

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

...

17 FIRST APPEAL NO. 1841 OF 2013

INDUBAI SHIVAJI HOGALE AND OTHERS

VERSUS

BABU GANPAT KALOKHE AND ANOTHER

...

Advocate for Appellants : Mr. Chapalgaonkar S. G.

Advocate for Respondent No.2 : Mr. M. K. Goyanka

Advocate for Respondent No.1 : Mr. Irfan D. Maniyar

...

CORAM : S. V. GANGAPURWALA, J.

DATE : 5th October, 2015

PER COURT :

1. The present appellants had filed an application for compensation under section 166 of the Motor Vehicles Act on account of death of one Shivaji in an accident. The said claim petition is dismissed. Aggrieved thereby, the claimants have filed the present appeal.

2. Mr. Chapalgaonkar, the learned counsel for the claimant submits that the Court below, solely on the basis of police papers, has decided the application and came to the conclusion that the deceased, who was driving motorcycle, was negligent. According to the learned counsel, the map as annexed with the spot

panchanama has not at all been considered. The accident is on the curve. As such, it cannot be said that the driver of the tempo was not negligent. According to the learned counsel, the owner driver of the tempo i.e. the respondent no.1 has not filed his written statement denying the averment made in the claim petition nor he has led his evidence. In fact, the he would have been the best witness. Adverse inference needs to be drawn for not examining the driver and the eye witnesses on record by the respondent no.1. The court below ought to have considered the uncontroverted statement of the claimants. Only because a criminal complaint was filed against the deceased and 'B' summary was filed, thereafter, on the death of the deceased, it could not have been concluded by the tribunal that the deceased was rash and negligent and was responsible for the accident.

3. Mr. Goyanka the learned counsel for respondent no.2 submits that the police papers, spot panchanama and all other documents have been rightly considered by the tribunal and they all go to show that it was the deceased who was driving the motorcycle in a rash and

negligent manner, in a drunken state, resulting in the accident. The tempo was stationary, stashed for repairs and the deceased hit the stationary tempo. The FIR, statement of witnesses and spot panchanama, all these facts, leads to irresistible conclusion that the deceased was negligent.

4. I have heard the learned counsel for respondent No.1 also.

5. Upon being asked as to why adverse inference should not be drawn for the owner and driver of the vehicle who was present on the spot, is not examined though he is a party, Mr. Goyanka, the learned counsel submits that opportunity be given to the respondent no.2 to examine respondent no.1. The same would be in the nature of permitting the additional evidence.

6. Considering the fact that whole case revolves round the aspect of negligence and the respondent no.1 was an eye witness, I would accept the request of learned counsel for respondent no.2 and permit the respondent no.2 to examine respondent no.1, of course the claimant would be entitled to cross examine.

7. In the light of above, the impugned judgment and order is quashed and set aside. .

8. The matter is remitted to the tribunal. The parties shall appear before the tribunal on 4th November, 2015

9. The respondent no.2 may examine respondent no.1 and thereupon, the tribunal should decide the case afresh.

10. In view of the fact that the matter is remitted back to the tribunal, the claimant is entitled to file application for amendment seeking conversion of claim petition under section 163 A of the Motor Vehicles Act. The respondents are entitled to file their say to the said application. The application for amendment shall thereafter be decided on its own merits.

11. The First Appeal is accordingly disposed of. No costs.

(S. V. GANGAPURWALA, J.)

JPC