

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.20 OF 2021

Mrs. Amalina Antonio Costa
alias Avelina Menezes,
widow of Antonio Costa,
68 years of age,
r/o H.No.346/1, Gonvol,
Xeldem, Quepem Goa.

... Appellant

Versus

1 Mrs. Jaymala Milind Daddiker,
wife of Shri Milind Daddiker,
major of age,
r/o H.No.779/1, Rainbow Valley,
Mugali-Ramnagari, St. Jose de Areal,
Salcete Goa.

2 Mr Nilesh Digamber Amonkar,
Son of Shri Digamber Amonkar,
major of age,
r/o H.No.21/T1-T2,
Kamat Kinara, Miramar,
Panjim, Tiswadi Goa.

3 Bajaj Alliance General Insurance
Company Limited,
Through its Manager,
GE Plaza, Airport Road,
Yerawada, Pune 411 006,
Maharashtra,
Policy No.HBA/00450078.

... Respondents

Mr. A. D. Bhobe and Ms. A. Fernandes, Advocates for the
Appellant.

Mr. C. Padgaonkar, Advocate for Respondent No.1.

Mr. Sarvesh Sawant, Advocate for Respondent No.2.

Mr. P. Shirodkar, Advocate for Respondent No.3.

CORAM: M. S. SONAK, J.

DATED : 5th JANUARY 2023

ORAL JUDGMENT

1. Heard Mr. Bhobe, learned counsel for the Appellant, Mr. Padgaonkar, learned counsel for Respondent No.1 (driver), Mr. Sawant, learned counsel for Respondent No.2 (owner) and Mr. Shirodkar, learned counsel for Respondent No.3 (Insurance Company).

2. The challenge in this Appeal is to the judgment and award dated 07.01.2021 by which the Tribunal dismissed the Appellant's Claim Petition No.112/2017 on the ground that the Appellant failed to establish the rashness and negligence on the part of the Honda Civic car driver. However, after recording this finding, the Tribunal did not bother to decide the issue of the quantum of compensation. In doing so, the Tribunal acted in breach of the ruling of the Hon'ble Supreme Court, requiring the Courts and the Tribunals to avoid shortcuts and decide all issues that fall for their determination.

3. In *Bimlesh & Ors. V/s. New India Assurance Company Limited*¹, in paragraphs 7,8 & 9, the Hon'ble Supreme Court has held that the Tribunal has to follow the summary procedure subject to

¹ (2010) 8 SCC 591

any rules that may be made in this behalf. The Code of Civil Procedure, 1908, is not strictly applicable to the proceedings before the Claims Tribunal except to the extent provided in Section 169(2) of the MV Act and the Rules made thereunder. The whole object of the summary procedure is to ensure that the Claim Petition is heard and decided by the Claims Tribunal expeditiously. In paragraph 9, the Hon'ble Supreme Court has held that the *Claims Tribunal must dispose of all issues one way or the other while deciding the claim petition.*

4. Therefore, the Tribunals should not dispose of the Claim Petitions based on some preliminary issue, usually raised by the Insurance Company about maintainability or otherwise. So also, the Tribunals, even after holding that the issue of rashness and negligence is not proven, should not neglect to decide on other issues, including the issue of the quantum of compensation. The Hon'ble Supreme Court has held that since all the issues (points for determination) are required to be considered by the Claims Tribunal together in the light of the evidence that may be led in by the parties and not piecemeal, often matters are required to be remanded. Accordingly, in *Bimlesh* (supra), the matter had to be remanded because not all issues were decided in one go. Recently, even in the *Agricultural Produce Marketing Committee, Bangalore Vs The State of Karnataka and others, 2022 LiveLaw (SC) 307*, the Hon'ble Supreme Court has reiterated that the Courts must avoid shortcuts and decide all issues that fall for their determination.

5. The Tribunal has also adopted an incorrect approach when deciding the issue of rashness and negligence. Instead of following and applying the relatively recent decisions of the Hon'ble Supreme Court in the case of *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors*², *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.*³, *Parmeshwari V/s. Amir Chand & Ors.*⁴, *Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors*⁵ and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.*⁶, the Tribunal chose to rely on *Suresh alias Sudesh Foll Dessai Vs Suresh s/o Shamba Velip and others, First Appeal No.17 of 2003 dated 26.08.2010* and *Narayan Kalangutkar and another Vs New India Insurance Co. Ltd., and others, 2012 ALLMR (2) 244* decided by the learned single Judges of this Court. Even the decision in *Pukh Raj Bumb Vs Jagannath Atchut Naik and others*⁷ does not or possibly could not refer to most of the decisions of the Hon'ble Supreme Court referred to above. Therefore, even in deciding the issue of rashness and negligence, the Tribunal must adopt the approach indicated by the Hon'ble Supreme Court in the decisions referred to above.

