
(2016) 05 BOM CK 0050

In the Bombay High Court

Case No : First Appeal No. 999 of 2012 With Cross Objection (St.) No. 30505 of 2012

National Insurance Company Ltd.

APPELLANT

Vs

National Insurance Company Ltd.

RESPONDENT

Date of Decision : 05-05-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2016) 4 AIRBomR 382 : (2017) 2 ALLMR 387 : (2017) 3 MhLJ 725

Hon'ble Judges : A.S. Oka and C.V. Bhadang, JJ.

Bench : Division Bench

Advocate : Mr. Rahul Mehta i/b. KMC Legal Venture, for the Appellant; Mr. Avinash M. Gokhale, Advocate and Mr. Amol Gatne, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

C.V. Bhadang, J.(Oral) - Samir Parekh aged 29 years met with an unfortunate death, in a freak accident, which occurred on 26th April, 2001 involving three vehicles.

2. Mrs. Chaitali Samir Parekh, widow of the deceased, filed application no.255 of 2002 before the Motor Accident Claims Tribunal at Mumbai under section 166 of the Motor Vehicles Act, 1988 (for short, "the Act"), claiming compensation of Rs.3,00,00,000/- (Rupees Three crores). In the said application, apart from the owners of the two vehicles namely a Tata Sumo Jeep bearing registration No.MH-01-S-8355 and a Wagon-R bearing registration no. MH-04-AW-8373, the insurers of these two vehicles were made parties. The original respondent nos.1 and 2 namely Chandrakant Parekh (since deceased) and Smt.Hasumati Parekh, are the parents of the deceased. The compensation was claimed jointly and severally against the opposite party nos.1 and 2 and the insurers.

3. It would be necessary to briefly set out the manner in which the accident occurred. On the fateful day of 24th April, 2001, deceased Samir Parekh was

driving his Hyundai Santro Car bearing Registration No.MH-01-Y-2267 and was proceeding towards Mahim causeway from Bandra. When the deceased reached near Mahim signal at about 00.15 hrs., a Tata Sumo Jeep (No. MH-01-S-8355) came from the opposite side, crossed the road divider and dashed against the Santro Car driven by the deceased. In the meantime, a Wagon-R (No. MH-04-AW-8373) came from behind the Santro Car and rammed into the Santro Car (No.MH-01-Y-2267). As a result of the accident, the deceased was stuck inside the car behind the steering wheel. The deceased was removed from the car and was admitted to the Leelavati Hospital at Bandra where he succumbed to the injuries.

4. At the relevant time, the deceased was aged 29 years and was dealing in the stock markets and was also said to be engaged in export business. According to the original claimant, the deceased was earning more than Rs.1.23 crores per year. The deceased was enjoying good health and would have lived up to more than 75 years, considering the longevity in the family. On account of his untimely death, the original claimant and the respondent nos.1 and 2 being the parents of the deceased have suffered loss of dependency. The original claimant has also suffered a loss of consortium. It was in these circumstances, a claim of Rs.3,00,00,000/- (Rupees Three crores) as compensation was made.

5. The owner as well as the insurers contested the petition. It was contended by the opposite party no.1 that the deceased was guilty of contributory negligence, in the occurrence of the accident. It was contended that there was no physical road divider on the spot and the Santro Car driven by the deceased had drifted towards the right side (western side of the road). It was contended that seeing the Tata Sumo Jeep coming from the opposite direction, the deceased lost control as a result of which the Santro Car dashed against the Tata Sumo Jeep. Subsequently, the Wagon-R rammed in the Tata Sumo car from behind.

6. The owner of the Wagon-R (opposite party no.2) remained absent and the petition was proceeded ex-parte against her.

7. The United India Insurance Company Limited, the insurer of the Tata Sumo Jeep-respondent no. 4 herein contested the petition on similar grounds as raised by the opposite party no.1. It was specifically contended that the accident occurred due to composite negligence of the deceased and the driver of the Wagon- R. A contention about breach of policy condition namely, the driver of the Tata Sumo Jeep not having a valid driving license was also raised.

8. The National Insurance Company Limited (insurer of the Wagon-R) contended that the accident occurred due to negligence of the deceased. It was contended that the driver of the Wagon-R car had no role to play in the accident.

9. On the basis of the rival pleadings, the Tribunal raised three issues. The original applicant/claimant led evidence, in which the original applicant examined herself apart from (AW-2) Ms. Shobha Vaity, Rajkumar Malhotra (AW-3), Tukaram Mane (AW-4), Shivratn Chhabaria (AW-5) and Ravindra Marchant

(AW-6). She also produced the record pertaining to investigation of the offence by the police and the copies of the insurance policies. The opposite parties (owners) and the insurers have not led any evidence.

