

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 550 OF 2018
with
CAF/1404/2018 IN FA /550/2018

Reliance Gen. Insurance Co. Ltd. ..Appellants

v/s.

Sujata Sadanand Mule & Ors. ..Respondents

Ms. Deepika Prabhala a/w. Mr. Rajesh Kanojia i/b. Res. Juris for the
Appellant

Mr. Sarthak Diwan i/b. Mr. Paras Yadav for the Respondent Nos.1 to
3.

CORAM : SMT. ANUJA PRABHUDESSAI,J.
DATED : 12 APRIL, 2018.

ORAL JUDGMENT.

1. Heard. With consent of the parties, matter is taken up for final
hearing at the stage of admission.

2. The appellant- insurance company herein has challenged the
judgment and Award dated 27th October, 2015 in MACP No. 4 of
2014. By the impugned judgment and Award, the Claims Tribunal,
Ratnagiri, has awarded compensation of Rs.18,27,000/- with

interest at the rate of 7.5% from the date of application till realization.

3. The respondents no. 1 is the widow and the respondents no.2 and 3 are the children of Sadanand Mule, who died in a motor vehicle accident. These respondents (hereinafter referred to as claimant nos.1, 2 and 3), claimed that on 26th November, 2012 Sadanand Mule was traveling from Marleshwar to Ganpatipule by his Maruti Omni vehicle no, MH 08/ C-7302. When he reached Nivali Ghat, a Chevrolet car bearing no. MH 14/CS 2412 came from the opposite side at a fast speed and dashed against the Maruti Omni. Sadanand Mule suffered serious injuries and remained under treatment. On 27.12.2012 he succumbed to the injuries sustained in the said motor vehicle accident. The claimants alleged that the accident was caused due to rash and negligent driving of the respondent no.5. Kunal Nikare, the driver of Chevrolet car. They further claimed that prior to the accident Sadanad Mule was earning annual income of Rs 4,00,000/-. Being the dependents of the deceased Sadanand Mule, the claimants filed a petition under section

166 of the Motor Vehicles Act against the driver, owner and the insurer of the offending car claiming total compensation of Rs.51,42,790/-.

4. The respondent no. 5 did not contest the petition. The appellant/ insurance company and the respondent no.4 owner filed their written statement and denied the claim. They denied the involvement of the vehicle in the accident and further claimed that the deceased was himself responsible for the accident. They also denied the income of the deceased and disputed their liability to pay the compensation.

5. The tribunal after considering the oral as well as documentary evidence adduced by the parties held that the death of Sadanand Mule was due to the injuries sustained in the accident, caused due to rash and negligent driving of the respondent no.5. With regard to the quantum of compensation, the tribunal held that the claimants had not proved the income of the deceased. The tribunal therefore estimated the income of the deceased as Rs.1,00,000/ per annum.

The deceased was 49 years of age. Relying upon the decision of the Apex Court, in *Rajesh and others vs. Rajbir Singh & ors. 2013 ACJ* the tribunal added 30% towards future prospects. Upon deducting 1/3rd towards personal expense of the deceased and applying the multiplier of 13 the tribunal computed compensation of Rs.11,27,000/- towards loss of dependency. The Tribunal also awarded Rs. 5,66,000/- and Rs. 8,800/- towards actual medical expenses and ambulance charges. In addition, an amount of Rs.1,00,000/- is awarded towards loss of consortium and Rs. 25,000/- towards funeral expenses. The Tribunal has thus awarded total compensation of Rs. 18,27,000/- .

6. The appellant/insurance company has basically questioned the quantum of compensation awarded by the tribunal. The learned Counsel for the appellant submits that in the absence of any evidence, the learned Tribunal was not justified in fixing the income of the deceased as Rs.1 lakh. She contends that the compensation awarded for loss of dependency is excessive and exorbitant. She further contends that in terms of the judgment of the Apex Court in

National Insurance Company vs. Pranay Sethi & Ors. ACJ 2700,

compensation towards loss of future prospects can only be granted on the basis of established income, i.e the definite income earned by the deceased and not on the basis of the notional income. She contends that having failed to establish the definite income earned by the deceased; the claimants are not entitled for addition of any amount towards future prospects.

7. Per contra, the learned Counsel for the respondents/claimant nos.1 to 3 contends that the claimants had established that the deceased was self employed. The quantum of loss of dependency computed by the tribunal on the basis of the estimated income is neither excessive nor exorbitant. On the aspect of future prospects, he submits that irrespective of the fact that the claimants were not able to prove the actual income of the deceased there must be an addition to the income towards future prospects. He contends that the compensation awarded by the tribunal is just and reasonable.

