IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 148 OF 2013
WITH
CROSS OBJECTIONS NO.4 OF 2014

First Appeal No. 148 of 2013

1 Smt. Rosa Maria Fernandes e Souza widow of late Jose Leandro Souza, aged 34 years, widow

2 Master Raydon Souza
son of late Jose Leandro Souza aged 5 years, minor, represented by his natural guardian (mother)- Smt. Rosa Maria Fernandes e Souza (Applicant No.1)
Both about residents of 314, Uddo, Quelossim, Cortalim, Taluka Mormugao, Dist. South Goa 403 710 ….. Appellants

V e r s u s

1 Jaisingh Kiro
son of Anthoney Kiro
major in age, driver of Tipper Truck bearing registration No.GA02-U-6594 permanent resident of near Junmur Church, Garhatoly, Andali, Jambahal, Raibaga, Sundargarh, Orissa, temporary resident of C/o H.No.751, Marcelino Faria, Pool, Verna, Salcete Goa.

2 Mrs. Florinda Colaco, major, owner of Tipper Truck bearing registration No.GA02-U-6594 resident of House No.750, Pocol, Verna, Salcete Goa –

403 722.

3 The New India Assurance Company Ltd.
Insurer of the Tipper Truck bearing registration number GA02-U-6594
Jagannath Building, near Railway Flyover Margao Goa. …. Respondents.

Mr. S.S. Kakodkar, Advocate for the Appellant.

Mr. E. Afonso, Advocate for the respondents.

WITH

CROSS-OBJECTION NO.4 OF 2014

IN

FIRST APPEAL NO.148 OF 2013

1 Jaisingh Kiro
son of Anthoney Kiro
major in age,
r/o. near Junmur Church, Garhatoly, Andali, Jambahal, Raibaga, Sundargarh, Orissa, temporary resident of C/o H.No.751, Marcelino Faria, Pocol, Verna, Salcete Goa.

2 Mrs. Florinda Colaco,
major of age,
Pocol, Verna, Salcete Goa.

3 The New India Assurance Company Ltd.
Jagannath Building, near Railway Flyover Margao Goa.

….. Appellants

V e r s u s

1 Smt. Rosa Maria Fernandes e Souza widow of late Jose Leandro Souza,

aged 33 years, widow, residents of 314, Uddo, Quelossim, Cortalim, Taluka Mormugao, Dist. South Goa

2 Master Raydon Souza
son of late Jose Leandro Souza aged 4 years, minor,

residents of 314, Uddo, Quelossim, Cortalim, Taluka Mormugao, Dist. South Goa. …. Respondents.

Mr. E. Afonso, Advocate for the Cross Objectioners / Original Respondents.

Mr. S. S. Kakodkar, Advocate for the Appellants / Respondents.

Coram :- **SMT. M. S. JAWALKAR,J.**

Reserved on : 29th October, 2020

Pronounced on: 4th December, 2020

JUDGMENT

1. Heard Mr. Kakodkar, learned Advocate for the Appellants and Mr. E. Afonso, learned Advocate for the Respondents.

2. The present appeal and cross objections are filed

being aggrieved by the judgment and award dated 18.09.2013 passed by the Motor Accident Claims Tribunal, Margao, in Claim Petition No.217 of 2011 for enhancement and cross objections are filed for setting aside the Judgment and Award therein.

3. The Claim Petition was filed by the widow and the minor son of deceased Jose Leandro Souza.

4. It is the case of the claimants before the Claims Tribunal that Jose, since deceased, was 38 years old, working as a welder and also as an agricultural labour and earning Rs.10,000/- per month. On 25.07.2011, at about 8.30 hours, he was riding the Honda Activa scooter bearing registration no.GA-06/C-3001 from Poriebhatt, Verna and proceeding towards his residence at Uddo, Quelossim, Cortalim. On reaching near the Old Mardol Hotel, Verna, at about 8.50 hours, on the Margao-Panaji Highway, the respondent no.1, drove the tipper truck bearing registration number GA-02/U-6594 at a fast speed, rashly and negligently, in the same

direction and gave a dash to his scooter which was driven on the extreme left side of the road and at a slow speed. The dash was so violent that Jose was dragged alongwith the scooter to a length of more than 11 metres. The tipper truck stopped there thereafter at a distance of about 30 metres from the place where the scooter had fallen. Jose sustained grievous injuries and succumbed to them. The claimants were dependent fully on the deceased. They had lost the monitory and moral support, love and affection and company. On all these counts, claimants claimed compensation to the tune of Rs.19,75,000/-. The respondent nos.1 and 2 being driver and the owner and respondent no.2 being insurance company, are jointly and severally liable to pay the amount of compensation to the claimant.

5. After considering the pleadings, issues were framed and the learned Tribunal awarded amount of Rs.7,89,500/- along with interest at the rate of 9% per annum.

