IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1243 OF 2016
WITH
CIVIL APPLICATION NO. 3466 OF 2016

Reliance General Insurance Co. Ltd. ..Appellant
Vs
Smt. Rajeshree Sanjaykumar Kadam and ors. ..Respondents

AND
CIVIL APPLICATION NO. 487 OF 2017
IN
FIRST APPEAL NO. 1243 OF 2016

Ms Deepika Prabhala a/w. Mr. Rajesh Kanojia i/b Res Juris for the Appellant.
Mr. T.J. Mendon for the Applicants in CAF-487/17 and for Respondent FA No.1243 of 2016.

CORAM : SHANTANU S. KEMKAR &
M. S. SONAK, JJ.

Date of Reserving the Judgment : 14 July 2017.
Date of Pronouncing the Judgment : 21 July 2017.

JUDGMENT : (*PER : M. S. SONAK, J.*)

1] Heard learned counsel for the parties.

2] At their request and with their consent the appeal is admitted and taken up for final disposal. This is mainly because Ms Deepika Prabhala, learned counsel for the appellant, has submitted that she has only two contentions to raise in this appeal and Mr. Mendon, learned counsel for the respondents-claimants, has also stated that the respondents do not intend to file any cross-appeals or cross objections in the matter.

3] This appeal is directed against the award dated 30th January 2016 made by the Motor Accident Claims Tribunal (MACT), Mumbai in Motor Accident Claim Petition No. 323 of 2008. The operative portion of the impugned award reads thus:

> *“1] Motor Accident Claim Application no. 323/2008 is allowed with proportionate cost.*
> *2] The Opposite party and insurer shall jointly and severally pay to the applicants a sum of Rs. 63,48,360/- (In words Rupees Sixty – Three Lacs Forty Eight Thousand Three Hundred and Sixty Only) towards compensation amount (inclusive of NFL amount) along with interest thereon @ 7% p.a. from date of application till actual realization.*
> *3] Out of the total compensation amount, 25% be paid to the applicant no.1 widow, 30% each be paid to the applicant nos. 2 & 3, the children of deceased and remaining 15% be paid to the applicant no.4 mother of deceased along with interest accrued thereon.*
> *4] The share of minor applicant nos. 2 & 3 be invested in any Nationalised Bank of choice of applicant no.1 till they attain the age of majority, with liberty to applicant no.1 to withdraw the quarterly interest thereon.*
> *5] A/c payee cheques of above mentioned amount in the names of respective applicants be deposited in the office of the Tribunal and Account officer shall handover the same to the respective applicants on due identification and payment of deficit court fees.*
> *6] Award be drawn up after payment of deficit court fee.”*

4] The Motor Accident Claim Petition No. 323 of 2008 was instituted by and on behalf of Rajeshree (widow - aged 35 years), Charitra (son - aged 11 years), Shweta (daughter- aged 4 years) and Yashodabai (mother- aged 75 years) claiming compensation of Rs.5 crores on account of demise of Sanjaykumar Kadam (aged 42 years) on account of motor accident. On 29th November 2007, a motor Tipper (Dumper) – insured vehicle dashed Sanjaykumar from behind, whilst Sanjaykumar was driving his motorcycle, resulting in his instantaneous death on the spot.

5] Ms Deepika Prabhala, learned counsel for the appellant-Insurance Company has raised only following two grounds in support of this appeal:

a] That the MACT, erred in deducting only 40% of determined compensation amount on account of contributory negligence of Sanjaykumar, when, the evidence on record, very clearly establishes that Sanjay Kumar was not wearing a helmet while driving his motorcycle at the time of accident. She submits that the deductions should have been to the extent of 50% and not 40% ; and b] That the MACT, clearly erred in taking into consideration allowances like uniform allowance, kit allowances and diet allowances for determining Sanjaykumar's net income. She submits that such allowances were purely personal to Sanjaykumar and therefore, such amount, was required to be excluded, when determining Sanjaykumar's net salary earnings. She submits that upon such exclusion, the compensation amount is required to be reduced substantially.

6] Mr. Mendon, learned counsel for the respondent-claimants, submits that there was no case of contributory negligence made out and even the deduction to the extent of 40% as made by the MACT is excessive. He submits that even if it is assumed that Sanjaykumar was not wearing Helmet at the time of accident, that by itself, can never be regarded as contributory negligence. In any case, Mr. Mendon submits that deduction of compensation to the extent of 40% is excessive and there is absolutely no justification on the part of the appellant in insisting upon further deductions to the extent of 10%.

