

**IN THE HIGH COURT OF BOMBAY AT GOA****FIRST APPEAL NO.49 OF 2011**

National Insurance Company Ltd.,  
Bicholim Branch, Bicholim, Goa .. Appellant

V/s

- (1) Smt. Tejaswini P. Kurtikar  
Widow of Pramod Kurtikar,  
Aged 28 years, residing at  
Flat No.5, Prasheel Co-Operative  
Housing Society, Behind Canara  
Bank, Ponda, Goa.
- (2) Shri Ankush Gangaram Shiratode,  
S/o. Gangaram Shiratode,  
Major of age, resident of Thane,  
Bhivandi Thakur Pada, Mumbai,  
Maharashtra and C/o. Shri Sakharam  
Thakur, Gaonkarwado, Honda,  
Sattari-Goa.
- (3) Shri Sakharam B. Thakur  
S/o. Bablo Thakur,  
Resident of Gaonkarwado,  
Honda, Sattari-Goa.
- (4) Smt. Taramati Kurtikar @  
Taramati Pilenkar,  
widow of Harischandra Kurtikar,  
74 years old, Household,  
residing at H. No.22,  
Pansule, Dharbandora, Goa. .. Respondents

Shri U. R. Timble and Ms. Yadika Mandrekar, Advocates for the  
appellant.

Shri Suraj Naik, Advocate for the respondent no.1.

Shri F. Andrade, Advocate for the respondent no.4.

**CORAM :- C. V. BHADANG, J.**

**DATE : 1<sup>st</sup> / 5<sup>th</sup> March, 2018**

**ORAL JUDGMENT :**

The challenge in this appeal is to the judgment and award dated 03/09/2010, passed by the learned Motor Accident Claims Tribunal, Panaji (Tribunal, for short) in Claim Petition No.47/2008. By the impugned judgment, the Tribunal has partly allowed the Claim Petition, granting compensation of Rs.15,43,600/- to the respondent nos.1 and 4 along with interest at the rate of 9 % p.a. from the date of the application till realisation. The Tribunal has directed the compensation to be apportioned in the ratio of 65:35 in favour of the respondent nos.1 and 4 respectively.

2. The brief facts, necessary for the disposal of the appeal, may be stated thus :

That Promod Kurtikar, a businessman, who was the husband of first respondent and son of the fourth respondent, met with a vehicular accident on 05/04/2008. On that day, the deceased was driving his Santro Car bearing No.GA06-A-1751 and was proceeding from Ponda to Panaji. When he reached

Farmagudi Cone road, the second respondent came driving a Tempo bearing registration no.GA-02-T-8781 at a high speed and gave a dash to the Car of the deceased. As a result of the accident, Pramod sustained injuries, to which he succumbed on the spot.

3. The first respondent filed a petition under Section 166 of the Motor Vehicles Act, 1988, claiming compensation of Rs.30 Lakhs in respect of the accidental death of her husband. The appellant happens to be the insurer of the Tempo of which the third respondent is the owner. At the relevant time, the Tempo was being driven by the second respondent. It was contended that the accident occurred solely due to the rash and negligent driving of the Tempo. As a result of untimely death of Praomod, the first and the fourth respondents have lost their support.

4. The appellant contested the petition on various grounds. It was contended that the accident occurred due to the rash and negligent driving of the Santro by the deceased himself. It was also contended that the quantum of compensation claimed is very high. It was alternatively contended that there would be contributory negligence attributable to the deceased and the compensation will have to be proportionately reduced to that extent.

5. On the basis of the rival pleadings, the Tribunal framed the issues.

6. The original claimant Tejaswini examined herself as AW1 along with Vishant Tilve (AW2), Devendra Naik (AW3) and Ramakant Borkar (AW4). The appellant did not lead any evidence. The other respondents in Claim Petition failed to contest the petition and leave was granted to the appellant under Section 170 of the Act to raise all the available contentions.

7. The Tribunal found that the accident occurred due to the rash and negligent driving of the Tempo. On the basis of the income tax returns and the profit and loss account for the year ending 31/03/2005 and 31/03/2006, the Tribunal reckoned the monthly income of the deceased at Rs.15,000/- and applied a multiplier of 16 and arrived at Rs.19,20,000/- as the compensation towards the loss of dependency. The Tribunal granted Rs.2,000/- towards funeral expenses, Rs.2,500/- towards loss of estate and Rs.5,000/- towards loss of consortium and arrived at a figure of Rs.19,29,500/-. The Tribunal, however, reduced the compensation to Rs.15,43,600/-, taking into account the uncertainties of life.