6. Being aggrieved by the said Judgment and Award, an

appeal bearing FA no. 148 of 2013 is filed by the appellants on 20.12.2013 and Cross Objections were filed by the respondents on 12.03.2014.

7. The learned Counsel for the appellants submitted that the present appeal is mainly filed for enhancement of compensation. It is submitted that learned Tribunal awarded compensation assessing notional income of deceased as to Rs.6,500/- per month. There is no basis to hold that said amount as monthly income specifically when there is evidence on record to show that he was working as a welder as well as an agricultural labourer. The learned Tribunal ought to have paid the income of the deceased as Rs.10,000/- per month. It also erred in not granting amount of compensation towards future prospects of the deceased. There were all chances of increment in the earning and claimant would have benefited by it. The Claims Tribunal awarded the amount of Rs.5,000/- towards consortium, Rs.2,000/- towards funeral expenses and Rs.2500/- towards loss of estate, which is very meagre

amount. In view of these facts, compensation granted needs to be enhanced. It is also submitted that the Cross Objections are not maintainable as those were filed in the month of March, 2014 and, that too, after depositing, without any protest or reservation, the entire amount of compensation as per the award. As the amount was deposited without any protest, it is not the party aggrieved and therefore the Cross Objections are not maintainable.

8. In support of his contention that only aggrieved party can file appeal, the learned Counsel has relied on an unreported judgment in ***First Appeal no. 102 of 2008*** of this Court decided on 01.08.2014 in the case of ***Francis Fernandes vs. Roshni D'Silva***. It is further submitted that otherwise also, there is no substance in the Cross Objections, as there are eye witnesses examined by the claimants. A Chargesheet is filed against the driver of the Tipper truck and claimants therefore sufficiently proved the rash and negligent driving of the driver of the respondent.

9. Learned Counsel, Shri Kakodkar, also relied on ***Dulcina Fernandes & Ors. vs*. Joquim Xavier Cruz & anr., *(2013) 10 SCC 646,*** wherein it is held that filing of FIR itself is prima facie proof of rash and negligent driving. Even if he is acquitted, what cannot be overlooked is the fact that upon investigation of the case registered against the driver, prima facie, material showing negligence were found to put him on trial. It is also further the contention of the learned Counsel for the appellants that driver or owner did not enter into witness box nor led any evidence, though written statements were filed. In such circumstances, adverse inference is required to be drawn against them.

10. Learned Counsel relied on ***National Insurance vs. Pranay Sheti & ors. (2017) 16 SCC 680.*** It is submitted that as per ***Pranay Sheti*** (supra) in case the deceased was self employed or 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. It is also held that amount of

Rs.15,000/- for loss of estate, Rs.15,000/- for funeral expenses and Rs.40,000/- towards loss of consortium, are reasonable figures and that figure should be enhanced at the rate of 10% in every three years.

11. Learned Counsel Shri E. Afonso, for the respondents, in reply submitted that Cross Objections are very much maintainable. Even though amount is paid, Insurance Company can file Cross Objections. Order XXI Rule 1 is not applicable in the Claim Petition. It is submitted that decision relied on, is not applicable in the present matter as Cross Objections are filed by all the respondents.

12. Learned Counsel relied on ***(1998) 9 SCC 202*** in the case of ***Narendra Kumar & anr. vs. Yarenissa & Ors.,*** in support of his contention that the Cross Objections are maintainable being filed by aggrieved persons. It is held by the Hon'ble Apex Court, that even in the case of joint appeal by insurer and owner of offending vehicle, if an award has been made against the tort-feasors as well as the insurer,

even though an appeal filed by the insurer is not competent, it may not be dismissed as such. The tort-feasors can proceed with the appeal after the cause title is suitably amended by deleting the name of the insurer. Tort-feasors against whom an award for compensation is made is an aggrieved person even though the insurer is liable to answer the award or decree as a judgment debtor.

13. He also relied on the unreported judgment in the ***New India Insurance Company Ltd. vs. Smt. Sushma Gupta,*** of Allahabad High Court in ***First Appeal from Order no. 3165 of 2008***. The issue involved in the matter before the Allahabad High Court as to whether an appeal filed under Section 173 of the Motor Vehicle Act, 1988, before the High Court, read with Rule 222 of UP Motor Vehicles Rules 1990, confers any right on the respondents in the appeal to file Cross Objections and envisaged in terms of Order 42 Rule 22 of the Civil Procedure Code(CPC) or not. After considering various judgments even of Full Bench of Himachal Pradesh, it

was held that Cross Objections under Order 41 Rule 22 of CPC would be maintainable in an appeal filed under Section 173 of the 1988 Act before the High Court. Cross objections filed by owners are also maintainable. It is clarified that the conclusion drawn are confined only to availability of the right to file Cross Objections in an appeal under Section 173 of the 1988 Act before the High Court.

