
(2014) 09 BOM CK 0195
In the Bombay High Court
Case No : First Appeal No. 21 of 2009

Sharda Gaikwad

APPELLANT

Vs

Allen Goes

RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 173

Citation : (2014) 09 BOM CK 0195

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.S. Kakodkar, Advocate for the Appellant; V.G.P. Dukle and E. Afonso, Advocate for the Respondent

Judgement

B.P. Dharmadhikari, J.—In this First Appeal filed under Section 173 of the Motor Vehicles Act, claimant challenges the Judgment and Award dated 07.10.2008 delivered by Presiding Officer, Motor Accident Claims Tribunal-III, South Goa, Margao, in Claim Petition no. 144 of 2007. The Motor Accident Claims Tribunal has dismissed the Appellant's Claim Petition.

2. The contentions of Appellant before Motor Accident Claims Tribunal was that while walking on foot towards the bus stop on 10.09.2006 on the road between Quepem to Tilamol near Kushavati Bridge, a motorcycle with registering no. GA-02/P-4584, came rashly and negligently on wrong side and dashed against her. She fell down and suffered fracture injury. The Respondent no. 1 was the driver, the Respondent no. 2 is the transferee-owner while Respondent no. 3 is the insurer of the vehicle. The Respondent no. 4 is the original owner of that motorcycle. The claimant claimed a total compensation of Rs.2,27,000/- which included demand of Rs.10,000/- towards medical expenses, Rs. 2,00,000/- for permanent disability and Rs.2,000/- towards transport, Rs.10,000/- towards pain and suffering and Rs.5,000/- towards future medical expenses.

3. The Motor Accident Claims Tribunal in the face of rival pleadings framed the following issues and has answered the same as mentioned against it:

4. Advocate Shri S. S. Kakodkar, appearing for the claimant- Appellant has submitted that the Motor Accident Claims Tribunal should have applied yardstick of preponderance and pleadings should have been accordingly construed properly. According to him, the accident spot is not in dispute. The word "wrong side" or "correct side" need to be understood in the background of the facts and the fact that the motorcycle driver was convicted also needs appreciation. He has taken the Court through relevant evidence to show that the accident took place on katcha side of the road on right hand side while proceeding from Quepem to Tilamol. The claimant was proceeding towards Tilamol on katcha portion on right hand side and Respondent no. 1 came in opposite direction i.e. he was proceeding from Tilamol to Quepem. He contends that the accident was witnessed by the husband of the claimant as also one eye witness and both have been examined. He also invites attention to the evidence of Head Constable who has investigated into the accident. He submits that as the accident has taken place below the tarred portion, the motorcycle has entered on wrong side and dashed against the pedestrian who was on the correct side. He submits that the Motor Accident Claims Tribunal has failed to appreciate these facts.

5. In the alternative and without prejudice by inviting attention to the sketch of accident placed on record, he points out that after the impact, the motorcycle has gone below the road and travelled distance of about 18 metres before coming to halt. He submits that it went down the bridge and the mode and manner in which the accident took place is evident therefrom. He relies on the principles of *res ipsa loquitur* to substantiate his contention.

6. To increase the quantum granted, the learned Counsel states that the fracture injury was admitted and, therefore, pain has been suffered by claimant for over twelve weeks. There is also permanent disability though in very small percent. According to him, in this situation, under no fault liability under Section 140 of the Motor Vehicles Act, in said circumstances, an amount of Rs.25,000/- is permitted. The Motor Accident Claims Tribunal has failed to apply its mind in quantifying the amount of Rs.10,000/- only on account of pain and suffering and Rs.10,000/- towards permanent disability. He points out that as Motor Accident Claims Tribunal found that the Petitioner was not a housewife, her monthly income has rightly been presumed at Rs.4,000/-. He further points out that one of the witnesses has stated that she was also working as a labourer. Hence, grant of an amount of Rs.9,000/- towards loss of earning for a period of three months is questioned by him as insufficient.

7. The Judgment of the Hon'ble Apex Court reported at *Kusum Lata and Others Vs. Satbir and Others*, in the case of *Kusum Lata and Ors. vs. Satbir and Ors.*, and *Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others*, in the case of *Bimla Devi and Ors. vs. Himachal Road Transport Corpn. and Ors.*, are relied upon by him to show that norm of touchstone of preponderance of probability needed to be applied. *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, and *Division Bench*

Judgment of this Court reported in 1996(1) T.A.C. 589 (Bom.) in the case of Sakharibai Hasanali Makani and Ors. vs. Girish Kumar Rupchand Gadia and Ors., are relied upon by him to urge that principle of res ipsa loquitur ought to have been resorted.

