Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.1 OF 2021

The New India Assurance Co. Ltd.,
through its Divisional Manager,
Mr. Deepak Pal,
7th Floor, BSNL Building,
Patto Centre, Panaji Goa. … Appellant

Versus

1 Mrs. Nelufer Bi,
w/o late Nazim Sayyed
aged 29 years, housewife,
r/o H.No.202, Keri,
P.O. Sanquelim, Sattari Goa.

2 Mast. Niyan Nazim Sayyed,
minor aged 6 years,
son of late Nazim Sayyed
represented by his natural
guardian mother, ad-litem
Nelufer Bi (Respondent No.1),
r/o H.No.202, Keri
P.O. Sanquelim, Sattari Goa.

3 Shri Soid Abdul Goni,
alias Sayyed Abdul Gani,
aged 69 years,
r/o H.No.202, Keri,
P.O. Sanquelim, Sattari Goa.
(Since deceased) represented by
Respondent Nos. 1, 2 and 4

4 Smt. Aixam Bi alias Aisha Bi,
w/o Soid Abdul Goni,

alias Sayyed Abdul Gani
aged 67 years, housewife,
r/o H.No.202, Keri,
P.O. Sanquelim, Sattari goa.

5 Shri Gurudin Govind Prasad,
driver, aged 47 years,
r/o H.No.92, Beri,
Navabganj, Barabaki,
Uttar Pradesh

6 Automobile Corporation Goa Ltd.,
Honda Sattari,
North Goa 403 505

7 Tata Motors Limited,
having office at Plot No.T.1 & T.2,
Chinhat Industrial Area,
Lucknow – Uttar Pradesh

8 M/s Excel Transporters,
having their registered office at
17, Krishna Vihar,
Faizabad Road, Chinhat,
Lucknow, U.P. … Respondents

Ms Christabel Afonso, Advocate for the Appellant.
Mr Milton Marshal and Ms S. Usgaonkar, Advocates for Respondent Nos. 1 and 2.
Mr Jeevan Bandekar, Advocate for Respondent Nos.3 & 4.
Mr James Lopes, Advocate for Respondent No.6.
Mr Somnath Karpe and Ms S. Parodkar, Advocates for Respondent No.8.

CORAM: M. S. SONAK, J.

DATED : 15th OCTOBER 2022

JUDGMENT

1. Heard the learned counsel for the parties.

2. This appeal by the Appellant – Insurance Company challenges the judgment and award dated 11.11.2019 by which the Tribunal has directed the Appellant herein and Respondent Nos. 5, 6, and 7 to jointly and severally pay to Respondent Nos. 1 to 4 (claimants) the compensation of ₹1,07,38,690/- with interest at the rate of 7% per annum from the date of award till the amount is paid.

3. Ms Afonso, learned counsel for the Appellant – Insurance Company, submits that, in this case, there was a fundamental breach of the insurance policy's terms because the driver of the offending vehicle did not have a proper licence to drive the said vehicle. She referred to the evidence of Satish Padwalkar (AW2), the investigating officer, and pointed out the two licences produced on record. She submitted that the fact that the two licences were produced is a ground to doubt the validity of either of the licences. She submitted that both the licences did not entitle the driver to drive a heavy vehicle. She referred to certain answers given by AW2 on this issue. She submitted that all this evidence is sufficient to conclude that the driver of the offending vehicle had no valid licence. Consequently, there was a fundamental breach of the insurance policy.

4. Ms Afonso then contended that the deceased's income was adequately not proven. The deceased was said to be working with Princess Cruise Lines Ltd. However, no witnesses from this company were examined. There are no bank documents about the transfer of amounts produced. Rakesh Nair (AW3) was only an authorized representative of Operations and Manning Agencies and, therefore, not competent to depose to the deceased's income. She submits that even the documentary evidence does not establish the deceased's income.

5. Ms Afonso further submitted that the deduction towards personal expenses should have been one-third and not one-fourth. She presents that there was no evidence of the father being dependent upon the deceased son. Therefore, in terms of the ***National Insurance Company Limited vs Pranay Sethi and others***[1], and ***Sarla Verma & Ors vs Delhi Transport Corporation & Anr***[2]**,** the deductions should have been one-third and not merely one-fourth.

6. Ms Afonso submitted that the Tribunal has gone by the gross income without taking any tax allowances. Therefore, she offers that at least 20% should have been deducted towards taxes while computing the deceased's net income. In support of this, she relied on the

1 (2017) 16 SCC 680

2 (2009) 6 SCC 121

decision of this Court in ***Oriental Insurance Co. Ltd. Vs Yvette Gomendes***[3]***.***

7. Ms Afonso submitted that the Tribunal was justified in awarding interest only at the rate of 7% per annum and that too from the date of the award because, in this case, the claimants delayed the proceedings before the Tribunal. Therefore, she submits that the Tribunal has correctly exercised the discretion in this regard. She relies on ***Sangita Vs Allanur SK Hanif***[4] in support of her contention.

