

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

First Appeal No. 2509 of 2013

1. Sandeep s/o. Bhausahab Murtadak,
Age : 24 years,
Occupation : Nil,
R/o. Panchvati,
Makhamalabad Road,
Nashik,
Taluka & District : Nashik.

2. Shri Lahamge s/o. Bhikan Bhimaji,
Age : 35 years,
Occupation : Business,
R/o. Navjeevan Colony,
Vaijapur, Taluka : Vaijapur,
District : Aurangabad.

.. Appellants
(Original respondents)

versus

1. Vaishali @ Gumpha Vasant Arak,
Age : 45 years,
Occupation : Household.
2. Rekha D/o. Vasant Arak,
Age : 27 years,
Occupation : Education.
3. Pratibha D/o. Vasant Arak,
Age : 25 years,
Occupation : Education.
4. Pradeep s/o. Vasant Arak,
Age : 23 years,
Occupation : Education.

All respondents R/o. Plot No.1,
Sangita Colony,
Bhavsingpura Road, Aurangabad,
Taluka & District : Aurangabad.

.. Respondents
(Original claimants)

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*Mr. R.N. Dhorde, Senior Advocate, instructed by
Mr. V.R. Dhorde, Advocate, for appellants.*

*Mr. R.B. Dhakane, Advocate, for respondent
nos.1 to 4.*

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With

First Appeal No. 835 of 2014

1. Vaishali @ Gumpha Vasant Arak,
Age : 45 years,
Occupation : Household.
2. Rekha D/o. Vasant Arak,
Age : 27 years,
Occupation : Education.
3. Pratibha D/o. Vasant Arak,
Age : 25 years,
Occupation : Education.
4. Pradeep s/o. Vasant Arak,
Age : 23 years,
Occupation : Education.

All Appellants r/o. Plot No.1,
Sangita Colony,
Bhavsingpura Road,
Aurangabad,
Taluka & District : Aurangabad.

.. Appellants
(Original claimants).

versus

1. Sandeep s/o. Bhausahab Murtadak,
Age : 24 years,
Occupation : Nil,

(3)

F.A. No. 2509 of 2013 &
F.A. No. 835 of 2014

R/o. Panchvati,
Makhamalabad Road,
Nashik,
Taluka & District : Nashik.

2. Shri Lahamge s/o. Bhikan Bhimaji,
Age : 35 years,
Occupation : Business,
R/o. Navjeevan Colony,
Vaijapur, Taluka : Vaijapur,
District : Aurangabad.

.. Respondents.

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Mr. R.B. Dhakane, Advocate, for appellants

Mr. R.N. Dhorde, Senior Advocate, instructed by
Mr. V.R. Dhorde, Advocate, for respondent nos.1 and 2.

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CORAM : A.M. BADAR, J.

DATE : 7TH DECEMBER 2015

ORAL JUDGMENT :

1. Heard the learned Counsel for respective parties.
2. First Appeal No. 2509 of 2013 is filed by original respondents i.e. rider and owner, respectively, of motorcycle bearing registration No. MH-20/VA-1597 on whom the liability to pay compensation of Rs. 28,08.552/- is imposed by the learned Member of Motor Accident Claims Tribunal, Aurangabad, vide judgment and award dated 29-7-2013 in M.A.C.P. No. 677/2010. First Appeal No. 835 of 2014 is filed by original

claimants for enhancing the compensation awarded by the learned Tribunal.

3. For the sake of convenience, parties shall be referred to in their original capacity.

4. Facts in nutshell giving rise to both these appeals under Section 173 of the Motor Vehicles Act, 1988 [**For short, hereinafter referred to as “MV Act”**], are thus :-

