

(2019) 01 BOM CK 0168
In the Bombay High Court
Case No : First Appeal No. 3001 Of 2009

India Assurance Company Ltd.

APPELLANT

Vs

Sunita And Ors

RESPONDENT

Date of Decision : 04-01-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 168
Code of Civil Procedure, 1908 — Order 41 Rule 33
Constitution of India, 1950 — Article 142

Citation : (2019) 1 BomCR 859

Hon'ble Judges : Sunil K.Kotwal, J

Bench : Single Bench

Advocate : S.G. Chapalgaonkar, N.D. Kendre

Final Decision : Dismissed

Judgement

1. This appeal is directed by original respondent No.2 - New India Assurance Company Ltd. against judgment and award passed by Motor Accident Claims Tribunal, Latur (hereinafter referred to as 'Tribunal') passed in M.A.C.P. No. 379 of 2005. Respondent Nos. 1 to 3 are the original claimants. Respondent No.4 is original respondent No.1, who is the owner of Tractor bearing registration No. MH-24-D-2177, involved in the accident (hereinafter referred to as 'offending Tractor'). Respondent No.5 is driver of offending Tractor and respondent No.6 is mother of the deceased, who is one of the claimant. The Tribunal awarded total compensation of Rs. 5,96,000/- inclusive of "no fault liability" compensation, with interest thereon @ 7.5% p.a. from the date of the claim petition.

2. The facts leading to institution of this appeal are that, on 21.06.2005 at about 7.30 p.m., when the deceased was proceeding from village Halgara towards village Sawari by his motorcycle along with his friend- Satish, who was pillion rider, near the field of Shrinivas Jain, the offending Tractor came from opposite direction and gave dash to the motorcycle, resulting into death of the deceased Balaji. The accident occurred due to rash and negligent driving by the driver of

the offending vehicle. Therefore, claim petition for compensation under Section 166 of the M. V. Act, came to be filed before the Tribunal.

3. Heard Shri. S. G. Chapalgaonkar, learned counsel for the appellant - The New India Assurance Company Ltd. and Shri. N. D. Kendre, learned counsel for the claimant Nos. 1 to 3 and 6.

4. Learned counsel for the appellant submits that this appeal is preferred challenging the award passed by the Tribunal on two grounds. According to him, the first ground is that the accident occurred due to contributory negligence of the deceased. The second ground is the exorbitant compensation amount awarded by the Tribunal.

5. Learned counsel for the appellant submits that the spot of the accident is on the middle of the road as shown in the spot panchanama and therefore, only one inference is to be drawn that the accident occurred due to contributory negligence of the deceased, who drove his motorcycle by the middle portion of the road.

6. Next limb of the argument of learned counsel for the appellant is that the learned Tribunal without having any evidence on record, assessed the notional income of the deceased as Rs.4,500/- per month and awarded exorbitant compensation. He submits that as claimants did not file cross-objection or cross-appeal for enhancement of the compensation in this appeal, this court cannot enhance the compensation, though it can determine fair and reasonable compensation. He placed reliance on "Ranjana Prakash and others Vs. Divisional manager and another" (2012 AIR SCW 848) and "United India Insurance Co. Ltd. Vs. Rajani Suresh Bhore and others" [(2017) 5 AIR Bom R 592].

7. Learned counsel for the appellant has pointed out that in case "Jitendra Khimshankar Trivedi and others Vs. Kasam Daud Kumbhar and others" [(2015) 4 Supreme Court Cases 237], the Supreme Court exercised jurisdiction under Section 142 of the Constitution of India while enhancing the compensation in absence of cross-objections and cross-appeal by the claimant.

8. Learned counsel for the claimants supported the judgment and award passed by the Tribunal on the ground that only because there was 'head-on collision' in between the Tractor and the motorcycle of the deceased, inference cannot be drawn that the deceased contributed the occurrence of the accident on account of his own negligence. Next submission of learned counsel for the claimants is that the Tribunal erroneously applied multiplier of "16" when the deceased was only 30 years old and as per the judgment of "Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another" [(2009) 6 SCC 122], multiplier of "17" is applicable.

9. Next submission of learned counsel for the claimants is that the Tribunal did not consider the compensation under the head of loss of future prospect and even under non-pecuniary heads, the Tribunal awarded less compensation. He

placed reliance on "National Insurance Company Limited Vs. Pranay Sethi and others" [2018 (3) Mh. L.J. 70].