8. Advocate Shri E. Afonso, appearing for the Respondent no. 3-Insurance Company has opposed the Claim Petition. He submits that the findings of fact reached by Motor Accident Claims Tribunal are consistent with the evidence on record and accident took place on account of rash and negligent act of claimant in suddenly crossing the road. He states that in this situation, the doctrine of res ipsa loquitur has no application. He prays for the dismissal of Appeal.

9. Advocate Shri V. G. P. Duple appearing for the Respondent no. 1-motorcycle Driver, also strongly opposes the Appeal. He invites attention to the case as pleaded by the claimant and also to her evidence to urge that the accident admittedly has taken place on right hand side of the road going from Quepem to Tilamol and motorcycle approaching from Tilamol towards Quepem was, therefore, on its correct side. He submits that thus finding recorded by Motor Accident Claims Tribunal in concluding part of paragraph 10 at page 93 of the paper book and para thereafter i.e. para 11(wrongly shown as para 10 again) show no perversity and hence this Court should not interfere.

10. In reply, Advocate Shri S. S. Kakodkar, points out that the spot of accident was never in dispute and Insurance Company did not ask for leave to defend before Motor Accident Claims Tribunal.

11. After hearing the respective Counsel, following points arise for my consideration:

(1) Whether on 10.09.2006, motorcycle was being driven by Respondent no. 1 in rash and negligent manner which caused the accident ?

(2) Whether the finding of Motor Accident Claims Tribunal that claimant herself was negligent and hence accident occurred, is sustainable ?

(3) Whether the amount of compensation has been worked out properly by Motor Accident Claims Tribunal?

12. The case as pleaded by the Appellant-claimant shows a statement that she was a pedestrian walking on extreme side of the road and was proceeding towards bus stop to go to Sanvordem. At the place near Kushavati Bridge and Dr. Mahesh Raikar's dispensary, on the road between Tilamol to Quepem, motorcycle driven by Respondent no. 1 rashly and negligently came to wrong side and hit her. Respondent nos. 1 and 2 have filed their joint written statement and denied these contentions. They denied that the claimant was a pedestrian on extreme side of the road and that she was proceeding towards the bus stop. They claimed that the accident took place entirely due to the fault of claimant as she came abruptly running from left side to right side and was responsible for it.

13. Thus, Respondent no. 1-driver also accepted that the accident took place on left side of the road i.e. on his correct side while proceeding from Tilamol to Quepem. Before proceeding to consider the oral evidence in this respect, it would be proper to look into the admitted sketch on record. The sketch shows a bridge and a tar road upon it. Tilamol is shown on right hand side while Quepem-Margao is on left hand side. The width of tar road is about six metres. After tarred portion, there is a katcha road of width of about 0.90 metres. The accident spot is shown on this katcha part on right hand side of the road while proceeding from Quepem to Tilamol. The Respondent no. 1, motorcycle driver, was coming from Tilamol and proceeding towards Margao-Quepem and hence accident spot is on his left hand side below the tar road.

14. A perusal of evidence of Aw.3-Ravi Gopikar, reveals that he was working as a Hawaldar at Quepem Police Station. After receiving knowledge of accident, he carried out the initial investigation. It appears that he had drawn a panchanama of the spot of accident. He stated that the motorcycle rider ran away from the spot and chargesheet was filed against him. In cross examination conducted by Respondent nos. 1 and 2, he accepted the accident took place on left hand side when one proceeds from Tilamol to Quepem.

15. Perusal of evidence of claimant-Appellant shows that her affidavit of examination in chief is in consonance with the statement made in Claim Petition. In cross examination conducted by Respondent nos. 1 and 2, she has stated that she was climbing the bus at Quepem to go to Tilamol when accident occurred. In next line, she has stated that she was going to the bus stop which was on the other side of the bridge. She was walking towards the bus stop at the time of accident. She denied that after seeing the bus, she was running on the road to catch it. She denied that the accident took place because of her rash and negligent act. Her cross examination conducted by Respondent nos. 3 and 4 shows an answer by her that she was walking on the left side of the road proceeding towards Tilamol, the motorcycle was coming from Tilamol. She denied that she was trying to cross the road from her right hand side towards left side. She denied that accident took place due to her fault.

