IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1013 OF 2014

1. Shri Dnyaneshwar Adhar Chaudhari
Age 36 years, Occ. Agriculturist

2. Roshan Dnyaneshwar Chaudhari
Age 8 years, Occ. Education

3. Deepali Dnyaneshwar Chaudhari
Age 6 years, Occ. Education

Appellant Nos. 2 and 3 are minors and appellant No.1 is the father hence natural guardian.
All R/o. Bornar, Ta. And Dist. Jalgaon ...Appellants

Versus

1. Shri Aslam Ibrahim Patel
Age major, Occ. Owner and driver
R/o. Pimpalkotha,
Tal. Erandole, Dist. Jalgaon

2. The Branch Manager
The National Insurance Company Ltd.
299, Baliram Peth,
Behind Kelkar Market, Jalgaon ...Respondents

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Mr. M.M. Bhokarikar, advocate for the appellants
Mr. H.A. Patankar, advocate for respondent No.2

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CORAM : V. K. JADHAV, J.

Date of Reserving the Order : 15.06.2016

Date of pronouncing the Order: 16.08.2016

PER COURT :-

1. By consent, heard finally.

2. Being aggrieved by the judgment and award dated 7.4.2012 passed by the learned Member, Motor Accident Claims Tribunal, Jalgaon, in M.A.C.P No. 36 of 2008, the appellants-original claimants preferred this appeal to the extent of quantum.

3. Brief facts, giving rise to the present appeal, are as under:-

a) On 16.8.2007, deceased Ashabai, wife of appellant No.1 and mother of appellant Nos. 2 and 3, was travelling in an auto rickshaw bearing registration No. MH-19/AE-5788 owned and driven by respondent No.1, from Paldhi to Ringangaon. The said rickshaw was driven by respondent No.1 in high speed and he lost control over the auto rickshaw, it went beside the road and dashed against a tree. As a result of which, deceased Ashabai had received serious injuries. Immediately after the accident, deceased Ashabai was admitted to Sahyog Critical Care Center, Jalgaon where she was indoor patent in ICU from 16.8.2007 to 22.8.2007 and ultimately on 22.8.2007 she succumbed to the injuries. At the time of accident death, deceased Ashabai was pregnant and

due to the accident, foetus in her womb also died. Deceased Ashabai was agriculture labourer and was earning Rs.3000/- p.m.. The appellants had spent huge amount over her medical treatment. It is with these contentions, the appellants had filed claim petition for grant of compensation amount of accidental death of deceased Ashabai.

b. Respondent No.1 owner and driver of offending auto rickshaw contested the claim petition by filing written statement at Exh.15 thereby denying that he was driving the said rickshaw in rash and negligent manner. It was contended that at the time of accident, the said rickshaw was insured with respondent No.2 insurer and therefore, if it is found that accident had occurred due to the fault on his part, then the amount of compensation may be recovered from insurer.

c. Respondent No.2 insurer had also contested the claim petition by filing written statement contending that the accident arose due to the fault of deceased Ashabai herself and not because of rash and negligent driving of respondent No.1. Respondent No.2 insurer had denied that the contentions of the appellants that they have incurred huge amount for medical treatment of deceased Ashabai and prayed for

dismissal of claim petition.

d. After hearing the respective parties and on going the pleadings, learned Member of the Tribunal, by judgment and award dated 7.4.2012 held the respondents jointly and severally liable and directed them to pay an amount of Rs.4,82,975/- to the applicants. inclusive of an amount under no fault liability, with interest @ 7.5% p.a. from the date of application till the realization of entire amount. Learned Member held that claim petition on account of loss-death of foetus in the womb of deceased Ashabai is not maintainable.

e. Being aggrieved and dissatisfied with the judgment and award, as aforesaid, the original claimants preferred this appeal to the extent of quantum.

