

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.110/2015

KADAMBA TRANSPORT
CORPORATION LTD.,
a Company having their
Registered Office at Paraiso de Goa ,
Porvorim, Goa, represented herein by
their Managing Director MR. DERRICK
PEREIRA NETO, major, married,
service, having address at Porvorim, Goa. ... APPELLANT

Versus

1. SMT. AKSHATA SANTOSH SAWANT,
widow of Late Santosh Sawant,
major of age, housewife

2. MISS. ANKITA SANTOSH SAWANT,
major in age, service,

3. MR RAMNATH SANTOSH SAWANT,
major in age, student,

all resident of H No. 235-F-3, Holibhat,
Talaullim, Ponda, Goa .

4. SHRI RAJU JAGNATH PARWAR,
major, s/o Mr. Jagnath Parwar, driver
Kadamba Transport Corporation,
r/o Porwal, Khorjuem, Aldona,
Bardez, Goa. ...RESPONDENTS

Mr. Ajit Kantak, Advocate for the Appellant.

Mr. V. G. Kurtikar Advocate for the Respondent Nos.1, 2 and 3.

CORAM: M. S. SONAK J.

DATED: 10th March 2022

JUDGMENT:

1. Heard Mr. Ajit Kantak for the appellant and Mr. Vaman Kurtikar for respondents no.1, 2, and 3 (Claimants).

2. The challenge in this appeal is to the Judgment and Award dated 24.03.2015 in Claim Petition No.105/2011 made by the Motor Accident Claims Tribunal, Panaji (Tribunal) awarding the claimants compensation of ₹27,00,000/- with interest @ 9% p.a. on account of the demise of Santosh Sawant upon whom the claimants were dependent in a vehicular accident on 05.08.2011 at Sao Pedro, Old Goa.

3. Mr. Kantak, learned counsel for the Kadamba Transport Corporation (KTC), submitted that there is no evidence to establish any rashness and negligence on the part of the driver of the KTC bus. He submitted that there is variance between the pleadings and proof and the claimants failed to establish that the accident took place as pleaded by them. He submits that the sketch annexed to the panchanama, if evaluated in a proper perspective, makes it evident that the accident took place on

account of rashness and negligence on the part of late Santosh Sawant, and further there was no rashness and negligence on the part of the KTC bus driver. He made several submissions in the context of the sketch to submit that the same was incorrect on the aspect of the spot of the accident. He submitted that the driver of the KTC bus was already acquitted in criminal proceedings lodged against him. He submitted that the driver of the KTC bus i.e. respondent no.4 herein has deposed in this matter and explained in great detail how the accident took place due to the negligence of late Santosh Sawant. He submits that all this evidence has not been properly assessed by the Tribunal and therefore the finding of the Tribunal on rashness and negligence warrants reversal.

4. On the aspect of compensation, Mr. Kantak submitted without prejudice that the Tribunal erred in awarding compensation of ₹1,00,000/- towards loss of consortium when the decision in the case of *National Insurance Company Ltd. v. Pranay Sethi & Ors. - 2017 (16) SCC 680* very clearly provides that the compensation towards loss of consortium should be only ₹40,000/-. He submitted that the compensation of ₹1,00,000/- towards loss of care and protection for children is also unheard and the same is required to be deleted because of *Pranay Sethi (supra)*. He submitted that the compensation

towards funeral expenses should have been ₹15,000/- and not ₹25,000/-. He submitted that the Tribunal has failed to deduct the tax component from the salary and therefore the compensation towards dependency is also excessive.

5. Mr. Kantak finally submitted that in this case the finding of rashness and negligence recorded by the Tribunal should be reversed and the claim petition should be dismissed. In the alternate, he submitted that the compensation amount should be suitably reduced on account of the errors pointed out by him. He submitted that this appeal should be accordingly allowed.

6. Mr. Kurtikar, learned counsel for the claimants defended the impugned award based on the reasoning reflected therein. He however submitted that the claimants are entitled to additional compensation, in terms of the decision in *Pranay Sethi (supra)* and *Magma General Insurance Co. Ltd v. Nanu Ram Alias Chuhru Ram – 2018 (18) SCC 130*. He submitted that the Appellate Court is competent to determine the just compensation even in the absence of an appeal by the claimants.

