

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 24 OF 2022

1. Shyam K. Karmalkar,
Son of late Kaitan Karmalkar,
aged 63 years, married, service, and his
wife

2. Mrs. Radha Shyam Karmalkar, Wife
of Mr. Shyam K. Karmalkar, Naik, aged
51 years, housewife,

3. Miss. Maithili Shyam Karmalkar
daughter of Mr. Shyam K. Karmalkar,
aged 29 years, spinster, service, and

4. Mast. Raj Shyam Karmalkar Son of
Mr. Shyam K. Karmalkar, aged 15 years,
student, through his natural guardian his
father Appellant No.1, Resident of
House No. 362/1, Caribhat,
Village Carambolim, Taluka-Tiswadi
North-Goa, District,

.... Appellants.

Versus.

1. Mr. Jaywant Chougale,
Son of Mr. Govind Chougale, aged 43
years, driver of Truck { Eicher] bearing
registration No. GA-05, T-3218,
resident of Baradwadi-Kolhapur,
Maharashtra, [Pin No. 416212]

2. Mr. Keshav Prasad Gupta,
Son of Mr. Durgaprasad Gupta,
Owner of Truck [Eicher] bearing
registration No, GA-05, T-3218,
resident of 15/2/A, Ella-Baingunim,
Tiswadi, North-Goa,

3. Chola mandalam General Insurance
Company Ltd, Head Office, Dare
House, 2nd floor, N.S. C. Road,
Chennai-600001

....Respondents.

Mr. Milton Marshal, Advocate *for the Appellants.*

Mr. James Lopes, Advocate *for Respondent No.3.*

CORAM : M. S. SONAK, J.

Reserved on : 1st December 2022
Pronounced on : 2nd December 2022

JUDGMENT: -

1. Heard the learned Counsel for the parties.
2. The Appellants-Claimants, challenge the Judgment and Award dated 8th February 2018 made by the Motor Accident Claims Tribunal, Panaji (Tribunal), rejecting the Appellants' Claim Petition No. 70/2018, on the ground that the Appellants failed to prove that the accident, in which their son/brother

Minesh Karmalkar died, took place due to rashness and negligence on the part of the owner and the driver of the truck (Eicher) bearing registration No. GA-05-T-3218.

3. The Tribunal, in the impugned Award, determined the compensation payable to the Appellant at ₹20,39,000/-. However, the Tribunal rejected the claim petition because the Appellants, according to the Tribunal, failed to prove any rashness and negligence on the part of Respondents No.1 and 2, *i.e.* the owner and the driver of the truck (insured vehicle). Hence, this Appeal.

4. Mr Marshal, the learned Counsel for the Appellants, submits that the truck was wrongly parked on National Highway-4 (NH-4). There were no indicators or signages. As a result, Minesh, riding his scooter (Jupiter), collided with the parked truck at 4.25 a.m. on 11/2/2018 while trying to avoid a head-on collision with another vehicle that came on the wrong side.

5. Mr Marshall relied on the Highway Administration Rules, 2004 and Motor Vehicles (Driving) Regulations, 2017, to support his contention that the truck was parked on the Highway without taking the precautions statutorily prescribed under the Rules, 2004. He relied on *K. Anusha and other vs. Regional*

Manager, Shriram General Insurance Co. Ltd.,¹; *Jumani Begam vs. Ram Narayan and others*²; *New India Assurance Co. Ltd. vs. Manonmani and others*³ in support of his contentions

6. Mr Marshal submitted that the Tribunal erred in rejecting the evidence of the eye witness Maksud Khan (AW.3). He submitted that the Tribunal also failed to correctly appreciate the police investigation documents like panchanama and the sketch. For all these reasons, he proposed that the finding of the absence of rashness and negligence must be reversed.

7. Mr Marshal relied on *Dulcina Fernandes and others vs. Joaquim, Xavier Cruz and another*⁴; *Bimla Devi & ors. Vs. Himachal Road Transport Corpn. & Ors.*⁵; *Anita Sharma and Ors. Vs. New India Assurance Company Ltd. and another*⁶ and *Sunita and ors. vs. Rajasthan State Road Transport Corpn. and others*⁷ in support of his contentions on the issue of rashness and negligence.