10. Learned counsel for the claimants submits that in view of the law settled by the Apex Court in "Jitendra khimshankar Trivedi" (supra), even in absence of cross-objections, Appellate Court can enhance the compensation after determining just and fair compensation.

11. Initially, I will consider whether the Insurance Company can prove the occurrence of the accident on account of contributory negligence of the deceased. Undisputedly, the Insurance Company did not examine any eye witness of the accident to substantiate its contention. Therefore, only on the basis of police papers I have to determine, whether the Insurance Company can establish its plea of contributory negligence.

12. After going through the copy of the FIR (Exh.41), it emerges that the informant- Baburao Marutirao Pandit specifically mentioned in the FIR that the accident occurred due to rash and negligent driving by the driver of the offending Tractor, which gave dash to the motorcycle of the deceased from its front side. Even after careful examination of contents of spot panchanama (Exh.42), it becomes clear that on the spot of accident, the road passes from North-South direction. Village Halgara is on northern side and village Sawari is on southern side. It is specifically mentioned in the spot panchanama that the spot of the accident is eastern portion of the road. On the spot of the accident, the motorcycle of the deceased was lying on the eastern side of the road, which is also specifically marked in the sketch map, which is the part of the spot panchanama. Undisputedly, the deceased was proceeding from village Halgara i.e. from northern side towards southern side to the village Sawari. Thus, the eastern side is the left side of the deceased. On the basis of this situation, it can be ascertained that at the time of accident the deceased was proceeding towards village Sawari by driving his motorcycle by the left side of the road and that time the offending Tractor came towards wrong side of the road towards its right side and gave dash to the motor of the deceased from its front side. From the FIR as well as spot panchanama, it also emerges that even after giving the dash to the deceased's motorcycle, the Tractor left the spot of accident. The above discussed situation on the spot and the conduct of the driver of the Tractor, is sufficient to hold that the accident occurred only due to rash and negligent driving by the driver of the offending Tractor. In other words, the Insurance Company cannot prove that even the deceased contributed the occurrence of the accident by driving his motorcycle in rash or negligent manner. Accordingly, I answer point No.1 in the negative.

13. While determining the quantum of compensation, the age of the deceased plays an important role. The School Leaving Certificate Exh-46 of the deceased shows that his date of birth was 09.05.1975. The accident occurred on 21.06.2005. Thus, on the date of accident the deceased was only 30 years old as claimed by the claimants. In the circumstances, in view of the law settled by the

Apex Court in "Smt. Sarla Verma Vs. Delhi Transport Corporation" (supra), multiplier of "17" is applicable in the case at hand.

14. No doubt, regarding actual monthly income of the deceased no documentary evidence is placed on record by the claimants. However, the license issued by Shop Inspector under Bombay Shops and Establishment Act, 1948 (Exh.47), shows that since 1995 the gold-smith shop of the deceased Balaji Marutirao Pandit @ Potdar in the style "Sheetal Jewellers", was registered at Udgir. On the basis of certificate of registration of the shop together with oral contention of Sunita Potdar (PW-1), certainly it can be gathered that the deceased was earning his livelihood as gold-smith having the skill of designing gold ornaments. Thus, considering the age of the deceased and his personal skill as a gold-smith, the notional income determined by the Tribunal as Rs.4,500/- per month is certainly just and reasonable. Thus, the annual income of the deceased comes to Rs.54,000/-.

15. As in the family of the deceased, including his mother, there are four dependents, in view of Smt. Sarla Verma (supra), 1/4th income is to be deducted from the annual income of the deceased towards his personal expenses. If from the annual income of the deceased, 1/4th i.e. Rs.13,500/- is deducted, the annual contribution by deceased to his family comes to Rs.40,500/-.

16. In addition to this, the deceased being 30 years old self- employed person, as per law laid down by the Apex Court in the case of "Pranay Sethi and others" (supra), 40% income is to be added in the annual income of the deceased towards loss of future prospect. Thus, if in the annual contribution by deceased i.e. Rs.40,500/-, 40% income is added, it come to Rs.56,700/-. After applying multiplier of "17", the loss of dependency come to Rs.9,63,900/-.

17. In addition to this, under conventional heads, the claimants are entitled to following additional compensation.

1)

Loss of consortium

Rs.40,000/

2)

Loss of estate

Rs.15,000/

3)

Funeral expenses

Rs.15,000/-

18. Thus, the claimants are entitled to total following compensation under

different heads.

