Jose

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.54 OF 2016

The New India Assurance Co. Ltd.
2nd Floor, Jaganath Building,
Jose Inacia de Loyala Road,
Madraon, Goa. ... Appellant.

Versus

1. Mrs. Milagrin Colaco,
Widow of late Sucorro Colaco,
Major of age,
R/o H.no 18, Gaunlloy,
Nuvem, Salcete, Goa.

2. Meera Colaco,
Daughter of Succor Colaco,
Major of age,
Unmarried, student
R/o H. no 18, Gaunlloy,
Nuvem, Salcete, Goa.

3. Peter Colaco,
s/o Sucorro Colaco,
Major of age,
unmarried, student,
R/o H. no 18, Gaunlloy,
Nuvem, Salcete, Goa.

4. Joel Colaco,
s/o Sucorro Colaco,
Major of age,
Unmarried, student,
R/o H. no 18, Gaunlloy,
Nuvem, Salcete, Goa.

5. Mr. Caitano Francisco Goes,
Son of Pascoal Goes,
Major of age,
r/o House no 119, Ambeaxir,
Sernabatim, Colva,
Salcete, Goa.

6. Riwaj,
Aged 25, son of Dorjee Tamang,
c/o Vipin Dwivedi,
The Pavilion Bar & Restaurant,
Benaulim, Salcete, Goa. ... Respondents.

Mr. Amey Kakodkar with Mr. Mayur Mahamal, Advocates *for the Appellant*.

Mr. Jagannath Sambari, Advocate *for Respondent No.1*.

Coram: M.S. SONAK, J.

Date: 3rd September 2021.

ORAL JUDGMENT:

1. Heard Mr. Amey Kakodkar for the Appellant and Mr. Jagannath Sambari for Respondent No.1.

2. Mr. Kakodkar states that all the Respondents in this appeal have been duly served.

3. The challenge in this appeal is to the Judgment and Award dated 28.01.2016 made by the Motor Accidents Claims Tribunal (MACT) awarding the Respondent No.1 (Claimant) compensation of ₹28,89,248/- with interest at the rate of 9% per annum from the date of the petition till realization. This was as against the claim of compensation of ₹25,00,000/- by the Claimants in their claim petition.

4. Mr. Kakodkar at the outset contends that there was no evidence about rashness and negligence on the part of the driver and therefore, the claim petition should have been dismissed. He submits that the accident took place at 5:45 a.m. when the insured vehicle – Activa scooter dashed against the husband of Claimant No.1. He submits that, however, there was no question of the scooter proceeding in a rash and negligent manner at this hour.

5. The evidence on record is sufficient to reject the aforesaid contention of Mr. Kakodkar. In this case, PW5 - Minguel Barreto has deposed that on the fateful day i.e. 03.02.2014 when he was going for morning mass at about 5:45 a.m., he noticed an Activa scooter in fast speed proceeding from Verna to Margao. This witness deposed about this Activa scooter dashing against Socorro who was walking on the left-hand side of the kutcha road proceeding towards the Nuvem Church. This evidence along with the other documentary evidence produced on record clearly makes out a case of rashness and negligence on the part of the driver of the scooter. Therefore, this contention of Mr. Kakodkar will have to be turned down.

6. Mr. Kakodkar then submitted that in the salary certificate of Socorro produced by the Claimants, his date of birth is shown as 01.01.1963. This means that on the date of the accident i.e. 03.02.2013, Socorro was above 50 years of age. He, therefore, submits that the multiplier to be adopted in this case had to be only 11 and not 13. He further submits that even towards future prospects, the addition to the salary income could have been 15% and not 30% as determined by the MACT. He submits that in terms of the law laid down by the Hon'ble Apex Court in the case of ***National Insurance Company Limited vs. Pranay Sethi and Others***[1], the compensation towards the loss of consortium had to be ₹40,000/- and not ₹1,00,000/- as has been awarded by the MACT.

