

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

FIRST APPEAL NO. 40 OF 2011

1. Smt. Rajashree wd/o Maroti Borkar,
Aged : 37 yrs, Occ. Nil
2. Himalaya s/o Maroti borkar,
Aged : 15 yrs, Occ.: Student,
3. Ku. Manjiri d/o Maroti Borkar,
Aged : about 7 yrs, Occ. : Student.

All Appellants No. 1 to 3 are R/o
Gokulnagar, Ward No. 4, Gadchiroli, Tah.
and District Gadchiroli.

.... **APPELLANTS**

// **VERSUS** //

1. Sharad s/o Haridas Jambhulkar,
aged 34 years, Occ. - Driver,
R/o Samrat Ward, Armori, Tq.
Armori, Distt. Gadchiroli.
(Amendment carried as per Court's
order dated 16.09.2010)
2. Maharashtra State Road Transport
Corporation through Manager, S.T.
Bus Depot, Chandrapur, Tah. And
District Chandrapur.

.... **RESPONDENTS**

Shri P.S. Khubalkar, Advocate for Appellants.

Respondent no. 1. is served.

Shri R.S. Charpe, Advocate for Respondent no.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 25/02/2021.

JUDGMENT :

Heard Counsel for the respective parties.

2. The Appellant herein has challenged the judgment and award dated 02.01.2009 in M.A.C.P No.23 of 2007 whereby learned Member of Motor Accident Claims Tribunal, Gadchiroli has dismissed the petition under Section 166 of the Motor Vehicles Act.

3. The Appellants were the Claimants in the Claim Petition filed under Section 166 of the Motor Vehicles Act, 1988 (for short 'the M.V. Act') and shall be hereinafter referred to as 'the Claimants'.

4. The Claimant no.1 is the Widow and Claimant nos. 2 and 3 are the children of deceased Maroti Borkar who expired on 12.12.2006 due to the injuries sustained in a motor vehicular accident. It was the case of the Claimants that on 12.12.2006 while Maroti Borkar was proceeding from Sironcha, a S.T. Bus bearing registration no. MH-31-AP-9644 dashed against his motorcycle bearing registration no. MH-33-D-3413. Said Maroti Borkar expired on the spot due to injuries sustained in the said accident. The Claimant averred that the deceased was 40 years of age. He was a teacher, earning Rs.13,500/- per month.

The Claimants claimed that the accident was caused solely due to rash and negligent driving of the driver of S.T. Bus. The Claimants therefore, filed an application under Section 166 of the M.V. Act claiming total compensation of Rs.22,86,666/-, which was subsequently restricted to Rs.1,00,000/- by reserving their right to amend the petition.

5. The Respondent nos.1 and 2 claimed that the deceased had driven the motorcycle at a high speed and that the accident was caused due to his negligence.

6. The Tribunal after considering the evidence adduced by the Claimant as well as the Respondents recorded a finding that the accident was caused due to rash and negligent driving on the part of the deceased. On the issue of quantum of compensation, the Tribunal held that the Claimants have proved that the deceased was earning Rs.13,500/- per month and further held that the Claimants have suffered loss of more than Rs.1,00,000/- on account of death of Maroti Borkar. The Tribunal however, held that the Respondents are not liable to pay the said amount to the Claimants in view of failure to prove the issue of negligence. Being aggrieved by this judgment, the Claimants have filed this appeal under Section 173 of the M.V. Act.

7. Shri P.S. Khubalkar, learned Counsel for the Appellant/Claimants submits that the evidence of P.W.2, who is an independent eye witness, amply proves that the accident was caused due to rash and negligent driving by the driver of the S.T. Bus. He submits that the Tribunal was not justified in discarding the evidence of this witness on the basis of the previous statement recorded by the Officer of Maharashtra State Road Transport Corporation (M.S.R.T.C.), without complying with provision under Section 145 of the Indian Evidence Act. He submits that though the Respondent no.1 had lodged the F.I.R., the Investigating Officer after investigating the case, had filed a charge-sheet against the Respondent no.1 for driving the vehicle in the rash and negligent manner and thereby causing death of Maroti Borkar. He submits that the deceased Maroti Borkar was a teacher by profession. He was earning Rs.13,500/- per month. The Tribunal has not considered the loss of dependency and has not granted compensation on other conventional heads. He submits that the impugned judgment reflects total non-application of mind and cannot be sustained.

