

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.26 OF 2017

Shri Dinesh Divsekar
Son of Shri Pandhari Divsekar,
Aged 53 years, married,
Service, Indian National,
Residing at H.No.492, Dhanwa,
Thivim, Bardez-Goa.

...Appellant

Versus

1. Shri Dinkar A. Matawankar,
Son of Shri Ankush Matawankar,
Aged 53 years, Driver,
Married, Indian National,
Resident of H.No.105, Dhavjawado,
Kitla, Aldona, Bardez-Goa.

2. Mr. Jose A.G. Silveira,
Son of Antinio Silveira,
Major of age, Indian National,
Resident of H.No.13/303-A/11,
Ashique Square, F-1, Opp. PWD,
St. Inez, Panaji-Goa.

3. National Insurance Co. Ltd.,
Through its Divisional Manager,
Having its Office at Govinda Building,
M.G. Road, Above UCO Bank, Panaji-Goa.

...Respondents

Mr. Jatin Ramaiya with Ms. M. Viegas, *Advocates for the Appellant.*

CORAM: M. S. SONAK, J.

DATED: 3rd MARCH 2022

ORAL JUDGMENT :

1. Heard Mr. Jatin Ramaiya, who appears along with Ms. M. Viegas for the appellant. Respondents, though served, are neither present nor represented.

2. The challenge in this appeal is to the judgment and award dated 17.09.2016 in Claim Petition No.110/2012 made by the Motor Accident Claims Tribunal (Tribunal) dismissing the petitioner's Claim Petition seeking compensation of ₹5,64,350/- on the ground that the appellant had failed to establish rashness and negligence on the part of respondent no.1 - the driver of the bus bearing no.GA-01-T-7539 which dashed against the appellant's Eterno scooter bearing no.GA-03-B-4547 on 14.11.2011 when the appellant was traveling from Bicholim to Akhada.

3. By the impugned award, the Tribunal has determined the compensation payable to the appellant at ₹4,40,000/-but held that the appellant failed to establish the rashness and negligence of the driver of the bus and, therefore, the appellant is not entitled to any compensation at all. The Tribunal has also held that the appellant failed to establish any permanent disablement

because no doctor was examined in support of the disability certificate produced on record.

4. Mr. Ramaiya, learned Counsel for the appellant, points out that the proceedings before the Tribunal are summary in nature and the claimant is required to prove rashness and negligence on the touchstone of preponderance of probability. He points out that merely because the pillion rider, Vilas Narvekar may have not been examined the case pleaded and deposed by the appellant could not have been disbelieved. He submitted that the Tribunal should have also appreciated that the bus was a much larger vehicle than the Eterno scooter driven by the appellant and, therefore, the duty of care expected from the driver of the bus was much greater.

5. Mr. Ramaiya also submitted that there were some contradictions in the reasoning indicated in the impugned award. On one hand, the Tribunal has held that the documents like FIR, panchanama, sketch, cannot be considered as evidence because no police officials or panchas were examined in the matter, but on the other hand, the Tribunal has non-suited the appellant almost exclusively relying upon the sketch annexed to the panchanama. Mr. Ramaiya submitted that even the sketch indicates bloodstains to the extreme left of the road and this probabalises the appellant's

version. He submits that even the sketch establishes that the accident has taken place at a sharp curve. He submits that despite service the driver of the bus failed to appear in the matter and depose to the cause of the accident. Mr. Ramaiya submits that the appellant deposed to the accident and there was no significant cross-examination. He, therefore, submits that the evidence on record was sufficient to record a finding of rashness and negligence on the part of the driver of the bus.

6. Mr. Ramaiya relied on *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors.*¹, *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.*², *Parmeshwari V/s. Amir Chand & Ors.*³, *Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors.*⁴ and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.*⁵ to submit that the approach of the Tribunal is contrary to the law laid down by the Hon'ble Supreme Court in these decisions.

