Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 3 OF 2020
WITH
STAMP NUMBER MAIN NO. 2666 OF 2019

FIRST APPEAL NO. 3 OF 2020

The New India Assurance Company Ltd,
7th Floor, Sanchar Bhavan,
BSNL Building,
Patto, Panaji,Goa-403001 through its authorized Signatory Mrs. Risika Ojha. …. Appellants.

Versus

1) Pushpa Gopinath Kamath,
Wife of late Shri Nileshwar Gopinath Kamath, Aged 57 years, Indian National,

2) Ganesh Gopinath Kamath,
Son of Shri Nileshwar Gopinath Kamath, Aged 21 years, Indian National,

3) Mrs. Radha Kamath,
Aged 78 years, Indian National,
All residing at Building 8/F-2, 1st Floor, Kamat Estate, Tonca, Caranzalem, Goa.

4) Mr. Saravanan,
Son of Rathinam, major of age,

Residing at #20, State Bank Colony, Dharmapuri, Tamil Nadu, 636702.

5) R. Kangaraj,
Son of Ratina Chettian, major of age, Indian National, Residing at #2/1-4, Main Road, New Tharagu Pet, Bangalore -02.

6) Umesh,
Son of Kari Gowda,
Aged about 35 years, D.No.84,
16th A Main Road, 5th Block,
Nandini Layout, Bangalore — 96.

7) M/s. IRE-TEX Premier India Pvt. Ltd.,
Residing at #230, 24 Floor, 15th Cross Sampige Road, Malleshwaram, Bangalore — 560003, Represented by its Proprietor G. Shenoy, Son of G. O. Shenoy, No.7, Vijay Maxt 2nd floor, 14th Cross, Malieshwaram, Bangalore.

8) The Oriental Insurance Co. Ltd., Door No.2, Kheny Building No.3, 1st floor, 1st Cross, Gandhinagar, Bangalore-09 ....Respondents.

Mr Amey Kakodkar, with Mr Pankaj Shirodkar, Advocates *for the Appellant.*

Mr A.D. Bhobe with Ms A. Kuvelkar, Advocates *for Respondents No.1 to 3.*

WITH

STAMP NUMBER MAIN NO. 2666 OF 2019

1) Pushpa Gopinath Kamath,
Wife of late Shri Nileshwar
Gopinath Kamath,
Aged 60 years, Indian National,

2) Ganesh Gopinath Kamath,
Son of Shri Nileshwar Gopinath
Kamath, Aged 25 years,
Indian National,

3) Mrs. Radha Kamath,
Aged 82 years, Indian National,
All residing at Building 8/F-2,
1st Floor, Kamat Estate,
Tonca, Caranzalem, Goa 403 002. .... Appellants.

Versus

1) Mr. Saravanan,
Son of Rathinam, major of age,
Residing at #20, State Bank Colony,
Dharmapuri, Tamil Nadu, 636702.
(driver of vehicle bearing
registration No.KA-01-C-4687)

2) R. Kangaraj,
Son of late Ratina Chettian,
major of age, Indian National,
Residing at #2/1-4, Main Road,
New Tharagu Pet, Bangalore -02.
(owner of vehicle bearing
registration No.KA-01-C-4687)

3) Branch Manager,

The New India Assurance Company Ltd,
BO-713001, 105-A, Railway Station
Road, Tirupattur, Tamul Nadu,
(Insurer of vehicle bearing
registration No.KA-01-C-4687)

4) Umesh, Gowad,
Son of Kari Gowad,
Aged about 39 years, Indian National,
R/o. D.No.84,
16th A Main Road, 5th Block,
Nandini Layout, Bangalore — 96.
(driver of Honda City vehicle
bearing registration No.KA-04-Z-9024)

5) M/s. IRE-TEX Premier India Pvt. Ltd.,
#230, 24 Floor, 15th Cross
Sampige Road, Malleshwaram,
Bangalore — 560003,
Represented by its Proprietor
G. Shenoy, Son of G. O. Shenoy,
R/o. No.7, Vijay Maxt 2nd floor,
14th Cross, Malieshwaram,
Bangalore-560 003
(owner of Honda City vehicle
bearing registration No.KA-04-Z-9024). … Respondents.