10. The learned Tribunal came to the conclusion that the accident occurred on account of the negligence of the drivers of the Tata Sumo Jeep and the Wagon-R car. The Tribunal found that this was a case of composite negligence of the drivers of the Tata Sumo Jeep and the Wagon-R car which was apportioned at 70% : 30%, respectively. In so far as the quantum is concerned, the Tribunal came to the conclusion that the monthly contribution of the deceased out of the income from the business and as a share speculator could be assessed at Rs.24,000/- p.m. The Tribunal further deducted 1/3rd amount towards the personal and living expenses of the deceased. Thus, the loss of dependency was found to be Rs.16,000/- per month i.e. Rs.1,92,000/- p.a. Applying a multiplier of 17, the Tribunal assessed compensation towards loss of dependency at Rs.32,64,000/-, apart from Rs.5,000/- towards loss of consortium to the applicant, Rs.2,000/- towards funeral expenses and an amount of Rs.2,500/- towards loss of estate. Thus, the Tribunal awarded a total compensation of Rs.32,73,500/- jointly and severally against the opposite party nos.1 and 2 and the insurer nos.1 and 2.

As the Tribunal held that it was a case of composite negligence, it was found that there was no need to apportion the liability inter se between the joint tortfeasors. The Tribunal also awarded interest at the rate of 7.5% per annum on the amount of compensation from the date of application till realisation. The Tribunal further directed to pay an amount of Rs.15,73,500/- with proportionate interest to the original applicant/widow and an amount of Rs.8,50,000/- with proportionate interest, each to original respondent nos.1 and 2, being the parents of the deceased.

11. Feeling aggrieved, the National Insurance Co. Ltd. (insurer of the Wagon-R) has filed First Appeal No.999 of 2012 in which the original applicant has filed Cross-Objection Stamp No.30505 of 2012.

12. We have heard the learned counsel appearing for the parties. With the assistance of the learned counsel for the parties, we have perused the record and the impugned judgment.

13. The learned counsel for the appellant strongly urged that having regard to the manner in which the accident has occurred, no negligence could be attributed, to the driver of the Wagon-R. The learned counsel has taken us through the oral evidence led and in particular that of (AW-2) Shobha Vaity who is the sole eye witness, examined on record, in order to submit that it was the Tata Sumo Jeep which after mounting the road divider came on the wrong side of the road and dashed against the Santro Car. It was contended that thus, the fact that the Santro Car was dashed from in front in which the deceased was stuck behind the wheels and was required to be extricated with the help of the fire

brigade, the death of the deceased cannot be attributed to the impact of the Wagon-R car from behind. It was also contended that the deceased was removed from the car after about one and half hours from the accident and the death cannot be directly attributed, to the injuries suffered as valuable time was lost, before the deceased could get medical aid. The learned counsel has also referred to the panchanama in order to submit that no liability can be fastened on the appellant in the absence of proof of any negligence by the driver of the Wagon-R.

14. A perusal of the grounds of Appeal would show that according to the appellant, the learned Member has erred in apportioning the negligence to the tune of 30:70 between the driver of the Wagon-R and Tata Sumo vehicle. The learned counsel has taken, exception to the finding as to quantum which according to the learned counsel is excessive.

15. The learned counsel appearing for the respondent no.4- United India Insurance Company Limited has contended that there was contributory negligence by the deceased in which the Santro Car had drifted towards the right side as a result of which it dashed against the Tata Sumo Jeep. It is contended that the Tribunal failed to address itself on the issue of the contributory negligence by the deceased. On behalf of respondent no.4 (United India Insurance Company Limited) written notes of arguments have been filed on record. It is also contended that in view of non-impleadment of the tortfeasors i.e. the drivers of either of the vehicles and in the absence of any evidence, the issue of apportionment of negligence could not have been gone into. In so far as the quantum is concerned, it is contended that there is no evidence to support the correctness of the facts and figures as mentioned in the income tax return (Exhibit-42). It is pointed out that in the Financial Year 2000-01 (Assessment year 2001-02), the deceased was shown to have suffered a loss of Rs.9,61,060/- and had thus no income available to support the family.

