

Niti

**IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.79 OF 2016**

1. Gopal Gaonkar,
S/o. Bhiku Gaonkar,
Major in age.

2. Smt. Gunavanti Gaonkar,
W/o. Gopal Gaonkar,
Major in age,
Both are R/o. H.No.8,
Old Vaddem, Curti,
Sanguem, Goa.

...Appellants

Versus

1. Shri Milagres Rodrigues,
S/o. Mariano Rodrigues,
Major in age,
R/o. H.No.37,
Curdi, Vaddem,
Colony No.1,
Sanguem, Goa.

2. The United Insurance Co. Ltd.
Office at Jamandas Building,
Second Floor,
P.B. No.15,
Church Road,
Curchorem, Goa.

.... Respondents

Mr. Shailesh Redkar, Advocate for the Appellant.

CORAM : M.S. SONAK, J.

DATE : 10th March 2022

ORAL JUDGMENT :

1. Heard Mr. Shailesh Redkar, learned Counsel for the appellant. The respondents, though served, are neither present nor represented.
2. Since the appeal is of the year 2016 and was duly notified on the cause list, the matter cannot be adjourned any further.
3. The challenge in this appeal is to the judgment and award dated 03.03.2016 in Claim Petition No.122 of 2014 made by the Motor Accident Claims Tribunal (Tribunal) dismissing the Claim Petition because the claimants were unable to establish that the accident took place on account of rashness and negligence of respondent no.1, the driver of the Tata Sumo vehicle bearing registration no.GA-02-S-0761.
4. Mr. Redkar, firstly submitted that the Tribunal was not justified in not even determining the compensation amount and such approach is contrary to the law laid down by the Hon'ble Supreme Court in *Bimlesh & Ors. V/s. New India Assurance Company Limited*¹.

¹ (2010) 8 SCC 591

5. Mr. Redkar then submitted that the Tribunal has adopted a hyper-technical approach for determining rashness and negligence. He relies on the decisions of the Hon'ble Supreme Court in the cases of *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.*², *Parmeshwari V/s. Amir Chand & Ors.*³, *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors.*⁴, *Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors.*⁵ and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.*⁶ to submit that the approach of the Tribunal on this issue is contrary to the law laid down in these decisions.

6. Mr. Redkar submits that though respondent no.1 Milagres took the defense that there was no collision between the Tata Sumo vehicle and the Pulsar motorcycle that Pradeep Gaonkar – deceased was riding, said Milagres failed to step in the box. Mr. Redkar submits that an adverse inference should have been drawn by the Tribunal.

2 (2021) 1 SCC 171

3 (2011) 11 SCC 635

4 2020 (13) SCC 486

5 (2018) 5 SCC 656

6 (2013) 10 SCC 646

7. Mr. Redkar submits that the Tribunal was not justified in discarding the evidence of eyewitness Kusta Gaonkar (CW2), simply because this witness was unable to state the registration number of the Tata Sumo vehicle or on account of the reasoning that this witness too would have been hit by the Sumo vehicle if what he was deposing was correct. Mr. Redkar submits that such an approach is directly contrary to the law laid down in ***Sunita & Ors.*** (supra).

8. Mr. Redkar submits that the sketch to the panchanama was admitted to be incorrect by the Investigating Officers. The Tribunal, therefore, erred in placing excessive reliance upon the same. He submits that the approach of the Tribunal, in this case, is contrary to the law laid down in ***Anita Sharma*** (supra).

9. Mr. Redkar submits that the material evidence on record has been overlooked and emphasis was laid by the Tribunal on trivial discrepancies. He, therefore, submits that the finding on the aspect of rashness and negligence warrants reversal.

10. Mr. Redkar submits that the income of the deceased Pradeep was ₹5,000/- per month. Based thereon compensation of ₹8,77,000/- is due and payable to the parents of the deceased Pradeep, who was hardly 21 years old at the time of the accident.

11. Mr. Redkar submits that this appeal be allowed and the respondents be directed to pay compensation of ₹8,77,000/- jointly and severally together with interest.

12. Since respondents were neither present nor represented, the material on record was perused in the context of the findings favorable to the respondents recorded by the Tribunal. Based on the evidence on record and the approach to be adopted in such matters, as indicated in the several decisions relied upon by Mr. Redkar, the finding on the aspect of rashness and negligence warrants interference.