8. PW1 Sujata, has deposed that her husband, the deceased

Sadanand Mule was self-employed. He used to sell sweets, pooja articles etc. at various temples during festivals and fairs and earn Rs.1 lakhs per annum from the said business. she had produced certificates Exhs. 34 to 37 issued by Group Grampanchayat Kasheli, Group Grampanchayat Wdapeth, Group Grampanchayat Dhaulwalli, Group Grampanchayat Ambolgad and bills at Exh.39 to 51 issued by several wholesalers. These documents also substantiate the claim that during fairs and festivals the deceased used to set up stalls near temples and sell pooja items, sweets etc. In addition, he was engaged in the business of sale of alphonso mangoes, which generated annual income of Rs.2 lakhs. He owned an auto rickshaw under registration no.MH-08/E-4459 and he earned income of Rs 1 lakh by operating the said auto-rickshaw. The claimants therefore claimed that the annual income of Sadanand Mule was Rs.4 lakhs.

9. PW2 Ravikant Kubade and PW3 Suhas Phodkar who are the owners of mango orchards have produced agreements at Exhs. 95, 96, 97, 101 and 102 and confirmed that Sadanand Mule used to purchase mango produce from their orchards and sell the same in the

local market. The testimony of PW1 which is duly corroborated by PW2 and PW3 amply proves that the deceased was self employed. There is no denial of the fact that the deceased was engaged in the business as stated by PW1. It is to be noted that the claimants had not produced tax assessment records; bank records etc. and in the absence of such records no implicit reliance could be placed on the documentary evidence produced by the claimants to contend that the annual income of the deceased was Rs.4 lakhs. Under the circumstances, the learned Tribunal was perfectly justified in computing the compensation on the basis of estimated income. Considering the age of the deceased, the fact that he owned a four wheeler as well as a three wheeler and that he was engaged in three different types of business, the tribunal estimated the income of the deceased as Rs. 1,00,000/-. The estimate of the income is reasonable and not excessive.

10. It may be mentioned that relying upon the decision of the Apex Court in *Rajesh* (supra), the tribunal has added 30% as future prospects. In this regard it is pertinent to note that the Constitutional

Bench of the Apex Court in ***National Insurance Company vs. Pranay Shetty and Ors. (2017) ACJ 2700*** has considered the issue of (1) multiplier to be applied; (2) future prospects; (3) compensation for non-pecuniary losses. As regards issue of future prospects the Apex court has held as under:

"58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under [Section 168](#) of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on

the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the hu-

man attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

....."

11. Having analysed the above referred issues, the Supreme Court has summarized its conclusion in the penultimate paragraph of the judgment as under:-

"61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced herein before.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

12. It is thus settled that in case of death of a self-employed person or a person on fixed salary an addition has to be made to the established income towards loss of future prospects. The rate of such addition towards future prospects would depend upon the age of the deceased. i.e. 40% of the established income in case of death of a person below 40 years, 25% when the deceased was in the age group of 40 to 50 years and 10% in case the deceased was in the age group of 50 to 60 years. The term 'established income' has also been clarified to mean income minus tax component.

13. The contention of the appellant-Insurance is that the established income means the actual income earned by the deceased

through self-employment and not the notional income. It is urged that since the claimants have failed to prove the actual income of the deceased and the compensation was computed on the basis of notional income, no further additions could have been made on account of future prospects.

14. It is pertinent to note that as provided in clause 6 of second schedule to the Motor Vehicle Act 1988, the concept of 'notional income' applies to those who had no income prior to the accident. The concept of notional income cannot be made applicable in a case where the deceased was employed but was unable to prove income. Similar view has been taken by the Rajasthan High Court in ***Vishan Das and ors. vs. Suwa Lal and ors*** 2007 ACJ 1477, wherein it has been held as follows:

7. Once there is evidence of the fact that the deceased was working, the learned Tribunal can safely presume that the deceased was having an income. Item 6 of the Second Schedule attached to the Motor Vehicle Act, 1988 (henceforth to be referred to as 'the Act' for short) speaks of "Notional income for compensation to those who had no income prior to accident" (emphasis added). Hence, a notional income can be presumed only in case the deceased

had 'no income' prior to his death by accident. However, in case the deceased was employed, he would naturally, be earning some amount. In other words, he would have 'some income'. Hence, 'notional income' cannot be presumed in such a case. To apply a notional income in those cases where there is lack of evidence with regard to the income of the deceased, is to misread and misapply item 6 of the Second Schedule of the Act. Therefore, the contention raised by Mr. Bhandari, about the application of notional income, is unacceptable. ..."

