

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

FIRST APPEAL NO.394 OF 2009

1. Usha w/o Kishor Pawar
Age : 38 years, Occu : Household/Service,
R/o. Disha Garden Apartment,
Flat No.12, N-2, CIDCO, Aurangabad
2. Akash s/o Kishor Pawar
Age : 16 years, Occu : Education
R/o. As above
3. Akanksha d/o Kishor Pawar
Age : 10 years, Occu : Education

Appellant Nos.2 & 3 minors,
U/g of real mother i.e. Appellant No.1

.. Appellants
(Orig. Claimants)

Versus

1. Amirkhan s/o Usman Khan Pathan
Age : Major, Occu : Driver,
R/o. Pangarmala, Majle Chincholi
Tq. & Dist. Ahmednagar
2. Shobha w/o Raosaheb Avhad,
Age : Major, Occu : Household,
R/o. Pangarmala, Majle Chincholi,
Tq. & Dist. Ahmednagar
3. National Insurance Company Ltd
Through its Divisional Manager
At Hazari Chambers Station Road,
Aurangabad
4. Shri Vitthalrao s/o Gangadharrao Pawar
Age : 66 years, Occu : Retired Head Master,
R/o. Sanjog Nagar, House No.C-2/2/
(Bhagyanagar) Behind Dr Sanap's Hospital,
Old Jalna, Tq. & Dist Jalna.
5. Smt Chandrabhagabai w/o Vitthalrao Pawar

.. Deleted as per
order Exh.35

Age : 63 years, Occu : Household,
R/o. As above.

6. Amirkhan s/o Usman Khan Pathan
Age : Major, Occu : Driver,
R/o. Pangarmala, Majle Chincholi,
Tal & Dist Ahmednagar

..Added as per
order below Exh.38

.. Respondents
(Orig Respondents)

...

Advocate for Appellants : Shri S.G. Chapalgaonkar;
Advocate for Respondent No.3 : Shri D.V. Soman;
Respondents No.4 & 5 : Served.
Advocate for Respondent No.6 : Shri C.V. Joshi.

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CORAM : PR. BORA, J.
Dated: October 31, 2018

ORAL JUDGMENT :

1. The claimants in Motor Accident Claim Petition No.453 of 2005 decided by the Motor Accident Claims Tribunal at Aurangabad on 10.10.2008 have filed the present appeal seeking enhancement in the amount of compensation as well as challenging some of the findings recorded by the Tribunal adverse to them.

2. The claimants preferred the aforesaid claim petition claiming compensation on account of the death of Kishor Pawar alleging the same to have been caused in a vehicular accident happened on 12.03.2005 on Jalna – Aurangabad road. The appellants are hereinafter referred to as the claimants. It was the case of the claimants that, deceased Kishor Pawar when was coming to Aurangabad from Jalna on his motorcycle, the iron bars protruding

out of the truck bearing registration no.MH-15-B-757 were pierced into his body since the driver of the said truck negligently and abruptly stopped the said truck and in the accident so happened, deceased Kishor received severe injuries and ultimately succumbed to the said injuries. It was alleged by the claimants that, accident in question happened because of the absolute negligence on part of the driver of the truck. As was stated in the petition, the age of deceased Kishor on the date of accident was 41 years and at the relevant time he was serving as an Assistant Professor in Jawaharlal Nehru Engineering College at Aurangabad. His total income was claimed to be around Rs.25,000/- per month. The claimants had, therefore, claimed the compensation of Rs.25,00,000/- from the owner and insurer of the said truck.

3. Petition was resisted by the owner and insurer of the offending truck. Both had filed their separate written-statements opposing the claim petition. A plea was raised by the Insurance Company that, in occurrence of the accident the negligence on part of deceased Kishor was equally responsible. The age and income of the deceased was also disputed. A plea was also raised that, claimant Usha, the wife of deceased Kishor, was serving as a teacher and was thus not depending upon the income of deceased Kishor.

4. In order to substantiate the contentions raised in the petition, one of the claimants testified before the Tribunal and certain documents were placed on record, which were containing the certified copies of the police papers pertaining to criminal case registered in connection with the alleged accident and as about the income of deceased Kishor i.e. the letter of appointment in favour of deceased Kishor Pawar, his salary certificate, the amount of royalty received to deceased Kishor for writing books and his income from the agriculture. No evidence was adduced by the respondents.

