

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO.43 of 2010**

Shri Satish alias Santosh Gaonkar,
about 31 years of age, service,
s/o Shri Babani Gaonkar,
r/o H.No.40, Simpler Veroda,
Cuncolim, Salcete-Goa .. Appellant

V/s

1. Shri Durgesh B. Gaonkar,
s/o. B. Gaonkar, 28 years of age,
r/o Simpler Veroda, Cuncolim,
Salcete-Goa.
2. National Insurance Co.Ltd.
2nd floor, Marchon Building,
Varde Valaulikr road, Opp. Lohia
Maidan, Margao-Goa 403 601 .. Respondents

Mr. V. G. P. Dukle, Advocate for the appellant.

Mr. U. R. Timble and Ms. Y. Mandrekar, Advocates for the respondent no.2.

CORAM :- C. V. BHADANG, J.

Reserved on : 5th December, 2015

Pronounced on : 18th December, 2015

JUDGMENT :

By this appeal, the appellant/ claimant is challenging the judgment and award dated 30/11/2009, passed by the Motor Accident Claims Tribunal, Margao in Claims Petition No.243/2007.

2. By the impugned judgment, the Claims Petition filed by the appellant has been dismissed.

3. The brief facts are that the appellant was, at the relevant time, working as a Peon in Department of Post at Chinchinim Branch and was getting salary of Rs.3422/- per month. The appellant was 29 years of age. The accident in question had occurred on 04/07/2007. It is contended that the appellant had gone to the Chinchinim Post Office and was returning home on a Bajaj Kawasaki Caliber vehicle bearing registration No.GA02-P-4580 as a pillion rider. The said motor bike was driven by the first respondent, who is the brother of the appellant. The appellant had started at around 11.30 hours and when they reached three road junction near Uskini Band, Cuncolim, Salcete, Goa on National Highway 17, leading from Margao to Karwar, the first respondent made an attempt to cross the main road. It was contended that there was light drizzling at that time, as a result of which, the road had become slippery. The first respondent tried to cross the main road leading to Simpler Cuncolim, oblivious of the traffic on the main road. It so happened that one Shri Melvin Fernandes was proceeding on his Hero Honda motor vehicle bearing registration No.GA-02-P-1526 from Canacona to Margao. There was a pillion rider on the Hero Honda. It was contended that after seeing the

said Hero Honda motorbike, the first respondent, in order to avoid collision, applied emergency brakes. As a result of which, the motor bike started wobbling. It was contended that the claimant, on noticing that the first respondent is loosing control over the bike and in order to save himself, jumped off the vehicle and proceeded to other end of the road on foot. The first respondent could not control his vehicle, as a result of which, it dashed a lady, who was standing near the bus shed and thereafter, hit the right leg of the appellant, who was standing by the side of the road. It was contended that as a result of the same, the right leg of the appellant got entangled in the wheel of the motorbike and he sustained a crushing injury to his right leg. According to the appellant, the rider of the Hero Honda, namely Mr. Melvin Fernandes and the lady standing on the bus shed also sustained injuries.

4. It was contended that the appellant sustained a fracture of the right tibia fibula, resulting into permanent disablement. The appellant was bedridden for some time and has difficulty in walking. Initially, the appellant was taken to Hospicio Hospital and thereafter, to Goa Medical College, Bambolim, where he was operated upon. The appellant was eventually discharged on 17/07/2007 and had incurred expenditure of Rs.15,000/- on the

treatment. The second respondent is the insurer of the motorbike. In such circumstances, the claim of compensation of Rs.1,50,000/- was made.

5. The first respondent contended that the appellant had sought for a lift on the Bajaj Caliber motorcycle. It was contended that when the first respondent was trying to cross the main road, as it was raining, he could not notice the ongoing vehicles proceeding from Canacona to Margao. When he reached the centre of the road, he suddenly spotted the Hero Honda motorcycle and in order to avoid collision, had applied brakes, as a result of which, the vehicle skidded. He also contended that the appellant, in order to save himself, jumped off the vehicle. He did not dispute that his vehicle first hit a lady and thereafter, the appellant. He, however, denied that there was any negligence. It was contended that on account of the slippery road, the accident occurred.