8. I have heard Shri Timble, the learned Counsel for the appellant, Shri Suraj Naik, the learned Counsel for the respondent no.1 and Shri Andrade, the learned Counsel for the respondent no.4. With the assistance of the learned Counsel for the parties, I have gone through the record and the evidence led as also the impugned award passed by the Tribunal.

9. Shri Timble, the learned Counsel for the appellant has raised three contentions. (i) It is submitted that it is not proved on record that the accident occurred due to rash and negligent driving by the driver of the Tempo. It is submitted that although the Tribunal has placed reliance on the evidence of AW2 and for the matter of that AW4, it is contended that the statement of AW4 was not recorded by the police during the course of investigation. The learned Counsel has pointed out that it is not shown that the driver of the Tempo was chargesheeted. It is submitted that the basic requirement of the accident being the outcome of the rash and negligent driving by the driver of the Tempo, is not established. The learned Counsel made an alternate submission in this regard. (ii) It is submitted that the spot panchanama and the sketch annexed thereto, would show that it was the Santro Car, which had drifted towards the right side and as such, the deceased was also responsible to certain extent for the accident and this

would be a case, where contributory negligence of the deceased has to be ascertained, which exercise has not been undertaken by the Tribunal. (iii) It is next submitted that the tax returns for the year 2004-2005 and 2005-2006 show the income of Rs.1,02,122/- and 1,05,160/- respectively and as such, the monthly income cannot exceed Rs.8,500/-. It is, thus, submitted that the Tribunal was in error in reckoning the monthly income of Rs.15,000/-. Except this, there are no other contentions raised.

10. The learned Counsel for the first and fourth respondents have supported the impugned Award. It is submitted that the appellant has not led any evidence before the Tribunal and the contention about, any contributory negligence of the deceased, was not raised before the Tribunal. It is submitted that the Tribunal has rightly found that the accident occurred due to the rash and negligent driving of the Tempo. The learned Counsel have submitted that there was no contributory negligence on the part of the deceased at least none has been established on record to reduce the amount of compensation. In so far as the quantum of compensation is concerned, it is submitted that the deceased was a self-employed person having business of his own and there were prospects of the business getting better and consequent increase of the income, which has to be factored in. It is

submitted that the Tribunal, on overall consideration of the evidence, has rightly reckoned the monthly income of Rs.15,000/- per month and at the same time, has reduced it to certain extent taking note of the uncertainties of life. It is, therefore, submitted that no interference is called for in the impugned Award.

11. I have carefully considered the rival circumstances and the submissions made.

12. Firstly, it will be necessary to deal with the aspect as to whether the accident was caused due to the rash and negligent driving of the Tempo and whether any contributory negligence, can be attributed to the deceased.

13. It is now well settled that the question of negligence, which is the very basis of liability, has to be decided on the basis of ocular evidence if available and in consonance with the principle of *res ipsa loquitur* and on preponderance of probability. The degree of proof required in a petition for compensation under the Act, may not be as high as is required in a trial for rash and negligent driving under the Indian Penal Code. In this regard, it would be necessary to make a reference to the evidence of AW2 and AW4. AW2 states that on 05/04/2008, at around 15.32 to

16.00 hours, he was travelling from Ponda to Panaji and on reaching Conem at Priol, he saw a white coloured Santro Car at the left side of the road and a Truck on the right side. This witness has acted as a panch on the spot panchnama (Exh.32). Admittedly, AW2 has not witnessed the accident. His evidence is relevant only to the extent of proving the spot panchnama Exh.32. PW4-Ramakant has stated that on 05/04/2008, he was coming to Ponda from Panaji by his Car bearing No.GA06-D-8899 and he had seen the Tempo Bearing No.GA02-T-8781, which had overtaken his Car and had given a dash to the Santro, which the deceased was driving. This witness has stated that the Tempo was being driven in a rash and negligent manner. It is true that the statement of this witness was not recorded by the police. However, that by itself would not be sufficient to discard the evidence of this witness, which otherwise appears to be natural. Nothing significant has come in the cross-examination of this witness, so as to discard the evidence of this witness.

