

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

First Appeal No. 1936 of 2013

Shantabai wd/o. Subhash Mandlik,
Age : 50 years,
Occupation : Nil,
R/o. Dholewadi, Rajapur Road,
Sangamner, Taluka : Sangamner,
District : Ahmednagar.

.. Appellant
(Original claimant)

versus

1. Dattatraya Fakira Kandekar,
Age : Major,
Occupation : Owner of truck,
R/o. Janta Nagar (East),
Galli No.7, Sangamner,
Taluka : Sangamner,
District : Ahmednagar.
2. Bajaj Allianz General Insurance
Company Ltd.,
Shri Ganesh Plaza,
Mumbai Naka, Nashik,
Taluka & District : Nashik.

.. Respondents
(Original respondents)

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Mr. Darshan D. Pokharkar, Advocate, for the appellant.

Mr. R.D. Bhalerao, Advocate, for respondent no.1.

Mr. S.G. Chapalgaonkar, Advocate, for respondent no.2.

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CORAM : A.M. BADAR, J.

DATE : 7TH DECEMBER 2015

ORAL JUDGMENT :

1. Heard the learned Counsel appearing for respective parties.
2. Admit. Taken up for final hearing with consent of parties as record and proceedings is already received by this Court and on earlier occasion it was indicated that the First Appeal shall be finally heard at the stage of admission itself.
3. This is an appeal under Section 173 of the Motor Vehicles Act, 1988 [**For short, hereinafter referred to as “MV Act”**], by the original claimant feeling aggrieved by rejection of her claim by the Motor Accident Claims Tribunal, Sangamner, in M.A.C.P. No. 28/2010 on 28-2-2012. For the sake convenience, parties hereinafter shall be referred to in their original capacity.
4. Facts in nutshell giving rise to institution of present appeal are thus :-
 - (a) Claimant Shantabai is widow of deceased Subhash s/o. Yeshwant Mandlik. According to her, deceased was 56 years old at the time of his accidental death. He was working as labourer on regular basis with Municipal Corporation, Sangamner and earning Rs. 10,530/- per month.
 - (b) According to the claimant, on 10-11-2009, at about 4.00 a.m., Subhash was returning from village Rayatwadi to his native place Dholewadi by bicycle after attending religious programme at Rayatwadi. This return journey was undertaken at about 4.00 a.m. on 10-11-2009.

When Subhash was proceeding by his bicycle, a truck bearing registration No. MH-17/T-2061 owned by respondent no.1 and insured with respondent no.2 came from behind and gave dash to the bicycle of Subhash. The truck then fled away from the spot. 2 - 3 relatives of Subhash were behind his bicycle. Subhash was admitted at Dr. Tambe's Hospital at Sangamner where he breathed last on 17-11-2009. With these averments, the claimant preferred claim petition for awarding compensation of Rs. 6,00,000/- from respondents.

(c) By filing written statement at Exhibit 38, respondent no.1 - owner has admitted that the accident in question took place. However, according to him, the deceased was ignorant about the condition of road as well as rules of traffic. According to respondent no.1 - owner, the accident happened because of negligence of the deceased in riding bicycle. Driver of the truck, according to respondent no.1, was not at all responsible for the accident.

(d) Respondent no.2 - Insurance Company opposed the claim by filing written statement at Exhibit 19. It denied each and every adverse averment and contended that the truck insured with it bearing registration No. MH-17/T-2061 was not at all involved in the accident in question. According to the Insurance Company, involvement of the truck is deliberately shown in the accident resulting in death of Subhash. The Insurance Company further pleaded that the FIR was belatedly lodged on 19th December 2009 i.e. after 40 days of the accident in question. This FIR is against unknown vehicle. According to the Insurance Company, Subhash died in a hit and run case and the truck was not at all in the

accident.

(e) On the basis of rival pleadings, the learned Tribunal framed issues and parties went for trial. Claimant Shabtabai adduced evidence at Exhibit 39 and also examined Somnath Laxman Pavbake - an employee of Municipal Council to prove income of the deceased. Respondent - Insurance Company examined its witness in order to prove the fact that the truck in question was involved in other claim petitions where initially the FIR was against the unknown vehicle.

