HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

M.A. C.M.A. Nos.839 of 2013 AND 4199 OF 2014

COMMON JUDGMENT: (Per Hon'ble Sri Justice A. Shankar Narayana)

Both the Civil Miscellaneous Appeals arise out of the award, dated 16-10-2012, in O.P. No.446 of 2010, passed by the learned Chairman, Motor Accidents Claims Tribunal - cum - V Additional Metropolitan Sessions Judge (Mahila Court), Hyderabad (for short 'Tribunal'), as such, they are being taken up for disposal by this common judgment.

2 . Former appeal is preferred by The Oriental Insurance Company Limited, respondent No.2 in the O.P., on the ground that the compensation granted by the Tribunal is excessive and arbitrary, whereas the latter appeal is preferred by the claimants, petitioners in the O.P., against the very same award requesting to enhance the compensation by granting their claim of Rs.30,00,000/- towards compensation as against Rs.25,79,996/- granted by the Tribunal.

3 . Petitioner Nos.1 to 5 in the O.P. are wife, parents and unmarried younger brothers of one N. Srinivas, who died in the accident (hereinafter referred to as 'deceased'), while respondent No.1 is owner of the lorry bearing No.KA - 02AA - 1518 that involved in the accident and respondent No.2 is its insurer.

4 . For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the O.P. before the Tribunal.

5. (a) The facts, in brief, are that on 15-07-2009, at about 6-45 A.M., when the deceased, a resident of Jeedimetla, Ranga Reddy District, was proceeding on his motorcycle bearing No.AP - 29 - BH - 1204 from Cheryal to Hyderabad, near BSNL Office, Shamirpet, on Rajiv Rahadari, lorry bearing No. KA - 02AA - 1518 belonging to respondent No.1, coming in the opposite direction from Hyderabad and proceeding towards Karimnagar District, driven at high speed in a rash and negligent manner, hit the motorcycle of the deceased resulting injuries to him. He was immediately shifted to Gandhi Hospital, Secunderabad, and from there he was shifted to Nizams Institute of Medical Sciences, Hyderabad (NIMS), for better treatment, where he succumbed to injuries while undergoing treatment at about 3-00 p.m. on the same day.

(b) The Station House Officer, Shamirpet, registered a case in Crime No.FIR No.124 of 2009 for the offence punishable under Section 304-A of the Indian Penal Code (IPC) against the driver of the lorry.

(c) Claiming that the deceased was aged 26 years at the time of accident, working as Junior Planner in Hyderabad Aeronautics Limited, Balanagar, Hyderabad, drawing a monthly salary of Rs.22,000/- and used to contribute the entire amount for the family, and on account of his death, they are deprived of his support, petitioners laid the claim for Rs.30,00,000/- under Section 166 of the Motor Vehicles Act, 1988 (for short ‘the Act’).

(d) Respondent No.1, owner of the lorry that involved in the accident, remained *ex parte* before the Tribunal.

(e) Respondent No.2, insurer of the lorry, opposed the claim by raising various pleas mainly pleading that due to rash and negligent driving of the deceased only, the accident had occurred.

6. Based on the aforesaid pleadings, the Tribunal framed three (3) relevant issues for fixing responsibility for the accident. During enquiry, petitioner No.1, wife of the deceased, examined herself as PW.1 besides examining one G. Srikanth, an eyewitness to the occurrence, as PW.2 and one S. Datta, an employee from the company in which the deceased was working, as PW.3 and exhibited Exs.A-1 to A-8 to substantiate their claim. On behalf of the respondents, no witnesses were examined except marking a copy of the insurance policy of the insured lorry as Ex.B-1 on consent.

7. On issue No.1, the Tribunal, on appraisal of evidence, both, oral and documentary, let in by the petitioners, recorded a finding that the deceased also contributed to the accident and, therefore, apportioned the negligence on the part of the driver of the lorry at 80% and on the part of the deceased at 20%, and, thus, answered the issue.

