
(2023) 01 BOM CK 0024
In the Bombay High Court
Case No : First Appeal No.19 Of 2021

Santolina Josephina And Others	Vs	APPELLANT
Inacio Xavier Fernandes And Others		RESPONDENT

Date of Decision : 07-01-2023

Acts Referred:

Motor Vehicles Act, 1988 — Section 134, 163A, 166, 169(2), 187
Indian Penal Code, 1860 — Section 279, 304A, 337

Citation : (2023) 01 BOM CK 0024

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

Bench : Single Bench

Advocate : Sanman R. Keny, Akshay Naik

Final Decision : Disposed Of

Judgement

M. S. Sonak, J

1. Heard Mr. Sanman Keny for the Appellants and Mr Akshay Naik for Respondent No.2-Insurance Company. Respondent No.1-owner/driver of Pleasure scooter (allegedly the offending vehicle) though served, was neither present nor represented.

2. The widow, aged mother, and the minor son-Sejal George Fernandes challenge the impugned Judgment and Award dated 9th May 2019, made by the Motor Accident Claims Tribunal, South Goa, Margao (Tribunal), dismissing their Claim Petition No.80/2014 for alleged failure on their part in proving the owner/driver's rashness and negligence. However, after recording this finding, the Tribunal did not bother to record any finding on other issues, particularly on the quantum of compensation. In doing so, the Tribunal acted in breach of various rulings of the Hon'ble Supreme Court, and this Court requiring the Courts and Tribunals to avoid shortcuts and decide all issues that fall for determination.

3. In Bimlesh & Ors. V/s. New India Assurance Company Limited (2010) 8 SCC 591, 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.

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. Therefore, the two issues that arise for determination in this Appeal are as follows :

(A) Is the Tribunal's finding on rashness and negligence legal and proper legal and proper?

(B) If Respondent No.1 was indeed rash and negligent, what is the quantum of compensation payable to the Appellant-Claimants?

6. On the issue of rashness and negligence, the very approach of the Tribunal is contrary to several decisions of the Hon'ble Supreme Court on the subject. The Tribunal, instead of relying upon and applying relatively recent decisions of the Hon'ble Supreme Court in the case of *Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors* (2020) 13 SCC 486 , *Anita Sharma & Ors. V/s. New India Assurance Company Limited & Anr.* (2021) 1 SCC 171 , *Parmeshwari V/s. Amir Chand & Ors.* (2011) 11 SCC 635, *Mangla Ram V/s. Oriental Insurance Company Ltd. & Ors* (2018) 5 SCC 656 and *Dulcina Fernandes & Ors. V/s. Joaquim Xavier Cruz & Anr.* (2013) 10 SCC 646, chose to rely upon the decision in *Pukh Raj Bumb vs. Jagannath Atchut Naik and ors.* 2014 4 MLJ 447 to hold that the Appellants had not proved the issue of rashness and negligence.

7. The Tribunal also relied upon *Oriental Insurance Company Ltd. vs. Prem Lata Sukla and ors* – 2007 (4) ALD 85 (SC) and *Oriental Insurance Company Ltd. vs. Meena Variyal & ors.* (2007 (5) SCC 428 to hold that the proof of rashness and

negligence on the part of the driver of the vehicle is sine qua non for maintaining an application under Section 166 of the Motor Vehicles Act and further the victims of accidents or their dependants have the option to proceed either under Section 166 or under Section 163A of the Motor Vehicles Act. However, the Tribunal did not consider the law in the relatively recent decisions of the Hon'ble Supreme Court referred to above.

8. In all the above cases not referred to by the Tribunal, 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.

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 considered 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. 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 defense 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 offenses 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.

12. 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.

13. 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.

14. If the impugned Award is perused, one gets the impression that the Tribunal was under the misimpression that it was trying a criminal case. This is more so if one considers the Tribunal's evaluation of AW2- Pedro Francis D'Costa's evidence. The finding that AW.2 was not a worthy witness or that he had sworn a false affidavit, with respect, is incorrect. The evaluation is in direct conflict with the several decisions of the Hon'ble Supreme Court referred to above. The Hon'ble Supreme Court has, time and again, held that the Tribunals should take a holistic view of the matter bearing in mind that proof of an accident or how the accident was caused may not always be possible for the Claimants.

15. Further, the approach of the Tribunal should not be to find fault with the non-examination of some best eyewitnesses, as may happen in a criminal trial. Still,

the Tribunal should analyze the material placed on record by the parties to ascertain whether the claimant's version was more likely than not true. Further, the Tribunal must draw appropriate inferences from the failure of the Respondents to cross-examine the witnesses and even failure on the part of the parties or crucial witnesses to step into the witness box. But, again, if the Tribunal were to be mindful of all this, the principle laid down by the Hon'ble Supreme Court, in all probabilities, the finding on rashness and negligence would have been diametrically opposite.

