Motor Vehicles Rules, 1989, with a further direction to follow the mandate of the said Rule, keeping all other points open for agitation to the respective parties.

(Underline supplied)

In the case of New India Assurance Co. Ltd. Vs. Babruwan and Others, , another Single Judge of this Court has taken a view that non-impleadment of a driver not fatal. In paragraph No. 8 of the said decision, the learned Judge has held thus:

8. It was canvassed that the driver of the jeep was not arrayed as a party. However, non-impleadment of the driver of the jeep by itself is not fatal. Insurance company by leave of court could examine him. Claimants had indeed proved negligence of the jeep driver but as stated earlier, insurance company appellant has failed to establish breach of policy conditions.

Similar view has been taken by the Division Bench of this Court in the case of Oriental Insurance Co. Ltd. Vs. Pritam Rajiv Shetty and Another, . In paragraph No. 8, the Division Bench has held thus:

8... Merely because the driver of some other vehicle or its insurer is not added as party to the proceedings, the application would not fail for non-joinder of the necessary parties, if it comes to the light that in fact such other vehicle was also responsible for the accident. In short, the claim application is not liable to be dismissed on the principle of non-joinder of the necessary parties. As a matter of fact it is the duty of Tribunal to call upon the parties to furnish the registration number of vehicle(s), the name of the owner(s) and its insurer(s) and issue notice to all of them and thereafter make full and complete adjudication of the application. In the instant case such exercise had not been undertaken by the Tribunal and even the appellant also failed to make such request to the Tribunal. In our opinion, the claim application cannot be rejected on the ground of the principle of non-joinder of necessary party. Moreover, we may also notice that claim application is not a plaint governed by the proceedings under the special Act and, therefore, the law of which strict compliance is required while filing the civil suit cannot be applied while dealing with the proceedings under the special Act.

(Underline supplied)

Another learned Single Judge of this Court in the case of New India Assurance Company Ltd. Vs. Smt. Suman Bhaskar Pawar, Dinesh Pawar, Ramesh Pawar and Subhash Shinde, considered various decisions of this Court and the Apex Court and has also considered Rule 260 of the Maharashtra Motor Vehicles Rules, 1989. He decided the issue of the driver being a necessary party by summarizing the law as under:

16. In view of the above, my findings on all aforesaid aspects are summarised are as under:

(i) Meena Varila's case decided by the Apex Court does not lay down a law that driver of offending vehicle is necessary party in all cases and in his absence, the Judgment and Award shall vitiate.

(ii) In an unreported Judgment of this Court in First Appeal No. 3839/2008, National Insurance Company Ltd., vs. Vachista decided on 14-9-2009, it has not been laid down that driver of the offending vehicle was not necessary party, in case of claim petition under Motor Vehicles Act.

(iii) In Machindranath's case the contention that, the driver of the offending

vehicle was necessary party in a claim petition and in his absence the entire judgment and award would vitiate, has been rejected.

(iv) In view of the Judgment of the Apex Court in Machindranath's case, the driver of the offending vehicle would be a proper party or he should at least be examined, as witness on the allegations of rash and negligent driving on his part and without his involvement, no adverse finding on negligence can be made against him and if any such finding is recorded, same would vitiate the proceedings.

(v) No decree or award can be made personally against the driver of the offending vehicle unless he is involved in a claim petition either as party or at least as witness.

(vi) If there are specific rules involving the driver in a claim petition in particular manner, then the matter would be governed by the said rules and its compliance will have to be shown.

(vii) The requirement of Rule 260(1) and (2) of the Maharashtra Motor Vehicles Rules, 1989 is mandatory and the Tribunal shall send to the owner or driver of the vehicle or both, involved in the accident and its insurer, a copy of the application and annexures thereto, together with notice of the date on which the parties shall enter their appearance.

(viii) The service of notice shall be effected on owner, driver and insurer of the offending vehicle in question, as the case may be, by way of personal service, through the bailiff or by Registered Post A/D or both, as the Tribunal may deem fit and proper.

(ix) If the driver or owner or insurer of the offending vehicle does not respond to the notice so issued and duly served, the Tribunal may proceed ex parte and pass an award against any of them or all of them and the proceedings shall not vitiate for not calling a driver and examining him as witness.

