IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

FIRST APPEAL NO.384 OF 2022
WITH
CIVIL APPLICATION NO.63 OF 2022
IN
FIRST APPEAL NO.384 OF 2022

The Oriental Insurance Co. Ltd. .. Appellant / (Orig. Insurer)

Versus

1. Mrs. Divya Girish Kapadia .. Respondents
2. Miss. Bhakti Girish Kapadia
3. Miss. Shraddha Girish Kapadia
4. Mr. Sagar Girish Kapadia
5. The Oriental Bank of Commerce

WITH
CIVIL APPLICATION NO.63 OF 2022

Mrs. Divya Girish Kapadia & Ors. Applicant / Respondent no.1,3 & 4.

In the matter between:-

The Oriental Insurance Co. Ltd., .. Appellant

Versus

Mrs. Divya Girish Kapadia & Ors. .. Respondents.

…

Mr. Devendranath S. Joshi for appellant.
Mr. N. C. Sheth for Respondent nos.1, 3 and 4 and for applicant in CA No.63 of 2022.

CORAM: BHARATI DANGRE, J.

RESERVED : 27th APRIL, 2022

PRONOUNCED : 08th JUNE, 2022

JUDGMENT:-

1. The present appeal is instituted by the Oriental Insurance Company Limited, being aggrieved by the judgment and order passed by the M.A.C.P., Mumbai in Claim Application No.1645 of 2010, by which the claim filed by the applicant under section 166 of the Motor Vehicles Act, 1988 came to be granted and the Insurance Company is fastened with the liability to pay compensation of Rs.68,20,000/- (Rupees Sixty Eight Lakhs Twenty Thousand Only) to the applicants along with interest at the rate of 9% from the date of filing of application till realization of amount.

2. Heard Advocate Devendranath Joshi for the Insurance Company and learned Advocate Shri. N. C. Sheth for respondent nos.1, 3 and 4.

3. The applicants /claimants had moved an application for withdrawal of the amount.

On the delay being condoned, the appellant was directed to file private paper book/compilation of documents and on its compliance, the appeal is taken up for hearing at the stage of admission.

4. The deceased is one Girish Natwarlal Kapadia, who succumbed to an accident, which took place on 18.03.20210 at around 7.00 hours in the morning, while he was on a stroll on P.K. Road. When he was walking by the side of the road, a motor

car bearing no.MH-04-AW-8089 coming from rear side, being rashly and negligently driven, knocked him, which resulted in fatal injuries. He was declared dead being brought to Wockhardt Hospital, Mumbai.

5. The deceased at the time of his accidental death was aged 54 years and a Chartered Accountant by profession. He was also partner in Kapadia and Gajaria Associates Firm.

Claiming that accident occurred on account of gross negligence of the driver of the offending motor car, his wife and three major children claimed compensation of Rs.75,00,000/- (Rupees Seventy Five Lakhs Only), by projecting his earning to be of Rs.6,00,000/- per annum. Claiming that the entire family was dependent on him and suffered loss of income, loss of love and affection, Claim Application No.1645 of 2010 was instituted against the opposite party and the Oriental Insurance Company Limited. The compensation was claimed under various heads along with costs and interest.

6. Despite notice, the opposite party chose to remain absent and hence, the Tribunal proceeded ex-parte against the opposite party and permission was granted under section 170 of the Motor Vehicle Act, 1988, to the insurer to defend the claim on various grounds.

The insurer filed written statement and denied the involvement of the offending motor car in the accident and specifically denied that the accident occurred on account of a rash and negligent driving of the said vehicle. It was sought to be canvassed that the accident occurred due to the negligence of the deceased and the claim of compensation was refuted by contending that it is exorbitant and excessive. The age, income and occupation of the deceased was also contested.

7. In support of the claim, the applicant no.1 Smt. Divya Kapadia entered into the witness box. She reiterated the claim for compensation and brought on record the copies of the F.I.R., postmortem report and insurance policy. She also produced the certificate, certifying the educational qualification of her husband and also brought on record the Income Tax Returns of her husband, certified by the Commissioner of Income Tax for the year 2008-09 to 2010-11 to establish his monthly earning, which form the basis of the claim for compensation.

