IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3654 OF 2016

UNITED INDIA INSURANCE COMPANY LTD
VERSUS
SANTOSHI VENKATRAO CHAVAN AND OTHERS
...
Advocate for Appellant : Mr Kanade Arun G.
Advocate for Respondents 1-4 : Mr M.D. Narwadkar
Respondent no.5 served
...
CORAM : V.K. JADHAV, J.
Dated: March 29, 2017
...

PER COURT :-

1. Heard finally with consent at admission stage.

2. Being aggrieved by the judgment and award passed by the Member, Motor Accident Claims Tribunal, Nanded dated 6.11.2015 in MACP No.219/2013, the original respondent no.2 insurer has preferred this appeal.

3. Brief facts, giving rise to the present appeal are as under :-

a] On 30.1.2013 deceased Venkatrao after completion of his training work at Mukhed started returning to Nanded by his motor cycle. On way on Naygaon-Narsi road, at about 06.45 p.m. to 7.00 p.m. one jeep bearing registration No. MH-30/B-0489 has given dash to his motorcycle on its backside. In consequence of which, deceased Venkatrao fell down on the road and sustained injuries on his head and other parts of the body. He died on the spot.

b] Legal representatives/claimants approached to the Tribunal by filing M.A.C.P. No.219/2013 for grant of compensation under various heads. It has been contended in the claim petition that, the driver of the said jeep had driven the vehicle in a rash and negligent manner and caused the accident. Deceased Venkatrao was serving as a Clerk in District Central Co-operative Bank at Nanded on monthly salary of Rs.27,131/-. The claimants were entirely depending upon his income and they have no independent source of income as such.

c] Respondent-owner has failed to file his written statement and therefore hearing of the claim petition ordered to proceed without his written statement.

d] The appellant-insurer has strongly resisted the claim petition. It has been contended that the driver of the jeep was not responsible for the accident and the deceased, who was riding the motorcycle at the time of accident, was at fault. It has been contended that, the jeep had not given dash to the motorcycle. Deceased Venkatrao had lost his control over the motorcycle in the darkness and fell down on the road and accordingly sustained injuries. It has been contended that, crime bearing No.7/2013 came to be registered against unknown vehicle and it was not registered against the driver of the said jeep. The claimants have claimed exorbitant compensation. In the alternate, the appellant-insurer has contended that, deceased Venkatrao had also contributed the negligence to the extent of 50%. Deceased was also not holding valid and effective driving licnece at the time of accident and also the driver of the jeep.

e] The claimants have adduced oral and documentary evidence in support of their contentions and the appellant-insurer has also examined one witness.

f] The learned Member of the M.A.C.T., Nanded by its impugned judgment and award dated 6.11.2015 partly allowed the claim petition and thereby directed the respondents to pay jointly and severally an amount of Rs.38,75,753/- after deducting the income tax if any inclusive of amount received towards interim compensation to the petitioners with interest at the rate of 7% p.a. from the date of petition till its realization.

4. The learned counsel for the appellant-insurer submits that, the appellant-insurer has examined the driver of the vehicle jeep involved in the accident. He has deposed that at the relevant time, he was driving said jeep and at that time road widening work was going on and metal was lying on the road. He has further deposed that motorcycle was going ahead of his vehicle. Rider of the motorcycle suddenly applied brakes of the motorcycle and therefore his vehicle dashed to the motorcycle. Learned counsel submits that, on account of sudden application of the brakes by the deceased, the

accident had taken place and as such the driver of the jeep was not responsible for the accident. In the alternate, the learned counsel submits that, in the backdrop of the peculiar facts of the case, the Tribunal ought to have considered contributory negligence on the part of the deceased to the extent of 50%. Learned counsel submits that, the Tribunal has not deducted 10% of the amount towards income tax while considering the salaried income of the deceased for determination of loss of income. Learned counsel submits that, even though, the Tribunal has made addition in the income of deceased at 30% towards his future prospects, no amount is deducted towards income tax from the said amount.

5. Learned counsel for respondents-original claimants submits that, witness Sanjay Kure has deposed before the Tribunal that at the time of accident road widening work was going on and metal was lying on the road. Even, said witness Sanjay has stated in his examination-in-chief itself that there road widening work was going on and, therefore, the motorcycle rider

might have applied brakes. Learned counsel submits that, it was for the driver of the jeep which was following said motorcycle to take care when road widening work was going on. Even though, deceased had suddenly applied brakes to his motorcycle because of the road widening work was going on at the spot of accident, the driver of the jeep had not taken care while driving his jeep and thus given dash to the motorcycle on its backside. Learned counsel submits that dash was given to the motorcycle on its backside is sufficient to draw inference that the driver of the jeep had driven the vehicle jeep in a rash and negligent manner and he was alone responsible for the accident. Even though the Tribunal has considered the contributory negligence to the extent of 15% on the part of the deceased against which respondents-claimants have not preferred any appeal.

6. Learned counsel submits that the claimants have examined witness no.2 Pandurang Kadam, who is Branch Manager in Nanded District Central Cooperative Bank limited to prove the pay slip of the salaried income

of deceased Venkatrao which is produced on record marked at exh.51. In the pay slip exh.51 no deduction is shown towards the income tax. Learned counsel submits that, if the deceased was receiving income chargeable under the head of salaries, the employer if fails to deduct the income tax at source which is commonly known as T.D.S. from the employees salary, then penalty of non-deduction of T.D.S. as prescribed under the provisions of section 201(1A) of the Income Tax Act, 1961 would be on the employer. In absence of any deduction at source by the employer, the presumption would be that salaried income of the deceased was not taxable and therefore no income tax was deducted at source. It is for the appellant-insurer to prove by producing evidence that the employer failed to deduct the TDS from the salary of the employee though his salaried income was taxable.

