

**IN THE HIGH COURT OF BOMBAY AT GOA****FIRST APPEAL NO.8 OF 2011**

Mr. Nilesh Sada Aikar,  
Son of Sada Aikar,  
23 years old,  
Service, r/o. H.No.25,  
Ambeli, Sattari, Goa.

.... Appellant

V/s

1. Mr. Suraj Sashikant Dessai,  
Major in age, r/o. H.No.115,  
Madhala Wada, Surla, Sacorda,  
Sanguem, Goa (driver).
2. Mr. Sashikant B. Dessai,  
Major in age, r/o. Surla, Sacorda,  
Sanguem, Goa (owner).
3. The New India Assurance Co. Ltd.,  
Through its Manager, Dadaji Mansion,  
II Floor, Above Dena Bank, Ponda.
4. Mr. Ramnath V. Panvelkar,  
H.No.3, Sirsodem, Khotodem,  
Sattari, Goa.

.... Respondents

Shri Amit Palekar, Advocate for the Appellant.

Shri Deepak Gaonkar, Advocate for the Respondents No.1,2 & 4.

**Coram:- NUTAN D. SARDESSAI, J.**

**Reserved on : 23<sup>rd</sup> February, 2017**

**Pronounced on : 16<sup>th</sup> June, 2017**

**JUDGMENT :**

The original claimant before the Motor Accidents Claims Tribunal, Mapusa is in appeal challenging the impugned

judgment and award passed by the learned Presiding Officer of the MACT pursuant to which she had dismissed the Claim Petition filed at the instance of the appellant/original claimant. The parties would be referred to in their original status before the learned MACT for brevity's sake hereinafter.

2. The claimant had maintained the petition before the learned MACT claiming the compensation of ₹2,00,000/- on account of the injury suffered by him in a vehicular accident at Khotade Sattari on 7/07/2006 at about 19.15 hrs. due to the alleged rash and negligent driving of the vehicle by the respondent no.1, owned by the respondent no.2 and insured with the respondents no.3 at the relevant time. He had suffered fracture injuries which had resulted in a permanent disability. Nonetheless, the learned MACT did not find favour with his case and dismissed his petition giving rise to the present appeal.

3. The claimant assailed the judgment on the grounds that it was contrary to law and the evidence on record, that there was a failure of the learned Presiding Officer to appreciate the evidence led on record by him to show that the

accident was caused due to the rash and negligent driving of the respondent no.1. The learned Presiding Officer of the MACT had totally ignored the predicates in the grant of the claim while rejecting the relief. The learned MACT had failed to appreciate that the respondent no.1 had driven the bus in a rash and negligent manner and dashed against the claimant and failed to appreciate the evidence brought on record by him through his witnesses. The learned MACT had failed to appreciate the complaint dated 9/07/2006 as well as the Scene of accident panchanama which was corroborated by his witness being the Police Officer who had conducted the panchanama but had forgotten to sign the sketch and as such there was no doubt on the authenticity of the said document.

4. The learned Presiding Officer had failed to appreciate that there was no reason to disbelieve his case and the sketch produced on record which was prepared by the Police. The learned Presiding Officer had erroneously concluded that the claimant was himself riding the motorcycle at a fast speed and in a rash and negligent manner and had failed to appreciate that the sketch was identified by the Police Officer who was its author and who had categorically

affirmed that he had forgotten to sign the same and therefore ought not have concluded that the same could not have been read in evidence. The learned Presiding Officer fell in error on such and similar grounds raised in the appeal memo and hence there was reason to interfere with the impugned judgment and award and he was entitled to the grant of compensation in his favour.

5. Shri A. Palekar, learned Advocate for the appellant invited attention to the impugned judgment and the panchanama and submitted that it belied the case of the respondents in defence. There was ample material to conclude on the basis of the injuries suffered by the claimant and the damages to the bus that it was driven in a rash and negligent manner. The learned Presiding Officer had not considered the law of inertia and gravity while appreciating the case at large before her. Even assuming at the highest that the claimant was riding the motorcycle at a fast speed, he would be on his left side while negotiating the curve. He adverted to the evidence brought on record not only of the claimant but also that of the other witnesses and urged that the claim had to be allowed.

