IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 445 OF 2007

1. Shobha w/o Subhash Kargude
   Age : 31 years, occu.: household
   R/o Pali, Tal. And Dist. Beed.

2. Alka d/o Subhash Kargude
   Age : 14 years, occu.: education

3. Santosh s/o Subhash Kargude
   Age : 11 years, occu.: education

4. Sheetal d/o Subhash Kargude
   Age : 8 years, occu.: education

   Appellant Nos.2 to 4 being minor
   Through their Guardian
   Shobha Subhash Kargude, mother.

5. Babasaheb Yogaji Kargude
   Age : 60 years, occu.: nil

   All r/o As above. **Appellants**.

Versus

1. Vivek Rajaram Dagde
   (Appeal is dismissed against
   respondent No.1).

2. National Insurance Co. Ltd.
   Through Branch Manager,
   Branch Office at Railway
   Station Road, Aurangabad. **Respondents**.

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Mr. S.G. Chapalgaonkar, Advocate for the appellants.
Mr. P.P. Bafna, Advocate holding for
Mr. R.C. Bora, Advocate for respondent No.2.

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CORAM : SUNIL K.KOTWAL,J.

Judgment reserved on : 06th September 2018.
Judgment pronounced on : 12th September 2018.

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. Original claimants in Motor Accident Claim Petition No.126/2005 have filed this appeal for enhancement of compensation against the judgment and award passed by Motor Accident Claims Tribunal, Beed.

2. Respondent No.1 is the owner of offending vehicle and respondent No.2 is the insurer Insurance Company, with whom the offending vehicle is insured.

3. Heard strenuous arguments submitted by Mr. S.G. Chapalgaonkar, learned Counsel for appellants and Mr. Bafna, learned Counsel for respondent No.2. Appeal against respondent No.1/owner is already dismissed.

4. Learned Counsel for the appellants submits that though the appeal is dismissed against the owner of offending vehicle, his presence in the present appeal is not necessary, as the appeal survives to the extent of statutory liability of Insurance Company. The Insurance Company can contest the claim on all grounds as it was party before the trial Court. He points out that neither owner nor Insurance Company has preferred appeal challenging the finding of Tribunal recorded against driver of the offending vehicle

regarding his rash and negligent driving. He places reliance on **"Andhra Pradesh High Court in Meka Chakra Rao Vs. Yelubandi Babu Rao" [LEX (APH) 2000 1286 (DB)]**.

5. In reply, learned Counsel for respondent No.2 - Insurance Company submits that in absence of driver and owner of the offending vehicle, the dispute cannot be adjudicated in proper manner. Therefore, in absence of owner, this appeal is not tenable.

6. The above peculiar point arose before Division Bench of **"Andhra Pradesh High Court in Meka Chakra Rao Vs. Yelubandi Babu Rao"** (supra) wherein the Division Bench held that,

> *"If the claimants Tribunal records a finding that the accident had taken place due to rash or negligent driving of the driver of the motor vehicle and if such finding is not challenged either by the insurance company or by the owner of the motor vehicle, the question that arises in appeal filed against the orders of the Tribunal by the claimants is only with regard to the determination of just, fair and reasonable quantum of compensation and, therefore, there cannot be any bar to decide the quantum of compensation against the insurance company even in the absence of owner of the vehicle to the extent of the statutory liability of the insurance. But the quantum of compensation cannot be decided over and above the statutory liability of the insurance company in the absence of the owners, but the question of the statutory liability of the insurance company*

survives for consideration at the appellate stage".

7. This Court fully concedes with the opinion expressed by the Division Bench of Andhra Pradesh High Court and hold that when owner and Insurance Company have not challenged the finding of Tribunal regarding rash or negligent driving of the offending vehicle by driver, the dispute regarding enhancement of compensation can be properly adjudicated even only in presence of Insurance Company, to the extent of its statutory liability to pay compensation. Learned Counsel for respondent – Insurance Company has not filed the policy of the insurance to show the exact limit of its statutory liability. Therefore, respondent – Insurance Company is liable to pay entire compensation to the claimants.

8. The next submission of learned Counsel for the appellants about inadequate quantum of compensation is that the Tribunal considered the notional income of the deceased only as Rs.3,000/- per month when there was evidence before the Tribunal regarding income of the deceased from milk vendor business and tractor driving business. He submits that the deceased being an able bodied person having skill of tractor driving, cannot be equated with ordinary agricultural labour and his monthly notional income cannot be less than Rs. 5,000/-.

9. His next objection is that the Tribunal did not consider the future prospect of the deceased in view of law laid down by Apex

Court in the case of **“National Insurance Co. Ltd. Vs. Pranay Sethi” [(2017) 16 SCC 680]**. He fairly concedes that from the annual income of the deceased, one-fourth amount can be deducted as there are five dependents in the family of the deceased. He also points out that compensation under conventional head shall be enhanced in accordance with law laid down in **“Pranay Sethi's”** case (supra).

10. Learned Counsel for Insurance Company fairly concedes that compensation may be enhanced under conventional head. According to learned Counsel for Insurance Company, driving licence of deceased is not filed on record. He submits that no agricultural land is recorded in the name of deceased. Therefore, there is no need to enhance the notional income of deceased. He submits that considering the age of deceased, multiplier of “15” should be applied. At last he submits that due to head-on collision in between offending vehicle and motorcycle of the deceased, there was contributory negligence on the part of deceased, and therefore, there shall be apportionment regarding liability to pay the compensation to the claimants. He has drawn my attention to Order 41 Rule 33 of the Code of Civil Procedure.

