

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 245 OF 2017

Ramchandra Sawalaram Kadam ..Appellant

vs.

Smt. Bismillah Hasan Pathan & Ors. ..Respondents

WITH

FIRST APPEAL NO. 246 OF 2017

Ramchandra Sawalaram Kadam .. Appellant

vs.

Mahamadhanif Ramjan Pathan & Ors. .. Respondents

WITH

FIRST APPEAL NO. 247 OF 2017

Ramchandra Sawalaram Kadam .. Appellant

vs.

Smt. Bismillah Hasan Pathan & Ors. .. Respondents

WITH

FIRST APPEAL NO. 248 OF 2017

Ramchandra Sawalaram Kadam .. Appellant

vs.

Shahenaj Munnawar Shaikh & Ors. .. Respondents

WITH

FIRST APPEAL NO. 249 OF 2017

Ramchandra Sawalaram Kadam .. Appellant

vs.

Shahenaj Munnawar Shaikh & Ors. .. Respondents

Mr. S. P Thorat for the Appellant in all the matters.

Ms Manisha Jagtap for Respondent Nos.1 to 5.

Ms Jyoti Bajpayee for Respondent No.9.

CORAM : M. S. SONAK, J.

DATE : 27 MARCH 2017.

P.C. :-

1] Heard Mr. Thorat, learned counsel for the appellant, Ms Manisha Jagtap, learned counsel for respondent Nos.1 to 5 (claimants).

2] Mr. Thorat, learned counsel for the appellant, states that all the respondents are duly served and necessary affidavit of service has also been filed to this effect. Since, the appeals were lodged in the year 1997, it was already made clear that the appeals will be disposed of finally, no sooner the service is complete. In particular, Mr. Thorat points out that the National Insurance Company, which is the insurer in respect of Truck bearing registration No. MTL 6084 has been duly served, both at Satara Office as well as Mumbai Head Office. The proof as regards the same has also been annexed to the affidavit of service. In these circumstances, the appeals are taken up for final disposal.

3] In all these appeals, the appellant, who is alleged to be the owner of Jeep No. MAF-2528, challenges the judgments and awards dated 30 September 1996 made by the Motor Accident Claims Tribunal (MACT), Sangli to the extent, that such awards hold the appellant liable for payment of compensation to the claimants for contributory negligence, to the extent of 50%. In the accident, which took place on 20 October 1989, almost 12 persons in the jeep, including the jeep driver one Mr. Pawar died. Since the claims arise from one and the same accident, the reasoning insofar as negligence is concerned, is identical, in all judgments and awards. Taking into consideration, the grounds raised by Mr. Thorat, in these appeals, it is only appropriate that these appeals are disposed of by common judgment and order. Learned counsel for the parties agree that this will be an appropriate course to adopt.

4] Mr. Thorat, learned counsel for the appellant, has basically advanced the following two submissions in support of these appeals:

a] That the appellant had already transferred the jeep to Dinkar D. Nalawade (R-6 in M.A.C.P No. 184/90). Further, Nalawade had transferred the jeep to Uttam Jadhav (R-7 in M.A.C.P No. 184/90). Further, Uttam Jadhav had also transferred the jeep to Uttam Pawar who was actually driving the jeep on 20 October 1989, and who unfortunately died in the accident, which took place on the said date. Mr. Thorat submits that there is material on record which establishes all these transfers or in any case, the transfer between Uttam Jadhav and Uttam Pawar. He submits that the MACT clearly ignored in appreciating such evidence on record and foisted the liability upon the appellant, who is a retired primary school teacher;

b] In the alternate and without prejudice, Mr. Thorat submits that from the material on record, it is very clear that the accident which took place on 20 October 1989 was solely on account of negligence of Balu Yashwant Gavali (R-1 in MACP No.184/1990), the driver of Truck No. MTL-6084, who was driving the truck at very high speed carrying gas cylinders. He submits that in the accident, not only the driver Pawar, but almost 12 persons traveling by the jeep died in the accident. Mr. Thorat points out that even the claimants, in their claim petition, had only alleged negligence as against the truck driver. He points out that even the police report and

panchanama supports his case, that it is the only the truck driver who was responsible for the accident. He submits that all these materials have been ignored by the MACT and the driver of the jeep has been unnecessarily held responsible, for contributory negligence, to the extent of 50%. Mr. Thorat submits that admittedly, the truck was insured with National Insurance Company (R-3 in MACP No. 184/1990) and therefore, was bound to indemnify the owner Arvind Pore (R-2 in MACP No. 184/1990). Mr. Thorat submits that the MACT has clearly erred in not directing the driver Balu Gavali, the owner Arvind and insurer National Insurance Co. Ltd., to pay the entire amount of compensation as has been awarded by the MACT.