Mr A.D. Bhobe with Ms A. Kuvelkar, Advocates *for the Appellants.*

Mr Amey Kakodkar, with Mr Pankaj Shirodkar, Advocates *for Respondent No.3.*

CORAM : M. S. SONAK, J.

DATE : 13th January 2023

ORAL JUDGMENT: -

First Appeal No.3/2020.

1. Heard Mr Amey Kakodkar with Mr P. Shirodkar for the Appellant-Insurance Company and Mr A.D. Bhobe, who appears with Ms A. Kulvelkar for Respondents No.1 to 3 (Claimants).

Stamp Number Main No.2666/2019.

2. Mr A.D. Bhobe appears with Ms A. Kuvelkar for the Appellants, and Mr Amey Kakodkar appears with Mr P. Shirodkar for Respondent No.3 (Insurance Company).

3. The records indicate that registration of the Claimants' first Appeal, Stamp Number Main No.2666/2019, was refused by the Registrar (Judicial) on 24/9/2021. After that, no steps were taken by the Claimants for restoration. Finally, however, the matter was considered in the interest of justice. Accordingly, on the oral request of Mr Bhobe and accepting the explanation that due to the COVID-19 pandemic, track of this matter was lost, the Registrar's order dated 24/9/2021 is set aside, and the Appeal is restored.

4. Since the Insurance Company and the Claimants challenged the same Judgment and Award dated 24/4/2019 in Claim Petition No.83/2015 made by the Motor Accident Claims Tribunal at Panaji (Tribunal), even the restored Appeal was taken up for final disposal along with First Appeal No.3/2020. The Court must award just compensation irrespective of the Claimants filing an Appeal or cross-objections.

5. Mr Kakodkar, learned Counsel for the Appellant-Insurance Company, submits that the finding about the rashness and negligence warrants interference. He submits that the evidence on record establishes that the accident was caused due to rashness and negligence of Umesh (Respondent No.6), who was driving the Honda City car in which the deceased Nileshwar Kamath was sitting. He submits that the evidence also establishes no negligence on the part of Saravanan, the driver of the truck with which the Honda City vehicle collided.

6. Mr Kakodkar submits that the independent investigating agency recorded an FIR against Umesh (car driver) and not the truck driver. He submits that even the documentary evidence from the hospital in which the deceased was admitted refers to the collision of the car in which the deceased was sitting with the truck, which was stationary/parked on the side of the highway due to its being air-locked. He submits that the Insurance Company did try to summon the truck driver, but despite such efforts, the truck driver could not be served.

7. Mr Kakodkar points out that the Claimants, even though they could have, failed to examine G.G. Shenoy, who was travelling in the same car in the context of the genesis of the accident. He pointed out that G.G. Shenoy was, however, examined as a witness of the Claimants to prove the deceased's income. Accordingly, he submits that the Tribunal erred in drawing an adverse inference against the Insurance Company for failure to examine the truck driver.

8. For all the above reasons, Mr Kakodkar submits that the finding about rashness and negligence on the truck driver's part is vitiated. The Tribunal should have instead held that the car driver's negligence caused the accident.

9. Mr Kakodkar submits that the income of the deceased was not adequately proved. He submits that no income tax returns were produced. There is evidence that the employer is related to the deceased and his family; therefore, the possibility of fake employment documents enabling the Claimants to claim compensation cannot be ruled out. Finally, he submits that the Tribunal deducted only 25% towards personal expenses, when in terms of the law in ***Sarla Verma (Smt.) and ors. vs. Delhi Transport Corporation and anr.***[1], the deduction should have been 1/3rd. For all these reasons, Mr Kakodkar submits, without prejudice, that the compensation amount should be reduced.