7] Mr. Mendon submits that the MACT, has awarded inadequate compensation. No compensation has been awarded towards loss of estate. The amount paid towards performance allowance by Sanjaykumar's employer has been unjustifiably discarded. On the aspect of diet allowance, Mr. Mendon submits that such allowance was not meant for diet of Sanjaykumar alone, the same was benefited for the entire family. Mr. Mendon submits that the respondents had examined representative of AIR India, *inter alia,* as regards salary and other allowances, which Sanjaykumar was drawing. Mr.Mendon has placed deposition of this witness on record and point out that no questions were posed to the witness on the aspect of diet allowance or for that matter other allowances which the appellant now seeks to exclude from computation. For all these reasons, Mr. Mendon submits that this appeal may be dismissed with costs.

8] We have considered the rival submissions and also perused the material on record.

9] On the aspect of contributory negligence, even if we accept that Sanjaykumar was, to some extent, negligent in not wearing a Helmet whilst driving the motorcycle, to say that his contribution to the accident was to the extent of 40% does appear to be on the higher side. The MACT, was required to take note of the circumstance that the insured vehicle, was a heavy motor vehicle, a Dumper. In a case of this nature, greater duty of care was expected from the driver of the insured vehicle. In this case, the driver of the insured vehicle has not been examined, even though, the plea of contributory negligence has been raised.

10] In ***New India Assurance Co. Ltd. vs. Smt. Sharda Devi and ors. - 2012 (4) ALJ 266,*** the Division Bench of Allahabad High Court has held that driving of a two wheeler without Helmet and driving it with three pillion riders may constitute s breach of rule, but that by itself, cannot be treated as composite or contributory negligence on the part of such driver

11] In ***Jose vs. Niyas – 2017 ACJ 170,*** the Division Bench of Kerala High Court, has also held that non wearing a Helmet by a driver of two wheeler, though, an offence under the relevant provisions of Motor Vehicle Act could be taken as a ground to fix contributory negligence on the part of the rider. In other words, the consequence pursuant to the accident is not a circumstance to be weighed for fixation of negligence in causing the accident.

12] As noted earlier, even the driver of the insured vehicle has not been examined in the present case. The responsibility of the driver of the Dumper, which is a much heavier vehicle than the motorcycle, was greater in the facts and circumstances of the present case. In facts and circumstances of the present case, contributory negligence on part of Sanjaykmar could have been computed between 30 – 35% at highest. For all these reasons, we are unable to accept the first contention of Ms. Deepika Prabhala that contributory negligence, in the present case, was required to be determined at 50%, insofar as Sanjaykumar is concerned. Accordingly, the first ground in support of the present appeal fails and is hereby rejected.

13] Insofar as the second ground is concerned, we agree with Ms Deepika Prabhala that amounts of Rs.3600/- per month towards Uniform allowances and Rs.3450/- per month towards Kit allowance were required to be excluded from the income of Sanjaykumar, in order to determine his net income. On the aspect of diet allowance, however, at least in this case, there is no material on record to hold that such allowance was entirely personal to Sanjaykumar and not intended for the benefit of his family members as well. The diet allowance, in the present case, was Rs.25,000/- per month, i.e., even more than the basic pay of Sanjaykumar.

14] Before the MACT, the appellant did not even raise any plea that diet allowance was intended or paid for the sole benefit of Sanjaykumar and not for the benefit of family members as well. On behalf of the respondents-claimants, Mr.D.K. Gramopadhye, the representative of Sanjaykumar's employer, AIR India Ltd was examined. He has deposed that the salary certificate bearing signature of N.P. Ghagre, Assistant Manager, Finance, Air India Limited, represents the true and correct position about salary emoluments and drawn by Sanjaykmar at the time of his unfortunate demise in the accident. Significantly, no questions whatsoever were posed to Mr. D.K. Gramopadhye, on the aspect of either diet allowance, or for that matter uniform allowance and kit allowance. In case any challenge, as now raised by the appellant, were to have been raised or if suitable questions were to have been posed to Mr.D.K. Gramopadhye, the position, could have been clarified. In these circumstances, we are unable to exclude the amount of Rs.25,000/- from out of income of deceased Sanjaykumar, as reflected in the salary certificate, marked as Exhibit-25-C. At the highest, deduction to the extent of Rs.5000/- can be permitted on the basis that such deduction represents the components, which deceased Sanjaykumar might have utilised for sake of his personal diet. Again, such deduction, is quite unnecessary and would result into duplication, since, from out of the net income as determined, deduction to the extent of 25% (1/4th), will have to be made towards living and personal expenses of deceased Sanjaykumar. Accordingly, there is no warrant for making any separate deduction on this ground.

