2024:BHC-NAG:2240

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

FIRST APPEAL NO.92/2009

1. Smt. Vanchala @ Vanchhala
   wd/o Gulabrao Tayade,
   a/a 27 years, Occ. Household work

2. Roshan Gulabrao Tayade,
   a/a 6 years, minor by next friend
   Smt. Vanchhala wd/o Gulabrao Tayade

   Both r/o Deshmukh Plots, Near Railway
   Station, Akot, Tq. Akot, Dist. Akola. .....**APPELLANT**

...V E R S U S...

1. Ravi Telgote,
   adult, Occ. Driver, r/o Amboli Ves
   of Akot, Dist. Akola.

2. Niyaz Ahmed s/o Gulam Murtaza,
   adult, Occ. Business, r/o Kabrastan,
   Ward No. 26, Akot, Dist. Akola.

3. The Oriental Insurance Co. Ltd.
   through its Branch Manager,
   Rayat Haveli, Old Cotton Market,
   Akola, Dist. Akola. ...**RESPONDENTS**

Mr. C. A. Joshi, Advocate for appellant.
None for respondent nos. 1 and 2, though served.
Mr. D. N. Kukday, Advocate for respondent no.3.

CORAM:- ANIL L. PANSARE, J.

DATE OF RESERVING THE JUDGMENT :- 07.02.2024
DATE OF PRONOUNCING THE JUDGMENT: 26.02.2024

ORAL JUDGMENT

Appellants-original claimants are aggrieved by judgment and award dated 04.04.2006, passed by Member, Motor Accident Claims Tribunal, Akot in Motor Accident Claim Petition

No.73/2005. The appellants have sought additional compensation of Rs.6,27,960/-.

2. The facts necessary to decide the appeal are as under.

Appellant no.1 is wife and appellant no.2 is son of Gulabrao Tayade, who expired in an accident, that occurred on 21.01.2004. Gulabrao was working as labourer. On the date of accident, he was engaged as a labourer on tractor and trolley bearing registration No. MH-27/F-6304 and MH-27/A-7805, respectively owned by the respondent no.2. The vehicle was being driven by respondent no.1. The tyre got punctured and, therefore, the vehicle turtled down and Gulabrao came below the tyres. He was taken to hospital where he was declared brought dead.

3. According to the appellants, the respondent no.1 was driving the vehicle in rash and negligent manner, which resulted into the accident. Gulabrao was earning Rs.150/- to 200/- per day. In addition, he was earning Rs.50/- per day by selling milk. Accordingly, the compensation was claimed. The respondents denied the claim.

4. The appellants, in support of their case, have examined appellant no.1 as first witness and their neighbour as the second witness. The respondent no.2 has examined himself in defence.

5. The tribunal, after having gone through the evidence, held that Gulabrao was earning Rs.60/- per day. In addition, he has taken Rs.10/- per day towards earnings from milk business. Thus, the total income of Gulabrao was assessed at Rs.70/- per day. This finding has been challenged by the appellant.

6. I have heard learned counsel for the parties. I will refer to the pleadings, documents and evidence to the extent necessary to decide the points that arise for my consideration. I have recorded my findings thereon for the reasons to follow.

1	Whether the tribunal has committed error in assessing the income of Gulabrao at the rate of Rs.70/- per day.	In the affirmative.
2	Whether the award requires modification?	In the affirmative
3	What order?	As per final order.

<u>As to point nos. 1 and 2.</u>

7. Both the points are interlinked, hence are decided by common reasoning. On the point of income, the appellant no.1 has deposed in tune with her claim, meaning thereby that her husband Gulabrao was earning Rs.150/- to Rs.200/- per day as a labourer. He was getting the payment on per trip basis. In addition, she deposed that they had a buffalo with them. In morning, Gualbrao used to sell milk and earn Rs.50/- per day. In

the cross-examination, the respondent – insurance company has, at one place brought on record that Gulabrao was earning Rs.150/- to Rs.200/- per day but, later, put up a case that this amount is exaggerated. Appellant no.1 has admitted that she does not have documentary evidence to show that her husband Gulabrao was getting work everyday and further that he was earning some amount by selling milk. The respondent no.2 – owner has also cross-examined appellant no.1. The owner has brought on record that Gulabrao was working as labourer on the tractor owned by respondent no.2. He has then brought on record that Gulabrao was earning Rs.150/- to Rs.200/- per day and that the said labour charges were being paid by the respondent no.2.

