

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 48 OF 2019

Katu Dholo Gaonkar,
s/o Dholo Gaonkar,
aged 50 years, (Dt. of Birth 05.11.1965),
Agriculturist,
r/o H.No.264/2,
Nuvem, Shristhal,
Canacona, Goa 403 702

... Appellant

Versus

- 1 Mr Ravi M. Mukhiyer P.,
r/o H.No.231/12,
Collector Nager,
1st St. Anna Nagar,
Weston Extension,
Chennai – 600 101,
(driver of truck bearing No. KA-51
MG-0455)
- 2 Mr C. Sakthivel, son of Chinnaamy,
r/o 21, Near Ayyappa Temple,
Attibel Post, Anekal Taluk,
Bangalore – 562 107,
(owner of truck bearing No.KA-51
MG- 0455)
- 3 United India Insurance Com. Ltd.,
Divisional Office 171800,
146/N, IIInd Floor,
Kumar Complex,
Anna Salai, Main Road,
Tiruchengodu – 637 211,
Namakkal, Tamil Nadu,

Policy No.1718003114P104964925/1,
Valid till 30.09.2015.

... Respondents

Mr Shailesh Redkar, Advocate for the Appellant.
None for the Respondents though served.

CORAM: M. S. SONAK, J.

Reserved on : 8th JUNE 2023

Pronounced on: 13th JUNE 2023

JUDGMENT

1. Heard Mr Redkar, learned counsel for the Appellant.
2. Mr Redkar states that the service is complete in this matter. Despite service, the Respondents have neither been present nor represented.
3. The challenge in this appeal is to the judgment and award dated 19.07.2018 made by the tribunal dismissing the Claim Petition No.44/2016 on the ground that the Appellant had failed to establish that the accident in which the Appellant claims to have suffered injuries was due to negligence of the truck driver. The tribunal also held that the claim petition deserves to be dismissed for non-joinder of necessary parties, i.e. the driver and owner of Bajaj Discover motor cycle bearing No. KA-30-Q-4674 on which the Appellant was riding pillion. The Tribunal has held that there was material suppression on the part of the Appellant.

4. Regarding rashness and negligence, it is rather suspicious that the Appellant should not have disclosed the name of the motorcycle driver when the Appellant rode a pillion on the said motorcycle. The motorcycle driver and owner were neither impleaded as parties nor was the Appellant ready to disclose their names. In the cross-examination, the Appellant only stated that the driver's local name was "Japan"; further, he did not know the motorcycle driver's real name. All this gives an impression that the Appellant was bent upon suppressing all these facts from the tribunal and the Court.

5. However, the question is whether the Appellant could have been non-suited on the ground of suppression or non-joinder of motorcycle driver and owner. Even if this was a case of composite negligence of the motorcycle and truck drivers, the Appellant was entitled to implead only one of the joint tortfeasors. The Appellant's claim could not have been denied on the ground that he had failed to implead other joint tortfeasors where *inter se* liability could always be worked out independently.

6. In *Khenyei Vs New India Assurance Company Limited*¹, the Hon'ble Supreme Court has held that the victim/claimant is entitled to sue any joint tortfeasors or all of them to recover the total compensation. The extent of liability of each of them separately is neither required to be established by the victim/claimant nor required to be determined by Court/Tribunal for payment of compensation.

¹ (2015) 9 SCC 273

Even if only one of the joint tortfeasors is impleaded by the claimant, such tortfeasors would be obliged to make full payment of compensation and then, if necessary, recover the same from other tortfeasors.

7. The Appellant who sustained injuries has deposed in this matter. The Appellant also examined AW2, who claimed to be an eyewitness to the accident. The claimant deposed that an FIR was filed against the truck driver, but he failed to produce such FIR or even examine the police officer who investigated the accident.

8. The Appellant deposed that when he was riding a pillion, a truck of drilling Rigs bearing No. KA-51-MG-0455 came from the opposite direction at a sharp turn when the Appellant was riding a pillion on a motorcycle. He claimed that the truck arrived at a fast speed and rashly and negligently dashed against the motorcycle. As a result, the motorcycle driver and the Appellant fell to the ground and suffered grievous injuries to his right leg.

9. In the cross-examination, the Appellant avoided being candid in the context of the role of the motorcycle driver. He claimed that he did not even know the actual name of the motorcycle driver. However, he claimed that the motorcycle was being driven at a speed of 30 KMPH and denied the suggestion that the bike was at a speed of more than 60 KMPH. He rejected the suggestion that the accident occurred due to the motorcycle driver's rash and negligent driving.

10. One Sanju Naik deposed favouring the Appellant. He claimed to be an eyewitness to the accident. He deposed that as the motorcycle on which the Appellant was riding a pillion reached a sharp curve, a truck came from the opposite direction at a fast speed and negligent manner and gave a dash to the motorcycle. This witness admitted that he acted as a Pancha witness. He admitted that the panchanama was silent about damages to the truck as there were no damages to the truck. He admitted that on the truck's right-hand side, the measurement of the road up to the right edge is 2.5 metres.

