

Santosh.

**IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.46 OF 2010**

Francis D'Mello,
son of Inacio D'Mello, aged 53 years,
r/o. H.No. 63, Cotombi, of Quepem Taluka ... Appellant.

Versus

1. Mrs. Catarina Carvalho,
w/o. Joaquim Carvalho,
r/o. H.No.195, Gudi Paroda, of
Quepem Taluka

2. Jose Fernandes, r/o. H.No.8, Amona of
Quepem Taluka .

3. United India Insurance Co. Ltd.
Branch Office, 2nd Floor,
Jamnadas Bldg., Curchorem, Goa. ... Respondents.

Mr. Ivan Santimano, Advocate *for the appellant.*

Mr.A.R.S. Netravalkar, Advocate *for respondent no.3.*

CORAM : M. S. SONAK, J.

DATED : 16th September 2021

ORAL JUDGMENT

1. Heard Mr. Ivan Santimano for the appellant and Mr. A.R.S. Netravalkar for respondent no.3-Insurance Company.

2. The challenge in this appeal is to the Judgment and Award dated 17/12/2008, made by the Motor Accident Claims Tribunal, South Goa, Margao (Tribunal), dismissing the appellant's claim petition on the ground that the appellant failed to prove any rashness and negligence on the part of the driver of tipper truck bearing no. GDZ 694 which, according to the appellant, caused the accident, giving rise to the claim.

3. Mr. Santimano has submitted that the finding recorded by the Tribunal on the issue of rashness and negligence is vitiated by perversity. He submits that the relevant evidence was overlooked and irrelevant considerations are taken into account. He submits that in this case, the driver of the truck chose not to appear before the Tribunal. He submits that the driver of the truck was charged for rash and negligent driving and, in fact, pleaded guilty to such a charge. He relies on a Judgment of the Madras High Court in the case of *Nagammal vs. Muthiraiyan*¹, as well as the decision referred to therein in support of his case that the driver pleading guilty is a relevant piece of evidence to be taken into consideration. He submits that the sketch has been misinterpreted by the learned Tribunal and the evidence of the appellant, as well as another eye witness, has been ignored. He submits that based

¹ 2018 0 Supreme (Mad) 3043

on the material on record, a clear case of rashness and negligence on the part of the driver was made out.

4. Mr. Santimano submits that the Tribunal has determined the compensation at ₹ 59,178.65, though not awarded the same to the appellant. He submits that this determination is on the conservative side. He submits that the appellant was holding an ITI Diploma which qualified him as an air-conditioning technician. He submits that there was evidence about the appellant earning ₹ 8,000/- per month. He submits that there was a hurt certificate produced on record. He submits that the evidence of the doctor has been misconstrued. He submits that no adequate compensation has been awarded towards pain and suffering; loss of amenities of life; loss of expectation of life; permanent disability; transportation and above all towards loss of income.

5. For all these reasons, Mr. Santimano submits that the compensation should have been determined at least ₹1,50,000/- in the facts and circumstances of the present case. He submits that this is also a fit case where costs should be awarded in favor of the appellant. He has relied on certain decisions in support of the appellant's case.

6. Mr. Netravalkar, the learned Counsel for the Insurance Company has submitted that rashness and negligence is a *sine qua non* for sustaining the claim as is held by the Hon'ble Supreme Court in *Minu B. Mehta and anr. vs. Balkrishna Ramchandra Nayan and anr.*². He submits that in this case, this rashness and negligence on the part of the driver has not been established. He states that the sketch referred to by the Tribunal, very clearly establishes that there was no negligence whatsoever on the part of the driver and it is the claimant, who was at blame for the alleged accident. He submits that even if the driver pleads guilty to the criminal charge of rashness and negligence for the same incident, the same is quite an irrelevant circumstance that has correctly been excluded from consideration by the learned Tribunal. He submits that both, the oral, as well as the documentary evidence on record is not at all sufficient to establish the rashness and negligence on the part of the driver.

