IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 323 OF 2008

The New India Assurance Co. Ltd. .. Appellant
vs.
Smt. Vijaya Vilas Chavan & Ors. .. Respondents

Mr. D. R. Mahadik for Appellant.
Mr. Sachin K. Pandey for Respondent Nos. 1, 4 and 6.

CORAM : M. S. SONAK, J.
DATE: 20 FEBRUARY 2017

<u>P.C</u> :

1] This is an insurance company's appeal against the award dated 23 January 2007.

2] The insurance company, for the last seven years, has not been able to serve respondent no. 5, who was the owner of the insured vehicle. This is despite grant of several opportunities. In the meanwhile, the execution of the impugned award has been stayed.

3] On 4 August 2016, at the behest of the claimants, this court made the following order after hearing Mr. S. K. Pandey, learned counsel for the applicants :

> *"1. Having regard to the reasons mentioned in the Civil Application, the same is allowed to be extent of expediting the hearing of the above First Appeal. The First Appeal to be placed for final hearing after the ensuing Diwali vacation of*

the year 2016. The Civil Application is disposed of.

2. Private paper book to be filed prior to the First Appeal being listed for final hearing."

4] From the said date onwards, the least that was expected of the insurance company was to take steps to serve the unserved respondent no. 5 and to file a private paper book, so that, the matter could be taken up for final disposal. The matter appeared on board on 7 December 2016 and 24 January 2017. However, no steps were taken to serve the unserved respondents or to even file the paper book.

5] Today, when the matter is called out, learned counsel for the insurance company again asked for four weeks time to serve the unserved respondents. Upon query as to why the paper book has not been filed, learned counsel for the insurance company submits that the dispute is only regards to quantum and in any case, paper book will be filed after two to three weeks. In a matter of such nature, such casualness on the part of the insurance company cannot be appreciated. Mr. Pandey, learned counsel for the claimants submitted that the presence of the owner is not at all required and even before the MACT, the owner had not put up any defence or laid any evidence. Mr. Pandey, therefore submitted that the matter can proceed without the presence of respondent no. 5.

6] Upon this court, agreeing to proceed with the matter, however, Mr. Pandey declared that he has lost his brief and therefore, he is in no position to assist this court. Some of the submissions made by Mr. Pandey, indeed confirms this position that he is in no position to assist this court or the claimants themselves.

7] Be that as it may, this is a matter which pertains to the year 2008. From the year 2008 onwards, the claimants have been deprived compensation. At the behest of the claimants, this matter was posted for final hearing. Today, neither the learned counsel for the insurance company nor the learned counsel for the claimants wish to proceed with the matter. Since adjournment was refused, learned counsel for the insurance company has made his submissions for final disposal of the appeal.

8] Mr. Mahadik, learned counsel for the insurance company submits that in this case, it is the driver Vilas, who died in the accident, was entirely responsible for the accident. Mr. Mahadik submits that the accident took place on account of the negligence of the deceased driver and therefore, there was no question of holding driver of the truck MH-06-K-3361 responsible for the accident. In any case, Mr. Mahadik submits that the contribution of the deceased to the accident was required to be assessed at 50%

and not merely 30%.

9] Further, Mr. Mahadik submits that in this case, multiplier has been incorrectly taken as 17 whereas, in fact, as per the decision in the case of ***Sarla Verma (Smt.) & Ors. vs. Delhi Transport Corporation & Anr***.[1], the multiplier could have been 16. Mr. Mahadik says that the evidence on record indicated that net income of the deceased was Rs.13,407.98 per month and MACT has erred in taking the net salary at Rs.18,000/- per month. For these reasons, Mr. Mahadik submits that the impugned award is liable to be set aside or in any case modified.

10] In this case, the deceased was 32 years on the date of the accident. He was driving the motorcycle along with his sister (original claimant no. 4) on the fateful day when the motor cycle and the truck met with an accident which resulted in his demise. The sister, who was riding pillion, has been examined. In her testimony, she has stated that her brother was driving the motorcycle at a moderate speed. The truck was in front of them and because the truck driver suddenly applied the brakes, her brother dashed the motorcycle against the truck at the rear side. In the cross-examination, some minimal dent may have been made to her version that the truck driver after applying the brakes,

1 (2009) 6 SCC 121

proceeded in reverse. However, the main portion of the testimony remains undented. Significantly, in this case, driver of the truck was never examined. Mr. Mahadik states that the truck driver was not a party to the proceedings. Be that as it may, however, nothing prevented the owner or the insurance company to summon the truck driver. The MACT has also, not ruled that the accident was solely on account of the negligence of the truck driver. Contributory negligence to the extent of 30% has been apportioned to the deceased. The finding on this aspect is reasonable and is sufficiently borne from the material on record. Since, the truck driver was never examined, there is no reason to now give any credence to the case of the insurance company that the accident took place on account of the negligence of the deceased alone. There is accordingly, no case made out to interfere with this finding of fact recorded by the MACT.

11] On the aspect of income, no doubt, the MACT has held that the net salary of the deceased was Rs.13,407.98 per month. Thereafter, by taking into consideration the future prospects, the net salary has been taken at Rs.18,000/-. The deceased in this case was 32 years old at the time of accident. Therefore, applying the law laid down in the case of ***Munna Lal Jain & Anr. vs. Vipin Kumar Sharma & Ors***.[2], 50% addition was warranted to the income

2 (2015) 6 SCC 347

towards future prospects. Considered from this perspective, the MACT did not err in taking the net salary of the deceased at Rs.18,000/-.

12] Mr. Mahadik is however right that the multiplier in this case could not have been taken as 17. Applying the law laid down in the case of *Sarla Verma* (supra), the multiplier in this case vide paragraph 42 would be 16 and not 17. This however, makes no difference to the ultimate amount of compensation determined by the MACT. Although, there would be reduction to the extent of Rs.1,44,000/- by applying the multiplier of 16 instead of 17, it is to be noted that in this case, the MACT has awarded only an amount of Rs.15,000/- towards loss of consortium to Vijaya, the widow of the deceased. In a case of this nature, at least an amount of Rs.1,00,000/- was required to be awarded to Vijaya for loss of consortium. Further, an amount over Rs.1,00,000/- each was required to be awarded to the two minor children for the loss of love and affection on account of demise of their father. No such amount has been awarded to the children. Even towards funeral expenses, an amount only of Rs.5,000/- has been awarded when in fact this amount should be Rs.25,000/-. If all these amounts are added, then, the deduction of Rs.1,44,000/- on account of application of correct multiplier stands set off. Therefore, there is really no case made out to interfere with the impugned award.

13] Mr. Pandey, learned counsel for the claimants states that the claimants have no desire to institute any cross objections in the matter.

14] The impugned award was made on 23 January 2007. The claimants have also not preferred appeal against the impugned award.

15] Upon cumulative consideration of the aforesaid, there is no case made out to interfere with the impugned award. The appeal is accordingly dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)

Chandka