

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.14/2019

1. MRS. SUBHADA SUBHASH DHEKNE, wife of Mr. Subhash H. Dhekne, aged about 64 years, married, housewife, Indian National, r/o Flat No.302, Khalap Mansion, Vasco Da Gama-Goa.

2. MR. SUBHASH H. DHEKNE
(Deleted since expired)

2a) Mr. Hirendra Subhash Dhekne (son of deceased Appellant No.2), major in age, Flat No.Ahanti, Chicalim, Vasco Da Gama Goa.

2b) Mrs. Preethi Hirendra Dhekne, (Daughter-in-law of deceased Appellant No.2), r/o Flat No.404, Ahanti, Chicalim, Vasco Da Gama Goa.

... APPELLANTS

Versus

1. MR. SURESH VITHOBA GAONKAR, son of Shri Vithoba Gaonkar, 29 years of age, Indian National and r/o Virangol, Akheti, Joida, Karwar, Karnataka, (Driver Mini Bus bearing Registration No.GA-07-F-4399 at the time of accident)

2. M/S. J. P. NUNES & SONS, having address at Near General Post Office, Panaji-Goa (owner of Mini Bus

bearing Registration No.GA-07-F-4399
at the time of accident)

3. UNITED INDIA INSURANCE
COMPANY LIMITED, through its
Manager, having office at Mascarenhas
Building, M. G. Road, Panaji-Goa.

... RESPONDENTS

Mr. Sagar Dhargalkar, Advocate *for the Appellants*.

Ms. C. Afonso, Advocate *for the Respondent No.2*.

Mr. A. R. S. Netravalkar, Advocate *for the Respondent No.3*.

CORAM.: M. S. SONAK, J.

DATED: July 15, 2022

ORAL JUDGMENT:

1. Heard learned counsel for the parties.
2. This appeal challenges the Judgment Award dated 16.10.2018 in Claim Petition No.15/2017 made by the Motor Accident Claims Tribunal, North Goa at Panaji (Tribunal), to the extent it holds that there was contributory negligence of 50% on the part of the 26-year-old Naval Dhekne, who died in a vehicular accident on 17.10.2015. His parents claimed compensation for his death.
3. Mr. Dhargalkar submitted that merely because the Tribunal found that the accident occurred in the middle of the road, Naval should not be held responsible for the accident to 50%. He

submits that the relevant evidence was ignored or, in any case, misconstrued. Finally, he submits that the approach of the Tribunal was contrary to the law laid down in the following decisions:

- (i) *Pramodkumar Rasikbhai Jhaveri vs. Karmasey Kunvargi Jhaveri – (2002) 6 SCC 455;*
- (ii) *Jiju Kuruvila And Others vs. Kunjujamma Mohan And Others – (2013) 9 SCC 166;*
- (iii) *Kumari Kiran vs. Sajjan Singh And Others – (2015) 1 SCC 539;*
- (iv) *Sunita And Others vs. Rajasthan State Road Transport Corporation And Others – (2020) 13 SCC 486.*

4. Ms. Christabel Afonso learned counsel for respondent no.2 submitted that there was no error in the finding recorded by the Tribunal; therefore, this appeal may be dismissed.

5. Mr. Netravalkar, learned counsel for respondent no.3- insurance company, submitted that the deceased Naval was 100% responsible for the accident. Without prejudice, however, the insurance company has honored the award of the Tribunal. He submitted that the Tribunal had ignored the evidence that the deceased Naval's dead body was found at a distance of almost 11.60 mtrs. from the accident spot. He submits that he would

not be thrown at such a distance unless the deceased drove at a breakneck speed and in a rash and negligent manner. He, therefore, submits that the accident was caused entirely due to the rashness and negligence of the deceased Naval. He, therefore, submitted that this appeal may be dismissed.

6. Mr. Netravalkar pointed out that the Tribunal had awarded ₹50,000/- to each of the claimants for the loss of love and affection they would have received from their son Naval. He, however, pointed out that in terms of *National Insurance Co. Ltd. vs. Pranay Sethi & Ors. - 2017 (16) SCC 680*, the compensation of only ₹40,000/- could have been awarded towards the consortium, and there was no provision for making any award towards love and affection.

