
(1994) 07 BOM CK 0119
In the Bombay High Court

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Shri Rajendra Daya Bamanian and Others

RESPONDENT

Date of Decision : 07-07-1994

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2)(b)(ii)

Citation : (1995) 1 ACC 635

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

Bench : Division Bench

Judgement

G.D. Kamat, J.—This appeal by the Insurance Company challenges the Award dated 27th February, 1990, made in Claim Petition No. 26/89 by the Claims Tribunal, South Goa, Margao. The Claim Petition had been instituted by respondent No. 1 claiming a sum of Rs. 3,10,000/- by way of compensation in respect of the accident that took place on 25th August, 1988, at Dangarwadi, Diu. According to the respondent No. 1 (original claimant) he came from a minor road on a cycle to the main road being the Diu-Vanakbara Road. Passenger bus bearing registration No. CDB-975 driven by respondent No. 3 and owned by respondent No. 2 was proceeding at a high speed from Diu to Vanakbara and due to negligence dashed against him, as a result of which he was thrown down along with the cycle. As a result of the impact apart from multiple minor injuries he suffered a compound fracture of tibia and fibula of the right leg.

2. The claim was contested on behalf of the respondents No. 2 and 3 as also the appellant. On the basis of the evidence recorded, the Tribunal found favour with the original claimant partially. The Tribunal held that though the respondent No. 3 drove the bus rashly and negligently, yet the original claimant had also contributed to that accident. The Tribunal held that the responsibility for the accident insofar as the original claimant is concerned is 1/3 and that of the respondent No. 3 is 2/3. On several heads viz. Special damages and general damages, a compensation of Rs. 1,20,000/- was determined and thereafter the same was sought to be slashed by 10% on the ground that the original claimant

is getting a lump sum award, with the result it was brought down to Rs. 1,08,000/-. Applying the ratio of contributory negligence, a sum of Rs. 72,000/- was awarded in favour of the original claimant which was directed to be paid jointly and severally by the Insurer, Insured and Driver together with 12% interest from the date of claim till complete satisfaction. By way of costs, Rs. 2,500/- were also awarded.

3. Two points have been raised in the present appeal by the Insurer Oriental Insurance Co. Ltd., the first being that the Diu Municipal Council is the registered owner of the bus in question and despite this fact the original claimant instituted the claim petition in the name of Smt. Jethibai Transport. It was contended that the Insurance Policy was in the name of Diu Municipal Council and that way Smt. Jethibai Transport is unknown to the Insurer.

4. This contention of the Insurer is to be mentioned to be rejected. It is true that the original claimant in his claim petition impleaded Smt. Jethibai Transport with a suffix "Undertaking by Diu Municipal Council, Diu". It is clear from the evidence on record that passenger transport is being undertaken by Diu Municipal Council in the name of Smt. Jethibai Transport. Despite the description of respondent No. 1 as mentioned above, when the defences were filed in the Claim Petition no point was raised by the Diu Municipal Council that there has been either mistake or error in the description of the owner of the vehicle in question. Secondly, defences were signed and verified by the President of the Diu Municipal Council. It is therefore, clear that whatever description of the owners made by the original claimant in the Claim Petition was understood by the parties concerned as a claim made against Diu Municipal Council in the name and style of transport undertaken by the aforementioned Council. Apart from this, even while describing the owners as Smt. Jethibai Transport it was identified by saying that it is an undertaking of Diu Municipal Council. In this view of the matter we do not think that the claim can be allowed to be defeated on this ground.

5. Mr. H.R. Bharne, learned Counsel for the Insurance Company now says that the Tribunal is in error in misreading the relevant clauses incorporated in the policy of Insurance and has erred in directing that the compensation awarded in the sum of Rs. 72,000/- is liable to be paid jointly and severally by the Insurer, Insured and the Driver. Relying upon the provision of Section 95(2)(b)(ii) of the Motor Vehicles Act, 1939, he says that the statutory liability in one accident insofar as the third party is concerned, is limited to Rs. 50,000/-. He therefore, says that even when the case of the original claimant is accepted, the Tribunal was bound to limit the liability of the appellant Insurance Company, to the extent of Rs. 50,000/- only.

