

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1046 OF 2015
WITH
CIVIL APPLICATION NO. 3330 OF 2016

ROYAL SUNDARAM ALLIANCE
INSURANCE CO LTD,
Subramaniam Building, IInd Floor, No. 1
Club House, Annasalai, Chennai 600 002
through Mr Sandip Jadhav, Manager Legal ... **APPELLANTS**

versus

1. **SMT VARSHA RAJENDRA PACHE**
Age 30 years, Occu.: Household
2. **MASTER BHUSHAN RAJENDRA PACHE**
Age 8 years, Occu.: Education
3. **KU. SAKSHI RAJENDRA PACHE,**
Age 5 years, Occu.: Education,
Applicants No. 2 & 3 being minors
through G.A.L. Applicant No. 1
4. **BHAUSAHEB DAGDU PACHE,**
Age 65 years, Occu.: Nil.
5. **SUVARNA BHAUSAHEB PACHE,**
Age 60 years, Occu.: Household,
All r/o, At: Dhangaradi Post Shirwal,
Tal. Khandala, Dist: Satara.
6. **M/s. KHOSLA TRANSPORT**

Address: Twin Ornate, Row House
No. 2, Plot No. 202-203, Sector-21,
Nerul, Navi Mumbai 400 706

... **RESPONDENTS**

APPEARANCES

FOR THE APPELLANT **Mr N Mehta, i/b KMC Legal Venture.**

FOR RESPONDENTS NOS. **Mr Yuvraj P Narvankar.**
1 TO 5 & APPLICANT IN
CAF/3330/16.

CORAM : G.S.Patel, J.

DATED : 25th July 2017.

ORAL JUDGMENT:

1. This civil application is by the original claimants, Respondents nos. 1 to 5, seeking to withdraw the decretal amount deposited.

2. By consent, the appeal itself is taken up for hearing and final disposal, it having been admitted on 20th April 2016. The grounds of challenge are limited.

3. This was the claim under Section 166 of the Motor Vehicles Act 1988 in a fatal accident case. The claimants sought compensation of Rs.39,65,000/- on account of death of one Rajendra B Pache. He died on 16th January 2012. On that day, at about 9.15 am, Rajendra was on his way to village Dhangarwadi from Shirwal. He was riding his motorcycle registration No. MH-11-AX-

4888. As he approached Pandharpur Phata at Shirwal, a gas tanker No. MH—04-CA-1289 approached from the rear and overtook Rajendra's motorcycle. Immediately after passing the motorcycle, the tanker driver swerved sharply left without considering how close Rajendra's motorcycle was behind the tanker and to its left. As a result, the tanker hit the motorcycle. Rajendra suffered multiple injuries. He died from these injuries.

4. The 1st Applicant/1st Respondent is Rajendra's widow. Applicants Nos. 2 and 3 are their minor son and daughter, then aged eight and five. Applicants Nos. 4 and 5 were Rajendra's parents.

5. Opponent No. 2 is the present Appellant, the insurance company. It entered a written statement and contested the proceedings. Opponent No. 1, the owner, remained absent throughout, though served. The insurer admitted ownership and insurance of the vehicle but claimed that Rajendra did not have a valid and effective driving license. Pausing here for a moment, I find that in case after case this opposition is taken almost by rote. Parties who take such stands must be aware of the consequences of making an affirmative statement of this kind, the evidentiary burden placed by such statements, and the consequences of a failure to prove that averment. Once, for instance, it is shown there is a valid license, the insurer must make good on its averment. There is no presumption that everybody who drives or rides a vehicle does so without a valid license.

6. The insurer also claimed contributory negligence. This stands on a different footing.

7. The Tribunal framed five issues. The question of the driving license being invalid was answered in the negative.

8. The Court found that this was a case of contributory negligence and both the tanker driver and Rajendra were negligent in the conduct of their respective vehicles. To end the controversy over the contributory negligence aspect, it is sufficient to note that the Tribunal computed the total compensation at Rs. 29,17,000/- but reduced it by 50% on a finding that Rajendra was also negligent. The claimants have not challenged this finding. There is no substantive first appeal or cross-objections by the claimants. As a result, this finding cannot be disturbed. The case of the insurer is not that the deceased motorcyclist was solely responsible and, therefore, it is not necessary to further enter into this controversy.