14. The spot panchnama Exh.32 shows that at the spot of accident, the width of the Ponda to Panaji road was 18 feet with 2 feet katcha patches on either side. The sketch indicates that the actual spot of impact was 8.3 metres from the eastern boundary while 13.4 metres from the western boundary of the road. The

sketch indicates that the impact was such that the Santro was pushed back and had gone to the extreme left side of the road while the Tempo had come further towards Ponda and stopped in an oblique manner in the middle of the road. The learned Counsel for the appellant has strongly contended on the basis of the sketch and particularly, the spot of impact that it was the Santro, which had drifted towards the right side. The contention, in my considered view, cannot be accepted. This is because the actual spot of impact was not discernible from the location of vehicles, which had changed after the impact. As noticed earlier, the Tempo had travelled further towards Ponda and the Santro was pushed back to a considerable extent and ultimately halted on the extreme left side of the road. The spot of impact, in such cases, is normally ascertained with the help of some marks on the road or the broken parts, which may be found lying on the road. Merely on account of the fact that the spot of impact is shown 13.4 metres from the western boundary, would not lead to an inference that Santro had drifted towards the right, attributing contributory negligence to the deceased. From the evidence of AW4 and the nature of the impact, which had pushed the Santro back to a certain extent and the fact that the Tempo had travelled much thereafter to the south i.e. towards Ponda before halting in the middle of the road, is indicative of the speed at which the Tempo

must have been driven. In my considered view, there is sufficient evidence to conclude that the accident occurred solely due to rash and negligent driving of the Tempo by the second respondent and no contributory negligence can be attributed to the deceased.

15. This takes me to the quantum of the compensation. It is true that on the basis of the income tax returns for the year 2004-2005 and 2005-2006, the monthly income would be around Rs.9,000/- per month, which the Tribunal has reckoned as Rs.15,000/- per month. However, at the same time, after arriving at a final figure of Rs.19,20,000/-, the Tribunal has reduced it to Rs.15,43,600/-, taking into account all the uncertainties of life. In my considered view, a fresh attempt can be made to compute the compensation having regard to the decision of the Supreme Court in the case of **National Insurance Company Ltd. Vs. Pranay Sethi and others**; AIR 2017 SC 5157. Considering the fact that the net income for the two years has been shown to be Rs.1,02,122/- and Rs.1,05,160/- respectively, it would be appropriate to reckon the monthly income of the deceased at Rs.9,000/-. Thus, the annual income would be Rs.1,08,000/-. Considering the fact that the deceased was self-employed businessman aged 36 years, 40 % increase will have made in the annual income towards future prospects, which is Rs.43,200/-.

Thus, the annual income would be Rs.1,08,000+Rs.43,200 =Rs.1,51,200/-. Considering the fact that there were two dependents on the deceased, the deduction towards personal and living expenses would be to the extent of 1/3<sup>rd</sup> i.e. Rs.50,400/-. Thus, the annual dependency would be Rs.1,51,200-50400= Rs.1,00,800/-. The multiplier to be employed is in accordance with the decision of the Supreme Court in the case of **Sarla Verma and others Vs. Delhi Transport Corporation and another;** (2009)6 SCC 121, which is 16. Thus, the total compensation would be Rs.16,12,800/-. After adding Rs.15,000/- towards funeral expenses, Rs.15,000/- towards loss of estate and Rs.40,000/- towards loss of Consortium, the final figure would come to Rs.16,82,800/-. It can, thus, be seen that the compensation comes to much higher than what is granted by the Tribunal. In that view of the matter, I do not find that the challenge raised on behalf of the appellant to the quantum of the compensation, can be sustained.

