

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO. 55 OF 2022
WITH
CIVIL APPLICATION NO. 51 OF 2022

1. The Director General of Police,
Police Headquarters, Panaji, North Goa,
Goa.

2. The State of Goa,
through its Chief Secretary, Office of
Goa Legislative Complex,
Porvorim, Goa.

..... Appellants.

Versus.

1. Jose Francisco Fernandes,
son of Sebastao Fernandes, aged 42 years
old, married, residing at House
No.9/91, Surbanwado, Pernem, Goa.

2. Gopal Anant Desai
(driver of bus) resident of House
No.215, Talewado, Palem, Bicholim,
Goa.

..... Respondents.

Mr. Pravin Faldessai, Addl. Govt. Advocate for the
Appellants.

Ms Megha Y. Salkar, Advocate for Respondents No.1.

CORAM : M. S. SONAK, J.

DATE : 6th October 2022

ORAL JUDGMENT: -

1. Heard Mr Pravin Faldessai learned Additional Govt. Advocate for the Appellants and Ms Salkar for Respondent No.1 (Claimant).

2. On 22nd September 2022, this Court made the following order :

"1. By a separate order, delay in instituting this Appeal has been condoned. Accordingly, with the consent of the learned Counsel for the parties, the Appeal is taken up for admission and the civil application for interim relief.

2. Considering the short issue involved, the learned Additional Government Advocate and Ms. Salkar for the claimants agree that this matter can be disposed of finally by calling for Records and Proceedings. Accordingly, Records and Proceedings are called. The Registry to ensure that such Records and Proceedings are available by 06.10.2022, latest. The Appeal will be decided based on such Records and Proceedings.

3. Stand over to 06.10.2022."

3. Accordingly, the record and proceedings are before me. With the assistance of the learned Counsel for the parties, the Appeal is taken up for final disposal after admitting the same. This is with the consent of the learned Counsel for the parties as recorded in the order dated 22nd September 2022.

4. Mr Faldessai submits that the finding on the issue of rashness and negligence is incorrect and the same warrants interference. He presents that the Appellants' bus driver was turning after giving the necessary signal; therefore, it was the Claimant's duty to have stopped his motorcycle. He submits that there is no case of rashness and negligence on the part of the Appellants' bus driver; therefore, there was no liability for the Appellants to pay the compensation awarded.

5. Mr Faldessai states that the compensation awarded is also excessive because no proper evidence was given about the income and, in any case, the loss of income. He points out that the disability is facial paralysis, and there was no functional disability. Based on the aforesaid, Mr Faldessai submits that this Appeal may be allowed.

6. Ms Salkar, the learned Counsel for the Claimant, submits that the evidence on record duly supports the finding of rashness and negligence. She points out that it was the bus driver's duty to have stopped the bus and, only upon ascertaining that there was no vehicle behind him, proceeded with the turn. She points out that there is no evidence about the signal.

7. Ms Salkar points out that the compensation awarded is less than just compensation. She states that even though the employer could not be examined, the Tribunal should have considered notional income. She submits that due to the 20% disability suffered by the Claimant, he could not resume his work as a Restaurant In-charge. She presents that the Claimant has a minor daughter who has to provide for, and due to the accident, it has been increasingly difficult for him to serve and provide for himself and his daughter. She relies on *The New India Assurance Company Ltd. vs. Smt. Fatima Malik Shaikh and ors.*¹ to submit that the compensation can be enhanced even though the Claimant files no appeal or cross-appeal.

8. The rival contentions now fall for my determination.

9. The first issue is about the rashness and negligence of the bus driver. In this case, there is ample evidence on record to sustain the finding of rashness and negligence recorded by the Tribunal. There is no evidence about the signal being given by the bus driver. From the evidence on record, it is apparent that the bus driver was negligent before turning. The evidence shows that the driver did not bother to see if any vehicle was following him or if the same was likely to be affected by the proposed turn.

1. First Appeal No.10 of 2016 decided on 7.4.2022

10. A specific defence was taken about the Claimant carrying a bag of coconuts on his motorcycle, thereby losing control. However, there is no convincing evidence on this aspect. Even DW.2, who was examined on behalf of the Appellants, had not stated this alleged circumstance in his statement to the Police. Further, he did not explain why this critical fact, assuming that the same was a fact, was never stated by him in his Police statement.

