



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1084 OF 2017

IFFCO TOKIO GENERAL INSURANCE CO.LTD.)
2nd Floor, AFL House, Lok Bharti Complex)
Marol Maroshi Road, Andheri (East),)
Mumbai – 400 067)...APPELLANT

V/s.

1. MANISHA TANAJI BHOIR)
Aged 35 years, Occupation : Housewife)
)
2. DEU PANDU BHOIR)
Aged 65 years, Occupation : Nil)
)
3. MUKTABAI DEU BHOIR)
Aged 60 years, Occupation : Nil)
)
4. PRANAY TANAJI BHOIR)
Aged 8 years, Occupation : Student)
)
All residing at Aambivali, Post Majgaon)
Taluka Khalapur, District – Raigad.)
)
5. KETAN HARISHCHANDRA MHATRE)
Aged 19 years, Occupation : Business)
Residing at Gaurinandan, Sector 12,)
Room No.14, Plot No.7, Panvel,)
District – Raigad)...RESPONDENTS

Mrs.Varsha Chavan, Advocate for Appellant.

Mr.T.J.Mendon, Advocate for Respondents No.1 to 4.

CORAM : ABHAY AHUJA, J.

RESERVED ON : 7th JUNE 2023
PRONOUNCED ON : 2nd AUGUST 2023

JUDGMENT :

1. This is an Appeal filed under Section 173 of the Motor Vehicles Act, 1988 (the “M. V. Act”) impugning the judgment and award dated 24th August 2016 passed by the Motor Accident Claims Tribunal, Alibaug (the “M.A.C.T.”), directing Appellant and Respondent no.5, owner of the offending vehicle, to jointly and severally pay a sum of Rs.56,48,374/- together with interest at the rate of 7 percent per annum.

2. In view of order dated 3rd October, 2022, this Appeal is being finally heard at the stage of admission on the basis of compilation of documents filed on behalf of the Appellant.

3. The brief facts are that on 4th February 2009, at about 3.00 p.m., one Mr.Tanaji Bhoir was riding a motorcycle bearing No.MH-06-V-626 along with his friend, pillion rider named Mr.Harishchandra Pingale and while intending to take a right turn for Mouje Kalate on NH4 (old Mumbai – Pune Highway) gave right light indication to the vehicles behind, when the offending motorcycle bearing No.MH-06-AT-7975 insured with the Appellant Insurance Company, gave a forceful dash

from behind in which mishap Tanaji Bhoir sustained serious injuries, and succumbed to the injuries in the hospital while taking treatment.

4. The widow, parents and minor children of the deceased Tanaji filed a Claim Application before the M.A.C.T. under Section 166 of the M. V. Act on 31st March 2009 for a compensation of Rs.1.25 Crores and the M.A.C.T. has awarded a sum of Rs.56,48,374/- along with interest at the rate of 7 percent per annum which has been accepted by the claimants, as admittedly, no appeal has been filed by them.

5. However, the Insurance Company, being aggrieved by the said judgment and award, has filed this Appeal.

6. Ms. Varsha Chavan, learned Counsel for the Appellant Insurance Company, does not seriously dispute that there was negligence on the part of the driver of the offending vehicle as held by the Tribunal based on statements recorded, First Information Report and Jabab, which led to the accident causing the death of Mr. Tanaji Bhoir, however she submits that the Insurance company is primarily dissatisfied and aggrieved on the issue of quantum primarily on the following grounds (in respect of which Compilation of Documents has been filed on behalf Appellant Insurance Company on 11th October, 2022.) :

(a) Whether trial Court was correct in considering income from transport business when there are no pleadings to that effect?

(b) Whether the trial Court was correct in discarding a clear admission in the cross examination that on the date of accident, the deceased was not employed and already resigned from his previous job ?

7. Learned Counsel for the Appellant Insurance Company, would submit that even though there are no pleadings or evidence led before the trial Court with respect to the deceased's income from transport business, the trial Court has considered the same in awarding compensation. The trial Court has failed to appreciate the contradiction in the claimants' evidence. In the Claim Application, the deceased's occupation is mentioned as "service" and salary income as Rs.37,750/- and there is not even a whisper of transport business in the said application. Learned Counsel also refers to the Claim Application filed before the M.A.C.T. and refers to Items 4 and 5 of the said application and submits that on their own admission, the claimants have indicated the deceased's monthly income as Rs.37,750/-, and if that be so, the M.A.C.T. could not have considered only the Return of Financial year 2007-08 or the income from the transport business to determine the

compensation. Learned Counsel draws the attention of this Court to paragraph 12 of the cross-examination of the widow, where the widow has stated that it is true that in her affidavit of examination in chief it is not stated that her husband had any other source of income other than his service.