14. Learned Counsel Shri E. Afonso also relied on ***Civil Appeal no. 838 of 2020, Urmila Devi & Ors. vs. Branch Manager National Insurance Company Ltd. & anr.,*** wherein claimant's Cross Objections were held not maintainable by the Single Judge of High Court. Hon'ble Apex Court set aside the order of the Hon'ble High Court rejecting Cross Objections of claimants not maintainable. It is held that if whole award is under challenge in appeal and claimants are added as respondents, they have every right to maintain Cross Objections.

15. Apart from this, preliminary submission, on the issues

of rashness and negligence, it is submitted that eye witnesses are in relation of deceased and are interested witnesses. They would not have been relied as they are not spontaneous. Panch witness though claimed that he saw the accident, his statement was not recorded but he was asked to act as a panch witness. On the issue of quantum of compensation, it is submitted that there is no proof of salary. The deceased had studied upto IXth standard. He had not undergone any training in welding.

16. The deposition of Caetano Xavier, Aw.4, if perused, it appears that he might be neighbour of deceased as per his own statement. The yard is not fully functional for the last four-five years and he used to undertake repair work of the Barges belonging to the owners alone. As per his own statement, nature of his work is chipping and painting. However, he also added that fabrication is also a part of his job. It is submitted that deceased was not holding any qualification of welder. There is no evidence as to how many

days he used to be in employment. It is further submitted that accident is of 2011. Therefore, compensation awarded is just and fair.

17. Learned Counsel relied on **Sadhana Lodh vs National Insurance Company Ltd. (Appeal (Civil) case no. 557 of 2003 dated 24.01.2003),** wherein it is held that it is not disputed that under Section 173 of the Act, an insurer has right to file an appeal before the High Court on limited grounds available under Section 149(2) of the Act. However, in a situation where there is a collusion between the claimant and the insured or the insured does not contest the claim and further if the Tribunal does not implead the insurance company to contest the claim, in such a situation it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merit, in that case it is open to the insurer to file an appeal

against the award of the Tribunal on merits. Thus, in such a situation, the insurer can question the quantum of compensation awarded by the Tribunal.

18. In my considered opinion, the said citation is on the point that the insurer has a remedy by filing an appeal before the High Court and, therefore, the High Court ought not to have entertained the petition under Article 226 and 227 of the Constitution of India. Here, cross objections are filed by owner, driver as well as insurer and there is no question of any collusion if joint cross objections are filed.

19. So far as, challenge in cross objections that driver of the Tipper Truck was not rash and negligent, there is no evidence on record. Whereas the documents produced by Aw.1 Rosa, including police papers shows that driver of the Tipper Truck was rash and negligent. The dash was given from the back side of the scooter. The victim died on the spot. He was dragged around 11 metres along with scooter and thereafter the truck stopped at a distance of about 30 metres

from the place where the scooter had fallen. That shows, that the truck was in a very high speed. There is no plea of any fault in the truck like failure of brakes or any fault in engine. In fact, driver or owner, did not enter into the witness box in support of their defence specifically when driver is having special knowledge how the accident occurred.

20. In the case of ***Bimladevi & Ors vs. Himachal Road Transport Company & Ors.*** *and* ***Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & anr.*** (supra) wherein the Hon'ble Apex Court held that for the purpose of determining the issue of rash and negligence, Court is required to apply the principles underlying burden of proof in terms of the provisions of Section 106 of Evidence Act. The claimants were merely to establish their case on the touch stone of preponderance of probabilities. The standard of proof beyond reasonable doubt could not have been applied in Claim Petition.

21. As the driver or owner failed to enter into the witness

box, adverse inference needs to be drawn. Apart from this fact, it is a matter of record that FIR was filed against the driver of the Tipper Truck and he was chargesheeted. The claimant also examined eye witness, Aw.2, who deposed that he was proceeding to Cortalim behind the scooter of victim. The scooterist was one metre of left side of the tar road. Speed of his vehicle and the speed of the scooter was the same. The Tipper Truck was in high speed and gave dash of his left side to the scooter. He saw the accident and deposed accordingly. He deposed that he informed to claimant Rosa as he identified deceased Jose and he knew him from his childhood. The deceased Jose is in distant relationship to this witness. The learned Tribunal rightly appreciated his evidence and observed that only because the witness was in distant relationship, his testimony cannot be disbelieved which otherwise inspires confidence. Learned Tribunal after considering the evidence on record, rightly came to the conclusion that respondent no.1 driver of the involved Tipper Truck drove his vehicle in a fast speed and in rash and

negligent manner. He caused accident by giving violent dash to scooter rider from behind and dragged him to 11 metres distance causing crushing injuries and caused his untimely death. I do not see any reason to interfere in the reasoning given by the Tribunal in respect of rash and negligent driving considering oral as well as documentary evidence.