8. Thus, the appellant no.1 had claimed that her husband Gulabrao was earning Rs.150/- to Rs.200/- per day, which earning has been substantiated in the cross-examination by the respondent no.2. He does not dispute that Gulabrao was getting work everyday. He has not disputed in the cross-examination that Gulabrao was earning additional sum out of milk business. So far as the cross-examination by respondent no.3 is concerned, at one point, even respondent no.3 has brought on record that Gulabrao was earning Rs.150/- to 200/- per day but later put up a case that this amount is an exaggerated sum.

9. Respondent no.3, through cross-examination has shown expectation that the person like Gulabrao, a labourer, will have documentary evidence to show that he was engaged as labourer and secondly he used to sell the milk. This expectation appears to be far fetched. A labourer usually will not possess documentary evidence in support of his earning as also of selling meager milk to the neighbouring people. In fact, the second witness has led the evidence in respect of his business and has further stated that the transaction was oral. He has deposed that Gulabrao was working as labourer with respondent no.2. In addition, he used to earn money by selling milk. He being neighbour, was aware of the said fact. He was one of the customers for purchasing milk. Gulabrao used to sell milk to other people in the locality. The transaction was oral. He used to earn good by selling milk. After his death, his wife, appellant no.1 was in financial crisis and, therefore, sold the cattle. In the cross-examination, respondent no.2 has only given a suggestion which has been denied that Gulabrao being the neighbour of witness, he (witness) is deposing false. Respondent no.3 has not even cross-examined the said witness.

10 Thus, there is ample evidence to show that Gulabrao was working as labour and earning daily wages to the tune of

Rs.150/- to 200/- per day. There is further evidence that he was earning by selling milk. Despite this fact, the trial court, for want of documentary evidence, has assessed the income at the rate of Rs.70/- per day.

11. That apart, if one goes though the evidence of respondent no.2, the earning of Gulabrao as claimed by the appellant is in a way proved in the cross-examination of this witness. Respondent no.2 has also deposed that Gulabrao was working a labourer on the tractor and trolley owned by respondent no.2. In the cross-examination, he has denied the suggestion that respondent no.2 used to pay Rs.150/- to Rs.200/- to Gulabrao. Respondent no.2 volunteered that he used to pay Rs.60/- per day. The further cross-examination is important. Respondent no.2 states that he used to pay Gulabrao as per trip. The next statement is, "In one day, there could be maximum __ trips" *(Eka Divasat Jastit Jast __ Trip Hou Shaktat)*. As could be seen, there appears error in recording evidence. The crucial fact as regards number of trips is absent. Nonetheless, the statement indicates that in one day, there would be at least more than one trip. Thus, a presumption that there will be at least 2 trips per day can made. Respondent no.2 has also deposed that he used to pay Rs.50/- per day (50 x 2) meaning thereby that Gulabro was earning at least

100/- per day. Respondent no.3 has also cross-examined respondent no.2, however, there is nothing in the cross-examination on the point of Gulabrao's earning. Despite this, the tribunal has, on the basis of the voluntary statement of respondent no.2 that he used to pay Rs.60/- per day, assessed Gulabrao's income at the said rate ignoring all other attaining circumstances, which clearly prove that Gulabrao was earning at least Rs.100/- per day as a labourer.

12. Thus, the evidence of the above three witnesses, if taken together, a clear picture emerges that Gulabrao was earning at least Rs.100/- per day as a labourer and had additional income by selling milk. Unfortunately, appellant no.1 has not deposed as to the quantity of milk extracted from one buffalo and, in turn, the quantity of milk sold to the neighbouring people. The appellant no.1 has also not deposed the rate at which the milk was sold. In the circumstance, one will have to guess the quantity of milk available for sale and the rate of milk in the year 2004. In my view, the quantity of milk at disposal would be around 2 Litre with rate of Rs.15/- per litre. In that sense, Gulabrao must be earning Rs.30/- per day by selling milk.

