

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,**BENCH AT AURANGABAD****FIRST APPEAL NO. 3548 OF 2016**

1. Yogiraj Raghunath Garje,
Age; 57 years, Occ; Service,
Resident of Ashti, Tq. Ashti,
District; Beed.
2. Sushilabai Yogiraj Garje,
Age; 52 yrs, Occ; Household,
Resident of As above. **...APPELLANTS**
(Original Claimants)

VERSUS

1. Kundalik Kisan Wanve,
Age; 38 yrs, Occ; Owner & Driver,
Resident of Swastik- Meera,
Flat No. 5, A-203, Sector No. 7,
Kamothe, District; Raigad.
2. The New India Assurance Co. Ltd.,
Through its Branch Manager,
Sathe Chowk,
Dr. Bhagchand Surana Building,
Near Hotel Sagar, Jalna Road, Beed,
Taluka & District; Beed. **....RESPONDENTS**
(Orig. Respondents)

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Shri. Girish S. Rane, Advocate for Appellants
Shri. T.M. Tandale, Advocate for Respondent
No.1

Shri. S.G. Chapalgaonkar, Advocate for
Respondent No.2

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CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 14/3/2019

Date of Pronouncing Judgment : 22/3/2019

JUDGMENT :

This appeal is directed by Original Claimants against the judgment and award passed by the Motor Accident Claims Tribunal, Beed (hereinafter referred to as the 'MACT') in Motor Accident Claim Petition No. 102 of 2010, (hereinafter referred to as the 'MACP'). Respondent No. 1 is the owner and driver of the offending vehicle and respondent No. 2 is the Insurer of the offending vehicle.

2. Facts leading to the institution of this appeal in brief are that on 8.8.2009, the deceased Raviraj was proceeding by Ghodbandar road, in Thane City, at about 11.00 p.m., on his motorcycle. That time, the offending vehicle i.e. Tanker, bearing registration No. MH-04-F-6062 came from back side and gave dash to the motorcycle of the deceased and subsequently fled away. In that accident, the deceased sustained serious injuries. The deceased was shifted to the Civil Hospital, Thane, by a local Member of Legislative Assembly, who was passing by the road. However, the deceased was declared as dead. On next day morning, the

room met of the deceased namely Suryakant Sawant, lodged First Information Report (for short 'FIR'), in the Police Station and in the result, the crime was registered against the driver of the unknown vehicle. On 23.12.2009, respondent No. 1, who is the registered owner of the offending vehicle, visited the police station and informed that the accident occurred due to the offending vehicle owned by him. In the result, charge-sheet was filed against respondent No. 1.

3. Respondent No. 1 did not file written statement and only respondent No. 2 the Insurer, has disputed the involvement of the offending vehicle in the above said accident and its liability.

4. The dependents of the deceased filed Motor Accident Claim Petition before MACT, Beed. After considering the evidence placed on record, the Tribunal held that the claimants cannot prove the involvement of the offending vehicle. In the result, the claim petition was dismissed. Therefore, this appeal arose.

5. Heard Shri Girish S. Rane, learned counsel for appellants, Shri A.M. Tandale, learned counsel for respondent No. 1 and Shri S.G. Chapalgaonkar, learned counsel for respondent No. 2.

6. Learned counsel for appellants submits that the accident occurred on 8.8.2009, at about 11.00 p.m. and the FIR was lodged by the room met of the deceased on 9.8.2009. He has drawn my attention towards the FIR, which was lodged by Dr. Suryakant Savant, against unknown driver of the unknown vehicle.

7. The contention of the learned counsel for the appellants is that on 23.12.2009, the owner of the offending vehicle, who himself was driving it, at the time of accident, approached to the Police Station and gave confessional statement about the involvement of his vehicle and the occurrence of the accident due to his driving. He submits that on the basis of this confessional statement, even charge-sheet was also filed against respondent No. 1, who is the owner and driver of the offending

vehicle.

