

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.143/2018

IFFCO TOKIO GENERAL
INSURANCE CO. LTD., A/2, 1st
floor, Reliance House, Isidorio
Baptista Road, Pajifond, Margao,
Goa-403 601.

... APPELLANT

Versus

1. Miss Amberly Jonalynn Fernandes,
d/o late Mrs. Alvia Cardozo, aged 4
years, r/o H.No.1338/E, Sinaibhag,
Curtorim, Salcete, Goa, 403 709,
(represented by her Grandmother
and natural guardian applicant no.2).

2. Mrs. Alexinha Cardozo, w/o Joao
Cardozo, aged 57 years, r/o.
H. No.1338/E, Sinaibhag, Curtorim,
Salcete, Goa.

3. Mr. Joao Sebestiao Cardozo,
s/o. Mr. Agostino Cardozo, aged 67
years, r/o. H. No.1338/E, Sinaibhag,
Curtorim, Salcete, Goa.

4. Shri Pedro Travaso, son of
Sebastiao Travaso, aged 58 years,
r/o H. No.310, Nr. Betal Temple,
Kakoda Curchorem, Quepem-Goa.
(Driver of the Tanker bearing Reg.
No.GA-01-Z-4777).

5. Mr. Ernesto D'Cunha, son of Jose Santa D'Cunha, major in age, r/o. House No.532/A, Nagwaddo, Betalbatim, Salcete, Goa. (Owner of the Tanker bearing Reg. No.GA-01-Z-4777).

6. Mr. Joaquim Fernandes, s/o late Joao Caetano Fernandes, aged 37 years, r/o. House No.795, Batora, Curtorim, Salcete, Goa.

... RESPONDENTS

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

Mr. Shailesh Redkar, Advocate *for the Respondents No.1 to 3*.

Mr. Ryan Menezes, Advocate *for the Respondent No.4*.

WITH
MISC. CIVIL APPLICATION NO.266/2021
IN
FIRST APPEAL NO.143/2018

1. Miss Amberly Jonalynn Fernandes, d/o late Mrs. Alvia Cardozo, aged 4 years, r/o H.No.1338/E, Sinaibhag, Curtorim, Salcete, Goa, 403 709, (represented by her Grandmother and natural guardian applicant no.2).

2. Mrs. Alexinha Cardozo, w/o Joao Cardozo, aged 57 years, r/o. H. No.1338/E, Sinaibhag, Curtorim, Salcete, Goa.

3. Mr. Joao Sebastiao Cardozo, s/o. Mr. Agostino Cardozo, aged 67 years, r/o. H. No.1338/E, Sinaibhag, Curtorim, Salcete, Goa.

... Applicants

IV

IFFCO TOKIO General
Insurance Co. Ltd., A/2,
1st floor, Reliance House,
Isidorio Baptista Road, Pajifond,
Margao, Goa-403 601.

... Appellant

Versus

1. Miss Amberly Jonalynn Fernandes,
d/o late Mrs. Alvia Cardozo,
aged 4 years, r/o H.No.1338/E,
Sinaibhag, Curtorim, Salcete,
Goa, 403 709, (represented by her
Grandmother and natural guardian
applicant no.2).

2. Mrs. Alexinha Cardozo,
w/o Joao Cardozo, aged 57 years,
r/o. H. No.1338/E, Sinaibhag,
Curtorim, Salcete, Goa.

3.Mr. Joao Sebestiao Cardozo,
s/o. Mr. Agostino Cardozo,
aged 67 years, r/o. H. No.1338/E,
Sinaibhag, Curtorim, Salcete, Goa.

4. Shri Pedro Travaso, son of
Sebastiao Travaso, aged 58 years,
r/o H. No.310, Nr. Betal Temple,
Kakoda Curchorem, Quepem-Goa.
(Driver of the Tanker bearing
Reg. No.GA-01-Z-4777).

5. Mr. Ernesto D'Cunha, son of
Jose Santa D'Cunha, major in age,
r/o. House No.532/A, Nagwaddo,
Betalbatim, Salcete, Goa.

(Owner of the Tanker bearing
Reg. No.GA-01-Z-4777).

6. Mr. Joaquim Fernandes,
s/o late Joao Caetano Fernandes,
aged 37 years, r/o. House No.795,
Batora, Curtorim, Salcete, Goa.

... Respondents

Mr. Shailesh Redkar, Advocate *for the Applicants/Respondent Nos.1
to 3.*

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

Mr. Ryan Menezes, Advocate *for the Respondent No.4.*

WITH
FIRST APPEAL NO.2/2020

Shri Pedro Travaso, s/o
Sebastiao Travaso, major,
House No.310, near Betal Temple,
Kakoda Curchorem, Quepem-Goa.

