

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

FIRST APPEAL NO. 3356 OF 2015

- 1) Bhagwat S/o. Maruti Khedkar,
Age:-53 years, Occu.: Labourer,
R/o. Ghogas Pargaon, Tq. Shirur (Kasar),
District : Beed
- 2) Meera W/o. Bhagwat Khedkar,
Age:-48 years, Occu.: Household,
R/o. As above.

**...APPELLANTS
(Orig. Claimants)**

VERSUS

- 1) Laxman S/o. Balasaheb Thorat,
Age-53 years, Occu.: Business,
R/o. Hingangaon, Tq. Haveli,
District : Pune,
(Owner of Tractor),
- 2) Gokul S/o. Bhavsingh Jadhav,
Age:38 years, Occu.:Driver,
R/o. Odhari, Tq. Chalisagaon,
District : Jalgaon,
(Driver of Tractor),
- 3) New India Assurance Co. Ltd.,
Branch Office, Jalna Road,
Beed, Tq. & Dist. Beed,
Through its Manager.

**...RESPONDENTS
(Orig. Respondents)**

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Shri. A.N. Nagargoje, Advocate for Appellants;
Shri. S.G. Chapalgaonkar, Advocate for Respondents.

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CORAM: P.R.BORA, J.

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Date of reserving the judgment: 24/11/2016

Date of pronouncing the judgment: 21/12/2016
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JUDGMENT:

1. The present Appeal is filed against the judgment and order passed by the Motor Accident Claims Tribunal, at Beed, in M.A.C.P.No.127/2012 decided on 15th September, 2015.

2. The aforesaid Claim Petition was filed by the present appellants seeking compensation in respect of death of one Ganesh Bhagwat Khedkar in a vehicular accident happened on 20th of December, 2010. It was the case of the appellants that deceased Ganesh was dashed from his behind by a tractor bearing Registration No.MH-12-TA 8511 while deceased Ganesh was walking, following the bullock cart of his father. According to the appellants, the alleged accident had happened because of negligence on the part of the driver of the offending tractor attached with the trolley. The appellants had, therefore,

claimed compensation of Rs.5,00,000/- from the owner and insurer of the said tractor.

3. The Claim Petition was resisted by the respondents and more particularly by the Insurance Company. The Insurance Company had raised a plea of contributory negligence on the part of the deceased. On other counts also the petition was contested by the Insurance Company.

4. Learned Tribunal, after having assessed the oral and documentary evidence adduced before it, held that in occurrence of the alleged accident, the deceased, vide his negligence, has contributed in equal proportion along with the driver of the offending tractor and, as such, held the appellants entitled to receive from the owner and insurer of the offending tractor half of the compensation as was determined by it. The Tribunal assessed the amount of compensation to the tune of Rs.7,23,000/- and fixed the liability on the owner and insurer of the tractor to jointly or severally pay half of the said amount i.e. Rs.3,61,500/- to the appellants with interest thereon at the rate of seven

and half per cent per annum from the date of application till realization. Aggrieved thereby, the appellants i.e. the original claimants had preferred the present appeal.

5. Shri A.N. Nagargoje, learned Counsel appearing for the appellants, assailed the impugned judgment on three counts. Learned counsel submitted that the Tribunal has grossly erred in holding that the negligence on the part of deceased Ganesh was the contributing factor for occurrence of the alleged accident and the proportion of the negligence on the part of the deceased was equal as of the driver of the offending tractor. Learned Counsel submitted that the evidence on record clearly shows that deceased Ganesh was walking, following the bullock cart of his father and was dashed from his behind by the offending tractor. Learned Counsel submitted that the accident had happened at the extreme left side of the road and, as such, no blame could have been attributed on the part of the deceased in occurrence of the alleged accident. Learned Counsel submitted that though no evidence was adduced on behalf of the respondents as about the plea raised by them of contributory negligence, on surmises

and conjectures, the Tribunal has held that the deceased contributed the happening of the alleged accident vide his negligence.

6. Learned Counsel further submitted that while determining the amount of compensation the Tribunal ought not have effected any deduction from the amount awarded by it towards the non pecuniary damages even though it had held that in occurrence of the accident there was equal negligence of the deceased.

7. Learned Counsel submitted that no such deduction is permissible from the amount awarded towards non pecuniary damages. Learned Counsel further submitted that the Tribunal has also erred in not awarding adequate compensation towards non pecuniary damages. Learned Counsel further submitted that instead of awarding interest at the rate of nine per cent which is the prevailing rate of interest, the Tribunal has erred in awarding the interest at the rate of seven and half per cent per annum. Learned counsel, therefore, prayed for setting aside the finding of the Tribunal in so far as it has held the

deceased negligent in occurrence of the alleged accident in equal proportion with that of the driver of the offending tractor and to enhance the amount of compensation accordingly.

8. Shri S.G. Chapalgaonkar, learned Counsel appearing for the respondent Insurance Company (Respondent no. 3) submitted that the Tribunal has passed a well reasoned order thereby holding the deceased also equally negligent in occurrence of the alleged accident. Learned Counsel further submitted that the Tribunal has also awarded a just and fair compensation towards non pecuniary damages and has also not committed any error in awarding interest at the rate of seven and half per cent per annum. Learned Counsel submitted that in fact the Tribunal has awarded the compensation on higher side. Learned Counsel submitted that though deceased Ganesh was bachelor, while determining the amount of compensation the Tribunal has applied the multiplier based on the age of the deceased when it ought to have been on the basis of the age of the parents of the deceased. Learned Counsel further submitted that the Tribunal has

also erred in enhancing the income of the deceased under the head of future prospects while determining the amount of dependency compensation, though the appellants claimants had not adduced any evidence therefor. In the circumstances, according to the learned Counsel, the compensation as awarded by the Tribunal needs to be decreased.

