

(1994) 08 BOM CK 0074
In the Bombay High Court
Case No : F.A. No. 99 of 1990

Anand Ramkrishna Raikar and Others APPELLANT
Vs
Raghunath V. Keny and Another RESPONDENT

Date of Decision : 17-08-1994

Acts Referred:

General Clauses Act, 1897 — Section 6
Motor Vehicles Act, 1988 — Section 140, 144, 217

Citation : (1995) 1 ACC 141 : (1996) ACJ 697

Hon'ble Judges : G.D. Kamat, J;A.A. Halbe, J

Bench : Division Bench

Advocate : F.J. Colaco, for the Appellant; E. Afonso, for the Respondent

Judgement

G.D. Kamat, J.—Appellant Anand R. Raikar and his wife Mirabai instituted Claim Petition No. 31 of 1987 under the provisions of the Motor Vehicles Act, 1939, claiming a total compensation of Rs. 5,20,000/- from the respondents. The claim petition had set out that at about 2.30 p.m. on 19.10.1986, their son by name Gurudas, who was aged 21 years and studying in XIIth Standard met with an accident while driving scooter bearing No. GDF 160 along the national highway between Margao and Cortalim being knocked down by a motor vehicle bearing No. GDZ 1647, a taxi owned and driven at the relevant time by respondent No. 1 and insured with respondent No. 2. The victim Gurudas succumbed to his injuries soon after the accident. According to the original claimants, the vehicle bearing No. GDZ 1647, which was proceeding from Cortalim to Margao, was being driven rashly and negligently and that is how it collided with the scooter driven by the deceased Gurudas and based upon which the claim for compensation was raised.

2. The respondents took the defence that the deceased Gurudas overtook a Kadamba bus, which was proceeding ahead of his scooter, at a place called Nuvem without caring to notice that the vehicle driven by the respondent No. 1 was coming from the opposite direction. That as a result of negligence on the part of Gurudas the accident took place and that is how the claimants are not

entitled for any compensation.

3. In support of the claim petition evidence was led on behalf of the original claimants of four witnesses, to which we will make a reference a little later. It may be mentioned at this stage itself that no evidence was led on behalf of respondent No. 1, who is the driver and owner of the vehicle, for reasons best known to him. On the available material the Tribunal came to a conclusion that neither the case set up in the original claim petition nor the defence story that deceased Gurudas had overtaken the Kadamba bus was true and that the accident had happened in the manner disclosed by one Cipriano Quadros, AW 2, whose evidence was accepted in toto. Having accepted the evidence of Cipriano Quadros and considering the age of the deceased Gurudas the Tribunal held that in ordinary course a sum of Rs. 1,00,000/- would have to be awarded in favour of the original claimants by way of compensation but, however, since the responsibility for the accident of deceased Gurudas is to the extent of 75 per cent as against 25 per cent qua respondent No. 1, a sum of Rs. 25,000 corresponding to the share of the responsibility was awarded in favour of the original claimants and directing it to be paid with interest at 12 per cent per annum from the date of filing of the petition till final payment with a further direction that the amount of Rs. 15,000/- paid as and by way of no fault liability u/s 92-A shall be adjusted against the compensation awarded.

4. It appears that during the pendency of the claim petition appellant Anand R. Raikar, father of the deceased, expired with the result his legal representatives, namely, son, daughters and sons-in-law have come on record under letters a to e.

5. Mr. F.J. Colaco, learned Counsel appearing for the appellants, has raised three principal contentions in the present appeal. According to him, the Tribunal is in total error in apportioning the responsibility of the accident in the ratio of 75 per cent to deceased Gurudas and 25 per cent to respondent No. 1. For, according to him, on the basis of the existing material there is no question of fixing any responsibility insofar as deceased Gurudas is concerned and the entire responsibility for the accident has to be shouldered by the respondent No. 1, who is the driver of the taxi bearing No. GDZ 1647. He, however, contended that even if this court takes a very stringent view of the matter, the maximum that can happen is the responsibility insofar as deceased Gurudas is concerned could be held at 25 per cent with the result 75 per cent shall be that of respondent No. 1. This, according to him, is if the accident is to be posed at the safest course.

6. The second contention of Mr. F.J. Colaco is that considering the age of the deceased Gurudas, the income that he was already making and the income that Gurudas was to make in future until he attains the age of inactive life, a much larger and higher compensation was justified and that way a sum of Rs. 1,00,000/- determined by the Tribunal cannot be sustained.

