

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

922 FIRST APPEAL NO. 3668 OF 2016

1. Farzana Begum w/o Abdul Khadir
Age: 41 years, Occu.: Household
2. Yasmeen Begum d/o Abdul Khadir
Age: 26 years, Occu.: Household
3. Parveen d/o Abdul Khadir
Age: 24 years, Occu.: Household
4. Samreen d/o Abdul Khadir
Age: 20 years, Occu.: Education
5. Kauser d/o Abdul Khadir
Age: 18 years, Occu.: Education
6. Azhar Ahmed s/o Abdul Khadir
Age: 16 years, Occu.: Education
7. Afrain d/o Abdul Khadir
Age: 13 years, Occu.: Education
8. Anjum d/o Abdul Khadir
Age: 10 years, Occu.: Education
Petitioner No.6 to 8 are minors
U/G of petitioner No.1
9. Rukhyabee w/o Abdul Waheed
Age: 66 years, Occu.: Household

All R/o Rahmat Nagar, Nanded
Near Degloor Naka, Nanded
Tq. & Dist.Nanded.

..Appellants

VERSIS

1. Sk.Saleem s/o Sk.Hyder
Age: Major, Occu.: Owner of the
Vehicle Bearing No.MH-26 H-7885
R/o Bazar Galli, Hadgaon,
Tq.Hadgaon, Dist.Nanded.
2. The Bajaj Allianz General Insurance
Co.Ltd. GF Plaza, Airport Road,
Yerwada, Pune through its
Divisional Manager,
Pune, Pin Code : 411 006.
3. The Bajaj Allianz General Insurance
Co.Ltd., Through its
Divisional Manager,
Branch Shivaji Nagar, Nanded. ..Respondents

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Advocate for Appellants : Shri Hamza Khan I. Pathan
Advocate for Respondent No.1 : Shri P.V.Ambade
Advocate for Respondent No.2 : Shri S.G.Chapalgaonkar
Respondent No.3 is served.

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CORAM : P.R.BORA, J.**DATE: 6th September, 2018****ORAL JUDGMENT:-**

1. The appellants have filed the present First Appeal against the Judgment and order dated 25.07.2016 passed by the Motor Accident Claims Tribunal, Nanded, in Motor Accident Claim Petition No.413 of 2010.
2. The appellants had filed the aforesaid claim petition under

Section 166 of the Motor Vehicles Act, 1988 (herein after referred to as 'the Act') claiming compensation on account of death of Abdul Khadir S/o. Abdul Wahed alleged to have been caused in a vehicular accident happened on 20.02.2010. It was the contention of the appellants that on 20.02.2010, while deceased Abdul Khadir was returning to his home on Motorcycle, his Motorcycle was dashed by a Truck bearing registration No.MH-26 H-7885 at about 9:00 p.m. and in the accident so happened, he was severely injured. The Truck which gave the dash fled from the spot. Abdul Khadir while under treatment suffered death on 07.03.2010. It was the further contention of the appellants that initially, though the First Information Report (FIR) was registered against the unknown vehicle, during the course of investigation, it was revealed that the Truck bearing registration No.MH-26 H-7885 owned by present respondent No.1 was involved in the alleged accident and the accident happened because of negligence of the driver of the said Truck. The appellants, therefore, filed the claim petition against the owner and insurer of the aforesaid Truck claiming compensation of Rs.50,00,000/-.

3. The owner of the Truck filed his written statement and denied

that the alleged accident happened because of the negligence of his driver. The Insurance Company, in its written statement denied the very involvement of the Truck No.MH-26 H-7885 in occurrence of the alleged accident.

4. In order to substantiate the contentions raised in the claim petition, total four witnesses were examined by the appellants. Evidence of Noor Ali Khan (PW-2) was adduced claiming that he had eye-witnessed the alleged accident. The Investigation Officer/Police Inspector - Umashankar Manmath Kasture, who filed the charge-sheet in the case arising out of the alleged accident, was examined as PW-3 and for proving the income of deceased Abdul Khadir, Senior Clerk - Hanumant Mohanrao Kausalya from the Office of the Anti-Corruption Bureau was examined as PW-4. No oral or documentary evidence was adduced by respondent No.1. Insurance Company also did not adduce any oral evidence. The learned Tribunal after having assessed the evidence brought on record before it, dismissed the claim petition vide the impugned order holding that the appellants have failed in proving the involvement of the Truck bearing registration No.MH-26 H-7885 in occurrence of the alleged accident. Aggrieved by, the original claimants have preferred the

present appeal.

