

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL FROM ORDER NO.38 OF 2016

Manuel Joseph Fernandes @ Joseph Joaquim Fernandes, Driver, 36 years of age, r/o. Building No.1, 2nd floor, Madkaikar Classic, Opposite St. Francis Xavier Residency, Phase No.1, Old-Goa.

... Appellants

V e r s u s

1. Mr. Arvind Baburao Limberkar,
Son of Late Mr. Baburao Limbekar,
Service, married, major of age, r/o
F-2 Anup Apartment, Bhind SRS
Computers, Shantinagar, Ponda-
Goa.
2. Mr. Vinod Kanta Naik
Son of Mr. Kanta Naik, Major of
age, driver, R/o. House No.599,
Usgao, Ponda, Goa.
[Deleted]
3. Sant. Ujwala Vishwas Naik, Wife
of Mr. Vishwas Naik, Major of age,
Business, r/o. House no.392,
Takwada, Usgao, Goa. [Deleted]
4. United India Insurance Co. Ltd.
Branch Office, Ponda, Ponda-Goa.

5. Miss. Pritum Prakash Borkar, D/o.
Mr.Prakash Borkar, Major of age,
r/o House No.134, Talewada,
Bethoda, Ponda-Goa.
6. National Insurance Co.Ltd. Ponda
Branch, Ponda-Goa. ... Respondents

Mr. Sahish Mahambrey, Advocate for the Appellant.

Mr. Milton Marcel, Advocate for the Respondent no.1.

Mr. Suraj Naik, Advocate for the Respondent no.4.

Mr. P. Sawant, Advocate for the Respondent no.5.

Ms. Yadika Mandrekar, Advocate for the Respondent no.6.

CORAM : C. V. BHADANG, J.

Reserved for Judgment on: 29th August, 2019.

Judgment Pronounced on : 22nd November, 2019.

JUDGMENT

1. The challenge in this appeal is to the order dated 07.06.2016 passed by the Motor Accident Claims Tribunal at Panaji, (Tribunal, for short) in Misc. Civil Application No.16 of 2016 in Claim Petition No. 56 of 2008. By the impugned order,

the learned Tribunal has refused to condone the delay in filing the application for setting aside an exparte award dated 11.07.2014 in Claim Petition No.56 of 2008.

2. The brief facts necessary for the disposal of the appeal may be stated thus :

The first respondent, (original claimant), filed Claim Petition No. 56 of 2008 against the appellant (the original respondent no.4) and others claiming a compensation of ₹15,00,000/- on account of the permanent disability suffered in a vehicular accident which occurred on 11.07.2007. At the time of the accident, the first respondent was travelling as a pillion rider on the motorcycle driven by the appellant, bearing registration no.GA-01-K-6768. The respondent no.6 is the insurer of the said motorcycle which was involved in the accident with a mini bus bearing registration no. GA-01-W-4869.

3. The Tribunal by an award dated 11.07.2014, granted a compensation of Rs.11,45,000/- along with interest as against the appellant and the respondent no.5, who is the owner of the two wheeler. The respondent no.6-insurer of the motorcycle has been exonerated. The said award has been passed exparte against the appellant.

4. According to the appellant, he was never served of a summons in the Claim Petition and thus the first respondent has obtained the exparte award without serving the appellant. It is contended that the notice in this execution proceedings was served on 14.04.2015. It is contended that the appellant approached Advocate Pavithran, who called the appellant in his office on 14.04.2015 and he advised that the reply filed in the Execution Application would be sufficient to deal with the exparte judgment and there is no need to file any other proceedings challenging the said award. It is contended that the appellant bonafidely believed in the advice of Advocate Pavithran

and did not take any immediate steps in challenging the award. However, eventually, the application for setting aside the exparte award was filed along with an application for condonation of delay on 14.03.2016. It is the specific case made out by the appellant that counted from the date of knowledge i.e. 14.04.2015, the delay is of 299 days.

5. The first respondent filed his reply and opposed the application, claiming that the delay is of more than 2723 days. The first respondent also pointed out that the roznama dated 07.10.2008 in Claim Petition No. 56 of 2008 shows that the appellant (the respondent no.4) was present in person before the Tribunal. It is submitted that, however, on account of subsequent absence, steps were taken to serve him by registered post AD which summons was returned as not claimed, which was treated as a good service. It was contended that the application was not supported by an affidavit of the concerned Advocate and,

therefore, there is no case made out for condonation of delay or for setting aside the exparte award.

