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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 269 OF 2015
WITH
CIVIL APPLICATION NO. 2202 OF 2014

The Bajaj Allianz General Isurance Co Ltd …Appellant
Versus
Kanchan Sunil Alias Suman Sinha & Ors …Respondents

Mr Milind M Sathaye, *for the Appellant.*
Mrs Rima Kundu, *for Respondents Nos. 1 to 3.*

CORAM: G.S. PATEL, J
DATED: 13th July 2017

PC:-

1. **Admit**.

2. The amount awarded with interest has been deposited. By consent, the Appeal is taken up for hearing and final disposal forthwith.

3. The insurer is in appeal against an order dated 18th January 2012 in a fatal accident case. The application was under Section 166 of the Motor Vehicles Act 1988. The victim was one Sunil alias Suman Makeshwar Sinha. On the date of the accident, 25th July

2008, he was about 36 years old and employed with Technomax Furnaces at a salary of Rs. 7,500/- per month. He had a supplementary income of Rs. 2,500/- per month from his work as a welder and fitter. The Applicants were his 25-year-old widow, his five-year-old daughter, his two-and-a-half-year-old son and his parents, aged 58 and 50 respectively.

4. The case is this. At about 9.00 p.m. on 25th July 2008, Sunil was on his motorcycle No. MH-04-CL-893 and as he neared Pranavi Rice Mill at Kudus village, a tempo No. MH-04-CG-5958 approached in the opposite direction from Wada towards Bhiwandi. This tempo was travelling at some speed. The driver lost control. It collided with Sunil's motorcycle. He was rushed to the Rural Hospital, Wada but was declared dead on admission.

5. The claim was mounted on the footing that the driver of the tempo was negligent. The owner was the 1st Opponent. The 2nd Opponent was the insurer, the present Appellant. The claim was for compensation in the amount of Rs. 22 lakhs.

6. The owner did not appear and the claim proceeded *ex parte* against him. The insurer denied all adverse allegations. It claimed that the driver of the insured vehicle did not have a valid license but, and to cut a very long story short, this is not proved and the insurer does not seem to have taken any effective steps to establish this. The material defence is of contributory negligence. The specific allegation was that Sunil was himself negligent in the manner in which he was driving and conducting his motorcycle.

7. On an overall assessment, the MACT Thane arrived ultimately at a finding of contributory negligence but apportioned responsibility 20:80 between Sunil and the driver of the tempo. This was largely on the basis of the spot panchanama. This is referred to in paragraph 12 of the impugned order. The Tribunal noted the extensive damage to the motorcycle. It also found that the door of the tempo was damaged as were the nearside mudguard and front windshield. Importantly, it was noted that the spot panchanama disclosed that the width of the road was 24 feet. There was a metalled road or berm of about five feet in width on either side of the asphalt road. The fact that there was a head-on collision is not disputed. The MACT held that it both drivers ought to have been more careful. Then the MACT said that considering the nature of the vehicle, a greater responsibility ought to be attributed to the driver of the tempo "as he was driving big vehicle".

8. It is really this portion and little else that falls for consideration. The mere size of the vehicle cannot in each and every case be determinative or dispositive of the responsibility when there is a plea of contributory negligence. But in this case, there is material available in the spot panchanama dated 26th July 2005. this was part of the record. It clearly shows that the tempo was on the wrong side of the asphalt road. The spot panchanama confirms that there was a 24-ft wide asphalt road bordered by a five foot berm. Thus, given the width of the road and size of the peripheral kachha road, the fact that the tempo was on the wrong side of the median is sufficient evidence to support the finding of the Tribunal. I am, therefore, unable to find fault with the impugned order. This portion calls for no interference.

9. Having regard to the income, age and other factors, and after reducing 20% towards contributory negligence, the Tribunal granted an Award of Rs. 9,09,000/- including the NFL amount of Rs. 25,000/-. The only hesitation I have is in regard to the amounts granted towards loss of consortium, loss of estate and loss of love and affection, respectively Rs 10,000/-, 10,000/- and Rs. 20,000/-, and an amount of Rs. 5,000/- towards funeral expenses. This is a total of Rs. 45,000/- under these four heads. In my assessment each of these is unacceptably low. The accident occurred in 2008. The Award is of 2012. Every principle of just compensation requires, for example, that funeral expenses should have been taken at Rs. 25,000/-. As to loss of consortium, given Sunil's age and the fact that his wife was only 25 years at that time, an amount of Rs. 10,000/- seems to me too trivial and Rs. 20,000/- to the two minor children and to the parents' collectively towards loss of love and affection is unacceptably paltry. Similarly the figures of Rs. 10,000/- towards loss of estate simply cannot be sustained.

10. Mr Sathaye submits that absent a substantive Appeal by the Claimants, these amounts cannot be enhanced. I do not think that is a correct position in law. I have had occasion to deal with this issue in *United India Insurance Co Ltd v Rajani Suresh Bhore.*[1] In a very similar situation, MS Sonak J recently also invoked the inherent powers and the mandatory requirement of awarding just compensation in *The State of Maharashtra v Kamladevi Kaushal*,[2] and again in *New India Assurance Co Ltd v Seema Sudam Auti*.[3]

1 First Appeal No. 1344 of 2014 decided on 29th June 2017.

2 First Appeal No. 103 of 2017 decided on 15th March 2017.

3 First Appeal No. 1991 of 2011, decided on 9 June 2017.

Having regard to these factors, this amount of Rs. 45,000/- will need to be adjusted as follows:

- **(a)** Rs. 25,000/- towards funeral expenses, an increase of Rs. 20,000/-;
- **(b)** Rs 1 lakh towards loss of consortium, an increase of Rs. 90,000/-;
- **(c)** Rs. 50,000/- towards loss of estate, an increase of Rs. 40,000/-;
- **(d)** Rs. 1,20,000/- towards loss of love and affection for the two minor children and parents, an increase of Rs. 1 lakh.

11. The total increase is thus Rs. 2,50,000/-. amount would, therefore, come to Rs. 11,59,000/-. The decree is modified accordingly. The total compensation will thus be Rs. 11,59,000/-, rounded off to Rs.11,60,000/-.

12. The Claimants will be entitled to withdraw the amount already deposited with all accrued interest. The statutory deposit will be transferred to the MACT Thane and will be allowed to be withdrawn with accrued interest. The additional amount will be deposited by the insurance company within a period of eight weeks from today and will be allowed to be withdrawn by the original claimants immediately. All withdrawals are to be permitted on production of an authenticated copy of this order.

13. The First Appeal is disposed of in these terms. No costs.

14. The Civil Application does not survive and is disposed of as infructuous.

15. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J)