22. Admittedly, from the evidence on record, the deceased was 38 years of age. Learned Counsel for appellant submitted that the quantum granted is not just and fair. It is pointed out that learned Tribunal held an amount of Rs.6,500/- only as notional income and by multiplying multiplier as per **Smt. Sarla Varma & Ors. vs. Delhi Transport Corporation (2009 (4) All MR 429),** awarded amount of Rs.7,80,000/- after deducting one-third towards the personal expenses, Rs.2,000/- awarded towards funeral expenses and Rs.2,500/- towards the loss of estate and only Rs.5,000/- towards the loss of consortium. Thus, total amount is awarded Rs.7,89,000/- only. Learned Counsel relying on ***Pranay***

Sethi's (supra) matter, submitted that in view of this judgment, claimant is entitled to funeral expenses to the tune of Rs.15,000/-, loss of estate to the tune of Rs.15,000/- and consortium to the tune of Rs.40,000/-, 40% additional towards future prospects. The learned Tribunal not at all granted any amount towards future prospects.

23. In view of ***Pranay Sethi's*** (supra) matter, wherein Hon'ble Apex Court observed that although the wages/income of those employed in unorganised sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their

labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching clothes. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour like barber, blacksmith, cobbler, mason, etc. The Hon'ble Apex Court further referring ***Reshma Kumari and Ors vs. Madan Mohan & Ors's (2013) 9 SCC 65)*** matter and ***Sarla Varma's*** (supra) matter, held that the multiplicand/multiplier is concerned, it has to be accepted on the basis of income established by the legal representatives of the deceased. Future prospects are to be added to the sum on the percentage basis and "income" means actual income less the tax paid and for making addition to income for future prospects as per ***Reshma Kumari*** (supra), the Tribunal shall follow para 24 of the Judgment in ***Sarla Verma***(supra). Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of

death.

24. In view of this judgment, the claimant is entitled for 40% of addition towards future prospects. The learned Claims Tribunal erred in not awarding addition of future prospects so also awarding meagre amount towards funeral expenses, loss of estate as well as consortium. Considering the guiding principles laid down in ***Pranay Sethi's*** (supra), matter, the claimant is entitled for enhanced compensation. However, considering the other evidence on record, admittedly, deceased was not holding any special qualification of welder nor it has come on record that he was regularly getting work. In such circumstances, the amount as held by Claims Tribunal as notional income of deceased, I do not see any reason to interfere in the said conclusion of notional income. Though learned Counsel for respondent submitted that there is nothing on record to show that he is having any educational qualifications of welding, however, one can take note that there are many persons who had not taken any specific

educational qualifications of training for doing welding work but they are in this field and by practice they do that work skillfully. So amount of Rs.6,500/- held by Claims Tribunal as notional income of deceased is neither unreasonable nor exorbitant. Considering the age of deceased as 38 years, he will fall within the age group of 36 to 40 and multiplier of 15 as per ***Sarla Verma*** (supra).

25. Thus, in view of the citation referred and discussed above, claimant is entitled as under :

Loss of Income Rs. 6,500 x 12 = Rs. 78,000 yearly income if one-third deducted on personal expenses amount comes to Rs. 52,000 x 15	Rs. 7,80,000/-
Loss of Future Income @40%	Rs. 3,12,000/-
Funeral Expenses	Rs. 15,000
Loss of Estate	Rs. 15,000
Loss of Consortium	Rs. 40,000
TOTAL	Rs.11,62,000/-

26. Accordingly, I proceed to pass the following:

O R D E R

1. The appeal is partly allowed with proportionate cost and Cross Objection no.4 of 2014 is hereby rejected.

2. The judgment and award passed in Claim Petition No. 217 of 2011 dated 18.09.2013 passed by the Claims Tribunal, Margao, is hereby modified as under :

(i) Claimants are entitled for compensation in 1:1 proportion of ₹11,62,000/- (Rupees Eleven Lakhs Sixty Two Thousand only) including amount of Rs.40,000/- payable only to the claimant no.1 (inclusive of amount awarded under Section 140 of the M.V. Act.) The respondents to pay jointly and severally the amounts awarded to the claimants.

(ii) The claimants are also entitled for interest at the rate of 9% p.a. on the awarded amount from the date of filing of the petition till its

realisation.

(iii) The amount of compensation in the share of minor is hereby directed to be kept in fixed deposit in any Nationalised Bank of claimant's choice till he attains age of majority. The claimant no.1 is entitled to receive quarterly interest accrued on the said amount so deposited in Fixed Deposit.

(iv) Award be drawn accordingly.

3. If any amount paid as per award dated 18.09.2013, the respondents are entitled to adjust the said amount.

4. Appeal is disposed off accordingly.

M. S. JAWALKAR,J.

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