

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 4516 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE GITA GOPI

Sd/-

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|---|---|----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | NO |
| 2 | To be referred to the Reporter or not ? | NO |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |

SONALBEN ALIAS CHARMIBEN HIRENBHAI JIVANI
Versus
NARANBHAI CHANANBHAI BABARIYA

Appearance:

DELETED for the Appellant(s) No. 1

MR MONAL S CHAGLANI(10240) for the Appellant(s) No. 2,3

MR DAKSHESH MEHTA(2430) for the Defendant(s) No. 3

MR. RUSHANG D MEHTA(6989) for the Defendant(s) No. 3

RULE SERVED for the Defendant(s) No. 2

UNSERVED EXPIRED (R) for the Defendant(s) No. 1

CORAM: HONOURABLE MS. JUSTICE GITA GOPI

Date : 09/09/2022

ORAL JUDGMENT

1. The original claimants as appellants have challenged the judgment and award dated 30th June 2018 passed in the M.A.C.P. No.205 of 2007 by the Motor Accident Claims Tribunal (Auxiliary) at Gondal.

2. Mr. Monal Chaglani, learned advocate has challenged the impugned judgment and award on the ground that the learned Tribunal has not considered the oral as well as documentary evidence on record and has not considered the income aspect in accordance with the judgments of the Hon'ble Apex Court where the income tax returns were produced before the Court. According to Mr. Chaglani, the learned Tribunal has erred in considering the aggregate income of the deceased for the last three years and has not even considered the mother of the deceased as dependent while both the parents were dependent on the deceased son. He further submitted that the Tribunal has totally discarded the evidence and has erred in not considering the parents as dependent and only granted a lump-sum amount of Rs.50,000=00, which could have been granted even under Section 140 of the Motor Vehicles Act. In support of the submission to consider the parents as dependent, Mr. Chaglani has relied upon the following judgments :

- (1) Chandra and others vs. Mukesh Kumar Yadav and others, (2021) 6 ALT 116;
- (2) Indrawati and others vs. Ranbir Singh and others, 2021 ACJ 2156;
- (3) Sukhdev Prasad vs. Sunil Kumar and others, 2022 ACJ 332;
- (4) N. Jayashree and others vs. Cholamandalam MS General Insurance Co. Ltd. and others, AIR 2021 SC 5218;

- (5) Jagruthi Shishir Banugariya and others vs. Rajvi Kanthan Ahir and others, 2016 ACJ 905;
- (6) National Insurance Company Ltd. and others vs. Birender and others, AIR 2020 SC 434.

3. Countering the argument, Mr.Daxesh Mehta, learned advocate appearing for the Insurance Company submitted that the learned Tribunal has given reasons for not considering the parents as dependent and further it has been submitted by Mr.Mehta, relying upon the judgment of the Division Bench of this Court in the case of Bhavnaben Shaileshbhai Rank vs. Mahmadm Khan Mahmadjallaudinkhan Pathan (First Appeal No.3508 of 2021, decided on 6th December 2021), that if at all the income of the deceased has to be considered, then the aggregate income for the last three years is required to be assessed since there is no evidence to support the ITRs filed by the deceased.

4. The learned Tribunal, while considering the report, found that the applicant no.1 Sonalben alias Charmiben Hirenbhai Jivani, i.e. widow of the deceased, had made a declaration to affidavit Exh.23 to delete her name and she had consented to give her share of compensation to the applicants nos.2 and 3 respectively since stating that she remarried after the death of her husband in an unfortunate incident. The applicant no.2 being the mother of the deceased examined herself at Exh.20 and she admitted that her daughter-in-law, i.e. applicant no.1, has

remarried. In that circumstances, the learned Tribunal observed that there were only two applicants, i.e. mother and father of the deceased, on record and the learned Tribunal went on to consider the issue, whether or not the parents were entitled to the compensation, while determining the same on the basis of the available evidence. The learned Tribunal thus observed that the mother of the deceased, after the marriage of the deceased with the applicant no.1, moved to Rajkot and the father of the deceased owned a shop at Bagsara. Thus, the learned Tribunal observed that prior to the accident, the sustenance of the parents was on the income of the shop which, as per the learned Tribunal, continued. Thus, the learned Tribunal did not find the applicants nos.2 and 3 as the dependent on the income of the deceased. Hence, the learned Tribunal did not deem fit to grant any compensation under the head of dependency loss.