8. On issue No.2 as to determining just compensation, the Tribunal has taken the age of the deceased as 26 years, monthly income at Rs.15,687/- based on Ex.A-8 salary certificate of the deceased which is proved through the evidence of PW.3, Senior Manager of HRD Department, HAL, where the deceased was working, and considering the deceased as a permanent employee, relying on the decision of the Hon'ble Supreme Court in **Sarla Verma v. Delhi Transport Corporation**, added 50% of the monthly income i.e., Rs.7,844/- (Rs.15,687/- x 50%) towards future prospects and, thus, arrived at monthly income of the deceased at Rs.23,531/- (Rs.15,687/- + Rs.7,844/-) for the purpose of determination of compensation, and deducted 20% thereof i.e., Rs.4,706/-

(Rs.23,531/- x 20%) towards contributory negligence of the deceased.

The Tribunal has deducted 1/3rd i.e., Rs.6,275/- (Rs.18,824/- x 1/3) of the amount towards personal expenses of the deceased and the remaining 2/3rd i.e., Rs.12,549/- towards contribution of the deceased to his family and taking the age of the deceased as 26 years, applied multiplier '17' as per the table formulated in the decision referred supra, and worked out the loss of dependency at Rs.25,59,996/-. Towards conventional sums, granted a sum of Rs.10,000/- towards consortium to petitioner No.1, Rs.5,000/- towards loss of estate and Rs.5,000/- towards funeral and transport expenses, and, thus, granted a total sum of Rs.25,79,996/- towards compensation with interest at 7.5% per annum. The Tribunal opining that petitioner Nos.4 and 5 cannot be construed as dependants being younger brothers of the deceased as they are majors, dismissed their claim, and apportioned the compensation at Rs.15,79,996/- to the share of petitioner No.1 and Rs.5,00,000/- each to petitioner Nos.2 and 3.

9 . Assailing the aforesaid order, insurer of the lorry preferred the former appeal stating in the grounds of appeal that the Tribunal went wrong in fixing the contributory negligence at 20% on the part of the deceased instead of 50% as it was a head on collision. It is stated that the Tribunal, somehow, did not deduct compulsory deductions viz., income tax and others and erroneously took total salary of the deceased into consideration in passing the award placing reliance on the decision of the Hon'ble Supreme Court in **Shamawati Sharma and others v. Karam Singh and others**. It is stated that the insurer has obtained permission under Section 170 of the Act as per the orders in I.A. No.568 of 2011, dated 15-12-2011, and thereby it is competent to challenge the quantum of compensation.

10. The petitioners, in their grounds of appeal in the latter appeal, stated that the Tribunal ought to have awarded the amount claimed

towards just compensation. It is stated that the amounts awarded towards funeral expenses and consortium are very low.
It is also stated that the Tribunal has arrived at wrong conclusion in attributing contributory negligence to the deceased without any evidence. It is further stated that the Tribunal has granted low rate of interest. Thus, the petitioners sought to enhance the compensation granted by the Tribunal.

11. Now the points that arise for determination are:

1. Whether the request of the insurer that the deceased contributed to the accident to the extent of 50% as against 20% determined by the Tribunal can be acceded to?

2. Whether the contributory negligence to the extent of 20% attributed to the deceased cannot be sustained as pleaded by the petitioners?

3) Whether the compensation granted by the Tribunal is excessive and arbitrary as pleaded by the insurer?

4. Whether the petitioners are entitled to enhancement of compensation as claimed by them?

12. Heard Sri A. Ramakrishna Reddy, learned standing counsel for the insurer, and Sri K. Dhanunjayareddy, learned counsel for the petitioners, in both the appeals.