13. There is no dispute about the accident that took place on 02.12.2011 at 17.20 hours at Villian, Bhati, Sanguem, Goa, involving the pulsar motorcycle that one Yogesh Gaonkar was riding with the deceased Pradeep Gaonkar as a pillion and the Tata Sumo vehicle owned and driven by Milagres (respondent no.1 herein). The only dispute is about whether the accident was on account of rash and negligent driving of the Tata Sumo by Milagres or on account of the pulsar motorcycle skidding due to rash and negligent driving by Yogesh Gaonkar.

14. There is evidence that the accident took place on a sharp turn when the deceased riding pillion was proceeding from

Vaddem to Margao and the Tata Sumo vehicle came in the opposite direction. The fact that the accident took place at a sharp turn is something that is borne out from the evidence on record and otherwise, there is no serious dispute about the same. Even the Tribunal admits this position.

15. The Tribunal holds against the claimants primarily on the following grounds:-

(a) that the police investigations had revealed that it was Yogesh Gaonkar, the rider of the pulsar motorcycle, who was negligent and caused the pulsar motorcycle to skid at the sharp turn. The Tribunal noted that criminal prosecution was launched against Yogesh Gaonkar and not against Milagres, the driver/owner of the Tata Sumo;

(b) the sketch attached to the panchanama supports the version of the negligence of Yogesh Gaonkar and not Milagres;

(c) that testimony of Kusta Gaonkar (CW2) is not creditworthy because he could not remember the registration number of Tata Sumo and further, if his

deposition was true, then the Tata Sumo would have hit him along with the rider of the Pulsar motorcycle.

16. As noticed earlier, the factum of the accident is not disputed. There is also no dispute about the Pulsar and the Tata Sumo being found at the site of the accident. Mrs. Lourdina Rodrigues (RW1), Fatima Pereira (RW2), and Telma Fernandes (RW3), who were traveling in the Tata Sumo have deposed in the matter and claimed that there was no collision or contact between the Pulsar motorcycle and the Tata Sumo. They claimed that the pulsar motorcycle skidded and the rider and the pillion rider fell down, but they maintained that there was no collision or contact between the two vehicles. The Tribunal has accepted this version after seeking some corroboration in the sketch annexed to the panchanama.

17. Now, the approach to be adopted by the Tribunal for determining the issue of rashness and negligence in motor accident claims cases has been spelled out by the Hon'ble Supreme Court in *Sunita and Ors.* (supra), *Anita Sharma* (supra), *Parmeshwari* (supra), *Mangla Ram* (supra), *Dulcina Fernandes* (supra), and by this Court in *Shri Narcivha Chari V/s. Mr. Joao Faria (First Appeal Bo.34 of 2017)* and *Smt.*

*Neha Nilesh Arlekar & Ors. V/s. Mr. S.D. Rocky & Ors.
(First Appeal No.23 of 2015).*

18. 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 at 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. 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 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.

19. In *Sunita & Ors.* (supra) the Hon'ble Supreme Court has held that the rider of the motorcycle had expired and the issue arose as to whether the non-examination of the pillion rider was fatal to the case of the claimants because the best eyewitness was not examined. The Hon'ble Supreme Court held that non-examination of the pillion rider would not be fatal because the approach of the Tribunal in examining the evidence in accident claim cases is not to find fault with non-examination of some best eyewitness in the case but to analyze the evidence already on record to ascertain whether that is sufficient to answer the matters on the issue of the touchstone of preponderance of probabilities. The Hon'ble Supreme Court referred to its earlier decision in *Dulcina Fernandes* (supra) where the acquittal in a criminal case was held to be irrelevant.

20. In *Sunita & Ors.* (supra), the Hon'ble Supreme Court did not approve the approach of the High Court in discarding the

evidence of the claimant's witnesses on grounds like such witnesses not being cited in the chargesheet or such witnesses failing to identify the age of the pillion rider or such witnesses failing to state the precise registration number of the vehicles involved in the accident. The Hon'ble Supreme Court held that it has no hesitation in observing that such a hyper-technical and trivial approach of the High Court cannot be sustained in a case for compensation under the Act, in connection with a motor vehicle accident resulting in the death of a family member. The Hon'ble Supreme Court referred to its decision in ***Mangla Ram*** (supra), on the approach of the Tribunal and the Courts in evaluating the evidence in such matters and also pointed out the difficulties which the claimants face in establishing how exactly the accident took place. The Hon'ble Supreme Court held that in all such matters a holistic approach rather than a hyper-technical approach has to be adopted precisely because rashness and negligence have to be proved on the touchstone of preponderance of probabilities and not beyond a reasonable doubt.