The insurer or the opposite party did not examine any witness.

8. The applicant no.1, deposed that her husband was qualified as B.Com F.C.A, and stated that he possessed huge an experience in the field and was a capable professional and with his experience, he would have earned an amount of Rs.1,00,000/- per month, with the robust and good health, which he enjoyed and he would have survived till the age of 80 years. She deposed that she was paid a sum of Rs.40,000/- per month for household expenses and she has to look after the three children who are in the midst of their career. She produced on record the CA Membership Certificate of her husband as well as the Income Tax Returns certified by the Commissioner of Income Tax (Exh.27).

On cross examination, she admitted that she was not an eye-witness to the accident.

9. The First Information Report, with Mulund Police Station on 18.03.2010 was registered on a complaint filed by the son of the deceased, who reported that, his father left for morning walk at around 7.00 a.m. on the fateful day and within ten minutes, he received phone call from his friend, intimating him that his father was knocked by motor car on P.K. Road. On reaching the spot hurriedly, he found his father lying on the road in an injured condition. He was bleeding from his head and froth was oozing from his mouth. From the bystanders, he came to know that his father was knocked down by a driver of Maruti Zen and he sustained injuries. The spot panchnama and the inquest panchnama fortified his complaint. Statement of one Bhumika Manilal Maru, who was driving the offending motor car insured with the Insurance Company, was also recorded. She deposed that her father was the owner of Maruti Zen motor car no.MH-04-AW-8089 and she was a learner and was driving the car in the morning hours, of 18.03.2010, and while she was proceeding to the square of P.K. Road, one BEST bus was seen approaching and at that time, one person on her left side was attempting to cross the road in a quick fashion and all of a sudden, he came before her vehicle, and though she blew the horn, it was no consequence, as the said person dashed against her vehicle. She was petrified and left the spot and informed her parents about the accident.

10. The postmortem report opined the cause of death of Girish Kapadia as under:

> "Death due to chest injury with fracture of rib. Internal organ injury, head injury due to vehicular accident".

The Income Tax Returns for the Assessment Years 2008-09, 2009-10 and 2010-11 were produced on record, depicting that the deceased was the partner in M/s. Kapadia and Gajaria Associates Firm. The Income tax returns reflect his income as an individual as well as income from the Partnership Firm, as the remuneration /salary from the Partnership Firm and on profit of 43% as per Partnership Deed of Kapadia and Gajaria Associates Firm. The Income Tax Returns also reflected income from the saving bank account, fixed deposit, postal monthly income, interest on debenture(s) of Companies and interest from loan and advances.

As per Income Tax Returns of the Assessment Year 2009-10 i.e., for the annual year income was reflected as Rs.7,40,091/-, 2010-11 his income was reflected as Rs.7,39,202/- which included remuneration of Rs.6,32,916 and share of profit to the tune of Rs.1,76,583/- minus the income tax.

Since the tax on the share of profit in the Partnership Firm was paid by the Partnership Firm, therefore in the Income Tax Return of the deceased which was shown as exempted under section 10(2A) of the Income Tax Act.

The aforesaid income, as reflected in the Income Tax Return for the Assessment Year 2010-11 was the basis for claim of compensation for Rs.75,00,000/- (Rupees Seventy Five Lakhs Only) by the applicant before the Tribunal.

11. Taking into consideration the aforesaid evidence brought on record, the Tribunal accepted the claim that the accident occurred due to rash and negligent driving by the driver of the offending vehicle, and merely because the driver was not impleaded as a respondent, it cannot be held that the claim is not maintainable.

Applying the principle of r*es ipsa loquitur,* the Tribunal, on the basis of copy of the FIR, postmortem report, spot panchanama and inquest panchanama rendered a finding in favour of the applicants, to the effect that the deceased Girish Kapadia died in a vehicular accident which took place on P.K. Road opposite Tara Modak Udyan, near Shobhana Bungalow, Mulund (W) by rash and negligent driving of motor car no.MH-04-AW-8089.

