

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.91/2019

1. SHRI SIDHARTH V. KERKAR, son
of Vithal Kerkar, r/o H.No.221, Driver
Hill, Vasco-da-Gama, Goa.

2. SHRI VITHAL S. KERKAR, son of
Sakharam Kerkar, r/o. H. No.333, Near
Government School, Mangor Hill, Vasco-
da-Gama, Goa.

... APPELLANTS

Versus

SHRI SANDESH N. DESAI, son of Shri
Narendra Desai, r/o H. No.45, Behind La
Rose Building, Dattawadi, Orulem,
Vasco-da-Gama, Goa.

... RESPONDENT

Mr. Parag Rao with Mr. Akhil Parrikar, Advocates *for the*
Appellants.

CORAM:

M. S. SONAK, J.

RESERVED ON:

August 12, 2022

PRONOUNCED ON:

August 17, 2022

JUDGMENT:

1. Heard Mr. Parag Rao, who appears along with Mr. Akhil Parrikar for the Appellants. The Respondent, though served, neither present nor represented.

2. The appellants – driver and owner of Honda scooter bearing Registration No.GA-06-H-0384, challenge the judgment and Award dated 17.12.2018 made by the Motor Accident Claims Tribunal, South Goa at Margao (Tribunal) in Claim Petition No.4/2013 awarding compensation of ₹14 lakhs to the Respondent-claimant who suffered permanent disablement to the extent of 75% in the vehicular accident that occurred on 05.08.2011.

3. Mr. Rao, learned counsel for the Appellants, submits that the finding on the issue of rashness and negligence is vitiated by perversity. He points out that the first Appellant (Sidharth) was prosecuted but honorably acquitted by the learned Magistrate in Criminal Case No.95/S/2012. He submits that the finding in the acquittal order, though not binding on the Tribunal, ought to have been considered. He presents that deposition of the Respondent and his admission that it was drizzling at the time of the accident before the Magistrate was relevant but was excluded from consideration by the Tribunal. He submits that if the entire evidence, including the evidence, led before the Magistrate were to be considered by the Tribunal, then it would be apparent that the finding on rashness and negligence is unsustainable.

4. Mr. Rao submitted that the claimant had come up with a false case as to the genesis of the accident. He pointed out that the claimant deposed to the location of the Shiv Sagar building being on the right side of the road when the evidence overwhelmingly establishes that the same was on the left side. He pointed out confusion about the building Sushila Bhavan and Shiv Sagar. He pointed out that there are inconsistencies about the alleged spot of the accident. He pointed out that the scooter was found fallen at a distance of 70 mtrs. from the pool of blood on the concrete slabs. He submits that the Magistrate had correctly concluded that the blood-stained concrete slabs could not be the point of impact because it was beyond the pool of blood. Even the investigating officer had deposed that he did not know whose blood was seen on the concrete slabs covering the gutter. The investigating officer claimed that this was told to him by the Head Constable since the claimant was made to sit on that concrete slab where blood stains were found. Mr. Rao submits that the Tribunal did not properly appreciate all these circumstances before recording the finding of rashness and negligence.

5. Mr. Rao, without prejudice, submitted that there was no proof of the claimant's income; in any case, the evidence was that the claimant earned only ₹733/- per month. He submitted that

the Tribunal misdirected itself in ignoring these findings and holding that notionally the claimant must have been earning Rs.4,000/- per month. He presents a contradiction in the claimant's statement about being a salaried employee and electrical contractor. He submitted that proper pleadings do not back up the evidence. When a specific case of income is pleaded, there was no question of falling back on notional income or relying on the notification about minimum wages. He submitted that the compensation awarded is excessive and does not represent just compensation. He relied on *National Insurance Company vs. Pranay Sethi – (2017) 16 SCC 680* to submit that the determination of compensation has to be on the foundation of evidence brought on record regarding the claimant's age and income, and only after that apposite multiplier can be applied.

6. Mr. Rao submitted that there is apparent duplication, and the Award of ₹75,000/- towards loss of amenities of life was not called for after an exorbitant award was made towards loss of income due to the disabilities. He submits that there is no proper evidence about awards under other heads.

7. Mr. Rao distinguished *Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr. - (2013) 10 SCC 646* by pointing to paragraphs 12 and 13. He submitted that the

situation in the said matter was completely different from that in the present case.

