(2009) 03 BOM CK 0022

In the Bombay High Court

Case No : F.A. No. 50 of 2004

Gulab and Others — APPELLANT

Vs

N. Moideen Kunhi and Others — RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 168, 170

Citation : (2010) ACJ 2436

Hon'ble Judges : U.D. Salvi, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : M. Sonak, for the Appellant; M.S. Joshi, for the Respondent

Final Decision : Allowed

Judgement

U.D. Salvi, J.—The appellants-dependants as well legal representatives of the motor accident victim are before us on being aggrieved and dissatisfied with a judgment and award dated 18.11.2003 delivered by Motor Accidents Claims Tribunal, Panaji, in Claim Petition No. 216 of 1995.

2. Concisely, the facts leading to the claim petition are as under:

(i) Deceased Santosh Priolkar proceeding from Panaji to Ponda on his scooter bearing registration No. GA 02-B 4150 was thrown off his scooter by a jeep bearing registration No. GDJ 8400 as a result of head-on collision between the two at about 6.30 p.m., on 16.6.1995 near Basilica Church at Old Goa, and such collision would not have occurred but for rash and negligent driving of the jeep. The deceased Santosh Priolkar, aged about 53 years, succumbed to the injuries sustained in the said accident on the same day at Goa Medical College & Hospital at Bambolim, Goa, later on.

(ii) The deceased Santosh Priolkar was working as the Senior Engineer with Zuari Agro Chemicals Limited on a handsome pay package including perks of around Rs. 1,88,600 per annum. According to the appellants, considering the future prospects of the deceased Santosh Priolkar and their dependency on him, they remain entitled to compensation of Rs. 26,00,000.

3. Learned Tribunal after hearing the parties and considering the evidence led before it granted total compensation of Rs. 7,93,140 along with interest at the rate of 9 per cent per annum on the sum excluding the amount of future dependency from the date of the presentation of the petition till its realization. This reduction in quantum of compensation aggrieved the appellants and prompted them to prefer the present appeal.

4. No cross-appeal has been preferred by any of the respondents, either the owner of the offending vehicle or its insurer. Only controversy which survives for the present appeal is regarding the quantum of compensation awarded in the claim petition.

5. Learned advocate Mr. Sonak for the appellants submitted that despite adducing evidence in respect of the cash earnings and the benefits received by the deceased victim from his employer and the future prospects in form of vocal and exhaustive affidavit-in-chief of the constituted attorney for the appellants and the documents, namely, certificate of salary, Exh. 41 and payslip, Exh. 42, the learned Tribunal had restricted all its view of the facts concerning the income of the deceased to the gross salary of Rs. 8,905 as shown in the salary certificate, Exh. 42 and consequently, had arrived at erroneous loss of dependency of Rs. 7,93,140, much in contrast with judicial wisdom expressed by the Apex Court in National Insurance Company Ltd. Vs. Indira Srivastava and Others, , while expounding the meaning of the word ''income'' and the phrase ''just compensation''. He further assailed hyper technique attitude of the learned Tribunal in appreciating the evidence adduced before it with the aid of the judgment of High Court of Judicature at Gauhati in Ranu Bala Paul and Others Vs. Bani Chakraborty asid Ors., . He further submitted that the learned Tribunal completely lost sight of the future prospects of the deceased victim and landed himself in error while assessing the quantum of compensation. In his view the just compensation, taking into consideration the basic pay, HRA at the rate of 30 per cent of basic pay, provident fund/family pension fund, superannuation fund, own vehicle usage reimbursement vide salary certificate at Exh. 41 as well as washing allowance vide payslip at Exh. 42, ex gratia payment, performance award, leave travel allowance, reimbursement of medical expenses and cost of pair of shoes and future prospects as disclosed in affidavit-in-chief at Exh. 29, can be reasonably worked out to the modest figure of Rs. 18,00,000. He further pointed out that there was no justification spelled out in the impugned judgment about grant of interest on the part of the amount awarded and the interest ought to have run on the entire amount of compensation adjudicated to be due to the appellants.

