

(2019) 07 BOM CK 0096
In the Bombay High Court
Case No : First Appeal No. 1699 Of 2016

The New India Assurance Co. Ltd.

APPELLANT

Vs

Vimal Babasaheb Hulgunde And Ors

RESPONDENT

Date of Decision : 17-07-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2019) 07 BOM CK 0096

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : M.M. Ambhore, A.D. Aghav

Final Decision : Partly Allowed

Judgement

Vibha Kankanwadi, J

1. Present appeal has been filed by the original respondent No.2 - Insurance Company challenging the Judgment and award passed in Motor Accident

Claim Petition No.638 of 2009 by learned Member Motor Accident Claims Tribunal, Ahmednagar on 13-05-2015, whereby the petition filed under

Section 166 of the Motor Vehicles Act by the present respondents No.1 to 8 came to be allowed.

2. The original claimants had come with a case that, they are the legal heirs of one Babasaheb Lahanu Hulgunde. The said Babasaheb met with

accident at about 4.45 p.m. on 11-07-2009 on Jamkhed - Kharda road. He was walking on the road when he was dashed by pick-up van bearing

No.MH-16/Q-7634. It was stated that the said vehicle was driven by respondent No.1 at the relevant time he is also the owner of the said vehicle.

The accident took place due to the negligence on the part of the respondent No.1. Babasaheb had received severe injuries and died on the spot.

Babasaheb was 40 year old person cultivating about 15 Acres of land and getting income of Rs.2,50,000/- to Rs.2,50,000/- per annum. He was also

doing milk business and getting income of Rs.4000/- to 5000/- per month. So also after the season of agriculture, he used to work on Crane, thereby

earning Rs.250/- to 300/- per day. All the claimants were dependent on his income. The said offending vehicle was insured with respondent No.2 on

the date of the accident, and therefore, compensation was claimed from both the respondents.

3. Respondent No.1 failed to file written statement. Respondent No.2 by filing written statement denied all the averments in the petition. It was denied

that, the accident had taken place due to the negligence on the part of the respondent No.1. It was contended that, the accident had occurred due to

deceased himself as he had suddenly appeared on the road without taking note of any incoming vehicle. Age and income as narrated in the petition

has been denied by the Insurance Company. Statutory defences have also been taken.

4. Taking into consideration the rival contentions, issues were framed. Only claimants have adduced evidence. Taking into consideration the evidence

on record and hearing both sides, the learned Tribunal has held that, deceased Babasaheb died due to vehicular accident and the said accident had

taken place due to the negligence on the part of the respondent No.1. Respondent No.2 Insurance Company has failed to prove breach of terms of

policy. Under such circumstance, respondents No.1 and 2 are jointly and severally liable to pay compensation to the claimants. Amount of

Rs.16,23,320/- has been awarded as compensation to the claimants inclusive of the amount under no fault liability. This Judgment and award is

challenged in this appeal.

5. Heard Learned advocate Mr. M. M. Ambhore for appellant and learned advocate Mr. A. D. Aghav for respondents No.1 and 3.

6. Taking into consideration the submissions made, the grounds taken in appeal memo, following points arise for determination, findings and reasons for

the same are as follows ;

A) Whether the claimants had proved that the accident had taken place due to the rashness and negligence on the part of the respondent No.1 while

driving pick-up van ?

B) Whether the Tribunal was justified in computing the compensation of Rs.16,23,320/- ? If no, then what would be the just amount of compensation ?

AS TO POINT ""A"" :

7. It has been vehemently submitted on behalf of the appellant that, the learned Tribunal failed to consider that the deceased had suddenly appeared on the road and he had not taken care of the traffic going on the road. The Tribunal ought to have held that, deceased himself was responsible for the accident.

8. No evidence has been adduced by the Insurance Company to support this contention taken in the written statement by it. No doubt the witness who has been examined on behalf of the claimant i.e. C.W.1 Manohar was not eye-witness, yet he relied on police papers. The contents of the FIR Exhibit

34, spot panchanama Exhibit 35 are not supporting the contention taken by the Insurance Company. The panchanama of the spot Exhibit 35 would

show that, the spot of the accident was on the extreme southern edge of the road. Another fact which can be seen from the panchanama of the spot

is that, there were tire marks to the extent of 25 feet and then from the spot where the blood had fallen, the vehicle had stopped at a distance of about

10 feet. It gives indication about the speed of the vehicle. Under such circumstance, the doctrine of res ipsa loquitur is required to be invoked in this

case as the spot is speaking itself for the rashness and negligence on the part of the vehicle driver. No fault can be found that the finding given by the

learned Tribunal that the said accident had taken place due to the negligence on the part of the respondent No.1. Hence, point ""A"" is answered in

affirmative.