1. 2021 SCC OnLine SC 3339

2. (2020) 5 SCC 807

3. 2017 (2) TAC 12 (Mad)

4. 2013 (4) TAC 827 (SC)

5. 2009 ALL SCR 1771

6. (2021) 1 SCC 171

7. (2020) 13 SCC 486

8. Mr Marshal submitted that the deceased, Minesh, was 27 years old and a B.Com. Graduate. He offered that there was evidence that Minesh was undertaking professional engagements in photography, construction contracts and also operating a bar and restaurant. He submitted that the passbook containing Minesh's finances was admitted in evidence. Based upon the same, his income of Minesh should have been taken at ₹1,25,000/- per month.

9. Mr Marshal, without prejudice, submitted that since Minesh was a B.Com. Graduate, his income should have been taken at a minimum of ₹25,000/- per month, even on a notional basis. He relied on *S. Chandrasekharan and ors. Vs. M. Dinakar and anr.*⁸; *HDFC Ergo General Insurance Co. Ltd. vs. Smt. Lalta Devi and ors.*⁹; *Oriental Insurance Co. Ltd. vs. Meenakshi and ors.*¹⁰ and *Oriental Insurance Co. Ltd. vs. Premlata Shukla and ors.*¹¹ in support of all these submissions.

10. For all the above reasons, Mr Marshal submitted that the finding recorded by the Tribunal on the issue of rashness and negligence be reversed and the Appellants be awarded

8. 2022(3) TAC 353 (SC)

9. 2015 (1) TAC 693 (Del)

10. 2021 (1) TAC 896 (P&H)

11. (2007) 13 SCC 476

compensation of ₹1,15,15,706/- based on Minesh's annual income of ₹13,59,629/-. In the alternate, Mr Marshal submitted that the Appellants be awarded a compensation of ₹37,60,000/- based on Minesh's income of ₹25,000/- per month.

11. He also prayed for the Award of costs, usually awarded by the Tribunals.

12. Mr Lopes, the learned Counsel for Respondent No.3- Insurance Company, defended the finding of rashness and negligence for the reasons reflected in the impugned Award. He submitted that there is clear evidence about the truck being parked on a Katcha road, which was entirely permissible. He offers that there was no evidence of some vehicle coming on the wrong side, requiring Minesh to collide with the truck. He submits that there was evidence of proper illumination, and the Appellants' witness deposed to the visibility of almost 20 metres. Finally, he proposed that AW.3 was a planted witness, as held by the Tribunal.

13. Mr Lopes submitted that, admittedly, Minesh was not wearing a helmet. However, he submitted, without prejudice, that this factor should be considered contributing to the death because of the head injuries sustained by Minesh. For this, he referred to

*Jose P.J. And ors. vs. Niyas and others*¹², which was relied upon by Mr Marshal to contend that non-wearing of a helmet would not be a ground to infer negligence.

14. Mr Lopes submitted that the Appellants had raised an exaggerated claim and wished the Tribunal to believe that Minesh was single-handedly involved in the business of photography, construction and running a bar and restaurant without assistance from any employees or overheads. He pointed out that the Appellants produced no evidence about any of the three businesses/ professions. Furthermore, he pointed out that no income-tax returns were produced. He submitted that the entries in the passbook if construed in their entirety, suggest that his net income of Minesh hardly amounted to too much. He offered that the decisions relied upon by Mr Marshal are distinguishable and, in the absence of any concrete evidence about Minesh's income, the Tribunal was justified in taking his notional income at ₹10,000/- per month. Mr Lopes also submitted that most of the Appellants, except Appellant No.2 (mother), were not dependent upon Minesh.

15. For all the above reasons, Mr Lopes submitted that this Appeal may be dismissed.

12. 2017 (3) TAC 263 (Ker)

16. Rival contentions now fall for my determination.

17. The evidence on record substantially established that on 11/2/2018, at about 4.00– 4.30 a.m. Minesh was riding a Jupiter scooter bearing registration No. GA-07-Y-4598 and proceeding from Corlim-Ponda on NH-4. Near St. Francis Xavier Residency Phase-I, Old Goa, Minesh collided with a parked truck (Eicher) bearing registration No.GA-05-T-3218. Minesh was rushed to the hospital but succumbed to the head injuries he sustained after about five days.

18. Regarding rashness and negligence, the Appellants examined Sunil Mandrekar (AW.2), Head Constable, Old Goa Police Station and Maksud Khan (AW.3), who claimed to be the eye witness to the accident. The Appellants also relied upon police investigation documents like a complaint, scene of accident panchanama, and the sketch of the accident scene.

19. Sunil Mandrekar, AW.2, accepted that he did not witness the accident, but he deposed to the preparation of the panchanama and investigated the accident in which Minesh ultimately succumbed.

