IN THE HIGH COURT OF JUDICATURE OF BOMBAY BENCH AT AURANGABAD

FIRST APPEAL NO.141 OF 2015

1. Smt Jyoti w/o Subhash Waghmare,
   Age: 26 years, Occu: Household,
   R/o: Village Malkapur,
   Tq. Bhokardan, Dist. Jalna.

2. Ku.Tripti d/o Subhash Waghmare,
   Age: 3 years, Minor under guardianship
   of Claimant No.1.

3. Kashinath S/o. Bala Waghmare,
   Age: 52 years, Occu: Agriculture,
   R/o : Village Malkapur,
   Tal. Bhokardan,
   Dist. Jalna.

4. Sow Yeshodabai w/o Kashinath Waghmare
   Age: 50 years, Occu: Agriculture,
   R/o Village Malkapur,
   Tal. Bhokardan,
   Dist. Jalna.

5. Datta S/o Subhash Waghmare,
   Age : Minor, under guardianship of
   his real mother Claimant No.1

...APPELLANTS
(Orig. Claimants)

VERSUS

1. Sandip s/o Sureshkumar Chhutlani,
   Age: 40 years, Occu: Vehicle Owner
   R/o : 211, Krishna Nagar,
   5th Lane, Sahakar Nagar, Amravati,
   Amravati - 444 605

2. United India Insurance Company Ltd.,
'Kanchan' First Floor, Over Satish
Motors, Wadnera Road, Amravati,
Divisional Office,
Aurangabad Through its Local Office at
Jalna, Taluka and Dist. Jalna.

...**RESPONDENTS**
(Orig. Respondent)

...

Mr. M.B.Ubale, Advocate h/f Mr. L.K.Pradhan, Advocate for appellants;
Mr. A.N.Sabnis, Advocate h/f Mr. M.S. Kulkarni, Advocate for Respondent No.1;
Mr. S.R.Bagal, Advocate for Respondent No.2

...

...

CORAM: P.R.BORA, J.

***

Date of reserving the judgment: **31/3/2016**
Date of pronouncing the judgment:**3/5/2016**

***

JUDGMENT:

1. The appellants have filed the present appeal seeking enhancement in the amount of compensation awarded by the Motor Accident Claims Tribunal at Jalna in Claim Petition No.15/2011 decided on 2nd of March, 2013.

2. The appellants had filed the aforesaid claim petition seeking compensation on account of death of one Subhash Waghmare who died in a motor accident happened on 18.11.2010, having involvement of a luxury Bus bearing registration No.MH-27-AF-8711 owned by present respondent no.1 and insured with present respondent no.2. According to the appellants, the alleged accident had happened because of sole negligence on the part of the driver of the luxury Bus. The Tribunal has, however, recorded a finding that negligence on the part of deceased Subhash, who was plying the motor cycle at the relevant time, was also responsible in occurrence of the alleged accident and the proportion of negligence is held to the extent of 30 per cent on the part of the deceased. In the present appeal, it is the contention of the appellants that the Tribunal has erroneously recorded the aforesaid finding without there being any evidence.

3. It is the further contention of the appellants that the compensation of

Rs.10,84,000/- awarded by the Tribunal is inadequate. It is the contention of the appellants that the Tribunal has wrongly deducted certain amounts from the monthly salaries of the deceased while determining the amount of dependency compensation. It is the further objection of the appellants that the Tribunal has not awarded adequate compensation under the heads of loss of consortium, loss of love and affection, funeral expenses. The appellants have, therefore, prayed for enhancing the amount of compensation on the aforesaid grounds.

4. Shri Mr.M.B.Ubale, learned Counsel, h/f Mr.L.K.Pradhan, learned Counsel appearing for the appellants, submitted that the Tribunal has manifestly erred in appreciating the evidence on record while recording the findings as regards to the negligence of the deceased in occurrence of the alleged accident. Learned Counsel submitted that the incriminating finding so recorded by the Tribunal has resulted in substantially reducing the amount of compensation

payable to the appellants. Learned Counsel submitted that when the Insurance Company has raised the defense that the alleged accident had happened because of the negligence of the deceased Subhash, the burden was on the respondent Insurance Company to prove the contributory negligence of deceased Subash in occurrence of the alleged accident. Learned Counsel submitted that, admittedly, the Insurance Company has not adduced any evidence. In such circumstances, according to the learned Counsel, the Tribunal ought not have held deceased Subhash negligent in occurrence of the alleged accident. In order to support his contention, learned Counsel relied upon the judgment of the Honourable Apex Court in the case of **Meera Devi and another Vs. Himachal Pradesh Road Transport Corporation and others ((2014) 5 Mh.L.J. 1).**

5. Shri S.R.Bagal, learned Counsel appearing for respondent No.2 Insurance Company resisted the submissions made on behalf of the

appellants. Learned Counsel submitted that the initial burden was on the appellant to prove that the alleged accident happened because of the absolute negligence on the part of the driver of the luxury Bus. Learned Counsel submitted that the documentary evidence on record was sufficient to prove the negligence on the part of deceased Subhash and, as such, respondent Insurance Company was not required to adduce any more oral evidence. Learned Counsel submitted that the Tribunal has correctly analyzed the situation on the spot of the occurrence and has, accordingly, recorded the conclusion, holding deceased Subhash also negligent in occurrence of the alleged accident. Learned Counsel submitted that if the situation on the spot is considered, in fact, the Tribunal ought to have held the deceased responsible in equal proportion for occurrence of the said accident.

