

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.49 OF 2022

Mrs Elsy Jolly Jacob
(mother of the deceased)
Aged 54 years, married,
Housewife, resident of
H.No.139/1, Plot No.06,
Behind Honda Showroom,
Jaycee Nagar, Curti Ponda Goa.

....Appellant

Versus

1. Shri Babaji Ramu Desai
Major of age, Driver,
Resident of A/P Londa,
TQ Khanapur Dist, Belgaum.

2. Mr Mahesh Gurudas Naik
Major of age, Occu. Business,
Resident of H.No.S-133,
Indiranagar Satode,
Querim, Ponda Goa.

3. Bajaj Allianz General Insurance
Company Ltd., Through its
company having its office
At Sesa Ghar 20, EDC Complex,
Patto Plaza, Panaji Goa.

4. Mrs. Binsu Mary John,
Widow of the deceased,
Widow of Theverthundiyl
John Jacob, aged 26 years,
Married, service,
Resident of H.No.139/1,
Plot no.06, Behind Honda Showroom,

Jaycee Nagar, Curti Ponda Goa.

....Respondents

Mr R.G. Ramani, Senior Advocate, with Mr Pranav Kakodkar, Advocate for the Appellant.

Mr Amey Kakodkar, Advocate for Respondent No.3.

CORAM : M.S. SONAK, J.

Reserved on : 9th JUNE 2023

Pronounced on : 12th JUNE 2023

JUDGMENT :

1. Heard Mr R.G. Ramani, learned Senior Advocate, along with Mr Pranav Kakodkar for the appellant and Mr Amey Kakodkar for respondent no.3.
2. This appeal is directed against the judgment and award dated 25.02.2021 made by the Motor Accident Claims Tribunal dismissing Claim Petition No.10/2017.
3. The Tribunal has held that the claimants failed to establish that the accident in which John Jacob died was caused on account of rash and negligent driving of Babaji, the driver of the tipper truck bearing registration no.GA-05-T-6112. Given this finding, the Tribunal did not bother determining the compensation amount the claimants would have otherwise been entitled to. Thus, the Tribunal decided only on the issue of rashness and negligence, but the other issue of the quantum of compensation was not decided.

4. The approach of the Tribunal in not deciding all the issues together is contrary to the law laid down by the Hon'ble Supreme Court in *Bimlesh and Ors. V/s. New India Assurance Company Ltd.*¹ and *Agricultural Produce Marketing Committee, Bangalore V/s. State of Karnataka*². Despite the judgments of the Hon'ble Supreme Court and the decisions of this Court following such judgments, the Tribunals in several cases only determine the issue of rashness and negligence and not the issue of quantum of compensation.

5. On the issue of rashness and negligence, the Tribunal has mainly relied upon the circumstance that the police authorities did not deem it necessary to file any FIR or launch any prosecution against the truck driver for the accident in which the deceased, John, who was driving a Dio scooter bearing registration no.GA-05-H-9792 died after the two vehicles were involved in the accident. The Tribunal has also relied upon the evidence of Nitin Halarnkar, PSI of the Ponda Police Station (AW3), who deposed that his investigations revealed that the accident occurred due to the fault of the deceased, John.

6. Based upon the above two factors coupled with the scene of the accident sketch and the panchanama, the Tribunal concluded that the deceased, John was solely responsible for the accident and that there was no rashness and negligence on the part of the truck driver.

¹ (2010) 8 SCC 591

² 2022 SCC OnLine SC 342

7. Mr Ramani argued that the Tribunal, however, failed to give sufficient credence to the evidence of Sanjay Patkar (AW4) and Aleluia Braganza (AW5), the eyewitnesses to the accident. The Tribunal also failed to draw appropriate inference from the circumstance that the truck driver Babaji failed to step into the witness box and deposed to the genesis of the accident in which John died. The Tribunal also failed to consider that the tipper truck is much heavier and bigger than a Dio scooter.

8. Mr Ramani also argued that the Tribunal was not justified in accepting Nitin Halarnkar, PSI (AW3)'s entire evidence. Admittedly, Nitin Halarnkar (AW3) had not witnessed the accident. He also did not disclose the nature of his investigations. He maintained that there were no witnesses at the time of the accident. Sanjay Patkar (AW4) and Aleluia Braganza (AW5) spoke about witnessing the accident. They referred to the number of persons present at the accident site opposite St. Anne's Church. Therefore, the Tribunal was not justified in basing its conclusion almost entirely on the deposition of Nitin Halarnkar, PSI (AW3).

9. Mr Ramani, without prejudice submitted that the Tribunal should have considered the aspect of contributory negligence. He offered that the Truck driver was equally responsible for the accident, and the compensation should have been ordered, accordingly.

10. Mr Amey Kakodkar learned Counsel for respondent no.3, defended the impugned award on the reasoning reflected therein. He submitted that the truck driver was not responsible for the accident. He offered that the deceased was driving the scooter rashly and hit the truck's rear tyre in the process of overtaking. Mr Kakodkar submitted that the truck driver could not be held responsible for the accident in such circumstances. Mr Kakodkar also referred to the scene of the accident sketch and panchanama and pointed out that the truck driver could not be held responsible for the unfortunate accident. He, therefore, submitted that this appeal may be dismissed.

