

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.83/2018

1. PRATIMA HARI GAONKER
wife of late Mr. Hari Dnyanesh
Gaonker, aged 40 years,
housewife,

2. MAST. HARESH HARI
GAONKER, son of late Mr. Hari
Dnyanesh Gaonker, aged 14
years, student

3. MAST. YASH HARI
GAONKER, son of late Mr. Hari
Dnyanesh Gaonker, aged 13
years, student

4. MRS. RADHABAI
DNYANESH GAONKER, wife
of late Mr. Dnyanesh Gaonker,
aged 67 years, housewife,
All resident of House No.647/1,
Deulwada-Borim, Ponda Goa.

... APPELLANTS

Versus

1. MR. DEEPAK SINGH, son of
Mr. Jai Govind Singh, aged 32
years, driver, resident of Village
Babura, Tal. Thana, Vidhyachal,
Dist. Mirzapur, Uttarpradesh.

2. M/S. ASHWINI LOGISTIC
SOLUTION, through its Prop.
Mr. Kuldeep Singh Bhalotihia,
P.L. 128/115, Dashmesh
Compound, Shop No.19,

Mumbra Panvel Road, Dahisar
Mor. Navi Mumbai.

3. THE NEW INDIA
INSURANCE CO. LTD., Vashi,
D.A.D. [170800], Shanti Centre,
1st floor, Sec-17, Vashi, Navi-
Mumbai Branch, Maharashtra-
State.

... RESPONDENTS

Mr. Milton Marshal, Advocate *for the Appellants*.
Mr. U. R. Timble with Ms. Y. Mandrekar, Advocates *for*
Respondent-Insurance Company.

**WITH
FIRST APPEAL NO.12/2022**

THE NEW INDIA ASSURANCE
CO. LTD., Panaji Divisional Office,
7th Floor, Sanchar Bhavan, BSNL
Building Patto, Panaji-Goa.

... APPELLANT

Versus

1. MRS. PRATIMA HARI GAONKAR
wife of late Mr. Hari Dnyanesh Gaonkar,
age 38 years, housewife,

2. MAST. HARESH HARI GAONKAR,
son of late Mr. Hari Dnyanesh Gaonkar,
age 12 years, student, minor

3. MAST. YASH HARI GAONKAR,
son of late Mr. Hari Dnyanesh Gaonkar,
age 11 years, student, minor

Both represented by Resp.no.1
being their mother.

4. MRS. RADHABAI DNYANESH
GAONKAR, wife of late Mr. Dnyanesh
Gaonkar, age 65 years, housewife,
All resident of H.No.547/1, Deulwada,
Borim, Ponda-Goa.

5. MR. DEEPAK SINGH, son of
Mr. Jai Govind Singh, aged 32 years,
driver, resident of Village Babura,
Tal. Thana, Vidhyachal, Dist. Mirzapur,
Uttarpradesh.

6. M/S. ASHWINI LOGISTIC SOLUTION,
through its Prop. Mr. Kuldeep Singh
Bhalotihia, P.L. 128/115, Dashmesh
Compound, Shop No.19, Mumbra
Panvel Road, Dahisar Mor.
Navi Mumbai.

... RESPONDENTS

Mr. U. R. Timble with Ms. Y. Mandrekar, Advocates *for*
Appellant.
Mr. Milton Marshal, Advocate *for Respondents No.1 to 4*.

CORAM: M. S. SONAK, J.

DATED: 7th January 2023

ORAL JUDGMENT:

1. The learned counsel for the parties agree that a common
Judgment and Order can dispose of both these appeals. Both

these appeals challenge the Judgment and Award dated 31.03.2018 made by the Motor Accident Claims Tribunal, North Goa (Tribunal), disposing of Claim Petition No.83/2015. First Appeal No.83/2018 is instituted by the claimants claiming additional compensation. First Appeal No.12/2022 is instituted by the insurance company objecting to the award of any compensation. Hence, it is only appropriate to consider and dispose of both these appeals by a common Judgment and Order.

2. Mr U. R. Timble, the learned counsel for the insurance company, pointed out that in the written statement filed by the insurance company and by filing a separate application, leave was applied under Section 170(b) of the Motor Vehicles Act (M.V. Act). Such leave was applied because neither the owner nor the truck driver involved in the accident bothered to appear or defend the proceedings. He submits that the Tribunal made no orders on these applications but proceeded to make the impugned award. Mr Timble, relying on *National Insurance Co. Ltd. vs Smt. Jairani and others – First Appeal No.397/2008, decided by the Division Bench of the Allahabad High Court on 07.01.2009*, submits that the award is rendered nullity in such a case. He placed on record this decision which is reported in ILR (Allahabad Series) at page 87.