1)

Loss of dependency

Rs.9,63,900/-

2)

Loss of consortium

Rs.40,000/-

3)

Loss of estate

Rs.15,000/-

4)

Funeral expenses

Rs.15,000/-

Total

- Rs. 10,33,900/-

19. As due to filing of this appeal by the Insurance Company, the claimants could not get the fruits of award passed by the Tribunal, on this compensation amount, the claimants are entitled to interest @ 9% p.a. From the date of filing of claim petition.

20. Now, question to be determined is whether in absence of cross-objection by the claimants, this Court can enhance the compensation. In the case of "Ranjana Prakasha and others Vs. Divisional Manager and another" (supra), the Apex Court observed that in an appeal by the owner / insurer, the claimant will not be entitled to seek enhancement of the compensation by urging any new ground, in absence of any cross-objection or cross-appeal.

Relevant para Nos. 7 and 8 are reproduced as under :

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example,

where the claimants seek compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner / insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner / insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by the owner / insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation.

21. Thus, in this case, the Division Bench of Apex Court has made it clear that where the appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, High Court has to examine the facts and by applying the relevant principles, initially shall determine the just and fair compensation. If the compensation determined by the High Court is higher than compensation awarded by the Tribunal and if it is the appeal preferred by the claimants, then only High Court can allow the appeal and enhance the compensation. However, position is different when the appeal is preferred by Insurance Company or by the owner for reduction of the compensation. In such case, if the compensation determined by the High Court is more than the compensation awarded by the Tribunal, the only course available is to dismiss the appeal. However, if the compensation determined by the High Court is less than the compensation awarded by the Tribunal, then by allowing the appeal, High Court can reduce the quantum of compensation.

22. The case of *Ranjana Prakash (supra)* is also followed by this Court in *United India Insurance Co. Ltd. Vs. Rajani Suresh Bhore and others (supra)*. No doubt, in *Jitendra Khimshankar Trivedi Vs. Kasam Daud (supra)* in para No.12 of the judgment the Apex Court observed that :

12. The Tribunal has awarded Rs.2,24,000/- as against the same, the claimants have not filed any appeal. As against the award passed by the Tribunal when the claimants have not filed any appeal, the question arises whether the income of the deceased could be increased and compensation could be enhanced. In terms of Section 168 of the Motor Vehicles Act, the courts/the Tribunals are to pass awards determining the amount of compensation as to be fair and reasonable

and accepted by the legal standards. The power of the courts in awarding reasonable compensation was emphasised by this Court in Nagappa v. Gurudayal Singh, Oriental Insurance Co. Ltd. v. Mohd. Nasir and Ningamma v. United India Insurance Co. Ltd. As against the award passed by the Tribunal even though the claimants have not filed any appeal, as it is obligatory on the part of courts / the Tribunals to award just and reasonable compensation, it is appropriate to increase the compensation.

23. However, after carefully going through this judgment, it emerges that while enhancing the compensation, the Apex Court exercised jurisdiction under Article 142 of the Constitution of India, which High Court does not possess. Thus, though compensation determined by this Court in the case at hand is more than awarded by the Tribunal, this Court cannot enlarge the scope of this appeal and cannot enhance the compensation more than awarded by the Tribunal. However, by exercising its jurisdiction under Order 41 Rule 33 of the Code of Civil Procedure, this court can only enhance the rate of interest to the extent of 9% p.a. from the date of filing of claim petition till realization of the entire compensation amount.

24. Accordingly, I hold that this appeal preferred by Insurance Company, deserves to be dismissed. However, the award passed by the Tribunal needs to be modified to enhance the rate of interest @ 9% p.a. from the date of filing of petition till realization of the entire compensation amount.

25. Accordingly, First Appeal No. 3001 of 2009 is dismissed. However, award passed by the Motor Accident Claims Tribunal, Latur in M.A.C.P. No. 379 of 2005 is modified to enhance the rate of interest on compensation amount, to the extent of @ 9% p.a. from the date of filing of compensation amount.

claim petition till realization of entire The award be modified accordingly.

26. If the compensation amount is deposited by the Insurance Company in this Court, the original claimants are permitted to withdraw the same in accordance with the modified award and apportionment of the compensation shall be in accordance with the award passed by the Tribunal. For disbursement of the compensation, the same be transmitted to the Motor Accident Claims Tribunal, Latur.

27. Parties shall bear their respective costs of the appeal.

28. First Appeal is disposed of in above said terms.