



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.147 OF 2019

Bombay Electric Supply and)
Transport Undertaking,)
 Electric House, Colaba,)
 Mumbai 400005)... **APPELLANT**

Vs.

MR. PRADEEP GYANCHANDRA DUBEY)
 Room No.51, Raghunath Chawl,)
 Sanjay Gandhi Nagar, Opp. Ram Gopal Industries)
 Dr. R.P. Road, Mulund (West))
 Mumbai 400080)...**RESPONDENT**

Mr.Bhavesh Wadhwani a/w. Mr.Aavish Shetty i/by M.V.Kini & Co.,
 Advocate for the Appellant.

Mr.T.J.Mendon a/w. T.R.Kale, Advocate for the Respondent.

CORAM : ABHAY AHUJA, J.
RESERVED ON : 19st AUGUST 2023
PRONOUNCED ON : 5th OCTOBER, 2023

JUDGMENT :

1. This Appeal has been filed under section 173 of the Motor Vehicles Act, 1988 (the “M.V. Act”) challenging the judgment and award dated 25th July, 2017 passed by the Motor Accident Claims Tribunal, Mumbai in Motor Accident Claim Application No.772 of 2013 partly allowing the

Application of the Respondent and awarding a sum of Rs. 13,50,073/- towards total compensation along with interest at the rate of 8% per annum.

2. Attempts were made by the parties to settle the matter before the Lok Adalat but since there was no final outcome of the settlement, the matter was once again listed for final hearing at the stage of admission.

3. The brief facts are as follows. That on 14th November, 2012, the Respondent who was then aged about 28 years, a self-employed person conducting a pan shop from 9:00 pm till late hours of the night, after closing his pan shop was returning home at about 1:00 a.m. on a motor cycle ridden by him, moving from R.H.B. Road, Mulund towards Sanjay Gandhi Nagar and was going along Kalidas Road to go to M.G. Road and had reached beside Chanakya Society, Devidayal Road, when a BEST bus bearing Registration No. MH-01-AP-0694 (the "Offending Vehicle") came from LBS road side and gave a dash to the Respondent's motorcycle. The Respondent fell down along with motor cycle on the road and sustained fracture injuries to his person. The Respondent was treated in Raj Hospital as an indoor patient from 14.11.2012 to 12.12.2012.

4. The Respondent then preferred an application on 29.04.2013 claiming Rs.25,00,000/- from the BEST being the employer of the driver along with costs of medical treatment, pain and suffering caused by the accident and interest *inter alia* on the grounds that he did not recover well from the accidental injuries, and is facing difficulties to continue his business.

5. The Appellant vide its Written Statement filed before the Tribunal denied the claim. The Appellant claimed that the BEST bus was being driven in a proper manner and was going from Vashi to Mulund Bus Depot and that when the bus reached near Mulund station, the Appellant while riding his motorcycle tried to cross the bus from Kalidas road towards MG road at an extremely fast speed in rash and negligent manner and while doing so collided against the left side front portion of the BEST bus. The Appellant claimed that it was due to the Respondent's own negligence that he met with an accident and there was no negligence on the part of the bus driver. The Appellant denied the personal particulars of the Respondent as well as his claim for alleged disability and medical expenses as well as damages claimed on account of other expenses under the respective heads. The Appellant prayed for dismissal of the Respondent's application with costs.

6. The Tribunal examined the FIR, spot panchnama and chargesheet and the evidence being the examination of the Appellant with respect to the issue of negligence. The Tribunal observed that in view of death of the bus driver before he could be examined, it is only the version of the applicant and police papers that are available on record to determine the aspect of negligent driving of the BEST bus. After examining the above, the Tribunal held that it did not appear that the Appellant was attempting to cross the bus to go to the other side of the road. The Tribunal also noted that it was in the FIR that the BEST driver did not provide any assistance to the Appellant after the accident nor did he report the accident to the police, rather he fled from the spot to avoid any liability. The Tribunal concluded that the BEST driver was at fault and responsible for the accident.

7. On the issue of loss of income due to functional disability, the Tribunal, based on available evidence, estimated that the Respondent had an earning of Rs.9000/- per month. The Tribunal also concluded that the Respondent had suffered 45% loss of income due to functional disability and in the same manner, 45% functional disability had to be considered to determine the loss of future income to the Respondent.