16. Evidence of her husband Suresh Gaikwad shows an assertion in chief that the motorcycle being driven rashly and negligently, came in fast speed from opposite direction, came to wrong side and hit his wife. In cross examination he has stated that the motorcycle was coming from Tilamol towards Quepem and it was originally on its left hand side. He denied that at the time of accident, claimant was crossing the road from her left towards her right side. This material has come on record in cross examination conducted by Respondent no. 3. One Rami Kale, is an eye witness who claims that he saw the accident from about 15 metres. He deposed that the claimant was pedestrian on katcha road facing Sanvordem direction and her husband was following her. The motorcycle came in opposite direction in speed rashly, came to wrong side and hit the claimant Sharda. Hi cross examination shows that he accepted occurrence of accident on

right hand side of the road proceeding from Quepem to Tilamol. He stated that the claimant was walking on the left side of the road. He denied that the accident took place on left hand side of the road when claimant was crossing the same from left to right. He has stated that a scooter dashed against the claimant. His cross examination conducted by Respondent nos. 3 and 4 shows that the accident took place on tar road. He denied that the accident took place on left side of the road and on katcha road as one proceeds from Quepem to Tilamol. He also stated that he was not in a position to differentiate between a scooter and a motorcycle. He denied the suggestion that the claimant was always a housewife.

17. When this evidence on record is considered in the background of pleadings in Claim Petition and the sketch, it is apparent that the Appellant-claimant nowhere stated that she was walking on left side of the road which proceeds from Quepem to Tilamol. Her cross examination by Respondent nos. 1 and 2 shows only a roving effort. She has stated in cross examination that she was climbing the bus at Quepem to go to Tilamol when the accident occurred. This was not the case pleaded by anybody. If the bus was to go from Quepem to Tilamol, it would be on left side of the road and if Appellant was climbing the bus, she would be on more left side thereof. The Respondent no. 1 motorcycle rider was coming from Tilamol to Quepem i.e. in opposite direction. As such, there was no scope for any accident to take place as she claimed to be climbing a bus to go to Tilamol. However, in next breadth, she has also stated that she was going to bus stop which was on the other side of the bridge. In sentence thereafter, Motor Accident Claims Tribunal has recorded that she was walking towards bus stop at the time of accident. She denied the suggestion that seeing the bus, she was running on road to catch it. She has also denied that the accident took place due to her fault. The mode and manner in which questions have been put and answers have been given shows roving effort by Respondent no. 1 to confuse the claimant and also her inability to comprehend the same. If there was really any bus, she would have run from the katcha road on right hand side to her left hand side as noted above. Respondent nos. 1 and 2 plead that she came running towards the right hand side. Her cross and answers given by her therefore do not appear to be in accordance with the situation at the spot. In cross examination conducted by Respondent nos. 3 and 4, thereafter, she accepted that she was walking on left side of the road which proceeded towards Tilamol. She also accepted that the motorcycle was coming from Tilamol. She denied the suggestion that she was trying to cross the road from her right hand side towards the left side. This line of cross examination shows an effort made to confuse the witness. The witness has been placed on the left hand side of the road as also right hand side of the road simultaneously. This suggestion given is by Respondent nos. 3 and 4 who were not present on the spot and Respondent no. 1-driver has not given any such suggestion to the claimant. Learned Motor Accident Claims Tribunal ought to have attempted to find out whether claimant was in a position to understand those questions.

18. I find that the accident took place on the katcha road on the right hand side

of the road when one proceeds from Quepem to Tilamol. Appellant-claimant was a pedestrian walking towards Tilamol. The motorcycle came from opposite direction and was on its correct side i.e. on left hand side when one proceeds from Tilamol to Quepem. Thus, Appellant-claimant and motorcycle rider were facing each other and approaching each other. The accident has taken place in this situation. The spot of accident is not on tar road but on katcha road i.e. below tar road i.e. on further right hand side insofar as claimant is concerned.

19. In this situation, if the claimant wanted to cross the road, she would have gone from right hand side of the road to her left side i.e. to the other side of the road. She was on the southern side as shown in the sketch map and she would have proceeded towards northern side. Even if it is presumed that any bus was standing on other side and she wanted to board it to go to Tilamol, she would have been required to cross the road from left hand side for a motorcycle rider to his right hand side. In that situation, there was no question of accident taking place on katcha part i.e. below the tarred portion of the road.

20. Even if it is presumed that the claimant crossed the road from her left hand side to the left hand side of the motorcycle driver, again, the spot of impact could not have been on katcha road. In fact, the road appears to be straight and the pedestrian whether on left side of the road or right side of the road would have been visible from some distance. The sketch shows that after the impact, the motorcycle has gone down the bridge and stopped after the distance of about 18 metres. It appears that chappals of one person sitting on the motorcycle is lying at a distance of 3.30 metres from motorcycle towards its east while the other chappal is lying at a distance of 4.10 metres towards its west. Side light of the motorcycle is found damaged.

