

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.108 OF 2019

1 Mr. Carlito Fernandes,
Son of Dumingo Fernandes,
Aged about 60 years, retired and his
wife,

2 Mrs. Pedrina Fernandes,
W/o Mr. Carlito,
Aged about 51 years,
Both residents of H.No.26,
C/o Village Carlito, Ward No.3,
Near Forest Office,
Sheller, Canacona Goa.

... Appellants

Versus

1 Mr. T. Jagdeesh,
Son of Mudappa Poojari,
Major in age,
R/o H.No.2-167,
21, Rotti Gudde House,
Thumbe, Bantawalar-Karnataka,

2 Mrs. Benedita D'Souza,
W/o Leo D'Souza,
Major in age,
Resident of Lovely Home,
Kulai, Hosa Betty,
Mangalore, Kanara, Karnataka,

3 National Insurance Company
Limited, Having office at 2nd Floor,
Rasik Chambers,
Opp. Central Market,
Market road, Mangalore,
Karnataka 575001

... Respondents

Mr Vaman Ganesh Kurtikar, Advocate for the Appellants.
Respondents absent though served.

CORAM: M. S. SONAK, J.

DATED : 6th JANUARY 2023

ORAL JUDGMENT

1. Heard Mr Vaman Kurtikar, learned counsel for the Appellants.
The Respondents though served, are neither present nor represented.
2. The challenge in this appeal is to the judgment and award dated 10.04.2019 dismissing the Claim Petition No.48/2015 on the ground that the claimants, parents of the deceased Albino Fernandes, failed to prove that the accident was caused due to rashness and negligence on the part of the driver of the Tata tanker in which Albino Fernandes died.
3. After recording a finding that the Appellants failed to prove the rashness and negligence, the Tribunal did not bother to answer other issues, particularly the quantum of compensation.
4. The above approach on the part of the Tribunal is contrary to the law laid down by the Hon'ble Supreme Court and this Court, namely that the Tribunal should decide all the issues that fall for their determination.

5. 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 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.*

6. Therefore, normally, 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 shirk deciding 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. Recently, even in the *Agricultural Produce Marketing Committee, Bangalore Vs The State of*

¹ (2010) 8 SCC 591

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.

7. Now coming to the issue of rashness and negligence, again, it is clear that the Tribunal failed to consider the law in *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

8. 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

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

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.

9. 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 taken into account by the Courts/Tribunals.

10. 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.

11. The claimant's case is that their son Albino Fernandes was proceeding from Verna to Margao on a Honda Dio scooter when a Tata tanker driven by Respondent No.1 and owned by Respondent 2, which was in front of him suddenly applied brakes without any sign or indication. As a result, Albino dashed against the Tata tanker and suffered injuries to which he succumbed two days later. In support of their case that the tanker driver was negligent, the claimants examined an eye witness Santosh Naik (AW2), besides claimant No.1 – Carlito (AW1).

12. The evidence of claimant No.1 (AW1) is not very relevant because, admittedly, he was not present at the accident spot. However, the evidence of AW2, eye witness, is quite relevant. He has clearly and cogently deposed about how the tanker, all of a sudden, applied brakes without showing any sign of stopping, because of which, the deceased riding the Honda Dio scooter dashed against the tanker from behind. The Tribunal has, however, reasoned that even if it is to be believed that the tanker suddenly applied brakes, the fact that the deceased dashed against the Tata tanker in front of him shows that the deceased had not maintained a safe distance from the Tata tanker or that he was travelling at high speed and could not control himself.

13. In my judgment, the reasoning above may not be correct and is more like a surmise. The Tribunal failed to appreciate that the

claimants examined an eye witness to depose that the deceased was not riding a scooter negligently. The eye witness also deposed that the tanker, without bothering to give any signal or indicator, suddenly applied brakes. As a result, the deceased dashed against the tanker from behind. Most significantly, the Tribunal failed to appreciate that the tanker driver did not bother to step into the witness box and depose either that he never applied any brakes suddenly or after giving due signs/indicators. Therefore, the Tribunal should have drawn an adverse inference against the tanker driver rather than surmise that the deceased had not maintained a safe distance or that the deceased was riding at a fast speed.

14. The Tribunal also relied upon some police papers and alleged endorsement made therein that the accident had occurred due to the fault of the deceased. However, none of the Respondents chose to examine police officials who are allegedly supposed to have made the endorsement in their papers. At least after the claimants examined one eyewitness, either the tanker driver should have examined himself or police officials should have been examined by the Respondents if they wished to rely upon endorsement in the police records.

15. As noted earlier, the approach of the Tribunal while deciding the issue of rashness and negligence was not quite consistent with the law laid down by the Hon'ble Supreme Court in several decisions referred to above. The Hon'ble Supreme Court has held that the Courts/Tribunals have to be mindful that the approach and role of

Courts and Tribunals while examining evidence in accident claim cases ought not to be to find fault but instead, the Courts and Tribunals should analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true. Besides, the Courts and Tribunals must take a holistic view bearing in mind that strict proof of an accident caused by a particular manner may not be possible for the claimants. The Courts and Tribunals should also draw appropriate inferences from the Respondents' failure to cross-examine the claimants' witnesses or confront them with their version despite the adequate opportunity. In such matters, the assumption has to be on the touchstone of the preponderance of probability.