7. We will come to the third contention a little later and separately as the same is not based upon any evidence. Briefly stated, Mr. Colaco says that the original

claimants are entitled to Rs. 25,000/- by way of no fault liability in spite of having been paid a sum of Rs. 15,000/- by virtue of the provisions of Section 92-A of the Motor Vehicles Act, 1939.

8. For the purpose of appreciation of the first two contentions and regard being had to the vehemence with which this appeal was argued, we will examine the evidence led on behalf of the original claimants.

9. Original claimant Anand R. Raikar, AW 1, father of deceased Gurudas, says that he was informed by a catholic person that an accident has taken place at Nuvem at about 4.00 p.m. on 19.10.1986; that person agreed to take the witness to the hospital at Margao. On reaching the hospital he was told that the deceased was in the operation theatre and he was asked to go home. The same catholic person informed the witness while returning to Merces that his son Gurudas has since expired.

According to him, Gurudas had gone to Margao to get one of his married daughters admitted in hospital for delivery and according to his information the deceased met with an accident while coming from Margao to Merces on the way at Nuvem. He affirms that deceased Gurudas was a student of Chowgule College and was studying in XIIth Standard. He also says that deceased Gurudas was helping him during his off time in the making of gold ornaments. According to him, the income that the deceased would get was between Rs. 700/- to Rs. 800/- for the making charges of gold ornaments. He produced birth certificate (Exh. 19), which shows that deceased Gurudas was born on 19.8.1965.

10. Cipriano Quadros, AW 2, says that he was present when the accident took place. He describes that the accident occurred on the highway Cortalim-Margao route between the villages of Verna and Nuvem. He says that he was proceeding to Margao for a marriage on that day on his motorbike. At a distance of about 100 metres, there was a road forking towards Majorda at an angle of 90°. According to him, a taxi was moving ahead of him and almost at a junction where the Majorda road forks he saw a motor cycle coming from Majorda village road, entering the highway and taking a left turn to go towards Cortalim and at which stage collision took place between the taxi, which was going ahead of him and the scooter. The scooterist fell down on the ground and the taxi came to a halt. Upon reaching the site of the accident he saw that the scooterist had injuries to the neck as a result of which the main artery had been cut and blood was gushing out of the same. He says a European tourist who was travelling in the taxi alighted and rushed to the fallen boy and both tried to stop the bleeding by putting a handkerchief on it. In the meantime a pick-up was coming, which was stopped by them and when they were about to put the scooterist into the pick-up they saw an ambulance coming from Margao side. The witness says that the driver of the ambulance acceded to their request and agreed to carry the scooterist to a hospital at Margao. The witness says that he went to the Margao hospital to find out the condition of the scooterist and came to know that the scooterist was already dead. He took down in his diary the numbers of the two

vehicles. To a court question as to the exact spot where the accident had taken place the witness replied that it was more or less in the middle of the highway just at the junction.

11. Next witness is Camilo Colaco, AW 3, who had admittedly not seen the accident. He says that he reached the spot of the accident after some time. He was waiting at a bus-stop, which was 300 metres from the spot of the accident. On coming to know about the accident he went there and found that the scooterist had fallen on the road on the left side of person facing Panjim. He affirms that the collision had taken place at the junction where the road from the village Majorda joins the highway.

12. Since the factum of death nor the injuries are disputed, it is not necessary to make any reference to the evidence tendered by Dr. Silvano Sapeco, AW 4.

13. This is all the evidence led on behalf of the original claimants in support of their claim petition. Before we come to the analysis and the grievances made on behalf of the appellants, we may mention that on behalf of the respondents Rama Powar, RW 1, P.S.I. had been examined. In his brief evidence he says that he is a P.S.I. attached to Margao Rural Police Station and in the investigation carried out in respect of the accident in question he had come to the conclusion that the scooterist, deceased Gurudas, was at fault and, therefore, he did not file any charge-sheet against the respondent No. 1 and accordingly obtained a summary from the Magistrate concerned. He also produced a panchnama of the scene of accident. It is not known as to why no punch witness has been examined. At any rate the panchnama exhibited as Exh. 29 has no evidentiary value as the same has not been proved by any of the panchas who attested that document and the same cannot be relied upon either for the assertion of Rama Powar that respondent No. 1 was not in fault insofar as the accident of 19.10.1986 was concerned nor for the purpose of apportionment of responsibility of the unfortunate accident.