6. I have gone through the discussion made by the learned Tribunal on the point and I have also perused the spot panchnama. The alleged

accident had happened on the Nagar-Aurangabad road. Though it was the contention of the appellants in the claim petition that the deceased was proceeding towards Ahmednagar from Aurangabad, and while he was taking turn, so as to enter on Gulmohar Road, near Maharaja Hotel on Aurangabad-Nagar Highway, was dashed by a luxury Bus coming from his behind, in the supplementary statement recorded of Pandit Waghmare, on whose information the FIR was registered, he has stated that the luxury Bus was proceeding from Ahmednagar to Aurangabad. The informant is the real brother of deceased Subhash. His supplementary statement, as aforesaid, was recorded on 2nd of December, 2010. However, in her evidence before the Court, appellant No.1 i.e. the widow of deceased Subhash has reiterated that deceased Subhash was dashed by a luxury Bus coming from his behind. On perusal of the situation on the spot and more particularly, having regard to the sketch prepared at the time of drawing Spot Panchnama, which is part of the spot panchnama, it is revealed that deceased was proceeding towards Ahmednagar from Aurangabad whereas the luxury Bus was proceeding from Ahmednagar towards Aurangabad. The sketch further depicts that there was cut provided at the relevant spot providing entry on Gulmohar road near Hotel Maharaja on western side. Nagar-Aurangabad road is South North. Deceased Subhash was thus proceeding towards southern side and at the cut provided as aforesaid, he took a turn to enter on Gulmohar road on the western side. At that time, the luxury Bus was proceeding from South to North i.e. From Ahmednagar to Aurangabad and the accident had happened at the distance of about 5 km from the road divider on the western side. If the aforesaid situation on the spot is taken into account, there remains no doubt that in occurrence of the alleged accident, deceased Subhash also needs to be held negligent and no hundred per cent negligence can be attributed on the part of the driver of the luxury Bus. The Ahmednagar-Aurangabad Highway is a four lane road and there is a road divider in between. Thus, from every side of the road two vehicles can easily pass. While taking turn to his right side, so as to enter on the Gulmohar road on the western side, deceased Subhash was expected to be very cautious and was expected to see whether any other vehicle is coming from the side of Ahmednagar, proceeding towards Aurangabad, before crossing the said road. Similarly, the driver of the luxury Bus was also expected to be equally cautious in driving the Bus at the relevant spot where the cut was provided for the vehicles coming from the side of Aurangabad, to enter them on the Gulmohar road on the western side.

In the aforesaid circumstances, the Tribunal has rightly recorded a conclusion that in occurrence of the alleged accident, the driver of the luxury Bus as well as deceased Subhash both were responsible. It further appears to me that the Tribunal has not committed any error in determining the proportion of the negligence. Though it was sought to be contended by the learned Counsel appearing for respondent no.2 Insurance Company that the negligence of the deceased ought to be held in equal proportion with the driver of the luxury Bus, I do not find the said submission acceptable having regard to the situation on the spot which I have elaborately discussed here-in-above.

7. The second objection raised by the appellant is about the determination of the compensation on the basis of income of deceased Subhash. In order to prove the income of deceased Subhash, the appellants / claimants had examined one Shivaji Gopalrao Sampal, then working as a Clerk in Pandav Electronics, Nashik, where the deceased was stated to be serving at the relevant time. In the evidence of said Shivaji Sampal, the salary certificate of deceased Subhash was duly proved. The salary certificate is at Exh.38 in the record of the Tribunal. The Tribunal has held the net payable salary of Rs.10,490/- as a base for determining the amount of dependency compensation. The salary certificate shows that the gross salary of deceased Subhash in the

month of July, 2010, was Rs.13,490/- and after deductions, the take home salary was shown as Rs.12,169/-. According to the appellants, the compensation ought to have been determined on the gross salary of the deceased and deductions shown in the salary certificate were liable to be ignored. The submission so made is, apparently, unacceptable. The amount which was being paid to deceased Subhash towards mobile claim or towards some personal expenses was certainly not liable to be computed in the income of deceased Subhash for deciding the dependency of the appellants on the said income. The salary payable of deceased Subhash was Rs.11,300/-. It appears that the Tribunal has deducted an amount of Rs.810/- from the said amount and held the salary of the deceased to the tune of Rs.10,490/-. Rs.610/- was the contribution being made by the deceased towards provident fund and Rs.200/- was the amount deducted towards Profession Tax. The amount of Profession Tax was certainly liable to be deducted but there was no reason to deduct the