11. Mr Kakodkar, without prejudice to the above, submitted that there was no legal evidence about John's employment and salary details. He submitted that conveyance and uniform allowance could never be considered for determining dependency compensation.

12. The rival contentions now fall for determination.

13. In this case, Sanjay Patkar (AW4) deposed that deceased John (Dio scooterist) was trying to overtake the tipper truck, and he had crossed the speed breaker. He also deposed that the scooterist hit the truck's right rear tyre and fell off the road. He then deposed that the scooterist suffered injuries and died on the spot. In the cross-examination, Sanjay Patkar (AW4) admitted that the truck was in the

centre of the road after the accident and denied the suggestion that he had not witnessed the accident.

14. Alleluia Braganza (AW5) deposed that he witnessed the accident while going for his morning walk. He deposed that he saw the tipper truck proceeding from Ponda to Khandepar's side when the truck driver suddenly took his vehicle on his right side and dashed his rear right tyre on the Dio scooter, which was also proceeding in the same direction. He stated that the accident took place due to the fault of the tipper truck driver.

15. In his cross-examination, Aleluia Braganza (AW5) maintained that he had seen the accident that took place. He claimed that the tipper truck changed sides and dashed the Dio scooter. He maintained that he was behind the Dio scooter when the accident occurred. He asserted that the accident took place due to the negligence of the tipper truck driver. He stated that he could say nothing to the suggestion that police records show that the accident took place due to the scooterist. He denied the suggestion that he had not witnessed the accident.

16. The truck driver did not step into the witness box. The Insurance company did not seek any summons to examine the truck driver. The Tribunal has not bothered to draw any inferences from this circumstance.

17. Nitin Halarnkar (AW3), the PSI, who conducted investigations into the accident deposed about the evidence pointing out to the negligence of the deceased, John. Therefore, no prosecution was launched against the truck driver. The evidence of Nitin Halarnkar (AW3) is not conclusive in such matters mainly because Nitin Halarnkar (AW3) was not a witness to the accident. At the same time, evidence of Nitin Halarnkar (AW3) is not irrelevant mainly because this witness deposed of the preparation of the panchanama and the scene of the accident sketch.

18. The scene of the accident sketch does not indicate the point of impact. The sketch also does not indicate the speed breaker though, one of the witnesses referred to the speed breaker at or near the scene of the accident. But the sketch shows break or skid marks of the scooter. The sketch shows and even otherwise, the appellant's witnesses deposed that it was the scooterist, who dashed the rear right tyre of the truck. The appellant's witness deposes that this was after the scooterist had crossed the speed breaker.

19. Aleluia Braganza (AW5), a chance witness, deposed to the truck driver suddenly taking the vehicle on the right side. However, Sanjay Patkar (AW4), another eyewitness to the accident, did not depose about such sudden turning of the truck to the right side. Instead, Sanjay Patkar (AW4) deposed that deceased John was trying to

overtake the tipper truck and after he had crossed the speed breaker, John hit the truck's right rear tyre and fell off the road.

20. The truck driver, who would have been perhaps in the best position to explain the genesis of the accident did not step into the witness box. Even the Insurance Company did not summon the truck driver as a witness. The truck, as noted earlier, is a larger and heavier vehicle. The truck driver was also expected to take cognizance of the vehicle following the truck through the rear view mirror. The accident took place at a curve and, therefore, even the truck driver should have ensured that the truck was at the minimum speed.

21. Upon cumulative consideration of the oral and documentary evidence on record, the finding about John being entirely responsible for the accident, in which he unfortunately died, will have to be reversed. John's contribution to the accident can be held at 70% and the truck driver's, at 30%. This is a case of contributory negligence and the Tribunal failed to consider the aspect of contributory negligence by relying almost entirely upon the evidence of Nitin Halarnkar, PSI (AW3). No sufficient consideration was shown to evidence of Sanjay Patkar (AW4) and Aleluia Braganza (AW5). No sufficient consideration was shown to the documentary evidence on record. Besides, no adverse inference was drawn due to the failure of the truck driver to examine himself. If all of such factors were to be considered, then, a case of contributory negligence was made out.

22. As noted above, John's contribution unfortunately will have to be placed at almost 70% *inter alia* because he was right behind the Tata tipper truck and was in the best position to control his scooter so that it does not dash the right rear tyre of the truck. There is clear evidence about John attempting to overtake the truck and, therefore, John should have been more careful. Accordingly, the issue of rashness and negligence is answered by holding that the deceased, John, contributed to the accident by 70% and the truck driver by 30%.

