

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.149/2017

MR. SEBY MINGUEL REBELLO,
s/o. Minguel Rebello, 37 years of
age, labourer, being mentally
retarded rep. by his wife and next
friend Mrs. Ruzad Rebello, Both
r/o. H.No.346, Akamol Ambaulim,
Quepem, Goa.

... APPELLANT

Versus

1. MR. LODRIN TREVON,
s/o. Francisco Fernandes, major,
r/o. H.No.62, Orcotto, Sanguem,
Goa.

2. CHOLAMANDALAM GENERAL
INSURANCE, 203-A, 2nd Floor,
Dempo Trade Centre, Patto, Panaji-
Goa.

... RESPONDENTS

Mr Cleofato Coutinho Almeida with Mr Shailesh Redkar,
Advocates for the Appellant.

CORAM: M. S. SONAK, J.

DATED: 18th November 2022

ORAL JUDGMENT:

1. Heard Mr Cleofato Coutinho Almeida for the appellant.
The respondents, though served, are neither present nor
represented.

2. The challenge in this appeal is to the Judgment and Award dated 02.07.2016 made by the Motor Accident Claims Tribunal, South Goa at Margao (Tribunal) in Claim Petition No.119/2013. The Tribunal determined the just compensation at ₹15,61,800/-. However, no award was made in favour of the appellant because the Tribunal held that the appellant had failed to prove that the accident was a result of rashness and negligence on the part of respondent no.1, the driver of the Maruti Alto car.

3. The Tribunal has discarded evidence of Arvind Nagekar (AW6), the police officer who investigated the accident, by holding that this witness did not indicate the basis upon which he identified the point of impact. Similarly, the Tribunal has rejected the evidence of Prakash Gaonkar (AW2) and Domingos Rebello (AW3). They were examined as eyewitnesses. But their testimonies were rejected on the ground that there were discrepancies in the timings, which cast doubt on their presence at the site at the time of the accident. The Tribunal has also relied upon the evidence of Dr Prajakt Kamulkar (RW1), who deposed to the appellant being in altered sensorium as an effect of alcohol. This witness also deposed to the smell of alcohol from the appellant's breath when brought for treatment soon after the accident at the Primary Health Center at Balli.

4. Now the evidence on record bears out that the police, after preliminary investigations, deemed it appropriate to file an FIR against respondent no.1, driver of the Alto car. A charge sheet followed this. The sketch accompanying the Panchanama shows the point of impact at least slightly on the lane for the commuters travelling from Balli to Ambaulim. If this point of impact is accepted, it does appear that the Alto car was somewhat on the wrong side.

5. The evidence of Arvind Nagekar should not have been rejected simply because he was unable to give the precise basis for noting the point of impact. However, suppose the evidence of Arvind Nagekar was considered along with the documentary evidence like the Panchanama and the sketch accompanying it. In that case, some negligence is required to be attributed to respondent no.1, the driver of the Alto car.

6. Even the evidence of Prakash Gaonkar (AW2) and Domingos Rebello (AW3) should not have been discarded simply on account of some discrepancies in timings. The two witnesses have deposed to the accident, and even if they may not have been very accurate about the timelines, their testimony should not have been entirely discarded.

7. The Hon'ble Supreme Court has time and again held that even the issue of rashness and negligence has to be decided on the touchstone of preponderance of probabilities. Therefore, the Tribunal's approach should not be finding faults with the evidence on the record but considering whether such evidence probabalizes the rashness and negligence on the part of the driver of the offending vehicle. Furthermore, in this case, the offending vehicle was much heavier than the bike the appellant was riding. Therefore, the duty of care that the driver of the heavier vehicle holds was much greater.

8. At the same time, the evidence of the driver also cannot be ignored in the present case. This is more so because of the evidence of Dr Prajakt Kamulkar, Medical Officer, Primary Health Centre, Balli, where the appellant was admittedly taken after the accident.

9. The doctor has categorically deposed that the appellant was in altered sensorium as an effect of alcohol. Furthermore, he has deposed that there was a smell of alcohol from the appellant's breath. Despite the opportunity, there was no cross-examination whatsoever on this crucial aspect. This doctor admitted not carrying out the test of alcohol content in the blood of the appellant as he did not have the necessary infrastructure.

However, the evidence about altered sensorium as an effect of alcohol coupled with the smell of alcohol from the appellant's breath has gone unchallenged. This evidence of Dr Prajakt Kamulkar (RW1) will also have to be considered.

10. Considering the point of impact, the width of the road, the evidence of the driver of Alto car, the evidence of the police officer and the two eyewitnesses, in my judgment, this is a case where both the appellant as well as the respondent no.1 have equally contributed to the accident. Even if the testimony of Arvind Nagekar (AW6) is accepted in its entirety, the point of impact is slightly towards the wrong side. Admittedly, Arvind Nagekar was not an eyewitness to the accident.

11. However, there is evidence of the appellant riding the motorcycle under the influence of alcohol. The evidence of RW1 Dr Prajakt Kamulkar inspires confidence, and the same was not even challenged despite the opportunity of cross-examination. Based on this evidence and the other evidence led by the Claimants and the respondents, the possibility of the Claimant having come too close to the road median and lost control cannot be ruled out. Even the appellant's wife was quite guarded in her evidence and merely stated that she did not know where the appellant had gone and whether he had consumed alcohol. To the

suggestion that on the date of the accident, the appellant was not in a condition to ride his motorcycle due to consumption of alcohol, she candidly deposed that she did not know about this matter.

12. Thus, applying the test of preponderance of probabilities and evaluating the evidence on record, this appears to be a case where both the appellant and the driver of the Maruti Alto Car have contributed equally to the accident. Accordingly, a case of contributory negligence is made out.

13. On the aspect of just compensation, Mr Coutinho points out that the Tribunal has failed to make any addition towards future prospects as provided in the case of *National Insurance Company Ltd. vs. Pranay Sethi & Ors. - (2017) 16 SCC 680*. On perusal of paragraph 53 of the impugned award, it does appear that no addition has been made towards future prospects. If such an addition were to be made, then the loss of future earnings would come to ₹19,65,600/- and not merely ₹14,04,000/- as determined by the Tribunal.

14. Mr Coutinho also submitted that the compensation of ₹50,000/- each towards (i) pain and suffering and trauma as a consequence of the injuries, (ii) loss of amenities and (iii) loss of expectation of life is entirely inadequate. However, considering

the evidence on record, both oral and documentary, this award appears to be adequate. Thus, the just compensation, in this case, can be computed at ₹21,15,600/-. However, since the appellant contributed equally to this accident, the appellant will be entitled to 50% of this amount which comes to ₹10,57,800/-.

15. The appeal is partly allowed. The respondents are jointly and severally directed to pay the appellant compensation of ₹10,57,800/- together with interest @ 9% p.a. from the date of the claim petition till actual payment.

16. The respondents, including in particular respondent no.2, are directed to deposit this awarded amount together with interest in this Court within eight weeks from today after giving due intimation to the learned counsel for the appellant.

17. The appellant can withdraw this amount upon deposit after furnishing identification and bank details. The Registry to ensure that the amount is directly deposited in the appellant's bank account.

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

M. S. SONAK, J.

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