

(2017) 07 BOM CK 0267
In the Bombay High Court
Case No : 228 of 2006

Basirabi wd/o Ajmal Khan, & Ors.

APPELLANT

Vs

The United India Insurance Co. Ltd., & Ors.

RESPONDENT

Date of Decision : 24-07-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 279](#),
[Section 304A](#), [Section 338](#), [Section 337](#) - Rash driving or riding on a public way - Causing death by negligence -

Citation : (2017) 07 BOM CK 0267

Hon'ble Judges : Shalini Phansalkar-Joshi

Bench : SINGLE BENCH

Advocate : C.A. Joshi, M.R. Kalar

Final Decision : Allowed

Judgement

1. This appeal is preferred by the claimants, being not satisfied with the amount of compensation awarded by Member, Motor Accident Claims Tribunal, Akot, in Claim Petition No. 65/2005 by its impugned judgment and order dated 09/12/2005.

2. Brief facts of the appeal can be stated as follows: Appellant no.1 is the widow, appellant nos.2 and 3 are the minor children, whereas appellant no.4 is the mother of the deceased Ajmal Khan. Respondent no.3 is the father of the deceased. As per the case of the appellants, deceased was having his own Truck bearing no. MHV-7907, which was used for transporting goods from Akot to nearby villages and from that business he was earning income of Rs.500/to Rs.600/per day. Moreover, the deceased was also driving the Truck bearing no. MH-30-A-9237, which was owned by his father, respondent no.3 herein.

3. On the date of accident, on 27/07/2003, while the deceased was driving the Truck bearing no. MH-30-A-9237, belonging to his father, respondent no.3, on Mumbai - Agra Highway and proceeding towards Akola along with his father,

respondent no.3 herein, in a moderate speed and on proper side of the road, at about 10:14 a.m. near village Argaon, Truck bearing no. MP-07-G-0724, came from opposite direction in a rash and negligent manner. The driver's side front tyre of the said Truck, all of a sudden got burst. As a result, said Truck came on the wrong side of the road and gave dash to the Truck driven by the deceased. As a result of the said accident, the deceased died on the spot. The F.I.R. came to be lodged about this accident at Sahapur Police Station against the driver of the offending Truck bearing no. MP-07-G-0724. The said Truck was owned by the respondent no.2 and insured with respondent no.1.

4. As per the case of the appellants, on account of death of the deceased, they lost their only source of support and income and hence they claimed compensation of Rs.20,00,000/, however restricted their claim for the amount of Rs.10,00,000/.

5. This petition came to be resisted by respondent no.1 contending inter alia that the cause of the accident was the rash and negligent driving of the deceased himself. He came on the wrong side of the road and as a result of it, the accident took place. It was contended that, due to the severe dash given by the Truck of the deceased to the Truck of respondent no.2, its tyre was burst and hence Truck was damaged, resulting into the death of the driver of the said Truck also. Thus it was submitted that, there was no negligence on the part of the driver of the said Truck, and hence claim petition for compensation filed by the legal heirs of the deceased, who was the tortfeasor, cannot be maintainable.

6. Secondly, it was submitted that the amount of compensation claimed by the appellants was excessive and exorbitant. It was denied that the deceased was working as driver on the Truck of his father and he was earning Rs.500/to Rs.600/per day from his own Truck and it was also denied that his income can be more than Rs.10,000/per month, as claimed by the appellants.

7. Respondent no.3, the father of the deceased filed his reply to the petition contending that it was the Truck owned by the respondent no.2, which was driven in a rash and negligent manner. He was an eye witness to the said accident, and hence according to him, the amount claimed by the appellants was just and reasonable. Moreover, said Truck was also insured with respondent no.1, and hence it is the liability of respondent no.1 to compensate the appellants.