6. There is substantial merit in this contention. The Tribunal in paragraph 35 of the Award has made reference that the limit of liability of Rs. 50,000/- refers to the liability of the Company u/s II-I-(ii) in respect of any claim or series of claims arising out of one accident, but however Section II-I-(ii) refers only to damage to property caused by the use of the vehicle while the liability for death or bodily

injury to any person caused by the vehicle is referred to in Section II-I(i). The Tribunal is clearly in error in interpretation of the terms and conditions of the policy and we will presently point out that under the limits of liability what is mentioned is thus:

Section II--Liability to Third Parties:

1. Subject to the Limits of Liability, the Company will indemnify the insured against all sums including claimant's cost and expenses which the insured shall become legally liable to pay in respect of:

(i) death of or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the Motor Vehicle.

(ii) Damage to property caused by the use (including the loading and/or unloading) of the Motor Vehicle.

7. What is therefore attracted in the present case is that the injured person is claiming damages for bodily injury u/s II-1(i). It is therefore clear that the liability of the Insurer u/s II-1(i) in respect of any one accident has to meet the requirement of Section 95(2)(b)(ii) of the Motor Vehicles Act, which limits it to Rs. 50,000/-. In other words, the statutory limit fixed u/s 95(2)(b)(ii) is incorporated in the Policy of Insurance and this being so, the question of foisting liability on the Insurer in excess of Rs. 50,000/- does not arise in the present case. In our view therefore, this Appeal of the Insurance Company is liable to succeed and the liability of the Insurer can in no event exceed Rs. 50,000/-.

8. Cross-objections have been filed on behalf of the respondents Nos. 2 and 3, owner and driver in this appeal. The grievance made insofar as the award is concerned is that at any rate, having regard to the evidence adduced by the original claimant and the injuries suffered by him, the compensation of Rs. 72,000/- is far in excess and the same cannot be sustained.

9. Mr. A.R. Kantak, learned Counsel appearing for the respondents Nos. 2 and 3 contended that there is no justification whatsoever for grant of compensation to the tune of Rs. 15,000/- as in any case taking everything in favour of the original claimant what is justified by way of special damages is a sum not more than Rs. 3,510/-. He referred to the evidence on record in support of this contention. Before we come to the evidence it may be useful to mention that on the head of special damages the Tribunal awarded a sum of Rs. 5,000/- for medical treatment and wages of attendant and Rs. 10,000/- to wards conveyance together making a sum of Rs. 15,000/-.

10. The story of the original claimant is that soon after the accident he was taken to a town called Una in Gujarat State and he was lodged at "Ashirvad Hospital" and treated by Dr. Rajesh Gandhi, an Orthopaedic Surgeon. The claimant in his evidence as also Dr. Gandhi who has issued a certificate had made out that the claimant was lodged in the Hospital from the date of the accident i.e. 25th August, 1988 and discharged therefrom on 29th August, 1988 and after putting

the necessary plaster claimant was sent home. The story of the claimant is that at first he was advised bed rest for six weeks and as called upon to do so, he had to go for check-up and follow-up treatment periodically to Una. There is also evidence to suggest that upon removal of the plaster after six weeks Doctor found that the fracture was in process of healing and therefore reapplied short plaster and directed the claimant to come back after another month. After about a month, when claimant was seen by the Doctor, the X-ray revealed that the fracture had not completely healed. Claimant was also directed physiotherapy exercises at least for a period of three months. According to the evidence of both the claimant and the Doctor, the claimant was complaining of pain and weakness felt in the leg and difficulty in squatting. Doctor otherwise opined that the disability suffered is to the extent of 20% based upon the standard set out in the "Manual Impediment" by Yadav and Varma, which is universally accepted as sound.

Bills for transportation, medicine and professional fees of the Doctors were also produced on record by the claimant. In the evidence of Dr. Gandhi, CI.W. No. 7, a bill in an amount of Rs. 2,020/- was proved.

Upendra Laxman Soma, CI.W. No. 6, was examined and he testified that he is the owner of a taxi bearing No. GJA 6440 and he had transported the claimant from Dangarwadi to Una Hospital on six occasions. He proved that a sum of Rs. 1,200/- which is reflected in the receipt dated 10th January, 1989, was paid to him by way of hire charges. Suggestions made to the witness in cross-examination were denied and the witness besides affirming that he had taken claimant six times to Una also asserted that his taxi was engaged by the claimant for taking the claimant from his house to the Hospital at Diu.

