

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 104 OF 2013

1. Merlin Betu D' Souza,
Wife of late Xavier Cruz Fernandes
2. Mast. Steve Ansley Fernandes,
Aged 2 years, son of late Xavier Cruz Fernandes,
3. Miss Shenora Jenica Fernandes,
Aged 5 months, daughter of late Xavier Cruz Fernandes

The appellants nos. 2 and 3 are minors
represented by the claimant no.1
As legal guardian

All residents of House No. 79,
Danda, Verna,
Salcete, Goa.

..... Appellants

V e r s u s

1. Vikas Kurtikar
Son of Premanand Kurtikar,
(deceased) through his LR
Pragati P. Kurtikar,
H. No.311, Khariabhat,
Carambolim, Ilhas, Goa.
2. Prashant Gaude
s/o Ankush Gaude,
House No. 118/1, Old Goa,
Owner of Mahindra Jeep,
No. GA-01-T-6254
3. The New India Assurance Company Ltd.

Having its divisional office at Velho Building,
Panaji, Goa.

..... Respondents

Mr. John A. Lobo, Advocate for the Appellants.

Mr. E. Afonso, Advocate for the Respondent no. 3.

Coram :- M. S. JAWALKAR, J.

Judgment reserved on : 23rd October, 2020

Judgment pronounced on: 29th October, 2020

JUDGMENT

1. Heard Mr. Lobo, learned Counsel for the appellants and Mr. E. Afonso, learned Counsel for the respondent no.3.

2. The present appeal is filed by injured claimant being aggrieved by the judgment and award dated 04.06.2011 in Claim Petition No. 59 of 2009 passed by the Claim Tribunal, North Goa, Panaji.

3. The claim of the claimants before Claims Tribunal was as under :

The claimants are the widow and minor children of the

deceased Xavier. At the time of accident, he was 30 years old. He was in service with Supreme Food Service Spinnereistrasse 2,8866 Ziegelbrucke, Switzerland at Afghanistan. He was receiving monthly salary of 550 US Dollars. On 23.05.2009, he was riding the scooter bearing no. GA-08/H 0462, with a pillion rider and proceeding from Goa Velha to Verna. On reaching near Corteg Garage, Agacaim at 17.20 hours, the Mahindra Jeep bearing registration no. GA-01-T-6254 driven by the respondent no.1 at a high speed in a rash and negligent manner by going through its wrong side, gave a dash to his scooter. The claimant claimed amount of compensation to the tune of ₹ 20,00,000/- from the respondents. The respondent nos. 1 and 2 have not contested the claim and respondent no.3-Insurance company, contested the claim.

4. The learned Tribunal after considering the evidence on record and contentions of the parties, awarded amount of ₹ 7,29,500/- and held respondents jointly and severally liable to pay the sum to the claimants.

5. There is no challenge to award by the Insurance company but it is challenged by the claimants only. The main ground for challenge is that learned Tribunal though held that “*First and foremost, the claimants had established the age and also the employment of Xavier as a Baker overseas from the agreement produced through Fondekar, Aw.3. Issue no5 is thus partly answered in the affirmative.*”

6. For the sake of convenience, issue no.5 is re-produced as under :

“5. The claimants examined three witnesses while the respondents no.3 examined none and closed their evidence, with the proceedings continuing *exparte* against the respondents no.1 and 2 till then. Ld. Adv. U. Naik came to be heard on the claimants' behalf while Ld. Adv. R. P. Naik placed his Written Submissions on record at Exh. 59. I would advert to their submissions both oral and written *vis-a-vis* the evidence on record and hence hereby proceed to

assign:”

7. However, it is observed by learned Tribunal that Merlin, Aw.1, wife of deceased, had not produced a copy of the passport or other contemporaneous record to show his journey overseas and/of the remittance made by him of his earnings from time to time. It is further observed, that it is one thing to get the employment overseas and it is another that such person had taken the employment. On this count, his notional income of ₹ 5,000/- per month considered as basic for the computation of compensation.