5] Ms Manisha Jagtap, learned counsel for the claimants, submits that in the claim petitions, the claimants may not have alleged any negligence as against the driver of the jeep. However, it is the MACT, which has deemed it appropriate to record a finding of negligence against the driver of the jeep. In terms of the impugned awards, the owners of jeep and truck have been held liable to the extent of 50%. The National Insurance Company has been held liable to the extent of 50%, since the Insurance Policy in respect of the truck was in force. The New India Assurance Company Ltd., which has since been deleted in this appeal, was not held liable, since there was no Insurance Policy in force, insofar as the jeep is concerned. She points out that the appellant continues to be the registered owner in respect of jeep and therefore, cannot avoid liability on basis of any alleged transfers. At the highest, this is a

matter between the appellant and the so called transferees.

6] As noted earlier, neither the driver of the truck-Gavali, the owner of the truck-Arvind Pore nor the insurer of the truck, i.e., National Insurance Co. Ltd., have appeared in the matter despite proper service.

7] Upon due consideration of submissions made by Mr. Thorat, in the facts and circumstances of these matters, there is really no necessity to decide the first contention raised by Mr. Thorat as regards transfer of jeep to the various transferees. There is no dispute that the appellant continues to be the registered owner of the jeep in the records of the Regional Transport Office, and therefore, there is no necessity to decide this first contention, on the basis of such material on record. Mr. Thorat, is right in his submission that the negligence was unnecessarily foisted upon the driver of the jeep and in fact, in these cases, the material on record does establish that it is the truck driver, who was entirely responsible for the accident, which resulted in death of not only the driver of the jeep, Pawar, but also of 12 other passengers in the jeep. If it is ultimately held that the negligence on the part of the driver of the truck caused the accident, then the entire liability will have to be borne by the driver Gavali, owner Arvind and the insurer, i.e., National Insurance Co. Ltd. on joint and several basis. There would be no question, in such a situation, to foist any liability upon the appellant and to that extent, the appeals, will have to be allowed.

8] In this case, the evidence on record is in the form of deposition of Gavali, i.e., the driver of the truck; panchanama, FIR, Maps and Photographs. Upon cumulative consideration of such evidence, it does appear that it is the driver of the truck who was entirely responsible for the accident and there was no reason to foist any liability upon the driver of the jeep.

9] The accident took place on 20 October 1989, at a spot which is about 10 km from Vita on Vita Mayani Road at village Chikalhol. The accident took place between 10.30 and 11.00 a.m. The accident was a collision between the jeep and truck. From deposition of Gavali, i.e., driver of the truck, it is clear that the truck was loaded with Gas cylinders. Gavali has deposed that whilst he was driving the truck at the speed of 40 to 44 kmph, on the correct side of the road, it is the jeep which was being driven at a speed of 70 to 80 kmph, which came on the wrong side of the road. Gavali, significantly, in his deposition has stated that when he crossed the bridge/kalvart, he saw that there was a stone on the road and the jeep driver, tried to avoid the stone and that is how the jeep collided with the truck. Gavali has also deposed that upon seeing the jeep coming towards the truck from the wrong side, he pulled over the truck towards the left and stopped the truck by applying brakes. He states that the truck was completely halted, when, the jeep collided with it.

10] The MACT, has itself recorded the finding that the deposition of Gavali, i.e., truck driver could not be regarded as truthful. This finding is quite correct. Despite such finding, the MACT has,

however, erred in foisting liability to the extent of 50% upon driver of the jeep and consequently upon the appellant. In the first place, neither the driver nor the owner of the truck in their written statement, have made any reference to any stone on the road and attempts of the jeep driver to avoid the stone. Secondly, the evidence on record very clearly establishes that the truck was not halted or parked on the left side of the road as claimed by Gavali, when the unfortunate accident took place. Rather, the material on record establishes that after the dash, the jeep was dragged behind for quite some distance and that is the reason there were skid marks extending to almost 40 feet found on the road. The material on record establishes that the jeep, after the dash, was virtually dragged for considerable distance of about 33 to 34 feet. The MACT, in such circumstances, has rightly concluded that if the truck was indeed halted or parked as claimed by Gavali, it is inconceivable that the truck drags the jeep for such a distance after the dash. This finding is corroborated by the panchanama, FIR and the photographs. The situation as reflected in the panchanama and the map clearly rules out the possibility of the truck being halted or stationary. This material shows that the truck was some where in the middle of the road slightly towards the western flank and the jeep was found towards the west. The MACT, as noted earlier, has itself rejected the deposition of Gavali by observing that his statement "*he is only half truth or may be totally lie*".

