

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.133/2017

1. MASTER OMKAR BHALCHANDRA
CHODANKAR, s/o Late Bhalchandra
Mhaddu Chodankar, Minor, Student,

2. MISS TRUPTI CHODANKAR, d/o
Late Bhalchandra Mhaddu Chodankar,
Minor, Student,

3. SMT. CHANDAN CHODANKAR,
widow of late Bhalchandra Chodankar, age
49 years, Housewife,

All are resident of H. No.393, Tank wado,
Revora, Bardez Goa.

... APPELLANTS

Versus

1. MR. SHAUNAQ ANANT PAI,
S/o Anant Pai, major in age, driver,

2. MRS. SUMITRA ANANT PAI
W/o Anant Pai, major in age, owner,
Both are r/o Emanuel Apartments,
Flat No.B-6, Shetyewada, Mapusa-
Goa.

... RESPONDENTS

None for the Parties.

CORAM: M. S. SONAK, J.

DATED: 17th June 2022

ORAL JUDGMENT:

1. On 06.05.2022, neither the appellants nor their advocate appeared in this matter. Therefore, the matter was posted on 09.06.2022.
2. Today when the matter was called out again, neither the appellants nor their advocate were present.
3. However, the interest of justice requires that this appeal is disposed of on merits.
4. The appellants/claimants are the two minor siblings and the widowed mother of late Kirti Bhalchandra Chodankar, who died in a road accident on 01.01.2011.
5. The claimant's case is that on 01.01.2011, the deceased was sitting in the rear seat of a Maruti Alto car bearing No.GA-06-A-1017. The car was parked on the extreme left side opposite Royal Enterprises on National Highway 17 at Guirim. The deceased was waiting for other colleagues to come. At that time, a Hyundai Accent car bearing No.GA-01-E-3957 came from behind at a fast speed. It was driven in a rash and negligent manner. Said Hyundai Accent car dashed to the Alto car from behind. The

impact was so severe that the spine and head of the deceased were damaged, and she died on the spot. The Accent car then proceeded further and dashed against a bus parked on the roadside. Respondent no.1 was driving the said Accent car.

6. Claimant no.3 Smt. Chandan Chodankar examined herself. She also examined Shri Shaikh Basir Ahmed (AW2), the deceased Kirti and Karishma Parsekar (AW3) employer. The police records like the scene of accident panchanama and sketch were also produced at Exh.25 Colly. However, the Tribunal, by the impugned judgment and award dated 17.08.2016, held that in the absence of the claimants examining any eyewitnesses to the accident, the issue of rashness and negligence of respondent no.1-driver could not be held as proved. The Tribunal, however, determined the compensation at ₹11,03,400/- but held that this compensation could not be paid to the claimants because they could not prove the issue of rashness and negligence of the driver.

7. On perusing the entire record, including in particular Exh.25 colly, the photographs, and the admission of the driver that he was convicted by the magistrate, in my opinion, the finding of the Tribunal on the issue of rashness and negligence is required to be reversed. Even the approach of the Tribunal in appreciating the evidence on record was contrary to the law laid

down by the Hon'ble Supreme Court in *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors*¹, *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.*², *Parmeshwari V/s. Amir Chand & Ors.*³, *Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors*⁴ and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.*⁵

8. In all the cases above, 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 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.

9. The Courts/Tribunals have to be mindful that the approach and role of Courts/Tribunals while examining evidence in

1 (2020) 13 SCC 486

2 (2021) 1 SCC 171

3 (2011) 11 SCC 635

4 (2018) 5 SCC 656

5 (2013) 10 SCC 646

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.

10. 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 bus 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-examine 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.

11. 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.

12. In *N. K. V. Bros. (P) Ltd. vs. M. Karumai Ammal & Others*⁶ the Hon'ble Supreme Court, in paragraph 3 made the following observations:-

"3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their 'neighbour'. Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the

⁶ AIR 1980 SC 1354

compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The states must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many states are unjustly indifferent in this regard."

13. *In Bashti Kasim Saheb vs. Mysore State Road Transport Corporation & Others*⁷, the Hon'ble Supreme Court has made the following significant observations that apply to the circumstances of the present case:-

"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

⁷ (1991) 1 SCC 298

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 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."

