

Amrut

**IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.56 OF 2017**

Smt. Benidita Jose Oliveiro
w/o Jose Oliviero

50 years of age, housewife,

R/o House No.15/B, Corriad, Mulas,

Paroda, Salcete Goa

Pin Code 403 705.

... Appellant

Versus

1. Shri Naven Costancio Cardozo,

S/o Costancio Cardozo,

r/o H.No.824/B, Cutbond Velim,

Salcete Goa 403723

(Driver/owner of Innova Car No.GA-08/F-4285, License No.GA-08-20090169116, Valid up to 20/10/2015).

2. Shri Neves Costancio Cardoz

s/o Costancio Cardoz

R/o H.No.824/B, Cutbond,

Velim, Salcete Goa 403 723

(Owner of Innova Car No.GA-08/F-4285).

3. ICICI Lambord General Insurance Co. Ltd., Margao Goa.

(Policy No.TIL/10130314

Valid from 29/07/2013 to 28/07/2014).

...Respondents

Mr. Sanman R. Keny, Advocate for the Appellant.

Mr. James Lopes, Advocate for respondent No.3.

CORAM: M. S. SONAK, J

DATE : 8th April 2022

ORAL JUDGMENT:

1. Heard the learned counsel for the parties.
2. The widow of Jose Oliveiro, who died in a motor accident that took place on 05.11.2013, appeals the judgment and award dated 06.01.2017 made by the Motor Accident Claims Tribunal (Tribunal) dismissing her Claim Petition No.140/2015 on the ground that she failed to prove that the accident took place on account of rash and negligent driving of Innova car bearing registration No. GA-08-F-4285 by Naven Cardozo (respondent No.1).
3. The Tribunal, having concluded that the issue of rashness and negligence was not proved by the Appellant, did not even bother to decide the issue of quantum of compensation. This is not the proper approach to be adopted by the Tribunal dealing with the claim petitions.
4. In *Bimlesh & Ors. V/s. New India Assurance Company Limited¹*, in paragraphs 7,8 & 9, the Hon'ble Supreme Court has held that the Tribunal has to follow the summary procedure subject to any rules that may be made in this behalf. The Code of Civil

¹ (2010) 8 SCC 591

Procedure, 1908, is not strictly speaking applicable to the proceedings before the Claims Tribunal except to the extent provided in Section 169(2) of the MV Act and the Rules made thereunder. The whole object of the summary procedure is to ensure that the Claim Petition is heard and decided by the Claims Tribunal expeditiously. In paragraph 9, the Hon'ble Supreme Court has held that *the Claims Tribunal is required to dispose of all issues one way or the other in one go while deciding the claim petition*. Therefore, normally, the Tribunals should not dispose of the Claim Petitions based on some preliminary issue, usually raised by the Insurance Company about maintainability or otherwise. So also, the Tribunals, even after holding that the issue of rashness and negligence is not proven, should not shirk deciding on other issues, including the issue of the quantum of compensation. The Hon'ble Supreme Court has held that since all the issues (points for determination) are required to be considered by the Claims Tribunal together in the light of the evidence that may be led in by the parties and not piecemeal, often matters are required to be remanded. In *Bimlesh* (supra), the matter had to be remanded. Therefore, in this case, it will have to be held that the approach of the Tribunal in not deciding all the issues together is contrary to the law laid down in *Bimlesh* (supra). Recently, even in *the Agricultural Produce Marketing Committee, Bangalore Vs The State of Karnataka and others*, 2022 LiveLaw (SC) 307, the Hon'ble Supreme Court has reiterated that the Courts must avoid shortcuts and decide all issues that fall for their determination.

5. Be that as it may, even the approach of the Tribunal on the issue of rashness and negligence is contrary to the law laid down by the Hon'ble Supreme Court in the cases of *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors*², *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.*³, *Parmeshwari V/s. Amir Chand & Ors.*⁴, *Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors*⁵ and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.*⁶

6. 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 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 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.

2 (2020) 13 SCC 486

3 (2021) 1 SCC 171

4 (2011) 11 SCC 635

5 (2018) 5 SCC 656

6 (2013) 10 SCC 646

7. 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, 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.

8. In *Sunita & Ors.* (supra), the Hon'ble Supreme Court has held that it is well settled that in motor accident claims cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the 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, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of a

preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases.

9. In *Sunita & Ors.* (supra), the Hon'ble Supreme Court held that the Tribunal had justly 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 in charge of the police station and the District Superintendent of Police 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.

10. 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, and yet, the FIR and the charge sheet were found to be deficient by the High Court.

11. 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 (respondent no.2) in the said matter. The Hon'ble Supreme 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 Hon'ble Supreme 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 Hon'ble Supreme 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 liability.

12. Now the evidence on record in this matter will have to be evaluated by keeping in mind the aforesaid perspectives and principles.

13. This is a case where the accident in which Oliveira died was witnessed by his son-in-law Savio Pinto (CW2). He deposed that Oliveira was about to cross the road when he was dashed by Innova. He maintained that Oliveira had taken only one step to such crossing, and Innova, which was about three meters away, rashly and negligently struck Oliveira down. There is no serious contradiction between the chief and cross-examination on this crucial version.