15. Relying upon the decision in Vishan Das (supra) the Andhra Pradesh High Court in ***The United India Insurance Co. ... vs Smt. K.***

Kistamma And Others on 6 August, 2014 has held thus:

8.(a) ...The notional income of Rs.15,000/- as provided in item No.6 of Second Schedule appended to M.V.Act applies to those persons who had admittedly no income prior to the accident. The heading to Item No.6 which reads as Notional income for compensation to those who had no income prior to accident, itself is self-explanatory in this regard. Should we give a plain meaning to the words who had no income prior to accident we understand that they refer to those persons who admittedly had no income prior to accident. We can visualize those persons as old and infirm, bed ridden by sickness and those who had no earning capacity. In respect of those persons, notional income has to be taken as Rs.15,000/- for computation of compensation. However, honestly speaking the said notional income will not apply to other persons who are able bodied persons and having earning potentiality and those who are employed in one or other avocation and earning some

income. In respect of such persons even if there is no concrete evidence regarding their earnings, the Court shall make a reasonable estimate of their earnings having regard to their age, nature of occupation etc..."

16. In the instant case, the deceased was self employed. He was operating auto rickshaw and was also engaged in the business of sale of mangoes as well as sweets and pooja items. He was deriving income from the said business. Hence, the concept of notional income is not applicable. A perusal of the impugned judgment also indicates that the tribunal had not assessed the compensation on the basis of notional income. As stated earlier, the claimants had quantified the annual income of the deceased as Rs. 4,00,000/-. However, having failed to prove the same, the tribunal estimated the annual income as Rs. 1,00,000/ and computed the compensation on the basis of estimated income. I am not inclined to accept the contention that there should not be any addition towards future prospects for the reason that the claimants were not able to establish the actual income earned by the deceased and that the compensation is computed on the basis of estimated compensation. It has to be

borne in mind that addition towards future prospect is made in view of likelihood of increase in salary or income considering the increase in the cost price, inflation and other factors. Furthermore, as held by the Apex Court in *Pranay Sethi (supra)* there is always an incessant effort to enhance ones income for sustenance. Hence, the fact that the claimants had failed to prove the actual income of the deceased does not lead to an inference that the income of the deceased would have remained static. The Tribunal was therefore justified in granting benefit of addition towards future prospects. In fact, not adding any amount with regard to future prospect to the income for the purpose of determination of multiplicand would be unjust and would deprive the claimants of just compensation..

17. The Tribunal, relying upon the decision of *Rajesh(supra)*, has added 30% to the income on account of future prospects. The deceased was admittedly 49 years of age and in view of the judgment of the Apex Court in *Pranay Sethi* the addition towards future prospect ought to have been 25% of the income less income tax. Upon adding 25% to the estimated income Rs. 1,00,000/, which was

below taxable limits, deducting 1/3rd towards personal expenses and applying the multiplier of 13, the loss of dependency works out to Rs.10,83,108/-

18. It is to be noted that the Tribunal has awarded Rs.1 lakhs towards loss of consortium, and funeral expenses @ 25,000/-. In view of the decision in Pranay Sethi (supra) the said amount needs to be reduced to Rs.40,000/- and Rs.15,000/- respectively.

19. Thus the claimants are entitled for compensation of Rs.10,83,108/- towards loss of dependency, Rs.40,000/- towards loss of consortium, Rs.15,000/- towards funeral expenses, in addition to actual medical expenses of Rs.5,66,000/- and ambulance charges of Rs.8,800/- which have not been disputed. Thus the claimants are entitled for total compensation of Rs.17,12,908/- which would be inclusive of compensation paid under Section 140 of M.V.Act.

21. Hence, the appeal is partly allowed. The compensation awarded by the Tribunal is reduced to Rs.17,12,908/-(inclusive of

compensation under 140 M.V.Act). The said amount shall carry interest @7.5% per annum from the date of application till deposit/realization. Award of compensation in the case is modified accordingly.

22. At this stage, the learned Counsel for the appellant submits that statutory amount has been deposited before this court and the entire award amount along with interest has already been deposited before the claims Tribunal at Ratnagiri. The Registry to forward the statutory amount deposited before this court to the MACT, Ratnagiri. The Nazir department of MACT Ratnagiri shall calculate the compensation payable to the claimant in terms of the award modified as above and pay 50% of the compensation amount as per the award along with proportionate interest thereon in favour of the claimant no.1, and 25% each along with proportionate interest thereon to the claimant nos.3 and 4 respectively.

24. The balance amount, deposited in excess of its liability, shall be refunded to the insurance company with the statutory deposit.

25. The Appeal is disposed of in above terms. In view of disposal of the appeal, civil application no. 1404 of 2018 does not survive and the same is disposed of.

. All concerned to act on an authenticated copy of this order.

(ANUJA PRABHUDESSAI, J.)