8. Learned counsel for appellants has pointed out that the police papers show that two eye witnesses were available, who had witnessed the occurrence and whose statements were recorded by the Police. He submits that the confessional statement of respondent No. 1 recorded by Police and police statements of these two eye witnesses are exhibited before the Tribunal without any objection, therefore, those statements can be read in evidence, to prove the involvement of the offending vehicle. He has drawn my attention to the case of **"Bimla Devi and Ors v. Himachal Road Transport Corpn and Ors"** [AIR 2009 Supreme Court 2819], wherein it is ruled that

"the in motor accident claim cases, the claimants have to establish their case merely on the touch stone of the preponderance of probabilities and the standard of proof of beyond the reasonable doubts, could not be applied".

9. The claimant has also drawn my attention to **"R.V.E. Venkatachala Gounder v. Arulmigu**

Viswesaraswami and V.P. Temple and another" [AIR 2003 Supreme Court 4548], wherein it is held that

"to substantiate his contention that once document is admitted in evidence without any objection, subsequently, its admissibility cannot be disputed".

10. The learned counsel for appellants has placed reliance on **"Dulcina Fernandes v. Joaquim Xavier Cruz and Anr."** [AIR 2014 Supreme Court 58] wherein it is held that

"to substantiate his contention, in motor accident claim cases, the proof beyond reasonable doubt, is not necessary".

11. The next contention of the learned counsel for the appellants is that the Tribunal has erroneously observed that the claimants and respondent No. 1 are relatives and they are in collusion with each other. His next contention is that as proper opportunity was not given to the claimants to examine the Investigating Officer, P.S.I., Shri Kamble, therefore, the confessional statement of respondent No. 1 and the statements of two eye witnesses before the Police, cannot be proved.

12. In reply, learned counsel for respondent No. 2 the Insurer submits that respondent No. 1 approached to Police, after four and half months, after the date of occurrence of the accident, which is improbable in natural circumstances. He has pointed out that only because the police statement of respondent No. 1 and other so called eye witnesses are exhibited, the proof of contents of those statements is not dispensed with. He submits that unless the so called eye witnesses are examined, their statements before the Police cannot become evidence on record. He has also pointed out that statements of those two eye witnesses were recorded by the police on 29.12.2009, i.e. after recording of the statement of respondent No. 1. According to the learned counsel for respondent No. 2, the above circumstance indicates the collusion in between the claimant, respondent No. 1 and the Investigating Officer.

13. Next contention of the learned counsel for respondent No. 2 is that the claimants have

not taken pains even to examine the Investigating Officer who has investigated this accident case and filed the charge-sheet against respondent No. 1. He has pointed out that no coercive steps have been taken by claimants to secure the presence of the Investigating Officer before the Tribunal. He placed reliance on

a. "Anil and others v. New India Assurance Company Limited and Others" [(2018) 2 Supreme Court Cases 482],

b. "Bajaj Allianz General Insurance v. Meera w/o Raju Chaudhari and others" [2014 (6) Mh. L.J. 556],

c. "Faridabegum s/o Shaikh Yousuf and others v. Daulat Khan s/o Sardar Khan (died) through L.Rs. Azamat Khan s/o Daulat Khan" [2014 (6) Mh. L.J. 751].

14. No doubt, in motor accident claim proceeding, the Rules of Pleadings and the Evidence Act are not strictly applicable. The claimants can prove their contentions on the basis of 'preponderance of probabilities' and 'proof of beyond reasonable doubt' is not necessary like in criminal trials. I have no doubt regarding this legal position.

15. However, it cannot be ignored that initial burden lies on the claimants to prove the involvement of the offending vehicle on the basis of some admissible material on record.

16. In the case at hand, the claimant Yogiraj Garje (PW 1) stepped in witness box and deposed that on 8.8.2009, when his son was passing by the road on his motorcycle, that time, the offending truck gave dash to that motorcycle, resulting into the death of his son. According to this witness, subsequently, during investigation, respondent No. 1 was traced out as the owner and driver of the offending vehicle.

