

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

FIRST APPEAL NO. 1354 OF 2016

MUKTABAI SHIVAJI RATHOD AND OTHERS
VERSUS
VIDHYANAND JAISING LAWAND AND OTHERS

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Advocate for Appellants : Mr A S Pavse And S.D.
Tawashikar

Advocate for Respondents : Mr R S Shinde For Resp 1&
2, Mr S R Bodade For Resp 3.

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CORAM : V.K. JADHAV, J.

Dated: March 08, 2017

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PER COURT :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the judgment and Award passed by the Member, Motor Accident Claims Tribunal, Beed dated 27.3.2015 in MACP No.51/2013, the original claimants have preferred this appeal.
3. Brief facts, giving rise to the present appeal are as under :-
 - a] On 28.11.2012 at about 9.00 p.m. deceased was riding the motorcycle and his friend Mahesh was the pillion rider. He was riding the motorcycle on Baramati-

Neera road and within the limits of village Malegaon, one jeep bearing registration No.MH-11/Y-1687 was proceeding in the same direction. The driver of the said jeep had suddenly applied brakes without giving any signal. In consequence of which, deceased could not control his motorcycle and dashed against backside of the jeep. He fell down on the road and sustained injuries. He was immediately taken to hospital at Baramati. He treated there for one month however, he succumbed to the injuries on 28.12.2012 while under treatment.

b] Legal representatives of deceased Shivaji approached to the Tribunal by filing MACP No.51/2013 for grant of compensation under various heads. It has been contended in the claim petition that accident had taken place on account of rash and negligent driving of the driver of the jeep. The claimants have incurred medical expenses to the tune of Rs.5.00 lacs. Deceased Shivaji was supplying labours to sugar factory on contract basis and he was also personally cultivating agricultural land owned and possessed by the family.

He was earning Rs.2.00 lacs from the said work of contractor ship and Rs.1.00 lacs from the agricultural source per annum. The claimants were entirely depending on his income and he was the only earning member of the family. It has been contended that deceased Shivaji become unconscious on the spot after the accident and there after he was immediately shifted to the hospital. Thus, by taking advantage of said fact, original respondent no.2 had lodged report against deceased Shivaji in collusion with the police authority and accordingly crime was registered against the deceased without any fault on his part.

c] Respondents no.1 and 2 strongly resisted the claim petition by filing written statement. It has been contended that respondent no.2 was driving the jeep on Baramati Nira road in slow speed. Ahead of his jeep one six seater vehicle and sugarcane loaded tractor and trolley were proceeding. Similarly, vehicles were also coming from the opposite direction. Thus, driver of the jeep had reduced speed of the jeep. Deceased was riding the motorcycle behind jeep in a speed and in a

rash and negligent manner. Deceased could not control his motorcycle and given dash to the backside of the jeep. It has been also contended that the accident had occurred on account of the negligence on the part of the deceased alone. It has been also contended that jeep was duly insured at the relevant time and respondent no.2 was also holding valid and effective driving licence.

d] Respondent no.3 insurer has also resisted the claim petition by filing his written statement and almost raised the similar grounds as raised by respondents no.1 and 2. In addition to that, it has been contended that, the driver of the jeep was not holding valid and effective driving licence and there has been breach of the conditions of the policy as specified.

e] The claimants have adduced oral and documentary evidence to substantiate their contentions. Respondents No.1 and 2 also adduced oral and documentary evidence.

f] The learned Member of the Tribunal by its impugned judgment and Award dated 27.3.2015

dismissed the petition. Hence, this appeal.

4. The learned counsel for the appellant original claimant submits that deceased was riding the motorcycle behind the jeep involved in the accident. Respondent no.2 driver of the jeep was driving it in a speed and in zigzag manner. There was no road divider and the vehicles were also coming from the opposite direction. The driver of the jeep was trying to overtake the vehicle proceeding ahead of his jeep and in that course the driver of the jeep had suddenly applied brakes though deceased was riding the motor cycle with moderate speed and by keeping sufficient distance. On account of the sudden application of the brakes, deceased could not control his vehicle and dashed against rear right side portion of the jeep. Learned counsel submits that the driver of the jeep alone was responsible for the accident. Learned counsel in the alternate submits that, even if, it is assumed that deceased had contributed the negligence to some extent, the evidence on record unmistakably point out that the driver of the jeep was also responsible for the accident

to some extent. The learned Member of the Tribunal, however, has not considered the same and dismissed the claim petition in toto.

