

(2010) 11 BOM CK 0080
In the Bombay High Court
Case No : First Appeal No. 255 of 2003

Prof. Ramesh Chitnis (dead through L.R.), Mangesh Ramesh Chitnis APPELLANT

Vs

Shri Raghoba Dessai, Bus Driver, Kadamba Transport Corporation Ltd. and Others RESPONDENT

Date of Decision : 16-11-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2011) 1 TAC 291

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : J.J. Mulgaonkar, for the Appellant; A.R. Kantak and E. Afonso, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this appeal, the Appellant takes exception to the award dated 29/4/2003 passed by the Motor Accident Claims Tribunal at Panaji in claim petition No. 147/1994 dismissing the claim petition filed by the claimant u/s 166 of the Motor Vehicles Act 1988 ("The Act" for short) claiming compensation on account of death of his wife. The Appellant Mangesh Chitnis, the son of Ramesh Chitnis, has been brought on record in view of death of Ramesh Chitnis (the claimant) during the pendency of the appeal. The parties shall hereinafter be referred to as per their status before the Tribunal.

2. The claimant filed claim petition claiming total compensation of Rs. 4,58,600/- on account of death of his wife Aarati Chitnis who died in motor vehicle accident on 23/1/1994. On the said date, at about 12.30 hours deceased Aarati with her husband Ramesh and son Mangesh along with their servant were traveling in a maruti van bearing registration No. MH-07-A-7821 from Sawantwadi to Dabolim Airport in Goa. The vehicle was driven by Dhananjay Dattaram Chavan, (Respondent No. 3). The vehicle met with an accident on the highway at

Bambolim at a distance of about 200 metres from Goa Medical College. The bus bearing registration No. GDX-128 which was driven by Respondent No. 1 and owned by Respondent No. 2 dashed against the maruti van as a result of which deceased Aarati sustained head injuries and died on the spot. In the claim petition the claimant urged that the accident had occurred on rash and negligent driving of Respondent No. 1, the driver of the bus.

3. Respondent Nos. 1 and 2 contested the claim petition. According to them, the accident occurred on account of rash and negligent driving of the maruti van by Respondent No. 3, who suddenly entered the highway, resulting in the accident.

4. Respondent No. 3 supported the case of the claimant. According to him the accident occurred on account of rashness and negligence on the part of Respondent No. 1.

5. Respondent No. 5 stated that since the entire claim was against Respondent Nos. 1 and 2 only, it was not liable to pay any compensation to the claimant.

6. On the basis of the pleadings of the parties, the Tribunal framed the following issues:

i) Whether the claimant proves that on 23.1.1994 at about 12.20 hours his wife Aarati Chitnis was traveling in maruti van No. MH-07-A/7821 from Sawanwadi to Dabolim airport via Panaji Agassaim road and when it had reached near GMC hospital at Bambolim Respondent No. 1 drove bus No. GDX-128 in opposite direction in a rash and negligent manner and dashed against the maruti van?

ii) Whether the claimant proves that in the said accident said Aarati Chitnis sustained head injuries resulting in her death?

iii) Whether the claimant proves that he is entitled to a total compensation of Rs. 4,58,600/-?

iv) Whether Respondents Nos. 1 and 2 prove that it was Respondent No. 3 who was rash and negligent in driving the said maruti van and that the accident was caused due to his fault and therefore, they are not liable to pay any compensation?

v) Whether the Respondents Nos. 3 and 4 prove that it was Respondent No. 1 who was rash and negligent in driving bus No. GDX-128 and therefore, they are not liable to pay any compensation?

7. Before the Tribunal, the claimant examined three witnesses namely, Ramesh Chitnis, CW.1, Mangesh Chitnis, CW.2 and Sandeep Patil, CW.3. Respondent No. 1 stepped in the box. Respondent No. 2 examined Shri Pundalik Sawant, RW.2 who was the conductor of the Kadamba bus at the relevant time. Dhananjay Chavan, Respondent No. 3 examined himself to prove his case.

