

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

**FIRST APPEAL NO.65/2022
WITH
MISC. CIVIL APPLICATION NO.328/2022**

1. SHAIKH AHMAD SAB,
s/o late Shaikh Fakir Sab, aged
about 66 years, (date of birth
08.05.1952), occupation business,
r/o H. No. SF 2, Sai Apartment,
Rawanfond, Shantinagar, Aquem
Baixo, P.O. Navelim, Salcete,
Goa 40707.

... APPELLANT

Versus

1. SHRI SALIM ANSARI,
s/o Shakula Ansari, r/o. Aman
Co-op. Society, Ramzan Building,
Flat No. DF-3, Near Chimble
Market, Panaji, Goa 403006,
(driver of Innova vehicle bearing
No. GA-07-F-0791 at the time of
the accident);

2. SHRI BASAVRAJ S.
JUMNEL, s/o Sangappa Jumnel,
r/o H. No115, Dando,
Caranzalen, Tiswadi, North Goa,
Goa 403002 (Owner of the
Innova bearing registration No.
GA-07-F-0791);

3. RELIANCE GENERAL
INSURANCE COMPANY LTD.,
4th Floor, Mathias Plaza, above

Canara Bank, Panaji, Goa
403001, (Policy No.
170772233800029 valid from
16.02.2013 to 15.02.2014)

... RESPONDENTS

Mr Gaurang Panandikar with Mr Shivam Phadte,
Advocates for the Appellant.

Mr James Lopes, Advocate for the Respondent No.3.

CORAM: M. S. SONAK, J.

DATED: 22nd February 2023

ORAL JUDGMENT:

1. Heard Mr Gaurang Panandikar for the Appellant and Mr James Lopes for respondent no.3-insurance company. Respondents no.1 and 2 though served are neither present nor represented.
2. The challenge in this appeal is to the Judgment and Award dated 27.01.2017 dismissing the Claim Petition No.123/2014 on the ground that the Appellant failed to establish rashness and negligence on the part of Respondent no.1, i.e. the driver of the Innova vehicle bearing registration no.GA-07-F-0791.
3. The Tribunal, after answering the issue of rashness and negligence against the Appellant, did not bother to compute the

compensation amount. Such an approach on the part of the Tribunal is contrary to the law laid down by the Hon'ble Supreme Court that the Tribunals and Courts must decide all issues one way or the other instead of resorting to shortcuts.

4. 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 claims tribunal must 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.

5. Be that as it may, even the finding about rashness and negligence recorded by the Tribunal is contrary to the weight of the evidence on record. Besides, even the approach of the Tribunal in evaluating the evidence on the aspect of rashness and negligence is contrary to several decisions of the Hon'ble Supreme Court, including the decisions in *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.

6. 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.

7. 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. Finally, they must consider the legal effect of failing to cross-examine crucial witnesses on crucial issues.

8. 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.

9. 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 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 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 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. In this case, an FIR was registered by the Police against the driver of the Innova car. The Head Constable who carried out the Panchanama was examined in this case. The Appellant, who suffered a permanent medical disability of 40%, examined himself. The Appellant also examined Shri Babasaheb Timankatte, an eyewitness to the accident. Significantly, the driver of the Innova vehicle failed to step into the witness box and explain his version of the accident.

11. The Tribunal, in breach of the approach directed to be adopted by the Hon'ble Supreme Court, has misread the Appellant's evidence and failed to draw an adverse inference against respondent no.1 for his failure to step into the witness box.

12. The entire award hinges around a solitary statement made by the Appellant during his cross-examination that the accident's impact was on his right leg. This isolated statement has been entirely torn out of the context in which the same appears. From the Appellant's and Mr Timankatte's evidence, it is clear that the Innova was approaching the main road from the side road from the Maruti Temple. The eye witness therefore deposed to the Innova hitting the left side of the scooter which the Appellant was riding. The Appellant deposed about the impact being on the right side only because the scooter fell on the right side after being hit on the left side, causing maximum injuries to the right leg, hip and arm. The damages to the scooter are also consistent with this version. The sketch and Panchanama also support this version. The Tribunal confused between the point of collision and the effect of such collision on the right leg of the Appellant.

