IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 159 OF 2013

Smt. Linnelle Emmanuel Walker,)
Age : 38 years, Occ: Service,)
Residing at : 302, Phoenix Appt.,)
130, Lullanagar, Pune – 40.).. Appellant

Versus

1. Shreehari Associates (P) Ltd.,)
Occ: Owner of Vehicle,)
Residing at Loni Sawangi,)
High Level Barrage Partur, Jalna,)
Maharashtra.)

2. ICICI Lombard General Insurance)
Co. Ltd.,)
Zenith House, Keshavrao Khade Marg,)
Mahalaxmi, Mumbai – 400 034.)

3. Shri Shyam Vitthalrao Ugale,)
Age : 25 years, Occ: Driver of Vehicle,)
Residing at Ghar No.65, Galli Borgaon,)
Tal : Khultabad, Dist: Aurangabad.).. Respondents

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Shri Abhishek M. Pungaliya for the Appellant.
Ms. Varsha Chavan for the Respondent No.2.

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CORAM : A.S. OKA &
REVATI MOHITE DERE, JJ
DATED : 18TH JUNE 2015

ORAL JUDGMENT (PER A.S. OKA, J)

. By the earlier order dated 6th April 2015, the parties were put to notice that the Appeal will be taken up for final hearing. By this Appeal, the Appellant has taken an exception to the judgment and award dated 25th July 2012 passed by the learned Member of the Motor Accident Claims Tribunal, Kolhapur.

2. The Appellant filed a Claim Petition under Section 166 of the Motor Vehicles Act, 1888 (for short "the M.V. Act") claiming compensation on account of death of her husband in a motor accident on 31st May 2008. The case made out in the Claim Petition is that the family members of the Appellant were sitting in a car near a hotel waiting for their friends to arrive. At that time, a Tata Pick-up Van owned by the first Respondent which was at the relevant time insured with the second Respondent, gave a dash to the said car. It is pointed out in the Claim Petition that not only the deceased husband of the Appellant but the son and daughter of the Appellant were victims of the said accident. The Claim Petition proceeds on the footing that the driver of the pickup van (third Respondent) was driving his vehicle in a rash and negligent manner. The Claim Petition was contested only by the second Respondent Insurer. The claim made by the Appellant was in the sum of Rs.85,90,000/-. By the impugned judgment and award, the compensation of Rs.6,64,936/- has been granted together with interest at the rate of 9% per annum from the date of filing of the said claim. The said amount has been granted which is inclusive of the amount payable on account of "no fault liability". The present Appeal is preferred by the Appellant for seeking enhancement. We must note

here that though by an order dated 6th April 2015, the parties were put to notice that the Appeal will be decided finally, there is neither any cross objection nor a cross appeal filed by any of the Respondents.

3. The learned counsel appearing for the Appellant has taken us through the notes of evidence and documents on record. He has relied upon the Civil Application No.566 of 2013 which is an Application for seeking permission to lead additional evidence. He submitted that firstly the case of the Appellant that her deceased husband was an employee of the AHA Air Hostess Academy (P) Limited has been discarded on a very hyper-technical ground. He pointed out that one Shri Kiran Francis Chabes, who was at the relevant time the Manager of the said Company, was examined who produced in evidence the certificate dated 3rd November 2008 issued by Shri Ravindra Jain, Senior Manager of the AHA Pvt. Ltd, Pune, the employer of the deceased. He urged that the evidence of the witness Shri Kiran Francis Chabes clearly shows that the signature of Shri Jain on the said document was proved. He urged that only because the said Kiran Chabes was no longer in the employment of the employer of the deceased, the said evidence could not have been discarded. In any event, he urged that the income tax return of the deceased filed for the Assessment Year 2006-2007 shows that the income of the deceased from the salary of was Rs.2,64,417/-. He submitted that there was no

reason to discard the income tax returns of the deceased filed after the death which shows that his income was Rs.3,23,629/-. He urged that the Tribunal has committed an error by taking the income of the deceased at Rs.5,000/- per month for the purpose of calculating the multiplicand. He pointed out that in fact, the Tribunal relied upon the income tax returns in Paragraph 10 of the judgment.

