

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

FIRST APPEAL NO. 222 OF 2017

THE ORIENTAL INSURANCE CO LTD
VERSUS
RUKHSANA BEGUM SK ILIYAS AND OTHERS

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Advocate for Appellant : Mr. S. M. Godsay with Ms Nihareeka S. Godsay.
Advocate for Respondent Nos.1 & 8 : Mr.S. G. Chapalgoankar.

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CORAM : **V. K. JADHAV, J.**
DATE : 22nd February, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and award passed by the learned Member of the Motor Accident Claims Tribunal, Aurangabad dated 22nd June, 2007 in MACP No.426 of 2006, original Respondent No.3 / Insurer has preferred this appeal.

3 Brief facts giving rise to the present appeal are as follows:

- i) On 23rd June, 2005, deceased Shaikh Ilyas was proceeding by Aurangabad – Jalna road on his motorcycle and on the way, while overtaking one tanker bearing registration No.MH-04-AL-5686, the said tanker had given dash to deceased Shaikh Ilyas.

In consequence of which, deceased Shaikh Ilyas has sustained severe injuries resulted into his death.

- ii) The legal representatives of deceased Shaikh Ilyas approached the Tribunal by filing MACP No.426 of 2006 for grant of compensation under the various heads. It has contended that deceased Shaikh Ilyas was getting Rs.5,000/- per month as a salary and he was also earning Rs.14,000/- per month from his business of colour contract.
- iii) The Appellant / Insurer has strongly resisted the claim petition by filing the written statement. It has contended that the accident had take place on account of rash and negligent driving of the motorcycle rider i.e. deceased Shaikh Ilyas.
- iv) Claimant No.1 has examined herself in support of the contentions raised in the petition. Respondents have not adduced any evidence. The learned Member of the Motor Accident Claims Tribunal, Aurangabad vide its impugned judgment and award dated 22nd June, 2007 allowed the petition with proportionate costs and

thereby held that Respondent No.2 and Appellant herein liable jointly and severally to the compensation pay Rs.7,00,000/- including the amount under no fault liability with interest @7.5% per annum from the date of petition till realization. Hence, this appeal.

4 The learned counsel for the Appellant / Insurer submits that deceased Shaikh Ilyas was responsible for the accident. The learned counsel submits that the motorcycle being driven by deceased Shaikh Ilyas had come below the rear driver side wheels of the said tanker and thus, the driver of the said tanker involved in the accident was not at fault. The learned counsel submits that the Tribunal ought to have held that deceased Shaikh Ilyas had contributed the negligence in that way. The learned counsel submits that the pillion rider of the said motorcycle had lodged the complaint and on the basis of the said complaint, crime was registered in the concerned police station. Claimant No.1 is not an eye witness to the accident and Claimants have not examined the said pillion rider. Thus, the Claimants have failed to prove the contents of the FIR and therefore, the said FIR cannot be treated as a substantive piece of evidence. The learned counsel submits that the Tribunal has placed reliance on

the contents of the FIR and recorded a finding that the driver of the tanker was alone responsible for the accident. The learned counsel submits that there is no satisfactory evidence about the income of deceased Shaikh Ilyas. Even the learned Member of the Tribunal has observed that the witness examined by the Claimants on the point of income of deceased Shaikh Ilyas has not kept the proper record of salary, which he was paying to the deceased. The learned Member of the Tribunal has considered only the family size of deceased Shaikh Ilyas and believed the said witness on the point of income. There is no proof of income of deceased Shaikh Ilyas from his business of colour contract. In absence of any satisfactory evidence about the income of deceased Shaikh Ilyas, the learned Member of the Tribunal has awarded the exorbitant amount of compensation.