...Appellant

Versus

1. Ms. Amberly Jonalynn Fernandes,
d/o late Ms. Alvia Cardozo, minor,
House No. 1338/E, Sinaibag,
Curtorim, Salcete, Goa, 403 709,
(represented herein by her
grandmother/natural guardian
Respondent No.2)

2. Mrs. Alexinha Cardozo,
w/o Joao Cardozo, major,
House No.1338/E, Sinaibag,
Curtorim, Salcete, Goa, 403 709.

3.Mr. Joao Cardozo,
s/o. Agostino Cardozo,
major, House No.1338/E,
Sinaibag, Curtorim, Salcete,
Goa, 403 709.

4. Mr. Ernesto D'Cunha,
s/o Jose S. D'Cunha, major,
House No.532/A, Nagwaddo,
Betalbatim, Salcete, Goa.

5. IFFCO TOKIO General
Insurance Co. Ltd., A/2,
1st floor, Reliance House,
Isidorio Baptista Road, Pajifond,
Margao, Goa.

6. Mr. Joaquim Fernandes,
s/o late Joao C. Fernandes,
major, House No.795,
Batora, Curtorim, Salcete, Goa.

... Respondents

Mr. Ryan Menezes, Advocate *for the Appellant.*
Mr. Shailesh Redkar, Advocate *for the Respondent Nos.1 to 3.*
Mr. Clayton Fonseca, Advocate *for the Respondent No.5.*

CORAM.: M. S. SONAK, J.

DATED: July 08, 2022

ORAL JUDGMENT:

1. Heard Mr. Clayton Fonseca for the appellant-Insurance Company in First Appeal No.143/2018 and Mr. Ryan Menezes for the appellant/driver in First Appeal No.2/2020.

2. Mr. Shailesh Redkar appears for respondents no.1 and 2 (original claimants) in both the appeals. He points out that respondent no.3, for whom he used to appear, has since expired. He points out that respondent no.3 was the grandfather of

respondent no.1 and Respondent no.2 is the grandmother of respondent no.1.

3. This claim petition was instituted by respondent no.1, daughter, respondent no.2 (mother), and respondent no.3 (father) of Alvia Cardozo, who died in the vehicular accident on 27.03.2015.

4. Now that respondent no.3 (grandfather) has expired, it is only appropriate that the share of his compensation should be apportioned in favor of Amberly (respondent no.1), who was only four years old at the time of the demise of her mother, Alvia in the vehicular accident.

5. The challenge in both these appeals is to the Judgment and Award dated 07.10.2016 in Claim Petition No.81/2015, by which the Tribunal has granted the claimants compensation of ₹34,35,000/- with interest @ 9% p.a. from the date of the petition till the final payment.

6. Mr. Clayton Fonseca, learned counsel for the Appellant-Insurance Company, submitted that the insured vehicle did not have a permit, which amounts to a fundamental breach of the terms and conditions of the insurance policy.

7. Mr. Fonseca submits that the insured vehicle was a tanker and could not apply without such a permit. He submits that even the tanker driver did not have valid and effective driving license at the time of the accident, which also amounts to a fundamental breach of the terms and conditions of the insurance policy. Based on this submission, he submits that the appellant-Insurance Company should have been absolved of the liability to pay any compensation. In the alternate, he submits that at least a pay and recover order should have been made.

8. Mr. Fonseca, without prejudice, submits that the Tribunal erred in holding that the deceased was drawing a monthly income of ₹15,000/-. He submits that there is no legal evidence to sustain this finding, and the documents produced on record are highly suspicious.

9. Mr. Fonseca also submitted that the Tribunal erred in adding 50% to Alvia's income. He submitted that Alvia did not have a permanent Government job and therefore the addition should have been a maximum of 40%.

10. Mr. Fonseca finally submitted that the award of ₹4 lakhs towards loss of love and affection and ₹25,000/- towards funeral expenses is contrary to the law in *National Insurance Co. Ltd.*

vs. Pranay Sethi & Ors. – 2017 (16) SCC 680 and in *United India Insurance Company Limited vs. Satinder Kaur alias Satwinder Kaur and Others – (2021) 11 SCC 780*.

11. Mr. Ryan Menezes, learned counsel for the appellant-driver in First Appeal No.2/2020, joins Mr. Clayton Fonseca's contention about the income and consequent compensation. However, he submits that there was no fundamental breach of the terms and conditions of the insurance policy. He submits that the burden was on the insurance company to establish a breach and that no evidence is produced on record supporting such a contention.

