

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO. 109 OF 2017

Mr. Fanky Carvalho alias Neves Franky
Carvalho., s/o. Antonio Carvalho, 35
years of age, businessman, r/o.
H.No.276, Santamol, Ambaulim,
Quepem, Goa. Appellant.

Versus.

1. Raju Jaswant Singh (dismissed in view
of order dtd. 22/12/16 passed in MCA
373/2015).

2. Nocolau D'Costa,
s/o. Francisco D'Costa, major, r/o.
H.No.535, Khamamol, Curchorem,
Goa

3. The New India Assurance Co. Ltd.,
Jagannath Bldg., Near Railway Station,
Margao, Goa

4. Mr. Navnath Naik,
s/o. Tukaram Naik, major, r/o. H.No.19,
Pontemol, Curchorem, Goa.

5. Mrs. Quiteria Fernandes,
w/o. Seby Fernandes, major, r/o.
H.No.410, Opp. Kalanath Society,
Mapa, Panchwadi, Ponda, Goa.

6. United India Insurance Co. Ltd.

Jamnadas Bldg., 2nd Floor, P.B. No.15,
Curchorem, Goa.Respondents.

Mr. C.A. Coutinho Almeida with Mr. Ivan Santimano,
Advocates for the Appellant.

Ms. C. Afonso, Advocate *for Respondent No.3.*

CORAM : M. S. SONAK, J.

DATE : 1st July 2022

ORAL JUDGMENT :-

1. Heard Mr. C.A. Coutinho Almeida for the Appellant and Ms. C. Afonso for Respondent No.3.

2. The record indicates that all the Respondents have been served, though there is no appearance on behalf of Respondents No.1,2,4, 5, and 6.

3. The challenge is to the impugned Judgment and Award dated 15/11/2014, by which the Motor Accident Claims Tribunal, at Margao (Tribunal), dismissed the Appellant's Claim Petition No.200/2010 by holding that the accident was due to the rashness and negligence of the Appellant and not the truck No.GA-02/T-5429. The Tribunal did not even bother to compute

the compensation amount that the Appellant might have been entitled to, but for this finding on rashness and negligence.

4. The Hon'ble Supreme Court in *Bimblesh and ors. vs. New India Assurance Co. Ltd.*¹ and *The Agricultural Produce Marketing Committee, Bangalore vs. The State of Karnataka and ors.*² has made it clear that the Courts and the Tribunals should dispose of all issues together and not adopt shortcuts by deciding the matters only on one of the issues that may arise. The Tribunal, in this case, by not determining all the issues, has breached this principle.

5. Mr. Coutinho submits that the evidence on record does not justify the finding of the Appellant's alleged rashness and negligence. He submits that the Appellant and several other commuters were only attempting to overtake a line of parked trucks. Therefore, he submits that no negligence can be attributed on this count. He refers to the defense of the driver of truck No.GA-02/T-5429 to submit that the same, to a certain extent, corroborates with the Appellant's version and proves that it is the truck driver who was negligent in the matter.

1. (2010) 8 SCC 591

2. 2022 LiveLaw (SC) 307

6. Mr. Coutinho submits that the evidence on record justifies the finding that the Appellant's income was ₹30,000/- per month. He submits that there is evidence about the expenses incurred by the Appellant due to the accident and to maintain his business as a truck owner/driver during the period when the Appellant was immobilized. He submits that the Appellant is entitled to compensation towards future medical expenses, pain and suffering, and loss of expectation of life. He handed in a calculation sheet to submit that the just compensation, in this case, would come to ₹7,75,840/-.

7. Ms. C. Afonso appears for Respondent No.3, *i.e.*, the insurer of truck No.GA-09/U-2182 that was coming from the opposite side and is alleged to have damaged the Vespa Scooter that the Appellant was riding. She submits that there is no claim against the owner, driver, or insurer of truck No.GA-09/U-2182. She submits that there was no injury caused by the truck bearing No.GA-09/U-2182 to the Appellant. She, therefore, submits that no relief can be granted to the Appellant as against Respondents No.1, 2, and 3.

8. Based on the submissions made, mainly two issues arise for determination:-

- (a) The issue of rashness and negligence; and
- (b) The issue of quantum of compensation.

9. On the first issue, the Appellant has examined himself as AW.1. The driver of truck No.GA-02/T-5429 did not bother to examine himself. The evidence shows that an FIR was registered against the Appellant for the accident from which this claim arises. The Appellant was prosecuted for the offense punishable under Section 279 IPC for rash and negligent driving. The evidence also shows that the Judicial Magistrate First Class acquitted the Appellant at Quepem by her Judgment and Order dated 24/11/2011, holding that the prosecution had failed to explain the genesis of the accident or even to identify the Appellant correctly.