8. The learned Counsel for appellant submitted that the learned Tribunal totally erred and arrived at wrong conclusion that there is no evidence to show that he was earning 550 US Dollars per month. Once it is held that agreement is proved, the terms itself made it clear that salary of the husband of claimant would be 550 US Dollars.

9. It is also alleged that claimants filed application for production

before Claims Tribunal. However, I could not find in record. It is submitted that the learned Tribunal though have considered the evidence led by witnesses of claimants however rejected the claim on account of non-production of the passport. Evidence of Aw.3 is material which clearly goes to show that the deceased was in employment at the time of the accident as prayed and was earning salary of 550 US Dollars. It is one of the main ground in appeal along with the ground of enhancement of rate of interest which is not pressed. The appellant also filed one Miscellaneous Civil Application No.759/2017 for producing passport on record as additional evidence which came to be allowed.

10. The learned Counsel for the appellant relied on citation *(2015) 11 SCC 703 Chanderi Devi & anr. vs. Jaspal Singh & Ors.* and *2019(2) SCC 192* in the case of *Ramla & Ors. vs. National Insurance Company.*

11. Learned Counsel for the respondent no.3, Mr. E. Afonso, submitted that except agreement, there is nothing on record to show that the claimant actually joined the duties at Afghanistan. It is further submitted by learned Counsel for respondent no.3 that the learned Tribunal has rightly assessed notional income of deceased and there is no case made out to interfere in the judgment and award passed by the learned Tribunal. He further submitted that even if passport is produced, it is not sufficient to prove the income as he has not produced any relevant record. As per his contention, the multiplier of 16 ought to have applied for. It is further the contention of the learned Counsel for respondent no.3 that there is nothing on record to show that what he was earning, what was his capacity to earn, etc.

12. The learned Counsel for appellant has drawn my attention to the birth certificate produced on record which is at page 44 of paper book, which shows date of birth of the deceased as 24.09.1979 and date of accident is 23.05.2009. Therefore, he was in age group of 26

to 30 and as per the judgment in the case of *Smt. Sarla Verma & ors. vs Delhi Transport Corporation (2009) 6 SCC 121*, the multiplier will have to be applied.

13. Both the Counsel relied on *National Insurance Company Ltd. vs. Pranay Sethi & Ors. (2017) 16 SCC 680*. It is the contention of the learned Counsel for the respondents that there is no substance in the contention of respondents that claimants have not produced anything on record to show that what the deceased was earning or what is his capacity because one has to see only what he was earning at the time of accident only. It is also submitted by learned Counsel for the appellant that at the relevant time, the value of one Dollar was ₹44/-. If his monthly salary was 550 US Dollars, it comes to around ₹24,000/- per month. Against, that amount granting of ₹5,000/- is totally unjustified. Moreover, the consortium is granted ₹ 5,000/- only, no funeral expenses awarded and as such the judgment and award passed by the learned Tribunal needs to be modified.

14. Learned Counsel for the appellant relied on the judgment in ***First Appeal No. 81 of 76*** passed by Madhya Pradesh High Court in ***Ram Babu vs. Life Insurance Corporation of India***, in support of his contention that in Claim Petition, documents bearing signature of deceased do not fall into the category of those documents which are required to be attested and, therefore, Section 68 of the Evidence Act, would not apply.

15. As there is no challenge by the Insurance Company to the judgment and award passed by the learned Tribunal, there is no necessity to go into the evidence relating to the occurrence of accident.

16. Learned Counsel for the respondent relied on order passed in ***Civil Application no.434 of 2014*** in ***Stamp Number (application) No. 579 of 2014 Mrs. Madhuri Rivonkar vs. Oriental Insurance Company Ltd.***, of this Court in support of his contention that the respondent can file cross objections after

notifying the date of hearing. Learned Counsel for the respondent also relied upon the order passed in MCA No. 183 of 2013 in First Appeal No. 32 of 2013, ***Mr. Pukh Raj Bumb vs. Jagannath Atchut Naik & 2 Ors.*** However, as there are no cross objections/appeal filed by the respondent Company, issue of rashness and negligence has attained finality.

