

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 83 OF 2010**

Bajaj Allianz General Insurance
Company Limited having its office at
GE Plaza, Airport Road, Yerwada,
Pune - 411 006 having their local office
at 3C & 3D, "Sesa Ghor" 20, Patto Plaza,
EDC Complex, Panaji - Goa and represented
by its Area manager Mr. Yashodhan Heblekar
Residing at Ponda, Goa.

... Appellant.

Versus

1. Shri. Sharad Chandrakant Raikar,
son of late Chandrakant Raikar,
residing at House No.572, Thana,
Cortalim, Goa.
2. Shri. Neil David Rosario,
son of Shri. David Rosario,
Driver and owner of the vehicle
GA 03 B 8057, resident of F-2, Block-C
Graceland Apartments, Saligao,
Porvorim, Goa.

... Respondents.

Mr. V. M. Kurtikar, Advocate for the appellant.
None for the respondents.

Coram :- K. L. WADANE, J.

Reserved on :- 23 April 2015.

Pronounced on :- 09 June 2015.

JUDGMENT :

The present appeal is preferred by the respondent No.2 Insurance Company against the Judgment and award passed by the Presiding Officer, M.A.C.T. for Taluka of Salcete at Margao (hereinafter referred

to as 'Presiding Officer') in Claim Petition No.43/2007, dated 30 April 2009, by which the learned Presiding Officer has partly allowed the petition and awarded compensation of Rs.2,36,530/-. Hence, the appeal.

2] Brief facts of the case may be stated as follows :

(Parties are referred to their original status)

On 3 March 2005 the claimant was driving his TVS scooty bearing No. GA 02 L 6704 (hereinafter referred to as 'scooty') and one Ravi Raikar was a pillion rider. The claimant was proceeding towards Verna bus stop to drop Ravi at the bus stop and after dropping him the claimant was proceeding back to Cortalim. When the claimant reached near Kamat Petrol Pump at about 15:10 pm., at that time respondent No.1 suddenly came from backside on a Honda Unicorn (hereinafter referred to as 'motorcycle') bearing No. GA 03 B 8057 in a fast speed and in a rash and negligent manner and gave dash to the right side of the scooty. As a result the claimant fell down on the road and sustained head injury and injury to the left knee. Thereafter, he was taken to the Goa Medical College and admitted there till 7 March 2005. In the accident scooty was damaged and the claimant incurred expenses of Rs.2,000/- for its repair.

3] The respondent No.2 resisted the claim petition by filing its

written statement and it has denied almost all contents of the petition particularly Para Nos.1 to 6, 8 and 10 to 20. The age, occupation and income of the claimant is denied. However, the insurance of the vehicle i.e. motorcycle is admitted. Considering the rival pleadings of the parties the Presiding Officer has framed issues at Exh.21.

4] To prove the claim, the claimant filed his affidavit at Exh.30 and in Para No.3 narrated the facts of the accident and the manner in which it was occurred. During the cross-examination nothing has been admitted by the claimant. There are only suggestions given to the claimant which he has denied. In support the claim claimant has relied upon the extract of the station diary, disability certificate, medical bills at Exhs.46 and 47 respectively. To prove the disability the claimant has relied upon the oral evidence of the Dr. Sundaram vide Exh.43 coupled with disability certificate Exh.46. The panch witness Mr. Anil Arsekar is examined at Exh.49. Investigating Officer Mr. Vassu Naik is examined at Exh.60. To prove the expenses required for travelling, the claimant has relied upon the evidence of Cactno Mendes. As against this no evidence is adduced by the respondent. Considering the oral as well as documentary evidence on record the learned Presiding Officer has partly allowed the petition. Hence, this appeal.

5] Looking to the memorandum of appeal, it appears that, the respondent No.2 has challenged the finding on the ground that there was contributory negligence of both the drivers. Secondly, the earning of the claimant to the extent of Rs.5,000/- is not proved as well as the medical bills are not properly proved and the compensation awarded for the disability is without any base or calculation.

6] I have heard the arguments of Mr. Kurtikar, the learned counsel for the appellant. None present for the respondents. Looking to the grounds mentioned in the memo of appeal and evidence on record and upon hearing the learned counsel for the appellant following points arise for my determination.

	Points		Findings
1)	Whether the respondent No.2, the insurance company proved that the accident occurred due to contributory negligence of respondent No.1 and the claimant ?	...	'In the negative'
2)	Whether the compensation awarded to the claimant is exorbitant compare to the evidence on record ?	...	'In the negative'
3)	What order ?	...	'Appeal dismissed with costs'

7] As to point No.1 :

The respondent No.2 – appellant had taken a ground in the appeal memo that the accident occurred due to contributory negligence of the respondent No.1 and claimant. However, its written statement is silent about the averments to that effect. Looking the contents of the written statement of respondent No.2 – appellant, it appears that, it is in the form of general denial. It is contended that the contentions in Para Nos.1 to 3, 8, and 10 to 20 are not admitted for want of knowledge but nowhere it is contended or pleaded from respondent No.2 – appellant that the claimant also contributed some negligence while driving the scooty. Therefore, in absence of any pleading there cannot be any evidence to that effect. Therefore, basically the respondent No.2 – appellant has not pleaded contributory negligence of claimant, therefore, now he cannot take such ground for appeal.

8] The claimant himself was injured in the accident. Therefore, he had opportunity to observe the manner in which the accident is occurred. The claimant has filed his affidavit under the provisions of Order 18 Rule 4 of the Civil Procedure Code and reiterated all the contents in the petition Exh.1. In Para No.3 the claimant has specifically deposed that when he reached near Kamat Petrol Pump, the respondent No.1 was driving the motorcycle came from backside in a fast speed in a

rash and negligent manner and gave dash on the right side of the scooty. The oral evidence of the claimant is supported by the other documents i.e. the panchnama of scene of offence with sketch. On perusal of the contents of the spot panchnama, it appears that, both the vehicles were lying on the road in the same direction and the headlight, left indicator, left side glass of the motorcycle was damaged. On the other hand, the right side rear tin of the scooty was pressed, left side glass was broken, chassis was bend, backside light was broken. This indicated that the dash was given by the motorcycle from back angle towards middle portion, therefore, the motorcycle was damaged from front side and scooty was damaged from back and middle side. The contents of the spot panchnama exactly supports the case of claimant as to the manner in which the accident occurred. No evidence is adduced by the respondent particularly the respondent No.1 did not stepped into witness box to depose contrary. Therefore, the version narrated by the claimant has to be accepted and the learned Presiding Officer has rightly considered the evidence on record. Hence, the respondent No.2 failed to establish that the accident was a result of contributory negligence amounts the claimant and respondent No.1.

Mr. Kurtikar, the learned counsel for the appellant relied upon the observations of this Court in the case of **Suresh Foll Dessai vs. Suresh and ors. reported in 2011(1) TAC 110** and in the case of **Narayan**.

Kalangutkar and anr. vs. The New India Insurance Company Ltd.

And ors. reported in 2012(2) ALL MR 244. Observations of tow above cases are inapplicable to the facts of present case simply because negligence of the claimant has not pleaded and proved. Hence, point No.1 answered in the negative.

9] As to point No.2 :

It is one of the ground in appeal that the compensation awarded to the claimant is excessive and exorbitant. I have gone through entire evidence on record. Looking to the nature of the injuries and disablement caused to the claimant that is to the extent of 40%, I do not think that the compensation awarded to the claimant on various head is exorbitant. Therefore, there is no substance in the grounds of appeal. Hence, point No.2 is answered in the negative.

10] Appeal stands dismissed with costs.

K. L. WADANE, J.

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