10. The conviction or acquittal in a criminal matter is not usually very relevant in deciding the issue of rashness and negligence in a claim petition. This is mainly because the standards of proof in the two proceedings are not the same. In a criminal prosecution, the standard is to prove beyond a reasonable doubt. In a claim petition, the standard accepted is that of the preponderance of probabilities.

11. The relevant fact in the present context is that the neutral agencies, *prima facie*, felt that the Appellant was negligent and responsible for the accident in which he suffered injuries. The impartial authorities, therefore, launched prosecution against the Appellant, though they may not have succeeded in securing his conviction.

12. The Appellant, in his affidavit-in-evidence, explains that on 29th May 2010, when he was returning to Quepem on his Vespa scooter, he found that there was heavy traffic of mining trucks on the road. The trucks going towards Quepem were parked in a long queue. He has stated that two-wheelers were making their way amongst these trucks just as he was. At about 12.30 p.m., when he reached near the truck bearing No. GA-02/T-5429, the truck driver, without any signal, drove his truck most rashly and negligently, swerved to the right side, and dashed the Appellant's scooter. The Appellant deposed that he sustained injuries due to this dash.

13. In his cross examination, the Appellant stated that the truck dashed the front bumper of his scooter. The Appellant admitted that he was overtaking the truck bearing No. GA-02/T-

5429 when the accident took place. He, however, denied that he was responsible for the accident.

14. The prosecution case papers like the FIR, panchanama and sketch attached to the panchanama are all part of the record because the Appellant himself produced the same. However, as noted earlier, the truck driver bearing No. GA-02/T-5429 did not step into the witness box or explain his version. However, this truck driver has filed a written statement, in which he offered the following explanation at paragraph 6 :

"6. The respondents state that at the relevant time of the alleged accident, respondent No.4 was proceeding from Sanvordem to Quepem by a truck bearing registration No.GA-02, T-5429 on his own side with a moderate speed of 30 KM. PH., however a passenger bus which was proceeding ahead of the truck of the respondent No.4, suddenly stopped and accordingly respondent No.4 also applied brakes and stopped his truck, at this juncture a truck bearing Registration No.GA-02,T-2182 came from the opposite direction.

The respondents state that the applicant who was proceeding behind the truck bearing Registration No.GA-02,-5429, overtook the said truck of the respondent No.4 and in the process dashed against the on coming truck bearing registration No.GA-02, T-2182 and sustained injuries.

The respondents state that the truck bearing registration No. GA-02, T-5429, did not touch the

scooter of the applicant herein. The respondents further state that the applicant himself, is responsible for the alleged accident and he is the author of the alleged accident.

The respondents state that the applicant is not entitled to claim any compensation from the respondents No.4 and 5 herein.

In the premises the respondents pray that the claim petition be dismissed as against the respondents No.4 and 5."

15. Even if the defense version of the truck driver is to be accepted though he did not choose to step into the witness box, it is apparent that the truck driver was not blameless. The version about the passenger bus ahead of the truck suddenly stopping, thereby forcing the truck driver to apply brakes and stop his truck, is something that the truck driver should have stepped into the witness box and explained. However, the defense about the Appellant overtaking the truck is corroborated by the evidence of the Appellant himself. However, there is no evidence supporting the truck driver's contention that his truck did not even touch the Appellant's scooter and that truck No.GA-09/U-2182 was responsible for the accident.

16. Based on the material on record, in my opinion, this is a case of contributory negligence. The Appellant and the truck

driver of the truck bearing No. GA-02/T-5429 are both responsible for the accident in equal measure.

17. The Appellant has deposed that there was heavy traffic of mining trucks at the accident spot. He has deposed to the long line of mining trucks parked on one side and the movement of the mining trucks from the opposite direction. In such a situation, there was a duty on the Appellant to have adopted utmost caution and circumspection before attempting to overtake the mining trucks in question. To say that several bikes were negotiating through the trucks is not an answer. To a certain extent, the Appellant embarked upon a misadventure and, unfortunately, suffered some injuries in the bargain.

18. At the same time, the truck driver's conduct of truck No.GA-02/T-5429 is also not blameless. Further, if his version in the written statement is to be believed, it is apparent that the truck driver applied his brakes quite suddenly and stopped the truck. The dash of the scooter is to the hind side of the truck, which is reasonably attributable to the sudden stopping of the truck. The truck driver's defense suggests that the Appellant attempted to overtake the truck. This aspect is corroborated by the admission of the Appellant in the cross. Again, the material

on record suggests that he was at the back side of the truck. Considering all these aspects cumulatively, in my opinion, this is a case of contributory negligence with the Appellant and the truck driver contributing equally to the accident.