6. The second respondent contended that the risk of the pillion rider, was not covered under the policy. The first respondent had also not paid any extra premium to cover the risk of a gratuitous passenger. Thus, the liability to indemnify and pay compensation was denied. It was contended that the owner and

the rider of the Hero Honda motorcycle, which was also involved in the accident, are the necessary parties.

7. The Claims Tribunal raised as many as 12 issues.

8. The claimant examined himself (AW1) along with two other witnesses and produced certain documents.

9. The first respondent did not lead any evidence. The second respondent Insurance Company only produced a copy of the Insurance Policy (Exhibit 52) on record. The Tribunal answered issue nos.1 and 10 in the affirmative and rest of the issues in the negative. By virtue of the finding against issue nos.10 and 11, the Tribunal calculated the amount of compensation to Rs.96,550/-. However, in view of the finding that the appellant failed to prove that the accident occurred due to negligence of the first respondent, the petition came to be dismissed. That is how, the appellant is before this Court.

10. I have heard Shri Duple, the learned Counsel for the appellant and Shri Timble, the learned Counsel for the second respondent. With the assistance of the learned Counsel for the parties, I have perused the record as also the impugned judgment.

11. It is submitted by the learned Counsel for the appellant that the Tribunal erred in attaching too much importance to the fact that the appellant and the first respondent were real brothers, and erroneously came to the conclusion that there was suppression of this fact by the appellant. It is submitted that the appellant had no reason to suppress this fact as even otherwise, the relationship between the appellant and the first respondent had no bearing on the issues involved in the Claims Petition. It is further submitted that the Tribunal ought not to have discarded the evidence of AW3 on the ground that he was a chance witness. It is submitted that the appreciation of the evidence is not proper, in as much as the standard of proof required in Claims Petition is not as high as is required, in a Criminal Case. The learned Counsel has taken me through the evidence led on behalf of the appellant, in order to show that the same has been appreciated in a manner, which would not be permissible, while deciding a Claims Petition. It is submitted that non-examination of the lady, who was standing near the bus shed and who was also injured in the accident, may not be material. It is submitted that once the Tribunal had computed the compensation, to which the appellant is entitled, it could not have rejected the petition on the ground of failure of the appellant to prove negligence of the first respondent.

12. On the contrary, it is submitted by the learned Counsel for the second respondent that in as much as there was a collusion between the appellant and the first respondent, i.e. the owner of the vehicle, the second respondent had sought for leave to defend and contest the petition on all available grounds under Section 170 of the Act and the same has been granted.

13. It is submitted that the entire story as put forth by the appellant of the manner, in which the accident occurred, is not trustworthy and one inspiring confidence. It is submitted that although the degree of proof required may not be as high as is required in a criminal case, a claimant is bound to prove negligence of the driver/ rider of the vehicle, which is the basis, on which the compensation can be claimed or granted. It is submitted that once the appellant had failed to prove the required negligence of the first respondent, the petition is rightly dismissed.

14. I have considered the rival circumstances and the submissions made.

15. Indisputably, the standard of proof required to prove

negligence, in a petition under Section 166 of the Act, is not as high as is required, while proving negligence in a criminal case. However, that does not absolve the claimant from establishing negligence on the basis of proof, verging on preponderance of probability. It has to be shown that the manner, in which the accident occurred and the attending circumstances and the evidence led, leads to a reasonable probability of the accident having occurred, due to the negligence of the driver/ rider of the vehicle. This is because, the very basis for claiming such compensation is tortuous liability of the driver/ rider and thereafter, on the basis of a contract of indemnity in the form of the policy of insurance, the Insurance Company can be made liable.

