

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.376 OF 2015

Royal Sundaram Alliance Insurance Company Ltd. .. Appellant

Vs

Smt. Manisha Suyog Jagdale and Others. .. Respondents

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Shri Rahul Mehta i/by KMC Legal for the Appellant.

Shri Ajit J. Kenjale along with Shri Rajesh Dharap for the Respondent
Nos.1 to 5.

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CORAM : A.S. OKA &
REVATI MOHITE DERE, JJ
DATED : 14TH AUGUST 2015

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

1. Submissions of the learned counsel appearing for the parties were heard on the earlier date. By this Appeal, the Appellant Insurance Company has taken an exception to the judgment and award dated 21st July 2014 passed by the learned Member of the Motor Vehicle Accident Claims Tribunal at Pune in Claim Application under Section 166 of the Motor Vehicles Act, 1966 (for short “the said Act”) filed by the first to fourth Respondents. For the sake of convenience, we are referring to the first to fifth Respondents as the Claimants. The Claimants are the legal representatives of late Suyog Bajirao Jagdale.

The accident occurred on 24th September 2009 at 12 noon. The deceased Suyog Jagdale was crossing the Mumbai-Pune Highway. At that time, a Trailer which was admittedly validly insured with the Appellant at that time and owned by the sixth Respondent gave a dash to the deceased. He sustained severe injuries. Though he was survived, unfortunately on 13th March 2010, he succumbed to the injuries sustained in the accident. The first Claimant is the widow of the deceased Suyog. The second and third Respondents are minor children of the deceased. The fourth and fifth Respondents are the parents of the deceased. The claim for compensation was made in the sum of Rs.1,39,44,609/- which was contested only by the Appellant. Various contentions were raised by the Appellant including the contention that the driver of the trailer was not possessing a valid driving license. It appears that by grant of leave under Section 170 of the Motor Vehicles Act, 1988 (for short “the said Act of 1988”), the Appellant was permitted to raise defences which could have been by the insured. The Tribunal granted total compensation of Rs.38,42,640/- together with interest at the rate of 8% per annum.

2. We must note here that on 16th June 2015, consent terms were filed by and between the Appellant and the original Claimants. An Application was made by the Claimants under Rule 7 of Order XXXII of the Code of Civil Procedure, 1908 (for short “the said Code”). After

consideration of the record of the case, this Court did not think it proper to grant leave and therefore, the Appeal itself is taken up for final disposal.

3. The first submission made by the learned counsel appearing for the Appellant is that the negligence on the part of the deceased has also contributed to the accident. The second contention raised by the learned counsel appearing for the Appellant is that as far as the evidence regarding the income of the deceased is concerned, it is a case of no evidence. He urged that though it is claimed that the deceased was running a hotel, no evidence such as income tax returns, vouchers, books of accounts etc was produced. He would, therefore, urge that the Tribunal committed gross error by holding that monthly income of the deceased at the time of his death was Rs.15,000/-. He submitted that the Tribunal has committed a gross error by adding 50% amount to Rs.15,000/- per month towards future prospects of increase in the income of the deceased. He submitted that in any case, there is no evidence on record to show that the income of the deceased would have steadily increased and, therefore, there were genuine prospects of increase in the earnings of the deceased in future.

4. As far as the settlement in the form of consent terms filed on 16th June 2015 is concerned, we find that for the purpose of

settlement, the income of the deceased was taken at Rs.12,000/- per month and no allowance was made for future prospects of earnings. This Court was of the view that the settlement was not in the interest of the minors.