8. For all the above reasons, Mr. Rao submitted that the impugned judgment and Award may be set aside.

9. On due consideration of Mr. Rao's submissions and evaluating the material on record, in my opinion, no case is made to interfere with the impugned judgment and Award made by the Tribunal. The reasons for this conclusion are discussed a little later.

10. However, before going to the reasons for the dismissal of this Appeal, reference is necessary to a disturbing trend in such matters.

11. This Appeal was admitted on 18.07.2019. The appellants did not apply for any stay on the execution of the impugned Award, but due to the admission of the Appeal, the records and proceedings were called for to this Court. As a result, the execution could not proceed before the executing Court. The appellants thus managed to stall the execution without securing the awarded amount.

12. There are several instances where the appeals are instituted in such matters, and based on the pendency of the appeals, adjournments are applied before the executing Court, even though no stay on execution is applied for or obtained. The Appellants are aware that usually, execution is stayed subject to the appellant depositing the awarded amount or otherwise securing the same. However, the idea is to stall the execution proceedings without depositing any amount or securing the awarded amount.

13. After that, further proceedings in the Appeal are attempted to be delayed. For example, though this Appeal was admitted on 18.07.2019, there is a record that the statutory deposit of ₹25,000/- was made only on 23.06.2020. Typically, such a deposit has to be made at the time of the Appeal, and there is no clarity as to how the Registry, in this case, numbered this Appeal even before the appellants made this statutory deposit. Suffice to record that there was a delay of almost a year in making the statutory deposit.

14. On 23.09.2020, a notice was issued to the appellant's advocate to deposit the costs for preparing the paper book. There is an endorsement that up to 15.12.2021, i.e., for almost 15 months, the appellants did not even bother to pay the paper book

or the printing charges, obviously because the delayed disposal of this Appeal was to their benefit. The matter was notified on the Registrar's board on 15.12.2021.

15. The appellants or their advocate did not bother to attend the Registrar's board. The appellants or their advocate also did not bother to take steps to deposit costs to prepare a paper book and printing charges. There is an endorsement to this effect in the record on 07.03.2022. Ultimately, the paper book and printing charges were deposited only on 10.03.2022.

16. Thus, the paper book and printing charges were deposited almost 18 months after the appellant's advocate was notified about the same deposit. Since the records and proceedings had been called for, there was no execution of the Award. The appellants thus took unfair advantage of the situation and virtually stalled the execution proceedings without depositing or securing the awarded amount.

17. Though the above is not quite relevant for deciding the Appeal on merits, the reason for recording the same is to point out the increasing trend. The Registry should therefore be quite diligent in such matters. Suppose no effective steps are being taken by the appellants who, in terms of the impugned judgment

and Award are required to make payments to the claimants. In that case, the Registry should place such matters immediately before the Court so that some time-bound directions can be given.

18. Now coming to the merits, one thing that must be kept in mind is that the scope of the proceedings before a Magistrate where the driver of the offending vehicle is charged with criminal offenses is quite different from the scope of proceedings before the Tribunal where a claimant claims compensation for either death or injuries. One of the fundamental differences is that standard of proof in criminal matters is that of proof beyond a reasonable doubt. However, in cases before the Tribunal, the standard of proof is that of a preponderance of probabilities.

19. Though Mr. Rao acknowledged this distinction, his entire endeavor was to convince this Court that the approach adopted by the learned Magistrate in the criminal case ought to have been adopted by the Tribunal in the claim petition. Incidentally, the Presiding Officer was common; therefore, this submission was possibly made with considerable intensity.

20. If the Judgment and Order dated 20.11.2012 in Criminal Case No.95/S/2012 acquitting Sidharth is perused, then it is

apparent that the learned Magistrate has picked holes in the prosecution version and ultimately granted the benefit of the doubt to Sidharth. The learned Magistrate found fault with some of the witnesses because they deposed that the Shiv Sagar building was on the right-hand side of the road if one proceeds from Vasco city to Mangor, when in fact, this building was on the left side of the road.

21. The learned Magistrate relied heavily on some inconsistencies and confusion regarding the location of the Shiv Sagar building and where the accident occurred. The learned Magistrate also made some observations about the precise spot of the accident and the uncertainty about the same. As a result, the learned Magistrate concluded that the prosecution could not prove the exact spot of the accident.