4. Learned counsel for the appellants submits that the Tribunal has committed error in not awarding any amount of compensation for the death of an unborn child. The concept that the foetus/unborn baby in the womb of mother, is part of body of the mother, is not correct. Learned counsel submits that considering our ancient principles of 'Dharmashastra', 'Law of Torts', 'Interpretation of Statues' in the light of 'Mimansasa' and present interpretations of the

different legislations of the different countries while interpreting the provisions as well as considering the scientific aspect, the life of the unborn is always considered separate, independent than that the life of the mother. Even while delivering the child; the mother may lose her life and the child survives. Learned Member has not considered the aspect that the life of foetus, unborn baby as a separate and independent life than mother and hence, loss or damage caused to the unborn baby created the right in favour of the father, mother etc. The Tribunal has also not granted the compensation considering the earning of deceased at the time of her death. The Tribunal has applied the multiplier 17 instead of 18 and further future prospects in the income of deceased is totally ignored. The rate of interest awarded on the amount of compensation is also at lower side. Learned counsel for the appellants submits that appeal be allowed by modifying the impugned judgment and award.

Learned counsel for the appellants, in order to substantiate his submissions, places reliance on the following judgments:-

I) ***National Insurance Company Ltd. vs. Kusuma and Anr, (Civil appeal No. 7212 of 2011) decided by the Supreme court on 23.8.2011.***

ii) S. Said-ud-din vs. Court of Welfare Commissioner Bhopal Gas Victims Tribunal and Ors, reported in (1997) 11 SCC

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iii) T.R. Manikuttan vs. M.N. Baby and Ors., reported in AIR 2009 Kerala 33

iv) Prakash and Others vs. Arun Kumar Saint and Anr, M.A.C. No. 602 of 2009 decided by Delhi High Court on 5.2.2010.

v) Santosh Bai and Anr. vs. Mohammed Anis and others, S.B. Civil Misc. Appeal No. 1182 of 2006 decided by Rajasthan High curt on 02.11.2011.

vi) The Oriental Insurance Company vs. Santhilal Patel s/o Kanji, Civil Misc. Appeal No. 2864 of 2011 decided by Andhra Pradesh High Court on 14.3.2007.

vii) Margappa Shethappa Vadar vs. Proctor and Gamble India and Another reported in 2008 (4) Bom. C. R. 820.

5. Learned counsel for the respondent-insurer submits that death of foetus in the womb cannot be termed as person within the meaning of sub section (1) of Section 165 of M.V. Act 1988. The person has to be born before he dies. Learned counsel submits that the appellants-original claimants are not entitled to claim any compensation for death of unborn child.

Learned counsel in order to substantiate his contentions places reliance on the judgment of this Court in the case of ***Margappa Shethappa Vadar vs. Proctor and Gamble India, Mumbai,***

reported in 2008 (4) Mh.L.J. 922, wherein this Court held that "death" of a foetus in womb cannot be termed as a death of a person within the meaning of sub-section (1) of Section 165 of M.V. Act. Therefore, Tribunal does not get jurisdiction to entertain such a plea, considering limited jurisdiction conferred on the Tribunal constituted under M.V. Act. Learned Member of the Tribunal has rightly considered this legal position and awarded just and reasonable compensation. There is no reason to interfere in the impugned judgment and award and the appeal is liable to be dismissed.

6. In the case of ***National Insurance Company Ltd. vs. Kusuma and Another (supra)*** relied upon by learned counsel for the appellants, a similar issue to the effect that whether the unborn foetus will still in mother's womb can be considered to be a child for the purpose of claiming compensation under Section 166 of M.V. Act, was raised before the Supreme court. However, after examination of facts situation closely as emerging from record, the Supreme Court observed that the appellant cannot be permitted to raise the aforesaid issue. The Supreme Court has however, considered the question of non pecuniary compensation to be awarded to the claimant mother on account of pains and sufferings as a result of death of unborn child. In the facts and circumstances of the said case, the Supreme Court refrained from interfering with the judgment

and order passed by the High Court enhancing the said amount of pains and sufferings to the mother on account of death of unborn child and awarded consolidated amount of Rs.1,80,000/-. The Supreme Court has considered the said appeal with regard to the quantum of compensation and not entitlement of claim for grievous injuries to a 30 weeks old child in utero resulting in the birth of a still born child. Thus, under the given circumstances, the question that was considered by the Supreme Court whether quantum of compensation determined by the High Court at lump sum amount of Rs.1,80,000/- for the loss of still born child treating it as child and towards the pains and sufferings to the respondent claimant.