5. The learned Tribunal, after having assessed the oral and the documentary evidence brought on record before it, held the claimants entitled for the total compensation of Rs.32,50,000/-, however, held the claimants entitled for 70% of the total amount by recording a further finding that, in occurrence of the alleged accident deceased Kishor was also found to be negligent and proportion of his negligence was quantified by the Tribunal to the extent of 30%. The learned Tribunal further reduced the amount of compensation on the ground that, wife of the deceased i.e. petitioner no.1 was in employment and was earning Rs.15,000/- per month. Ultimately, the Tribunal has awarded the total compensation of Rs.15,00,000/- to

the claimants. Dissatisfied with the amount of compensation so awarded, the claimants have preferred the present appeal.

6. Shri Chapalgaonkar, learned Counsel appearing for the claimants criticized the impugned judgment on several grounds. The first objection as was raised by the learned Counsel was in respect of the finding recorded by the Tribunal that in occurrence of the alleged accident 30% negligence was attributable on part of deceased Kishor. The learned Counsel took me through the contents of the spot panchanama, which is at Exh.52 in the record of the Tribunal. Reading out the panchanama the learned Counsel submitted that, from the plain reading of the spot panchanama, the only conclusion which emerges is that, the entire negligence in occurrence of the alleged accident was of the driver of the truck.

7. The learned Counsel pointed out that, deceased Kishor died because of the piercing of the iron rods in his body. The learned Counsel further submitted that, the averments in the spot panchanama clearly demonstrate that, the offending truck was carrying iron rods within it and the said iron rods were protruding outside the truck to the extent of about 6 to 7 feet. The learned Counsel also pointed out that, the spot panchanama also clearly

depicts that, tale lamps and the indicators of the offending truck were completely out of order. No red signal was fixed on protruding iron bars. There were also no reflectors.

8. The learned Counsel thereafter took me trough the observations made and the finding recorded by the learned Tribunal in para 10 of the impugned Judgment. Referring to the said finding, the learned Counsel submitted that, in such scenario, no negligence could have been attributed on part of deceased Kishor and the evidence on record unambiguously demonstrates that, the accident had occurred because of the absolute negligence on part of the truck driver. The learned Counsel submitted that, though in the earlier paragraphs the learned Tribunal has recorded a finding attributing the entire negligence on part of the truck driver, in the subsequent paragraphs on some wrong assumptions has attributed some negligence on part of deceased Kishor also. The learned Counsel submitted that, the observations so made by the Tribunal and the findings accordingly recorded are contrary to the evidence on record. The learned Counsel submitted that, the findings so recorded by the Tribunal, therefore, deserve to be set aside and quashed.

9. The learned Counsel thereafter submitted that, the

amount of compensation has also not been appropriately determined by the Tribunal. The learned Counsel submitted that, sufficient evidence was placed on record by the claimants evidencing the salary income of the deceased, his income from the royalty of books written by the deceased and also from the agriculture land and from the work of examiner as was being done by deceased Kishor at the Babasaheb Ambedkar Marathwada University. The learned Counsel submitted that, in fact proved income of the deceased Kishor was more than Rs.26,000/- and same must have been held as the proved income of deceased Kishor. The learned Counsel submitted that, the future prospects of deceased Kishor must have also been considered by the Tribunal while determining the amount of dependency compensation. The Tribunal has clearly lost sight of the said aspect. The learned Counsel submitted that, the Tribunal has also erred in awarding the compensation towards the non-pecuniary damages. The learned Counsel further submitted that, the most unconscionable part in the impugned Judgment is that, though the Tribunal has ultimately reached to a conclusion that the claimants are entitled to receive the compensation of

Rs.22,75,000/-, it restricted the award to the tune of Rs.15,00,000/- on the erroneous ground that claimant no.1 is serving as a teacher and earning monthly salary of Rs.15,000/-.