7. As of the date of the accident, the age of Socorro was about 50 years and one month. This means that his age was less than 51 years and in any case, his age was not between 51 to 55 years. Therefore, applying the law laid down by the Hon'ble Supreme Court in the case of ***Sarla Verma (Smt) and Others vs. Delhi Transport Corporation and another***[2]***,*** the MACT was justified in adopting the multiplier of 13 and there is no infirmity on the impugned Award on this count.

8. In this case, the MACT has made an addition of 30% towards the annual income of Socorro on the basis that Socorro was between 40 to 50 years at the time of the accident. However, in *Pranay Sethi* (supra), the Hon'ble Supreme Court has held that in case the deceased was between the age of 50 to 60 years, the addition should be 15%. Mr. Kakodkar is

1 (2017) 16 SCC 680
2 (2009) 6 SCC 121

therefore right in his contention that in this case, the addition to the salary of the deceased should have been 15% and not 30%.

9. Similarly, Mr. Kakodkar is also right in contending that compensation of ₹40,000/- should have been awarded towards loss of consortium and not ₹1,00,000/- as has been awarded by the MACT. This is what is set out in *Pranay Sethi* (supra).

10. Therefore, by accepting the aforesaid contentions of Mr. Kakodkar, the total compensation works out to ₹23,27,197/- and not ₹28,89,248/-. The impugned award is liable to be modified to this extent.

11. Mr. Kakodkar finally contended that in this case there is clear evidence that the driver of the vehicle did not possess a driving license and this constitutes a breach of an essential term of the insurance policy. He, therefore, submits that this is a fit case where an order for 'pay and recover' ought to have been made by the MACT. He relies on ***Manuara Khatun and others vs. Rajesh Kumar Singh and others***[3], in support of this contention.

12. In this case, RW1, the Police Inspector of the Traffic Cell has deposed that the driver was not holding a valid and effective driving license at the time of the accident. This aspect has in fact been accepted by the Tribunal, but the Tribunal, relying upon the decisions in ***National Insurance Company Limited vs. Swaran Singh and others***[4] and ***Bajaj***

3 (2017) 4 SCC 796
4 (2004) SCC 297

Allianz General Insurance Co. Ltd. vs. Mrs. Ashwita Arvind Poll and another[5], has held that the insurance company cannot avoid the liability to pay.

13. There is no error in the finding and approach of the MACT in requiring the insurance company to pay the Claimants and satisfy the determined amount. However, the question is whether there is an error on the part of the MACT in not making an order for 'pay and recover' in terms of the law laid down by the Hon'ble Supreme Court in *Manuara Khatun* (supra) and ***National Insurance Company Limited vs. Saju P. Paul and Another***[6].

14. In the present case, there was clear evidence that the driver of the vehicle involved in the accident did not have a driving license. Therefore, the Tribunal should have made an order for 'pay and recover' in terms of the aforesaid decisions of the Hon'ble Supreme Court. To that extent also, some interference is warranted with the impugned Award.

15. For all the aforesaid reasons, this appeal is partly allowed and is disposed of by making the following order:-

ORDER

a) The compensation amount is now reduced from ₹28,89,248/- to ₹23,27,197/-.

b) The Appellant will have to satisfy the Award as now modified but thereafter, will be entitled to recover such amount in

5 2015 (1) Goa.L.R. 442

6 (2013) 2 SCC 41

terms of the law laid down in *Manuara Khatun* (supra) and *Saju P. Paul* (supra).

c) Save as modified as aforesaid, the impugned Award will continue to operate and bind the parties.

d) There shall be no order as to costs.

16. The Appellant, in this case, had deposited the awarded amount in this Court and the Claimants were even granted leave to withdraw 50% of the amount. The Claimants are now granted liberty to withdraw the amount as determined in this order after adjusting the amounts already withdrawn by them. The withdrawal shall be together with the proportionate interest that may have accrued on the deposited amount. The balance amount will have to be refunded to the Appellant – Insurance Company together with proportionate interest as may have accrued on the deposited amount.

M.S. SONAK, J.