8. Learned Counsel for the Respondents states that P.W.2 had given a statement before the Officer of M.S.R.T.C. wherein he had attributed negligence to the deceased. He had admitted that the said

statement is in his handwriting and was signed by him. He further submit that the Tribunal has not committed any error in relying upon the said statement and holding that the accident was caused solely due to rash and negligent driving on the part of the deceased. He further submits that the Panchanama clearly indicates that the Bus was on the correct side of the road and this fact supports the contention of the Respondent that the deceased was on the wrong side of the road. He submits that even if it is held that the accident was not caused solely due to rash and negligent driving on the part of the deceased, from the material on record it can be gathered that deceased was also responsible for the accident and as such it would be the case of contributory negligence.

9. He submits that the Tribunal has not given findings on the other issues. Relying upon the decision of learned Single Judge of this Court in the case of ***Sunita Ashok Balsaraf and ors. vs. Divisional Manager, New India Assurance Company Ltd. And ors. 2019 DGLS (Bom.) 478***, he submits that this is a fit case for remand. He is also relied upon the decision of the Apex Court in the case of ***T.O. Anthony vs. Karvaranan and ors. 2008 DGLS (SC) 147*** to contend that when two vehicles are involved in an accident, and the drivers of both the vehicles allege negligence against each other, it becomes necessary to

consider whether the injured or the deceased was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his contributory negligence. He submits that the evidence on record would indicate that the deceased was also negligent and hence the liability to pay the compensation cannot be entirely fastened on the Respondents. He further submit that the amount claimed by the Claimants is exorbitant and that they are not entitled to receive the same.

10. In rebuttal, learned Counsel for the Appellant submits that though the Respondents had pleaded that the accident was caused solely due to rash and negligent driving of the deceased, they have not adduced any evidence to prove that the deceased was in any manner responsible for the accident. He has relied upon the decision of the Apex Court in the case of *Pramodkumar Rasikbhai Jhaveri vs. Karmasey Kunvargi Tak and ors. (2002) 6 SCC 455* to contend that the question of contributory negligence arises only when there has been some act or omissions on the part of the Claimant/deceased which has materially contributed to the accident. He has also relied upon the decision of Apex court in *Meera Devi and anr. vs. Himachal Pradesh Road Transport Corporation and ors. (2014) 4 SCC 511* to contend that contributory negligence must be proved with cogent evidence. He

submits that in the instant case, the Respondents have failed to prove the case of contributory negligence.

11. I have perused the record and considered the submissions advanced by the learned Counsel for the respective parties. It is not in dispute that there was collision between the motorcycle No. MH-33-D-3413 driven by the deceased and the S.T. Bus no. MH-31-AP-9644 driven by the Respondent no.2. It is also not in dispute that the deceased Maroti Borkar had expired as a result of the injuries sustained in the accident. The questions for consideration are :

- i) *Whether the accident was caused solely due to rash and negligent driving by the driver of the S.T. Bus or Whether it was a case of contributory negligence.*

12. In Pramodkumar (supra) the Hon'ble Apex Court has held that the question of contributory negligence arises when there has been some act or omission on the Claimant's part which has materially contributed to the damaged caused and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of legal duty to care, but when used in the expression 'contributory negligence' it does not mean breach of any duty. It only

means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'.

13. In the instant case, the evidence on record indicates that the S.T. Bus was proceeding from Allapalli to Sironcha whereas the deceased was proceeding on his motorcycle from Sironcha to Allapalli. There was collision between both these vehicles at Nilamgudam. C.W.2 Baburao Shedmake has deposed that the motorcycle was on the correct side of the road, whereas the Bus was driven at a high speed and was on the wrong side of the road. He has deposed that the accident was caused due to rash and negligent driving of Respondent no.1. The evidence of this witness cannot be discarded on the basis of the statement recorded by the Officer of M.S.R.T.C., since he was not confronted with the previous statement which was in variance with his deposition before the Court. Hence, none of the contradictions relied upon, can be taken note of in view of the specific bar contained under Section 145 of the Indian Evidence Act. Be that as it may, the evidence of C.W.2 reveals that the accident was caused due to rash and negligent driving of the driver of the Bus whereas the Respondent no.1 Driver of the bus, has deposed that he had slowed down the vehicle to allow the cattle to cross the road. He claims that on seeing the motorcycle

coming from the opposite direction at a high speed, he stopped the vehicle on the left side of the road, despite which the motorcycle dashed against the radiator of the bus. He claims that the accident was caused solely due to rash and negligent driving of the rider of the motorcycle. It is therefore necessary to consider the Panchanama at Exhibit 26, which depicts the accidental spot.