12. Mr. Redkar also submits that there is no evidence about any fundamental breach of the terms and conditions of the insurance policy. He submits that there is ample evidence to sustain the finding about income. He submits that the award for loss of love and affection was made in the peculiar circumstances of the present case where a four-year-old daughter was deprived of her mother's love and affection in the vehicular accident. He submits that the impugned Judgment and Award may not be interfered with.

13. The rival contentions now fall for my determination.

14. On the aspect of a fundamental breach of the terms and conditions of the insurance policy, it is by now well settled that the onus is on the insurance company to establish the same. However, there is neither any evidence about the absence of a permit nor the driver not holding a proper driving license.

15. AW1 has produced documents at Exh.28 Colly, including the driver's driving license. This license was issued on 28.04.1979 and was valid till 12.06.2017. The accident took place on 27.03.2015. Considering this evidence, Mr. Fonseca's first contention cannot be accepted.

16. The second issue concerns the income/salary of deceased Alvia. AW4, the Managing Director of M/s. Crownland Holdings Pvt. Ltd. was examined and deposed that Alvia was working as Receptionist for their Company from 01.03.2013 to 26.03.2015. He has deposed that she was drawing a monthly salary of ₹15,000/-. He also produced a salary certificate (Exh.56). Though he was cross-examined, no dent was made to his testimony. In such circumstances, the finding about the salary warrants no interference.

17. The Tribunal, in this case, has added 50% to Alvia's income, considering that Alvia was 29 years old at the time of her

unfortunate death. However, Mr. Fonseca submits that since Alvia did not have a Government job, the addition could have been only 40%. She relies on *Satinder Kaur (supra)*, which quotes paragraphs 59.3 and 59.4 of *Sarla Verma vs. Delhi Transport Corporation – (2009) 6 SCC 121*.

18. The decisions relied upon by Mr. Fonseca do not say that a 50% addition to the actual salary income of the deceased can be made only if the deceased had a Government job. Instead, the decisions distinguish between a permanent job and where the deceased was self-employed or on a fixed salary.

19. In the present case, there is nothing on record to show that Alvia did not have a permanent job. No questions were posed to AW4 on this issue. Mr. Fonseca, however, submits that since payments were made on vouchers, an inference must be drawn that Alvia did not have a permanent job. Based only on these circumstances, no such inference can be drawn, particularly when AW4, who deposed in this matter, was not questioned on this aspect. Therefore, the Tribunal cannot be faulted for adding 50% to Alvia's determined monthly income of ₹15,000/-.

20. Mr. Fonseca is justified in objecting to the award of ₹4 lakhs for loss of love and affection. In terms of Pranay Sethi

(supra) and Satinder Kaur (supra), each claimant would be entitled to ₹40,000/-. Now that respondent no.3 has expired, respondent no.1 can be awarded ₹80,000/- and respondent no.2 ₹40,000/-.

21. The award will have to be scaled down towards funeral expenses from ₹25,000/- to ₹15,000/-. However, a further amount of ₹15,000/- will have to be awarded towards the estate loss. Thus, the total compensation, in this case, will work out to ₹32,10,000/-.

22. Therefore, both appeals are partly allowed, and the compensation amount is reduced from ₹34,85,000/- to ₹32,10,000/-. The share awarded to the deceased respondent no.3 will now be apportioned in favor of respondent no.1 Amberly. This means that Amberly will be entitled to 75% of the awarded amount, and respondent no.2 will be entitled to the balance of 25%. The directions for payment of interest and investment, etc., are maintained. However, liberty is granted to apply to the Tribunal if any amounts are urgently required for Amberly's needs or her education.

23. Mr. Fonseca states that the awarded amount is deposited before the Tribunal. Therefore, the parties will now be entitled to apply to the Tribunal.

24. Both these appeals are partly allowed in the above terms. However, in the peculiar facts and circumstances of the present case, it is only appropriate that the appellants pay costs of ₹25,000/- each to respondent no.1 Amberly.

25. Accordingly, Amberly (respondent no.1), through her guardian respondent no.2, is permitted to withdraw the amount of ₹50,000/- i.e., ₹25,000/- each deposited by the appellants in this Court at the time of institution of these appeals. Furthermore, if any interest has accrued on such amounts, Amberly is permitted to withdraw the same. These costs are inclusive of the costs awarded by the Tribunal in the impugned Judgment and Award.

26. The appeals are disposed of in the above terms. The miscellaneous applications do not survive, and the same are also disposed of.

M. S. SONAK, J.