22. The learned Magistrate, paragraph 30, noted that the only incriminating evidence against Sidharth was the evidence of PW5 Sandesh Desai (claimant) that Sidharth was smelling alcohol and riding the scooter at a fast speed. However, the learned Magistrate concluded that when the doctor examined Sidharth, Sidharth was not "*clinically under the influence of alcohol.*" Based on this, the learned Magistrate concluded that the evidence raised a doubt regards the evidence of PW5 and Sidharth smelling of alcohol.

23. The learned Magistrate also went to the extent of holding that there was no material on record to indicate as to whom the scooter belonged. The learned Magistrate found it difficult to convict Sidharth without such evidence because the defense raised that the scooter belonged to Sandesh Desai (claimant) or some other person. Therefore, the learned Magistrate held that the benefit of this lapse of the prosecution has to go to Sidharth, who was the accused in the said matter.

24. Thus, it is pretty apparent that the learned Magistrate has extended the benefit of the doubt to Sidharth based on several lapses on the part of the prosecution to bring on record cogent evidence about Sidharth's involvement in the accident and the consequent rashness and negligence. Such a decision is hardly relevant or, in any case, beneficial to the appellants in summary proceedings before the Tribunal. As noted earlier, the approach has to be entirely different, and the standard of proof is that of a preponderance of probabilities.

25. Incidentally, it is apparent that Sidharth took contradictory defenses. At one stage, he denied his presence on the spot. At another stage, he took the defense that though the scooter might have been his, the claimant rode the scooter rashly and negligently. Finally, at yet another stage, the defenses were based

on the spot of the accident or the genesis of the accident, which according to Mr. Rao, did not make out any negligence case. Therefore, if at all the evidence in a criminal proceeding is required to be looked into in the summary proceedings before the Tribunal, then it is apparent that Sidharth has deposed in this matter without any regard for truth.

26. In Mangala Ram vs. Oriental Insurance Co. Ltd. - (2018) 5 SCC 656, Sunita And Others vs. Rajasthan State Road Transport Corporation And Others – (2020) 13 SCC 486, Anita Sharma and others v. New India Assurance Company Limited and another – (2021) 1 SCC 171, Vimla Devi & Ors. vs. National Insurance Company Ltd. - (2019) 2 SCC 186, Parmeshwari vs. Amir Chand & Ors. - (2011) 11 SCC 635, the Hon'ble Supreme Court has explained the approach that the Tribunals are expected to adopt when evaluating the issue of rashness and negligence.

27. 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.

28. 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. They must take a holistic view bearing in mind that strict proof of an accident caused by a particular vehicle in a specific manner often cannot be adduced 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. They must consider the legal effect of the failure to cross-examine crucial witnesses on crucial issues.

29. 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.

30. In *Sunita & Ors. (supra)*, the Hon'ble Supreme Court held that the Tribunal had correctly accepted the claimant's contention that the Respondents did not challenge the propriety of the FIR and the charge sheet before any authority. The only defense raised by the Respondents to this plea was that the FIR was based on wrong facts and was filed in connivance between the complainants and the police, against which the Respondents had complained to the superiors, but to no avail. The Hon'ble Supreme Court noted that apart from this bald assertion, no evidence was produced by the Respondents before the Tribunal to prove this point. The filing of the FIR was followed by the filing of the charge sheet for offenses under Sections 279, 337, and 304-A of IPC and Sections 134/187 of the MV Act, which, again reinforces the allegations in the said FIR insofar as the occurrence

of the accident was concerned and the role of the driver in causing such accident.

31. The Hon'ble Supreme Court did not approve the approach of the High Court in not even making a mention, let alone record a finding of any impropriety against FIR or charge sheet or the conclusion reached by the Tribunal. Yet, the FIR and the charge sheet were found to be deficient by the High Court. The Tribunal did not even look into these documents in the present case because the I.O. was not examined. There was no need to examine the I.O. Because such records were produced and relied on by both the contesting parties.

32. The Hon'ble Supreme Court, in paragraph 27, specifically held that the Tribunal's reliance upon FIR No.247/2011 in the said case and the charge sheet could not be faulted as these documents indicated the complicity of the driver in the said matter. The Court held that the FIR and the charge sheet, coupled with other evidence on record, inarguably establish the occurrence of the fatal accident and also point towards the negligence of respondent no.2 in causing the said accident. The Court observed that even if the final outcome of the criminal proceedings against respondent no.2 is unknown, the same will make no difference, at least to decide the claim petition under the

MV Act. The Court referred to its decision in *Mangla Ram (supra)*, where it was held that the nature of proof required to establish culpability under criminal law is higher than the standard required under the law of torts to create liabilities.