13. Accordingly, the Tribunal was unjustified in misconstruing a solitary statement and concluding that rashness and negligence

were not proved. The finding suffers from perversity and, in any case, is contrary to the approach directed by the Hon'ble Supreme Court in such matters.

14. Therefore, the finding on rashness and negligence is reversed. By way of a preponderance of probabilities, the Appellant has established that the accident occurred due to the rashness and negligence on the part of the Innova car driver.

15. Insofar as the quantum of compensation is concerned, there is no evidence about the precise income though the Appellant claimed that he was drawing an income of ₹20,000/- per month. The evidence shows that the Appellant owned a shop through which he used to sell furniture. The Appellant admitted that he was not himself a carpenter.

16. Dr Sainath Vaigankar, Senior Orthopedic Surgeon at Hospicio Hospital, Margao, was examined in this case. However, he deposed to the certificate issued by him. This certificate speaks about a case of fracture neck left femur with sciatic nerve palsy following the alleged motor vehicular accident on 27.01.2014.

17. The certificate also certifies that the Appellant was operated and further Hemi-arthroplasty was carried out on 30.01.2014. The certificate certifies that the Appellant was evaluated for

percentage of permanent disability because the Appellant had cemented bipolar prosthesis in situ with grade O power at the ankle joint due to sciatic nerve palsy. This certificate certifies the percentage of disability according to the Alimco Scale at 40%.

18. Dr Vaigankar deposed that the Appellant will be unable to squat, climb staircases or sit cross legged or walk for a long distance due to the disability. However, to question whether such disability would affect a person doing business, Dr Vaigankar replied that if it is a sitting job, the same will not be affected. The doctor also deposed that the disability is in respect of the entire body due to the said injury.

19. Now considering the Appellant's case that he was only doing the business of selling furniture or setting up stalls in jattras/feasts, though the medical disability is 40%, the functional disability can be taken up only at 20%. Further, there is no evidence that the Appellant earns ₹20,000/- per month. However, considering the evidence that the Appellant owned a shop through which he was selling furniture or was involved in setting up stalls in jattras/feasts, the Appellant's income can be taken at ₹10,000/- per month.

20. The Appellant was 61 years old at the time of the accident; therefore, the applicable multiplier would be 7. Considering the Appellant's age there is no question of making any addition towards future prospects. Thus, coupled with the functional disability of 20%, the compensation works out to ₹1,68,000/- for the loss of future income.

21. The Appellant has produced bills and other evidence regarding his expenses for the treatment. The evidence shows that the Appellant had to undergo at least two surgeries. Though one of the surgeries was at the Government hospital, bills are produced showing the expenses incurred by the Appellant. Therefore, the bill amount comes to approximately ₹1,00,000/- and the reimbursement to this extent can be awarded to the Appellant.

22. The Appellant can be awarded ₹50,000/- towards pain and suffering, considering that he had to undergo two surgeries. Towards loss of income during the treatment, ₹30,000/- could be awarded to avoid any overlapping. There is evidence that the Appellant was admitted to the hospital for about 15 days but was advised to rest for two to three months and further had to undergo physiotherapy. Considering all these aspects, an amount of ₹30,000/- for loss of income during recovery is reasonable.

23. Accordingly, the just compensation, in this case, is worked out to ₹3,48,000/-. The accident occurred in 2014. Therefore, the Appellant can be awarded interest @ 7% p.a. from the date of the claim petition till the actual payment.

24. Accordingly, this appeal is allowed. The respondents are jointly and severally directed to pay the Appellant compensation of ₹3,48,000/- with interest @ 7% p.a. from instituting the claim petition until effective payment. The Respondents, including Respondent no.3-insurance company, are directed to deposit this amount in this Court within six weeks from today after giving due intimation to the learned counsel for the Appellant.

25. Once the above amount is deposited, the Appellant can withdraw the same by furnishing identification and bank details. The Registry to ensure that the amount is transferred directly into the Appellant's bank account.

26. Misc. Civil Application No.328/2022 is disposed of. However, before the Appellant withdraws the compensation amount now awarded, the Appellant will have to pay the court fees as prescribed. The Registry to ensure that the Appellant pays the court fees before any transfer is made into his bank account.

27. The appeal and the misc. civil Application are disposed of in the above terms.

28. There shall be no order for costs.

M. S. SONAK, J.