12. In arriving at the amount of compensation payable, the Tribunal fell back on the evidence brought on record to the effect that the deceased was a qualified Chartered Accountant and was practising since last 30 years and used to earn a sum of Rs.60,000/- per month, apart from the fact that he was a partner in Kapadia and Gajaria Associates Firm. The last income tax return of the deceased, reflecting his annual income to be Rs.6,92,600/- was topped up with 15% of the income added towards future prospects and the annual income was computed as Rs.7,96,490/-. Applying the multiplicant of one fourth of the income, by considering that the deceased was maintaining family of four, was deducted towards his personal expenses. The loss of dependency was thus arrived at Rs.65,70,707/-. The amount of

Rs.1,00,000/- was awarded towards loss of consortium. Amount of Rs.1,00,000/- was computed towards loss of love and affection for applicant nos.2 to 4 Rs.25,000/- was granted for loss of estate and Rs.25,000/- was awarded towards funeral expenses. The total amount of compensation payable to the applicants was computed as Rs.68,20,707/- which is rounded off to Rs.68,20,000/- (Rupees Sixty Eight Lakhs Twenty Thousand Only).

The interest at the rate of 9% came to be awarded on the above compensation.

13. The learned counsel Shri. Joshi for the Insurance Company would vehemently submit that what is to be compensated to the family by way of compensation awarded under the Motor Vehicle Act is the loss of earning to the family. Therefore, the interest on capital gain/interest deposit etc, being not a fixed income, cannot be accounted towards the income of the deceased. He would submit that this figure would not have been considered and computed towards loss of income to the family.

The argument made at this stage appears to be impressive one but on a closure scrutiny of the income tax return of the deceased looses his sustainability.

Pertinent to note that compensation payable under the Motor Vehicle Act is a statutory compensation, which is payable to the claimant or his dependent on account of accidental injury or death, the peculiar advantage accruing under this Act has to be justified, co-relating to the accidental death. The compensation payable thus accrues on account of peculiar loss to the claimant caused by the accidental injury or to his dependent on his death. The Hon'ble Apex Court, in case of *Reliance General Insurance Company Limited V/s. Shashi Sharma and Others*, *(Special Leave Petition (Civil) No.26882/2013 with C.A.No.8867/12 decided on 23/9/2016)* has observed as under:-

> "The principle expounded in this decision that the application of general principles under the common law to estimate damages cannot be invoked for computing compensation under the Motor Vehicles Act. Further, the "pecuniary advantage" from whatever source must correlate to the injury or death caused on account of motor accident. The view so taken, is the correct analysis and interpretation of the relevant provisions of the Motor Vehicles Act, 1939, and must apply proprio vigore to the corresponding provisions of the Motor Vehicles Act, 1988. This principle has been restated in the subsequent decision of two Judges' Bench in Patricia S. Mahajan's case to reject the argument of the Insurance Company to deduct the amount receivable by the dependents of the deceased by way of "social security compensation" and "Life Insurance Policy".

14. The compensation to be awarded to the dependent of the deceased must be sufficient enough to recompensate the claim for the possible loss suffered or likely to be suffered due to sudden and untimely death of their family member as a result of motor accident. Though term "compensation" is not defined under the Act of 1988 and in Section 168 of the Motor Vehicle Act, it is well settled that the amount to be awarded as compensation need not be a bonanza largesse or source of profit, but what is excepted is to award "just, equitable, fair and

reasonable” compensation. The component of the quantum of “loss of income”, in the compensation under the Act, can be “pay and wages”. This would cover the earning of the deceased at the time when he suffered the accident, the cause being attributable to a third party. The whole purpose of award of compensation being to assist the family of deceased to overcome the hardship, including the financial hardship caused as a result of his untimely death and to make the family entitled to receive financial assistance for their sustenance, depending upon his earning at the time when he met with the accident.