14. A perusal of the Spot Panchanama, genuineness of which is not in dispute, reveals that Sironcha-Allapalli road runs from North to South direction. The bus was proceedings towards Sironcha which is towards North, whereas the motorcycle was proceedings towards Allapalli. The Panchanama reveals that the road at the place of the accident, was 18 feet wide with slope towards East-West direction. The S.T. Bus was on the left hand side of the road with the driver's side wheels on the tar road and other two wheels below the road. The dead body was lying ahead of the bus at a distance of about 5 feet from the bus. The motorcycle was extensively damaged. One Chappal/Slipper was found in between the rear wheels of the Bus, whereas the another Slipper had fallen towards the Western side of the road at a distance about 28 feet from the dead body. The Panchanama further records that there were brake marks of the bus to the extent of 40 feet, on the left side of the road.

15. The Panchanama does not show the exact spot of the accident, but only shows the position of the bus after the accident. The Apex court in the case of Jiju Kuruvila v. Kunjamma Moha AIR 2013 SC 2293 has held thus :

“24. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.

16. Hence, no negligence can be attributed to the deceased solely on the ground that the bus was stationed on the extreme left side of the bus. Nevertheless, the fact that there were brake marks of the bus to the extent of 40 feet, on the left side of the road indicates that the bus was on the correct side of the road. The brake marks falsify the contention of the Respondent no.1 that he had slowed down the vehicle and that the motorcycle had dashed a stationed vehicle. On the contrary brake marks to the extent of 40 feet is an indication of the fact that the bus was at a fast speed and that the driver had tried to stop the

bus to prevent the accident. The road at the place of the accident was only 18 feet wide and driving at a high speed on a narrow road is nothing but a rash and negligent act. It is also to be noted that the motorcycle had dashed against the bus which was on the correct side of the road. The accident was caused as the deceased, who was the rider to motorcycle was coming from the opposite direction and had gone on the wrong side of the road and had thus contributed to the accident. Hence, I am unable to accept that the accident was caused solely due to rash and negligent driving by the driver of the Bus or by the rider of the motorcycle. Considering the evidence of record as a whole, it is evident that this is case of contributory negligence, which is assessed at 50-50%.

17. As regards the quantum of compensation, it is in evidence that the deceased was drawing salary of Rs.13,500/-. He was paying professional tax of Rs.2,00/- and hence, compensation has to be computed on the basis of salary of Rs.13,300/- per month. Deceased was 40 years of age and was in permanent employment and hence, 30% of actual salary needs to be added to the income of the deceased towards future prospects which works out to Rs.2,07,480/-. Considering the number of dependants and upon deducting 1/3 towards personal expenses and on applying multiplier of 15, loss of

dependency works out to Rs.20,85,174/-. The Claimant no. 1 being the widow and Claimant nos. 2 and 3 being minor children are entitled for compensation of Rs.40,000/- each towards loss of spousal consortium and parental consortium respectively. In addition, Claimants are also entitled for compensation of Rs.30,000/- towards loss of estate and funeral expenses. Thus, total compensation works out to Rs.22,35,174/- upon deducing 50% towards contributory negligence, the Claimants, would be entitled for total compensation of Rs.11,17,587/-.

18. Hence, the following order :

- (a) The Appeal is allowed.
- (b) The impugned judgment is set aside.
- (c) The Claimants are held to be entitled for compensation of Rs.11,17,587/- with interest at the rate of 7% per annum from the date of the petition till final realization.
- (d) The Respondents to deposit the said amount with interest within a period of eight weeks from today.
- (e) The Claimants shall pay the deficit court fee on the enhanced amount.

The Appeal stands disposed of accordingly.

JUDGE

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