Amrut

# IN THE HIGH COURT OF BOMBAY AT GOA

## FIRST APPEAL NO.30 OF 2019

IFFCO Tokio General Insurance Company Limited,
Reliance House Isidore Baptista Road Salcete Goa. … Appellant

*Versus*

1. Vithoba Babai Naik,
Son of Babai Naik,
Aged 56 years,
Occupation employee of P.W.D.,
Quepem Goa.
Government of Goa,
r/o House No.519/2,
Kolsar, Galgibag,
Canacona, Goa.
Pin Code 403 728.
1(a) Mrs. Rukmini Vithoba Naik,
wife of late Vithoba Babani Naik,
R/o H.No.519/2, Collsar,
Galgibag, Poinguinim, Canacona,
South Goa, 403 728.
1(b) Mrs. Navisha Namdev Naik,
D/o late Vithoba Babani Naik,
and her husband,
1(c) Mr. Namdev Gurudas Naik,
S/o Gurudas Naik,
both R/o H.No.407, Mattawada,
Collem, South Goa 403 410.
1(d) Mrs. Reshma Pritam Kadam,
D/o late Vithoba Babani Naik,
and her husband,
1(e) Mr. Pritam Lavu Kadam,

S/o Mr. Lavu Kadam,
Both R/o B-6-10, Police Quarters,
Alto-Porvorim, Porvorim Goa 403 521
1(f) Mr. Darshan Vithoba Naik,
S/o late Vithoba Babani Naik
and his wife,
1(g) Mrs. Sunaina Darshan Naik,
D/o Mr. Shashikant Naik,
Both R/o H.No.519/2, Collsar,
Galgibag, Poinguinim, Canacona,
South Goa, 403 728.
1(h) Mr. Vishal Vithoba Naik,
S/o late Vithoba Babani Naik,
R/o H.No.519/2, Collsar,
Galgibag, Poinguinim, Canacona,
South Goa, 403 728.
1(i) Miss. Prity Vithoba Naik,
D/o late Vithoba Babani Naik,
R/o H.No.519/2, Collsar,
Galgibag, Poinguinim, Canacona, South
Goa 403 728.

2. Mr. Vimod Mangesh Dalal,
r/o D7, P.H.C. Quarters,
Sheller-Canacona also
r/o H.No.218-A, Sadolshem,
Canacona Goa. … Respondents

Mr. C. Fonseca, Advocate for the Appellant.
Mr. Jatin Ramaiya, Advocate for the legal representatives of deceased Respondent No.1 (Claimants).

**CORAM: M. S. SONAK, J.**

**DATED : 22nd September 2022**

## ORAL JUDGMENT

**1.** Heard Mr Fonseca, learned counsel for the Appellant, and Mr J. Ramaiya learned counsel for the legal representatives of the deceased Respondent No.1 ( Claimants).

**2.** The Appellant- Insurance Company challenges the judgment and award dated 22.06.2018 made by the Motor Accident Claims Tribunal, South Goa, Margao, in Claim Petition No.63/2015, awarding claimants compensation of ₹30 lakhs with interest at the rate of 9% per annum from the date of petition till the effective payment.

**3.** Mr Fonseca submits that in this case, there was no material on record to link Vimod Dalal, i.e. the owner of the insured vehicle, with the accident in which the predecessor of the claimants suffered injuries. He points out that Vimod was prosecuted but acquitted for want of any evidence about the involvement of the insured vehicle in the accident. He submits that in the absence of this primary evidence, no liability could have been foisted either upon Vimod or the Appellant-Insurance Company.

**4.** Without prejudice, Mr Fonseca submits that since the original claimant expired during the pendency of this appeal, the compensation for pain and suffering, loss of amenities, and loss of life must be deducted. Relying on ***Oriental Insurance Company***

***Limited Vs Kahlon alias Jasmail Singh Kahlon (deceased) through his legal representative Narinder Kahlon Gosakan and another*[1]**, Mr Fonseca submits that the Tribunal should have made the deduction to the extent of 46% given the disability of 54% certified by the doctors.

**5.** Based on all this, Mr Fonseca submitted a calculation sheet, in terms of which the compensation of a maximum of ₹15,15,566.18 could have been awarded in this matter. However, Mr Fonseca made it clear that this alternate submission was without prejudice to the primary submission that neither Vimod nor the Appellant-Insurance Company could have been held liable for the payment of any compensation in this matter. Furthermore, Mr Fonseca finally submitted that the award of interest at the rate of 9% per annum is also excessive considering that the claim petition, in this case, was filed only in 2015.

**6.** Mr Ramaiya, learned counsel for the claimants, points out that the original claimant died during the pendency of this appeal almost ten years after the accident in which he suffered serious injuries and a disability.

**7.** Mr Ramaiya points out that though clinical disability may have been certified at 54%, the functional disability is 100%, considering

**1** 2021 AIR (SC) 3913

the medical evidence that the original claimant suffered right spastic hemiparesis due to a head injury. He points out that the original claimant was a labourer engaged with the P.W.D. on a regular salary basis. He relied on ***Peter Godinho Vs Cornelins D'Souza and another, First Appeal No.41 of 2019 decided on 22.07.2022.*** Based on all this, he submits that this appeal may be dismissed.

**8.** The rival contentions now fall for my determination.

**9.** The Tribunal, in this case, has assessed the issue of the involvement of Vimod's vehicle in the accident on the touchstone of preponderance of probability. This is the correct approach in such a matter. The circumstance that Vimod may have been acquitted in a criminal prosecution is not very relevant for determining his involvement or involvement of his vehicle in the accident that occurred on 15.01.2012, injuring the original claimant Vithoba Naik.