16. In this case, the Claimants examined Pedro D'Costa-AW.2, an eyewitness to the accident. This witness deposed that he actually witnessed the accident. He was proceeding from his residence at Kenyabhat to Avedem, Bazar. He deposed that he saw Inacio Xavier Fernandes riding his scooter bearing registration No. GA-09-J-7162 and how he was about 5-10 meters behind him. He deposed that when all of them reached a road junction, he saw the deceased Sebastiao Fernandes riding his Access scooter bearing registration No.GA-09/C-3374 is coming from Naik Waddo and proceeding towards Cottambi.

17. Thus, AW.2 deposed to the accident which unfolded his eyes. He pointed out that Inacio (Respondent No.1), who was in speed, applied brakes, but still, his scooter went further and dashed to the left side front mudguard precisely on the front shock absorber of Sebastiao's scooter. He deposed how Sebastiao took his scooter to the right side of the road to avoid the accident and had almost crossed the side road. Finally, he deposed that this accident would not have occurred if Inacio had proceeded straight and was at a moderate speed. He deposed that he, too, applied brakes, and his scooter stopped. He deposed how Sebastiao, after the impact, fell on his head and sustained head injuries accompanied by bleeding.

18. Pedro D'Costa (AW.2) also deposed that since he knew Sebastiao, he rushed to help Sebastiao and Inacio. He deposed that he called 108 vehicle. However, since there was some delay, he put Sebastiao in a private car to take him to Hospicio Hospital at Margao. Further, on the way, near Immaculate Conception High School at Avedem, 108 vehicle reached, and he shifted Sebastiao in 108 to take him to Hospicio Hospital, Margao. He deposed how Sebastiao was operated on at 6.30 p.m. after obtaining his signature and brought back after the operation at 8.30 p.m. He deposed that Sebastiao died between 9.30 to 10.00 p.m. soon after that.

19. The deposition of Pedro D'Costa inspires confidence. His evidence is corroborated by the sketch accompanying the scene of offence panchanama, which shows that Inacio was not on the correct side of the road. Further, the sketch shows that Inacio's scooter skidded almost 6 meters after he applied brakes and dashed against Sebastiao's Access scooter, resulting ultimately in Sebastiao's death. This gives a clue about the speed with which Inacio was riding. Thus, the evidence of Pedro D'Costa (AW.2) is corroborated by the sketch accompanying the panchanama and other police documents concerning this accident.

20. The Tribunal disbelieved AW.2 and even held that Pedro (AW.2) had perjured himself only because Pedro stated that Sebastiao was riding a Pleasure scooter during the cross-examination. In his examination-in-chief, Sebastiao had stated that Inacio (R.1) was riding the Pleasure scooter and Sebastiao was riding the Access scooter. Incidentally, in the examination-in-chief, Pedro had even given the registration numbers. Therefore, by ignoring the deposition about registration numbers and based upon a very minor, inconsequential, and trivial mix-up, the testimony of Pedro D'Costa (AW.2) could not have been discarded.

21. The Tribunal also disbelieved Pedro D'Costa (AW.2) because in his examination-in-chief, he had stated that Sebastiao came to the main road from Naika Waddo and was proceeding towards Cottambi. However, in his cross-examination, he stated that Sebastiao was in front of him. The Tribunal found this to be contradictory when, in fact, it is not at all so. All that the witness meant is that the accident unfolded in front of him when Inacio's scooter went and dashed Sebastiao's Access scooter, which was also in front of him though it had come on the main road from Naika Waddo side. Based on an apparent misunderstanding of what the witness was saying and the very obvious mix-up in referring to the deceased riding a Pleasure scooter, the testimony of AW.2 should not have been discarded so lightly by the Tribunal. The evaluation of the testimony of this witness was also contrary to the several decisions of the Hon'ble Supreme Court referred to earlier.

22. The Tribunal, in this case, did not even take cognizance of the significant factor that neutral police authorities initially filed an FIR against Respondent No.1-driver of Pleasure Scooter, alleging offences under Sections 279, 304A of IPC. After investigations, the Police filed a charge sheet against Respondent No.1. There is nothing on record about Respondent No.1 protesting against filing such an FIR and, after that, the charge sheet.

23. Therefore, considering the law in *Sunita & Ors.* (supra), coupled with the fact that Respondent No.1 chose not to contest the proceedings by filing a written statement or stepping into the witness box, the Tribunal was not justified in holding that the Claimants had failed to prove the issue of rashness and negligence on the part of Respondent No.1. The evidence of AW2 and the filing of chargesheet shifted the onus on Respondent No.1. Yet, Respondent no.1 failed to examine himself. The Tribunal failed to draw an adverse inference. For all the above reasons, the Tribunal's finding on rashness and negligence has to be reversed and is, hereby reversed.