8. The Tribunal upon appreciation of the evidence led by the parties held that the claimant had not proved that Respondent No. 1 was driving the bus in a rash and

negligent manner. The Tribunal further held that it was Respondent No. 3 who was rash and negligent in driving the maruti van and the accident was caused due to his rash and negligent driving. The Tribunal did not give any finding on the aspect of compensation claimed by the claimant.

9. As stated above, during the pendency of the appeal the original claimant expired and his son has been brought on record.

10. Mr. Mulgaonkar, learned Counsel appearing on behalf of the claimant submitted that the Tribunal has erred in holding that Respondent No. 1 was not negligent in driving the bus. He further submitted that the evidence led by the parties clearly establishes that Respondent No. 1 was rash and negligent in driving the bus and he had not taken sufficient care to avoid the accident. In any event, Mr. Mulgaonkar submitted that the accident occurred on account of rash and negligent driving of the vehicle by Respondent No. 1 and/or Respondent No. 3 and therefore the Tribunal could not have dismissed the claim petition. In the alternative Mr. Mulgaonkar submitted that the Tribunal having held that Respondent No. 3 was rash and negligent in driving the maruti van ought to have allowed the claim petition at least as against Respondents Nos. 3 to 5. He further submitted that the Tribunal has clearly erred in not quantifying the compensation which the Tribunal ought to have done. Mr. Mulgaonkar further submitted that the evidence on record in any case establishes composite negligence on the part of Respondent No. 1 and Respondent No. 3 and therefore, the Tribunal ought to have allowed the claim petition. Mr. Mulgaonkar further submitted that although in the claim petition the claimant did not aver rashness and negligence on the part of Respondent No. 3, the driver of the maruti van, the Tribunal ought to have allowed the claim petition at least against Respondents Nos. 3 to 5 since strict rules of pleadings are not applicable in claim petition. Mr. Mulgaonkar further submitted that when two vehicles are involved in an accident it is for the Tribunal to find out on the basis of the evidence on record whether it is a case of composite negligence or negligence on the part of either of them. Mr. Mulgaonkar further submitted that the Appellant/claimant is entitled to compensation of Rs. 2,99,500/- along with interest thereon at the rate of 9% per annum, from the date of filing of the claim petition till the date of actual payment.

11. Per contra, Mr. Kantak, learned Counsel appearing on behalf of Respondent No. 2 submitted that finding given by the Tribunal that Respondent No. 3 was rash and negligent is based upon correct appreciation of the evidence led by the parties and more particularly, that of Respondent No. 3 himself who clearly admitted that the impact of the accident was on the right side of the body of the maruti van and at the time of the accident, he was crossing the road and he had crossed more than half of the road. Mr. Kantak invited my attention to the admission of Respondent No. 3 that he thought that the Kadamba bus would take the same road by which he had come. Mr. Kantak, therefore, submitted that no fault can be found with the impugned award which clearly exonerates Respondents Nos. 1 and 2. Mr. Kantak further submitted that the liability to pay

compensation, if any, to the claimant is that of Respondent No. 3 to 5 and the Respondent Nos. 1 and 2 cannot be saddled with any liability to pay compensation.