7. In the case of ***T.R. Manikuttan vs. M.N. Baby and Ors., (supra)*** the Kerala High Court has held that the loss of foetus should not be taken as an injury sustained by the pregnant woman in the accident. In the first place, foetus is another life in the woman and it comes as a baby in the course of time. Though foetus grows in the body of woman, it cannot be equated to or considered to be a part of the body of the woman. In effect, the foetus consequent upon the death of the pregnant woman is actually loss of a child. It has also observed that there is no scope for considering compensation for the bodily injury of the victim who died in the road accident and therefore, it would be illogical to grant compensation treating death of the foetus

along with the woman dying in the accident treating it as another bodily injury. Compensation to be granted for the death of a pregnant woman in motor accident is for loss of two lives. It is further held that the appellant-husband is certainly entitled to claim compensation separately for loss of his child in the womb of his wife, who perished in the accident.

In this case, the provision of sub-section (1) of Section 165 of M.V. Act are not considered by Karala High Court. There is no discussion whether death of foetus in the womb can be termed as death of person within the meaning of sub-Section (1) of Section 165 of M.V. Act. Consequently, Kerala High Court has not given thought to the legal position whether the Tribunal can get jurisdiction to entertain such claim.

8. In the case of ***Prakash and others vs. Arun Kumar Saint and Another (supra),*** relied upon by the learned counsel for the appellants, wherein Delhi High Court has considered the question as to whether the unborn child in womb should be considered at par with minor child. Delhi High Court has considered the views of various High Courts and also considered relevant provisions of Hindu Succession Act, Indian Succession Act, Sections 13 and 20 of Transfer of Property Act and Sections 312 to 316 of Indian Penal

Code and also considered the position and also refers to Black's Law Dictionary with regard to the rights of unborn child and legal status of unborn person as discussed in Salmond on Jurisprudence. The Delhi High Court thus allowed the appeal and awarded the compensation.

9. In similar way, the High Court of Rajasthan in the case of ***Santosh Bai and Anr vs. Mohammed Anish and Ors. (supra)*** in para 8 has made the following observations:-

> "8. To decide whether a child in the womb of the mother can be called as a person, it is pertinent to discuss different stages of birth of a child in the womb of a mother. Technically the term developing ovum is used for the first seven to ten days after conception i.e. until implantation occurs. It is called an 'embryo' from one week to the end of the second month and later it is called 'foetus'. It becomes an infant only when it is completely born. The life may enter immediately on the date of conception in the form of a small cell, which gets multiplied, but physically a mother can feel the movement of child only when the foetus is twenty weeks old i.e., five months, as the cell changes its structures and texture to become an eye, legs, bones, blood, head etc. and only when the child makes movements touching the internal walls of the womb, then the actual life does take its physical form, therefore, there may be controversy as regards the exact date of life entering the foetus but there cannot be any controversy as regards the life of the unborn child if a woman is carrying seven months pregnancy, as in many instances premature delivery takes place during the seventh month of pregnancy and the child still survives. An unborn child aged five months onwards in the

mother's womb till its birth can be treated as equal to a child in existence.

The unborn child to whom the live birth never comes can be held to be a 'person' who can be the subject of an action for damages for his death. As already stated above a person means a human being regarded as an individual and an individual's body : concealed on his person'. Therefore, human foetus to whom person hood could be attributed was also destroyed in the accident in the instant case; had the accident not occurred the unborn child would have survived and seen the light of the day.

An unborn child in the womb of a mother, if it is in the pregnancy of five months duration, it can safely be accepted to be a child who is yet to take birth and he can therefore be regarded as a human foetus who can be regarded as individual and if that foetus meets an end due to an accident involving a motor vehicle before it is actually born to live, a claim petition for grant of compensation can certain be maintained by mother or father or both, because, if the accident had not taken place, it would have certainly seen the light of day as a human being and different part of the family."

