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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.119 OF 2018

IFFCO Tokio General Insurance
Company Limited, Having its office at
A/2, 1st floor Reliance House,
Isidorio Baptista Road, Pajifond,
Margao, Goa.

... Appellant

Versus

1. Smt Yeshashri Surendra Naik,
W/o late Surendra Naik, Age 41 years
old, Housewife and her children,

2. Kum Aditi Surendra Naik,
D/o late Surendra Naik,
Age 9 years old,

3. Kum Ananya Surendra Naik,
D/o late Surendra Naik,
Age 7 years old,

All residents of H. No.306(a),
Hasapur, Pernem, Goa,
Both minors represented by
natural Guardian respondent no. 1,

4. Mr. Subhash V. Dempo,
Major of age, (Owner of the car),
S/o Vaicounth Dempo,
R/o C-21-368, Bella Vista,
Taleigao, Tiswadi, Goa.

5. Mr. Fondu Tato Fadte,
S/o Tatto Fadte, Major of age,
Resident of Deulwada,

Kumbharjuva, Tiswadi, Goa.

.... Respondents

Mr. Clayton Fonseca, Advocate *for the Appellant.*

Mr. A. Phadte, Advocate *for Respondent Nos.1 to 3.*

Ms. C. Afonso, Advocate *for Respondent No.4.*

CORAM: M. S. SONAK, J.

DATE : 8th SEPTEMBER 2022

ORAL JUDGMENT :

1. Heard Mr Clayton Fonseca for the Appellant, Mr A. Phadte for respondents nos.1 to 3 (claimants) and Ms C. Afonso for respondent no.4 (owner).

2. The Appellant – Insurance Company challenges the judgment and award dated 21.03.2018, made by the Motor Accident Claims Tribunal, North Goa at Panaji (Tribunal) in Claim Petition No.87/2015, awarding the claimants compensation of ₹35,38,060/- together with interest at the rate of 9% per annum for the death of Surendra Naik in a vehicular accident on 07.04.2015.

3. Mr C. Fonseca, learned Counsel for the Appellant, submitted that there was a breach of the fundamental terms of the insurance policy. He submitted that the insured vehicle owned by

respondent no.4 was used for hire and reward or motor trade. He submits that the evidence on record is sufficient to prove this fact, and the Tribunal erred in discarding such evidence.

4. Mr C. Fonseca referred to the statements of some witnesses recorded by the police authorities in pursuance of the FIR registered against the driver of the offending vehicle. Mr Fonseca points out that one of the statements was given by the occupant of the offending vehicle. He submits that all these statements establish that the offending vehicle was used for hire and reward or motor trade. He submits that this amounts to a fundamental breach of the insurance policy's terms. Therefore, he proposes that no liability could have been imposed upon the Insurance Company.

5. Mr Fonseca submitted that the Tribunal erred in rejecting the Appellant's application for amending the written statement. He presents that the plea of breach of the insurance policy's terms was already raised, and it was sought to be clarified by way of the amendment. Accordingly, he submits that the rejection order should be set aside and an opportunity should be granted to the Insurance Company to lead evidence on the breach.

6. Mr Fonseca relied upon *Amrit Pal Singh & Anr. V/s. Tata AIG General Insurance Company & Lrs.*¹ in support of this contention.

7. Mr Fonseca, without prejudice to the above, submitted that the quantum of compensation determined by the Tribunal is excessive and does not represent just compensation. He pointed out that the dairy business in which Surendra was alleged to be involved is a labour-intensive business; therefore, there should have been a deduction of at least 50% from Surendrar's annual income. He submits that the Tribunal was not justified in making additions towards the alleged bonus in the absence of clear evidence and for adding 25% towards future prospects. He submits that if a deduction to the extent of 15% was to be made and an addition towards the bonus ignored, the total compensation would come to ₹21,43,190/- towards dependency. To this, a maximum amount of ₹1,50,000/- could have been added towards consortium, funeral expenses and loss of estate.