8. Finally, she handed in a calculation sheet and submitted that in terms of the same, the compensation could not have exceeded ₹77,76,432/-.

9. Mr Milton Marshal, learned counsel for the widow and the minor son of the deceased, countered Ms Afonso's submission. He submitted that the driver had a valid licence that was produced on record. He submitted that the Insurance Company did not lead any evidence by either examining the driver or the R.T.O. officer. He submitted that the burden in this regard was on the Insurance Company but the same was never discharged. He relied on ***Poonam Devi and Another Vs Divisional Manager, New India Assurance Co. Ltd. and others***[5]***.***

3 First Appeal Nos. 80, 81 and 82 of 2015 and other connected matters disposed of on 23.05.2022.

4 (2020) 5 AIR BomR 745

5 2004 (2) T.A.C. 313 (S.C.)

10. Mr Marshal was supported for this contention by Mr Karpe, who appears for Respondent No.8 in this matter. Mr Karpe relied on ***Rishi Pal Singh Vs New India Assurance Co. Ltd., and others***[6] to submit that the vehicle owner is expected to verify the driving skills and not run to the licensing authority to verify the genuineness of the driving license before appointing a driver.

11. Mr Marshal pointed out the evidence on income and submitted that there is no ground to interfere with the finding recorded by the Tribunal on this count. He also submitted that there was no cross-examination on the issue of income and, therefore, this plea should not be allowed in this appeal. On the significance of cross-examination, Mr Marshal relied on ***Muddasani Venkata Narsaiah Vs Muddasani Sarojana***[7]***.***

12. Mr Marshal pointed out that the deceased's father was 63 years old when the claim petition was instituted and 68 years old when the same was decided.

13. Mr Bandekar, who had filed an appearance on behalf of the deceased's father in this appeal, now reported that the father has since expired. Mr Marshal and Mr Bandekar submitted that the father depended on the deceased, the only son. The learned counsel submitted that the deduction of one-fourth in the circumstances was

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7 AIR 2016 SC 2250

consistent with the law laid down in *Pranay Sethi* (supra) and *Sarla Verma* (supra).

14. Mr Marshal submitted that the deceased was a seafarer earning on a foreign ship. Therefore, in terms of the CBDT Circular dated 11.04.2017 not liable to pay any tax. He submitted that the Insurance Company never raised such an issue and therefore, no direct evidence was produced on record on this issue before the Tribunal.

15. Mr Marshal finally submitted that the award of interest should have been 9% per annum, and the same should be from the date of the claim petition and not from the award date. He pointed out that the Appellant Insurance Company objected to the non-joinder of alleged necessary parties, as a result of which necessary steps had to be taken. He submitted that there is no evidence of delay on the part of the claimants. He submitted that no reasons had been given by the Tribunal to depart from the normal rule that the interest should be awarded from the date of the claim petition. He relied on ***Kajal Vs Jagdish Chand and others***[8] for this proposition.

16. Finally, Mr Marshal handed in a calculation sheet based on which he submitted that the compensation of ₹1,08,58,690/- would represent the just compensation. He pointed out that the Tribunal had not made any award towards consortium for minor children and parents.

8 AIR 2020 SC 776

17. Mr Marshal and Mr Bandekar submitted that this Court should award just compensation by enhancing the amount awarded by the Tribunal even though the claimants may have instituted no cross-appeal or cross-objections. They rely on ***Surekha and others Vs Santosh and others [2020 (2) T.A.C. 44 (S.C.)], Rishi Pal Singh Vs New India Assurance Co. Ltd., and others***[9].

18. The rival contentions now fall for determination.

19. The following points arise for determination upon considering the rival contentions and the impugned award.

> (1) Is the Appellant-Insurance Company required to be exonerated on account of a fundamental breach of the insurance policy's terms due to the driver of the insured vehicle allegedly not having a proper driving licence?
>
> (2) Has the Tribunal correctly determined the deceased's income?
>
> (3) Whether the Tribunal should have deducted one-third towards the personal expenses of the deceased and not merely one-fourth?
>
> (4) Whether the Tribunal was obliged to determine the compensation based on net income after deducting the taxes and not on the gross income?
>
> (5) Was the Tribunal justified in awarding interest at the rate of 7% per annum from the award date and not from the claim petition?
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> (6) Should the Tribunal have awarded additional compensation to the consortium?