14. K. T. Gaus lodged the FIR/Complaint, Head Constable 3195, attached to the Mapusa Police Station. The relevant extracts from this FIR/Complaint read as follows:-

"Accordingly I proceeded at spot and noticed the spot which is located at Guirim on main NH 17 one way road leading from Panaji to Mapusa opposite Royal enterprises. I noticed the spot located at near junction where one road is leading inside the St. Anthony waddo Guirim and one luxury Bus No. MH-07-C-7077 is seen stationary on the internal tar road leading towards St. Anthony waddo Guirim facing towards Eastern direction and one black colour Hyundai Accent Car No GA-01-E-3957 seen ramped in front damaged portion of luxury bus No. MH-07-C-7077 facing towards Northern direction i.e. towards Mapusa direction and one Maruti Alto Car No GA-06-A-1017 seen badly damaged condition stationary on middle of NH-17 one way road facing towards Eastern direction leading from Panaji to Mapusa Robot VIII staff present at the spot pointed towards the spot and informed that injured occupants of Hyundai Accent Car No GA-01-E-3957 and Maruti Alto Car No. GA-06-A-1017 including drivers of both car are shifted to Asilo hospital in Robot and P.S. Vehicles and one of the lady occupant of Maruti

Alto Car No GA-06-A-1017 is seriously injured. I noticed glass and damaged fiber pieces are seen scattered on the NH-17 one way road and scratches marks are seen on the NH-17 one way road.

Further secured the presence of two respectable persons, requested them to act as Panchas to draw the detail scene of accident Panchanama and upon their consent conducted detail scene of accident Panchanama and during Panchanama on measuring the width of tar road it is 7.90 mts. Constructed divider is seen in the middle of NH-17 road. The distance from front right side wheel of Hyundai Accent Car No GA-01-E-3957 to its right side divider of NH-17 one way tar road while facing towards Mapusa direction is 7.20 mts. The distance from rear right side wheel of Hyundai Accent Car No GA-01-E-3957 to its right side divider of NH-17 one way tar road while facing towards Mapusa direction is 7.00 mts, rear left side wheel of Hyundai Accent Car No GA-01-E-3957 is seen on the left side edge of one way NH-17 road and front left side wheel of Hyundai Accent Car No.GA-01-E-3957 is seen ramped inside front show portion of luxury bus No.MH-07-C-7077 which is totally on the inner tar road. We see broken glass pieces on the left side edge of one way NH-17 tar road leading from Panaji to Mapusa direction behind the Hyundai Accent Car No GA-01-E-3957. The said point is marked as Point of Impact in to this accident. The distance from point of impact to rear left side wheel of Hyundai Accent Car No GA-01-E-3957 is 10.00 mts. The scratches marks on left side NH-17 one way road while travelling towards Mapusa starting from front side of Hyundai Accent Car No.GA-01-E-3957 to rear side of stationery cross direction Maruti Alto Car No GA-06-A-1017 is 9.40 Mts. The distance from the right side rear wheel of stationery cross direction Maruti Alto Car

No.GA-06A-1017 is 6.80 Mts. The bus stop shed erected on left side open space of NH-17 road leading towards Mapusa is marked as fixed point into this accident. The distance from fixed point to left side edge of NH-17 one way road leading towards Mapusa is 2.10 Mts. The distance from fixed point to Accident spot is 20.10 mts. The distance from the right side rear wheel of stationery cross direction Maruti Alto Car No.GA-06-A-1017 to point of impact is 10.80 Mts. The distance from point of impact to right side rear wheel of stationery cross direction Maruti Alto Car No.GA-06-A-1017 is 18.30 Mts.

On observing the damages of the Hyundai Accent Car No.GA-01-E-3957 we see front bumper, bonnet, Engine, radiator, wind glass badly damaged. We see front left side with glass of Hyundai Accent Car No GA-01-E-3957 is damaged. On observing the damages Maruti Alto Car No GA-06-A-1017 we see its right, left side doors with glass and panels badly damaged we see the rear portion of Maruti Alto Car No.GA-06-A-1017 is totally damaged the seats in the Maruti Alto Car No.GA-06-A-1017 are badly damaged. On observing the damages of luxury bus No MH-07-C-7077 we its front show bumper head lights radiator badly damaged.