Provident Fund contribution of Rs.610/- while assessing the amount of compensation. The Tribunal should not have deducted the said amount while computing dependency compensation. Thus, from the salary of Rs.11,300/-, permissible deduction was only to the extent of Rs.200/- towards Profession Tax and the compensation was liable to be determined on the amount of Rs.11,100/-. The Tribubnal has rightly held that one third of the same was liable to be deducted towards the personal expenses of deceased Subhash. Deducting such one third amount from Rs.11,100/-, the balance amount can be said to be available with the appellant to be spent for the welfare of his dependents. The said amount comes to Rs.7400/- per month and Rs.88,800/- per annum. Learned Tribunal has applied the multiplier of 18 holding deceased Subhash to be aged about 25 years. It is further brought to my notice by the Counsel for respondent No.2 Insurance Company that the date of birth of deceased Subhash was 3.3.1983. The school leaving certificate is there on record of the Tribunal. Deceased Subhash, at the time of his death, was thus 27 years old. The appropriate multiplier would, thus, be of 17 and not 18 which has been applied by the Tribunal. By applying the multiplier of 17, the amount of compensation comes to Rs.15,09,600/-.

8. It was vehemently argued by the learned Counsel for the appellants that the Tribunal has erred in not taking into account the future prospects of deceased Subhash while determining the amount of compensation. Relying on the judgment of the Honourable Apex Court in the case of **Smt. Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr. ((2009) 6 SCC 121)**, learned Counsel for the appellants submitted that the amount of compensation be enhanced by 50 per cent taking into account the future prospects of deceased Subhash. Opposing the submission so made, learned Counsel appearing for respondent no.2 Insurance Company submitted that the appellants claimants have not brought on record any evidence as about future prospects of

deceased Subhash and, as such, the Tribunal has not committed any mistake in computing the amount of compensation on the basis of the existing income of deceased Subhash at the time of his death. Learned Counsel relied upon the Division Bench judgment in the case of **New India Assurance Co.Ltd. Vs. Smt.Alpa Rajesh Shah and others (2014 (2) Mah. L.J. 17)** to buttress his contention

The appellants have admittedly not brought on record any evidence to show the prospects of increase or enhancement in the earnings of deceased Subhash. The Division Bench of this Court, in the case of **New India Assurance Co.Ltd. Vs. Smt.Alpa Rajesh Shah and others** (cited supra), has observed that the claimants must produce satisfactory evidence to show that there were genuine prospects of increase or enhancement in the earnings of the deceased. The Division Bench has further said that the increase in the earning can be considered by the Tribunal only when there is a strong and positive evidence on record in that regard. The prayer made by the appellants claimants for re-determination of the amount of compensation, considering the future prospects of increase in the earning of deceased Subhash thus cannot be considered in absence of any such evidence brought on record by the appellants.

9. Learned Tribunal has awarded a sum of Rs.10,000/- to the appellant no.1 i.e. the widow of the deceased towards loss of consortium and Rs.10,000/- each to appellant nos. 2 and 5 i.e. the son and daughter of the deceased towards loss of love and affection. The Tribunal has also awarded Rs.8,000/- towards funeral expenses. The appellants have sought enhancement in the amount under the above heads of compensation, granted by the Tribunal. The compensation awarded towards loss of consortium apparently appears inadequate and needs to be enhanced. I enhance the same to the tune of Rs.50,000/-. Appellant nos. 3 and 4 i.e. the parents of the deceased are also entitled for award of compensation towards loss

of love and affection as has been awarded by the Tribunal to the children of the deceased. I, therefore, grant an amount of Rs.40,000/- to appellant nos. 2 and 5 towards loss of love and affection. In so far as funeral expenses are concerned, I am not inclined to cause any interference.

10. The total amount of compensation thus comes to Rs.16,07,600/- (15,09,600 + 50,000 + 40,000 + 8000) In view of the fact that the negligence on the part of the driver, owner and insurer of the offending luxury Bus is held to the extent of 70%, it is obvious that the appellants are entitled to receive the 70% of the total amount of compensation as aforesaid which comes to Rs.11,25,320/- inclusive of the amount of No Fault liability. Accordingly, I hold the appellants entitled to receive the compensation of Rs.11,25,320/- jointly or severally from respondent nos. 1 and 2. Save and except the amount of compensation as enhanced, the other part of the impugned judgment and award shall remain as it is.

Modified award be prepared accordingly.

The deficit Court fee, if any, be recovered from the claimants before preparing the modified award.

The First Appeal stands allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

AGP/141-15fa