

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

939 FIRST APPEAL NO.1699 OF 2016

The New India Assurance Co. Ltd.,
Through its Manager (Legal Hub),
D.O. No. I, Adalat Road, Aurangabad,
Through Its Authorized Signatory
Shri Suryakant Shaebrao Makhare
R/o Aurangabad.

...Appellant.
(Org.Respdt.No.2)

VERSUS

1. Vimal Babasaheb Hulgunde,
Age 41 years, Occupation Household,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
2. Sakhubai Babasaheb Hulgunde,
Age 38 years, Occupation Household,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
3. Appa Babasaheb Hulgunde,
Age 22 years, Occupation Education,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
4. Pandurang Babasaheb Hulgunde,
Age 21 years, Occupation Education,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
5. Vithal Babasaheb Hulgunde,
Age 20 years, Occupation Education,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
6. Manohar Babasaheb Hulgunde,

Age 18 years, Occupation Education,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.

7. Lahanu Rama Hulgunde,
Age 66 years, Occupation Nil,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
8. Kalabai Lahanu Hulgunde,
Age 61 years, Occupation Household,
R/o Katewadi Tq. Jamkhed
Dist. Ahmednagar.
9. Raosaheb Bhau Tambe,
Age 51 years, Occupation Business
And Agri., R/o Khandeshwari
Tq. Karjat Dist. Ahmednagar.

...Respondents.
(Org.Claimants)
(Rsp.9 Org.R-1)

.....
Mr. M. M. Ambhore, Advocate, for appellant.
Mr. A. D. Aghav, Advocate, for Respondents No.1 and 3.
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 17-07-2019.

ORAL JUDGMENT :

1. Present appeal has been filed by the original respondent No.2 - Insurance Company challenging the Judgment and award passed in Motor Accident Claim Petition No.638 of 2009 by learned Member Motor Accident Claims Tribunal, Ahmednagar on 13-05-2015, whereby the petition filed under Section 166 of the Motor Vehicles Act by the present respondents No.1 to 8 came to be allowed.

2. The original claimants had come with a case that, they are the legal heirs of one Babasaheb Lahanu Hulgunde. The said Babasaheb met with accident at about 4.45 p.m. on 11-07-2009 on Jamkhed - Kharda road. He was walking on the road when he was dashed by pick-up van bearing No.MH-16/Q-7634. It was stated that the said vehicle was driven by respondent No.1 at the relevant time he is also the owner of the said vehicle. The accident took place due to the negligence on the part of the respondent No.1. Babasaheb had received severe injuries and died on the spot. Babasaheb was 40 year old person cultivating about 15 Acres of land and getting income of Rs.2,50,000/- to Rs.2,50,000/- per annum. He was also doing milk business and getting income of Rs.4000/- to 5000/- per month. So also after the season of agriculture, he used to work on Crane, thereby earning Rs.250/- to 300/- per day. All the claimants were dependent on his income. The said offending vehicle was insured with respondent No.2 on the date of the accident, and therefore, compensation was claimed from both the respondents.

3. Respondent No.1 failed to file written statement. Respondent No.2 by filing written statement denied all the averments in the petition. It was denied that, the accident had taken place due to the

negligence on the part of the respondent No.1. It was contended that, the accident had occurred due to deceased himself as he had suddenly appeared on the road without taking note of any incoming vehicle. Age and income as narrated in the petition has been denied by the Insurance Company. Statutory defences have also been taken.

4. Taking into consideration the rival contentions, issues were framed. Only claimants have adduced evidence. Taking into consideration the evidence on record and hearing both sides, the learned Tribunal has held that, deceased Babasaheb died due to vehicular accident and the said accident had taken place due to the negligence on the part of the respondent No.1. Respondent No.2 Insurance Company has failed to prove breach of terms of policy. Under such circumstance, respondents No.1 and 2 are jointly and severally liable to pay compensation to the claimants. Amount of Rs.16,23,320/- has been awarded as compensation to the claimants inclusive of the amount under no fault liability. This Judgment and award is challenged in this appeal.

5. Heard Learned advocate Mr. M. M. Ambhore for appellant and learned advocate Mr. A. D. Aghav for respondents No.1 and 3.

6. Taking into consideration the submissions made, the grounds taken in appeal memo, following points arise for determination, findings and reasons for the same are as follows ;

A) Whether the claimants had proved that the accident had taken place due to the rashness and negligence on the part of the respondent No.1 while driving pick-up van ?

B) Whether the Tribunal was justified in computing the compensation of Rs.16,23,320/- ? If no, then what would be the just amount of compensation ?

AS TO POINT "A" :

7. It has been vehemently submitted on behalf of the appellant that, the learned Tribunal failed to consider that the deceased had suddenly appeared on the road and he had not taken care of the traffic going on the road. The Tribunal ought to have held that, deceased himself was responsible for the accident.

8. No evidence has been adduced by the Insurance Company to support this contention taken in the written statement by it. No doubt the witness who has been examined on behalf of the claimant i.e. C.W.1 Manohar was not eye-witness, yet he relied on police papers. The contents of the FIR Exhibit 34, spot panchanama

Exhibit 35 are not supporting the contention taken by the Insurance Company. The panchanama of the spot Exhibit 35 would show that, the spot of the accident was on the extreme southern edge of the road. Another fact which can be seen from the panchanama of the spot is that, there were tire marks to the extent of 25 feet and then from the spot where the blood had fallen, the vehicle had stopped at a distance of about 10 feet. It gives indication about the speed of the vehicle. Under such circumstance, the doctrine of *res ipsa loquitur* is required to be invoked in this case as the spot is speaking itself for the rashness and negligence on the part of the vehicle driver. No fault can be found that the finding given by the learned Tribunal that the said accident had taken place due to the negligence on the part of the respondent No.1. Hence, point "A" is answered in affirmative.