16. The next question to be considered is whether in the absence of an appeal/ cross-objection by the respondent no.1 claimant, this Court can award compensation in excess of what is granted by the Tribunal. The issue is no longer *res integra*. In **United India Insurance Co. Ltd. Vs. Rajani Suresh Bhore;**

2017(5) ABR 592, this Court, after taking a survey of several decisions holding the field, has laid down the following principles, which emerge :

*“(a) The compensation awarded must be just compensation, neither excessive nor illusory, viz., compensation that is moderate, reasonable and appropriate.*

*(b) Where it is not a court in appeal can set it right, irrespective of whether or not a substantive appeal has been filed.*

*(c) An appeal court can always step into correct a computational error or one that is facially incorrect, such as the adoption of an incorrect multiplier. No separate or independent appeal or cross-objections are needed for this. The present case is an example.*

*(d) Where there is need for an adjustment of distribution of the award under various heads with no impact on the overall award, this can always be done by an appeal court without need for a separate appeal (as in the present case).*

*(e) Where an appeal is filed seeking reduction, an original claimant can, without filing an independent appeal, submit that the original award should be retained without interference.*

*(f) Where an appeal is filed seeking reduction, a claim for enhancement (i.e. not on maintenance of the original award, nor for correction of an obvious error), or vice versa, cannot be entertained without a substantive appeal or cross-objections as*

*contemplated by Order 41 Rule 22.”*

*(Emphasis supplied)*

17. It can, thus, be seen that under Section 166 of the Act, it is the statutory duty of the Tribunal to arrive at 'just compensation', which is payable and in that limited sense, the proceedings before the Tribunal may not even be considered as adversarial in nature. This Court in the case of **Rajani Bhore** (supra), has found that the appeal Court can always step in and correct computational error or one that is facially incorrect, such as adoption of incorrect multiplier and for such an exercise, filing of separate or an independent appeal or cross-objection is not necessary. In my considered view, the present case would be governed by the principles as laid down at clause (c) in the judgment in the case of **Rajani Bhore** (supra). The view as taken stands also fortified by the judgment of the Supreme Court in the case of **Jitendra Khimshankar Trivedi and others Vs. Kasam Daud Kumbhar and others**; (2015)4 SCC 237, in which the Hon'ble Supreme Court held thus, in para 12 of the judgment :

*“12. The Tribunal has awarded Rs.2,24,000/- as against the same, the claimants have not filed any appeal. As against the award passed by the Tribunal when the claimants have not filed any appeal, the question arises whether the income of the deceased could be increased and compensation could be*

*enhanced. In terms of Section 168 of the Motor Vehicles Act, the courts/ the Tribunals are to pass awards determining the amount of compensation as to be fair and reasonable and accepted by the legal standards. The power of the courts in awarding reasonable compensation was emphasised by this Court in **Nagappa V. Gurudayal Singh**; (2003)2 SCC 274, **Oriental Insurance Co. Ltd. Vs. Mohd. Nasir**; (2009)6 SCC 280 and **Ningamma Vs. United India Insurance Co. Ltd.**; (2009)13 SCC 710. As against the award passed by the Tribunal even though the claimants have not filed any appeal, as it is obligatory on the part of courts/ the Tribunals to award just and reasonable compensation, it is appropriate to increase the compensation.”*

(Emphasis supplied)

18. In the present case, this Court has only undertaken an exercise of computation of the compensation on the basis of the annual income of the deceased, which is discernible from the income tax returns and the Profit & Loss Account placed on record. The Supreme Court in the case of **Pranay Sethi** (supra), has standardised certain heads of the compensation, which are in the nature of general damages. For instance, the compensation in respect of loss of estate and funeral expenses is to be granted at the rate of 15,000/- each, while for loss of consortium, it has to be Rs.40,000/-. Apart from computing the compensation, this Court

has only added the compensation under the aforesaid heads as standardised in the case of ***Pranay Sethi*** (supra). In such circumstances, in my considered view, it would be open to this Court to grant the aforesaid compensation, notwithstanding the fact that the original claimant has neither filed a separate appeal nor cross-objection for enhancement.

19. In the result, the appeal is hereby dismissed. The impugned Award, however, is modified. The respondent nos.1 and 4 shall be entitled to compensation of Rs.16,82,800/- along with interest at the rate of 9 % p.a. from the date of the petition till the date of the actual payment. The amount deposited before this Court shall, accordingly, be adjusted. The order as regards the apportionment of the compensation in the ratio of 65:35 between the respondent nos.1 and 4 is hereby maintained. The amount lying before this Court along with interest, if any, shall be paid to the respondent nos.1 and 4 in the ratio of 65:35. In the circumstances, there shall be no order as to costs.

**C. V. BHADANG, J.**

SMA