

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.2/2016

1. Smt. Disha D. Naik,
widow of Devendra Namu Naik,
45 years of age, married,
resident of House No.1049,
Adanwada, Madkai, Ponda, Goa.

...APPELLANT

Versus

1) Shri Vishwajeet R. Tari,
son of Ramrai Tari, major of age,
resident of House No. 542,
Manaswada, Kundai-Goa.
(Driver of Bus No. GA-01-W-4123).

2) Shri Bhiku T. Fadhte,
son of Tatu Fadhte, major of age,
resident of House No. 511,
Manaswada, Kundai-Goa.
(Owner of Bus No. GA-01-W-4123).

3) National Insurance Company Ltd.,
Branch Office at Ponda Branch,
Ponda-Goa.
(Insurer of Bus No. GA-01-W-4123)

...RESPONDENTS

Mr. Neehal Vernekar, Advocate *for the Appellant*.
Mr. U. R. Timble, Advocate *for Respondent No.3*.

CORAM: **M. S. SONAK, J.**
Reserved on: **24th September 2021**
Pronounced on: **30th September 2021**

JUDGMENT:

1. Heard Mr. Vernekar for the appellant and Mr. Timble for the Respondent No.3-Insurance Company.

2. The challenge in this appeal is to the Judgement and Award dated 26.08.2014 by which the Motor Accident Claims Tribunal (Tribunal) dismissed a claim for compensation filed by the appellant-widow on the ground that she was unable to prove that the accident in which her husband died was on account of rashness and negligence on the part of the driver of minibus bearing registration no.GA-01-W-4123.

3. Mr. Vernekar, learned counsel for the appellant submits that the finding recorded by the Tribunal about the absence of rashness and negligence on the part of the driver of the minibus is contrary to the evidence on record and warrants interference. He submits that a false defence was taken by the respondents that the minibus was stationary and further, this defence, was never made good by any of the respondents. He submits that from the sketch annexed to the panchanama no proper inferences were drawn by the Tribunal. Without prejudice, he submits that at the highest this could have been considered as

a case of contributory negligence with the appellant's deceased husband contributing to the extent of 50%.

4. Mr. Vernekar submits that in this case, the Tribunal whilst determining the compensation has failed to make additions towards future prospects. He, therefore, submits that the compensation amount is also required to be enhanced in the facts and circumstances of the present case.

5. Mr. U. R. Timble defends the impugned award based on the reasoning reflected therein. He submits that there is no evidence whatsoever about the negligence and in the absence of the same, the Tribunal quite correctly dismissed the claim petition. Mr. Timble submits that even otherwise the compensation determined by the Tribunal is quite excessive and not consistent with the law laid down in *National Insurance Company Ltd v. Pranay Sethi, (2017) 16 SCC 680*. He, therefore, submits that this appeal may be dismissed.

6. The rival contentions now fall for my determination.

7. The first issue to be determined is whether the accident in which the appellant's husband died on the road was on account of the rashness and negligence on the part of the

driver of the minibus or whether, at least, any case of contributory negligence has been made out in this matter.

8. The appellant failed to examine the pillion rider, who might have been the best witness. However, that by itself can be no reason to conclude that the appellant has failed to bring forth any evidence concerning the accident.

9. This is a case of an accident between a minibus, which is a much bigger vehicle, and a scooter that the husband of the appellant was riding on the fateful date. Therefore, the duty of care on the driver of the bigger vehicle was undoubtedly greater. In this case, the respondents had taken a specific defence that the minibus was stationary or rather the minibus stopped on the side of the road after it saw the scooterist from the opposite direction and it is the scooterist who came and hit the minibus, thereby causing the accident.

10. Both parties have relied upon the sketch accompanying the panchanama. From the sketch, the version put forth by the respondents cannot be accepted in its entirety. This is because though the minibus appears to be on its right side, the accident spot is indicated somewhere in the centre of the road.

Therefore, the version that the minibus was stationary and it is the scooterist that dashed the minibus, is difficult to accept.

11. In such matters, the issue of rashness and negligence is required to be established by applying the test of preponderance of probabilities. Besides, in such matters, it is permissible for the Tribunal to take a holistic view by referring to the statements of witnesses forming a part of the Charge-sheet, FIR, and seizure reports. This is what was held by the Hon'ble Supreme Court in the case of *Mangla Ram v. Oriental Insurance Co. Ltd. - (2018) 5 SCC 656*.

12. Therefore, upon holistic consideration of the material on record, the alternate contention of Mr. Vernekar about this being a case of contributory negligence deserves to be accepted. The accident spot in the present case is quite close to the center of the road and therefore, is reasonable to proceed on the basis that the minibus was not stationary but was traveling. At the same time, having regard to the spot of the accident, it does appear that even the deceased was negligent because otherwise, he had no reason to swerve to the spot where the accident has taken place.

13. From the material on record, it is reasonable to infer that this is a case of contributory negligence and further, both the deceased as well as the driver of the minibus were equally responsible. This is more so because a greater duty of care was expected from the driver of the minibus which was admittedly a bigger and heavier vehicle as compared to the scooter. The observations in *Francis D'Mello v. Mrs. Catarina Carvalho & Ors. – First Appeal No.46/2010 decided on 16.09.2021* support such a view.

14. The next issue is about the determination of compensation. The Tribunal, in this case, has quite correctly held that the monthly salary of the deceased was ₹10,095/-. AW3 had produced the salary slip and there was no serious challenge to the admission of this document in evidence. The deceased was working with Wallace Pharmaceuticals and the documentation about his employment and his salary was quite correctly accepted by the Tribunal.

15. The Tribunal, however, should have added at least 15% towards the future prospects. In *Pranay Sethi (supra)* the Hon'ble Supreme Court has held that while determining the income, an addition should be made to the actual salary by 15% where the deceased was between the age of 50 to 60 years. In this

case, the evidence bears out that the deceased was between the age of 50 to 60 years and therefore, an addition of 15% was certainly due. This means that the monthly income of the deceased should have been taken at ₹11,609.25.

16. From the monthly income, 1/3rd should be deducted towards the personal expenditure of the deceased. This means that the monthly income could be taken at ₹7,739.5. Having regard to the age of the deceased, the multiplier would be 9. Therefore, the total dependency would work out of ₹8,35,866/-.

17. In addition to the aforesaid the widow would be entitled to compensation of ₹40,000/- towards loss of consortium, ₹15,000/- towards funeral expenses, and ₹15,000/- towards the loss of estate. This means that the total compensation can be worked out to ₹9,05,866/-.

18. Since the deceased contributed to the accident to the extent of 50%, the compensation payable to the appellant will now have to be determined at ₹4,52,933/-. On this amount, the respondents will have to pay interest @ 9% per annum from the date of the application till the date of actual payment.

19. The appeal is therefore partly allowed by making the following order:

- (a) The respondents are directed to jointly and severally pay to the appellant compensation of ₹4,52,933/- together with interest @ 9% per annum from the date of the application i.e. 21.10.2010 till the date of actual payment.
- (b) The respondents, including in particular respondent no.3 is directed to pay the aforesaid compensation to the appellant as expeditiously as possible and in any case within three months from today.
- (c) There shall be no order for costs.

M. S. SONAK, J.