

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.776 OF 2004

1. Smt. Padma wd/o Virendra Joshi,
Aged : 38 years.
2. Ku. Dhanashri d/o Virendra Joshi,
Aged : 6 years, through Natural
Guardian Mother Smt. Padma wd/o
V. Joshi.
3. Shri Laxmivallabh s/o Durlabh Joshi,
Aged : 69 years.
4. Smt. Jayantabai w/o Laxminvallah,
Aged : 63 years.

[Appellant No.3 & 4 are
deleted in view of order
of Hon'ble Court dtd.
01/12/20]

All Appellants 1 to 4 are residing at
Wadgaon Road, Yavatmal, Tahsil
and District Yavatmal.

... **APPELLANTS**

V E R S U S

1. Maharashtra State Road Transport
Corporation having its head office
at Wahatuk Bhavan Bombay Centre,
Bombay and its Divisional Office at
Yavatmal through its Divisional
Controller Yevatmal, Tahsil & District
Yavatmal.
2. Shri Sk. Katru s/o Sk. Bharu Mus
Driver of S.T.Bus, R/o Ward No.28,
Darwha, Tahsil Darwha,
District - Yavatmal.

[Ref. to Reg. (Judl.)
order dtd. 16-4-19, the
matter is abated against
R. No.2]

... **RESPONDENTS**

Shri A. J. Bhoot, Advocate for appellants.
Shri R. S. Charpe, Advocate for respondent No.1.

CORAM:- S. M. MODAK, J.
DATED : 09/12/2020.

ORAL JUDGMENT :

1. Heard Shri A. J. Bhoot, learned advocate for the appellants / original claimants and Shri R.S. Charpe, learned advocate for respondent No.1-MSRTC. Respondent No.2 - Driver died and accordingly, proceedings abated against him.

2. The issue involved in this appeal is whether the findings of the Claims Tribunal on the point of rashness and negligence of the S.T. Driver is correct or not. The Claims Tribunal has answered that issue against the claimants and dismissed the petition. For this reason, Claims Tribunal has not gone into the issue of income of the deceased, thereby determining the amount of compensation.

3. Before the Claims Tribunal on the point of accident, there was oral evidence of two witnesses from the side of the claimants. Whereas the bus driver himself entered into witness box. Apart from oral evidence, documentary in the form of FIR, Spot Panchanama and Post-Mortem Report was available before the Claims Tribunal.

4. Learned advocate for the claimants on one hand tried to place reliance on the evidence of two witnesses and on the other hand tried to find fault with the reasoning given by the Claims Tribunal. Even according to him, the Claims Tribunal ought to have applied the principle of *res ipsa loquitur* i.e. the circumstances speak for themselves. In support of his contention, he relied upon the following Judgments :-

i] M.S.R.T.C. Vrs Smt. Manjulabai wd/o Bhagwanji Nagpure and others, reported in 2013 SCC OnLine Bom 871.

ii] Anusaya w/o Laxman Patil and others Vrs. MSRTC, reported in 1996 SCC OnLine Bom 617.

iii] New India Assurance Co. Ltd. Vrs. Vimal Babasaheb Hulgunde and others, reported in 2019 SCC OnLine Bom 1298.

5. On the point of evidentiary value of the police papers, he relied upon Judgment in case of Oriental Insurance Co. Ltd., Aurangabad Vrs. Babulal s/o Chunilal Somani and others, reported in 2015 (1) Mh. L. J. 71. According to him, the income of the deceased was Rs.8,000/- (from plastic and agricultural business) and accordingly, he requested to apply

guidelines laid down by the Hon'ble Supreme Court in case of National Insurance Company Limited Vrs. Pranay Sethi and others, reported in 2017 (13) Scale 12.

6. On the other hand, learned advocate for MSRTC submitted that unless and until the negligence of the S.T. driver is proved, his master i.e. MSRTC cannot be held responsible. In support of his contention, he relied upon following two Judgments:-

i] Minu B. Mehta Vrs. Balkrishna Ramchandra Nayan, reported in 1977 AIR (SC) 1248.

ii] Narayan Kalangutkar and another Vrs. Shabir Yasin Mirban and others, reported in 2012 (4) AIR Bom R 541.

