

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.6/2020

Shri Ankush S. Sawant, s/o Shri. Sahadev
Sawant, major of age, unemployed,
Indian national, bachelor, r/o House No.
1309, Sawatawaddo, Mandrem, Pernem,
Goa.

... APPELLANT

Versus

1) Shri Kedar Chandrakant Sawant, s/o
Shri. Chandrakant Sawant, major of age,
bachelor, service r/o H. No.1335/2,
Sawatawaddo, Madrem, Goa. (Rider of
Splendor motorcycle No. GA-11-B-2333)

2) Shri Chandrakant Sawant, s/o Shri
Atmaram Sawant, major of age, married,
Indian, H. No. 1335/2, Sawatawaddo,
Madrem, Goa. (Owner of Splendor
motorcycle No. GA-11-B-2333)

3) Tata AIG General Insurance Co. Ltd.,
15th Floor, Tower A, Peninsula Business
Park, Ganpatrao Kadam Marg, Off
Senapati Bapat Marg, Lower Parel,
Mumbai, 400 013. (Insurance Company
of Splendor motorcycle No. GA-11-B-
2333)

4) Shri Suryakant Parastekar, s/o Shri
Vishnu Parastekar, major of age, r/o H.
No. 1376/1, BSF-49, Block B NR, Old
Police Quarters, Penha de Franca,

Porvorim, Bardez, Goa. (Owner and DRIVER of Maruti Alto car bearing No. GA-03-H-1958)

5) National Insurance Company Ltd.,
Branch Office, Govinda Building, M. G.
Road, Above Uco Branch, Panaji-Goa.
(Insurance Company of Maruti Alto car
No.GA-03-H-1958)

... RESPONDENTS

Mr. Ryan Menezes, Mr. Nigel Fernandes and Ms. Gina Almeida,
Advocates for the Appellant.

Mr. Geetesh Shetye, *Advocate for the Respondents No.1 and 2.*

CORAM: M. S. SONAK, J.

DATED: July 28, 2022

ORAL JUDGMENT:

1. Heard Mr. Ryan Menezes for the Appellant and Mr. Geetesh Shetye for respondents no.1 and 2 (driver and owner of motorcycle Splendor bearing No.GA-11-B-2333.

2. Mr. Menezes states that respondents no.3 to 5 are duly served. However, today, neither the said respondents nor their advocates appeared in this matter.

3. The challenge in this appeal is to the judgment and award dated 31.10.2018 made by the Motor Accident Claims Tribunal at Mapusa (Tribunal) in Claim Petition No.68/2014, dismissing

the appellant's claim petition on the ground that the appellant failed to establish that the accident was caused due to the rash and negligent driving of the Maruti Alto Car bearing registration No.GA-03-H-1958. The Tribunal has assessed the compensation that would have otherwise been payable to the appellant at ₹8,35,500/-.

4. Mr. Menezes submits that there was enough evidence on record to establish that the accident occurred due to rash and negligent driving by respondent no.4 i.e. the driver of the Maruti Alto car. He submits that the Tribunal has only gone by the testimony of Santosh Parab (RW1), the Head Constable who investigated the matter and chose to file a charge sheet against respondent no.1 i.e. the driver of the motorcycle. He submits that the Tribunal has ignored the evidence led by the appellant.

5. Mr. Menezes, without prejudice, submits that this was a case of composite negligence by the rider of the motorcycle and the driver of the Maruti Alto car. Therefore, the Tribunal should have held both these parties and the insurers of both the vehicles jointly and severally liable for the payment of compensation.

6. Mr. Menezes, without further prejudice, submits that the Tribunal, after recording a finding that the motorcycle rider was

responsible for the accident, should have at least made an award requiring the said rider, the owner, and the insurer of the motorcycle liable for the payment of compensation.

7. Mr. Menezes submits that the issue of rashness and negligence has to be established by applying the standard of preponderance of probabilities. He presents that the approach of the Tribunal, in this case, is contrary to the law laid down by the Hon'ble Supreme Court in *Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr. - (2013) 10 SCC 646*, *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* and *State of Goa vs. Constancio P. Braganza – 2012 ALL MR (Cri) 3678*.