(Underline supplied)

7. The learned Judge in the aforesaid decision in the case of New India Assurance Company Ltd., Aurangabad Vs. Suman Bhaskar Pawar and others (supra) has relied upon the decision of the Apex Court in the case of Machindranath Kernath Kasar Vs. D.S. Mylarappa and others (2008) 13 SCC 198. In the said decision, the Apex Court has considered all its earlier judgments including the judgment in the case of Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another, .

8. In the case of Sikhandar Khan Rashid Khan (supra), when this Court had decided the issue, it appears that the decision of the Apex Court in the case of Machindranath Kernath Kasar (supra) was not brought to the notice of this Court. When a Division Bench of this Court decided the issue in the case of Oriental Insurance Co. Ltd. Vs. Pritam Rajiv Shetty and another (supra), the decision of

the Apex Court in the case of Machindranath Kernath Kasar (supra) was not delivered. However, in the case of New India Assurance Company Ltd., Aurangabad Vs. Suman Bhaskar Pawar and others (supra), the decision of the Apex Court in the case of Machindranath Kernath Kasar (supra) and Minu B. Mehta and another (supra) have been extensively considered. This Court has held that the contention that the driver of the offending vehicle was a necessary party in a claim petition has been negated by the Apex Court in the case of Machindranath Kernath Kasar (supra). The Apex Court in the said decision held that the driver of the offending would be a proper party. This Court held that the requirement of Rule 260 of the said Rules of 1989 is mandatory and therefore, the Tribunal is under an obligation to send notice to the owner or the driver of the vehicle and to its Insurer.

9. Perusal of the provisions of the said Act and the said Rules of 1989 show that a claim petition is not at all a civil suit and neither the said Act nor the said Rules of 1989 require a claimant to implead any person as a party opponent to a claim petition. A duty is cast upon the Tribunal by virtue of Rule 260 of the said Rules of 1989 to issue the notices to the concerned parties. On this aspect, it will be necessary to make a reference to the decision of the Division Bench of this Court in the case of Bessaral Laxmichand Chirawala Vs. Motor Accidents Claims Tribunal, Greater Bombay, . In paragraph No. 10 of the said decision, the Division Bench held thus:

10... In that connection it requires to be noticed that provisions in the in connection with application for claims for compensation do not require any parties to be mentioned as opposite parties in the title of the application. When the formality of the amendment was asked for, it was the legal duty of the Tribunal in this case to ascertain true facts as regards the ownership of the B.E.S.T. Undertaking itself and thereafter it was permissible for the Tribunal even without an amendment having been granted to make an award of compensation in favour of the petitioner against the Municipal Corporation.

(Underline supplied)

Of course, the said decision was rendered in a claim petition under the Motor Vehicles Act, 1939. But even under the said Act and the said Rules of 1989, the legal position continues to be the same. However, Rule 260 of the said Rules of 1989 is now very clear which enjoins the Tribunal to issue notices to the concerned parties. Rule 260 of the said Rules of 1989 reads thus:

Rule 260. Notice to the parties involved : - (1) If the application is not dismissed under Rule 259, the Claims Tribunal shall, send to the owner or the driver of the vehicle or both involved in the accident and its insurer, a copy of the application, and the annexures thereto together with the notice of the date on which the parties shall enter their appearance either in person, or through their duly authorized agents, and may also file their written statement, if any, with additional copies of the same, for being furnished to the other parties connected

with the matter. It will dispose off the application, and may call upon the parties to produce on that date any evidence which they may wish to tender.

(2) The service of the notice shall be effected on the owner, the driver and the insurer of the vehicle in question, as the case may be, by way of personal service, through the bailiff or by Registered Post A/D or both.

(3) Whether the applicant makes a claim for compensation u/s 149, the Claims Tribunal shall give notice to the owner and insurer, if any, of the vehicle involved in the accident directing them to appear on the date, not later than fifteen days from the date of issue of such notice. The date so fixed for such appearance shall also be not later than fifteen days from receipt of the claim application filed by the claimant. The Claims Tribunal shall state in such notice that in case they fail to appear on such appointed date, the Claims Tribunal shall proceed ex parte on the presumption that they have no contention to make against the award of compensation.

