drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.2241 OF 2014

1. Mohd. Yusuf Abdul Gaffor Patel APPELLANTS
Age - 49 years, Occ - Nil

2. Chotibi Mohd. Yusuf Patel
Age - 43 years, Occ - Nil

3. Yasmeen Mohd. Yusuf Patel,
Age - 16 years, Occ - Nil
Minor u/g of appellant No. 2 Mother

All R/o Dadoji Konddev Nagar,
Ring Road, Latur

VERSUS

1. Ashok Murlidhar Ghorpade RESPONDENTS
Age - Major, Occ - Business
R/o Old Ausa Road,
Sant Maroti Maharaj Bhojanalay,
Ganesh Nagar, Latur

2. Branch Manager,
United India Insurance Co. Ltd.,
Ambejogai Road, Latur

....

Mr. Ravibhushan P. Adgaonkar, Advocate for the appellants
Mr. A.G. Vasmatkar, Advocate for respondent No.1
Mr. S. R. Bodade, Advocate for respondent No.2

....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 7th MARCH, 2018

ORAL JUDGMENT :

1. Heard learned advocates for the parties.

2. This is claimants' first appeal for enhancement of compensation, as according to them, the Commissioner for Workmen's Compensation Act and Judge, Driver Court, Latur has not properly taken into account the facts and evidence on record in respect of earning of deceased, which has resulted into awarding less compensation than deserved under the facts, circumstances and evidence.

3. Respondent No.1 had been engaged in transport business. It is the case of the claimants that Jabbar had been serving with respondent No.1 as driver. On the fateful day, Jabbar had been driving vehicle of respondent No.1 bearing registration No. MH-24/F-7518. Said vehicle of respondent No.1 had been insured with respondent No.2 insurance company. During the course of his employment, while he had been driving said vehicle, transporting goods, an oncoming offending vehicle - a jeep as known in common parlance bearing registration No. MH-26/V-9800 had collided and Jabbar had been severely hit and died of the injuries suffered due to the accident.

4. After death of Jabbar, the only bread earner in the family of the claimants had been lost. This incident had incurred liability

for respondents to pay compensation to the claimants. However, in spite of notice, there had been no movement for payment of compensation and as such, the appellants laid a claim before the Commissioner of Workmen's Compensation to the tune of Rs. 9,00,000/- making the respondents jointly and severally liable to pay the same.

5. While respondent No.1 - employer accepted the claim for compensation, respondent No. 2 insurance company, however, had denied the same disputing that the deceased had ever been in employment of respondent No.1 and had been driving vehicle in question and had been getting monthly wages as pleaded or for that matter, accident having occurred during the course of employment. Issues arising from the pleadings were framed.

6. Commissioner of Workmen's Compensation found that the claimants were dependents, deceased had been employee of respondent No.1 and accident having occurred during the course of employment. It had also been found by the Commissioner that the claimants were entitled to compensation, however, not to the tune as claimed and had reduced the claim for compensation. Thus, this first appeal, pursuant to section 30 of the Employees Compensation Act, 1923.

7. Learned advocate Mr. Adgaonkar, appearing for the appellants submits that there had been absolutely no contrary evidence given by respondent No.2, although the respondent has denied claims in the petition, *inter alia,* about Jabbar being employee of respondent No.1, being driving vehicle while accident had occurred and accident having been occurred during the course of employment. He submits that the Commissioner with reference to the evidence on record had given finding that Jabbar died of accident during the course of employment, him being employee of respondent No.1 and had been driving vehicle as a matter of employment.

8. He submits, evidence led in this respect by the claimants could not be impeached on any count by respondent No.2. The decision with respect to computation of income of deceased Jabbar had been way aside the evidence on record. There has been more than sufficient evidence establishing that deceased Jabbar had been working as driver with respondent No.1 and earning wages at the rate of Rs.7500/- per month. He submits that while the findings based on appreciation of evidence are recorded by the Commissioner, it is rather strange that the Commissioner did not properly appreciate evidence with regard

