
(2017) 01 BOM CK 0105
In the Bombay High Court
Case No : First Appeal No. 197 of 2009

Jagannath Narahari Naik

APPELLANT

Vs

Vasudev Datta Malik

RESPONDENT

Date of Decision : 04-01-2017

Acts Referred:

Citation : (2017) 1 ACC 573 : (2017) 2 BCR 165 : (2017) 2 TAC 302

Hon'ble Judges : C.V. Bhadang, J.

Bench : Single Bench

Advocate : Mr. Valmiki Menezes and Ms. Maria Correia, Advocates, for the Appellant; Mr. A.D. Bhobe and Ms. S. Bhobe, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

C.V. Bhadang, J.—The challenge in this appeal is to the judgment and award dated 27.2.2009 passed by the Motor Accident Claims Tribunal, Mapusa (Tribunal, for short) in Claim Petition No. 57/2006. By the impugned judgment, the Tribunal has partly allowed the petition filed by the respondents/claimants granting a compensation of Rs. 2,75,000 along with interest in respect of death of Umesh Malik, who happened to be the son of the respondents.

2. The brief facts are that now deceased Umesh met with a vehicular accident at Karaswada, Mapusa on 24.1.2005. The accident occurred when the appellant (the respondent No. 1 before the Tribunal) while riding his Bajaj Scooter No. GDG-3803 gave a dash to the deceased from behind in which Umesh sustained injuries to which he subsequently succumbed. The respondents filed the aforesaid Claim Petition before the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (Act, for short) claiming a compensation of Rs. 4,00,000. The New India Insurance Company Ltd. was arrayed as the third respondent before the Tribunal. However, subsequently, it came to be deleted as the Bajaj Scooter involved in the accident was found to be not covered by policy of insurance on the date of the accident.

3. The case made out in the petition was that Umesh who was aged 26 years on the date of the accident was earning Rs. 5,000 per month. The respondents are his dependents. It was claimed that the accident occurred due to rash and negligent driving of the scooter by the appellant herein.

4. The appellant contested the petition. It was contended that on the date of the accident the appellant was proceeding towards Mapusa from Sirsai on his scooter and when he reached near water tank at Karaswada he saw four persons walking towards Mapusa side on the left hand side portion of the tar road. The appellant contended that there was some altercation going on amongst the four persons. When the appellant reached near them one of them suddenly fell on the road in front of the scooter, as a result of which the appellant applied emergency breaks by which the vehicle got skidded and the appellant fell on the road and sustained injuries in which he lost consciousness. On regaining consciousness he found himself in the Government Medical College (GMC) taking treatment. In short, it was contended that there was no impact as such between the scooter and the deceased. It was contended that thus the appellant was not responsible for the accident and would not be liable to pay any compensation. It was contended that on the basis of a complaint lodged by one Sanjay, police falsely implicated the appellant as being responsible for the accident.

5. Before the Tribunal, the respondent No. 2 examined herself along with Head Constable Vithu Naik (AW2). The respondent examined two eye witnesses to the accident namely Vithoba Malik (AW3) and Rupesh Malik (AW4). The appellant examined himself in his defence.

6. The Tribunal came to the conclusion that the accident occurred due to the rash and negligent driving of the appellant resulting into death of Umesh and assessed the compensation at Rs. 2,75,000. Feeling aggrieved, the appellant is before this Court.

7. I have heard Shri Menezes, the learned Counsel for the appellant and Shri Bhobe, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have perused record and gone through the impugned judgment.

8. It is submitted by the learned Counsel for the appellant that there is no sufficient evidence to conclude that there was actual impact between the scooter driven by the appellant and the deceased. It is submitted that the deceased was one amongst the four persons, who were proceeding towards Mapusa on foot. It is submitted that there was some heated altercation going on amongst them. It is submitted that the deceased fell on the road of his own and sustained injuries. The learned Counsel was at pains to point out that the deceased was found to be under the influence of liquor and, as such, the contention on behalf of the appellant is probabalised. It is submitted that in order to avoid the impact the appellant applied emergency breaks in which the vehicle skidded and the appellant fell down and sustained injuries. It is thus submitted that the very

basis of the liability namely the accident having occurred due to the rash and negligent driving of the appellant is not established in this case. It is submitted that the appellant has been acquitted by the learned Magistrate of the offence of rash and negligent driving. It is submitted that the Tribunal has also discarded the evidence of Vithoba (AW3) and Rupesh (AW4) and, as such, it could not have reached the finding of negligence on the part of the appellant being the cause of the accident. Alternatively, it is submitted that the Tribunal ought to have gone into the aspect of contributory negligence on the part of the deceased which is not done. It is submitted that the finding of the Tribunal on the aspect of quantum is also not sustainable.

9. On the contrary, it is submitted on behalf of the respondents that the Tribunal has rightly come to the conclusion on the basis of the material circumstances on record that it was the appellant who was responsible for the accident. It is submitted that the Tribunal has rightly come to the conclusion that there was an impact between the deceased and the vehicle of the appellant, which resulted into the deceased getting injured which led to his death. It is submitted that there are no circumstances to indicate any contributory negligence on the part of the deceased. It is submitted that the Tribunal has rightly considered the monthly income of the deceased as Rs. 3,000 per month and after applying appropriate multiplier has granted compensation of Rs. 2,75,000 which does not call for any interference.