10. Thus, the law is that the claimant while filing a claim application is under no obligation to ensure that all necessary and proper parties are impleaded as opponents to the claim petition. Considering the nature of the proceedings, the responsibility is of the Tribunal to ensure that the notices are issued to all the necessary parties. This power can be exercised by the Tribunal at any stage of the proceedings.

11. It is a matter of common knowledge that while defending a claim petition, diverse defences are raised in the written statements by the owners and especially the Insurers. However, in many cases, we find that all the defences pleaded are not pressed into service at the time of final hearing. Whenever a contention is pressed into service by any of the opponents to the claim petition or the persons to whom the notice of the claim petition is issued under Rule 260 that the driver of a vehicle is a necessary party, the Tribunal is under an obligation to examine the said contention and if found correct, issue a notice to the driver. It is obvious that if such contention is not pressed by the party to whom the notice is served, the said party cannot be allowed to raise the said contention for the first time in the appeal. A claimant cannot be allowed to suffer as he is under no obligation to implead any party as the opponent to the claim petition. In such a case, if the driver is aggrieved by the adverse finding recorded against him by the award of the Tribunal, he has a remedy of preferring an appeal against the award after obtaining a leave of the Appellate Court. If neither the owner nor the Insurer raises a contention before the Tribunal regarding the non-joinder of the driver, it is not open for them to contend in the appeal that the driver was a necessary party and that the award is vitiated because of non-joinder of the driver. The observations made by this Court in the case of New India Assurance Company Ltd., Aurangabad Vs. Suman Bhaskar Pawar and others (supra) in clause (iv) of paragraph No. 16 will apply only when specific defence of non-joinder of the driver is pressed into service either by the owner or by the Insurer. If they fail to raise the said contention, the same is not

available for them in the appeal. Needless to say that the same will remain available to the driver who is not made party. As the law is that the responsibility of issuing the notice to the proper parties is entrusted to the Tribunal, if a contention regarding non-joinder is not raised, the claimant cannot be allowed to suffer on the ground that the Tribunal has failed to perform its duty. Even if a contention regarding non-joinder of driver is raised at the time of final hearing of a claim petition, if the said condition is correct, the Tribunal can issue notice to the driver at any stage.

12. Now in the facts of the present case, it is true that in the written statement the said contention was raised. However, no issue was framed on the basis of the said contention. From the discussion in the judgment, it appears that the said contention was not at all pressed at the time of final hearing. There is no ground taken in the Memorandum of Appeal that at the time of hearing, the said contention was agitated, but the same has not been considered. The Appellant could have always applied for recasting of the issues, but that was not done. Therefore, it is apparent that though the contention regarding non-joinder was taken in the written statement, the same was not agitated at any time thereafter. It appears that after having taken the said contention in the written statement, the said contention was not pressed thereafter. Therefore, now in appeal, the Appellant cannot be allowed to raise the said contention as the same will cause serious prejudice to the claimant.

13. The Tribunals will have to ensure that if such contention regarding non-joinder of the driver is raised and is found to be correct, a notice is issued to the driver so that the claimant does not suffer. The Tribunal should consider such contention in the written statement at the time of framing of issues.

14. Now, coming to the facts of the case, in view of the decision of the Apex Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , in a case where the deceased is unmarried, 50% of the amount of his income will have to be deducted on account of personal expenditure. In the present case, the age of the deceased was 18 years at the time of the accident. As the accident was of November 2005, notional income of the deceased has been rightly taken at Rs.2,500/- per month. Thus, the yearly income was taken at Rs.30,000/-. The 1/2 amount will have to be deducted on account of personal expenditure of the deceased. Therefore, the multiplicand will be Rs.15,000/-. On the basis of the average age of the claimants / parents, multiplier of 14 has been rightly applied by the Tribunal. Adding usual amount of Rs.10,000/- towards funeral expenditure etc, the total compensation payable will be Rs.2,20,000/-. To that extent, the appeal will have to be allowed.

15. Hence, I pass the following order:

- i. The impugned judgment and award is modified to the extent that the total compensation payable shall be Rs. 2,20,000/- instead of 2,90,000/-;
- ii. Rest of the award is confirmed;

- iii. The appeal is partly allowed on above terms with no order as to costs; and
- iv. Civil Application No. 751 of 2011 does not survive and the same is disposed of.