9. Mr Mehta's principal focus on behalf of the insurer/Appellant is, in my view quite correctly, on the income taken by the Tribunal. The appellants led the evidence of one Hemant Ingulkar as AW2. The claimant said that Rajendra was employed with Hemant Ingulkar and he worked as a truck driver at a salary of Rs. 11,000/- per month. Rajendra also owned an auto rickshaw and, the claimants said, he earned Rs. 6,000/- from that source of livelihood, making a total income of Rs. 17,000/- per month. They produced the registration of the auto rickshaw that Rajendra owned, apart from leading the evidence of Ingulkar.

Ingulkar's evidence was, therefore, necessarily limited to the salary that he paid Rajendra as a tanker driver. He said that from January 2011 to January 2012, a period of one year, he paid him Rs 11,000/- per month and he filed a salary certificate to this effect. In cross-examination he admitted that he had no original records regarding this payment and he had no document evidencing Rajendra's signature on a payment receipt. The salary certificate was a computer print-out. The Court held that except for his oral evidence there was no proof of Rajendra having a salary of Rs. 11,000/- per month.

10. At this stage, it is to be noted that the driving license No. 961087 produced at Exhibit 37 was in Rajendra's name, and it permitted the plying of a heavy motor vehicle. It was first issued on 12th February 1996 and was renewed till 17th March 2012. The accident took place on 16th January 2012. The Tribunal correctly held that this showed the license to be valid. It also went on to observe that this was *prima facie* evidence that Rajendra was in fact driving a heavy motor vehicle. This conclusion cannot be faulted.

11. The only question is whether on the material that was before the Tribunal, the Tribunal ought to have accepted this amount of Rs. 11,000/- or taken an amount that was less.

12. Rather than assisting Mr Mehta in his endeavours on behalf of the Appellant, this is precisely where his troubles begin. The evidence of Indulkar was not shaken in cross-examination. He was undoubtedly the employer. There is no cogent reason why an

employer's bare word should not be sufficient or should demand corroboration each time. The fact that a person is an employer does not automatically make him an unreliable witness or given to falsehood. There was no need to always demand supporting documents. For instance, if there is a case of a domestic servant being the victim of an accident, there may well be no 'documentary record' of salary; yet the salary is always paid, month on month. Few householders or housewives take receipts or maintain registers for salaries paid to domestic staff, especially part-time staff. This may also be true of small commercial operations and enterprises. The fact that there is no documentation does not of its own mean that when the employer gives oral evidence of salary paid, it should be disbelieved. However, this is precisely what the Tribunal held, saying that Hemant may have given this evidence in order to support the Applicants. This seems to me to have been the purest conjecture on the part of the Tribunal. If the Tribunal felt anything of the sort was happening, it could have put questions to Ingulkar himself. It did not do so. There is no logical reason why the employer should have arrived at a peculiar figure of Rs. 11,000/-; he might as well have said Rs. 15,000/- or Rs. 25,000/- if what he wanted to do was to benefit the applicants. That reasoning does not withstand scrutiny.

13. What the Tribunal did was to compute a truck driver's salary at Rs. 300/- per day on a basis that is entirely unknown and arrive at a salary of Rs. 9,000/-.

14. What the Tribunal then did was to add to this the additional income from the auto rickshaw business on a similar presumption

that this must have earned some income. Rajendra was shown to have owned the Bajaj auto rickshaw. There was a permit in his name at Exhibit-39 and it was valid unto 18th November 2016 having been issued six years earlier on 19th April 2010.

15. It is unclear to me what is being suggested by the insurer when it challenges this as ‘unproved’: whether it is suggested that Rajendra bought the auto rickshaw and kept it idle, or that he spent money on acquiring it but earned nothing from it. The claimants said that he earned Rs.6,000/- a month from plying his auto. Once again, in paragraph 17, for assessing the income from the auto rickshaw, as in paragraph 16 for the income of the truck, the Tribunal proceeded on a hypothetical of a Rs.100/- a day and arrived at a monthly income from the auto rickshaw of Rs.3,000/- per month.

16. Now this is the conflict for appellants. They are now, as Shakespeare famously said, “hoist by their own petard”. For, if the appellants accept a notional income of Rs.9,000/- as the tanker driver salary, there is no reason why they should not accept Rs.3,000/- as the auto rickshaw income. Both are equally notional. The only alternative that faces the appellants is that I should take the salary as deposed by Ingulkar at Rs.11,000/- and add to that the Rs.3,000/- per month assumed by the Tribunal as the auto rickshaw earnings, arriving at an income of Rs.14,000/- per month. That is not the appellant’s case. It is only fortunate for the appellants that the claimants have not come to court seeking an enhancement.