3. Mr Timble, without prejudice, submits that since the insurance company was factually allowed by the Tribunal to raise all defences, including the defences other than those stipulated under Section 149(2) of the M.V. Act and was also allowed to cross-examine the witnesses or lead defence evidence, the appellant-insurance company would have no objection if the application under Section 170(b) of the M.V. Act which remained to be formally allowed, is allowed by this Court and the insurance company is permitted to urge all grounds, including the ground that the quantum of compensation is excessive and does not represent just compensation.

4. Mr. Timble submits that RW2, a private investigator (advocate) has clearly deposed that the license attached by the police authorities from the driver of the insured truck, was never issued by the RTO authorities in the name of such driver. Mr. Timble referred to the paper book's documents at pages 136 to 138. Based on this, Mr. Timble submitted that a licensed driver did not drive the insured truck, which amounts to a breach of the terms and conditions of the insurance policy. Mr. Timble submitted that the insurance company should have been exonerated from the liability.

5. Mr. Timble submitted that there is evidence about the driver bring under the influence of alcohol. He submits that even this amounts to an offence under the M.V. Act and a breach of the terms and conditions subject to which the insurance policy was issued. He submits that this is another reason why the insurance company should have been exonerated of the liability to pay any compensation amount.

6. Mr. Timble submits that the evidence bears out that there were two pillion riders i.e. the deceased, his wife and his minor son. He submits that this amounts to a breach of the traffic rules, and therefore, a case of contributory negligence is made out. Further, he presents that the Tribunal did not adequately consider this aspect; therefore, the compensation amount, or at least the apportionment, should be varied.

7. Finally, Mr. Timble submitted that the only income tax returns on record pertain to 2010-11, in which the returned income was ₹1,55,000/-. He points out that AW2 (Chartered Accountant) has produced four balance sheets that the Tribunal has relied upon. However, they were neither signed by the deceased nor were any returns filed based on these balance sheets. Furthermore, he points out that the claimants produced no returns for the year subsequent to 2010-11. He, therefore,

submits that the Tribunal was clearly in error in relying upon such self serving balance sheets and determining deceased's income at ₹4 lakhs per annum. Mr. Timble submitted that at the most the deceased's income could be taken at ₹1,55,000/- p.a.

8. Mr. Milton Marshal, the learned counsel for the appellants in First Appeal No.83/2018 (claimants) at the outset, did not object to the alternate submission made by Mr. Timble concerning leave under Section 170(b) of the M.V. Act. He submitted that since all the parties proceeded on the basis that leave was granted and the insurance company was given full opportunity to raise all defences, including defences related to quantum, the matter may not be remanded to the Tribunal.

9. Mr. Marshal submitted that the evidence on record overwhelmingly establishes that the truck come on the wrong side and dashed against the motorcycle that the deceased was driving. He submits that the minor riding along with the mother contributed nothing to this accident in which the deceased lost his life. He submitted that there is no medical evidence about the driver being under the influence of alcohol. Merely because of the FIR/statements with regard to the driver being drunk do not establish this position or that the alcohol consumed was above the prescribed limits. He submits that the burden of proving such

matters is squarely upon the respondents, who have failed to discharge this burden.

10. Mr. Marshal submits that the Tribunal was justified in relying upon the balance sheets prepared by a Chartered Accountant. He submits that there is evidence about the qualifications possessed by the deceased and the nature of his business. He relies on *Shri Man Bahadur Chettri vs. Shri Tenzing Chopel Bhutia & Anr. - 2014 ACJ 2348* to submit that the income certificate or the balance sheets prepared by a Chartered Accountant are admissible in evidence without examination of the maker.

11. Mr. Marshal submitted that the Tribunal has committed an error apparent on the face of record by deducting 50% towards personal expenses of the deceased when it is an admitted fact that the deceased was survived by his widow, minor sons and an aged mother in which circumstances, a deduction would not exceed 25%. He submitted that the Tribunal also failed to award consortium to each claimant, even though the rate awarded is less than what is prescribed in *National Insurance Company Ltd. vs. Pranay Sethi & Ors. - (2017) 16 SCC 680* as explained in *Anjali vs. Lokendra Rathod – Civil Appeal No.009014 of 2022 decided by the Hon'ble Supreme Court on 06.12.2022.*

He, therefore, submits that the claimants' First Appeal No.83/2018 may be allowed by suitably increasing the compensation amount and the insurance company's First Appeal No.12/2022 be dismissed.

