

(1977) 09 BOM CK 0011
In the Bombay High Court
Case No : A.F.O.D. No. 137 of 1974

Jaikumar Chhaganlal Patni and Others

APPELLANT

Vs

Mary Jerome D'souza and Others

RESPONDENT

Date of Decision : 21-09-1977

Acts Referred:

Fatal Accidents Act, 1855 — Section 1A, 2
Motor Vehicles Act, 1939 — Section 110 , 110A, 110B, 110C, 110D

Citation : AIR 1978 Bom 239 : (1978) 80 BOMLR 95 : (1978) MhLj 164

Hon'ble Judges : Pratap, J;Deshpande, J

Bench : Division Bench

Advocate : S.N. Dwivedi, for the Appellant; N.B. Zaveri, for the Respondent

Judgement

This Judgment has been overruled by : Mrs. Helen C. Rebello and Others Vs. Maharashtra State Road Transport Corpn. and Another, (1998) 2 ACC 512 : (1999) ACJ 10 : (1998) 7 AD 269 : AIR 1998 SC 3191 : (1999) 95 CompCas 509 : (1998) 6 JT 418 : (1998) 5 SCALE 339 : (1999) 1 SCC 90 : (1998) 1 SCR 685 Supp : (1999) 1 UJ 174 : (1998) AIRSCW 3105 : (1998) 7 Supreme 404

Deshpande, J.—By its judgment dated 12-7-1973 the Motor Accidents Claims Tribunal for Greater Bombay awarded a sum of Rs. 40,000/- with interest at 6 per cent per annum from the date of claim by way of compensation for the widow and two sons of deceased Jerome D'souza. The deceased was a taxi driver and at the relevant time had parked his taxi on Section V. Road at Bandra on 22-5-1970, while on his way from north to south. As he was crossing the road on foot to the opposite side towards Bandra Talkies, a car belonging to respondents Nos. 1 and 2 rushed from Khar side and fatally hit him and threw him at a distance causing his instantaneous death. Owners of the car, respondents 1 and 2, entered appearance at the trial but did not display any interest in contesting the claim, which came to be contested only by the Insurance Company after securing permission to that effect u/s 110-C of the Act. At the trial, the widow of the deceased examined herself to prove the income of

the deceased and source of it and also examined one B.E.S.T, driver to prove negligence who had seen how the car of respondents 1 and 2 hit the deceased. None of the respondents entered the witness box nor examined any other witnesses. The validity of this award is challenged in this appeal by all the respondents.

2. Mr. Dwivedee, the learned advocate appearing for the appellants, faintly tried to challenge the findings as to identity of the car, as also the negligence of the driver. Evidence of Ram-sevak Tiwari the B.E.S.T. driver however, shows that he had just parked his bus at the Bus Stop near Bandra Talkies while on his way towards the north. He saw the deceased coming from the side of his parked taxi towards Bandra Talkies, and also saw him being knocked down by the car with such a force near the divider, that the deceased was thrown at a distance of a few feet. He noted the car number, when the person driving the car had stopped it for some time, to get down and go to the place where the deceased was lying. He had conveyed this information to one Head Constable who was travelling by the same bus. His evidence further shows that on that very day within three hours he was called at the Police Station, Bandra, where his statement was recorded and saw the same car being brought to the Police Station during this time, which he had identified there. His cross-examination is wholly ineffective. It is true that the chit on which the number of the car was noted has not been produced, nor the Head Constable to whom the information was passed by him is examined. We are unable to see what adverse inference can be drawn against the claimants for this omission. The Head Constable is not alleged to have seen the accident, nor a rough chit by itself even if produced could have made any difference to the conclusion. The circumstance that the respondents have not chosen to enter the witness box or to enforce the production of the records at the police station to demonstrate the alleged falsity of the claimants' case only indicates how unfounded the defence on this point is. In the absence of any contrary evidence, we do not feel any hesitation in confirming the findings of the trial Court about the identity of the car as also about the negligence of the driver.