7. Mr. Kurtikar submitted that the evidence on the aspect of rashness and negligence has to be construed holistically and there is no error whatsoever in the finding recorded by the Tribunal on

the aspect of rashness and negligence. He relies on *Sunita and others v. 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* in support of this proposition. He also relies on the decisions of this Court in *Narcinvha Chari v. Mr. Joao Faria & Ors. in First Appeal No.34 of 2017*, *Smt. Neha Nilesh Arlekar and others v. Mr. S. D. Rocky & Ors. in First Appeal No.23 of 2015* and *Shri Rama Andrade v. Shri Sameer R. Salgaonkar in First Appeal No.62 of 2015*.

8. Rival contentions now fall for my determination.

9. This is a case where Santosh Sawant, aged about 53 years sustained serious injuries to his head, brain, chest, abdomen, and other parts of the body on account of a head-on collision with the KTC bus bearing registration no.GA-01-X-0383 when he was traveling on his Dio scooter bearing registration no.GA-05-C-7146 from Panaji to Ponda. The deceased Santosh was shifted to the Goa Medical College (GMC) in an unconscious state by 108 ambulance soon after the accident that took place at 13.15 hrs. on 05.08.2011, however, he succumbed to the injuries on the same day at about 18.35 hrs.

10. The first claimant is Santosh's widow, a housewife, who was suffering from cancer and taking treatment at the GMC. The second claimant is his daughter who was, at the time of the accident, a student of Second Year L.L.B. Course at Ramnath Kare College, Margao. The third claimant is his son who, at the time of the accident, was studying the Engineering Diploma Course at the Government Polytechnic, Panaji.

11. There is no dispute and in any case, there is ample evidence that deceased Santosh at the time of the accident was working as an Upper Division Clerk with Shikshan Prasarak Sangh's Shree Mahalaxmi English High School, Talaulim, Ponda, Goa which is a Government-aided school. He had a permanent job with a monthly salary of ₹28,026/-. All this is established based on both oral as well as documentary evidence and to which there was no serious challenge. Mr. Kantak only pointed out that the tax component had to be deleted before determining the net income of deceased Santosh.

12. There is also no dispute about the involvement of the KTC bus in the accident. The only dispute is whether the accident took place on account of the rashness and negligence on the part of the driver of the KTC bus or whether the accident took place

on account of any rashness and negligence on the part of deceased Santosh.

13. In this case, there is no dispute that the accident was reported to the Old Goa Police Station and an FIR was lodged soon after the accident. The police authorities reached the site, carried out a panchanama, and drew a sketch (Exh.27). Surendra Dhure, Head Constable attached to Old Goa Police Station deposed in this matter as AW2.

14. Though AW2 was not an eyewitness to the accident, as a Head Police Constable he deposed of the information received, the FIR lodged preparation of panchanama, drawing of the sketch, and other investigations that he carried out in the matter. He specifically deposed that he observed marks of the accident at the spot which he depicted as the place of the accident on the sketch to the panchanama. He deposed that his investigations had revealed that the KTC bus was proceeding from Ponda to Panaji and the scooter was proceeding from Panaji to Ponda. He deposed that his investigations revealed that the KTC bus had come totally on the wrong side of the road and dashed against the scooter. He also deposed that his investigations revealed that the scooterist i.e. deceased Santosh had no chance to avoid the

accident. He deposed that based on his investigations, the prosecution was lodged against the driver of the KTC bus.

15. The cross-examination of AW2 did not make any significant dent in his deposition. He maintained that the KTC bus was in the middle portion of the road. The Tribunal has quite correctly evaluated and assessed the evidence of AW2 and based on the sketch and other investigation papers quite correctly concluded that it was the KTC bus that was driven in a rash and negligent manner on the wrong side which caused the accident.

16. Significantly, AW2 denied the suggestion that the rider of the scooter had entered the main road from the left-hand side without paying any attention to the oncoming traffic and that for this reason, the KTC bus had to swerve to the right-hand side to avoid the accident. AW2 deposed that at least from the site, no such inference was possible. Mr. Kurtikar also pointed out that the evidence on record bears out that deceased Santosh, a U.D.C. in an aided school, had gone to Panaji for official work concerning the school and was returning to Ponda. Mr. Kurtikar submitted that there was no reason whatsoever for deceased Santosh to travel on some internal kaccha roads and then enter upon the main road, when in fact, the main road is a straight road from Panaji to Ponda. Mr. Kurtikar submitted, with some

justification that a patently false and even an unfair stance was taken by the KTC in this matter simply to avoid payment of compensation.