8. Further, learned Counsel for the Appellant – Insurance Company, would submit that the Tribunal has, while awarding compensation, erroneously considered that the deceased was, at the time of his death, working with Reliance Industries Ltd., even though the cross examination clearly records in paragraph 11 that it was true that one month prior to the accident of her husband, he had resigned from his job. She would submit that, therefore, his salary from Reliance Industries cannot be considered for the purposes of grant of compensation.

9. Without prejudice to the above, learned Counsel draws the attention of this Court to the Income Tax Returns of the three years (Assessment years 2006-07, 2007-08 and 2008-09) corresponding respectively to Financial years 2005-06, 2006-07 and 2007-08 that were furnished as evidence before the Tribunal and submits that the

last Return shows net profit from transport business as 'Nil'. Learned Counsel submits that as can be seen, the salary income has increased by Rs.2,53,540/- for assessment year 2008-09 and surprisingly, there is 100% increase in salary despite the fact that the deceased had left his job in that year, and income from Salary is shown at Rs.4,77,580/- which would include severance pay on account of his resignation. There is no evidence as to what was the salary income and what was the amount of severance pay. In any case, she submits, the amount of Rs.4,77,580/- cannot be his annual income. She would submit that, firstly, it raises doubt whether the deceased was in transport business at all, and secondly, that an average of the three years Income Tax Returns should have been considered as per the settled law. Learned Counsel relies upon the decision of the Hon'ble Apex Court in the case of **ICICI Lombard General Insurance Co. Ltd. vs. Ajay Kumar Mohanty**¹ and the Gujarat High Court in the case of **Rajeshwariben Wd/o. Kalpeshbhai Shah vs. Yunusbhai Isabbhai Sipai**² in support of her contention. Learned Counsel would submit that the Hon'ble Apex Court sitting in a Bench of 4 Judges has unanimously observed in the case of **ICICI Lombard GIC Ltd. vs. Ajay Kumar Mohanty (supra)** that average income is required to be considered. There is clear finding to that

1 Civil Appeal No.7181 of 2015 decided on 6th March 2018

2 First Appeal No.579 of 2019 with connected Appeal decided on 6th May 2022

effect, which is further explained by a Division Bench of Gujarat High Court in the case of **Rajeshwariben Wd/o Kalpeshbhai Shah Vs. Yunusbhai Isabbhai Sipai (supra)**.

10. Learned Counsel submits that alternatively, the compensation be awarded on the basis of notional income and relies upon the decision of this Court in **Mulchand Dhanji Shah and Anr. vs. Mr. Noordam Iraj Ahmed and Ors.**³

11. On the other hand, Mr.Mendon, learned Counsel for Respondents/Original Claimants, vehemently opposes the submissions made on behalf of Appellant. He firstly submits that it is settled law that what is important is evidence and not the pleadings while computing compensation, as contents of the application are not the evidence and substantive evidence is only deposition of the witness. He relies upon the decision of this Court by Justice Pendse in the case of **Sakharbhai Hasan Ali Makani vs. Girish Kumar Rupchand Gadia**⁴. Learned Counsel would submit that the Claim Application has been filled up as per the form that has been prescribed under the Motor Vehicles Rules which is neither a suit nor a plaint nor a Petition and is

³ First Appeal No.1005 of 2019 decided on 10th January 2022

⁴ I 1997 ACC 668

an application for the purposes of awarding compensation. The Tribunal holds an inquiry regarding the incident and evaluates the damage for granting just compensation. He submits that the process is not adversarial. Learned Counsel relies upon a Division Bench decision of this Court in the case of **Oriental Insurance Co. Ltd. vs. Pritam Rajiv Shetty and Another**⁵ to submit that a claim application is not a plaint governed by the Code of Civil Procedure nor it is a civil suit but special proceedings under the Special Act, and therefore the law, of which strict compliance is required while filing a suit, cannot be applied while dealing with proceedings under the Special Act.