5. Shri H.I.Pathan, learned Counsel appearing for the appellants assailed the impugned Judgment on various grounds. The learned Counsel submitted that though, the Tribunal has dismissed the claim petition on the sole ground that the claimants did not prove the involvement of the offending vehicle in the accident, no issue in that regard was framed by the Tribunal and as such no opportunity was given to the appellants either to adduce necessary evidence in that regard or make necessary submissions on the said issue. The learned Counsel submitted that without framing a specific issue in that regard, no such finding could have been recorded by the Tribunal. The learned Counsel submitted that in the similar circumstances, the Division Bench of this Court in First Appeal No.1993 of 2009 decided on 04.01.2010 had remanded the matter back to the Tribunal with a direction to frame a specific issue in that regard and to decide the matter afresh. The learned Counsel submitted that similar circumstances are existing in the instant case and as such, the course as was adopted by the Division Bench in the said case, will have to be adopted in the present case. The learned Counsel further submitted that the finding recorded by the Tribunal is otherwise even on facts,

is incorrect and unsustainable and this Court can set aside the same without remanding the matter back to the Tribunal.

6. The learned Counsel submitted that the Tribunal has given unnecessary weightage to some minor admissions given by Noor Ali Khan (PW-2) as well as Investigating Officer - Umashankar Kasture (PW-3). The learned Counsel submitted that what was required to be considered by the Tribunal was the core fact deposed by the aforesaid two witnesses as about occurrence of the accident and involvement of the alleged Truck in the said accident. The learned Counsel submitted that merely because Noor Ali Khan (PW-2) did not immediately report the incident of the accident to the Police Station, his evidence could not have been rejected in toto by the Tribunal. The learned Counsel submitted that the Tribunal has lost the sight of the fact that owner of the vehicle did not dispute the involvement of the vehicle owned by him in occurrence of the alleged accident. What has been disputed by the owner of the vehicle is the allegation that the accident happened because of the negligence on the part of the driver, who was driving the offending vehicle. The learned Counsel submitted that in the background of the Written Statement submitted by the owner of the offending vehicle, if the

evidence of Noor Ali Khan (PW-2) and Investigating Officer – Umashankar Kasture (PW-3) is considered, there remains no doubt about the involvement of offending Truck in occurrence of the alleged accident. The learned Counsel submitted that the Tribunal has analyzed the evidence of Noor Ali Khan (PW-2) as if it was a criminal trial. The learned Counsel submitted that it was not necessary on the part of the appellants to prove everything beyond reasonable doubt. The learned Counsel submitted that the evidence of Noor Ali Khan (PW-2) and Investigating Officer - Umashankar Kasture (PW-3) was sufficient to reach to the conclusion that the appellants have sufficiently proved the involvement of the offending Truck owned by respondent No.1 and insured with respondent No.2 in occurrence of the alleged accident.

7. The learned Counsel submitted that the learned Tribunal has also failed in appreciating that when a specific plea was raised by the Insurance Company as about false claim made by the appellants about the involvement of the offending Truck, the said fact ought to have been proved by the Insurance Company by adducing positive evidence in that regard. The learned Counsel submitted that admittedly, the Insurance Company did not adduce any evidence

either oral or documentary. The learned Counsel, therefore, prayed for setting aside the impugned Judgment and allow the claim petition filed by the appellants.

8. The learned Counsel submitted that the deceased was in the services of the Police Department and his salary was proved by the appellants by bringing on record his salary certificate and his age was also proved. In such circumstances, according to the learned Counsel the compensation can be determined on the basis of the evidence which is available on record. The learned Counsel in the circumstances, prayed for allowing the claim petition and in the alternative, prayed that the Tribunal be directed to frame a specific issue as about involvement of the offending Truck bearing registration No.MH-26 H-7885 in the accident and to decide the said issue by giving due opportunity to the parties to the claim petition and also to decide on merits all other issues already framed.

