



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 4258 OF 2017

The Oriental Insurance Company Ltd.
Thorough its Branch Manager,
Sant Krupa Market, 1st Floor,
Govind Sing Marg, Nanded
Tq. & Dist. Nanded.

...Appellant

Versus

1. Pallavi w/o Rajeshwar Srinivar
age 26 years, occ. Household
2. Shantanand s/o Rajeshwar Srinivar
age 6 years (minor)
3. Raghavi d/o Rajeshwar Srinwar
age 4 years (Minor)
4. Savitrabai w/o Shankarrao Srinivar
age 50 years, occ. Household

Resp. No. 1 to 4 r/o Naigaon (Bz)
Tq. Naigaon (Kh.) Dist. Nanded

5. Mohan s/o Kistaya Demewar
age major, occ. Business
& owner, r/o Srinivas Medical Stores
Hyderabad Road, Naigaon (Bz)
Tq. Naigaon (Kh.)
Dist. Nanded.

.. Respondents

Mr. U. S. Malte, Advocate for the appellant.
Mr. S. V. Suryawanshi, Advocate for respondents No. 1 to 4.

CORAM : R. M. JOSHI, J.
RESERVED ON : 4th JANUARY, 2024.
PRONOUNCED ON : 9th JANUARY, 2024.

JUDGMENT :

1. This appeal is filed under Section 173 of Motor Vehicles Act raising challenge to the judgment and award dated 28th February, 2017 passed in Motor Accident Claim Petition No. 61/2015 by Civil Judge, Senior Division, Biloli.

2. Parties are referred to as claimants, insurer and owner for the sake of convenience.

3. The facts in nutshell which led to filing of this appeal are narrated as under :

Claimants are wife, son, daughter and mother of deceased Rajeshwar who died in motor vehicular accident on 27th January, 2015. It is the case of claimants that along with other passengers, deceased was travelling in Tavera jeep bearing registration No. MH 26 V 4866 (offending vehicle) from Tirupati towards Naigaon. When the jeep reached the spot of the accident, it hit to the road divider and thereafter dashed against another car bearing registration No. KL 07 DX 8757. According to the claimants, driver of Tavera jeep was driving the vehicle in excessive speed and due to his

negligence, accident in question has occurred. It is also claimed that crime is registered against the driver of Tavera jeep and charge-sheet has been filed against him. Claim petition was filed against the owner and insurer. The offending vehicle was duly covered by valid insurance policy during the relevant period with insurer. Claimants further contended that the deceased was employed earlier and was drawing salary of Rs. 30,000/- per month and thereafter for betterment he left the job and started business as jeweller. They claim to be dependent on the income of the deceased and compensation of Rs. 20,00,000/- was sought from respondents / owner and insurer.

4. Owner filed written statement (Exhibit 18) and admitted the factum of occurrence of accident involving offending vehicle as well as death of deceased therein. It is however denied that the accident has occurred due to rash and negligent driving of the driver of Tavera jeep. Claim is also challenged on the ground of non-joinder of necessary party.

5. Insurer filed written statement at Exhibit 16 challenging maintainability of the claim on the ground of non-joinder of necessary parties. Insurer also denied contention of claimants with regard to the manner in

which the accident has occurred so also the claim of income and compensation amount by them.

6. Learned Tribunal frames issues at Exhibit 20. On behalf of the claimants, claimant No. 1 Pallavi examined herself. They also placed reliance on documentary evidence. Owner as well as insurer did not adduce any evidence in rebuttal.