8. On these respective pleadings of the parties, the Tribunal framed necessary issues at Exh.29, for its consideration. In support of their case, appellant no.1 examined herself and also led the evidence of witness, by name, Ramesh Mahadeorao Guhe, the owner of Vishal Transport, to show that the deceased was earning Rs.500/to Rs.600/per day from his own Truck bearing no. MH-V-7907. Respondent no.3 also examined himself to prove the insurance policy and also to prove that the cause of the accident was the rash and negligent driving of the Truck owned by respondent no.2 and not of the deceased.

9. On appreciation of this evidence, the Tribunal, on the basis of the spot

panchnama (Exh.31), was pleased to hold that it was a case of contributory negligence as the vehicle of the deceased was found on wrong side of the road. Accordingly, the Tribunal attributed 40% of the negligence to the deceased. The Tribunal, further held the income of the deceased from both the sources as Rs.5,000/per month and then applied the multiplier of "17" and came to the finding that the total amount of compensation comes to Rs.6,80,000/. However deducting there from, 40% of the amount, which was towards the contributory negligence of the deceased, awarded the compensation of Rs.4,27,000/to the appellants, inclusive of NFL amount of Rs.50,000/.

10. While challenging this judgment and order of the Tribunal, submission of learned counsel for appellants is that the Tribunal has not properly considered the evidence on record, especially the fact that, the tyre of the Truck owned by respondent no.2 was burst and that was the cause of the accident. It is urged that, even the F.I.R. is also lodged against the said Truck driver and that was sufficient to hold that the sole cause of the accident was rash and negligent driving of the Truck owned by respondent no.2. It is submitted that respondent no.3, who was an eye witness to the accident, has examined himself, however he is not crossexamined by any of the other respondents. Thus, it is submitted that this evidence was more than sufficient to prove that the sole cause of the accident was the rash and negligent driving of the Truck owned by respondent no.2, and hence the deceased cannot be in any way considered liable for contributory negligence.

11. As regards the amount of compensation, by placing reliance on various judgments of the Hon"ble Apex Court, learned counsel for appellants has submitted that the amount awarded by the Tribunal is quite inadequate and meager. Hence it is required to be enhanced.

12. Per contra, submission of learned counsel for respondent no.1 - insurance company is that, the Tribunal has properly assessed the evidence on record, as to ascertain the cause of the accident. The spot panchnama clearly goes to show that the vehicle of the deceased had come on the wrong side of the road and in the said accident as the drivers of both the vehicles have succumbed to injuries, then it has to be held that the cause of the accident was the contributory negligence on the part of both the drivers. According to learned counsel for respondent no.1, therefore, no interference is warranted in the impugned finding of the Tribunal on that aspect. As regards the quantum of compensation, he submitted that in the absence of any documentary evidence produced on record showing the actual income of the deceased, the Tribunal has rightly considered his income as Rs.5,000/per month and assessed the amount of compensation. The amount awarded by the Tribunal is also fair and reasonable. Hence, on this issue also, according to learned counsel for respondent no.1, no interference is warranted in the impugned judgment and order of the Tribunal.

13. In view of these rival submissions advanced before me by learned counsel for both the parties, the first and foremost issue necessarily arising for my

consideration is, whether the cause of the accident was the rash and negligent driving of the Truck owned by respondent no.2 or whether deceased also needs to be held responsible for contributory negligence?

14. In this case, appellants have examined an eye witness to the accident who is the father of the deceased. He was traveling along with the deceased in the said Truck at the time of accident. His evidence shows that the deceased was driving the Truck on the proper side of the road and in a slow speed, however the Truck owned by respondent no.2, came from opposite direction in a fast speed, its driver's side front tyre was burst and therefore he was unable to control the said Truck and as a result, the said Truck gave dash to the Truck of the deceased; on account of that the accident occurred, in which his son succumbed to the injuries sustained in the accident. This evidence of the father of the deceased has remained unchallenged and unshattered on record. This witness was not at all crossexamined by respondent no.1 or respondent no.2.