7. The rival contentions now fall for my determination.

8. The main issue involved in this appeal concerns the finding of contributory negligence recorded by the Tribunal.

9. The entire reasoning of the Tribunal for holding the deceased responsible to the extent of 50% for the accident in which he died is to be found in paragraph 14 of the impugned award, which reads as follows:

"14. From these averments made by respondent no.1, it is clear that according to him the accident took place on the left lane of the road if one proceeds from Dabolim to Cortalim and that he stopped the bus at the spot of the accident itself. In other words, it is manifest that according to respondent no.1, he did not move ahead after the impact and was able to stop the bus on impact. If this was so, there would have been some glass pieces in front of the bus or at least some under the bus. It is not the case of respondent no.1 that there were any such glass pieces in front of the bus where it was stationary or under the bus. The very fact that these glass pieces were seen only towards the middle of the road will be indicative of the fact that the accident took place towards the middle of the road. At this juncture, it will not be out of place to mention that respondent no.1 had taken a plea in the written statement that the minibus was empty at the time of the accident, however, in cross-examination he stated that he was carrying about 14 passengers from the airport towards Panaji. As there are glass pieces shown in the panchanama around the dividing line, in the absence of independent witnesses, the only conclusion that can be arrived at is that the accident has taken place in the middle of the road, which would mean that both the deceased rider of the scooter and respondent no.1 were responsible for the accident in equal measure. It has been argued on behalf of respondents no.1 and 2 that the case of these respondents has to be believed, given the fact that the claimants have not examined any eyewitness, whereas, these respondents have examined respondent no.1 who had witnessed the accident. However, his testimony cannot be taken to prove that the accident took place in the manner stated by him, as his testimony is self-serving and also he has made contrary statements regarding the presence of passengers on the bus at the time of the

accident. This issue is accordingly answered partly in the affirmative."

10. Thus, Mr. Dhargalkar is justified in contending that the sole basis for the above finding is the conclusion that the accident took place in the middle of the road and, therefore, both the deceased – the rider of the scooter and respondent no.1, i.e., the minibus driver were equally responsible for the accident. Mr. Dhargalkar is also justified in his contention that the evidence on record does not support this finding. In any case, this finding results from an improper appreciation of the evidence on record. Mr. Dhargalkar also submitted that the approach of the Tribunal is contrary to the approach prescribed by the Hon'ble Supreme Court in some of the decisions he relied upon.

11. The claimants are the parents of the deceased Naval, aged 26 years at the time of the accident. Naturally, therefore they could not depose to the genesis of the accident.

12. Ms. Afonso and Mr. Netravalkar submitted that respondent no.1 – Suresh Gaonkar, the driver of the minibus involved in the accident, has deposed in the matter. However, before considering the driver's deposition, it is necessary to advert to the driver's written statement.

13. In his written statement, the driver categorically pleaded that his minibus was proceeding empty from Dabolim towards Cortalim on its left lane. Besides, the driver also pleaded how according to him, the deceased drove the scooter rashly and negligently and therefore was responsible for the accident. The driver also claimed that the spot of the accident was wrongly marked on the Panchanama and the sketch.

14. The driver filed an affidavit in evidence. This affidavit is silent on whether his bus was empty at the time of the accident. However, in his cross-examination, he admitted that he was carrying about fourteen passengers from the airport to Panaji. On being confronted about his pleadings in the written statement, he answered that he has studied up to the IXth standard and does not know to read English. He further stated that he does not know what was written in his affidavit in evidence.

15. The owner of the bus, perhaps alarmed by such deposition of the driver, recalled this witness for cross-examination. On this occasion, the driver maintained that he was carrying about fourteen passengers but added that they were foreigners traveling from the airport to their respective hotels. He also attempted to clarify that before he signed his affidavit, he was asked about the accident and how it happened, and he told accordingly.

16. The counsel for the insurance company Mr. Netravalkar questioned the driver about the payment by the passengers. This was a relevant question posed by Mr. Netravalkar to test the credibility of this driver. The driver, however, answered that the owner and the agent had fixed the passengers' payment. The owner has not bothered to step into the witness box.

17. The driver finally deposed that he did not know whether what was explained to him was in his affidavit. He deposed that he cannot confirm whether what he has stated has been incorporated in his affidavit.

18. The evidence of the driver inspires no confidence whatsoever. In his written statement, he took a definite plea about his bus being empty at the time of the accident. In his affidavit, he omitted to state anything about the position of the passengers. However, in his cross-examination, he was trapped into admitting that he was carrying fourteen passengers from the airport to Panaji. This is most relevant because the question would be why none of these independent witnesses were examined by the driver or the owner. The driver then tried to make up for the lost ground in his re-examination by stating that the passengers in his bus were foreigners. This statement was made only in the re-examination to create a foundation for their non-examination.

Mr. Netravalkar's pertinent question for testing the credibility of this witness was also not answered quite honestly by this driver.