9. I have carefully considered the submissions made by the learned Counsel appearing for the respective parties. I have also perused the impugned judgment and the material placed on record. In so far as the objections in respect of compensation as awarded by the learned Tribunal towards non pecuniary damages and the rate of interest as awarded by the Tribunal are concerned, I do not see any merit in the submissions made on behalf of the appellants in that regard. According to me, the Tribunal has awarded just and fair amount of compensation towards the loss of love and affection and the funeral expenses. Further, it is within the discretion of the Tribunal as to at what rate the interest is to be awarded on the amount of compensation. It does not

appear to me that the Tribunal has erred in exercising the said jurisdiction by awarding interest at the rate of seven and half per cent per annum. In no case, it can be said that it is an arbitrary exercise of the powers by the Tribunal.

10. I, however, find substance in the contentions raised on behalf of the appellant regarding the finding recorded by the Tribunal on the point of the contributory negligence and the proportion of the negligence attributed on part of deceased Ganesh. Admittedly, none of the respondents has adduced any evidence in order to prove the contributory negligence on the part of the deceased in occurrence of the alleged accident. Perusal of the impugned judgment reveals that the Tribunal while assessing the evidence on record, more particularly the evidence in the form of Police papers i.e. the FIR and the spot panchnama, has reached to the conclusion that in occurrence of the alleged accident the negligence on the part of the deceased was a contributing factor. In paragraph nos.9, 10 and 11 of the impugned judgment, the relevant discussion is made by the learned Tribunal

which read thus:

"9. Claimant no.1 deposed in his evidence that he was driving bullock cart. The deceased was walking on the road following it. The Tractor came from behind and hit the deceased on his hand. It made the deceased to fell down and wheel of trolley went over his head causing his death instantly. In cross-examination this witness concedes that there were 5 to 6 bullock carts moving in row. There is no evidence to show the distance of other bullock carts. In this situation if the deceased was walking behind the bullock cart of his father it is not possible for the Tractor to hit him without hitting the bullock carts running behind. It appears that the deceased was moving on the road along with bullock cart of his father when the accident took place. It may be noted that Tractor pulling two loaded trolleys causes loud noise when running on the road and its presence can be noticed from a considerable distance. it is also to be considered that Tractor having two loaded trolleys may run at the maximum speed of 20 to 25 Km/hrs. It is not explained that how the deceased failed to notice the Tractor on the road and how he came into contract with it.

10. On perusal of spot panchanama I find that place of accident is shown on the road. It means the deceased was walking on the road. It may be noted that the accident took place on 15 feet wide road having 2 feet wide shoulder on each side. It a matter of common sense that road is not meant for walking. The deceased ought to have walked on the shoulder of the road if he wanted to do so. At least he should have removed himself from the

road on seeing Tractor.

11. In view of the facts and circumstances on record I hold that accident was not possible without the negligence on the part of Tractor driver as well as of the deceased. I hold both of them negligent equally. I answer issues no.1 and 2 accordingly."

11. The discussion made by the Tribunal as aforesaid and the conclusion recorded by it, if read in the background of the contents of the spot panchnama and more particularly, the map of the spot of occurrence, cannot be wholly subscribed. It is not in dispute that deceased was hit by the offending tractor from his behind. Even if it is assumed that while walking, following the bullock cart of his father, deceased Ganesh might have slightly moved on the road towards his right side, the higher responsibility was definitely on the driver of the tractor, to avoid the accident and, as such, the negligence on the part of the deceased cannot be held at par with the negligence of the driver of the tractor. After having considered the entire material on record, it appears to me that it would be just and proper to apportion the negligence on the part of the driver of the offending tractor

and the deceased Ganesh in the ratio of 75 : 25. To the aforesaid extent, the impugned award needs to be modified.

12. Though it was sought to be canvassed by the learned Counsel for the Insurance Company that the Tribunal has erred in determining the amount of dependency compensation by applying multiplier based on the age of the deceased, in absence of any appeal or Cross Objection preferred by the Insurance Company, challenging the finding recorded by the Tribunal, to the said extent, I am unable to concede to the request of the Insurance Company to re-determine the amount of compensation by applying the multiplier based on the age of the deceased.

13. I have already noted that there is no substance in the contentions raised by the appellants as about the inadequacy of the amount of compensation granted by the Tribunal towards non pecuniary damages as well as the rate at which the Tribunal has granted the amount of interest on the amount of compensation.

14. The Tribunal has assessed the amount of compensation to the tune of Rs.7,23,000/-. In view of the fact that the proportion of negligence on the part of deceased Ganesh is held by this Court to the extent of 25 per cent, the appellants are entitled to receive 75 per cent of the total compensation which comes to Rs.5,42,250/- jointly and severally from the owner and the insurer of the offending tractor. Save and except the modification in the amount of compensation as aforesaid, the other part of the award is maintained as it is. Deficit Court fee be recovered from the claimants before preparation of the modified award.

The First Appeal stands allowed in the aforesaid terms. No order as to the costs.

(P.R.BORA)
JUDGE

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AGP/3356-15fa