

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.23 OF 2015

1. Smt. Neha Nilesh Arlekar

widow of Nilesh Arlekar

Age 27 years, housewife.

2. Harsh Nilesh Arlekar

Son of late Nilesh Arlekar

Age 8 years,

represented by his natural guardian.

3. Khushal Nilesh Arlekar

Son of late Nilesh Arlekar

Age 6 years,

represented by his natural guardian

All residents of H.No.2/235,

Naika Vaddo, Calangute, Bardez, Goa.

...Appellants

Versus

1. Mr. S.D. Rocky

Major in age,

R/o. Nagani Lishang,

District Senapati, Manipur

(Rider of vehicle no.GA-03-T-0188)

2. Lawrence Barretto,

Major in age,

Resident of H.No.89, Calangute,

Bardez-Goa.

(Owner of vehicle no. GA-03-T-0188)

3. Blossom Mendes

Major in age,

Resident of H.No.2/5/A, Cotula,

Saligao, Bardez, Goa.

4. Bajaj Allianz Insurance Company Ltd.
Policy serving office through its
Branch Manager having office at 214/215
Dwarkanath Centre, Second floor,
Boshan Homes and Commercial Complex
Shri Bodgeswar Temple, Goa.

...Respondents

Ms. R. Banaulikar and Mr. J.J. Mulgaonkar, Advocates for the
Appellants.

CORAM : M. S. SONAK, J.

DATE : 25th FEBRUARY 2022

ORAL JUDGMENT :

1. Heard Ms. R. Banaulikar learned Counsel appearing for the appellants. Though the respondents are served, there is no appearance on their behalf.

2. Challenge in this appeal is to the judgment and award dated 17.09.2014 made in Claim Petition No.43/2010 by the Motor Accident Claims Tribunal (Tribunal).

3. The Claim Petition No.43/2010 was instituted by the widow (aged 27 years) and her two minor sons, Harsh (aged 4 years old) and Khushal (aged 2 years old) claiming compensation on account of the death of their husband/father, Nilesh Arlekar, in a vehicular accident that took place on 19.04.2010 at Calangute, Goa. The Tribunal has rejected the claim and declined to award any compensation to the claimants on the specious plea that the claimants failed to prove the involvement of

the Activa motorcycle bearing no.GA-03-T-0188 and its driver Mr. S.D. Rocky Shingni (respondent no.1) in the accident. The Tribunal also did not bother to answer all the issues that had been framed in the petition, including the issue of the quantum of compensation, by simply observing that such an issue “*does not arise*”.

4. In matters of this nature, the Tribunal must answer all the issues so that there is no occasion for any remand once the issue of maintainability or the issue of rashness and negligence of the driver, the issue of involvement of the alleged offending vehicle, etc. is decided in favor of the claimant. The approach adopted by the Tribunal, in this case, is contrary to the law laid down by the Hon'ble Supreme Court in the case of ***Bimlesh and Ors. V/s. New India Assurance Company Limited***¹. In paragraphs 7, 8 & 9 this is what the Hon'ble Supreme Court has observed :

“7. Section 166 of the Act, 1988 provides that an application for compensation arising out of an accident of the nature specified in Section 165(1) may be made, inter alia, by all or any of the legal representatives of the deceased where death has resulted from the accident.

8. Section 169 makes a provision that the Claims Tribunal shall follow the summary procedure subject to any rules that may be made in this behalf. The Code of Civil Procedure, 1908 is not applicable to the proceedings before the Claims Tribunal except to the

¹ (2010) 8 SC C 591

extent provided in sub-section (2) of Section 169 and the Rules. The whole object of summary procedure is to ensure that claim application is heard and decided by the Claims Tribunal expeditiously.

