

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 321 OF 2017

SHRI MADAVRAO SHRIPAT WANKHEDE AND ORS
VERSUS
SHRI SHIRISH ANAND MAHAJAN AND ORS

...
Advocate for Appellants : Mr. Mukul S. Kulkarni
Advocate for Respondent No.3 : Mr. S. R. Bodade
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CORAM : V. K. JADHAV, J.
DATED : 20th JULY, 2017

PER COURT:-

1. By consent, heard finally at admission stage.
2. Being aggrieved by the judgment and award dated 25.11.2016 passed by the learned Chairman, M.A.C.T. Jalgaon in M.A.C.P. No. 436 of 2009, the original claimants have preferred this appeal.
3. Brief facts, giving rise to the present appeal are as follows:-
 - a) On 10.1.2009, at about 5.00 p.m. deceased Umesh was riding motorcycle and proceeding from Sakri Chadvel to Kondaibari. One Vishal Chavan was the pillion rider. One tractor, attached with trolley, was proceeding in the same direction. Deceased Umesh blew horn of the motorcycle and requested for the side. Initially, driver of the said tractor had taken the vehicle tractor attached with

trolley to the left side of road and thereby gave signal to deceased Umesh to overtake his vehicle. However, before deceased Umesh could cross the tractor, the driver of the said tractor with trolley suddenly taken his vehicle on middle portion of the road. In consequence of which, deceased Umesh had received smash of trolley on his head and other parts of the body and in consequence of which he has sustained multiple injuries and died on the spot.

b) The appellants-claimants approached the Tribunal by filing M.A.C.P. No. 436 of 2009 for grant of compensation under various heads. It has been contended in the claim petition that the driver of said tractor had driven it in rash and negligent manner and caused death of deceased Umesh. Deceased Umesh was working at Primary Health Center at Chadvel, Tq. Sakri, as a Medical Officer, Class-II, on monthly salary of Rs.21,680/-. Accordingly, the appellants-claimants claimed compensation to the tune of Rs.39,00,000/- and some odd amount, however, restricted their claim to the tune of Rs.10,00,000/-.

c) The respondent Nos. 1 and 2 have resisted the claim petition by filing written statement. It has been contended that the driver of the said tractor trolley had driven it by observing the traffic Rules. Deceased Umesh had tried to overtake the said tractor and he was

riding the motorcycle in high speed. It has also been contended that deceased and pillion rider were chitchatting at that time. It has been contended that handle of the motorcycle dashed against rear portion of the tractor and as a result of which motorcycle slipped, the deceased fell down and thus, he sustained head injury. It has been contended that deceased Umesh is entirely responsible for the accident and driver of the tractor was not responsible. In the alternate, it has been contended that the said tractor is insured with respondent No.3, and as such, respondent No.3 insurer is liable to pay the compensation if awarded by the Tribunal.

d) Respondent No.3 insurer has also resisted the claim petition by filing written statement. It has been contended that deceased Umesh alone was responsible for the accident. Respondent No.3 insurer has also raised some other grounds in the written statement, however, those grounds are not relevant since the respondent insurer has not preferred any appeal or cross appeal.

e) The appellants-claimants have adduced oral and documentary evidence in support of their contentions. Respondents have not adduced any evidence. Learned Chairman of the Tribunal allowed the petition with costs and thereby directed the respondent Nos. 1 to 3 to pay compensation of Rs.10,45,000/-, jointly and severally with

interest @ 7.5% p.a. from the date of petition till realization of the entire amount.

f) The learned Chairman of the Tribunal has held that respondent No.1 i.e. driver of tractor and deceased Umesh were equally responsible for the accident and accordingly deducted 50% of the amount towards negligence on the part of deceased Umesh. Being aggrieved by the said finding of negligence on the part of deceased Umesh and the quantum of compensation, as awarded by the Tribunal, original claimants have preferred this appeal.

4. Learned counsel for the appellants-claimants submits that the appellants-claimants have examined pillion rider/witness No.3 Vishal Chavan. He is an eye witness to the accident and he had also sustained injuries in the said accident. He has deposed that deceased was driving the motorcycle in slow speed and by keeping the motorcycle by left side of the road. Deceased Umesh blew horn to overtake the said tractor and accordingly driver of said tractor gave side to the motorcycle to overtake the tractor. However, before the motorcycle could cross the tractor, it was suddenly taken on road and as such, accident had taken place. Learned counsel submits that considering the police papers, placed on record and in the light of oral evidence of eye witness, it is clear that deceased Umesh had

received smash of trolley on his head and other parts of body and he died due to injuries sustained in the said accident. Learned counsel submits that road on the spot of accident was narrow and driver of the tractor had not taken precautions. Initially, he had given side to the motorcycle to overtake his tractor but abruptly he took the tractor attached with trolley on the middle portion of the road. The learned Chairman of the Tribunal has not considered the evidence on record and erroneously recorded the finding that the driver of the tractor and deceased Umesh are equally responsible for the accident. The Tribunal ought to have recorded the finding that the driver of tractor alone is responsible for the accident and deceased Umesh was not at fault. Learned counsel submits that though respondent Nos. 1 and 2 have narrated some different story in their written statement, failed to substantiate the same by examining the driver of tractor to substantiate its defence. Learned counsel submits that adverse inference can be drawn against the respondent since the respondent failed to substantiate their defence by examining the driver of the tractor.

