

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.65/2019

1. SHRI ANDREZ SONYA
VANGAD alias ANDREW
FERNANDES, son of Sonya Vangad,
aged 49 years, service, married and
his wife

2. EFFIE FERNANDES alias EFFIE
CONCEICAO FRANCISCA
FERNANDES, aged 48 years,
service, both residents of House
No.821 (old) 237 (New), Kalsoi
Wado, Village Codali, Kirlapal-
Dabhal, Taluka Dharbandora 403406.

... APPELLANTS

Versus

1. SHRI SUMIT GAONKAR, son of
Vithoba Gaonkar, rider of motorcycle
bearing registration number G.A. 09-
J-7740, resident of 35, Zariwado,
Cotarli, Sanguem Goa 403704.

2. SHRI SANGAM GAONKAR, son
of Ganesh Gaonkar, owner of
motorcycle bearing registration
number GA 09-J-7740, resident of
House No.128, near Puirish
Devasthan, Madhala Wada, Cotarli,
Sanguem Goa 403704.

3. NATIONAL INSURANCE
COMPANY LTD., Insurer of

motorcycle bearing registration
number GA 09-J-7740, Branch office
at Margao Goa.

... RESPONDENTS

Mr. S. S. Kakodkar, Advocate *for the Appellants*.

Mr. U. R. Timble with Ms. Yadika Mandrekar, Advocates *for the Respondents No.3*.

CORAM.: M. S. SONAK, J.

DATED: July 14, 2022

ORAL JUDGMENT:

1. Heard learned counsel for the parties.
2. The parents of 19-year-old Stenzil, who died in a vehicular accident on 04.02.2014, appeal Judgment and Award dated 21.02.2019 in Claim Petition No.138/2014 made by the Motor Accident Claims Tribunal at Margao (Tribunal).
3. The Tribunal determined the compensation at ₹15,82,000/-by the impugned award. But the Tribunal held that Stenzil contributed to the accident to the extent of 70%. Based on this finding of contributory negligence, the Tribunal awarded the parents a total compensation of ₹5,24,000/- with interest @ 6% p.a. from the date of the petition till payment.

4. Mr. Kakodkar, the learned counsel for the appellants, raised two grounds in support of this appeal:-

(ii) That the finding about contributory negligence or, in any case, the apportionment was erroneous and not supported by the evidence on record;

(ii) That Stenzil's income should have been assessed at more than ₹10,000/- per month.

5. Mr. Kakodkar relied on *The Senior Divisional Manager¹, The National Insurance Company Ltd. vs. Shri Jyotiba Appaji Shigate², Sudhir Kumar Rana vs. Surinder Singh & Ors.* and *M. R. Krishna Murthi vs. New India Assurance Company Limited & Ors.³* in support of his contentions.

6. The respondents were duly served. However, only respondent no.3-insurance company, is represented by Mr. U. R. Timble. Since no leave was granted to the insurance company under Section 170 of the M.V. Act, Mr. Timble could not make any submissions on the two grounds raised by the appellants.

1. 2020 (1) ALL MR (Journal) 70

2. AIR 2008 SC 2405

3. (2020) 15 SCC 493

7. The claimants have examined Ubaldino Fernandes (AW2) and Roy Fernandes (AW3) as eyewitnesses to the accident. Respondent no.1 (R1), the rider of the other motorcycle involved in the accident, also deposed in the matter.

8. From the assessment of the evidence of these three witnesses, it transpires that Stenzil only possessed a learner's license. He was not accompanied on his motorcycle by any other person. Stenzil was not even wearing a helmet at the time of the accident. The evidence also indicates that he was in the process of taking a U-turn when the other motorcyclist (R1) dashed him. The two witnesses examined by the claimants have deposed that Stenzil was riding the motorcycle at a speed of hardly 10 to 15 km. per hr. because he was in the process of taking a U-turn. They have also deposed to the manual and mechanical signals he gave before attempting the U-turn.

9. The evidence also shows that the accident occurred on a straight and relatively wide road. Even R1 admitted seeing Stenzil for the first time when he was about 100 mtrs. away. R1 also accepted the position of the vehicles as reflected in the Panchanama. He admitted the existence of a road divider. He admitted that he had not pleaded about the speed at which he

was driving. He denied the suggestion about Stenzil's manual and mechanical signals when taking the turn.