7. From the pleadings before the Tribunal and evidence adduced on record, following points arise for consideration of this Court :-

- | | |
|--|-------------|
| i) Whether the accident in question has taken place due to negligence of the driver of Tavera jeep ? | Yes |
| ii) Whether the claimants are entitled for compensation from owner and insurer jointly and severally ? | Yes |
| iii) Whether the claimants are entitled to enhancement of compensation ? | Yes |
| iv) Whether interference is called for in the impugned judgment and award ? | Partly Yes. |

8. Learned counsel for the insurer submits that the Tribunal has allowed application filed by the insurer under Section 170 of Motor Vehicles Act and hence, insurer is entitled to challenge the award on all counts. It is submitted that the initial burden is on the claimants to prove the claim including the factum of occurrence of accident, negligence of driver of the

vehicle insured as well as income of the deceased. According to him, claimant No. 1 is not eye-witness to the accident in question and as such there is no evidence with regard to occurrence of accident to ultimately hold that there was negligence of the driver of the jeep. He further submits that the learned Tribunal has committed error in considering income of the deceased during his employment as thereafter the deceased had left the job and started business as per the claim of claimants. Document Exhibit 44 ought not to have been exhibited or read in evidence for want of proof. Tribunal erred in considering the same to be statement of account showing income of the deceased from the bare perusal of the said statement, shows that it is a statement of loan account. It is also argued that 20% profit/income accepted by Tribunal is without any basis. He further submits that the Tribunal has committed error in applying multiplier of 15 ignoring the fact that as per the judgment of Hon'ble Apex Court in the case of Sarla Varma vs. Delhi Transport Corporation, (2009) ACJ 1298 (SC), which is followed in the case of National Insurance Co. Ltd. v. Pranay Sethi and others, 2017 SCC OnLine SC 1270, the multiplier of 14 would have been applied in this case considering age of deceased above 41 years and below 45 years. According to him, since the claimants have failed to prove the income of deceased, compensation ought to have been calculated on the basis of notional income. With these amongst other contentions, interference in award is sought.

9. Learned counsel for the claimants supported the impugned judgment with a rider that claimants are entitled for enhancement of compensation as the learned Tribunal has not considered future prospects of the deceased as held by Hon'ble Apex Court in case of Pranay Sethi (supra). It is his submission that in view of the said judgment, since the age of the deceased was 45 years, 25% future prospects ought to have been added to the amount of compensation. According to him, for enhancement, no separate appeal or even cross-objection is required to be filed.

10. Before going into the factual matrix of the case, it would be just and necessary to take into consideration the nature of proceedings before Tribunal under Sections 163 and 166 of Motor Vehicles Act. As per the provisions of the Act, it is a statutory function of the Tribunal to decide reasonable compensation payable to the claimant who either sustained injury or died in an accident arising out of motor vehicle. The Hon'ble Apex Court in case of Anita Sharma Vs. New India Assurance Company, (2021) 1 SCC 171, has held that nature of proceedings under Section 169 of Motor Vehicles Act are in the nature of summary proceedings and that strict principles of evidence and standard of proof like criminal trial are inapplicable. It is further held that the standard of proof on preponderance of probabilities would apply to such cases. The Hon'ble Apex Court expects from the Court

to analyse the material placed on record to ascertain whether the claimant's version is more likely than not true. Keeping in mind the provisions of Motor Vehicles Act as well as judgment of Hon'ble Apex Court, the facts in the present case are considered.

11. No doubt, the initial burden is on claimants to prove the factum of occurrence of accident as well as negligence on the part of the driver of offending vehicle in order to make owner and insurer thereof liable for payment of compensation arising out of such accident. Here in this case, claimant No. 1 examined herself at Exhibit 23. She deposed about the accident and registration of First Information Report as well as filing of charge-sheet against the driver of Tavera jeep. Certified copies of First Information Report, Post Mortem notes (Exhibit 33), registration of vehicle bearing No. MH 26 V 4866 (Exhibit 36) and insurance policy (Exhibit 37) collectively are the part of record. In the cross-examination, no doubt, she admitted to have not witnessed occurrence of the accident however, there is nothing elicited in her cross-examination in order to create doubt about the document sought to be placed on record. Exhibition of these documents is not objected at stage of trial nor any doubt is created in respect of the same by effectively cross examining claimant No. 1. The owner has failed to cross-examine this witness. Whereas, on behalf of insurer, there is even no

suggestion made to the witness that the driver of Tavera jeep was driving the vehicle by taking utmost care and the vehicle was not driven in excessive speed. Further, there is no suggestion to the effect that the accident has occurred due to mechanical fault or fault on the part of the other vehicle. Moreover, the genuineness thereof has not been challenged, except vague suggestion that by managing police, First Information Report is reported against driver of offending vehicle. The First Information Report is lodged by the police personnel at place far distant from the residence of the claimants. In such circumstances, there is no reason or justification to hold that it is registered at instance of claimants to seek compensation.

