

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.104 OF 2016

WITH

FIRST APPEAL NO.22 OF 2017

FIRST APPEAL NO.104 OF 2016

National Insurance Co. Ltd.
Through its authorised Officer,
2nd floor, Diamond Chambers,
18th June Road, Panaji-Goa.

... Appellant

V e r s u s

1. Mr Umesh M. Kholkar (since deceased)
(a) Neha Nikhil Pai,
Major, Married,
(b) Nikhil D. Pai,
Major, married,

Both residing at
H.No.B/405, Vidya
Enclave, Plot No.67,
Opposite Sky Villa, Near
Goa Club Estadia, Behind
PDA Colony, Vollant,
Porvorim.

2. Mrs. Nita U. Kholkar,
Aged 49 years,
wife of Umesh M. Kholkar.
both Indian Nationals and
residents of H. No.61,
Opp. Diwar Ferry, Sao Pedro,
Ribandar, Tiswadi-Goa.
3. Mrs. Farha Roohi,
Major of age, wife of
Badruddin Roohi,
residents of Flat No.C-3/F6,
Sapna Park, Curti,
Ponda Goa(Driver).
4. Mr. Badruddin Hafizullah,
Son of Mohammad Hafizullah,
resident of Flat No.C-3/F6,

Sapna Park, Curti,
Ponda-Goa (owner)

5. The New India Insurance Company Limited,
Panaji, Divisional Officer,
Velho Building, 3rd floor,
Rua Conde de Torres, Post Box No.190,
Panaji Goa (dropped) ... Respondents.

Shri V. R. Timble, Advocate for the Appellant.
Shri S. N. Joshi, Advocate for the Respondent nos.3 and 4.
Ms. A. Dos Reis Falcao, Advocate holding for Shri Amey
Kakodkar, Advocate for the Respondent no.5.

WITH

FIRST APPEAL NO.22 OF 2017

1. Umesh M. Kholkar,
since deceased through legal heirs
1(a) Neha Nikhil Pai
(b) Nikhil D. Pai,
Both major in age, residents of
Upper Ground Floor,
Sukhakarta Niwas, Nova
Cidade, Alto Porvorim, Goa.
2. Mrs. Nita U. Kholkar,
wife of late Mr Umesh M. Kholkar,
54 years of age, housewife,
resident of H. No.61,
Opp. Divar Ferry, Sao Pedro,
Ribandar-Goa. ... Appellants

V e r s u s

1. Mrs. Farha Roohi,
Major of age, w/o Badruddin Roohi,
r/o B-63, Sairaj Park,
Shantinagar, Ponda,
Goa 403 401.
2. Mr Badruddin Hafizullah,
s/o Mohammad Hafizullah,
r/o B-63, Sairaj Park,
Shantinagar, Ponda,Goa.
3. National Insurance Company,

2nd floor, Diamond Chambers,
18th June Road, Panaji, Goa.

... Respondents

Shri S. D. Lotlikar Senior Advocate with Ms. A. Naik, Advocate for the Appellants.

Shri S. N. Joshi, Advocate for the Respondent Nos.1 and 2.

Shri U. R. Timble, Advocate for the Respondent No.3.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Judgment on : 3 July 2018

Judgment Pronounced on : 9 July 2018

JUDGMENT

1. The First Appeal No.104 of 2016 is of the insurer challenging the judgment dated 15.09.2015 passed by the learned Motor Accident Claims Tribunal, Panaji, (MACT, for short hereinafter), while the First Appeal No.22 of 2017 is of the original claimants challenging the very same judgment and award of the MACT seeking enhancement of the compensation in appeal. Hence, for brevity's sake hereinafter, the two sets of appellants would be referred to as the insurer and the claimants respectively.