20. AW.2 deposed that at the accident, he noticed the truck parked on the left side, facing towards Corlim side and the Jupiter

scooter was seen falling near the rear driver side adjacent to the truck's tyre. He deposed about drainage, followed by an erective wall followed by a service road. He deposed to three tracks on the road to proceed in Corlim direction. He deposed about the truck being stationed on the katcha road. However, when confronted with the panchanama or the sketch of the accident spot, he could not explain why the katcha road was not mentioned or shown on the panchanama. He admitted that the two straight lines shown in the sketch were white strip lines on the Highway. He acknowledged that such lines were visible even if one proceeds from Corlim to Panaji. However, he claimed that he did not know where the truck's owner was residing.

21. AW. 2's evidence is relevant because this witness was involved in preparing the panchanama, one of the crucial pieces of documentary evidence on record. This panchanama includes a sketch of the scene of the accident. The panchanama, sketch and complaint give an idea of the location.

22. AW. 2's version about the truck being parked on the Katcha road inspires no confidence, though it was relied upon by Mr Lopes for the Insurance Company. If the truck was parked on a katcha road or if there was a katcha road where the truck would

have been parked, such an important feature would have been mentioned in the panchanama and in the sketch of the accident scene. AW.2 could not explain why there was no reference to this critical feature if there was a katcha road and the truck was parked on the katcha road. A service road is visible in the sketch and admitted in the oral evidence. The offending truck was admittedly not parked on the service road.

23. Mr Lopes submitted that AW.2 conducted the investigations and, ultimately, filed a complaint against Minesh for rash and negligent driving. Although the documents bear this out, there was no explanation sought or offered by AW.2 why he felt that the accident occurred due to any rashness or negligence on the part of Minesh. Further, despite his investigation, it is quite surprising that AW.2 could not answer where the truck's owner was residing. This is important because Mr Marshal pointed out that the insurance policy documents stated the owner's address as St. Francis Xavier Residency, Old Goa. He pointed out that even the Bailiff served the owner at the St. Francis Xavier Residency address. The truck was parked on the road opposite St. Francis Xavier Residency.

24. Thus, there is no doubt that the truck was parked on the National Highway opposite the owner's house. There is no evidence that the spot where the truck was parked was designated as a parking bay or a parking spot. There is no evidence of any indicators or safety measures adopted by the truck when parked on the NH-4. There is no evidence of any driver or a cleaner being present in the tuck while it was parked on the NH-4. Significantly, neither the owner nor the driver has deposed in the matter after it was established that the truck was parked on the NH-4.

25. In the above regard, Mr Marshal rightly relied on Rule 20 of the Highways Administration Rules, 2004, which, *inter alia*, provides that no person in charge of, or in possession of, any vehicle shall allow such vehicle to stand on a highway unless - (a) such vehicle stands in such circumstances which have not to cause or likely to cause danger, obstruction or undue inconvenience to other users of the Highway or to the passengers thereon: (b) such vehicle is under the close supervision of its driver or other person assigned its supervision and is not left unattended by such driver or person unattended for two hours or more; (c) such vehicle is parked in a place legally allowed or allowed by the Highway Administration for such parking; (d) such vehicle is wrecked,

burnt or impartially dismantled condition creating a traffic hazard; and (e) such vehicle is not creating any obstruction in a smooth and easy traffic movement on the Highway.

26. The evidence on record shows that the truck, as parked, was causing danger, obstruction and undue inconvenience to the other Highway users or passengers thereon. Admittedly, the truck was not under close supervision of its driver or any other person. Instead, the truck was left unattended for over two hours. Although there is no evidence about the truck being left unattended for over two hours, it is legitimate to hold that the truck was parked for the entire night in front of the owner's residence. In any case, the burden was on the owner or the driver to establish that the truck was not left unattended for two hours or more. Since the owner and the driver have not bothered to examine themselves, such a burden remains undischarged.

27. As noted earlier, there is no evidence that the spot where the truck was parked was legally allowed or allowed by the Highway administration for such parking. This is possibly the reason why a reference was made to katcha road. The oral and documentary evidence does not support this theory of the katcha road. The evidence about the truck being parked on the NH-4

itself is very clear. In the absence of any evidence being adduced by the owner or the driver about the parking spot being a legally allowed spot, it will have to be held that there was negligence in parking the truck on the Highway. Finally, it is apparent that the truck obstructed the passengers in the smooth and easy traffic movement on the Highway. All these circumstances are sufficient to infer the rashness and negligence on the owner and truck driver's part. All this evidence was, however, overlooked by the Tribunal.