7. Mr. Ramaiya points out that in *Sunita* (supra), the Hon'ble Supreme Court has already held that non-examination of a

1 (2020) 13 SCC 486

2 (2021) 1 SCC 171

3 (2011) 11 SCC 635

4 (2018) 5 SCC 656

5 (2013) 10 SCC 646

witness is never fatal in matters before the Tribunal where there is evidence to decide the issue on the touchstone of preponderance of probability. Mr. Ramaiya submits that the version of the appellant should be accepted because the same was not even denied by the driver of the bus. He submits that there was no cross-examination to the statement of the appellant on oath.

8. Mr. Ramaiya also submitted that, in this case, the Insurance Company had not secured leave under Section 170 of the MV Act and, therefore, could not have raised any defenses other than the permitted defenses under Section 149(2) of the MV Act. Therefore, for all the aforesaid reasons, Mr. Ramaiya submits that the impugned award, to the extent it answers the issue of rashness and negligence against the appellant, is required to be set aside and compensation as determined is required to be awarded to the appellant.

9. Since the respondents are neither present nor represented, I have gone through the evidence on record in some detail. On the evaluation of the evidence on record, it does appear that the approach of the Tribunal is not quite consistent with the law laid down by the Hon'ble Supreme Court in *Anita Sharma* (supra), *Parmeshwari* (supra), *Mangla Ram* (supra) and *Dulcina Fernandes* (supra).

10. In all the aforesaid cases, the Hon'ble Supreme Court has held that the approach of the Courts/Tribunals when dealing with such matters has to be sensitive enough to appreciate the turn of events at the spot, or the hardship that the claimants usually face in tracing witnesses and collecting information for an accident, when they were themselves not present at the accident spot. Further, the Courts/Tribunals must be cognizant of the fact that strict principles of evidence and standard of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such matters is one of the preponderance of probabilities, rather than proof beyond a reasonable doubt. The Courts/Tribunals have to be mindful that the approach and role of Courts/Tribunals while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eyewitnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true. The Courts/Tribunals, in matters of this nature, are required to take a holistic view bearing in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The Courts/Tribunals should also draw appropriate inferences from the failure of respondents to properly cross-examine the witnesses of the claimants or confront them with their version despite the adequate opportunity. The legal effect of the failure to cross-examine crucial witnesses on crucial issues must be taken into account by the Courts/Tribunals.

11. In *Sunita* (supra), one of the issues involved was the non-examination of the pillion rider. The Hon'ble Supreme Court

had held that such non-examination would be fatal to the case of the appellant-claimant. In the present case as well the Tribunal has held that non-examination of Vilas Narvekar, who was riding pillion with the appellant, is a serious lacuna in the case of the appellant.

12. In ***Sunita*** (supra), at paragraph 34, the Hon'ble Supreme Court has held that non-examination of the pillion rider cannot be held to be fatal to the case of the appellant/claimant in every case. The approach in examining the evidence in accident claim cases is not to find fault with the non-examination of some "best" eyewitness in the case but to analyze the evidence already on record to ascertain whether that is sufficient to answer the matters in issue on the touchstone of preponderance of probability.

13. In ***Dulcina Fernandes*** (supra), the Tribunal discarded the evidence of the claimant's eyewitness, *inter alia*, because the respondent was acquitted in the criminal case concerning the accident. The Hon'ble Supreme Court, however, held that the material on record was *prima facie* sufficient to establish that the respondent was negligent. Again the Hon'ble Supreme Court reiterated that matters of even rashness and negligence in claim petitions have to be decided on the touchstone of the preponderance of probability.

14. In the present case, there is no dispute whatsoever about the accident involving the appellant's Eterno scooter and the bus that was being driven by respondent no.1. A complaint was lodged, FIR was registered and a panchanama was also drawn up. Even the Tribunal has accepted the factum of the accident in this case.

15. The Tribunal has not at all considered the evidence led by the appellant on the genesis of the accident even though there was virtually no cross-examination on the version put forth by the appellant. Only one or two suggestions were put to the appellant to deny his version. The tribunal has ignored the evidence of the appellant simply because the appellant failed to examine Vilas Narvekar, the pillion rider. Applying the law laid down in ***Sunita*** (supra) and ***Dulcina*** (supra) this approach by the Tribunal cannot be approved.

