

(2013) 02 OHC CK 0001
In the Orissa High Court
Case No : M.A.C.A. No. 510 of 2011

Namita Swain

APPELLANT

Vs

Guruprasad Saha

RESPONDENT

Date of Decision : 19-02-2013

Acts Referred:

Citation : (2014) ACJ 1656

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

B.N. Mahapatra, J.—As per service report, notice on respondent No. 1 is sufficient. Despite service of notice, respondent No. 1 has not entered appearance. On the request of learned counsel for the claimants-appellants and the learned counsel for respondent No. 2, the matter is taken up for final disposal.

The present appeal has been filed by the claimants-appellants challenging the judgment dated 31.1.2011 passed by learned First Additional District Judge-cum-First M.A.C.T., Cuttack (for short, "the Tribunal") in M.A.C. No. 780 of 2006 for enhancement of amount of compensation awarded by the Tribunal.

2. Claimants-appellants' case before the Tribunal in a nutshell is that on 23.5.2006 at about 10 p.m. at Sarodalagada on NH 5 near Chandikhol, while the deceased was coming from Jagatpur after doing his duty as a mason with his friend Sukanta Mallik to his home, a truck bearing registration No. WB 41-B 5656 coming from behind, i.e., from Jagatpur side in a high speed and rash and negligent manner, without blowing horn, dashed against the deceased, as a result, the deceased received severe injuries and was shifted to S.C.B. Medical College & Hospital, Cuttack for treatment where he died on 25.5.2006. At the time of accident, he was aged about 26 years and was earning a sum of Rs. 200 per day as mason. The wife of the deceased spent a sum of Rs. 15,000 for

treatment of the deceased and another sum of Rs. 15,000 for his funeral ceremony. With these averments, the claimants-appellants filed claim petition before the Tribunal claiming compensation of Rs. 6,00,000.

3. Owner of the vehicle did not appear. Therefore, the case was heard ex parte against opposite party No. 1.

4. The stand of opposite party No. 2, insurance company, is that the case was not maintainable and the averments were not admissible. The truck driver was not negligent; the claim is excessive and opposite party No. 2 called upon the petitioners to produce all relevant documents, like D.L. permit and police papers, to substantiate their stand. On the basis of the pleadings, the Tribunal framed as many as four issues. After taking into consideration the oral and documentary evidence, the Tribunal came to the conclusion that due to rash and negligent driving of the driver of the offending vehicle, the accident happened and caused death of the deceased. On the date of accident, i.e., 23.5.2006, all the documents of the offending vehicle were valid and up-to-date covering the date of accident except the permit in view of filing of Exh. A by opposite party No. 2.

5. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. Vs. Challa Bharathamma and Others, the Tribunal held that opposite party No. 2, insurance company, is not liable to pay compensation, but will disburse the same in favour of the petitioners having a right to recover the same from opposite party No. 1, the registered owner of the offending vehicle. Fixing income of the deceased at Rs. 100 per day, the learned Tribunal deducted 73rd from the income of the deceased for personal expenses and applying multiplier 18 determined the amount of compensation at Rs. 4,32,000. Adding to it Rs. 9,500 towards funeral expenses, loss of consortium and loss to estate, the total amount of compensation was determined at Rs. 4,56,000 (sic). The learned Tribunal awarded costs of Rs. 500 and directed the insurance company to pay the entire amount of compensation of Rs. 4,56,500 along with interest at the rate of 7.5 per cent per annum from the date of filing of the claim petition, i.e., 21.12.2006 to the claimants-petitioners within one month with right of recovery from opposite party No. 1, owner of the vehicle, taking recourse to law. The Tribunal also directed to keep a portion of the compensation amount in fixed deposit in the name of the claimants. Challenging the said order of the Tribunal, the claimants have filed the present appeal.

6. Mr. Panigrahi, learned counsel for the appellants-claimants, submits that the finding of the Tribunal that the deceased was not a mason is contrary to the materials available on record. Therefore, the finding is perverse. It is further submitted that in view of the evidence that the deceased was earning Rs. 200 per day, the Tribunal is not at all justified in taking the income of the deceased at Rs. 100 per day. It is also submitted that the future prospects of the deceased have not been taken into consideration while determining the amount of compensation. In support of his contention, Mr. Panigrahi, learned counsel, relies upon the decision of the Hon'ble Supreme Court in the case of Santosh Devi Vs.

National Insurance Company Ltd. and Others, It is further submitted that to substantiate the claim of earning of Rs. 200 per day, the claimants produced three witnesses who were examined and all the witnesses stated that the deceased was earning Rs. 200 per day as a mason. In cross-examination, no contrary statement has been elicited from the mouth of witnesses that their evidence to the effect that the deceased was earning Rs. 200 per day was false.