5. Learned counsel for the appellant submits that, deceased Shivaji was supplying labours on contract basis to the sugar factory and he was earning Rs.2.00 lacs per annum as a commission. Besides this, he was also personally cultivating his agricultural land and getting Rs.1.00 lac per annum. Deceased Shivaji was hospitalized for a considerable period and during the treatment he succumbed to the injuries. The appellant claimants thus incurred huge medical expenses. The appellants claimants are also entitled for compensation under non-pecuniary heads such as loss of consortium, pains and sufferings, loss of love and affection etc.

6. Learned counsel for respondent insurer submits that, deceased Shivaji had not kept safe distance from jeep which was proceeding ahead of his motorcycle. Respondent no.2 driver has examined himself on oath before the Court. He was driving his jeep in a slow

speed since two other vehicles were proceeding ahead of his jeep in the same direction. Other vehicles are also coming from the opposite direction. Deceased Shivaji had driven the motorcycle in a speed and in rash and negligent manner and dashed against rear right side portion of the jeep. Thus, the driver of the jeep was not at all responsible for the accident. The learned counsel submits that, if this court is inclined to consider the negligence on the part of the driver of the jeep to some extent, a note may be taken that the deceased had contributed the negligence to the greater extent compared to the driver of the jeep. Learned counsel submits that the appellants claimants failed to prove income of the deceased from his business of supplying the labour to the sugar factory. If the deceased Shivaji was supplying the labours to the sugar factory and he would get some commission from the sugar factory, the claimants should have produced the documents to substantiate the same. Learned counsel submits that, so far as income from the agricultural source is concerned, after death of deceased Shivaji the appellants claimants are looking after the agricultural

land and they are cultivating the agricultural land, the same is also reflected from the copies of 7/12 extracts produced on record. Thus, there is no loss as such so far as agricultural income is concerned. Learned counsel submits that, the appellants-claimants have not examined any witness to prove the hospital bills and other medical expenses. The appellants are claiming an amount near about 3,50,000/- under the medical expenses without substantiating the same. Learned counsel however, vehemently submitted that the learned Member of the Tribunal has rightly considered the evidence on record and dismissed the claim petition in toto. No interference is required.

7. I have also heard the learned counsel for respondent nos. 1 and 2.

8. On careful perusal of the pleadings, oral and documentary evidence and the judgment and Award passed by the Tribunal, it appears that deceased was riding the motor cycle behind jeep at the time of accident. Both the vehicles were proceeding in the same

direction. Accident had taken place at about 09.00 p.m. on 28.11.2012. Deceased Shivaji and pillion rider both sustained the injuries in the accident and after the accident they were immediately shifted to the hospital. On the next day, respondent no.2/driver of the jeep has lodged the complaint in the police station. He has stated in his complaint exh.28 that, ahead of his jeep one six seater vehicle and a tractor attached with trolley fully loaded with sugarcane proceeding in the same direction in slow speed. Respondent no.2 driver has also deposed that the vehicles were also coming from the opposite direction and there was no road divider as such. He has also admitted in his cross examination that the vehicles proceeding ahead of his jeep were in slow speed compared to speed of the jeep. It is the usual scenario that if the vehicles like tractor and trolley loaded with sugarcane and a six seater vehicle if plying on the road in the same direction, the jeep if proceeding in the same direction, the driver of the jeep try his level best to overtake the aforesaid vehicle. Such task of overtaking the vehicles is always difficult when there is no road divider and the vehicles are also coming from

the opposite direction. In that event, it is incumbent upon the driver of the jeep to take utmost precaution, if, he fails to overtake the vehicles proceeding ahead of his jeep because of the constant flow of the vehicles coming from the opposite direction, to give signal/indicator to the vehicles following his vehicle jeep. It is true that deceased was riding the motorcycle behind of his jeep and as admitted by the pillion rider in his cross examination that, deceased Shivaji and he himself both seen the vehicle jeep proceeding in the same direction. It was thus necessary for deceased Shivaji to keep sufficient distance between his vehicle and jeep proceeding ahead of his motorcycle. Said pillion rider witness Mhasu @ Mahesh has deposed that just before the accident their motorcycle was at a distance of 25Feet from the jeep. However, by sudden application of the brakes, deceased Shivaji could not control his vehicle and dashed against rear side of the jeep. No doubt, deceased Shivaji was at fault more compared to driver of the jeep, however, in the given set of facts, the driver of the jeep had also driven the jeep in the rash and negligent manner and contributed the negligence to

some extent. That is on the backdrop that the witness Mhasu @ Mahesh has deposed before the tribunal that, tail lights of the jeep were not functioning and driver of the jeep has failed to give signal/indicators. In view of the above, in my considered opinion, the deceased Shivaji had contributed negligence to the extent of 80% whereas driver of the jeep contributed negligence to the extent of 20%. Accordingly, I answer issue nos. 1 and 2 accordingly.