10. Learned Counsel for the appellants cited following two Judgments:

- (i) **Archit Saini and Another Vs. Oriental Insurance Company Limited and Others, 2018 DGLS (SC) 75**
- (ii) **National Insurance Company Limited Vs. Pranay Sethi and Others, AIR 2017 SC 5157**

Relying upon the law laid down in the aforesaid Judgments, the learned Counsel submitted that, the amount of compensation needs to be adequately enhanced and the appeal filed by the appellants deserves to be allowed.

11. Opposing the submissions made by Shri Chapalgaonkar, the learned Counsel appearing for the respondent - Insurance Company Shri Soman supported the impugned judgment and award. The learned Counsel submitted that, no mistake has been committed by the Tribunal in attributing the negligence to the extent of 30% on part of

deceased Kishor. The learned Counsel submitted that, the Tribunal has rightly observed that, deceased Kishor was also duty bound to be cautious about the condition of the road and situation. Learned Counsel submitted that, it cannot be accepted that a truck could not have been noticed by deceased Kishor. The learned Counsel further submitted that, situation on the spot of occurrence clearly demonstrates that, deceased Kishor was plying his motorcycle at a high speed and in a negligent manner and that has resulted in occurrence of the alleged accident. The learned Counsel submitted that, as has come on record, the offending truck had stopped at a check post and in the circumstances the same must have been noticed by deceased Kishor and he could have avoided the alleged accident. In the circumstances, according to the learned Counsel, no fault can be found with the conclusion recorded by the Tribunal attributing negligence on part of the deceased to the extent of 30%.

12. Insofar as the quantum of compensation is concerned, the learned Counsel submitted that, the Tribunal has awarded a just and fair compensation after having considered

the overall evidence on record. The learned Counsel submitted that, claimant no.1 is admittedly serving as a teacher and is having sufficient income of her own and in the circumstances cannot be held to be depending upon the income of her deceased husband. The learned Counsel submitted that, the compensation awarded by the Tribunal is just and fair and no interference is required in the amount of compensation so awarded by the Tribunal. The learned Counsel submitted that, on the contrary, the Tribunal has awarded some more compensation by applying the multiplier of 16, whereas it could have been of 15. The learned Counsel, therefore, submitted for dismissal of the appeal.

13. I have given due consideration to the submissions made by the learned Counsel appearing for the respective parties. First objection as has been raised by the appellants is as about the finding recorded by the Tribunal attributing negligence to the extent of 30% on part of deceased Kishor. In light of the submissions made by the learned Counsel appearing for the parties and the observations made by the learned

Tribunal in its judgment, when I perused the contents of the spot panchanama which is at Exh.52, it is apparently revealed that, the Tribunal has manifestly erred in attributing negligence to the extent of 30% on part of deceased Kishor. I deem it appropriate to reproduce the observations made by the Tribunal in para 10 of the impugned Judgment, which reads thus :

“10. Ex.52 is spot panchnama, which shows situation at the place of incident. It shows that all the wheels of the truck were on the tar road. There is a centre strip on the tar road at the place of accident. Right side driver wheels were at 3 ft. distance at its cleaner side from the centre strip. Thus, this would show that truck was stopped just near the centre strip of the road and it was not parked at extreme left side of the road. Spot panchnama further shows that iron-bars were protruding out of the truck to a distance of about 7 ft. Truck's lights and indicators were completely out of order. No red signal was fixed on protruding iron-bars. There were also no reflectors. Headlights of the motorcycle were completely smashed and motorcycle was extensively damaged. There were blood stains to about 10 to 12 iron-bars in the truck. Description in spot panchnama would clearly show that truck was not stopped at extreme left side and it was nearly in the middle of the road. Besides, no space was left to pass and red signal and reflectors or brake lights were not in order. Vehicle drivers coming from backside thus could not have noticed the vehicle. This shows negligence on the part of truck driver. Ex.53 is postmortem report which shows that deceased died due to multiple injuries sustained by the deceased. Postmortem report would show that one of the bar penetrated body of the deceased at 6th rib and then it perforated the body going through thorax causing fracture of vertebra and damage to liver, spleen and other internal organs. This would show that deceased had died instantaneously due to shock. There also seems to be fracture of 6th rib. Death of deceased is clearly due to injuries in the accident. Ex.55 is AA-Form which shows that truck No.MH-15-B-757, driven by respondent no.1 Amirkhan and owned by respondent no.2 Shobha was involved in the accident and that it was insured with respondent no.3 Insurance Company. Thus, evidence of PW1 Usha, complaint at Ex.51, spot panchnama at Ex.52 and postmortem report at Ex.53 would show date, time and place of accident, vehicles involved, fault on the part of truck driver and accidental death of deceased.”