2. Admittedly, a vehicular accident had taken place on 13.08.2010 near the Ice Factory, Patto-Ribandar Causeway in which the son of the claimants had sustained grievous injuries while proceeding from Ribandar towards Panaji with the oncoming vehicle driven by the respondent no.1 and owned by the respondent no.2 in the insurer's appeal and succumbed to

them while undergoing treatment at the Goa Medical College Hospital at Bambolim on the same day itself. The claimants had carved a case that the driver of the Maruti car was rash and negligent and it dashed against the motorcycle driven by the deceased resulting in fatal injuries to him and his death later in the hospital on the same day. The learned MACT had found favour with the case of the claimants that the driver of the Maruti car was rash and negligent and on the basis of the earnings of the deceased and considering their dependency, had awarded the compensation of ₹18,53,000/- with interest @ 9% per annum in their favour apart from the cost of the petition.

3. The insurer felt aggrieved and preferred the appeal challenging the judgment on the premise that the learned MACT had erred in holding that the accident had occurred on account of the rash and negligent driving of the Maruti driver when in fact it was the deceased himself who was responsible for the accident, that the learned MACT did not consider that there was atleast contributory negligence on the part of the deceased and failed to appreciate that there was a clear breach of the policy and no liability could be fastened on the insurer pursuant to the award made by it. The learned MACT had erred in granting exorbitant compensation to the

claimants and therefore the impugned judgment and award was liable to be interfered with and he had to be awarded compensation which was much lesser compared to that awarded by the MACT after making necessary deductions on account of the contributory negligence at the instance of the deceased.

4. The claimants challenged the impugned judgment and award on the premise that the compensation of ₹18,53,000/- awarded by the learned MACT was totally on the lower side, bad in law and against the well settled principles governing the grant and awarding of compensation. The learned MACT ought to have awarded the total compensation of ₹37,50,000/- as claimed in the petition. The entire exercise done by the learned MACT while awarding compensation towards future prospects was against the well settled principles of law. The learned MACT committed a gross error by only considering an increase of 30% of the earnings of the deceased for the purpose of considering future prospects when the law required to consider an increase of 40% when the deceased was below the age of 40 years. The learned MACT committed a gross error in not awarding compensation under the head of loss of estate, loss of expectation of life and loss of love and affection and therefore the judgment and award to

that extent had to be modified and they awarded the compensation as claimed in the petition.

5. Shri U. R. Timble, learned Advocate appearing for the insurer submitted at the outset that the evidence on the rash and negligent driving was not properly construed by the learned MACT and that on a perusal of the sketch itself, the learned MACT ought to have held that it was a case of contributory negligence. On the quantum, it was his case that the compensation awarded was on the higher side and in that context he placed reliance in a Constitution Bench Judgment in National Insurance Company Limited vs Pranay Sethi & Ors. [2017(13) SCALE 12].

6. Shri S. N. Joshi, learned Advocate for the respondent nos.3 and 4 in the insurer's appeal submitted that there was no negligence on the part of the Maruti driver and therefore they had to be exonerated from the liability of paying any compensation.

7. Shri S. D. Lotlikar, learned Senior Advocate contended at the outset that the appeal at the instance of the insurer was not maintainable on the premise that they had failed to bring their case within the predicates of Section 170 of the Motor

Vehicles Act (Act, for short). It was also not their case that there was any collusion between the applicant and the insured nor was it their case that the driver and owner of the vehicle in question had failed to contest the proceedings. They were duly represented throughout in the proceedings and there was no proof of collusion and therefore the insurers were not entitled to raise any issue either on the aspect of rashness and negligence when the petition was well defended by the driver and owner much less on the quantum of compensation. Their defences were restricted to those under Section 149(2) of the Act. He invited attention to the impugned judgment and submitted that the case of the insurer on the aspect of contributory negligence was without any basis looking to the very same sketch of the scene of accident coupled with the testimony of the panch and the eye witness and juxtapositioned with that of the Maruti driver.

8. Shri S. D. Lotlikar, learned Senior Advocate inviting attention to Pranay Sethi (supra) submitted that the deceased was a young boy of 21 years who was pursuing his Masters in Commerce and working part time as an Accountant at the relevant time earning ₹10,000/- per month. He had all the scope or likelihood of earning a reasonable sum of ₹20,000/- per month if not more on completion of his Masters in the

normal course. Thus, taking his income at ₹20,000/- per month and giving 40% increase towards future earnings as laid down in Pranay Sethi (supra), the claimants were entitled to much more compensation than that awarded by the learned MACT.