17. I have little choice but to accept the income as stated by the Tribunal as being reasonable. The converse is in fact thoroughly unreasonable because it requires me to hold that simply because the party has not been able to produce an income statement, there should be no income taken as being received from the auto rickshaw use at all. This means the auto rickshaw must be assumed to have been sitting idle for six years with a continually renewed permit, insurance and maintenance cost. That is not a conclusion likely to be drawn.

18. The next aspect of the case is that Rajendra was 36 years old, and, taking a life expectancy of 60 years, the Tribunal considered an increase in salary and his increase in income from the auto rickshaw business at 50%. Mr Mehta would have it, based *inter alia* on the decision in *Royal Sundaram Alliance Insurance Company Ltd vs Smt Manisha Suyog Jagdale & Ors*,¹ that there is simply no basis for taking 50% towards loss of future income or loss of future prospects. What would have to be shown was a steady rise in income.

19. This again is answered in a most straightforward fashion. Rajendra was obviously a very capable driver of multiple vehicles: a motorcycle, a tanker and an auto rickshaw, each requiring different skills. The fact that he was employed as a tanker driver from January 2011 to January 2012 and had an auto rickshaw permit from 2010 seems to me *prima facie* to indicate that he was bettering his prospects. In 2010 he was not employed as a tanker driver. He had only his auto rickshaw business. He thus improved his prospects in

1 2017 ACJ 1133.

less than a year by acquiring the necessary heavy motor vehicle license and obtaining employment as a tanker driver.

20. It is difficult therefore to hold that on the record there is no material to indicate that he had bettered his prospects even during his short lifetime. It is entirely conceivable that evidence in such matter is less than optimal. But this does not mean that in case after case we should let the best become the enemy of the good. One has to approach these matters in a slightly different manner. Here a life has been snuffed out. We have limited material with which we must work. We must necessarily look at what is available and what the deceased was able to do and achieve in the earning years that were available to him. It is not in every case that a person is able to show from such cogent documentation as would satisfy the exacting standards of an insurer that income earned steadily increased. Sometimes this must be gleaned, and reasonably gleaned, from the material at hand. What else is to be made of the fact that Rajendra had more than one source of income except to say that he was furthering and bettering his prospects? Why should one completely ignore one entire source of livelihood and the fact that by gaining a second income source in parallel to the one he already had, Rajendra had in fact in the last year or so of his life more than doubled his immediate prospects? To reject the implications of this evidence for want only of some paper — and there is nothing to suggest either that paper is on its always entirely reliable — seems to me to be needlessly pedantic. It also cuts against the grain of the governing statute, one that has been firmly held to be a social welfare legislation. The argument canvassed by the appellants is not an approach I could ever bring myself to commend. It would result in

the highest injustice in case after case. It puts on an innocent victim, literally a third party to a contract of insurance, a quite unacceptably onerous burden of maintaining copious and detailed and authenticated records of income, and it seeks to bind a court of *justice*, one required to make an order of 'just compensation', to ignoring the available evidence in quest of the impractical and the impossible. No one suggests there be no evidence at all; but such evidence as exists must be weighed. It is not to be defenestrated only because there is no paper behind it. Very often, indeed, Courts in these cases proceed on a reasonable assumption — a 'notional' income — and there is a basis for that too. It is a presumption legitimately to be drawn in law that a person shown to be working and employed, and supporting a family, earned *some* income. The computation or assessment of that income is in the hands of the court, and those hands must be safe hands, ones that further the legislative intent, not allow evidence to slip through them like water through a sieve. I do not think that the decision relied on by Mr Mehta is one that is to be read as a rigid formula in all such cases.

21. Having regard to these factors and most especially the aspect of the Tribunal having been reduced the over all claim by as much as 50%, I find myself unable to agree that the impugned order calls for any interference. There is no doubt that as regards the other aspects such as interest, loss of consortium and so on, there is no ground for interference either.

22. Having regard to all these situations, I proceed to dismiss the appeal but with no order as to costs.

- 23.** The claimants will be entitled to withdraw the entire amount deposited with accrued interest. The statutory deposit of Rs.25,000/- is to be transferred to the MACT, Satara and to be invested in a fixed deposit until withdrawn by the claimants.
- 24.** The MACT, Satara will permit the withdrawal on production of an authenticated copy of this order.
- 25.** The appeal is disposed of in these terms. No order as to costs.
- 26.** The civil application does not survive and is disposed of as infructuous.

(G.S. PATEL, J.)