

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.28/2019

1. Mrs. Pedrinha Fernandes, D/o late Roque Fernandes, aged 62 years, unmarried, r/o H. No.156-A, Camrabhat, Sao Jose de Areal, Salcete, Goa. Through her guardian, as the claimant is mentally challenged), Mrs. Jeniffer Costa e Fernandes, w/o Raju Fernandes, aged 38 years, housewife, resident of H. No.65/A, Dongrim, Raia, Salcete, Goa, 403 720. ... APPELLANT

Versus

1. Mr. Prasad Naik, s/o Ganesh Naik, aged 36 years, r/o H. No.18, Costi, Kalay, Sanguem, Goa

2. The Managing Director, Kadamba Transport Corporation Ltd., Paraiso de Goa, Alto Porvorim, Bardez, Goa ... RESPONDENTS

Mr. Prashil Arolkar, Advocate *for the Appellant*.
Mr. A. R. Kantak, Advocate *for Respondent No.2*.

CORAM: M. S. SONAK, J.
DATED: August 19, 2022

ORAL JUDGMENT:

1. Heard Mr. Prashil Arolkar for the Appellant and Mr. A. R. Kantak for the respondent no.2. Respondent no.1, though served, is neither present nor represented.

2. The appellant, through her guardian, challenges the judgment and award dated 15.09.2018 in Claim Petition No.62/2016, by which the Motor Accident Claims Tribunal at Margao (Tribunal) has dismissed her claim petition seeking compensation of ₹5 lakhs for the death of her brother in a vehicular accident on 01.09.2015.

3. The Tribunal has held that the appellant failed to prove that the accident was caused due to the rashness and negligence on the part of the KTC bus driver. After recording its finding, the Tribunal did not even bother to compute the quantum of compensation, even though a specific issue was framed in this regard.

4. The Hon'ble Supreme Court has repeatedly held that the courts must decide all issues one way or the other, particularly while deciding the claim petitions. The approach of the Tribunal in this matter is contrary to such decisions.

5. In *Bimlesh & Ors. v. National India Assurance Co. Ltd. - (2010) 8 SCC 591*, in paragraph 9, the Hon'ble Supreme Court has held that the claim tribunal is required to dispose of all issues one way or the other in one go while deciding a claim petition. In *Agricultural Produce Marketing Committee,*

Bangalore v. State of Karnataka & Ors. - 2022 SCC OnLine (SC) 342, the Hon'ble Supreme Court has held that the courts must avoid shortcuts and decide all issues that fall for their determination.

6. The Tribunal, in this case, has also not adopted the correct approach in determining the issue of rashness and negligence. The approach, with respect, is contrary to the law laid down by the Hon'ble Supreme Court in several decisions, including *Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr. - (2013) 10 SCC 646*, *Mangala Ram vs. Oriental Insurance Co. Ltd. - (2018) 5 SCC 656*, *Sunita And Others vs. Rajasthan State Road Transport Corporation And Others – (2020) 13 SCC 486*, *Anita Sharma and others vs. New India Assurance Company Limited and another – (2021) 1 SCC 171*, *Parmeshwari vs. Amir Chand & Ors. - (2011) 11 SCC 635* and *Vimla Devi & Ors. vs. National Insurance Company Ltd. - (2019) 2 SCC 186*.

7. 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.

8. 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. They must take a holistic view bearing in mind that strict proof of an accident caused by a particular vehicle in a specific manner often cannot be adduced 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. They must consider the legal effect of the failure to cross-examine crucial witnesses on crucial issues.

9. 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.

10. In *N. K. V. Bros. (P) Ltd. vs. M. Karumai Ammal & Others - AIR 1980 SC 1354* 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. Accident 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 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."

11. In *Sunita & Ors. (supra)*, the Hon'ble Supreme Court held that the Tribunal had correctly accepted the claimant's contention that the Respondents did not challenge the propriety of the FIR and the charge sheet before any authority. The only defense raised by the Respondents to this plea was that the FIR was based on wrong facts and was filed in connivance between the complainants and the police, against which the Respondents had complained to the superiors, but to no avail. The Hon'ble Supreme Court noted that apart from this bald assertion, no

evidence was produced by the Respondents before the Tribunal to prove this point. The filing of the FIR was followed by the filing of the charge sheet for offenses under Sections 279, 337, and 304-A of IPC and Sections 134/187 of the MV Act, which, again reinforces the allegations in the said FIR insofar as the occurrence of the accident was concerned and the role of the driver in causing such accident.

12. The Hon'ble Supreme Court did not approve the approach of the High Court in not even making a mention, let alone record a finding of any impropriety against FIR or charge sheet or the conclusion reached by the Tribunal. Yet, the FIR and the charge sheet were found to be deficient by the High Court. The Tribunal did not even look into these documents in the present case because the I.O. was not examined. There was no need to examine the I.O. Because such records were produced and relied on by both the contesting parties.