12. Although Respondent Nos. 3 and 4 were served, both of them have chosen not to put in appearance.

13. Mr. Afonso, learned Counsel appearing for Respondent No. 5 submitted that the deceased Aarati was not third party and as such, the claim petition filed u/s 166 of the Act against Respondent No. 5 was not maintainable. Mr. Afonso further submitted that since deceased was a passenger in the maruti van, the claimant is not entitled to claim any compensation from Respondent No. 5 since there is no such liability on the insurance company under the provisions of the Act. He further submitted that even if Respondents Nos. 3 and 4 are held liable to pay any compensation, Respondent No. 5 cannot be called upon to pay compensation and recover the same from the owner in the event the insurance company is exonerated, since the Apex Court in a recent judgment has opined that the earlier view taken by the Apex Court that even if the insurance company is not liable to pay any compensation under the Act it can be directed to pay the compensation and recover the same from the owner, is not the correct view. Mr. Afonso further submitted that under the provisions of the Act Respondent No. 5 is not liable to pay any compensation to the claimant on account of death of Aarati who was the passenger in the maruti van, which was insured with Respondent No. 5. In support of his submissions Mr. Afonso placed reliance upon the following judgments:

- i) Dr. T.V. Jose v. Chacko P.M. Alias Thankachan and Ors. (2001) 8 SCC 748.
- ii) New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and Others, .
- iii) National Insurance Co. Ltd. Vs. Parvathneni and Another, .
- iv) New India Assurance Company Ltd. Vs. Sadanand Mukhi and Others, .
- v) The Oriental Insurance Company Limited Vs. Meena Variyal and Others, .
- vi) New India Assurance Co., Bijapur v. Smt. Kusum and Ors. (2003) (3) T.A.C. 423 Karnataka.

14. In re-joinder, Mr. Mulgaonkar submitted that in the event Respondent No. 3 is held to be rash and negligent in driving the vehicle, Respondent No. 5 is bound to pay the compensation and the claim petition filed u/s 166 of the Act against Respondent Nos. 3 to 5 was maintainable. Mr. Mulgaonkar further submitted that Respondent No. 5 having not placed on record the policy of insurance it is bound to pay the compensation in the event Respondent Nos. 3 and 4 are held liable to pay compensation. In support of his submissions, Mr. Mulgaonkar placed reliance upon the following judgments:

- i) Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others, .

- ii) T.O. Anthony Vs. Karvarnan and Others, .
- iii) Bhagyalakshmi and Others Vs. United Insurance Co. Ltd. and Another etc., .
- iv) Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, .
- v) National Insurance Co. Ltd., New Delhi v. Jugal Kishore and Ors. AIR 88 SCC 719.

15. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

16. In view of the rival submissions and the findings given by the Tribunal the following points arise for determination in the appeal:

- i) Whether the accident occurred on account of rash and negligent driving of the Respondent No. 1?
- ii) Whether the accident occurred on account of rash and negligent driving of Respondent No. 3?
- iii) Whether it was a case of composite negligence on the part of Respondent Nos. 1 and 3?
- iv) Whether in the absence of any averment in the claim petition that Respondent No. 3 was rash and negligent in driving the vehicle, Respondent Nos. 3 to 5 jointly or severally can be saddled with liability to pay compensation?
- v) If the appeal is to be allowed what compensation the Appellant is entitled to?

17. It would be necessary first to decide as to whether there was rashness and negligence on the part of Respondent No. 1 or Respondent No. 3 or both of them.

18. In support of the claim that it was Respondent No. 1 who was rash and negligent, the claimant examined himself and two witnesses. Ramesh Chitnis, CW1 deposed in consonance with the case set up in the claim petition and stated that on 23/1/1994, he along with his wife Aarati and son Mangesh and a servant were proceeding from Sawantwadi to Dabolim airport in a maruti van. The vehicle was on the left side of the road as one proceeds from Panaji to Margao. The vehicle driven by Respondent No. 1 in fast speed and in rash and negligent manner dashed against the maruti van on account of which his wife Aarati died on the spot on account of injuries on the head and other parts of the body. He further stated that she was 52 years old and was M.A. and was a lecturer in Junior college. She was the sole proprietor of the business known as Prabhat Agencies and was getting income of Rs. 3000/- per month and was also earning Rs. 300/- per month as lecturer. He produced a certificate from Technical School Sawantwadi to show that his wife was working as a lecturer and also challans in respect of payment of professional taxes in respect of Prabhat Agency. He also produced Form No. 4 A of Income Tax Department and also notices of Demand and assessment of sales tax of Prabhat Agencies. He also placed on record a