(a) Claimants alleging to be dependent legal representatives of Vasant Arak (since deceased) lodged a claim for compensation on account of his death to the tune of Rs. 32,82,796/- against respondents under Section 166 of the MV Act. It is case of claimants that claimant no.1 is widow and rest of claimants are children of deceased Vasant Arak. Respondent no.1 Sandeep Bhausahab Murtadak was riding offending motorcycle bearing registration No. MH-20/VA-1597 owned by respondent no.2 Lahamge Bhikan Bhimaji. It is case of claimants that on 8-1-2010, at about 6.00 p.m., deceased Vasant Arak was riding the motorcycle bearing registration No. MH-20/AF-2068 and was proceeding towards Aurangabad, along with Cashier as pillion rider. The accident happened before 200 feet from Warzadi Fata. According to claimants, when deceased Vasant was riding the motorcycle, one truck was coming from the opposite direction. Offending motorcycle driven by respondent no.1 Sandeep was overtaking that truck. Rider of that motorcycle could not control it while overtaking the truck and gave forceful dash to the motorcycle of deceased Vasant. It is case of claimants that respondent no.1 Sandeep was riding the

motorcycle recklessly in high speed and because of its high speed, he could not control the motorcycle and gave dash to the motorcycle on which Vasant and his Cashier were travelling. Because of this accident, Vasant sustained grievous head injury as well as injuries to other parts of his body. The pillion rider of that motorcycle also sustained injury. Ultimately Vasant succumbed to the fatal injuries on 30-1-2010.

(b) According to claimants, deceased Vasant was serving as Branch Manager in Bank of Maharashtra. They spent Rs. 2,50,000/- towards his medical treatment. He was earning salary of Rs. 32,604/- per month. According to claimants, the deceased was 55 years of age at the time of his accidental death. As such they are entitled for compensation of Rs. 32,27,796/- by applying principles laid down in Schedule II of the MV Act apart from Rs. 50,000/- towards love and affection and Rs. 5,000/- towards general expenses.

(c) By filing written statement at Exhibit 22, both respondents opposed each and every adverse averments made by claimants. However, at this juncture, it needs to be noted that the accident in question is not disputed by respondents nor death of Vasant caused due to injuries suffered in that vehicular accident is disputed. In para 3 of their written statement, respondents have alleged that deceased Vasant drove motorcycle in rash and negligent manner and he was overtaking the truck and in that attempt he was on his right side and dashed the motorcycle of respondents. It is further averred that respondent no.1 was driving the motorcycle at a very low speed and from left side. Respondents contended that as per Schedule II to the MV Act, relying on Section 163A of the said Act, maximum

compensation of Rs. 4,00,000/- can be awarded. In para 9 of their written statement, respondents have contended that deceased Vasant himself was driving the motorcycle in rash and negligent manner but false crime is registered against respondents in collusion with Police authorities. These pleadings of respondents are reproduced as it is sought to be contended that motorcycle of respondents was not proved to be involved in the accident and that the accident itself is not proved.

(d) On the basis of rival pleadings, issues were framed and parties went for trial. In support of their claim, claimants examined claimant no.1 Vaishali @ Gumphar Arak - widow. Raju Madhav Raut, pillion rider with deceased Vasant came to be examined as CW 2. Reliance is also placed on Police papers in respect of the accident by claimants. In rebuttal, respondents examined respondent no.1 Sandeep s/o. Bhausaheb Murtadak. They also adduced evidence of alleged eye witnesses namely Bhimrao s/o. Shankar Dane (RW 2) and Janakisingh s/o. Chhansing Badkane (RW 3).

5. After hearing the parties, by the impugned judgment and award, the learned Tribunal held that deceased Vasant died in an accident caused due to rash and negligent driving of the motorcycle owned by respondent no.2. It further held that respondents failed to prove that the accident occurred because of fault of deceased Vasant himself. Accordingly compensation was assessed by applying multiplier of 11 as deceased was 55 years of age. Deduction of 1/3rd amount was made considering the fact that only three claimants were dependent on deceased. Apart from loss of dependency, Rs. 10,000/- came to be awarded towards loss of consortium, Rs. 30,000/- towards love and affection and Rs. 5,000/-

were awarded towards funeral expenses of deceased Vasant.