12. Learned Counsel for the Respondents would further submit that the documents that were shown were documents evidencing income of the deceased on the date of the death would need to be considered and not the average of the previous years. Learned Counsel relies upon the decision of a Division Bench of this Court in the case of **New India Assurance Co. Ltd. vs. Alpa Rajesh Shah and Others**⁶ in support of his contention. He relies upon the decision of the Hon'ble Supreme Court in the case of **Malarvizhi and Others vs. United India Insurance Co. Ltd. and Another**⁷ as well as the decision in the case of **Rukmani Jethani and**

5 2007 ACJ 444
6 2014 ACJ 1747
7 2020 ACJ 526

Others vs. Gopal Singh and Others⁸, where it was held that the year in which the income declared was highest must be taken.

13. Learned Counsel would submit that, admittedly, the deceased was working with Reliance Industries Ltd. and at the same time he had his own transport business. However, in order to devote time and to pursue his transport business, the deceased thought it fit to leave his job with Reliance Industries Ltd.; the Income Tax Returns show income from transport business as well as from salary; he would submit that these are Returns which were submitted to the Income Tax Authorities in time and the last Return was for the entire year till the deceased died in the month of February 2009 (the month and year in which he met with the accident and died) i.e. 11 months upto February 2009 is shown in the Income Tax Returns. He would submit that the widow has been fair enough to do so and the M.A.C.T. has rightly determined the income declared on the basis of highest return and awarded the compensation. Therefore, no fault can be found with the judgment and award. Learned Counsel would, therefore, submit that the Appeal deserves to be dismissed.

⁸ 2021 ACJ 2683

14. Mrs.Varsha Chavan, learned Counsel for Appellant and Mr.T.J.Mendon learned Counsel for Respondents No.1 to 4 have been heard and rival contentions considered.

15. It is not in dispute that the deceased was working with Reliance Industries Limited and just one month before the accident he had resigned from his services with Reliance Industries Limited. The Tribunal has on the basis of the return for the assessment year 2008-2009 considered the income of the deceased as Rs.4,77,580/-. A perusal of the said return as well as statement of income annexed to it indicates that the gross total income of the deceased for the assessment year 2008-2009 corresponding to the financial year 2007-2008 is Rs.4,77,580/-, which as per computation of income is the salary income. The TDS paid on such income is Rs.87,590/-. From the statement of income, it is gathered that the deceased was in transport business as well as in service. Infact, the returns as well as the statements of income for the earlier assessment years 2006-2007 as well as 2007-2008 also indicate that the deceased was having income from transport business as well as salary income. In the return for the year 2008-2009, the net income in respect of transport business is shown as Nil although for the earlier years there are amounts shown in

respect of business as well. The returns for the assessment years 2006-2007 and 2007-2008 clearly show income from business. Not only that, the return for the year 2008-2009 and in particular the statement of income describes the deceased's occupation as transport business and salary income. Just because the net profit or net taxable income is shown as Nil for the assessment year 2008-2009, it cannot be said that the deceased was not in the said business. The income tax return as well as the statement of income of the computation of income for the assessment year 2008-2009 clearly record the salary income as Rs.4,77,580/- and there is a TDS of Rs.87,590/- deducted on the same. That, the return appears to have been filed with the Income Tax Department on 17th September, 2008 and being a statutory document, as per settled law, reliance can be placed on the same. Therefore, it cannot be doubted that the deceased was in transport business.

16. Learned Counsel for the Appellant has submitted that the salary of Rs.4,77,580/- shown in the return for assessment year 2008-2009 would include severance pay on account of the deceased's resignation as the earlier returns have shown less than half the figure and there can't be a 100% increase in salary in the year the deceased had left his job. Firstly, there is no evidence to show any such difference between

salary and severance pay and even otherwise the Appellant has neither produced nor led any evidence in this regard, which ought to have been done to disprove the claim of the claimants. The Hon'ble Supreme Court in the case of **Malarvizhi and Ors Vs. United India Insurance Co. Ltd and another (supra)** has approved the approach of the High Court, when the High Court proceeded on the basis of the income tax return for the year 1997-1998, for which year income declared by the deceased was the highest and not the year 1999-2000 and 2000-2001 which had reflected a reduction in the annual income of the deceased observing that to benefit the Appellant, the High Court proceeded on the basis of the income tax return for the assessment year 1997-1998 and not 1999-2000 and 2000-2001 which reflected a reduction in the annual income of the deceased. Also in the case of **Rukmani Jethani and Others vs. Gopal Singh and Others (supra)**, the Hon'ble Supreme Court found error in the approach of the M.A.C.T. in not taking into account the ITR filed on behalf of the deceased for the financial year 2004-2005, when the deceased had died on 14th September, 2005 and considered the ITR for financial year 2003-2004. The Tribunal had not considered the said return as the same was filed after the death of the deceased on 14th September, 2005. Therefore, in my view no fault can be found with the approach of the Tribunal in considering the return of

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the deceased for the assessment year 2008-2009 corresponding to financial year 2007-2008.

