

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.107/2018

1. The New India Assurance Co. Ltd. a Government of India undertaking, having its Branch office at Jagannath Building, 2nd Floor, Jose Inacia De Loyola road, Margao, Salcete, Goa. Through its authorized signatory & Manager Ms. Rishika Ojha.

... APPELLANT

Versus

1) Vallabh Prabhudessai, S/o Pandurang Prabhudessai, Aged 44 years, occupation driver, Resident of H. No. 326, Cusman Qupem, Goa, 403705 (original Claimant)

2) Mateus Pereira, s/o Sebastiao Pereira, Major in age, R/o H. No. 19, Devlamol, Malkarnem, Quepem, Goa.

3) United India Insurance Co. Ltd. Having Divisional office at 9, Rohit Chambers, 5th Floor, Janmbhoomi Marg, Fort Mumbai, Maharastra, 400001.

4) Damodar Anjikhani, s/o Jankoji Anjikhani, r/o H. No. 24, Near Chapel Bobrimoddi, Quepem, Goa.

5) Sameer Langote, s/o Yamaji
Langote, r/o H. No. 296, Gauliwado,
Fatorda, Salcete Goa.

... RESPONDENTS

Mr. Amey Kakodkar, Mr. Pankaj Shirodkar and Ms. Amanda
Godinho, Advocates *for the Appellant*.

Mr. V. G. Kurtikar, Advocate *for the Respondent No.1*.

Mr. A. R. S. Netravalkar, Advocate *for the Respondent No.3*.

CORAM.: M. S. SONAK, J.

DATED: July 22, 2022

ORAL JUDGMENT:

1. Heard Mr. Amey Kakodkar for the Appellant, Mr. Kurtikar for Respondent No.1, and Mr. A. R. S. Netravalkar for the Respondent No.3-insurer of the Sumo vehicle. The remaining respondents are duly served but are neither present nor represented in this appeal.

2. This appeal is instituted by the insurance company of the motorcycle bearing Registration No.GA-08-L-0632, which was involved in the accident with the Tata Sumo bearing Registration No.GA-09-A-9264 on 18.02.2014. The claimant was the pillion rider on the motorcycle and suffered injuries that resulted in his permanent disablement.

3. The Tribunal has held that the motorcycle driver was solely responsible for the accident and not the driver of the Tata Sumo. Further, the Tribunal has determined the compensation at ₹23,50,000/- and awarded interest @ 9% p.a. from the date of the claim petition.

4. Mr. Kakodkar, learned counsel for the insurer of the motorcycle, submits that leave was obtained under Section 170 of the Motor Vehicles Act. Therefore, the insurance company is entitled to raise all contentions. He proposes that the evidence on record establishes that the accident occurred due to the rashness and negligence of the Tata Sumo driver. In the alternative, he submits that this is a case of composite negligence, and the Tribunal erred in not holding the driver of Tata Sumo equally responsible for the accident. He proposed that the combined negligence should be assessed on an equal basis between the driver of the motorcycle and the Tata Sumo driver.

5. Mr. Kakodkar referred to the pleadings on record. He submitted that the accident occurred in the middle of the road when the Tata Sumo driver saw the motorcycle about 3 to 4 meters away before the accident. He submits that the Tata Sumo driver and his witnesses have taken contradictory stands in variance with the pleadings. He offers that Gregorio Menezes

(RW5) was not an eyewitness to the accident and his testimony deserved rejection.

6. Mr. Kakodkar also submitted that the claimant was drawing a salary for only 11 months in a year, and the Tribunal overlooked this aspect. However, Mr. Netravalkar, learned counsel for the insurance company, as the insurer of the Tata Sumo vehicle, pointed out that the claimant earned a salary only for 10 & ½ months a year and not 12. Based on this, the learned counsel submitted that the computation made by the Tribunal is incorrect, and the same must be reduced.