7. Learned counsel for respondents-claimants in order to substantiate its contentions placed his reliance on a case **Vimal Kanwar and others Vs. Kishore Dan and ors reported in 2013 AIR SCW 3258**.

8. On careful perusal of the evidence lead by the parties and judgment and award passed by the Tribunal, particularly, the evidence of witness Sanjay Kure examined by the appellant-insurer, it appears that witness Sanjay was the driver of the jeep involved in the accident and he has almost deposed in favour of the claimants. According to said witness Sanjay he was driving his vehicle jeep behind the motorcycle of the deceased and at the spot of incident road widening work was going on and metal was also lying on the road. He has further deposed that, suddenly rider of the motorcycle applied brakes and therefore, his vehicle jeep dashed to the motorcycle. He has further stated in the examination-in-chief itself that there was road widening work was going on and, therefore, rider of the motorcycle might have applied brakes and incident took place. It is thus clear that road widening work was going on and there were more than one reasons for the deceased to drive his vehicle motorcycle slowly and to avoid any untoward incident by application of the brakes to the motorcycle as and when occasion so arises. It was for the driver of the jeep, who was

following said motorcycle, to take utmost care and caution to anticipate even sudden stoppage of the vehicle proceeding ahead of his jeep due to road widening work. Though, the driver of the jeep was at fault entirely, the Tribunal has considered the fault on the part of deceased to some extent and held that the deceased had contributed the negligence to the extent of 15%. In view of this, I do not find any substance in the submission made by the appellant-insurer that deceased Venkatrao had contributed the negligence to the extent of 50%.

9. So far as quantum of compensation is concerned, the learned counsel appearing for the appellant-insurer has restricted his submissions to the extent of deducting salaried income of the deceased towards income tax. On perusal of the pay slip exh.51, it appears that no deduction is made towards income tax and only Rs.200/- shown to have been deducted towards professional tax alongwith other deductions. So far as other deductions under different heads are concerned, those are not required to be considered but

amount towards professional tax should have been considered by the Tribunal. In a case **Vimal Kanwar and others Vs. Kishore Dan and ors** (supra) relied upon by the learned counsel for the respondents-claimants, in paragraph no.21 of the Judgment, the Supreme Court has dealt with a issue '*Whether the income tax is liable to be deducted for determination of the compensation under the Motor Vehicles Act*'? and by referring the observations made in the case of **Sarla Verma and another reported in (AIR 2009 SC 3104)** has made following observations :-

> *This Court further observed that "where the annual income is in taxable range, the word "actual salary"? should be read as "actual salary less tax". Therefore, it is clear that if the annual income comes within the taxable range income tax is required to be deducted for determination of the actual salary. But while deducting income-tax from salary, it is necessary to notice the nature of the income of the victim. If the victim is receiving income chargeable under the head "salaries" one should keep in mind that under Section 192 (1) of the Income-tax Act, 1961 any person responsible for paying any income chargeable under the head "salaries" shall at the time of payment, deduct income-tax on estimated income of the employee from "salaries" for that financial year. Such deduction is commonly known as tax deducted at source ('TDS' for short). When the employer fails in default to deduct the TDS from employee salary, as it is his duty to deduct the TDS, then the penalty for non-deduction of TDS is prescribed under Section 201(1A) of the Income-tax Act, 1961.*
>
> *Therefore, in case the income of the victim is only from "salary", the presumption would be that the employer under Section 192 (1) of the Income- tax Act, 1961 has deducted the tax at source from the employee's salary. In case if an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the employer failed to deduct the TDS from the salary of the employee.*

> *However, there can be cases where the victim is not a salaried person i.e. his income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income tax and no further tax has to be deducted from the income.*

10. Thus on careful perusal of pay slip at exh.51, only inference could be drawn that salaried income of the deceased was not taxable and, therefore, the employer has not shown any deductions at source from his salary towards income tax. Though the appellant-insurer has not raised any specific defence to that effect in the pleadings, it is for the appellant-insurer to prove by producing evidence to substantiate that employer failed to deduct the TDS from the salary of deceased Venkatrao. In absence of that, I am not inclined to accept the submissions made on behalf of the appellant-insurer on this point.

11. In view of the above discussion, the judgment and award passed by the Tribunal requires modification to the extent of deductions as shown in the salary slip exh.51 to the tune of Rs.200/- as professional tax. Thus, the claimants are entitled for the compensation of

Rs.38,47,492/- instead of Rs.38,75,153/- as awarded by the Tribunal. Hence, following order.

ORDER

I] Appeal is hereby partly allowed. No costs.

Ii] The judgment and Award passed by the Member, Motor Accident Claims Tribunal, Nanded in MACP No.219/2013 dated 6.11.2015 is hereby modified in the following manner :-

a] The respondents no.1 and 2 do pay jointly and severally amount of Rs.38,47,492/-(Rs. Thirty eight lacs forty seven thousand four hundred and ninety two only) inclusive of the amount received towards the 'No Fault Liability', to the petitioners with interest @ 7% p.a. from the date of petition till its realization.

Iii] Rest of the Judgment and award stands confirmed.

IV] Award be drawn up as per the above modifications.

V] Needless to say that if the amount is deposited before this Court as per the award passed by the Tribunal, the same shall be adjusted in the modified award as above.

V] The claimants are entitled to withdraw the amount as per the award after modification and the amount in excess if any shall be refunded to the appellant-insurer.

VII] First Appeal accordingly disposed of.

sd/-

(V.K. JADHAV, J.)

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aaa/-