17. Learned Counsel for the Appellant has also submitted that since there was no income with respect to the transport business for the assessment year 2008-2009 whereas there was some income in respect thereof for the two previous years, an average of the three years income should have been considered. True that the income tax return of the deceased for the assessment year 2008-2009 showed business income as Nil, however considering that the M.V. Act is a beneficial legislation to compensate the family members of the deceased with just compensation in line with the approach approved by the Hon'ble Supreme Court, the return declaring the highest income of the deceased was, in my view, correctly considered.

18. Learned Counsel for the Appellant has referred to and relied upon the decision in the case of **ICICI Lombard General Insurance Co. Ltd. vs. Ajay Kumar Mohanty (supra)** to submit that average of the three years income tax returns ought to have been considered by the Tribunal. In my view, the ratio of the said decision is distinguishable in as much as in that case it was the Tribunal who had on the basis of
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income tax returns for the years 2007, 2008 and 2009 arrived at an average income but after doing that it had taken the annual income on the basis of testimony of the claimant. It is in that context that the Hon'ble Supreme Court had recorded the computation of average income by the Tribunal. In the case at hand as well as in the Supreme Court decision in the case of **Malarvizhi and Ors. vs. United India Insurance Co. Ltd and Another (supra)**, it was the Tribunal that had considered income of the years in which the deceased had declared a lesser income and the High Court had referred to an assessment year in which the deceased had declared the highest income, which approach the Hon'ble Supreme Court has approved as the same was for the benefit of the claimant. In my view, it has been a consistent approach not to disturb or interfere with an approach which is more beneficial to the claimant unless the same is manifestly perverse. Once the Tribunal, in its wisdom has, after considering the facts, taken an approach which is beneficial to the claimant, in my view, the same ought not to be interfered or faulted with, as the provision for compensation under Section 166 of the M.V. Act is a beneficial piece of legislation to provide solace of just compensation to the family of the victim.

19. For the same reason, the decision of the Gujarat High Court in the case of **Rajeshwariben Wd/o. Kalpeshbhai Shah vs. Yunusbhai Isabbhai Sipai (supra)** relying upon the decision of the Hon'ble Supreme Court in the case of **ICICI Lombard General Insurance Co. Ltd. Vs. Ajay Kumr Mohanty (supra)**, in my view, is distinguishable, in as much as in the said decision also the Hon'ble Gujarat High Court found no error with the findings of the Tribunal where it considered an average of three years income of the deceased prior to his death.

20. Further, this Court in the case of **New India Assurance Co. Ltd. vs. Alpa Rajesh Shah and Others (supra)** has observed that the Tribunal had committed an error by taking the average of the income for last three years, as the income on the date of the death ought to have been taken into consideration. Paragraphs 9 and 14 of the said decision are relevant and are usefully quoted as under :

“9. The learned Member of the Tribunal while calculating the multiplicand has deducted the tax payable from the net income for the said three years and has taken the average of the income of three years. Thus, he has taken the yearly income of the deceased at Rs.1,60,000/- for the purposes of computing multiplicand. We find that the learned Member has committed an error by taking the average of the income for last three years. The income on the date of death ought to have been taken into consideration after deducting the income tax payable.