6. Shri D. Gaonkar, learned Advocate for the respondents no.1,2 & 4 submitted that the driver was driving the minibus from Mollem to Valpoi with due caution and diligence at the relevant time and at a moderate speed. When he reached a temple at Khotade, the motorcyclist came from ahead alongwith two pillion riders on his motorcycle totally unmindful of the traffic, at a fast speed towards the wrong side of the road and dashed against the minibus due to which they fell on the road and sustained injuries. The Valpoi Police had registered an FIR against the rider under Sections 279 and 337 IPC. He had blown the horn to avoid a collision, applied the brakes and took his vehicle to the extreme left about 1 mt. outside the road and in that process the minibus fell towards its left since it was the rainy season and the soil outside the road was soft. There was no fault of the respondent no.1 in driving the minibus and therefore the learned Presiding Officer had rightly disallowed the claim of the appellant.

7. Shri D. Gaonkar, learned Advocate for the respondents no.1,2 & 4 next adverted to the evidence of one

Shivnath Devli Aw3 and submitted that he had supported the defence case during the course of his cross-examination. The evidence of HC Tulshidas Dhuri Aw6 also supported his case who had filed a chargesheet against the appellant/claimant. The investigation conducted by him revealed that the claimant was himself rash and negligent and the respondent no.1 was not at all at fault. There was no perversity in the reasoning given by the learned MACT. Besides, even if the sketch was considered, it did not show the position of the vehicles at loco and what was therefore available for scrutiny was the panchanama. HC Tulshidas Dhuri Aw6 had also not made any reference to the spot of impact. There was also no basis in the case of the appellant that he was riding on his left side of the road and that while he was manoeuvring the turn that he was on the extreme left side and as otherwise there was no basis for the Head Constable to fasten the liability on him. He relied in **Narayan Kalangutkar & Anr. V/s. The New India Insurance Company Ltd. & Ors. [2012 (2) ALL MR 244]**, **Shri Laximan Vithoba Gaunkar V/s. Shri Sudesh Gaunkar & Ors. [2011 (1) ALL MR 56]** and **Mr. Pukh Raj Bumb V/s. Mr. Jagannath Atchut Naik & Ors. [2013 (6) ALL MR 528]** and concluded his arguments that the learned

MACT had scrutinized the evidence in a proper manner and it did not call for any interference with the impugned judgment and award.

8. Shri E. Afonso, learned advocate for the respondents no.3 adopted the arguments of Shri D. Gaonkar and pressed for the dismissal of the appeal. i would consider their submissions in the light of the evidence and decide whether the learned MACT was justified in concluding that the appellant was himself at error in riding the motorcycle and inviting the accident or whether the learned MACT fell in material error in absolving the respondent no.1 of the liability in driving the minibus rashly and negligently and as to cause grievous injury to the appellant/claimant entitling him to the compensation claimed in the petition. In that context it would also be appropriate to consider whether the learned MACT could have considered the sketch drawn by the Police which remained to be signed by him and whether in the absence of the signature the learned Presiding Officer was justified to altogether brush aside the sketch while appreciating the evidence on record and to hold against the appellant/claimant.

9. In **Narayan Kalangutkar** (supra), a learned Single Judge of this Court held that in order to succeed in a Claim Petition arising out of a vehicular accident the claimant has to prove the rashness and the negligence on the part of the driver of the vehicle. Only if the negligence of the driver is proved, the owner and insurer of the vehicle are liable to pay the compensation to the victim or the legal representatives of the deceased in the case of death. It was further held that appreciation of evidence in the nature of vehicular accident panchanama or the sketch in any accident are not substantive evidence and they can be used to corroborate the oral evidence of the panch witness. In **Laximan Vithoba Gaunkar** (supra), a learned Single Judge of this Court held that in order to succeed in a Claim Petition the claimant has to establish the rashness and the negligence on the part of the driver of the offending vehicle and unless rashness and negligence is established, the claimant is not entitled to any compensation. In the facts at large, the claimant had not been able to discharge this burden and therefore the finding of the Tribunal that the appellant/claimant had not been able to establish that the

respondent no.1 was driving his vehicle in a rash and negligent manner could not be faulted.