POINT Nos.1 AND 2:

13. The Tribunal has simply referred to Exs.A-1 to A-5, which are certified copies of the first information report, charge sheet, inquest panchanama, postmortem examination report and Motor Vehicle Inspector's report, respectively. Then discussing the evidence of PW.2, eyewitness to the occurrence, observed that the deceased driving the motorcycle was having ample opportunity to avert the accident having seen the opposite vehicle coming from the opposite direction and observing that, that care was not taken by the deceased, recorded a finding that it accounts for contributory negligence along with the driver of the lorry. Having observed as such in paragraph No.14, recorded thus:

> "……. Some negligence can also be attributed to the motorcyclist, who is no other than the deceased. He could not take certain precautions, having seen the vehicle coming from opposite direction, at high speed, rashly and negligently. This part of care was not taken by the deceased which act also contributed to the accident. More care is attributed to the driver of the lorry to see that the heavy vehicle is driven in slow speed in crowded place and said care is lacking in the present case. Considering the totality of the circumstances, I deem it appropriate to fix the negligence on the drive (*Sic.* driver) of the lorry to 80% and 20% on the part of the deceased."

Thus, that has been the finding recorded by the Tribunal in fixing negligence of the driver of the lorry at 80% and of the deceased at 20%. When the evidence, both, oral and documentary, let in by both sides is examined, it is to be found that Ex.A-1, first information report, would reflect the entire negligence on the part of the lorry driver and even after investigation, charge sheet was filed attributing negligence to the lorry driver alone alleging the offence punishable under Section 304-A of IPC. The recitals in Ex.A-3, inquest report and Ex.A-5, Motor

Vehicle Inspector's report would probablize negligence of the driver of the lorry alone, but nothing is attributed to the deceased in that direction. Thus, as seen from the material on record, it is clear that the insurer never pleaded contributory negligence, but intended to throw the entire negligence on the deceased in an attempt to seek exoneration from its liability. When negligence is attributed to the deceased completely contrary to what is contained in Exs.A-1, A-2, A-3 and A-5, the whole burden lies on the insurer to positively prove either entire negligence or contributory negligence. In fact, when contributory negligence is not at all pleaded, the insurer is prevented from raising such a plea at a later stage of the proceedings, either before the Tribunal or before this Court in appeal. Even otherwise, as seen from the order impugned,

it is found that the insurer has not examined any witness and has not taken any pains to file the scene of occurrence panchanama and the rough sketch of the scene of occurrence drawn by the police during the course of investigation so as to point out the spot at which the accident had occurred, total width of the road and the road portions on either side of the accident spot including the skid marks in aiding the Court to arrive at a correct conclusion besides examining the relevant witnesses. Minimum, what is required to be done by the insurer to discharge the burden resting on it, when not done, it is not open for it now to contend that the Tribunal went wrong in fixing negligence on the part of the deceased at 20% instead of 50%. The submission of the learned standing counsel for the insurer and the ground agitated on that aspect of the case is, therefore, without any merit.

14. Per contra, it is the submission of the learned counsel for the petitioners that when nothing is proved by the insurer in establishing negligence of the deceased, the Tribunal was not right in fixing the contributory negligence at 20% on the deceased, and, therefore, sought to set aside the finding recorded by the Tribunal.

There is merit in the submission of the learned counsel for the petitioners for the reason as already mentioned in the above that the crime was registered against the lorry driver alone and the charge sheet was also filed showing him as the accused. This circumstance alone is sufficient enough to substantiate the stand taken by the petitioners and to set aside the finding recorded by the Tribunal in fixing the contributory negligence of the deceased at 20%. As seen from the observations made and the finding recorded by the Tribunal, it appears that the Tribunal has just carried away by the doctrine called 'doctrine of last opportunity', which cannot be applied in this case. Thus, the said finding is appears to be based on assumption, which cannot stand, as such, the same is set aside holding that the lorry driver alone is responsible for the accident. Hence, we hold, only due to the rash and negligent driving of the lorry driver, the accident has occurred.

