

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.1 OF 2019**

Cholamandalam MS General Insurance
Co. Ltd., |
203-A, 24 Floor, Dempo Trade Center,
Patto, Panaji-Goa, through its
Authorised signatory Ms.Pallavi Sunil
Rathod.

..... Appellant.

Versus.

1. Smt.Jumibai Ramchandra Lamani,
Widow of Late Ramchandra Lamani,
Age 49 years, Housewife, Residing at
Hiregulbal L.T. Village, Taluka and
District Bagalkot, Karnataka

2. Manjunath Ramchandra Lamani,
S/o Late Ramchandra Lamani,
Age 23 years, Student, Indian National,
Residing at Hiregulbal, L.T. Village,
Taluka and District Bagalkot,
Karnataka.

3. Shri Dishant Mandrekar,
Son of Vilas Mandrekar, Major in age,
Businessman, Resident of H.No.153,
Near Government High School,
Headland, Sada, Vasco-da-Gama, Goa.

..... Respondents.

Mr. James Lopes, Advocate *for the Appellant.*

Mr. Sanman Keny, Advocate *for Respondents No.1 and 2.*

CORAM : M. S. SONAK, J.

DATE : 28th July 2022

ORAL JUDGMENT: -

1. I heard Mr. Lopes for the Appellant and Mr. Keny for Respondents No. 1 and 2 (Claimants.)
2. The Appellant-Insurance Company appeals the Judgment and Award dated 2nd January 2016 made by the Motor Accident Claims Tribunal, Margao (Tribunal) in Claim Petition No. 95/2013, awarding the Claimants compensation of ₹12,44,000/- with interest at the rate of 9% per annum for the death of Sunil in a vehicular accident on 22/7/2011. Sunil was the first respondent's 26 years old son and elder brother of the second respondent.
3. Mr. Lopes submits that the evidence on record makes out a case that Sunil was negligent in riding the motorcycle and, therefore, solely responsible for the accident. He points out that

even a neutral investigating officer, based on his evidence, chose to file an FIR against Sunil for his rash and negligent driving.

4. Mr. Lopes submits that the evidence on record shows that the Truck was parked in the parking bay. Therefore, there was ample space on the road for the motorcycle to pass. Yet, Sunil dashed into the Truck after the pillion rider admitted that the motorcycle's headlights were working and were on at the time of the accident. He referred to the evidence of the Panch witness-AW.4 and the sketch accompanying the panchanama. He also referred to the evidence of the Investigating Officer (RW.1). Based on all this, Mr. Lopes submitted that the accident occurred due to rashness and negligence on Sunil's part alone.

5. Mr. Lopes, without prejudice, submitted that this was a case of contributory negligence, with both the parties contributing equally to the accident. He offers that even the evidence of the pillion rider (AW.1) establishes that Sunil was negligent or, in any case, equally responsible for the accident.

6. Mr. Keny, the learned Counsel for the Claimants, submits that the owner/driver of the Truck did not file any written statements and did not step in the witness box to depose in the matter. He submits that the Investigating Officer failed to

produce photographs taken at the time of investigations; therefore, the Tribunal rightly drew an adverse inference. Finally, he offers that the evidence on record shows that the Truck which was parked on the road had taken no precautions to indicate its presence. For all these reasons, Mr. Keny submits that the finding of rashness and negligence warrants no interference.

7. Mr. Keny submits that the compensation awarded by the Tribunal is inadequate and does not represent a just compensation. He proposes that no addition has been made towards future prospects, and no proper amounts have been awarded towards the consortium. On a proper computation, the compensation amount comes to ₹19,42,695.20, and this Court may award the same even in the absence of any cross-appeal or cross-objections by the Claimants. He submits that this Court must award just compensation.

8. Rival contentions now fall for my determination.

9. Based on the rival contentions, basically, two points arise for determination in this Appeal :

(a) Whether the Tribunal's finding on the issue of rashness and negligence is proper ?; and

(b) Whether the Tribunal has correctly computed the quantum of compensation?

10. As regards the first point, indeed, the owner and the driver of the Truck may not have filed written statements in this matter. However, in summary proceedings before the Tribunal, this aspect cannot be held entirely against the owner and the driver. For example, suppose there is evidence that establishes any negligence on the part of Sunil. In that case, such evidence cannot be overlooked simply because the owner and the driver may not have filed any written statements or may not have stepped into the witness box. The aspect of the owner and the driver, including, in particular, the driver not stepping into the witness box, must be considered when evaluating the other evidence on record.

