

IN THE HIGH COURT OF BOMBAY AT GOA

MISC. CIVIL APPLICATION NO. 442 OF 2017

IN

FIRST APPEAL NO.43 OF 2017

Smt Sukanya Santosh Gaonkar &
Ors

...Appellants

Versus

Shri Caitano Fernandes & Ors.

...Respondents

Shri M. Marshal, Advocate for the Applicant.

Shri A.R.S. Netravalkar, Advocate for the Respondent
No.3.

Shri V. Pangam, Advocate for the Respondent No.4.

CORAM: NUTAN D. SARDESSAI, J.

Reserved on : 6th November 2017

**Pronounced
on : 10th November 2017**

ORDER:-

1. The applicants being the original applicants and who are appellants in the appeal assailing the Judgment and Award of the learned Motor Accident Claims Tribunal, Panaji dated 29/11/2016 seek the indulgence of this Court to produce additional evidence in accordance with Order XLI Rule 27 C.P.C. It was the case of the applicants that a petition was filed claiming the compensation on account of the death of her husband and the father of the minor Applicants No.2 and 3

which took place on 31/03/2013 at St.Cruz involving the minibus driven by the Respondent No.1, owned by the Respondent No.2 and insured with the Respondent No.3. The accident had occurred due to the rash and negligent driving of the minibus by the Respondent No.1 and she had examined witnesses in support of her case. However, the respondents examined two witnesses being Franco D'Costa and Prasad Naik as eye-witnesses by filing their affidavit in the Court when they were in fact panchas to the scene of accident panchanama. The Tribunal however while giving more weightage to the evidence of the respondents more particularly that of the two witnesses was pleased to dismiss the petition. She had learnt later that the chargesheet was filed against the Respondent No.1 before the J.M.F.C., Panaji in which the same two witnesses were examined as panch witnesses. Their versions in the statements recorded before the J.M.F.C. were totally in contradiction of their version as eye witnesses in the claim petition and therefore it was necessary to produce all these documents namely their deposition before the J.M.F.C. to show the worth of their testimony and for arriving at a proper finding in the appeal. These additional documents would also be relevant to prove the fraud which the respondents had played on the applicants and

to initiate necessary perjury proceedings against them. Therefore, it was necessary to produce these documents in the nature of the statement of the Panch witnesses recorded before the J.M.F.C. to substantiate the applicants' case in the appeal. No prejudice would be caused to the Respondents and therefore the application had to be allowed.

2. The Respondents No.3 contested the application on the premise that the accident was an outcome of the rashness and negligence of the deceased himself and that there was no rashness and negligence of the minibus driver. The Applicants had suppressed the Accident Information Report which was rather produced by them. The applicants had introduced the Respondent No.4, the cousin of the deceased as the material witness and rider of the motorcycle to advance their case for compensation with ulterior motive. There was no basis in the application to produce additional documents which had no bearing on the case and therefore the application had to be dismissed with costs. The Respondents No.3 relied on the Panchanama of the scene of accident, the sketch and the Accident Report Form of the motorcycle and the minibus to buttress their case.

3. Shri M. Marshal, learned Counsel came to be heard on behalf of the applicants who contended that consequent to the accident on 30/01/2013 the late husband of the Applicant no.1 was in a state of coma for six months. She was herself pregnant at the time of the accident and having a minor one year child to look after and besides she had to take care of her husband who was in coma and therefore, she had not pursued the case with the Police. The Respondents had filed the affidavits of the Panchas in the Claim Petition one of whom had admitted in the course of the cross-examination that the contents of the affidavit were as per the say of the Respondent No.1. The same witness while deposing before the J.M.F.C. had admitted that the Panchanama was signed in the Police Station which belied the earlier version. The second Panch admitted before the J.M.F.C. that he was not an eye-witness to the accident which militated against his version before the Claims Tribunal. Both these witnesses revealed in their cross-examination before the J.M.F.C. that they had filed false evidence before the Claims Tribunal. All these documents were not in the possession of the Applicant No.1 and therefore she had to be granted liberty to produce the same in this appeal to get substantial justice and as otherwise her cause would suffer

immensely. Shri Marshal, learned Counsel for the Applicants relied in **Eastern Equipment & Sales Limited v/s. ING Yash Kumar Khanna** [(2008) 12 SCC 739] and **Malyalam Plantations Ltd. V/s. State of Kerala** [(2010) 0 Supreme (Raj) 952] to substantiate his case that the documents had to be allowed to be produced in appeal as they went to the root of the case and therefore as a necessary corollary it was a fit case to remand the case to the M.A.C.T.

4. Shri A.R.S. Netravalkar, learned Counsel for the Respondents No.1 to 3 reiterated his case that the petition came be to dismissed as the accident had taken place on account of the rash and negligent riding of the motorcycle by the deceased himself and it was not a case of any head on collision. The Applicant No.1 had set up a false case and was not entitled to any compensation. Besides, she had suppressed the Accident Report Form and not produced it in the Court. The Respondent No.4 who had been examined as a rider of the motorcycle was one of the witnesses and there was suppression of the fact that he had not sustained any injuries despite the case of the Applicants that there was a frontal impact of the bus with the motorcycle. He placed reliance in **Oriental Insurance Co. Ltd. V/s. Balinder Pal and Others** [2017 ACJ 2140] and

submitted that the documents could not be allowed to be produced in appeal and the application had to be dismissed. He further placed reliance in **New India Assurance Co. Ltd. V/s. Anil and others** [2012 ACJ 1740] and pressed for the dismissal of the application.

5. Shri V. Pangam, learned Counsel for the Respondent No.4 chose not to address the Court apparently supporting the case of the applicants. Be that as it may, i would consider submissions made by the learned Advocates for the contesting parties, the Judgments relied upon and more particularly consider the statements of the witnesses who had apparently given contradictory statements before two different fora in respect of the same accident.