21. In ***Anita Sharma*** (supra), the Hon'ble Supreme Court reiterated that the standard of proof in such cases is the only preponderance of probabilities and, therefore, the approach and role of the 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 the claimant's version is more likely than true.

22. The Tribunal, in this case, does not appear to have assessed and evaluated the evidence on record from the aforesaid perspective which was required to be adopted having regard to the several rulings of the Hon'ble Supreme Court on the subject.

23. The circumstance that the police investigations revealed that it was Yogesh Gaonkar, who was negligent, may have been a relevant factor but certainly, that was not some conclusive factor. Based on the said factor, therefore, the Tribunal was not justified in virtually exonerating Milagres. Incidentally, Milagres did not even step into the witness box and depose as to how the accident, according to him, took place.

24. Lourdina Rodrigues (RW1), Fatima Pereira (RW2), and Telma Fernandes (RW3), the travelers in the Tata Sumo, have no doubt deposed in this matter, but they claimed that there was neither any collision nor any contact between the Pulsar motorcycle and the Tata Sumo. Now, this evidence is not

supported by the material on record which shows damage to a portion of the Tata Sumo. The best person to explain the accident was not RW1, RW2, and RW3 but Mr. Milagres himself who was driving the Tata Sumo. Milagres, however, failed to step into the witness box and such failure was not even considered by the Tribunal before exonerating said Milagres.

25. The Tribunal, in this case, has placed excessive reliance on the sketch annexed to the panchanama. The Tribunal has held that this sketch corroborates the version of Milagres as pleaded. The Tribunal held that since the claimants themselves relied upon the sketch, now they can not resile from the same.

26. The claimants simply produced the panchanama and all other investigation papers before the Tribunal. They were accepted in evidence “*subject to proof*”. Simply because the claimants truthfully placed all this material before the Court it cannot be said that it was the claimants, who had relied upon such material or that the claimants were attempting to resile from the same.

27. That apart, on the aspect of the sketch on which the Tribunal has placed excessive reliance, the evidence of Ashok Dessai (RW5), Assistant Sub-Inspector, and the evidence of

Deepashri Morajkar (RW4) is confusing, at the best and uninspiring, at the worst.

28. Ashok Dessai (RW5), in his chief, claimed that he registered the complaint filed by Deepashri (RW4), who was a lady head constable attached to Sanguem Police Station. He deposed that he recorded statements of eyewitnesses including Prashant Gaonkar, who is incidentally the brother of deceased Pradeep Gaonkar. However, in the cross, RW5 admitted that Prashant Gaonkar was indeed the brother of deceased Pradeep and, further, he was not an eyewitness to the accident.

29. Ashok Dessai (RW5), in his chief, clearly deposed that he had sketched the accident spot. Now, the sketch bears the date of 02.12.2011. In his cross-examination, RW5 admits that he took over the investigation of the case only on 04.12.2011. There is no explanation as to how he could have sketched the accident spot on 02.12.2011 when according to him he took over the investigation only two days later, that is on 04.12.2011.

30. Deepashri Morajkar (RW4), the lady head constable, in her examination-in-chief has stated that she had drawn the panchanama and sketch. This means that there is variance between the versions of the two officials. Deepashri (RW4)

drawing the sketch appears to be more probable because Ashok Dessai (RW5) had taken over the investigation only on 04.12.2011 and panchanama and sketch are dated 02.12.2011, that is the date of the accident. Now Deepashri (RW4) has not at all explained the sketch. Instead, it is Ashok Dessai (RW5), who has purported to explain the sketch. He has gone to the extent of stating that the spot of the accident shown in the sketch is not the spot where the accident occurred.