7. On the aspect of compensation, Mr. Netravalkar submits that the Tribunal was, in fact, was charitable to the appellant. He submits that the income was never proved by leading cogent evidence. He submits that even the medical evidence speaks only of vertigo which is a common ailment and that could have been even caused due to age and other related factors unconnected

² AIR 1977 SC 1248

with the accident. He submits that there is no disability established and yet, some amount has been determined. He submits that the income of the appellant was never proved and yet, two months' income has been determined on that score. He relies on *North West Karnataka Road Trans. Corpn. vs. Babu*³ on the aspect of assessment of compensation. Finally, he submits that this appeal is frivolous and should be dismissed with exemplary costs, which he quantifies at ₹ 10,000/-.

8. Rival contentions now fall for my determination.

9. As was correctly pointed out by Mr. Netravalkar, the learned Counsel for the Insurance Company, proof of negligence on the part of the driver of the vehicle allegedly involved in the accident is necessary to sustain a claim before the Tribunal. Therefore, the burden was on the appellant to establish that there was indeed negligence on the part of the truck driver that resulted in the accident and eventually, the claim for compensation on account of such accident. Mr. Netravalkar has quite correctly relied on the ruling of the Hon'ble Supreme Court in *Minu B. Mehta* (supra) in support of this proposition.

³ 2007 ACJ 1967

10. However, it is also well settled that rashness and negligence on the part of the driver of the vehicle involved in the accident have to be proved by a claimant having regard to the test of preponderance of probability only. There is no requirement that such rashness and negligence have to be proved by the claimant beyond a reasonable doubt. That is not a standard of proof that is expected in a matter of this nature.

11. Therefore, the main consideration in this appeal is, whether the appellant, in this case, had produced sufficient oral and documentary evidence before the Tribunal, based on which it should be stated that the rashness and negligence on the part of the driver of the truck which was involved in the accident, had been proved by adopting the test of preponderance of probability.

12. According to me, there was more than ample evidence on record based on which the Tribunal should have concluded that there was rashness and negligence on the part of the driver of the truck which resulted in the accident giving rise to the claim. The Tribunal, unfortunately, has over-focussed on the sketch of the accident site and, thereafter, misinterpreted it to record a finding that there was no rashness and negligence on the part of the driver of the truck involved in the accident. Besides, the Tribunal has virtually ignored the evidence of both, the appellant who was

actually involved in the accident and the eye witness who bothered to come to the Court to depose about the accident. All these factors, according to me, render the findings recorded by the Tribunal on the aspect of rashness and negligence, as perverse and warranting interference by this Court.

13. In *Smt. Maya S. Naik and ors. vs. M/s. Kavlekar Gas Service and ors.* - First Appeal No. 58 of 2012 decided on 2nd September 2021, it was held that where the accident was between a Swaraj Mazda Tempo, a much larger and heavier vehicle, and an Eterno Scooter, the duty of care that was expected from the driver of such a large and heavy vehicle was much higher. This is a circumstance that was required to be taken into consideration for determining whether there was rashness and negligence on the part of the driver of the large and heavy vehicle.

14. In the said case, relying upon the decision of the Hon'ble Supreme Court in the case of Mangla Ram vs. Oriental Insurance Co. Ltd. and ors. - (2018) 4 SCC 525 it was held that there was no requirement of proving the aspect of rashness and negligence beyond a reasonable doubt in proceedings before the Tribunal. In that case, the Hon'ble Supreme Court approved the award made by the Tribunal taking a holistic view of the matter by referring to the statements of witnesses forming part of the charge-sheet, FIR,

jeep seizure report which had stated that the jeep in question was involved in the accident.

15. In this case, there is no dispute whatsoever that the driver of the truck was charged for the criminal offense of having driven the truck in a rash and negligent manner. Before the competent Court, the driver was explained the substance of the accusation against him and thereafter, the driver pleaded guilty to the charge and was convicted. The Tribunal has simply ignored this circumstance by observing that the judgment in a criminal proceeding is entirely irrelevant in the proceedings before the Tribunal.

16. Mr. Santimano has relied on *Nagammal* (supra), which, in turn, refers to the decision in *Oriental Insurance Co. Ltd. vs. K. Balasubramanian* – (2007) 2 TNMAC 399, taking the following view :

“It is a well settled proposition of law that the judgments of Criminal Courts are neither binding on the Civil Court/Motor Accident Claims Tribunal nor relevant in a Civil Case or a claim for compensation under the Motor Vehicles Act, except for the limited purpose of showing that there was a criminal prosecution which ended in conviction or acquittal. But there is an exception to the general rule. When an accused pleads guilty and is

convicted based on his admission, the judgment of the Criminal Court becomes admissible and relevant in Civil proceedings and proceedings before the Motor Accident Claims Tribunal, not because it is a judgment of the Criminal Court, but as a document containing an admission. Of course, admissions are not conclusive proof of the facts admitted therein. But unless and until they are proved to be incorrect or false by the person against whom the admissions are sought to be used as evidence, the same shall be the best piece of evidence."