11. AW.2, pillion rider can be said to be the eye witness. In paragraphs 6,7, 8, and 9 of his affidavit-in-lieu of examination-in-chief, this is what AW.2 has stated :

"6. I say that at about 4.00 am. we left Ravi's residence to come to Mangoor Hill and since it was raining Sunil Lamani who was riding his Pulser motor cycle bearing Registration No. GA-06-H 3021 with me as pillion rider was wearing raincoat and helmet.

7. I say that Sunil was ridding the motorcycle on the left-hand side of the road in a slow speed as it was raining and while proceeding from Upasnagar to Varanapuri, at about 04.30 am when reached near Ekta Engineering (Garge), Shantinagar, Vasco-da-Gama dashed against Truck bearing Registration No. GA-06-T-5209 which was parked on the road facing towards Varanapuri side without any parking lights or indicator.

8. I say that no precaution had been taken to show that the Truck bearing Registration No. GA-06-T-5209 was parked and the rear body of the said Truck was full of coal dust and as such parking of the Truck was not visible and as a result of which the deceased Sunil Lamani dashed his Pulser motor cycle bearing Registration No. GA-06-H 3021 against the Truck bearing Registration No. GA-06-T-5209.

9. I say that as a result of the accident, the deceased dashed his head and motor cycle bearing Registration No. GA-06-H-3021 against the rear portion of the Truck bearing Registration No. GA-06-T-5209 and suffered head injury as blood was whooshing out from his head and face."

12. AW.2, in his cross-examination, stated that the deceased Sunil had worn a helmet at the time of the accident. However, he admitted that the road at the accident spot was a straight stretch with no curves and no vehicular traffic. He also admitted that the road was about 20 feet wide, and two heavy vehicles could easily pass simultaneously with a physical road divider. Furthermore, he

acknowledged that there was no katcha road by the side of the road, and there were gutters at the two edges of the tar road.

13. AW.2 also admitted that the Truck was stationary and not in motion. He also admitted that the Truck was parked on the left side of the road as one proceeded to Varanapuri.

14. The Claimants examined Hanumanta Lamani alias Ravi (AW.4), who was incidentally one of the Panchas to the Panchanama carried out by the Investigating Officer (RW.1). This witness stated that the Truck was entirely covered from behind with a load of coal and even the number plate was not visible. In his cross-examination, he admitted that there was no katcha road on either side of the road at the accident spot. He also admitted that there was a parking place of one meter by the roadside for the Truck. He stated that the Truck was parked beyond the white stripe onto the tar road.

15. Santosh Gaonkar, Head Constable, attached to Vasco Police Station, also deposed in this matter as RW.1. He deposed that his investigations revealed that the motorcycle rider was responsible for the accident and, therefore, he lodged a complaint against the rider (Sunil) under Section 279, 337 and 304-A IPC. He deposed that the Truck was stationed in the parking bay.

16. RW.1, in his cross-examination, admitted that he did not inquire the Truck's owner or driver of the Truck why the Truck was parked at the said spot. He acknowledged that neither the owner nor the truck driver was at the accident. Moreover, RW.1 admitted that there was no visibility on the road even when he visited the accident spot after the accident. He denied the suggestion that coal was being transported in the said Truck. But at the same time admitted that the rear portion of the Truck was covered with black soot, and it was covered with a black color tarpaulin. He acknowledged that several stray cattle sit along that stretch of the road, causing obstruction to the visibility and many accidents occur along that stretch of the road.

17. RW.1 also admitted that there was no visibility to the Truck from a long distance since it was covered with black soot and a black tarpaulin. He acknowledged that the Truck was approximately 3-3.5 meters in width and that he had not shown the availability of road space on the left and right sides of the Truck. He denied the suggestion that the Truck was parked on the road and not in the parking bay. He denied the suggestion about the panchanama not being proper. He also denied that he deliberately withheld the photographs showing the correct position at loco.

18. Mr. Lopes also invited my attention to the accident sketch accompanying the panchanama (page 60 of the paper book) and made his submissions based thereon.

19. On evaluating the evidence on record, the Tribunal has concluded that the Truck was entirely responsible for the accident in which Sunil died. The Tribunal has drawn an adverse inference against the Investigating Officer (RW.1) for failing to produce the photographs. The Tribunal has also noted that no precautions were taken by the truck driver/owner so that the other vehicles could get an idea about the Truck being parked by the side of the road.

