

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 3751 OF 2016

RAJENDRA BABURAO MADKAR AND ANOTHER
VERSUS
SUNIL BABASAHEB GAPAT AND OTHERS

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Advocate for Appellants : Mr. S. D. Tawshikar, h/f Mr. Ashok S. Pavse.

Advocate for Respondent Nos.1 & 2 : Mr. S. G. Chapalgaonkar.

Advocate for Respondent No.3 : Mr. Dhananjay P. Deshpande.

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CORAM : **V. K. JADHAV, J.**

DATE : 17th January, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and award passed by the Motor Accident Claims Tribunal, Beed dated 24th June, 2016 in MACP No.130 of 2013, the original Claimants have preferred this appeal.

3 Brief facts giving rise to the present appeal are as follows:

- i. On 13th April, 2013 at about 05:00 am in the morning, deceased Amol Rajendra Madkar and his friend Anand Gangaram Jadhav were proceeding by

motorcycle bearing registration No.MH-23-AE-5991 from Barshi. On way, near Pargaon on highway No.211, one truck bearing registration No.MH-25-B-7462 was parked on the road. The driver of the said truck did not give any signal by electronic indicators. Consequently, the motorcycle being driven by Anand Gangaram Jadhav dashed against the back portion of the truck. Deceased Amol was the pillion rider. The parents of deceased Amol have filed MACP No.130 of 2013 for grant of compensation under various heads. It is contended that at the time of accidental death, the age of Amol was 19 years. He was painter and was earning Rs.30,000/- per month. The Appellants / Claimants have accordingly claimed the compensation of Rs.15,00,000/- against the Respondents.

- ii. Respondent No.1 / owner has resisted the claim petition by filing his written statement Exhibit – 16. He has contended that the rider of the motorcycle was responsible for the accident. In the additional written statement, it is submitted that there was no fault on

the part of the driver of vehicle truck. The tires of the truck were burst and it was kept extremely on the left side of the Kaccha portion of the road in breakdown condition. The rider of the motorcycle could not control as it was driven in excessive high speed and thereby gave dash to the truck.

- iii. Respondent No.3 / Insurer has also contested the claim by filing written statement Exhibit – 14. Respondent No.3 has also raised the similar plea as of Respondent No.1 / owner.
- iv. The Claimants have adduced oral and documentary evidence in support of their contention. Respondents have not adduced any evidence. The learned Member of the Motor Accident Claims Tribunal, Beed by judgment and award dated 24th June, 2016, dismissed the petition. Hence, this appeal.

4 The learned counsel for Appellants / original Claimants submits that the said vehicle truck was parked in the middle portion of the road. Accident had taken place at 05:00 am in the morning. The driver of the truck had not kept on any signal indicating thereby that the

vehicle like truck kept stationary. It was thus not possible for the rider of the motorcycle to notice the said truck in absence of any indicators at the dawn time. The learned counsel submits that the owner of the truck has not denied the accident. The owner of the truck has raised the defence that the tires of the truck were burst and it was parked on extremely left side of the Kaccha portion of the road in breakdown condition and the rider of the motorcycle was driving it in a fast and excessive speed and thus dashed against the back portion of the truck. The Claimants have examined P.W.1. Admittedly, he has not witnessed the accident. The learned counsel submits that the Claimants have provided all the necessary details and also produced the police papers and charge-sheet to demonstrate that the accident had taken place in a particular manner. The Respondent / owner has also not denied the same. Thus, by application of principles of *res ipsa loquitur*, the burden shifts on Respondent No.1 / owner to prove that the driver of the truck was not rash and negligent while keeping the truck in stationary position on almost middle portion of the road without keeping on the indicators. The Tribunal has however, not considered this aspect of the case and dismissed the claim petition in to to.

The learned counsel submits that deceased Amol

was doing the painting work and he was in the employment of Balrjanv Construction institution of monthly salary of Rs.25,000/-. The Claimants have examined the proprietor of the said institution to prove the income of deceased Amol. Deceased Amol was 19 years of age at the time of his death. Considering his income, the Tribunal ought to have awarded just and reasonable compensation as admissible in law. The learned Member of the Tribunal has not considered anything and dismissed the claim petition in to to. The learned counsel submits that the Claimants are also entitled for the compensation under non-pecuniary heads such as funeral expenses, loss of estate and loss of love and affection etc.