16. As noted earlier, the evidence of AW2 was sufficiently creditworthy. He not only stood by his statement in the examination in chief but also withstood the cross-examination. He denied that the accident occurred due to the deceased trying to overtake the tanker. Little was elucidated from this eyewitness in the course of or rather cursory in the cross-examination. However, the Tribunal failed to consider this aspect. The Tribunal also failed to draw an adverse inference against the tanker driver who did not step into the witness box.

17. Based on all the above factors and considering the law laid down by the Hon'ble Supreme Court in the above decisions, the finding on rashness and negligence is liable to be reversed. The evidence on record, applying the touchstone of preponderance of

probabilities, establishes that the accident in which the deceased expired occurred due to the rashness and negligence of the tanker driver.

18. Now coming to the quantum of compensation, claimant No.1 (AW1) deposed that Albino was a Steward at a resort Pousada Tauma, at Calangute, and drawing a monthly salary of ₹7000/-. Though he produced no order of appointment or salary certificate, AW1 deposed how Albino had undergone practical training with Bell Tower Resorts Pvt. Ltd., and also worked as a room attendant in the housekeeping department at La Palms Beach Resort, Varca Goa. He deposed that Albino had also done the course at the Government I.T.I. Canacona Goa. He deposed that Albino was physically well built and qualified to pursue his profession abroad or on a ship/cruise liner. He would have gradually risen in his profession and increased his earnings. The certificates were produced concerning the experience and qualifications, including the certificate issued by Fr. Agnel Institute of Catering, Margao, Bell Tower Resorts Pvt. Ltd., and La Palms Beach Resort, Varca.

19. Considering the above evidence on record, the statement of AW1 about Albino drawing a monthly salary of ₹7000/- will have to be accepted. There was no serious cross-examination on this issue. In any case, no dent was made to this statement during the cross. There is evidence that Albino was 27 years old at the time of the accident.

20. In terms of *National Insurance Company Limited Vs. Pranay Sethi and others*⁷, an additional 40% is due to future prospects. Thus, the compensation towards dependency by considering the appropriate multiplier and increase towards future prospects would come to ₹9,99,600/-. In determining this amount, a deduction of 50% was made from his yearly income (since he was a bachelor) after including a 40% increase towards future prospects. In addition, the claimants are entitled to the compensation of ₹15,000/- towards loss of estate, ₹15,000/- towards funeral expenses, and ₹40,000/- each towards parental consortium. Thus, the total compensation works out to ₹11,09,600/-.

21. During the pendency of this appeal, claimant No.1 Carlito expired. Carlito had himself deposed that Albino's natural mother was Assensao Coutinho e Fernandes, daughter of Jose Coutinho, resident of Xeller, Canacona Goa. AW1 has even placed on record the judgment and decree dated 31.01.1987 by which his marriage with said Assensao Coutinho e Fernandes, the natural mother of Albino, was dissolved. At that time, Albino was hardly one year and three months old. Albino's custody was with AW1 since then.

22. Mr V. Kurtikar, on instructions, stated that claimant No.2, i.e. stepmother of Albino, will share a portion of the compensation amount if awarded with Assensao Coutinho e Fernandes. However, she is personally not aware of the whereabouts of Assensao Coutinho e

⁷ (2017) 16 SCC 680

Fernandes. This is an appreciable gesture because Assensao Coutinho e Fernandes was the natural mother of Albino. Mr Kurtikar, on instructions submitted, that one-third of the compensation can be granted or will be shared with Assensao Coutinho e Fernandes.

23. For all the reasons above, this appeal is allowed. Accordingly, the impugned judgment and award are set aside, and the Respondents are directed to jointly and severally pay Appellant No.2 the compensation of ₹11,09,600/- with interest at the rate of 7% per annum from the date of the claim petition till the actual payment.

24. Accordingly, the Respondents, including the Insurance Company, are directed to deposit the above-determined compensation amount together with interest in this Court within eight weeks from the date Appellant No.2 furnishes a certified copy of this judgment and order to the office of the Insurance Company. This compensation amount will have to be deposited in this Court after giving due intimation to Mr Kurtikar, learned counsel for the Appellants.

25. Upon deposit, Appellant No.2 will be entitled to withdraw two-thirds of the deposited amount by providing bank details and identification documents. Registry to pay the amount by bank transfer into the account of Appellant No.2.

26. As far as the balance one-third amount is concerned, the Goa State Legal Services Authority must contact Assensao Coutinho e Fernandes and facilitate her withdrawal of this amount. The registry

should obtain the identification and bank details of the said Assensao Coutinho e Fernandes and directly transfer one-third of the amount into her bank account. This part of the order is made by consent from Mr Kurtikar, learned counsel for the Appellants under the instructions from Appellant No.2. If, however, Assensao cannot be traced within four months despite diligent search, this amount must be directly paid to Appellant No. 2 by bank transfer. The appeal is disposed of in the above terms.

M. S. SONAK, J.

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