

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NOS.100 & 129 OF 2017

FIRST APPEAL NO.100 OF 2017

1. Mrs. Fransquinha Fernandes,
aged 48 years, Widow of Jose Fernandes,
r/o Hs. No.1241, Near Mount Mary Chappel,
Akhada, St. Estevam, Ilhas-Goa.

2. Master. Joel Fernandes,
aged 16 years,
(minor) S/o late Jose Fernandes,
r/o Hs. No.1241, Near Mount Mary Chappel,
Akhada, St. Estevam,
represented by his guardian
& mother Appellant No.1

3. Mr. Auspicio Fernandes,
aged 91 years, r/o Hs. No.1241,
Near Mount Mary Chappel, Akhada,
St. Estevam, Ilhas-Goa.

4. Mrs. Arcanzela Fernandes,
(since deceased), aged 74 years,
represented by her husband
Auspicio Fernandes Appellant No.3,
r/o Hs. No.1241,
Near Mount Mary Chappel,
Akhada, St. Estevam, Ilhas-Goa.

....Appellants

Versus

1. Mr. Anil M. Yadav,
Major, driver, C/o Ana Domilita,
Hs. No.23 Near Agarshala,
St. Francisco Wado,
St. Estevam, Ihas-Goa.

2. Mr. William Fernandes,
S/o Alfred Fernandes,
R/o Hs. No.4/133, Porba Waddo,
Calangute, Bardez, Goa.

3. Bajaj Allainz General Insurance
Co. Ltd., Shop. No.5/F1 No.2,
Garden Centre Phase II,
Opposite Police Station,
Mapusa, Bardez Goa.

....Respondents

Mr. E. Afonso, Advocate for the Appellants.
Mr. Amey Kakodkar, Advocate for the Respondent No.3.

**WITH
FIRST APPEAL NO.129 OF 2017**

Bajaj Allainz General Insurance Co. Ltd.
Shop No.5/F1 No.2,
Garden Centre Phase II,
Opposite Police Station,
Mapusa, Bardez, Goa.
through its Authorised Signatory
Mr. Nilesh Subashchandra Gandhi
having office at 3 C D, Sesa Ghor,
Patto Plaza, Panaji, Goa.

.... Appellant

Versus

1. Mrs. Fransquinha Fernandes,
aged 44 years, widow of Jose Fernandes,
r/o H.No.1241,
Near Mount Mary Chappel,
Akhada, St. Estevam, Ilhas Goa.

2. Mast. Joel Fernandes,
aged 12 years (minor),
s/o late Jose Fernandes,
r/o H.No.1241,
Near Mount Mary Chappel,

Akhada, St. Estevam,
represented by his guardian
& mother applicant no.1.

3. Mr. Auspicio Fernandes,
aged 87 years, r/o H.No.1241,
Near Mount Mary Chappel,
Akhada, St. Estevam, Ilhas Goa.

4. Mrs. Arcanzela Fernandes,
aged 75 years, r/o H.No.1241,
Near Mount Mary Chappel,
Akhada, St. Estevam, Ilhas, Goa.

5. Mr. Anil M. Yadav,
major, driver, c/o Ana Domilita,
H.No.23, Near Agarshala,
St. Francisco Wado,
St. Estevam, Ilhas, Goa.

6. Mr. William Fernandes,
major of age, s/o Alfred Fernandes,
r/o H.No.4/133, Porba Waddo,
Calangute, Bardez, Goa.

7. Mr. Umakanta Mishra,
Resident of Narasingha Ballava,
Patana, Kumbharpada,
Tirio, State of Orissa,
Presently residing at Calangute,
Near Don Bosco High School,
Naikwado, Calangute, Bardez, Goa.

.... Respondents

Mr. Amey Kakodkar, Advocate for the Appellant.
Mr. E. Afonso, Advocate for the Respondent Nos.1 to 4.

CORAM: M. S. SONAK, J.

DATED: 3rd FEBRUARY 2022

ORAL JUDGMENT :

1. Heard learned Counsel for the parties. Learned Counsel for the parties agree that both these appeals can be taken up and disposed of by a common judgment and order since they challenge the judgment and award dated 21.02.2017 made in Claim Petition No.92 of 2013.
2. First Appeal No.100 of 2017 has been instituted by the claimants seeking enhancement of compensation and First Appeal No.129 of 2017 has been instituted by the Insurance Company, *inter alia*, on the ground that there was no rashness and negligence of the driver proved in this matter; there was a breach of the terms of the insurance policy and, in any case, the compensation and interest awarded are quite excessive.
3. In this case, there is no dispute that Jose, who died in a motor accident on 08.06.2013, was a fisherman 59 years of age. There is also no dispute about the involvement of the insured vehicle, i.e. Aactiva scooter bearing no.GA-03-D-2071.
4. Mr. Kakodkar, learned Counsel for the Insurance Company submits that there is no evidence of any rashness and negligence on the part of the driver of the scooter and, therefore, the claim petition ought to have been dismissed. To make good this plea, the necessary minimum was the examination of the driver of the scooter or any other witness to the accident. This has not happened in the present case.