10. Mr Kakodkar, in the alternate, submitted that this was a case of composite negligence involving the car driver and the truck driver. He pointed out that the accident occurred on a highway where the car driver had enough space to avoid the parked truck. Furthermore, he pointed out that there was no evidence about any water logging and the testimony of the widow, who was admittedly not an eye witness, was also not credit-worthy. He, therefore, submitted that at least 75% of the blame should be apportioned to the car driver, and only 25% should have been imposed upon the truck driver. Based on these submissions, Mr Kakodkar submits that the liability for payment of compensation should be apportioned between the two insurance companies and not foisted entirely on the Appellant-Insurance Company.

11. Mr Bhobe, learned Counsel for the Claimants, submits that the Claimants are not concerned with composite negligence. However, Mr Bhobe pointed out that the evidence on record

1. (2009) 6 SCC 121

establishes the negligence on the truck driver's part. He points out that the truck was in motion and suddenly broke after swerving to the other lane. Consequently, the car in which the deceased was travelling crashed into the truck, thereby killing the deceased.

12. Mr Bhobe submits that even if it is assumed that the truck was parked on a highway, the truck driver's negligence is evident because no trucks are supposed to be parked on highways. He pointed out that there was no evidence of any precautions or signages the truck driver was responsible for taking. Mr Bhobe submitted that the FIR was lodged based entirely on the truck driver's complaint. He, therefore, submitted that such self-serving documents do not establish any negligence of the car driver. He submitted that the Insurance Company failed to examine the truck driver; therefore, the Tribunal rightly drew the adverse inference.

13. Mr Bhobe pointed out that the car owner admitted in the written statement the Claimants' version of the accident and the rashness and negligence of the truck driver. Therefore, there was no requirement that the Claimants examine G.G. Shenoy *i.e.* the Managing Director of the Company that owned the car, as a witness to prove the accident or the genesis of the accident.

However, since G.G. Shenoy was examined by the Claimants on the issue of income, it was for the Appellant-Insurance Company to cross-examine this witness on his admission in the written statement. Since this was not done, the adverse inference was correctly drawn by the Tribunal.

14. Mr Bhobe, in the context of the Appeal instituted by the Claimants, submitted that the Tribunal failed to add 15% towards future prospects. Further, he submits that the Tribunal erred in excluding the HRA amount while computing the income of the deceased. He relied on ***Raghuvir Singh Matolya and ors. vs. Hari Singh Malviya and ors.***[2] and ***Sunil Sharma and ors. vs. Bachitar Singh and ors.***[3] to submit that since HRA is paid for the benefit of the employee's family members and not the employee alone, the same has to be considered while computing the deceased's income.

15. Mr Kakodkar, however, referred to the evidence of G.G. Shenoy i.e. the employer of the deceased to point out a specific admission that HRA was not paid or was deducted because the deceased was offered accommodation in Bangalore and further

2. (2009) 15 SCC 363
3. (2011) 11 SCC 425

because, the Claimants, on their own say, were not residing with him at Bangalore, but were living at Panaji, Goa.

16. The rival contentions now fall for my determination.

17. In the Appeal instituted by the Insurance Company, the two main points for determination are whether the driver of the insured vehicle (truck driver) was rash and negligent and consequently responsible for the accident and the issue of the quantum of compensation. On the other hand, in the Appeal instituted by the Claimants, the point for determination is about the quantum of compensation.

18. On the issue of rashness and negligence, though the Claimants could not examine any independent witnesses, they relied upon the version of the car owner as reflected in his written statement. In this written statement, the car owner agreed with the Claimants' version about the accident being caused due to the truck driver's negligence.