7. On the other hand, the learned counsel appearing for the insurance company submits that the Tribunal is not justified in taking the income of the deceased at Rs. 100 per day which is contrary to the notification issued by the Government of Orissa in Department of Labour and Employment in 2006 fixing the minimum wages at Rs. 75 for the skilled labourer. Therefore, the Tribunal should have taken Rs. 75 instead of Rs. 100 per day. So far as the future prospects of the deceased are concerned, it is submitted that the deceased was a mason and was not doing any stable/permanent job. He might not get work on every working day. Further, it is submitted that there is no certainty that a person who lives for any longer period will earn more in future from time to time. Therefore, the future prospects of the deceased should not be taken for the purpose of computing compensation.

8. On the rival contentions of the parties, the following questions arise for consideration by this court:

(i) Whether the Tribunal is justified in determining the income of the deceased at Rs. 100 per day?

(ii) Whether future prospects of a mason, who does not work in any permanent organisation, should be taken into consideration for the purpose of determining the amount of compensation?

9. Perusal of the evidence of PWs 1 to 3 reveals that all of them have stated that the deceased was getting Rs. 200 per day. PW 1 is the wife of the deceased, PW 2 is the co-worker and PW 3 is the employer-contractor. Nothing contrary has been elicited from the mouth of PWs 1 and 2. So far as PW 3 is concerned, in cross-examination he stated that he knows the wife of the deceased but he cannot show any document that he is a contractor. He also submits that he has not entered into any written contract with the deceased. In cross-examination, PW 3 has not stated that the deceased was not earning Rs. 200 per day. The deceased was working under him as a mason cannot be treated as false merely because PW 3 failed to produce any document to the effect that he was a contractor.

10. It is stated at the Bar that wages/salary of any skilled or unskilled labourer is not paid in accordance with the rates prescribed in the Minimum Wages Act. In reality, the amount paid as wages is much more than the amount prescribed in a notification issued by Government of Odisha. It is further submitted that presently a mason is getting Rs. 350 per day. The wage prescribed under the latest notification is less than Rs. 150 per day.

11. In view of the evidence of PWs 1 to 3 and in absence of any contrary evidence, this court is inclined to accept that the deceased was earning Rs. 200 per day as a mason.

12. So far as question No. (ii) is concerned, it is necessary to refer to the decisions of the Hon'ble Supreme Court in the cases of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, and Santosh Devi Vs. National Insurance Company Ltd. and Others,

13. This court is not inclined to accept the submission of learned counsel for the insurance company that there is no certainty that income of a person, who would live for a longer period, would be increased from time to time. The argument advanced by learned counsel for the insurance company is not at all acceptable for the reason that if such a proposition will be accepted, then future prospects cannot be taken into consideration for the purpose of determining the compensation in any case. In the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, the Hon'ble Supreme Court held as under:

(11) In General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, this court increased the income by nearly 100 per cent, in Smt. Sarla Dixit and another Vs. Balwant Yadav and others, the income was increased only by 50 per cent and in Abati Bezbaruah Vs. Dy. Director General Geological Survey of India and Another, the income was increased by a mere 7 per cent. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50 per cent of actual salary to the actual salary income of the deceased towards future prospects. Where the deceased had a permanent job and was below 40 years. [Where the annual income is in taxable range, the words "actual salary" should be read as "actual salary less tax"]. The addition should be only 30 per cent if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

14. Admittedly, in the present case, the work performed by the deceased was not permanent in nature. However, the Hon'ble Supreme Court in a judgment in the case of Santosh Devi Vs. National Insurance Company Ltd. and Others, has stated that it is reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he/she becomes a victim of accident, then the same formula deserves to be applied for calculating the amount of compensation. In view of the same, future prospects of the deceased should be taken into consideration while determining the compensation in case of death of a skilled or

unskilled labourer.

15. In view of the same, this court is of the considered opinion that the future prospects of the deceased should be taken into consideration for the purpose of awarding compensation. Therefore, the compensation would be Rs. 8,64,000 (Rs. 200 per day - $\frac{1}{3}$ rd x 30 x 12 x 18). When Rs. 9,500 is added towards funeral expenses as done by the Tribunal, the total compensation comes to Rs. 8,73,500, which the insurance company is liable to pay.

16. In view of the above, the insurance company is directed to pay the aforesaid amount of compensation of Rs. 8,73,500 along with interest at the rate of 7.5 per cent per annum from the date of filing of the claim petition till the date of deposit deducting the amount already paid. The insurance company is also directed to deposit the compensation amount before the Tribunal within a period of eight weeks from the date of this judgment. The Tribunal is directed to disburse the amount of compensation in the same manner it has directed in its judgment. With the aforesaid observation and direction, the appeal is disposed of.