9. The inquiry under Section 168 and the summary procedure that the Claims Tribunal has to follow do not contemplate the controversy arising out of claim application being decided in piecemeal. The Claims Tribunal is required to dispose of all issues one way or the other in one go while deciding the claim application. The objection raised by the Insurance Company about maintainability of claim petition is intricately connected with its liability which in the facts and circumstances of the case is dependent on determination of the effect of the additional premium paid by the insured to cover the risk of the driver and other terms of the policy including terms of the policy contained in Para 5. Since all the issues (points for determination) are required to be considered by the Claims Tribunal together in light of the evidence that may be let in by the parties and not in piecemeal, we do not think it proper to consider the rival contentions on merits at this stage. Suffice it to say that matter needs to be sent back to the Claims Tribunal.”

5. In this case, upon evaluation of the evidence on record, I am quite satisfied that the Tribunal was not justified in holding that the offending vehicle was not involved in the accident and

that the accident was not caused on account of rash and negligent driving by the respondent no.1 (Rocky Shingni). Reasons for this will be shortly discussed in the course of this judgment and award. The accident, in this case, took place on 19.04.2010. The claimants, as noted earlier, are the widow and the two minor children, who have not received any compensation to date, except perhaps some compensation under the 'no-fault liability provision. In such a situation, there is no question of any remand and it would be the duty of this Court itself to assess the quantum of compensation based on the evidence on record. If the Tribunal had done its duty of answering all the issues, including the issue of quantum of compensation, then perhaps there would have been no necessity for this Court to undertake this exercise or to consider remand and thereby only prolong the agony of the claimants.

6. The finding recorded by the Tribunal about the non-involvement of the Activa motorcycle or the absence of any rashness and negligence on the part of respondent no.1 (Rocky Shingni) warrants interference because the Tribunal has failed to appreciate the material on record and, besides, the approach of the Tribunal is contrary to the law laid down by the Hon'ble Supreme Court in the cases of *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.*², *Parmeshwari V/s. Amir Chand & Ors.*³, *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors.*⁴, *Mangla Ram V/s.*

2 (2021) 1 SCC 171

3 (2011) 11 SCC 635

4 2020 (13) SCC 486

*Oriental Insurance Company Ltd. & Ors.*⁵ and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.*⁶.

7. In all the aforesaid cases, the Hon'ble Supreme Court has held that the approach of the Courts/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. 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

⁵ (2018) 5 SCC 656

⁶ (2013) 10 SCC 646

cross-examine crucial witnesses on crucial issues must be taken into account by the Courts/Tribunals.

8. Bearing the aforesaid principles in mind, the evidence on record in this matter will have to be evaluated.

9. In a claim petition, there was a clear allegation about the involvement of the Aactiva motorcycle causing the accident in which Nilesh, who was 36 years old at the time of the accident, expired. There are clear allegations that respondent no.1 (Rocky Shingni) was riding this Aactiva motorcycle and after dashing Nilesh he sped away from the spot leaving Nilesh to succumb to the injuries on the spot. There are allegations about rash and negligent driving by respondent no.1 (Rocky Shingni).

10. Though respondent no.1 (Rocky Shingni) was impleaded as a respondent in the Claim Petition and was duly served, he did not bother to respond to the allegations made in the Claim Petition nor was he examined. He also did not bother to depose before the Tribunal in the Claim Petition.

11. Only respondent no.4, i.e. the Insurance Company filed its written statement on 15.02.2011 in response to the Claim Petition.

12. The Insurance Company, in its written statement, at the outset, denied the involvement of the Aactiva scooter. Without prejudice, the Insurance Company contended that respondent no.1 (Rocky Shingni) was not holding a valid and effective driving license at the time of the accident and this amounted to a

breach of the terms of the insurance policy. This defense was taken under the sub-title "*statutory defenses*".

13. Thereafter, the Insurance Company proceeded to file a reply on merits. In paragraph 25 of its reply this is what the Insurance Company stated :

"25. The present opponent submits that the driver of said Acura was driving in a slow and moderate speed, by observing rules and regulations of traffic. It is stated that at the material time of the accident, the deceased was self negligent and was not attentive towards the traffic and was crossing the road negligently. It is therefore submitted that the deceased was self negligent and sole responsible for the alleged accident for which present opponent cannot be held liable and petition is required to be dismissed against the present opponent. In alter it is submitted that the contribution of the deceased towards the accident is needs to be considered."