14. In the first place we are terribly at a loss to find that the original claimants did not lead cogent evidence to positively suggest that though deceased Gurudas was assisting his father in his off time in the making of gold ornaments was that way earning anywhere between Rs. 700/- and Rs. 800/- per month. We are, therefore, unable to appreciate the tall claim made on behalf of the original claimants and as canvassed by Mr. Colaco, the learned Counsel for them in this appeal. It must be mentioned that in the first instance in the claim petition nothing was mentioned insofar as the income of deceased Gurudas is concerned. The only assertion has come in examination-in-chief when Anand R. Raikar, AW 1, deposed:

During his off time he was helping me in manufacturing gold ornaments. We are jewellers. I say that the work he used to do was giving monthly income. I say now that the income he would get was between Rs. 700/- and Rs. 800/-.

A bare reading of the above extracted passage reveals that it was the

expectation of Anand R. Raikar, AW 1, that deceased Gurudas would have earned an amount of Rs. 700/- to Rs. 800/- if he was to engage himself in the making of gold ornaments. In reality the witness is silent on the income that would be attributed to the work or assistance rendered by deceased Gurudas. In any event the evidence is so sketchy on the income and considering the statement made in the claim petition that the income of the deceased was nil, it is difficult to accept that deceased Gurudas was that way an earning member of the family though he might have assisted his father in the traditional family work as a goldsmith in the making of gold ornaments as job work.

15. We now come to the main grievance of Mr. Colaco where he faults the finding of the Tribunal about the apportionment of the responsibility between the two drivers. We have already indicated elsewhere in the judgment that the Tribunal found that the responsibility of deceased Gurudas was 75 per cent while that of respondent No. 1 as a taxi driver was 25 per cent. In our view upon reading the evidence of Cipriano Quadros, AW 2, there is considerable merit in the criticism levelled by the learned Counsel. We agree with the learned Tribunal that Cipriano Quadros, AW 2, is an independent witness and has deposed truthfully what transpired before him and there is no iota of suspicion about his evidence. We are, therefore, per forced to fully accept the evidence of Cipriano Quadros, AW 2. The finding that the accident took place at a junction of national highway at Nuvem between Margao and Cortalim where a village road forks to Majorda is beyond any dispute. Insofar as the exact place where the collision took place, there is no evidence except that of Cipriano Quadros. According to the evidence of Cipriano, the deceased was on a scooter and came from Majorda village road on to the highway and took a turn to his left towards Cortalim at which point of time the collision took place between the scooter and the taxi, which was moving in the direction of Margao. After describing the collision he has clearly stated that the accident took place in the middle of the highway just at the junction. In other words, two things clearly stand out. The first is that the deceased was moving from a village road to the national highway and it was clearly incumbent upon him to have looked on both the sides so as to be on the highway. If deceased Gurudas had taken a little precaution, needless to say that he could have avoided the collision. The second aspect is that admittedly the road was clear and for a long stretch it was a straight road. Even on the assumption that the scooterist had come on the highway from a minor road, it was clearly incumbent upon the respondent No. 1, who was driving his taxi, to avoid any collision, to have been careful enough to see the oncoming traffic. The fact that the accident had taken place in the middle of the highway suggests that the taxi was driven in the middle of the highway. This being the picture of the accident it is not understood as to how the Tribunal could have apportioned the responsibility in the ratio of 75 per cent to deceased Gurudas and 25 per cent to respondent No. 1, driver of the taxi. It appears that the Tribunal was influenced by overemphasizing a situation that when a person is coming to the highway from a village road, therefore, such person must be doubly careful with the result persons driving vehicles on the

highway need not be that careful.

Though Mr. Colaco has strenuously urged that as long as the accident has taken place on the left hand side of the road for traffic coming from Margao to Cortalim, the entire responsibility for the accident must be foisted on the respondent No. 1, we are unable to accept it for the simple reason that evidence of Cipriano Quadros, AW 2, cannot be ignored. If by any chance we are to ignore the evidence of Cipriano Quadros, there would be no evidence for this accident with the result, on the contrary, the original claimants may come to grief. Once we accept the evidence of Cipriano Quadros, then there is no escape for us but to hold that the collision had taken place almost in the middle of the highway and this being so, in our view, there can be no difficulty in holding that the scooterist as well as the taxi driver were both at fault insofar as the occurrence of the accident is concerned and they must share the responsibility equally.

