

(2008) 12 BOM CK 0050

In the Bombay High Court

Case No : First Appeal No. 312 of 2006 with Cross Objection No. 25 of 2007

National Insurance Company Ltd.

APPELLANT

Vs

Mrs. Samira Fernandes and Others

RESPONDENT

Date of Decision : 02-12-2008

Acts Referred:

Income Tax Act, 1961 — Section 5(A)
Motor Vehicles Act, 1988 — Section 168, 170

Citation : (2006) ACJ 2480 : (2009) 1 BomCR 22 : (2008) 111 BOMLR 297 :
(2009) 2 MhLj 458

Hon'ble Judges : N.A. Britto, J;A.P. Deshpande, J

Bench : Division Bench

Advocate : J.P. Mulgaonkar, for the Appellant; M.S. Sonak, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—The dispute between the parties is as regards the quantum of compensation awarded to the claimants (respondents No. 1 to 3 herein) as against a claim for Rs. 25,00,000/-.

2. The learned MACT (Motor Accidents Claims Tribunal) has awarded compensation of Rs. 21,60,000/-with interest at the rate of 6% per annum, on a sum of Rs. 3,48,896/-(excluding future loss of dependency) from the date of the petition till the entire amount is paid.

3. The accident took place on 6/12/2001 between a scooter driven by the deceased and truck No. KA 213/498 driven by respondent No. 4, owned by respondent No. 5 and insured with the appellant herein, who was respondent No. 3, in the claim petition.

4. The claim petition was filed by the claimants (respondent nos. 1 to 3) who are the widow and children of the deceased Savio Nigel Fernandes. Claimant No. 1 was 32 years of age, claimant No. 2 was 4 years of age, and claimant No. 3 was 2 years of age.

5. The deceased was 32 years of age. The deceased was working as a Junior Manager in the Production Department of the German Remedies Ltd. To prove the income of the deceased the claimants had examined the Senior Manager in the Department of Personnel Administration of the said Company and who had given the details of the salary drawn by the deceased. He had categorically stated that the total salary of the deceased was Rs. 2,37,627/per year and in addition, the deceased was getting medical reimbursement of Rs. 6,250/-and that he was given average raise of 20.59% in the salary for the year 2001-2002. He had also stated that the deceased was earning a basic pay of Rs. 9,950/-and was getting HRA of Rs. 1,990/-, educational allowance of Rs. 600/-and conveyance allowance of Rs. 1,100/-, thus a total amount of Rs. 13,640/-per month besides Rs. 14,925/-as LTA and Rs. 20,000/-as bonus per year. He had produced the certificate issued by the Company at Exhibit 44.

6. Nevertheless, the learned MACT came to the conclusion that the deceased was drawing a salary of Rs. 18,965/-including conveyance allowance and further held that conveyance allowance could not be considered for the purpose of computing compensation. The learned MACT therefore considered monthly income of deceased as Rs. 15,792/-and then deducted 1/3rd towards personal expenses and taking the multiplier of 17, worked out the loss of dependency at Rs. 21,47,712/-. The learned MACT awarded a sum of Rs. 5,000/-towards loss of consortium, Rs. 2,000/-towards funeral expenses, Rs. 2,000/-for transport and other miscellaneous expenses and Rs. 3,000/-towards loss of an estate and thus awarded a compensation of Rs. 21,60,000/-.

7. Shri Mulgaonkar, the learned Counsel on behalf of the appellant has submitted that the learned MACT was right in excluding the conveyance allowance and in case the said allowance was deducted and then another 1/3rd was deducted towards the personal expenses of the deceased, the compensation payable would not have worked out to more than Rs. 17,17,054.40 by using the same multiplier.

8. On the other hand, it has been submitted by Shri Sonak, the learned Counsel on behalf of the claimants that conveyance allowance is also part of the income and in this context Shri Sonak has placed reliance on the case of National Insurance Company Ltd. Vs. Indira Srivastava and Others, . Learned Counsel has further submitted that it was undisputed that the total salary per annum of the deceased was Rs. 2,37,627/-as stated by the said Senior Manager, Personnel and Administration of the said company, and besides the deceased was also entitled to medical reimbursement up to a maximum of Rs. 6,250/-and was given an average raise of 20.59% in salary for the financial year 2001-02. Learned Counsel has also pointed out that the evidence of the said witness wherein he had stated that the yearly emoluments in the year 2005 of Junior Department Manager was Rs. 2,60,000/-and the deceased had promotional avenues as well to the posts of Department Manager and then to Senior Department Manager and that by 01/04/2004, the deceased might have been promoted as Department Manager and his yearly emoluments would have been between Rs.

2,60,000/-to Rs. 2,70,000/-per annum. Learned Counsel, therefore, submits that considering the promotional avenues which the deceased would have been entitled to, a higher estimate of his income ought to have been made by the learned MACT and compensation sought for, awarded to the claimants.