to wages being paid to deceased Jabbar and ought to have accepted the claimed wages. He submits that the Commissioner has committed error in going by guesswork indulged into as would find place in paragraph No. 12 of the judgment. He submits that the Commissioner has relied on a document at Exhibit-U-21, an assessment of income depicting an outgo of Rs.1,36,800/- per year towards salary expenses. The commissioner has thereafter drifted to guesswork while there being evidence on record. He submits that the figure which has been referred to under Exhibit-U-21 easily accommodates outgo on salary of deceased Jabbar. It is not the case that respondent No.1 had big transport business and had employed several persons. He points out that the employer's evidence with regard to payment of salary to deceased Jabbar coupled with certificate depicting the same could not be disputed nor did cross-examination of said witness bring forth anything which would cast doubt about evidence on record. In such a case, compensation as claimed by the appellants was incumbent to have been considered to be proper and ought to have been granted. He, therefore, urges to allow the first appeal and to enhance the compensation as claimed.

9. Mr. Vasamatkar, learned advocate appearing for

respondent No.1 supports the appellants adverting to that respondent No.1 is a small time businessman and the Commissioner has committed an error in indulging into guesswork with regard to computation of wages. The outgo as appearing on salaries under Exhibit-U-21 ought to have been properly considered, since it does not at all exceed the outgo on salary of deceased Jabbar.

10. Mr. Bodade, learned advocate appearing for respondent No. 2 - insurance company, however, vehemently submits that the Commissioner has properly considered the matter, particularly the aspect about income being earned by deceased Jabbar. He submits that besides evidence by the employer there is nothing on record to show income of the deceased and the salary certificate issued by the employer could hardly be wholly relied on, as depicting true states of affairs. He submits that salary of Rs.7500/- per month to a driver in an area, which is remote is rather on steeper side and a driver may not fetch salary as is claimed by the claimants.

11. Besides aforesaid, Mr. Bodade submits that the income certificate could not be relied on, since the same is not backed by any payroll having been placed before the court. He further

submits that though claim of salary of Rs.7500/- has been made, yet Exhibit-U-21 does not support such a claim. There are no details given about figure Rs.1,36,800/- as salary outgo on employees. In the circumstances, payroll could have brought forth true state of affairs and the same having not been supplied to the court, judgment rendered can hardly be faulted with especially so far as computation of income of Jabbar is concerned.

12. Mr. Bodade further goes on to submit that in any case, the compensation awarded by the Commissioner in the present case been Rs.4,39,900/- and interest is on higher side, the same exceeds range of compensation amount being granted or accepted by the Supreme Court having regard to the decisions wherein maximum compensation to the tune of Rs.3,75,000/- has been granted. He refers to and relies on judgments in the cases of *"Mallama (Dead) BY LRs V/s National Insurance Company Limited"* reported in *2014 STPL 7342 SC, "Mallikarjuna G. Hiremath V/s Branch Manager, the Oriental Insurance Co.Ltd., and Another"* reported in *2009 STPL 4954 SC*, *"National Insurance Co. Ltd., V/s Sheeja P. V. and Others"* reported in *2011 STPL 23953 Kerala*. He submits that all these cases involve drivers and, therefore, those may guide compensation to be awarded to drivers.

13. Judgment reported in *2011 STPL 23943 Kerala* as has been referred to is a case wherein compensation of Rs.3,64,455/- was awarded with interest @ 12%. It appears that the person concerned died of heart attack, who had been performing duty as driver had complained of acute chest pain while he had come to the employer on duty. With reference to the evidence on record in respect of income, compensation had been awarded by the Commissioner. An appeal against the same by the insurer had failed.

14. Judgment reported in *2009 STPL 4954 SC* has been referred to wherein insurer had been absolved of payment of compensation. Facts in that case are altogether different and no analogy can be drawn from that case to present scenario. In that matter, the driver had taken tourists to Gurugunta and while passengers went to visit temple, driver was trying to take bath and had slipped in a pond and died of drowning. In those circumstances, the court had considered that it would not be said that the person died during the course of employment.

15. Judgment reported in *2014 STPL 7352 SC* referred to by Mr. Bodade, would also hardly have any nexus with the present facts and circumstances. It is a case in respect of liability being

incurred by the insurer while ownership of vehicle had been transferred from one person to the other. Mr. Bodade, learned advocate, however, submits that the citations referred to depict that compensation thereunder did not go beyond Rs.3,75,000/- for drivers.