5 The learned counsel for Respondent / Insurer submits that as per the contents of spot Panchanama Exhibit – 25, the said truck was kept on the left portion of the road and it was in breakdown condition. It further appears from the contents of the spot Panchanama that the said motorcycle gave dash to the right back portion of the truck. The learned counsel submits that as noted in the spot Panchanama, the road on the spot is 30 feet in width and sufficient space was left for the vehicles plying on that road. As per the spot Panchanama, the motorcycle was badly damaged and its

indicators, mudguard and other parts were broken. The learned counsel submits that the evidence in the form of FIR and spot Panchanama unmistakably point out that the rider of the motorcycle alone was responsible for the accident. The learned counsel submits that in the alternate, if this Court comes to a conclusion that the driver of the truck was at fault then contributory negligence on the part of the rider of the motorcycle may be considered. The learned counsel submits that if this Court comes to a conclusion of awarding the compensation then it has to be considered that the evidence of Witness No.2 – Bharat Deshmane is not at all convincing. The Claimants have examined the said witness on the point of income of deceased Amol. According to said witness, Bharat Deshmane is the proprietor of one Balrjanv Construction institute and the said institute was paying Rs.25,000/- per month to deceased Amol. The said witness has admitted in his cross-examination that even though such amount was paid to deceased Amol as a monthly salary, there is absolutely no documentary evidence available with the institution. The learned counsel submits that the said witness is telling lie before the Court and his evidence is not at all believable. In absence of any income proof, at the most the notional income of deceased Amol can be considered at Rs.4,500/- per month and not more than that. The

learned counsel submits that considering the average age of the parents, appropriate multiplier can be applied to ascertain the future loss of income / dependency. The learned counsel submits that there is no question of considering the future prospects since there is no evidence about private employment / self employment of deceased Amol in any manner.

6 I have also heard the learned counsel appearing for Respondent No.1 / owner.

7 On careful perusal of the judgment and award and the documents such as FIR Exhibit – 24, spot Panchanama Exhibit – 25, inquest Panchanama Exhibit – 26, PM notes Exhibit – 27, evidence of Claimant No.1 Exhibit – 20, it appears that in the early morning at about 05:00 am, the accident had taken place. At such a time, it is difficult to sight the stationary vehicle on road. Respondent No.1 has not examined his driver to prove that at the time of accident the driver of truck has kept the indicators of the truck on or taken any other precaution to indicate that the vehicle truck parked on the tar road, may be due to the reason of breakdown or any other reason. The spot Panchanama Exhibit – 25 and the map drawn on it clearly shows that the said truck was almost parked on the middle portion of the road.

Even the learned Member of the Tribunal has also observed that 10 feet space is left for the vehicle plying on that road. It has clearly mentioned in the spot Panchanama that the width of the road is 30 feet at the spot. If at all 10 feet space is left for the vehicles plying on that road then obviously the only inference could be drawn that the said vehicle kept on the middle portion of the tar road occupying more than 15 feet of width of the tar road. In view of the above facts, though Claimant No.1 has not witnessed the actual incident, by application of the maxim of *res ipsa loquitur*, the burden shifts on Respondent No.1 to prove that the driver of the truck was not at fault and the rider of the motorcycle was entirely responsible for the accident.

8 On careful perusal of the spot Panchanama, it appears that the motorcycle was badly damaged in the accident. Its indicators, mudguard and other parts were broken. It is obvious that if the vehicle like motorcycle dashed against the back portion of the truck, there would be extensive damage to the motorcycle. However, extensive damage to the motorcycle also indicates that at the time of accident, the motorcycle was also driven in a speed. It is true that speed is not only the criteria to decide rash and negligent act. However, the accident had taken place at morning time at about 05:00 am. The rider

of the motorcycle did not take care to drive the vehicle carefully at the dawn time. In the given set of facts, it would be just and appropriate to record a finding that the driver of the truck had contributed negligence and the responsible to the extent 80% whereas the rider of the motorcycle, who was not impleaded as a party in the claim petition responsible to the extent of 20%.

9 So far as income of deceased Amol is concerned, the evidence of said witness Bharat Deshmane is not at all convincing. Though he was paying Rs.25,000/- per month to deceased Amol, there is no documentary evidence available with the institution. The said witness has also admitted that though his institution was registered long back, the audit of the said institution was not carried till the date of his examination before the Court and even though some 8 labours are working in this institute, he has not kept their attendance register and the wages register. He has admitted that deceased Amol was residing in the lane in which he is residing.