5. Learned counsel for the appellants-claimants submits that so far as the quantum of compensation is concerned, the Tribunal has not made any addition in the income of deceased Umesh towards his future prospects. Deceased Umesh was 26 years of age at the time

of his accidental death and in the light of ratio laid by Supreme Court in the case of ***Sarla Verma and others vs. Delhi Transport Corporation and another, reported 2009 (5) Mh.L.J. 775***, the Tribunal ought to have made addition in the income of deceased to the extent of 50% which is in consonance with his age at the time of his accidental death. Learned counsel submits that even the Tribunal has erroneously awarded interest @ 7.5% instead of 9%.

6. Learned counsel for the appellants in order to substantiate his contentions, placed reliance on the following judgments:-

- I) Municipal Corporation of Greater Bombay vs. Hari Tukaram Katake and others, reported in 2008 (1) Bom.C.R. 913
- ii) New India Assurance Co. Ltd. vs. Alpa Rajesh Shah, reported in 2014 (1) Bom.C.R. 755

7. Learned counsel for the respondent-insurer submits that the fact that dash was given from the right side back portion of the trolley is sufficient to draw the inference that deceased Umesh had driven the motorcycle in negligent manner. Admittedly, it was narrow strip of road and on such narrow road, deceased Umesh should have taken care before overtaking the vehicle like tractor which was proceeding ahead of his motorcycle. The Tribunal has considered oral and documentary evidence placed on record and correctly

recorded the finding that respondent No.1 driver of the tractor and deceased Umesh contributed negligence equally. No interference is required.

8. Learned counsel for the respondent-insurer submits that so far as the quantum of compensation is concerned, deceased Umesh was not permanent employee. The appellants-claimants have not placed on record pay rolls and appointment letter. It is thus not clear that deceased Umesh was getting fixed salary. Learned counsel submits that the Tribunal has considered that the employment of deceased Umesh was temporary and his tenure was extended only up to 28.02.2009 and there can be no addition under the head of future prospects as per the ratio laid down in the case of ***The New India Assurance Co. Ltd. vs. Alpa Rajesh Shah and others, reported in 2014 (2) Mh.L.J. 17***. Learned counsel submits that the Tribunal has erroneously applied the multiplier 17 instead of 13. The Tribunal ought to have applied the multiplier 13 by considering the average age of the parents of deceased Umesh and not as per the age of deceased Umesh. The Tribunal has awarded just and reasonable compensation. No interference is required.

9. On careful perusal of pleadings, evidence and the impugned judgment and award passed by the Tribunal, it appears that the

appellants-claimants mainly relied upon the evidence of eye witness Vishal Chavan. P.W.3 Vishal Chavan was the pillion rider and he had sustained injuries in the said accident. He has deposed that deceased Umesh started overtaking the said tractor after blowing horn of the motorcycle, indicating his intention to overtake the tractor and after the driver of tractor gave signal, permitting deceased to overtake the tractor, deceased Umesh started overtaking the tractor. P.W.3 Vishal Chavan has further deposed that while overtaking the said tractor, driver of the tractor suddenly taken the said tractor on the middle portion of the road. In consequence of which, deceased Umesh sustained smash of right side portion of the trolley and died on the spot. On perusal of complaint Exh.37, it appears that P.S.I. Sonwane, has lodged the said complaint on behalf of State and a specific reference is given to the statement of said witness Vishal Chavan in the complaint. P.W.3 Vishal Chavan has stated before the investigating officer and pointed out that the driver of tractor had driven it in rash and negligent manner and caused the accident. Thus, the contents of compliant Exh.37 corroborates oral evidence of witness Vishal Chavan before the Court.

10. Further, on perusal of seizure panchnama of vehicle tractor, Exh.39, it appears that above the back side tyre of right portion of trolley, a damage to the trolley is noticed. Learned counsel for the

appellants-claimants has rightly pointed out that judicial note can be taken that back side tyres of the trolley are not at the extreme back portion of the trolley but those are usually in the middle portion of the trolley. On perusal of statement of witness Dr. Vishal Chavan, recorded by the police during investigation, Exh.41, it appears that he has disclosed the accident in detail in the same manner, as he deposed before the court. Needless to state that his police statement is admissible in civil proceeding. On perusal of postmortem note, particularly para 17 of the post mortem note, I find that deceased Umesh had sustained external injuries on his left ribs, chest and left side of head. On internal examination, in column No.19, fracture on palpaton was noticed and neck movement rotated more than 180 degree. In the opinion of doctor, who has conducted the postmortem examination, deceased died due to haemorrhagic shock due to cardio-respiratory failure, due to brain and lungs injuries as detailed in column Nos. 17, 18, 19 and 20 of the postmortem report.