copy of the F.I.R and Panchanama and sketch. In cross examination, he admitted that the Kadamba bus gave a dash in the middle of the maruti van on the driver's side and that the bus was coming towards Panaji side and the maruti van was proceeding from Bambolim by G.M.C road. Their vehicle had crossed speed breakers. He admitted that kadamba bus was proceeding towards Panaji and it was supposed to proceed from the Highway road and not the internal road by which their vehicle came. He denied the suggestion that at the time of the impact their vehicle was in an oblique position on the main highway or that the driver was trying to cross the road and he had almost crossed more than half of the road without confirming that no vehicle was coming from the opposite direction. He denied the suggestion that his wife was not having monthly income of Rs. 3000/-. In cross examination on behalf of Respondent No. 4 he clearly stated that his claim was only against Respondent Nos. 1 and 2 and he had no claim against Respondents Nos. 3, 4 and 5.

19. Mangesh Chitnis, CW.2 also deposed on the same lines. He further added that their driver as well as he were aware that there was a main highway to proceed from Panaji to Margao. He admitted that the internal road by which they were proceeding from Panaji to go to the airport at Dabolim was connecting the said main highway and the level of the road of the highway was slightly more as compared to the internal road. He further stated that before starting crossing the highway they looked at both sides in a range of about 100 metres and the actual impact took place after their vehicle was in a straight line towards Margao side. He further stated that in order to avoid the impact the driver took the vehicle more on the left side. He denied the suggestion that the accident occurred in the middle of the road on the highway.

20. Sandeep Patil, CW.3, who was a pancha in respect of the Panchanama of the scene of accident deposed about contents of the panchanama and the sketch.

21. Ragohoba Desai, RW.1, the driver of the kadamba bus deposed in consonance with the case set up by him and stated that he saw the maruti van approaching the junction and it had slowed down, after crossing the speed breakers, as if to stop the van. Therefore, he increased the speed but the driver of the maruti van suddenly also increased the speed and attempted to cross the road. He, therefore, tried to save the maruti van by swerving the bus towards the middle of the road but the maruti van continued to come across the right side of the bus, as a result of which the accident occurred. He further stated that the main highway was slightly at a higher level as compared to the old road coming from front of Goa Medical College. In cross examination he denied the suggestion that he was trying to compete with the private bus and as such he was rash and negligent in driving the vehicle. He also denied that he was driving the bus in fast speed or that he had taken the bus on the wrong side of the road on account of overtaking of the said private bus.

22. Pundalik Sawant, CW.2 who was the conductor of the kadamba bus tried to support the case set up by the driver. However, in cross examination he admitted

that the bus had only one door at the back side. In view of his clear admission that he was standing at the door at the time of the accident, his evidence does advance the case of Respondent Nos. 1 and 2.

23. Dhanajay Chawan, Rw.3 who was driving the maruti van at the time of the accident in examination in chief claimed that at about 12.00 on 23/1/1994, he was driving maruti van in which Chitnis family was travelling. He took note of he traffic on the highway and crossed more than half of the portion of the same and was proceeding towards Agasaim. At that time Kadamba bus driven by Respondent No. 1 suddenly came from Agacaim side overtaking the stationary private passenger bus which had halted towards Agassaim side and gave dash on his vehicle as a result of which his vehicle turned turtle. He further stated that the Kadamba bus was on the wrong side when it dashed against his vehicle. He further stated that the said bus was in very fast speed and the driver appeared to have unsighted of his vehicle due to the private stationary bus and as such due to negligent and rash driving of the Respondent No. 1 the accident occurred. He further claimed that he was driving slowly and cautiously. In cross examination he was confronted with the written statement in which he had not stated about the stationary bus or that the kadamba bus was overtaking the said stationary bus. He admitted that the road from where the kadamba bus was coming was a downward slope. He also admitted that the impact of the accident was on the right side of the body of maruti van on the sliding door. He also admitted that at the time of the accident he was still crossing the road and he had crossed more than half side of the road. He could not state as to at what distance the kadamba bus was when he first saw it. He admitted that he did not see the kadamba bus when he was about to cross the road. He also admitted that the accident had taken place before he could cross the road completely for the purpose of taking the turn to go to Agassaim side. He candidly admitted that he had thought that the kadamba bus would take the same road on which he had come.