11. Pratap Lauji Macwana, CI.W. No. 3, Medical Officer at Diu, who used to give physiotherapy to the claimant, mentioned in his evidence that he was paid a sum of Rs. 200/- by the mother of the claimant and proved the receipt dated 19th September, 1981.

The claimant has produced some bills by which it transpires that he purchased medicines of the value of Rs. 90/- though at the same time he made a statement that he had not retained all the bills for the purchase of the medicines.

12. It seems there is justification for the learned Counsel for the respondents Nos. 2 and 3 to suggest that barring the amounts of Rs. 2,020/-, towards Ashirvad Hospital Bills, Rs. 1,200/- for six trips by taxi, Rs. 200/- fees for physiotherapy exercise and Rs. 90/- for medicines together making a sum of Rs. 3,510/-, there is no cogent evidence in respect of the tall claim made by the claimant, nor any justification exists for the Tribunal to hold that on the head of Special Damages Rs. 15,000/- by way of compensation can be awarded.

The fact remains that by various bills the claimant proved that he spent the sum of Rs. 3,510/-, but the further fact remains that in the matter of payment towards taxi fare, purchase of medicines, etc., bills and vouchers are not

collected nor accounts noted in writing. On an overall consideration that the original claimant was immobilized for a long period of time, which is not less than at least six to eight months, in the matter of not giving the details of expenditure, the claimant could be held to be entitled to a sum of Rs. 1,490/- and adding this figure to the expenditure, the claimant could be held to be entitled to a sum of Rs. 1,490/- and adding this figure to the expenditure proved at Rs. 3,510/-, we find no difficulty in awarding a sum of Rs. 5,000/- in favour of the original claimant on the Subhead of Special Damages. To this we will add a sum of Rs. 5,00/- by way of loss of wages which could not be earned by the original claimant as a result of being incapacitated for a period of not less than eight months. We reject this claim for a sum of Rs. 12,000/- for loss of wages, with the result, on the head of Special Damages a sum of Rs. 10,000/- in all is liable to be paid.

13. Mr. Kantak now attacked the further three Sub-heads upon which in all a sum of Rs. 1,05,000/- has been awarded by the Tribunal. The Tribunal in the impugned award held that the claimant is entitled to sum of Rs. 35,000/- on the Sub-head of pain, suffering and shock. A further sum of Rs. 35,000/- was awarded on the Sub-head of discomfort and inconvenience and then the Tribunal awarded a further sum of Rs. 35,000/- on the head that the claimant having suffered 20% permanent disability, he was incapacitated to lead a normal life. There is some justification when the learned Counsel says that there is duplication insofar as the first two Sub-heads are concerned inasmuch as once a sum of Rs. 35,000/- is awarded on the Sub-head of pain, suffering and shock, there could not have been another equal sum of Rs. 35,000/- on the Sub-head of discomfort and inconvenience. This apart, urges the learned Counsel, compensation awarded is far in excess of what the original claimant deserved. In any case, there is no justification whatsoever for having awarded another large sum of Rs. 35,000/- on the grounds that he was incapacitated to lead a normal life, says the Counsel.

14. In our view, bearing in mind the criticism levelled on behalf of the respondents Nos. 2 and 3, it is necessary that the assessment of damages payable to the original claimant is done afresh in this appeal. High compensation of Rs. 1,05,000/- awarded on the aforementioned Sub-heads by way of general damages seems to be not justified on the grounds that they are far in excess and not a just and reasonable compensation.

15. The Tribunal despite coming to findings on the basis of the evidence on record that there was rashness and negligence on the part of the driver of the bus and despite holding that the principle of *res ipso loquitur* is attracted to the facts of the case, yet held that the responsibility of the accident should be shared by the original claimant and the driver in the proportion of 1/3rd to 2/3rd respectively.

16. The question to ask is whether on the facts of this case any responsibility if at all, can be attributed to the original claimant. In this connection, the claimant

says that he was riding on a cycle and coming from the side road to the main road Diu-Vanakbara and when he reached the point of the junction of the side road with the main road he saw the bus coming from Diu to Vanakbara which was going at a fast speed. According to him he stopped the cycle at that juncture and despite being stationery the bus dashed against his cycle, as a result of which he was thrown out five to six metres away from the point of impact. He says that the bus came to a halt four to five metres away from the place where the cycle had fallen and that too on the katcha portion of the road on the right-hand side which was obviously the wrong side for the bus. It was travelling from Diu to Vanakbara.