15. Thus, point Nos.1 and 2 are answered in favour of the petitioners and against the insurer.

<u>POINT Nos.3 AND 4</u>:

16. Now turning to the determination of compensation by the Tribunal, during the course of arguments, learned standing counsel for the insurer submitted a copy of Ex.A-8, which is pay slip for the month of March, 2009. The accident took place on 15-07-2009.
But copy of Ex.A-8 would show total earnings of the deceased at Rs.17,276/- per month, deductions at Rs.4,596/- and net pay at Rs.12,680/-. But, basing on Ex.A-8, the Tribunal has recorded that the evidence of PW.3 and Ex.A-8 contents would show that the deceased was getting monthly income of Rs.15,687/-. However, taking monthly income of the deceased at Rs.15,687/- as found by the Tribunal, the statutory deductions, as can be seen from the pay slip supplied by the insurer, an amount of Rs.100/- can be deducted towards professional tax. The other deductions relate to provident

fund, G.S.L.I., Union, V.P.F. and D.R.F. at Rs.1,260/-, Rs.50/-, Rs.5/-, Rs.3,151/- and Rs.30/-, respectively. Since the other deductions cannot be construed as statutory deductions as they are repayable by the employer, we would like to deduct only Rs.100/- towards professional tax, which is not repayable by the employer, from Rs.15,687/-, it comes to Rs.15,587/- (Rs.15,687/- - Rs.100/-) per month, and, thus, arrive the annual income at Rs.1,87,044/- (Rs.15,587/- x 12). Since the Tribunal has deducted 1/3rd therefrom towards personal expenses of the deceased and rejected the claim of claimant Nos.4 and 5 being the major elder brothers of the deceased and their father is alive, who is also one of the petitioners herein, we affirm the same and when 1/3rd, which works out to Rs.62,348/-, is deducted towards personal expenses of the deceased, the balance works out to Rs.1,24,696/- towards contribution of the deceased to his family. The age of the deceased taken by the Tribunal at 26 years is not in dispute and, in fact, the evidence of PW.3 would show that date of birth of the deceased was 06-06-1983, and therefore, the multiplier chosen by the Tribunal basing on the decision of the Hon'ble Apex Court in **Sarla Verma's Case** (Supra 1) cannot be faulted. When multiplier '17' is applied to the multiplicand of Rs.1,24,696/-, the loss of dependency works out to Rs.21,19,832/-. The deceased was working in HAL, a public sector undertaking company, and he was permanent employee, which was not controverted to in the cross-examination of witnesses by the insurer**,** the petitioners are entitled to 50% of the annual dependency towards future prospects as per the law laid down by the Hon'ble Apex Court in **Sarla Verma's Case** (Supra 1) and **Rajesh and others v. Rajbir Singh and others**, which works out to Rs.10,59,916/-. Thus, the petitioners would become entitled to Rs.31,79,748/- towards loss of dependency.

17. One of the submissions of the learned standing counsel for the insurer is that no amount is deducted towards payment of income tax and, therefore, sought to rely on the decision of the Hon'ble Apex Court in **Shamawati Sharma's Case** (Supra 2), wherein the Apex

Court confirmed deduction of 30% towards income tax and surcharge made by the High Court and thereby sought to apply 30% deduction from the annual income of the deceased towards income tax.
We would like to observe that the accident therein had taken place on 25-12-1990 and the deceased was, even during those days, drawing a monthly salary of Rs.13,794/-. The accident in the instant case had taken place in July, 2009, during which year, the deceased was drawing a salary of Rs.15,687/- only. Therefore, in our view, the decision relied on by the learned standing counsel for the insurer in **Shamawati Sharma's Case** (Supra 2) is inapplicable.