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20. In this case, an accident occurred on 15.02.2012 at about 6.15 hours in which Nazim Sayyed was killed. He had just descended from Mumbai to Goa bus and was standing at the bus stop to catch a bus to proceed to Keri and join his family. In a rash and negligent manner, a Tata chassis of six wheels (bus), proceeding from Colvale to Peddem, dashed Nazim, standing on the extreme left-hand side of the road. The impact was so powerful that Nazim suffered grievous injuries and died on the spot.

21. There is evidence that Nazim, at the time of death, was 27 years old. He was an Assistant Cook in 2007 with Princess Cruise Lines Ltd. In addition, there is evidence that Nazim earns USD 964 per month in terms of the letter of appointment or contract that was produced on record. The evidence about Nazim's age or, for that matter, employment was not even seriously challenged. Mr Rakesh Nair (AW3), an authorized representative of Carnival Support Services India Pvt. Ltd., head of Operations and Manning Agencies, deposed in this matter. He deposed Nazim's employment and salary details. He produced documentary evidence on record proving substantially that Nazim was earning USD 964 per month.

22. The Appellant-Insurance Company was granted full opportunity to cross-examine AW3. However, the cross-examination is brief. Apart from suggesting that the wage slips produced on record at Exhibit 73 Colly are fabricated documents, no further questions were posed nor were answers elicited on the ground which the learned counsel for the Appellant – Insurance Company now raised in this appeal.

23. The entire cross-examination on behalf of the Appellant – Insurance Company of crucial witness AW3 on the aspect of employment and income reads as follows:-

> "***Cross-examination by Adv. Ms. S. Fernandes for respondent no.3 and holding for Adv. Shirsat for R6:-***
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> *I say that the contract at Exh.71 colly was signed by Fleet Maritime Services India Pvt. Ltd., on behalf of Princess Cruise Lines Ltd. I say that Carnival Support Services India Pvt. Ltd., was earlier known as Fleet Maritime Services India Pvt. Ltd. The contract is normally renewed depending upon the performance of the employee. The wages are debited from the account of Princess Cruise Lines Ltd. It is not true to suggest that the wage slips produced at Exh. 73 colly are fabricated documents. It is not true to suggest that the terms and conditions at Exh.71 colly are false. It is not true to suggest that I am deposing falsely.*

24. In *Muddasani Venkata Narsaiah* (supra), the Hon'ble Supreme Court has considered the importance of cross-examination and the effect of no effective cross-examination. The Court has held that the cross-examination is a matter of substance, not a procedure where one is required to put one's own version in cross-examination of the opponent. The effect of non-cross-examination is that the witness's statement has not been disputed. The Court referred to its earlier decision in ***Bhoju Mandal and others Vs Debnath Bhagat and***

others[10] and repelled a submission on the ground that same was not put either to the witnesses or suggested before the Courts below. A party is required to put his version to the witness. If no such questions are put, the Court will presume that the witness account has been accepted as was held in ***Chuni Lal Dwarka Nath Vs Hartford Fire Insurance Co. Ltd. and Another***[11]**.**

25. The Hon'ble Supreme Court also referred to ***Maroti Bansi Teli Vs Radhabai w/o Tukaram Kunbi and others***[12]***,*** where it was held that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by the other party must be accepted as fully established. The Court also referred to the decision of the Calcutta High Court in ***A. E. G. Carapiet Vs A.Y. Derderian***[13] held that the party is obliged to put his case in cross-examination of witnesses of the opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely a technical one.

26. The Court also referred to the decision in ***Kuwarlal Amritlal Vs Rekhlal Koduram and others***[14] where it was laid down that attestation is not explicitly challenged, and the witness is not cross-examined regarding details of attestation, it is sufficient for him to say

10 AIR 1963 SC 1906
11 AIR 1958 Punjab 440
12 AIR 1945 Nagpur 60
13 AIR 1961 Cal. 359
14 AIR 1950 Nagpur 83

that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines.

27. Finally, the Court also referred to ***Karnidan Sarda and Another Vs Sailaja Kanta Mitra[15],*** where it was laid down that the system of administration of justice allows for cross-examination of the opposite party's witnesses to test their evidence. Therefore, it must be assumed that when the witnesses were not tested in that way, their evidence is to be ordinarily accepted.

28. Applying the above principles to the facts of the present case and considering the virtually total absence of serious cross-examination of AW3 on the issue of income, the second point for determination will have to be answered against the Appellant – Insurance Company.

