IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.517 OF 2014

Shri Sanjay Chandrakant Khalipe ... Appellant

Vs.

Shri Rajesh D. Rathi & anr. ... Respondents

Mr.Milind Deshmukh for the Appellant
Mr.D.S. Joshi for Respondent No.2

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **OCTOBER 5, 2017**

P.C.:

1. This appeal is directed against the judgement and award dated 4.1.2014 passed by the learned Member, Motor Accident Claims Tribunal, Satara in MACP No.313 of 2005. It is an injury claim. On 31.4.2005, 5he petitioner Sanjay Khalipe was returning from Satara at about 2.30am on his motor cycle bearing No.MH-11-D-7625 on the National Highway No.4. When he came at the village Kedarwadi near Kasegaon, some rod work was in progress at that time. A bus was going ahead of the applicant and there was dust in the area. One Uno car bearing No.MH-10-E-3056 came from the opposite direction with high and excessive speed and it dashed the motor cycle. The applicant went towards eastern side, fell down and sustained injuries. He was operated 5 times. His right leg was fractured.

He was in ICUC from 31.1.2004 to 4.2.2004 at Wanless Hospital, Miraj. He was an indoor patient in the private hospital. He had suffered permanent disability due to the accident and therefore, he filed Claim Petition for Rs.20,62,300/-. He examined himself and also tendered medical evidence of the Doctor and the insurance company. The opponent No.2 i.e., Insurance Company, contested the claim on the point that the accident has taken place due to rash and negligent driving of the claimant alone and the driver of the Uno car is not responsible. The insurance company is not liable to pay any amount. After considering the oral and documentary evidence, especially after examining the sketch of the accident and panchanama, the Tribunal held that the claimant was rash and negligent who tried to overcome the bus and hence, he is responsible solely. Hence, the Appeal from Order.

2. The Claim application was rejected on the ground that the claimant was rash and negligent. He was going from south to north direction. He went towards his right side and dashed the Uno car which was coming from the opposite direction while he was overtaking the bus. The trial Court has relied on the spot panchanama (exhibit 60); copy of FIR (exhibit 59) and the sketch of the spot panchanama. As per the FIR given by the driver of the car, the claimant was held responsible for the accident as when he was trying to overtake, he dashed on the right side headlamp of the Uno car. Also, it is true that in the FIR, the applicant/claimant was held

negligent and he was prosecuted by the police for rash and negligent driving. However, it is to be noted that the claimant at the relevant time was very much injured and he was shifted to the hospital so the FIR was registered in his absence by the driver of the car.

3. On the point of negligence, it was necessary for the insurer to examine the driver of the Uno car. However, the insurance company did not examine him. As per the spot panchanama (exhibit 60), the vehicles were found at 3' distance towards the easter side from the middle of the road where the marks of the crushed motor cycle of the claimant were seen so also the brake marks of the Uno car at 7' distance towards eastern side of the road are seen. It is to be noted that on the basis of the panchanama, the trial Court construed the manner in which the accident might have occurred. However, the Tribunal has lost sight of the fact that the accident took place after midnight at 2am. The appellant has stated that there was a heap of rubble as the work of road repair was going on. Thus, it is a time of less visibility. In the spot panchananama, it is specifically mentioned that after examining the spot of accident, the panchas arrived at conclusion that the motor cyclist i.e., the applicant completely went on wrong side.

4. Mr.Joshi, learned Counsel for the insurance company while opposing this appeal has heavily relied on the spot panchanama and the

FIR. He also pointed out the sketch where the motor cycle was found. He submitted that the motor cyclist i.e., the claimant was trying to overtake and while overtaking came towards the right side and had crossed the middle line of the road. Therefore, he dashed on the Uno car. He argued that the inference drawn by the learned trial Judge is strongly supported by the position of vehicles and the brake marks as mentioned in the spot panchanama. He further argued that the spot panchanama and the FIR are the documents which were prepared immediately after the incident and these documents are produced and relied by the claimant himself and therefore, it is an admission by him on the point of how the accident took place. He submitted that the trial Court has rightly dismissed the claim on this point alone and the appeal is also to be dismissed.

