

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.72/2015

1. AKARAM JADHAV

Aged about 67 years
Retired, s/o. Abba Jadhav
and his wife;

2. SMT. KAMAL AKARAM JADHAV

Aged 63 years,
w/o Shri Akaram Jadhav,
housewife;

3. SMT. LAXMI JALANDER JADHAV

Aged 29 years
w/o. late Jalander Jadhav,
housewife;

4. MISS SAKSHI JADHAV, 7 years of age,
d/o. late Jalander Jadhav;

5. MISS SRUSTI JALANDER JADHAV

Aged 5 years, d/o. late Jalander Jadhav;

6. MISS SRAJANI J. JADHAV

Aged 3 years, d/o. late Jalander Jadhav;
[claimant no. 4, 5, and 6 are being
Minor and represented by its guardian
claimant no. 1). (claimant no. 2 and 3
represented by its power of
Attorney holder claimant no. 1)
All above residents of H. No. 68, Near
Temple, Chapelabhat, Quepem, Goa.

... APPELLANTS

Versus

1. SHRI JAYESH ASHOK NAIK
Aged 30 years, resident of H. No. 17
near Ram Mandir, Pontemol,
Churchorem, Goa (driver)
(driver of Tata Tipper Truck bearing
Reg. No. GA 09-U-0257).

2. ILLHAS SHRIKANT NAIK,
Major of age, business,
r/o. H. No 209, Jaraswaddo,
Tivrem, Marcel-Goa
(owner of Tata Tipper Tuck bearing)
Reg. No. GA-09-U-0257)

3. MR. ARVIND KUMAR
s/o. Mahesh Gautam,
r/o. c/o. Mahendra Kumar,
major in age, Bureya flat No. 35
Kirti Nagar, Beloda, Ponda (driver)
(driver of Tata Tipper Truck bearing
Reg. No. GA 08 U 1613).

4. MR. RATNA SHIVKUMAR
ARKASALI, Major in age,
r/o. H. No. 10, Monte Hill
Talsanzor, Margao, Goa (owner)
(owner of Tata Tipper Truck
Bearing Reg. No. GA 08-U-1613)

5. ORIENTAL INSURANCE
COMPANY LTD., II floor,
Gafur Building, station Road
Curchorem, Goa (Insurer)
Policy No. 2012/4058 of tipper
No. GA 09 U 0257.

6. NATIONAL INSURANCE CO. LTD.,
2nd floor, Magjidada Mansion

Above Dena Bank Ponda, Goa
(Insurer) Policy No. 271202/31/ii/
6300001369 of Tata tipper
No. GA 08-U-1613.

...RESPONDENTS

Mr. C. A. Coutinho, Advocate *for the Appellants.*

Mr. U. R. Timble with Ms. Y. Mandrekar, Advocates *for Respondent No.6.*

CORAM: M. S. SONAK J.

DATED: 28th April 2022

ORAL JUDGMENT:

1. Heard Mr. C. A. Coutinho for the appellant and Mr. U. R. Timble for respondent no.6.

2. Mr. Coutinho submits that all the respondents in this matter have been duly served. Since the accident, in this case, took place on 24.12.2011, there is no point in adjourning this matter any further.

3. The appellants-claimants, i.e., the parents, wife, and three minor daughters, then aged 4, 2, and 1, respectively, of late Jalander Jadhav, challenge the impugned judgment and award dated 13.02.2015 by which the Motor Accident Claims Tribunal (Tribunal) determined compensation payable to them at

₹30,18,000/- but dismissed the claim petition on the specious plea that the claimants failed to establish rashness and negligence on the part of the respondent no.2, i.e., the driver of the tipper truck bearing registration no.GA-09-U-0257.

4. The Tribunal, in this case, has exonerated the driver of the Tata Tipper Truck bearing registration no.GA-08-U-1613 is the other truck that was alleged to be involved in the accident. Such exoneration need not be revisited based on the oral and documentary evidence on record, including the documents at Exh.41 and the deposition of the Head Constable Shri Sudhakar Fal Dessai, who was examined as AW2.

5. However, the Tribunal has held that the claimants have failed to establish negligence on the part of the driver of the Tata Tipper truck bearing registration no.GA-09-U-0257 and this finding, with respect, suffers from serious errors bordering perversity. The entire reasoning is to be found in paragraphs 18 and 19, which are reproduced for the convenience of reference:-

"18. In the sketch it is shown that the Motorcycle of the deceased is in between the front and the rear driver's side wheels of the truck. The Motorcycle is also close to the front wheel. The accident spot with some blood marks is shown perpendicular to the length of Motorcycle and on its right hand side as one proceeds from Dabal to Sanvordem.

From this position of these vehicles, it is difficult to know how the accident had occurred. It is possible that the accident occurred due to the rash and negligent riding by the deceased himself. There are also no brake marks nor skid marks behind either the Motorcycle or the truck bearing no.GA-09-U-0257. In case the said truck was in a fast speed and had applied brakes, there would have been at least brake marks behind the said truck.