Claimant is supported in his evidence by Mahendra Rama, CI.W. 2. According to him he saw the accident which took place at 12 a.m. on a junction of a road starting from Dangarwadi and joining the Diu-Vanakbara road. According to him he was following the claimant on his cycle. He deposes that the original claimant entered the main road. On seeing the bus claimant applied brakes but the bus gave a dash to the cycle as a result of which claimant fell at a distance of six to eight metres from the point of collision and the bus stopped at a distance of two metres on the right side of the road.

Manilal Govind, CI.W. 5, was examined in favour of the original claimant to prove the Panchanama. He deposes that the bus was stationery on the right side of the katcha portion of the road facing Vanakbara and the cycle had fallen on the road on the left side. He affirms that at the place of the accident the road is a straight one and the width is about five to six metres with the result two vehicles can pass at a time without any difficulty. He also identified the sketch of the scene of the offence.

17. As against this version the case of the respondent No. 3 driver, is that the original claimant was riding on his cycle and suddenly he came on the main road; that the bus was going at a reasonable speed after taking a turn on a curve on the right-hand side and as he was supposed to take another curve on the left-hand side he had to necessarily proceed with less speed. According to him he applied brakes and tried to save the original claimant and as a result of that the bus went to the right side outside the tarred portion of the road. According to him the cycle was thrown at a distance of one metre from the bus.

18. Regard being had to the oral evidence and supported by the Panchanama together with the sketch, it seems clear that the road is straight where the impact took place. The fact remains that the bus driven by the respondent No. 3 driver, was on the katcha portion of the road, that is to say on the right-hand side as one proceeds from Diu to Vanakbara. The road is admittedly nearly eight metres in width. This being the tell-tale not much effort is necessary to hold and more particularly having regard to the injuries suffered by the original claimant and the position of the cycle, that the bus was driven at a high speed. Even on the assumption that the cycle driven by the claimant was not stationery, if the version of respondent No. 3 is to be accepted, there was no question of bus

having gone on the wrong side and stopped on the katcha portion of the road. It is, therefore, difficult to hold the original claimant is responsible for this accident. The finding based on the evidence therefore must be that the entire responsibility for the accident must be attributed to the driver of the bus.

19. Coming to the compensation on General Damages, we have already highlighted that the original claimant suffered a compound fracture of both tibia and fibula of the right leg. We have also seen that the original claimant was hospitalized at Ashirvad Hospital at Una. His leg was put in plaster at the beginning for a period of six weeks and thereafter short plaster was applied. The applicant was advised physiotherapy for a period of three months. We have mentioned elsewhere that the applicant was not in a position to carry on any activity for a period of not less than about eight months. Being so, on the Sub-head of pain, suffering shock and discomfort, a sum of Rs. 25,000/- is a reasonable compensation. In addition, a sum of Rs. 25,000/- is further necessary to be awarded to the original claimant for loss of amenities insofar as future life is concerned/The original claimant says that on the date of the accident he was about 20 years of age and working as a Khalasi. Though an attempt is sought to be made on behalf of the respondents No. 2 and 3 that the claimant was helping his father, who is in some construction activity, there is no cogent evidence adduced by the respondent No. 2. Dr. Gandhi was also opined that the original claimant has suffered permanent disability to the extent of 20% and that the claimant was still complaining of pain and weakness in his leg. We therefore, feel that the compensation of Rs. 25,000/- for loss of amenities for future life is not out of place.

20. Appeal partly succeeds. The compensation awarded to the original claimant is adjudged at Rs. 60,000/- on all counts. The liability of the Oriental Insurance Company Ltd. is limited to Rs. 50,000/- only. The compensation in excess of Rs. 50,000/- shall be jointly and severally paid by respondents Nos. 2 and 3. The awarded compensation shall carry interest at the rate of 12% per annum from the date of claim application until payment. To the extent indicated the cross-objections filed by respondents Nos. 2 and 3 in the appeal are also partly allowed. Costs of Rs. 2,500/- awarded by Tribunal is maintained and parties are directed to bear their own costs in this appeal. If "no fault" liability is paid, the same to be deducted.