8. For the above reasons, Mr. Menezes submits that this appeal may be allowed.

9. Mr. Geetesh Shetye, learned counsel for respondents no.1 and 2, submits that it was the appellant's own case that the driver

of the Maruti Alto car was responsible for the accident. He submits that the rider of the motorcycle has already been acquitted. He offers that the insurance company failed to prove that the motorcycle rider had no valid license. He submits that the onus is on the insurance company to prove this aspect. For all these reasons, Mr. Shetye submits that this appeal may be dismissed or, in the alternative, the entire liability may be imposed upon respondents no.4 and 5.

10. Mr. Shetye, without prejudice, also submits that should the rider of the motorcycle be found to be negligent, the liability may be imposed upon respondent no.3, the insurer of the motorcycle.

11. The rival contentions now fall for my determination.

12. In this case, Mr. Menezes has made it clear that the appellant has no grievance about the compensation amount assessed and determined by the Tribunal.

13. Therefore, in this case, the only issue for determination is whether the appellant has proved the issue of rashness and negligence.

14. The Tribunal, in this case, has no doubt held that the driver of the Maruti Alto car was not negligent. However, the Tribunal has also held that the rider of the motorcycle was negligent. The claim petition had been filed not only against the driver/owner and insurer of the Maruti Alto car but also against the motorcycle's driver/owner and insurer. The Tribunal, therefore, was duty-bound to at least make an award against the driver and owner of the motorcycle, assuming that the Tribunal wished to accept the insurer's defense about the driver not having a valid driving license to drive the motorcycle. The Tribunal, however, was not justified in dismissing the claim petition.

15. On the issue of rashness and negligence, the appellant has examined himself. In his evidence, he has clearly deposed that the Maruti Alto car came on the wrong side and therefore was responsible for the accident. Except for some suggestions, there was no dent made to this testimony. The driver of the Maruti Alto car did not examine himself in this matter.

16. Similarly, even the motorcycle rider (Kedar Sawant) chose not to examine himself. The Tribunal has almost entirely gone by the evidence of Santosh Parab, who conducted the investigations in this accident and ultimately filed a charge sheet only against Kedar Sawant. The Tribunal completely ignored the appellant's

evidence concerning the Maruti Alto car driver. The Tribunal also failed to note that the Maruti Alto car driver chose not to examine himself and explain his version of the accident.

17. The evidence on record shows that the Maruti Alto car driver and the motorcycle rider were jointly responsible for this accident. Therefore, merely because the investigating authorities chose not to lodge an FIR against the Maruti Alto car driver and follow the same by a prosecution does not mean that the appellant has failed to prove the involvement of the Maruti Alto car in the accident or the negligence of the Maruti Alto car driver.

18. In such matters, rashness and negligence have to be decided on the touchstone of preponderance of probabilities. Accordingly, such issues must be determined by following the approach suggested by the Hon'ble Supreme Court in the cases relied upon by Mr. Menezes. In particular, the approach presented in *Dulcina Fernandes (supra)*, *Mangala Ram (supra)*, *Sunita & Others (supra)*, *Anita Sharma (supra)* and *Vimla Devi (supra)* is required to be followed.

19. Accordingly, following this approach, it would be reasonable to hold that this is a case of composite negligence

involving the driver of the Maruti Alto car and the motorcycle rider Kedar Sawant.

20. The motorcycle insurance company (respondent no.3) examined Santosh Parab as their witness. This witness has deposed that during his investigations, it was revealed that the rider of the motorcycle Kedar Sawant had no license to ride the motorcycle. Even Kedar did not examine himself and produce such license to discharge the onus that had shifted on him. Therefore, this is a fit case to make pay and recover order following the precedents in similar circumstances.

21. Accordingly, the finding of the Tribunal on the issue of rashness and negligence is now reversed. Consequently, respondents no.1, 2, and 3 on the one hand and respondents no.4 and 5 on the other are held jointly and severally liable to pay the appellant the above determined compensation amount together with interest in equal interest proportions. This means that respondents no.1, 2, and 3 will have to pay 50% of the awarded amount, and respondents no.4 and 5 will have to pay the balance 50% of the awarded amount.

22. However, it is clarified that in the first place, respondent no.3 will have to pay 50% of the awarded amount together with

interest thereon. After that, respondent no.3 will be entitled to recover this amount from respondents no.1 and 2.

23. Respondents no.3 and 5 are directed to deposit the awarded amount with interest in this Court within eight weeks after giving due intimation to the learned counsel for the appellant. Upon deposit, the appellant can withdraw the deposited amount by furnishing proper identity documents and bank details. The Registry to ensure that the amount is deposited directly into the bank account of the appellant-claimant.

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

M. S. SONAK, J.

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