**(2012) 08 PAT CK 0050**

**In the Patna High Court**

**Case No :** Miscellaneous Appeal No. 467 of 2008

Most. Saraswati Devi and Others — APPELLANT

Vs

Subodh Kumar — RESPONDENT

**Date of Decision :** 01-08-2012

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 140
Penal Code, 1860 (IPC) — Section 279, 304(A)

**Citation :** (2013) 1 PLJR 670

**Hon'ble Judges :** Mihir Kumar Jha, J

**Bench :** Single Bench

**Advocate :** Ajay Kumar, for the Appellant; Kailash Nath Diwakar, For the Respondent No. 1 and Mr. Ramchandra Lal Das, For the Respondent No. 2, for the Respondent

# Judgement

Honourable Mr. Justice Mihir Kumar Jha

1. Heard learned counsel for the parties. The appellants are aggrieved by the impugned judgment and award dated 18.3.2008 in Claim Case No. 193 of 2005 passed by the District Judge cum Motor Vehicle Appeal Claim Tribunal, Muzaffarpur, whereby and whereunder, the compensation claim of Rs. 3,93,500/- for the death of Kira Mahto, the husband of the appellant No. 1 and father of appellant nos. 2, 3, 4 & 5 has been reduced to Rs. 1,39,500/-.

2. The facts giving rise to this appeal lie in a very narrow compass. Kira Mahto on 21.7.2005 had met an accident at 2.30 PM when a truck bearing registration No. DNG 909 coming from his behind had hit him leading to his immediate death at the spot. A substantive criminal case, Saraiya P.S. Case No. 183 of 2005 was filed against the truck driver and the police after investigation had found the offence u/s 279 and 304(A) of the Indian Penal Code to be true and as such had filed charge-sheet.

3. The appellants, being the family members, the wife and the children of

deceased Kira Mahto, had filed an application seeking compensation of Rs. 3,93,500/- along with interest at the rate of 9% per annum from the date of filing of the claim i.e. 8.8.2005 till its actual payment to them. In the claim petition, it was mentioned that deceased Kira Mahto was aged about 40 years and was working as a Munshi in a petrol pump with his salary of Rs. 3,000/- per month. According to the appellants, late Kira Mahto was the sole bread earner of the family and his premature death in a truck accident made them physically and financially paralyzed causing them irreparable mental agony. The appellant had accordingly quantified the total amount of compensation of Rs. up to 3,93,500/- along with interest at the rate of 9% from the date of filing of the claim bill its realization.

4. The said claim petition was contested by the vehicle owner, the respondent No. 1 as also by the United India Insurance Company Ltd., the opposite party No. 2. The case of the owner of the vehicle was that the death of late Kira Mahto did not take place on account of any deliberate act on the part of the driver. The respondent No. 1, however, has mainly taken the defence that his truck, being registration No. DNG 909 was insured with United Indian Insurance Company Limited for the period 1.9.2004 to 31.8.2005 vide policy No. 210201/31/04/01540 and as such, he should be absolved from any liability to pay compensation.

5. The respondent No. 2, the United India Insurance Company, having appeared, had contested the claim petition by filing a written statement and apart from the formal ground, it had denied both the age and income of deceased as also the amount claimed by way of compensation by the appellants to be excessive and without any basis.

6. In support of the claim, the appellants had examined four witnesses, namely, A.W.1 Saraswati Devi who is the appellant No. 1, A.W.2 Bikram Kumar, an independent person supporting the incident, A.W.3 Sanjay Kumar Mahto, eldest son of the deceased and A.W.4 Ajay Kumar, another son of the deceased. Apart from oral evidence, the appellants has also adduced documentary evidence wherein Exhibit-1 was the Income Certificate, Exhibit-2 was certified copy of the First Information Report Saraiya P.S. Case No. 182 of 2005 dated 21.7.2005, Exhibit-3 being certified copy of charge-sheet of the aforementioned police case and Exhibit-4 the certified copy of the postmortem report of the deceased Kira Mahto.