5. After hearing the parties, by the impugned judgment and award, the learned Tribunal came to the conclusion that the claimant failed to prove that on 10-11-2009, the truck bearing registration No. MH-17/T-2061 gave dash to Subhash Mandlik and that Subhash died because of rash and negligent driving of the said truck. Hence this appeal by the claimant.

6. Heard Shri Pokharkar, the learned Counsel appearing for the appellant - claimant. He had taken me through the record & proceedings and particularly through the statement of Bhaurao Kondaji Navale recorded by Police during investigation under Section 161 of the Code of Criminal Procedure, and submitted that Bhaurao Navale had disclosed the facts regarding the accident to the claimant but as the claimant was under mental trauma, there was delay in lodging the FIR. Shri Pokharkar, the learned Counsel appearing for the claimant by relying on judgment of the Hon'ble Apex Court in the case of *Kusum Lata and others Vs. Satbir and others*, reported in *AIR 2011 SC 1234*, submitted that evidence of Shantabai as well as Police papers placed on record are sufficient to hold that

deceased Subhash died because of rash and negligent driving of the truck owned by respondent no.1 and insured with respondent no.2. Forgetting to take down the registration number of the vehicle involved in the accident and non-mentioning the same in the FIR, according to Shri Pokharkar, the learned Counsel for the appellant, is of no consequence.

7. As against this, Shri Chapalgaonkar, the learned Counsel appearing for respondent no.2 - Insurance Company, supported the impugned judgment and award by arguing that the same truck was found to be involved strangely in successive accident where the FIR shows that unknown and unidentified truck dashed the victims therein.

8. Shri Bhalerao, the learned Counsel appearing for respondent no.1 - owner has submitted that the accident happened because of negligence of deceased Subhash as pleaded by him in the written statement.

9. By now, it is well settled that the proceedings before the Tribunal are summary in nature to which strict law of pleading and evidence is not applicable. However, at the same time, it needs to be kept in mind that at least some proof in respect of happening of the accident as well as rash and negligence of the driver of the offending vehicle is required in order to get preponderance of probable version in respect of the accident in question in order to fasten the liability of payment of compensation on the offending vehicle. In the light of this position of law, let us examine whether the claimant has proved the accident and whether by applying principles of *res ipsa loquitur*, it can be held that the accident

in question had happened because of rash and negligent driving of the truck bearing registration No. MH-17/T-2061 resulting in death of Subhash on 17-11-2009.

10. Evidence of claimant Shantabai is sufficient to hold that because of injuries suffered by him, her husband Subhash died at Dr. Tambe's Hospital at Sangamner, on 17-11-2009. The question which falls now for consideration is whether this vehicular accident was caused because of rash and negligent driving of truck bearing registration No. MH-17/T-2061. The accident in question had happened at wee hours on 10-11-2009 on Sangamner-Pune Highway. It is not in dispute that FIR of this accident came to be lodged on 19-12-2009. This FIR is at Exhibit 43. Perusal of this FIR lodged by ASI A.K. Bhongle of City Police Station, Sangamner, makes it clear that it was registered during the course of enquiry of Accidental Death case of deceased Subhash. It is apposite to mention here that death of Subhash on 17-11-2009 resulted in registration of Accidental Death case No. 83/2009 under Section 174 of the Code of Criminal Procedure, 1973. During enquiry of this Accidental Death case on 17-11-2009 itself, Police recorded Panchanama of spot of the incident. However, nothing incriminating was found on the spot of the incident due to passage of time. On 17-11-2009 itself, inquest Panchanama was recorded by inspecting dead body of Subhash. Then the corpse was sent for autopsy to Rural Hospital, Sangamner, on the very same date. Thus, though the FIR was lodged after 40 days, within 7 days of the incident, Police machinery played its role by recording Accidental Death case No. 83/2009. Necessary formalities were carried thereafter. This aspect of the matter is material because there was ample opportunity with claimant

Shantabai or the witnesses who were attending deceased Subhash at Dr. Tambe's Hospital at Sangamner to disclose the facts leading to the accidental death as well as involvement of the truck bearing registration No. MH-17/T-2061 to the Police which were available. However, perusal of evidence on record shows that neither the claimant nor the alleged witnesses including Bhaurao Navale had taken pains to inform the incident to Police. Claimant Shantabai undisputedly is not an eye witness to the incident in question. However, her cross examination reveals that Bhaurao Kondaji Mhaske and Kailas Mahadu Mandlik, who allegedly saw the accident were very much present at the hospital when Subhash was taking treatment after the accident. As such when Police came at the hospital after death of Subhash for enquiring his accidental death, nothing prevented the claimant as well as these two alleged eye witnesses to disclose involvement of the truck of respondent no.1 Dattatraya in the accident in question. Alleged mental trauma of Shantabai rather could have prompted her to bring the culprit responsible for accidental death of her husband to the book.