10. In **Pukh Raj Bumb** (supra), a Division Bench of this Court held that mere marking of the panchanama or the sketch of the scene of accident was an exhibit was not enough and the proof of execution, proof of its contents and evidential value of its document were to be looked into by the Court. The ratio in these judgments would be considered while appreciating the evidence brought on record on behalf of the appellant and the respondents, if any and a final conclusion would be drawn whether the appellant had at all established the rashness and negligence of the minibus driver or conversely whether he was completely at fault and/or that there was contributory negligence at his instance. As a necessary sequel the question which would also arise for determination was whether the claimant was entitled to a certain amount of compensation in case it was held that he had established the rashness and negligence of the minibus driver as was his case or whether he had failed to prove the aspect of the rashness and negligence of the minibus driver.

11. The appellant Nilesh had examined himself and in the course of his affidavit had stated that he was riding the motorcycle from Savarshe to Ambeli on the morning of 7/07/2006 with one Shivnath Naik. On reaching at Khotade the minibus in question came from the opposite direction at a fast speed while he was still on the left side of the road and riding the motorcycle at a slow speed. The minibus driver brought the minibus towards the right side of the road, dashed against his motorcycle and thereafter the minibus went off the road and fell on its left side. He had produced the Complaint, the Accident Panchanama and the Sketch to substantiate his case on the aspect of the rashness and negligence of the minibus driver amongst other documents which would assume relevance in so far as the quantum of compensation is concerned and which need not detain me here at this stage. During his cross-examination he had fairly admitted that he was not holding a driving licence on the date of the accident and there were two pillion riders alongwith him on the motorcycle. There was no particular dispute that his direction was from Valpoi towards Mollem and there was a turn on the right side of the said road leading towards Mollem. He had also otherwise admitted that it had rained prior to the

accident. Nonetheless, he had categorically denied the case of the respondents no.1 & 2 that he could not negotiate the right turn due to which he had gone in the middle of the road and caused the accident. For that matter he had also categorically denied the falsity of his statement that the minibus had come from the opposite direction at a fast speed, that the driver of the minibus had taken the bus to the right side of the road and dashed against his vehicle due to which the minibus went off the road and fell on its left side.

12. Assuming at the highest that the claimant was not holding a driving license and riding the motorcycle with two pillion riders, and accepting the version of the respondents no.1 & 2 that the minibus was driven at a slow speed and on its side of the road, there was no justification for the minibus driver to take the bus to the right and thereafter travel a distance of not less than 36 ft. and fall on its side of the road. Rather there appears force in the contention of Shri A. Palekar, learned Advocate for the appellant that applying the law of inertia and gravity the appellant could not have taken the motorcycle towards the right while negotiating the curve and that too with two pillion riders. The fact that the bus had

travelled to a distance of not less than 36 ft. from the point of impact on the right side of the Mollem Valpoi road i.e. the left side of the Valpoi Mollem road and fallen on its left side would give rise to an irresistible conclusion that the minibus was negotiating the right curve by taking the bus towards the right and that on account of its speed the driver could not control the minibus due to which it travelled a distance of around 36 ft. to the left and then fell on its side.

13. The appellant's witness Shivnath Naik Aw3 who was travelling as a pillion alongwith him on the fateful morning fairly conceded that there was another pillion on the motorcycle driven by the appellant, that on reaching at Khotade the minibus in question came from the opposite direction at a fast speed and dashed against their motorcycle which was driven at a slow speed and on the left side of the road. The minibus had thereafter gone towards its left side and fell off the road. He had maintained during his cross-examination that there was another pillion named Abhishek Naik who was sitting behind the appellant and ahead of him and that there was a right turn to the road while they were proceeding from Valpoi to Mollem which was approximately 10

to 15 mts. from the spot of impact.