7. It has to be noted that no oral or documentary evidence was laid by the respondents, who had contested the claim of compensation of the appellants only on the basis of the plea raised in their written statement.

8. The Tribunal having framed following issues:-

I. Is the claim case as framed maintainable?

II. Whether the accident in question took place due to rash and negligent driving of the driver of Vehicle No. D.N.G.909 on 21.7.05 at 2.30 P.M. near Bakhra, P.S. Saraiya, Dist. Muzaffarpur.

III. Whether the deceased Kira Mahto died in this accident which arises Saraiya P.S. Case No. 183/05?

IV. Are the applicants entitled to the claim propounded if no what would be the quantum of compensation and from whom?

V. Are the claimants entitled to award or awards as prayed for?

had recorded a finding in respect of the issue No. 2 and 3 that from the oral and documentary evidence, it was safely established that deceased Kira Mahto died on 21.7.2005 on account of motor vehicle accident. As with regard to the issue No. 1, it was held that the appellants being widow and son and daughter of the deceased Kira Mahto, the claim filed by them was legally maintainable. As with regard to issue No. 4 and 5, namely, on the quantum of compensation and the amount to which they were entitled, the Tribunal had held the income of Rs. 3,000/- per month of Kira Mahto was not true and as such the compensation was to be calculated on notional income of the deceased for Rs. 15,000/- per annum. The Tribunal had also determined the age of the deceased as 47 years and thus applying the multiplier of 13 for the age group of 45 to 50 years, it had fixed the compensation at Rs. 1,30,000/- apart from Rs. 5,000/- towards loss of consortium and Rs. 2,000/- towards funeral expenses as also Rs. 2,500/- towards loss of estate. In this way, the Tribunal had awarded compensation of Rs. 1,39,500/- in which after deducting the amount of Rs. 50,000/- already paid to the appellants by way of ad-interim compensation u/s 140 of the Motor Vehicle Act and the Insurance Company was directed to pay Rs. 89,500/- along with interest at the rate of 6% per annum from the date of filing of the claim application and till its realization. The liability for payment of such compensation by the Insurance Company was determined on the basis that the vehicle, in question, truck No. DNG 909 was admittedly insured with the United Indian Insurance Company Limited covering the death risk from 1.9.2004 to 31.8.2005 bearing policy No. 210201/31/04/01540 and the deceased Kira Mahto dying in motor vehicle accident on 21.7.2005.

9. Mr. Ajay Kumar, learned counsel for the appellants, while assailing the impugned judgment, has basically questioned the impugned judgment on two grounds, namely, the income of the deceased Kira Mahto as also the amount of interest. He has submitted that from the oral evidence and the documentary evidence, it was well supported that the deceased was working as an employee in capacity of a Munshi in a petrol pump, IBP Company Limited, At & P.O. Badka Gaon, in the district of Muzaffarpur with monthly salary of Rs. 3,000/- per month and, therefore, his income would not have been arrived on the basis of notional income, inasmuch as, the concept of notional income is only available when the person is having no source of income. He has submitted that even on account of non-examination of the employer, the owner of the petrol pump, if the certificate

 

showing monthly income of Rs. 3,000/- per month was not sought to be believed, the safer standard of the minimum wages of a Munshi under the notification issued by the Government of Bihar under Minimum Wages Act ought to have been made the basis for computing the income of the deceased Kira Mahto. In this regard, he has relied on the Division Bench judgment of Calcutta High Court in the case of Mitali Sengupta & Ors. Vs. Oriental Insurance Co. Ltd. & Ors. reported in 2009 ACJ 250 and two judgments of the Delhi High Court in the case of National Insurance Co. Ltd. Vs. Rajendra Kumar & Ors. reported in 2009 ACJ 66 as well as in the case of Ramehar & Ors. Vs. Vinod Kumar & Ors. reported in 2009 ACJ 452.

10. As with regard to the payment of interest, it has been stated that as the total sum awarded by way of compensation by the Tribunal was less than Rs. 2.5 lacs, the interest ought to have been allowed at the rate of 9% per annum instead of 6% per annum.