8. With respect to the quantum of compensation, the Tribunal after taking into account hospital and medical expenses, rest period, special diet, conveyance, services rendered by relatives, pain and suffering, disability and loss of amenities in life and considering of loss of future earnings in the ratio of 45% functional disability and after applying a multiplier of 17, awarded a total compensation of Rs.13,50,073/- (inclusive of No Fault Liability (NFL)) with interest @ 8% from the date of application till realisation.

9. Aggrieved by and dissatisfied with the Impugned Judgment and Award allowing the Application of the Respondent by awarding a sum of Rs. 13,50,073/- towards total compensation along with interest at the rate of 8%, the Appellant has preferred this Appeal as mentioned above.

10. The learned counsel for the Appellant submits that while awarding compensation, the Tribunal failed to take into account the fact that the Respondent was driving the motorcycle in high speed despite the traffic being moderate coupled with the fact that the Respondent did not give the particulars of the helmet which amounted to contributory negligence on the part of the Respondent.

11. The Appellant further submitted that the Tribunal did not consider the fact that the Respondent had failed to establish his profession and monthly income and physical disability. The Appellant relied on the decision of the Hon'ble Supreme Court in the case of ***Raj Kumar v. Ajay Kumar***¹ to submit that Dr. Mukhi cannot be said to be the treating doctor because in the absence of continuous papers it was difficult to believe that Dr. Mukhi was still treating the Respondent for injuries when his evidence was recorded in April 2017 whereas the accident had taken place in November, 2012, and therefore the Tribunal should have constituted a medical board and referred the claimant to the medical board for assessment of the disability as in Paragraph 18 of the said decision the Hon'ble Supreme Court has stated that the Tribunals should act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give “ready to use” disability certificates, without proper medical assessment. The Hon'ble Supreme Court further observed that there are several instances of unscrupulous doctors who without treating the injured, readily give liberal disability certificates to help the claimants. The Appellant also contended that the driver of a vehicle is a vital witness and in this case he could not be produced or

1 (2011) 1 SCC 343

examined by the Respondent. The Appellant submitted that therefore the Tribunal erred in arriving at a conclusion that the Respondent is earning a monthly income of Rs.9000/- per month and granting compensation of Rs.13,50,073/- along with interest @8%. It was therefore prayed that the Impugned Judgment and Award be set aside.

12. Mr. Mendon, learned counsel for the Respondent has opposed the submissions made on behalf of the Appellant. He has drawn my attention to the FIR at Pg. 30 of the Appeal wherein the BEST driver has been charged under Sections 279 and 338 of the Indian Penal Code, 1860 as well as Sections 184, 134(A) and (B) of the MV Act, all of which he submits, are serious in nature. He also submits that as mentioned in the FIR the driver ran away immediately after the accident and there were some pedestrians who noted the bus number and reported the matter to the police. He submits that the driver was driving the BEST bus in a rash, dangerous and negligent manner as a result of which the Respondent suffered serious injuries which resulted in permanent partial disability. The learned counsel for the Respondent would submit that the BEST driver was also in clear violation of Sections 134 and 184 of the MV Act.

13. On the claim of contributory negligence raised by the Appellant, the learned counsel for the Respondent submits that the BEST driver was chargesheeted and criminal case was filed before the Magistrate.

14. The learned counsel for the Respondent further submitted that the Appellant failed to examine the driver before the Tribunal and that unless the driver was examined no contributory negligence could be attributed to the Respondent as per the law laid down by the Hon'ble Supreme Court in the case of *Jiju Kuruvilla & other v. Kunjujamna Mohan and others*². The learned counsel would submit that it is well settled law³ that the person who is driving a heavy vehicle or the bigger vehicle has to be more cautious than smaller vehicle and therefore the bus of the Appellant being a heavy transport vehicle was required to be cautious and take extra care and caution of another vehicle.

15. On the issue of compensation, the learned counsel for the Respondent relies on the decision of the Hon'ble Supreme Court in the case of *Shiva Kumar M. v. Managing Director, BMC*⁴ to submit that the compensation was correctly calculated by the Tribunal.

² 2013 ACJ 2141.

³ Yerramma & other v. G. Krishnamurthy & Anr. (2014 ACJ 2161)

⁴ 2017(2) TAC-11 (SC).