14. *Income tax returns for the period of three years immediately prior to the date of death of the deceased show that the net income of the deceased was Rs.1,75,739/-, Rs.2,30,435/- and Rs.2,10,750/- respectively. The last figure represents income for about 11 months. The income on the date of death will have to be taken into consideration for determination of multiplicand. It is true that for the purpose of calculating multiplicand, income tax payable on net income has to be deducted. The income tax paid by the deceased for the assessment year 1999-2000 was Rs.29,554/- out of which a sum of Rs.25,000/- was already paid on 15.12.1998 during the lifetime of the deceased. After deducting the said amount of Rs.29,554/- from the income of the deceased of Rs.2,10,750/- for about 11 months, net amount comes to Rs.1,81,196/-. Thus the net monthly income after deducting income tax was Rs.16,472/-. Adding Rs.16,472/- to Rs.1,81,196/-, the yearly net income at the time of death of deceased comes to Rs.1,97,668/- which can be rounded off to Rs.2,00,000/-."*

21. The return of the deceased for the year 2008-09 is the piece of evidence closest to his death and can safely be considered as a document evidencing income of the deceased at the time of his death. The concept of income on date of death does not mean exactly on the date of death but piece of evidence reasonably close to the date of the death, otherwise it would become practically impossible to determine the compensation on this basis. Therefore, since the return for AY 2008-09 filed as part of the evidence is the closest to the date of the death of the deceased and having held that the income in the said return has been correctly considered, submission on behalf of the Appellant that on the date of the accident, the deceased was not

employed, having resigned one month back, would not be relevant or material consideration in the facts of this case for determination of compensation to be awarded to the claimants.

22. In view of the above discussion, the question of awarding compensation on the basis of notional income would not arise. The decision in the case of **Mulchand Dhanji Shah and Anr. vs. Mr. Noordam Iraj Ahmed and Ors. (supra)** relied upon by the learned Counsel for the Appellant is, therefore, not relevant to the case at hand. In any event, that was a case in which the Court had come to a categorical finding that the applicants could not produce documentary evidence of unimpeachable character to demonstrate that the deceased was dealing in the business and was an income tax assessee. In the case at hand, it is quite clear that the deceased has not only filed income tax returns but also was in transport business. Therefore, the said decision does not lend any assistance to the case of the Appellant.

23. I am also in agreement with the submissions of Mr. Mendon, made on behalf of the claimants, that a Claim Application is not a plaint governed by the Code of Civil Procedure, 1908, nor is it a Civil Suit but it is a special proceeding under the Special Act viz. the M.V.

Act, and therefore, the law, of which strict compliance is required while filing Civil Suit cannot be applied while dealing with the proceedings under the M. V. Act. It is true that in the Claim Application preferred by the claimants, the deceased's monthly income was shown as Rs.33,750/-, however the income tax return for the assessment year 2008-2009 reflects a figure of Rs.4,77,580/- but the Motor Vehicles Act being a special legislation, the Code of Civil Procedure is not to be strictly applied as the Claim Application is not plaint in a Civil Suit, and therefore, the evidence of the return has been correctly considered for the purposes of arriving at the compensation payable to the claimants. The following extract of paragraph 8 of the decision in the case of **Oriental Insurance Co. Ltd. vs. Pritam Rajiv Shetty and Another (supra)** is useful :-

“.....Moreover, we may also notice that the claim application is not a plaint governed by the Code of Civil Procedure or it is not a civil suit but it is the special proceedings under the Special Act and, therefore, the law which strict compliance is required while filing the civil suit cannot be applied while dealing with the proceedings under the special act.....”

24. Also, this Court in the case of **Sakharbhai Hasan Ali Makani vs. Girish Kumar Rupchand Gadia (supra)**, has observed that the contents of a claim application are not evidence.

25. The income tax return of the deceased for the assessment year 2008-2009, as mentioned above, is a statutory document and has been correctly accepted for determination of income of the deceased for computation of compensation under the M. V. Act. With this evidence at hand, in view of the decisions in the cases of **Oriental Insurance Co. Ltd. vs. Pritam Rajiv Shetty and Another (supra)** and **Sakharbhai Hasan Ali Makani vs. Girish Kumar Rupchand Gadia (supra)**, the contention that only a sum of Rs.37,750/- has been mentioned in the Claim Application is to be considered, cannot be countenanced. The same would also apply to the argument on behalf of the Appellant that there is no whisper of the deceased being in transport business in the Claim Petition.

26. Ergo, both the grounds raised on behalf of the Appellant stand repudiated. The Tribunal has correctly considered deceased's income on the basis of return for the Assessment Year 2008-09 recording deceased's income as Rs.4,77,580/-.

27. The Appeal is devoid of any merit. There is neither any error nor any illegality nor perversity in the judgment and award of the Tribunal. The Appeal deserves to be dismissed and is hereby dismissed. No costs.

(ABHAY AHUJA, J.)