11. In the case at hand, no cross objection or cross appeal is filed by Insurance Company alleging contributory negligence on the part of the deceased. So also, in the Written Statement (Exh.15)

the Insurance Company has not taken the defence of contributory negligence on the part of deceased. Even in the cross-examination of claimant Shobha (PW-1), no suggestion is given by learned Counsel for respondent No.2 regarding contributory negligence on the part of deceased. No witness is examined by respondent No. 2 to prove the so called contributory negligence on the part of deceased. Otherwise also the F.I.R. (Exh.25) does not speak regarding any type of negligence at the hands of deceased. Therefore, for the first time in the appeal, respondent No.2 – Insurance Company cannot take the plea of contributory negligence. Otherwise also, in absence of any evidence on record, by no stretch of imagination it can be held that there was contributory negligence on the part of deceased. So also, when deceased was not at fault for occurrence of the accident, neither the owner of said motorcycle nor Insurance Company is the necessary party in the present accident claim petition.

12. About notional income of deceased, evidence of claimant Shobha (PW-1), who is the wife of deceased, is cogent regarding income of the deceased by working as driver with one Raman Seth. She has also proved the driving licence (Exh.32) of the deceased. According to this witness, the deceased used to sell milk. In support of her contention she has also proved the certificates (Exhs. 33 to 36) issued by Grampanchayat, Aher

Wadgaon. The evidence of claimant is also supported by her father-in-law Babasaheb (PW-2) and one Gul Mohammad Pathan (PW-4). Gul Mohammad Pathan (PW-4) is hotel owner who deposes that he used to purchase milk from the deceased and his monthly payment was about Rs. 4,000/- to Rs. 5,000/- towards milk purchase. This witness has also made it clear that for some period the deceased also worked with him as driver at the monthly pay of Rs. 4,000/- and diet allowance at the rate of Rs. 60/- per day. The evidence of Gul Mohammad (PW-4) is disbelieved by learned Tribunal because no receipts were produced on record by the claimants. However, it cannot be ignored that in cases of such small scale milk vendor business, nobody issues receipt and if such receipts are issued, nobody preserves it for years together. Therefore, when some independent hotel owner deposes on behalf of the claimants, certainly his evidence holds some substance. Even the above-referred certificates issued by Grampanchayat indicate that the deceased was owner of she buffaloes and cows. Therefore, the contention of claimants regarding milk business of the deceased is not blunt contention in the air. Even the earning capacity of the deceased is proved by the claimants by placing on record his effective driving licence (Exh.32) to driver Light Motor Vehicle anywhere in the India.

14. In the circumstances, considering the sources of income available to the deceased as milk vendor and driver as well as his young age of 40 years as mentioned in the postmortem (Exh.30), I have no hesitation to hold that the notional monthly income of the deceased cannot be less than Rs. 5,000/- considering his death in the year 2005.

15. Thus, considering the monthly income of deceased at the rate of Rs. 5,000/- per month, his annual income is Rs. 60,000/-. As the age of the deceased was 40 years at the time of his death, in view of ratio laid down in the case of "**Pranay Sethi**" (supra), the deceased being self employed person 25% income is to be added in his annual income. Thus, annual income of the deceased is Rs.75,000/- including an addition of 25% amount towards future prospects.

16. In view of law laid down by Apex Court in the case of **"Sarla Verma Vs. Delhi Transport Corporation" [2009(6) SCC 121]**, when the number of dependents in the family of claimants is "5", one-fourth income is to be deducted from the annual income of the deceased. Thus, the annual income of deceased for determination of loss of dependency is Rs.56,250/-. So also, considering age of the deceased as 40 years at the time of his death, multiplier of "15" will be applicable. Thus, the loss of dependency to the claimants is calculated as 8,43,750/-.

17. In addition to the above mentioned compensation, in accordance with Pranay Sethi (supra), under conventional heads the claimants are also entitled to compensation of Rs. 40,000/- for loss of consortium, Rs. 15,000/- for loss of estate and Rs. 15,000/- towards funeral expenses.

18. Thus, my conclusion is that the claimants are entitled to following compensation under different heads.

1.	Loss of dependency	:-	Rs. 8,43,750/-.
2.	Loss of Consortium	:-	Rs. 40,000/-
3.	Loss of estate	:-	Rs. 15,000/-
4.	Funeral expenses	:-	Rs. 15,000/-
	Total	**:-**	**Rs. 9,13,750/-.**

19. The appellants are also entitled to the interest at the rate of Rs. 9 % per annum on this compensation amount, from the date of petition till realisation. This compensation shall be inclusive of the interim compensation, if any, received by the appellants. The appellants are also entitled to proportionate costs of the appeal from respondent No.2 – Insurance Company.

20. Accordingly my conclusion is that this appeal deserves to be allowed enhancing the compensation to the extent of Rs. 9,13,750/- (Rupees Nine Lakh Thirteen Thousand Seven Hundred Fifty only) with interest thereon at the rate of 9% per annum from the

date of petition till realisation of the entire amount. The appellants are entitled to proportionate costs of the appeal. The appellants shall pay deficit Court fees, if any. Respondent No.2 – Insurance Company shall pay proportionate costs of the appeal to the appellants. Award passed by the learned Tribunal be modified accordingly.

(SUNIL K. KOTWAL)
JUDGE

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