16. I have heard Mr. Wadhwani learned counsel for the Appellant and Mr. Mendon, learned counsel for the Respondent at length and with their able assistance, I have perused the papers and proceedings in the matter and considered the rival contentions.

17. The Appellant has raised two primary grounds to challenge the Impugned Judgment and Award, the first ground being that the Tribunal while granting compensation failed to take into account the fact that the Respondent was driving the motorcycle in high speed despite the traffic being moderate and therefore there is contributory negligence on the part of the Respondent and the second ground being that the Respondent failed to establish the profession and monthly income and physical disability and therefore the Tribunal erred in arriving at a conclusion based on guess work that the Respondent is earning a monthly income of Rs.9000/- inspite of categorical admission by the Respondent in cross examination of not having any documentary proof to establish employment.

18. But before that a bit on the negligence of the driver of the BEST bus. The Tribunal relied upon the decision of the Hon'ble Supreme Court

in the case of *Dulcina Fernandes and Others v. Joaquim Xavier Cruz and Another*⁵ wherein it was held that the plea of negligence under the MV Act is required to be decided by the Tribunal on the touchstone of preponderance of probability and not on the basis of proof beyond reasonable doubt. The Tribunal held that in view of the principles laid down in the case of *Dulcina Fernandes and Others (supra)*, in all eventualities, it was BEST driver who was negligent and responsible for occurrence of the accident and that no any part of negligence can be attributed to the Respondent.

19. The Tribunal concluded that the issue of negligent driving could only be decided on the basis of the Respondent's version and on the basis of the police papers available on record. On the basis of the damage to the motorcylce recorded in the spot panchnama, the cross examination of the Respondent and the conduct of the driver as recorded in the FIR, the Tribunal concluded that the BEST driver was at fault and responsible for the accident. In this context it would be useful to quote the relevant portion of Paragraph 8 of the Impugned Judgment and Award as under:

“8.....In this matter, BEST bus was not negotiating the turn rather it is the case of the opposite party that applicant was

5 2013 (4) TAC 827 (SC)

moving on his motorcycle from left to right side. There is no dispute that heavy passenger vehicle must take more precaution and care of other vehicles driven on the road. It was late night hours and moderate traffic on road when the accident occurred. In view of death of BEST driver, it is only the version of applicant and police papers available on record to determine the aspect of negligent driving of vehicles. At the time of recording the spot panchnama, it is noted therein that motorcycle was lying by the side of road in a damaged condition. It's right side handle, rear side indicator were damaged in the accident. The applicant has denied that he was moving on motorcycle from left to right side and his evidence is that BEST bus was to his left side the eventuality as suggested to applicant in cross examination looking to the right hand side of motorcycle was damaged, it does not appear that applicant was attempting to cross the bus to go to the other side of the road. It is the FIR that BEST driver did not provide any assistance to applicant after accident nor reported the accident to police. It shows that BEST driver was to avoid any liability fled away from the spot....”

20. In a recent judgment in the case of ***Mathew Alexander v. Mohammed Shafi and Another***⁶, the Hon'ble Supreme Court has reiterated the principles laid down in the case of ***Dulcina Fernandes and Others*** (*supra*). Paragraph 13 of the said judgment is relevant and is quoted as under:

“13....Similarly, in (2009) 13 SCC 530, in the case of Bimla Devi v. Himachal Road Transport Corporaton (“Bimla Devi”), it was observed that in a claim petition filed under Section 166 of the Motor Vehicles Act, 1988, the Tribunal has to determine the amount of fair compensation to be granted in the event of an accident has taken place by reason of negligence of a driver of a

6 2023 SCCOnLine SC 832

motor vehicle. A holistic view of the evidence has to be taken into consideration by the Tribunal and strict proof of an accident caused by a particular vehicle in a particular manner need not be established by the claimants. The claimants have to establish their case on the touchstone of preponderance of probabilities. The standard of proof beyond reasonable doubt cannot be applied while considering the petition seeking compensation on account of death or injury in a road traffic accident. To the same effect is the observation made by this Court in Dulcina Fernandes v. Joaquim Xavier Cruz (2013) 10 SCC 646 which has referred to the aforesaid judgment in Bimla Devi.

