

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.18 OF 2020

1. Shri. Pradip Vaseant Salelkar,
36 year of age, Son of late Vasant
Salelkar,

2. Smt. Neeta Pradip Salelkar,
60 year of age,

Both residents of House no. 318/1,
Fourth Ward, Near Colva Circle,
P. O. Colva, P.O. 403 708.

..... Appellants.

Versus.

1. Abubakkar G. Batwale,
Major of age, S/o. Mr. Gons Batwale,
R/o. Nandgaon, Tal. Kankavali,
Dist. Sindhudurg, P. C. 416 602.
Maharashtra State, (Driver of Truck
bearing Reg. no. MH-07/C-5452),

2. Mr. Jagdish Dattatray Koli,
Major of age, S/o. Shri Dattatray Koli,
R/o. Kharepatan, Tal. Kankavali, Dist.
Sindhudurg, P. C. 416 602, Maharashtra
State, (Regd. Owner of Truck bearing
Reg, no. MH-07/C-5452).

3. The Oriental Insurance Co. Ltd
Branch Office, no. 16 Chintamani Park,
Ground Floor, Opp. To Gango Temple,

Mumbai-Goa Road, Kankavali, Dist.
Sindhudurg, P. C, 416 602. MaharashtraRespondents.
State

Mr. Ashwin D. Bhobe, Advocate for the Appellants.

Mr. Dinesh Naik, Advocate for Respondents No.1 & 2.

Mr. Santosh H. Bharne, Advocate for Respondent No.3.

CORAM : M. S. SONAK, J.

Reserved on : 06/01/2023

Pronounced on : 07/01/2023

JUDGMENT: -

1. Heard Mr A.D. Bhobe for the Appellants, Mr Dinesh Naik for Respondents No.1 and 2, and Mr Santosh Bharne for Respondent No.3-Insurance Company.

2. The Claimants are the parents of Aishwarya, who died in a vehicular accident on 19/4/2017. She was 17 years old and a student pursuing 12th Science in Mushtifund Aryaan Higher Secondary School, Panaji, Goa.

3. On 19/4/2017, she was riding a pillion with her father, Pradip Salelkar (Appellant No.1), on a motorcycle when they were struck by a truck bearing registration No.MH-07/C-5452. As a result of this accident, Aishwarya and her father, Pradip,

sustained injuries. However, unfortunately, Aishwarya succumbed to the injuries while being shifted to the hospital from the accident spot. Her father – Pradip, survived.

4. Claim Petition was instituted by Aishwarya's father – Pradip, and her mother, Neeta. The Motor Accident Claims Tribunal, at Margao (Tribunal), by the impugned Judgment and Award dated 15/11/2019 in Claim Petition No.102/2017, held that Aishwarya's father-Pradip and the truck driver contributed equally to the accident which resulted in Aishwarya's demise. Accordingly, after determining the just compensation at ₹16,90,000/-, the Tribunal awarded only 50% of the compensation, i.e. ₹8,45,000/- to Aishwarya's mother-Neeta. No compensation was awarded to Pradip due to the finding of contributory negligence. Hence this Appeal by the Appellant-Claimants.

5. The Tribunal, based on the material on record, accepted and recorded a finding that the sketch of the scene of the accident panchanama showed the brake marks of the tyres of the truck for a distance of 14.20 metres which indicated that the truck driver applied brakes to control his vehicle. However, the vehicle stopped at a distance of more than 14 metres from the spot where

the brakes were applied. From this, the Tribunal correctly concluded that the truck was driven at high speed; therefore, the same was not easily controllable.

6. There is evidence that the accident occurred at an intersection where an internal road joined the main road from Panaji to Margao. There is evidence that there is a junction at the intersection, and just before the junction, there were markings of cross stripes, speed breakers, or rumble strips on the highway, so the vehicles should reduce their speed at that spot. However, at the time of the accident, such speed breakers or rumble strips were removed due to the international BRICS event in Goa. This was deposed to by Pradip, who examined himself. Therefore, there was no serious challenge to this aspect.

7. Thus, there is adequate evidence of rashness and negligence on the truck driver's part. Significantly, the truck driver failed to step into the witness box, though, on behalf of the truck owner and the truck driver, Mr Dinesh Naik vehemently contended that the negligence ought to be attributed to Pradip or, in any case, Pradip contributed to the accident, equally. However, there was no explanation why the truck driver did not step into the witness box or why an adverse inference ought not to be drawn against

the truck driver for his failure to step into the witness box.

8. The Tribunal, relying upon the evidence of AW.3- Investigating Officer, held that the highway was marked with a continuous line showing the divider portion of the highway even at the junction. AW.3 also deposed that as per traffic rules, if there is a continuous line divider without any break or dots, it denotes that the rider is prohibited from taking a right turn even at the junction. The Tribunal also considered the statement of Pradip that he had seen the truck at a distance of about 20-25 metres, and due to both these factors, the Tribunal concluded that Pradip, by turning to the right crossing continuous divider line despite noticing the truck at a distance of 20-25 metres, contributed equally to the accident.

9. The Tribunal did not advert any rules or regulations for concluding that even at a junction or an intersection, there is an absolute bar from crossing a continuous divider line. Instead, the Tribunal went entirely on the deposition of AW.3, which, with respect, may not be a proper approach.