6. Heard Shri Dhorde, the learned Senior Counsel appearing for appellants in F.A. No. 2509 of 2013. He strenuously urged that the entire story put forth by claimants is totally false and contrary to the information given to Jinsi Police Station by claimant no.1 Vaishali. In that information, she informed Police that the accident took place when deceased Vasant was going to Kannad. He further argued that one Balu Kande is named in FIR but claimants have not adduced his evidence. In submission of the learned Senior Counsel, FIR was lodged belatedly on 7-3-2010. Nothing was found on the spot which was inspected thereafter. Therefore, the accident itself is not proved by claimants much less involvement of motorcycle owned by respondent no.2 in the said accident.

7. By relying on ruling of Gujarat High Court in the case of ***Oriental Insurance Co. Ltd. Vs. Smitaben Jayendrabhai Patel & others***, reported in ***2014(6) ALL MR (Journal) 52***, Shri Dhorde, the learned Senior Counsel argued that as the accident happened on the middle of road and there was head on collision between two motorcycles, it needs to be held that deceased Vasant had contributed in happening of the accident in question. As such even if it is held that the accident in question occurred because of involvement of motorcycle of respondent no.2, then also compensation should be reduced proportionately considering contributory negligence of deceased Vasant.

8. By relying on judgment of the learned Single Judge of this Court in the case of ***Mrs. Clara Baracho Pinto Vs. Mr. Vishnu Andrade &***

another, reported in 2012(5) **ALL MR 353**, Shri Dhorde, the learned Senior Counsel argued that though salary certificate was not disputed, the learned Tribunal ought to have insisted for proof of its contents as contents were not intended to be admitted by respondents. Therefore in his submission, notional income of deceased of Rs. 13,000/- should have been taken into consideration by the learned Tribunal while assessing the compensation.

9. As against this, by going through the judgment of the learned Tribunal, Shri Dhakane, the learned Counsel appearing for claimants, vehemently argued that both the witnesses produced by respondents are got up witnesses and as such the learned Tribunal rightly disbelieved their version. He further argued that the learned Tribunal ought to have deducted only ¼th amount from the salary of deceased in order to assess loss of dependency. In his submission, delay in lodging FIR cannot be a ground to doubt version of claimants in respect of the accident in question. For substantiating this contention, he has placed reliance on judgment of the Hon'ble Apex Court in the case of **Ravi Vs. Badrinarayan & others**, reported in (2011) 4 SCC 693. By placing reliance on judgments of the Hon'ble Apex Court in the case of **Jiju Kuruvila & others Vs. Kunjujamma Mohan & others**, reported in (2013) 9 SCC 166 and in the case of **Rajesh and others Vs. Rajbir Singh and others**, reported in (2013) 9 SCC 54, Shri Dhakane, the learned Counsel further argued that award for loss of consortium, loss of love and affection as well as funeral expenses needs to be modified by awarding Rs. 1,00,000/- towards loss of consortium, Rs. 1,00,000/- each to children for loss of love and affection and Rs. 25,000/- towards funeral expenses.

10. I have carefully perused record and proceedings including oral as well as documentary evidence adduced by the parties. In the case in hand, claimants have come up with the contention that the accident in question happened because of sole negligence of respondent no.1 Sandeep Murtadak in riding the motorcycle and dashing it against the motorcycle on which deceased Vasant was travelling. As against this, according to respondents, the accident happened because of sole negligence of Vasant in riding the motorcycle. As the FIR of this accident which took place on 8-1-2010 came to be lodged on 7-3-2010 by Raju Madhavrao Raut, in the spot Panchanama recorded thereafter, nothing was found on the spot in order to test the veracity of oral evidence by comparing the same with the situation prevalent on the spot of occurrence at the time of the accident. As such this Court will have to assess and weigh the trustworthiness of oral evidence in respect of the happening of the accident in question coming on record by both sides. It is not possible to apply principle of *res ipsa loquitur* as by passage of time because of delay in lodging the FIR, the spot Panchanama is not giving any idea about mode and manner of happening of the accident.

11. This is a claim under Section 166 of the MV Act which is a piece of social welfare legislation and it is trait that provisions of such beneficial legislation are to be interpreted in order to advance remedy. The procedure which is contemplated for assessing compensation in respect of victims of vehicular accident is a summary procedure and strict rules of evidence and pleadings are not applicable. The documents having some probative value, genuineness of which is not disputed by the parties, can be looked into for getting preponderance of probable version. Broader

probabilities of the case sought to be made out by the victim of the vehicular accident is required to be kept in mind in order to achieve the goal of social welfare legislation.