5 The learned counsel for the Respondents / original Claimants submits that the document FIR was admitted by the Respondents and therefore, the said document was exhibited by the Tribunal. The Appellant / Insurer has never taken any objection at any stage before the Tribunal and on the other hand, the learned counsel for the Appellant / Insurer before the Tribunal made his submissions by referring the contents of the FIR. The learned counsel submits that as per the contents of the FIR, the tanker as well as the motorcycle were

proceeding in the same direction and at the spot of accident, the driver of the tanker had give side to the motorcycle being driven by deceased Shaikh Ilyas. Thus, deceased Shaikh Ilyas had started overtaking the said tanker. However, the driver of the tanker had not left the sufficient space to facilitate the said overtaking and in consequence of which, the motorcycle came below the rear driver side wheels of the tanker. The learned counsel submits that the accident had taken place on account of rash and negligent driving on the part of the driver of the tanker alone and deceased Shaikh Ilyas was not at all responsible for the accident. He had not contributed the negligence in any manner. The learned counsel submits that the Tribunal has considered the notional income of deceased Shaikh Ilyas at Rs.5,000/- per month. The Claimants have examined Witness No.2 Majidullahkhan on the point of income. The Tribunal though observed that he had not kept the proper record of salary, which he was paying to the deceased, further, observed that the said witness is not speaking lie. The Tribunal has also considered that said witness Majidullahkhan is an independent witness and he is not related to the Claimants. He is a businessman, whose shop is registered under the Shop Act. Thus, considering the size of the family of the deceased, the Tribunal has considered the income of deceased at Rs.5,000/- per month. Even

though there are 8 members entirely depending upon the income of deceased Shaikh Ilyas, the Tribunal has deducted 1/3rd of the amount towards personal and living expenses of deceased Shaikh Ilyas. The Tribunal has awarded the just and reasonable compensate. No interference is required. There is no substance in the appeal and the appeal is liable to be dismissed.

6 On careful perusal of the pleadings, the evidence and the judgment and award passed by the Tribunal, I do not find any fault in the findings recorded by the Tribunal that the driver of the tanker is entirely responsible for the accident. As per the contents of FIR, deceased Shaikh Ilyas, who was riding the motorcycle at the time of accident, gave horn to the tanker, which was proceeding ahead of the motorcycle. Consequently, the driver of the tanker had given him side for overtaking the tanker and accordingly took his tanker to the left side of the road. However, deceased Shaikh Ilyas when started overtaking the said tanker, the driver of the said tanker again took his tanker towards the right side by leaving less space for overtaking. Thus, the motorcycle being driven by deceased Shaikh Ilyas dashed against the rear driver side wheels of the tanker. I do not think that deceased Shaikh Ilyas was responsible for the accident and he had contributed the negligence to some extent. The learned Tribunal has rightly

observed that the driver of the tanker, should have left enough space for the vehicle trying to overtake his tanker. The driver of the tanker could have avoided the said accident by keeping his tanker at the left side of the road. It further appears from the contents of spot Panchanama that there is a divider and if a big vehicle like tanker is suddenly taken towards the right side after permitting the backside motorcycle to overtake the tanker, a small vehicle like motorcycle has no other way, but to dash against the wheels of the tanker since the road towards the right side is blocked by the road divider.

7 So far as the quantum of compensation is concerned, the Claimants have examined Witness No.2 Majidullahkhan. The learned Member of the Tribunal though found that he has not kept the proper record of the salary, believed him. It further appears from the evidence of said witness that he is an independent witness carrying on his business in the shop registered under the provisions of the Shop Act. There are in all 8 members depending upon the earnings of deceased Shaikh Ilyas. Under these circumstances, the learned Member of the Tribunal has rightly considered the income of deceased Shaikh Ilyas at Rs.5,000/- per month. I do not find any fault in it. On the other hand, the Tribunal ought to have deducted $\frac{1}{6}$ th of the amount of his income towards his personal and living expenses instead of $\frac{1}{3}$ rd. However,

the Respondents / Claimants have not preferred any appeal nor filed cross-objection.

8 In view of the above discussion, I do not find any substance in the appeal. There is no merit in the appeal. Hence, the following order :

ORDER

- I. The appeal, is hereby dismissed with costs.
- II. The Respondents / Claimants are permitted to withdraw the amount if deposited by the Appellant / Insurer before this Court.
- III. The appeal is disposed of accordingly.
- IV. Pending civil application for stay and the civil application seeking deletion of the names of Respondent Nos.8 and 9 and treating Respondent Nos.1 to 7 who are already on record as legal heirs and representatives of deceased Respondent Nos.8 and 9, stand disposed of.

[V. K. JADHAV, J.]