21. It is not in dispute that a chargesheet was filed against the motorcycle driver and panchanama placed on record is therefore part of that chargesheet. Motor Accident Claims Tribunal has refused to look into that panchanama.

22. However, from the facts noted supra, it is apparent that even if the motorcycle rider coming on left side finds a pedestrian travelling on wrong side of road, he cannot give a dash to such pedestrian. He ought to have controlled his vehicle and stopped it. The sketch map or evidence does not show any such effort. On the contrary it appears that the motorcycle went on the katcha road, gave a dash to the pedestrian and then went out of control. The sketch map does not show any brake marks. The situation at spot, therefore, shows rash and negligent driving by Respondent no. 1. Had he taken reasonable care and caution, he could have slowed his motorcycle and avoided collision with pedestrian. The pedestrian could have been permitted either to cross the road or to move away from its path. Why the motorcycle was required to be taken on the katcha road is not explained by Respondent no. 1.

23. The claimant-Appellant was on katcha road and being pedestrian, it cannot be said that she was on wrong side. The vehicle proceeding on tar road could

have proceeded safely without any obstruction. The said vehicle appears to have entered on katcha road and then given a dash. The pleadings that the motorcycle entered on wrong side, therefore, appear in Claim Petition.

24. In this situation, I find that the accident took place on account of rash and negligent driving of his motorcycle by Respondent no. 1 and not on account of any fault of claimant-Appellant. The findings recorded by Motor Accident Claims Tribunal against issue nos. 1 and 4 as framed by it are, therefore, unsustainable. Point nos. 1 and 2 formulated above in this Judgment are answered accordingly.

25. The medical evidence on record shows fracture to Appellant-claimant. However, Dr. Neil Baretto, examined as Aw.5, has stated that the patient (claimant) did not abide by medical advise and did not take further treatment. He stated that she had left the hospital against medical advise on 12.09.2006. Her case was then re-evaluated and re-examined almost after two years i.e. on 10.06.2008 for permanent physical disability. He also deposed that the disability evaluation was not performed as the fracture had not united. He could not definitely state whether there would be any disability after operation but stated that minimum percentage thereof would be one to two percent. He has also stated that persistent pain post operation is considered to be permanent disability. He has also pointed out that no discharge card was issued to the claimant. In cross examination, he pointed out that the then Medical Officer treating the claimant had recorded that the Appellant-claimant was not willing to undergo surgery. In further cross examination, he had stated that had she undergone surgery at the time she was advised, there would have not been any shortening of the leg. This material has been looked into by the Motor Accident Claims Tribunal while computing the amount of compensation. Various heads under which damages are required to be worked out are considered from paragraph 16 onwards while answering issue no. 3. The Motor Accident Claims Tribunal has found that the claimant would have suffered distress and pain for a period of eight to twelve weeks and, therefore, awarded her compensation of Rs.10,000/- towards pain and suffering.

26. In this background, considering the Doctor's evidence that permanent disability may be to the extent of one percent to two percent or a subsisting pain, in peculiar circumstances, Motor Accident Claims Tribunal has awarded compensation of Rs.10,000/- only. No evidence was adduced to show any loss of expectation and, therefore, no compensation has been awarded under that head. As compensation has been awarded for loss of amenities of life, no separate compensation has been given for permanent disability accepted willfully by claimant. The claimant had prayed for medical expenses of Rs.10,000/- and her evidence shows that amount of Rs.6,000/- was sought for medicines and amount of Rs.4,000/- towards special diet. The Motor Accident Claims Tribunal has found that these expenses were not supported by any material on record. In the absence of any evidence, no damages have been awarded on this count. For the same reasons, no compensation is awarded towards transport. While working out

loss of salary or income, the Motor Accident Claims Tribunal has accepted her evidence that she was working as a labourer and was earning Rs.4,000/- per month. Accordingly, for a period of twelve weeks, loss of income has been worked out at Rs.3000/- per month by relying upon the Judgment reported at N.K.V. Bros. (P) Ltd. Vs. M. Karumai Ammal and Others, An amount of Rs.9000/- has been given for said period of twelve weeks. Taking overall view of the evidence, I do not find anything wrong with the said exercise taken by Motor Accident Claims Tribunal. The Appellant- claimant did not co-operate with medical authorities and has not taken complete medical treatment. Thus, point no. 3 also stands answered accordingly.

27. The Appeal is thus partly allowed. Dismissal of Claim Petition by Motor Accident Claims Tribunal is set aside and claimant- Appellant is held entitled to recover compensation of Rs. 29,000/- from Respondent nos. 1, 2 and 3 jointly and severally with interest at 9% calculated from the date of filing of the Claim Petition till its realization.