3. Mr. Dwivedee's challenge to the quantum of compensation, however, needs close examination. The judgment does not indicate any basis or reasoning in support of the quantum fixed, and stands exposed to the charge of being arbitrary. The principles as to how the quantum of compensation in such cases should be determined are no more in dispute. Even before the enforcement of the Motor Vehicles Act of 1939 and inclusion of Sections 110 to 110F therein under the Amendment Act of 1956, the damages claimable by the dependants of the victims of the motor accidents, were determined by reference to Section 1A and Section 2 of the Fatal Accidents Act of 1855, corresponding to English Fatal Accidents Act of 1846 and the English and Indian cases decided thereunder. In terms of these principles the pecuniary loss to dependants is to be ascertained, (to quote Supreme Court in its leading judgment in the Bus accident case of Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others,

"Only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained... .."

(Underlining supplied)

To work this out, one has to find out amongst other things (1) the net annual income of the deceased earned by dint of his labour, manual or of head and heart -- (2) as to how much out of it was spent by him for himself and how much for his dependants, which is otherwise referred to as their "dependency", (3) as to how long each dependant would have been required to depend on the same, widow being assumed to be so required during her whole of lifetime in the absence of any evidence to the contrary, and (4) how long the deceased could have supported, each one of them, depending on the estimate of expectancy of his future span of life. The age of the deceased on the date of the accident, his health and estimate of the years during which he would continue to earn, also are equally important and relevant factors.

4. Each of these considerations bristles with several uncertainties and imponderables, i.e. as to expectancy of life, increase or decrease in the net annual income and number of dependants and also constant change in value of the money in the market. Some element of conjecture inevitably does enter into actual calculations. The figure is ordinarily arrived at by multiplying the dependency, i.e. net annual amount receivable or received by the dependants, by as many years as the deceased was expected to survive, and earn, otherwise referred to as "years purchase". Formerly this ranged between 10 to 20 years. In view of the estimated increase in the average longevity now up to the age of 65, this figure is increased in a Supreme Court case up to 28 years. See *Smt. Manjushri Raha and Others Vs. B.L. Gupta and Others*, . Allowance has to be made also for shorter period of dependency in the cases of aged parents, marriageable daughters, and other dependants ceasing to be dependant on becoming earning members themselves.

5. The provisions of the Motor Vehicles Act provide for compensation even for injuries that do not prove to be fatal and differ from those of the Fatal Accidents Act on certain other minor points. Section 110F of the Motor Vehicles Act requires the Tribunal to award such amount by way of damages as it thinks just. Opinion is divided on whether "just" compensation conceived u/s 110F, requires application of any different principle by the Claims Tribunal from the one implicit in the Fatal Accidents Act and evolved in English and Indian cases decided thereunder. The Supreme Court has adverted to this in the case of *Sheikhupura Transport Co. Ltd. Vs. Northern India Transport Insurance Co.*, , arising directly under the said Section 110B of the Motor Vehicles Act, and merely observed that, that Section 110B is wider in scope, without indicating the extent of such width. The Supreme Court, however, has still reiterated the general principle indicated in the case of *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and*

Others, by citing the above quoted passage, though the Gobald case was tried by the Civil Court by reference to Fatal Accidents Act and not to the Motor Vehicles Act. In other words, essential principles of the decided cases under the Fatal Accidents Act still hold the field and pecuniary benefits coming to the claimants by reason of the death of the deceased are still liable to be balanced against the claimants' pecuniary losses.