8. Mr Fonseca submitted that the accident, in this case, occurred in 2015 and, therefore, the award of interest at the rate of 9% per annum was excessive.

¹ 2018 DGLS (SC) 526

9. Mr Phadte, learned Counsel for the claimants, defends the impugned award based on the reasoning reflected therein. He submits that the burden of establishing a breach of any insurance policy terms is on the Insurance Company. He pointed out that, in this case, neither were there any worthwhile pleadings nor was any credible evidence on this issue. Finally, he points out that no case was made towards deduction to the extent of 50% as suggested, and the Tribunal was justified in including the bonus amounts. He, therefore, submits that this appeal may be dismissed.

10. Ms Afonso, learned Counsel for respondent no.4, submits that there were no pleadings on the aspect of any alleged breach of the insurance policy. She presents that pleadings are necessary for such matters and relies on *New India Assurance Co. Ltd. V/s. Shilpa Sandeep Shinde & Ors.*² in support of this proposition.

11. Ms Afonso submits that the Insurance Company's application for amendment is correctly rejected because the same was filed after the commencement of the trial and without disclosing any due diligence. She relies on *Pandit Malhari*

² 2018 (1) TAC 160 Bombay

*Mahale V/s. [REDACTED] Mahale & Ors.*³ and *Shashi Kant Pandey V/s. Mithilesh Kumar @ Ganga Devi*⁴ in support of this proposition.

12. Ms Afonso submits that the Insurance Company led no evidence in this matter even though the entire burden was upon it to establish any alleged breach of the insurance policy's terms. She, therefore, submits that this appeal may be dismissed.

13. The rival contentions now fall for determination.

14. In this case, the Insurance Company had very vaguely pleaded in its written statement that there was a breach of the insurance policy terms. The pleadings in paragraph 6 suggest that the breach was about the vehicle not possessing a permit and a fitness certificate. The pleadings in paragraph 7 allege violation without specifying the breach or even giving a doubt as to what the violation was.

15. The Insurance Company realized the deficiency in its pleadings and, therefore, at a highly belated stage, tried to seek leave to amend them. Unfortunately, this application seeking leave to amend the pleadings was filed after the trial commenced,

³ (2020) 11 SCC 549

⁴ 2014 (2) Civil Court Cases 497

particularly after the claimants closed their evidence. In the amendment application, the Insurance Company pleaded that it has inadvertently and, due to oversight, failed to specify that the said Maruti Van was used for motor trade/commercial purposes.

16. The Tribunal, by its order dated 12.02.2018, rejected the application seeking leave to amend the written statement. The Tribunal held that the trial had already commenced, and the Insurance Company had not shown any diligence to justify the grant of leave at that stage. On perusal of the application at Exhibit B-54, it is evident that the Insurance Company did not bother to show any diligence on their part or explain why there were no clear pleadings in its written statement in the first instance or, in any case, why the amendment application was not filed before the commencement of the trial. Therefore, there is no infirmity in the Tribunal's order dated 12.02.2018 or its approach in denying the Insurance Company leave to amend its written statement at a belated stage.

17. That apart, based on the existing pleadings and the pleadings sought to be incorporated by way of amendment, it is apparent that the Insurance Company is not clear about the precise breach. There is no clarity about the term the owner is alleged to have breached. Mr Fonseca argued about the vehicle

being used for hire and reward. He even suggested that the vehicle was used in connection with the motor trade. The amendment speaks about some commercial use. In short, the Insurance Company alleged the breach in the first instance and then tried to find out what this breach might be.

18. Even based on the existing pleadings, the Insurance Company chose to lead no evidence. Merely relying upon the statements recorded by the parties during the investigation, the Insurance Company cannot succeed in establishing a breach. The burden of proving such a breach is squarely upon the Insurance Company. From the statements read out by Mr Fonseca, even assuming that such statements can be directly read as evidence in the context of the breach, there is no case made out to conclude that the vehicle was used for hire and reward or in connection with the motor trade.