19. In his written statement and evidence, the driver challenged the Panchanama and the sketch attached to the Panchanama. In this case, there is evidence that an FIR was filed against the driver for Offences punishable under Sections 279 and 304(A) of the Indian Penal Code. Nothing on record suggests that the driver challenged the filing of the FIR or that he protested the Panchanama and the sketch accompanying the Panchanama.

20. As held in *Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr. - (2013) 10 SCC 646*, the fact that neutral authorities like police deemed it appropriate to launch prosecution against the driver for rash and negligent driving is not an irrelevant circumstance for deciding the issue of rashness and negligence. Except for baldly challenging the Panchanama and the sketch, the driver brought forth no evidence to demonstrate why and how this Panchanama and Sketch were wrong.

21. On the other hand, the claimants examined Santosh Gaonkar, the Head Constable (AW3). This witness has deposed in some detail about the scene of the accident. The relevant

extract of his deposition is transcribed below for the reference of convenience:-

"The said Aactiva scooter was lying on the tar road. There was a dead body of a male person lying in the bushes outside the tar road if one faces Cortalim. The scooter was fallen behind the bus at a distance of 4.20 mtrs. from the right rear tyre of the bus. The scooter was fallen on the right side portion of the tar road if one faces Cortalim. The distance between the front tyre of the scooter to the edge of the tar road on the right-hand side if one faces Cortalim was 2.35 mtrs and the distance between the rear tyre of the scooter to the head of the deceased person was 2.90 mtrs. There were glass pieces fallen at a distance of 6.10 mtrs in front of the scooter and this was taken as the accident spot. The distance from this spot to the right rear tyre of the bus was 2.10 mtrs. The distance between the accident spot and the dead body was 11.60 mtrs. There were blood stains near the head of the deceased and there was a helmet near the head of the deceased. The accident spot was seen close to the dividing line but more towards the right hand side if one faces Cortalim. The distance between the spot of the accident to the edge of the tar road on the right hand side if one faces Cortalim was 2.90 mtrs. The scooter was totally damaged and it was seen that the front right edge of the bumper of the bus was damaged. The front right side head light of the bus was also damaged and the front right edge of the body of the bus was damaged. So also, the glass of the door on the driver's side of the bus was damaged. The panchanama started at 05.55 hours and concluded at 06.40 hours. I also drew a sketch of the scene. Shown to me the panchanama and sketch which were marked B colly for proof. I identify the same as having been drawn by me and they bear my signature at point S. The same are taken on

record and marked as Exh.55 colly. The dead body was shifted to the Hospicio hospital for preservation. Inquiries revealed that the accident took place due to the rash and negligent driving of the said bus by Suresh Gaonkar and hence I lodged my complaint against the said Suresh Gaonkar. Shown to me the FIR and Complaint which were marked A colly for proof. The same are taken on record and marked as Exh. 56 colly. I identify my signature at point S on the complaint."

22. In his cross-examination, he denied the suggestion that he had wrongly shown the accident spot on the portion of the road, which is on the right-hand side of the dividing line if one faces Cortalim. Furthermore, he denied the suggestion that it was the scooter that went on the wrong side of the road and dashed the bus. Finally, he denied the suggestion that he had filed a false complaint against the bus driver.

23. The sketch is appended to the Panchanama depicting the scene of the accident. The Panchanama and the sketch were produced in evidence by the Head Constable. As concluded by the Tribunal, the sketch does not show that the accident occurred in the middle of the road. Even the sketch shows a divider line and the spot of the accident on the side where the minibus should never have been. The damages to the bus, the spot of the accident, the traces of broken glass, and the position of the two vehicles do not sustain the finding of contributory negligence on

the part of the deceased. Rather, the evidence on record points out the rashness and negligence of the bus driver, who alone was required to be held responsible for the accident.

24. The Tribunal failed to appreciate that the minibus was a heavier and larger vehicle; therefore, the duty of care on the minibus driver was much greater. Mr. Netravalkar's contention about the bus driver seeing the scooterist hardly three to four meters away and his inference that the scooterist (deceased) was cent-percent responsible for the accident are entirely misconceived. Firstly, no such suggestion was put on behalf of the insurance company by Mr. Netravalkar to the Head Constable who deposed in this matter. Secondly, Mr. Netravalkar, on behalf of the insurance company, questioned the bus driver to expose his credibility. Curiously, now it is contended that the bus driver was not responsible for the accident, and the entire blame lay on the deceased.