7. Mr. Vaman Kurtikar, learned counsel for the claimant submitted that this was indeed a case of composite negligence. However, on the issue of quantum, he proposed that the award towards pain and suffering and loss of amenities is inadequate. He pointed out that the claimant has suffered a permanent disability since his right leg has been paralyzed. He submits that in similar circumstances, the Hon'ble Supreme Court, in the case of *Erudhaya Priya v. State Express Transport Corporation Ltd. - 2020 ALL SCR 1616* awarded ₹2,00,000/- towards pain and suffering and ₹1,50,000/- towards loss of amenities. Therefore, he submits that the compensation amount should be enhanced to ₹3,50,000/-.

8. Mr. Netravalkar submits that there is no evidence of any rashness and negligence on the part of the Tata Sumo driver. On the other hand, he states that there is clear evidence of rashness and negligence on the part of the motorcycle driver. He points out the evidence of the Tata Sumo driver, his wife, his brother, and Gregorio – an independent eyewitness. He submits that the evidence of all these witnesses establishes that the accident occurred due to the motorcycle driver's rashness and negligence.

9. Mr. Netravalkar submits that the motorcycle owner/driver did not even choose to file any written statement in the matter. He, therefore, offers that their testimony is of no avail and should have been rejected by the Tribunal.

10. Mr. Netravalkar submits that the sketch attached to the panchanama corroborates the ocular evidence of the above witnesses. Based on all this material, the Tribunal was justified in holding that the accident occurred due to the rash and negligent driving of the motorcycle driver.

11. Mr. Netravalkar maintained that the compensation awarded by the Tribunal was excessive because the Tribunal failed to notice that the claimant earned a salary only for 10 & ½ months and not 12 months. Based on this, Mr. Netravalkar

submitted that compensation should be reduced by at least ₹2,50,000/-.

12. Mr. Kakodkar and Mr. Netravalkar submitted that the accident, in this case, took place only in the year 2014, and therefore the award of interest @ 9% p.a. was not appropriate. Consequently, they proposed that the interest could be a maximum of 7% p.a.

13. The rival contentions now fall for my determination.

14. On the aspect of quantum of compensation, there is some substance in the contention of Mr. Kakodkar and Mr. Netravalkar that the claimant was drawing a salary for 10 & ½ months or a maximum of 11 months in a year. The Tribunal has taken his salary earnings for the year, i.e., 12 months. To that extent, there will be a reduction of around ₹2,00,000/- in the head under ii(b) as determined by the Tribunal.

15. However, the evidence on record also establishes that the claimant has suffered severe injuries leading to his medical disablement to the extent of 28% but functional disablement to the extent of 100%. The claimant's right leg is paralyzed. The claimant had to be admitted to the hospital for 25 days and

undergo an operation involving implants in his leg. There is evidence of the pain and suffering, yet the Tribunal awarded him compensation of only ₹15,000/- under the head of pain and suffering.

16. Similarly, the compensation for loss of amenities, i.e., the right leg, is too inadequate. Accordingly, the Tribunal has awarded only ₹28,000/- towards the loss of amenities.

17. Therefore, even after accepting Mr. Kakodkar and Mr. Netravalkar's contentions about salary computation, it is apparent that the reduced amount will have to be recouped again by enhancing compensation for pain and suffering and loss of amenities.

18. In *Erudhaya Priya (supra)*, compensation of ₹2 lakhs was awarded towards pain and suffering and a further ₹1,50,000/- towards loss of amenities. However, the facts in the said case are not entirely similar to those in the present case. There was evidence of the victim requiring hospitalization on eight occasions due to fractures in the arms and legs. There was also evidence of admission for eight months.

19. Therefore, in the facts of the present case, compensation under head ii(a) will have to be reduced, but compensation under the head ii(b) and (iv) will have to be proportionately enhanced. Thus, both these amounts can be set off against each other, obviating the necessity of interfering with the quantum of compensation determined by the Tribunal.

