

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 858 OF 2010

Balu s/o. Limbaji alias Limraj Bhosale,
 Age 29 years, Occu. Nil, R/o. Rui,
 Now present at village Undari,
 Taluka Kaij, District Beed.

.. Appellant
 (Original Claimant)

Versus

The Divisional Manager,
 M.S.R.T.C., Divisional Office,
 Beed.

.. Respondent
 (Original Respondent)

...

Mr. Swapnil S. Dargad, Advocate for Appellant
 Mr. D. S. Bagul, Advocate for Respondent

...

CORAM : ANIL S. KILOR, J.
DATE : 7th APRIL, 2021

ORAL JUDGMENT :-

This is an appeal filed by the claimant challenging the Judgment and Order dated 15th January, 2009 passed by the Member, Motor Accident Claims Tribunal, Ambejogai, District Beed, in Motor Accident Claim Petition No. 23 of 2007, rejecting the claim on the ground that the claimant has failed to establish and prove that the accident in question occurred due to negligence and rash driving of the driver of Maharashtra State Transport Corporation (MSRTC) Bus.

2. I have heard the learned counsels for the respective parties.

3. The brief facts of the present case, are as follows -

3.1 It is the case of the appellant-claimant that on 09-04-2008 at about 5.10 a.m., when the appellant along with Jagannath Pawar were proceeding on a motorcycle bearing No. MVG-2815 from village Undari to Shikhar Shinganapur and when the motorcycle reached in the Ghat area near Shikhar Shinganapur, one ST Bus bearing No. MH-20-D-6046 came from backside of the appellant and gave dash to the motorcycle, due to which, the accident occurred and appellant sustained serious injuries. The appellant was hospitalized and he incurred medical expenses of Rs. 50,000/-.

3.2 It is the further case of the appellant that he sustained permanent disability in the said accident. Accordingly, he filed a claim petition under Section 166 of the Motor Vehicles Act, and though, according to him, he is entitled to receive compensation to the tune of Rs.31,18,000/-, he restricted his claim to Rs.4,00,000/-.

3.3 The respondent- MSRTC filed its reply to the Claim Petition and denied the case of claimant that the accident occurred due to negligence and rash driving of driver of the S.T. Bus. It is the case of the respondent that the motorcycle had given dash to the S.T. Bus and not the S.T. Bus.

3.4 The claimant has examined himself and two more witnesses including Doctor. Whereas, the respondent examined driver of the S.T. Bus.

3.5 The learned Tribunal, after scrutinizing the oral as well as documentary evidence and more particularly the spot panchnama, arrived at the conclusion that the claimant failed to establish and prove the accident occurred due to negligence and rash driving of driver of the S.T. Bus and, as such, the claim petition was rejected.

3.6 The learned Tribunal has also held against the claimant on the ground that the person who was driving the motorcycle and the insurance company were not made party to the claim petition.

4. Mr. Dargad, learned counsel appearing for the claimant submits that the impugned Judgment and Order dated 15-01-2009 passed by the learned Tribunal failed to consider and appreciate the oral as well as documentary evidence available on record.

4.1 He further submits that there is difference between contributory negligence and composite negligence and the present case is of composite negligence, and therefore, even if it is held that ST Bus driver and the person, who was driving motorcycle on which the claimant travelling as a pillion rider, were negligent, the claimant can file claim petition against all the persons, who are negligent or any one of such persons. And, in this matter, since the claim petition was filed against the respondent - MSRTC and not against the driver and owner of the motorcycle, the claim is maintainable.

4.2 The learned counsel for the claimant has placed reliance on the following Judgments -

- (1) *Sunita and others Versus Rajasthan State Road Transport Corporation and others*¹
- (2) *Mangal Ram Versus Oriental Insurance Company Limited and others*²
- (3) *Dulcina Fernandes and others Versus Joaquim Xavier Cruz and another*³
- (4) *Khenyei Versus New India Assurance Company Limited and others*⁴

4.3 It is submitted that in the case of accident claim, a strict rule of evidence is not applicable, but the claimant has to prove and establish his case on the basis of preponderance of probabilities. He, therefore, submits that the impugned Judgment and Order is not sustainable in the eyes of law and, accordingly, he prays for setting aside the Judgment and Order of the learned Tribunal and award the compensation by allowing the present Appeal.

5. On the other hand, Mr. Bagul, learned counsel appearing for the respondent - MSRTC supports the impugned Judgment and Order and states that the learned Tribunal has rightly relied upon the spot panchnama from where one can easily arrive at the conclusion that

1 (2020) 13 Supreme Court Cases 486

2 (2018) 5 Supreme Court Cases 656

3 (2013) 10 Supreme Court Cases 646

4 2015 (9) Supreme Court Cases 273

because the motorcycle was damaged from the front side and not from the backside and at the same time the ST Bus was damaged from the backside and not from the front side the motorcycle gave dash to ST Bus and not the ST Bus gave dash to the motorcycle.

5.1 Mr. Bagul, learned counsel appearing for the respondent further argued that it is necessary for the claimant while claiming the compensation under Section 166 of the Motor Vehicles Act, 1988 to prove and establish negligence and as the claimants failed to prove the fact of negligence, no claim can be entertained, and therefore, the Tribunal has rightly rejected the claim.