(emphasis supplied)

21. From a perusal of the FIR, the spot panchnama, other police papers, the examination in chief and cross examination of the Respondent, it appears that on 14th November, 2012, the Respondent was returning home at about 1:00 a.m. and was driving towards Sanjay Gandhi Nagar. The Respondent was along Kalidas Road to go to M.G. Road and when the Respondent reached beside Chanakya society, Devidayal road, the BEST bus came from LBS Road and gave a violent dash to the Respondent's motorcycle due to which the Respondent fell down and sustained fracture injuries on the left side of his body after which he was taken to Raj Hospital at Mulund for treatment. It is also clear from the FIR that the BEST driver fled from the spot and did not offer any assistance to the Respondent. The BEST driver was also chargesheeted and criminal case was filed before the Magistrate. It is not in dispute that the BEST driver is

no more and died during the pendency of the proceedings before the Tribunal and was not examined before the Tribunal.

22. Therefore on a preponderance of probabilities, as gathered from the evidence of the FIR, the spot panchnama, other police papers, the examination in chief and cross examination of the Respondent, this Court is of the view that the Respondent sustained injuries in an accident which occurred due to the rash and negligent driving of BEST bus bearing No. MH-01-AP-0694.

23. Now coming to the question whether there was any contributory negligence on the part of the Respondent in this case, one must examine the well-settled principles of law on this issue. In this regard, it would be relevant to quote paragraph 8 of the decision of the Hon'ble Supreme Court in the case of *Pramodkumar Rasikbhai Jhaveri vs. Karmasey Kunvargi Tak*⁷

“8. But before that, what is 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,

⁷ (2002) 6 SCC 455

so that he becomes blameworthy in part as an 'author of his own wrong'. 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 damage caused and is of such a nature that it may be properly described as negligence."

(emphasis supplied)

24. The facts of the present case clearly indicate that the Respondent was driving on his motorcycle along Kalidas Road to go to M.G. Road and when the Respondent reached beside Chanakya society, Devidayal road, the BEST bus came from LBS Road and gave a violent dash to the Respondent's motorcycle due to which the Respondent fell down and sustained fracture injuries. From the FIR, spot panchnama, the other police papers, the examination in chief and cross examination of the Respondent, it does not appear that the Respondent was attempting to cross the BEST bus or was in any manner not using reasonable care or safety. On the contrary, the BEST driver should have been aware of the fact that he was driving a heavy passenger motor vehicle and that it was necessary for him to take extra care and caution of the other vehicles on the road. There is therefore no act or omission on the part of the Respondent which has materially contributed to the damage caused. Further, in the case of ***Meera Devi and Another vs. Himachal Pradesh***

*Road Transport Corporation and Others*⁸, the Hon'ble Supreme Court has observed that to prove contributory negligence, there must be cogent evidence. The word 'cogent' means clear, logical and convincing. In the facts of the present case, there does not appear to be any cogent evidence to prove the contributory negligence of the Respondent. Also in the case of *Jiju Kuruvilla* (supra) relied upon by the learned counsel for the Respondent, the Hon'ble Supreme Court has held that in the absence of direct or corroborative evidence, the court cannot give any specific finding about negligence on the part of any individual.

25. That, not giving particulars of the helmet, in no way proves that there was contributory negligence on the part of the Respondent. It was for the Appellant to prove that absence of those details has led to the accident in question. There is nothing to suggest that the Respondent got injured as he was not wearing a helmet. There is no whisper of any head injury but fracture injuries on the left side of the body. Therefore, in my view, nothing would turn on the Appellant's submission on the aspect of not giving any particulars of helmet. In any event, it was for the Appellant to dwell further on this aspect in evidence, which the Appellant has failed to do.

8 (2014) 4 Supreme Court Cases 511

26. In the present case, therefore, there is no direct or corroborative evidence about the negligence of the Respondent and hence no contributory negligence can be attributed to him.

27. Appellant has further contended that the driver of vehicle was vital witness and could not be produced and examined by the Appellant. It is quiet surprising that such a submission is coming from the Appellant who was the employer of the driver. In my view, it was duty of the Appellant to examine driver in the first place to prove the allegation of contributory negligence, that duty cannot be pushed on to the Respondent-Claimant.

