

(2022) 03 BOM CK 0046
In the Bombay High Court
Case No : First Appeal No.111 Of 2015

Gauri Rajendra Kamat And Others	Vs	APPELLANT
Sandra D'Souza And Others		RESPONDENT

Date of Decision : 15-03-2022

Acts Referred:

Road Regulations Rules, 1989 — Rule 3, 4

Citation : (2022) 03 BOM CK 0046

Hon'ble Judges : M. S. Sonak, J

Bench : Single Bench

Advocate : A. R. S. Netravalkar, Vibhav Amonkar

Final Decision : Dismissed

Judgement

M. S. Sonak, J

1. Heard the learned counsel for the parties.
2. The appellants are the rider, owner, and the insurance company concerned with TVS Scooty bearing registration No. GA-07-D-9447 was held to be involved in an accident that took place on 15.11.2011 at 14.50 hours near Sreyas Society, Alto Santa Cruz, Goa, in which Joseph John D'Souza who was riding a Suzuki scooter bearing registration No. AP-31-BF-4288 sustained grievous injuries and died.
3. The appellants challenge the judgment and award dated 30.06.2015 in Claim Petition No.28/2012, instituted by respondent Nos. 1 to 4 (claimants) by which the Motor Accident Claims Tribunal, Panaji (Tribunal) has awarded respondent Nos. 1 to 4 the compensation of Rs.38,25,000/- together with interest at the rate of 9% per annum from the date of institution of the petition till realization of the amount.
4. Mr. Netravalkar learned counsel for the appellants vehemently submits that there is no legal evidence on record to infer any rashness and negligence on the

part of the first appellant (Gauri). He submits that the criminal prosecution was lodged against Gauri in which she was duly acquitted.

5. Mr. Netravalkar submits that irrespective of the acquittal in the criminal proceedings, the evidence on record is not sufficient to conclude any rashness and negligence on the part of Gauri even applying the touchstone of preponderance of probabilities. He submits that the deposition of Gauri and eye witness Ismail Shaikh (RW2) was unduly discarded by the tribunal. He submits that there was no collision or impact between the two vehicles and the inference to the contrary could not have been drawn on account of some scratch marks on the two vehicles. He submits that such scratch marks could have resulted from any other incident or on account of several other reasons than the alleged impact between two vehicles on 15.11.2011.

6. Mr. Netravalkar submits that the evidence on record establishes that the deceased Joseph was the one who was riding the Suzuki scooter in a rash and negligent manner. He submits that the evidence on record bears out that the deceased Joseph came at a very fast speed from the crossroad joining the main Bambolim to Alto Santa Cruz road, took a right turn towards Bambolim, and lost control after reaching the center of the main road. He submits that Joseph then abandoned his scooter, dived/fell on the center of the road. He submits that this was a case of a self accident and Gauri and her insurer were unnecessarily roped into this matter.

7. Mr. Netravalkar referred to the sketch accompanying the panchanama and tried to demonstrate the claimants' version about the genesis of the accident was almost impossible and Gauri's version was the most probable one. He relied on B. S. Chandrappa Vs Shobha and others 2003 ACJ 1770 to submit that the sketch of the scene of the accident by police is mandatory and aspect of negligence has to be normally decided by relying upon such sketch. He also relied on rules 3 and 4 of the Road Regulations Rules, 1989 to submit that Joseph breached the same and was, therefore, solely responsible for the accident.

8. Mr. Netravalkar then submitted that in the absence of any rashness or negligence on the part of Gauri, the tribunal erred in foisting liability of payment of compensation on Gauri and her insurer.

9. Mr. Netravalkar, without prejudice to the aforesaid, submitted that the compensation determined by the tribunal was neither just nor proper. He pointed out that there was no evidence of Joseph being eligible to earn some pension or that Joseph or his family was denied pension on account of the demise of Joseph. He submitted that Joseph was 6.1 feet tall and obese according to the Autopsy report. He pointed out that this is contributory to his losing control and causing the self accident. He pointed out that this must also be the cause why Joseph retired from his earlier service at the age of 58 years. He pointed out that the determination of compensation is entirely on surmises and conjectures.

10. For all these reasons, he submits that the impugned award warrants

interference.