9. Shri H.I.Pathan, learned Counsel for the appellants relied upon the Judgment of this Court in the case of *Harshadrai Mohanlal Bhammar Vs. Anil Baburao Ghodeswar & others. [(2005) (S) Bom.C.R. 923]*, wherein the learned Single Judge of this Court has held that the

evidence of the eye-witness cannot be discarded merely on the basis of some discrepancy and or for want of clear evidence etc. The reliance was also placed by the learned Counsel on the another Judgment of this Court in the case of *Smt.Manisha Wd/o Prakash Patil & Ors. Vs. Umakant Marotrao Kolhe & anr.*, [2016 ALL MR (CRI) 1271]. The learned Counsel taking me through the observations made by this Court in the aforesaid Judgment submitted that the facts involved in the present case are similar to the facts which were involved in the aforesaid case. The learned Counsel submitted that normally, the persons are reluctant to approach and/or to go to the Police Station and in such circumstances, merely because a person, who has eye-witnessed the alleged incident, did not report the incident of accident in the Police Station, cannot be a ground to reject his evidence.

10. Shri P.V.Ambade, learned Counsel appearing for respondent No.1 submitted that the appellants failed in proving the negligence of driver of the offending vehicle and as such the learned Tribunal has rightly rejected the claim petition.

11. Shri S.G.Chapalgaonkar, learned Counsel appearing for respondent Insurance Company supported the impugned Judgment.

The learned Counsel submitted that the learned Tribunal has rightly appreciated the evidence of Noor Ali Khan (PW-2) and the Investigating Officer – Umashankar Kasture (PW-3) and has recorded correct conclusion, which does not warrant any interference. The learned Counsel taking me through the evidence of both the witnesses, which was already read over by the learned Counsel for the appellants, submitted that the evidence of these witnesses read as it is transpires that Noor Ali Khan (PW-2) was a got up witness planted to prove the involvement of the offending vehicle in occurrence of the accident. The learned Counsel submitted that if the conduct of the said witness is considered, it was highly improbable and no reliance can be placed on the evidence of the said witness. The learned Counsel submitted that the offence came to be registered and charge-sheet came to be filed against the driver of the offending vehicle in relation to the accident only on the basis of the statement of said Noor Ali Khan (PW-2).

12. The learned Counsel further invited my attention towards evidence of Investigating Officer - Umashankar Kasture (PW-3). The learned Counsel submitted that from the evidence of Umashankar Kasture (PW-3), it can be gathered that no proper investigation was

conducted by the said Police Officer in the alleged accident and merely relying upon the sole statement of Noor Ali Khan, the charge-sheet came to be filed. The learned Counsel submitted that though, the accident had happened on 20.02.2010, and though, the person dashed in the said accident was a Police person, the FIR was not immediately lodged and it came to be lodged after two days i.e. 22.02.2010. The learned Counsel further pointed out that deceased Abdul Khadir died on 07.03.2010 i.e. after about 17 days of occurrence of the alleged accident. The learned Counsel submitted that during the said entire period, there was absolutely no investigation except the FIR on record against the unknown vehicle. The learned Counsel submitted that taking all the circumstances cumulatively, the only conclusion, which emerges is that the vehicle alleged to have been involved in the alleged accident was infact not involved. The learned Counsel submitted that after analyzing the entire evidence, the Tribunal has arrived at a correct conclusion and no interference is required in the finding so recorded. The learned Counsel in the circumstances, prayed for dismissal of the appeal.

13. In so far as the alternate prayer made on behalf of the appellants to remit back the matter to the Tribunal by directing to

frame issue as about involvement of the offending vehicle in the alleged accident, the learned Counsel for the respondent Insurance Company submitted that the issues framed were sufficient to cover the aspect as has been argued and the parties were having knowledge of all the facts and that is the reason that the appellants examined eye-witness of the alleged accident as well as the Investigating Officer and in the circumstances, according to him, no case is made out for remitting the matter back to the Tribunal as has been prayed on behalf of the appellants. The learned Counsel relied upon the Judgment of Hon'ble Apex Court in the case of *Anil and Others Vs. New India Assurance Company Limited and Others [(2018) 2 SCC 482]* to buttress his contention.