6. We have thus to see if the figure of Rs. 35,000/- accords with these principles. Coming first to the question of the net income of the deceased and its portion spent by him over the dependants, the Tribunal is driven to rely on the sole evidence of the widow whose knowledge about the husband's income does not appear to be very precise. In the absence of contrary evidence and absence of any serious challenge even to what she has stated, Tribunal's estimate of the net income of the deceased being Rs. 350 per month and Rs. 150/- per month being spent on his own, and Rs. 200/- per month being spent for the dependants, appears to us to be unexceptional. The estimate is fortified by the facts that he was paying rent of Rs. 85/- per month and Rs. 20/- per month in addition towards electricity charges, etc. If anything, it is a case of under-estimation presumably due to her ignorance. The dependants, no doubt, inherited one taxi and the widow has admitted receipt of Rs. 600/- per month from it by hiring. Mr. Dwivedee strongly relied on it and wanted us to take this into account for reduction of the compensation. Unfortunately appellants have not brought any data to indicate its actual condition, the year of make, and its recurring or costly repair expenditure and whether it was purchased with his own money or under any arrangement with the creditor or stability or certainty of such income, as hints to that effect were made by Mr. Zaveri offering relevant evidence. Some hint of the possession of one more taxi was thrown in cross-examination, without pursuing to indicate if it belonged to the deceased or to someone else and was run by him with some arrangement with the owner. The claimant-widow has filed an affidavit to the said effect. Though no counter affidavit is filed, nor request to cross-examine the widow was indicated in spite of her presence in the Court, we do not think it safe to rely on such a material at this late stage. We will have to proceed on the basis that dependants were receiving net amount of Rs. 200/- per month. The deceased was aged 42 as indicated in the claim petition at the time of death. Widow's evidence about his being 40 cannot be accepted in the absence of any explanation of the earlier statement. Nothing is suggested against his health. Taking 65 as the average longevity, life expectancy can be fixed at 23 years more. The compensation amount on this data by recourse to the accepted formula comes to $\text{Rs. } 200 \times 12 \times 23 = \text{Rs. } 55,200$.

7. The principal contention of Mr. Dwivedee is that the amount of Rs. 15,000/- admitted to have been received by the widow, towards the Life Insurance policy is liable to be deducted from the above amount of Rs. 55,200/-. This, according to him, is the pecuniary advantage received by the claimants by reason of the death in terms of the ratio of Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, . It is nobody's case that it was an accident policy

entitling the claimants to such amount, on the death of the deceased only in such an accident, and the amount could not have been received by them, had the death been due to otherwise than such an accident. We express no opinion if this could have made any difference as there is no unanimity in the decided cases as to the liability of even such amounts to deduction from compensation. Judicial opinion is also sharply divided on the question whether life policy amount can be said to have come to the claimants by reason of the death of the deceased to justify its deduction from the amount of compensation payable to the claimants towards their pecuniary loss. Our attention was drawn by Mr. Zaveri the learned advocate for the respondents, to a few judgments, of High Court of Life Insurance Corporation of India and Another Vs. Kasturben Naranbhai Vadhia and Others, , High Court of Punjab and Haryana in Sood and Company v. Surjit Kaur 1973 ACJ 414, ag also Delhi High Court in Bhagwanti Devi v. Ish Kumar 1975 ACJ 56 and several other judgments of same High Courts, which do support his contention that amounts so received are not liable to be deducted as the same cannot be said to have come to the claimants by reason of the death of the deceased, Mr. Dwivedee, on the other hand, drew our attention to the judgments reported in Union of India(UOI) Vs. Supriya Ghosh and Others, Smt. Sushila Devi and Others Vs. Ibrahim and Another, ; Sabita Pati v. Rameshwar Singh 1973 Ace CJ 319 (Orissa High Court) and Automobiles Transport (Rajasthan) Pvt. Ltd. and Another Vs. Dewalal and Others, and a few other judgments of the same Courts taking the contrary view. We may at once observe that Patna High Court supports deduction only of such policy amounts as are subscribed to meet accident contingency and not other policy amounts. It rather supports Mr. Zaveri's contention and not that of Mr. Dwivedee, Mr. Zaveri also drew our attention to some other judgments of Delhi High Court, including in the case of Orissa Road Transport Co. Ltd. Vs. Sibananda Patnaik and Others, which justify deduction only of a portion and not of the entire policy amounts.

8. The answer turns really on whether such policy amount can be said to be "pecuniary advantages" that come to the claimants "by reason of the death of the deceased?" That such amounts amount to pecuniary advantage admits of little doubt. Controversy really centres round if it comes to the dependants "by reason of death". Reading of the decided cases only go to show how this very question can arise under variety of circumstances, giving rise to different considerations, pregnant with equally different legal implication, and it is by no means easy to lay down any inflexible rule as to which pecuniary benefit can be said to have been received "by reason of the death." It is pertinent to note that in the absence of any provision to the contrary, such policy amounts form part of the estate of the deceased and come to his heirs or dependants by way of inheritance, unless it is sought to be disposed of by the deceased otherwise. Nominee mentioned therein is not necessarily the beneficiary but invariably happens to be merely an authorised collector thereof for the benefit of all heirs. We are unable to see any difference between this amount, and any other income yielding estate, that comes to the dependants either by way of inheritance or