10. The Andhra Pradesh High Court in the case of ***The Oriental Insurance Company vs. Santhilal Patel s/o Kanji (supra)*** decided on 14.3.2007, in para 8 of the judgment has made the following observations:-

"8. To decide whether a child in the womb of the mother can be called as a person, it is pertinent to discuss different stages of birth of a child in the womb of a mother. Technically the term developing ovum is used for the first seven to ten days after conception i.e. until implantation occurs. It is called an 'embryo' from one week to the end

of the second month and later it is called 'foetus'. It becomes an infant only when it is completely born. The life may enter immediately on the date of conception in the form of a small cell, which gets multiplied, but physically a mother can feel the movement of child only when the foetus is twenty weeks old i.e., five months, as the cell changes its structures and texture to become an eye, legs, bones, blood, head etc. and only when the child makes movements touching the internal walls of the womb, then the actual life does take its physical form, therefore, there may be controversy as regards the exact date of life entering the foetus but there cannot be any controversy as regards the life of the unborn child if a woman is carrying seven months pregnancy, as in many instances premature delivery takes place during the seventh month of pregnancy and the child still survives.

An unborn child aged five months onwards in the mother's womb till its birth can be treated as equal to a child in existence.

The unborn child to whom the live birth never comes can be held to be a 'person' who can be the subject of an action for damages for his death. As already stated above a person means a human being regarded as an individual and an individual's body : concealed on his person'. Therefore, human foetus to whom person hood could be attributed was also destroyed in the accident in the instant case; had the accident not occurred the unborn child would have survived and seen the light of the day."

11. In the case of ***Margappa Shethappa Vadar vs. Proctor and Gamble India & Anr (supra)*** this Court in paras 7 to 12 has made the following observations:-

"7. I have given careful consideration to the submissions made by the learned Counsel appearing for the parties. It must be noted here

that I am dealing with the controversy relating to the maintainability of the claim petition filed by the appellant under the said Act. It must be clarified that I am not dealing with any other right or remedy which may be available in law to the appellant. It will be necessary to refer to section 165 of the said Act of 1988. Sub-section (1) of section 165 and explanation to the said sub-section read thus:

165. Claims Tribunals (1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereinafter in this chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

Explanation - For the removal of doubts, it is hereby declared that the expression claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles includes claims for compensation under section 140 (and section 163-A).

Thus, a Tribunal is created for adjudicating upon the claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of use of motor vehicles, or damages to any property of a third party so arising or both. A Tribunal established under section 165 of the said Act of 1988 can adjudicate upon the aforesaid claims and this is the limited jurisdiction conferred upon the Tribunal. Section 166 provides that an application for compensation arising out of an accident in the nature specified in sub-section (1) of section 165 may be made by any of the legal representatives of the deceased where a death has resulted from an accident involving use of a motor vehicle.

8. A claim for compensation is maintainable at the instance of legal representatives of a deceased person where the death of the person is as a result of an accident involving use of a motor vehicle or motor vehicles. The emphasis of sub-section (1) of section 165 is on the death of or bodily injury to persons. In the present case, the compensation is claimed on account of death of a foetus in the womb of the mother. Therefore, question which arises is, whether the foetus or a child in the womb is a person. The word person is not defined under the said Act. A contention is sought to be raised that a foetus in the womb also has a life. A foetus has a heart. A foetus can move his limbs and it is said that a foetus can react to the surroundings.

9. When the statute refers to a person, the reference is to a human being which exists in the world. It is true that a foetus may have a life or may have signs of life. However, a foetus or a child in womb becomes a human being or a person only after he or she is born.

10. Under Hindu Law, in certain contingencies, there can be a right vesting in an unborn person in the womb. But the right becomes available only after the person is born and comes into existence in the world. Reliance was sought to be placed on the provisions of Indian Penal Code. Merely because there are certain offences in the said Code relating to foetus in the womb, the Code has not given the status of a person to the foetus in the womb as is clear from the definition under the said Code.

11. Before a human being can be termed as a person, he has to be born. In the present case, we are not dealing with a human being who is born into this world. Therefore, the death of a foetus in the womb cannot be termed as a death of a person within the meaning of sub-section (1) of section 165 of the said Act of 1988. Therefore, the Tribunal does not get jurisdiction to entertain such a claim.

12. There is another difficulty in the way of the appellant. Under

> section 166, in case of a death of a person resulting from an accident arising out of a use of motor vehicle, the claim can be made only by legal representatives of the deceased or an agent duly authorized by the legal representatives of the deceased. There is no concept such as legal representatives of a foetus or child dying in the womb. There can be legal representatives of a deceased person. A person has to be born before he dies. Here we are concerned with a child which was never born."

