

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.41 OF 2019

Shri Peter Godinho
S/o. Xavier Godinho
(Since dec. through legal heirs)

1(a) Smt. Greata Godinho
Widow of Peter Godinho alias Pidu
Gudinho, aged 50 years, widow.

1(b) Shri Gracian Godinho
Son of late Peter Godinho alias Pidu
Gudinho, aged 28 years, bachelor.

1(c) Miss Shaina Godinho,
Daughter of late Peter Godinho alias Pidu
Gudinho, aged 25 years, spinster,
All above residents of Taki-Xeldem,
Taluka Quepem.

... Appellants

Versus

1. Shri Cornelins D'Souza
Son of Xavier D'Souza,
major, resident of Diana Villa
Near Church, Kennigalli,
Manglore, D.K. and now at
C/o. Jossy D'Sa
House No.74, Shirvodem.
Navelim, Salcete Goa.
(driver & Owner)

2. The Oriental Insurance Co. Ltd.
City Branch I Kulyadi Bldg.
K.S. Rao Road, Hampankatta
Mangalore 575001 pin 440628.

... Respondents

Mr. S.S. Kakodkar, Advocate for the Appellant.

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

CORAM: M. S. SONAK, J.

DATE : 22nd JULY 2022

ORAL JUDGMENT :

- 1.** Heard Mr. Kakodkar for the appellants and Ms. C. Afonso for respondent no.2 (Insurance Company).
- 2.** This appeal challenges the judgment and award dated 14.12.2018 passed by the Motor Accident Claims Tribunal, South Goa at Margao, dismissing the appellants' Claim Petition because she had not succeeded in proving the rashness and negligence on the part of the truck driver.
- 3.** This Claim Petition was initially instituted by Peter Godinho, appellant's husband/father, for the injuries sustained by him in the accident that occurred on 13.11.2002 when he was proceeding from Canacona to Curchorem on his motorcycle. The appellants contend that the truck bearing registration no.KA-19-1381 owned and driven by respondent no.1 dashed this motorcycle due to which Peter sustained severe injuries.

4. There is evidence that Peter suffered orthopedic injuries rendering him 90% disabled. There is also evidence that these injuries resulted in Peter being 100% neurologically disabled. There is evidence about Peter being treated in no less than three hospitals and suffering hospitalization for about 66 days. During the pendency of the Claim Petition, Peter died on 15.09.2009 after suffering for almost seven years.

5. The Tribunal had initially rejected the Claim Petition on the ground that the appellants had failed to prove rashness and negligence. However, this Court set this award aside, and the matter was remanded for reconsideration. The Tribunal was directed to consider the issue of rashness and negligence as also the quantum of compensation.

6. On remand, the Tribunal has made the impugned award, again holding that the issue of rashness and negligence was not proved but determining compensation at ₹81,760/- against the claimed amount of ₹1.00 lakh.

7. As regards the first issue of rashness and negligence, the Tribunal is correct that the evidence of Peter's wife Greta is not of much significance because she was not an eyewitness to the accident. However, the Tribunal was not justified in rejecting the

evidence of Assis Dias (AW2), an eyewitness to the accident. Further, the Tribunal has also not paid adequate attention to the evidence of Surendra Naik (AW4), the Head Constable, who visited the accident site soon after it was reported, drew out the panchanama, and ultimately lodged an FIR against the truck driver for rash and negligent driving. Finally, there is evidence that the truck driver was charge-sheeted though the Magistrate eventually acquitted him.

8. The acquittal judgment, which is on record, is mainly based on the non-examination of Peter (victim). There is clear evidence on record that Peter was bedridden from the time of the accident and not in his senses to give his statement. Greata, his wife, deposed to this aspect, and there was no serious challenge to this position. Therefore, based on the acquittal by the JMFC, there was no ground to hold that the truck driver was not rash and negligent in this matter. Besides, it is well settled that the standard of proof in a criminal trial and proceedings before the Tribunal is entirely different. Before the Tribunal, the evidence will have to be assessed on the touchstone of preponderance of probability.

9. The Tribunal, in this case, has unnecessarily picked holes in the testimony of Assis Dias (AW2). Even Ms. Afonso contended that this witness was a plant. However, there is no good reason to

accept this contention. Even the truck driver, after initial denials, admitted that there was a scooter/scooter driver along with the Sumo vehicle that assisted Peter after the accident.

10. In this case, the factum of the accident is not denied. There is evidence about the police machinery lodging an FIR and launching prosecution against the truck driver. Assis has explained the genesis of the accident. The truck driver may have his version but failed to examine the cleaner, who was admittedly in the truck, whose evidence might have been more balanced than the partisan evidence of the truck driver.

11. In this case, the Tribunal approach is contrary to the law led by the Hon'ble Supreme Court in the case of *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.