19. G.G. Shenoy, the Managing Director of the Company that owned the car, was examined by the Appellants in the context of the salary certificate of the deceased or the employment and income of the deceased. The Insurance Company, at that stage, had full opportunity to question G.G. Shenoy, who was also travelling in the car at the time of the accident, on the genesis of the accident. However, because G.G. Shenoy was not posed any question during the examination-in-chief on the genesis of the accident, there was no cross-examination on the part of the Insurance Company of this witness on the genesis of the accident.

20. The complaint of the truck driver and the FIR registered based thereon is a part of the evidence on record. However, it is apparent that the FIR was almost entirely based upon the truck driver's complaint and without any independent investigation into the accident's genesis. Therefore, based on this almost singular factor, the car driver's negligence cannot be presumed. Significantly, the Appellant-Insurance Company could not examine the truck driver, who would have perhaps been the best witness supporting their version. Surprisingly, however, the Insurance Company did not even try to examine the police officials who investigated the accident's genesis. Thus, the Appellant Insurance Company failed to cross-examine G.G. Shenoy on the genesis of the accident. Furthermore, it failed to examine the police officials who are said to have investigated the genesis of the accident. Finally, it could not even examine the truck driver, who would have been the best witness to explain the genesis of the accident.

21. Besides, even if the Appellant-Insurance Company's version about the truck being parked by the side of the highway is to be accepted, the truck driver can still not avoid the charge of rashness and negligence. In the first place, trucks are generally not to be parked by the side of highways. However, in case of any mechanical breakdown and emergency, even if such trucks are parked, all precautions have to be taken by way of signages, etc. Unfortunately, there are neither any pleadings nor any evidence about such precautions. Therefore, rashness and negligence on the truck driver's part are established by the standards of the preponderance of probability.

22. The Tribunal has relied upon the sketch appended to the panchanama. The Tribunal concluded that the sketch shows that the truck was parked in the highway's centre. Although this may not be the correct manner of seeing or interpreting the sketch, even the sketch, coupled with the Insurance Company's version, shows that the truck was parked on the highway. Normally, there is a prohibition of parking such trucks on the highways. However, no evidence was led to show that this was some designated parking place. Moreover, even if the submission about the truck being air-locked and unable to move is to be accepted, precautions were a must, and there were neither any pleadings nor evidence about the truck driver observing such precautions so that the vehicles on the highway do not crash into the parked truck.

23. Even the case about composite negligence raised in the alternate by the Insurance Company has not been established by the evidence on record. As noted earlier, the Claimants' version is acceptable by applying the standards of the preponderance of probability. The Insurance Company led no independent evidence to establish any negligence on the car driver's part. Based only on the complaint made by the truck driver and the consequent FIR, no composite negligence can be inferred.

24. For all the above reasons, no case is made to interfere with the finding about rashness and negligence.

25. On the aspect of the quantum of compensation, Mr Kakodkar is justified in contending that the deductions towards the deceased's personal expenses should have been 1/3rd and not merely 1/4th as held by the Tribunal. It is apparent that the Tribunal misread paragraph 30 of *Sarla Verma* (supra) by missing the crucial comma (,) in paragraph 30. Paragraph 30 of *Sarla Verma* (supra) is transcribed below for convenience :

> "**30.** T*hough in some cases the deduction to be made towards personal and living expenses is calculated on the*

basis of units indicated in U.P. SRTC v. Trilok Chandra – (1996) 4 SCC 362, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six."

26. From the above, it is evident that where the deceased was married, the deduction towards personal and living expenses of the deceased should be one-third (1/3rd), where the number of dependent family members is 2 to 3. It can be one-fourth (1/4th), where the number of dependent family members is 4 to 6. In the present case, the dependent family members were only three. Therefore, the deduction towards personal expenses should have been one-third (1/3rd and not one-fourth (1/4th)

27. Regarding Mr Bhobe's contention about the inclusion of HRA component, normally, the HRA must be considered for computing the deceased's income. In *Raghuvir Singh Matolya* (supra), it is held that an HRA is paid to an employee for the benefit of family members and not for the employee alone. Therefore, HRA must be included for determining the income of the deceased. Similarly, in *Sunil Sharma* (supra), it is held that the deduction of HRA for determining the deceased's income was incorrect.

