

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1264 OF 2006

1. Kashinath s/o Ganpatrao Pensalwar
Age 52 years, Occ. Agri and Business
2. Shobha w/o Kashinath Pensalwar
Age 47 years, Occ. Agri.a d Household
3. Smita d/o Kashinath Pensalwar
Age 18 years, Occ. Education

All R/o. Udgir, Tq. Udgir,
District Latur

...Appellants

versus

1. Nagnath s/o Tejappa Kulal
(dismissed as per Registrar's
order dated 17.3.2009)
2. Akash Ashokrao Shinde
Age 42 years, Occ. Business,
R/o. Namdeo Galli, Omerga
District Osmanabad
3. The New India Assurance Co. Ltd.
Through its Branch manager,
Branch Office at Chandra
Nagar, Latur

...Respondents

.....
Mr. R.R. Deshmukh, h/f Mr. R.B. Deshmukh for appellants
Mr. M.M. Ambhore, advocate for respondent No.3
.....

CORAM : V. K. JADHAV, J.
DATED : 12th APRIL, 2016

ORAL JUDGEMNT:-

1. Being aggrieved by the judgment and award dated 1.8.2006

passed by the Member, M.A.C.T. Udgir, in M.A.C.P. No. 15 of 2004, the original claimants have preferred this appeal to the extent of quantum.

2. Brief facts, giving rise to the present appeal, are as follows:-

a) On 1.12.2003, at 12.30 p.m. deceased Sachin was returning to his house on his motor bike from his Engineering college by left side of the road. On Udgir Solapur road, one truck bearing registration No. MWC 5897 driven by original respondent No.1 in high speed, came from opposite direction and gave a dash to motor cycle of deceased Sachin. In consequence of which, deceased Sachin died on the spot. Parents and sister of deceased Sachin filed claim petition bearing M.A.C.P. No. 15 of 2004 before the M.A.C.T. Udgir for grant of compensation under various heads.

b) The respondent Nos. 1 and 2 i.e. driver and owner of vehicle-truck involved in the accident, strongly resisted the claim by filing separate written statements. According to them, deceased Sachin himself was careless and negligent in driving his motor cycle and he himself gave dash to one third person by name Shaikh Nazir and thereafter gave a dash to the truck

and fell down on the road. According to them, driver of the truck was not rash and negligent while driving the truck at the time of accident. Respondent No.3 insurer has also resisted the claim petition on similar grounds. Learned member of the Tribunal, vide impugned judgment and award dated 1.8.2006 partly allowed the claim petition thereby directing the respondent Nos. 1 and 3 to pay compensation jointly and severally to the tune of Rs.1,14,334/- alongwith interest. Being aggrieved by the same, original claimants prefer this appeal to the extent of quantum.

3. Learned counsel for the appellants submits that the Tribunal has committed error while arriving at the conclusion that deceased Sachin had contributed negligence to the extent of 1/3rd. The Tribunal has erroneously exhibited the police statements of the witnesses and relying on those statements, held that the deceased Sachin had contributed negligence to some extent. The police statements can be used only for the purpose of contradiction and if the witness to that statement is not examined before the Court, the statement of such witness cannot be read in evidence. Learned counsel submits that the police statement is not a substantive part of evidence and the same cannot be read in evidence. The claimants have examined one eye witness to the incident and he has deposed

that accident had taken place on account of rash and negligent driving of driver of the truck and deceased Sachin was not responsible for accident, in any manner. The Tribunal has unnecessarily given weightage to registration of crime on the basis of complaint lodged by one Shaikh Najir Ahmed. Learned counsel submits that even assuming that prior to the accident, deceased Sachin had given dash to Shaikh Najir by riding his motor cycle, further there is no evidence to show that thereafter deceased Sachin driven the motor cycle in such manner that he contributed negligence to the extent, as worked out by the Tribunal. Learned counsel submits that there is clear evidence to show that driver of the truck alone is responsible for the accident. Learned counsel submits that the driver of the truck has not entered into witness box to support his pleadings. The Tribunal has considered the notional income of deceased at Rs.1500/- p.m. The Tribunal should have considered the notional income of deceased at Rs.3000/- p.m. deceased Sachin was also personally cultivating the agriculture land and the same is not considered by the Tribunal even though 7x12 extract was produced. The Tribunal has discarded 7x12 extract for the reason that Talathi, who has issued 7x12 extract, is not examined before the Tribunal. Learned counsel for the appellants submits that instead of applying multiplier 18, the Tribunal has erroneously applied the multiplier 17.

