

Damodar Vs. Umakant and Another

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Court : Mumbai Goa

Decided On : Sep-19-2014

Judge : B.P. Dharmadhikari

Appeal No. : First Appeal No. 5 of 2009

Appellant : Damodar

Respondent : Umakant and Another

Advocate for Pet/Ap. : Ms. Asha Desai

Judgement :

Oral Judgment:

1. This appeal under Section 173 of the Motor Vehicles Act, is filed by a driver of a fire engine/fire tender in employment of respondent No.2. Respondent No.2 is the Fire Department, Government of Goa which provides services to extinguish fire and other emergency services. Respondent No.1 before this Court is the claimant before the Motor Accident Claims Tribunal, at Panaji.

2. By the impugned judgment and order dated 21st August, 2008, the Motor Accident Claims Tribunal (MACT), has allowed Claim Petition No.83/2005 and awarded compensation of Rs.61,000/- to respondent No.1, including the amount of No Fault Liability already granted to him, with 9 % interest upon it. It is not in dispute that on 27th April, 2006, an application under Section 140 of the M.V. Act

filed by respondent No.1, was allowed and he was given compensation of Rs.25,000/-.

3. The said respondent No.1 has chosen not to appear before this Court to oppose the proceedings.

4. I have heard Advocate Ms. Asha Desai, learned Counsel for the appellant and Advocate Ms. N. Kholkar for respondent No.2.

5. Advocate Ms. Desai contends that in order to award compensation, a finding that the fire engine being driven by the appellant was in speed and was driven in rash and negligent manner, is must. She submits that the material on record shows that there was no evidence of such reckless or negligent driving. On the contrary, respondent No.1 was a rider of a motorcycle with two passengers on pillion and his motorcycle, which was then ascending the slope, came in speed and dashed against the fire engine being driven by the appellant. She points out that the first fire engine had proceeded further and respondent No.1 somehow avoided collision with it. The second fire engine, being driven by the appellant, was following it and in the process of avoiding collision, respondent No.1, who lost balance, collided with the second fire engine on its right side. She submits that neither spot panchanama nor sketch on record shows the exact spot of accident on a road, which was narrow and having a slight curve towards right.

6. According to her, the MACT has erroneously looked into the judgment delivered by learned Chief Judicial Magistrate, acquitting the claimant of the offences punishable under Sections 279, 337 and 338 of I.P.C.. Though learned Magistrate had found that there was contributory negligence, but that finding of contributory negligence is set aside by the Sessions Court, North Goa, on 27th February, 2008.

7. In the alternative, she points out that while awarding compensation, there is presumption about medical expenses. There is also presumption about transport charges for attending hospital and also about loss on account of pain and sufferings. Monthly income of respondent No.1 has also been accordingly assumed and he has been given 7 times thereof towards loss of income of seven months and an amount of Rs.26,000/- towards loss of future income has been

awarded. Respondent No.1-claimant could have produced definite material and evidence to prove his entitlement to a particular sum under these heads. But, that has not been done. She, therefore, contends that award of compensation to him is also not correct, inasmuch as no loss is established by him.

8. Learned Counsel appearing for respondent No.2-employer, supports the contentions of the appellant. It is pointed out that the appellant immediately, after the accident, stopped his fire tender by the side of road, stopped a Municipal jeep which was coming behind his vehicle and brought the claimant to hospital where he was treated.

9. During the arguments, it has transpired that as the fire tender belongs to the State Government, it has not been insured with any insurance company.

10. After hearing the respective Counsel, following points arise for consideration before me :

(1) Whether respondent No.1-Claimant has established rash and negligent driving of the fire tender by the appellant?

(2) Whether respondent No.1-Claimant has established that he suffered any damages on account of the said accident?

(3) Whether respondent No.1-Claimant is entitled to recover those damages from the appellant or respondent No.2?

11. The facts leading to the accident are not much in dispute. The claimant, in his affidavit of examination-in-chief, has stated that on 18th April, 2002 he was proceeding from Merces to Curca, along with one pillion rider Deepak Kunkolekar. When he reached near Bal Bhavan, Merces, Curca road, at about 1.00 p.m. one vehicle of Fire Services came from opposite direction in fast speed. Therefore, he took his motorcycle to katcha road and avoided the accident. To proceed further, he brought his motorcycle back on the edge of tarred road and at that time, another fire engine driven by the present appellant came in fast speed, in a rash and negligent manner. In the process of taking right turn, it dashed against the motorcycle, throwing him and the pillion rider away. He has then deposed about

the injuries and loss of medical bills. In cross examination, he has stated that there was only one pillion rider on his motorcycle. He could not state whether position of the vehicle shown in the sketch map was correct or not.

12. Perusal of evidence of the claimant's witness no.2, namely Krishan Raul, son of Punaji Raul shows that he is a Head Constable who investigated into the accident. He has drawn the sketch and also prepared spot panchanama. He only points out the position prevailing after the accident. He has stated that the motorcycle had fallen on the left side of the road i.e. on its correct side. He accepted in cross examination that in the FIR lodged he had stated that the motorcycle was being driven rashly and negligently and dashed against the fire brigade. The motorcycle rider, in the process, injured himself grievously and also two pillion riders. Road, at the spot of the accident, was narrow and the accident took place soon after the turn. He further deposed that at the spot of the accident, the motorcycle rider, as well as the fire tender driver, could have seen each other.

13. CW.3 is the Doctor who issued certificate, after examining the claimant. He has pointed out that 2nd, 3rd, 4th and 5th toes of the right foot of the claimant were required to be amputated. He has also stated that percentage of disability worked out was 9 %.