16. Mr. Colaco in support of the contention that the entire responsibility for the accident should lie on respondent No. 1 relied upon the decision of *Bhagwani Devi v. Krishan Kumar Saini* 1986 ACJ 331, to suggest that as long as respondent No. 1 has not entered the witness-box and given his version of the accident an adverse inference has to be drawn against him. We want to assure the original claimants that while apportioning the responsibility at 50:50 we have taken into consideration that respondent No. 1, who had taken the defence that deceased Gurudas had overtaken the Kadamba bus going in front of him was false and on top of it he avoided the witness stand. Mr. Colaco had also urged relying upon two decisions of two learned Judges of this court in two separate judgments that it is the duty of the court to find out who had the last opportunity or last clear chance to avoid accident so as to determine the negligence. It is true that in the decision of *Municipal Corporation of Greater Bombay v. Govind V. Pethe* 1985 ACJ 51 and in the decision of *Antonio Milagres Fernandes (Dead) through L.R.'s Vs. Pramod Vijayan and Another*, the two Judges considered the aspect of last opportunity or last clear chance holding that such factor is always important for the purpose of determining the negligence. We do agree with the learned Counsel. In our view, having regard to the evidence which we have already referred to and regard being had to its nature we find it difficult to know as to who between the two had the last opportunity or last clear chance to avoid the collision. We are, therefore, per forced to leave the matter as we held earlier.

17. We have already pointed out earlier that the Tribunal held that regard being had to all the circumstances a sum of Rs. 1,00,000/- would be just and proper compensation in this matter and after apportioning the responsibility of the accident awarded a sum of Rs. 25,000/- in favour of the original claimants on the basis that the responsibility of deceased Gurudas was 75 per cent. Once we hold as we have held already that the responsibility for the accident in this case is equal between the two drivers, we find no difficulty in awarding 50 per cent of the compensation as determined by the Tribunal with the result the compensation would come to Rs. 50,000/- as we find that there is no challenge

to the award of Rs. 1,00,000 on behalf of the respondents. With this we come to the last point.

18. Mr. Colaco says that in view of the pendency of the claim petition and what is more pendency of this appeal the original claimants are entitled to get Rs. 25,000/- by way of no fault liability u/s 140 of the Motor Vehicles Act, 1988. According to him though indeed the original claimants had been awarded a sum of Rs. 15,000/- by way of no fault liability u/s 92-A of the Motor Vehicles Act, 1939, once the legislative change has been brought about by the 1988 Act there can be no denial of the benefit for the remaining amount and all the more so because compensation to the victims and their dependants, in the first place, is under a welfare legislation and in the second place a beneficent provision to assist the injured or the dependants of the deceased.

19. Strictly speaking a contention of this type ought not to have been made when the claim petition had culminated into a final award and against which the very appellants had preferred an appeal. We will succinctly point out the reason as to why we say so. u/s 92-A of the 1939 Act, which now corresponds to Section 140 of the 1988 Act, the principle of no fault liability was introduced. This doctrine was introduced in order to give immediate relief to the injured persons in accidents or the dependants of the persons who meet with accidents and who desert this world. Whatever compensation is awarded under no fault liability is finally liable to be adjusted against the final award to be made in a claim petition. What, therefore, stands out clearly is that whatever compensation paid under no fault liability is not in addition to the final award made in favour of the claimants. When the matter of final award is in appeal, it is difficult to accept that this court should separately direct payment of the difference between the no fault liability compensation, even on the assumption that Mr. Colaco is right for needless to say the same will have to be adjusted in the final award to be made in the appeal. Therefore, in any event such exercise would be an exercise in futility. Since Mr. Colaco was insisting, we refer to a few authorities cited by him across the Bar to suggest that even in pending cases in respect of accidents which took place prior to 1.7.1989, the date on which the Motor Vehicles Act, 1988, was brought into force, the original claimants are entitled to be compensated in terms of Section 140 of 1988 Act thereby making the difference good. In the decision of National Insurance Co. Ltd. Vs. Ram Kishore Soni and Others, , a learned single Judge of the Madhya Pradesh High Court held that Section 140 of the new Act shall prevail and apply to pending cases and, therefore, the compensation for death would be Rs. 25,000 instead of Rs. 15,000/-, which was ordained u/s 92-A of the old Act. To the same effect is the next decision of a learned single Judge of the Delhi High Court in Oriental Insurance Co. Ltd. Vs. Ram Chander Dwivedi and Others, . In both these cases the learned single Judges have held that Section 140 of the new Act is retrospective in nature.

20. To buttress his submission Mr. Colaco stated that when Section 92-A was

incorporated in the 1939 Act and brought into force on 1.10.1982, a question had arisen whether no fault liability compensation is liable to be paid in pending cases. According to him a learned single Judge of this court in the decision of *Oriental Fire & Genl. Ins. Co. Ltd. v. Shantabai S. Dhume* 1987 ACJ 198 , held that Section 92-A applies to pending cases and, therefore, retrospective in nature. Mr. Colaco, therefore, asserted that on the basis of the same ratio this court should hold that the original claimants are entitled to receive compensation u/s 140 of the new Act and not Rs. 15,000/- as already paid u/s 92-A of the old Act. Mr. Colaco in addition relied upon a decision in *Mosmi and Another Vs. Ram Kumar and Others*, , where a Division Bench of the High Court of Punjab and Haryana held that Section 140 of the new Act is retrospective. The same view was adopted by the Kerala High Court in the decision of *United India Insurance Co. Ltd. Vs. Padmavathy and Others*, .