5. The claimant no.2 had filed her examination-in-chief at Exh.20. She was cross-examined, and during the course of her cross-examination, she admitted the fact that after the marriage, her son and daughter-in-law started staying in Rajkot, while she volunteered that she too was staying at Rajkot along with her son. The said evidence has been read by the Tribunal. She further stated that her husband was having a photocopy shop at Bagsara and she was also having occupation along with her husband. The shop was being run prior to the accident and it continued. The

income from the shop was used for their livelihood. She also affirmed that her husband continued with the shop.

6. In the case of Chanda and another (supra), while appreciating the facts of the case that the unfortunate parents had lost their son aged about 32 years and the claim compensation was filed under Section 166 of the Motor Vehicles Act and where an issue was raised about the parents not being the dependent as they were found to be living separately, the Hon'ble Apex Court, while deciding the case and referring to the judgment of Magma General Insurance Company Limited and others vs. Nanu Ram @ Chuhru Ram and others, reported in (2018) 18 SCC 130, observed that the finding of the Tribunal that the parents cannot be treated as dependent would run contrary to the judgment of the Apex Court in the case of Sarla Varma and others vs. Delhi Transport Corporation and another, reported in (2009) 6 SCC 121.

7. In the case of Indrawati and others (supra), the Delhi High Court, while appreciating the fact that the deceased son had died at the age of 23 years and was survived by parents, who had claimed compensation, a question was raised for the consideration as to whether the mother would be entitled to compensation for the death of her son. The Hon'ble Delhi High Court, while observing the case of Mahendrakumar Ramrao Gaikwad vs. Gulabbai Ramrao Gaikwad, reported in 2001 Cri.L.J. 2111 from the Bombay High Court, referred to the ancient scriptures of

'*manu*' to acknowledge the recognition of the rights of aged parents to be maintained by their children even if the children are unable to maintain themselves. The case of Magma General Insurance Company Limited (*supra*) was also considered to appreciate the parental consortium and even the case of Sarla Varma (*supra*) was referred to observe that the Supreme Court had laid down the three years' principle for computation of compensation in respect of death of parents as well as spouse while applying the multiplier method by further observing that the application of those principles have not been made subject to any condition meaning thereby that no further evidence is required to prove the dependencies in the case. Thus, the Delhi High Court, while considering the settled law laid down by the Supreme Court in the above referred judgments, held that the parents of deceased child are considered as dependent for consideration of compensation.

8. In Sukhdev Prasad (*supra*), the Delhi High Court, while considering the dependency of the parents on the death of 25 years' old son and referring the ratio laid down in the case of National Insurance Company Limited vs. Pranay Sethi and others, reported in AIR 2017 SC 5157, Magma General Insurance Company Limited (*supra*), Indrawati and others (*supra*), held that the parents of the deceased are always considered as dependent upon their children and are entitled to compensation according to the principles laid down by the

Hon'ble Apex Court in the case of Pranay Sethi (supra).

9. In N.Jayashree and others (supra), the mother-in-law of a deceased son-in-law was also considered as dependent.

10. In Birender and others (supra), in context of dependency of the major son, it has been observed that the legal representatives of the deceased would be entitled to receive compensation under the conventional heads. It was observed in paragraphs 12, 13, 14 and 15 as under :

“12. We have heard Mr. Amit Kumar Singh, learned counsel for the insurance company (appellant) and Ms. Abha R. Sharma, learned counsel for the respondent Nos. 1 and 2. The principal issues which arise for our consideration are as follows :

(i) Whether the major sons of the deceased who are married and gainfully employed or earning, can claim compensation under the Motor Vehicles Act, 1988 (for short, 'the Act') ?

(ii) Whether such legal representatives are entitled only for compensation under the conventional heads ?

(iii) Whether the amount receivable by the legal representatives of the deceased under the 2006 Rules is required to be deducted as a whole or only portion thereof?

13. Reverting to the first issue - that needs to be answered on the basis of the scheme of the Act. Section 166 of the Act provides for filing of application for compensation by persons mentioned in clauses (a) to (d) of sub-section (1) thereof. Section 166 of the Act, as applicable at the relevant time, reads thus:

“Section 166. Application for compensation.- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made-

(a) by the person who has sustained the injury;
or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and

shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under Section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3) *****

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under subsection (6) of section 158 as an application for compensation under this Act.”

