

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

FIRST APPEAL NO. 3171 OF 2015

NEW INDIA ASSURANCE COMPANY LTD.
VERSUS
NUZHAT BEGUM W/O LATE SHAIKH SULTAN AND OTHERS

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Advocate for Appellant : Mr. Vinodkumar R. Mundada.

Advocate for Respondent Nos.1 to 3 : Mr. Mahesh V.Ghatge.

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CORAM : **V. K. JADHAV, J.**

DATE : 23rd January, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and award dated 17th July, 2015 passed by the learned Member of the Motor Accident Claims Tribunal, Nanded in MACP No.627 of 2007, the original Respondent / Insurer has preferred this appeal.

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

- i. On 6th May, 2006, deceased Shaikh Sultan was riding his motorcycle from Nanded to Mukhed. At 11:30 pm, when his motorcycle reached near village Kahala Bk., a truck bearing registration

No.MH-04-H-4411 was found kept stationary on the road without keeping the parking lights on. At that time, one another vehicle was also coming from the opposite direction. Consequently, deceased Shaikh Sultan could not see the stationary truck and dash against the back portion of the said truck. The legal representatives of deceased Shaikh Sultan preferred MACP No.627 of 2007 for grant of compensation under the various heads. It has also contended in the claim petition that the driver of the truck has kept the vehicle stationary on the road without keeping the parking lights on and without any indicators and the accident occurred on account of the negligence on the part of the driver of the truck alone. The Respondents / Claimants have also contended in the claim petition that deceased Shaikh Sultan was earning Rs.7,000/- per month by doing the business and they were entirely depending upon his income.

- ii. Respondent Nos.1 and 3 did not appear and therefore the hearing of the claim petition ordered

to be proceeded *ex-parte* against them.

- iii. The Appellant / Insurer has strongly resisted the claim petition by filing the written statement. It has contended that the accident occurred due to the negligence of deceased himself. It has also contended that the truck was stationary on the extreme left side of the road. Deceased Shaikh Sultan was riding unnumbered motorcycle without having any driving licence and the accident had taken place due to his rash and negligent riding of the motorcycle. The Respondents / Claimants have adduced their evidence, however, the Appellant / Insurer has not adduced any evidence. Both the parties relied upon the police papers submitted alongwith the claim petition and those are duly exhibited by the Tribunal.
- iv. The learned Member of the Motor Accident Claims Tribunal, Nanded vide its impugned judgment and award partly allowed the petition and thereby directed the Appellant / Insurer alongwith the owner

to pay jointly and severally the compensation of Rs.6,41,000/- inclusive of the amount of NFL with interest @ 7.5% per annum. Being aggrieved by the same, the original Respondent / Insurer has preferred this appeal.

4 The learned counsel for Appellant / Insurer submits that deceased Shaikh Sultan was riding the motorcycle without having the driving licence. He had driven his motorcycle in rash and negligent manner. Even the crime was registered against deceased Shaikh Sultan and no crime was registered against the driver of the truck. The said truck was kept stationary at the left side of the road and deceased Shaikh Sultan had driven his motorcycle in rash and negligent manner and dashed against the back portion of the truck. The learned counsel submits that even though accepting that accident had taken place in night time and no precautions have been taken by the driver of the truck, then deceased Shaikh Sultan had contributed the negligence to some extent by riding his motorcycle in rash and negligent manner. The learned Member of the Tribunal has however, not considered this aspect of the case. The learned counsel submits that the Respondents / Claimants have failed to prove the income of deceased

Shaikh Sultan and therefore, the Tribunal has considered the notional income of deceased Shaikh Sultan at Rs.3,000/- per month. Even though there is no evidence about his income, the learned Member of the Tribunal has further considered 50% of enhancement in the income towards future prospects. There is no evidence about the future prospects. Deceased Shaikh Sultan was not in the employment nor he was self employed.

5 The learned counsel for Respondents / Claimants submits that the said truck was kept stationary on the tar road and it was not possible for the vehicles plying on that road to notice such stationary truck kept on the tar road without any parking lights or indicators on showing its stationary position. The incident had taken place at 11:30 pm and due to the continuous traffic of the motor vehicles on the said road coming from both the sides, it was not possible for deceased Shaikh Sultan to notice the stationary vehicle. The learned counsel submits that considering the same, the Tribunal has rightly come to the conclusion that on account of the negligence on the part of the driver of the truck, deceased Shaikh Sultan met with an accident and died. The learned counsel submits that deceased Shaikh Sultan was doing the business and therefore, the Tribunal has rightly considered 50% of enhancement towards future prospects after taking into account the

age of the deceased at the time of his accidental death. The learned counsel submits that no interference is required in the impugned judgment and award. The learned Tribunal has awarded a very meager amount under the non-pecuniary heads. There is no merit in the appeal. The appeal is liable to be dismissed.

6 On careful perusal of the pleadings and the evidence on record, it is clear that the vehicle truck was kept stationary on the tar road without keeping the parking lights on and without any indicators at the time of the accident. Accident had taken place at 11:30 pm and as per the map drawn on the spot Panchanama Exhibit – 26, the spot where the accident had taken place is on the curve of the road and it is not straight road. Under these circumstances, it was not possible for the rider of the motorcycle to notice a stationary vehicle if kept on tar road without keeping the parking lights on or and without any indicators. Furthermore, no issue is framed and tried to the effect that whether deceased Shaikh Sultan was having any driving licence while driving the motorcycle at the time of accident or not and therefore, merely on the basis of the pleadings to that effect, no any inference or conclusion could be drawn. The owner of the vehicle truck though duly served, remained absent before the Tribunal and therefore, hearing of the claim petition ordered to be proceeded *ex-parte* against them. The

Appellant / Insurer has also has not examined the driver of the truck as its witness. Since the accident is not denied, then the maxim of *res ipsa loquitur* squarely applies to the facts and circumstances of the present case and it is for the Respondent including the Insurer to prove that the driver of the truck, who kept the vehicle stationary on the tar road, was not negligent. In absence of any evidence to that effect, in my considered opinion, the Tribunal has rightly arrived at a conclusion that deceased Shaikh Sultan met with an accidental death on account of the negligence on the part of the driver of the truck. In absence of any evidence, it cannot be inferred that deceased Shaikh Sultan had contributed the negligence in any manner.

7 So far as the quantum is concerned, it appears that the Claimants have failed to prove the income of deceased Shaikh Sultan. The learned Member of the Tribunal has therefore, considered the monthly income of deceased Shaikh Sultan at Rs.3,000/-. However, the Tribunal should have considered the notional income of deceased Shaikh Sultan at Rs.4,500/- per month instated of Rs.3,000/- per month. In absence of any income proof and in absence of evidence pertaining to the employment or self employment of deceased Shaikh Sultan, the Tribunal has erroneously granted 50% of the enhancement in the income towards the future prospects.

8 In view of the above discussion, if 50% enhancement towards the future prospects is not considered and if the notional income of deceased Shaikh Sultan is considered at Rs.4,500/- per month, considering his 1/3rd deduction towards his personal expenses, the loss of future income comes to the same amount as assessed and determined by the learned Member of the Tribunal though in different angle. In view of the above, no interference is required. Hence, the following order:

ORDER

- I. The appeal is hereby dismissed. In the circumstances, there shall be no order as to the costs.
- II. The Respondents / Claimants are permitted to withdraw the amount of compensation if deposited by the Appellant / Insurer before this Court during the pendency of the appeal alongwith interest accrued if any.
- III The appeal is disposed of accordingly.

IV. Pending civil applications, if any, stand disposed of.

[V. K. JADHAV, J.]

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