

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.49/2016

MS. JAKHOTIYA PLASTICS PVT. LTD.

R/o 318/319, Kundaim Industrial Estate,
Kundaim, Ponda, Goa.

... APPELLANT

Versus

1. SMT. SMITA LAXMAN GAUDE,
aged 37 years, wd/o Laxman Surya Gaude

2. MASTER SANAT LAXMAN GAUDE
aged 6 years, S/o Laxman Surya Gaude
represented by legal guardian
Smt. Smita Laxman Gaude

3. MASTER AKASH LAXMAN GAUDE
aged 4 years, S/o Laxman Surya Gaude
represented by legal guardian
Smt. Smita Laxman Gaude

4. SMT. SAVITRI SURYA GAUDE
aged 60 years, w/o Surya gaude
All r/o.: H.no.118, Gad Wada,
Khandola, Marcel, Goa.

...RESPONDENTS

**Mr. Sanket Kamat and Mr. Yogesh Nadkarni, Advocate for the
*Appellant.***

Ms. Christabel Afonso, Advocate for the Respondents.

CORAM: M. S. SONAK J.

DATED: 8th April 2022

ORAL JUDGMENT:

1. Heard Mr. Sanket Kamat and Mr. Yogesh Nadkarni for the appellant and Ms. Christabel Afonso for the respondents.

2. The appellant is admittedly the owner of the Bajaj Chetak Scooter bearing registration no.GA-01-K-5980 involved in an accident on 20.12.2011, which resulted in the death of Laxman Surya Gaude. The scooter was driven by one Pranab Jana (Jana), who was impleaded as respondent no.1 before the Motor Accident Claims Tribunal (Tribunal). However, the said Jana has not been impleaded as a party in this appeal for the reasons best known to the appellant.

3. The deceased Laxman's widow, Smita, then aged 37 years, his two minor children, Sanat and Akash, then aged 6 and 4 years respectively, and his mother Savitri, then aged 60 years, instituted Claim Petition No.53/2012 before the Tribunal seeking compensation on account of the death of Laxman in the vehicular accident. The Tribunal has awarded the claimants compensation of ₹37,37,500/-, including the amount of ₹50,000/- towards No-Fault Liability together with interest @ 9% p.a. from the date of filing of the claim. Since the scooter was not insured, the

appellant is held to be liable for payment of this awarded amount together with said Jana (driver). Hence this appeal by the appellant-owner of the offending vehicle.

4. Mr. Kamat learned counsel for the appellant firstly submitted that the Tribunal erred in making an Order dated 04.11.2015, closing the evidence on behalf of the appellant. He points out that no sufficient opportunity was granted to the appellant and the Tribunal even failed to appreciate that there is usually some delay in the service of summons upon the witness. He submits that on account of the Order dated 04.11.2015, the appellant was deprived of an opportunity to defend the claim petition effectively.

5. Mr. Kamat submitted that secondly and without prejudice to the above, the evidence on record sufficiently establishes that the offending vehicle was stolen by Jana. He pointed out that on 20.12.2011, even a complaint/FIR was lodged with the police, and the same was duly registered. He submits that in such circumstances, there was no question of holding the appellant liable for the acts of the said Jana.

6. Mr. Kamat, again without prejudice to the above, finally submits that there are errors apparent on the face of the record in

the matter of computation of the quantum of compensation. He submits that a maximum of 40% addition could have been made to the proved income in terms of the law laid down in *National Insurance Company Limited vs. Pranay Sethi & Ors. - 2017 (16) SCC 680*. He submits that the award of compensation towards loss of love and affection or funeral expenses is also over and above what has been prescribed in *Pranay Sethi (supra)*. He submits, no doubt, without prejudice, that the compensation amount could have been determined at the maximum of ₹30,75,000/- and not ₹37,37,500/- as determined by the Tribunal.

7. Ms. Christabel Afonso, learned counsel for the respondents, defends the impugned award based on its reasoning. She submits that more than ample opportunity was granted to the appellant. She submits that a patently false case was set out by the appellant about theft, and in any case, the same was not made good either by leading any evidence or through cross-examination. She made particular reference to the testimony of Joaquim Fernandes (AW2), the Head Constable attached to the Ponda Police Station, and Firoz Khan (AW3), who deposed not only as an eyewitness to the accident but also that he had seen Jana riding the offending vehicle at least 100 times before the accident in question in the Kundaim Industrial Estate complex

where the industry of the appellant is presently based. She submitted that there is no error in the computation of compensation considering the law as it stood on the date on which the impugned award was made. She also pointed out that there were no grounds in the appeal memo questioning the quantum of compensation, and therefore the issue of quantum should not even be gone into in this appeal. She pointed out that there was a non-joinder of a necessary party. For all these reasons, she submitted that this appeal may be dismissed.

8. Ms. Afonso also made a grievance about the bank guarantee furnished by the appellant by pointing out that the same is not in accord with the orders made by this Court. She submitted that at this stage, it would be inequitable to require the claimants to continue with the execution proceedings when they were ordered to be secured by bank guarantee. She also prayed for suitable orders on this issue.

