

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.4 OF 2016

Mr. Azam Anwar Harrihar
alias Azam Anwar Hariar,
aged 29 years, service
Resident of H.No.66, Pajifond,
Margao, Salcete Goa.

...Appellant

Versus

1. Mr. Gunaji Shetgaonkar
aged 41 years, son of Babu
Shetgaonkar, driver,
r/o H.No.222 Bhatiwada,
Morjim, Pernem Goa.

2. The Kadamba Transport Corporation Ltd.,
Through its Managing Director,
Porvorim, Bardez Goa.

3. The New India Assurance Company,
with office at Ponda Goa.

...Respondents

Mr. Tarshish Pereira, Advocate for the Appellant.

Mr. Ajit R. Kantak and Mr. Raunak Kantak, Advocates for
Respondent Nos. 1 and 2.

Mr. P. Shirodkar, Advocate for Respondent No.3.

CORAM: M. S. SONAK, J.

Date: 30th September 2021

ORAL JUDGMENT

1. Heard Mr. Pereira, learned counsel for the Appellant, Mr.
Raunak Kantak along with Mr. A. R. Kantak, learned counsel for

Respondent Nos.1 and 2, and Mr. P. Shirodkar learned counsel for Respondent No.3.

2. This appeal is directed against the judgment and award dated 29.09.2015 made by the Motor Accident Claims Tribunal, Panaji (Tribunal) dismissing the claim of the Appellant – claimant on the ground that the Appellant had failed to prove that the accident in which he suffered injuries was caused on account of rash and negligent driving of the bus by the driver of the Kadamba State Transport Corporation – Respondent No.2.

3. Mr. Pereira learned counsel for the Appellant submits that the sketch attached to the panchanama on which the Tribunal has placed reliance does not depict the correct position of what may have transpired at the site. He submits that the sketch seems to suggest that the appellant's motorcycle dashed the bus at the spot just beyond the front wheel. He submits that this is quite inconceivable and impossible. He submits that the evidence on record does suggest rashness and negligence on the part of the driver of the bus. He submits that in any case since the bus is a bigger and heavier vehicle the duty of care upon its driver was much greater than that of the Appellant. He submits that the Appellant was prosecuted for rash and negligent driving but the prosecuted ended in acquittal and no sufficient credence was given to this by the Tribunal. He submits that even the compensation determined by the Tribunal is on a conservative basis and the same deserves to be enhanced. For all these reasons, Mr. Pereira submits that the

impugned award may be set aside and the Appellant's claim petition be allowed.

4. Mr. Kantak defends the impugned award based on the reasoning reflected therein. He points out that the evidence on record very clearly establishes that it is the Appellant who was negligent while driving his motorcycle and was solely responsible for the accident. He points out that the evidence on record also makes it clear that the Appellant or his work has not suffered in the least after the accident. He submits that the acquittal in a criminal case is quite irrelevant because there the test applied was quite different from the test which is required to be applied in civil matters. He, therefore, submits that this appeal may be dismissed.

5. Mr. Shirodkar submits that even before the Tribunal the Respondent No.3 had been dropped after it was pointed out that the bus was never insured with Respondent No.3 -Insurance Company. He, therefore, submits that the Appellant was not justified in impleading the Insurance Company as a party in this appeal without even seeking leave of this Court, and in any case, no relief whatsoever can be granted as against the Respondent No.3.

6. The rival contentions now fall for determination.

7. The first issue to be determined in this case is whether the accident in which the Appellant sustained injuries was caused on

account of rash and negligent driving of the driver of KTC bus or whether the Appellant was himself responsible for the accident.

8. In the claim petition, there are hardly any pleadings explaining how the accident took place or explaining the basis why the driver of the KTC bus was rash and negligent while driving the bus thereby causing an accident.

9. The Appellant filed his affidavit in evidence on 12.11.2010 and the only statement on this aspect is to be found in paragraph 21 which reads as follows:

“21. I say that on the day of the accident I was proceeding for my work on my Splendor motorcycle from my residence and when I reached Goa Velha market, a Kadamba Transport Corporation bus bearing Registration No.GA-01/X-0276 driven by Gunaji Shetgaonkar, the Respondent No.1 herein came in a rash and negligent manner and collided with the Splendor motorcycle ridden by me, as a result, I suffered from fractures of my right hand, right leg and other grievous injuries and had to be taken to the Goa Medical College Hospital where I am still undergoing treatment for the injuries sustained. I say that my work involved travelling on a motorcycle as I had to do a lot of trouble shooting/repairs/maintenance of computer systems which work had to be done in places where the computers and the computer systems are installed I cannot do this type of work at present as I cannot ride a two-wheeler due to my disability.”

10. Again, even the aforesaid statements do not explain how the accident was caused and the basis why the driver of the KTC bus should be held negligent. The Appellant has merely recited the conclusion that the driver came in a rash and negligent manner and collided with his motorcycle.

11. The contention now raised in this appeal about the sketch to the panchanama incorrectly depicting the position at the site was neither raised in the pleadings nor raised in the affidavit in evidence.

12. Ordinarily, there can be no variance between the pleadings and proof but in this case, there is neither any pleading nor any evidence to show that the sketch does not depict the position at the site correctly.

13. The panchanama, sketch, and other case papers concerning the prosecution of the Appellant for rash and negligent driving of the motorcycle were produced by the Investigating Officer (AW3) before the Tribunal. This witness has deposed that it is the Appellant who was driving the motorcycle in a rash and negligent manner and that is the reason why he was prosecuted. This witness has also deposed that their investigation did not reveal that the accident was caused due to rash and negligent driving by the driver of the KTC bus. According to me, all such evidence is virtually gone unchallenged.

14. On perusal of the sketch as well, it is quite clear that the bus was on its right side. If the case of the Appellant that the bus came on the wrong side is to be accepted, then, the impact would have been either head-on or at least on the front side of the bus. From the spot of impact, any negligence on the part of the driver of the bus seems extremely improbable. The Tribunal has also taken note of the width of the road at the place of the accident and the slight

curve at the very same position. Based upon all these factors, the Tribunal has quite correctly concluded that the Appellant failed to establish that the accident was caused by the driver of the KTC bus, even by applying the test of preponderance of probability. Rather the Tribunal has held that applying this test, it appears that it is the Appellant who was negligent and caused the accident.

15. The acquittal in the criminal prosecution is not relevant because there the prosecution had to prove the guilt beyond a reasonable doubt. In contrast, the test to be applied before the Tribunal for evaluating the evidence was that of the preponderance of probability only. According to me, no case is made out to interfere with the findings recorded by the Tribunal that the Appellant has failed to establish any rashness and negligence on the part of the driver of the KTC bus.

16. In the absence of Appellant establishing that the driver of the KTC bus was negligent, there is no question of Appellant being entitled to any compensation. Mr. Kantak has pointed out to the admission on the part of the Appellant that even after the accident he has been undertaking his work of computer repairs and maintenance. Mr. Kantak pointed out that even AW4 the Orthopaedic surgeon who was examined in this matter has deposed that the Appellant will have no difficulty while riding a two-wheeler or doing any work of computer repairs or maintenance.

17. Respondent No.3 had already been dropped as a party before the Tribunal, there was no justification for impleading this Respondent in this appeal and that too without seeking leave of this Court.

18. For all the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

M. S. SONAK, J.

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