28. In the light of the above, I am of the view that the Tribunal was correct in holding that the BEST driver was negligent and responsible for the accident and that no any part of negligence can be attributed to the Respondent.

29. I now come to the second issue raised by the Appellant, that the Respondent failed to establish the profession and monthly income and physical disability.

30. The Respondent has disclosed his occupation as panwala in the FIR which is the same as in the Claim Application where it is stated that he is the owner and conductor of Jai Matadi Pan Shop. It cannot be said that in the application before the Tribunal, he has altogether shown a different profession than disclosed in the FIR. No contrary evidence has been brought on record by the Appellant. Therefore the Respondent has to be believed that he was conducting a pan shop at the time of the accident.

31. Further, in the case of ***Shiva Kumar M.*** (*supra*) relied upon by the learned counsel for the Respondent, the Hon'ble Supreme Court, when posed with a similar issue of lack of documentary evidence with regard to the income of a painter going house to house, held that for a casual worker it was difficult to get evidence of income and therefore the evidence of the claimant has to be accepted. The Appellant has not brought any contrary evidence to disprove the claim of the Respondent. In the present case although the Respondent had claimed that his income was Rs.15,000/- per month from the pan shop, the Tribunal estimated his earning only to be Rs.9000/- per month. The Respondent has accepted the calculation of notional income and not challenged the same.

32. On the issue of lack of evidence of physical disability, the examination in chief and cross examination of Dr. Mukhi, clearly bears out that it was Dr. Mukhi was the Doctor who treated the Respondent and the reliance placed by the learned counsel for the Appellant on the case of ***Raj Kumar (supra)*** to claim that the Tribunal should have constituted a medical board and referred the Respondent to such medical board for assessment of the disability is misplaced in the facts of the case. In fact in the present case, in line with the principles laid down by the Hon'ble Supreme Court that mere production of disability certificate or discharge will not be proof of the extent of disability stated therein unless the doctor who treated the claimant or who medically examined and assessed the extent of disability of the claimant is tendered for cross examination with reference to the certificate, Dr. Mukhi was cross examined on the Disability Certificate. I have perused the Certificate dated 1st April, 2013 issued by Dr. Mukhi who is stated to have treated the Respondent and has medically examined and assessed the injury to the Respondent, in which he has described the injuries of the Respondent as well as the certificate dated 31st December, 2013 in which Dr. Mukhi has also clearly stated that the Respondent is having 50% total partial disability. The Appellant has not brought on record any contrary evidence in this regard. In the present

case, Dr. Mukhi being the doctor who treated the Respondent and also assessed the disability of the Respondent, was tendered for cross examination with reference to the disability certificate.

33. This is not a case where an unscrupulous Doctor has without treating the injured given the certificate. No evidence to this effect has been brought on record and hence the reference to the medical board is clearly not necessary in the facts of this case. In fact, the Tribunal has considered functional disability of 45% instead of 50% which has been accepted by the Respondent.

34. Ergo, the calculation of 45% loss of future earnings, the multiplier of 17 considering the age of the Respondent being below 30 years at the time of the accident, hospital and medical expenses, a lumpsum amount towards rest period of four months, expenses of special diet, conveyance and services rendered by relatives, have, in my view, been correctly computed totaling to a compensation of Rs.13,50,073/- inclusive of NFL along with interest at the rate of 8% to be paid from the date of the application till realization, in accordance with the principles settled in the decisions of the Hon'ble Supreme Court in the case of *National Insurance*

*Company Limited v. Pranay Sethi and Ors.*⁹ as well as *Sarla Verma & Ors. v. Delhi Transport Corp. & Anr.*¹⁰

35. In the circumstances, I do not find any error or illegality or perversity in the findings and the decision of the Tribunal. There is no merit in the appeal. The Appeal deserves to be dismissed and is hereby dismissed. Parties to bear their own costs. Interim order stands vacated.

36. The Respondent is entitled to total compensation of Rs. 13,50,073/-along with interest at the rate of 8% per annum and is permitted to withdraw the claim amount less the amount already withdrawn, with proportionate accrued interest at the above rate.

37. Let the Record and Proceedings lying in this court be transferred to the Motor Accident Claims Tribunal, Mumbai.

(ABHAY AHUJA, J.)

9 (2017) 16 Supreme Court Cases 680

10 (2009)6 SCC 121