2 (2020) 13 SCC 486

3 (2021) 1 SCC 171

4 (2011) 11 SCC 635

5 (2018) 5 SCC 656

6 (2013) 10 SCC 646

7 2014(4) Mh. LJ 447

6. In all 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. 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.

7. The Courts/Tribunals, in matters of this nature, are required to take a holistic view bearing in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done 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 legal effect of the failure to cross-examine crucial witnesses on crucial issues must be considered by the Courts/Tribunals.

8. In *Sunita & Ors.* (supra), the Hon'ble Supreme Court has held that it is well settled that in motor accident claims cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place because of the negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of a preponderance of probability and not the strict standard of proof beyond all reasonable doubt followed in criminal cases.

9. In *Sunita & Ors.* (supra), the Hon'ble Supreme Court held that the Tribunal had justly 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 defence 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 in charge of the police station and the District Superintendent of Police but to no avail. The Hon'ble Supreme Court noted that apart from the above bald assertion, no evidence was produced by the respondents before the Tribunal to prove this point. Furthermore, the filing of the FIR was followed by the filing of the charge sheet for offences 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.

10. 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 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 (respondent no.2) in the said matter. The Hon'ble Supreme 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 Hon'ble Supreme 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 in deciding the claim petition under the MV Act. The Hon'ble Supreme Court referred to its decision in *Mangla Ram* (supra), where it was held that the nature of proof required to establish guilt under criminal law is higher than the standard required under the law of torts to create liability.

11. Therefore, if the Tribunal, in the present case, were to be guided by the law laid down in the above Supreme Court decisions

rather than the early decisions of this Court (that did not have the benefit of the later opinions expressed by the Hon'ble Supreme Court), perhaps the finding on the issue of rashness and negligence would have been different.

12. The Tribunal failed to appreciate in the present case that neutral authorities like police authorities lodged an FIR against the car driver invoking *inter alia* the provisions of Sections 279, 337, and 304-A of IPC. After the investigations, the police authorities filed a charge sheet against the driver. Ultimately, the driver was acquitted, which is entirely beside the point. It is well settled that the standard of proof in a criminal trial is proof beyond a reasonable doubt. In contrast, the Tribunals in such matters are guided by the principles of the preponderance of probabilities.

13. The Appellant widow, apart from examining herself, examined Alvito Rodrigues, PSI, attached to the Maina-Curtorim Police Station where the accident occurred. This witness has produced on record the panchanama, sketch of the accident spot, FIR etc. All these documents were admitted in evidence without any challenge. On the other hand, the driver and the owner chose not to file any appearance before the Tribunal. However, in this Court, Mr. Padgaonkar and Mr. Sawant argued vehemently in defence of the impugned judgment and award. Incidentally, the Honda Civic car driver did not bother to file a written statement or examine himself before the Tribunal.

14. The panchanama, coupled with the sketch, does indicate rashness and negligence on the part of the driver of the Honda Civic car. Admittedly, the Appellant's husband, Antonio Costa, rode a Pleasure motorcycle and travelled from Ramnagari to Gogal on the main road. However, the record evidence shows that the Honda Civic car came out from the internal road onto the main road. Moreover, the Honda Civic car is much larger and weightier than the Pleasure motorcycle. Besides, the Honda Civic car was coming from the internal road onto the main road. These two circumstances are sufficient to hold that duty of care for the Honda Civic car driver was much more or greater than the duty of care expected from the deceased Antonio Costa, who was riding the Pleasure motorcycle. Besides, if the point of impact depicted in the sketch is noticed, perhaps even the principle of *res ipsa loquitur* was invocable against the Car driver. Therefore, the Honda Civic car driver's duty was to stop at the mouth of the internal road, which led to the main road and let the motorcycle pass before getting onto the main road.

15. The sketch or other evidence shows that the impact was not head-on, but the Honda Civic car collided with the motor car sideways. Furthermore, due to the impact, the motorcycle was thrown off at a distance of more than 10 metres and collided with another motorcycle coming from the opposite direction. All these aspects speak eloquently about the rashness and negligence of the driver of the Honda Civic car. Yet, by adopting a patently incorrect approach, overlooking material evidence, and virtually ignoring several decisions

of the Hon'ble Supreme Court, the Tribunal concluded that the Appellant did not prove rashness and negligence.