11. Mr. V. Amonkar defends the impugned award based on the reasoning reflected therein. He however pointed out that the compensation determined is too less and upon proper analysis of the material on record, the compensation to the extent of Rs.1.28 crores ought to have been awarded to the claimants. He relied on *Ranjana Prakash and others Vs Divisional Manager and another* (2011) 14 SCC 639 to submit that the appellate Court can enhance the compensation awarded by the tribunal even in the absence of any cross-appeal or cross-objections by the claimants. He also submitted a chart/calculations explaining the claim for Rs.1.28 crores.

12. Mr. Amonkar submitted that the evidence of eye witness Ismail Shaikh was quite correctly discarded by the tribunal. He, however, submitted that there was no reason to discard the evidence of Polly Raikar, an authentic eyewitness to the accident. He submits that there was ample evidence on record to sustain a finding of rashness and negligence on the part of Gauri. He submitted that Gauri has contradicted herself in her pleading and evidence. He submitted that the version put forth by Gauri is not even probable. He submitted that the acquittal in a criminal prosecution is quite irrelevant in such matters where the issue of rashness and negligence has to be determined on the touchstone of preponderance of probabilities. He relied on *National Insurance Company Limited vs Pranay Sethi and others* (2017) 16 SCC 680, *Anita Sharma and others vs The New India Assurance Co. Ltd. and others* (2021) 1 SCC 171 and *Sunita and others vs Rajasthan State Road Transport Corporation and others* (2020) 13 SCC 486 in support of his submissions.

13. The rival contentions now fall for determination.

14. The first point to be determined in this matter concerns rashness and negligence on the part of either Gauri or the deceased Joseph.

15. AW1 Leroy D'Souza is the dependent son of deceased Joseph who produced on record the FIR No.144/11 dated 16.11.2011, scene of accident panchanama and sketch, memorandum of the autopsy, inquest panchanama, and some other documents, in support of his case that Gauri was rash and negligent and therefore, responsible for the accident. In his cross-examination, the suggestions mainly in the form of denials were put to him. Gauri's case was also put up to him which he denied. AW1 had not witnessed the accident and his evidence is important only because he produced the FIR and other case papers concerning the accident. These case papers indicate that even the police authorities were prima facie satisfied that it was Gauri who was riding her Scooty in a rash and negligent manner and consequently responsible for the accident. Leroy also deposed that Gauri was ultimately charge-sheeted and prosecuted for the offense of rash and negligence driving though he claimed that he was not aware of the result of such prosecution.

16. Anil D'Souza (AW2) was the panch witness who deposed to the contents of

the panchanama and the sketch which were drawn in his presence. He maintained that the vehicles involved in the accident were in the same position as shown in the sketch. Though AW2 was extensively cross-examined, no dent whatsoever was made to his testimony. The tribunal quite rightly relied upon his testimony. The tribunal, in this case, has taken cognizance of the panchanama and the sketch of the panchanama. Based thereon the tribunal has not erred in concluding that the position of the vehicles and the spot of accident probabalise the claimants' version about the genesis of the accident than the version put forth by Gauri.

17. Mukund Parab (AW3) is the Head Constable attached to the Old Goa Police Station on the date of the accident i.e. 15.11.2011. He too deposed to the panchanama and the sketch. He too deposed that the vehicles were in the same position as shown in the sketch. Again, even this witness was extensively cross-examined but no dent whatsoever was made to his testimony. This witness did state in the cross-examination that he had not seen any eyewitness at the place of the accident.

18. Mr. Netravalkar urged that the evidence of Polly Raikar should be discarded on the above ground as well. There is no reason to discard the evidence of Polly Raikar on this ground. In any case, if Mr. Netravalkar's submission is correct then, the evidence of Ismail Shaikh who claims to be an eyewitness will also have to be discarded for the same reason. AW3 merely stated that he had not seen any eyewitnesses but that does not mean that there were no eyewitnesses to the accident.

19. Polly Raikar (AW5) deposed as an eyewitness to the accident. He deposed that on 15.11.2011 at about 2.45 p.m. when he was proceeding from Donapaula to Santa Cruz and had reached near Sreyas Housing Society, Rego Bagh, Alto Santa Cruz, a Scooty driven by a girl about 20 years of age in a rash and negligent manner and fast speed overtook his motorcycle, thereby going completely on the right half of the road. He deposed that this girl lost her control and dashed against a Suzuki Access scooter bearing registration No. AP-31-BF-4288 which was metallic grey and coming in opposite direction. He deposed that this Suzuki scooter was driven by an elderly person who was riding completely on the left side of the road i.e. from St. Cruz to Bambolim direction. He deposed that the old rider fell due to the impact and sustained severe injuries. He deposed that even the girl on the Scooty fell on the left side and suffered some simple injuries. He deposed that one of the persons in the crowd called 108 Ambulance and further, he along with the staff of the Ambulance took the old rider to GMC.