10. Mr. Bhobe, however, referred to the Motor Vehicles (Driving) Regulations, 2017. Clause 6 refers to "*Lane traffic*". Sub-clause (4) of clause 6, provides that where a road is divided

by a longitudinal yellow or white solid line, the driver, proceeding in the same direction and trying to overtake another vehicle ahead, shall not cross the said yellow or white solid line. Clause 9 provides for the precautions to be taken at intersections.

11. Mr. Santosh Bharne, learned Counsel for the Insurance Company, placed reliance on Indian Roads Congress, 2015 (IRC). He referred to Clause 3.1.1, which provides that as traffic moves forward, the broken longitudinal markings can be crossed, whereas continuous longitudinal markings shall not be crossed. Incidentally, Clause 3.1.4 provides that the continuous longitudinal marking in yellow indicates that the marking provided is strictly prohibitive and not to be straddled by the vehicles. In this case, AW.3 deposed about the markings in white, not yellow.

12. Be that as it may, even upon conjoint reading of Regulations 2017 and the Code of Practice issued by the IRC, no absolute prohibition was demonstrated, particularly at junctions or intersections. However, precautions had to be taken undisputedly in case of turning at the intersection or junction.

13. From the sketch annexed to the Panchanama, it is seen that Pradip was virtually at the mouth of the internal road, i.e. more

than 80% of the width of the highway was traversed. This, coupled with the truck skid marks of almost 14.20 metres, indicates that the truck driver's contribution to the accident was much higher than Pradip's contribution if any.

14. While Pradip stepped into the witness box and withstood the cross-examination, the truck driver, without any explanation, failed to even step into the witness box and depose his version of the accident. An adverse inference had to be drawn against the truck driver for failing to enter the witness box. However, even after considering the ambiguity in the context of the white continuous line divider or Pradip's statement of noticing the truck at a distance of 20-25 metres, his contribution to the accident cannot be taken above 25%.

15. The Tribunal also failed to appreciate that the truck is a much heavier vehicle and due care that was expected of the truck was, therefore, much more significant. In addition, the Tribunal considered removing speed breakers /rumble strips due to the BRICS event. But even this impact was equally apportioned on Pradip, which may not be correct. Thus, on cumulative consideration of the material on record and further, by drawing an adverse inference against the truck driver for failure to examine

himself, the finding about contributory negligence can be sustained, but only by holding that the truck driver's contribution was 75% and Pradip's contribution was 25%.

16. Mr Dinesh Naik also tried to urge Aishwarya was not wearing a helmet while riding a pillion. No such defence was raised either in the written statement or in the course of evidence. No questions were posed to Pradip or the Investigating Officer on this aspect. Because the Panchanama may not refer to this aspect, Mr Naik wanted the Court to accept that Aishwarya was not wearing a helmet. This would not be a correct approach, and based upon this contention, which was not even raised before the Tribunal, no negligence can be attributed to Aishwarya.

17. Mr. Naik relied upon *The New India Assurance Co. Ltd. vs. Mr. Julius T.J. Freitas & Ors.* 2021 (7) All MR 29 on the aspect of failure to wear a helmet contributing to an accident. However, there was positive evidence about the rider not wearing a helmet in the said matter. In the present case, there is no such evidence. Therefore, the decision in *Mr. Julius T.J. Freitas & Ors.* (supra) is distinguishable.

18. In *Siby Paul vs. Praveen Kumar G.N. and ors.* AIR 2009 Kerala 99, again, the issue was about a helmet. This decision

holds that contributory negligence can be assumed if drivers or pillion riders do not wear a helmet. In this case, there is no evidence that Aishwarya was not wearing a helmet. Therefore, even this decision will not apply to the present case.

19. In *Kadamba Transport Corporation Ltd. vs. Mrs. Anacleta Henriquina Iida Fernandes and Anr.* 2021 (2) All MR 230, this Court, on evaluating the evidence in the particular case, held that the bus driver and the scooterist were equally responsible for the accident. However, the facts in the said case are not comparable to the facts in the present case. Therefore, the decision in *Kadamba Transport Corporation Ltd. vs. Mrs. Anacleta Henriquina Iida Fernandes* (supra) is of no assistance to the owner/driver.

20. Thus, for all the above reasons, the impugned Judgment and Award is modified by holding that the truck driver's contribution to the accident was 75% and not merely 50% as held by the Tribunal. As a result of this modification, Respondents No.1, 2, and 3 would now become jointly and severally liable to pay to Neeta – Claimant No.2 an amount of ₹12,67,500/-, instead of ₹8,45,000/-. In all other aspects, the directions in the impugned Award are maintained.

21. Respondents No.1, 2, and 3, if they have already paid the originally awarded amount, must now deposit in this Court the enhanced amount, together with interest, within 2 (two) months from today after giving due intimation to the learned Counsel for the Appellants. Suppose the originally awarded amount is not yet paid. In that case, the Respondents, particularly the Insurance Company, must deposit the entire awarded amount, with interest, within 2 (two) months from today, in this Court.

22. Upon deposit, Appellant No.2 will be entitled to withdraw the deposited amount, after furnishing identity and bank details. Registry to ensure that the amounts are directly deposited into Appellant No.2-Neeta's bank accounts. The Appeal is partly allowed in the above terms. There shall, however, be no order for costs.

M. S. SONAK, J.

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