4. The learned counsel appearing for the second Respondent Insurer pointed out that the income tax returns have not been exhibited and, therefore, no cross-examination of the Appellant was made on the said income tax returns. She submitted that the case of the Appellant was that the salary of the deceased was Rs.76,250/- and, therefore, the income reflected from the income tax returns relied upon by the Appellant was inconsistent with the figure of salary. She, therefore, submitted that the Tribunal has taken a reasonable amount of Rs.5,000/- per month as the income of the deceased at the time of his death. She submitted that even assuming that the income tax return for the Assessment Year 2006-2007 is taken into consideration, the same will reflect the income of the deceased as of 31st March 2006 and, therefore, the income reflected from the said document cannot be taken as the income of the deceased on the date of his death. She urged that the Apex Court has held that for calculating the multiplicand, the income on the date of death of the deceased will have to be taken into

consideration. She submitted that in any case, there is no evidence to show that there were any future prospects of the increase in the income of the deceased. She would, therefore, pray that no interference is called for with the impugned judgment and award.

5. As far as the issue of negligence is concerned, there is no contest. The finding of the Tribunal that the vehicle insured with the second Respondent was being driven in a rash and negligent manner is not challenged by the Respondents and, therefore, the only challenge is as regards the quantum of compensation. We have given careful consideration to the submissions. We have perused the record of the Tribunal.

6. The Appellant stepped into the witness box. Her examination-in-chief is in the form of an affidavit. In Paragraph 6 of the affidavit-in-lieu of the examination-in-chief of the Appellant, she has referred to the income tax returns of the deceased husband for the years 2006 to 2008. She has stated that the said documents are at Sr.Nos.2, 3 and 4 of the list of documents. This reference is made to the list at Exhibit-33 which was filed on 12th October 2011 i.e. the date on which the affidavit-in-lieu of the examination-in-chief was filed. We have perused the said list. The second document in the said list is the income tax return of the deceased for the Assessment Year 2006-2007

which was filed on 31st July 2006. The third document is the income tax return for the Assessment Year 2007-2008 which was filed on 10th October 2008 and the income tax return for the Assessment Year 2008-2009 which was filed on 31st July 2008. As far as the first income tax return for the Assessment Year 2006-2007 is concerned, in the cross-examination of the Appellant made by the Advocate for the second Respondent, there is no challenge. The only suggestion given to the Appellant is that she has not produced any document of income and that her husband was not an earning member of the family.

7. The learned counsel appearing for the second Respondent contended that there was no cross-examination made as the income tax returns were not exhibited and only the photocopies of the income tax returns were produced. It is true that the photocopies of the income tax returns were produced. However, Civil Application No.566 of 2013 has been filed by the Appellant seeking leave under Rule 27 of Order XLI of the Code of Civil Procedure, 1908 to produce the originals. During the earlier hearing, this Court had directed the Applicant to give inspection of the original documents (Income Tax Returns) to the Advocate for the second Respondent. Admittedly, inspection of the original documents has been provided. As far as this Application is concerned, there is no contest by the second Respondent as no reply has been filed to the said Application.