20. AW5 in his cross-examination stated that he was requested to appear in the Court by the claimant lady who had his contact number. He also deposed that the said lady contacted him at the office of Advocate Dhond. He deposed that he was having a case with Advocate Dhond concerning some plot. He denied the suggestion that he was a false witness or that he had not even seen the accident.

21. The tribunal has rejected the testimony of AW5 on the sole ground that the claimant contacted him at the office of Advocate Dhond, learned counsel for the claimant. Now, this may not be correct. Based on this factor alone, and without anything else, there was no reason to reject the testimony of AW5. The evidence of AW5 is sufficiently corroborated by the police investigation papers. At no stage did Gauri complain about any falsity in the FIR. At no stage did Gauri herself lodge any complaint about rashness and negligence on the part of Joseph. Instead, Gauri deposed that no sooner she saw Joseph coming from the opposite direction, allegedly at fast speed and in a rash and negligent manner, she fainted or become unconscious. Gauri also claimed to have fainted and become unconscious on seeing blood.

22. Although Mr. Netravalkar may be justified in his contention that there can be no generalization about the doctor or medical student never fainting or becoming unconscious at the sight of blood as held by the tribunal, nevertheless considering the testimony of AW5 and corroboration which it finds in the police investigation papers, there is no case made out to fault the findings recorded by the tribunal about the rashness and negligence on the part of Gauri and the absence of any rashness and negligence on the part of the deceased Joseph.

23. The tribunal, in this case, has analyzed the evidence on record in the proper perspective. The tribunal was conscious that the procedure before it was summary and the issue of rashness and negligence had to be decided on the touchstone of preponderance of probabilities and not on the touchstone of proof beyond a reasonable doubt.

24. The approach of the tribunal, in this case, is consistent with the law laid down by the Hon'ble Supreme Court in the case of Sunita (supra) and Anita Sharma (supra). The tribunal, in this case, was sensitive even to appreciate the turn of events at the spot and hardship that the claimants usually faced in tracing witnesses and collecting information for an accident, when they were not present at the accident spot. The Hon'ble Supreme Court has held that the approach of the Court must not be simply to find fault with the claimant for non-examination of some best eyewitnesses but instead approach should be to analyze the material on record and ascertain whether the claimant's version is more likely than not true. The Court has held that in such matters a holistic view must be taken bearing in mind the strict proof about the genesis of the accident may not always be possible. The tribunal is therefore required to draw appropriate inferences from facts and also from the failure of the respondents to properly cross-examine the claimant's witnesses or confront them with their version despite the adequate opportunity.

25. In Sunita and others (supra) the Hon'ble Supreme Court has held that inference of rashness and negligence should be sustained even based on FIR and charge sheet, particularly whether only defense raised by the respondents that the FIR was based on wrong facts or was filed in connivance with the complainant and the police. The Court held that in the absence of any proper

complaint to the higher authority, there was nothing wrong with the tribunal relying on such police investigation documents and concluding that it was the driver of the offending vehicle who was rash and negligent.

26. In this case, the tribunal has not ignored the sketch accompanying the panchanama. In fact, based on the panchanama and the sketch, the tribunal has drawn reasonable inferences, even after discarding the evidence of Polly Raikar, an eyewitness to the accident.

27. The tribunal, in this case, was quite justified in rejecting the evidence of Ismail Shaikh. In the first place, Ismail Shaikh, when he was floundering during the cross, was alerted by his counsel with an unfortunate interruption, as noted by the tribunal. Secondly, Ismail Shaikh admitted that he knew Gauri Kamat and her father Rajendra Kamat for the last 15 years because all of them reside in the Rego Bag complex. This admission was in the cross-examination. In the chief, however, Ismail Shaikh deposed about seeing "one girl was riding Scooty from Bambolim side.....". He also deposed about how "the said girl on the Scooty slowly fell on the road....."