14. The written statement of the Insurance Company has been verified by Mr. Sandip K. Gunjal, Senior Executive Legal of the Insurance Company, and the same reads as follows:

"VERIFICATION

I Mr. Sandip K. Gunjal, Senior Executive Legal, the undersigned, do hereby verify and state that the statements made in the foregoing written statement

are true to the best of my knowledge, information and belief."

15. Although it may be permissible to the parties to raise defenses in the alternate or without prejudice to one another, such liberty is not to be confused with a license to make any statements, particularly, statements of facts, without discussing the source of information. Here, Mr. Sandip K. Gunjal, Senior Executive Legal of the Insurance Company, as on oath made a statement in the written statement that the driver of the Activa was driving at a slow and moderate speed by observing the rules and regulations of the traffic. There is a further statement that deceased Nilesh was self negligent at the material time of the accident because he was not attentive towards traffic rules and crossed the road negligently.

16. Mr. Sandip K. Gunjal, Senior Executive Legal of the Insurance Company had verified the above statement to be true to the best of his knowledge, information, and belief. There is no clarity as to whether these statements are true to his personal knowledge or information or belief, though this is most unlikely. The source of information or belief is also not stated in the written statement. It is true that in such matters, strict rules of pleadings will not apply. However, this principle is not intended to grant a license to the parties to plead facts without discussing the source of knowledge, information, or belief.

17. The Tribunal has simply ignored the statements made by or on behalf of the Insurance Company by observing that these were only some statutory defenses raised by the Insurance Company.

The statements, in turn, accept that respondent no.1 (Rocky Shingni) was at the material time of the accident driving the Activate motorcycle. This is something that the Tribunal should have considered and not overlooked. The further defense about respondent no.1 (Rocky Shingni) not having a driving license or that the deceased Nilesh was himself negligent are matters that the respondents ought to have proved by leading cogent evidence before the Tribunal. The respondents, including the Insurance Company, have failed in making good their defenses.

18. In *Nirmala Kothari V/s. United India Insurance Company Limited*⁷, the Hon'ble Supreme Court has held that the onus of verification of a driver's licence is on the Insurer. Similarly, the onus of proving that the insured did not take adequate care and caution to verify the genuineness of the licence or was guilty of wilful breach of the conditions of the insurance policy or the contract of insurance lies on the insurer. In this case, such an onus has not at all been discharged by any of the respondents and this crucial aspect was overlooked by the Tribunal.

19. Apart from the aforesaid, in this case, Tukaram Patil (AW2) has deposed to witnessing this accident. He deposed that a black Activa that was driven in a rash and negligent manner dashed Nilesh, as a result of which he fell and sustained injuries. AW2 deposed that he was a taxi driver operating from the Calangute stand and though he witnessed this accident, he could not stop because he had passengers in his taxi and they insisted on him to proceed because they were getting late. He deposed that on the

7 (2020) 4 SCC 49

next day, he came to know that it was Nilesh Arlekar, who had sustained injuries in the accident and had further succumbed to the injuries.

20. In the cross-examination of Tukaram Patil (AW2), all that was put to him was that his statement was not recorded by the police and that he had not witnessed the accident. Based on such cross-examination and applying the law laid down by the Hon'ble Supreme Court in *Anita Sharma* (supra), and other decisions referred to above, the Court should not have disbelieved AW2. Merely because the police may not have recorded AW2's statement or cited him as a witness does not mean that AW2 was not an eyewitness to the accident.