5. The Head Constable Sushant Sawant (AW2) was examined as a witness in this matter, who has produced the complaint dated 08.06.2013 on record (Exhibit 39). He deposed that the investigations carried by him revealed that the accident was on account of the rash and negligent driving by the driver of the offending vehicle. He also produced on record the sketch of the site of the accident attached to the panchanama (Exhibit 40). A perusal of these documents also indicates that the accident was on account of rash and negligent driving by the driver of the offending vehicle.

6. In this case, the son of the deceased, who was an eyewitness to the accident, has also deposed (Exhibit 65). He has stated that he was traveling along with his father deceased Jose on a Deo scooter and when they reached Curpin junction, the offending vehicle came from the opposite direction at a fast speed and dashed against the scooter that was being driven by his father on the left side of the road.

7. Mrs. Vasanti Sawant (AW4), another eye witness, has also deposed in this matter (Exhibit 68). She too stated that the accident was on account of rash and negligent driving by the driver of the offending vehicle. She deposed that after the accident the driver ran away from the spot. There is yet another eyewitness, Jose Magalhaes (AW5), who has also deposed to the accident.

8. The testimony of none of the aforesaid witnesses has been dented in cross-examination. There is no reason to disbelieve the consistent testimony of the eyewitness, which finds corroboration

in the police documents produced on record. In such matters, the aspect of rashness and negligence has to be proved by applying the test of preponderance of probabilities. In my judgment, there is ample evidence to sustain the findings of rashness and negligence, and the impugned award warrants no interference in so far as this finding is concerned.

9. On the aspect of the driver of the offending vehicle not possessing a proper driving licence and consequently, there being a breach of the terms of the insurance policy, at the outset, it is necessary to state that the burden of proving that breach is on the Insurance Company. This position was made clear by the Hon'ble Supreme Court in *Narcinva V. Kamat And Anr. V/s. Alfred Antonio Doe Martins & Ors.*¹. In this case, the Hon'ble Supreme Court held that the burden of proving that the driver of the offending vehicle had no valid licence is on the Insurance Company. Mere failure on the part of the driver or the owner to produce such a driving licence in the Court cannot absolve the Insurance Company.

10. In this case, the Insurance Company only relied on certain documentary evidence produced by the police constable on which there was an endorsement "without MDL". The Tribunal has quite correctly stated that no efforts were made to explain the meaning of this phrase. Based on this material, the Tribunal quite correctly held that the Insurance Company has failed to discharge the burden which the law casts upon it.

¹ 1985 2 SCC 574

11. The Insurance Company, in this case, no doubt urged that letters were sent to the owner and driver requesting them to produce a driving licence and that they failed to do so. Based upon this, it cannot be said that the driver possessed no valid driving licence on the date of the accident, and to that extent, there was a breach of the insurance policy. The decision of the Hon'ble Supreme Court in *Narcinva V. Kamat And Anr.* (supra) is a complete answer in the present facts and circumstances and the same is sufficient to reject the contention of the Insurance Company concerning breach of the terms of the insurance policy. The findings recorded by the Tribunal, in this regard, therefore, warrant no interference.

12. Now, on the aspect of determination of just compensation, Mr. Afonso has submitted that there is clinching evidence that the deceased Jose was a fisherman in the business of fishing for the last several years. He pointed out that though the fishing boat was registered in the name of his brother, it is Jose, who was operating the fishing boat together with two helpers. He referred to the evidence of Jose's widow wife (AW1) and submitted that Jose's income should have been taken at ₹50,000/- per month, i.e. ₹2000/- per day, and by presuming that the deceased must have worked for at least 25 days in a month. Mr. Afonso also pointed out that the deceased had been issued an identity card by the Ministry of Agriculture, Department of Animal Husbandry, Dairying & Fisheries, Government of India, establishing that he was a fisherman and in the business of fishing and sale of fish for quite some time. Mr. Afonso also relied on the evidence of Inacio Fernandes (AW6), who has deposed that he used to buy fish worth ₹5,000/- to ₹6,000/- from deceased Jose, each day. Based

on all these, Mr. Afonso contended that the income of the deceased Jose should have been taken at ₹50,000/- per month and not ₹10,000/- per month, as determined by the Tribunal.

13. Mr. Afonso pointed out that the Tribunal has failed to take into account the factor of future prospects. He submitted that at least 10% enhancement was due having regard to the age of the deceased by applying the law laid down in *National Insurance Company V/s. Pranay Sethi*².