17. The aforesaid two decisions take the view that though the judgments in criminal proceedings are neither binding on a Civil Court or a Motor Accident Claims Tribunal, there is an exception to this general rule. The exception arises when an accused pleads guilty and is convicted based on his admission in the criminal proceedings. In such a case, the admission becomes a relevant piece of evidence even in civil proceedings or the proceedings before the Tribunal. The Madras High Court has explained that the judgment in criminal proceedings may not itself be relevant, but the admission which is recorded therein is relevant evidence and the same can always be taken into account. No doubt, the admission may not be conclusive proof of facts admitted therein, but the admission certainly is sufficient for the onus to shift on the person who is proved to have made such admission. In this case, the driver has done nothing to discharge the onus that had shifted on him.

18. According to me, the admission in the form of the plea of guilt by the driver of the vehicle was certainly not an irrelevant circumstance that could have been ignored by the Tribunal. The Tribunal has only focussed on the relevancy of the judgment in the criminal proceedings and entirely ignored the evidence in the form of admission of the driver of his guilt to the charge that he drove the truck in a rash and negligent manner causing the accident in question.

19. That apart, the appellant as well as the eye witness Alberto Fernandes (AW.4) have deposed in this matter. They have deposed that the truck was being driven in a rash and negligent manner in the direction opposite to that of which the appellant was proceeding on his scooter. Apart from some suggestions, there is nothing elicited in the cross-examination to demolish the statements made by the appellant as well as the eyewitness on oath. Even the sketch indicates that the brake marks of the truck extended to almost over 9 meters. This is an indication of the speed at which the truck was being driven and such an indication is also a relevant consideration for determining the rashness and negligence on the part of the driver of the truck.

20. According to me, the Tribunal has completely misconstrued the sketch on record and the inferences drawn from

the sketch, are not sustainable. Besides, the Tribunal has completely ignored the other oral and documentary evidence on record, including that of accident report form and plea of guilt on the part of the driver. Therefore, the finding on rashness and negligence recorded by the Tribunal is quite perverse and warrants interference.

21. In so far as the compensation is concerned, again, there is a substance in the contention of Mr. Santamano that the determination is on the conservative side. This is a matter where the appellant was entitled to compensation greater than what has been determined by the Tribunal.

22. The appellant has deposed to his qualification and his vocation as an air-conditioning technician. There was no serious dispute on this aspect or, in any case, the cross-examination has made no dent in this aspect. Besides, on this score, the appellant had also deposed to earning about ₹ 8,000/- per month by pursuing this vocation as a technician. True, no documentary evidence was produced, but, according to me, the claim was by no means exaggerated. Ultimately, even the Tribunal has relied upon this aspect and determined the compensation of ₹ 16,000/- on the basis that the appellant may have been out of work for about two months on account of the accident. The claim that the

appellant was earning ₹ 8,000/- per month ought to have been accepted in the facts of the present case.

23. The Tribunal has again, selectively relied upon the evidence of the doctor. The Tribunal has emphasized the doctor's statement in the very short cross-examination, which in its entirety reads as follows :

“Sometimes age can also cause vertigo. Working down levels as an A.C. Technician is possible.”

24. The Tribunal has, however, not given due consideration to the doctor's evidence that though the doctor did not find any objective neurological disability, there was *significant post-traumatic vertigo*. The doctor has also deposed that the appellant will not be able to work at heights and that his driving activities will also be affected. The doctor has deposed that working at down levels as an AC technician is possible, implying thereby that working at the higher levels as an AC technician is not possible. As an AC technician, it is reasonable to presume that the appellant would be required to work at higher levels and his work could never have been restricted to only lower levels. The doctor has deposed that the appellant's driving activities will be affected. The doctor has also deposed to significant post-traumatic vertigo.

All this evidence could not have been simply ignored because the doctor has quite correctly stated that sometimes even age can cause vertigo.