16. The learned counsel for the original applicant/cross objector has supported the finding of the learned Tribunal on the point of composite negligence. It is submitted that in the manner in which the accident occurred, no contributory negligence could be attributed to the deceased. Reliance is placed on the decision of the Hon"ble Apex Court in the case of *Khenyei v. The New India Assurance Company and Others* (2015) 9 SCC 273; in order to submit that in a case of composite negligence the inter se liability of joint tortfeasors need not be worked out, separately. It is submitted that in any event, it is a matter inter se between the joint tortfeasors and insofar as the claimant is concerned, the joint tortfeasors can always be called upon to pay the compensation by way of a joint and several liability. The learned counsel has also placed reliance on the decision of the Hon"ble Apex Court in the case of *Municipal Corporation of Greater Bombay v. Laxmam Iyer & Anr.* (2003) 8 SCC 731; and on the point of interest, the decision in the case of *Jitendra Khimshankar Trivedi & Ors. v. Kasam Daud Kumbhar & Ors.* (2015) 4 SCC 237;

17. As regards quantum of compensation is concerned, the learned counsel has

placed heavy reliance on the income tax return for the assessment year 2001-02 (FY 1999-2000) which shows that the deceased had a business income to the tune of Rs.1,21,00,000/- and had paid an advance tax on 14th March, 2000 to the tune of Rs.20,00,000/-. It is submitted that the said return was filed prior to the death and thus would have great probative value in determining the income of the deceased. The learned counsel has taken exception to the manner in which the learned Tribunal has arrived at the income of Rs.24,000/- per month by drawing an average. He, therefore, submitted that the compensation needs to be appropriately enhanced.

18. The learned counsel appearing for the cross-objector as also the respondent no.4 (United India Insurance Company limited) has taken us through a letter dated 22nd July, 2008 from the Income Tax Officer, Mumbai which shows that in the Assessment Year 2001- 2002 (FY 2000-01), which was filed on 24th September, 2001, the deceased had declared a loss of Rs.9,61,060/-. It is contented that thus the income tax return can not form a basis to arrive at the income as claimed on behalf of the applicant. It was also pointed out that in the earlier Income Tax Return for the Assessment Year 2000-01, the deceased had earned capital gains which cannot be a regular feature and a source of regular income.

19. We have given our anxious consideration to the rival circumstances and submissions made. At the outset, it may be mentioned that the occurrence of the accident, the involvement of the three vehicles therein and the coverage of insurance of the Tata Sumo Jeep and the Wagon-R and the death of Samir Parekh in the accident is not in dispute. It would be first necessary to deal with the question of negligence, both composite and/or contributory, if any. In this regard, it would be appropriate to make a reference to the evidence of Mrs. Shobha Vaity (AW-2). She has stated that Mahim Sagar Sanidhya Rahiwasi Sangh is on Mahim Causeway. The distance between her house and the road is about 20 feet. The accident took place around midnight when she was returning from using the common toilet and was standing near the road when one Tata Sumo Jeep was proceeding from Dadar side to Bandra side. The Tata Sumo Jeep mounted the divider, came on the wrong side of the road and dashed against the Santro Car. On her raising shouts, people gathered there. She also claimed that two vehicles which came from Bandra side dashed against the Santro Car. She specifically stated that the accident took place on the part of the road which was leading from Bandra to Dadar. The road divider was not much high. The road divider consisted of blocks. The Sumo Car was completely damaged. There is nothing much in the cross-examination of this witness, except she was confronted with the portion in the FIR in which this witness expressed her inability to explain as to why it is mentioned in the FIR that she saw the spot of the incident after hearing the sound of impact. It is trite that standard of proof required to prove negligence in a claims petition, is not as high as is required in a criminal case. In a case of the present nature, negligence can be proved on the basis of preponderance of probability. It is (AW-2) Shobha Vaity who had lodged

the FIR on the basis of which an offence was registered. She appears to be a natural witness who explained the manner in which the accident had occurred. Her evidence is substantially corroborated in material particulars by the FIR.