10. Based on the above evidence, the Tribunal concluded that Stenzil contributed to the accident to the extent of 70%. The Tribunal, in determining this percentage, took into account the circumstances that Stenzil only had a learner's license; he was not wearing a helmet; there was no pillion rider accompanying him, and there was no "L" mark on his motorcycle. The Tribunal also considered Stenzil attempting a U-turn without clearly indicating his intention.

11. There is no positive evidence on record about the absence of an "L" mark on the motorcycle Stenzil was riding. None of the witnesses have deposed to this circumstance. The Tribunal has based its conclusion on the absence of this description in the Panchanama. This may not be appropriate, mainly since no questions were posed to any of the witnesses on this issue. Even R1, in his deposition, did not advert to this issue.

12. Mr. Kakodkar referred to the Karnataka High Court decision in *Jyotiba Appaji Shigate (supra)*, in which it is held that in the case of a two-wheeler, there is no rule about learner being accompanied by an instructor. These observations were

undoubtedly made in the context of the contentions about a breach of insurance policy terms.

13. In *Sudhir Kumar Rana (supra)*, the Hon'ble Supreme Court has held that driving a vehicle without a license may amount to an offense, but in all cases, that may not lead to a finding of negligence. There has to be some nexus between the rider not having a license and the accident. Otherwise, an inference of rashness and negligence cannot be drawn mechanically.

14. In my judgment, considering the evidence on record cumulatively, a case of contributory negligence has no doubt been made out. However, the percentage of negligence attributed to Stenzil is relatively high. The evidence on record does not support this percentage. R1 admitted seeing Stenzil at a distance of almost 100 mtrs. There is evidence about the road being straight and wide. There was no issue of visibility involved. In these circumstances, R1's negligence was marginally higher than Stenzil's. Thus construed, Stenzil's negligence or his contribution to the accident can be quantified at 40% and not 70%. The first point for determination stands answered accordingly.

15. On the aspect of Stenzil's income, the award is entirely consistent with the claimants' pleadings and their evidence. Admittedly, Stenzil was not earning anything at the time of the accident, but he was a student undertaking the refrigeration and air conditioning course.

16. The claimants had not only claimed but had also deposed that after his education, Stenzil would have gotten a job beginning with a salary of about ₹10,000/- per month. The Tribunal accepted this version. Mr. Kakodkar, however, submits that the pleadings and evidence were that Stenzil would have earned this amount "initially."

17. The deceased's income has to be construed at the time of the accident. Here, the Tribunal has accepted the claimants' case about Stenzil's potential to earn ₹10,000/- per month, even before he could actually complete his education, get a job and earn this amount. Besides, the Tribunal, quite correctly, has made an addition of 40% towards the future prospects consistent with the law in *National Insurance Co. Ltd. vs. Pranay Sethi & Ors.*⁴. Based on all this, the Tribunal has quite correctly determined the compensation towards dependency at ₹15,12,000/-.

4. 2017 (16) SCC 680

18. The Tribunal has, however, erred in awarding only ₹40,000/- towards the consortium. Since there were two claimants, compensation of ₹40,000/- each should have been awarded to them. The compensation amount thus can be assessed at ₹16,22,000/-. Therefore, the appellants will be entitled to compensation of ₹9,73,200/- considering that Stenzil contributed to the accident to the extent of 40%.

19. The appeal is partly allowed, and the compensation amount is enhanced to ₹9,73,200/- in substitution for compensation of ₹5,24,000/- awarded by the Tribunal. Accordingly, the directions about interest are sustained.

20. The respondents are jointly and severally held liable to pay the appellants the above compensation together with interest from the date of the petition till the effective payment. Accordingly, the respondents, including in particular respondent no.3-insurance company, are directed to deposit in this Court the enhanced component together with interest thereon @ 6% p.a. from the date of the petition within six weeks from today. However, before making a deposit, intimation should be given to the learned counsel for the appellants.

21. Upon deposit being made, the appellants will be entitled to withdraw the deposited amount. For this, the respondents must provide identity documents and bank details. The Registry must transfer the deposited amount to the bank accounts of the appellants directly.

22. There shall be no order for costs.

M. S. SONAK, J.

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