5. The learned Member, Tribunal ought to have taken into account that the accident took place in the morning at 2 am and the panchanama was drawn between 7.15am to 7.55am on 31.1.2004. Thus, the panchanama was drawn nearly after 4 hours. Secondly, after the impact, the vehicles cannot be stationary at the place of the impact but because of the impact, they move away from the actual place of the impact. In this case, the vehicles moved towards the eastern side and, therefore, the panchas drew inference that the motor cycle went towards the right side. The evidence of the

claimant is required to be looked into on this point. He has specifically stated that the car came from the opposite direction from Karad with a high and excessive speed and crossed the middle line but as soon as he saw him, he immediately turned the car towards left side and while turning, the car gave forceful dash to his motor cycle and his right leg was crushed. He further submitted that because of that dash, his motor cycle was thrown towards eastern side and then again, it turned towards the western side. The driver of the car applied the brake and stopped near the heap of rubble. He also referred that the driver of the car has falsely stated that the applicant gave the dash to the car. He had produced his statement which was recorded by the police officer on 2.2.2004 when he was in Miraj Wanless hospital. In the cross-examination, many suggestions put about rash and negligent driving were denied specifically by him. In fact, no admission of the applicant could be sought on the point of negligence. The submission of Mr.Joshi that the claimant has himself produced the spot panchanama and therefore, it being his document, it is to be treated as admission against him, is not convincing. In the application for compensation made under the Motor Vehicles Act, the parties produce the FIR or panchanama to prove the fact of the accident. The contents mentioned in the panchanama if at all are controverted by the claimant in his deposition on oath before the Tribunal, then it definitely carries more weightage than the panchanama drawn by the panchas. In the present case, the claimant has specifically given a version contrary to the contents in the panchanama. Thereafter, the burden shifts on the insurance company to prove that the accident was caused due to rash and negligent driving of the claimant alone.

6. Hence, it was necessary for the insurance company to examine the driver of the car to establish its defence that it was not the driver of the car but the complainant himself was rash and negligence and is solely responsible for the accident. However, the insurance company failed to discharge this burden and therefore, the trial Court ought to have appreciated the evidence of the applicant properly and should not have dismissed the claim on this ground. Thus, considering the time of the accident and the manner in which the accident has taken place, I am of the view that it is a case of contributory negligence.

7. The learned Member, Tribunal did not discuss anything on the other aspects i.e., about his income, disability, etc. but it simply dismissed the claim by holding that the claimant was only

responsible. Hence, the accident took place 13 years back i.e., on 31.1.2004 and, therefore, on the basis of this evidence of the claimant, I think it is appropriate to consider the claim. He has stated that he was admitted in the Wanless hospital, Miraj as his right leg was crushed. There was fracture to shaft right femur so also compound fracture to right tibia; injury to fibula and there was bone loss. He was operated 5 times upon his right leg. He was in ICU for 5 days. Then, he has deposed in detail about his continuous discharge and admission in different hospitals for treatment – one from Wanless hospital and another from Chaddha plastic surgery hospital. He has also deposed that due to accidental injuries, his leg is shortened and there is a loss of power in the leg. He cannot stand continuously for more than half an hour. He also cannot walk for longer distance. He needs an attendant. He has to spend money on rickshaw and he has suffer 38.% permanent disability. He relied on the certificate of disability issued by Dr.Bhaskar Prani, MD, Orthopaedics. He has deposed that the expenditure for his surgery was approximately Rs.3 lakhs and he has also produced the certificate of Dr.Chaddha and Dr.Prani. He also stated that he was working in a printing press and running the press at Vita and he has taken loan of Rs.160,000/- from one credit society and has invested

Rs.10 lakhs in the printing business. He had employed 4 workers and used to pay Rs.5,000/- to machine operator and Rs.2,000/- to the other three workers. He said that he used to earn Rs.20,000/- per month. He produced a photoshop licence of his printing press. He was bed ridden for nearly 2 years and therefore, suffered loss in the business. Therefore, he claimed a total compensation of Rs.46,48,000/-.

8. As already held earlier, it is a case of contributory negligence and hence, 50% of the total amount of the compensation be granted with interest @ 9% p.a. At the time of the accident, the claimant was 36 years of age and deposed that he was earning money and his income was Rs.20,000/ -per month out of the printing press business. He also deposed that for two years, he was bed ridden. Taking into account his evidence, his income can be considered at Rs.10,000/- per month and for two years, there was 100% loss of income. It is to be noted that he was not a salaried person but was having a business and, therefore, the loss of income due to permanent disability can be calculated on some guess work. Therefore, loss of income due to permanent disability is reasonably taken as Rs.2 lakhs. Then, medical treatment, is to be granted

considering the proof and the nature of operations as the leg is shortened at Rs.2,50,000/-, for bones and suffering Rs.2 lakhs is appropriate and Rs.50,000/- for attendant and special diet is granted. Thus, the calculations are as under:

Medical treatment		250000
Pains and suffering		200000
Attendant and special diet		50000
Loss of income during treatment		240000
Loss of income due to permanent disability		200000
	Total:	940000
Less: 50%		470000
	Total:	470000

Thus, an amount of Rs.470,000/- shall be paid to the claimant with interest @ 9% p.a. from the date of filing of the application.

9. First Appeal is disposed of accordingly.

(MRIDULA BHATKAR, J.)