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

12. In all the cases above, the Hon'ble Supreme Court had held that the approach of the Courts/Tribunals when dealing with such matters has to be sensitive enough to appreciate the turn of events on 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 mindful 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.

13. 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 the 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, the Courts/Tribunals are required to take a holistic view, bearing in mind that strict proof of an accident caused by a particular vehicle in a specific manner may not be possible by the claimants. The Courts/Tribunals should also draw appropriate inferences from the failure of respondents to properly

cross-examining the witnesses of the claimants or confront them with their version despite the adequate opportunity. The courts/Tribunals must take the legal effect of the failure to cross-examine crucial witnesses on crucial issues must be taken into account by the Courts/ Tribunals.

14. In *Anita Sharma* (supra), the Hon'ble Supreme Court has reiterated that the standard of proof in accident claim cases is that of the preponderance of probabilities, not beyond a reasonable doubt. The Court held that, *therefore, the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with the 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 claimant's version is more likely than not true.*

15. In *N. K. V. Bros. (P) Ltd. vs. M. Karumai Ammal & Others*⁶ the Hon'ble Supreme Court, in paragraph 3 made the following observations:-

"3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often

⁶ AIR 1980 SC 1354

persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their 'neighbour'. Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The states must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by

the injustice of delayed justice. Many states are unjustly indifferent in this regard."

16. In *Bashti Kasim Saheb vs. Mysore State Road Transport Corporation & Others*⁷, the Hon'ble Supreme Court has made the following significant observations :-

"8. The evidence in the case indicates that there was no traffic on the road at the time of the accident. No untoward incident took place like sudden failure of the brakes or an unexpected stray cattle coming in front of the bus and still the vehicle got into trouble. In absence of any unexpected development it was for the driver to have explained how this happened and there is no such explanation forthcoming. In such a situation the principle of res ipsa loquitur applies. The petitioner, in the circumstances, could not have proved the actual cause of the accident and on the face of it, it was so improbable that such an accident could have happened without the negligence of the driver, that the Court should presume such negligence without further evidence. The burden in such a situation is on the defendant to show that the driver was not negligent and that the accident might, more probably, have happened in a manner which did not connote negligence on his part, but the defence has failed to produce any evidence to support such a possibility. We, therefore, agree with the finding of trial court on this issue and set aside the judgment of the High Court."

⁷ (1991) 1 SCC 298

17. If the Tribunal were to have applied the law declared by the Hon'ble Supreme Court in the above cases then, the finding on rashness and negligence would be otherwise. Therefore, the finding on rashness and negligence is reversed for all the above reasons.

18. On the aspect of compensation, some accepted facts need to be stated. First, Peter was around 57 years old at the time of the accident. His wife had deposed him that he was a businessman, and they were earning ₹15,000/- per month. This means that Peter's income can be taken at ₹7,500/- per month.

19. The medical evidence establishes that Peter was disabled due to the accident of 100% neurologically though the orthopedic disability might be only 90%. In ***Oriental Insurance Company Ltd. V/s. Kahlon @ Jasmail Singh Kahlon (dec.) through his legal representative Narinder Kahlon Gosakan & Anr.***⁸. The Hon'ble Supreme Court has explained how compensation is to be computed in cases similar to the present case. Based on this decision, the compensation awarded by the Tribunal towards medicines, attendant charges, and transport charges in the amount of ₹74,260/- will have to be sustained.

8 AIR 2021 SC 3913

20. In addition to the above amount, the appellants would be entitled to compensation towards loss of estate, which cannot be only ₹7,500/- as determined by the Tribunal. The annual income of Peter was ₹90,000/-. To this, a 10% addition towards future prospects takes the yearly income to ₹99,000/-. The multiplier, in this case, is 9. Thus, the compensation would come to ₹8,10,000/-.

21. The total compensation payable can therefore be assessed at ₹8,84,260/- out of which the appellants have already received ₹25,000/- towards no-fault liability. The appellants would consequently be entitled to compensation of ₹8,59,260/- together with interest at the rate of 9% from the date of the Claim Petition till actual payment. Accordingly, an award is now made to that effect by allowing this appeal.

22. The respondents, including, in particular, respondent no.2 – Insurance Company, are directed to deposit the above amount within eight weeks from today in this Court after giving due intimation to the learned Counsel for the appellants. The appellants can withdraw this amount upon deposit by furnishing proper identification documents and bank details. The Registry to transfer this amount directly into the bank account of the appellants.

23. Appellants/claimants will have to pay the deficit Court fee before withdrawing the compensation amount now awarded.

24. The appeal is allowed in the above terms. Accordingly, there shall be no orders for costs.

M. S. SONAK, J.

NITI K HALDANKAR
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