15. Moreover, the evidence on record shows that the police have, after carrying out necessary investigation in the case, filed F.I.R. and charge sheet against the driver of the Truck owned by respondent no.2. Learned counsel for appellants has relied upon the certified copy of the F.I.R. (Exh.30) and along with it the statement of Cleaner of the offending Truck, namely, Paramjeetsingh Gurjalsingh. He has also stated before the police, immediately after the accident that, as the front tyre of their Truck burst, the Truck could not be controlled by the driver and hence it dashed on the Truck of the deceased, which was coming from opposite direction. It appears that, on the basis of this statement of the Cleaner Paramjeetsingh, police have filed charge sheet against the driver of the said Truck for the offence under sections 279, 337, 338 and 304A of I.P.C.

16. Learned Tribunal has however, relying upon the spot panchnama (Exh.31) held that as the Truck driven by the deceased was found to be on the right side of the road, leaving its left side, the deceased was also equally responsible for the said accident. However, this finding of the Tribunal cannot be upheld in view of the fact that the evidence of the only eye witness examined in this case, has remained unchallenged on record; coupled with the fact that police have, after inquiry and investigation found that the driver of the offending Truck was responsible for the cause of the accident. The cause of the accident clearly appears to be bursting of front tyre of that Truck. In view of this direct evidence, which was neither controverted nor challenged, merely on the basis of spot panchnama, it cannot be said that the deceased himself was also responsible for contributory negligence. As held by the Hon'ble Apex Court in the case of Jiju Kuruvila and others VsKunjujamma Mohan and others, (2013) 9 SUPREME COURT CASES 166, "Mere position of the vehicles after accident, as is shown in a scene mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors, like the speed of vehicles, intensity of collision, reason for

collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn, as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual".

17. In the instant case, there is direct evidence of respondent no.3 stating about the manner in which the accident has taken place. It may be true that, being the father of the deceased, he may give the evidence to support the case of the appellants, but in that case, it was the responsibility of the respondent nos.1 and 2, the owner and insurance company of the offending vehicle to cross-examine him. However, no such cross-examination of respondent no.3 is conducted. Not only that, no other evidence of an eye witness is produced on record. In that situation, direct evidence of an eye witness, which is also coupled with the police papers, cannot be discarded, merely on the basis of some averment in the spot panchnama that the Truck of the deceased was found to be on the right side of the road. As held in the abovesaid judgment of the Hon'ble Supreme Court, after the collision, the position of the vehicles may change due to the impact of collision and hence from the mere position of the vehicles after the accident, as reflected in the spot panchnama, it would not be proper to ignore the direct evidence and to hold the deceased also responsible for contributory negligence. Therefore, to the extent of this finding of the Tribunal holding the deceased responsible for the contributory negligence of 40%, which finding is not based on the evidence on record but against the evidence on record, needs to be set aside.

18. This brings me to the quantum of compensation.

19. It is undisputed that at the time of accident, deceased was of the age of 34 years. The Tribunal has applied the multiplier of "17". Learned counsel for the fairly submits that the multiplier should be "16", having regard to age of the deceased.

20. Now about the income of the deceased. According to appellant no.1, the widow, the deceased was getting Rs.5,000/per month as his salary from respondent no.3. Moreover, he was also having a separate Truck bearing no. MH-V-7907, which he has attached to Vishal Transport and from that he used to earn Rs.500/to Rs.600/per day. She has stated that after deducting all the expenses of the said Truck, her husband was getting Rs.5,000/per month. Hence his total earning was Rs.10,000/per month. However, her cross-examination is relevant and important, because in her cross-examination, she has categorically admitted that, she has not produced any documentary evidence to show that her husband was earning Rs.5,000/per month as salary from his father and Rs.5,000/per month as income from his own Truck. Moreover, she has stated that, her husband was paying the income tax. If his income was Rs.10,000/per month, then he was expected to pay the income tax. However, income tax returns or the PAN Card is not produced on record. Similarly, father of the deceased has

deposed that he was giving salary of Rs.5,000/per month to the deceased, however he has also not produced on record any documentary evidence to that effect, neither accounts are produced, nor any salary certificate is produced on record.