17. Learned Counsel for the appellants relied on ***(2019) 2 SCC 192*** in the case of ***Ramla & Ors. vs. National Insurance Company Ltd. & Ors.*** in support of his contention that the compensation needs to be computed on the basis of salary drawn in foreign country. In the said matter before the Hon'ble Apex Court, the deceased was working at Al – Rawabi Food Centre, Doha, disclosing a salary of 2500 Qatar Riyals which is equivalent to ₹ 30,000/- per month. Hon'ble Apex Court also held that equivalent amount can be the basis of computing compensation and also deducted 40% amount towards expenses.

18. To the objection of learned Counsel for respondent that the document is not duly stamped, the learned Counsel for appellant relied on the citation *(2006) 11 SCC 331* in the case of *Shyamal Kumar Roy vs. Sushil Kumar Agarwal* in support of his contention that if a party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise an objection thereto at the appropriate stage but if no objection had been made by Appellant in regard to the admissibility of the said document, he, at a later stage, cannot be permitted to turn round and contend that the said document is inadmissible in evidence.

19. In *(2004) 2 SCC 283* in the case of *Krishi Utpadan Mandi Samiti Sahaswan, District Badaun vs Bipin Kumar & anr.*, wherein, Hon'ble Apex Court held that Section 92 precludes a party from leading evidence contrary to the terms of a written document. However, this citation is in different context. Where party undervalued their document and on that count taking advantage of

insufficiently stamped.

20. Learned Counsel for the appellant relied on *AIR 1981 MP 69* in the case of *Smt. Rami Bai vs. Life Insurance Corporation*, the question that arose was at the time of taking policy, a false age is shown by the deceased and life insurance corporation declined to grant a claim to the legal heirs of deceased for want of liability and there was suppression of material facts. Though age on policy mentioned as 48 in the said matter, after inquiry, it was revealed that his age was 66 ½ years, in view of the age mentioned in partnership deed, the Hon'ble M.P. High Court held that these deeds do not fall into the category of those documents which by law are required to be attested and, therefore, for the proof of these deeds, Section 68 of the Evidence Act would not apply. It is Section 67 which would apply. Section 67 does not lay down any particular mode of proof for proving that a particular writing or signature is in the hand of a particular person. Thus, the signatures may be proved in any one or more of the following modes as per Section 67 of Evidence Act.

“(i) By calling the person who signed or wrote a document;

(ii) By calling a person in whose presence the documents are signed or written;

(iii) ...

(iv) ...

(v) ...

(vi) ...

(vii) ...

(viii) ...

Thus it is contended that Agreement of Employment is duly proved through Aw-3.

21. The learned Counsel for the appellant has relied on the judgment of a Five Judge Bench reported in *(2017) 16 SCC 680* in the case of ***National Insurance Company Limited vs. Pranay Sethi & Ors.***, and stated that for computing just compensation, the Hon'ble Apex Court has laid down certain guidelines. It includes guidelines while computing deductions, personal and living expenses to determine multiplicand depending on the age of the deceased, reasonable figures on conventional heads, namely, loss of

estate, loss of consortium and funeral expenses, future prospects of all categories of persons and for different ages with permanent job, self employed or fixed salary.