9. In terms of Section 168 of the Motor Vehicles Act, 1988, the tribunal is required to assess compensation which appears to it to be just. Just ordinarily means right in amount; exact neither more, nor less. It can't be arbitrary, fanciful nor unjustifiable. Nevertheless as stated by the Apex Court in *Concord of India Insurance Co. Ltd. v. Nirmala Devi and Ors.* 1980 ACJ 55 the determination must be liberal and not niggardly since law values life and limb in a free country in generous scales. A life lost can never be got back. Only an effort is made to pay its equivalent in terms of money to compensate for the loss of life. It cannot be a source of profit to make a fortune out of a misfortune.

10. The Apex Court in *National Insurance Co. Ltd. v. Indira Srivastava and Ors.* (supra) was considering what "income" should be considered whilst determining compensation payable. In para 20 the Apex Court referred to two dictionaries for the meaning of term "income" and then has concluded thus:

If the dictionary meaning of the word "income" is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income tax or professional tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute.

The Apex Court has further held that 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 packets the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. Loss caused to the family on a death of near and dear one can hardly be compensated on monetary terms. The Court held that:

The amounts which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit but from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

The Apex Court approved the view held by the Madras High Court in *National Insurance Co. Ltd. v. Padmavathy* 2007 AIHC 1921 and so also the view held by the Andhra Pradesh High Court in *S. Narayanamma v. Secy. To Govt. of India, Ministry of Telecommunications* APLJ pp. 478-79). In the first case it was stated as follows:

7. ...Income tax, professional tax which are deducted from the salaried person goes to the coffers of the Government under specific head and there is no return. Whereas, the general provident fund, special provident fund, LIC contribution are amounts paid under specific heads and the contribution is always repayable to an employee at the time of voluntary retirement, death or for any other reason. Such contribution made by the salaried person are deferred payments and they are savings. The Supreme Court as well as various High courts have held that the compensation payable under the Motor Vehicles Act is statutory and that the deferred payments made to the employee are contractual. Courts have held that there cannot be any deductions in the statutory compensation, if the legal representatives are entitled to lump sum payment under the contractual liability. If the contributions made by the employee which are otherwise savings from the salary are deducted from the gross income and only the net income is taken for computing the dependency compensation, then the legal representatives of the victim would lose considerable portion of the income. In view of the settled proposition of law, I am of the view, the Tribunal can make only statutory deductions such as income tax and professional tax and any other contribution, which is not repayable by the employer, from the salary of the deceased person while determining the monthly income for computing the dependency compensation. Any contributions made by the employee during his lifetime, form part of the salary and they should be included in the monthly income, while computing the dependency compensation.

In the second case it was stated thus:

13. ...My view is that the deductions made by the Tribunal from the salary such as recovery of housing loan, vehicle loan, festival advance and other deductions, if any, to the benefit of the estate of the deceased cannot be deducted while computing the net monthly earnings of the deceased. These advances or loans are part of his salary. So far as house rent allowance is concerned, it is beneficial to the entire family of the deceased during his tenure, but for his untimely death the claimants are deprived of such benefit which they would have enjoyed if the deceased were alive. On the other hand, allowances, like travelling allowance, allowance for newspaper/periodicals, telephone, servant, club fee, car maintenance, etc., by virtue of his vocation need not be included in the salary while computing the net earnings of the deceased....

11. The Apex Court in *Grifan Vs. Sarbjeet Singh and Others*, considered the aspect of future prospects and enhanced the compensation, in case of a permanent injury, from Rs. 2 lacs to the additional of Rs. 2 lacs.

12. In the case of *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others*, the Court held that:

The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependents, and to deduct therefrom such part of his income as the deceased was accustomed to spend

upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependents. Then that should be capitalised by multiplying it by a figure representing the proper number of years" purchase.

Much of the calculation necessarily remains in the realm of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case "it is overall picture that matters" and the Court must try to assess as best as it can the loss suffered.

The Court reiterated that the multiplier method was logically sound legally well-established. In that case the deceased was 39 years of age and his income was Rs. 1,032/-per month. The Apex Court observed that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the choice of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant, whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, 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. Considering that the deceased had more or less a stable job, the Apex Court took a liberal view of the prospects of the future and estimated the gross income to Rs. 2000/-. The Apex Court then held that in the absence of evidence regarding personal living expenses it was not unusual to deduct 1/3rd of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents which should be capitalised with the appropriate multiplier. The Apex Court then proceeded to take Rs. 1,400/-per month or Rs. 17,000 per year as the loss of dependency and capitalised the same by a multiplier of 12 which was appropriate to the age of the deceased and worked out a compensation to Rs. 2,04,000/

13. In *Tasnimtaj and Others Vs. Managing Director, KSRTC and Another*, the Apex Court considered the future economic prospects of the deceased. There is no doubt that in this case the deceased had very bright prospects in life and had a lucrative future career which was cut short by the negligence of the driver of the truck and although there is scope to consider higher gross income of the deceased so as to assess the compensation, we are not inclined to do so, because of the over all view of the matter, we take.