14. The only reason why the Tribunal had disbelieved Savio Pinto is that in the criminal prosecution, this witness deposed that he was going to visit his wife, who was admitted to hospital for delivery, and before the Tribunal, he stated that he was going to meet one Anthony Pinto where he was working. Even Mr. Lopes agreed that this was too trivial a circumstance to reject the testimony of Savio Pinto. The Tribunal also reasoned that Savio was an interested witness because he was the son-in-law of the deceased Oliveiro.

15. The testimony of Savio Pinto could not have been rejected on the above grounds. Merely because he was a son-in-law of the deceased, that does not disable him from being an eyewitness to the accident, which is not at all in dispute. The criminal prosecution was also lodged against the driver after an FIR came to be registered in the matter. The presence of Savio Pinto is not unnatural on the spot. From the evidence of Savio as also the documents like FIR, panchanama, and sketch, the case of rashness and negligence on the part of the driver of the Innova vehicle is certainly made out because this issue has to be determined based on the preponderance of probability and not beyond a reasonable doubt. Applying the principles laid down by the Hon'ble Supreme Court in the above judgments, this issue of rashness and negligence could not have been answered against the claimants.

16. Mr. Lopes, however, pointed out the pleadings in the claim petition where it was stated that the deceased Oliveiro was walking on the left side of the road when he was hit by Innova from behind. Mr.

Lopes submitted that Savio Pinto's testimony does not support this version because this witness admitted that Oliveira was crossing the road when he was hit by Innova. Mr. Lopes also relied on the sketch to say that the pleadings in the claim petition were not correct or, in any case, not proved. He submitted that there was a variance between pleadings and proof. He submitted without prejudice that at least a case of contributory negligence to the extent of 50% was borne from the evidence on record.

17. Now in these matters, the pleadings have to be construed liberally and not pedantically. The evidence on record does make out a case of rashness and negligence on the part of the driver of the Innova vehicle. True, even the deceased should have been a bit more careful while crossing the road. Mr. Savio Pinto states that the deceased took his step when the Innova vehicle was hardly three meters away. This does not absolve the driver of the Innova vehicle from exercising care and caution because the driver has seen an old man attempting to cross the road almost three meters away. Therefore, at the highest, this is a case where Oliveira can be said to have contributed to the accident to the extent of around 10% to 15%. But this is not a case where the driver of Innova can be absolved of rashness and negligence entirely.

18. The deceased Oliveira was a coconut plucker. His wife deposed that he was earning ₹800/- to ₹1000/- per day. Manuel Carvalho (CW3) deposed that Oliveira was plucking at least 20 coconut trees

per day and earning ₹60/- per tree. This means that his income was almost ₹36,000/- per month, according to this witness.

19. Now Mr. Lopes is quite right that both these witnesses deserve no credence on the aspect of income of Oliveiro. He pointed out that though in the claim petition it was claimed that Oliveiro was 60 years old, no evidence was produced. Instead, the autopsy report indicates his age as 64 years. He submitted that it is unbelievable that Oliveiro, at the age of 64 years, was plucking 20 coconut trees per day and earning ₹30,000/- to ₹35,000/-. Without prejudice, he submitted that the notional income could be taken at ₹5000/- per month, at the highest.

20. From the evidence on record, it is a little difficult to accept the evidence of the claimant and CW3 on the aspect of income. This is a case where the income can be safely taken at ₹7000/- per month, which translates as income of little more than ₹200/- per day. This could be taken as reasonable income for coconut plucker. Even at the age of 64 years, Oliveiro could be capable of plucking coconuts though not from too many trees. Some amount of guesswork is permissible in such matters, and therefore, it would be reasonable to take his monthly income at ₹7000/-.

21. Since Oliveiro was over 60 years old or 64 years old, according to the autopsy report, there is no question of any addition towards future prospects in terms of the law laid down by the Hon'ble

Supreme Court in *National Insurance Company Limited Vs. Pranay Sethi and others*⁷. The appropriate multiplier would be five in this case. Thus, towards dependency, the compensation of ₹4,20,000/- can be determined. To this, an amount of ₹40,000/- is to be added towards consortium and ₹30,000/- towards funeral expenses and loss of estate. This will take care of the amount of ₹5500/- claimed to have been spent for traveling expenses to take the body of the deceased Oliveiro from hospital to home and thereafter to church. The total compensation would then come to ₹4,90,000/-.

22. A deduction of 50% is due because this is the amount Oliveiro would have spent on himself. This means that the dependency factor would come to ₹2,45,000/-. To this, the addition of ₹40,000/- is due towards consortium and ₹30,000/- towards funeral expenses and loss of estate. This will take care of the amount of ₹5500/- claimed to have been spent for traveling expenses to take the body of the deceased Oliveiro from hospital to home and thereafter to church. Thus, the total compensation can be fairly determined at ₹3,15,000/- in this case.

23. This appeal is therefore partly allowed, and the respondents are held jointly and severally liable to pay the Appellant the compensation of ₹3,15,000/- together with interest at the rate of 7% per annum from the date of the application till the date of actual payment. The claim petition is allowed to this extent.

24. The respondent – the insurance company is directed to deposit the above amount in this Court within two months after due intimation to the learned counsel for the Appellant. Once the amount is deposited, the Appellant to furnish proper identification papers and bank details so that the registry can remit this amount into her account. There shall be no order for costs.

M. S. SONAK, J

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