10 In absence of any satisfactory evidence about the income of deceased Amol, as suggested by the learned counsel for Respondent / Insurer, the notional income of deceased Amol is required to be considered at Rs.4,500/- per month and not more than

that. Deceased Amol was not in private employment nor self employment. No documents are placed on record to show that deceased Amol had completed some diploma course in painting or atleast he had undergone the training course for painting. There is no evidence about his future prospects. In absence of any evidence, I am not inclined to add certain amount in his income towards future prospects.

11 The learned counsel for Appellants / Claimants has placed his reliance on the following cases:

- a) **Somnath S/o Thakaji Mandlik Vs. Dipakbhai Chimanbhai Patel and another**, (First Appeal No.150 of 2015, decided by this Court on 22nd August, 2016.)
- b) **Neeta w/o Kallappa Kadolkar and others Vs. Divisional Manager, Maharashtra State Road Transport Corporation, Kolhapur**, reported in, **(2015) 3 Supreme Court Cases 590**,
- c) **Rajesh and others Vs. Rajbir Singh and others**, reported in, **(2013) 9 Supreme Court Cases 54**.

12 In a case of *Neeta w/o Kallappa Kadolkar and others*

(supra), the Supreme Court by referring the case of **Santosh Devi Vs. National Insurance Co. Ltd**, reported in, **(2012) 6 SCC 421**, has ruled out that even in case of private employment, the future prospects can be taken into consideration to determine the loss of dependency. However, in the instant case, there is no satisfactory evidence about the private employment and also of the self employment.

13 In a case of *Rajesh and others Vs. Rajbir Singh and others* (supra) relied upon by the learned counsel for Appellants / Claimants, in para 17 of the judgment, the Supreme Court has made the following observations:

“17. Although the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who

earns his livelihood by stitching cloths. If the cost of living increases the prices of essential go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour like barber, blacksmith, cobbler mason, etc.”

14 In the case in hand, there is no satisfactory evidence about the income of deceased Amol and therefore, his notional income was required to be considered. Deceased Amol was not having any certificate to show that he was having bright future. There is no evidence to show that he was doing the painting business in the city. In view of the same, the case cited above cannot be made applicable to the facts and circumstances of the present case.

15 In a case of *Somnath S/o Thakaji Mandlik Vs. Dipakbhai Chimanbhai Patel and another* (supra) in the similar circumstances this Court has considered the contributory negligence of the rider of the motorcycle to the extent of 10%. However, in the instant case, considering the extensive damage caused to the motorcycle, contribution of the rider is determined to the extent of 20%.

16 Deceased Amol was unmarried and the claim petition is preferred by his parents. In view of the decision of this Court in the

case of **United India Insurance Company Ltd. Vs. Sobha Amarsingh Rajput**, reported in, **2016 SCC OnLine Bom 8996**, the average age of parents is required to be considered in case of unmarried son for applying the correct multiplier. Thus, considering the average age of parents, the relevant multiplier would be 14. Since deceased Amol was unmarried, 50% amount from his income is required to be deducted on account of his personal expenses. Thus, the notional income of deceased Amol is to be considered at Rs.2,250/- X 14 with the corresponding annual income. So far as the compensation under the non-pecuniary heads are concerned, the Claimant are entitled for Rs.25,000/- towards funeral expenses, Rs.10,000/- towards loss of estate, Rs.10,000/- towards loss of love and affection.

17 Thus the compensation under different heads can be broadly categorized as under:

Loss of future income / dependency	Rs.3,78,000/-
Funeral expenses	Rs.25,000/-
Loss of estate	Rs.10,000/-
Love and affection	Rs.10,000/-
Total =	Rs.4,23,000/-

18 Since the rider of the motorcycle, its Insurer and the owner are not impleaded as party to the claim petition, the Appellants / Claimants are entitled to 80% of the compensation worked out hereinbefore. In view of the same, the Appellants / Claimants are entitled to the total compensation of Rs.3,38,400/- (Rupees Three Lacs Thirty-Eight Thousand and Four-Hundred only). Hence the following order:

ORDER

- I. First Appeal No.3751 of 2016, is hereby partly allowed.
- II. The judgment and award passed by the Motor Accident Claims Tribunal, Beed dated 24th June, 2016 in MACP No.130 of 2013, is hereby quashed and set aside.
- III. MACP No.130 of 2013, is hereby partly allowed and the Respondent Nos.1 to 3 shall pay jointly and severally an amount of Rs.3,38,400/- (Rupees Three Lacs Thirty-Eight Thousand and Four-Hundred only) inclusive of no fault liability with interest at the rate of 9% per annum from the date

of application till realization of the entire amount.

- IV. Award be drawn up accordingly.
- V. The appeal is accordingly disposed of.

[V. K. JADHAV, J.]

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