16. In the present case, indisputably, there was no prosecution launched or chargesheet filed by the police either against the first respondent or the rider of the Hero Honda vehicle Melvin Fernandes. According to the appellant, he was a pillion rider on the Bajaj Kawasaki vehicle, which was driven by the first respondent and while reaching the main road, the first respondent tried to cross the same. However, after seeing the Hero Honda vehicle, he applied emergency brakes, as a result of which, the vehicle became unstable and in order to save himself, the

appellant jumped off the vehicle, crossed over the road on foot to the other side, by which time, the Bajaj Kawasaki Vehicle after giving dash to a lady, standing at the bus shed, hit the appellant on his right leg. In my considered view, it is not possible to visualise the manner, in which the accident could have occurred in the context of the normal human conduct and probabilities. It is, in this context, that the evidence led has to be considered and appreciated. It is true that the alleged suppression of fact that the first respondent is the brother of the appellant, would not be material. It is also trite that the evidence cannot be appreciated in such a minute details and it has only to be seen whether it establishes the negligence on the basis of preponderance of probability. In this regard, the evidence of AW3, who is said to be an eye-witness, would be material. AW3 Niraj Prasad was knowing the appellant as both of them are residing at Cuncolim. This witness has stated that the road at the place of accident was about 5 metres in width. If one goes from Margao to Cuncolim, the kaccha road on the left side would be about 1 to 2 metres. There is no kaccha road on the right side. The bus shed is on the left side of the road, if one proceeds from Margao to Cuncolim. The bus shed is also three metres away from the kaccha road. The witness states that the accident occurred on tar road towards left hand side of the road, if one proceeds from Margao to Cuncolim,

about one metre away from the right hand side edge of the tar road. This witness has further stated that the two vehicles, namely, Bajaj Kawasaki, on which the appellant was riding as a pillion and the Hero Honda vehicle, had no actual collision. He states that on account of the brakes being applied, the Bajaj Kawasaki vehicle skidded on account of the road being wet, due to drizzle. The rider of the Hero Honda along with the pillion also fell down. He, then, states that the Bajaj Kawasaki vehicle first hit a lady, standing in front of the bus shed and then the appellant, who was also standing near the bus shed. The right leg of the appellant got entangled in the wheel, causing him injuries. He states that he was on the spot only for five minutes. He, however, did not give any assistance to the appellant or the first respondent or to that lady. He did not give any statement of the accident to the police. He also did not inform the police that he had witnessed the accident.

17. In this case, although the matter was reported to the police and a panchanama was drawn, none of the riders, namely, the first respondent or that of the Hero Honda vehicle, were chargesheeted. It is true that non-filing of the criminal case may not be decisive. A claimant can always independently prove negligence. However, non-filing of the chargesheet can always be

considered as one of the circumstance along with the evidence adduced on record. The appellant, in his evidence, has stated that he was riding as a pillion rider on the motorcycle and as a result of the accident, his brother and he himself fell down. There was no collision between the other motorcycle and the Bajaj Kawasaki vehicle. Thus, at one stage, the appellant does not state about he having jumped from the vehicle, having crossed over the road and then Bajaj Kawasaki vehicle hitting him. This part of the evidence was tried to be explained away on behalf of the appellant, saying that the said evidence does not show whether it pertains to the initial period where, the vehicle became unstable on application of brakes or when it finally hit the appellant. In my considered view, the evidence of the appellant and AW3, who, in my opinion, has rightly been held as a chance witness, does not establish the manner, in which the accident occurred much less the negligence of the first respondent even on preponderance of probability. It is, in this regard, that non-examination of the lady as also the rider of the other vehicle, assumes importance. It may be that individually, each of these circumstances, namely, non-filing of the chargesheet or non-examination of the lady, standing at the bus shed, and the rider of the other vehicle, may not be decisive. However, a cumulative effect of the same, in the context of the oral evidence, is that the appellant has failed to establish

negligence, which is the basic requirement for grant of compensation under the Act.

18. In that view of the matter, I do not find that any case for interference is made out. Accordingly, the First Appeal is dismissed, with no order as to costs.

C. V. BHADANG, J.

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