12. It is trite that claim petition is not to be tried as criminal proceeding wherein strict proof of the fact is required. In any enquiry for determination of compensation, claimants are expected to prove their case on preponderance of probabilities. First Information Report indicates that offence was registered against the driver of the offending jeep. There is nothing on record to indicate First Information Report being challenged by any one or quashment thereof is sought. In absence of any evidence to prove otherwise, the evidence on record is sufficient to hold that the accident has occurred due to negligence of the driver of offending jeep. The findings

recorded by learned Tribunal with regard to the negligence therefore deserves no interference.

13. As far as death of deceased in the said accident is concerned, neither owner nor insurer disputed the same. Moreover, Post Mortem notes indicate that deceased sustained multiple fracture injuries resulting into cardio respiratory failure due to road traffic accident. The evidence on record, therefore, is sufficient to hold that on 27th January, 2015, deceased Rajeshwar was travelling in offending jeep which met with an accident and owing to the injuries sustained in the said accident, he died. There is no serious dispute about the claimants being dependents on the income of deceased. Apart from this, the claimants have obtained heirship certificate from the competent Court indicating that they are legal heirs of deceased Rajeshwar. The claimants, therefore, have right to claim compensation in respect of death of the deceased.

14. On the point of income, claimant No. 1 has deposed about deceased being employed previously and earning Rs. 30,000/- per month. She however further claimed that deceased ceased employment and for betterment started his business. In order to substantiate the same, reliance is placed on account statement of the Nanded Merchants Co.Op. Bank Ltd.

(Exhibit 44) for the period from 28th May, 2013 to 20th April, 2015. Apart from this, passbook of the same bank in respect of recurring deposit and LIC premium receipts were also placed on record. In the cross-examination, except for a vague suggestion that contents of affidavit in paragraphs No. 6 and 7 about income of her husband are false, nothing is brought on record to challenge the genuineness of the account statement. There is no cross-examination challenging genuineness of account statement (Exhibit 44). The evidence led by claimants clearly indicates that deceased was doing business as jeweller in the name of style Gandewar Jewellers. Exhibit 44 clearly establishes the fact that income minus expenditure was about Rs. 21,17,014/- for the period from 28th May, 2013 to 20th April, 2015. The contention now sought to be raised by insurer that, exhibit 44 is not statement of account but is a loan account is not supported by material evidence on record. The said submission sans foundation as it was never suggested during cross-examination that Exhibit 44 is not statement of account but a loan account. Had it been so asked, claimants would have led further evidence. Apart from this, even bare perusal of the said statement indicates that the entries therein show payment of insurance premium etc. which cannot become part of a loan account. Thus, this Court finds no substance in the said contention of the insurer, that this document cannot be relied upon for determination of income of deceased.

15. When deceased is claimed to have been in the business of jewellers, it is not possible to determine the ratio of profit earned in such business with mathematical precision. Certain guess work would definitely involve therein, which is permissible unless the guess work of the Court is not substantiated/supported by evidence on record or wholly improbable. Learned Tribunal has held net income of 20% of the total business. The jewellers business in Indian society is considered as flourishing owing to love of our people for gold and ornaments. Whatever may be economical conditions prevailing, considering need of people to buy gold on various occasions, this business never seen declining trend. Apart from this, it is pertinent to note that deceased was saving not less than about Rs. 5,000/- per month which can be ascertained from the documents Exhibit 38, 39 and 41 collectively. Undisputedly, deceased had responsibility of his wife, two minor children and mother. There could not be such saving if the deceased was not earning proportionate income. Having regard to the facts and circumstances of the case, net income considered by the Tribunal of Rs. 2,11,701/- per month is just and reasonable and deserves confirmation. The claimants, having succeed in proving income of deceased, question of application of notional income in the present case does not arise.