14. I have given due consideration to the submissions made by the learned Counsel appearing for the respective parties. I have perused the impugned Judgment as well as entire evidence, which was adduced before the Tribunal. I have also gone through the Judgments relied upon by the learned Counsel appearing for the parties.

15. From the submissions advanced on behalf of the appellants, it

is quite evident that in order to prove that the Truck bearing registration No.MH-26 H-7885 was involved in the alleged accident and because of the rash and negligent driving of the said Truck by its driver the alleged accident had taken place, the entire thrust of the appellants is on the evidence of one Noor Ali Khan (PW-2), who is posed as an eye-witness to the alleged accident and based on whose statement the charge-sheet is filed against the driver of the said Truck in relation to the accident in question.

16. In order to prove the charge-sheet, the appellants had examined the Investigating Officer namely Umashankar Kasture (PW-3), who filed the said charge-sheet. Before scrutinizing the evidence of Noor Ali Khan (PW-2), I would prefer to look into the evidence of Umashankar Kasture (PW-3) the Investigating Officer. On perusal of the testimony of the said witness and reading of the charge-sheet, a copy of which is filed on record, it is revealed that the charge-sheet for the offences punishable under Section 279, 338 and 304A of the Indian Penal Code came to be filed in relation to the alleged accident solely on the basis of the statement of Noor Ali Khan (PW-2). Umashankar Kasture (PW-3) in his cross-examination has candidly admitted that offences came to be registered and

ultimately charge-sheet came to be filed in relation to the alleged accident happened on 20.02.2010 solely on the basis of the statement of Noor Ali Khan (PW-2). Said Noor Ali Khan (PW-2) is thus a crucial witness. The statement of Noor Ali Khan (PW-2) was admittedly recorded after two and half months of the occurrence of the alleged accident.

17. I have carefully perused the evidence of Noor Ali Khan (PW-2) as well as the evidence of Umashankar Kasture (PW-3). On perusal of the evidence of said Noor Ali Khan (PW-2), it is apparently revealed that the Trial Court has not committed any error in not believing his evidence. As has been deposed by said Noor Ali Khan (PW-2) on 20.02.2010 at about 9:00 to 9:15 p.m. when he was passing from Degloor Naka on his Motorcycle, one Truck ahead of him gave a dash to one Motorcyclist near Waghalekar Petrol Pump because of which the Motorcyclist fell down. Noor Ali Khan (PW-2) had further deposed that the Truck driver did not stop the Truck on the spot after occurrence of the alleged accident and proceeded further. He had further deposed that he, therefore, chased the said Truck for a distance of about 1km. but failed in catching hold of it. As has come on record in his cross-examination, he had gone to

Hyderabad after the said incident of accident and after he returned from there, he came to know about the death of Abdul Khadir in the alleged accident, whereupon he went to the Police Station and disclosed about the alleged accident and involvement of the said Truck bearing registration No.MH-26 H-7885 in the alleged accident. Noor Ali Khan (PW-2) also stated that he had noted down the registration number of the offending Truck in his diary.

18. On reading of the evidence of Noor Ali Khan (PW-2), the question arises whether his conduct, as is revealed from the facts deposed by him, can be said to be natural, probable and believable. The learned Tribunal has elaborately discussed the evidence of the said witness and has ultimately recorded a finding that his evidence cannot be believed. The Tribunal has also observed that the said witness was a planted witness so as to falsely show the involvement of the Truck bearing registration No.MH-26 H-7885 in occurrence of the alleged accident. I fully agree with the observations so made and the findings recorded by the learned Tribunal. The entire story as has been attempted to be brought on record through the evidence of the Noor Ali Khan (PW-2) appears to be concocted and wholly unbelievable. It appears quite unconscionable that a person who

chased a Truck as because it gave a dash to a motorcyclist and had not thereafter stopped at the spot but attempted to flee away from the spot, would after failing in catching-hold of the said Truck, would not take any further action and would quietly go to his home.