11. Sri Kailash Nath Diwakar, learned counsel for the respondent No. 1, had submitted that the compensation awarded by the Tribunal was justified and needed no interference by this Court.

12. Mr. Ram Chandra Lal Das, learned counsel for the Insurance Company, respondent No. 2, which had mainly contested the claim of the appellants in the Tribunal had submitted that the factum of late Kira Mahto, the deceased, being an employee of a petrol pump and having regular income, could not have been proved by the oral evidence and/or the certificate of the owner of the petrol pump without examination of the owner of the petrol pump himself before the Tribunal. He had further submitted that in such a situation, the concept of notional income adopted by the Tribunal would require no interference from this Court. Mr. Das, learned counsel for the respondent Insurance Company had also submitted that the award of 9% per annum by way of interest in a case awarding compensation of less than 2.5 lacs could not be applied as a rule of thumb and the amount of 6% interest in the facts and circumstances of the case would also require no interference by this Court.

13. In the considered opinion of this Court, the approach of the Tribunal in applying the principle of notional income for the deceased Kira Mahto is wholly unsustainable both on fact and in law. In this regard, it is significant to note that in the oral evidence, AW-3 had categorically stated that his father, late Kira Mahto, the deceased, was employed as a Munshi in M/s Krishn Kumar Singh, Barka Gaon Petrol Pump and was getting salary of Rs. 3,000/- per month. He had also exhibited the certificate given by the Krishn Kumar Singh, the owner of the petrol pump, wherein it was clearly mentioned that the deceased Kira Mahto was employed as a Munshi in the petrol pump and was being paid salary of Rs. 3,000/- per month by him. AW-3 was subjected to cross-examination by the counsel for the Insurance Company and had answered that his father was working in the said petrol pump for last three years but he could not show from which date he was started working in the petrol pump. He had also withstood the

 

test of cross-examination as with regard to the certificate given by Krishn Kumar Singh, the owner of the petrol pump.

14. Thus, the oral evidence of AW-3 and Exhibit-1 which could not be shaken by the Insurance Company had at least led to establishing all the fact that late Kira Mahto was not a man without any income so as to be subjected to notional income. The principle of notional income, strictly speaking, can be applied only in the case where there is no evidence of working of a person and having a regular income. The Division Bench of the Calcutta High Court in the case of Mitali Sengupta (supra) having found that the victim in that case was a driver had repelled the concept of applying the principle of notional income of Rs. 15,000/- per annum and had held that since his income could not be less than Rs. 2,500/- a month. Similarly, in the case of Rajendra Kumar (supra), the Delhi High Court had held that the income of the deceased was not proved with the help of evidence, the Court could take the minimum wages into consideration as fixed under the Minimum Wages Act. It was in this regard that the Delhi High Court had held that the notional income could only be applied in a case where the deceased was not earning prior to the date of accident.

15. Thus in the present case, even if it is accepted that the income of Rs. 3,000/- per month as a Munshi in a petrol pump was not conclusively proved by the appellants, the Tribunal in view of the oral and documentary evidence, as discussed above, ought to have held that the deceased was working as a Munshi and for such Munshi, even if the income of Rs. 3,000/- per month could not be safely established, it was to be calculated as per the notification issued under the Minimum Wages Act.

16. As per the notification No. 5/M.W. 4017/03 L&E - 946 dated 31.3.2004 relied and placed on record by the learned counsel for the appellants, the minimum wages for such category of employees employed in any shop or establishment has been notified in three categories, namely, unskilled, semiskilled and skilled with the prescribed monthly income. Under the semiskilled categories of employment which includes a Driver, Helper, Assistant Munim, Clerk, Typist, Clerk, Compounder, Steno Typist, Office Assistant, Supervisors, Accounts Clerk, Sales Clerk, Blacksmith, Carpenter, Electric or Pump Mistri, Cycle Fitter, Takedgir, Assistant Sales Man, Assistant purchase men have been incorporated with the definition of semiskilled worker to be one who does work generally of well-defined routine nature wherein the major requirement is not so much of the judgment, skill and dexterity but of proper discharge of duties assigned to him for a relatively narrow job and where important decisions are made by others confining to routine operation of limited scope. In the considered opinion of this Court the same would also cover the deceased employee working in a petrol pump as a Munshi, inasmuch as, a Munshi in a petrol pump can be very well covered under the designation of either Munim or a Clerk or Account Clerk or Sales Clerk.