17. However, from the cross-examination of Yogiraj (PW 1), it emerges that he was not witness of the occurrence of the accident and Dr. Savant lodged FIR against an unknown vehicle. He has also admitted that on the next day of the accident, when his statement was recorded by the police, he has mentioned about the involvement of the unknown vehicle. From his cross-examination,

it also emerges that after four and half months from the date of occurrence of the accident, respondent No. 1 appeared before the police and gave statement. However, this witness cannot tell what statement was given by respondent No. 1. Therefore, obviously, the testimony of Yogiraj (PW 1) is of no help to the claimant to prove the contents of statement of respondent No. 1 before the police. It is to be noted that this witness has nowhere deposed regarding the presence of two eye witnesses, at the time of occurrence of the accident. He has not even named those two eye witnesses. Therefore, in any case, the evidence of Yogiraj (PW 1) is of no help to the claimants to prove even police statement of so called two eye witnesses or the statement of respondent No. 1 before the Police.

18. Otherwise also, the FIR (Exh. 28) shows that on the next day, after occurrence of the accident, Shri Suryakant Savant, who was the room met of the deceased, lodged report to the police station, against one unknown vehicle. In the FIR, even the presence of eye witnesses is not

mentioned. On the basis of this FIR, offence was registered against the unknown driver of the unknown vehicle under Sections 304 A, 279, 338 and 427 of the Indian Penal Code and under Sections 184 and 135 of the Motor Vehicles Act, 1988. The police papers placed on record in the form of inquest panchanama, spot panchanama and the police statement recorded on 9.8.2009, do not show reference of the involvement of respondent No. 1 or his truck in the above said accident.

19. Record shows that the claimants have not examined the Investigating Officer, PSI, Shri R.K.Kamble. Summons was issued to PSI, Shri Kamble on 10.9.2012 (Exh. 53), 29.11.2012, 16.1.2013. On 8.2.2013 the claimant sought adjournment. Thereafter, summons were again issued on 7.3.2013. The Police papers of investigation were placed on record by Kasarwadi Police Station on 7.4.2013. Summons were also issued to PSI Shri Kamble on 23.9.2013, 27.1.2014, 12.3.2014. The bailiff report dated 29.3.2014 shows that PSI Shri Kamble has refused to accept the summons. However, thereafter, no coercive steps were taken by the

claimants. On 13.8.2015, after the closure of recording of evidence for the claimants, he again filed application (Exh.-70) for issuance of summons of PSI Shri Kamble. From the order passed by the Tribunal, it emerges that, that application was filed when final arguments of both parties were heard and the case was fixed only for filing citations. On 13.8.2015 by recording necessary reasons that application was rejected. Thus, evidence on record clearly indicates that despite more than sufficient opportunities to the claimants, they could not secure the presence of PSI Shri Kamble to prove the recording of statements of respondent No. 1 and other two eye witnesses.

20. It is to be noted that the claimants have not taken pains even to examine respondent No. 1 or the so called two eye witnesses to prove their contentions. Therefore, merely on the basis of statements recorded by police of all these witnesses, which are not admissible in evidence, the claimants cannot prove the involvement of the offending vehicle in the above said accident.

21. The ratio of "**R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple and another**" [supra], is of no help to the claimants, for the simple reason that in this case, the Apex Court held that, if the document sought to be proved is itself inadmissible in evidence, merely because the document has been exhibited, the objection as to its admissibility is not excluded and is available to be raised, even at the later stage or even in appeal or revision (para 20 of the Judgment). Therefore, only because, some police statements which themselves are in admissible if they are exhibited by the Tribunal, those statements cannot be read in evidence, as substantial evidence of those witnesses, to prove the involvement of the offending vehicle.

22. After perusal of the judgment passed by the Tribunal, I am fully satisfied that, the Tribunal has rightly held that, the claimants failed to prove the involvement of the offending vehicle in the above said accident. Therefore, I need not determine the quantum of compensation

payable to the claimants. I hold that the judgment passed by the Tribunal dismissing the claim petition, is absolutely correct and needs no interference. Accordingly, First Appeal No. 3548 of 2016 is dismissed.

23. Parties to bear their respective costs.

(**SUNIL K. KOTWAL**)
JUDGE

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