16. The Tribunal, at paragraph 17 of the award, has held that though no doubt the offense was registered against respondent no.1, which is clear from the copy of FIR - Exhibit 33, the contents of the FIR are not established. Similarly, in paragraph 18, the Tribunal has held that non-examination of relevant witnesses including the concerned police officer and the pillion rider is what is to be held against the appellant.

17. Thereafter, however, the Tribunal has almost entirely based its reasoning on the sketch annexed to the panchanama even though no panchas were examined in this matter. Even here, the Tribunal has failed to account for the bloodstains at the extreme left side of the curved road where the accident has taken place. Bloodstains towards the extreme left to some extent corroborate the appellant's version about him moving to the extreme left noticing the bus coming from the opposite direction with great speed. There is some discrepancy or rather concern about the scooter ultimately being found beneath the front wheel of the bus towards the right side of the road. However, as has been held by the Hon'ble Supreme Court, a holistic view has to be taken in such matters bearing in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be established by the claimants. Further, the Hon'ble Supreme Court has held that the Tribunal should draw appropriate inferences from the failure of respondents to properly cross-examine the witnesses of the claimants or confront them with their version despite the adequate opportunity. The legal effect of the failure to cross-examine crucial witnesses on crucial issues has to be taken into account by the Courts and Tribunals in such matters.

18. Besides, as was correctly pointed out by Mr. Ramaiya, the duty of care was much greater on the driver of the bus, which is a much bigger vehicle as compared to an Eterno scooter that the appellant was riding. There is no dispute that the accident has taken place at a sharp curve where the duty of care to be taken by the bus driver ought to have been the greatest. On the holistic consideration of the evidence on record and by overlooking some slight discrepancies here and there it will have to be taken that there is sufficient evidence on record to answer the issue of rashness and negligence in favor of the appellant on the touchstone of preponderance of probability.

19. Fortunately, the Tribunal, in this case, has followed the law laid down by the Hon'ble Supreme Court in *Bimlesh & Ors. V/s. New India Assurance Company Limited*⁶ and determined the just compensation even though the issue of rashness and negligence was answered against the appellant. On perusal of such determination, I am satisfied that there is no case made out to interfere with the just compensation determined by the Tribunal.

20. The Tribunal, in this case, has accounted for the five months' leave and proceeded to award the appellant

6 (2010) 8 SCC 591

compensation of ₹2.00 lakhs, which is *prima facie* on the higher side. The appellant was employed in Mormugao Port Trust, which is a Central Government undertaking. From the evidence on record, it cannot be said that this much loss was incurred by the appellant on account of loss of leave. Normally there is a capping when it comes to encashment of the leave. However, even the award on this head is not required to be interfered with because the same is otherwise within the bounds of reasonability. Even if some reductions were to be made under these heads, some addition would be required under some other heads. Since the overall compensation of ₹, 4,40,000/- in the facts of the present case is not excessive but is close to the just compensation to which the appellant can be said to be entitled, there is no good case made out to enhance this amount further.

21. The appellant failed to examine the doctors to prove any permanent disability. In any case, as against the appellant's claim of ₹5,64,350/- the appellant has been awarded compensation of ₹4,40,000/-. The appellant was 47 years old at the time of the accident. There is no evidence that the appellant was removed from his service or denied promotions or other financial benefits for causes relatable to the accident and the injuries sustained therein. There is no explanation as to why doctors could not be examined in support of the plea of permanent disability. The

impact of this disability on the actual working of the appellant is also not made clear.

22. For all the aforesaid reasons, this appeal is allowed. The finding of rashness and negligence as recorded in the impugned award is reversed. The appellant is held entitled to compensation of ₹4,40,000/-. This amount will have to be paid by the respondents, including in particular respondent no.3 (Insurance Company), with interest at the rate of 6.5% per annum from the date of the claim petition till actual payment.

23. The respondents, including in particular respondent no.3, are directed to deposit the aforesaid amount in this Court within two months from today. Upon deposit, the appellant will be entitled to withdraw the said amount by providing proper identification and bank details so that the amount can be directly transferred to his bank account.

24. The appeal is allowed in the aforesaid terms. There shall be no order for costs.

M. S. SONAK, J.