**10.** The claimant's case is that Vimod dashed Vithoba Naik, who was walking on the right side of the road and did not even bother to stop and help but fled away. The police had investigated this matter and deemed it appropriate to file a charge sheet against Vimod. However, because the Judicial Magistrate may have ultimately acquitted Vimod, that is not sufficient to avoid civil liability where a touchstone is to be adopted for evaluation of evidence is only the preponderance of probability.

**11.** The Tribunal has noted that the prosecution failed to examine the witnesses; therefore, the Magistrate had no option but to acquit Vimod. However, before the Tribunal, CW5 Durgesh Chowdary was examined as an eyewitness. Besides, CW1-HC Dinesh Naik also deposed in the matter and explained the investigation process, including lodging of F.I.R., preparation of scene of accident panchanama, and eventual filing of the charge sheet. I believe this evidence is sufficient to establish the complicity of Vimod or Vimod's vehicle in the accident.

**12.** In ***Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors***[2], ***Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.***[3], ***Parmeshwari V/s. Amir Chand & Ors.***[4] ***Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors***[5.] and ***Dulcina Fernandes & Ors. Vs Joaquim Xavier Cruz & Anr***[6]***,*** the Hon'ble Supreme Court had held that the approach of the Courts/Tribunals when dealing with such matters has to be sensitive enough to appreciate the turn of events on 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

**2** (2020) 13 SCC 486
**3** (2021) 1 SCC 171
**4** (2011) 11 SCC 635
**5** (2018) 5 SCC 656
**6** (2013) 10 SCC 646

mindful 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.

**13.** 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 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 the claimant's version is more likely than not true. The Courts/Tribunals in matters of this nature, the Courts/Tribunals are required to take a holistic view, bearing in mind that strict proof of an accident caused by a particular vehicle in a specific manner may not be possible by the claimants. The Courts/Tribunals should also draw appropriate inferences from the failure of respondents to properly cross-examining the witnesses of the claimants or confront them with their version despite the adequate opportunity. The courts/Tribunals must take the legal effect of the failure to cross-examine crucial witnesses on crucial issues must be taken into account by the Courts/ Tribunals.

**14.** 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.

**15.** *In* ***Bashti Kasim Saheb vs. Mysore State Road Transport Corporation & Others***[7], the Hon'ble Supreme Court has made the following significant observations:-

> *"8. The evidence in the case indicates that there was no traffic on the road at the time of the accident. No untoward incident took place like sudden failure of the brakes or an unexpected stray cattle coming in front of the bus and still the vehicle got into trouble. In absence of any unexpected development it was for the driver to have explained how this happened and there is no such explanation forthcoming. In such a situation the principle of res ipsa loquitur applies. The petitioner, in the circumstances, could not have proved the actual cause of the accident and on the face of it, it was so improbable that such an accident could have happened without the negligence of the driver, that the Court should presume such negligence without further evidence. The burden in such a situation is on the defendant to show that the driver was not negligent and that the accident might, more probably, have happened in a manner which did not connote negligence on his part, but the defence has*

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**7** (1991) 1 SCC 298

> *failed to produce any evidence to support such a possibility. We, therefore, agree with the finding of trial court on this issue and set aside the judgment of the High Court."*

**16.** Considering the above position of law and the evidence on record in my judgment, no case is made to interfere with the finding recorded by the Tribunal about the involvement of Vimod and the insured vehicle in the accident that injured original claimant Vithoba Naik.

**17.** On the aspect of compensation, the record bears out that the accident occurred on 15.01.2012, and the claim petition was filed on 15.05.2015. Moreover, the original claimant Vithoba Naik died after the Tribunal made the impugned award but during the pendency of this appeal. In these circumstances, there is no case to deduct the amount towards pain and suffering or loss of amenities or life.

**18.** **Kirti v. Oriental Insurance Company Limited**[8] holds that claims and liabilities crystallize at the time of the accident itself, and changes post thereto ought not to ordinarily affect pending proceedings.

**19.** The compensation calculation handed in by Mr Fonseca focuses only on clinical disability of 54%. However, it is well settled that in such matters, the functional disability is what has to be focused upon

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**8 2021(2) SCC 166**

rather than only clinical disability. In *Peter Godinho* (supra), even after considering *Kahlon alias Jasmail Singh Kahlon* (supra), this Court concluded that though Peter's clinical disability might be only 90%, his functional disability due to the accident was 100%, and the compensation was required to be determined accordingly.

**20.** In this case, there is medical evidence about original claimant Vithoba suffering a permanent disability of 54% due to head injury on account of right spastic hemiparesis. However, the evidence on record also shows that Vithoba was working as a labourer regularly with P.W.D. but was rendered incapable of working due to his injuries. Accordingly, CW4 Shri M. P. Veluidan, Executive Engineer -Legal from P.W.D., has deposed in this matter. The Tribunal's approach in this matter is consistent with the law in ***Raj Kumar Vs Ajay Kumar***[9]**.**

**21.** There is no dispute about Vithoba's monthly income and age in the present case. Accordingly, there is also no dispute about the multiplier of 9 applicable to the matter. Furthermore, there is evidence about medical expenses, attendant charges, and travelling expenses. Therefore, the Tribunal should also have made an award towards future medical expenses. However, since the Tribunal has chosen to award interest at 9% per annum, no separate award is made under the said head while sustaining the higher interest rate.

**9** (2011) 1 SCC 343

**22.** The Appellant- Insurance Company has deposited the awarded amount in this Court. Accordingly, the claimants are entitled to withdraw the same by furnishing their identification documents and bank details.

**23.** At the request of Mr Fonseca, the withdrawal is permitted only after four weeks from today. The claimants will be entitled to the interest accrued on the deposited amount.

**24.** For all the above reasons, this appeal is hereby dismissed. Accordingly, there shall be no order for costs.

**M. S. SONAK, J.**