12. Keeping in mind these principles of appreciation of evidence in claimants under the MV Act 1988, let us examine the evidence on record in order to ascertain the mode and manner in which the accident happened. It is not in dispute that CW 2 Raju Raut was the pillion rider travelling with deceased Vasant. Claimants have relied on his version about the accident in order to prove their claim in respect of rash and negligent riding of motorcycle by respondent Sandip. It is in evidence of CW 2 Raju Raut that when the motorcycle on which he was travelling came near Warzadi Fata, he saw one truck coming from the opposite direction and one motorcyclist overtaking that truck. As per his evidence, he gave signal to the rider of that motorcycle but the said motorcycle was in high speed. Witness Raju Raut further deposed that the said motorcycle coming from opposite direction gave dash to the motorcycle on which he was travelling and in this manner the fatal accident took place. In his cross examination, this witness has admitted that after the accident, persons had gathered on the spot but he was not aware about their names. This witness could not state registration number of the truck coming from the opposite direction. He was unable to tell width of the road at the spot of the accident.

13. Evidence of this witness Raju Raut shows that when he was hospitalized, he received phone call from Police but he informed to the Police that he will come to the Police Station later on. It is thus seen that

he was obviously called by the Police for lodging the FIR. From his cross examination, it is brought on record that as he was unable to walk, he could not inform about the accident to the Police.

14. At this juncture, it needs to put on record that though witness Raju Raut has categorically deposed about the mode and manner about happening of the accident pointing the guilt of rashness at respondent no.1 Sandip, his version about actual happening of the accident is not at all challenged in the cross examination. His evidence to the effect that when the motorcycle on which he was travelling came near Warzadi Fata, a truck came from the opposite direction and at that point of time, the motorcyclist was overtaking that truck, is not at all challenged in the cross examination. Similarly version of this witness that he had given signal by his hand to the rider of that motorcycle but that motorcyclist gave dash to the motorcycle on which he was travelling, is also not challenged in the cross examination. Version of witness Raju Raut that the motorcycle coming from the opposite direction was at high speed is also not challenged in the cross examination. In other words, evidence of this witness about mode and manner of happening of the accident because of dash given by the motorcycle coming from the opposite direction being unchallenged, cannot be doubted in any manner. As such testimony of this victim of the accident needs to be accepted to hold that the accident happened because of negligence of respondent no.1 Sandip in riding the motorcycle.

15. At this juncture, it needs to be mentioned here that though it was sought to be argued that two versions about the place of the accident

are there, it needs to be pointed out that as the accident itself is not disputed by respondents even in their written statement, there is no reason to dwell upon this aspect any further.

16. The delay in lodging the FIR is of also no consequence as happening of the accident because of collusion of two motorcycles - one driven by deceased Vasant and another driven by respondent no.1 Sandeep is not in dispute. That apart, evidence of CW 2 Raju Raut is cogently explaining the delay. He himself is the injured victim of the accident in question. His presence at the time of accident, as such, cannot be disputed. He was hospitalized after the accident because of injuries caused to him in the accident. In this backdrop, his version shows that instead of visiting the hospital for recording his statement for treating it as FIR, Police telephoned him and called him to the Police Station for lodging report. Material elicited from his cross examination shows that witness Raju Raut went to Police Station for lodging FIR on 7-3-2010 and he could not approach Police Station earlier because he was unable to walk. As such the delay in lodging FIR due to apathy of Police machinery is of no consequence except loss of evidence in respect of the accident which might have been found on the spot, if cognizance of this accident was immediately taken by Police authorities. For this carelessness of Police authorities, claimants cannot be blamed.

17. Prior to coming to the firm conclusion regarding mode and manner about happening of the accident, one will have to assess evidence of respondents also. Respondent no.1 Sandeep Murtadak had entered in the witness box to disclose version of respondents about the accident.