14. *The legal representatives of the deceased could move application for compensation by virtue of clause (c) of Section 166(1). The major married son who is also earning and not fully dependant on the deceased, would be still covered by the expression “legal representative” of the deceased. This Court in Manjuri Bera (supra) had expounded that liability to pay compensation under the Act does not cease because of absence of dependency of the concerned legal representative. Notably, the expression “legal*

representative” has not been defined in the Act. In Manjuri Bera (supra), the Court observed thus:

“9. In terms of clause (c) of sub-section (1) of Section 166 of the Act in case of death, all or any of the legal representatives of the deceased become entitled to compensation and any such legal representative can file a claim petition. The proviso to said sub-section makes the position clear that where all the legal representatives had not joined, then application can be made on behalf of the legal representatives of the deceased by impleading those legal representatives as respondents. Therefore, the High Court was justified in its view that the appellant could maintain a claim petition in terms of Section 166 of the Act.

10.The Tribunal has a duty to make an award, determine the amount of compensation which is just and proper and specify the person or persons to whom such compensation would be paid. The latter part relates to the entitlement of compensation by a person who claims for the same.

11. According to Section 2(11) CPC, “legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Almost in similar terms is the definition of legal representative under the Arbitration and Conciliation Act, 1996 i.e. under Section 2(1)(g).

12. As observed by this Court in *Custodian of Branches of BANCO National Ultramarino v. Nalini Bai Naique* [1989 Supp (2) SCC 275] the definition contained in Section 2(11) CPC is inclusive in character and its scope is wide, it is not confined to legal heirs only. Instead it stipulates that a person who may or may not be legal heir competent to inherit the property of the deceased can represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression “legal representative”. As observed

in Gujarat SRTC v. Ramanbhai Prabhatbhai [(1987) 3 SCC 234] a legal representative is one who suffers on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parent and child.”

In paragraph 15 of the said decision, while adverting to the provisions of Section 140 of the Act, the Court observed that even if there is no loss of dependency, the claimant, if he was a legal representative, will be entitled to compensation. In the concurring judgment of Justice S.H. Kapadia, as His Lordship then was, it is observed that there is distinction between “right to apply for compensation” and “entitlement to compensation”. The compensation constitutes part of the estate of the deceased. As a result, the legal representative of the deceased would inherit the estate. Indeed, in that case, the Court was dealing with the case of a married daughter of the deceased and the efficacy of Section 140 of the Act. Nevertheless, the principle underlying the exposition in this decision would clearly come to the aid of the respondent Nos. 1 and 2 (claimants) even though they are major sons of the deceased and also earning.

15. It is thus settled by now that the legal representatives of the deceased have a right to apply for compensation. Having said that, it must necessarily follow that even the major married and earning sons of the deceased being legal representatives have a right to apply for compensation and it would be the bounden duty of the Tribunal to consider the application irrespective of the fact whether the concerned legal representative was fully dependent on the deceased and not to limit the claim towards conventional heads only.....”

11. Observing the principles as laid down in the above referred judgments and following the case of Pranay Sethi (supra), this Court concludes that both the parents are dependents of the deceased son and are entitled to apply for compensation. Thus, the observations made by the learned Tribunal become erroneous. Both the parents are entitled for the compensation amount under the head of dependency loss.

12. Learned advocate Mr.Dakshesh Mehta has insisted upon to consider the average income of last three years preceding the death of the deceased son. However, countering the same, learned advocate Mr.Chaglani has relied upon the judgments in the cases of Pranay Sethi

(supra); Sangita Arya and others vs. Oriental Insurance Company Limited and others, reported in AIR 2020 SC 2877; Sheela Devi and others vs. Sumit Kumar and others (First Appeal No.1080 of 2021, decided on 18.04.2022, by Hon'ble High Court of Allahabad); and The New India Assurance Company Limited vs. Salmabibi Jainulabedin Doi (First Appeal No.96 of 2022, decided on 03.03.2022, by a Coordinate Bench of this Hon'ble Court).

13. In the case of Bhavnaben Shaileshbhai Rank (supra), relied upon by Mr.Mehta, the observations made by the Division Bench of this Court is to the effect that the safe and proper course is to take into consideration the average income of the last three years preceding the death, which would indicate the average income of the deceased as the earning for the last three years prior to his death. While that observations were made in context of the circumstances noted by the Division Bench placing reliance on the judgment of the Hon'ble Apex Court in the case of ICICI Lombard General Insurance Company Limited vs. Ajay Kumar Mohanty and another, reported in (2018) 3 SCC 686, wherein it was indicated that it would be apt, appropriate and safe to take the average income, inasmuch as in a given case there may be situation where due to unforeseen circumstances, the income for the last year could either be less or abysmally on the lower side. Thus, in that circumstances, the Division Bench had considered it safe to consider the average income of the last three years preceding the death of the deceased.