14. What follows from *National Insurance Co. Ltd. v. Indira Srivastava and Ors.* (supra) is that taxes to be deducted from the income of a salaried person would not become part of his income for the purpose of assessing compensation and so also money received on medical reimbursement as well as travelling allowances. The learned MACT therefore was right in excluding the travelling allowance of the deceased of Rs. 1,100/-but was wrong in taking the monthly income of the deceased as Rs. 18,965/-. In the absence of any cross-examination, we are inclined to ignore the tax liability of the deceased. Considering the take away

salary of the deceased, it is quite probable that the deceased might have otherwise also got the benefit of Section 5(A) of the Income Tax Act, 1961. The monthly income of the deceased excluding the travelling allowance works out to Rs. 18,702.25. The learned trial Court took a deduction of 1/3rd towards the personal living expenses of the deceased and there is no dispute raised regarding the same even though on this aspect also there was scope for taking those expenses less than 1/3rd, considering the other facilities the deceased was entitled to in the said company. If 1/3rd of the said income is taken out towards the personal living expenses of the deceased, the dependency of the claimants works out to Rs. 12,468.16 per month and Rs. 1,49,617.99 per year and with the multiplier of 17, regarding which also there is no dispute, the compensation payable works out to Rs. 25,43,506/-.

15. The claimants had also claimed an amount of Rs. 25,000/-on account of damage to the scooter of the deceased, and, had examined a chartered mechanical engineer to support their claim and who, upon inspection, had found that the vehicle was badly damaged, beyond repairs and he had assessed total loss at Rs. 25,000/-. The learned MACT is totally silent on this aspect, and, in our view, the claimants would be entitled to recover the said sum of Rs. 25,000/

16. The learned Counsel on behalf of the parties have also not raised any dispute as regards the sum of Rs. 12,000/-awarded by the learned MACT towards loss of consortium, funeral expenses, transport expenses and loss of estate and therefore we are inclined to award the same to the claimants. Arithmetically compensation payable works out to Rs. 25,80,506/-i.e. more than claimed by the claimants.

17. We are conscious of the fact that the claimants have claimed only a sum of Rs. 25,00,000/-not only before the tribunal but also before this Court and there is no embargo as such to award compensation more than claimed by the claimants as in law what claimants claim is considered only to be an estimate and it is the duty of tribunal to assess compensation which is just. We say this on the authority of a three Judges Bench decision of the Apex Court in Nagappa Vs. Gurudayal Singh and Others, . However, taking overall view of the matter and considering that the claimants neither sought enhancement of the compensation before the tribunal as well as before this Court we are inclined to restrict the claim to the sum of Rs. 25,00,000/which in our view, will be just compensation payable to the claimants on account of the untimely death of the deceased in the accident considering the income and age of the deceased. Whatever has been paid to the claimants shall be deducted and the balance amount will carry interest at the rate of 8% till it is paid.

18. Before concluding, we must note that this appeal could be filed by the insurer only because of lack of due diligence on the part of the learned MACT. It is now well settled that an insurer cannot file an appeal disputing the quantum of compensation unless the insurer obtains an order u/s 170 of the Act. Obtaining an order under the said section is no empty formality. Perusal of Section 170

shows that permission can be given only after recording of reasons in writing and when the tribunal is satisfied that

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest

19. In this case, we find that after it was found that the driver and the owner of the vehicle had not contested the petition, an application was filed on 7/12/2004 purporting it to be an application u/s 170 of the Act and the learned MACT even without calling for a say or no objection from the claimants proceeded mechanically to grant the same without assigning any reasons. It has also come to our notice that in some cases the claimants too give no objection as a matter of course but it is the learned MACT who is expected to deal with the same irrespective of no objection given by the claimants. No objection to the application certainly would not give the tribunal jurisdiction to grant it without application of mind and giving reasons. The Apex Court in Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, has stated that; The provisions of Section 170 of the Act clearly show that the insurance company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the condition precedent mentioned in the section are found to be satisfied and for that purpose the insurance company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the insurance company cannot have a wider defence on merits than what is available to it by way of statutory defence. In the absence of permission in that case it was held that the insurer was not entitled to file an appeal on the merits of the claim which was awarded by the tribunal.

20. A Division Bench of Kerala High Court in National Insurance Co. Ltd. Vs. Mary Janet and Others, has interpreted the expression "or" in between Clauses (a) & (b) of Section 170 of the Act as "and". For the present we need only emphasize that no permission u/s 170 of the Act can be given mechanically without giving reasons in support thereof.

21. In view of the above, we proceed to dismiss the appeal and allow the cross-objections and award Rs. 25,00,000/- as compensation payable to the claimants. A sum of Rs. 10,000/- shall be paid by the appellant to the claimants as costs of this appeal.