

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.3856 OF 2016

Arvind s/o Vishwambhar Hire,
Age 37 years, Occupation LIC Agent
and Agri., R/o Samarth Nagar, In
Front of Post Office, Bhoom Tq.
Bhoom Dist. Osmanabad.

...Appellant.
(Orig.Claimant)

VERSUS

1. Mohd. Riyazuddin s/o Mohd.
Mainuddin, Age Major, Occup.
Business, R/o. 11-1-131,
Agapura, Hyderabad.

2. The Branch Manager,
The Oriental Insurance Co. Ltd.,
At Osmanabad.

...Respondents.
(Orig.Respdts.)

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Advocate for Appellant : Mr. A. S. More.
Advocate for Respondent No.2 : Mr. Ganesh Yadav
holding for Mr. R. F. Totala.

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CORAM : SMT.VIBHA KANKANWADI, J.
Date : 26-03-2019.

ORDER :

1. Present appeal has been filed by the original claimant challenging the Judgment and award passed by learned Motor Accident Claims Tribunal at Osmanabad, in Motor Accident Claim Petition No.173 of 2009 dated 16-05-2012, whereby his petition under Section 166 of Motor Vehicles Act came to be partly allowed.

2. The present appellant – claimant had come with a case that, he met with an accident at about 2.30 hours on 22-03-2009 when he was proceeding in his own car bearing No.MH-12/ D-M-3159 towards Bhoom. It is stated that, he was slowly and cautiously proceeding from the correct side of his road on Pune – Solapur road, near Karkumbh Tq. Daund. At that time truck bearing No.AP-13/ W-8362 came in opposite direction in high speed, rash and negligent manner, with full focus of head light. After coming to wrong side of its road, the truck dashed the car driven by claimant. As a result of which he sustained grievous injury to right side hip. It was fractured and dislocated. So also he had sustained grievous injuries to his right knee, shoulders and on other parts of the body. It is stated that, he was admitted to hospital. He has taken treatment however still he has suffered permanent disability. He has stated that, the said accident had taken place due to the negligence on the part of the truck driver. Respondent No.1 is the owner of the said truck and the said truck was insured with respondent No.2 at the relevant time. The claimant contends that, he was working as LIC agent, aged 34, was getting Rs.2,00,000/- per year from his 16 acres of irrigated land. He was also earning Rs.3,50,000/- per year from his LIC business. He therefore, claimed compensation of Rs.9,45,000/- however restricted the same to Rs.7,00,000/-.

3. Petition proceeded ex-parte against respondent No.1

Insurance company - respondent No.2 filed written statement and denied all the contents of the petition including the rashness and negligence on the part of the truck driver. It was stated that, the accident took place due to the negligence on the part of the claimant himself. Other statutory defences have been taken.

4. Taking into consideration the rival contentions, issues came to be framed. Claimant alone led evidence however after hearing both sides and perusing the documents on record, the learned Tribunal has come to the conclusion that claimant suffered permanent disability due to the vehicular accident. However, claimant himself was also responsible for the accident to the extent of 50 %, and therefore, though he was held to get compensation of Rs.15,48,000/-, the 50% of the same was deducted towards his own negligence and the award has been passed holding respondents No.1 and 2 liable to pay jointly and severally to the extent of Rs.7,74,000/-.

5. In the present appeal the claimant is challenging that though the disability certificate states that, he has suffered 35 % permanent disability yet there is 100 % loss of income for him, and therefore, the compensation ought to have been awarded on the basis of loss of his entire income. He has produced evidence to prove his income and therefore the calculation made by the learned Tribunal is wrong. Another point that has been raised in the appeal is that, the learned

Tribunal wrongly held that, claimant himself is negligent to the extent of 50 %, and therefore towards the contributory negligence, the 50 % of the compensation amount is deducted.

6. Heard Mr. A. S. More, Advocate for appellant, Advocate Mr. Ganesh Yadav holding for Advocate Mr. R. F. Totla for respondent No.2.

7. It will not be out of place to mention here that, the present respondents have not filed any appeal challenging the findings those have gone against them and therefore the scope of this appeal is restricted to those points only which have been raised in the present appeal by the claimant. Taking into consideration this aspect, following points arise for determination, findings and reasons for the same are as follows ;

- A) Whether 35 % physical disability of the claimant had resulted in 100 % loss of income to him ?
- B) Whether the learned Tribunal was justified in holding claimant negligent to the extent of 50 % ?

