

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.33 OF 2019

1. Shri Bhimsen Tanaji Gawade,
s/o Mr. Tanaji Gawade,
aged 57 years, service,
R/o H.No.147, Gawadewada, Mandrem,
North Goa, Goa – 403 527

2. Smt. Rajashree Bhimsen Gawade,
aged 47 years, occ. Housewife,
R/o H.No.147, Gawadewada, Mandrem,
North Goa, Goa 403 527.

... Appellants

Versus

1. Govt. of Goa,
The Director of Fire Emergency Services,
St. Inez, Panaji Goa 403 501
(Owner of the vehicle)

2. Shri Narayan Ramkrishna Dhargalkar,
r/o H.No. Not known,
Tisk, Usgaon, Ponda Goa.
(Driver of the vehicle).

... Respondents

Mr. Salil Saudagar, Advocate for the Appellants.

Ms. Sapna Mordekar, Additional Government Advocate for
Respondent No.1.

Mr. Arun Talaulikar, Advocate for Respondent No.2.

CORAM:

M. S. SONAK, J.

DATED:

22nd July 2022

ORAL JUDGMENT

1. Heard the learned counsel for the parties.
2. The Appellants – Parents of 21 years old Suraj Gawade appeal the judgment and award dated 31.10.2018 by which the Motor Accident Claims Tribunal at Mapusa dismissed their Claim Petition No.51/2015 because they were allegedly unable to prove that the accident in which Suraj died on the spot, was due to rash and negligent driving of the driver of water tender of the Government Fire Services Department at Ponda. The Tribunal determined the compensation payable to the claimants at ₹12,25,000/- but declined to award the same for want of proof of rashness and negligence.
3. Suraj was a student of B.E. Mechanical Engineering at the time of this accident on 21.05.2014. At about 6.00 p.m., he was riding his scooter (Activa) from Ponda to Panaji when a water tender of the Government Fire Services Department, Ponda, tried to take a turn and enter the Fire Station knocked him down, killing him on the spot.
4. Suraj's father (AW1) and one Sandeep Naik (AW2) deposed to the accident. The Tribunal has correctly held that the evidence of AW1 might not be much relevant because he was not a witness to the accident. However, the Tribunal was not justified in rejecting the testimony of Sandeep Naik (AW2), an eyewitness to the accident.
5. AW2, in his chief, explained how he was at the accident spot. He explained how he saw a water tender coming behind the Activa

scooter when Suraj was riding. He deposed about a slight slope upwards from where the scooter and water tender were coming. He deposed how the water tender accelerated to overcome the gradient and how he heard the revving sound of the water tender engine.

6. AW2 then deposed that the water tender sped up and took a sudden left turn to go through the gate of the Fire Station by trying to overtake the scooter. In this process, the water tender hit the scooter and the rider. He deposed about hearing the sound of impact and thereafter saw the scooter and its rider thrown down due to the impact of the water.

7. In my judgment, AW2 withstood the cross-examination admirably. Some insulting and insensitive suggestions were made to him, but AW2 stood his ground. The only reason why the Tribunal has rejected the testimony of AW2 is that he stated that he had not witnessed the accident taking place and that when he heard the sound, he saw the scooter and its rider thrown away due to the force of the impact of the water tender to it.

8. The above statement has been torn out of the context and setting in which his entire testimony stands. If his testimony is considered in its entirety, then it is evident that the witness has seen the genesis of the accident though the precise point of impact may have escaped him. Furthermore, this witness has deposed in great detail about the accident's circumstances and his role in witnessing it. Therefore, based on such a solitary line torn out of context, the

Tribunal was not justified in rejecting the testimony of this witness, more so because police records corroborated this testimony. The water tender driver is facing prosecution for his rash and negligent driving leading to the accident.

9. AW1, Suraj's father, had not witnessed the accident, but he produced on record the following documents concerning the police investigations into the accident.

Sr. No.	Particulars	Date
1	Complaint under Sec.279, 304 A IPC	04.06.2014
2	FIR	25.06.2014
3	Scene of offence panchanama	21.05.2014
4	Sketch of Scene of offence panchanama	21.05.2014
5	Inquest panchanama	21.05.2014
6	Memorandum of Autopsy	22.05.2014
7	Death Certificate	05.06.2014
8	Birth Certificate	18.12.2012
9	Bonifide Certificates of Gawade Suraj Bhimsen	08.12.2014 and 24.05.2017

10. Regarding rashness and negligence, FIR, scene of offense panchanama, the sketch of the scene of offense panchanama, inquest panchanama, and memorandum of the autopsy were relevant documents. Therefore, they were admitted in evidence and even marked as exhibits. Incidentally, most of these documents were also

produced on record by Narayan Dhargalkar (RW1), the driver of the water tender.

11. Thus, there was no dispute about these documents. Yet, the Tribunal refused to look into these documents and draw necessary inferences simply because Suraj's parents failed to examine the investigation officer in the matter. In my opinion, this was an entirely wrong approach in a case where the parents of the deceased Suraj were seeking compensation for Suraj's death in a vehicular accident. Moreover, these documents, to a great extent, corroborate the eyewitness testimony.

12. The documents establish that the neutral authorities, like police authorities, also deemed it appropriate to register an FIR against the water tender driver and lodged the prosecution against him. Mr. Saudagar submitted that the prosecution is still pending, and the trial has reached the stage where the driver's statement under Section 313 of Cr.P.C. is to be recorded.

13. The Tribunal has overwhelmingly relied upon the evidence of the driver (RW1) and Mahadev Velip (RW2), an officer sitting next to this driver in the water tender at the time of the accident. However, on an analysis of the evidence of these witnesses, even if the presence of RW2 is to be accepted, their version inspires not much confidence.