9. So far as the defence of breach of the policy raised by the respondent insurer is concerned, the respondent insurer has not examined any witness to substantiate the same. Respondent no.3 insurer has failed to prove that the driver of the jeep was not holding valid and effective driving licence at the time of accident. It is well settled that, the burden is on the respondent insurer to prove the defence pertaining to the licence of the driver of the vehicle involved in the accident. Respondent no.3 insurer has failed to discharge said burden.

10. So far as the income of deceased Shivaji is

concerned, the appellants claimants have failed to prove his income from business of supplying labours to the Sugar Factory on contract basis. The appellants claimants have not placed and proved the documents to substantiate their contentions about income of deceased Shivaji from that source. Furthermore, so far as income from the agricultural source is concerned, corpus of the land remained as it is and it appears from the 7/12 extract Exh.35 to 40 that even after death of Shivaji, the appellants claimants are cultivating the land and taking crops. However, deceased Shivaji was looking after the land as deposed by the claimants and there may be some loss on account of lack of experienced and skilled supervision due to untimely death of deceased Shivaji. The same can be quantified at Rs.500/- p.m. at the most. In absence of any income proof as discussed above, the notional income of deceased Shivaji can be considered at Rs.4,500/-p.m. inclusive of future prospects. Thus, for the purpose of determination of the compensation, notional income of deceased Shivaji with loss in income from the agricultural source is considered at Rs.5,000/- p.m.

11. Claimant no.1 has deposed that deceased Shivaji was 42 years of age at the time of his accidental death. Age of the deceased Shivaji also appears in the postmortem report exh.31 as 42 years. In view of this, the relevant multiplier would be '14'. There are in all 5 claimants and as such $1/4^{\text{th}}$ of the amount from his income is liable to be deducted towards personal and living expenses of deceased Shivaji. After deducting $1/4^{\text{th}}$ amount, loss of future income/dependency comes to Rs.3,750x12= 45,000/- and after applying multiplier '14' amount of compensation comes to Rs.6,30,000/-.

12. The appellants claimants have claimed Rs.50,000/- towards loss of consortium. So far as widow claimant no.1 is concerned, the appellant claimants are entitled for an amount of Rs.1,00,000/- (Rs. One lac) for loss of consortium. Claimants no.2 and 3 being minor sons are entitled for amount of rs.25,000/- each for loss of love and affection. The claimants are also entitled for an amount of Rs.10,000/- for loss of Estate and Rs.20,000/- towards funeral expenses.

13. According to the appellants-claimants, they have incurred medical expenses to the tune of Rs.3,49,423/-. Though, learned Member of the tribunal has exhibited said bills, receipts, cash memos at exh.34, the appellants claimants have failed to examine any witness to prove hospital bills and the expenses incurred in the hospital. So far as cash memos pertaining to purchase of medicines from the medical shops are concerned, the claimants are entitled for the same. In view of the above the claimants are entitled for an amount of Rs.2.00 lacs in total towards medical expenses.

14. Thus, break up of compensation under various heads which can be broadly categorized is as follows :-

1	Loss of future income/dependency	Rs.6,30,000/-
2	Loss of consortium	Rs.1,00,000/-
3	Loss of love and affection	Rs.0,50,000/-
4	Loss of Estate	Rs.0,10,000/-
5	Funeral expenses	Rs.0,20,000/-
6	Medical expenses	Rs.2,00,000/-
	TOTAL	Rs.10,10,000/-

15. Deceased Shivaji had contributed the negligence to the extent of 80% and driver of the had jeep contributed the negligence to the extent of 20%. thus, the claimants

are entitled to the extent of 20% of the above amount i.e.2,02,000/- rounded to Rs.2,00,000/- (Rs. Two lacs). The claimants are entitled for the same. Hence, following order.

ORDER

- I. First appeal is hereby allowed.
- II. The judgment and Award passed by the Member, Motor Accident, Claims Tribunal, Beed dated 27.3.2015 in M.A.C.P. No.51/2013 is hereby quashed and set aside.
- III. MACP No.51/2013 is hereby partly allowed with proportionate costs.
- IV. Respondents No. 1 to 3 do pay jointly and severally amount of Rs.2,00,000/- (Rs. Two lacs) along with interest @ 9% p.a. from the date of application, till realization of the entire amount.
- V. Award be drawn up accordingly.
- VI. First appeal accordingly disposed of.

sd/-

(V.K. JADHAV, J.)

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aaa/-