14. Shivnath Naik Aw3 had not ruled out the possibility that in case a person comes in the direction from Valpoi to Mollem at a high speed there was a possibility of the said person loosing control over the vehicle and going beyond the road. This was a mere hypothetical position which was stated by him and in any event does not support the case in defence that the appellant was riding the motorcycle at a fast speed and that he had lost control while negotiating the right turn and dashed against the oncoming minibus. Besides, it cannot be overlooked that this witness had fairly stated that the road was wide enough for two trucks to pass simultaneously. If that was so, the oncoming minibus driver could have exercised enough care and caution accepting his case for a moment that he was driving the minibus at a slow speed and on his side of the road. Therefore the contention of Shri D. Gaonkar, learned Advocate for the respondents no.1,2 & 4 that the respondents had breached the case of the appellant or that he had failed to prove the rashness and negligence of the minibus driver cannot at all be accepted.

15. HC Tulshidas Dhuri Aw6 was examined by the appellant as his witness who stated at the outset that he had conducted the panchanama in the Motor Accident Case no.43/2006 involving the minibus and the motorcycle and having taken place at Khotade Sattari. He had described the road of the accident as being that proceeding from Mollem to Valpoi i.e. the direction of the minibus unlike the motorcycle proceeding from Valpoi towards Mollem. He had spelt out that there was a kacha road on either side of the tar road and of the width of 2-3 ft. He had found the motorcycle lying on the kacha road which was on the right side of the road proceeding towards Valpoi while the minibus was on the left side of the same road i.e. beyond the kacha road and proceeding towards Valpoi. Taking a pause here, the position of the motorcycle on the kacha portion of the left side of the Valpoi Mollem road would substantiate the contention of Shri A. Palekar, learned Advocate for the appellant that the appellant was riding the motorcycle on the left side of the road while proceeding towards Mollem and negotiating the right turn as otherwise it would not justify the position of the motorcycle as found by HC Tulshidas Dhuri Aw6. It also belies the defence plea that the appellant was riding the motorcycle on the right side of

the road in which event the motorcycle should have been lying on the right side of the Valpoi Mollem road and not on the kacha road to the left of the Valpoi Mollem road.

16. HC Tulshidas Dhuri Aw6 had also maintained that the accident spot was on the tar road on the right hand side facing in the direction towards Valpoi and the distance between the edge of the road and the spot of impact was roughly 3 ft. He had accordingly drawn the panchanama and the sketch and which were signed by the two panchas. His reiteration that he had drawn the panchanama and the sketch should have weighed with the learned Presiding Officer who had just brushed aside the sketch merely because it did not bear his signature. Besides, he had maintained during his cross-examination that he had carried out the entire investigation in the case and mentioned the history of the case in the complaint Exhibit 33. He had also denied the case put to him at the instance of the respondents no.1 & 2 that the accident spot was wrongly shown on the right side of the road as one proceeds from Mollem to Valpoi and/or that the same ought to have been shown on the left side of the road proceeding from Mollem to Valpoi in the sketch. He had also

categorically denied the defence case that he had not prepared the sketch annexed to the panchanama though he had forgotten to sign it. The long and short of his testimony therefore even accepting his version that the charge sheet was filed against the appellant, does not at all depart from the fact that the spot of impact was on the left side of the Valpoi Mollem road i.e. the direction in which the claimant was riding the motorcycle though with two pillion riders. Therefore assessing the evidence as it were in the face of the firm assertion by HC Tulshidas Dhuri AW6 that the spot of impact was correctly shown by him, there was no justification for the learned Presiding Officer to draw an inference that the appellant was at fault and solely responsible for the accident and/or that there was no fault whatsoever of the minibuss driver.