19. From the sketch, it is not possible to know on account of whose rash and negligent driving the accident had occurred. There is no eye witness to the accident. The Motorcycle is also lying on the right hand side of the truck bearing no.GA-09-U-0257 which was proceeding in the same direction as that of the Motorcycle of the deceased. The width of the road is 6.50 metres. The right hand side wheels of said truck are at a distance of about 4.00 to 4.7 metres from the right edge of the road. From this position of the vehicles, it appears that the deceased was overtaking the said truck. The possibility of he giving a dash whilst overtaking cannot be ruled out. Other possibility of the said truck giving dash to the Motorcycle on account of rash driving by the driver of the said truck cannot be spelt out from the sketch. There is no ocular evidence of the eye witness to establish how the accident had taken place. As discussed hereinabove, it is difficult to hold that the accident occurred due to rash and negligent driving either by respondent no.1 and/or respondent no.3. The claimants have, therefore, failed to prove that the accident occurred due rash/negligent driving by respondent no.1 and/or respondent no.3. The issue is, therefore, decided in the negative"

6. Apart from several infirmities in the above reasoning, it is pertinent to refer to the surmises and conjectures and the doubts to suggest that the accident may have occurred due to the deceased's rash and negligent riding. In this case, the evidence on record does not admit any scope for even raising such doubts, and therefore, the reasoning warrants interference.

7. There are several reasons why the above reasoning warrants interference.

8. Firstly, the Tribunal has completely failed to even look at the pleadings of the driver of the truck bearing registration no.GA-09-U-0257 and its insurer.

9. The truck driver, in his written statement, does not deny the accident but only pleads as follows:-

"It is denied that the accident occurred due to rash and negligent driving of the respondent no.1 and to that effect Curchorem police station registered an offense. The police have also filed a complaint and registered a FIR against the respondent no.1. Thus this respondent the insurance company is in no way liable to pay any compensation to the claimants or any party."

10. The insurer of the above truck, in paragraph 11 of its written statement, pleads the following case:-

"It is submitted that the accident occurred due to the fault of the deceased. On 24/12/2011 when the deceased was waiting at a junction to cross the road on the Motorcycle, however he did not pay attention to what was behind him, and so when he started the bike and turned the truck came from behind and dashed him."

11. From the pleadings, it is apparent that the involvement of the truck bearing registration no.GA-09-U-0257 in the accident is not denied. Further, there is no dispute that the deceased died in this very accident after he was crushed by the Tata Tipper truck. The sketch attached to the panchanama shows the spot of the accident in the middle of the road. This evidence was more than sufficient to invoke the principle of *res ipsa loquitur*.

12. But apart from this principle, the pleadings referred to above, including the pleadings of the insurer, constitute admission about the rashness and negligence on the part of the truck driver.

13. If the insurer's version is believed, the deceased was only waiting at the junction to cross the road on the Motorcycle. The allegation is that he ignored what was behind him, and so when he started the bike and turned, the truck came from behind and dashed him. The truck driver should have focused on what was in front of him, and the deceased could not have been faulted for what was behind him. The pleadings are not even referred to,

much less considered by the Tribunal before holding that there was no rashness and negligence of the truck driver.

14. The minimum that was expected in this case was that the truck driver, who was in the best position to explain how the accident took place, examines himself. The insurer could have also persuaded the truck driver to depose if the insurer was confident of its pleadings in paragraph 11 of its written statement. However, the truck driver, having failed to step into the witness box, the Tribunal was not justified in raising doubts about the deceased himself being negligent or responsible for the accident. Unfortunately, he was crushed by a Tata Tipper truck in the middle of the road that had come from behind. In my view, the *res ipsa loquitur* principle was attracted to this case.

15. The Head Constable Sudhakar Fal Dessai (AW2) has deposed that the Tata Tipper truck bearing registration no.GA-09-U-0257 was responsible for the accident as per his investigations. He could not explain why no prosecution was launched against the driver of the Tata Tipper truck but merely stated that PSI Prashal Dessai did a further investigation. The panchanama and the sketch accompanying the panchanama had undoubtedly made a *prima facie* case about rashness and negligence on the truck driver's part. Therefore, it is surprising

that the prosecuting agencies messed up further investigations. There is no explanation for why the matter was not taken to its logical conclusion, and prosecution was launched against the truck driver. Mr. Couthino offers that those days when trucks carrying mineral ore were causing havoc on roads and prosecutions were rarely launched.

16. Be that as it may, before the Tribunal, the issue of rashness and negligence had to be established only by applying the test of preponderance of probabilities. This is yet a significant aspect that the Tribunal has ignored.

17. In *Bashti Kasim Saheb vs. Mysore State Road Transport Corporation & Others*¹, the Hon'ble Supreme Court has made the following significant observations that, apply to the circumstances of the present case:-

"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

1 (1991) 1 SCC 298

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."