28. Thus, in the chief, Ismail Shaikh tried to give an impression that he was a completely disinterested witness who happened to be at the spot. Ismail Shaikh tried to give an impression that he was not even knowing Gauri. Ismail Shaikh was however exposed in the cross-examination. Ismail Shaikh also claimed that he was the one who took the injured Joseph by taxi to GMC. He deposed that his son paid Rs.500/- for this taxi.

29. Now all this is unbelievable because there is evidence on record from several sources that the deceased Joseph was taken to GMC by 108 Ambulance. Besides, it is quite inconceivable that Ismail Shaikh could take deceased Joseph who was quite tall and obese in a taxi to GMC which was within one kilometer from the accident spot, and that his son could pay Rs.500/- to the taxi. Further, it is most unlikely that Ismail Shaikh, if he was really present at the spot, would not rush to assist Gauri whom he knew for last about 15 years and who claims to have fainted at the spot of the accident. The natural reaction of a helpful neighbor would be to first help his neighbor's daughter who claimed to have fallen unconscious on the side of the road. The tribunal was quite justified in holding that Ismail Shaikh was an unreliable witness.

30. Thus, both on facts as well as on law, there is no case made out to interfere with the findings recorded by the tribunal that it was Gauri who was rash and negligent and therefore, responsible for the accident.

31. On the aspect of compensation again, there is no error in the approach of the tribunal. Indeed, some other approach for determination or broadly the same amount of compensation was possible.

32. The tribunal has accepted the claimants' version that the deceased Joseph was earning Rs.1.90 lakh per month just before he resigned from his previous

job as Vice President of Ocean Sparkle Limited. The tribunal has also considered that Joseph was already 58 years old at the time when he resigned or may be retired from his position. The tribunal has then reasoned that late Joseph would have at least earned one-third of his monthly income by way of pension and this would come to approximately Rs.6,00,000/- per annum after deductions of taxes etc. Based on this reasoning, the tribunal has determined the compensation at Rs.38,25,000/-. The tribunal also held that only the widow and son Leroy were dependent since two other claimants i.e. daughters had their independent source of income were not dependent upon earning of Joseph. Some element of guesswork is inevitable in such matters but by taking a holistic view, the compensation determined is within the bounds of reasonability and warrants no modification.

33. The tribunal has erred in awarding compensation of Rs.1,00,000/- towards loss of companionship and further Rs.1,00,000/-towards love and affection. Instead, following the law laid down in Pranay Sethi (supra), the tribunal could have awarded Rs.40,000/- each towards loss of consortium to each of the four claimants. Even though two daughters may not have been dependent on late Joseph, they are still entitled to compensation for the loss of consortium for having lost their father in the accident. Even the compensation towards funeral expenses is required to be reduced from Rs.25,000/- to Rs.15,000/-. But the addition of Rs.15,000/- is due to loss of estate. Even after making this adjustment, there is no case made out to disturb the compensation determined by the tribunal.

34. Mr. Amonkar's calculations are quite exaggerated. There is no evidence that Joseph had resigned to seek better employment. There is evidence about physical attributes of Joseph i.e. his height and obesity. Joseph was already 58 years old at the time of the accident. Normally, people do not resign to get their qualifications validated. Such validation is normally undertaken during employment itself perhaps a precondition of continuance. Therefore, the calculations submitted by Mr. Amonkar warrants no acceptance.

35. Even if Mr. Netravalkar's contention about the pension is to be accepted, the material on record does suggest that Joseph on account of his qualification and experience certainly had the potential of earning at least Rs.6,00,000/- per annum. This is after considering the element of future prospects. Joseph was admittedly 58 years old at the time of the accident and had already resigned from his previous service. The tribunal has applied the correct multiplier and made appropriate deductions towards amounts that Joseph would have spent on himself.

36. On a holistic consideration of the material on record, though there is no case made out to enhance the compensation determined by the tribunal, there is also no case made out to reduce the same. In the peculiar facts of the present case, even the interest rate though slightly on the higher side does not call for any interference. The compensation amount as determined together with interest

awarded in this case constitutes just compensation.

37. The ruling in *Ranjana Prakash and others* (supra) relied upon by Mr. Amonkar does not support his case but there is no necessity to go into this issue in the present matter because no case has been made out for enhancement of the compensation.

38. For all the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed. There shall be no order for costs.