Undisputedly respondent no.2 Lahamge Bhimaji was not an eye witness to the accident. In his evidence, RW 1 Sandeep Murtadak has stated that deceased Vasant was riding motorcycle by his right side whereas he was riding motorcycle at totally left side. As per version of Sandeep, when he was riding the motorcycle in a moderate speed, truck came from the opposite direction and simultaneously motorcycle on which deceased Vasant was travelling also came from the opposite direction. Respondent no.1 Sandeep deposed that in an attempt to overtake the truck, Vasant gave dash to his motorcycle and therefore he as well as Vasant sustained injuries in the accident.

18. Respondent no.1 Sandeep as such attempted to demonstrate that the accident happened because of rash and negligent riding of deceased Vasant. He further deposed that as deceased Vasant as well as Raju Raut were influential persons, Police registered crime against him.

19. From cross examination of this witness, it is clear that though this witness was knowing about registration of offence against him and though he had appeared before the learned Judicial Magistrate (F.C.) and secured bail, this witness never intended to lodge FIR in respect of the accident in question or to inform Police about the accident. Respondent no.1 Sandeep was injured in the accident. CW 2 Raju Raut lodged report of the accident dated 8-1-2010 on 7-3-2010. By that time, there was no FIR of this accident. As such if respondent no.1 Sandeep is right in saying that he was not at fault in causing the accident and that the accident happened because of negligence of deceased Vasant, then nothing prevented respondent no.1 Sandeep in lodging report of the accident

against deceased Vasant. Even respondent no.2 Lahamge Bhimaji - owner of the motorcycle could have very well lodged report about the accident in which his motorcycle might have been damaged because of collision of two motorcycles. Up to 30-1-2010, Vasant Arak was very much alive. However, respondent no.2 Lahamge Bhimaji had also chosen not to take recourse to law in respect of this accident. Suffice to state that respondent no.1 Sandeep Murtadak was prosecuted by Police in pursuant to FIR lodged on 7-3-2010 by Raju Raut in respect of this accident. Thus conduct of both respondents shows that they intentionally avoided to report the accident to Police due to instinct of self preservation.

20. Cross examination of respondent no.1 Sandeep shows that at the time of the accident, he was not travelling alone on the motorcycle. His friend was a pillion rider on his motorcycle. If really accident had happened because of rash and negligent act on the part of the deceased, evidence of pillion rider of the motorcycle driven by respondent no.1 Sandeep would have been best evidence in order to come to the conclusion regarding mode and manner of happening of accident. His evidence could have been preferred as against interested testimony of respondent no.1 Sandeep. However, though best evidence was available with respondents, in the form of version of pillion rider of the motorcycle of respondent no.2, the said witness is not examined by respondents. This conduct of respondents also throws doubt on their version about the accident.

21. Respondents have examined Bhimrao Dane and Janaksing Badkane - alleged eye witnesses to the accident in question. RW 2 Bhimrao Dane has stated that his agricultural land is situated half

kilometer from Warzadi Fata and he had seen the accident. According to his evidence, motorcycle of deceased Vasant was going towards Aurangabad and while overtaking the truck, he gave dash to the motorcycle of respondent no.1 Sandeep. At this juncture, it needs to mention here that though this witness has witnessed the accident in question, he has not lodged report of this accident to Police. His evidence does not state that he is cited as an eye witness to the accident by Police in the criminal case. Similar is the case of RW 3 Janaksing Badkane. This witness also deposed that while overtaking the truck, deceased Vasant dashed the motorcycle of respondent no.1 Sandeep. This witness has also not stated that he is cited as an eye witness by Police in the criminal case. This witness has also not lodged report about the accident to Police. Version of this witness Janaksing shows that a month prior to coming to the court, respondent no.2 Lahamge Bhimaji met him and asked him to depose about the accident. At this juncture, it is necessary to mention that both these witnesses, namely Bhimrao Dane and Janaksing Badkane were not knowing respondent no.2 Lahamge Bhimaji. It was he who approached them a month prior to the day they entered in the witness box to depose about the accident. Witness Janaksing has categorically admitted that respondent no.2 Lahamge asked him to depose in the court. Considering this nature of evidence, particularly as both of them had never disclosed the incident to Police and as they are not cited as witness by Police in the criminal case, the learned Tribunal refused to put reliance on their version. I see no infirmity in this course taken by the learned Tribunal in disbelieving version of RW 2 Bhimrao Dane and RW 3 Janaksing Badkane. Evidence of respondent no.3 Sandeep is also disbelieved by the learned Tribunal as his testimony is interested and

though he was having ample opportunity to lodge report in respect of the accident, he failed to do so.