AS TO POINT "B" :

9. Now turning towards quantum, the claimants had given three sources of income for the deceased ; (1) agriculture, (2) milk business and (3) wages from Crane driving. Claimants have not produced documentary evidence as well as oral evidence in respect of income from Crane driving. It appears that, some certificate was

produced in respect of milk business, however the concerned person with the record was not examined to support the said certificate. Only 7/12 extract and 8/A extract has been produced on record, however it can be seen that both those documents i.e. Exhibits 41 and 42 stand in the name of claimant No.7 i.e. father of the deceased. The learned Tribunal had come to the conclusion that, since there is no cogent, material evidence regarding income of the deceased, the guess work was done and finding is given that, Babasaheb might have been earning at least Rs.6000/- per month. The learned advocate appearing for the appellant submits that, when the Tribunal had come to the conclusion that, there was no material and cogent evidence to prove the income then by invoking notional theory, the Tribunal ought to have taken his income @ Rs.5000/- per month. I do not agree with his submission. It is to be noted that, Babasaheb had two wives and four children to support, therefore he had the responsibility of six persons plus himself. Though the lands were standing in the name of claimant No.7 and claimant No.7 has two more sons, having their own family yet there was justifiable guess work that has been done by the Tribunal that Babasaheb might have been earning at least Rs.6000/- per month. That figure does not require any modification.

10. The learned Tribunal has added 30 % of the income towards future prospects, however it can be seen that, his age that has been taken by the learned Tribunal and as per the post mortem report, is 45 years. Therefore, taking into consideration his age and the fact that he was self employed, as per the decision in *National Insurance Company Ltd. Versus Pranay Sethi and others, in Special Leave Petition (Civil) No.25590 of 2014 and other, decided on 31-10-2017*, future prospects are required to be added to the extent of 25 % of the income. That 25 % comes to Rs.1500/-. Thus by adding the said future prospects, the income of the deceased would be Rs.7500/- (Rs.6000 + 1500 p.m.) yearly it would be Rs.90,000/- (7500 p.m. X 12 months). Further taking into consideration the dependency of all the claimants and as per the decisions in, *National Insurance Company Ltd. Versus Pranay Sethi and others (Supra) with Sarla Verma and others v. Delhi Transport Corporation and another*, reported in (2009) 6 SCC 121, 1/5th is required to be deducted towards personal expenditure. That amount comes to Rs.18,000/- (1/5th of Rs.90,000/-). Therefore, after deducting the personal expenditure, the dependency of the claimants would be Rs.72,000/- per annum.

11. Taking into consideration the age of the deceased and the ratio laid down in *Pranay Sethi* with *Sarla Verma's case (Supra)*, the just multiplier in this case would be 14. After applying the multiplier the total loss of the income by the claimants would be Rs.10,08000/- (72,000 X 14).

12. The learned Tribunal has awarded almost Rs.5,50,000/- towards non pecuniary damages under the head of loss of consortium, loss of love and affection for children and parents. It is to be noted that, the said amount was granted as per the decision in, *Rajesh and others Versus Rajbir Singh and others*, reported in (2013) 9 SCC 54, as the Tribunal has decided this matter on 13-05-2015. However, now since in *Pranay Sethi's* Judgment it has been held that,

"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."

We cannot calculate the compensation or we cannot allow the computation of the compensation which has been done on the basis of case of *Rajesh and others Versus Rajbir Singh (Supra)* to sustain and therefore the decision in Constitution Bench in *Pranay Sethi* is

required to be applied for awarding non pecuniary damages i.e. conventional heads. As per Pranay Sethi's Judgment it has been directed that, in conventional heads the damages to be awarded is Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively for loss of estate, loss of consortium and funeral expenses respectively. That much amount is required to be granted in this case, that comes to Rs.70,000/-. Therefore, after adding the conventional head damages, the total amount of compensation to which the claimants were entitled to was Rs.10,78,000/-. Under such circumstance the compensation awarded by the learned Member being higher deserves to be set aside and modified. Point is therefore answered accordingly.

13. For the aforesaid reasons, following order is passed ;

ORDER

i) The appeal is hereby partly allowed with proportionate costs.

ii) The Judgment and award passed in Motor Accident Claim Petition No.638 of 2009, by learned Member Motor Accident Claim Tribunal, Ahmednagar, on 13-05-2015 is hereby set aside and modified as follows ;

"Respondents No.1 and 2 should pay amount of

Rs.10,78,000/- (in words rupees ten lakh seventy eight thousand only) (inclusive of amount of Rs.50,000/- granted under no fault liability), jointly and severally to petitioners No.1 to 8 together with interest @ of 9 % per annum from the date of filing of the petition till actual realization of the entire amount.

iii) It has been submitted that, entire amount as per the award was deposited in this Court and thereafter the claimants were allowed to withdraw amount of Rs.10,00,000/- (ten lakh) by this Court. Under such circumstance, taking into consideration the modification in the compensation amount, after calculating the compensation once again, excess, if any, be refunded to the appellant, and rest of the amount to which the claimants are entitled would be given to them equally.

iv) Award be drawn accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.