Surprisingly in the subsequent paras, the Tribunal has recorded some contrary conclusions. On perusal of the spot panchanama,

it is revealed that, the offending truck was stopped at the short distance from the centre of the said road. More importantly, it is revealed that, the offending truck was carrying iron rods / bars in it and the said iron bars were protruding outside the truck to the extent of 6 to 7 feet. As has come on record and as has been recorded in the spot panchanama, which was carried out immediately after the accident, the indicators and parking lights of the offending truck were not on and no red signal was fixed on the protruding iron bars.

14. Admittedly, the accident had happened in the midnight. It has also amply come on record that, the iron bars were pierced into the body of deceased Kishor and ultimately the said injuries became the cause of his death. It has also come on record that, the blood was noticed on the spot itself and iron bars were also found to be stained with blood. As has been observed by the Reference Court in para 10 of its Judgment, the vehicle was parked on the spot in such a way that no vehicle coming from its rear side could have been conveniently passed from the side of the said truck. Having considered the situation as above, it can be visualized that, in absence of the parking

lights or indicators on and in absence of red signals fixed on the protruding iron bars, it was impossible to notice the said truck or the protruding iron bars by a person on a two wheeler coming from the back side of the said truck. From the discussion made by the Tribunal, it is transpired that, the Tribunal was of the opinion that if the motorcycle being run at a moderate speed, perhaps motorcyclist could have avoided the accident or at least could not have received so extensive injuries. The Tribunal, on the basis of the injuries caused to the deceased has drawn an inference that, the motorcyclist was also plying the motorcycle at a high speed. It is difficult to agree with the finding so recorded by the Tribunal. A vehicle running on a highway on Jalna - Aurangabad road if being run at the speed of 30 to 40 kms per hour cannot be said to be run in a high speed. Having considered the scenario on the spot, it can be visualized that, even if the motorcyclist following the said truck had been driving his motorcycle at the speed of 30 kms per hour even then he would have received the same serious injuries as were caused to deceased Kishor.

15. Importantly, it cannot be lost sight of that the vehicle

running on the road is under an obligation to follow the rules as are prescribed under the Motor Vehicles Act and the rules thereunder. In the memo of appeal, the appellants have referred to rules 102 to 105 of the Central Motor Vehicles Rules, 1989.

16. Rule 102 provides for Signalling devices, direction indicators and stop lights. Rule 103 requires that, a direction indicator shall be fitted and every direction indicator shall be so designed and fitted that [the driver of the vehicle including a construction equipment vehicle] when in his driving seat is aware that it is operating correctly. Rule 104 shows that, every motor vehicle including trailers and semi-trailers shall be fitted with two red reflectors, one each on both sides at their rear. Rule 105 (2)(i) provides that every motor vehicle shall also carry two lamps (hereinafter referred to as the rear lamp) showing to the rear a red light visible in the rear from a distance of one hundred and fifty-five metres; and in the case of a motor cycle one lamp showing a red light to the rear visible from a distance of seventy-five metres.

17. The appellants – claimants have also referred to Rule

236 of The Maharashtra Motor Vehicles Rules, 1989, which reads thus:

“236. Visibility of lamps and registration marks:

(1) No load or other things shall be placed at any time on any motor vehicle so as to mask or otherwise interrupt vision of any lamp, registration mark or other mark required to be carried by or exhibited on any motor vehicle by or under the provisions of the Act, unless a duplicate of the lamp or mark so masked or otherwise obscured is exhibited in the manner required by or under the Act for the exhibition of the masked or obscured lamp or mark.

(2) All registration and other marks required to be exhibited on a motor vehicle by or under the provisions of the Act shall, at all times be maintained as far as may be reasonably possible in a clear and legible condition.”