REASONS

AS TO POINT 'A' :

8. In order to prove the disability the claimant had examined CW.3 Dr. Ajay Maindarkar. When the claimant had gone for assessment of disability, he found that there were restrictions to the movement of left wrist, flection 20 % and extension 30 %. The right

hip examination, gave the result that 20 % of movements were restricted and flection was 30 %. This was the examination that was done earlier but then again when the claimant visited his hospital on 30-09-2009, when he noticed that the range of movement was same, he assessed the disability for wrist at 15 % and for hip 20 %, and therefore, issued permanent disability to the extent of 35 %. In his cross-examination except denial there is nothing. However, it is to be noted that, the expert has not given opinion that the claimant cannot perform all the activities which he would have performed in the past i.e. prior to accident. The cross-examination of the claimant is also important. He has stated that, he has not filed any document showing that his LIC business during last five years or three years, that is just prior to his deposition but after accident. His licence to do business of LIC is still in force. He has not approached LIC requesting that his licence to be cancelled as he has suffered 35 % disability. In clear terms he has agreed that, he is still doing the business of LIC. Same is the case as regards agriculture, if at all he had any income from the same. This statement is made for the reason that, he has not produced 7/12 extract of his lands but in his cross-examination it has come that he has agricultural land admeasuring 8 Acres 33 Gunthas, Gut No.89 at village Bhansali. When there is no documentary evidence to show loss though the documents were produced to show income; then, it

cannot be stated that the said physical disability of 35 % would have resulted in 100 % loss of income for the applicant. The learned Tribunal was justified in not holding the applicant entitled to get loss of income @ 100 %. Therefore, point 'A' is answered in the negative.

AS TO POINT 'B' :

9. The learned Tribunal has held that, since the accident had taken place in the middle of the road, the claimant was also responsible to the extent of 50 %. In order to arrive at the said conclusion, the Tribunal has taken note of cross-examination of CW.1 Arvind Hire. It was clearly asked to him as to whether he had told the fact that he was driving his car from the extreme left side of his road; he had given answer in the affirmative but after he was shown the certified copy of the statement made by him before police, he accepted that there is no mention about the said fact that he was proceeding from left side of his road. Another fact to be noted is that, though the certified copy of the panchanama has been produced at Exhibit 28, no map is attached to the same. The FIR on which even the claimant is relying was filed by police officer, Certified copy of the same at Exhibit 26, clearly shows that the informant with two panchas went to the spot and found that the spot is in the middle of the road. Claimant had no enmity with police. He had not taken any efforts to get the said situation corrected in the

police papers. Except the bare words now he is making in his petition and examination-in-chief, there is nothing on record to show that he was proceeding from left side of his road. Taking into consideration this fact, the learned Tribunal was justified in coming to the conclusion that the claimant has contributed to the accident.

10. The learned advocate appearing for the appellant has relied on, *Usha Rajkhowa and Ors. Vs. M/s. Paramount Industries and Ors.*, reported in *AIR 2009 Supreme Court 1951*, wherein it was held that,

“When there was no evidence that there was any failure on the part of the car driver to take any particular care, finding that accident was result of contributory negligence on the part of the car driver is improper.”

Similar view was taken in, *Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and others*, reported in *AIR 2002 Supreme Court 2864*, and in, *Smt. Sarla Dixit and Another Vs. Balwant Yadav and Others*, reported in *AIR 1996 Supreme Court 1274*. It is to be noted from these decisions by Hon'ble Apex Court that, on the basis of the evidence in those matters, wherein there was no evidence regarding contributory negligence, the said decision was taken. However, in this case, the police papers on which the claimant himself is relying, gives a picture that the accident had taken place in the middle of the road and he never objected to those

documents. The ratio in above said authorities is not applicable to the facts of the present case. Point 'B' is therefore answered in the affirmative.

11. There is no merit in the present appeal. All the facts and the points involved in the matter were considered properly by the Tribunal and therefore no interference is required in this appeal. Hence, the appeal stands dismissed. No order as to costs. Decree be drawn accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.