

(2015) 09 BOM CK 0079
In the Bombay High Court
Case No : First Appeal No. 68 of 2010

Sejal Sushant Naik and Others	Vs	APPELLANT
Nikhil Madhukar Sadhale and Others		RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

Citation : (2015) 6 ALLMR 387

Hon'ble Judges : K.L. Wadane, J

Bench : Single Bench

Advocate : Nilesh Shirodkar, for the Appellant

Final Decision : Dismissed

Judgement

K.L. Wadane, J—The present appeal is filed by the original claimants against the impugned judgment and award passed by the learned Presiding Officer of the Motor Accident Claims Tribunal, Panaji, in Claim Petition No. 5/2006 dated 28.01.2010 by which the learned Presiding Officer has partly allowed the claim petition and awarded compensation of Rs. 9,97,177/- together with interest at the rate of 9% per annum.

2. The parties are referred to their original status.

3. The claimants are the widow and son of the deceased Sushant who died in the motor vehicular accident on 28.11.2005. On the date of the accident i.e. on 28.11.2005, the deceased Sushant aged about 35 years was travelling in a maruti zen car bearing No. GA-01-J-1312 driven by his friend from Ponda to Bhamai. On reaching near Dada Vaidya Chowk at about 00.05 hours, the tempo trax jeep bearing registration No. GA-01-E-9975 driven by the respondent no. 1 came from the wrong direction at a very fast speed, in rash and negligent manner and dashed against the front side of the maruti zen car. The dash was solely due to the rash and negligent driving of the respondent no. 1 which resulted in severe and grievous injuries to Sushant who succumbed to death while being shifted from I.D. Hospital Ponda to G.M.C. hospital Bambolim.

4. The husband of the claimant no. 1 had suffered serious and grievous injuries to his forehead, right eye, right elbow, left arm, left shoulder, left thigh, left ankle and other injuries and because of such injuries he died.

5. The claimant no. 1 is the widow and claimant no. 2 is a minor son who was aged about 8 months at the time of the death of Sushant. Due to the death of their sole earning member, the claimants have suffered heavy loss. Therefore, the claimants have claimed total compensation of Rs. 40,05,350/- which the respondents as a driver, owner and insurer of the offending vehicle are jointly and severally liable to pay compensation to the claimants.

6. The respondent nos. 1 and 2 have not contested the petition but only the respondent no. 3 insurance company alone has contested the petition on the ground that the income of the deceased shown by the claimants is excessive and not in accordance with the income tax return. The respondent no. 3 also contested the petition on the ground that the accident occurred due to the negligence of the driver of the maruti zen car alone. Therefore, respondent no. 3 - insurance company has prayed to dismiss the petition.

7. Considering the rival pleadings of the parties, the learned Presiding Officer has framed three issues. First relating to the negligence of the respondent no. 1, second relating to the death of the deceased due to the injuries sustained to him in the accident and third relating to the entitlement of the compensation and its extent. Issue no. 1 is partly answered in the affirmative and issue no. 2 in the affirmative and ultimately, the Presiding Officer has determined the compensation as referred to above.

8. Being dissatisfied with the judgment and award passed by the learned Presiding Officer, the original claimants have approached this Court by filing an appeal. Looking to the averments of the respective parties, it appears that the death of the deceased in the motor vehicular accident is not in dispute. The claimants have preferred this appeal mostly on the ground that there was sole negligence on the part of the respondent no. 1 and the compensation determined by the Tribunal is absolutely inadequate compared to the income of the deceased. Looking to the limited controversy, it is material to refer the evidence of the relevant witnesses.

9. I have heard the arguments of Mr. Nilesh Shirodkar, learned counsel appearing for the appellants and Mr. U.R. Timble, learned counsel appearing for respondent no. 3. With the help of the learned counsel appearing for the parties, I have also gone through the entire evidence on record and reasons recorded by the learned Tribunal while passing the award. Considering the pleadings of the parties, evidence on record and upon hearing both the parties, the following points arise for my determination.

10. Point No. 1:- To consider the first point for determination, it is material to note here that the claimants have specifically contended that the accident occurred due to the sole negligence of respondent no. 1 and to prove this fact,

the claimant no. 1 stepped into the witness box and deposed about the manner in which the accident occurred. However, during the cross examination she has admitted that she had not seen the accident. Therefore, the oral evidence of the claimant no. 1 is not relevant to consider this aspect. The relevant witnesses have been examined in this behalf are CW2 Ramdas, AW3 Santosh and AW4 Deepak Pawar, Head Constable. CW2 Ramdas is stated to be an eye witness and the driver of the zen car, in which the deceased was travelling. Looking to his evidence, it appears that on the date of the accident, this witness Ramdas CW2 and the deceased Sushant were going from public cafe towards upper bazar, and for going to upper bazar, they had to cross Dada Vaidya Chowk and go to the lane towards upper bazar and that the person going through that road has to keep attention on the vehicles coming from Panaji side. It was the case of the claimants that the deceased and his friends were proceeding from Ponda towards Bhamai and on reaching near Dada Vaidya Chowk, a tempo trax jeep had come from the wrong direction at a very fast speed and dashed against the front side of their vehicle causing fatal injuries to him. AW3 Santosh has deposed about the situation appearing at the spot after the accident.

11. I have gone through the oral evidence and the contents of the deposition of AW3 Santosh as well as the contents of the spot panchanama including the sketch. On perusal of the sketch, it appears that the spot of accident is exactly shown in a square on the road from old bus stand towards upper bazar. The tempo trax appears to be went completely on the wrong side and there were brake marks of 8.30 metres which indicate the high speed of the tempo trax.