29. Apart from the absence of cross-examination, in this case, there is positive and creditworthy evidence on the aspect of employment and income of Nazim. This is a primary reason for deciding the second point for determination against the Appellant – Insurance Company. The additional reason is the absence of cross-examination of the crucial witness.

30. On the first point for determination, the Insurance Company, after raising a plea that the bus driver had no effective licence, did not

15 AIR 1940 Patna 683

bother to lead any evidence. The burden of proving a breach of the insurance policy's terms was on the Insurance Company. Neither was the driver examined nor any R.T.O. witness examined.

31. The claimants had produced the driving licence on page 136 of the paper book. The Investigating Officer (AW2) examined on behalf of the claimants and produced another driving licence on page 142 of the paper book. The Appellant – Insurance Company cannot seek to draw a mileage based upon these two driving licences. As was pointed out by Mr Marshal, both these driving licences speak about the licensee being authorized to drive a heavy vehicle. In any case, assuming that there is some ambiguity, the Appellant–Insurance Company cannot draw much mileage out of the same because the Appellant–Insurance Company did not bother to lead any evidence to avoid its liability. Based on the evidence on record, no case of convincing nature is made out to suggest any breach, much less a fundamental breach of the terms and conditions of the insurance policy.

32. In ***Poonam Devi*** (supra) the Hon'ble Supreme Court has made the following observations at para 2:-

> *"2. In National Insurance Co. Ltd Chandigarh v. Nicolletta Rohagi and Ors., [2002] 7 SCC 456, 2003 (3) T.A.C. 293 it was held that the Insurance Company cannot challenge the quantum of compensation awarded by the Tribunal. The only ground open to insurer is contained in Section 149 (2) of the Motor Vehicles Act. In National Insurance*

> *Co. Ltd. v. Swaran Singh and Ors, (2004) 1 Scale 180, 2004 (1) T.A.C. 321, this Court has held that "mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence or failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time." In the present case, the insurer has not led any evidence that the driver of the vehicle had no licence. The burden of proof that the driver had no licence was open to the insurer, which it failed to discharge."*

33. Similarly, in *Rishi Pal Singh* (supra), the Hon'ble Supreme Court held that the vehicle owner is expected to verify the driving skills and not run to the licensing authority to verify the genuineness of the driving licence before appointing a driver. Therefore, once the owner is satisfied that the driver is competent to drive the vehicle, the owner is not expected to verify the genuineness of the driving licence issued to drive. Finally, relying upon ***United India Insurance Co. Ltd., Vs Lehru & Others***[16] ***and National Insurance Co. Ltd. Vs Swaran Singh and others***[17]***,*** the Court held that the insurance companies should not be allowed to frugal out from the insurance contract based upon such vague pleas which are ultimately not made good by leading cogent evidence.

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16 (2003) 3 SCC 338

17 (2004) 3 SCC 297

34. Thus, based on the above, the first point for determination will have to be decided against the Appellant – Insurance Company.

35. Regarding the third point for determination, in the pleadings, i.e. in the cause title of the claim petition, the claimants had clearly stated that the deceased's father was 63 years old and unemployed. There was no contest on this issue in the written statement. In the evidence also, there was no challenge in this aspect. The father was 67 years old when the impugned award was made. Finally, during the pendency of this appeal, the father has expired. Thus, there is no evidence to disprove the assertion about the father being dependent on his only son, who died in the accident in unfortunate circumstances.

36. Considering the above position, even after following the decision in *Pranay Sethi* (supra) and *Sarla Verma* (supra), the deductions towards personal expenses of the deceased should have been one-fourth and not one-third, as contended by Ms Afonso. This is a case where the parents, wife, and minor son depend on the deceased Nazim. Thus, the deduction of one-fourth towards personal expenses was legal and proper.

37. Again, there were no challenges in the pleadings or the course of evidence on the aspect of taxable income. However, if such challenges were to be raised, then perhaps some evidence could have been produced by and on behalf of the claimants on the issue of net income and gross income.

38. There is no dispute about the deceased being a seafarer working outside India on a foreign ship. Therefore, some credence will have to be given to the CBDT Circular dated 11.04.2017 produced by Mr Marshal. Para 2 of this Circular reads as follows:-

> "*2. The matter has been examined in the Board. Section 5(2)(a) of the Income-tax Act provides that only such income of a non-resident shall be subjected to tax in India that is either received or is deemed to be received in India. It is hereby clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign ship shall not be included in the total income merely because the said salary has been credited in the N.R.E. account maintained with an Indian bank by the seafarer.*"

39. Based on the above Circular and the other evidence on record, no case is made out for any deduction towards taxes while computing monthly or annual income of Nazim. Accordingly, even the fourth point for determination will have to be answered against the Appellant – Insurance Company.