19. The next issue is about the quantum of compensation.

20. On the issue of quantum of compensation, the Appellant has examined himself as AW.1. Therefore, the claim of ₹3,034/- towards medicines and ₹2,000/- towards transportation has to be allowed and is hereby allowed. Similarly, the Appellant has deposed to spending ₹60,000/- by way of salary to a driver that he had to drive his truck during the period the Appellant was immobilized. Therefore, this is a reasonable claim that can be considered and allowed.

21. There is some evidence about the Appellant requiring further surgeries to remove a plate in his hand and a rod in the leg. Mr. Coutinho has restricted this claim to ₹25,000/-, considering the evidence on record that the Appellant has availed the medical facilities in the government Hospital. This claim is also quite reasonable and deserves to be allowed.

22. Though no doctor was examined in this case, a permanent disability certificate is produced on record. This certifies that the Appellant was diagnosed as a closed fracture right lateral end clavicle, closed fracture proximal right ulna, CLW right arm with impending compartmental syndrome right forearm, closed fracture mid 1/3rd right tibia-fibula with CLW right leg. The Appellant was treated by open reduction and internal fixation with plate and screw on 29/5/2010 and was discharged from the ward on 19/6/2010. After that, the Appellant attended the OPD for regular follow-up.

23. The certificate further certifies that the Appellant was assessed for percentage of permanent disability by the Department of Orthopaedics on 2/8/2011, and according to the ALIMCO scale, the percentage of permanent disability is 8% due to mild limited motion of the right lower limb.

24. There is evidence that the Appellant underwent one surgery and that there was a possibility of two more for removal of the rod and the plate. Considering this evidence on record, the Appellant is entitled to compensation of ₹75,000/- towards pain and suffering.

25. Towards the loss of expectation of life, the Appellant will not be entitled to the compensation of ₹1,00,000/- as claimed, but an amount of ₹25,000/- considering the percentage of disability and the surgeries that the Appellant had to go through and is likely to go through in future. The disability concerns the mild limited motion of the right lower limb.

26. Again, there is only evidence of the Appellant on the aspect of future earnings. The Appellant has not led any significant evidence, but he examined Vivek Kantak from Chowgule and Company. This witness identified the earning statement concerning the truck belonging to the Appellant. This earning statement is not clear. But Mr. Coutinho states that this statement refers to the total payment of ₹82,930/- for April. Mr. Coutinho contended that the Appellant's monthly income should be taken at ₹30,000/-, after deducting expenses towards fuel, maintenance, staff, etc.

27. Based on the statement and in the absence of any proper evidence from the Appellant himself, the above contention cannot be accepted in its entirety. Besides, there is no stability in the income from operating mining trucks. Usually, there is no transportation during the monsoons. Considering all these

aspects, the Appellant's monthly income can be taken at ₹20,000/- and not ₹30,000/- as suggested. Applying the principles in *Raj Kumar vs. Ajay Kumar and anr.*³ and *Sandeep Khanuja vs. Atul Dande and anr.*⁴ Based on the evidence on record evidence, the compensation towards loss of future earnings will then come to ₹3,07,200/-.

28. The above assessment is based on the undisputed position that the Appellant was 31 years old at the time of the accident and, therefore, the multiplier applicable would be 16. Besides, there is evidence that the Appellant was a truck driver and has sustained a permanent disability of 8%. The Appellant has himself led evidence that he was required to engage services of a driver for six months at the salary of ₹10,000/- per month. Although the Appellant claimed that even after that, he could not drive the truck, this evidence hardly inspires any confidence. Considering the disability certificate, which was incidentally not even proved adequately by examining the doctor who issued it, the functional disability can also be held at only 8%. Quite reasonably, Mr. Coutinho, in the calculation submitted by him, also assessed the functional disability at 8%.

3. (2011) 1 SCC 343

4. (2017) 3 SCC 351

29. Thus, the just compensation, in this case, will work out to ₹4,97,240/-. That can be rounded off to ₹5,00,000/-. Since the Appellant was responsible for the accident to 50%, he will be entitled to compensation of ₹2,50,000/- for which Respondents No.4, 5, and 6 will be jointly and severally liable. On the said amount, the Appellant will be entitled to interest at the rate of 9% per annum from the date of filing of the claim petition, till actual payment/deposit.

30. This Appeal is partly allowed. The compensation payable to the Appellant is determined at ₹2,50,000/-. Respondents 4, 5, and 6 are directed to jointly and severally pay this amount to the Appellant within two months from receiving an authenticated copy of this judgment and order. The said Respondents, including Respondent No.6-Insurance Company, are directed to deposit this amount in this Court within two months from the date of receipt of an authenticated copy of this Judgment and Order. The deposit will be after due notice to the learned Counsel for the Appellant.

31. Upon deposit, the Appellant will be entitled to withdraw the same by furnishing identification papers and bank details so

that the Registry can transfer the amount directly into the Appellant's bank account.

32. The Appeal is allowed to the extent above. There shall be no order for costs.

M. S. SONAK, J.