pursuant to any will or settlement. The causal connection between receipt of such amounts, and death is too apparent and both really stand on the same footing legally. Donations by the charitable trusts, or provisions for such dependants by some public spirited institutions, or gifts or contributions by relatives or sympathisers, of course stand on different footing and are clearly distinguishable, and can never be treated as advantages or benefits or having received by reason of the death of the bread winner, though the death may furnish an occasion for such receipts. We are ourselves unable to see how and why the policy amount or other amounts from income yielding assets, such as bank balances, or interests thereon, or on fixed deposits, or dividends from shares and securities, left or settled by the deceased on the dependants, cannot be said to have come to the claimants by "reason of the death" of the deceased and why it should not be balanced against the pecuniary losses caused by the death of the bread winner in terms of *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, The Supreme Court has been at pains in the above quoted passage to indicate how source of such pecuniary advantage is irrelevant, by words "from whatever sources". It should not be forgotten that these essentially are compensatory and not punitive damages.

9. It will be of interest in this context to note that, in England, the insurance policy amount was considered to be such pecuniary advantage, coming to the dependants by reason of the death, of the deceased, and was liable to be deducted under the common law, from the amount of compensation payable under Fatal Accidents Act of 1846. This situation was reversed firstly by Fatal Accidents (Damages) Act of 1908 and improved further for the benefit of the claimants by Law Reforms (Personal Injuries) Act of 1948 and altered drastically by the Fatal Accidents Act of 1959 ensuring that various kinds of insurance and pensionary benefits are not excluded from the compensation payable by the tortfeasors. Claims for such compensation in India, as discussed earlier, are still determined mainly by reference to principles underlying the Fatal Accidents Act, 1855, analogous to English Act of 1846; and the decided cases thereunder prior to 1908 enactments, contemplate reducing the amount of compensation by such insurance amounts, if received by the dependants. In the absence of any statutory provisions analogous to the above referred to English enactments of 1908, 1948 and 1959, it should be difficult to find any basis or trace any rationale not to deduct such life policy amounts when on the face of it, these amount to pecuniary advantages and are received by the dependants by reason of the death of the bread winner victim.

10. While holding to the contrary, the High Courts of Gujarat, Punjab and Haryana and Delhi appear to have treated the receipt of such amounts as collateral benefits, coming to the dependants not so much by reason of the death of the deceased, as by reason of the contract that the deceased had entered into with the Life Insurance Company. With respect, this view and the reasoning in support thereof is open to grave doubt. The learned Judges have mainly relied on the *Bradburn v. Great Western Rly. Co.* (1874) All ER 195 and *Parry v. Cleaver*

(1969) 1 All ER 555. As noted by Sen J. In the case of Smt. Sushila Devi and Others Vs. Ibrahim and Another, in both these cases, injured persons had claimed damages for their own injuries, resulting into their physical disabilities, and the learned Judges and noble Lords were not called upon to deal with the claims of the dependants of the deceased, killed in any fatal accident. Policy amounts were received by the injured claimants, in these cases, as a result of arrangements or contracts, made by them with their employers or insurers, to meet some such specific contingencies to their own selves.

11. These amounts obviously stood on different footing from the life policy amounts payable to his dependants on the death of the insured. Principles governing award of damages in these two events cannot be identical. Amongst other distinguishing features, there was a risk of benefit of the premiums being lost to the insured in Bradburn's case, (1874) All ER 195 if no accident causing injuries had occurred, while entire life policy amount is refundable to the insured on maturity, in some cases with interest or dividend, if death does not take place during the prescribed number of years. The Courts in both these cases found, and with respect rightly, that benefits receivable by the injured claimants, from the arrangements of their own creation, cannot be allowed to go to the wrong doers and set off against the compensation payable by them. No question of benefits of the amounts saved and contributed by the deceased and consequentially inherited or received by the dependants by reason of death of any one could arise in any one of these cases.