6. At the outset, there was no particular dispute of the case carved by the Applicant No.1 in particular that her husband was confined in a state of coma for about six months after the accident and that at the relevant time she was pregnant and besides having a minor child of one year to look after apart from her comatose husband, since deceased. It is therefore preposterous to assume that the Applicant No.1 for herself and

as the guardian of the minor Applicants No.2 and 3 and in a state of family way could pursue the matter before the Police and with her husband in a comatose condition lying at home. That apart, a cursory perusal of the statements proposed to be produced on record reveal that one of the so called eye-witnesses Franco D'Costa claimed that he was travelling in the minibus involved in the accident and that he saw the motorcycle driven in a rash and reckless manner. However, during his cross-examination he had admitted that he was a signatory to the Scene of Accident Panchanama and that he had deposed in the case as a witness at the request of the Respondent No.1 and to help in the case.

7. The next eye-witness Prasad Naik too had claimed that he had seen accident in his affidavit in evidence but admitted during his cross-examination that Franco was present alongwith him as a panch to the Scene of Accident Pananchanama and that his statement was not recorded by the Police in connection with the said accident as an eye-witness. However, during his examination before the Magistrate the said eye-witness Prasad Naik stated that he acted as a panch witness to the Scene of Accident Panchanama who did not at all shed any light on the

fact that he had witnessed the accident. Rather, during his cross-examination he admitted that he had narrated the facts in the chief on the basis of the rough sketch attached to the Panchanama. Moreover, he also admitted that he was informed about the accident at the Police Station and that he was present at the Police Station with Franco to sign the recorded Panchanama of which the contents were not read over to him.

8. Franco D'Costa on the other hand during his cross-examination before the Magistrate stated that he had acted as a Panch at the request of the Police to the Scene of Accident Panchanama and described the position of the vehicle seen at the spot. He was found rather hostile to the case of the State and cross-examined by the Additional Public prosecutor. Nonetheless during his further cross-examination he admitted that he knew the owner of the minibus who took him and the other Panch witness to the Police Station after the accident and that both of them had signed on the Panchanama at the Police Station of which the contents were not read over nor explained to them. In the light of these contradictory and varying statements of the eye-witnesses, Shri Marshal, learned Advocate for the applicants is justified in the circumstances of the case to seek the

indulgence of this case to produce these documents as additional documents by recourse to Order XLI Rule 27 C.P.C. At the cost of repetition, the Applicant No.1 was saddled with the task of looking after husband in a comatose condition when she was in the family way and besides having a minor son aged barely one year to look after. By no stretch of the imagination could she be expected to go behind the Police and keep track of the nature of investigation carried out by them or the outcome of the accident registered by them involving her husband, since deceased. In that backdrop too it is rather farfetched to expect the Applicant No.1 in particular to have produce the Accident Report Form or attribute motives to her for its none production in the course of the proceedings before the learned M.A.C.T, Panaji.

9. Eastern Equipment (supra), was an appeal directed against the order passed by the learned Single Judge of the Delhi High Court by which an order passed by the Appellate Court rejecting the Petition filed by the appellant in a pending appeal for acceptance of additional evidence under Order XLI Rule 27 C.P.C. was affirmed. The Hon'ble Apex Court on hearing the parties and after considering the facts and circumstances of

the case was of the view that in order to decide the pending appeal in which the application under Order XLI Rule 27 C.P.C. was filed ought to have taken up at the Appellate Court alongwith the application for acceptance of additional evidence under Order XLI Rule 27 C.P.C. Without going into the merits as to whether the application was rightly rejected by the Appellate Court as well as by the High Court, the Hon'ble Apex Court set aside the order of the High Court as well as of the Appellate Court rejecting the application under Order XLI Rule 27 C.P.C. with a direction to decide the pending appeal alongwith the application under Order XLI Rule 27 on merits within a defined time.

10. In **Malayalam Plantation** (supra), the Hon'ble Apex Court held that it was the duty of the Appellate Court when a separate application was filed under Order XLI Rule 27 for reception of additional evidence by both sides. It is to be considered at the time of hearing the appeal on merits whether the documents or evidence have any relevance in the issue involved and it was for the High Court to consider and take a decision one way or other.

11. In **Balinder Pal** (supra), the learned Single Judge of Punjab and Haryana High Court held that the Claims Tribunal had to adjudicate the case only on the basis of evidence produced before it and not on the basis of testimonies given before the Criminal Court when in the factual matrix the owner and driver had disputed the involvement of the offending vehicle in the accident and the Insurance Company contended that if on the basis of the deposition of the witnesses, the driver of the offending vehicle was acquitted by Criminal Court, the statement of some witness before the Tribunal could not be relied upon to determine the involvement of vehicle in the accident. This Judgment with respect is clearly distinguishable and cannot support the contention of Shri Netravalkar, learned Counsel for the Respondent No.1 to 3 to exclude the documents from the purview of production under Order XLI Rule 27 CPC. The Judgment in **Anil** (supra), is clearly distinguishable on facts and cannot aid the Respondents in opposing the application for production of additional documents.

12. In the circumstances, I deem it appropriate to allow the production of the additional documents which are relevant for deciding the issues in controversy. It would follow as a

necessary corollary that in view of the conflicting statements made by the so-called eye-witnesses that the matter be remanded to the learned M.A.C.T. for appropriate adjudication of the case and decide the petition on its own merits, without being influenced with the observations made by this Court while allowing the application for the production of additional documents.

13. The parties are directed to appear before the learned M.A.C.T., Panaji on 01/12/2017 at 10.00 hrs.

14. The application stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

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