18. Considering the rules as above, there remains no doubt that, the offending truck was being run and was stopped at the spot of occurrence in complete violation of the aforesaid rules. The description in the spot panchanama clearly shows that, the truck was not stopped at the extreme left side and it was stopped nearly in the middle of the road. Besides, no space was left for passing of any vehicle either coming from the rear or from the front side; the red signal and reflectors or break lights were not in order. I reiterate that, it has also amply come on record and the spot panchanama also reflects the said position that, the iron bars loaded in the said truck were protruding out

of the truck to the distance of about 7 feet. It is really surprising that, the learned Tribunal though has taken note of all the aforesaid facts, in para 10 of its Judgment has eventually did not attribute the entire negligence on part of the truck driver and quantified it only to the extent of 70% and attributed the deceased also with the negligence to the extent of 30%. The finding so recorded by the Tribunal is apparently unsustainable and deserves to be set aside.

19. After having considered the entire evidence on record and more particularly situation on the spot, I have no hesitation in holding that, in occurrence of the alleged accident, the entire negligence has to be attributed only on part of the driver of the offending truck and no negligence can be attributed on part of deceased Kishor.

20. The next question which falls for my consideration is about the quantum of compensation as determined by the Tribunal. The learned Tribunal on the basis of the evidence brought on record as about the income of the deceased held the claimants entitled for the compensation of Rs.32,50,000/- and

in view of the finding recorded by it holding the deceased also negligent to the extent of 30% in causing the alleged accident, held respondent nos.1 to 3 jointly and severally liable to pay the compensation amounting to Rs.22,75,000/- to the claimants. However, immediately thereafter taking note of the fact that, claimant no.1 Usha i.e. widow of the deceased is earning income of Rs.15,000/- per month as salary from her permanent job and further observing that, claimant no.2 i.e. son of the deceased would also self-sufficient within the short period and claimant no.3 would also not be dependent on claimant no.1 after few years after she gets married, reduced the compensation payable to the claimants to Rs.15,00,000/-.

21. The view so taken by the learned Tribunal is apparently unconscionable. The claims under Section 166 of the Motor Vehicles Act arise out of the tortious liability of the wrong doer. Under Section 168 of the Motor Vehicles Act, the Tribunal is cast with the responsibility to assess and award the just amount of compensation. The amount of compensation has to be determined by the Tribunal on the basis of the income of the deceased, to which his legal heirs / dependents are deprived of.

Merely because widow of the deceased is also doing a job and is earning monthly salary to the tune of Rs.15,000/- cannot be a ground for reducing the amount of compensation while determining the pecuniary losses, which the dependents of the deceased are likely to suffer. The widow got the private employment after the death of her husband on her own skills and merit. Earning of the monthly salary of Rs.15,000/- by the widow is, thus, not a gain resulting from the death of her husband. It has to be understood that, had deceased not suffered the accidental death, the income of the family of the deceased would be consisting of his own income plus income of his wife. As such, the earnings of the widow cannot be taken into account in determination of the pecuniary losses caused to the legal heirs of the deceased. In determining the pecuniary loss to the legal heirs of the deceased, in my opinion, no deduction can be made on the ground of the earning capacity or the actual earning of the widow. The Tribunal has thus committed an error in deducting the amount of compensation on the ground that widow of the deceased is earning the income by way of salary to the tune of Rs.15,000/- per month.

22. It is not in dispute that, deceased was serving as an Assistant Professor in Jawaharlal Nehru Engineering College at Aurangabad. His salary certificate was produced on record at Exh.59. His net salary was Rs.17,535/-. Deducting the amount of income tax and the profession tax, his net salary income was Rs.16,200/-. The claimants had also placed on record the certificates evidencing that, the remuneration was paid to the deceased for the work of examiner to the tune of Rs.50,000/-. The claimants had also claimed that, for the books which were written by deceased Kishor on engineering subjects, royalty of Rs.15,000/- was received to him for the first edition and similar royalty was likely to be paid for the second edition. It was also the contention of the claimants that, deceased Kishor was owning 6 acres of land as a joint family property and was receiving the income therefrom to the tune of Rs.25,000/- per annum.