16. The Tribunal, perhaps with some justification, faulted the Appellant for not examining her daughter, who was also a pillion rider with her father on the Pleasure motorcycle. The Appellant should have examined her daughter. Mr. Bhobe submits that the daughter was in a trauma and perhaps was not in a state to depose. The Appellant should have at least deposed to this factor. However, be that as it may, this is not the case whether, based on the non-examination of the daughter, an adverse inference could be drawn against the Appellant. As noted above, the Hon'ble Supreme Court has held 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.

17. Moreover, the evidence on record is sufficient to establish rashness and negligence on the part of the Honda Civic car driver. In any case, the material on record is more than enough for the onus to shift upon the driver of the Honda Civic car. There is no explanation as to why the driver of the Honda Civic car chose to remain *ex-parte* or did not step into the witness box. There is no explanation for why the Insurance Company did not call upon the driver to step into the witness box.

18. The Tribunal, which was quick to draw an adverse inference against the Claimant-widow, failed to draw an adverse inference against the driver for not daring to step in the witness box and face cross-examination. Based on the material on record, if at all any adverse inference was required to be drawn, then the same should have been drawn against the driver of the Honda Civic car and not the Appellant, a widow struggling to receive some compensation on account of the death of her husband after he was knocked off by Honda Civic car on the main road.

19. For all the above reasons, the finding about rashness and negligence recorded by the Tribunal is, with respect, unsustainable. Accordingly, the same is hereby reversed.

20. On the aspect of compensation, the Appellant has claimed that the deceased, Antonio was a 66-year-old mason, but no proof of income was produced. Though some reference was made to the rates of minimum wages at the time of the accident, the fact that Antonio was 66 years old cannot be ignored. In such circumstances, Antonio's income can be taken at ₹10,000/- per month on a notional basis. Therefore, the multiplier involved in this case would be five and deductions of up to one-third are in order because of the amount Antonio would have spent on himself. Thus, applying the principles in *National Insurance Company Limited Vs. Pranay Sethi and*

*others*⁸, the compensation towards dependency would come to ₹4,00,000/-.

21. The Appellant has produced original bills of ₹33,610/-. However, most of these concern the funeral for which not more than ₹15,000/- can be awarded by following the dictum in *Pranay Sethi and others* (supra). However, some compensation is due to the Appellant for the expenses that she must have incurred for retrieving her husband's body and other incidental costs. Further, the Appellant is entitled to ₹40,000/- towards loss of consortium, ₹15,000/- towards loss of estate, and ₹15,000/- towards funeral expenses. To this amount, ₹15,000/- must be added towards the expenses. Further, in the peculiar facts, compensation of ₹10,000/- is due for retrieval of the body by the Appellant and other incidental costs that the widow incurred after her husband was knocked dead on the highway by the Honda Civic car driver.

22. It is also a fit case where the Respondents should pay the costs of ₹15,000/- to the Appellant. These costs will have to be paid at the rate of ₹5,000/- each by each of the Respondents. The costs are awarded because Respondent No.3-Insurance Company filed an insensitive written statement by going to the extent of even denying the occurrence of the accident. The car driver did not bother to file any reply before the Tribunal or examine himself before the Tribunal.

8 (2017) 16 SCC 680

Still, the car driver and the car owner opposed the grant of relief in this Appeal.

23. Accordingly, this Appeal is allowed. Therefore, the impugned judgment and award are set aside. In substitution, the Respondents are directed jointly and severally to pay the Appellant the compensation of ₹4,95,000/- with interest at the rate of 7% per annum from the date of the claim petition till the actual payment.

24. In addition to the usual costs in such matters, each of the Respondents will pay the costs of ₹5,000/- (each) to the Appellant within four weeks from today. Respondent Nos. 1, 2, and 3, including, in particular, Respondent No.3 – Insurance Company is directed to deposit in this Court the amount of ₹4,95,000/- together with interest at the rate of 7% per annum from the date of the claim petition within six weeks from today. Besides, even the costs imposed on the insurance company will have to be deposited.

25. Once the above amount is deposited, the Appellant will be at liberty to withdraw the same by furnishing identification and bank details. Registry to ensure that the amount is directly transferred into the bank account of the Appellant. The costs amount payable by other Respondents either be deposited in this Court within four weeks, or the cheque drawn in the name of the Appellant can be handed over to the learned counsel for the Appellant, who should then forward the same to the Appellant.

26. The Appeal is disposed of in the above terms.

M. S. SONAK, J.