12. As against this, the maruti zen car also went towards the wrong side to some extent. This appears to be because the drivers of both the vehicles were not diligent to observe the traffic on the road. Considering the situation at loco, it appears that the tempo trax driver was more negligence compared to zen car driver. Looking to the evidence on record, it appears that the learned Presiding Officer has correctly assessed the situation at the spot, the negligence on the part of the respondent no. 1 and zen driver and its percentage. Therefore, the claimants have failed to establish that there was total negligence on the part of respondent no. 1 and no negligence on the part of the car driver. Hence, the point no. 1 is answered accordingly.

13. Point No. 2 : - To prove the monthly earning of the deceased, the claimants have pleaded that the deceased was doing business of transportation and he was having seven vehicles and earning Rs. 17,137/- per month and to prove this fact, the claimant no. 1 has deposed by way of contents in her affidavit at para 7 accordingly. In support of the evidence of the claimant no. 1, the claimants have relied upon the document at Exhibit 43, Saral form of the income tax. During the cross examination, the claimant no. 1 has admitted that she do not have any income tax return of the year prior to 2005-2006 ie. prior to Exhibit 43. The Saral form of income tax return of 2005-2006 was in her possession and, therefore, she has produced it. Further, she has stated that she do not know

anything about their business. Further from the cross examination, it is seen that the vehicles owned and possessed by the deceased were taken by the financier which goes to suggest that all the vehicles were purchased by the deceased by obtaining loan and failure to pay such loan, the financier has taken the possession of all the vehicles. The details of which are given by this witness in her cross examination. So looking to the averments in the petition and the oral evidence, it appear that the claimants are mostly relying upon the Saral form. On perusal of the same, it appears that it was submitted in the office of the Income Tax on 26.10.2005 and the deceased died on 28.11.2005. It is common knowledge that normally the income tax returns of the independent or HUF are filed at the most by the end of July or August. But this particular return came to be filed on 26.10.2005 which creates a doubt about the genuineness of the document. Further more, it is recorded in the cross examination that the income tax return of the deceased was filed by the Chartered Accountant. However, this document is only pertaining to a particular year. The claimants have not produced any other document showing that the deceased had submitted his income tax return prior to the year 2005. Apart from that, the Saral form and the statement of profit and loss of the business done by the deceased are not produced on record. Therefore, looking to the reasons recorded by the learned Presiding Officer, I am of the considered opinion that the learned Presiding Officer has rightly disbelieved Exhibit 43. However, looking to the reasons recorded by the learned Presiding Officer, it appear that the judgment is absolutely silent as to what was the exact income of the deceased and, therefore, it is very difficult to note how the learned Presiding Officer has calculated the amount to the extent of Rs. 9,97,177/-. Further more, the amount awarded to the claimants towards the funeral expenses, loss of estate, loss of consortium and loss of love and affection appears to be very low.

14. In view of the observations, in the cases reported in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, (2009) ACJ 1298 : AIR 2009 SC 3104 : (2009) CLT 1055 : (2009) 6 JT 495 : (2009) 6 SCALE 129 : (2009) 6 SCC 121 : (2009) 5 SCR 1098 : (2009) 5 UJ 2280 : (2009) AIRSCW 4992 : (2009) 3 Supreme 487 and Rajesh and Others Vs. Rajbir Singh and Others, (2013) 2 ACC 841 : (2013) ACJ 1403 : (2013) 3 CTC 883 : (2013) 8 JT 288 : (2014) 173 PLR 779 : (2013) 3 RCR(Civil) 170 : (2013) 6 SCALE 563 : (2013) 9 SCC 54 : (2014) 1 SCC(L&S) 149 , this Court is required to determine the earning of the deceased and the amount of compensation to be awarded to the claimants on various permissible heads. From the evidence on record, one thing is very much clear that the claimants have failed to establish that the deceased was earning Rs. 17,137/- per month. In such circumstances, the determination of the earning of the deceased is a guess work. Therefore, considering the overall facts and circumstances of the case, I am of the opinion that the monthly earning of the deceased has to be considered at least to the extent of Rs. 8000/- per month. The amount of compensation payable to the claimants is calculated as under :

Out of Rs. 16,32,000/-, one third is required to be deducted for self expenses. After such one third deduction, the amount works out to Rs. 10,88,000/-. The negligence of respondent no. 1 is considered to the extent of 85% and the negligence of the zen car driver is considered to the extent of 15%. The claimants have not made the driver, owner and the insurer of the car as parties to the petition. Therefore, the claimants are not entitled for the compensation to the extent of 15% out of the above determination of the compensation. Hence, after such deduction, the amount works out to Rs. 9,24,800/- to which the claimants are entitled on account of loss of earning/dependency of the deceased. In addition to that, the claimant no. 1 is entitled for the compensation of Rs. 1,00,000/- on account of loss of consortium. The claimant no. 2 is entitled for the compensation of Rs. 1,00,000/- for loss of love and affection and guidance. The claimants are entitled for the compensation of Rs. 5000/- for funeral expenses and Rs. 5,000/- for the loss of estate. Hence, the total compensation comes to Rs. 11,34,800/- to which the claimants are entitled together with interest at the rate of 9% per annum from the date of the petition till its realisation. Therefore, the award passed by the learned Presiding Officer needs to be modified accordingly in the above terms. Hence, the point no. 2 is answered accordingly. Therefore, the following order :-

ORDER

- (i) The appeal is partly allowed.
- (ii) The claimants are entitled for the compensation of Rs. 11,34,800/- together with interest at the rate of 9% per annum from the date of the petition till its realisation.
- (iii) On depositing the compensation amount, 50% amount shall be invested in the name of claimant no. 2 in any Nationalized bank till he attains the age of majority and 50% amount be paid to the claimant no. 1.
- (iv) The appeal stands disposed of accordingly.