
(2010) 08 BOM CK 0044
In the Bombay High Court
Case No : First Appeal No. 17 of 2003

Suresh alias Sudesh Foll Dessai

APPELLANT

Vs

Suresh and Others

RESPONDENT

Date of Decision : 26-08-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2011) 1 TAC 110

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

Bench : Single Bench

Advocate : S.S. Kakodkar, for the Appellant; E. Afonso, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this appeal the Appellant/claimant takes exception to the judgment order dated 21st October, 2002 dismissing the Claim Petition No. 402/1995 filed by the claimant u/s 166 of the Motor Vehicles Act, 1988 ("the Act" for short.)

2. The claimant filed above referred Claim Petition claiming compensation of Rs. 1,50,000/- on account of injuries suffered by him in an accident, which took place on 27th September, 1995 at about 7.30 a.m. when he was proceeding by Motorcycle bearing No. GA-02-T-240 to Balli from Quital and the Pickup driven by the Respondent No. 1 owned by the Respondent No. 2 and insured with the Respondent No. 3 coming in opposite direction dashed against the vehicle driven by the claimant causing injuries to him. The Claim Petition was contested by the Respondents. The Tribunal framed the following issues:

(i) Whether the claimant proves that the accident took place on account of the rash and negligent driving of the pick-up No. GA-02-T-6061 driven by the Respondent No. 1 ?

(ii) Whether the claimant proves that as a result of the said accident, he suffered injuries on the head, compound fracture of tibia and fractures on the 2nd, 3rd

and 4th fingers of the left hand?

(iii) Whether the claimant proves that on account of the said injuries, he is entitled to claim compensation of Rs. 1,50,000/-?

(iv) Whether the Respondents prove that the motor-cycle was driven by the applicant in a rash and negligent manner ?

(v) What order ?

3. Before the Tribunal, the claimant examined five witnesses. The Respondents examined 2 witnesses. The Tribunal upon appreciation of the evidence represented by the parties held that the claimant had not proved that the accident had taken place on account of rash and negligent driving of the vehicle by the Respondent No. 1. The Tribunal held that the claimant had proved that he had suffered injuries. The Tribunal assessed the compensation at Rs. 66,500/-. Aggrieved by the judgment and order, the claimant has filed the present appeal.

4. Mr. Kakodkar, learned Counsel for the Appellant/claimant submitted that the finding given by the learned Tribunal that the claimant had not proved rashness and negligence on the part of the Respondent No. 1 is contrary to the evidence on record. He further submitted that the evidence of the claimant clearly proves that the Respondent No. 1- the driver of the pick-up was rash and negligent and, therefore, the finding recorded by the learned Tribunal that the Respondent No. 1 was not rash and negligent in driving the offending vehicle is patently unsustainable in law. He further submitted that the learned Tribunal has erred in placing reliance upon the panchanama and the sketch which have not been proved in accordance with law and, therefore, the impugned judgment and order is liable to be set aside. Learned Counsel further submitted that the compensation awarded is on lower side and having regard to the facts and circumstances of the case and the evidence led by the claimant, the Tribunal ought to have granted compensation to the tune of Rs. 1,50,000/- Mr. Kakodkar submitted that adverse inference has to be drawn against the Respondents since the driver of the pick-up did not examine himself.

5. Mr. Kakodkar, learned Counsel for the Appellant relied upon the judgment delivered by the learned Single Judge of this Court in the case of Smt. Ushakiran Shridhar Shinde v. Arunkumar Kisanlal Kalal 2004(4) All. M.R. 21 and of the Apex Court in N.K.V. Bros. (P) Ltd. Vs. M. Karumai Ammal and Others, .

6. The Respondent Nos. 1 and 2 remained absent though served.

7. Per contra, Mr. Afonso, learned Counsel appearing for the Respondent No. 3 supported the impugned judgment and order and submitted that the claimant himself examined pancha to prove the panchanama and the sketch and, therefore, he cannot be now permitted to urge that the same cannot be relied upon. Mr. Afonso further submitted that the finding recorded by the learned Tribunal that the claimant has not proved rashness and negligence on the part of the Respondent No. 1 were borne out from the evidence on record and as such,

cannot be faulted.

8. I have carefully considered the rival submissions and perused the record and the judgments relied upon. In the light of the arguments advanced and findings given by the learned Tribunal, following points arise for determination in the appeal:

(i) Whether the claimant has proved that the Respondent No. 1 was rash and negligent in driving the pick-up ?

(ii) Whether the compensation assessed by the learned Tribunal is inadequate?

9. In support of his case claimant examined five witnesses namely claimant himself- CW1, Prashant Phal Dessai "CW2" eye witness, Laxmikant Naik Dessai "CW3" pancha, Narayan Phal Dessai-"CW4", who according to the claimant worked as an attendant in the hospital and Dr. Ponraj Sundaram "CW5" Associate Professor, Neurosurgery from Goa Medical College, who had examined the claimant and had given certificate of disablement.

10. The moot question which arises for consideration is that whether the claimant has been able to establish rashness and negligence on the part of the Respondent No. 1. The claimant deposed that he was proceeding from Balli to Quital on 27th September, 1995 at about 7.30 a.m. and he was to take turn to his left, but at the said turn, pick-up came and gave him dash and he fell down. He sustained injuries. He further deposed about the injuries suffered by him as well. Suggestion was put to him that he was driving vehicle at a fast speed and that he had dashed on the right rear wheel of the pick-up, which suggestion of course, the claimant denied. In the cross-examination, he admitted that middle front portion of the pick-up dashed against his motorcycle. He was also shown sketch and he admitted that the accident had taken place at a turn as shown in the sketch.