9. Rival contentions now fall for my determination.

10. In this appeal, there is neither any dispute about the accident nor the involvement of the offending vehicle owned by the appellant in the accident. There is also no dispute that the accident took place on account of the rash and negligent driving

of Jana, who has, for reasons best known to the appellant, not even been impleaded as a respondent in this appeal. There is no challenge on this aspect of the matter.

11. Therefore, the points which arise for determination in this appeal are as follows:-

- a) Whether the Order dated 04.11.2015 shutting out the appellant from leading evidence in the matter is legal and valid?
- b) Whether the appellant has otherwise proved that the offending vehicle was stolen on the date of the accident, i.e., 20.12.2011, and therefore, the appellant was not responsible for the accident committed by the alleged thief, Jana?
- c) Whether the above point can be answered against Jana, in the absence of his impleadment in this appeal?
- d) Whether there is an error in the computation of the compensation amount by the Tribunal?

12. On the first aspect, the record indicates that on 31.08.2015, after the claimants closed their evidence, the matter

was adjourned for the evidence of the appellant to 28.09.2015. This means that ample opportunity was granted to the appellant to keep their witnesses ready or, if necessary, to even seek summons for their presence. On 28.09.2015, the appellant chose not to lead any evidence but simply applied for yet another adjournment which the Tribunal granted unconditionally, and the matter was further adjourned to 20.10.2015.

13. On 20.10.2015 again, no witnesses were presented by the appellant, but an application was made seeking summons or seeking fresh summons. Even this was allowed subject to payment of costs of ₹300/- and Bhatta charges of ₹250/- and the matter was adjourned to 04.11.2015. On 04.11.2015, when the Order shutting further evidence was made, not only that the witnesses were not present, but further, even the advocate for the appellant did not bother to remain present.

14. This is a case where Laxman, who was about 38 years old, died in a vehicular accident. His widow, two minor children, and aged mother were seeking compensation. From this perspective and also the fact that more than ample opportunities were granted to the appellant, there was nothing wrong in the Tribunal shutting out the appellant's evidence by Order dated 04.11.2015.

This was the correct course adopted by the Tribunal in the facts of the present case.

15. Even after the Order was made on 04.11.2015, it is not as if the appellant was serious or diligent in pursuing the matter. On 07.11.2015, an application was filed, again seeking adjournment because the appellant wished to appeal the Order dated 04.11.2015. After considering the objections raised by the claimants, this application was dismissed, and the matter was posted for arguments on 20.11.2015. No proceedings were taken up in the meanwhile, and on 20.11.2015, the advocate for the appellant argued the matter on merits. Considering the totality of the circumstances, the first point for determination will have to be answered against the appellant.

16. On the second point for determination, Ms. Afonso appears to be justified in contending that the appellant came out with the false plea that the offending vehicle was stolen on the date of the accident simply in an attempt to avoid liability. The Tribunal has noted that even the factum of the lodging of the complaint was not proved by the appellant because the author of the complaint was not examined. However, even if some indulgence is extended to the appellant and it is presumed that the appellant indeed filed a complaint on the date of the accident

that the offending vehicle had been stolen by some unknown person or by Jana still, there is no evidence on record to make good such a serious plea. Rather, the evidence on record establishes that this was a false plea raised by the appellant simply to avoid liability.

17. Joaquim Fernandes (AW2), a Head Constable attached to the Ponda Police Station, has deposed in this matter and stated that the rider, Jana, was working for the appellant, which had an industry situated in the Kundaim Industrial Estate, which is where the accident took place. Through this witness, the complaint dated 20.12.2011 about the theft was attempted to be produced; the same was resisted by the claimants by pointing out that the author of the complaint was not examined. This objection was upheld by the Tribunal. However, even if this objection were to be overruled and the complaint was to be produced on record still, that would not obviate the necessity of making good such a plea, at least by the standard of preponderance of probabilities.

18. Significant, however, is the testimony of Firoz Khan (AW3), an eyewitness to the accident. This witness has stated that he was in the goods transport business, and in that capacity, he would frequently go to Kundaim Industrial Estate to supervise

the loading and unloading of goods. On 20.12.2011, when he was at the Kundaim Industrial Estate, he actually witnessed the accident in which Laxman unfortunately died.

19. Firoz Khan (AW3), in para 2 of his affidavit in lieu of his examination-in-chief, stated as follows:

"2. At the time of accident Pranab Jana was riding the said scooter GA-01-K-5980. Prior to the accident on many occasions I had seen the said Pranab Jana at least 100 times riding the said scooter in said Kundaim Industrial Estate Complex. On the day of accident the said Pranab Jana was coming at the back of me riding the said Scooter GA-01-K-5980. On the way he suddenly overtook my motorcycle in a rash and negligent manner and in high speed and swung to the left and dashed against the pedestrian who was standing by the left side of the road. After the dash the said pedestrian flung to a distance of about 4 to 5 mts and fell on left side of the road. The said Pranab Jana fell down along with his scooter to a distance of about 7 to 8 mts. Thereafter the scooter went on grazing on the road to another 7 to 8 mts ahead. The said accident took place just 15 to 20 mts in front of me."