However, a reference is required to be made of the case of Pranay Sethi (supra) to clarify that while assessing the fact that whether the deceased was self-employed or had a fixed salary without the provision for annual increment etc., it was observed that the Court would take the actual income at the time of the death and the departure is permissible only in rare and exceptional cases involving special circumstances.

14. The very ratio has been adopted in Pranay Sethi's case (supra) while considering the aspect of addition towards the future prospective income of the deceased. In Sangita Arya and others (supra), the Hon'ble Apex Court considered the ITRs filed prior to the death of the deceased which reflects the income of the deceased and following the case of Sangita Arya and others (supra), the Hon'ble High Court of Allahabad, in the case of Sheela Devi and others (supra), and this Hon'ble High Court in the case of Salmabibi Jainulabedin Doi (supra), has deprecated the method of assessing the income on the basis of the aggregate income of last three years and both the Hon'ble High Court of Allahabad and this Hon'ble Court has thus considered to assess the income based on the latest income tax returns to consider the computation of income and also such income tax returns are considered to be the base for awarding the future prospective income.

CONCLUSION :

15. Here in this case, the date of accident is 12.10.2006, whereas as per Exh.32, the ITR return for the Assessment Year 2006-07 (i.e. for the period from 01.04.2005 to 30.03.2006) was filed on 10.10.2006, i.e. two days prior to the accident, which shows the income of the previous year. The income so reflected in Exh.32 is prior to the death of the deceased, i.e. the income of the earlier year was assessed. Hence, Exh.32 is the latest and the last prior to the death of the deceased. Hence, Exh.32 is required to be considered to assess the income as well as the future prospective income. As per Exh.32, the yearly income assessed is Rs.1,05,800=00. Thus, deducting the income tax of Rs.592=00, the aggregate amount of Rs.1,05,000=00 per annum would be considered as the actual income of the deceased and 40% rise in future prospective income would be considered taking into consideration the age of the deceased at the time of the accident as 27 years. Hence, Rs.42,000=00 is added to the same. Thus, the dependency income would come to Rs.1,47,000=00 with a multiplier of 17, that is, the total amount that comes under the head of dependency income to the parents would be Rs.24,99,000=00. Taking into consideration total number of dependents, 1/3rd amount is required to be deducted as personal expenses of the deceased. Hence, deducting Rs.8,33,000=00 towards the personal expenses of the deceased, the dependency loss would come to Rs.16,66,000=00.

16. The chart showing the compensation payable to the claimants/appellants is as under :

| COMPENSATION | | |
|---|---|---------------------|
| Income of the deceased at the time of his death | Rs. 1,05,000=00 | |
| Addition - Future Prospects @ 40% | Rs. 42,000=00 | |
| | Rs. 1,47,000=00 | |
| Multiplier of 17 (deceased was aged about 27 years) | Rs.24,99,000=00 (Rs.1,47,000 x 17) | |
| 1/3rd deduction towards personal expenses of the deceased | Rs.16,66,000=00 (24,99,000-8,33,000) | |
| | | Rs.16,66,000 |
| Addition : | | |
| Consortium (Filial) | Rs. 80,000=00 | |
| Loss to estate | Rs. 15,000=00 | |
| Funeral and other misc. expenses | Rs. 15,000=00 | Rs. 1,10,000 |
| Total Compensation : | | Rs.17,76,000 |

17. Both the parents would be entitled to consortium money in accordance with the judgment in the case of Magma General Insurance Company Limited and others (supra). Hence, the total amount under the head of consortium would be Rs.80,000=00, Rs.15,000=00 under the head of loss to estate and Rs.15,000=00 towards the funeral and other misc. expenses following Pranay Sethi's case (supra).

18. Thus, in toto, the claimants are entitled to receive Rs.17,76,000=00 as compensation. The Insurance Company is directed to deposit the said amount within a period of ten weeks from the date of receipt of writ of this order. It is further directed that from the date of application to the date of the award of the learned Tribunal dated 30th June 2018, the said amount shall be deposited with 9% interest per annum, and from 1st July 2018 till the date of this order, the said amount shall be deposited with 7.5% interest per annum.

19. The First Appeal is allowed in part to the aforesaid extent.

(GITA GOPI, J.)

/MOINUDDIN