21. There are two decisions of two different Benches of this court, which, in our view, require special mention. Mr. Colaco indeed wants to wriggle out of these two decisions. We will, however, point out later as to how Mr. Colaco cannot overcome these two decisions.

A question arose whether the liability of the insurance company in respect of one accident which had been enhanced statutorily to Rs. 1,50,000/- is applicable to pending cases, the Division Bench in the decision of *Inderjeet Singh & Co. v. Kamal Prakash Pawar* 1989 ACJ 132 , held that since the liability of the insurer was Rs. 50,000/- per accident as on the date of the accident, that liability should govern the fate of the case and not the enhanced statutory liability of Rs. 1,50,000/-.

This decision of the Division Bench came up for consideration before another Division Bench of this court in the decision of *Prakash Chandumal Khatri and another Vs. Suresh Pahilajrai Makhija and another*, , where it was held approving the ratio of *Inderjeet Singh & Co. v. Kamal Prakash Pawar* 1989 ACJ 132 , that legislative change brought about during pendency of the matters does not change the liability which remains the same as on the date of the accident. In other words, the Division Bench held that liability is not dependent upon the legislative changes brought about during the pendency unless, of course, the statute clearly states so and in the absence the rights of the parties are to be decided qua liability as on the date of the accident.

22. In these two decisions the Division Bench looked to the case of a single Judge in *Oriental Fire & Genl. Ins. Co. Ltd. v. Shantabai S. Dhume* 1987 ACJ 198 , and disapproved the ratio that Section 92-A applied to pending cases when Section 92-A was incorporated in the 1939 Act and brought into force as from 1.10.1982.

23. As mentioned earlier with a view to wriggle out from the two decisions of the Division Bench of this court, Mr. Colaco says that both the courts did not consider Section 140 of the 1988 Act. We are unable to agree with the learned Counsel.

We have seen Section 144 in Chapter X of the Motor Vehicles Act, 1988 and it must be confined to that Chapter only. That Chapter contains some provisions in addition to the provision of making payment of no fault liability by awards pending the hearing and final disposal of the claim petitions on fault liability. Section 144 does not apply in the matter of repeals and savings and the vested rights accrued by virtue of the provisions of the General Clauses Act. We may mention that 1988 Act repealed 1939 Act and the repeal and saving clause is contained in Section 217. Sub-section (4) of Section 217 reads thus:

The mention of particular matters in this section shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.

A bare reading of the provision of Section 6 of the General Clauses Act read with Sub-section (4) of Section 217 of the Motor Vehicles Act, 1988, makes it absolutely clear that the rights of the parties vis-a-vis their liability shall be governed by the law in force as on the date of the accident and it does not get affected by the legislative changes brought about during the pendency of the matter. Unless a different intention is shown to the contrary or a specific provision is made bringing the new change with retrospective effect, there is no scope to hold otherwise. Therefore, we must hold that the claimants are not entitled to re-determination of no fault liability u/s 140 of the new Act.

24. Original claimants had impleaded Oriental Fire & Genl. Ins. Co. Ltd. under a mistake. During the pendency of the appeal the original claimants-appellants sought deletion of Oriental Fire & Genl. Ins. Co. Ltd. Upon deletion of that party the cross-objections instituted on behalf of Oriental Fire & Genl. Ins. Co. Ltd. were withdrawn by its Counsel, Mr. Bharne, we have mentioned this for making the record clear.

25. Coming back to the main appeal, in our view, the same must partly succeed. Appeal accordingly partly allowed. Claim Petition No. 31 of 1987 is partly allowed. A compensation of Rs. 50,000/- is awarded to the original claimant Mirabai Anand Raikar, who is appellant No. 2 in this appeal and the same is directed to be paid with interest at the rate of 12 per cent per annum from the date of the claim petition until final payment. The same to be paid jointly and severally by respondent Nos. 1 and 2. Costs of Rs. 2,500/- as awarded by the Tribunal are maintained. In addition, respondents shall pay costs of Rs. 1,500/- in this appeal. The amount of Rs. 15,000/- already paid under no fault liability shall be deducted from the compensation awarded.