15] The material on record, clearly establishes that the deceased Sanjaykumar in addition to drawing average net salary of Rs.62,000/- per month was also receiving performance linked bonus of Rs.58,627/50. From out of this amount, income of Rs.17,588/- was deductible towards tax. Thus, the net income of Sanjaykumar came to Rs.1,07,310/- per month.

16] In this case, however, the MACT, accepted the appellant's contention that performance linked bonus must not be regarded as Sanjaykumar's income for computation of compensation, since, such amount is paid subject to approval of the Board of Directors and further the same depends upon the performance of the employee and the profit made by the employer in any given year.

17] Whilst the MACT, may be right in not treating the entire amount of performance linked bonus, as a part of regular income to Sanjaykumar, we are of the opinion that at least some reasonable credence was required to be given to the circumstance that Sanjaykumar, was drawing such performance linked bonus, whilst in the employment of AIR India Ltd. The benefits of such bonus, were certainly not for Sanjaykumar alone, but the same were passed on to the family members as well. On account of the accident and the demise of Sanjaykumar, the family has certainly been deprived of such amounts. Taking into consideration the variable nature of such income, the MACT, may not have been justified in adding the entire amount to the annual income. However, the MACT, was not justified in excluding such income in its entirety and proceeding on basis that the same could never be taken into consideration for determining the annual income of Sanjaykumar.

18] In ***National Insurance Co. Ltd. vs. Indira Srivastava and ors. - (2008) 2 SCC 763,*** there is indication that bonus can be regarded as payable is a part of salary component. This decision is also an authority for exclusion of uniform allowance or kit allowance or amounts paid towards taxes. However, on basis of such decision, we are satisfied that the MACT was not right in completely excluding the bonus component whilst determining the annual income of Sanjaykumar.

19] Thus, we find that although there is substance in the contention of Ms Deepika Prabhala that the amount of Rs.7000/- per month towards uniform allowance and kit allowance was required to be excluded for purpose of determining monthly income of Sanjaykumar, we further find that such deduction is counter balanced by the following factors:

(a) As observed earlier, the deduction towards contributory negligence, in the facts and circumstances of the present case, should not have exceeded 30% to 35%;

(b) That the MACT should have given some credence to the performance linked bonus, which Sanjaykumar was drawing, whilst in service;

(c) That the MACT was required to make an award of at least Rs.1,00,000/- towards loss of estate, which, the MACT has failed to make in the impugned award;

(d) That the appellant-Insurance Company failed to deposit the awarded amount within the statutory prescribed period before the MACT. As a result, Yashodabai, Sanjaykumar's aged mother, expired, without availing any compensation;

(e) The accident in which Sanjaykumar expired took place in the year 2007. The litigation has continued for almost one decade and the respondents-claimants, which includes minor children, are yet to receive any compensation; and

(f) The interest rate of 7% awarded by the MACT, in the facts and circumstances of the present case is on a conservative basis.

20] We are of the opinion that the cumulative consideration of the factors listed at (a) to (f) above are more than sufficient to offset any reduction of compensation upon exclusion of uniform allowance and kit allowance.

21] For all the aforesaid reasons, we are satisfied that the impugned award warrants no interference.

22] However, we clarify that the compensation amount awarded to Sanjaykumar's mother, Yashodabai be apportioned equally between Rajeshere, Charitra and Shweta. Rest of the directions in the impugned award are maintained.

23] By Civil Application No. 487 of 2017, the respondents – claimants have applied for withdrawal of compensation amount deposited by the appellant – Insurance Company before the MACT. Now that this appeal is being dismissed, the said civil application is disposed of by permitting withdrawals consistent with the impugned award as now modified.

24] Civil Application No. 3466 of 2016 for stay of the impugned award, does not survive and the same is also disposed of.

25] The appeal and civil applications are disposed of, in the aforesaid terms.

26] The statutory amount for filing of the appeal deposited before this Court, is also allowed to be transferred to the Motor Accident Claims Tribunal for disbursement of the same to the respondents/claimants.

27] There shall be no order as to costs.

28] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.) **(SHANTANU S. KEMKAR, J.)**