17. This is a case where an eye witness namely Kuso B. Naik - AW3 also deposed in the matter. He stated that the accident took place near the house of Shripad Naik, M.P., which is corroborated from other evidence on record. He stated that he saw the deceased riding his scooter on the main road proceeding from Panaji to Ponda and the KTC bus coming from the opposite direction, moving towards the extreme right-hand side (wrong side) in a rash and negligent manner and dashed the Dio scooter. In the cross-examination, there is no serious dent in the testimony of AW3.

18. The driver of the KTC bus (RW1) examined himself. He maintained that deceased Santosh came to the main road from the side of kaccha road. He maintained that seeing this, he applied breaks and swerved the KTC bus towards the right. He deposed that it is the deceased who was unable to control the scooter and came and dashed against the KTC bus.

19. In the cross-examination, AW3 was exposed. He could not answer why his version did not find support in the panchanama

and sketch annexed to it. He admitted not having protested against the lodging of FIR against him. He admitted not having complained about the sketch or panchanama. He had no explanation why he did not lodge any complaint against Santosh for rash and negligent driving. In short, the testimony of RW1 could not pass the muster of cross-examination.

20. Despite all this, Mr. Kantak, learned counsel for the KTC, tried to pick holes in the sketch and panchanama by submitting in the first instance that the same was clearly wrong and in the second instance that even based on such sketch, the negligence on the part of deceased Santosh was a matter of *res ipsa loquitur*. From the submissions of Mr. Kantak, it appeared that he was defending the driver of KTC, which is incidentally a Goa Government State Road Transport Corporation against some criminal charge. Mr. Kantak's submissions, almost suggested that the claimants had to prove the aspect of rashness and negligence beyond a reasonable doubt and not on the touchstone of preponderance of probabilities. The aspect of rashness and negligence in motor accident claim cases has to be established only on the touchstone of preponderance of probabilities.

21. In this case, there is overwhelming evidence to sustain the finding of rashness and negligence on the part of the driver of the

KTC bus. The material on record suggests that the KTC, in this case, has taken a false defense to defeat the claim petition though, fortunately, the KTC failed in this endeavor. The Tribunal, in this case, has correctly assessed and evaluated the evidence on record. The Tribunal has discussed in great detail in paragraph 16 how it was the driver of the KTC bus who was rash and negligent and thereby responsible for the accident in which the husband and the father of the claimants died.

22. Paragraph 16 of the impugned award reads as follows:

“16. With this evidence, it is clear that respondent no.1 stepped into the witness box and denied the contentions including the positions of vehicles shown in the panchanama and sketch. Thus aspect is clearly an afterthought as he did not lodge any protest or complaint with higher authorities with regard to such panchanama and sketch though he was arrested and prosecuted for such offence. The conductor of the bus was not examined to corroborate the contention of respondent no.1. One thing is clear that RW1 admitted that he was driving the bus from the middle portion of the road which is admittedly a national highway having a width of around 6 ½ to 7 mtrs., as shown in the sketch. The speed of the vehicle was on the higher side which is clearly depicting from the break marks found at the rear portion as well as the drag marks from the spot of impact which are around 8 mtrs. Thus, even after collision of both the vehicles, the driver was unable to stop the bus and the same was dragged with the scooter upto a distance of 8 mtrs., clearly shows that respondent no.1 was