14. Mr. Kakodkar countered the aforesaid submissions by pointing out that the testimony of Inacio is completely untrustworthy. He points out that there is no evidence about the deceased owning any boat or about the deceased employing two helpers or about the deceased earning ₹50,000/- per month. Mr. Kakodkar submits that the Tribunal has been quite generous when it comes to determining the income of the deceased and, therefore, no interference is warranted in the appeal instituted by the claimants.

15. Mr. Kakodkar submitted that the Tribunal has awarded excessive amounts towards loss of estate and loss of consortium. By simply discovering new heads which are not even contemplated in terms of law laid down in the case of *Pranay Sethi* (supra). He submitted that this accident took place in the year 2013 and, therefore, the award of interest at the rate of 9% per annum is also excessive. He, therefore, submitted that the award be suitably modified and the compensation awarded reduced.

16. The main issue which falls for determination is whether the Tribunal was right in treating the income of the deceased at only ₹10,000/- per month.

17. The evidence on record, as urged by Mr. Kakodkar, is to a certain extent little sketchy. Not much reliance can be placed on the evidence of Inacio (AW6), except that the deceased Jose was indeed a fisherman, involved not only in catching fish but also selling the same on a wholesale or retail basis. The widow wife of Jose has deposed about the deceased engaging two helpers and earning an income of ₹50,000/- per month. Again, there is no proper evidence about the engagement of such helpers or the payments made to them.

18. However, the evidence on record clearly bears out that the deceased was in the business of catching and selling fish for the last several years. For this purpose, the deceased was issued the necessary identity card by the Government authorities. There is evidence about the family of the deceased, or in any case, the brother of the deceased owned a boat. There is evidence of the widow on the aspect of income. Even though the evidence of the widow cannot be accepted in its entirety, I do feel that the determination of monthly income at ₹10,000/- by the Tribunal is rather too conservative.

19. Upon cumulative consideration of the aforesaid factors, in my judgment, the monthly income of the deceased who has been in the business of catching as well as selling fish, both on a retail as well as a wholesale basis, can be safely taken at ₹15,000/- per month. The fact that no income tax returns have been produced

is not a ground to hold that the deceased was earning an income of ₹15,000/- per month. The deceased was a traditional fisherman in an unorganized sector. Here, the absence of income tax returns would not mean that the deceased was not earning even ₹15,000/- per month.

20. In terms of the law laid down in *Pranay Sethi* (supra), to the monthly income of ₹15,000/- an addition of income is due towards future prospects considering that the deceased was 59 years at the time of the accident and his demise therein. There is no dispute that the multiplier applicable in such matters would be 9. Therefore, the compensation towards dependency would come to ₹17,82,000/- minus the amount which the deceased would have spent for himself. In this case, the deduction has to be 25%. This means that the compensation towards dependency would come to ₹13,36,500/-.

21. Besides, the claimants are entitled to ₹15,000/- towards loss of estate and ₹15,000/- towards funeral expenses. Towards consortium, each of the claimants is entitled to ₹40,000/-. This means that to the amount of ₹13,36,500/- a further addition of ₹1,90,000/- will have to be made. The just compensation, in this case, would then come to ₹15,26,500/-.

22. On the aspect of interest, Mr. Kakodkar is right that this accident has taken place in the year 2013 and, therefore, there was no justification for awarding interest at the rate of 9% per annum. In my judgment, interest at the rate of 7% per annum would be appropriate.

23. Thus, the two appeals are partly allowed and are disposed of by making the following order :

(a) The just compensation, in this case, is now determined at ₹15,26,500/- in place of ₹12,35,000/- determined by the Tribunal in the impugned judgment and award;

(b) The interest rate is reduced from 9% to 7% per annum;

(c) The Insurance Company will have to pay the enhanced compensation taking into account the interest now determined, within six weeks from today, to the claimants.

(d) The claimants will be entitled to withdraw the amount deposited in this court by furnishing appropriate calculations in terms of the impugned award that is now modified by this judgment and order. The Registry to facilitate the withdrawals. The amount to be paid directly into the account of the claimants for which the bank details will be supplied by the learned Counsel for the claimants within two weeks from today. The calculations must be shared with the learned Counsel for the Insurance Company before withdrawals are actually effected.

(e) Since in First Appeal No.100 of 2017, respondent no 4 i.e. the mother of the deceased, has expired, the

share awarded to the mother is now directed to be equally shared by the remaining claimants. To that extent, the directions issued in the impugned judgment and award also stand modified.

(f) The other directions, subject to what is stated above in the context of the mother of the deceased, are hereby maintained.

(g) Both the appeals are disposed of in the aforesaid terms. There shall be no orders for costs.

(h) Miscellaneous Civil Applications, if any, do not survive and the same are also disposed of.

M.S. SONAK, J.