5. The first point to be considered is as regards the negligence and contributory negligence. We must note here that the driver of the offending vehicle which was admittedly insured with the Appellant has not been examined by the Appellant. Moreover, there is nothing placed on record to show that any effort was made by the Appellant to secure the presence of the driver. The first witness Smt. Manisha Jagdale who is the first Claimant filed her affidavit-in-lieu of examination-in-chief. The said Smt. Manisha Jagdale, in her cross-examination, has accepted that she was not an eye witness to the accident. The second witness Mr. Dilip Kumar Parda examined by the Claimants was an Assistant Manager of Aditya Birla Memorial Hospital wherein the deceased was admitted. The said witness was examined to prove that a sum of Rs.5,65,948/- was paid towards the bill of the hospital. The third witness Ms. Varsha Madhukar Awchite was examined who was the billing in-charge of Pawna Hospital in support of the case of the Appellant that the treatment and hospitalization charges of Rs.1,76,000/- were paid to the said hospital. The fourth witness Shri Dilipkumar Pareda, is the Billing In-charge of Aditya Birla

Hospital. The fifth witness is one Shri Shailesh Paulasrao Gajbhiv, who is a Tax Consultant, who allegedly prepared the final statement of account of the business of the deceased. One Shri Jitendra Haribhai Patel, the sixth witness, deposed about the existence of hotel business of the deceased. The last witness Dr. Madhav Waghmare was examined, who performed the post mortem on the body of the deceased. It is true that no eye witness to the accident was examined. The learned Member of the Tribunal has recorded a finding that the First Information Report and other documents on record show that there was no zebra crossing on the highway in that area. The deceased was crossing the road at about 12 noon. There were bushes in between the open space of the road divider. Thus, the deceased was crossing the road in a broad day light. We must note here that the Tribunal after considering the fact that the deceased was crossing the road from a place where there was no zebra crossing, has held that even the deceased has contributed to the accident to the extent of 20%. The Appellant wants to shift the entire burden on the deceased. This could have been done provided the driver was examined to prove that he had taken all possible care which could have possibly been taken under such circumstances. The learned counsel appearing for the Claimants stated that his instruction was not to file any Cross-objection. Considering the fact that the driver of the offending vehicle was not examined, it is not possible to find fault with the view taken by the Tribunal that the driver of the Trailer

Container has contributed to the accident due to his negligence only to the extent of 80%.

6. Now the second issue is regarding the quantum of compensation. The learned Judge after considering the evidence of the witnesses of Aditya Birla Hospital and Pawna Hospital has accepted the case that the total expenditure incurred on the medical treatment of the deceased till his death was Rs.15,90,809/- which was rounded off to Rs.15,90,800/-. As far as the loss of dependency is concerned, the learned Member came to the conclusion that the income of the deceased at the time of his death was Rs.15,000/- per month. He added 50% being Rs.7,500/- per month on account of future prospects of earning. Considering the number of dependents, 1/4th amount was deducted on account of personal expenditure of the deceased in accordance with the guidelines laid down by the Apex Court in the decision in the case of *Sarla Verma (Smt) & Ors. v. Delhi Transport Corporation & Anr.*¹. Considering the age of the deceased, the multiplier 15 was applied. The sum of Rs.1,75,000/- was granted on the other counts such as loss of consortium, funeral expenses, loss of love and affection etc.

7. Now let us consider the issue of the income of the deceased. It will be necessary to make a reference to the evidence of

¹ (2009)6 SCC 121

his widow. She filed affidavit-in-lieu of the examination-in-chief. We have perused the affidavit-in-lieu of the examination-in-chief. She has stated that the deceased was having two hotels one at Manoharnagar, Chakan Road, Talegaon Dabhade Station, Maval and another opposite the Talegaon General Hospital, Chakan Road, Talegaon. She stated that the income of the deceased from the hotel business was Rs.30,000/- and apart from the said hotels, he was doing the business in real estate and was earning approximately Rs.10,000/- per month. We have carefully perused her cross-examination made by the Advocate for the Appellant before the Tribunal. There is no suggestion given that the deceased was not running two hotels. Only question asked to the widow was whether a license for running both the hotels was obtained. She pleaded ignorance about it. She also pleaded ignorance about the fact whether the deceased was paying income tax. She denied the correctness of the suggestion that her deceased husband and her brother were jointly doing the business of hotel. Thus, the case that the deceased was running two hotels is not seriously challenged in the cross-examination. Even the extent of the income of the deceased stated by the widow in the examination-in-chief has not been questioned in the cross-examination. Shri Shailesh Paulasrao Gajbhiv examined by the Claimants claimed that he had prepared final statement of account of the business of the deceased for the year 2008-2009. He claimed that the deceased approached him in May 2009 for