40. Considering the Circular, lack of cross-examination, and the evidence on record, the decision in ***Oriental Insurance Co. Ltd Vs Yvette Gomendes*** (supra) will not apply to the facts and circumstances of the present case.

41. On the aspect of interest, as noted earlier, the Tribunal has awarded interest at the rate of 7% per annum, and that too from the date of award, there is no discussion of why the interest is awarded only from the date of the award and not from the date of the claim petition. The record does not suggest any deliberate or intentional delay on the part of the claimants. Even the Tribunal has not said so. In the above circumstances, the reference is necessary to certain observations in *Kajal Vs Jagdish Chand* (supra). These observations are found in para 31 and the same read as follows:-

> "*31. The High Court enhanced the amount of compensation by Rs.14,70,000/ and awarded interest @ 7.5% per annum but directed that the interest of 7.5% shall be paid only from the date of filing of the appeal. This is also incorrect. We are constrained to observe that the High Court was not right in awarding interest on the enhanced amount only from the date of filing of the appeal. Section 171 of the Act reads as follows :*
>
> > *"171. Award of interest where any claim is allowed.– Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."*
> >
> > *Normally interest should be granted from the date of filing of the petition and if in appeal enhancement is made the interest should again be from the date of filing of the petition. It is only if the appeal is filed after an inordinate delay by the claimants, or the decision of the case has been delayed on account of negligence of the claimant, in such exceptional cases the interest may be awarded from a later date. However, while doing so, the tribunals/High Courts must give reasons why interest is not being paid from the date of filing of the petition. Therefore, we direct that the entire amount of*

> *compensation including the amount enhanced by us shall carry an interest of 7.5% per annum from the date of filing of the claim petition till payment/deposit of the amount."*

42. The decision of the learned single Judge of this Court in *Sangita Vs Allanur SK Hanif* (supra) only lays down that Section 171 of the Motor Vehicles Act vest discretion in the Tribunal when it comes to the award of interest. However, the decision of the Hon'ble Supreme Court in *Kajal Vs Jagdish Chand* (supra) is quite clear about the normal rule being the award of interest from the date of filing of the petition unless there is a special reason to deviate.

43. Therefore, in this case, the award will have to be modified, and the interest will have to be directed to be paid from the date of the claim petition and not merely from the date of the award.

44. The Tribunal has awarded interest at the rate of 7% per annum even though the accident, in this case, took place on 15.02.2012. Normally, the Tribunal for the accident that occurred up to 2012 -2013 award interest at 9% per annum. But, again, there is no reason why this usual rule has departed in this case.

45. The Tribunal also failed to award the consortium at the rate of ₹40,000/- per claimant regarding the minor son and the parents.

46. In *Surekha and others Vs Santosh and others* (supra), the Hon'ble Supreme Court has held that in motor accident claim cases, the Court should not take the hyper-technical approach and deny just compensation to the claimants merely because they may not have filed cross objections or preferred cross-appeal.

47. Even recently, in ***Meena Devi Vs Nunu Chand Mahto @ Nemchand Mahto and others***[18]***,*** the Hon'ble Supreme Court has held that there is no restriction that the Tribunal/Court cannot award compensation exceeding the amount so claimed. The Tribunal/Court must award just compensation which is reasonable in the facts relying upon the evidence produced on record.

48. For all the above reasons, the appeal of the Appellant – Insurance Company is liable to be dismissed, but the impugned award is required to be modified.

49. Accordingly, this appeal is disposed of by directing the Appellant and Respondent Nos. 5, 6, and 7 jointly and severally to pay the claimants, i.e. Respondent Nos. 1, 2, and 4, the compensation of ₹1,08,58,690/- together with interest at the rate of 9% per annum from the date of the claim petition till the date of effective payment.

50. Mr Bandekar pointed out that Respondent No.3, i.e. Nazim's father expired. The Tribunal awarded 10% of the compensation to the father and 10% to the mother. Now, even Mr Marshal agrees that 20% of the compensation can be paid to the mother. It is ordered accordingly.

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51. The appeal is disposed of by modifying the impugned award in the above terms. The Misc. Civil Application No.110 of 2021 does not survive with the disposal of First Appeal No.1 of 2021, and the same is disposed of accordingly.

52. The Appellant – Insurance Company must deposit the enhanced compensation within six weeks after giving due intimation to the learned counsel for Respondent Nos. 1, 2, and 4. Upon deposit, Respondent Nos. 1, 2, and 4 can withdraw the amount by furnishing proper identity documents and bank details. Registry to ensure that the compensation amount is transferred directly into their bank accounts.

M. S. SONAK, J.