31. In the above circumstances, the Tribunal should not have placed such excessive reliance on the testimony of Deepashri (RW4) and Ashok Dessai (RW5) or for that matter the sketch attached to the panchanama. The Tribunal, without good reasons, has disbelieved the evidence of Kusta Gaonkar, the eyewitness to the accident. The fact that there was some damage to the Tata Sumo corroborates that the claimants' version than the version of Milagres and his witnesses, who state that there was no collision or for that matter contact between the Pulsar motorcycle and the Tata Sumo vehicle. On the touchstone of preponderance of probabilities, the version of the claimants appears to be more probable than the version of Milagres. For all the aforesaid reasons the finding recorded by the Tribunal on the issue of rashness and negligence is required to be reversed and is hereby reversed.

32. The Tribunal, in this case, was not justified in not even determining the compensation. In *Bimlesh & Ors.* (supra), the Hon'ble Supreme Court has held that the whole object of the summary procedure before the Tribunal is to ensure that a Claim Petition is decided expeditiously. Therefore, the Tribunals must decide all issues one way or the other in one go and not dispose of Claim Petitions based on one or two issues whether preliminary or otherwise. The Hon'ble Supreme Court has held that Tribunals even after holding that issue of rashness and negligence is not proved, should not refrain from deciding other issues including the issue of compensation. The Court held that all issues, that is a point for determination are required to be considered by the Claims Tribunal together in the light of evidence that may be let in by the parties and not in piecemeal thereby necessitating remand.

33. In this case, there is no question of any remand because the claimants have led evidence on the aspect of compensation. The claimants, in this case, are the elderly parents of deceased Pradeep, who died in the accident. They have received no compensation at all for the death of their son in the accident. At this stage, therefore, it will not be appropriate to remand the matter. There is no necessity of remand in this matter.

34. The claimants, that is the father of deceased Pradeep deposed that Pradeep was a sample Collector for Italab and earned a salary of ₹5,000/- per month. A salary certificate has been produced though no witness on behalf of the employer was examined. In the cross-examination, there were only denials.

35. That apart, in such matters, where the proof of income is not forthcoming some amount of guesswork is always permissible as was held in *Hem Raj V/s. Oriental Insurance Company Limited & Ors.*⁷. In *Kirti & Anr. V/s. Oriental Insurance Company Limited*⁸, the Hon'ble Supreme Court has explained how the income of the deceased can be assessed in the absence of documentary proof. The claim about Pradeep's income being ₹5,000/- is certainly within the bounds of reasonability and can be accepted as correct. Even otherwise, this income of ₹5,000/- per month in the year 2011, when the accident took place, spells out earning of even less than ₹200/- per day, which is something which even a laborer might have earned.

36. The deceased Pradeep was 21 years of age at the time of the accident and, therefore, considering the law laid down in *National Insurance Company V/s. Pranay Sethi*⁹, an addition

7 (2018) 15 SCC 654

8(2021) 2 SCC 166

9 (2017) 16 SSC 680

to the extent of 40% is required to be made. Thus, the monthly income can be taken at ₹7,000/-. Since Pradeep was a bachelor deduction to the extent of 15% has to be made because this is the amount that he would have spent on himself. The multiplier to be adopted in this case would be 18. Thus, the compensation towards dependency would come to $₹3,500/- \times 12 \times 18 = ₹7,56,000/-$.

37. In addition to the aforesaid, the claimants are entitled to compensation of ₹40,000 each towards loss of consortium, ₹15,000/- towards loss of estate and ₹15,000/- towards funeral expenses.

38. This means that appellants/claimants are entitled to total compensation of ₹7,56,000/- + ₹1,10,000 = ₹8,66,000/-. On this amount interest of 7% per annum is due from the date of filing of the Claim Petition till the date of actual payment.

39. The appeal is allowed. Compensation is determined at ₹8,66,000/-. The respondents are jointly and severally held liable to pay the said compensation together with interest at the rate of 7% per annum from the date of filing of the claim petition till the date of actual payment.

40. The respondents, including, in particular, respondent no.2 – Insurance Company, are directed to deposit the aforesaid amount in this Court within two months from today. Upon deposit, the appellants will be entitled to withdraw the same by submitting proper identification and bank details. The Registry to ensure that the compensation amount is directly deposited in the bank accounts of the appellants. The appeal is disposed of in the aforesaid terms. There shall be no order for costs.

M. S. SONAK, J.

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