25. The hurt certificate is on record and the same should have been taken into consideration by the Tribunal for determining the compensation towards pain and suffering. The hurt certificate, which was not even challenged, refers to the head injury with a fractured base of the skull (as reported in CT scan done in Hospicio) with cervical spine injury with quadriparesis with epistaxis and bilateral ecchymosis.

26. By virtually overlooking this material piece of evidence, the Tribunal has proceeded to award compensation of only ₹ 5,000/- to the claimant against the head of pain and suffering. There is no proper award in respect of several other heads against which the compensation was claimed.

27. The decision in the case of *North West Karnataka Road Trans. Corpn.* (supra) turns on its own facts and has no application to the facts as emerged in the present matter.

28. As against the head of pain and suffering the Tribunal, in this case, should have awarded compensation of at least ₹

20,000/-. This is because the hurt certificate refers to the kinds of injuries that were caused to the appellant on account of the accident. Besides, the doctor who deposed in this matter also deposed to the significant post-traumatic vertigo which has nexus to the accident itself. It must be remembered that the appellant was only driving the scooter and the accident was with a much larger vehicle like i.e. a truck.

29. Towards the loss of amenities for life, the Tribunal has determined the compensation of only ₹ 10,000/-. The Tribunal has failed to consider the medical evidence on record which speaks about the hurt. The Tribunal has quite correctly noted that the appellant was 54 years old at the time of the accident. Taking into consideration all these aspects, the compensation of at least ₹ 30,000/- should have been awarded towards the loss of amenities for life.

30. Towards permanent disability, the Tribunal has determined compensation of ₹ 15,000/-. Though there is indeed no permanent disability, the evidence on record speaks about post-traumatic vertigo with which the appellant will have to perhaps live for his life. This has affected not only his earning capacity, but also his capacity to drive. The compensation of ₹ 15,000/-, in

the fact and circumstance of the present case, is quite low and is required to be enhanced to at least ₹ 45,000/- .

31. On the aspect of medical expenses, there is no case made out to interfere with the award of the Tribunal since the Tribunal has determined compensation of ₹ 11,178.65 as against the claim of ₹ 20,000/-. However, towards transportation, compensation of ₹ 5,000/- was due as against ₹ 2,000/- awarded by the Tribunal, The evidence on record reasonably suggests that the appellant had to make several visits to the doctor on account of his treatment, which according to the Tribunal, must have continued for over two months.

32. Towards loss of income, the Tribunal has awarded only ₹16,000/-. According to me, this compensation is required to be enhanced substantially. There is no reason to reject the claim of the appellant that he was earning ₹ 8,000/- per month. The appellant had the necessary qualification, as well as experience to earn this much amount. The evidence also suggests that post-accident, the appellant would not be able to work at higher levels as an AC technician. This would be a considerable handicap. This aspect has been ignored by the Tribunal and, therefore, according to me, the compensation on this score will also have to be enhanced to at least ₹ 1,00,000/-. The Tribunal has failed to take

into account the effect the accident has had on the future earning capacity of the appellant.

33. The aforesaid means that the total compensation payable to the appellant will have to be determined at ₹2,11,178.65 (rupees two lakhs eleven thousand one hundred seventy eight and paise sixty-five), as against ₹ 59,178-65 determined by the Tribunal. It is settled position in law that there is a duty cast on the Tribunal and consequently this Court, to determine the just compensation. Therefore, even if lesser compensation may have been claimed, that does not prevent this Court from determining and awarding the just compensation.

34. This is a case where the costs are liable to be awarded, but payable by the Insurance Company. Although Mr. Netravalkar had proposed the costs of ₹ 10,000/- imposable on the appellant, costs of only ₹5,000/- are awarded to the appellant which shall be paid by the Insurance Company.

35. The appeal is accordingly allowed. The appellant is awarded compensation of ₹ 2,11,178.65 (rupees two lakhs eleven thousand one hundred seventy eight and paise sixty-five), together with interest at the rate of 6% per annum from the date of application, till the actual payment. The appellant shall also be

entitled to costs of ₹ 5,000/- (rupees five thousand). The Insurance Company will have to honor this award within a maximum period of three months from today.

36. The appeal is disposed of in the aforesaid terms.

M. S. SONAK, J.

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