20. Firoz Khan (AW3) was cross-examined on behalf of the appellant. The cross-examination is entirely on the issue of whether or not Firoz Khan (AW3) had actually witnessed the accident. There is no cross-examination whatsoever on the most significant statements made by Firoz Khan about seeing Jana riding the offending vehicle at least 100 times before the accident

in the said Kundaim Industrial Estate complex. This part of the testimony, which was most crucial, has gone unchallenged at the behest of the appellant.

21. The proceedings before the Tribunal are by and far summary in nature. The claimants have to establish their case by the standards of the preponderance of probabilities. This is a case where the appellant took a serious defense about the theft of the offending vehicle but failed to make good such a defense. The testimony of AW2 and AW3, by a preponderance of probabilities, establishes the nexus between Jana and the Appellant. The appellant did not even bother to examine their own managers if, indeed, Jana was not an employee of the appellant or they had no truck with the appellant. Considering this state of the evidence or rather the total lack of evidence on the part of the appellant, it does appear that the appellant attempted to set out a false case before the Tribunal or, in any case, failed to establish the plea of theft of the offending vehicle even by the standard of preponderance of probabilities. The second point for determination will therefore have to be answered against the appellant.

22. The appellant now wants to avoid liability by placing the entire blame on Jana. This cannot be done behind Jana's back. If

the appellant was serious in this contention about the theft of the scooter by Jana, certainly Jana was a necessary party to this appeal. The third point of determination will have to be decided against the appellant. In any case, considering the determination on the second point, this point is not much relevant at this stage.

23. On the fourth point for determination, however, Mr. Kamat is on a stronger wicket. In para 59.4 of *Pranay Sethi (supra)*, the Hon'ble Supreme Court has held that 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. From the evidence of Ashok Agshikar (AW5), it does transpire that the law laid down in para 59.4 should have been appropriately applied rather than the law in para 59.3 of *Pranay Sethi (supra)*. Therefore, the addition towards future prospects should have been 40% and not 50% as taken by the Tribunal.

24. Similarly, applying the law in *Pranay Sethi (supra)*, the compensation awarded towards loss of love and affection is quite excessive, and the same is required to be scaled down to ₹40,000/- for each of the claimants, i.e., a total of ₹1,60,000/-. Similarly, the compensation of ₹30,000/- is due towards funeral expenses and

loss of estate. After including ₹50,000/- for No-Fault Liability, the total compensation works out to ₹30,75,000/- and not ₹37,37,500/- as was determined by the Tribunal in the impugned award read with the Corrigendum dated 25.04.2016.

25. *Pranay Sethi (supra)* is a decision of the Constitution Bench, and the law laid down in the earlier decisions will have to yield to the law laid down in *Pranay Sethi (supra)*. Therefore, Ms. Afonso's contention on the aspect of quantum cannot be accepted. The grounds in the memo of appeal cannot be construed pedantically. Besides, it is both the duty of the Tribunal as well as this Court to determine just compensation. The expression "*just*" implies compensation that is just to both parties. Applying this very principle, the Tribunal made an award that exceeded the claimed amount by over ₹20 lakhs.

26. On the aspect of deficit in the bank guarantee amount, there may be some merit in the calculations furnished by Ms. Afonso. Mr. Kamat, however, disputes these calculations and submits that a bank guarantee as directed by this Court has been furnished. Mr. Kamat, without prejudice, however, submits that should there be any shortfall, the appellant will now deposit the awarded amount in this Court within four weeks from today.

This statement made by Mr. Kamat based on instructions from the appellant is accepted as an undertaking to this Court.

27. This appeal is partly allowed by now determining the just compensation at ₹30,75,000/- in place of the earlier awarded amount of ₹37,37,500/-. The other directions in the impugned award are not interfered with. On the aspect of apportionment of compensation, the directions issued by this Court in orders dated 18.04.2018 and 07.12.2021 will operate because such directions were issued to protect the interest of the minors.

28. The appellant is directed to deposit the entire awarded amount in terms of this Judgment and Order in this Court within four weeks from today. In making such a deposit, the appellant would be entitled to adjust the amounts already deposited and even withdrawn by the respondents. This means that only the balance will now have to be deposited within four weeks from today. Until the balance amount is deposited, the bank guarantee to continue to remain in force. Mr. Kamat points out that the bank guarantee is valid till December 2022. However, once the amount is deposited, the appellant will have the liberty to apply in this Court for discharge of the bank guarantee.

29. The respondents will be entitled to withdraw the deposited amount after offering proper identification and furnishing bank details. The Registry to ensure that the amounts are directly remitted into the bank accounts of the claimants.

30. There shall be no order for costs.

M. S. SONAK, J.

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