24. Upon appreciation of the evidence led by the parties, the Tribunal after placing heavy reliance on the evidence of Dhanajay Chawan held that Respondent No. 3 had suddenly entered the main highway, thinking that the kadamba bus would also take the same route which he had taken. In view of the clear admission on the part of Dhananjay Chawan that his vehicle had just crossed the highway at the time of the impact the evidence of Ramesh CW.1 and Mangesh CW.2 to the effect that they had already come on the highway and they were facing Agassaim cannot be accepted. Therefore, the Tribunal was right in holding that there was no rashness and negligence on the part of Respondent No. 1 in driving the bus. The panchanama and the sketch which have been duly proved by the claimant himself through Sandeep Paitl, CW.3, clearly supports the case set up by Respondent Nos. 1 and 2 that it was Respondent No. 3 who suddenly tried to enter the highway presumably because he thought that the Kadmaba bus would cross the same road by which he had come. Therefore the Tribunal was perfectly justified in holding that the accident occurred on account

of rash and negligent driving of Respondent No. 3 and not on account of rash and negligent driving of the bus by Respondent No. 1.

25. The next question which arises for consideration is whether Respondent Nos. 3 to 5, jointly or severally can be held liable to pay any compensation to the claimant.

26. In paragraph 23 of the claim petition filed by the claimant, the claimant specifically averred that the accident occurred on account of rash and negligent driving of the bus by Respondent No. 1. Moreover, the claimant Ramesh Chitnis, in his cross examination on behalf of Respondent No. 4 stated as under:

Our car had sustained damages on account of the accident. My claim is only against the kadamba bus and the driver. I have no claim against Respondents Nos. 3, 4 and 5.

27. In view of the specific stand taken by the claimant in the claim petition as well as in the course of his evidence that his claim was only against Respondents Nos. 1 and 2 and that he had no claim against Respondents Nos. 3, 4 and 5, I find it difficult to accept the submission of Mr. Mulgaonkar that in the event Respondent No. 3 is held rash and negligent in driving the van, the Respondent Nos. 3 to 5 are jointly and severally liable to pay the compensation to the claimant. No doubt, in the case of Bimla Devi, relied upon by Mr. Mulgoankar, the Apex Court has held that while dealing with claim petition in terms of Section 166, the Tribunal *stricto sensu* is not bound by pleadings of parties. Its function being to determine amount of fair compensation in the event an accident has taken place by reason of negligence of driver of motor vehicle. The ratio of the said judgment would not advance the case of the claimant in view of the specific stand taken by the claimant that it was Respondent No. 1 who was rash and negligent in driving the bus and that he had no claim against Respondents Nos. 3, 4 and 5. In view of the categorical stand taken by the claimant, I am of the considered opinion that the Respondents Nos. 3 to 5 cannot be saddled with any liability to pay compensation in the appeal preferred against the award dismissing the claim petition. I, therefore, hold that although Respondent No. 3 was rash and negligent in driving the vehicle, the Appellant/claimant is not entitled to any compensation from Respondents Nos. 3 to 5, either jointly or severally.

28. In view of the findings given above, I do not deem it necessary to deal with all the authorities relied upon by both the sides.

29. In the result, therefore, I do not find any merit in the present appeal. Consequently, the appeal stands dismissed. Having regard to the facts and circumstances of the case, the parties are directed to bear their own costs.