28. Based on the above oral and documentary evidence and even without going through the evidence of AW.3, it is apparent that by applying the touchstone of preponderance of probabilities, the Appellants established the rashness and negligence on the part of the owner and the driver of the truck. Now, if the evidence of Maksud Khan (AW.3) is considered, this position is further fortified.

29. Although there are some loose ends concerning AW.3, his evidence need not be rejected outright. His version was probable. This witness explained the reason why he could not make a call to the police or to the ambulance since his phone was dead. This witness explained that in the meanwhile, one Gurkha did call the

police and ambulance. Even the complaint filed by AW.2 refers to the Gurkha lodging the complaint and calling up the ambulance. This witness also accepted that Minesh was not wearing a helmet while riding the scooter. Therefore, the criticism about AW.3 being a tutored or got-up witness may not hold. This witness categorically denied the existence of any Katcha road or that the truck was parked on the katcha road.

30. Thus, the oral and the documentary evidence on record probabilises the Appellants' version about the truck being parked on the NH-4 without taking any precautions like indicators or warning signs. Therefore, the breach of the provisions of Rule 20 referred to above also has been established on the touchstone of the preponderance of probabilities. In such circumstances, the finding about the total absence of rashness and negligence on the part of the owner and the truck driver, who did not even bother to examine themselves, will have to be interfered with.

31. In *K. Anusha and ors.* (supra), the issue involved was a lorry parked on the NH-4 without any indicator or signal. The Tribunal and the High Court held that this was a case of contributory negligence based upon the following reasoning reflected in paragraph 11 :

"11. The first grievance of the appellants about the finding of contributory negligence is liable to be sustained for three reasons namely, (i) that even according to the Tribunal and the High Court, the spot where the lorry was parked, as indicated in Exhibits P-1 to P-6 (FIR, complaint, spot magazar etc.) and Exhibit P-22 (spot sketch), was not a parking place; (ii) that according to the High Court, the driver of the lorry ought to have parked the vehicle on the left side of the road by giving proper indication/signal, but it was not done; and (iii) that as per the finding of the High Court, the accident occurred at about 4.30 a.m. when the lighting should have been poor."

32. In *Jumani Begam* (supra), the Hon'ble Supreme Court held that once substantive evidence before MACT established that the truck had been parked on the road at night without any reflectors, negligence was established, and the finding about contributory negligence was set aside.

33. In *Manonmani and ors.* (supra), a Division Bench of Madras High Court held that once it was established that the offending vehicle was not parked on the service road or in the

parking place, negligence was presumed, and the onus was on the parked vehicle owner or the driver to establish otherwise.

34. The above three decisions assist the Appellants' case since there is ample evidence that the truck with which Minesh's scooter collided was parked on the NH-4 at a spot which was neither designated as a parking bay, nor parking spot. There is no evidence about the indicators or warning signs. There is proof of a breach of Rule 20 of the Highways Administration Rules, 2004. The owner and the driver chose not to examine themselves and discharge the onus that had shifted on them. All this evidence, coupled with the precedents referred to above, warrant interference with the finding of the Tribunal on the issue of rashness and negligence.

35. However, the evidence on record also establishes that Minesh was riding his scooter without wearing a helmet. The Appellants claim that Minesh had attended a wedding as its photographer and was returning early in the morning. There was not much traffic on the road regarding the evidence on record. AW.3 deposed to the visibility of about 20 metres. Though not wearing a helmet by Minesh may not be the cause of the accident, if Minesh had worn a helmet, he could have survived the

accident. The post-mortem shows that Minesh died due to head injuries after battling for life for about five days. A helmet would have certainly made a difference.

36. Even in *Jose P.J. & ors. vs. Niyas and ors.* (supra), relied upon by Mr Marshal, the Division Bench of the Kerala High Court, after holding that non-wearing of the helmet was not the cause of the accident, upheld the finding of contributory negligence to the extent of 25 per cent. Thus, even in this case, considering the evidence on record, Minesh can be said to have contributed to the accident or, rather, his death due to the accident, to the extent of 25 per cent.

37. Thus, regarding rashness and negligence, it will have to be held that the owner and the truck driver were negligent and, consequently, responsible to the extent of 75 per cent and Minesh contributed to the extent of 25 per cent.

38. On the issue of the quantum of compensation, the Appellants' case that Minesh was single-handedly working as a professional photographer, construction contractor and even maintaining a bar and restaurant cannot be believed. The evidence on record does not support this tall claim.

