

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FIRST APPEAL NO.681/2018

The Manager, National Insurance Company Ltd., Nagpur

..Vs..

Shyamabai Wd/o Gendlal Tikariya and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.D. Zoting, Advocate for the appellant.
Shri Asghar Hussain, Advocate for respondent Nos.1 to 5.

CORAM : NITIN W. SAMBRE, J.

DATED : 5.9.2019

1] Heard.

2] The present appeal is by the insurance company questioning the judgment delivered in claim petition preferred under Section 166 of the Motor Vehicles Act. On September 13, 2009 deceased was travelling on Hero Honda Motorcycle. Swaraj Mazda, a goods vehicle, claimed to have given him dash as it was driven in rash and negligent manner resulting into death of said Gendalal - the deceased. An offence being Crime No.166/2009, punishable under Sections 279, 337 and 304-A of the Indian Penal Code came to be registered.

3] Deceased was a public servant working with railway and claimed to have earning Rs.15,286/- per month as such a claim of Rs.16,99,744/- was made which was restricted to Rs.12,00,000/-. The Tribunal

vide its impugned judgment was pleased to allow the claim petition. As such this appeal by the insurance company.

4] The submissions of Shri Zoting are the Tribunal has failed to consider the contributory negligence of the deceased, who was negligently riding a motorcycle. According to him, offending vehicle though is insured with the appellant insurance company, the other vehicle should be also made liable, because of contributory negligence. As such the submissions are the impugned judgment is not sustainable.

5] The learned Counsel for the respondents supported the judgment impugned.

6] The Tribunal framed issues at Exh.191 based on the pleadings. The vehicle owner was proceeded *ex parte*. The insurance company has stepped into the shoes of the vehicle owner pursuant to the provisions of Section 170 of the Motor Vehicles Act and has adduced the evidence resisting the claim on behalf of the owner also. The written statement at Exh.14 raises a defence of contributory negligence of 50% on the part of the deceased. It is also claimed that the driver of the offending vehicle was not holding a valid driving licence.

7] The claimants examined P.W.2 - Vinod, Section Officer of Account Section of the Central Railway

to prove the income whereas the appellant / insurance company has not examined any witness. The appellant has admitted that the offending goods vehicle was insured with it.

8] Deceased was shifted to a government hospital where he died while taking treatment. Registration of offence against the vehicle driver is not in dispute. The copy of F.I.R. in the aforesaid crime was also produced on record including spot panchanama. The spot panchanama and the F.I.R. demonstrate that the deceased was travelling from north to south direction to attend his duties as a Railway Station Cabin Attendant. The Tribunal has analyzed the spot panchanama and reached to a conclusion that there is contributory negligence of 30 : 70. The Tribunal then proceeded to analyze the income of the deceased and after considering the evidence of P.W.2 - Vinod has recorded a finding that at the age of 47 years i.e. on the date of accident, the income of the deceased was Rs.13,334/- per month and proceeded to answer the entitlement of compensation to the tune of Rs.13,96,209/-.

9] The Tribunal then proceeded to note that the appellant and the vehicle owner are jointly and severally liable to pay the amount of compensation. The appellant is permitted to deposit the amount and recover the same from the vehicle owner.

10] In the aforesaid background, once the Tribunal based on the documentary evidence on record has recorded a finding of contributory negligence and has permitted the appellant to recover the amount from the owner, in my opinion, no case is made out for interference. The appeal must fail. It is **dismissed** accordingly. No costs.

JUDGE

Tambaskar.