11. Be that as it may, the belated FIR as such makes it clear that up to 19-12-2009, involvement of the truck in question was not reported to Police. ASI Bhongle registered Crime No. I-178/2009 against unidentified truck driver on 19-12-2009. At that point the truck was not identified. It appears that during the course of investigation on 20-12-2009, statement of Bhaurao Kondaji Navale came to be recorded by Police wherein for the first time he came up with a version that truck bearing registration No. MH-17/T-2061 gave dash to deceased Subhash and thereafter driver Sanjay Tukaram Rupwane alighted from the truck enabling Bhaurao

Navale to identify him. This version of Bhaurao Navale to Police cannot be used in order to determine the mode and manner of happening of the accident when the same is totally disputed by respondent - Insurance Company. Owner of the truck was not an eye witness to the accident in question. Case of the claimant is to the effect that after giving dash to the bicycle of the deceased, the truck fled away from the spot of the incident. Therefore, Police statement of Bhaurao Navale is of no consequence in order to determine involvement of the truck in question. He is not examined as witness before the Tribunal by the claimant.

12. On this backdrop, evidence of respondent - Insurance Company needs to be examined. Exhibit 77 is the copy of Claim Petition No. 8/2009 in respect of death claim of Kisan Shivram Shejwal. In that matter, the accident occurred on 24-12-2008. FIR at Exhibit 78 of the same date shows that unidentified truck dashed motorcycle of said Kisan Shejwal. Panchanama at Exhibit 79 as well Exhibit 80 shows that unidentified truck dashed Kisan. Exhibit 81 is the written statement of the Insurance Company disputing involvement of the truck. In this Claim Petition No. 8/2009, the claim of rash and negligent driving is ultimately against the very same truck bearing registration No. MH-17/T-2061. The compensation is claimed against its owner and Insurance Company.

13. Then there is another Claim Petition bearing registration No. 171/2010 at the Tribunal at Sangamner itself. This is in respect of death claim of Ganesh Dashrath Gadakh. The accident therein is stated to have occurred on 10-4-2010. Deceased therein was travelling on the motorcycle. FIR at Exhibit 73 in that matter is against unidentified truck.

The report lodged by Sunil Namdeo Shirsath at Exhibit 74 also shows that unidentified truck gave dash to the motorcycle of Ganesh Gadakh. Ultimately the claim for compensation in respect of this accident is lodged by showing involvement of the very same truck bearing registration No. MH-17/T-2061. It is very strange coincident that in similar manner in two more accidents firstly the FIRs were against unknown and unidentified truck drivers. Strangely with passage of time, involvement of the very same truck is shown in the accident in question resulting in giving cause of action for filing claim petition against the owner as well as insurer of the very same truck. Otherwise such aspect would not have any major bearing on fate of the instant claim petition. However material eye witnesses are not examined by the claimant. In this situation, when the Insurance Company had categorically denied involvement of the truck and when the alleged eye witnesses were from the community of the claimant and known to the claimant, having attended the injured at the time of his admission at the hospital, non-examination of these material eye witnesses by the claimant ultimately led the Tribunal to hold that involvement of the truck in question was not proved by the claimant. This approach of the learned Tribunal cannot be faulted with. The appreciation of evidence adduced by the parties by the learned Tribunal is correct and no fault can be found with the same. The learned Tribunal has arrived at the correct finding of the fact.

14. In the case of *Kusum Lata and others (supra)*, relied upon by the learned Counsel for the appellant, the accident as well as involvement of the tempo was duly proved by adducing evidence of Dheeraj Kumar. The driver of the tempo was apprehended on the spot itself. The said case

proceeded on its own facts and has no application to the facts of the present case.

15. In the result, the Appeal fails and the same is dismissed with no order as to costs.

(A.M. BADAR)
JUDGE

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