11. CW2- Prashant Phal Dessai claimed to be an eyewitness. He deposed that the claimant was climbing the slope and pick-up was descending the slope. Pick-up gave dash to motorcycle. He deposed that front right portion of the pick-up dashed against the motorcycle and the width of tar road at the place was 5 to 6 meters. He further deposed that the pick-up did not keep its left and was being driven at the right side of the road. In the cross-examination, he admitted that the accident took place at the turn. He denied the suggestion that the motorcycle gave dash on the back wheel of the pick-up. He also denied the suggestion that the accident took place on account of fault of the motorcyclist.

12. The claimant himself examined the pancha Laxmikant Naik Dessai CW3, who deposed that he was called at the spot, where he saw the pickup and the motorcycle, and he was requested to act as a pancha. After the police took measurements, their signatures were taken. He did not remember whether the police had prepared the sketch. He identified the signature on the panchanama Ext.27 and also identified the sketch Ext.26.

13. Narayan Phal Dessai- CW4 deposed that he attended the claimant in the hospital for about 2 months. He stayed with claimant for about 5 months and he was paid Rs. 150/- per day.

14. Dr. Phonraj Sundaram- CW5 deposed the injuries suffered by the claimant.

15. Insofar as the evidence of pancha Laxmikant Naik Dessai CW3 is concerned, in his examination-in-chief, he has only identified his signature on the panchanama and also identified the sketch, but has not proved the contents of the panchanama of the sketch by deposing as to their contents. Therefore, in view of the judgment of the Single Judge of this Court in case of Ushakiran Shridhar Shinde and Ors. v. Arunkumar Kisanlal Kalal and Ors. 2004 (4) All. M.R. 21, neither the panchanama nor the sketch stands proved. However, I am really surprised that the claimant having himself examined the pancha in support of his case has chosen to attack his own evidence, after the learned Tribunal on the basis of the panchanama and sketch gave finding against the claimant. Be that as it may, in view of the judgment of this Court, the contents of the panchanama and sketch do not stand proved.

16. The next question which arises for consideration is whether the claimant has proved rashness and negligence on the part of the Respondent by leading oral evidence. It is pertinent to note that the claimant himself in his evidence did not give all the details as to the manner in which the accident occurred. His evidence only proves that the accident took place at a turn, and the middle front portion of the pick-up driven by Respondent No. 1 dashed against the motorcycle. On the basis of this evidence, it is extremely difficult for this Court to come to a finding that it was the Respondent No. 1, who was rash and negligent in driving the vehicle. Moreover, Prashant Phal Dessai CW2 whom the claimant examined as an eye-witness to the accident, stated that the front right portion of the pick-up dashed against the motorcycle. Obviously, this witness does not corroborate the version of the claimant himself. It is, therefore, difficult to accept that Prashant Phal Dessai was really an eye-witness to the incident. Evidence of witness has to be tested on the touchstone of probability and merely because the testimony of witness has not been shaken in the cross-examination, the same by itself would not be sufficient to accept the evidence of such witness. See Juwarsingh and Others Vs. State of Madhya Pradesh, . In view of this factual position, the only conclusion which can be drawn is that the claimant has not been able to establish that it was on account of rashness and negligent on the part of the Respondent No. 1, the accident occurred resulting in permanent injuries to the claimant. It is well settled by a catena of decisions of the Apex Court that in a Claim Petition filed u/s 166 of the Act, the claimant has to prove rashness and negligence on the part of the driver of the offending vehicle and in the absence of such proof, the claimant is not entitled to any compensation. Thus, the finding of the learned Tribunal that the claimant has not proved rashness and negligence on the part of the Respondent No. 1 is upheld, but for the reasons aforesaid and not for the reasons stated by the learned Tribunal since the Tribunal had mainly relied upon

the panchanama and the sketch. Therefore, the finding of the learned Tribunal that the claimant has not been able to establish the rashness and negligence of the part of the Respondent No. 1, cannot be faulted.

17. In view of the finding given that the claimant has not been able to establish rashness and negligence on the part of the Respondent No. 1, it is not necessary for me to go into the aspect as to whether the compensation awarded is inadequate as contended by Mr. Kakodkar.

18. The judgment in the case of N.K.V. Bros. (P.) Ltd. (supra) relied upon by Mr. Kakodkar, does not advance the case of the claimant, since no ratio as such is laid down in the said case.

19. Insofar as the argument of Mr. Kakodkar that since the Respondent No. 1 has not stepped into the box to establish as to the manner in which the accident had occurred, adverse inference has to be drawn against the Respondent No. 1 is concerned, I find that the same does not advance the case of the claimant. It is well settled that the claimant has to prove the rashness and negligence on the part of the driver of the offending vehicle. The burden of proving rashness in an accident is on the claimant and only when he leads some evidence of rashness and negligence on the part of the driver of the offending vehicle, the driver of the offending vehicle has to lead evidence to dislodge the evidence led by the claimant. In the present case, the evidence led by the claimant himself does not establish the rashness and negligence on the part of the Respondent No. 1. Therefore, non-examination of the Respondent No. 1 by itself would not advance the case of the claimant.

20. In view of the above discussion, I find no merit in the appeal. The appeal is, therefore, dismissed. Having regard to the facts and circumstances of the case, parties to bear their own costs.