Further Visited at Asilo hospital and it revealed that one of the injured lady occupants of Maruti Alto Car No GA-06-A-1017 Miss Kirti Bhalchandra Chodankar R/o Revora Bardez Goa has been succumbed to his accidental injuries. Other injured were discharged after treatment. Accordingly secured their presence at the Police Station and recorded the statement of Maruti Alto Car No.GA-06-A-1017 namely Mr. Kalpeet Prasad Nadkarni who is injured driver of Maruti Alto Car No.GA-06-A-1017, and Mrs. Annapurna Kholkar injured occupant, Miss Karishma

Arjun Parsekar who is Eye witness and was likely to be boarding the Maruti Alto Car No.GA-06A-1017. Also recorded the statements of the injured occupants of Hyundai Accent Car No GA-01-E-3957 Mr. Sanchit Pravin Gupta and Mr. Layhart Braganza S/o Luciano Braganza who were discharged after treatment and all witness had identified the driver to be Mr. Shaunaq Anant Pai Age 21 yrs R/o Shetye wado Peddem Mapusa who has sustained injuries and presently undergoing treatment at Asilo hospital Mapusa. Also recorded the statement of driver of luxury bus No.MH-07-C-7077 who has parked the bus is recorded.

Upon the scene of accident Panchanama and the statements on record of witness it is revealed that on 01/01/2011 at about 07.15 hrs the driver of the Hyundai Accent Car No. GA-01-E-3957 namely Mr. Shaunaq Anant Pai, Age 21 yrs R/o Shettyewado Peddem Mapusa while proceeding on NH-17 one way road from Panaji to Mapusa direction drove his Hyundai Accent Car No. GA-01-E-3957 in rash and negligent manner without proper care and caution and when reached at Guirim opposite Royal enterprises first dashed to Maruti Alto Car No. GA-06-A-1017 which was stationery facing towards Mapusa direction on the extreme left side edge of NH-17 one way road to its rear side and further dragged the same and then went off the NH-17 road and dashed to road side parked luxury bus No. MH-07-C-7077 to its front side, as a result causing injuries to the occupants and driver of Maruti Alto car No.GA-06-A-1017 namely Annapurna Kholkar, Kirti Chodankar and Kalpeet Nadkarni, also to the occupants of Hyundai Accent Car No.GA-01-E-3957, namely Mr. Sanchit Pravin Gupta and Mr. Layhart Braganza and damaging the luxury bus No.MH-07-C-7077. Further the injured lady occupants of Maruti Alto car No.GA-06-A-

1017 Miss Kirti Bhalchandra Chodankar, Age 21 yrs R/o Revora Bardez Goa succumbed to her injuries at Asilo hospital and injuries to himself."

15. The Tribunal has also noted that the sketch annexed to the scene of accident panchanama (Exh.25 Colly) depicts the position of the vehicles at the site after the accident. There are some glass pieces seen at a distance of about 10 meters from the meeting point of the two roads and the offending vehicle, the offending vehicle is partly on the side road and partly on the highway on the left side, the vehicle of the victim is at a distance of about 18.30 meters from the glass pieces and about 7 meters from the alleged offending vehicle. There are also skid marks of about 6 meters starting from behind the alleged offending vehicle up to the victim's vehicle.

16. The Tribunal has failed to note that the sketch annexed to the scene of accident panchanama also shows that the offending vehicle, after dashing the Maruti Alto car in which Kirti was seated, proceeded further and dashed a luxury bus that was parked on the roadside. The luxury bus bearing registration no.MH-07-C-7077 is evident in the sketch. The sketch indicates the impact between the offending Accent vehicle and the luxury bus. The Alto car where Kirti was seated is also seen in the sketch.

17. There is no dispute about the accident. There is also no dispute about the involvement of the offending Hyundai vehicle. The only disagreement is whether the accident occurred because of the rash and negligent driving of respondent no.1, i.e., the driver of the Hyundai Accent vehicle.

18. Now the evidence on record makes out a case of *res ipsa loquitur*. There is evidence that the Alto car where Kirti was seated was stationary. Moreover, the Hyundai Accent car has not only dashed the Maruti Alto car, but even after the dash, respondent no.1 was in a position to control the vehicle and went and dashed a luxury bus parked a little distance away. All this is very clearly evident from the sketch to the Panchanama, which was not even seriously contested. Therefore, merely because the claimants were not in a position to examine eyewitnesses, the issue of rashness and negligence could not have been decided against them.

19. There are photographs placed on record. There is evidence about the postmortem of Kirti and the injuries suffered by her. Applying the principles set out in the above decisions rendered by the Hon'ble Supreme Court, I believe the issue of rashness and negligence should have been decided in favor of the claimants. This finding is not based on the police documents but mainly

stems from the conviction of the driver of the offending car in the criminal prosecution launched on such police documents.