12. The rival contentions now fall for my determination.

13. On considering the rival contentions and the material on record, the following points arise for my determination in these appeals:-

- a) Effect of the Tribunal not disposing of the application under Section 170(b) of the M.V. Act before making the impugned award;
- b) Whether the insurance company has made out a case of a fundamental breach of the terms and conditions of the insurance policy because the driver of the insured vehicle had no driving license and, in any case, was driving under the influence of alcohol?
- c) Is any contributory negligence made out in this case?

d) Whether the income and consequently the quantum of compensation as determined by the Tribunal is correct and constitutes "just compensation"?

e) Whether the Tribunal failed to follow the law in *Pranay Sethi (supra)* and *Anjali vs. Lokendra Rathod (supra)* in the determination of the compensation amount?

14. Insofar as the issue of non-disposal of the application under Section 170(b) of the M.V. Act is concerned, the record indeed bears out that the insurance company, in its written statement and by filing a separate application, sought for such leave. The record also bears out that the driver and owner of the insured/offending truck failed to contest the proceedings. In such circumstances, the Tribunal should have granted the leave and not proceeded to make the final award without disposing of the application under Section 170(b) of the M.V. Act

15. In *National Insurance Company Ltd. vs. Jairani (supra)* the Division Bench of Allahabad High Court has taken the view that any award made by a Tribunal without disposing of an application under Section 170(b) of the M.V. Act would be nullity. Based thereon, the award was set aside, and the matter was remanded for fresh adjudication. In the present case,

however, we need not go into the issue of whether any award is rendered nullity or not. This is because the record bears out that both parties bona fide proceeded based on the premise that leave had already been granted by the Tribunal. Perhaps even the Tribunal proceeded on the impression that such leave has been granted, though the records do not disclose any formal order granting such leave. Although such leave is not to be presumed or implied, such circumstances are sufficient to avoid a remand at this stage. The record also bears out that the insurance company was permitted to raise all defences and lead evidence supporting all defences. Therefore, Mr Marshal fairly conceded that the appropriate course to adopt would be to grant leave and permit the insurance company to urge all grounds in this appeal.

16. Therefore, leave is granted in the appeal, and the insurance company was heard on all points, including the quantum of compensation. Tribunals, however, must be diligent in disposing of applications for leave under Section 170(b) of the M.V. Act. Such applications have to be decided upon due application of mind and not in a mechanical manner. Normally, such applications should be disposed of before the evidence commences. Therefore, a copy of this order may be circulated to the two Principal District Judges in this State, and the Principal District Judges should distribute the same to all the Motor

Accident Claims Tribunals functioning in the State of Goa so that Section 170 applications, where made, are disposed of even before the evidence in the matter commences.

17. Insofar as the second point for determination is concerned, at the outset, it is necessary to note that the burden is on the insurance company to establish breach of the terms and conditions of the insurance policy. As regards the driver being under the influence of alcohol, there is no evidence to sustain this contention. The FIR does refer to the driver being under the influence of alcohol. However, that, by itself, is not sufficient to discharge the burden. No witnesses were examined, and no effort was made to establish that the alcohol limits exceeded the prescribed limits. Based on such a casual statement in the FIR, the fundamental breach of the terms and conditions of the insurance policy cannot be inferred.

18. The insurance company examined Advocate Om Prakash, who was engaged as a Personal and Concealment Investigating Officer. He has submitted a report to which he has attached some information about the licensing authority of Bhadohi (UP). This report does not say that the license is a fake license but that the license under this number was issued in another name. The insurance company did not bother to examine the RTO

authorities alleged to have issued this communication. The communication is itself a little vague. However, based upon the evidence of RW2 and this communication, which is not even proved in accord with law, no breach of the terms and conditions of the insurance policy can be inferred. Therefore, based on the evidence on record, the second point for determination will have to be answered against the insurance company by holding that no fundamental breach of the terms and conditions of the insurance policy has been proved by the insurance company.

19. Regarding the third point for determination, the evidence on record clinchingly establishes that the accident occurred due to the rashness and negligence of the truck driver who came on the wrong side. The mere fact that the minor son was in the lap of his mother, who was riding a pillion, hardly contributed to the accident in which the deceased died. Thus, no case of contributory negligence is made out. Even assuming some rules were breached, this breach contributed almost nothing to the accident. The third point for determination is answered accordingly.

20. The fourth point for determination concerns mainly the determination of the deceased's income. There is evidence that the deceased was in the business of selling and repairing electronic

goods under the name and style of Harison Electronic Clinic at Kurtarkar Commercial Arcade, Tisk, Ponda, Goa. There is evidence that the deceased possessing a B.Sc. Degree in First Class and a Diploma Certificate in Electronics in First Class. The sale deed by which the business premises were purchased is on record. The PAN Card is also on record. The Income Tax Returns for the year 2010-11 are also on record.