22. Now let me turn to the evidence led by the claimants. The claimant no.1 examined herself as Aw.1. She produced police papers on record. She has admitted that she has not personally seen the accident. She denied that she is staying in her matrimonial house. She deposed that she is being look after by her father since she is a widow. Claimant nos.2 and 3 are children of the deceased. At the time of accident, age of deceased was 29 years and was earning 550 US Dollars per month from his employment at Afghanistan as a Baker. There is nothing adverse to the claimant brought on record by the respondents. The claimant further examined one Vasant Kale, Aw.2. However, he is examined in relation to the occurrence of the accident. It is not necessary to go through his evidence. The claimant further examined Parikshit Fondekar, Aw.3, to prove agreement/appointment of deceased in Supreme Food Services,

Switzerland. His evidence is important to prove that he is the Director of Kamakshi Overseas Consultant, Margao and are engaged in recruiting persons overseas. He further deposed that he knew Xavier Cruz Fernandes, being one of the recruit by their Company overseas with Supreme Food Services in Afghanistan. He identified the agreement and signature of the deceased Xavier. The said agreement dated 16.12.2008 is marked at exhibit 49. He deposed that they were holding the power of attorney on their behalf to mobilise the recruitment process. He also further deposed that the said agreement was entered into at Margao in his office. He denied further suggestions of falsely deposing to support the claimants. He produced on record, agency agreement and power of attorney which is at exhibits 49 and 56. He deposed that the agency agreement between M/s. Supreme Food Services and M/s. Kamakshi Overseas Consultancy was entered into on 29.08.2008 and taken effect from 25.02.2009. He also admitted that power of attorney is of 12 months validity with effect from 25.01.2009. He further added that

it continues till its termination. He deposed that exhibit 49 is the offer made directly by the said company to the candidate for the first time and his agency has done the deployment.

23. The learned Tribunal after appreciating the evidence on record, held that the claimants have established the age and also employment of the deceased Xavier as baker overseas from the agreement produced through Parikshit Fondekar, Aw.3. However, that claimant failed to produce copy of passport or other contemporaneous record to show his journey overseas and all the remittance made by him of his earnings from time to time declined to hold income of the deceased as 550 US Dollars.

24. It is the contention of the learned Counsel for the appellant that only at the time of final arguments, this issue of passport arose and claimants though applied for production of copy of passport, no order was passed thereof. It is further submitted by the learned Counsel that the production of the passport is very much necessary

to adjudicate this matter as claimant's case was denied on this ground. There was Misc. Civil Applicant no.759 of 2017, which is allowed and passport is taken on record. Learned Counsel for the appellant as well as respondent, advanced their arguments on this additional evidence i.e. passport. Advocate for appellant as well as respondent submitted that they do not wish to lead any oral evidence on the said passport.

25. It is contention of the appellant that when learned Claims Tribunal held that the claimant had established the age and also employment of deceased Xavier as a baker overseas from the agreement, there was no reason to hold notional income of ₹ 5000/- per month which is too low.

26. It has come on record that in cross of Aw.1, that after the said accident, she is not residing in her matrimonial house and residing with her father. As such, it is submitted by learned Counsel for appellant that it was not possible for her to produce all the relevant

documents pertaining to the employment of deceased. However, there is no such evidence except her stay to her parents house after accident.

27. It is submitted by learned Counsel for appellant on perusal of passport read with agreement, that there is no reason to disbelieve that he was in employment at Afghanistan. There are visa entries to that effect.

28. Learned Counsel for the respondent pointed out that first visa was valid from 29/12/2008 to 28/03/2009 i.e. for 3 months. There is exit entry from Afghanistan on 20/02/2009 and there is no endorsement thereafter of his return to Afghanistan. There is substance in the contention of the Counsel for respondent. From the agreement and passport it appears probable that the deceased has joined duty and arrived in Afghanistan on 30/12/2008 by departing from Bombay on 28/12/2008. However, it is unexplained since return on 28/02/2009 till his death i.e. 23/05/2009 how he was in

India. From the agreement admittedly deceased was on probation for a period of 6 months. During this period of 6 months he served around 1 month and 22 days if presumed as per agreement he joined the duties and for a period of three months thereafter he was in India. There is no any evidence in explanation thereof. As such, it is difficult to believe that a person on probation of 6 months after doing his job only for 1 month and 22 days returned to India and continued his stay for about 3 months was really continued in service or not.