preparation of the final accounts. He stated that the deceased had approached him for preparation of the final account of one of the two hotels by name Apurva at Chakan Road, Talegaon Dabhade. He stated that the statement of account was prepared by him for obtaining loan. However, the witness produced only a photocopy of the statement of accounts. In the cross-examination, he admitted that he has not submitted the income tax returns in terms of the final account and he claimed that he was not aware whether the deceased had filed the income tax returns. He stated that prior to the year 2008, the deceased never met him for preparation of final accounts and after 2009, nobody else has met him. On the aspect of the hotel business, one Shri Jitendra Patel was examined. He stated that he was carrying on business of Hardware and Paint Shop at Talegaon, Dabhade. He stated that the hotel Apurva was having a common boundary with the place of his business and for about five to six years prior to his death, the deceased was having hotel Apurva which is opposite to Talegaon General Hospital. There is a medical college and hostel of medical college in front of the hotel Apurva. The students of the medical college were the customers of the said hotel and the business was flourishing. He deposed that he was visiting hotel Apurva in Manoharnagar area of the same town. In the cross-examination, he denied the suggestion that the parents and the brother of the deceased were conducting the hotel business after his demise.

8. Now coming back to the findings recorded by the learned Member of the Tribunal, he has observed that the said Shailesh was not deposing directly on the point of income of the deceased. The learned Member disbelieved the case that the deceased was simultaneously running two hotels, as on the date of the death of the deceased i.e. 13th March 2010. As there is no serious challenge to the contention that the deceased was having two restaurants, there was no reason for the Tribunal to disbelieve the case of the Claimants. The learned Member of the Tribunal came to the conclusion that the income of the deceased Suyog can be reasonably taken at Rs.15,000/- per month. What is borne out from the record is the fact that the deceased was having hotel business at least in the locality at Talegaon Dabhade. There is nothing on record to show that after his demise, any member of his family is running the said business. The income of the deceased taken from the hotel business as of the year 2009 at Rs.15,000/- per month is certainly reasonable. In fact, it is a conservative estimate of his income by the Tribunal. Therefore, in our view, the finding on this aspect calls for no interference.

9. As far as the increase in the future prospects of the earnings is concerned, such artificial increase cannot be granted unless there is a cogent material on record to prove that there was a

likelihood of steady increase in the income of the deceased. In the facts of the case, the details such as the income of the deceased for a period of 4 to 5 years prior to the date of accident have not been brought on record. If the income for the earlier period would have been placed on record, the Tribunal could have ascertained whether there was a steady rise in the income of the deceased. The burden was on the Claimants to prove that there were future prospects of increase in the income of the deceased especially when the deceased was in business. In absence of any evidence in support, the case that there were prospects of increase in the income of the deceased in future cannot be accepted. The earnings, therefore, as held by the Tribunal, ought to have been taken at the rate of Rs.15,000/- per month which even in the year 2009 would not have attracted payment of income tax. Thus, the yearly income ought to have been taken at Rs.1,80,000/-. The learned Member of the Tribunal has rightly deducted 1/4th amount towards the living and personal expenses of the deceased in terms of the decision of the Apex Court in the case of **Sarla Verma**. Accordingly, the sum of Rs.45,000/- will have to be deducted from the sum of Rs.1,80,000/-. Therefore, yearly dependency is Rs.1,35,000/-. The multiplier 15 has been rightly applied in terms of the decision of the Apex Court in the case of **Sarla Verma** as the age of the deceased was below 40 years and above 35 years. Thus, applying the multiplier 15, the total amount comes to Rs.20,25,000/-. The learned member of the Tribunal has granted a