11. The Tribunal has evaluated the evidence in its proper perspective. The Tribunal was also mindful of the legal position that the issue of rashness and negligence has to be established on the touchstone of preponderance of probabilities and not beyond a reasonable doubt. Upon cumulative consideration of these circumstances and the law on the subject, I believe no case is made to interfere with the finding of rashness and negligence.

12. On the issue of compensation, again, no error warrants a reduction of the compensation awarded. The Tribunal, in this case, has held against the Claimant for failure to examine the employer. However, there was evidence about the Claimant working as an In-charge in Rizwan's Real Relish Restaurant at Calangute, which Yunus Ali owned. He produced a salary

certificate issued. Therefore, the Claimant's income should have been at least notionally taken at ₹5,000/- per month. Furthermore, there is evidence that the Claimant was admitted to a hospital from 31/10/2015 to 14/11/2015 for treatment. A further period of at least 15 days was necessary for recovery; therefore, an amount of ₹5,000/- was due to loss of income.

13. The Claimant had claimed ₹18,000/- towards transportation expenses. However, the Tribunal has awarded only ₹10,000/-. Therefore, there was no reason to deny the balance ₹8,000/-.

14. The Claimant is entitled to further compensation of ₹35,000/- towards future medical expenses. This is because AW.2, the Doctor has stated that a person with facial paralysis is given physiotherapy and that the Claimant would require such physiotherapy in the future. In addition, there is evidence of about 20% of disability because of facial paralysis; as a result, further medical treatment cannot be ruled out. Ms Salkar points out the evidence which suggests that the Claimant was rendered unfit to work in the future. However, considering the extent and nature of the disability, this contention cannot be accepted.

15. The Claimant is entitled to additional compensation of approximately ₹48,000/-. Thus, in this case, the just compensation would be ₹4,52,236/- and not merely ₹4,04,236/-.

16. In the case of *Surekha and others vs. Santosh and others*², the Hon'ble Supreme Court has held that the appellate Court should not deny just compensation to the claimants merely because they may not have preferred any cross-objection or cross-appeal. This Court has also held the same in the State of *Maharashtra vs Kamaladevi Kaushal and others*³ and *New India Assurance Co. Ltd. Vs Seema Sudam Auti and others*⁴. In *Kadamba Transport Corporation Ltd. Vs Smt. Akshata Santosh Sawant and others*⁵, the same proposition has been reiterated. The above position was also reiterated in *Fatima Malik Shaikh* (supra).

17. For all the above reasons, this Appeal is disposed of by modifying the Award and directing the Appellants to pay the Claimant a compensation of ₹ 4,52,236/- with interest at the rate of 9% per annum from the date of the petition until final payment.

2. (2021) 201 PLR 795

3. FA No.103/2017 decided on 15.3.2017

4. FA No.1991/2011 decided on 9.6.2017

5. FA No.110/2015 decided on 10.3.2022

18. Usually, the interest should have been around 7% per annum in this matter. However, this is a case where the Claimant has to look after his minor daughter. In addition, the Claimant has also had facial paralysis. Therefore, even though his case about being disabled to do any work may not be correct, his ability will likely affect his employment. Thus, considering all these aspects, interest is maintained at 9% per annum.

19. The Respondent-Claimant is now permitted to withdraw the deposited amount, with interest, if any, that shall have accrued thereon. Appellants should also pay the additional amount and interest within 4 (four) weeks from today by depositing the same in this Court. The Appellants should give necessary intimation to the learned Counsel for the Claimant. Upon deposit, liberty is given to the Claimant to withdraw the said additional amount.

20. The Claimant will have to furnish proper identity and bank details. The Registry to ensure that the amounts are directly transferred into the Bank account of the Claimant.

21. The Appeal is disposed of in the above terms. The record and proceedings will be sent to the appropriate Court once the appeal period is over.

22. Misc. Application does not survive because of the disposal of the Appeal. Accordingly, the same is also disposed of. Accordingly, there shall be no order for costs.

M. S. SONAK, J.

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