20. On the aspect of interest, however, Mr. Kakodkar and Mr. Netravalkar are justified in submitting that the same is excessive. The accident, in this case, took place in the year 2014, and therefore, interest @ 7% p.a. would be appropriate.

21. The next aspect to be considered is whether the Tribunal was right in holding that the motorcycle driver was solely responsible for the accident in which the claimant suffered the above injuries.

22. The claimant had pleaded that the Tata Sumo driver was driving rashly and negligently and, therefore, was responsible for the accident. On the other hand, the Tata Sumo driver and his insurance company had pleaded that the motorcycle driver was solely responsible for the accident.

23. The police authorities, in this case, chose not to launch any prosecution against any of the parties because they believed that the accident was due to the intervention of a buffalo. However, this was neither the case of the claimant/motorcycle driver nor the case of the Tata Sumo driver in their pleadings. However, on behalf of the Tata Sumo driver, suggestions were put to the claimant's witnesses about the intervention of the cattle/buffalo. Similarly, suggestions were also put about the motorcycle being flung and dashing against the windscreen of the Tata Sumo. Finally, even a case was put up that the Tata Sumo was parked, yet the motorcycle driver, rashly and negligently, dashed against the Tata Sumo.

24. Mr. Kakodkar is right in submitting that the Tata Sumo driver has taken contradictory stands. In the pleadings, a simple case of negligence was alleged against the motorcycle driver. However, as the evidence progressed, several contradictory theories were attempted to be placed on record. One was about the intervention of the cattle/buffalo, the second about the motorcycle being flung and hitting the windscreen, and the third about the Tata Sumo being parked. However, none of these theories have the backing of either pleadings or other evidence on record.

25. The driver of Tata Sumo deposed that he saw the motorcycle at a distance of about 3 to 4 meters before the collision. However, the Tribunal has recorded a finding precisely to the contrary by misreading this portion of Tata Sumo driver's evidence. The Tata Sumo driver discovered that the accident did not occur in the middle of the road. However, his wife, sitting in the Tata Sumo and deposed in the matter, clearly stated that the accident happened in the middle of the road.

26. Gregory's evidence hardly inspires any confidence. It is doubtful whether he was an eyewitness because he claims not to have told the police anything about the accident even though he was cited as Pancha. Again, his testimony does not correspond to the pleadings or the various theories or versions put up by and on behalf of the Tata Sumo driver during the evidence.

27. Thus, the evidence on record establishes that the accident occurred in the middle of the road. It also shows that the Tata Sumo driver saw the motorcycle at a distance of about 3 to 4 meters before the impact. The evidence also establishes that there was a slight curve on the road where the accident took place. The evidence also shows the shifting stances of the Tata Sumo driver. Finally, the evidence also establishes that the motorcycle driver and the claimant were rendered unconscious due to the accident,

and the panchanama was virtually prepared as per the dictates of the Tata Sumo driver, or at least the Tata Sumo driver had a significant role in its preparation. Based on all this, a case of composite negligence is made out.

28. The evidence on record, at least by a preponderance of probabilities, supports the appellant's case that the Tata Sumo driver was equally responsible for the accident. Thus, the liability of the motorcycle driver and the Tata Sumo driver will have to be apportioned equally. Their respective insurers will also be equally liable.

29. For the above reasons, this appeal is partly allowed. The motorcycle owner/driver and the Tata Sumo owner/driver, together with the insurers of their vehicles, are held equally liable to pay the compensation amount awarded by the Tribunal. Since this is a case of composite negligence, these parties will have to bear the liability in the proportion of 50% each.

30. The appellant and respondent nos.2 and 3 are directed to deposit the compensation amount as determined in this order in equal proportions within eight weeks from today after giving intimation to the learned counsel for the claimant.

31. Upon deposit, the claimant will be entitled to 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 claimant.

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

M. S. SONAK, J.

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