22. In the backdrop of discrepant evidence of respondents, unchallenged version of CW 2 Raju Raut needs to be accepted in order to hold that the accident happened because of rash and negligent riding of motorcycle bearing registration No. MH-20/VA-1597 by respondent no.1 Sandeep. Therefore finding of the learned Tribunal on this aspect which is perfectly in consonance with evidence on record needs to be upheld. In the matter of ***Smitaben Jayendrabhai Patel & others (supra)***, the parties agreed to apportion contributory negligence of the victim. Hence this ruling is not applicable to the instant case.

23. Now comes the question of determination of compensation by the learned Tribunal. Exhibit 35 is the salary slip of deceased Vasant. Evidence of his widow Vaishali as well as that of CW 2 Raju Raut shows that deceased Vasant was working as Branch Manager in Bank of Maharashtra. His salary as per undisputed salary slip was Rs. 32,604/-. It cannot be said that contents of this admitted document cannot be read in evidence. The learned Tribunal deducted statutory deduction from his salary. Rs. 1,000/- came to be deducted from salary of deceased Vasant towards income tax and Rs. 200/- towards professional tax. Age of the deceased as stated by claimants i.e. 55 years came to be accepted by the learned Tribunal. Though the learned Counsel for claimants argued that there were in all four dependents on deceased Vasant, cross examination of claimant Vaishali goes to show that her one daughter is married. Careful perusal of claim petition shows that there are no pleadings in the claim

petition that the same is filed on behalf of dependent legal representatives excluding the married daughter of deceased Vasant. Even in chief examination, claimant Vaishali has not stated that apart from claimants, the deceased is having one more married daughter. In the light of this position of pleading as well as evidence, the learned Tribunal has considered admission of Vaishali in her cross examination that her one daughter is married, in order to come to the conclusion that out of four claimants, only three are the dependents of deceased Vasant. Mr. Dhakane, the learned Counsel appearing for claimants, has attempted to show that there is one more married daughter who is not arrayed as claimant in this petition by advancing arguments to that effect. However, this argument is not in consonance with either pleading or evidence on record. As such the learned Tribunal is right in considering three dependents of the deceased while calculating the loss of dependency. Multiplier of 11 is rightly applied considering the judgment of the Hon'ble Apex Court in the case of ***Sarla Verma & others Vs. Delhi Transport Corporation & another***, reported in ***2009(5) Mh.L.J. 775***. As such assessment of compensation on account of loss of dependency is perfectly correct and needs no interference.

24. Shri Dhakane, the learned Counsel appearing for claimants, relying on judgments of Hon'ble Apex Court in the case of ***Jiju Kuruvila & others (supra)*** and in the case of ***Rajesh and others (supra)***, submitted that compensation of Rs. 1,00,000/- per children for loss of love and affection and Rs. 1,00,000/- towards loss of consortium apart from Rs. 25,000/- towards funeral expenses needs to be granted. However, no straight jacket formula can be carved out for awarding such compensation. Each case has to be adjudicated on its facts and circumstances in order to award non-

pecuniary damages to the victims of the vehicular accident. In the case in hand, deceased Vasant was 55 years of age at the time of accident. His daughters are stated to be aged about 27, 25 and 23 years old. In the wake of these facts and evidence, the learned Tribunal has awarded non-pecuniary damages to claimants. Considering the facts of this case, it cannot be said that such award is not representing just and reasonable compensation to claimants or that amount awarded on conventional heads is not reasonable.

25. In the light of foregoing discussion, both appeals are devoid of merit and therefore the order :

ORDER

First Appeal No. 2509 of 2013 and First Appeal No. 835 of 2014 are dismissed with no order as to costs.

**(A.M. BADAR)
JUDGE**

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