39. AW.1, Minesh's father admitted that Minesh had not done any photography courses and there were no invoices or receipts concerning his income from the profession of photography. AW.1 also admitted that Minesh's construction concern was not registered or had no trade licence. The bar and restaurant were in Minesh's mother's name since 2005. Minesh never filed any income tax returns, though it was claimed that he was earning ₹13.00 – 17.00 lakhs per annum. No independent witnesses were examined to support the claim of either these business activities or the income therefrom.

40. The passbook, which was produced, throws no light on the nature of earnings of Minesh. None of the witnesses deposed to the income and expenditure from the professions. Therefore, merely because there were some passbook entries, which were never proved by any of the witnesses, it would not be safe to accept the Appellants' claim about Minesh's earnings between ₹13.00 – 17.00 lakhs per annum.

41. However, there is evidence that Minesh was a B.Com. Graduate. He must have been helping his mother run the bar, and the restaurant business also cannot be ruled out. In *Meenakshi and ors* (supra); *Smt. Lata Devi and Ors.* (supra), the

Punjab and Haryana High Court and the Delhi High Court were concerned with a 21-20-year-old B.Com. Graduates. The High Courts took their notional income at ₹25,000/- per month, relying upon the evidence on record. Similarly, in *S. Chandrasekharan and ors.* (supra), the Hon'ble Supreme Court took the income of a B.Com. graduate, aged 37 years as ₹26,250/-. However, in the said case, there was evidence about the lady being employed for about three years before the accident. Therefore, considering the evidence on record, Minesh's income could be safely taken at ₹16,000/- per month and not merely ₹10,000/- per month.

42. Minesh was 27 years old at the time of the accident. Minesh was a B.Com graduate. There was evidence about at least his assisting the mother in operating the bar and restaurant. The passbook entries referred to some income Minesh must have been drawing. Therefore, even after accounting for expenses, his income could be taken at ₹16,000/- per month.

43. Following the law in *National Insurance Co. Ltd. vs. Pranay Sethi and ors.*¹³ an additional 40 per cent will have to be made towards future prospects. This means that to the annual

13. (2017) 16 SCC 680

income of ₹1,92,000/-, an addition of 40 per cent will have to be made, taking this figure to ₹2,68,800/-.

44. Minesh was a bachelor and, therefore, a deduction of 50 per cent will have to be made towards expenses on himself. Dependency amount, therefore, comes to ₹1,34,400/- per year. Applying the multiplier of 17, the compensation towards dependency would come to ₹22,84,800/- .

45. To the above figure, a compensation of ₹1,60,000/- will have to be added towards the consortium (₹40,000/- for each of the Appellants-Claimants). Besides, the Appellants would be entitled to ₹15,000/- towards funeral expenses and another ₹15,000/- towards loss of estate. This takes the total compensation amount to ₹24,74,800/-

46. Since Respondents No.1 and 2 contributed to the accident to the extent of 75 per cent, they would be liable to pay the compensation of ₹18,56,100/- to the Appellants. Since the vehicle was insured, Respondents No.1, 2 and 3 are held to be jointly and severally liable to pay the compensation amount of ₹18,56,100/-, to the Appellants. On this amount, the Respondents will bear interest at the rate of 6 per cent per annum from the date of the claim petition till effective payment.

47. Accordingly, this Appeal is allowed. The impugned Award is modified and it is held that the Respondents No.1, 2 and 3 are jointly and several liable to pay compensation of ₹18,56,100/-, together with interest at the rate of 6 per cent per annum from the date of claim petition, till effective payment, to the Appellants. Accordingly, respondents No.1, 2 and 3 are directed to pay the said amount and interest to the Appellants.

48. Out of the above compensation amount, it would be appropriate if Appellant No.2, *i.e.* the mother of Minesh, is awarded 50 per cent. The balance of 50 per cent is to be shared equally between Appellant Nos. 1, 3 and 4. If Appellant No.4 is still a minor, then his share should be invested in a nationalized bank and paid to him upon his attaining majority.

49. Respondents No.1, 2 and 3, including in particular, Respondent No.3-Insurance Company, is directed to deposit the above amount of ₹18,56,100/-, together with interest at the rate of 6 per cent from the date of the claim petition, in this Court within two months from today, after giving due intimation to the learned Counsel for the Appellants. Upon deposit, the Appellants will be entitled to withdraw the deposited amount in terms of the above directions for payment/investment. For this, the Appellants

will have to furnish identification and bank details so that the Registry can transfer their respective shares into their bank accounts directly.

50. The Appeal is allowed, with costs as are usually determined by the Tribunals in such matters.

M. S. SONAK, J.

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