AS TO POINT ""B"" :

9. Now turning towards quantum, the claimants had given three sources of income for the deceased ; (1) agriculture, (2) milk business and (3) wages

from Crane driving. Claimants have not produced documentary evidence as well as oral evidence in respect of income from Crane driving. It appears

that, some certificate was produced in respect of milk business, however the concerned person with the record was not examined to support the said

certificate. Only 7/12 extract and 8/A extract has been produced on record, however it can be seen that both those documents i.e. Exhibits 41 and 42

stand in the name of claimant No.7 i.e. father of the deceased. The learned

Tribunal had come to the conclusion that, since there is no cogent, material evidence regarding income of the deceased, the guess work was done and finding is given that, Babasaheb might have been earning at least Rs.6000/- per month. The learned advocate appearing for the appellant submits that, when the Tribunal had come to the conclusion that, there was no material and cogent evidence to prove the income then by invoking notional theory, the Tribunal ought to have taken his income @ Rs.5000/- per month. I do not agree with his submission. It is to be noted that, Babasaheb had two wives and four children to support, therefore he had the responsibility of six persons plus himself. Though the lands were standing in the name of claimant No.7 and claimant No.7 has two more sons, having their own family yet there was justifiable guess work that has been done by the Tribunal that Babasaheb might have been earning at least Rs.6000/- per month. That figure does not require any modification.

10. The learned Tribunal has added 30 % of the income towards future prospects, however it can be seen that, his age that has been taken by the learned Tribunal and as per the post mortem report, is 45 years. Therefore, taking into consideration his age and the fact that he was self employed, as per the decision in National Insurance Company Ltd. Versus Pranay Sethi and others, in Special Leave Petition (Civil) No.25590 of 2014 and other, decided on 31-10-2017, future prospects are required to be added to the extent of 25 % of the income. That 25 % comes to Rs.1500/-. Thus by adding the said future prospects, the income of the deceased would be Rs.7500/- (Rs.6000 + 1500 p.m.) yearly it would be Rs.90,000/-(7500 p.m. X 12 months). Further taking into consideration the dependency of all the claimants and as per the decisions in, National Insurance Company Ltd. Versus Pranay Sethi and others (Supra) with Sarla Verma and others v. Delhi Transport Corporation and another, reported in (2009) 6 SCC 121, 1/5th is required to be deducted towards personal expenditure. That amount comes to Rs.18,000/- (1/5th of Rs.90,000/-). Therefore, after deducting the personal expenditure, the dependency of the claimants would be Rs.72,000/- per annum.

11. Taking into consideration the age of the deceased and the ratio laid down in Pranay Sethi with Sarla Verma's case (Supra), the just multiplier in this case would be 14. After applying the multiplier the total loss of the income

by the claimants would be Rs.10,08,000/-(72,000 X 14).

12. The learned Tribunal has awarded almost Rs.5,50,000/-towards non pecuniary damages under the head of loss of consortium, loss of love and affection for children and parents. It is to be noted that, the said amount was granted as per the decision in, Rajesh and others Versus Rajbir Singh and others, reported in (2013) 9 SCC 54, as the Tribunal has decided this matter on 13-05-2015. However, now since in Pranay Sethi's Judgment it has been held that,

â??As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.â??

We cannot calculate the compensation or we cannot allow the computation of the compensation which has been done on the basis of case of Rajesh

and others Versus Rajbir Singh (Supra) to sustain and therefore the decision in Constitution Bench in Pranay Sethi is required to be applied for

awarding non pecuniary damages i.e. conventional heads. As per Pranay Sethi's Judgment it has been directed that, in conventional heads the

damages to be awarded is Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively for loss of estate, loss of consortium and funeral expenses

respectively. That much amount is required to be granted in this case, that comes to Rs.70,000/-. Therefore, after adding the conventional head

damages, the total amount of compensation to which the claimants were entitled to was Rs.10,78,000/-. Under such circumstance the ncompensation

awarded by the learned Member being higher deserves to be set aside and modified. Point is therefore answered accordingly.

13. For the aforesaid reasons, following order is passed ;

ORDER

i) The appeal is hereby partly allowed with proportionate costs.

ii) The Judgment and award passed in Motor Accident Claim Petition No.638 of 2009, by learned Member Motor Accident Claim Tribunal,

Ahmednagar, on 13-05-2015 is hereby set aside and modified as follows ;

â??Respondents No.1 and 2 should pay amount of Rs.10,78,000/- (in words rupees ten lakh seventy eight thousand only) (inclusive of amount of

Rs.50,000/- granted under no fault liability), jointly and severally to petitioners

No.1 to 8 together with interest @ of 9 % per annum from the date of filing of the petition till actual realization of the entire amount.

iii) It has been submitted that, entire amount as per the award was deposited in this Court and thereafter the claimants were allowed to withdraw

amount of Rs.10,00,000/- (ten lakh) by this Court. Under such circumstance, taking into consideration the modification in the compensation amount,

after calculating the compensation once again, excess, if any, be refunded to the appellant, and rest of the amount to which the claimants are entitled

would be given to them equally.

iv) Award be drawn accordingly.