12. The other High Courts, in the cases as referred above, have not considered the provisions of Section 165 of M.V. Act, most particularly, sub-section (1) of Section 165 and explanation to the said provision. In para 10 of the judgment, this court has observed that under Hindu Law, in certain contingencies, there can be a right vesting in an unborn person in the womb. But the right becomes available only after the person is born and comes into existence. This Court has therefore, held that death of a foetus in the womb cannot be termed as a death of a person within the meaning of sub-section (1) of section 165 of the said Act of 1988 and therefore, the Tribunal does not get jurisdiction to entertain such a claim. The observations made by this Court are more logical and acceptable compared to the observations made and the views expressed by other High Courts.

13. Learned counsel has referred to the provisions of Northern

Territory Consolidated Act, Unborn Victims of Violence Act of 2004 in the United States of America. However, it appears from the said texts that there are separate provisions with regard to unborn child and unborn victims of Violence Act. In the light of said provisions, the claim of wrongful death of still born foetus is recognized and accordingly dealt with. Since we do not have similar provision to deal with the question of wrongful death of still born foetus the compensation cannot be awarded in respect of death of unborn child. The learned Member of the Tribunal has therefore rightly rejected the claim to that extent and awarded compensation under different heads excluding the said claim. I do not find fault in it.

14. So far as the submission to consider the future prospectus of deceased Ashabai is concerned, she was doing labour work and earning Rs.3000/- p.m. Learned Member of the Tribunal has therefore, rightly considered her income of Rs.3000/- p.m. for assessing the compensation by deducting 1/3rd towards her personal and living expenses. There is no material placed on record to consider the future prospects of deceased Ashabai. The learned Member of the Tribunal has rightly applied the multiplier 17 in view of law laid down by Apex Court in the case of **Sarla Verma and others vs. Delhi Transport Corporation and another, reported in (2009) 6 SCC 121**. The compensation awarded under the head of 'loss of

future income' is correct and no interference is required in it. The learned Member of the Tribunal has however awarded meager amount under the non pecuniary heads, such as, loss of consortium, funeral expenses and loss of estate. The learned Member has not awarded any compensation to appellant Nos. 2 and 3 (minor claimants) for loss of love and affection of their mother. In view of the above, recalculation of compensation awarded by the Tribunal is required to be done. The learned Member has awarded interest on compensation amount @ 7.5%, however, the Tribunal ought to have awarded interest @ 9% p.a. from the date of application till realization of entire amount.

15. In view of the above discussion, the break up of compensation which can be broadly categorized as under:-

I)	Loss of dependency/income (as awarded by the Tribunal)	Rs. 4,08,000.00
II)	Loss of consortium	Rs. 50,000.00
III)	Funeral Expenses	Rs. 10,000.00
IV)	Loss of Estate	Rs. 10,000.00
V)	Loss of love and affection Rs. 10,000/- each for minor claimant Nos. 2 and 3.	Rs. 20,000.00
VI)	Medical expenses (as awarded by the Tribunal)	Rs. 54,975.00
		Total Rs. 5,52,975.00

16. Thus the appellants-claimants are entitled for Rs.5,52,975.00 (Rupees five lacs fifty two thousand nine hundred and seventy five only). Hence, I proceed to pass the following order:-

O R D E R

I. The appeal is hereby partly allowed.

II. The judgment and award dated 07.04.2012 passed by the learned Member, M.A.C.T. Jalgaon in M.A.C. P. No. 36 of 2008 is hereby modified to the following effect:-

"The respondents do pay, jointly and severally, the compensation of Rs.5,52,975.00 (Rupees Five lacs fifty two thousand nine hundred seventy five only) to the claimants inclusive of amount awarded to them under the principles of 'no fault liability' with interest @ 9% p.a. from the date of application till realization of entire amount.

III. The rest of the judgment and award passed by the learned Member, M.A.C.T. Jalgaon stands confirmed.

IV. The award be prepared in tune with the modification, as aforesaid.

V. The appellants to pay deficit court fees within a period of four weeks from today.

VI. The appeal is disposed of accordingly.

(V. K. JADHAV, J.)

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