16. Though there is no other evidence on record to indicate the age of deceased but Post Mortem notes (Exhibit 33) indicates the approximate age of deceased to be 45 years. In the absence of any other evidence, the said age is required to be considered for the purpose of computation of compensation. Having regard to the age of the deceased, by following the dictum in the case of Sarla Varma (supra), the multiplier applicable to the present case would be 14. The learned Tribunal has incorrectly applied it to be 15. Hence to that effect, modification is required in the award. Otherwise, insurer has failed to make out any case for causing interference in the computation of compensation made by Tribunal on basis of income of deceased, except to extent of future prospects.

17. The insurer challenges maintainability of claim for non-joinder of driver to the claim petition. Needless to say that strict procedure is not applicable in the enquiry which is summary in nature. Claimants are entitled to seek compensation from driver as well as owner at first instance being joint tortfeasors. If compensation is claimed from driver, he would be necessary party as in his absence no liability can be fixed upon him. However, vicarious liability of owner to compensate victim does not get discharged in absence of driver. It is open for the claimant to raise claim against both joint tortfeasors or either of them. In any event, owner has appeared in this proceeding and it

was always open for him to lead evidence to show that driver of offending jeep was not negligent and consequently driver is not liable to pay compensation on the basis of vicarious liability for act of his employee. Owner has failed to prove the same. Having regard to the nature of claim, driver is not necessary party and no prejudice is shown to have caused to the merit of the case, on account of his absence. Hence, issue raised about maintainability of claim for non joinder of necessary party, sans merit.

18. The claimants are seeking enhancement of compensation for the reason that learned Tribunal has failed to consider future prospects as contemplated by the judgment of Hon'ble Apex Court in the case of Pranay Sethi (supra). Learned counsel for claimants placed reliance on judgment of Hon'ble Apex Court in case of Jitendra Trivedi vs. Kasam Kumbhar, **2015(4) SCC 237**, which permits the appellate Court to enhance compensation even without filing appeal or cross objection. Learned counsel for insurer opposed the said contention.

19. In the case of Nagappa vs. Gundappa, the Hon'ble Apex Court has held that it is the duty of the Tribunal to determine just and reasonable compensation and as such it is open for the Tribunal to grant compensation more than sought for. The Hon'ble Apex Court thereafter in the judgment of

Jitendra Trivedi (supra) has reiterated the said principle underlying the importance of just and reasonable compensation. In such circumstances, there is no reason or justification to deny enhancement of compensation if justified only on the ground that appeal or cross-objection has not been filed.

20. In the case of Pranay Sethi (supra), the Hon'ble Apex Court has considered the precedents particularly in case of Sarla Varma wherein future prospects were granted to a salaried deceased person but the said benefit was not extended to self-employed person. The Hon'ble Apex Court then held that a person of age between 45 to 50 years is entitled for 25% future prospects. In the instant case, deceased was aged 45 years. There is ample evidence on record to show that he was conducting business as jeweller. Even previously he was working and for better prospects, he left employment and started his business. Considering the viability of said business, the claimants would be entitled for future prospects. As held in the case of Pranay Sethi (supra) additional amount of 25% is required to be considered for the purpose of computation of compensation.

21. Applying the multiplier of 14, the amount comes to Rs. 29,63,814/-. As discussed earlier, after adding 25% amount towards future prospects, the amount comes to Rs. 37,04,767/-. 1/4th amount needs

to be deducted towards personal expenses. Thus, the amount comes to Rs. 27,78,575/-. The Tribunal has rightly held that amount of Rs. 3,50,000/- needs to be added towards loss of consortium, loss of estate, loss of expectation of life and funeral expenses. Thus, the final amount of compensation comes to Rs. 31,28,575/-. The claimants shall be liable to pay Court fee on additional compensation.

21. Resultantly, appeal stands disposed of in aforesaid terms.

22. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb

LATER ON :

1. Learned counsel for the claimants seeks permission to withdraw the amount.

2. Permission granted.

(R. M. JOSHI)
Judge

dyb