11. Though the respondents have not examined any witness including the driver of the tractor, however, even if the contention raised in the written statement is considered to some extent, the injuries, as discussed above, are not possible by fall on the road and the injuries, as detailed above, are only possible by smash. Thus,

the postmortem report Exh.42 also corroborates case of the appellants-claimants. It has come on record that road at the spot of accident is narrow strip. Probably driver of the tractor may not be in a position to foresee the road condition ahead and even if he has given side to the motorcycle, he might have been forced to take the tractor suddenly on the middle portion of road. It was thus incumbent upon deceased Umesh to take certain care while overtaking the vehicle like tractor on such a narrow strip. However, in the given set of facts, I do not agree with the finding recorded by the Tribunal that deceased Umesh and respondent No.1 driver of the tractor are equally responsible for the accident. In view of the discussion above, in my considered opinion, driver of the tractor is responsible to the extent of 75% whereas the rider of motor cycle is responsible to the extent of 25%. I record my finding to issue No.1 accordingly.

12. So far as quantum of compensation is concerned, considering the fixed income by way of salary as Medical Officer appointed at Primary Health Center, Chadvel, and there were definite prospects of increase in the income of deceased, the Tribunal ought to have made addition in the salaried income of deceased Umesh towards his future prospects. I do not find any substance in the submission made on behalf of the respondent-insurer that there is no sufficient evidence on record to make addition in the salaried income of

deceased towards future prospects since the documents like appointment letter and pay rolls are not submitted before the Tribunal.

13. The appellants-claimants have examined witness No.2 Tushar Arun Dixit, he is serving as junior clerk in Health Department, Zilla Parishad, Dhule. He has brought before the Court the record and placed salary certificate at Exh.51, alongwith the chart, showing deduction of amounts from the salary of Medical Officer, appointed at Primary Health Center. There is no reason to discard the oral evidence of said Tushar Dixit, who is a Government servant. Deceased Dr. Umesh was working as Medical Officer at Primary Health Center, Chadvel, Tq. Sakri, District Dhule. As per the record, he was working as Medical Officer at the said Primary Health Center since 30.8.2004. Further, copy of pay roll is also placed on record indicating that the Zilla Parishad is paying fixed salary to the Medical Officers working at various Primary Health Center, within the jurisdiction of Zilla Parishad, Dhule. There is no reason to discard this evidence. After necessary deduction, the Tribunal has considered the salaried income of deceased Umesh at Rs.20,000/- p.m. Thus, considering the age of deceased at the time of his accidental death, 50% addition in the salaried income is required to be made towards future prospects. Learned counsel for the respondent-insurer

vehemently submitted that deceased was not permanent employee and his appointment was up to 28.2.2009 only. However, in view of above discussion, deceased Umesh was working since 2004 as a Medical Officer at Primary Health Center, Chadvel and he was getting fixed salaried income, there were definite prospects of increase in the income and as such future prospects are required to be considered as an exception.

14. It appears that the Tribunal has erroneously applied multiplier by considering the age of deceased. The Tribunal ought to have considered the average age of the appellants-claimants and as such, relevant multiplier would be 13 instead of 17. Further, the amount of 25% is required to be deducted towards negligence on the part of deceased. Since deceased Umesh was unmarried son and as such 50% amount from the salaried income is required to be deducted towards his personal and living expenses. Thus, the amount of Rs.15,000/- p.m. (corresponds to Rs.1,80,000/- per annum) would be the loss of future income. By applying the multiplier 13, the total loss of future income/dependency comes to Rs.23,40,000/-. After deducting the amount to the extent of 25% on account of negligence on the part of deceased, the total amount of compensation under the head of loss of future income comes to Rs.17,55,000/-. The amount of Rs.25,000/- awarded by the Tribunal towards funeral expenses is

just and proper. I do not find any reason to interfere in it. Thus, the appellants-claimants are entitled for total compensation of Rs.17,80,000/- (Rs.17,55,000/- + Rs.25,000/-) with interest at the rate of 9% p.a. from the date of filing of petition till realization of entire amount. Thus, the judgment and award passed by the Tribunal is required to be modified so far as the quantum of compensation is concerned. 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 25.11.2016 passed by the learned Chairman, M.A.C.T. Jalgaon, in M.A.C.P. No. 436 of 2009 is hereby modified in the following manner:-

“The respondent Nos. 1 to 3, being jointly and severally liable, do pay to the petitioners the compensation of Rs.17,80,000/- (Rupees Seventeen lacs eighty thousand) (inclusive of interim amount of Rs.50,000/- payable under the principle of 'no fault liability') with interest @ 9% p.a. from the date of filing of petition till realization of the amount.”

- III. The award be drawn up as per the above modification.
- IV. The appeal is accordingly disposed of.
- V. The deficit court fees, if any, be deposited within a period of three weeks from today.

(V. K. JADHAV, J.)

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