19. Mr Fonseca referred to the insurance policy and the *'limitations as to use'* endorsed thereon. This clause states that the policy covers the use of the vehicle for any purpose other than hire or reward, carriage of goods (other than samples or personal luggage), organized racing, pace making, speed testing, reliability trails, and Use in connection with Motor Trade. Based on the vague statements recorded during investigations, mostly torn out

of context, the Insurance Company makes no case of a breach. The insurer did not bother to examine these statement makers. There was no opportunity for the owner to cross-examine them.

20. *Amrit Paul Singh & Anr.* (supra) also provides that the exceptions that have been carved out under Section 66 of the Act, needless to emphasize, *are to be pleaded and proved*. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. In *Shashi Kant Pandey* (supra), the Allahabad High Court refused to permit pleadings in a Claim Petition where the trial had already commenced, and the applicant showed no diligence.

21. In *Shilpa Sandeep Shinde* (supra), the learned Single Judge of this Court has emphasized the necessity of proper pleadings on the aspect of breach of a policy backed by cogent proof. Applying all these principles, there is no error in the findings and the approach of the Tribunal.

22. On the aspect of quantum of compensation, there is evidence that Surendra was drawing a salary of ₹5,746/- as a security guard. Based on this evidence, the Tribunal has correctly computed the dependency component at ₹8,04,440/-. This is also consistent with the calculations handed over by Mr Fonseca.

23. There is further evidence on record that Surendra was engaged in the dairy business and earning ₹12,750/- per month after deducting expenses. Therefore, Mr Fonseca's contention about deducting 50% towards his business expenses cannot be accepted. Only after the deduction of the expenses was the finding recorded on the income of ₹12,750/-. That apart, in terms of *National Insurance Company Ltd. V/s. Pranay Sethi & Ors.*⁵, considering that Surendra left behind three dependants, a deduction of 1/3rd is appropriate. Based on this, the compensation towards dependency considering the income from the dairy business comes to ₹17,85,000/-.

24. The claimants are entitled to a consortium compensation of ₹40,000/- each, funeral expenses of ₹15,000/- and loss of estate of ₹15,000/-. Thus, the total compensation, in this case, can be computed at ₹27,39,440/-.

25. The Tribunal, in this case, was not justified in making additions towards bonuses in the dairy business. The Tribunal, consistent with the law in *Pranay Sethi* (supra), has already added 25% towards future prospects. The evidence on the bonus aspect was also quite sketchy and not at all clear. Therefore, a one-time

5 (2017) 16 SCC 680

payment or bonus on a particular occasion should not have been considered.

26. Similarly, the Tribunal erred in awarding interest at the rate of 9% per annum since the accident, in this case, took place on 07.04.2015. Interest at the rate of 7% per annum would therefore be appropriate.

27. Accordingly, this appeal is partly allowed, and the just compensation is determined at ₹27,39,440/- together with interest at the rate of 7% per annum from the date of the Claim Petition till the actual payment.

28. Mr Fonseca states that the Insurance Company has deposited the awarded amount in this Court. Accordingly, the Insurance Company and the claimants are to exchange and then submit calculations to the Registrar (Judicial). The Registrar (Judicial) to permit withdrawal of the deposited compensation in terms of the impugned award as now modified by this judgment and order. The Appellant and the claimants will be entitled to the proportionate interest that shall have accrued on the deposited amounts. If any amount has been withdrawn, the same will have to be adjusted accordingly.

29. The claimants will have to furnish identity documents and bank details so that their share of compensation can be directly transferred into their bank accounts.

30. The statutory deposit of ₹25,000/- made by the Appellant can now be returned to the Appellant - Insurance Company with interest that shall have accrued thereon.

31. The appeal is partly allowed in the above terms.

32. There shall be no order for costs.

M. S. SONAK, J.

NITI K
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