14. RW1 deposed to Suraj's colliding with the pole and coming under the water tender after that. He deposed that there was always a

rush of traffic at the accident spot; therefore, it was inconceivable that the water tender was driven at some speed. The collision with the pole version contradicts the documentary evidence. Further, Mahadev Velip (RW2), sitting next to RW1, admitted that there was no rush or traffic at the time of the accident.

15. Both the witnesses do not claim to have seen the accident but insist that Suraj collided against a pole or rough edge of the road and came under the water tender after that. If they have not seen the accident as they claim, it is difficult to appreciate their deposition about the collision with the pole or edge of the road. Moreover, the version suggested by these two witnesses is not backed by contemporary evidence.

16. The version suggested by RW1 and RW2 finds no corroboration in the scene of the accident panchanama or the actual panchanama. Two witnesses have taken a diverse stance. Even suggestions put to Suraj's father or Sandeep Naik (AW2) are contradictory. First, the suggestions were put about Suraj having consumed alcohol when there was not even an iota of evidence to make such an insensitive suggestion to a father who has lost 21 years old son in a road accident. Then, suggestions were put about the collision with the pole when the police reflected in the scene of the accident panchanama is not near the site of the accident. After that, suggestions were made about a rough road edge collision. Finally, suggestions were put up about rash and negligent driving by Suraj

when witnesses claimed that they did not even see the scooter which he was riding at the time of the accident.

17. The Tribunal erred in rejecting the testimony of AW2 and documentary evidence in the form of police investigation reports. The Tribunal also erred in blindly accepting the contradictory versions of RW1 and RW2 and concluded that Suraj was responsible for the accident in which he died. The approach of the Tribunal is contrary to the law laid down 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

18. 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

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

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.

19. 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 take into account the legal effect of the failure to cross-examine crucial witnesses on crucial issues.

20. 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.

21. 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 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

⁶ AIR 1980 SC 1354

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."

22. 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.

23. 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.

24. 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.

25. The Appellants have taken out Stamp Number (Appln.) No.477 of 2020 (Filing No.) for the production of additional evidence. Mr. Saudagar submitted that there is clear evidence, even otherwise, that the water tender was registered in 1984 and the accident occurred in 2014. This means that the water tender was almost 30 years old at the time of its accident. Therefore, by the Civil

Application, the Appellants seek to produce official documents that indicate that this water tender was already "condemned" in 2012.

26. Mr. Saudagar submits that the above evidence establishes that the water tender was not roadworthy and should not have been on the road in the first place.

27. In my judgment, there is no necessity to advert to the above aspect because the evidence on record is sufficient to establish by applying the test of preponderance of probabilities, rashness, and negligence on the part of the water tender driver.

28. Ms. Mordekar and Mr. Talaulikar made a valiant attempt to point out that Suraj was responsible for the accident or, in any case, the water tender driver was not responsible for the accident. They submitted that there were errors in the police records, the police records were not proved by examining the investigation officer, and there were no damages to the water tender. Since the water tender was turning and entering into Fire Station, a presumption would arise that it was slow. Since there was an upward gradient, a presumption would arise that 30 years old tender filled with water would not have gathered much speed. Finally, they pointed out that mechanical and manual signal was given before the turn. For all these reasons, they submitted that the water tender driver was not responsible for the accident.

29. On due consideration of all the above contentions, in my judgment, the same cannot be accepted. The evidence on record, by a preponderance of probabilities, establishes negligence on the part of the water tender driver. The points raised by the learned counsel for the Respondents could perhaps legitimately be made in a criminal trial that the driver is facing. However, the scope of proceedings before the MACT is entirely different. Examining all such issues will be contrary to the approach the Hon'ble Supreme Court prescribes in the decisions referred to above in claim cases.

30. For all the above reasons, the finding on rashness and negligence recorded by the Tribunal is hereby reversed.

31. Regarding compensation, the Tribunal has correctly taken Suraj's income at ₹10,000/- per month. Moreover, there is no dispute about Suraj's age and, consequently, the multiplier of 18. Therefore, the Tribunal has correctly added 40% towards future prospects and the deduction of 50% towards personal expenses that Suraj would have incurred. Based on all this, the compensation for dependency comes to ₹15,12,000/-.

32. In terms of *National Insurance Company Limited Vs. Pranay Sethi and others*⁷, the compensation of ₹15,000/- is due towards loss of estate, ₹15,000/- towards funeral expenses, and

⁷ (2017) 16 SCC 680

₹40,000/- each towards consortium. Thus, the total compensation that can be awarded to the Appellants comes to ₹16,22,000/-.

33. The compensation workings derived support from the decision of the Hon'ble Supreme Court in *Meena Pawaia and others Vs Ashraf Ali and others*⁸, where the Hon'ble Supreme Court was also coincidentally concerned with the death of 21 years old student studying in the third year of B.E.

34. For all the reasons above, this appeal is allowed, and the Respondents are jointly and severally directed to pay the compensation of ₹16,22,000/- together with interest at the rate of 9% per annum from the date of the petition till the date of actual payment.

35. The Respondents are directed to deposit the above amount in this Court within six weeks from today after giving due intimation to the learned counsel for the Appellants. Once the amount is deposited, the Appellants will be entitled to withdraw the same by submitting proper identification documents and bank details. The registry to facilitate the remission of this amount directly into the bank accounts of the Appellants.

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

37. Stamp Number (Appln.) No.477 of 2020 (Filing No.) does not survive with the disposal of the appeal, and the same is disposed of accordingly.

M. S. SONAK, J.

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