6. The learned Tribunal by the impugned order, refused to condone the delay. Hence, this petition.

7. I have heard the learned Counsel for the parties and perused record.

8. Mr. Mahambrey, the leaned Counsel for the appellant has strenuously urged that the roznama dated 07.10.2008 showing the personal presence of the appellant is incorrect. It is submitted that had the appellant been present on that day, there would not have been any occasion for the appellant to take further steps for service of the appellant by registered post AD or by regular mode. The learned Counsel has taken me through the various roznamas, namely dated 20.04.2009 (D-21) which notice, according to the learned Counsel, was issued on the Ponda address. It is submitted that even the subsequent roznamas did not indicate that the

appellant was served. It is thus submitted that the roznama dated 12.10.2009 which records that the appellant was served on the basis of the notice (exhibit D-29) which was sent by registered post AD and was returned unclaimed, cannot be held to be good service. The learned Counsel has also referred to the copy of the driving licence of the appellant which shows the address of the appellant at Madkaikar Classic, Old Goa, Tiswadi, Goa. It is submitted that thus, the appellant could not have been served on the address as mentioned in the title clause of the Claim Petition which is at Pequeno, Mungul, Margao, Goa. This part of the argument pertains to the absence of the appellant before the Claims Tribunal during the pendency of the Claim Petition.

9. Insofar as the delay after the receipt of notice in the Execution Application on 14.04.2015 is concerned, that is solely based on the advice by the concerned Advocate. It is contended that the appellant was advised that filing of reply in the Execution

Application is sufficient and there is no need to challenge the award.

10. The learned Counsel for the first respondent has supported the impugned order. It is submitted that the present issue is only pertaining to the delay in filing the application for setting aside exparte award and, therefore, it is necessary not to go into the circumstances which led to the passing of the exparte award. The learned Counsel pointed out that the appellant has filed a false affidavit about the alleged advice given by the concerned Advocate and, therefore, appropriate costs need to be imposed on the appellant. For this, reliance is placed on the decision of the Supreme Court in the case of **Sciemed Overseas Inc. vs. BOC India Limited & Ors. (2016) 3 SCC 70**. Learned Counsel submitted that even otherwise, no exception can be taken to the record of the roznama dated 07.10.2008 which records the presence of the appellant in person.

11. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

12. As rightly submitted on behalf of the first respondent, the issue in the present appeal is only as regards the condonation of delay in filing the application for setting aside the exparte award. Even, according to the appellant, he came to know of the passing of the exparte award somewhere on 14.04.2015 on receipt of the notice in the execution case. The application for setting aside the exparte award along with application for condonation of delay is filed on 14.03.2016. This part of the delay is explained on the specious ground of the alleged advice by Advocate Shri Pavithran. It is contended that the appellant was advised that filing of the reply in the execution application would be sufficient and there is no need to challenge the award separately. In my considered view, such an omnibus explanation cannot be accepted. Although in an appropriate case, the lapse of the Advocate cannot act to

the prejudice of the party, this is not a case where the explanation as put forth can be accepted as being probable. There is a gross delay of 299 days (computed from the admitted date of knowledge being 14.04.2015), which cannot be condoned without proper/acceptable explanation.

13. The Supreme Court in the case of **Esha Bhattacharjee vs Managing Committee of Raghunathpur Nafar Academy, (2013) 12 SCC 649**, has inter alia held that there is a distinction between a delay of short duration and the delay of gross nature. In the latter case, a stricter approach is warranted. It is necessary to note that the first respondent is trying to get the compensation in respect of an accident which is of the year 2007. There are instances where the private respondents being the owners/drivers of the offending vehicle do not seriously contest the Claim Petition believing that the Insurance Company would be saddled with the liability. It is only when the insurer is exonerated that there are attempts made to challenge the award belatedly. This

ultimately results into delay in payment of the compensation to the injured or the dependants of a person in a death case.

14. As has been rightly submitted by the learned Counsel for the first respondent, the circumstances in which the impugned exparte award was passed and whether the appellant had a notice of the pendency of the Claim Petition or whether he was properly served, would have strictly fallen for consideration while considering the main application for setting aside the exparte award after the condonation of delay. However, considering the fact that the parties have addressed the Court on this aspect also I may briefly examine the same. In the first place, the roznama dated 07.10.2008 records that the appellant was personally present. Normally, such record is sacrosanct unless contested or controverted before the same Court at the earliest. That apart, the learned Tribunal on the basis of the roznama dated 05.09.2009 and 13.10.2009, has found that the notice issued to the appellant by registered post AD was returned as unclaimed

and, therefore, was considered as sufficient service. Although, it is now sought to be contended that the appellant was not staying at the same address and was residing at a different address on the basis of the copy of the driving license, the record does not disclose that this aspect was brought on record before the Tribunal. Quite to the contrary, in para 6 of the impugned order, the learned Tribunal has noted that there is nothing mentioned in the application that the appellant was not residing on the said address (i.e. as mentioned in the cause title) at the relevant time. The Tribunal has noted that this aspect came only by way of an affidavit filed at exhibit 4 in which it is admitted that the appellant was residing on the said address, and subsequently, he left the said place. The Tribunal has found that when the notice by registered post AD was forwarded on the said registered address and was returned as unclaimed, it is for the party to demonstrate that no such notice was delivered on that address or that he was not residing on the said address. The finding so recorded, on the basis of facts obtaining on the record, to my

mind, does not suffer from any infirmity so as to require interference. Looked from either angle, no case for interference is made out.

15. The appeal is without any merit and is dismissed with no order as to costs.

C. V. BHADANG, J.

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