29. As such, his notional income is required to be considered for calculation of compensation. Though his employment at the relevant time is not established, it appears that he was having potential to get an employment as a Baker. From the agreement, it appears that his salary was fixed to US Dollars 550 and if rate prevalent then of US Dollar, equivalent amount may come to Rs.24,000/-. In my considered opinion, considering the skilled job, the amount of Rs.5,000/- notional income held by the learned

Claims Tribunal is to lower side. It has to be atleast Rs.7,000/- per month if he would have been employed in India as a Baker. It appears that his age was 29 years and eight months. Therefore, he was between the age group of 26 to 30 and as per ***Sarla Verma*** (supra) the multiplier of 17 will be made applicable. If one third amount is deducted towards his personal expenses, the total dependency comes to Rs.9,52,068/-.

30. Learned Counsel relied on citation ***Pranay Sethi*** (supra), wherein Hon'ble Apex Court clarified law while calculating just compensation on the aspect of deduction of personal and living expenses, selection of multiplier, age of deceased, reasonable figures on conventional head namely loss of estate, loss of consortium and funeral expenses, future prospects for all categories of persons and for different ages with permanent job, self employed or fixed salary. It is held that if person is married, one third amount to be deducted if dependents are two to three. It is further in para 52 that :

“The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-

centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years.”

31. Similarly, for computing future prospects, Hon'ble Apex Court laid down guiding principle as under :

“On addition of future prospects to determine the multiplicand, Section 168 of the Act deals with the concept of “just compensation” and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of “just compensation” has to be viewed through the prism of fairness, reasonableness and non- violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot

expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are

concerned, there has been standardization keeping in view the principle of certainty, stability and consistency.”

32. The Hon'ble Apex Court held that LR's of self employed persons are also entitled to amount towards future prospects. There may be some degree of difference as regards the percentage that applied to in respect of a person having permanent job or self employed. Even self employed persons also made efforts to enhance one's income for sustenance. In case of self employed, Hon'ble Apex Court held that additional of 40 percent of the established income should be the warrant where the deceased was below the age of 40 years. Thus, claimants are entitled for 40% addition towards future prospects which comes to Rs.3,80,827/-. As laid down in ***Pranay Sethi's*** case (supra), claimants are also entitled for Rs.15,000/- loss of estate, Rs.15,000/- towards funeral expenses and Rs.40,000/- towards consortium. Thus, total amount of compensation for which claimant is entitled to is as under :

Loss of income (7000 x 12 x 17)	Rs.	9,52068/-
Loss of future prospects	Rs.	3,80,827/- (40% addition)
Loss of Estate	Rs.	15,000
Loss of consortium/love & affection	Rs.	40,000
Funeral charges	Rs.	15,000
TOTAL	Rs.	14,02,895/-

33. Thus, I proceed to pass the following :

ORDER

(1) The appeal is allowed.

(2) The award passed by the learned Claims Tribunal in Claim Petition no.59 of 2009 dated 04.06.2011 is modified as under :

(i) The Petition is partly allowed with proportionate cost.

(ii) Respondent nos.1 to 3, are jointly and severally liable to pay the compensation amounting to Rs.14,02,895/- (Rupees Fourteen Lakhs

Two Thousand, Eight Hundred and Ninety Five only) (inclusive of amount under Section 140 of M.V. Act) to the claimants which shall carry interest at the rate of 9% from the date of application till payment.

(iii) The amount so deposited shall be paid in proportion 2:1:1 to claimant nos.1, 2 and 3 respectively excluding amount of Rs.40,000/-.

(iv) Petitioner No.1 is entitled to receive an amount of Rs.40,000/- in addition to share mentioned in clause (iii) of order.

(v) The amount to the share of each of the minor claimant shall be invested in fixed deposit in any nationalised bank till they attain the age of majority.

(3) The respondents are entitled to adjust the amount if paid as per award passed on 04.06.2011.

(4) Award be drawn accordingly.

M. S. JAWALKAR, J

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