24. On the next issue of the quantum of compensation, the Claimants have produced evidence that the deceased was the owner of a truck used to transport mining ore. Appellant No.1, his widow, has deposed to this aspect. She also deposed to availing of a loan facility to purchase this truck and how loan instalments were being paid to the Bank. AW.8-Jayant Nimsaka, Assistant Manager, Agarwal Mineral Pvt. Ltd., deposed to truck transport receipts issued by the mining company. These receipts bore the truck registration number. The

Bank Manager, who was examined in this matter, also deposed that this is the very truck Sebastiao had purchased and hypothecated with the Bank. The same effect is evidence by Tushar Kauthankar (AW.7), Mines Foreman at Hiralal Khodidas Mines at Colomba. The Claimants also examined Tahir Parkar (AW.3), who deposed that Sebastiao was their commission agent for works like obtaining passports, visas, etc. He deposed that the commission would vary from Rs.1,000/- to Rs.5,000/- per person. In the claim petition, the Claimants had pleaded that Sebastiao was earning Rs.50,000/- per month after excluding expenses for diesel. Appellant No.1 also deposed that Sebastiao used to pay income tax. However, no income tax returns were produced. None of the witnesses, however, deposed to the actual income of the deceased.

25. Mr. Akshay Naik, learned Counsel for the Insurance Company, invited the Court's attention to the cross-examination of AW.1, in which she stated that she used to work abroad and sent money to her husband every month. She deposed that the truck was lying idle after the mining ban in 2012. She deposed that Sebastiao ran the truck business for three and half months. Even the driver who the Claimants examined deposed that the truck business was run for about six months. She deposed that she could not say what Sebastiao's income or the expenses he would incur for the truck business. Finally, she admitted that she sold the truck after 2012 and after the imposition of a mining ban.

26. The Bank Manager, after deposing to the loan status, stated that a One Time Settlement (OTS) facility was provided to Appellant No.1, which she earnestly settled. There was some ambiguity about whether the truck was sold before clearance of the loan and lifting of the hypothecation or not. However, this is not very relevant. The evidence, as pointed out by Mr Akshay Naik, shows that after the mining ban, there was not much income from the truck business. Even about the income as a commission agent, there is not much evidence about the number of cases Sebastiao would handle and the income he would receive. Besides, even from the truck business, it is not as if only the amounts towards diesel had to be deducted. There were other expenses towards maintenance, upkeep, etc. Considering the above, Mr Akshay Naik is justified in contending that the claim of a monthly income of Rs.50,000/- is exaggerated.

27. From the evidence on record, including the entries in the passbook, the fact that Sebastiao had a Maruti car and had also constructed a bungalow, though possibly with the help from Appellant No.1, who was working abroad, it could be safely held that Sebastiao's income at the time of his unfortunate demise in the accident, was Rs.20,000/- per month or thereabouts. This is more so because his income, in all probabilities, was affected by the mining ban which entered force in September 2012. This accident took place in December 2013.

28. Sebastiao was 54 years old at the time of his unfortunate demise. He left behind his widow, aged mother, and a minor son.

Thus, a deduction of 1/3rd is due towards his personal expenses. However, at the

same time, a 10% increase can be allowed towards future prospects. Based on all this, applying the principles in National Insurance Company Limited Vs. Pranay Sethi and others (2017) 16 SCC 680 , the compensation towards dependency would come to Rs.19,36,000/-.

29. Mr Akshay Naik did argue that Appellant No.1, who was working abroad and sending money into India, would not be regarded as a dependant. However, even if this contention were accepted, there can be no dispute that the aged mother and the minor son were dependants. Therefore, this contention would be relevant in the context of apportionment alone. The Appellants would be entitled to compensation of Rs.40,000/- each towards consortium and Rs.15,000/- towards funeral expenses, and another Rs.15,000/- towards loss of estate. Thus, the Appellants would be entitled to a compensation of Rs.20,86,000/-. Since the accident occurred in 2013, interest at 7% per annum would be appropriate.

30. On the aspect of apportionment, it would be appropriate if 25% of the compensation is paid to Appellant No.1 (widow of Sebastiao), 25% to Appellant No.3 (mother of Sebastiao) and the remaining 50% to Appellant No.2-Master Sejal George Fernandes, who was only ten years old when he lost his father in the road accident. Further, 50% of the amount apportioned in favour of Master Sejal should be invested in a fixed deposit in the joint names of Sejal and his mother, Smt. Santolina Josephina Sebastiao Fernandes for an initial period of two years. However, if some amounts are required for Sejal's education or other pressing expenses, liberty is granted to apply to the Tribunal to release the proportionate share. However, at the option of Sejal, upon attaining the age of 21 years, Sejal can apply for withdrawal of the entire amount.

31. The Appeal is allowed in the above terms. Accordingly, the impugned Judgment and Award is set aside and substituted by the above Award. The Respondents, including in particular Respondent No.2-Insurance Company, must deposit the awarded amount, together with interest, in this Court within two months from today after giving due intimation to the learned Counsel for the Appellants. Upon deposit, the Registry to permit withdrawals consistent with the above order. Registry to ensure that the Appellants furnish proper identification and bank details, and the amounts should be directly deposited in their bank accounts.

32. The Appeal is disposed of in the above terms. Accordingly, there shall be no orders for costs.