According to him, the Claims Tribunal has rightly disbelieved the evidence of two witnesses and in fact, the evidence of S.T. driver, who is an eye-witness to the incident, is more reliable. On the point of income, he submitted that the agricultural income is not proved and the father of the deceased cannot be said to be dependent as observed by Hon'ble Supreme Court in case of Pranay Sethi's case (supra).

CONCLUSION

7. I have perused the evidence of two witnesses i.e. Waman Maroti Wandhare (sitting in the office of Newspaper of Sinhazep) and Laxman Tawade (occupant of ST bus) very minutely. I have also read the evidence of S.T. driver - Sk. Katru S/o Sk. Bharu Mus. I have also considered the reasoning given by the Claims Tribunal while rejecting the evidence of these two eye-witnesses.

8. It is but natural that the widow of the deceased unless accompanying the deceased is unable to throw some light about the manner of the accident. Her evidence ultimately is on the basis of information received by her and on the basis of police papers. It is settled law that the Claims Tribunal is expected to conduct a summary inquiry. It is also a settled law that the Claims Tribunal is supposed to decide the matter by applying the test of "preponderance of probabilities". The test of "proof beyond reasonable doubt" cannot be made applicable to such inquiries.

9. When the record is perused, I find the Claims Tribunal while rejecting the evidence, has drawn following inference :-

- a] The witness - Waman Wandhare has admitted that he has not seen the alleged dash of S.T. bus to the scooterist.
- b] After hearing big noise, all persons have rushed to the spot and then he had seen the injured person lying on the road.
- c] The witness - Laxman Tawade was not believed.
- d] According to him, the scooterist came in a zigzag manner. Furthermore, nowhere he has stated about dash of S.T. bus to the scooterist.
- e] It is not possible to drive heavy vehicle in a fast speed when the road is narrow.
- f] The witness - Laxman Tawade has deposed in more than 2000 cases.
- g] Nothing damaging was elicited during cross-examination of the bus driver.

10. For these reasons, the evidence of two witnesses was not relied upon. On this background, learned advocate for the claimants has brought to my notice the contents of the Spot Panchanama. It is at Exh.48.

11. It is true that in case of **Oriental Insurance Co. Ltd., Aurangabad Vrs. Babulal s/o Chunilal Somani and others,** reported in **2015 (1) Mh.L.J. 71** this Court has opined about the evidentiary value of the police papers. So, certainly, we can read

the police papers, even though concerned witness is not examined. The following circumstances mentioned in the spot panchanama were highlighted on behalf of claimants :-

- a] There were tire marks at a distance of 15 feet from scooter up to S.T. bus.
- b] The S.T. bus was standing at the center of the road.
- c] There was pool of blood at two places towards eastern side.

12. Whereas learned advocate for MSRTC invited my attention to the following facts from the panchanama :-

- a] Two wheels [from conductor side of the bus] were at a distance of 4 feet from the side margin of the road towards northern side.
- b] The scooter is lying on southern side of the road.

13. When I have perused the citations relied upon by both the sides on the point of negligence, one thing is clear that the negligence of the driver needs to be proved. Ultimately, a petition under Section 166 of the Motor Vehicles Act, 1988 is based upon the principle of *fault liability*. It is also true that MSRTC can be held responsible only when negligence of the driver is proved. Now, the conclusions drawn in those cases on the point of negligence, were on the basis of facts of those cases.

14. Even though, the witness - Waman Wandhare during examination-in-chief has said about the accident, the answers given during cross-examination suggest that though he was present in the vicinity of the spot, actually he has not seen how the accident happened. The witness - Laxman Tawade said about zigzag driving by the scooterist. He gave opinion that S.T. bus driver was negligent because S.T. bus was in a speed. In what manner the S.T. bus has dashed the scooterist, was not deposed by him. Furthermore, there is doubt about his credibility because he has deposed in more than 2000 cases earlier.

15. It is no doubt true that S.T. driver is an eye-witness to the incident. He was driving the bus from Yavatmal to Nagpur and the scooterist was coming from Nagpur side i.e. from his opposite direction. Even, he has said that scooterist has passed his S.T. bus. He realized about the incident when he heard the noise and stopped the bus. Then he had seen that injured was lying on the ground. He reported the matter to the police, as it is reflected from the FIR at Exh.47. He also narrated the same story. So, when this Court has considered his evidence, and contents of

panchanama, what we find is that so far as tire marks are concerned, he has not explained anything. Even he has feigned ignorance when asked about skid marks on the road.