driving the vehicle in rash manner. He did not disclose about the distance when he saw the scooter suddenly entering on the main road from the left-hand side slabs over the gutter. The impact shown in the sketch is on the right hand side while proceeding towards Panaji which means the scooter had already entered the portion of the road which proceeds towards Old Goa and there was sufficient place for the bus driver on his own portion of the road i.e. in the left 3½ mtrs. to pass through. He himself claimed that there was no movement of traffic at the relevant time and the accident took place in broad day light and hence it is not even the case of lack of visibility. Thus the contention of the bus driver cannot be accepted. It is well settled that a driver of a heavy and large vehicle has to take all precautions specifically while passing through the village portion of national highway and he has to take full care since the national highway is connected with the internal road of the village. The possibility of entering on national highway through the internal road is common and expected by such drivers. In such situation, the driver of a heavy vehicle is expected to control his vehicle within a short distance so as to avoid accidents. The Scene of Accident Panchanama and the sketch and specifically the drag marks clearly show that the bus was driven in excessive speed and beyond control of the driver. In-spite of noticing the scooter and the possibility of collision, he took it towards right-hand side of the road instead of remaining in his own lane, and thus it also shows the rash and negligent act on the part of the bus driver. It does not lie in the mouth of the bus driver to say or put a suggestion that there was sufficient space for a scooter rider when he himself admitted that he was driving the bus from the middle portion of the road i.e. crossing the dotted line and entering other side portion of the road. Thus, the entire material brought on record is against respondent no.1 and

hence the claimants succeeded in proving the aspect of rash and negligent act on the part of respondent no.1 in the said motor vehicular accident. Hence Issue no.1 stands proved and answered in affirmative."

23. In this case, the Tribunal has appreciated and assessed the evidence on record in the perspective expected of a Tribunal dealing with motor accident cases. In *Sunita (supra)*, *Anita Sharma (supra)*, *Neha Nilesh Arlekar (supra)*, *Narcinvha Chari (supra)* and *Rama Andrade (supra)*, it is held that the approach of the 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.

24. 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.

25. In *Sunita & Ors. (supra)*, the Hon'ble Supreme Court has held that it is well settled that in motor accident claims cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place because of the negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of a preponderance of probability

and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases.

26. In *Sunita & Ors. (supra)*, the Hon'ble Supreme Court held that the Tribunal had justly accepted the claimant's contention that the respondents did not challenge the propriety of the FIR and the charge sheet before any authority. The only defense raised by the respondents to this plea was that the FIR was based on wrong facts and was filed in connivance between the complainants and the police, against which the respondents had complained to the in charge of the police station and the District Superintendent of Police but to no avail. The Hon'ble Supreme Court noted that apart from this bald assertion, no evidence was produced by the respondents before the Tribunal to prove this point. The filing of the FIR was followed by the filing of the charge sheet for offenses under Sections 279, 337, and 304-A of IPC and Sections 134/187 of the MV Act, which, again reinforces the allegations in the said FIR insofar as the occurrence of the accident was concerned and the role of the driver in causing such accident. The Hon'ble Supreme Court did not approve the approach of the High Court in not even making a mention, let alone record a finding of any impropriety against FIR or charge sheet or the conclusion reached by the Tribunal,

and yet, the FIR and the charge sheet were found to be deficient by the High Court.

27. The Hon'ble Supreme Court in paragraph 27 specifically held that the Tribunal's reliance upon FIR No.247/2011 in the said case and the charge sheet, cannot be faulted as these documents indicated the complicity of the driver (respondent no.2) in the said matter. The Hon'ble Supreme Court held that the FIR and the charge sheet, coupled with other evidence on record, inarguably establish the occurrence of the fatal accident and also point towards the negligence of respondent no.2 in causing the said accident. The Hon'ble Supreme Court observed that even if the final outcome of the criminal proceedings against respondent no.2 is unknown, the same would make no difference at least to decide the claim petition under the MV Act. The Hon'ble Supreme Court referred to its decision in ***Mangla Ram v. Oriental Insurance Company Ltd. & Ors. - (2018) 5 SCC 656***, where it was held that the nature of proof required to establish culpability under criminal law is higher than the standard required under the law of torts to create liability.

28. In *Anita Sharma (supra)* the Hon'ble Supreme Court has reiterated that the standard of proof in accident claim cases is that of the preponderance of probabilities not beyond a reasonable

doubt. The Court held that *therefore the approach and role of 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 claimant's version is more likely than not true.*

29. Therefore, both on evaluation of facts as well as having regard to the legal principles laid down in the aforesaid matters, this is a case where the finding recorded by the Tribunal on the aspect of rashness and negligence on the part of the driver of the KTC bus will have to be not only sustained but endorsed. The fact that the driver was acquitted in criminal prosecution, is entirely irrelevant because the scope of the criminal proceedings and the standard of proof required to be adopted therein is different from one that is required to be adopted in motor accident claim cases.