10. I have carefully considered the rival circumstances and the submissions made. The liability to pay compensation is a tortious liability based on negligence. The case made out on behalf of the appellant before the Tribunal is that while he was proceeding towards Mapusa, when he had reached near water tank at Karaswada, there were four persons walking towards Mapusa on the left hand portion of the tar road and that there was some heated conversation going on amongst them. It is specifically claimed that when the appellant reached close to them one of the four persons, fell on the road in front of the scooter and, therefore, the appellant applied emergency breaks, as a result of which the scooter got skidded and he fell on the road and sustained injuries. It can thus be seen that the presence of the appellant at the spot of the accident is not in dispute. The question is whether there was actual impact between the vehicle of the appellant and the deceased and the cause of the accident. The Tribunal after considering the circumstances and the evidence on record came to the conclusion that there was an impact between the vehicle and the deceased and the accident occurred due to the rash and negligent driving of the appellant. It is true that the Tribunal has discarded the evidence of both the eye witnesses Vithoba (AW3) and Rupesh (AW4) for the reason that the contents of the affidavit which were in English were not shown to be explained or interpreted to these witnesses, as they were not knowing English. Be that as it may, in the absence of an ocular evidence of the occurrence of an accident the question of negligence can be decided on the circumstantial evidence, in consonance with the principle of *res ipsa loquitur*. At times, the circumstances if properly

appreciated are more telling than the ocular evidence. At this stage, it needs to be emphasized that in a petition for compensation under the MV Act the degree of proof to establish negligence need not be as high, as is required in a criminal case. In other words, in a petition of the present nature, the degree of proof would proceed on the basis of preponderance of probability. It is significant to note that, although the appellant claims that he applied immediate breaks, there are no break marks noticed in the spot panchanama. Thus the contention raised on behalf of the appellant is not substantiated on the basis of the contents of the spot panchanama. On the contrary, the front light and the mudguard of the scooter was found damaged. In the ordinary course of things and as has been rightly found by the Tribunal if the vehicle got skidded and fell on one side it was not probable that the front side of the mudguard and the headlight would suffer any damage. That apart, the PM report Exhibit 33 shows in all five injuries on the deceased which includes a grazed abrasion 5 x 4 cms with brown scab formation seen over right side lower one third of back, 3 cms from mid opine region. Three out of the other injuries are on the front and one of the injuries is an abrasion over back of left elbow. The Tribunal after considering this has found that there was some blunt force impact (which is shown to be the cause of the injuries) from behind the deceased. Even going by the case made out by the appellant the deceased who was one amongst the four persons were proceeding on foot by the left side of the road and were proceeding towards Mapusa. The appellant who was riding his scooter was also proceeding towards Mapusa. Thus, the injuries sustained by the deceased on the right lower side of the back is probabalised and well explained, if the theory of the accident having occurred as claimed by the respondents is accepted.

11. It is true that it has come in the PM report that the stomach was having alcohol content. However, that by itself would not be sufficient to conclude that the deceased was responsible or had contributed to the accident. This would be so for more reasons than one. Firstly, the quantity and the percentage of the liquor content has not come on record in order to conclude that it was sufficient for the gait of the deceased being affected or was sufficient for the deceased to be unable to maintain his balance. Secondly, the case made out by the appellant that the deceased fell on the road on his own cannot be accepted for the reasons as indicated above. On the contrary, the absence of any break marks and the injuries both on the front and the right lower back side of the deceased corroborate the version of the respondents that there was an impact between the vehicle driven by the appellant and the deceased.

12. The acquittal of the appellant in the criminal case, would be of no consequence, again for plurality of reasons. Firstly, as noticed above, the standard of proof in a criminal case is much higher than the standard required in a Claims Petition. Secondly, the perusal of the judgment of acquittal dated 19.5.2008 in Criminal Case No. 80/S/2006/B on the file of the learned Judicial Magistrate First Class, Mapusa, would show that the material witnesses had failed to identify the appellant (who was the accused before the Magistrate) as

they were in a hurry to carry Umesh for treatment. Thus, I do not find that any exception can be taken to the finding recorded by the learned Tribunal holding that Umesh died on account of the injuries sustained in the accident which was caused due to the rash and negligent driving of the scooter by the appellant.

13. This takes me to the issue of quantum. The Tribunal in this regard has found that there is no income proof of the deceased produced on record and the only thing which was brought on record was that the deceased was doing some business. It was in these circumstances that the Tribunal opted to take a notional income at the rate of Rs. 3,000 per month. After deducting 7rd towards personal living expenses, the annual dependency was calculated at Rs. 24,000. The Tribunal has applied the multiplier of eleven and has arrived at compensation of Rs. 2,64,000. The Tribunal has awarded Rs. 5,000 each towards funeral expenses and loss of estate, which takes the total compensation to Rs. 2,74,000 which is rounded off to Rs. 2,75,000. In my considered view, the Tribunal was justified in reckoning the monthly income of Rs. 3,000 per month in the absence of any income proof. While applying the multiplier, the age of the deceased or the claimants whichever is more has to be taken into consideration. In the present case, it would be the age of the claimants which would be relevant. The claimant No. 1 was shown as 49 years of age while the claimant No. 2 was shown as 46 years of age at the time of the accident. The Tribunal after considering the fact that the birth certificate of the respondents were not produced has taken the age of the parents at around 50 years. It can thus be seen that the Tribunal has reckoned the multiplier depending on the age of the parents. Thus, in my considered view, no exception can be taken to the quantum of the compensation as determined by the Tribunal in this case.

14. In the result, the appeal is without any merit and is accordingly dismissed with no order as to costs.