17. In that view of the matter, the monthly salary of Rs. 1962/- per month for

 

area having population above one lac and below two lacs can be safely made applicable even in absence of the evidence showing population of Barkagaon having population of above two lacs. Thus, this Court would reject the submissions of the learned counsel for the petitioners for fixing the salary of the deceased at the rate of Rs. 2,232/- per month and would fix his salary only at the rate of Rs. 2,075/- per month.

18. On the basis of the above, the income of the deceased Kira Mahto would be Rs. 2075X12=24,900/- and applying the law laid down in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , it would fix the deduction to be made towards personal and living expenses as 1/4th, inasmuch as, the number of dependent family members is five, the widow and four children being the appellants. Thus, after deducting Rs. 6,250/- being the 1/4 of Rs. 24,900/-, the income for the purpose of compensation would be Rs. 18,650/- per month.

19. There being no dispute on the question of age and consequently the multiplier factor of 13, the amount of compensation will be Rs. 2,42,450/- apart from Rs. 10,000/- towards consortium, Rs. 5,000/- for funeral expenses and Rs. 5,000/- towards the loss of estate which would make a total of Rs. 2,62,450/- in view of the law laid down in the case of Sarla Verma (supra).

20. Admittedly Rs. 50,000/- had been paid to the appellants by way of ad-interim compensation and, therefore, the balance of Rs. 2,12,450/- would be payable to the appellants by way of compensation.

21. As with regard to the rate of interest, though the counsel for the appellants has submitted that interest at the rate of 9% per annum would be payable and for them he has relied on the judgment of the Apex Court in the case of Abati Bezbaruah Vs. Dy. Director General Geological Survey of India and Another, as also in the case of Tamil Nadu State Transport Corporation, Tanjore, rep. by its MD Vs. Natarajan and Others, . On the other hand, learned counsel for the Insurance Company has submitted that there can be no rule of thumb for award of interest at the rate of 9% per annum and in fact in appropriate cases, the rate of interest can be lower, inasmuch as, the Motor Vehicle Act does not prescribe any fixed amount of interest. He has also placed reliance on the judgment of this Court in the case of Md. Shahabuddin Vs. State of Bihar and Others, and in the case of Md. Sadaquat Hussain & Ors. Vs. Sri Surendra Singh & Ors. reported in 2010(1) BLJ 181.

22. In the considered opinion of this Court, the Apex Court in the case of Natrajan (supra) did not lay down any guideline for fixation of amount of interest but in the case of Abati Bezbaruah (supra), it has been held that the rate of interest would depend on the facts and circumstances of each case and award of interest would normally depend on the bank rate prevailing at the relevant time. The view taken by this Court in the case of Ram Dulari Sinha (supra) whereby 6% of interest is based on appreciation of fact of that case and also recording a

 

finding that the claimant Ram Dulari Sinha herself to some extent responsible for delay in disposal of the claim case. In the case of Md. Sadaquat Hussain (supra), this Court again appreciating the facts had declined to grant any interest.

23. The date of death of the deceased being 21.7.2005, this Court having regard to the fact that a sum of Rs. 50,000/- was already paid as a ad-interim compensation and Mr. Das has also claimed that rest of the amount after award of the Tribunal with interest 6% has already been paid to the claimants, this Court would leave the rate of interest unaltered and would direct for payment of interest at the rate of 6% per annum only on the rest of the enhanced amount from the date of claim to the date of its actual payment.

24. Thus, the award of the Tribunal below is modified to the aforesaid extent only and the Insurance Company is hereby directed to pay balance amount beyond what has already been paid by it to the appellants within a period of three months from today before the Tribunal. In the result, the appeal is allowed in part. There would be, however, no order as to cost.