18. The learned standing counsel for the insurer has also placed reliance on a decision of the Hon'ble Apex Court in **Yerramma and others v. G. Krishnamurthy and another,** wherein 10% of the income was deducted towards income tax from the monthly salary of the deceased, who was 53 years old on the date of accident. The facts in that decision would reveal that the accident had taken place on
20-05-2011 and he was drawing a salary of Rs.26,000/- per month. During the course of arguments, we required the learned counsel for the insurer to submit the tax computation for the Assessment Year 2010-11 corresponding to Financial Year 2009-10 and the learned counsel has submitted an extract from "Direct Taxes Ready Reckoner," which shows that for the relevant Assessment Year
2010-11 corresponding to Financial Year 2009-10, the standard deduction was Rs.1,60,000/-, which is not taxable that being the initial amount. In the instant case, we arrived the annual income of the deceased at Rs.1,87,044/- and when the standard deduction of Rs.1,60,000/- is applied, the balance of Rs.27,044/- would be taxable income provided there were no contributions towards savings that are exempted under Section 80C and 80CCC of the Income Tax Act, 1961. In the instant case as observed in the above, the deductions falling under Sections 80C and 80CCC would be more than Rs.50,000/-, which are exempted. Thus, the deceased cannot be

construed as an income tax assessee and, therefore, no amount can be deducted towards payment of income tax. We, therefore, reject the stand of the learned standing counsel for the insurer.

19. Now, turning to the conventional sum, learned counsel for the petitioner sought enhancement contending that the Tribunal has awarded only meager amounts of Rs.10,000/- towards consortium, Rs.5,000/- towards loss of estate and Rs.5,000/- towards funeral and transport expenses. Learned counsel, in fact, sought to enhance the amounts to Rs.1,00,000/-, Rs.50,000/- and Rs.50,000/- respectively, but we are not inclined to accept that submission. However, placing reliance on the decision of a Full Bench of the Hon'ble Apex Court in **Ramilaben Chinubhai Parmar and others v. National Insurance Company and others**, a total sum of Rs.50,000/- is awarded towards conventional sum as against Rs.20,000/- granted by the Tribunal. Thus, the petitioners are entitled to a total sum of Rs.32,29,748/-.

20. Now, the further question that arises for consideration is whether the petitioners are entitled to the compensation arrived at which is exceeds the claim made by them. Admittedly, the claim has been for Rs.30,00,000/-. The compensation arrived at by us would exceed by Rs.2,29,748/-. Since the petitioners filed separate appeal for enhancement of compensation and in the direction of determination of just and reasonable compensation, we arrived at Rs.32,29,748/-, the same can be awarded to the petitioners in view of the decisions of the Hon'ble Apex Court in **Nagappa v. Gurudayal Singh & others, Sri Laxman @ Laxman Mourya v. Divisional Manager, Oriental Insurance Company Limited** and **Rajesh's Case** (Supra 3) and, thus, there is no prohibition to grant just and reasonable compensation arrived at which is more than the amount claimed.

21. Out of the total compensation, claimant No.1, who is wife of

the deceased, is entitled to Rs.20,29,748/- with costs as directed by the Tribunal and claimant Nos.2 and 3 are entitled to Rs.6,00,000/- each. We would like to observe that dismissal of claims of claimant Nos.4 and 5, who are unmarried major younger brothers of the deceased, cannot be upset, and, therefore, we confirm the same.

22. Thus, the petitioners are entitled to a total compensation of Rs.32,29,748/- (Rupees thirty two lakhs twenty nine thousand and seven hundred and forty eight only) as against Rs.25,79,996/- awarded by the Tribunal, and the same is accordingly awarded, with interest at 7.5% per annum affirming the rate of interest granted by the Tribunal, placing reliance on the decision in **Rajesh's Case** (Supra 3) on the entire compensation, from the date of petition till realisation.
The petitioners are directed to pay court fee on the excess amount granted by this Court than the amount claimed by them. Point Nos.3 and 4 are accordingly answered.

23. Accordingly, MA CMA No.4199 of 2014 preferred by the petitioners is allowed and consequently MA CMA No.839 of 2013 preferred by the insurer is dismissed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in this appeal stand disposed of.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

October 9, 2015.

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