19. It was sought to be canvassed by the learned Counsel for the appellants that common man is always reluctant to go to the Police Station for lodging the report fearing that the Police would try to implicate him in the said crime and that was the reason that PW-2 did not go to the Police Station to lodge the report of the alleged accident. The argument so made is liable to be turned down for many reasons. As has come on record, PW-2 is in the business of sale and purchase of the vehicles. Looking to the nature of the business being carried out by PW-2, it is difficult to believe that even if he did eye-witness the alleged accident, he did not report the said accident to the Police fearing his implication in occurrence of the alleged accident. The very purpose of chasing the Truck by him was to nab the culprit and to ensure his arrest by the Police. In the circumstances, his further conduct of returning to his home after failing in catching the fleeing Truck without taking any further action is difficult to be accepted.

20. It has also come on record in the cross-examination of PW-2 that after he failed in catching and detaining the fleeing Truck, he returned at the spot where the accident had occurred and saw some persons lingering on the spot. It appears unnatural and unbelievable that PW-2 did not disclose to the said persons that he tried hard to catch-hold of the fleeing Truck, which had given dash to the Motorcyclist and though he failed in that he has taken down the number of the said Truck.

21. The further conduct of Noor Ali Khan (PW-2) appears equally improbable that he did not make any further enquiry and did not even attempt to know the name of the victim for whom infact he did chase the offending Truck for about 1km.

22. I fully endorse the observations made and the finding recorded by the learned Tribunal that if according to the version of PW-2, ten minutes were consumed for crossing the distance of one kilometer even though he was on Motorcycle, it has to be inferred that the offending Truck also must be moving very slowly. As further noted by the Tribunal, had PW-2 walked on the road, he could have

easily caught hold of the Truck driver. The circumstances as above lead to the only inference that the story attempted to be made out by PW-2 was concocted and PW-2 was planted as a witness by the Police in connivance with the claimants though he had not in fact eye-witnessed the alleged accident.

23. As further observed by the learned Tribunal there is nothing on record to show as to when and how Noor Ali Khan (PW-2) first came to know the name of the victim of the alleged accident and the further fact that he ultimately died in the said accident. As stated by the said witness in his cross-examination, he was not having any acquaintance with the victim of the alleged accident. Similarly, there is evidence to show as to how Sk.Jalil, who is stated to have taken Noor Ali Khan (PW-2) at the Police Station, came to know that Noor Ali Khan (PW-2) was the eye-witness of the alleged accident. The question further arises if Sk.Jalil was knowing that Noor Ali Khan (PW-2) was eye-witness of the alleged accident, why he himself did not give that information to the Police with the further information that said Noor Ali Khan (PW-2) has gone out of station and the moment he comes back he will bring him to the Police Station. There

is further no evidence to show whether Noor Ali Khan (PW-2) really had gone to Hyderabad and if yes, on which date he went to Hyderabad and when he returned therefrom. It is more surprising that Investigating Officer also did not make any enquiry as about the aforesaid aspect.

24. The fact disclosed by Noor Ali Khan (PW-2) in his cross-examination that he had noted down the number of the offending Truck in his diary cannot be believed. Had there been any truth in the fact so deposed by Noor Ali Khan (PW-2), he must have produced the said diary before the Police and in any case before the Tribunal. From the evidence of Umashankar Kasture (PW-3), it appears that Noor Ali Khan (PW-2) has not disclosed the said fact while giving his statement to the Police or else Umashankar Kasture (PW-3) in his evidence before the Court must have reiterated the said fact. As has come on record in the cross-examination of Noor Ali Khan (PW-2) there were two Police Chowkies on the way he chased the offending Truck. In the circumstances, his natural conduct would have been to give information about the alleged accident to the Police Officer present at the said Police Chowkies. Non-giving of such information raises serious doubt about the truthfulness of the

fact deposed by Noor Ali Khan (PW-2) that he chased the offending Truck.