16. The spot panchanama was prepared immediately after the accident i.e. on 20th April, 1993. It is very much clear from the spot panchanama that there were tire marks for 15 feet from the scooter up to the S.T. bus. Now, what was the occasion for appearance of tire marks on the road. As compared to S.T. bus, the scooter is smaller vehicle. It does not appear that marks may be of the scooter. So, certainly they must be of S.T. bus. If the S.T. driver is driving vehicle in a moderate speed, why there is necessity to apply brakes, as it is evidenced by tire marks.

17. When the scooterist has passed from right hand side of the bus, what was occasion for the S.T. driver to apply the brakes. Learned advocate for the MSRTC is right in his submission that there was no head collision. Furthermore, damage to either of the vehicles from the spot panchnama is not pointed out to me. On the basis of this evidence, there is reason to believe that S.T. bus and scooter have dashed to each other from their side.

18. Now, the question of negligence will arise. Learned Advocate for the claimants tried to show me the statement of deceased recorded before the police. It is not proved before the Claims Tribunal. So, we have got the evidence of the S.T. driver. He has nowhere stated that the scooterist has dashed S.T. bus from the side. So, there is reason to believe that even S.T. driver is not telling the entire truth. The width of the road is important. In the panchanama, the width of the road is mentioned as 20 feet. Shani Mandir is on the west side and Tahsil office is on east side, It has come in the evidence that there is police headquarter near the spot. Even office of one newspaper is also there. It has also come in the evidence that there is bridge near Shani Mandir Chouk. So in that eventuality, the S.T. driver ought to have driven the bus in a moderate speed. Tire marks do not show that he has driven the bus in a moderate speed. The answer given by the witness that the scooterist came in a zigzag manner, is not sufficient enough to exonerate the S.T. driver. So, the negligence of S.T. driver is certainly there. However, I do not hold him responsible 100%. It is for the reason that there is dash from side of S.T. bus. If a scooter passed southern portion of S.T. bus and if

the scooter dashed to the S.T. bus from the side, the S.T. driver cannot be held responsible 100%.

19. Considering the situation at the spot, the S.T. driver and scooterist ought to have applied brakes while driving their respective vehicles. If the S.T. driver ought to have driven the bus in a moderate speed and the scooterist ought to have verified that in a available space, whether he could have passed S.T. bus. So, I think that the deceased is also responsible.

20. Whether pleading about contributory negligence about the scooterist is there or not, is not important. Ultimately, what Court finds on appreciation of evidence is important. So, I think that first of all Claims Tribunal has not applied principle of *res ipsa loquitur* when the case is before him. He ought to have given weightage to the presence of the S.T. bus at the center and appearance of the tire marks. He has overlooked them. I find that he has appreciated the evidence as if he is deciding the criminal trial, it is not permissible. Those findings need to be set aside. However, I do not hold the S.T. driver 100% responsible. In a given situation, I hold them responsible 50% each. Hence, the

claimants are entitled to get only 50% of the compensation from the Court.

QUANTUM

21. According to the wife of deceased, the claimants were having income from two sources. One is from business of plastic industry in the name of "Virendra Plastics" and second is agricultural field.

22. So, from the business of Virendra Plastics, the deceased was getting Rs.8,000/- per month and Rs.4,000/- per month from the agricultural field. The Claims Tribunal has not decided this issue. In fact, the Claims Tribunal ought to have given finding. It certainly could have helped this Court. However, I do not think that on this ground, the matter needs to be remanded. If there is evidence available on record, the Appellate Court can consider them. The respondents were aware about this evidence and they have participated in the trial. Even I have heard learned advocate for MSRTC on this point. So, I am inclined to decide the amount of compensation on the basis of evidence.

23. His wife filed on record following documents :-

- a] Exh.40 - Turnover Certificate.
- b] Exh.41 & 43 - Demand notice by Department of Sales Tax.
- c] Exh. 42 & 44 - Assessment order.