25. There is nothing on record to indicate that the insurance company had obtained any leave under Section 170 of the Motor Vehicles Act, Ms. Afonso, learned counsel for the minibus owner, pointed out that the owner and driver had contested the proceedings and, therefore, there was no leave applied for or granted. In the absence of any such leave, it is doubtful whether

the insurance company can argue on the issue of rashness and negligence or even the quantum of compensation. Be that as it may, Mr. Netravalkar was fully heard on this aspect. On considering his submissions, however, no merit is detected in them.

26. The Tribunal, in this case, has failed to adopt the approach expected of it by the various decisions of the Hon'ble Supreme Court relied upon by Mr. Dhargalkar. In *Pramodkumar Jhaveri (supra)*, the Hon'ble Supreme Court held that the question of contributory negligence arises when there has been some act or omission on the claimant's part which has materially contributed to the damage caused and is of such a nature that it may properly be described as "negligence". Negligence ordinarily means a breach of a legal duty to care, but when used in the expression "contributory negligence," it does not mean a breach of any duty. It only means the failure of a person to use reasonable care for the safety of either himself or his property so that he becomes blameworthy in part as an "author of his own wrong". If the Tribunal were to apply this principle, there was no question of any blame being apportioned on the deceased scooter driver.

27. In *Pramodkumar Jhaveri (supra)*, the Hon'ble Supreme Court has further held that it has been accepted as a valid

principle by various judicial authorities that where, by his negligence, if one party places another in a situation of danger, which compels that other to act quickly to extricate himself, it does not amount to contributory negligence if that other acts in a way, which, with the benefit of hindsight, is shown not to have been the best way out of the difficulty. But, again, this principle was not even adverted to by the Tribunal in this case.

28. In *Sunita & Ors. (supra)*, the Hon'ble Supreme Court has held that in motor accident claims cases, once the foundational fact, namely, the actual occurrence of an accident, has been established, then Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place because of the negligence of the driver of a motor vehicle and, while doing so, Tribunal would not be strictly bound by pleadings of parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of the preponderance of probabilities and not the strict standard of proof beyond all reasonable doubt followed in criminal cases.

29. The Hon'ble Supreme Court has further held that 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. The Hon'ble Supreme Court also approved the Tribunal's approach of relying on the contents of the FIR, which *prima facie* indicates the negligence of the bus driver. For this purpose, the Hon'ble Supreme Court relied on its earlier decision in *Dulcina Fernandes (supra)* and *Mangala Ram vs. Oriental Insurance Co. Ltd. - (2018) 5 SCC 656*.

30. The Hon'ble Supreme Court has held that the Tribunal had justly accepted the appellants' contention that the respondents did not challenge the propriety of FIR and charge sheet before any authority. The only defense raised by the respondents was a bald assertion that FIR was based on wrong facts and was filed in connivance between appellant complainants and police. No evidence was produced to prove this point. Even if the final outcome of criminal proceedings against the bus driver were unknown, the same would make no difference, at least for deciding the claim petition under the Motor Vehicles Act. The nature of proof required to establish culpability under criminal law is far higher than standard required under Tort Law to create liability.

31. Applying the above principles to the facts from the evidence on record, the Tribunal was unjustified in apportioning the blame on the deceased. On the contrary, the evidence on record, duly supported by the unbelievable testimony of the bus driver, is quite sufficient to hold that the bus driver was solely responsible for the accident in which the claimants lost their 26-year-old son. Accordingly, the finding about contributory negligence is reversed.

32. Mr. Netravalkar is justified in contending that *Pranay Sethi (supra)* allows only ₹40,000/- towards consortium and not ₹50,000/- that has been awarded by the Tribunal under the head of "love and affection." Therefore, an amount of ₹20,000/- would have to be deducted from the award. However, this is a fit case to require the respondents to pay costs of ₹20,000/- to the appellants-claimants. Therefore, rather than impose such costs, the interest of justice will be met if the legal position is clarified. Still, the determination of compensation in the impugned award is not disturbed.

33. As a result, this appeal is allowed. Accordingly, the appellants-claimants are held entitled to receive the full compensation of ₹40,34,255/- with interest @ 9% p.a. from the filing of the claim petition.

34. Respondents no.1, 2, and 3, including in particular respondent no.3, are directed to deposit the additional compensation in terms of this judgment and order (after adjusting previous payments, if any) in this Court within eight weeks from today. Necessary intimation will have to be given to the learned counsel for the appellants about this deposit.

35. Upon deposit, the appellants will be entitled to withdraw the deposited amount by furnishing proper identity documents and bank details. The Registry to ensure that the amounts are deposited directly into the bank accounts of the appellants.

36. The appeal is allowed in the terms above. Miscellaneous applications, if any, do not survive, and the same are also disposed of.

M. S. SONAK, J.

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