30. On the aspect of compensation, as noted earlier there is proof, both oral as well as documentary, about deceased Santosh having an income of ₹3,27,365/- p.a. Mr. Kantak however pointed out that the salary certificate refers to deduction of income tax of ₹5,760/- and this amount will have to be excluded.

Mr. Kantak is quite right in his submission and the annual income of the deceased, after such deduction, can be taken as ₹3,21,605/-.

31. The Tribunal in this case, possibly based on some precedents in force at the relevant time, made an addition of only 3% towards future prospects. However, in terms of *Pranay Sethi (supra)* relied upon by Mr. Kantak himself an addition to the extent of 15% towards future prospects is warranted in this case because the deceased had a permanent job and was aged between 50 and 60 years i.e. 53 years at the time of the accident. This means that the annual income of deceased Santosh will have to be taken at ₹3,69,846/-.

32. A deduction of up to $1/3^{\text{rd}}$ is due for the personal expenses that the deceased would have incurred. This means that the dependency per annum would come to ₹2,46,566/-. There is no dispute in this case that the proper multiplier to be adopted is 11. This means that the total compensation towards dependency would come to ₹27,12,204/-.

33. Mr. Kantak, relying on *Pranay Sethi (supra)* submitted that the compensation towards consortium can be a maximum of ₹40,000/-. To the query from the Court as to whether the

compensation towards consortium has to be ₹40,000/- towards each of the claimants, Mr. Kantak submitted that the total compensation towards consortium cannot exceed ₹40,000/- according to *Pranay Sethi (supra)*. It is indeed surprising that such a contention should be advanced because such a contention is directly contrary to the decision of the Hon'ble Supreme Court in *Magma General Insurance Co. Ltd. (supra)* where the meaning and scope of the consortium has been explained to include not only spousal consortium but also parental consortium and filial consortium. In *Magma General Insurance Co. Ltd. (supra)* the Court has held that compensation of ₹40,000/- towards consortium should be awarded to each of the claimants. Therefore in this case the compensation towards the consortium would come to ₹1,20,000/-.

34. Mr. Kantak is however right in his submission that the Tribunal could not have made an award for loss of care and protection of children in an amount of ₹1,00,000/- or no amount at all. The award of compensation towards the consortium would possibly subsume this aspect. Mr. Kantak is also right that compensation towards funeral expenses should have been ₹15,000/- and not ₹25,000/-. However, further compensation of ₹15,000/- due towards loss of estate. Thus, in this case, applying

Pranay Sethi (supra) the just compensation works out to ₹28,62,204/-.

35. In *Surekha and Ors. v. Santosh and Ors. - (2021) 201 PLR 795* the Hon'ble Supreme Court has held that it is well settled that in the matter of insurance claim compensation about the motor accidents, the court should not take a hyper-technical approach and ensure that just compensation is awarded to the affected persons or the claimants even though such claimants may not institute any cross-appeal or cross-objections. Even otherwise, it is well settled that the Tribunals, as well as the Appellate Court, have to determine just compensation irrespective of the computation by the claimants themselves.

36. This is a case where deceased Santosh died entirely on account of rash and negligent driving by the driver of the KTC bus. The KTC in this case chose to raise a false defense simply to avoid payment of compensation. At the time of the demise of Santosh, his widow was stated to be suffering from cancer and taking treatment at the GMC. The two children were taking college education. This means that at the most crucial time of their lives, they lost their father. Considering all these aspects, this is a fit case to impose costs of ₹25,000/- on KTC. This appeal

is therefore dismissed with costs of ₹25,000/-. The just compensation is now determined at ₹28,62,204/-.

37. The appellant KTC will have to deposit the balance compensation amount and costs within four weeks from today. On the enhanced compensation amount as well the KTC will have to pay interest @ 9% p.a.

38. Mr. Kantak states that the awarded amount has already been deposited in this Court. If so, the claimants are at liberty to withdraw the same together with the interest that has accrued on this amount after submitting proper identification and bank details. The Registry to ensure that the compensation amount is deposited directly in the bank account of the claimants.

39. The miscellaneous civil application filed in this appeal does not survive and the same is also disposed of.

M. S. SONAK, J.