23. After having considered the evidence as aforesaid, it appears to me that, for determining the amount of compensation the relevant will be the salary income of the

deceased. The claimants have undoubtedly proved that, the net salary income of deceased Kishor was Rs.16,200/-. Considering that his was the permanent job, in view of the law laid down by the Hon'ble Apex Court in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others** (cited supra) his future prospectus would liable to be considered. The age of deceased Kishor was 38 years on the date of accident. 50% of his existing income will have to be, therefore added in the said income so as to determine the amount of compensation. Considering the monthly salary of deceased Kishor to the tune of Rs.16,200/-, 50% of the same i.e. Rs.8,100/- will have to be added in his said income by adding which his prospective income will be Rs.24,300/- per month i.e. Rs.2,91,600/- per annum.

24. Since the agriculture lands continued to be under cultivation and no specific evidence has been brought on record showing any loss in the agriculture income because of the death of deceased Kishor, I am not inclined to accept the contention of the claimants to hold the income of deceased

Kishor at least to the extent of Rs.25,000/- per annum as the pecuniary loss to the claimants while assessing the amount of compensation.

25. The appellants have also brought on record that, deceased Kishor used to regularly work as an examiner and used to receive the remuneration towards the same. It is also the case of the claimants that, deceased Kishor had written two books and towards the royalty thereof used to receive a sumptuous amount towards the same. It is, therefore, the case of the claimants that, deceased Kishor was receiving income more than Rs.1,00,000/- per annum towards the remuneration of examiner and on count of royalty. It was the contention of the learned Counsel for the claimants that, in the said income also, some addition needs to be made by way of future prospectus. It was proposed by the learned Counsel for the claimants that, considering the future prospectus the income of the deceased under the said head must be held around Rs.1,51,000/-.

26. I am, however, not fully convinced with the

submissions so made. It is true that, the claimants have brought on record the evidence showing that, deceased Kishor was working as examiner and used to receive the remuneration towards the same. It is also brought on record that, deceased Kishor used to receive the amount of royalty towards the books written by him. However, it has to be stated that, there is nothing on record to show that, the work of examiner was of perennial nature. It cannot be assumed that, such work would have been assigned to deceased every year in future. Similarly, insofar as the royalty amount is concerned, there is no concrete evidence showing the terms of the payment of royalty to deceased. However, the income of the deceased on the aforesaid count cannot be wholly discarded and to some extent that income also needs to be taken into account while determining the income of the deceased for assessing the pecuniary loss caused to the claimants. I quantify the income under the aforesaid two heads to the tune of Rs.50,000/- per annum. The total income of deceased Kishor thus has to be held as $\text{Rs.}2,91,600/- + 50,000 = 3,41,600/-$ for the purpose of assessing the compensation payable to the claimants. Out of the

said amount, 1/3rd of it i.e. Rs.1,13,867/- has to be deducted towards the personal expenses of the deceased. After deducting the said amount, the balance amount of Rs.2,27,733/- can be held to be the net annual pecuniary loss. Having regard to the age of deceased, the appropriate multiplier would be of 15, by applying which the amount of compensation payable to the claimants comes to Rs.34,16,000/-. In addition to the aforesaid amount, the claimants are also entitled for the non-pecuniary damages to the tune of Rs.70,000/-. The total amount of compensation payable to the claimants thus comes to Rs.34,86,000/-. It appears to me that, this would be the just and fair compensation payable to the claimants in the present case. As noted herein above, respondent nos.1 to 3 are jointly and severally liable to pay the entire said amount of compensation to the claimants.

27. For the reasons stated above, the following order is passed.

ORDER

(i) The finding recorded by the Tribunal holding deceased Kishor negligent to the extent of 30% in occurrence of

the alleged accident is quashed and set aside. It is held that, the alleged accident occurred because of sole negligence of the driver of the offending truck.

(ii) The appellants (Orig. claimants) are held entitled to receive the total compensation of Rs.34,86,000/- inclusive of the NFL compensation jointly and/or severally from original respondent nos.1 to 3 with interest thereon at the rate of 9% per annum from the date of filing of the claim petition till its realization.

(iii) The deficit Court fee, if any, be recovered from the claimants.

(iv) Award be drawn accordingly.

(v) The appeal stands allowed in the aforesaid terms.

(PR. BORA, J.)