

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.111 OF 2018

1. Smt. Anita Narendra Parsekar,
Wife of late Narendra Parsekar,
Aged 47 years, housewife,
Indian National,
2. Mast. Ashish Narendra Parsekar,
Son of late Narendra Parsekar,
Aged 17 years, student,
Indian National,
3. Mast. Ayush Narendra Parsekar,
Son of late Narendra Parsekar,
Aged 13 years, student, Indian National,
All resident of House No.4/71/1,
Mollebhat, Saligao,
Bardez Goa.

...Appellants

Versus

1. Mr. Pawan Hari Hariram Arya,
Age 23 years, Service,
C/o Jhon Cardoz,
Caspocam Bar & Restaurant,
Candolim, Bardez – Goa.
(Driver of Vehicle)
2. Mr. Bhadri Rai,
E4/206, Porob Waddo,
Calangute, Bardez Goa.
(Owner of vehicle)
3. Bajaj Allianz General Insurance
Company Ltd.
GE Plaza, Airport Road,
Yerwada, Pune 41100.
(Insurance Company)

...Respondents

Mr. Rishikesh P. Gawthankar, Advocate for the appellants.
Mr. Pranav Kakodkar, Advocate for respondent No.2.
Mr. Amey Kakodkar, Advocate for respondent No.3.

WITH
CROSS OBJECTIONS NO.6 OF 2019
IN
FIRST APPEAL NO.111 OF 2018

Bajaj Allianz General Insurance Co. Ltd.
a Company incorporated under the
Companies Act, 2013

Having its office at 3C-D, Sesa Ghor,
Patto Plaza, Through their authorized
signatory Mr. Dip Patekar

...Cross Objectitioner

IN

1. Anita Narendra Parsekar,
Wife of late Narendra Parsekar,
Aged 47 years, housewife,
Indian National,
2. Mast. Ashish Narendra Parsekar,
Son of late Narendra Parsekar,
Aged 18 years, student, Indian National,
3. Mast. Ayush Narendra Parsekar,
Son of late Narendra Parsekar,
Aged 14 years, student, Indian National,
Appellant No.3 represented through his
mother i.e. Appellant No.1 as he is a
minor. All residents of House No.4/71/1,
Mollebhat, Saligao, Bardez Goa.

...Appellants

Versus

1. Mr. Pawan Hari Hariram Arya,
Aged 22 years, Service,
C/o Jhon Cardoz,

Caspocam Bar & Restaurant,
Candolim, Bardez -Goa.
(Driver of the vehicle).

2. Mr. Bhadri Rai,
E4/206, Porob Waddo,
Calangute, Bardez – Goa.
(Owner of the vehicle).

...Respondents

Mr. Amey Kakodkar, Advocate for the Cross-objectioner.
Mr. Rishikesh P. Gawthankar, Advocate for the original appellants.
Mr. Pranav Kakodkar, Advocate for the original respondent No.2.

CORAM: M. S. SONAK, J

DATE : 1st July 2022

ORAL JUDGMENT:

1. Heard Mr. R. Gawthankar, learned counsel for the appellants.
Mr. P. Kakodkar appears for respondent No.2/owner of the insured vehicle. Mr. A. Kakodkar appears for respondent No.3/Insurance Company.

2. The appellants are the claimants who challenge the judgment and award dated 27.03.2018 made by the Motor Accident Claims Tribunal (Tribunal) on the ground that the amount of compensation determined is inadequate. In addition, respondent No.3-Insurance Company has filed Cross Objections No.6 of 2019, contending that there was a fundamental breach of the insurance policy. Therefore, no liability could have been imposed on the Insurance Company.

3. Mr. Gawthankar, learned counsel for the appellants, submits that the deceased Narendra Parsekar was a Government servant aged 52 years at the time of the accident. He offers that after Narendra's demise, the recommendations of the 7th Pay Commission were accepted by the Government, and the salary of Government servants was considerably increased. He submits that Narendra would have had eight years of service left, and the claimants should be compensated commensurate to this increase in pursuance of the recommendations of the 7th Pay Commission. He submits that the family would have benefited from this increase if Narendra had been alive. Therefore, there is no reason why this aspect should not be considered for determining the just compensation.

4. Mr. Kakodkar disputes the above contention and submits that the identical argument was rejected by the Hon'ble Supreme Court in *Sarla Verma Vs Delhi Transport Corporation and another*¹. He proposes that in terms of *National Insurance Company Limited Vs Pranay Sethi and others*², the Tribunal has already made an addition of 15% towards future prospects considering Narendra's age was 52 years at the time of his unfortunate demise.

5. Mr. Kakodkar submits that the driver of the insured vehicle had no license. He submits that this amounts to a fundamental breach of

1 (2009) 6 SCC 121

2 (2017) 16 SCC 680

the insurance policy; therefore, the Tribunal erred in imposing liability on the Insurance Company.

6. Mr. P. Kakodkar, learned counsel for respondent No.2/owner, contests the contention of Mr. A. Kakodkar learned counsel for the Insurance Company. He submits that a valid insurance policy was taken up, which is part of the record. He proposes that the onus was on the Insurance Company to establish a fundamental breach, and no evidence was led on the issue of the driver allegedly possessing no driving license. He, therefore, submits that the cross-objections may be dismissed.