18. The Tribunal also failed to appreciate that this is a matter involving two tipper trucks and a Splendor motorcycle that the deceased was riding. Even if one of the truck drivers is exonerated, there is ample evidence about the involvement of the other truck, not to mention the admission in the pleadings. The tipper truck is admittedly a much larger and heavier vehicle than a Splendor motorcycle. The tipper truck has dashed the Splendor motorcycle from behind. This accident has taken place in the middle of the road. In such circumstances, the duty of care expected from the truck driver was much greater. The truck driver even did not bother to examine himself in this matter. Considering all this, the finding recorded by the Tribunal about the absence of rashness and negligence on the part of the truck driver is entirely unsustainable.

19. In *N. K. V. Bros. (P) Ltd. vs. M. Karumai Ammal & Others*² 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 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

2 AIR 1980 SC 1354

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."

20. The approach of the Tribunal in evaluating the evidence on record on the issue of rashness and negligence is contrary to the law laid down by the Hon'ble Supreme Court in *Anita Sharma & Ors. vs. New India Assurance Company Limited & Anr.*³, *Parmeshwari vs. Amir Chand & Ors.*⁴, *Sunita & Ors. vs. Rajasthan State Road Transport Corporation & Ors.*⁵ *Mangla Ram vs. Oriental Insurance Company Ltd. & Ors.*⁶ and *Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr.*⁷

21. 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

3 (2021) 1 SCC 171

4 (2011) 11 SCC 635

5 2020 (13) SCC 486

6 (2018) 5 SCC 656

7 (2013) 10 SCC 646

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. 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 specific 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 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.

22. 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.*

23. In the present case, no formal FIR may indeed have been lodged against the truck driver for reasons best known to the prosecution or investigating agencies. But this is a matter where the factum of the accident was admitted. The sketch of the panchanama shows that the accident took place in the middle of the road. There are admissions in the pleadings that their makers did not even explain by stepping into the witness box. The Tribunal has failed to evaluate all this evidence by following the principles laid down by the Hon'ble Supreme Court.

24. For all the above reasons, the finding recorded by the Tribunal on the issue of rashness and negligence is reversed. There is ample evidence to hold that the truck driver was rash and negligent. Consequently, respondents nos.1, 2, and 5 are responsible for the payment of compensation to the claimants.

25. On the issue of just compensation, the Tribunal has accepted the case of the claimants that the deceased was drawing a monthly salary of ₹18,000/-. There is no dispute about the deceased's age and the multiplier to be applied. The Tribunal, however, failed to add 40% to the monthly income of the deceased towards future prospects. Such addition was necessary, given the law in *National Insurance Company Ltd. v. Pranay Sethi & Ors.*⁸.

26. Therefore, the monthly income should have been taken at ₹18,000/- + ₹7,200/- = ₹25,200/- and not merely ₹18,000/-. The deduction of 1/4th is warranted in the present case considering the number of claimants. This means the monthly income could be safely taken at ₹18,900/- for determining the compensation towards dependency.

27. The multiplier, in this case, will be 16 as correctly held by the Tribunal. Based on all this, the compensation towards dependency comes to ₹36,28,800/-. A further amount of ₹40,000/- towards each claimant, i.e., ₹2,40,000/-, will be added to the consortium. Further, the addition of ₹30,000/- is due towards funeral expenses and estate loss. The just compensation will then be ₹38,98,800/-.

8 2017 (16) SCC 680

28. Therefore, the appeal is allowed, and the respondent nos.1, 2, and 5 are held jointly and severally liable to pay compensation of ₹38,98,800/- to the claimants together with interest @ 9% p.a. from the date of the institution of the Claim Petition till the date of payment.

29. Out of the above compensation, 40% should be paid to the first two appellants, i.e., the parents of the deceased Jalander, in equal proportions. The balance of 60% should be paid to appellant nos.3, 4, 5, and 6. Out of this balance portion, 40% is apportioned to Jalander's widow and the balance to the three minor daughters in equal proportions. The share of the minor daughters should be invested in a nationalized bank account. The widow will have the right to apply to the Tribunal for interest or withdrawals if the circumstances so require.

30. Respondent nos.1, 2, and 5, including respondent no.5 should deposit the awarded amount in this Court within eight weeks from today with intimation to the learned counsel for the claimants/appellants. After that, the claimants/appellants will be entitled to withdraw the deposited amount by furnishing identity documents and bank details. The Registry to render all possible assistance to the claimants to get the amounts due to them at the earliest.

31. Since there was no appearance on behalf of respondent no.5, the Registry to ensure that copy of this order is immediately forwarded to respondent no.5. Mr. Coutinho states that he will also deliver a copy of this order to respondent no.5.

32. The appeal is allowed in the terms mentioned above. Accordingly, there shall be no order for costs.

M. S. SONAK, J.

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