6. Learned advocate Mr. Joshi for the insurance company urged the court to be rational rather than emotional in appreciating the evidence led by the petitioner on the point of quantum of compensation. He invited the attention of this Division Bench to the judgment of the Apex Court in Bijoy Kumar Dugar Vs.

Bidyadhar Dutta and Others, , in order to highlight the legal proposition that mere assertion of claimants is insufficient unless proved by leading cogent and reliable evidence before Tribunal. He further cited judgment in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, , in order to strengthen his argument on the appreciation of evidence in the course of determination of quantum of compensation. He argued that the future prospects of the victim are irrelevant in assessing the quantum of compensation and for advancing his argument, he relied on judgment in Oriental Insurance Company Ltd. Vs. Jashuben and Others, .

7. It is not in dispute that the deceased Santosh Priolkar was a Senior Engineer/ Manager with Zuari Agro Chemicals Ltd., at the material time. The impugned judgment reveals that the Tribunal completely overlooked the salary certificate at Exh. 41 while assessing the quantum of compensation and restricted its judicial sight to the figure of the gross salary as reflected in the salary slip at Exh. 42.

8. A fact remains that salary certificate at Exh. 41 and salary slip at Exh. 42 surfaced in the evidence through the testimony of Felix Menezes, Senior Manager with Zuari Agro Chemicals Limited, CW 2. According to learned advocate Mr. Joshi for the insurance company, the evidence of Felix Menezes, CW 2, merely provides empty portrayal of the figures allegedly concerning the salary/perks drawn by the deceased Santosh Priolkar without vouching truth of its contents and this fact can be seen from the absence of the particulars as reflected in the salary certificate at Exh. 41, in payslip at Exh. 42, particularly as regards the employee contribution, family pension fund and superannuation fund. In response to these submissions, learned advocate Mr. M. Sonak for the appellants explained that corresponding deductions made towards the provident fund and family pension scheme of Rs. 888 and Rs. 58 respectively do reflect in payslip at Exh. 42. Nonetheless, it needs to be observed that the payslip is a note for recording the fact concerning the gross earning and net take-home salary of the employee after the legitimate deductions made therefrom. It is, therefore, not expected that such payslip should reflect the employer''s contributions to the family pension/superannuation fund and the payment made by the employer towards the reimbursement of the expenses incurred by the employer. Assertions in the present case in respect of such facts were not only made by the constituted attorney of claimants in affidavit-in-chief but such assertions drew support through the testimony of Felix Menezes, CW 2, who had worked in Zuari Agro Chemicals Limited, over 32 years and had issued salary certificate at Exh. 41, may be at the request of claimants. It is, however, not demonstrated in cross-examination of Felix Menezes, CW 2, that such salary certificate at Exh. 41 was de hors the facts on record with Zuari Agro Chemicals Limited. On the contrary, the cross-examination of Felix Menezes, CW 2, shows that he has authority for issuing salary certificate(s) to the employees, one of them being the deceased victim. Certainly, it is not expected that Tribunal deciding the motor accident claim should succumb to niceties and technicalities of the Evidence Act, when there is adequate material on the basis of which the Tribunal can arrive or decide

things necessary to be decided for awarding compensation. We have before us the salary certificate at Exh. 41, issued by a person authorised to do so. It was therefore, for the respondents to demonstrate in the cross-examination or otherwise the fallibility of such certificate. Having not done so, the learned Tribunal ought to have taken due cognizance of the facts as revealed through the salary certificate at Exh. 41.

9. Salary certificate at Exh. 41 provides the following data:

Salary certificate at Exh. 41, therefore, begs a further question as to whether data reflected therein should be taken into consideration for understanding the income of the deceased Santosh Priolkar.

