

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
APPELLATE SIDE, BENCH AT AURANGABAD

FIRST APPEAL NO. 150 OF 2015

Somnath S/o. Thakaji Mandlik, Aged 45
Years, Occupation Labour, Resident of
Dholewadi, Taluka Sangamner, District
Ahmednagar

APPELLANT

V E R S U S

1 Dipakbhai Chimanbhai Patel, Aged 55 Years,
Occupation Business, Resident of 79K,
Airport Road, Band Faliya, Dalmondha,
Daman, Daman and Div (Union Territory)

RESPONDENTS

2 Branch Manager, The New India Assurance
Co. Ltd., Malpani Building, Sangamner,
Taluka Sangamner, District Ahmednagar

Mr. K.N. Shermale, Advocate for the Appellant
Mr. A.S. Osmanpurkar, Advocate for Respondent No.2

CORAM : A.V. NIRGUDE, J.

DATE : 22nd August, 2016

ORAL JUDGMENT :

1. By consent of the learned counsel for the parties, the Appeal is taken up for final hearing at admission stage.

2. Heard learned counsel appearing for the parties.

3. This Appeal challenges judgment and Award dated 8th October, 2014, passed by the learned Motor Accident Claims Tribunal, Sangamner, in M.A.C.P No. 18 of 2011.

4. The facts that came on record and which are relevant for deciding the Appeal, in short, can be stated as under :-

5. Appellant Somnath is a claimant before the lower Court. On 18th May, 2010, at about 08.00 p.m., the appellant and his friend were driving the motorcycle on public road which was going towards Nasik from Pune. The appellant was the rider and his friend was pillion-rider. The appellant was riding the motorcycle on the left side of the road, and despite of this, he collided on a vehicle which was standing on the left side of the road. Due to collusion, the appellant sustained injuries and his friend i.e. pillion-rider died due to head injury. The appellant was taken to the Hospital and was given medical treatment. Despite medical treatment, he sustained about 65% permanent disability. The appellant claimed a sum of Rs.6,00,000/- as compensation under Section 166 of the Motor Vehicles Act. The vehicle on which the appellant's motorcycle collided belongs to respondent no.1. The vehicle was insured with respondent no. 2 – Insurance Company.

6. In order to prove his claim, the appellant examined himself and explained as to how accident had taken place. Respondent no. 1 though served did not come before the Court and did not file written

statement. On the other hand, respondent no. 2 filed written statement and took various defences.

The learned Member came to a conclusion that the accident took place due to contributory negligence of the appellant and the driver of offending vehicle belonging to respondent no. 1. The appellant challenged this finding of the tribunal.

7. The question before this Court is, “who is proved to be negligent in this case?” The learned Judge of the lower Court rightly held that the driver of offending vehicle which was parked erroneously on the road was negligent and due to such wrong parking the accident had taken place.

8. The question is, whether the appellant who was riding the motorcycle was also partly negligent? To answer this question, I must go to the evidence of the appellant. In the deposition, he stated that due to darkness he could not see the offending vehicle standing in his way. From the contents of the spot panchnama it is seen that the offending vehicle was indeed standing on part on the road. The panchnama indicates that there was sufficient space further on the left side of the road. The vehicle could have been parked beyond the curb of the road. This means that the offending vehicle occupied about 5' width of the actual road where the vehicles ply. The offending vehicle thus was an obstacle on the road. The next question is, how did the appellant not see such obstruction? The appellant stated in his deposition that due to darkness he did not see the vehicle. The cross-examiner of the opponent tried to suggest that the appellant was also negligent at the time of accident. But, he could not

bring on record relevant facts which could indicate that the appellant could have seen the obstruction and could have stopped his vehicle in time. The cross-examiner could bring on record admission of the appellant that at the time of accident he was not wearing a protective helmet. But, despite opportunity, the cross-examiner could not bring on record as to whether the head lamp of the motorcycle was on and that there was otherwise good visibility. On such roads a rider or a car-driver would generally come across several kinds of obstructions. Some obstructions are caused due to wrong parking of the vehicles. Some obstructions are caused due to slow moving vehicles and some are pedestrians, stray animals on the road. All such obstructions are required to be avoided by a driver/rider of a motorcar/motorcycle. A rider of a motorcycle is under obligation to drive his vehicle carefully. He is also supposed to avoid obstructions as described above. Yet, if a rider or driver of motor vehicle collides on such obstructions, it cannot generally be presumed that such rider or driver was negligent while negotiating an obstruction. Negligence on his part could be pleaded as defence. In this case, the Insurance Company in their written statement did not even raise such a defence of contributory negligence. Had such defence been raised, the learned Member could have certainly framed an issue that the respondents should prove that this was a case of contributory negligence etc. Such issue was not framed. At the time of recording deposition, suddenly the cross-examiner of the insurance company suggested possibility of contributory negligence on the part of the appellant. For deciding such question of fact, the first requirement is that there should be proper defence taken in the written statement. Pursuant to it, a proper issue is required to be framed and only thereafter the burden to prove contributory negligence would shift on the

respondent. Generally an issue of contributory negligence is required to be proved by an independent evidence which is necessary to be brought on record from the side of respondent. In absence of all this, I am surprised that the learned Judge virtually invented the defence of contributory negligence. He came to a conclusion on the basis of evidence which I discussed above that the appellant was also negligent. He also jumped to a conclusion that the appellant contributed to the extent of 50% in the negligence. Both these findings are arbitrary and erroneous.

Despite this, I am inclined to hold that the appellant was also negligent at the time of accident. Admittedly, he was not wearing a protective helmet. He admittedly sustained injuries on his head. Fortunately despite injuries to his head, he survived. Section 129 of the Motor Vehicles Act, 1988 compels every person driving or riding a motorcycle to wear protective head wear. The appellant admittedly committed breach of the provision of Section 129 of the Motor Vehicles Act, 1988 and to that extent he is partly responsible for causing injuries to his head. In view of this, I hold that the appellant contributed only to the extent of 10% of the contributory negligence.

9. The learned Member of the Tribunal calculated the total amount of compensation to the tune of Rs.6,29,775/-. This amount is required to be reduced by 10%. After such deduction, an amount of Rs.5,66,797/- is payable. The impugned Judgment is accordingly modified. The appeal is partly allowed. The final order would read as under :-

ORDER

A) Appeal is partly allowed.

B) The Respondents jointly and severally shall pay an amount of Rs.5,66,797/- (Rupees Five Lac Sixty Six Thousand Seven Hundred Ninety Seven only) to the Petitioner – Somnath Thakaji Mandlik together with interest @ 8% p.a. from 29.01.2011 till its full realization. Out of said amount, an amount of Rs.1,00,000/- be kept in fixed deposit for five years in any Nationalized Bank of his choice in his name. Remaining amount with interest be paid to the petitioner by account payee cheque.

(A.V. NIRGUDE, J.)

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