20. (AW-4) API Tukaram Mane had investigated the offence being Crime No.129 of 2001, PS Mahim. He has stated that Shobha Vaity was the informant of the accident which involved three vehicles. He further stated that the Tata Sumo vehicle had crossed the divider and had entered into the traffic flow coming from Mahim. The Wagon-R which was following the Santro Car dashed against its rear side. He further stated that the Santro Car got sandwiched between the Sumo and Wagon-R. The injured who was the driver of the Santro Car was taken to the Leelavati hospital which took about one hour where the driver of the Santro Car was declared dead. The evidence of this witness has not at all been challenged. The spot panchanama would further substantiate the evidence of (AW-2) Shobha Vaity. The spot panchanama shows that the road on either side is 80 feet in width. The Tata Sumo Jeep was found to have crossed the road divider and entered the traffic flow coming towards Mahim. Front portion of the Santro Car was found to be entirely damaged in which the front portion including radiator, bonnet and engine were pushed till driver's seat. It can, thus, clearly be seen that the accident was triggered on account of the Tata Sumo Jeep crossing the road divider and ramming into the Santro Car from in-front. It is true that the Wagon-R car was coming from behind and it is possible that on account of the sudden occurrence of the impact between the Tata Sumo Jeep and the Santro Car, the Wagon-R dashed the Santro Car from behind. However, it is necessary to note that a driver of any vehicle is expected to take due care and caution while driving the vehicle on a public road. Even assuming that the driver of the Wagon-R would have abruptly found the Santro in front being rammed by the Tata Sumo, the fact remains that the driver of the Santro Car failed to avert the impact from behind. We further find from the evidence of (AW-2) Shobha Vaity that the Santro Car had not drifted towards the right, as claimed. Thus, no contributory negligence can be attributed to the deceased. It is not possible in such cases to decide the issue of negligence on mathematical precision. The Court is required to take a pragmatic view of the broad possibilities of the case, in consonance with the evidence on record. Having perused the record and the impugned judgment, we are not inclined to interfere with the finding of the learned Tribunal holding that the accident was caused due to the composite negligence of the driver of the Tata Sumo Jeep and the Wagon-R car as also the apportionment of the negligence as 70:30 percent, respectively. We, accordingly affirm the said finding.

21. There is a distinction between composite negligence and contributory negligence. The Hon"ble Apex Court in the case of Khenyei v. The New India Assurance Co. Ltd. and Ors (Supra) has inter-alia held in paragraph 15 of the Judgment as under:

"15. There is a difference between contributory and composite negligence. In the

case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan has held that in case of contributory negligence, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoers separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident."

Thus, in view of the fact that this is a case of composite negligence, it is not necessary to apportion the liability inter se between the joint tortfeasors. In so far as the applicant and the original respondent no. 2-Smt. Hasumati Parekh are concerned, the opponents/insurers would be jointly and severally liable to pay the compensation.

22. This takes us to the issue of quantum. The cross-objector who is the original applicant mainly relies upon the income tax return (Exhibit-42) for the financial year 1999-2000 (AY 2000-01). Indisputably the said income tax return is filed prior to the date of accident which is 26th April, 2001. However, in our opinion that alone may not be decisive, although in a given case it is a material circumstance to be reckoned. The applicant has stated in her evidence that the deceased belonged to an affluent family and they lived a lavish life. She stated that she along with the deceased and his parents were staying at a house at Altamount Road, Mumbai while the brother of the deceased was staying separately at Nepeansea Road, Mumbai. The applicant further stated that they had four motor vehicles including one Honda City which was for the exclusive use of the applicant. She has stated that the income of the deceased for the financial year 1999-2000 on the basis of the ITR at Exhibit-42 was declared at Rs.1,23,12,140/- and the deceased had paid an advance tax of Rs.20,00,000/-. She has further stated that the deceased was dealing in stocks and had also a proprietary export business, under the name and style as Chaitali Exports.

23. We first propose to deal with the evidence about the income tax return. (AW-3) Rajkumar Malhotra is the inspector from the income tax department. He states that the income tax return for the assessment year 2000-01 is not traceable in the office. (AW- 5) Shivratn Chhabria is stated to be a common friend of the deceased and used to help him in filing his income tax return. This witness claimed that he had filed the tax return at Exhibit-42. He, however, stated that he is not the Chartered Accountant of the deceased. He further stated that except his bare words there is no evidence to show that the facts and figures as mentioned in Exhibit- 42 are correct. He claimed that the facts and figures in the return are mentioned on the basis of audited accounts given by the

deceased. He further stated that he was not aware whether the deceased had that much income in the earlier years.

At this stage, it is necessary to mention that the copy of the Income Tax Return (Exhibit-42) is not accompanied by any profit and loss account and/or a balance sheet. As noticed earlier, (AW-3) Rajkumar Malhotra who is the inspector of income tax states that the return for the assessment year 2000-01 is not traceable in the office. (AW-6) Ravindra Merchant is the father of the applicant Chaitali. He cannot be said to have any personal knowledge about the contents of the Income Tax Return except that this witness has approached the brother of the deceased who had agreed to help in the matter. He further claims that he had obtained the original income tax return acknowledgement from the Chartered Accountant of the deceased. What is significant is a letter dated 22nd July, 2008 from the Income Tax office Mumbai. It appears from the paper book (which was submitted by the applicant) that a summons was sought to be issued at the instance of the applicant and in pursuance thereof the said letter was sent by the income tax authorities. The said letter would make it clear that as per the computer data, the return for the year 2001-02 of the deceased was filed on 24th September, 2001 declaring a loss of Rs.9,61,060/-. The said letter also states that the old record pertaining to the year 2000-01 was weeded out. However, no return of income was filed in the concerned Income Tax Office as per the computer data for the said year. It further appears that as per the computer record, the PAN number of the deceased was shown as ACJPP 3155G while in the tax return Exhibit-42, it is AAGPP 2148A.