33. In *Dulcina Fernandes (supra)*, the Hon'ble Supreme Court held that sufficient credence has to be given to the circumstances that neutral prosecution agencies deemed it appropriate to not only lodge an FIR against the driver of the offending vehicle but further to prosecute him. The Court referred to *Vimla Devi (supra)* and the adoption of the touchstone of preponderance of probabilities as opposed to proof beyond a reasonable doubt. The Court also referred to *United India Insurance Co. Ltd. vs. Shila Datta – (2011) 10 SCC 509* and held that rules of pleadings do not strictly apply in such proceedings. Though the Tribunal adjudicates a claim and determines the compensation, it does not do so as in adversarial litigation. The Court held that the Tribunal is required to follow a summary procedure.

34. In *Dulcina Fernandes (supra)*, the Court rejected the contention that acquittal in a criminal case was an extremely relevant circumstance by observing the following in para 12:

"12. C.W. 2, who was at the relevant time working as the Head Constable of Main Eurtorim Police Station, had deposed that a criminal case was registered against the first Respondent in connection with the accident and that after investigation he was charge-sheeted and sent up for trial. Though it is submitted at the Bar that the first Respondent was acquitted in the said case what cannot be overlooked is the fact that upon investigation of the case registered against the first Respondent, prima facie, materials showing negligence were found to put him on trial."

35. As noted earlier, Sidharth took up several contradictory and inconsistent defenses in this case. He failed to make good such defenses. The evidence of the so-called independent eyewitness also does not inspire confidence because the same is contrary to the specific case put up by Sidharth. The aspects like Shiv Sagar being on the left or right side or the element of the ownership of the offending vehicle are entirely irrelevant, at least in the summary proceedings before the Tribunal. There is no dispute about the accident and the vehicle's involvement. There is evidence about Siddharth driving the vehicle. Considering the circumstances of the accident, the smell of alcohol, the spate of contradictory defenses, and prosecution by neutral agencies, the Tribunal's finding deserves to be sustained.

36. The Presiding Officer of the Tribunal, being earlier the very same Magistrate who acquitted Sidharth, is also not a very

relevant circumstance. However, at the highest, such circumstance is relevant because the Presiding Officer has appreciated the difference in the two roles and the approach that he was required to adopt as a Magistrate and as the Tribunal's Presiding Officer deciding claim petitions. The acquittal, as noted, was mainly due to certain lapses on the part of the prosecution to prove the case beyond a reasonable doubt. Therefore, even if the evidence before the Magistrate was to be considered, a case of rashness and negligence has been made out by applying the touchstone of the preponderance of probabilities.

37. On the aspect of the quantum of compensation, again, there is no case made out to warrant interference. True, the salary certificate for August refers to the claimant's gross salary of ₹733/-. However, the accident, in this case, took place on 06.08.2011. There is evidence that the claimant could not resume work after the accident. Besides, there is evidence about the electrical contracts that the claimant used to take. Finally, there is evidence about the qualifications and skills possessed by the claimant. Based on all this material, the Tribunal did not err in adverting to the notifications for minimum wages and notionally determining the claimant's income at ₹4,000/-. This was a conservative estimate made by the Tribunal and the same being within bounds of reasonability warrants no interference.

38. The compensation under other heads has also been determined on a conservative basis. There was no challenge to the injuries and the consequent disabilities. Even otherwise, there is material evidence to back the 75% permanent disability claim. Thus, there is no case made out to interfere with the quantum of compensation.

39. For all the reasons above, this Appeal is liable to be dismissed and is hereby dismissed.

40. From the Appellants' conduct before this Court, it is apparent they will delay the execution of the Award. Accordingly, the amount of ₹25,000/- deposited by the appellants in this Court and interest accrued shall be paid by the Registry to the claimant. The Registry to write to the claimant or at least write to the executing Court so that the claimant can receive this amount by following the usual procedure of submitting identification documents and bank details. The records and proceedings must be sent to the executing Court within 15 days. The executing Court must dispose of the execution expeditiously within four months of receiving the records and proceedings.

M. S. SONAK, J.