13. The Hon'ble Supreme Court, in paragraph 27, specifically held that the Tribunal's reliance upon FIR No.247/2011 in the said case and the charge-sheet could not be faulted as these documents indicated the complicity of the driver in the said matter. The Court held that the FIR and the charge sheet, coupled with other evidence on record, inarguably establish the

occurrence of the fatal accident and also point towards the negligence of respondent no.2 in causing the said accident. The Court observed that even if the final outcome of the criminal proceedings against respondent no.2 is unknown, the same will make no difference, at least to decide the claim petition under the MV Act. The Court referred to its decision in *Mangla Ram (supra)*, where it was held that the nature of proof required to establish culpability under criminal law is higher than the standard required under the law of torts to create liability.

14. In the present case, the Tribunal was justified in holding that AW1 was not the competent witness to depose on the issue of rashness and negligence. However, the Tribunal was not justified in discarding the evidence of AW3-Damodar Chitari and AW4 – Head Constable of the Maina-Curtorim Police Station who conducted the panchanama and even lodged the FIR against the KTC bus driver for causing the accident by his rashness and negligence.

15. AW3 Damodar Chitari, in paragraph 2 of his affidavit in lieu of examination-in-chief, stated the following:-

"2. I say that, when I reached near Nuvem church at about 16:40 hours, I saw a Kadamba Mini Bus bearing reg.no. GA - 03 - X – 0187 which was proceeding in opposite

direction from Margao towards Panaji and when reached in front of Nuvem Church, Nuvem Salcete suddenly gave dash against the pedestrian who was crossing the road from right hand side to left hand side i.e. from Nuvem church side to Bus stand side. I immediately stopped my motor cycle and rushed towards him and I noticed that pedestrian had sustained injuries."

16. AW3 also deposed about the people who gathered at the accident spot, inquiring about the name of the KTC bus driver and the bus driver disclosing his name as Prasad Naik. He also deposed about the 108 ambulance reaching the spot, and the police arrived at the site, etc. In paragraph 5, he specifically stated that at the time of the accident, the KTC bus driver Prasad Naik was driving the Kadamba Minibus at a fast speed and rashly and negligently thereby causing the accident.

17. AW3 was cross-examined, and he explained that he was requested by the claimant to depose in the present matter since she, along with the deceased, used to attend the feast. He stated that he reached the accident spot after around two minutes after the accident. The Tribunal has relied upon this statement to discard AW2's entire testimony that had withstood the cross-examination.

18. AW3's statement that he reached the spot after two minutes does not detract from his clear and convincing evidence about the genesis of the accident. From the context, it is quite clear that AW3 witnessed the accident but may have taken two minutes actually to reach the spot of the accident. Therefore, based upon this solitary line which, to my mind, has been torn out of context or, in any case, misinterpreted, the clear and convincing testimony of AW3 should not have been rejected in a matter of this nature.

19. There is virtually no cross-examination of AW3 on the crucial and material aspects deposed to by him. A general suggestion that the contents of paragraphs 1 to 4 of the affidavit are false hardly suffices. Incidentally, AW3, in paragraph 5 of his affidavit, had clearly and categorically stated that at the time of the accident, the KTC bus driver Prasad Naik was driving the Kadamba Minibus at a fast speed and also in a rash and negligent manner, thereby causing the accident. Not even a suggestion was put to AW3 about the contents of paragraph 5 of his affidavit being incorrect or false. The Hon'ble Supreme Court of India has held that the courts/tribunals should draw appropriate inferences from the failure of the respondents to properly cross-examine the witnesses of the claimants or confront them with their version despite the adequate opportunity. The courts/tribunals must

consider the legal effect of the failure to cross-examine crucial witnesses on crucial issues.

20. Apart from AW3, the claimant examined Chandrakant Velip, Head Constable attached to the Maina-Curtorim Police Station at the time of the accident. He has also deposed about the panchanama, etc. He has deposed that on his investigations, he concluded that the accident occurred due to the negligence of the KTC bus driver. Therefore he lodged a complaint and eventual prosecution against the KTC bus driver. However, the Tribunal has brushed aside his evidence by observing that the KTC bus driver was ultimately acquitted in the prosecution launched against him.

21. Again, the Tribunal was not justified in adopting the above approach. The decisions referred to earlier held that the FIR, the charge sheet, and other investigation papers must be considered in such matters and even in cases where the prosecution ultimately may have failed, and the offending vehicle driver acquitted. In addition, the decisions have pointed out a fundamental difference between the nature of proof required under criminal law and civil law.

22. The Tribunal also failed to look into the medical documents produced on record. From the injuries sustained by the deceased, it is apparent that the bus driver's version about the deceased by himself falling in front of the KTC bus was false. A mere fall would not be sufficient for the injuries suffered by the deceased. After about fifteen days of agony and admission to the hospital, the victim died from such injuries. There is casualness and inconsistency in the suggestions put to the claimant's witnesses. There was no clear line of questioning, and the Tribunal has overlooked even this aspect.

23. Thus, the evidence on record, both oral and documentary, is more than sufficient to record a finding that the accident in which the deceased ultimately died due to the rashness and negligence on the part of the KTC bus driver.