11] From the material on record, however, it does appear that there is no element of truth in the deposition of driver Gavali. The MACT failed to notice that Gavali, in the course of his evidence,

came up with a theory that there was some stone on the road and in order to avoid this stone, the jeep driver; strayed a bit from his side and that is how the collision/accident took place. This was an important circumstance. In case, this circumstance was true, it is inconceivable that such a circumstance would not have been reflected in the written statement filed by the driver or the owner of the truck. This means that the theory of there being a stone on the road and the attempts of the jeep driver to avoid the stone, is a theory which deserves no acceptance and was attempted to be formulated by Gavali in order to create some ground to avoid liability.

12] The defence that the driver, upon noticing that the jeep was coming towards the truck, pulled over the truck to left side and completely stopped or halted the truck is also a complete falsity and deserves no acceptance whatsoever. Although, there is no overwhelming evidence on record to suggest to the contrary, the MACT, was not right in holding that even the driver of the jeep was responsible for the accident and he contributed to extent of 50%. There is no material on record to support such a finding. The circumstance that Gavali, the truck driver, raised patently false defences, has also been ignored by the MACT. It was not even the case of the claimants that the jeep driver was negligent for the cause of the accident.

13] The MACT has rightly recorded the findings with regard to the road width, site condition and the probable manner in which the accident may have taken place and has rightly concluded that the

deposition of Gavali was not trustworthy. The MACT has not given sufficient credence, not only to the false defence raised by Gavali, but also to the vital circumstance that the jeep, was in fact dragged for a distance of almost 33 to 34 feet from the point of impact soon after the collision. The MACT has also given certain credence to the truck, a much heavier vehicle, which was carrying Gas Cylinders. Therefore, the duty of care was much higher upon the driver of the truck.

14] If all such circumstances, were to be considered in their proper course, then perhaps, there was no occasion for recording the finding that the jeep driver was also liable for contributory negligence to the extent of 50%. Accordingly, the finding that the jeep driver contributed to the accident to the extent of 50% is required to be set aside and is hereby set aside. Instead, it is held that the accident took place entirely on account of negligence of the truck driver. As a result, the liability to pay the entire compensation awarded will lie upon the truck driver Gavali, the owner Arvind Pore and their insurer, i.e., National Insurance Company Ltd. as jointly and severally.

15] These appeals are allowed to the aforesaid extent. The impugned judgments and awards are modified to hold that that the entire liability for payment of compensation will be upon Gavali, driver of the truck, Arvind Pore- owner of the truck and the National Insurance Company-insurer of the truck. The finding that the jeep driver contributed to the negligence which caused the accident to the extent of 50% is set aside.

16] The appeals are disposed of in the aforesaid terms.

17] After this order was dictated, upon a query to Mr. Thorat as to whether there was compliance with section 173 of Motor Vehicle Act, 1988 (M.V. Act), Mr. Thorat states that there was no compliance with the said section of the M.V. Act. Section 173 (1) of the said Act provides that subject to the provisions of sub-section (2), any person aggrieved by an award may, within ninety days from the date of the award, prefer an appeal to the High Court. Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it Rs.25,000/- or 50 percent of the amount so awarded, whichever is less, in a manner directed by the High Court.

18] Mr. Thorat states that if 8 weeks are granted to the appellant, the appellant will deposit the amount of Rs.1,25,000/-, i.e., Rs.25,000/-, in each of the appeals. In case, the amount of Rs.25,000/- in each of the appeals, i.e., the total amount of Rs.1,25,000/-, is deposited within a period of 8 weeks from today, then, in the peculiar facts and circumstances of this case, it shall be taken as compliance with the provisions contained in section 173(1) of the M. V Act. and the orders apparently allowing the appeals shall stand. However, if the appellant defaults in deposit of such amounts, within a period of 8 weeks from today, then, the appeals shall be deemed to have been dismissed without any further reference to this court.

19] If the amount of Rs.1,25,000/- as aforesaid is deposited within a period of 8 weeks, then the claimants, in each of the appeals, shall be entitled to withdraw the same. However, the MACT, to which, the claimants will apply for execution, now that the Insurance Company is held to be liable, shall ensure that from out of the amounts payable by the Insurance Company, the amounts now deposited by the appellant shall be paid to the appellant by the Insurance Company. The appellant, upon deposit, shall to that extent, be entitled to participate in the execution proceedings or to even take out independent execution proceedings.

20] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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