16. Judgment in the case of *"Ramprasad Balmiki V/s Anil Kumar Jain and Others"* reported in *2008 STPL 20175 SC* has been referred to and relied on to submit that there is cap of Rs.3,75,000/- on compensation to be awarded. Looking at the facts of the case it appears that the same had been concerning Motor Vehicles Act and compensation granted thereunder was in peculiar facts involved in the same, where there had been claim with regard to permanent total disability and total disability, which hardly has any nexus to present case.

17. He purports to press into service and rely on a decision of the Supreme Court in the case of *"Ramjas Foundation V/s Union of India"* reported in *2010 CJ (SC) 2058*, submitting that it cannot be said that the claimants have come to the court with clean hands and having regard to the observations under paragraph No. 7 thereunder, the same would apply to present matter as well. He submits that while respondent No.1 has put up claim with the

insurer, he had submitted a document, which would reveal that there had been trimonthly quantum jump in renumeration being paid to deceased Jabbar giving indication that claim made by the claimants is highly improbable and dubious. Learned advocate, however, fairly refers also to that the claim being so made by respondent No.1 to the insurer does not form part of the record and proceedings before the Commissioner.

18. It emerges on record that respondent No.1 had been engaged in transport business and had been owning vehicle, which had met with accident. The record does not depict that the employer had been owning any other vehicle besides the one which had met with accident or engagement of any other person employee of respondent No.1. It is not a case that any other vehicle being employed by respondent No.1 for carrying on business.

19. Perusal of the decision of the Commissioner in respect of computation of income as appearing under paragraph No. 12 would show that he had adverted to the pleadings by claimants that Jabbar had been earning Rs.8000/- per month and in support of the same they had produced salary certificate Exhibit-U-18 and had also examined the employer - respondent No.1 at

Exhibit-U-17. Cross-examination of respondent No. 1 on behalf of respondent No.2 insurer as a matter of fact, appears to have revealed that respondent No.1 claimed he had been earning net profit of Rs.2,00,000/- per year and he had produced assessment of income at Exhibit-U-21 submitted to the income tax department, which reveals that salary expenses shown by him were to the tune of Rs.1,36,800/- per year. Thereafter, however, the commissioner drifted to some guesswork as it appears that it is observed in the order that if the vehicle is engaged in transport of goods, in such a case, the employer must be having office having minimum engagement of four persons. Guesswork does appear to be imaginary and not in tune with the record as it has appeared before the Commissioner. While the salary being claimed by the claimants by deceased Jabbar is supported by evidence placed on record, besides evidence of the employer and the certificate, a document which had been submitted to income tax department accommodating salary outgo on driver by a transporter, who does not appear to have more vehicle than the one which had met with accident, evidence with respect to salary, in the circumstances, does not appear to be away from record in any way. As a matter of fact, claim by the family of the deceased Jabbar is supported by documents. In such a case, the contention on behalf of respondent No.2 insurance company that income tax return does not depict particulars of salary is a pedantic excuse.

20. In view of aforesaid, having regard to evidence on record, the commissioner ought to have granted claim made by the claimants and ought not to have got veered away by guesswork.

21. In the circumstances, it would be expedient that income fetched by the deceased can be considered reasonably at Rs.6500/- per month giving allowance to personal expenditure. Award, as such, needs to be modified computing income of the deceased at the rate of Rs.6500/- per month by applying relevant factor as had been considered by the Commissioner. Having regard to that age of the deceased had been 23, pursuant to schedule IV provided under the Workmen's Compensation Act a lump sum amount towards compensation would be required to be computed. Salary being paid at the rate of Rs.6500/- per month will have to be brought down by 50% multiplied with relevant factor i.e. 219.95 as provided under the schedule, which works out to be Rs.7,14,837/- and the compensation accordingly be considered. Interest thereon from the date, as granted by the Commissioner would also be paid. As

such, respondent No.2 insurance company would be liable to pay an enhanced compensation to the tune of Rs.2,74,937/- and interest thereon from the date of expiry of one month from the date of accident till realization of full amount, pursuant to relevant provisions.

22. First appeal as such, is partly allowed and stands disposed of. Pending civil application, if any, stands disposed of.

[SUNIL P. DESHMUKH, J.]

drp/fa2241-14