5.2 Mr. Bagul, learned counsel appearing for the respondent-claimant further argues that even otherwise claim petition is not maintainable without making the driver of the motorcycle as a party and also insurance company to the claim petition. In support of his contention, he has placed reliance on the following Judgments -

- (1) *United India Insurance Co. Ltd. Versus Ratan Popat Patil and another*⁵
- (2) *New India Insurance Company Limited Versus Suman Bhaskar Pawar and others*⁶
- (3) *New India Insurance Company Limited Versus Sitaram Devidayal Jaiswal and others*⁷

5 2011 (2) Bom. C. R. 711

6 2010 (1) Bom. C. R. 319

7 2012 (5) Bom. C. R. 285

(4) *New India Insurance Company Limited Versus Sitaram Devidayal Jaiswal and others*⁸

6. To consider the rival contentions of both the parties, I have perused the record and Judgment and Order of the learned Tribunal.

7. The Hon'ble Supreme Court of India in the case of ***Sunita and others Vs. Rajasthan State Road Transport Corporation and others***⁹, after considering various judgments of the Apex Court has held thus,

“22. It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident has taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases.”

8. The judgments cited by the learned counsel for the appellant in the case of ***Mangal Ram and Dulcina Fernandes*** are on the similar lines and relied upon by the Apex Court in the above referred case of ***Sunita and others***.

9. On the above referred touchstone, I revert back to the facts of the present case. There is no dispute that the S.T. bus is involved in the accident. As regards the negligence, the learned Tribunal has observed that the driver of the S.T. bus was not negligent, by relying upon the oral

8 2012 (5) Bom. C. R. 285

9 2012 (5) Bom. C. R. 285

evidence of the driver who in his deposition put forth a story that one motorcyclist came from his backside in a high and excessive speed in rash and negligent manner and without observing whether the road is clear to overtake the bus, he tried to overtake the bus. At the same time, one *tumtum* vehicle came from opposite direction and there were pits on the road. Hence, the driver of the motorcycle lost his control on the motorcycle and in feared condition, brushed his motorcycle to the rear wheel tyre of the S.T. bus on the driver side and fell on the road. The tyre of the motorcycle came under the tyre of the S.T. bus and the motorcycle fell on the road.

10. If the said narration of this witness is taken as it is and considered in totality, the narration in such a detail is not possible from any driver who is driving a heavy vehicle like S.T. bus, particularly in ghat and in a situation when the motorcycle is coming from backside. The narration in such a detailed manner is possible only when the driver of the S.T. bus was continuously watching the motorcyclist. Thus, the said story appears to be improbable.

11. In the FIR and in the oral evidence of the claimant no. 1, it has come on the record that the S.T. bus gave dash to the motorcycle. No contrary evidence has been brought by the Insurance Company except the evidence of driver of the S.T. bus which cannot be relied upon for the above referred reasons. Having held so, I am of the considered view that

the learned Tribunal has committed error in holding that the driver of the bus was not negligent.

12. Furthermore, the spot panchanama in this case is not sufficient to arrive at a conclusion that the S.T. bus driver was not negligent but the deceased was negligent. For the purposes to decide negligence, material more than spot panchanama is necessary and, therefore, I do not find spot panchanama in this case sufficient to arrive at a conclusion that the S.T. bus driver was not negligent.

13. In the circumstances, looking at the oral evidence of the claimant no. 1 and the FIR, it is safe to hold that the driver of the S.T. bus was negligent.

14. In the case of *Khenyei Versus New India Assurance Company Limited and others*, the Hon'ble Supreme Court of India has held thus,

“15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. This Court in *T.O. Anthony v. Karvarnan*¹⁷ has held that in case of contributory negligence, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The

relevant portion is extracted hereunder: (SCC pp. 750-51, paras 6-7)

“6. ‘Composite negligence’ refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of ‘composite negligence’ will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error.”

The decision in *T.O. Anthony v. Karvarnan*¹⁷ has been relied upon in *A.P. SRTC v. K. Hemlatha*¹⁸.

15. In the light of above referred well settled position of law, if the oral evidence of the driver of the S.T. bus is accepted as probable and the oral evidence of claimant along with documentary evidence available on record, is considered, at the most, there may be a case of composite negligence and in that case, it will be held that the driver of the S.T. bus and driver of the motorcycle both were negligent for the occurrence of the accident. Even in that case, the Claim Petition against all the persons who are negligent or any one of such person who is negligent, is maintainable.

16. In the circumstances, the contention of the learned counsel for the respondent that in absence of driver of the motorcycle and Insurance Company, as party to the Claim Petition is not maintainable, is rejected and it is held that the Claim Petition is maintainable.

17. The judgments cited by the learned counsel for the respondent are of no help to the respondent in view of the fact that the said judgments are distinguishable on facts.

18. Having held as above, I am of the considered view that the appellant is entitled for compensation in this matter against the respondents. Accordingly, I hold that the Judgment and Order passed by the learned Tribunal is erroneous and not sustainable in the eyes of law.

19. In the above facts and circumstances, it will be appropriate that the learned Tribunal shall determine the amount of compensation and for that it would be in the interest of both parties, to remit the matter back to the learned Tribunal only for the said purpose.

20. Accordingly, I pass the following order :-

ORDER

- I] The first appeal is partly allowed.
- II] The Judgment and Order dated 15th January, 2009 passed by the Member, Motor Accident Claims Tribunal, Ambejogai, District Beed, in Motor Accident Claim Petition No. 23 of 2007, is set-aside.
- III] The matter is remanded back to the Tribunal for a limited purpose to determine the amount of compensation on the basis of oral as well as documentary evidence available on record, which shall be determined within a period of three months from today.
- IV] The parties shall appear before the Tribunal on 30th April, 2021.
- V] The Registry is directed to send back the record and proceedings to the Tribunal if possible before 30th April, 2021 or at the earliest.
- VI] No order as to costs.

(ANIL S. KILOR)
JUDGE

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