11. Mr Sanju Naik, to the question as to why the police had not recorded his statement if he was indeed a witness to the accident, stated that though he has disclosed to the police that he had witnessed the accident, his statement was not recorded by the police instead the police only asked him to act as a pancha witness.

12. Mr Redkar, learned counsel for the Appellant submitted that award was vitiated by an error apparent on the face of the record because the tribunal incorrectly recorded that there was about 2.5 metres portion of the road available from the right tyre of the truck towards the right edge of the tar road. By reference to the sketch, he submitted that the portion available was only $\frac{1}{2}$ metres and not 2.5 metres as held by the tribunal.

13. Mr Redkar's contention cannot be accepted. The sketch is quite ambiguous, and Mr Sanju Naik, the witness examined by the Appellant in clear and unambiguous terms, admitted that on the

truck's right-hand side, the measurement of the road up to the right edge was shown as 2.5 metres. Mr Sanju Naik was a Pancha witness. The Appellant himself examined this witness. Therefore, the Appellant cannot, without reasonable cause, distance himself from this deposition of Mr Sanju Naik merely because the same may now be found to be inconvenient.

14. There is evidence on record, and even otherwise, it was admitted in the course of the evidence that the truck was on its right side. There is evidence that about a 2.5 metre portion of the road was available from the right tyre of the truck towards the right edge of the tar road. In these circumstances, an inference could legitimately be drawn that the car was not responsible for the accident and the accident was possibly due to the rash and negligent driving of the motorcycle driver.

15. The Appellant cannot obtain an undue advantage by suppressing particulars about this motorcycle driver or by choosing not to file any claim petition against the motorcycle driver. Though this appeal could not have been dismissed on account of non-joinder of necessary parties, if the evidence on record, by a preponderance of probabilities, suggests that the truck driver was not rash and negligent or that it is the motorcycle driver who may have been responsible for the accident, the appeal will have to be dismissed.

16. The Appellant has not explained why he did not examine the motorcycle driver as his witness. An adverse inference is therefore

liable to be drawn because it is legitimate to infer that the motorcycle driver was unwilling to depose in the matter or that if the motorcycle driver were to be examined, the Respondents would have an opportunity to demolish his evidence by way of cross-examination and further establish that it was this motorcycle driver who was responsible for the accident.

17. The tribunal has examined the evidence on record and concluded that no case of rash and negligence was made out qua the truck driver. The truck was on its right side, and there is no evidence of any rashness and negligence. Instead, there was evidence of sufficient road width from where the motorcycle could have easily navigated. Therefore, there is no reason to disturb the finding about rashness and negligence.

18. Again, there is no clear evidence of income on the aspect of the quantum of compensation. Even the leave and license agreement for agricultural land does not inspire much confidence. In any case, even in the absence of evidence as to the income, the Appellant's income could be notionally taken at ₹5000/- per month.

19. The Appellant was around 50 years old at the time of the accident though the medical certificate produced by him shows that he was about 51 years. Dr S. M. Bandekar issued the medical certificate, but the Appellant failed to examine this doctor. Instead, other doctors who offered the Appellant Ayurvedic or Homeopathy treatment were examined. The receipts issued by one MBBS doctor were also placed

on record without examining the said doctor. Dr Bandekar's certificate refers to a permanent disability of 35% of the right lower limb due to severe knee joint stiffness.

20. Since the Appellant has not established the precise nature of activities he was undertaking, and even if it is held that the Appellant was an agriculturist, functional disability cannot be taken as more than 20% in this case. The Appellant has made an inflated claim based on some receipts issued by the doctors without bothering to examine such doctors. Some medicine bills claiming expenses of ₹30,118/- have been produced. The bills towards transportation have been produced, but there is no evidence that such transportation was availed.

21. The Appellant had claimed compensation of ₹5 lakhs in the claim petition against various heads. However, Mr Redkar submitted that just compensation would be to the extent of ₹10 lakhs. Mr Redkar also handed in a table of calculations.

22. As noted earlier, some compensation of ₹20,000/- towards medicines and ₹10,000/- towards transportation might have been just. Similarly, the compensation of ₹1,50,000/- towards loss of income due to functional disability would be just. In addition, ₹20,000/- could have been awarded towards non-pecuniary damages. In this case, just compensation would therefore come to ₹2,00,000/-. However, since the Appellant has failed to prove that the truck driver was responsible for the accident, no award can be made against the Respondents.

23. As a result, this appeal is liable to be dismissed and is hereby dismissed.

24. There shall be no order for costs.

M. S. SONAK, J.

TARI AMRUT NAGESH | Digitally signed by TARI AMRUT NAGESH
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