20. Respondent no.1 Shaunaq Pai, the driver of the Hyundai Accent car, has examined himself. He stated that Mr. Kalpit Nadkarni, whose car the deceased had boarded, suddenly took the car towards the right side without indicating that he was coming to the center of the road. Further, at the time of impact, the left indicator of his car continued to flash.

21. In his cross-examination, he asserted that he had a valid driving license and his vehicle was insured. However, he also admitted that the Judicial Magistrate First Class had convicted him, 'B' Court at Mapusa, in the criminal case arising out of the accident involved in this case.

22. The Tribunal has completely missed this vital evidence. The driver of the offending vehicle himself admitted that the JMFC convicted him for rash and negligent driving in the criminal case arising out of the accident involved in this very case. The standard of proof in a criminal case is that of proof beyond a reasonable doubt. In contrast, the standard of proof in a claim petition is only that of a preponderance of probabilities. The Tribunal was, therefore, not justified in holding that the claimants had failed to

prove the issue of rashness and negligence on the part of respondent no.1.

23. In this case, there is no dispute that Kirti was 21 years old at the time of her demise. There is evidence that she was a beautician employed at Anisha Beauty Parlor. AW2, Kirti's employer, has deposed in the matter. He has deposed that she was earning ₹300/- per day and taking independent orders.

24. AW3 Karishma has deposed that Kirti was not only working as a beautician in Anisha Beauty Parlor but was also taking private orders. Karishma is a co-employee at the Anisha Beauty Parlor. She has deposed to the independent orders of mehendi on weddings and other ceremonies and earned about ₹7,000/- to ₹8,000/- per month.

25. Based on the above evidence, the Tribunal has taken the income of the deceased at ₹9,800/- per month. The Tribunal has reasoned that the private orders would be only during the wedding season; therefore, an amount of only ₹2,000/- can be added to her monthly income of ₹7,800/-.

26. In my opinion, the approach of the Tribunal is not proper. Here, the claimants have examined Kirti's employer, who deposed

that she was earning ₹7,800/- per month. Her co-worker also deposed that Kirti was making an additional ₹7,000/- to ₹8,000/- per month by taking private orders. The inference that the private orders were only seasonal, i.e. for marriage ceremonies, is not based on any material on record. Therefore, her additional income should have been safely taken at ₹4,000/- per month. This means that the deceased's income would be ₹11,800/- per month, which can be rounded up to ₹12,000/- per month.

27. To this income, an additional 40% will have to be made towards future prospects considering the law laid down in *National Insurance Company Ltd. v. Pranay Sethi & Ors. - 2017 (16) SCC 680*. This means that the monthly income of the deceased can be taken at ₹16,800/-. Her annual income would then amount to ₹2,01,600/-.

28. A deduction of ₹67,200/- corresponding to 1/3rd is due from the above amount. This means that the dependency will have to be worked out by taking her income at ₹1,34,400/-.

29. Since Kirti was 21 years old at the time of the accident, the relevant multiplier will be 18. The compensation towards dependency would therefore amount to ₹24,19,200/-.

30. In addition, each claimant would be entitled to compensation of ₹40,000/- towards the consortium. Furthermore, the claimants are entitled to ₹15,000/- towards funeral expenses and ₹15,000/- towards loss of estate. Therefore, further addition of ₹1,50,000/- will have to be made. Thus the total compensation would come to ₹25,69,200/- and not just ₹11,03,400/-.

31. The Tribunal has awarded interest @ 8% p.a. from the date of institution of the claim petition till the actual payment.

32. 50% of the compensation is apportioned to appellant no.3, i.e., Kirti's mother. The balance of 50% will be shared equally by her two siblings, i.e., appellant nos.1 and 2, who, by now, must have attained the age of majority.

33. This appeal is accordingly allowed and the respondents are directed to jointly and severally pay the claimants an amount of ₹25,69,200/- together with interest @ 8% p.a. from the date of institution of the claim petition till the actual payment. The apportionment of compensation shall be in terms indicated above.

34. The assistance rendered by Advocate Mr. Shailesh Redkar in this matter is both acknowledged and appreciated.

35. The Registry, to forward an authenticated copy of this Judgment and Order to the appellants. The Registry to also inform the appellants that they can contact the Member Secretary of the North Goa District Legal Services Authority and seek assistance for executing this Order. If any execution proceedings are lodged by the appellants, the executing Court to dispose of the same expeditiously.

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

M. S. SONAK, J.

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SINGBAL
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