12. Now Lord Reid in the Parry's case 1969 1 All ER 555 (supra) based his view on the public policy reflected in the above referred to 1959 enactment, and extended the same to the pensionary benefits in dispute not specially covered by the Act. Judgment of Bramwell B., on the other hand, in the firstly named Bradburn's case (1874) All ER 195 (supra) itself refers to the distinction between claim for injuries by the injured and the claims of the dependants for fatal injuries caused to the deceased. Indicating how under the Fatal Accidents Act, Lord Campbell laid down, for the first time, the rule in Franklin v. South Eastern Railway Co. (1858) 3 H & N 211 for taking into account whatever comes in possession of family of the deceased, the learned Judge observed) "But that has no bearing on the case of a person suing upon his Common Law right for injuries caused to him by the defendant's negligence", Curiously enough this passage does not find place in the reprint i.e. (1874) All ER 195 . Text of this para in original report, i.e. (1874) 10 Ex. 1, is slightly different in details, though not in purport and substance. In the case of Union of India(UOI) Vs. Supriya Ghosh and Others, , the Division Bench quoted the entire para including this passage at page 136 from the original report presumably in support of its view that policy subscribed specially to meet accidents contingencies stand on different footing from the policies on life generally, and the amount of the former, and not of the latter is so deductible, which point is not relevant in this case. We have ourselves verified the correctness of the passage. With respect, the learned Judges of the above High Courts seem to have lost sight of this distinction emphasised to

Bradburn's case itself.

13. As indicated earlier, in some cases, the Delhi High Court as also Orissa High Court have found justification for deducting some portion of such policy amounts. This view is based on the assumption that the claimants could have the benefit of the policy amount even if the deceased had died otherwise than in the accident, or would have shared the benefit thereof had the policy matured during his lifetime. Death in fatal accident only accelerates its receipt by the dependants, according to this view, and interest chargeable for the estimated accelerated years alone represents the deductible portion of such benefit. This approach is adopted in some cases even to other liquid assets receipt of which as owner is merely assumed to have been accelerated, which, according to this approach is receivable and enjoyable by the dependants in either case, even without such death. In the case of *Amarjit Kaur v. Vanguard Ins. Co. Ltd.*, reported in 1069 ACJ 286 Deshpande, J. of the Delhi High Court justified deduction of only some portion of the policy amount on this ground. In support of his view the learned Judge relied on *Grand Trunk Railway Company of Canada v. Jennings* (1883) 13 AC 800.

14. It is true that liquid assets possessed and owned by the deceased in certain cases, are open to the enjoyment of all such dependants during lifetime of the deceased and they can claim certainty of inheriting or receiving it otherwise in the ordinary course. Accidental death in such cases can be said to have only accelerated the process of their ownership. Pecuniary benefit to the dependants is bound to be far lesser than in cases where such certainty of enjoyment, actual receipt, in any manner whatsoever, is absent or slender. Cases of the former type are bound to be far and few. The amount of the life policy standing in the name of the deceased is exposed to more uncertainties in majority of the cases, there being no guarantee even of continuation thereof. In the Privy Council case of *Jennings* 1888 13 AC 800 (supra) the deceased had subscribed to the policy expressly for the benefit of the wife and the wife was bound to receive the benefits thereof irrespective of death of the husband and of the accident. This forms the basis of the ratio of the case. This cannot be true of all the policies. No inflexible rule, therefore, can be laid down in this behalf as is suggested by the Delhi High Court. The question of discount on account of accelerated receipt of compensation in lump sum is being separately dealt with. Such amount ordinarily must be taken to have been received by reason of death and deducted from the compensation unless any specific case justifying deduction of lesser amount is made out. We have already shown how the word "just" in section 110B of the Motor Vehicles Act does not justify ignoring such benefits.

15. Had the deceased not met with accident, policy amount would have gone to the husband on maturity, and there was no guarantee that the amount would have been spent for the benefits of the dependants, alone in this case. Deceased is not shown to have been possessed of other property. Instability and insecurity to which a driver's life is exposed, introduces high degree of uncertainty of the

dependants having been ever benefited.