8. Before dealing with the issue whether the income tax returns can be relied upon, it will be necessary to make a reference to evidence adduced on the issue of income. The Appellant in her evidence has stated that her deceased husband was an employee of M/s. AHA Air Hostess Academy Private Limited and was drawing monthly salary of Rs.76,250/-. The Appellant examined one Kiran Francis Chabes who deposed that he was in the employment of the said Company till 10th March 2009. There was some criticism of his evidence on the ground that though he was no longer in the employment from the year 2009, the witness on 14th June 2012 purportedly produced a certificate issued by the employer signed by Shri Ravindra Jain showing the salary of the deceased husband of the Appellant. However, we must note here that going by the income reflected from the income tax returns on which the Appellant was relying upon, the case made out by the Appellant that the monthly salary of the deceased husband of Rs.76,250/- does not inspire confidence. The reason is that even in the income tax return which the deceased had filed after his demise, his yearly gross income is shown as Rs.3,23,629/-. Therefore, the Tribunal has rejected the case of the Appellant regarding the employment of her deceased husband with the said Company. Moreover, the Appellant did not examine any officer of the said Company who was currently in the employment of the said

Company. Therefore, we cannot find fault with the finding of the learned Member of the Tribunal when he has rejected the theory that the deceased was drawing the monthly salary of Rs.76,250/-.

9. Now coming to the Income Tax Returns relied upon by the Appellant, it is true that the office copies of the acknowledgments signed by the Income Tax Department were not produced. Only photocopies thereof were produced before the Tribunal. However, there is an application made for adducing additional evidence in the form of the said office copies. The photocopies of the Income Tax Returns and ancillary documents were placed on record before the Tribunal along with a list at Exhibit-33. An endorsement at Exhibit-33 shows that even copies of the documents were provided to the Advocate for the second Respondent. Now admittedly, the inspection of the original documents has been given to the learned counsel appearing for the second Respondent and there is no dispute raised about the genuineness of the income tax returns, the copies of which are already on record of the Tribunal. The first document is a Saral Form bearing acknowledgment of the Income Tax Department dated 31st July 2006. It shows that the income of the Appellant during the Financial Year 2005-2006 (Assessment Year 2006-2007) from the salary was Rs.2,64,417/-. Form 16 is also produced along with the said Saral Form. As far as the Form 16 issued by the employer is concerned, the same is not proved by

examining the concerned officer. Hence, the same will have to be kept out of consideration. Nevertheless, the Income Tax Return filed for the Financial Year 2005-2006, during the lifetime of the deceased, shows that his total income was Rs.2,64,417/-. It shows that he had paid income tax in the sum of Rs.7,884/- on the said income.

10. The Appellant relied upon the acknowledgment issued by the Income Tax Department of the Return of the Income of the deceased husband for the Assessment Year 2008-2009 (Financial Year 2007-2008). However, the acknowledgment bears rubber stamp of 31st July 2008. Thus, the Income Tax Return appears to have been filed after the death of the deceased husband of the Appellant. The Appellant in her evidence has not deposed that on the basis of the material available, as per her instructions, the return was filed. Therefore, the Income Tax Return of the Assessment Year 2008-2009 will have to be kept out of consideration.

11. The argument of the learned counsel appearing for the second Respondent is that if the Income Tax Return filed during the lifetime of the deceased is considered, at highest, it shows that as of 31st March 2006, his income was Rs.2,64,417/-, and therefore, the said income cannot be treated as the income on the date of the accident.

12. In Paragraph 12 of the impugned judgment, there is a finding recorded by the learned Member of the Tribunal that the deceased husband of the Appellant was a Commerce Graduate and was an Income Tax Payer. The learned Member of the Tribunal by relying upon the aforesaid Income Tax Returns has accepted that the deceased was a tax payer on the date of the accident. As far as the Tribunal exercising power under the M.V. Act is concerned, the same is not bound by the strict rules of evidence. Hence, in absence of any challenge to the genuineness, the return filed on 31st July 2006 by the deceased himself can be taken into consideration. It shows that the annual income of the deceased husband of the Appellant as of 31st March 2006 was Rs.2,64,417/-. As Stated earlier, the date of the accident is 31st May 2008. Therefore, it can be safely accepted that the yearly income of the deceased on the date of the accident was not less than Rs.2,64,417/-. The said document in any event shows the earning capacity of the deceased. As far as the determination of the income of the deceased for the purposes of calculating multiplicand is concerned, by the very nature of exercise, some guess work is always inherent. Therefore, this Court can safely proceed on the footing that the income of the deceased on the date of the accident was the income as of 31st March 2006 as reflected from the Income Tax Return. However, there is no evidence to show that the deceased had a permanent job. Therefore,

the future prospects of increase in the earnings of the deceased cannot be taken into consideration.