10. Adverting to the judgment of the Apex Court in National Insurance Company Ltd. Vs. Indira Srivastava and Others, , an answer to this pertinent question is not difficult to find out. Hon''ble Apex Court held:

(8) The term ''income'' has different connotations for different purposes. A court of law, having regard to the change in societal conditions must consider the question not only having regard to pay packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. The loss caused to the family on the death of a near and dear one can hardly be compensated in monetary terms.

(9) Section 168 of the Act uses the words ''just compensation'' which should be assigned a broad meaning. The court cannot, in determining the issue involved in the matter, lose sight of the fact that the private sector companies in place of introducing a pension scheme take recourse to payment of contributory provident fund, gratuity and other perks to attract people who are efficient and hard-working...the same may be either for the benefit of the employee himself or for the benefit of the entire family. If some facilities are being provided whereby entire family stands to benefit, the same must be held to be relevant for the purpose of computation of the total income...

(11) ... superannuation benefits, contributions towards gratuity, medical insurance policy for self and family and education scholarship were beneficial to the members of the family.

11. In light of these observations, it would be inappropriate and unjust to omit from judicial consideration the perks, such as HRA at the rate of 30 per cent of basic pay, employer''s contribution for provident fund/family pension and superannuation fund, in assessing the income for computation of quantum of compensation.

12. As regards the reimbursement, it would be worthwhile to consider the observations of the Supreme Court in the case of National Insurance Company Ltd. Vs. Indira Srivastava and Others, . The Apex Court observed medical reimbursement which provides for a slab and which keeping in view the terminology used, would mean reimbursement towards medical expenses on

production of medical bills and, thus, the same would not come within the purview of the aforementioned category (superannuation benefit, contributions towards gratuity, insurance, medical policy, etc.). Obviously, the reimbursements mentioned in the salary certificate at Exh. 41 cannot be considered for the purposes of computation of quantum of compensation.

13. The constituted attorney of the appellants disclosed in his affidavit-in-chief at Exh. 29 that deceased was also entitled to ex gratia payment, performance award, leave travel allowance, reimbursement of medical expenses and reimbursement of cost of pair of shoes. It is true that Felix Menezes, CW 2, was not obliged to say anything about such benefits referred in the testimony of the constituted attorney of the appellants, Gurudas Shankhawalkar, CW 1. However, there is no specific challenge to the said facts averred to by Gurudas Shankhawalkar, CW 1. Record reveals some material in form of statements and letters issued by Zuari Agro Chemicals Limited, in support of aforesaid averments. In Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, , the Supreme Court deprecated use of hypothetical assertions of claimants regarding future earnings of the accident victim had he survived the accident unless all relevant facts thereto are proved by leading cogent and reliable evidence before Tribunal. In the instant case, the assertions made on behalf of claimants are concerning the ex gratia payment, performance-award, leave travel allowance, reimbursement of expenses, which the deceased had earned or was entitled to during his lifetime and not the future prospects and, therefore, such benefit(s) if otherwise permissible or relevant for judicial consideration, need to be taken into account for the purposes of computation of quantum of compensation. In the considered view of this Division Bench, leave travel allowance is one such benefit which the members of the family of the victim always stood to benefit therefrom and the same therefore must be held to be relevant for the computation of total income. As regards the other benefits, it is difficult to say that such benefits would have continued to accrue and the members of the family of the victim, therefore, would at all times stood to benefit therefrom.

14. Learned advocate Mr. M. Sonak for the appellants pointed out from para 8 of the affidavit-in-chief at Exh. 29 of Gurudas Sankhawalkar, CW 1, that there were specific averments regarding future prospects of the deceased victim in terms of projected basic salary at the time of retirement of the deceased victim and there was no specific cross-examination of the witness on the said aspect. Perusal of the record shows a fact of discrepancy between the averments and the material on record in form of a purported certificate dated 20.7.1995 issued by Zuari Agro Chemicals Limited. A fact also cannot be ignored that the witness Gurudas Sankhawalkar, CW 1, constituted attorney of the appellants, was speaking mainly from the records as regards the service condition of the deceased victim and the most appropriate witness on this aspect Felix Menezes, CW 2, made no comment in his testimony about the said aspect of the matter. Moreover, the Apex Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, , specifically observed that a departure from the