21. Neha Arlekar, the widow, by filing an additional affidavit in evidence placed on record FIR, copies of station diary, panchanama, etc., all of which establish not only that an accident took place on 19.04.2010 but that black colored Activa motorcycle was involved in the accident. The papers also referred to the name of the driver as Rocky Shingni. All this evidence was more than sufficient to prove by a standard of preponderance of probabilities that not only the Activa motorcycle was involved in the accident but further it was respondent no.1 (Rocky Shingni), who was driving this motorcycle at the time of the accident. This is more so because, in this case, respondent no.1 did not bother to appear and deny such pleadings before the tribunal.

22. Promod Polji (AW4) from the Calangute Police Station was also examined and he deposed to the panchanama and FIR.

23. On behalf of the respondents, Harish Gawas (RW1), the PSI functioning at Calangute Police Station was examined. He also deposed to the registration of the FIR and the various case papers concerning the investigation. He, however, deposed that "A" final summary report was filed because there was no sufficient evidence to prosecute respondent no.1 (Rocky Shingni). He also deposed that during the investigation this respondent no.1 (Rocky Shingni) was arrested for the crime. In his cross-examination, he stated that as per his final report - Exhibit 47, his inquiries indicated that the case was proved but there was no sufficient evidence to prosecute the accused, respondent no.1 (Rocky Shingni), who had been arrested on 20.04.2010, as per the entry at serial no.53 in the station diary under Exhibit 40 colly.

24. The aforesaid evidence, of RW1 apart from assisting the case of respondents, lends Court assistance to the case of the claimants. The mere fact that the investigations ended in "A" final summary does not mean that the Activa motorcycle was not involved or that the same was not being driven by Rocky Shingni. The Tribunal was in complete error in relying upon this evidence to answer the issue against the claimants. The Tribunal lost sight of the fact that in a matter of this nature such issues are required to be proved only by the standard of preponderance of probabilities and not by the standard of requiring proof beyond a reasonable doubt. The evaluation and approach of the Tribunal are contrary to the several decisions referred to above by Ms. Banaulikar.

25. Accordingly, in this case, it will have to be held that the claimants have succeeded in establishing the involvement of the Aactiva motorcycle that was being driven by respondent no.1 (Rocky Shingni) in a rash and negligent manner at the time of the accident.

26. Now, going to the issue of compensation, there is clear evidence that deceased Nilesh was employed as a field officer with Tuff security and earning a salary of ₹10,000/- per month. His employer Ganesh Patil has deposed in this matter as AW3 and despite the opportunity, no dent whatsoever has been made to his deposition. There is also no dispute that Nilesh was 36 years old at the time of his accident. Based upon all this, and following the principles laid down by the Hon'ble Supreme Court in the case of *National Insurance Company V/s. Pranay Sethi*⁸ compensation will have to be determined at ₹18,30,000/- in this case.

27. For determining the aforesaid compensation, a 40% addition is made to the proved income of the deceased. A deduction of up to 1/3rd is made because this is the amount that the deceased would have spent on himself. The multiplier adopted is 15. Compensation of ₹15,000/- each is determined towards loss of estate and funeral expenses. Compensation of ₹40,000/- each is determined towards loss of consortium consolidating the said figure to ₹1,20,000/-. All this results in the final figure of ₹18,30,000/-.

28. This appeal is therefore allowed. The impugned award of the Tribunal is set aside and respondents are directed to jointly

8 (2017) 16 SSC 680

and severally pay to the claimants compensation of ₹18,30,000/-. This amount shall carry interest at the rate of 7% p.a. from the date of filing of the claim petition till the date of actual payment.

29. The respondents, including in particular respondent no.4 - Insurance Company are directed to deposit the aforesaid amount in this Court within two months from today. Upon deposit, the claimants are entitled to withdraw the said amount by providing their bank details. 50% of the compensation amount will have to be paid to the widow and the balance of 25% each will have to be paid to each of the minor children. The share of the minor children should be invested in a fixed deposit instrument in a nationalized bank though liberty is granted to withdraw the interest amount. If there is an urgent necessity of finances liberty is granted to move the Tribunal for suitable orders.

30. The appeal is disposed of in the aforesaid terms. There shall be no order for costs.

M. S. SONAK, J.