15. The best source to ascertain the income, undisputedly can be the income tax return, which is a statutory document on which reliance may be placed to determine annual income of deceased.

The Hon’ble Apex Court in the case of *Malarvizhi and Ors. V/s. United India Insurance Co. Ltd., and Anr., 2020 ACJ 526,* relied upon the income tax return indicating the annual income of the deceased and held as under:-

> “The Tribunal proceeded to determine the agricultural income arising from 36.76 acres of land on the basis of two judgments of the High Court. The Tribunal arrived at two different figures by applying the decisions and proceeded to determine the agricultural income on an average of the two amounts. The Tribunal superimposed a possible value of income from agricultural land despite a clear indication in the income tax returns of the income from agricultural land. The method adopted by the Tribunal is not sustainable in law. On the other hand, the High Court has proceeded on the basis of the income reflected in the income tax return for the assessment year 1997-1998. The relevant portion of the return reads:

“Income from house property	-Rs. 1,920
Business profit (other than 14.b)	-Rs.1,21,071
Net agricultural income	-Rs. 88,140”

> The tax return indicates an annual income of Rs.2,11,131 in the relevant assessment year. Mr. Jayanth Muth Raj, learned senior counsel appearing on behalf of the appellants, contended that other documents were marked which reflected the income of the deceased. We are in agreement with the High Court that the determination must proceed on the basis of the income tax return, where available. The income tax return is a statutory document on which reliance may be placed to determine the annual income of the deceased. To the benefit of the appellants, the High Court has proceeded on the basis of the income tax return for the assessment year 1997-1998 and not 1999-2000 and 2000-2021 which reflected a reduction in the annual income of the deceased”.

16. The income tax return, can safely be relied upon to compute earnings of the deceased and in the present case, the tax return for the preceding financial year before the death of the deceased reflect his income as a Chartered Accountant and as a partner in M/s. Kapadia and Gajaria Associates Firm. In the wake of aforesaid the tax return, account for his income as an individual and the tax payable thereupon as well as the income from the partnership firm, which include his remuneration /salary and interest on capital in determining his income. The tax return clearly reflect his income and the tax payable thereupon including the permissible deduction, reflect his annual earning and it can be safely relied upon to compute the income last drawn by him, when he succumbed to the accident.

Apart from this, Deed of Partnership between the deceased and one Kamlesh Gajaria, is also placed on record where it is apparent that the deceased had contributed to the capital of the partnership firm and the net profit/loss of the partnership profession was divided between the parties and the applicant was entitled to the share of 43%. The remuneration payable to the working partner was also one of the condition contained in the Partnership Deed along with other rights flowing therefrom.

The Tribunal has, therefore, rightly relied upon the said income tax return to arrive at the earnings of the deceased.

17. As far as the compensation payable to the claimant is concerned, it deserve a slight modification as regard the heads and the same is liable to be determined/computed in the following manner.

The assessment of compensation:

Income for the year A.Y.2009-10

Rs.7,40,000/- + Rs.74,000/- (10% future prospectus)

Total Rs.8,14,000/- less ¼ Rs.2,03,500/- = Rs.6,10,500/-

Rs.6,10,500 X 11 yrs (multiplier) = Rs.67,15,500/-

Rs.19,500/- for funeral expenses, Rs.19,500/- for loss to estate. (Rs.15,000/- with 10% increase from 2010 till 2022 as per "Pranya seethi").

Rs.52,000/- for each claimant consortium (as a Filial Consortium) with 10% increase as above.

The total compensation Rs.67,15,500/- +Rs.19,500/- + Rs.19,500/- + Rs/2,08,000/- = Rs.69,62,500/- + Interest @ 9% from the date of application.

18. With the aforesaid modification, for the heads under which

the compensation is to be awarded, the appeal filed by the Insurance Company do not deserve any consideration and is dismissed. No order as to costs.

(SMT. BHARATI DANGRE, J.)