9. i would consider their submissions, the judgment in Pranay Sethi (supra), the evidence on record and in view thereof, decide the appeals.

10. The claimants had admittedly not seen the accident and therefore what would remain at large is the testimony of Sairaj (Aw.3) who had received information that his friend Nimesh, since deceased, had met with an accident at Patto, Ribandar, caused due to the rash and negligent driving of the Maruti driver. Accordingly he had lodged a complaint against her for driving the vehicle in a rash and negligent manner and causing his death. There was no rebuttal of his testimony but for the suggestion that she had not contributed to the accident. The important testimony was of Paresh (Aw.4) who had indicated that while working in a travel agency at Panaji at the relevant time, he had left the office to go to the Syndicate Bank, Ribandar to withdraw money. He had reached the bank in about ten minutes and after completing the work at 10.05

hours, he had left the bank to proceed to Panaji. On reaching the road proceeding from Ribandar Patto to Panaji, he saw a Maruti car driven by its driver towards Old Goa side. The said vehicle in the process of overtaking another vehicle came on the wrong side i.e. his side of the road and gave a dash to the Deo Scooter and dragged the said scooter towards him. Due to the dash the rider and the scooter were dragged up to a distance of 14 to 15 metres and thereafter the rider of the scooter fell on the road while the car went ahead to a distance of 15 metres and stopped it.

11. Paresh (Aw.4) stated that he had stopped his motorcycle and ran towards the scooter on the right side and by that time, people had gathered at the spot. He had sustained injuries to his wrist and was bleeding profusely and there was bleeding injury on the head and besides he was unconscious. The people gathered at the spot, identified him by his name and thereafter he was taken by 108 ambulance to the Goa Medical College hospital, Bambolim. There were bare suggestions to dispute his statement on having seen the accident but materially he was unshaken on his employment, his mode of driving on the stated date and time and his place of work for which there was reason to conclude that he did have occasion to witness the accident. It needs reckoning that

there was not even a whisper at the instance of the insurer to him that the accident had occurred on account of the fault of the deceased himself and/or that there was contributory negligence at his instance.

12. The claimants had otherwise examined PSI Shirodkar (Aw.5) who had registered an offence against the Maruti driver for rash and negligent driving and causing the death of the scooter driver in support of their case. He too confirmed that Paresh (Aw.4) was an eye witness to the accident which had taken place around 11.00 hours. There was not even a suggestion to him that his investigation bore out that the accident was on account of the fault of the deceased. The aspect whether the victim was wearing a helmet at the time of the accident or otherwise would not be relevant for deciding the issue of rashness and negligence for it may have its own ramifications on the nature of injuries suffered by him, fatal or otherwise.

13. The Maruti driver Farha (Rw.1) had examined herself in which she claimed that she was driving her vehicle at a slow speed of 35 to 40 kms on the left hand side of the road while proceeding towards Patto, Ribandar when another car had come from behind to overtake her vehicle and sped away. At

that time, she saw the victim coming from the opposite direction in a high speed without wearing a helmet and attempting to pass through her vehicle and the other vehicle overtaking her. In that process, the deceased might have brushed with the other vehicle but it had directly hit on the right side of her vehicle. She had come out of the vehicle immediately after the accident and saw his physical condition and with the help of one person having a Trax vehicle, she arranged to shift the injured to the Goa Medical College Hospital. On the way, she encountered 108 ambulance and in that ambulance he was shifted to the hospital.

14. Farha (Rw.1) admitted that these statements which were made by her in her affidavit were made for the first time in the petition giving a clear indication that they were not pleaded by her. Even otherwise, what is a part of the record of the insurer's appeal is the claim statement of the claimants and the written statement in defence of the insurer with no defence of the Maruti driver and/or the owner. Be that as it may, looking to the testimony brought on record of the eye witness with that of the Maruti driver, apart from the panchanama and the sketch, there is every reason to conclude that the Maruti driver was rash and negligent and solely responsible for the accident and there is no basis in the

contention on behalf of Shri Timble, learned Advocate for the insurer that there was contributory negligence at the instance of the deceased.