20. On the evaluation of the evidence on record, it does appear that the Truck was mainly, if not solely, responsible for the accident. First, the Truck was transporting coal, which is evident from the consistent evidence of the witnesses' that soot was covering even the number plate of this Truck. There is evidence about the black tarpaulin customarily used to protect the coal during transport. Finally, there is some evidence of light rain showers, most likely during July in Goa.

21. The accident took place at about 4.30 am. There is no evidence of any proper lighting arrangement at or near the

accident spot. Additionally, there is evidence that neither the owner nor the truck driver was present at the accident spot. Thus, sufficient care should have been taken by the truck driver before parking the Truck by the side of the road, even if the parking was within a space where there was no prohibition for parking. There is evidence of the Truck stepping beyond the white line.

22. RW.1 has also deposed that this spot was prone to accidents. He has also deposed about cattle spotting at this stretch of the road. Based on all this evidence, the responsibility for the accident was mainly of the owner/driver of the Truck. However, even Sunil contributed to this accident to some extent.

23. The evidence on record shows that the Truck was parked, if not in the parking bay, at least in the stretch where there was no prohibition for such parking. There is evidence that the accident occurred on the straight road, which admitted passage of at least two vehicles without needing to stray toward the Truck. There is evidence that the motorcycle headlights were functioning correctly. Thus, Sunil should also have been more careful while driving on the road, which is known to be accident-prone

24. . Based on his investigations, even the investigating officer deemed it appropriate to lodge a complaint against Sunil for rash and negligent driving. This circumstance is not certainly conclusive, but it indicates that even the neutral authority, like the investigating officer, found that even Sunil was to blame for the accident.

25. Based on the evidence on record, in my opinion, the responsibility and the consequent liability of the truck driver/owner can be pegged at 75%, with a balance of 25% contribution from Sunil himself. Accordingly, the finding about rashness and negligence recorded by the Tribunal warrants modification. The evidence on record establishes that this was a case of contributory negligence, with the deceased Sunil contributing to the extent of 25% to the unfortunate accident.

26. The second point relates to the quantum of compensation. There is clear evidence about Sunil's employment and his monthly salary of ₹12,121/-. To this, 40% addition is due towards future prospects. Thus, Sunil's monthly salary can be taken at ₹16,969.40 and the annual salary at ₹2,03,632.80.

27. There is no dispute about Sunil's age at the time of the accident (26 years) and consequently correct multiplier to be

applied in terms of *National Insurance Company Limited vs. Pranay Sethi & ors.*¹ and *Sarla Verma vs. DTC*² would be 18. However, Sunil was a bachelor and, therefore, a deduction of 50% will have to be made for personal expenses. Thus the compensation for dependency comes to ₹18,32,695-20.

28. The Claimants would be entitled to a compensation of ₹40,000/- each towards consortium, ₹15,000/- towards funeral expenses, and ₹15,000/- towards loss of estate.

29. Thus, the total compensation would come to ₹19,42,695.20. Since Sunil had contributed to the accident to the extent of 25%, the compensation payable will come to ₹14, 57,021.40.

30. *Surekha and ors. Vs. Santosh and ors*³, the Hon'ble Supreme Court has held that just compensation cannot be denied to the Claimants merely because they may not have preferred a cross-appeal or filed cross-objections.

31. Accordingly, this Appeal is disposed of by directing the Appellant and Respondent No.3 to jointly and severally pay the

1. (2017) 16 SCC 680

2. (2009) 6 SCC 121

3. C.A. No.476 of 2020, decided on 21/01/2020 – (2021) 201 PLR 795

Claimants compensation of ₹14,57,021.40, together with interest at the rate of 9% per annum from the date of the application till effective payment.

32. The Appellant and Respondent No.3, including, in particular, the Appellant, will have to deposit the excess amount within six weeks from today after giving intimation to the learned Counsel for the Claimants.

33. Respondents No.1 and 2 (Claimants) are now permitted to withdraw the compensation amount deposited in this Court after furnishing proper identification documents and bank details. The Registry to ensure that the amount is transferred directly into the Claimants' bank accounts.

34. The Claimants will have to pay the deficit Court Fee before withdrawing the excess compensation that will have to be deposited by the Appellant. Registry to ensure that such excess Court Fee is paid before the excess compensation withdrawal.

35. The Claimants have already withdrawn some compensation, and necessary adjustments will be made. Accordingly, the statutory deposit made by the Appellant shall also be adjusted.

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

M. S. SONAK, J.

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