7. Mr. P. Kakodkar, however, supports Mr. A. Kakodkar's submission on the issue that there ought to be no increase in the quantum of compensation.

8. The rival contentions now fall for my determination.

9. Mr. Gawthankar's contention on the issue of quantum of compensation, though attractive at the first blush, will have to be rejected following the law laid down in *Sarla Verma* (supra).

10. In *Sarla Verma* (supra), the claimants had contended that there were two pay revisions since the accident, and the deceased could have been the beneficiary of these pay revisions had he been alive. Based on this contention, the claimants before the Hon'ble Supreme Court

pressed for additional compensation. The argument was that the notional increase need not be the basis when there was evidence of an actual increase.

11. The above contention was negated by the Hon'ble Supreme Court in paragraphs 43 to 47, and the same are transcribed below for the convenience of reference.

"43. In this case as noticed above the salary of the deceased at the time of death was Rs.4,004. By applying the principles enunciated by this Court to the evidence, the High Court concluded that the salary would have at least doubled (Rs.8008/-) by the time of his retirement and consequently, determined the monthly income as an average of Rs.4004/- and Rs.8008/- that is Rs.6006/- per month or Rs.72072/- per annum. We find that the said conclusion is in conformity with the legal principle that about 50% can be added to the actual salary, by taking note of future prospects.

44. Learned counsel for the appellants contended that when actual figures as to what would be the income in future, are available it is not proper to take a nominal hypothetical increase of only 50% for calculating the income. He submitted that though the deceased was receiving Rs.4004/- per month at the time of death, as per the certificates issued by the employer (produced before High Court), on the basis of pay revisions and increases, his salary would have been Rs.32,678/- in the year 2005 and there is no reason why the said amount should not be considered as the income at the time of retirement. It was contended that the income which is to form the basis for calculation should not therefore be the average of Rs.4004/- and Rs.8008/-, but the average of Rs.4004/- and Rs.32,678/-.

45. *The assumption of the appellants that the actual future pay revisions should be taken into account for the purpose of calculating the income is not sound. As against the contention of the appellants that if the deceased had been alive, he would have earned the benefit of revised pay scales, it is equally possible that if he had not died in the accident, he might have died on account of ill health or other accident, or lost the employment or met some other calamity or disadvantage. The imponderables in life are too many. Another significant aspect is the non-existence of such evidence at the time of accident.*

46. *In this case, the accident and death occurred in the year 1988. The award was made by the Tribunal in the year 1993. The High Court decided the appeal in 2007. The pendency of the claim proceedings and appeal for nearly two decades is a fortuitous circumstance and that will not entitle the appellants to rely upon the two pay revisions which took place in the course of the said two decades. If the claim petition filed in 1988 had been disposed of in the year 1988-89 itself and if the appeal had been decided by the High Court in the year 1989-90, then obviously the compensation would have been decided only with reference to the scale of pay applicable at the time of death and not with reference to any future revision in pay scales.*

47. *If the contention urged by the claimants is accepted, it would lead to the following situation: The claimants could only rely upon the pay scales in force at the time of the accident, if they are prompt in conducting the case. But if they delay the proceedings, they can rely upon the revised higher pay scales that may come into effect during such pendency. Surely, promptness cannot be punished in this manner. We therefore reject the contention that the revisions in pay scale subsequent to the death and before the final hearing should be taken note of for the purpose of determining the income for calculating the compensation."*

12. The above reasoning provides a complete answer to Gawthankar's contention, which would have to be rejected.

13. Mr. Gawthankar then pointed out that two of the three claimants, i.e., Narendra's children, have been awarded only ₹25,000/- each towards loss of consortium. In terms of the law laid down in *Pranay Sethi* (supra), they should have been awarded ₹40,000/- each. This submission is correct and will have to be accepted.

14. Consequently, the compensation amount will have to be increased by an amount of ₹30,000/-. The same is ordered to be increased accordingly.

15. The cross-objections will have to be dismissed because though the Insurance Company had raised the issue of the fundamental breach before the Tribunal, the Insurance Company did not bother to adduce any evidence in support. If the driver had no license, then it was for the Insurance Company to have summoned the appropriate RTO Authority and prove this aspect. The record indicates that the Insurance Company did not earnestly press this issue and/or insist that issue be cast. The onus of establishing a fundamental breach is on the Insurance Company. Since they have failed to discharge this onus, cross-objections cannot be allowed.

16. Accordingly, First Appeal No.111 of 2018 is partly allowed, and the compensation amount already awarded is enhanced by a further ₹30,000/-. The cross-objections are, however, dismissed.

17. Respondent Nos. 1, 2, and 3, including in particular respondent No.3, to deposit the entire awarded amount, including the additional amount of ₹30,000/- together with interest thereon at the rate of 9% per annum from the date of claim petition till the date of deposit in this Court within six weeks from today. The Insurance Company should give notice to the learned counsel for the appellants before making such a deposit.

18. The appellants will be entitled to withdraw the deposited amount on furnishing the identity documents and bank details. The registry to ensure that the amounts are directly transferred into the appellants' bank accounts.

M. S. SONAK, J

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