23. On the issue of the quantum of compensation, there is evidence that the deceased, John, was 27 years old at the time of the accident. There is overwhelming evidence that John was employed as a Restaurant General Manager with Yum India, a Company with a KFC outlet at Margao. An appointment letter dated 01.02.2016 is placed on record, indicating that the company's total cost due to John's employment would be ₹5,46,463/- per annum, as detailed in Annexure A.

24. Annexure A to the appointment letter refers to John earning guaranteed cash of ₹4,15,080/- per annum. However, this includes conveyance allowance and uniform allowance. After John's unfortunate demise, these allowances would have to be excluded for determining compensation. Accordingly, John's actual income could be safely taken as ₹3,70,884/- per annum at the time of the accident.

25. Since John was only 27 years old and had a permanent job as was deposed to by Yashdeep Thakur (AW2), a Restaurant General Manager with Yum Company, and at KFC, Margao, an addition of 50% would be appropriate towards prospects. This would be consistent with the law laid down in *National Insurance Company Ltd. V/s. Pranay Sethi & Ors.*³. Thus, John's actual income, together with the component of future prospects, can be taken as ₹5,56,326/-. The multiplier, in this case, would be 17. Therefore, the compensation towards dependency would come to ₹94,57,542/-.

26. To the above amount, compensation of ₹15,000/- towards funeral expenses, ₹15,000/- towards loss of estate and ₹40,000/- towards consortium would have to be added. Thus, the total compensation would come to ₹95,27,542/- but for John's contribution to the accident to the extent of 70%.

27. In this case, the Tribunal did not bother to compute the quantum of compensation. However, the Tribunal held that the appointment letter or the salary certificate could not be looked into because they were electronically generated, and there was no certificate under Section 65(b) of the Evidence Act. The Tribunal, however, failed to appreciate the evidence of Yashdeep Thakur (AW2), who was authorised to depose on behalf of John's employer. Besides, Yashdeep Thakur (AW2) was also a Restaurant General Manager at KFC.

3 (2017) 16 SCC 680

John's father also deposed in the matter and referred to John's appointment and earnings, which were not seriously challenged during cross-examination.

28. The Tribunal's approach to rejecting the salary certificate or the details of earnings was contrary to the law laid down by the Hon'ble Supreme Court in *Rajwati alias Rajjo and Ors. V/s. United India Insurance Company Ltd. and Ors.*⁴. In the said case, the payslip slip and the salary certificate were discarded by the High Court only because the employer was not examined. The Hon'ble Supreme Court held that the evidence of co-workers regarding the salary of the deceased, which corroborated the figures stated in the salary certificate, could not have been ignored. The compensation amount should have been determined based on the said evidence.

29. In *Rajwati* (supra), the Hon'ble Supreme Court also referred to *United India Insurance Co. Ltd. V/s. Shila Datta*⁵ in which it is held that the application for compensation under the MV Act is neither a suit nor an adversarial lis in the traditional sense. It is a proceeding in terms of and regulated by the provisions of Chapter XII of the Act, which is a complete Code in itself. Accordingly, rules of pleadings did not strictly apply, and the Tribunal is expected to follow a summary procedure as it thinks fit.

⁴ 2022 SCC OnLine SC 1699

⁵ (2011) 10 SCC 509

30. Further, in *Rajwati* (supra), the Hon'ble Supreme Court held that the standard of proof before a Tribunal is that of the preponderance of probabilities. In paragraph 20, the Hon'ble Supreme Court observed that the MV Act, 1988 is a beneficial piece of legislation and, as such, while dealing with compensation cases, once the actual occurrence of the accident has been established, the Tribunal's role would be to award just and fair compensation. The Hon'ble Supreme Court held that the High Court was not justified in rejecting the salary certificate and payslip solely because the person issuing the two documents was not examined before the Tribunal.

31. Now that it is found that deceased John contributed to the extent of 70% to the unfortunate accident in which he died, his mother, the appellant in this appeal, would be entitled to compensation of ₹28,58,262.60. Mr Ramani learned Senior Counsel for the appellant submitted that John's widow had remarried and was not interested in pursuing the matter and, therefore, had not even appealed the impugned order. Mr Ramani also pointed out that John's father expired during the pendency of the proceedings. Accordingly, this compensation of ₹28,58,262.60 will have to be paid to John's mother, the appellant, in this appeal. On this amount, the appellant would be entitled to interest at the rate of 6% per annum from the date of the Claim Petition until the actual payment of the compensation amount.

32. This appeal is accordingly partly allowed. The impugned judgment and award are set aside. Instead, it is ordered that the respondents jointly and severally pay the appellant compensation of ₹28,58,262.60 with interest at the rate of 6% per annum from the date of the Claim Petition till the date of actual payment. This amount must be deposited by the respondents, including, in particular, respondent no.3 – Insurance Company, within eight weeks from today after giving due intimation to the learned Counsel for the appellant.

33. Once the amount is deposited, the appellant is permitted to withdraw this amount after providing identity and bank details. The Registry to ensure that this amount is transferred directly into the appellant's bank account.

34. There shall be no order for costs.

M.S. SONAK, J.

NITI K
HALDANKAR

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