The respondent was given an opportunity to cross-examine the witness. Even the claimants have taken pains to prove Income Tax Clearance Certificate by examining one Rambhau Patre representative from Income Tax Department. He has proved the certificate at Exh.62. The income for the last year 1992-1993 is shown as Rs.59,820/- and an amount of Rs.8,820/- was paid towards tax.

24. This Court feels that the documents referred above can certainly be considered while deciding income of the deceased. There is no case put up by MSRTC that these documents are forged. Some of these documents were issued by Public Office.

25. Furthermore to prove agricultural income, 7/12 extract is filed on record. It is at Exh.45. Land stands in the name of the deceased. Deceased was cultivating crops of Cotton and Tur. This is a public document. It can be considered.

26. Learned advocate Shri Charpe submitted that as per observations in case of National Insurance Company Limited Vrs. Pranay Sethi and others, reported in 2017 (13) Scale 12, income means income minus tax (para 44). The said observations pertain to deducting the tax while computing income so the total income assessable is Rs.59,820/- and the tax demanded is Rs.8,820/-. Even if said submissions are considered still, the deceased was also having income from agriculture. There is no concrete evidence but 7/12 extract shows cultivation of crops. It suggests of some income.

27. After taking stock of above evidence and submission, this Court feels that there is reason to believe that the deceased was having annual income of Rs.60,000/- from both the sources. There is photocopy of acknowledgment for the assessment year 1992-1993 of Income Tax Department at Exh.30(2). But, it was not proved through wife or through witness-Patre. Even original acknowledgment is not filed. The ratio in case of Malarvizhi and others Vrs. United India Insurance Company Limited and another, reported in (2020) 4 SCC 228 relied upon by the claimants will not help them for the reasons stated above.

28. There are four claimants. The wife, parents and one daughter. As said by learned advocate for MSRTC, the father cannot be said to be dependent. So, there are only 3 dependents. If the dependents are 3, it is to be presumed that deceased must be spending 1/3rd for himself and contribution towards dependents is 2/3rd. So, loss of dependency comes to (Rs.60,000/- minus 2/3rd of Rs.60,000/-) Rs.40,000/-. The multiplier would be 15, if the deceased is in between age group of 36 to 40. It is in the evidence that the deceased was aged about 36 years. So, the amount will be Rs. 40,000/- x 15 = Rs. 6,00,000/-. The deceased is also entitled to get certain amount towards loss of future prospects. As per the **Pranay Sethi's** judgment, if the deceased is self-employed and below the age of 40 years, 40% of the established income will be lost on account of future prospects. It comes to Rs. 2,40,000/- [Rs. 6,00,000/- x 40%]. The claimants are also entitled to get Rs. 2,000/- towards funeral expenses and Rs.2,500/- towards loss of estate. There were four near relatives who have lost the company of the deceased, out of them, the appellant Nos.3 & 4 have expired. So, the remaining two appellants are only entitled on account of loss of consortium, they

are wife and daughter. The total amount is Rs. 80,000/- [Rs.40,000 x 2]. The total of the above amounts under above heads comes to Rs.9,24,500/- [Rs. 6,00,000 + Rs. 2,40,000/- + Rs. 2,000/- + Rs. 2500/- + Rs.80,000/-].

29. As held above, the deceased and the S.T. Driver is responsible for the accident equally. So, the claimants can get only 50% of Rs. 9,24,500/-. It comes to Rs. 4,62,250/-.

30. When the matter was dismissed and restored, it was on account of fault on the part of the appellants. Hence, they are not entitled for interest for the period from 20.02.2009 to 20.03.2015. In view of that, following order is passed.

ORDER

- 1 Appeal is partly allowed.
- 2] The respondents are directed to pay amount of compensation of Rs.4,62,250/- to the claimants along with interest @ 6% per annum from the date of petition till realization inclusive of amount towards no fault liability. (Excluding the period as mentioned below).
- 3] Once the amount is deposited, it be paid to appellant Nos.1 & 2 equally.
- 4] Appeal is disposed of in above terms.

5] The appellants are not entitled for interest for the period from 20/02/2009 to 20/03/2015 for which period the matter was not on the file.

[JUDGE]

Choulwar