28. However, in the present case, reference is necessary to the deposition of G.G. Shenoy (AW.2) on behalf of the Claimants. This witness was the Managing Director of the Company that owned the car involved in the accident and employed the deceased as General Manager from May 2007 to June 2009. AW.2 deposed to the salary certificate he issued, and the same was marked in evidence as Exhibit-57 colly.

29. AW.2 further deposed that the deceased was given accommodation in Bangalore apart from salary. Initially, AW.2 deposed that employees in metro cities are given HRA in addition to accommodation because it is impossible to get suitable accommodation with the paid HRA. However, to the specific question of whether the employer was paying HRA of ₹19,500/- as reflected in the salary certificate, to the deceased after AW.2 admitted that accommodation is available in Bangalore at a rent of ₹20,000/- to 21,000/-, gave the following answer :

> *"To the question that if you are paying house rent allowance of Rs.19,500/- and also obtain accommodation on rent at ₹20,000/- to Rs.21,000/- what was the need to pay house rent allowance, I say that the house rent allowance of ₹19,500/- as shown in the salary certificate*

was getting deducted towards accommodation provided to the deceased by the company.".

30. Thus, in the present case, it is quite clear that though the salary certificate showed an amount of ₹19,500/- towards HRA, this amount was not actually being paid to the deceased because the deceased was already provided with an accommodation, which otherwise, could have been obtained in Bangalore against payment of rent of ₹20,000/- to 21,000/-. Considering this evidence, the Tribunal was justified in excluding the HRA component, which, in any case, was not even being paid to the deceased for determining the deceased's income. Besides, as was correctly pointed out by Mr Kakodkar, there is evidence that the Claimants, i.e. the deceased's family members, were living in Panaji, Goa and the deceased was living in Bangalore in the accommodation provided by his employer.

31. The factual position in *Raghuvir Singh Matolya* (supra) and *Sunil Sharma* (supra) was quite different because, in those cases, the deceased was actually being paid the HRA and the question was whether this component must be included in determining the total income of the deceased. In the present case, no such HRA was actually paid to the deceased. Instead, his employer provided him with accommodation in Bangalore, where he used to work. Further, there is evidence that the Claimants i.e.

the deceased's family members were never residing with him at Bangalore, but were residing in Panaji, Goa. Because of this peculiar circumstance, Mr Bhobe's contention about the inclusion of the HRA is not accepted.

32. Mr Bhobe is, however, justified in contending that 15% increase was due towards future prospects, and further, the consortium should not have to be restricted only to ₹44,000/-, but it should have been ₹44,000/- per Claimant. Further, even the compensation towards the funeral expenses and loss of estate should have been ₹16,500/- on each head. This is consistent with the law in ***National Insurance Co. Ltd. vs. Pranay Sethi and ors.***[4] and ***Smt. Anjali & ors. vs. Lokendra Rathod & ors.***[5]

33. Thus, the just compensation, in this case, would work out to ₹32,87,280/- and not ₹34,14,070/-. The impugned Award is, therefore, modified to the above extent only. Accordingly, First Appeal No.3/2020 is partly allowed, and the compensation amount is reduced from ₹34,14,070/- to ₹32,87,280/-. Therefore, save and except this modification, the rest of the Award is maintained.

4. (2017) 16 SCC 680

5. Civil Appeal No. 009014 of 2022 decided on 6th December 2022

34. However, First Appeal Stamp Number Main No. 2666/2019 is dismissed. Therefore, there shall be no order for costs in these appeals.

M. S. SONAK, J.

SANTOSH S MHAMAL
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