13. The tribunal, without considering the aforesaid vital evidence, has assessed the income at Rs.10/- per day by assigning

the reasons of absence of documents to support, the milk business. The tribunal has overlooked the unchallenged testimony of the second witness of the appellants.

14. Put all together, the appellants have, through cogent evidence, proved that Gulabrao was earning Rs.100/- as labourer and Rs.30/- by selling milk. In that sense, Gulabrao's per day earning was Rs.130/-.

15. Mr. Kukday, learned counsel for the respondent no.3, has argued that the policy under question was "Act Only" policy and that there is a complete absence of evidence showing negligence. In respect of the implications of the "Act Only" policy, he has relied upon judgment in the case of ***Oriental Insurance Co. Ltd. Vs. Meena Variyal and Ors.;*** reported in ***(2007) 5 SCC 428***, ***National Insurance Co. Ltd. Vs. Prembai Patel and Ors.,*** reported in ***(2005) 6 SCC 173, New India Assurance Co. Ltd. Vs. Sadanand Mukhi and Ors.*** reported in ***II (2009) ACC 432 (SC).*** The learned counsel contends that respondent no.3 is not liable to pay the amount of compensation. However, the respondent no.3 has not challenged the finding of the tribunal, which means that respondent no3 is not aggrieved by the finding of the tribunal that the accident occurred because of the negligence of the driver and that insurance company is liable to pay the amount of

compensation. I, therefore, need not discuss the law laid down by the Supreme Court, which exercise if done will yield no result.

16. Learned counsel for the appellants has rightly argued that the tribunal has committed error in appreciating the evidence. The first point is accordingly answered in the affirmative. The order of the tribunal will have to be modified and accordingly the second point is also answered in the affirmative.

As to point no.3:

17. Having answered the first two points in the affirmative, the award rendered by the tribunal will have to be modified by taking the income of the Gulabrao at the rate of Rs.130/- per day. The evidence indicates that he used to get the work everyday. In a month, usually, the labours would work for about 26 days, considering a weekly off for a day. However, the earning by selling milk, considering its purpose, will be available throughout the month i.e. 30 days. Thus, the monthly earning of Gulabrao would be Rs.100 x 26 (+) 30 x 30 = 2600+900 = 3500/- per month. There is no dispute as regards age of the deceased at the time of the accident. He was 30 years old. Having assessed the monthly income at the aforesaid rate and the age of the deceased, the amount of compensation will have to be calculated in terms of the judgment of the Supreme Court in ***Sarla Verma and Ors. .Vs.***

Delhi Transport Corporation and anr., reported in ***(2009) 6 SCC 121***. In ***National Insurance Company Ltd. Vs. Pranay Sethi and Ors.*** reported in ***(2017) 16 SCC 680***. Additional amount for parental consortium for wife and son will have to be added. In the circumstances and considering the fact that accident had occurred in the year 2004, the spousal and parental consortium should be paid at the rate of Rs.10,000/- to each.

18. Thus, the modified calculation will be as under.

Sr.No	Particulars	Amount (Rs.)
1	Income from labour work (2600 x 12)	31200
2	Income from milk business. (900 X 12)	10800
	Total	42000
3	Add 10% (Future prospects) in terms of Pranay Sethi's case	(+)4200
	Total	46200
4	Multiplier in terms of Sarla Verma's case	(x) 17
	Total	785400
5	Deduction of 1/4th amount towards the expenditure as laid down in Sarla Verma's case.	(-) 1,96,350
	Spousal and parental consortium (Rs.10000/- x 1)	(+)10000
7	Loss of estate	(+)15000
	Total	614050

19. In view of above, following order is passed.

(i) The appeal is partly allowed.

(ii) Judgment and order dated 04.04.2006 passed by Motor Accident Claims Tribunal, Akot in Motor Accident Claim Petition No.73/2005, is set aside, to the extent of quantum of compensation awarded.

(iii) The claimants-appellants are awarded for compensation of Rs.6,14,050/-.

(iv) Rest of the award is kept as it is.

(v) Award be drawn after payment of deficit court fees.

(Anil L. Pansare, J.)

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