14. Deposition of the appellant shows that the claimant narrowly missed collision with the fire tender proceeding in his front and in the process, after losing control, banged on his vehicle. He has also stated that they were under influence of alcohol. He has also pointed out that there were three persons riding the motorcycle.

15. Perusal of the judgment delivered by the Chief Judicial Magistrate, Panaji, in Criminal Case No.201/2002/A shows that there the claimant has been acquitted of the offences punishable under Sections 279, 337, 338 of I.P.C. and Section 128 of the M.V. Act. Defence of the claimant before that Court was of total denial. The said Court has found that prosecution could not establish the offences and in any case, it was an accident, arising out of contributory negligence. This judgment was questioned by the present appellant in Criminal Revision Application No.72/2006 and learned Additional Sessions Judge-1, Panaji removed the observation of

contributory negligence from the judgment of Trial Court. Operative part of the said judgment dated 27th February, 2008, delivered by Additional Sessions Judge-1, Panaji reads as under :

ORDER

The revision is allowed. The observations made in the impugned Judgment under para 7, at line 8-9 on page 4, that "... it is only for contributory negligence..." are ordered to be deleted from the said Judgment, by the C.J.M., Panjim, within seven days of receiving this Judgment."

16. These facts, therefore, show that though the claimant was not found negligent by the competent criminal Court, that by itself does not mean that the present appellant was driving his vehicle in a rash and negligent manner.

17. The claimant himself has not accepted the sketch prepared by CW.2. He has not brought on record the spot of impact. He has claimed that the accident took place when he brought his vehicle from katcha road back on the left side edge of tar road. The motorcycle is seen lying at a distance of about one metre from the said edge of tarred road. The fire tender is shown standing at a distance of about 3.30 metres from the said motorcycle. Thus, the fire tender is stopped within distance of 10 to 11 feet from the spot where the motorcycle was seen lying and, therefore, within short distance of the spot of impact. It is not in dispute that the road has a slope from Curca towards Merces, i.e. from left hand side to right hand side as can be seen in the sketch and the fire tender was descending down on that slope. The motorcycle was ascending it.

18. In this situation, there is no evidence to show that the fire tender was being driven in excessive speed or in rash and negligent manner. The deposition of the appellant that the motorcycle rider (claimant) narrowly missed dashing against the first fire tender and in the process after losing control, dashed his fire tender, therefore, deserves to be accepted. In any case, the burden was upon the claimant to prove that the fire tender was being driven in reckless manner, negligently. That burden has not been discharged.

19. Coming to the second question, the injuries sustained by respondent No.1 in the accident are not in dispute. The medical evidence shows fracture to his right leg and also amputation of four toes. The competent Doctor has entered the witness box and has pointed out the same. Percentage of permanent disability has also been established on record. Therefore, the fact that respondent No.1 was injured in the accident, cannot be doubted.

20. However, a mere injury in an accident, by itself, does not entitle claimant to seek damages from the appellant. As already held above, he has failed to prove negligence on part of the appellant.

21. Learned MACT has considered the issue of computation of damages while deciding issue No.3. It has found that the claimant did not utter a word about his monthly income and did not produce a single bill towards purchase of medicines. However, looking to the nature of injuries, the MACT felt that he must have incurred amount of Rs.10,000/- towards purchase of medicines. It further found that he was admitted in Goa Medical College on 18.4.2002 and was discharged on 10/6/2002 and, thereafter, attended OPD for regular follow-ups. It accepted the dates mentioned in the OPD record which is at Exhibit 24-collectively and found that the amount of Rs.4500/- claimed as transport charges for attending the hospital, as reasonable. It, therefore, accepted the receipts thereof at Exhibit-25 collectively.

22. On account of damages towards pain and sufferings, the MACT has granted an amount of Rs.10,000/- though there is no evidence.

23. It has been expressly observed that there is no evidence on record to show what was monthly income of the claimant. Therefore, an amount of Rs.1500/- per month is presumed to be his nominal monthly income and on that basis, for a period of 7 months during which he could not work, compensation of Rs.10,500/- has been worked out towards loss of income thereof. Amount of Rs.26,000/- has been worked out towards permanent disability of 9% on account of imputation of 4 toes.

24. The records show that respondent No.1-claimant was working as a motorcycle taxi pilot and his claim was that he was earning Rs.4,000/- per month. He had claimed total amount of Rs.2,00,000/- in the claim petition. However, he could not establish the same. There is nothing on record to show that on account of permanent disability he has suffered any functional disability which reduced his monthly income in any way, as his monthly income is also not brought on record.

25. However, taking overall view of the matter, the loss computed by learned MACT under various heads cannot be said to be either excessive or arbitrary. It is a reasonable guess work. Learned MACT has taken note of the fact that part amount of Rs.25,000/- was already awarded to him under the No Fault Liability and therefore, after adjusting it, granted an additional amount of Rs.36,000/-. Thus, the total compensation granted in the final judgment delivered by the MACT is Rs.61,000/-.

26. In the light of the answer to point No.1 framed supra, it is apparent that respondent No.1 cannot recover that amount from the present appellant. He has failed to establish that the appellant was driving the fire tender either in speed or in a rash and negligent manner.

27. In the result, the appeal is allowed. Impugned Judgment and Order of the MACT which fastens the liability for the amount of Rs.61,000/- against the present appellant is, accordingly, quashed and set aside. Claim petition filed by respondent No.1 is dismissed.

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