sum of Rs.1,00,000/- towards the loss of consortium, a sum of Rs.25,000/- towards funeral expenses and a sum of Rs.50,000/- towards the loss of love and affection as the second and third Respondents were minors on the date of death. The said amounts are reasonable. Thus, the sum of Rs.1,75,000/- will have to be added to the sum of Rs.20,25,000/- and accordingly the total compensation payable on account of loss of dependency would be Rs.22,00,000/-. Thus, only this modification will have to be made to the impugned award while maintaining the other component of the expenditure on medical treatment. Thus, the total compensation will be Rs.22,00,000/- plus Rs.15,90,800/-. After deducting 20% on account of contributory negligence of the deceased, the compensation payable will be Rs.30,32,640/-. There is no reason to disturb the interest granted at the rate of 8% per annum from the date of filing of the Claim Petition.

10. As stated earlier, there were consent terms under which the Claimants have agreed to accept the compensation by taking the income only at the rate of Rs.12,000/- per month. The Claimants also agreed to waive the claim for future prospects of increase in the earnings of the deceased as well as a substantial part of interest. On evidence, we have found that the income of the deceased at the time of his death has been correctly taken at the rate of Rs.15,000/- per month by the Tribunal.

11. At this stage, it will be necessary to make a reference to the provisions of the Rule 7 of Order XXXII of the Code which reads thus:-

“7. Agreement or compromise by next friend or guardian for the suit—

(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

[(1A) An application for leave under sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor:

Provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the Court from examining whether the agreement or compromise proposed is for the benefit of the minor.]

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor”.

12. Sub-Rule (1-A) of Rule 7 of Order XXXII of the Code and the proviso thereto were incorporated by the Code of Civil Procedure (Amendment) Act, 1976 (with effect from 1st February 1977). Under Sub-Rule (1) of Rule 7, no next friend or guardian for the suit without the leave of the Court which is expressly recorded in the proceedings, is

entitled to enter into any agreement or compromise on behalf of a minor with reference to the suit in which he was acting as his next friend or guardian. Thus, even under the unamended Rule 7, the leave of the Court was necessary for entering into an agreement and compromise on behalf of a minor.

13. Now under the Sub-Rule (1-A) of Rule 7 of Order XXXII of the Code, an Application under Sub-Rule (1) for grant of leave shall be accompanied by an affidavit of the next friend or guardian. In addition, where the minor is represented by a pleader, a certificate of the pleader to the effect that the proposed agreement or compromise is for the benefit of the minor shall be accompanied with an Application for leave under Sub-Rule (1). The added Rule 1A gives an indication of what is to be considered while considering an application under Sub-Rule (1) of Rule 7 of Order XXXII of the said Code for grant of leave. The leave contemplated by Sub-Rule (1) can be granted only if the Court is satisfied that the proposed agreement or compromise is for the benefit of the minor. Therefore, when an application under Sub-Rule (1) of Rule 7 of the Order XXXII of the said Code is made, application of mind by the Court to the facts of the case is necessary. Only after consideration of all the relevant factors that the Court can come to a conclusion whether the proposed compromise or agreement is for the benefit of the minor. In the peculiar facts of the case, if the minor is

getting demonstrable advantage by entering into a compromise or an agreement, the Court will be justified in granting leave under Sub-Rule (1) of Rule 7 of the Order XXXII of the said Code.

14. Even before the Sub-Rule (1-A) was enacted, the law on the point was very clear. We may make a useful reference to the old decisions of a Division Bench of this Court. The first decision is in the case of *Chandulal Kanhayalal and another v. Nagindas Bapubhai and others*². In the said decision, the Division Bench held thus:

“The parties, for instance, may draft a decree which no self-respecting Court would dream of passing. Under those circumstances there is no legal obligation on the Court to put on its records a decree which would be a reflection on its competence. In this particular case the proposed decree is, generally speaking, in very confused terms. For our guidance we would, in the first place, ask the parties to number in consecutive paragraphs the preliminary decree of the learned Judge at p. 10 of the paper book, and then to show either by red ink alterations, or else by another full draft, exactly what will be the effect of the preliminary decree passed by the learned Judge as varied by the proposed consent order. I say this because this preliminary decree is an extremely long document. The proposed variations also run to a considerable length, and as at present advised I think it would give a great deal of unnecessary labour to anybody who wishes clearly to ascertain what is the effect of the joint orders, if he had to read first the preliminary decree, and then the document we have now before us”.

