

IN THE HIGH COURT OF BOMBAY AT GOA

First Appeal No. 1 of 2014

Prakash Sawant Dessai
s/o. Putu Sawant Dessai, Age, 50,
Occupation Factory Manager,
(Deceased)

1.(a) Babita Prakash Sawant
Dessai w/o. Late Prakash Sawant
Dessai Age 44 years.

1.(b) Prabita Prakash Sawant
Dessai D/o. Late Prakash Sawant
Dessai Age 20 years.

1.(c) Prajwal Prakash Sawant
Dessai, S/o. Late Prakash Sawant
Dessai, Age 16 years.

Represented by Natural Guardian
Smt. Babita Prakash Sawant Dessai
w/o. Late Prakash Sawant Dessai,

All are R/o. H.No.1112, Ghotmorod,
Cacora, Quepem, Goa. Appellants

V/s.

- 1 Carmina Noqueira, major in age,
w/o. Menino Noqueira, R/o.
H.No.23/6, St. Alex Ward, Tilamol,
Quepem, Goa.
- 2 Cindy Jan Noqueira, major in age,
D/o. Menino Noqueira, R/o. H. No.

23/6, St. Alex Ward, Tilamol,
Quepem, Goa.

- 3 National Insurance Company Ltd.
2nd floor, Marchon Building, Varde
Valaulikar Road, Opp. Lohia Maidan. Respondents.
Margao, Goa.

Mr. Shailesh Redkar, Advocate for the Appellants.

Mr. E. Afonso, Advocate for the Respondents.

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

Reserved on : 27th October, 2020

Pronounced on: 26th November, 2020

JUDGMENT

Present appeal is filed by the appellants (legal heirs of the original claimant) being aggrieved by the Judgment and Award in Claim Petition No.127 of 2011 dated 25/07/2013. The appeal is filed for enhancement of compensation.

2. The original Claimant's claim before the Claim Tribunal was as under :

That on 15/09/2010 at about 18.15 hours the claimant was walking in a procession alongwith other people

for emersion of lord Ganesh idol. The procession was proceeding from Grampurush Temple to interior Xeldem towards Assolda side. On the way all of a sudden a maruti Wagon R bearing No.GA09-A1959 proceeding towards Tilamol dashed against right leg of the claimant. It was driven by the respondent no.2 in a rash and negligent manner. The claimant suffered fracture injury to his right tibia and fibula. He was treated initially at PHC Cacora Curchorem and then in Hospicio Hospital Margao. He was operated in Hospicio Hospital on 20/09/2010. Since the operation was not successful he had to be again operated on 21/01/2011 and 27/01/2011. These operations were performed in Jankibai Memorial Hospital Ponda Goa.

It is further his contention that at the relevant time he was employed in Atlantic Spinning and wiving mill Ltd. at Xeldem and was earning ₹8700/- per month. He has claimed compensation of ₹4,00,000/-. Owner and driver i.e. respondent Nos.1 and 2 did not contest the proceedings. The claimant produced on record police papers, salary certificate (Exh.38), discharge card of Hospicio Hospital (Exh.39), case

papers of Janakibai Memorial Hospital (Exh.40), medical bills at Exh.41 and 42, disability certificate at Exh.43. The respondent no.3 Insurance Company did not led any evidence.

3. The learned Tribunal after considering the evidence on record and arguments advanced by the parties held that the claimant's contribution to the accident was approximately 30% and accordingly awarded amount of ₹1,26,000/- with interest of 9% p.a. It is submitted by the learned Counsel for the appellants that in view of the admitted facts procession was going on and the claimant was one of the member of the procession, in such situation the driver ought to have slow down his vehicle. He ought to have taken care and could have avoided the accident. As the driver and owner did not enter into witness box the learned Claims Tribunal ought to have drawn adverse inference against them. When there is a procession the vehicle in motion ought to have taken precaution. The procession was going on from the left side of the road as such there was no reason to held claimant's contribution to the extent of 30%. Therefore, the legal

representatives of the original claimant prayed for enhancement of the compensation. The learned Counsel relied on the citation as relied on before the Claims Tribunal.

4. As against this the learned Counsel for the Insurance company Shri E. Afonso, submitted that the legal heirs are not entitled for compensation in personal injury cases and they are only entitled for loss of estate. The learned Counsel Shri Afonso relied on judgment of this Court in **Dr. Skoda Afonso (Now deceased) through his LRs v/s. Motor Accident Claims Tribunal**(Writ Petition No.3 of 1995). In the said judgment this Court has also taken into consideration **Maimuna Begam wd/o Abdul Razzaque and others v/s. Taju s/o. Ahmed Khan and others** (1988 ACJ 417). This Court also taken into considerations Articles 2361, Article 2366 and Article 1737 of the Portuguese Civil Code and Section 306 of the Indian Succession Act.

5. The question which was required to determined in the Writ Petition was whether on the death of claimant during the pendency of the claims petition filed on account of injuries

succumbed by the claimant the cause of action would survive on the death of the claimant for the purpose of prosecuting the claim petition by the legal representatives. This Court held that Common Law maxim "Actio personalis moritur cum persona" was not only criticized in the country of its origin but the Indian Courts have generally taken a view that the maxim should not be applied as a part of our law except of course where specifically engrafted in a statute and that the principles of justice, equity and good conscience should be followed. In cases resulting into death of the claimant during the pendency of the claim petition, as a result of injuries suffers during the accident, there can be no doubt that cause of action would survive for the legal representative.

6. In fact in this present appeal the claimant filed appeal on limited ground that the Claims Tribunal holding original claimant contributed to the accident up to 30% is illegal and in view thereof enhancement. In fact, the legal representatives are entitle to continue the proceedings filed by the deceased claimant. On going through the evidence on record these facts are admitted that there was procession of

which the claimant was one of the members. The car which was coming from opposite direction gave to dash to right side of the claimant causing injury to his knee. In such circumstances, it is responsibility of the car driver to drive his car slowly. He could have avoided the accident and therefore holding of contribution of 30% on the part of the original claimant is not justified. Moreover, driver / owner did not contested the claim. The learned Claim's Tribunal in fact erred in holding original claimant contributed to the accident. However, after going through judgments only finding that original claimant contributed 30% there is no deduction made by the Claim's Tribunal in the total amount of compensation.

7. There is no challenge by the Insurance Company to the Award. From the judgment i.e. **Dr.Skoda Afonso**(supra), the legal representatives are entitled to prosecute the matter inspite of the death of the original claimant. It also clear that they are entitled to pursue the proceedings to the extent of loss of estate. After going through the Award it appears that the learned Tribunal awarded amount of ₹48,099/- towards

medical bills and towards loss of salary ₹48,067.50. The learned Tribunal has not taken into account amount towards permanent disability but taken into account amount towards pain and suffering wrongly. In fact claimants are entitled for amount of ₹1,16,166/- but as there is no challenge to this Award by the Insurance Company, I do not see any reason to interfere in the Award passed by the learned Tribunal except to the extent of finding that the claimant contributed to the accident to the extent of 30%. Though this finding is held as unjustified there is no effect on the final order, hence this appeal is liable to be dismissed. Accordingly, I proceed to pass the following:

O R D E R

Appeal is dismissed.

No order as to costs.

SMT. M.S. JAWALKAR,J.