15. I would now come to the aspect of compensation to be awarded in favour of the claimants and whether that awarded by the learned MACT was required to be scaled down as per the case of the insurer or to be upgraded as per the contention of the claimants. Before embarking on that discussion it would be appropriate to refer to the judgment in Pranay Sethi (supra). The Constitution Bench of the Apex Court while dealing with the insurer's appeal held that Rajesh vs. Rajbiir Singh [2013(6) SCALE 563] had not taken note of the decision in Reshma Kumari vs Madan Mohan [2013 (5) SCALE 160] which was delivered at an earlier point of time and therefore the decision in Rajesh was not binding precedent. It laid down that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. The actual salary should be read as actual salary less tax.

16. Pranay Sethi (supra) further held that in case the deceased was self-employed or was on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component. For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of *Sarla Verma vs Delhi Transport Corporation* and *anr.* [(2009) 6 SCC 121]. The selection of multiplier shall be as indicated in the Table in *Sarla Verma* read with paragraph 42 of that judgment. The age of the deceased should be the basis for applying the multiplier. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be ₹15,000/-, ₹40,000/- and ₹15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years.

17. The claimants had set out a case that the deceased was a student aged 21 years pursuing his Masters in Commerce and at the time of his death, he was also working part time as

an Accountant with M/s. Vikas on a salary of ₹10,000/-. He had aspired to pursue Masters in Business Administration (MBA), after completion of masters in Commerce, wanted to secure a Managerial Executive post on completion of studies in a well established and renowned Government/Semi Government with a salary of atleast ₹20,000/- and above and on that premise had claimed the compensation of ₹27,20,000/-. The first claimant Umesh (Aw.1) had stated that he and his wife were dependent on the deceased for their day to day needs and for running the house as he was not having any pension and that the deceased was pursuing his Masters in Commerce and working part time as an Accountant on a salary of ₹10,000/- with aspiration to pursue further studies in MBA on completion of his M.Com and procure a job in a Government or semi-Government or Private Organization with a salary of ₹20,000/- per month or above. There was no rebuttal of his testimony on the technical qualifications of the deceased except a denial of his statement that he was not working as an accountant on a salary of ₹10,000/- per month on part time basis.

18. The deceased was a young boy of 21 years who on completion of his B.Com was working part time as an Accountant with M/s Vikas Nurseries and drawing ₹10,000/-

per month. The claimants had produced his qualification certificates and besides examined the proprietor of M/s Vikas Nurseries, Vikar (Aw.2) who was unshaken in his testimony that the deceased was employed with him as an accountant and on payment of ₹10,000/- per month. The deceased who was pursuing M.Com in the normal course would have completed his Masters degree and pursued his MBA to pursue future good prospects either in view of a Government job or semi-government or even in a private establishment. He had all the promise to earn ₹20,000/- a month if not more considering also the cost of inflation.

19. Hence, considering the judgment in Pranay Sethi (supra) and giving a 40% increase in his future prospects, he would have easily earned ₹28,000/- per month in due course. I am however unable to concur with the contention of Shri S. D. Lotlikar, learned Senior Advocate that an amount of one third only had to be deducted towards dependency even considering that his parents were completely dependent on him considering the settled position of law that an amount of 50% has to be deducted towards the personal expenses of a bachelor. On that premise and considering his salary of ₹14,000/- per month, which would be ₹1,68,000/- annually and adopting the multiplier of 18, the claimants would be

entitled to a reasonable compensation of ₹30,24,000/- apart from ₹15,000/- towards the loss of estate and an equal amount towards the funeral expense taking the final tally to ₹30,54,000/- being the just compensation in the circumstances of the case.

20. In view thereof, i pass the following :

ORDER

The insurer's appeal is dismissed, while that of the claimants' is allowed enhancing the compensation from ₹18,53,000/- to ₹30,54,000/- with interest at 9% p.a. as ordered by the learned MACT.

There shall be no order as to costs.

Both the Appeals stand disposed off accordingly.

NUTAN D. SARDESSAI J.

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