(Underline added)

15. In the said decision in the case of *Chandulal Kanhayala*, the Division Bench of this Court observed that the parties before it were under a misapprehension that the Court is obliged to pass a formal decree in the exact form which the parties have proposed. In the case of *Dhairyasingh Gordhandas and others v. Kissandas Tribhovandas Mangaldas and others*³, a Division Bench of this Court held that the leave can be granted under Sub-Rule (1) of Rule 7 of Order XXXII of the said Code provided the Court is satisfied that the compromise or agreement is beneficial to the minor. The Division Bench held that it is not practicable to lay down a definite or a hard and fast rule as to what particular material a Judge may call for before he is satisfied that the compromise is for the benefit of the minor.

16. In view of the Sub-Rule (1-A) of Rule 7 of Order XXXII of the said Code brought on the statute book, now there is some responsibility also on the pleader representing a minor through the next friend or guardian. He has to certify that the proposed agreement or compromise is for the benefit of the minor. Therefore, when such a certificate is issued by a pleader, he acts as an officer of the Court. He is required to certify that the proposed agreement or compromise is for the benefit of the minor only after application of mind. Such certificate may not be conclusive and does not bind the Court while considering

3 AIR 1926 Bom. 291

the issue of grant of leave. But such certificate issued by the pleader is also a relevant factor to be considered by the Court. Therefore, with some emphasis, we must hold here that while issuing such a certificate required to be filed by the Sub-Rule (1-A) of Rule 7, the Advocate acts more as an officer of the Court rather than as an Advocate representing one of the parties to the legal proceedings.

17. In the Claim Petition under Section 166 of the said Act, the Tribunals will have to be very vigilant while granting leave as contemplated by the Sub-Rule (1) of Rule 7 of the Order XXXII of the said Code. Perusal of the material on record is necessary with a view to ascertain whether the proposed compromise or agreement is beneficial to the minors. It is the duty of the Tribunal under the said Act to grant just compensation to the Claimants. Therefore, the Tribunal will have to examine whether considering the facts and circumstances case, the proposed compromise or agreement gives demonstrable advantage to the minor. In this case, our task was to see the evidence which was already on record. When the evidence on record clearly shows that even by making a conservative estimate, the income of the deceased was atleast Rs.15,000/- per month, we have come to the conclusion that entering into a compromise by accepting that the income of the deceased was only Rs.12,000/- per month is not in the interests of the minors. We are of the view that the compromise is not for the benefit of

the minor. That is the reason why we declined to grant leave under Sub-Rule (1) of Rule 7 of Order XXXII of the said Code.

18. Thus, the Appeal preferred by the Appellant must succeed in part and hence, we pass the following order:-

ORDER :

- (a) The impugned judgment and award is modified only to the extent that the total compensation payable will be Rs.30,32,640/- together with interest at the rate of 8% per annum from the date of filing of the Claim Petition till its realization. The directions given under the impugned Judgment and Award regarding apportionment, investment etc stand confirmed;
- (b) The learned Member of the Tribunal shall take appropriate steps for giving effect to the modified award;
- (c) If the amount of Rs.25,000/- deposited in this Court is still lying with this Court, the same shall be transferred to the concerned Tribunal;

- (d) The Appeal is partly allowed on above terms with no order as to costs;
- (e) The Civil Application Nos.3979 of 2014 and 1355 of 2015 do not survive and the same are disposed of. Civil Application No.2216 of 2015 for grant of leave is rejected.

(REVATI MOHITE DERE, J)

(A.S. OKA, J)

Certified to be true and correct copy of the original signed
Judgment/Order.