24. It is trite that unlike a salaried person the income in a business or a profession would fluctuate to a certain extent. This would be more so in respect of business/profession which are susceptible to volatility. The business of dealing in stocks as also the export business in which the deceased was said to be engaged are susceptible to a certain amount of volatility and for all these reasons, we are unable to place implicit reliance on the Income Tax Return Exhibit-42 particularly in view of the discrepancy in the PAN number as also the letter dated 22nd July, 2008 which shows that for the accounting year 2001-02, a loss of Rs.9,61,060/- was declared by the deceased. In order to place reliance on the income tax return it has to be consistently shown that for a reasonable period, the income as claimed, was in fact earned by the deceased. We are, therefore, not inclined to place reliance on the Income Tax Return (Exhibit-42). The Tribunal after having discarded the evidence in the form of Income Tax Return has then proceeded to assess the income at Rs.24,000/- per month. It may be mentioned that in the matter of assessment of compensation, particularly in absence of any acceptable evidence, a reasonable guess work is necessary, if not inevitable. The question is whether the income as reckoned at the rate of Rs.24,000/- per month would be reasonable. It may be mentioned that Section 166 of the Act envisages determination of "just compensation", by the Tribunal. Thus, the compensation should neither be meager nor excessive, so as to lead to enrichment at the cost of the accident.

25. Going back to the evidence of (AW-1) Chaitali Parekh, we find that it was brought on record and in fact in the cross-examination, that the deceased was paying Rs.40,000/- per month to the applicant for expenses. Considering the overall circumstances and the evidence on record, we find that the income as reckoned by the learned Tribunal at the rate of Rs.24,000/- per month would be on the lower side. We are inclined to reckon the income of the deceased at Rs.50,000/- per month. The Hon"ble Apex Court in the case of Sarla Verma & Ors. v. Delhi Transport Corporation & Anr. 2009 ACJ 1298, has inter-alia held that the deduction towards the personal and living expenses where the deceased was married and the dependents are 2 to 3 can be reckoned as 1/3rd. We propose to deduct Rs.17,000/- towards the personal and living expenses of the deceased. Thus, the loss of dependency would be Rs.50,000/- less Rs.17,000/- which comes to Rs.33,000/- per month i.e. Rs.3,96,000/- p.a. Considering the age of the deceased as also the applicant, and the multiplier as set out in the decision in the case of Sarla Verma & Ors. v. Delhi Transport Corporation & Anr. (Supra), the Tribunal has rightly employed the multiplier of 17. Thus, the compensation would be Rs. 3,96,000/- x 17 = Rs.67,32,000/-. We are inclined to grant Rs.15,000/- towards funeral expenses and another Rs.50,000/- towards loss of consortium to the applicant and the loss of estate. Thus, the total compensation would be Rs.67,97,000/-.

26. The learned counsel appearing for the applicant has placed reliance on the decision of the Apex Court in the case of Jitendra Khimshankar Trivedi & Ors. v. Kasam Daud Kumbhar & Ors. (Supra), in order to submit that the Hon"ble Apex Court has granted interest at the rate of 9% per annum. Considering the prevailing rate of interest, we are inclined to modify the interest to 9% p.a. from the date of application till realisation. We further hold that the applicant and the original respondent no.2-Smt.Hasumati Parekh shall be entitled to 50% of the compensation each along with proportionate interest. The learned Member of the Tribunal shall pass appropriate order as regards the investments/ distribution of the amounts payable to the original applicant and the original respondent no.2. Consequently, we proceed to pass the following order:

ORDER

- (i) First Appeal No.999 of 2012, is hereby dismissed;
- (ii) Cross-objection Stamp No.30505 of 2012 is partly allowed. The amount of compensation awarded is enhanced to Rs.67,97,000/-;
- (iii) The amount of compensation shall carry interest at the rate of 9% per annum, from the date of application, till realisation;
- (iv) The additional amount shall be deposited by the concerned Respondents with the Tribunal within four months from today;
- (v) The original applicant Chaitali and the original respondent no. 2-Smt. Hasumati Parekh, shall be entitled to 50% of the compensation each, along with

proportionate interest. The Tribunal shall pass appropriate order of investments/ disbursement after hearing the parties;

(vi) In the circumstances, there shall be no order as to costs;