21. As regards the evidence of the witness Ramesh, the owner of Vishal Transport, he has admitted in his cross-examination that some times for 8 to 10 days, the Truck was not taken for transport services. Moreover, though he has also stated that deceased was earning Rs.500/to Rs.600/per day, as income from the said Truck, his own accounts or the vouchers etc. of showing the payment of such amount to the deceased, are not produced on record. The Tribunal has also disbelieved the salary certificate on the count that the certificate does not appear to be authentic. He has also not produced his account books though he has admitted that he has maintained such account.

22. Respondent no.3, who has filed his written statement to the claim petition, has not at all stated therein that he was paying the salary of Rs.5,000/per month to the deceased. Therefore, this case about payment of salary of Rs.5,000/per month to the deceased by his own father, appears to be put up only at the time of evidence before the court and that too without there being any evidence for the same. If one considers the fact that, respondent no.3 is the father of the deceased and deceased was engaged for working as a driver on the Truck of his father, then evidence of respondent no.3, as rightly observed by the Tribunal, cannot be taken as gospel truth. In my considered opinion, having regard to the entire material evidence on record, no fault can be found in the impugned judgment and order of the Tribunal, holding that income of the deceased can be considered as Rs.5,000/per month.

23. According to learned counsel for appellants, the Tribunal has not considered the future prospects of the deceased and hence some amount needs to be awarded towards the future prospects also. In support of his submission, he has relied upon the decision of the Hon'ble Apex Court in the case of Vimal Kanwar and others Vs Kishore Dan and others, (2013) 7 Supreme Court Cases 476 and Neeta Kallappa Kadolkar and others Vs Divisional Manager, Maharashtra State Road Transport Corporation, Kolhapur, (2015) 3 Supreme Court Cases 590, wherein relying upon its own judgment in the case of Santosh Devi Vs National Insurance Co. Ltd., (2012) 3 SCC (Cri) 160, it was held that, "Even in the case of private employment, the future prospects can be taken into consideration to determine the loss of dependency. Having regard to the age of the deceased, the same shall be added to the annual income of the deceased to determine the just and reasonable compensation under the heading of the loss of dependency".

24. In the light of this law, considering the age of the deceased in the present case, which was 34 years, 50% of his income needs to be added towards his future prospects.

25. Learned counsel for appellants has also submitted that in the instant case,

the Tribunal has deducted 1/3rd amount of the income of the deceased towards his personal expenses. By relying upon the judgment in the case of New India Assurance Company Limited VsGopali and others, (2012) 12 Supreme Court Cases 198, especially the observations made by the Hon"ble Apex Court in para nos.18 and 19, it is submitted that, as the number of dependents in this case is five, the Tribunal should have deducted only 20% of the amount of the income of the deceased towards his personal expenses. The observations in para nos.18 and 19 of the judgment in the case of New India Assurance Company Limited VsGopali and others, are as follows:

"18. Here, we are dealing with a case in which the deceased had 8 dependents including four sons and one daughter. The question which arises for our consideration is: whether in 1992 a person having an income of less than Rs.3,000/and a family of 9 could think of spending 1/3rd of his income on himself. On a conservative estimate, it is possible to say, he would have spent at least 50% of the income on the purchase of foodgrains, milk, etc. and for payment of water, electricity and other bills. 25% of the income would have been spent on the education of children which would have included school/college fee, cost of books, etc., 15% of the income would have been used for meeting other family necessities, like clothes, medical expenses, etc. He would have then been left with 10% of his income, a portion of which could be used to meet unforeseen contingencies and on the occasion of festivals. In this scenario, any deduction towards personal expenses would be unrealistic. In any case, where the family of the deceased comprised of 5 persons or more having an income of Rs.3,000/to Rs.5,000/, it is virtually impossible for him to spend more than 1/10th of the total income upon himself.

"19. What we have observed hereinabove may not apply to rich people living in urban areas who can afford to spend a substantial amount of their income in clubs, hotels and on drinks parties. In those cases, there may be a semblance of justification in applying the rule of 1/3rd deduction but it would be wholly unrealistic to universally apply that rule in all cases."