multiplier method proved to be logically sound and legally well established method of ensuring a ''just'' compensation which will make for uniformity and certainty of the awards, can only be justified in rare and extraordinary circumstances and very exceptional cases; and in light of such observation the Apex Court took decision of taking into account the prospect of advancement in the future career as seen from the evidence on record for the purposes computing the loss of dependency. The Supreme Court observed thus in the said case the deceased was 39 years of age. His income was Rs. 1,032 per month. Of course, the future prospect of advancement in life and career should also be sounded in terms of money to augment the multiplicand. Many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonable liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs. 1,032 per month. Having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs. 2,000 as the gross income.

15. In the present case, the deceased victim had only five years in hand before he could say good bye to his service. Considering the age of the deceased, the imponderables of life and the lack of clear and cogent evidence on the issue of future prospects of the deceased victim, it is not prudent to take liberal view of the prospects of the future in estimating the gross income of the deceased victim.

16. In the light of the aforesaid discussion, the equation of the quantum of compensation in the present case can be resolved as under:

We furthermore do not intend to interfere with the rate of interest in the facts and circumstances of the case. However, we find no justification for restricting the interest on the sum excluding the amount of future dependency.

17. Lastly, it needs to be observed that the submission made by learned advocate Mr. M. Sonak objecting to hearing the respondents. Insurance company on the point of the quantum of compensation particularly in the absence of permission u/s 170 of the Motor Vehicles Act, 1988, has some merits in light of the observation of the Apex Court in Chinnama George and Others Vs. N.K. Raju and Another, . In view of the provisions u/s 149 of the Motor Vehicles Act, the insurance company has limited defences in the claim petition only in relation to the policy issued by it. As a matter of fact, a insurance company is not required to be impleaded as party from the inception and impleadment of the insurance company as party may crop up at the stage of Section 170 when it is found that there is collusion between the claimants and owner or when it is found that owner is ex parte. However, as a matter of practice the insurance companies are being impleaded from very inception by the claimants and notices are issued to such insurers. The present case is no exception to this practice. This gives an

opportunity to the insurance company to participate in the proceeding. It is in this limited sense the insurance company is allowed to participate in the proceeding before us and nothing more.

18. In the end, it is necessary to reproduce the guidelines reiterated by the Apex Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, , for safeguarding the amount of compensation awarded as under:

(i) The Claims Tribunal should, in the case of minors, invariably order that the amount of compensation awarded to the minor invested in long-term fixed deposits at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may, however, be allowed to be withdrawn.

(ii) In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property, such as, agricultural implements, rickshaw, etc., to earn a living, the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money;

(iii) In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out in (i) above unless it is satisfied, for reasons to be stated in writing, that the whole or part of the amount is required for expanding and existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood, in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid;

(iv) In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above, subject to the relaxation set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order;

(v) In the case of widows the Claims Tribunal should invariably follow the procedure set out in (i) above;

(vi) In personal injury cases if further treatment is necessary, the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment;

(vii) In all cases in which investment in long-term fixed deposits is made it should be on condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be;

(viii) In all cases the Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency, if the amount awarded is substantial, Claims Tribunal may invest it in more than one fixed deposit so that if need to be one such F.D.R. can be liquidated.

19. It appears that these guidelines were not observed by the learned Tribunal in its letter and spirit.

20. In the result, this appeal succeeds in part and the compensation is determined at Rs. 12,72,000. The interest at the rate of 9 per cent per annum shall run on the entire amount of compensation awarded from the date of presentation of the petition till its payment. The judgment of the Motor Accidents Claims Tribunal, Panaji, stands modified accordingly. The learned Tribunal, Panaji is directed to bear in mind the aforesaid guidelines and pass appropriate directions accordingly. No order as to costs.