25. After having considered the facts and circumstances as above, unhesitatingly it can be said that Noor Ali Khan (PW-2) had not eye-witnessed the alleged accident and his evidence cannot be believed.

26. Serious doubts are also raised about the so called investigation carried out by Umashankar Kasture (PW-3) in the matter of the alleged accident. The FIR of the alleged accident was admittedly filed on 22.02.2010 against the unknown vehicle. As deposed by Umashankar Kasture (PW-3), on the same day he had visited the spot of the accident. It is surprising that he did not record the statement of any of the person in the surrounding area where the alleged accident had happened. As has come on record the alleged accident had occurred opposite to the Waghalekar Petrol Pump. The Investigating Officer, however, did not record the statement of any of the employee of the said Petrol Pump. The persons residing or carrying on their business around the spot of the accident could certainly have provided the information atleast about kind of vehicle that gave dash to the Motorcyclist, whether it was a Car, Jeep,

Tractor or a Truck ?. That much information could have been certainly gathered by the Investigating Officer (PW-3) from the said persons when he visited the spot of accident. Admittedly, no such effort was made. The Investigating Officer (PW-3) has also not explained as to the progress about the investigation in the matter of the alleged accident in the period between 22.02.2010 i.e. the date of lodging of the FIR till 18.05.2010 the date on which the statement of Noor Ali Khan (PW-2) was recorded by him. The Investigating Officer also did not collect any information or verify the fact deposed by Noor Ali Khan (PW-2) that he had been to Hyderabad after occurrence of the alleged accident and returned there from after two months and twenty-two days. The Investigating Officer also did not collect any information from Noor Ali Khan (PW-2) as to when and how he came to know the name of the victim of the alleged accident. The Investigating Officer also did not record the statement of Sk.Jalil who had brought Noor Ali Khan (PW-2) to the Police Station for recording his statement. After having considered the facts as aforesaid, I fully agree with the conclusion arrived at by the Tribunal that infact the Investigating Officer without conducting any investigation filed the charge-sheet only on the basis of the statement of PW-2, probably with the only intention to assist the claimants.

27. Further, when admittedly the accident had happened on a road having heavy traffic and as deposed by Noor Ali Khan (PW-2) there was heavy traffic even at the time of accident, it was impossible for the driver of the offending vehicle to flee away from the spot with the offending vehicle. When the alleged accident had happened in the city area and that too on a road having heavy traffic on it and the spot of accident was surrounded by shops and houses, naturally the same would have been instantly cordoned and it was difficult nay impossible for the offending Truckk to flee away from the said spot. The entire story, therefore, appears to be false and concocted. The appellants have utterly failed in proving that the Truck bearing registration No.MH-26 H-7885 was involved in the alleged accident. The finding recorded by the learned Tribunal in this regard is based on the evidence which has come on record and I see no reason to cause any interference in the finding recorded by the Tribunal that the claimants have failed to prove the involvement of the offending Truck in the occurrence of the alleged accident.

28. The contention of Shri H.I.Pathan, learned Counsel for the appellants that since no specific issue as about the involvement of the offending Truck was framed by the Tribunal, the appellants did not get the opportunity to adduce the necessary evidence therefor, must

also be rejected. The very first issue as was framed by the Tribunal was “Do the petitioners prove that due to rash and negligent driving of truck no.MH-26/H-7885, Abdul Khadir met with an accident and died ?”. Thus, the petitioners were cast with the burden to prove the rash and negligent driving of the driver of the Truck bearing registration No.MH-26 H-7885. The said burden could not have been discharged by the appellants/claimants unless they first prove the involvement of the said Truck in occurrence of the alleged accident. There was no need for framing of any specific issue as about the involvement of the offending Truck in occurrence of the alleged accident and it was well covered in the issue as was framed by the Tribunal. The Judgment relied upon by the learned Counsel in this regard may not apply to the facts of the present case.

29. After having considered the entire material on record, it does not appear to me that any case is made out by the appellants for causing any interference in the well reasoned Judgment delivered by the learned Tribunal. The appeal being merit-less, deserves to be dismissed and is accordingly dismissed with costs.

(P.R.BORA)
JUDGE