26. Here in the case, it is submitted that having regard to the income of the deceased which this court is considering as Rs.3,000/to Rs.5,000/, having regard to his future prospects, then only 20% of the amount should be deducted towards his personal expenses. However, the facts of the reported authority show that there were total 9 members in the family and in that backdrop, it was held that, deceased could not be expending 1/3rd of his income on himself. It may be true that in this authority, the Hon"ble Apex Court has also considered the eventuality where the family of the deceased comprised of five persons or more having an income of Rs.3,000/to Rs.5,000/and held that, it is virtually impossible for him to spend more than 1/10th of the total income upon himself.

27. Facts of the present case however disclose that it is only the widow and her two minor children, who were depending upon the income of the deceased. Appellant no.1 has admitted in her crossexamination that, her inlaws were and

are residing separately and their responsibility was not on her husband. Hence the submission that totally five members were depending on the income of the deceased cannot be accepted. Therefore, it has to be held that the Tribunal has rightly deducted 1/3rd amount of the income of the deceased towards his personal expenses.

28. Learned counsel for appellant has then placed reliance on the abovesaid judgment of the Vimal Kanwar and others Vs Kishore Dan and others to submit that appellant no.1 should be awarded Rs.1,00,000/towards the loss of consortium and loss of estate, plus Rs.50,000/towards loss of love and affection. Amount of Rs.2,00,000/is also claimed towards loss of love and affection for appellant nos.2 and 3 and Rs.1,00,000/each towards loss of love and affection to appellant no.4, mother and respondent no.3, father of the deceased. The amount of Rs.25,000/is further claimed towards funeral expenses, in addition to the amount which is already awarded by the Tribunal of Rs.9,000/towards bringing the dead body.

29. In my considered opinion, having regard to the amount of compensation which is awarded by the Tribunal on these heads and which is found to be meager, it is necessary to enhance the same by awarding the amount of Rs.1,00,000/to the appellant no.1 towards loss of love and affection and consortium, Rs.50,000/each to appellant nos.2 and 3 towards their loss of love and affection, Rs.25,000/each to appellant no.4 and respondent no.3 towards the loss of love and affection and Rs.25,000/towards funeral expenses. Thus, total amount of compensation comes as follows :

Sl. No. Heads Calculation

(i) Salary Rs.5,000/per month

(ii) 50% of (i) above to be added as future prospects (Rs.5,000/+ Rs.2,500/) = Rs.7,500/per month

(iii) 1/3rd of (ii) deducted as personal expenses of the deceased Rs.7,500/ Rs.-2,500/= Rs.5,000/per month

(iv) Compensation after multiplier of "16" is applied (Rs.5,000/x 12 x 16) = Rs.9,60,000/-

(v) Loss of love and affection and loss of consortium to appellant no.1 Rs.1,00,000/-

(vi) Loss of love and affection to the children (appellant nos.2 & 3) Rs.50,000/ each i.e. Rs.50,000/x 2 = Rs.1,00,000/

(vii) Loss of love and affection to appellant no.4 and respondent no.3 Rs.25,000/ each i.e. Rs.25,000/x 2 = Rs.50,000/-

(viii) Funeral expenses Rs.25,000/-

Total Compensation Awarded Rs.12,35,000/

30. Learned counsel for appellants has they relying upon the judgment in the case of Laxman Alias Laxman Mourya Vs Divisional Manager, Oriental Insurance Co. Ltd. and another, (2011) 10 SCC 756, submitted that appellant no.1 has, though restricted her claim to Rs.10,00,000/, she is ready to pay the requisite court fee on the additional amount of compensation, as awarded by this court.

31. In view thereof, appeal is allowed.

32. The impugned judgment and order of the Tribunal is modified to the extent that respondent nos.1 and 2 to pay the amount of Rs.12,35,000/, inclusive of the amount already awarded by the Tribunal to the appellants and respondent no.3 with interest at the rate of 7.5% per annum, from the date of petition till its realisation.