24. Mr. Kantak, however, submitted that AW3 was a brought-up witness. He submitted that AW3 resides at Cuncolim, and there is no explanation of what he was doing at the alleged accident spot. He pointed out that AW3 is a Hindu, and there is no explanation for how the claimant and the deceased knew AW3. Finally, he submits that AW3 admitted coming to the spot after two minutes. Based on all this, Mr. Kantak offers that the Tribunal was justified in doubting AW3's testimony.

25. The questions now posed by Mr. Kantak were never posed to AW3 when he was in the witness box. Possibly, if all such questions were posed, AW3 would have explained or given appropriate answers. Based on this line of questioning before the appeal court, there is no question of disbelieving the otherwise clear and convincing testimony of AW3.

26. Mr. Kantak also submitted that the deceased died almost fifteen days after the accident, so that no credence can be given to the autopsy report. Furthermore, he proposed that the doctors who conducted the autopsy have no first-hand knowledge about the causes of the injuries.

27. The evidence on record shows that the deceased was admitted to the hospital soon after the accident. From Hospicio, he was shifted to the Goa Medical College, Bambolim. True, he died after about fifteen days. Therefore, the doctors had the opportunity to look into his injuries to treat them. Thus, the medical evidence is not irrelevant, as was suggested.

28. On the issue of compensation, the claimant has examined Xavier Fernandes – AW2, Proprietor of Areal Bar & Restaurant at St. Jose de Areal. AW2 has deposed that deceased Antonio was working with him at the bar and restaurant as a Manager against

a monthly salary of ₹4,000/-. This witness identified the salary certificate he issued; the same was marked in evidence as Exh.46.

29. No significant dent has been made to AW2's testimony in cross-examination. However, the Tribunal disbelieved AW2 simply because AW2 was not maintaining employee registers. AW2 had deposed that he and only two other persons were running and managing the bar and restaurant. In these circumstances, failing to maintain employment registers was not a proper ground to discard his evidence. Even the salary deposed to by AW2 was entirely within the bounds of reasonability.

30. The Tribunal has also unduly discarded the evidence of AW1. AW1 is the guardian of the claimant. The claimant is the spinster sister of deceased Antonio. A guardian in these proceedings represented her because she is reported to be mentally challenged. Furthermore, AW1 has deposed Antonio to being a Manager at the Areal Bar & Restaurant. Therefore, there was no good reason to discard her evidence.

31. Since the deceased was earning ₹4,000/- per month, his annual income would have been ₹48,000/-. Moreover, the deceased was 62 years old at the time of his death; therefore, there is no question of making any addition to future prospects.

Moreover, the deceased was a bachelor, and therefore, a deduction of 50% is due.

32. The multiplier, in this case, is five considering the decision of the Hon'ble Supreme Court in *National Insurance Company Ltd. vs. Pranay Sethi & Ors. - (2017) 16 SCC 680*. Thus, the compensation for dependency would come to ₹1,20,000/-.

33. The claimant is entitled to ₹40,000/- towards consortium, ₹15,000/- towards funeral expenses, and another ₹15,000/- towards loss of estate.

34. The claimant has claimed ₹25,000/- towards medical expenses. No bills have been produced. However, there is evidence that the deceased was in the hospital for at least fifteen to sixteen days after the accident. Furthermore, there is evidence that the deceased died in the hospital itself. Therefore, there must have been expenses towards nourishment, transportation, purchase of some medicines, etc. Thus, the Tribunal should have allowed the claim of ₹25,000/- against this head. Furthermore, AW1 had deposed that she had misplaced the bills. This is quite reasonable considering that the claimant was herself mentally challenged, and the guardian had to look after not only the

claimant but also the deceased during the period of fifteen to sixteen days when he was hospitalized.

35. The deceased must have experienced tremendous pain and suffering for fifteen days, for which he was required to be hospitalized. Unfortunately, though, he did not live to receive any compensation for such pain and suffering. Therefore, such compensation is required to be paid to the claimant. Furthermore, there is evidence that the claimant depended entirely on her bachelor brother. Thus, the deceased had to be hospitalized for about fifteen days until he succumbed to the accident. For this, the claimant must be compensated to the extent of ₹50,000/-.

36. In this case, the claimant is entitled to compensation for the legal costs of ₹15,000/-.

37. Thus, the total compensation comes to ₹2,80,000/-. The accident, in this case, took place on 01.09.2015. Therefore, interest @ 7% p.a. will be appropriate for this amount.

38. This appeal is accordingly allowed. Accordingly, the respondents are held jointly and severally liable to pay the

appellant compensation of ₹2,80,000/- along with interest @ 7% p.a. from the date of the claim petition till realization.

39. The respondents are directed to deposit the above compensation amount together with interest in this Court within eight weeks from today without fail after giving due intimation to the learned counsel for the appellant. The appellant can withdraw this amount upon deposit by furnishing appropriate identification documents and bank details.

40. The appeal is allowed in the above terms.

M. S. SONAK, J.

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