13. Therefore, the gross income of the deceased at the time of his death will have to be taken as Rs.2,64,417/-. The income tax amount of Rs.7,884/- (as shown in the return) will have to be deducted from the amount of Rs.2,64,417/-. Thus, after deducting the income tax amount from the amount of Rs.2,64,417/-, the income of the deceased comes to Rs.2,56,533/- which can be rounded off to Rs.2,60,000/-.

14. As far as the deduction on account of personal expenditure is concerned, in the present case, the Appellant in Paragraph 3 of her affidavit-in-lieu of the examination-in-chief has stated that unfortunately, her son and daughter also died in the accident. As far as the deduction on account of personal expenditure is concerned, it will be necessary to make a reference to the decision of the Apex Court in the case of *Sarla Verma (Smt) & Ors. v. Delhi Transport Corporation & Anr.*, [(2009} 6 SCC 121]. The Paragraph 30 of the said decision reads thus:

> "30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra,* the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of

> dependent family members is 2 to 3, one-fourth ($1/4^{th}$) where the number of dependent family members is 4 to 6, and one-fifth ($1/5^{th}$) where the number of dependent family members exceed six."

15. Hence, the deduction towards personal and living expenses of the deceased will have to be taken as $1/3^{rd}$. Therefore, the $1/3^{rd}$ amount will have to be deducted from the amount of Rs.2,60,000/-. After deducting the $1/3^{rd}$ amount, the dependency comes to Rs.1,73,333/-.

16. Going by the finding recorded by the learned member of the Tribunal on the basis of the School Leaving Certificate of the deceased, the date of his birth is 3^{rd} November 1970. Therefore, on the date of the accident his age was 37 years. In the light of the decision of the Apex Court in the case of *Sarla Verma*, in view of the formula laid down in Paragraph 42 thereof, the multiplier of 15 is required to be applied for the age group of 36 to 40 years. Therefore, after applying the multiplier of 15, the compensation amount would be Rs.25,99,995/- (i.e. Rs.26,00,000/-). On account of the funeral expenditure and loss of consortium to the Appellant, an amount of Rs.50,000/- will have to be added. Therefore, just and fair compensation payable to the Appellant is Rs.26,50,000/-. After deducting the total amount granted under the impugned judgment and award, the balance amount comes to Rs.19,85,064/-. Considering the date of the accident, the interest on

the excess amount will have to be granted at the rate of 7.5% per annum. Accordingly, the Appeal must succeed in part and we pass following order:-

ORDER :

(a) The impugned judgment and award dated 25th July 2012 is hereby modified;

(b) The Appellant shall be entitled to the total compensation of Rs.26,50,000/- (inclusive of the amount paid on account of No Fault Liability);

(c) In addition to the interest already granted by the Tribunal, on the excess amount of Rs.19,85,064/-, the interest shall be payable at the rate of 7.5% per annum from the date of filing of the Claim Petition before the Tribunal;

(d) The Appellant will be entitled to proportionate costs throughout;

(e) We grant time of three months to the second Respondent to deposit the excess amount payable as per the modified judgment and award;

(f) After the amount is deposited, the Learned Member of the Tribunal shall pass an appropriate order regarding disbursement/investment of the amount which may be deposited by the second Respondent;

(g) If the amount already granted by the Tribunal or any part thereof is not yet deposited, the same shall be deposited within a period of three months from today

(h) The Appeal is partly allowed on above terms;

(i) Civil Application No.566 of 2013 and Civil Application No.3277 of 2013 stand disposed of in terms of this judgment and order;

(REVATI MOHITE DERE, J) (A.S. OKA, J)