17. The respondent no.1 had examined himself and asserted on oath that the accident took place entirely due to the fault, rashness and negligence of the appellant who at the time of the accident was riding the motorcycle with two pillion riders in violation of the Act. According to him he was driving the minibuss from Mollem to Valpoi on the left side of the road

with due caution and diligence and at a moderate speed. On reaching the temple at Khotade, the appellant came all of a sudden at a fast speed with two pillion riders from the opposite direction towards the wrong side of the road and dashed the minibus. He had blown the horn to avoid a collision, applied the brakes despite which the appellant came and dashed against the bumper of the bus and thereafter he took the bus towards the extreme left a metre outside the road and which fell on its left side due to the softness of the land. It would be worth noting at this juncture that the appellant in particular was seriously injured with fracture injuries and the pillion riders too had sustained injuries. The respondent no.1 as the driver of the bus had taken undue advantage of this situation and set the law in motion by lodging the complaint against the appellant for riding the motorcycle in rash and negligent manner and thereupon the Valpoi Police had proceeded mechanically to register an offence against the appellant.

18. The respondent no.1 Suraj had also for the first time carved a case in his affidavit that the Valpoi Police who had registered an offence against the appellant at his instance

had drawn the sketch wrongly to support the appellant and by showing the spot of impact on the right side of the road as one proceeds from Mollem to Valpoi. It was nowhere his case that he had made any grievance about such wrong depiction of the spot of impact to any superior Officer of HC Tulshidas Dhuri Aw6 when apparently he was present at the time of the panchanama unlike the appellant who was seriously injured. The cat is out of the bag on his admission that he was shown the sketch annexed to the panchanama before the JMFC Valpoi during the course of his deposition and he had admitted the sketch. Besides, his admission that he was climbing down a descending slope would also turn the tables against him inasmuch as there would be a greater momentum for his vehicle on the downward slope with a heavier load as compared to the motorcycle driven by the appellant which was conversely on the upward slope.

19. Thus considering the cumulative effect of the evidence brought by the appellant as also that of the respondent, coupled with the panchanama and the sketch which was admitted by HC Tulshidas Dhuri Aw6 apart from the appellant and Suraj Rw1, the learned MACT completely fell in

error to hold that the appellant was solely rash and negligent and responsible for the accident. There was also no reason for the learned MACT to disallow the sketch when HC Tulshidas Dhuri Aw6 had admitted having drawn the panchanama and the sketch and got it signed by the witnesses though conceding that it remained to be signed by him due to oversight. i am also fortified in this conclusion that the accident was due to the fault of the minibus driver considering the ratio in the judgments in **Narayan Kalangutkar, Shri Laximan Vithoba Gaunkar and Mr. Pukh Raj Bumb** (supra).

20. The learned Presiding Officer of the MACT was duty bound to arrive at a finding on the issue no.2 but short circuited the same on the premise that the appellant/claimant had not established the rashness and negligence of the minibus driver and on that premise closed the doors on him in so far as the quantum of compensation to which he was entitled had he succeeded in proving the rashness and negligence of the minibus driver. Be that as it may, the lethargy and inaction of the learned Presiding Officer cannot be the bane of the appellant and therefore the exercise of

computing the quantum of compensation would have to be undertaken by this Court by appreciating the evidence.

21. The appellant Nilesh had stated that soon after the accident he fell unconscious, was shifted to the hospital and thereafter to the GMC hospital Bambolim. His right leg was fractured due to the accident and he continued in the GMC for six days for treatment. He however got discharged from the GMC since it was far away from his residence at Ambeli and started taking treatment in Jankibai Memorial Hospital, Ponda. He was bedridden for a period of six months and under treatment. He had incurred an expense of more than ₹15,000/- though some of his medical bills were lost. The Doctor of Jankibai Memorial Hospital had issued a bill of ₹7,700/- for taking treatment and moreover he had to spend a considerable amount of ₹5,000/- towards travelling by a hired maruti van to travel to GMC and thereafter to the other hospital. He had spent an amount of ₹10,000/- on an attendant while his mother who could not go for work had lost her wages of ₹36,000/- till his confinement to the house for that period. There were steel rods in his leg and two screws which were not removed till his examination.