5. Learned counsel for the respondent-insurer submits that the Tribunal has rightly considered the negligence on the part of deceased Sachin. Learned counsel submits that the certified copy of the F.I.R. Exh.45 clearly shows that deceased Sachin had driven his motor cycle in rash and negligent manner and gave a dash to one Shaikh Najir Ahmed Shaikh just prior to the accident. Even it is stated in the said F.I.R. that after giving dash to Shaikh Najir Ahmed, deceased Sachin could not control his motor cycle and thereafter dashed against the truck coming from Udgir side and died on the spot. Learned counsel submits that the Tribunal has therefore, rightly considered the contributory negligence on the part of deceased Sachin to the extent of $\frac{1}{3}^{\text{rd}}$. In absence of any income proof, the Tribunal has rightly considered the notional income of deceased Sachin and accordingly awarded the compensation. Learned counsel submits that however, the Tribunal instead of deducting $\frac{1}{2}$ of the income towards personal expenses, deducted $\frac{1}{3}$ amount towards personal expenses.

6. On considering the evidence on record, it appears that the Tribunal has wrongly arrived at conclusion that deceased Sachin had contributed negligence to some extent. The Tribunal exhibited the police statement of witness and accordingly arrived at the said

conclusion. The same is not permissible. The police statement of witnesses can be used only for the purpose of omissions and contradictions and cannot be read in evidence as substantive part of evidence. The respondent No.1 though resisted the claim petition by filing his written statement, has failed to examine himself on oath. On the other hand, the claimants have examined one eye witness to the incident, who has deposed that accident has taken place due to rash and negligent driving of truck driver alone and deceased Sachin was not responsible for the accident. There is no reason to disbelieve the said witness and there is nothing in the cross examination to discard his evidence. So far as the F.I.R. at Exh.45 is concerned, said Shaikh Najir has stated by lodging the complaint that he learnt that deceased Sachin after giving dash to him lost control over the motor cycle and gave dash to the truck. The said statement is hearsay evidence and same cannot be considered unless and until Shaikh Najir is examined as witness before the Court. From the F.I.R. Exh.45 nothing can be concluded, especially to hold that deceased Sachin himself had contributed the negligence to some extent. Thus, in my opinion, deceased Sachin had not contributed negligence and driver of the truck involved in the accident alone is responsible for the accident.

7. So far as the notional income of deceased Sachin is

concerned, the Tribunal has erroneously considered it as Rs.1500/- p.m. He was personally cultivating the land the same is evident from 7x12 extract produced on record. However, there cannot be any loss in the agriculture income since corpus of land remained as it is even after accidental death of deceased Sachin. At the most, loss on account of lack of supervision can be considered to some extent. In absence of any income proof, his notional income can be considered. Thus, the notional income of deceased alongwith loss of agricultural income to the extent of supervisory charges, the loss of income comes to Rs.3000/- p.m. Deceased Sachin was unmarried and therefore, 50% of the amount from his income is required to be deducted towards his personal expenses. Thus, the loss of dependency comes to Rs.1,500/- p.m. correspondence to Rs.18,000/- per year. Deceased Sachin was 23 years old at the time of his accidental death and the same is not disputed. The Tribunal could have considered the multiplier 18 instead of 17. By applying the multiplier 18, the loss of income/dependency comes to Rs.3,24,000/-. The Tribunal has awarded just and reasonable compensation under the heads of non pecuniary loss. So far as the loss of income/dependency is concerned, the same is required to be re-calculated. The learned Tribunal has wrongly awarded the rate of interest on the compensation amount. Thus, the break up of compensation under various heads, can be broadly categorized is as

under:-

i)	Loss of income/dependency	Rs. 3,24,000.00
ii)	Loss of love and affection	Rs. 40,000.00
iii)	Expenses for funeral and carrying out dead body	Rs. 2,500.00

		Rs. 3,66,500.00
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Thus, the claimants are entitled to Rs.3,66,500.00 (Rupees Three lacs sixty six thousand and five hundred only). Hence, I proceed to pass the following order:-

O R D E R

- I. The appeal is hereby partly allowed with proportionate costs.

- II. The judgment and award dated 1.8.2006 passed by the learned Member, M.A.C.T. Udgir in M.A.C.P. No. 15 of 2004 is modified in the following manner:-

The opponent Nos. 1 to 3, jointly and severally, shall pay an amount of Rs.3,66,500/- (Rupees Three lacs sixty six

thousand five hundred) to the claimants with interest @ 9% p.a. from the date of application till realization of the amount.

III. The award be drawn up accordingly.

IV. Appeal is accordingly disposed of.

(V. K. JADHAV, J.)

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