21. The Income Tax Returns for 2010-11 show an income of ₹1,55,000/- for the said year. The accident occurred on 14.03.2015 i.e. almost after four to five years of filing these returns. No returns post the year 2010-11 have been produced. However, reliance is placed on four balance sheets (Exh.48 Colly) prepared by the Chartered Accountant, who was examined as AW2. The Tribunal relied these balance sheets to hold that the deceased's income was Rs.4 lakhs per annum.

22. Mr Timble, to a certain extent, is justified in his criticism that such balance sheets could not have been the basis for determining income. He points out that these balance sheets were not even signed by the deceased which leads one to believe that the same were prepared after the deceased's demise by the Chartered Accountant. Besides, no returns were produced to which these balance sheets may have been attached. He submits

that the Tribunal should not have blindly relied upon the balance sheets in the absence of these crucial elements. As noted earlier, there is some substance in the criticism of Mr. Timble. However, the decision in *Man Bahadur Chettri (supra)* was in a different context. Here, it does not appear that the deceased post-2010-11 filed any income tax returns, or it is also possible that a lesser income was indicated in the returns. Therefore, these returns were not produced in evidence. The balance sheets, indeed, do not bear the signature of the deceased, which in the normal course, they would bear if such balance sheets were indeed prepared when the deceased was living. Moreover, no returns have been filed or produced post-2010-11 to which such balance sheets had been annexed. Therefore, the Tribunal may not have been justified in blindly relying upon such balance sheets for determining the deceased's income.

23. However, the Chartered Accountant was examined and deposed that the income of ₹1,55,000/- p.a. reflected in the income tax returns for 2010-11 was only half of the deceased's income. He explained that for the State of Goa, special provisions have been made by which the husband and wife married under the regime of the communion of assets can share their income and file appropriate returns. There was no serious challenge to this explanation deposed to by the Chartered Accountant.

Therefore, if this explanation or statement is accepted, then, even in the year 2010-11, the deceased's income would be taken at ₹3,10,000/- p.a.

24. Over the next five years, it is possible as contended by Mr. Timble, that the income might have reduced. So also, it is possible, as contended by Mr. Marshal that the income would have increased. Considering that no income tax returns were filed or in any case produced, the increase cannot be considered substantial. Some element of guesswork is inevitable in such circumstances. The interest of justice will be met if the deceased's income is taken at ₹3,50,000/- p.a. instead of ₹4 lakhs as determined by the Tribunal.

25. Insofar as the last point for determination is concerned, Mr. Marshal is right in submitting that the Tribunal should not have deducted 50% towards personal expenses. Admittedly, the deceased was not a bachelor but had his widow, aged mother and minor sons dependent upon him. Accordingly, the deduction should have been only 25% and not 50%. Further, considering the law in *Pranay Sethi (supra)* and *Anjali vs. Lokendra Rathod (supra)*, the compensation towards the consortium should have been awarded to each of the claimants at the rate of ₹44,000/-.

Further, even the compensation towards loss of estate and funeral expenses should have been ₹16,500/- and not merely ₹15,000/-.

26. Thus, after accounting for an addition of 25% towards future prospects, the just compensation would work out to ₹48,02,750/-. However, the accident in this case took place on 14.03.2015. Therefore, interest @ 9% p.a. is excessive, and the same is scaled down to 7% p.a.

27. Both appeals are accordingly partly allowed. The compensation amount, in this case, is determined at ₹48,02,750/- interest @ 7% p.a. from the date of the claim petition till the actual payment. The costs awarded by the Tribunal are maintained.

28. Insofar as the apportionment of the compensation amount is concerned, at the stage of withdrawal of a portion of the deposited amount, the wife and the mother were awarded 30% each and the two children 20% each. Accordingly, the same ratio is maintained. However, insofar as the compensation payable to the children is concerned, the same should be invested in a fixed deposit in a nationalized bank. Two separate investment documents should be created. Such documents should be in the name of the child and his mother. The amount should be paid to

each child upon his attaining majority. However, in case of emergencies or educational needs, liberty is granted to file a suitable application before the Tribunal, which shall dispose of such application in accordance with the law.

29. The insurance company will now have to deposit the enhanced compensation amount within two months from today after due intimation to Advocate Marshal. The claimants will be entitled to withdraw the amount already deposited and the amount to be deposited within two months. For this, the claimants will have to furnish the necessary identification and bank details so that the Registry can transfer the amounts directly into their bank accounts.

30. Both appeals are disposed of in the above terms.

M. S. SONAK, J.

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