22. Nilesh Aw1 produced the Hurt Certificate Exhibit 34, the statement of the Medical Bills alongwith the bills Exhibit 36 colly as also the Discharge Card from Jankibai Memorial Hospital, Ponda and the hospital bill X2 and X3 for identification. Although he was cross-examined at length, there was no serious rebuttal of his testimony that he had however fracture injuries to his right leg and what was denied was his treatment at the private hospital and having incurred the expense of ₹7,700/- towards the hospital stay, ₹10,000/- towards the services of an attendant and ₹36,000/- towards the loss of income of his mother. Shivnath Aw3 had corroborated the version of Nilesh Aw1 that he had suffered injuries alongwith him, that they were taken to the Health Centre at Valpoi and thereafter shifted to the GMC hospital, Bambolim with no rebuttal of his testimony.

23. Dr. Sukthankar Aw4, an Orthopedic Surgeon revealed that he had operated upon Nilesh Aw1 who was admitted in Jankibai Memorial Hospital on 20/06/2007 and on the same day he was operated and discharged on 22/06/2007. He identified his signature on the Discharge

Summary X2- Exhibit 47 apart from the bill of the hospital X3- Exhibit 48. He confirmed that Nilesh Aw1 had followed up treatment with him for a month and a half after discharge and he had advised him to walk to promote an union in the fracture. He had not examined the patient and was therefore unable to say whether this injury would affect him in his day to day work. Nonetheless, he clarified during his cross-examination that his fracture had not united when the patient came to him in his hospital. The type of fracture suffered by the patient would take about three to six months to heal and may not even unite in that period of time. The appellant had therefore established from his examination, that of Shivnath Aw3 and Dr. Sukhtankar Aw4 that he had suffered fracture injuries to his right leg and which required about six months time to heal. He had however not got himself assessed for the extent of permanent disability and therefore considering the fracture injuries to his lower limb, he is awarded a reasonable amount of ₹20,000/- on that count apart from an amount of ₹5,000/- towards travelling for follow up treatment and a modest sum of ₹5,000/- towards the services of an attendant to help him in his mobility. The appellant would be entitled to an amount of ₹10,000/- towards the medical bills

to meet the medical expenditure incurred by him.

24. The appellant had also examined Basavraj Aw5 to prove his employment and income who stated that Nilesh Aw1 was working with him for ACGL company at Bhuipal Honda where he was a contractor and the claimant was employed on daily wages basis. He duly identified the Wages Slip – X4 Exhibit 52 and confirmed that he was paying ₹275/- per day to the claimant. He relented during his cross-examination that he was not maintaining the Muster Roll of the employees. Nonetheless, he had the punching card apart from the Wages Slip that Nilesh Aw1 was working with him at the relevant time. He also maintained that the ACGL company had initially given him the Muster Roll, Wage Slip Register and on the basis of the same he had been issuing the Wages Slip not only to the claimant but also to the other employees. Thus considering his income on daily wages at ₹275/- per day and assuming that he was working even 20 days in a month, his income would be ₹5,500/- per month, on an average which a young man of robust build could easily earn. Thus giving due weightage to his testimony coupled with that of Dr. Sukthankar Aw4 that he would require about six months time

to be ambulatory and that he would not be able to attend to his job during such period, he is awarded a reasonable sum of ₹33,000/- towards the loss of income. Besides, he is awarded an amount of ₹36,000/- which his mother had lost during the period of his confinement to the house and towards the loss of her employment. The appellant/claimant therefore is held entitled to a modest sum of ₹10,000/- towards the medicines taking the total tally to ₹1,09,000/- being the just compensation in the circumstances of the case. Having thus held that the accident was an outcome of the fast speed, rashness and negligence of the respondent no.1 and that the appellant is entitled to an amount of ₹1,09,000/- i pass the following order:

### **O R D E R**

- (i) The appeal is allowed and the impugned judgment and award dated 17/08/2010 passed by the MACT, Mapusa is quashed and set aside.
- (ii) The appellant is held entitled to an amount of ₹1,09,000/- which shall carry interest at the rate of 9% from the date of the application till the date of the award and the costs of the proceedings.

(iii) The appeal stands disposed off accordingly.

**NUTAN D. SARDESSAI, J.**

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