16. Mr. Zaveri's contention that policy amount consists partly of the contribution made by the deceased and the excess over it payable thereunder. According to Mr. Zaveri, the accelerated value of the contribution made may be deducted at the most and not the excess which is the benefit of the contract and not of the death. Apart from the absence of any good reason, to so split the amount, we have already indicated how discount of the supposed acceleration of the saving depends on facts of each case and how the second part of the contention, adopted in Bradburn's case (1874) All ER 195 (supra) is distinguishable. With respect, we are unable to agree with the views of the learned Judges of the High Courts on which reliance is placed by Mr. Zaveri. The amount of Rs. 15,000/- is thus liable to be deducted. This brings down the amount to Rs. 40,200 (Rs. 55,200 -- 15,000).

17. Mr. Dwivedee then contends that this figure is liable to be discounted by 40% because of its being paid in lump sum as against the spread over of the same over 23 years in the event of deceased not having met with the accident. Reliance was placed on *Nepoleon Fernandes Vs. The Union of India*, and *Amarjit Kaur v. Vanguard Ins. Co. Ltd.* 1969 ACJ 286 of the Delhi High Court in which amount was discounted at 33 1/2 per cent for the same reason. Mr. Zaveri drew our attention to a few cases in which either no discount was made at all or it was effected at a very smaller rate. We, however, find that the amounts involved in these cases were very small or final determination of compensation was unduly delayed and the cases are all distinguishable on facts. When the compensation is calculated on the basis of what the claimants would have received in all during the course of 23 years, interest receivable on the investment of such lump sum for all these years, reflects an unanticipated and in a way unmerited addition. Discount thus is an indispensable process and part of fair and just determination. Percentage of discount however must depend on facts and facts of each case. We have already noticed that income of Rs. 200 itself happens to be a very modest estimate. 25 per cent discount in the circumstances of this case would, in our opinion, be just and fair. This would reduce the amount by Rs. 1,050/- and bring it down to Rs. 39,150.

18. The learned Judge has allowed a sum of Rs. 5,000/- to the widow by way of compensation for loss of her husband's consortium. Mr. Zaveri and Mr. Dwivedee wanted this amount respectively to be raised or reduced. To reduce such a loss to money value is indeed a difficult task, and one has only to ensure that it bears fair proportion to the total amount. The amount appears to be just and fair. This will raise the figure from Rs. 30,150/- plus Rs. 5,000/- = Rs. 35,150.

19. Mr. Zaveri then contends that the claim set up by the claimants also contained a prayer for compensation towards the loss to the estate and the learned Judge must have some amount also on this count in his mind, while fixing the total compensation at Rs. 35,000/-. The contention is not without substance, though absence of discussion makes it difficult to verify. Mr. Zaveri

claims addition of Rs. 5,000/- on this count as the loss to the estate by way of expectancy of life. Mr. Dwivedee contends that when the amount of pecuniary monthly benefit has been fixed at 23 years purchase, loss of the expectancy of life must be deemed to have been included therein and no separate amount can be claimed on that count without duplication. However, identical submission made in the case of Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, before the Supreme Court has been firmly turned down. While rejecting this contention the Supreme Court observed:

"Under section 2 both the courts awarded damages for the loss to the estate in a sum of Rs. 5,000/-. That figure represents the damages for the mental agony, suffering and loss of expectation of life. There was no duplication in awarding damages under both the heads..."

The Supreme Court so observed, notwithstanding the fact that a sum of Rs. 25,200/- was found payable by way of compensation to the dependants of the deceased u/s 1 of the said Act by multiplying the dependency by as many years purchase as the deceased was expected to survive. The contention of Mr. Zaveri, therefore, shall have to be accepted. Awarding Rs. 5,000/- on this count will not be unfair when compensation amount under the first head comes to be fixed at Rs. 35,150/-. The addition of Rs. 5,000/- makes the total of Rs. 40,150/- as against the total of Rs. 40,000/- already awarded. The learned Judge thus has been right instinctively though he did not discuss the reasons. This necessitated our going into details and dealing with all the points raised. No interference in the award is, therefore, called for,

20. In the result, the appeal fails.

21. In the circumstances of the case there will be no order as to costs.

22. Appeal dismissed.