IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3795 OF 2017

1. Rukhmini w/o Popat Kedar
   Age : 34 years, occu.: household

2. Pallavi d/o Popat Kedar
   Age : 16 years, occu.: education

3 Avinash s/o Popat Kedar
   Age : 12 years, occu.: education

4 Yogesh s/o Popat Kedar
   Age : 10 years, occu.: education

   Appellant Nos.2 to 4 being minor
   Through their Guardian
   Rukhmini Popat Kedar

5. Subhadrabai w/o Baburao Kedar
   Age : 34 years, occu.: houshold

   All r/o Hatral, Tal. Pathardi,
   District Ahmednagar. **Appellants**.

Versus

Divisional Officer,
Maharashtra State Road Transport
Corporation, Divisional office at
Kothala, Sarjepura,
Ahmednagar. **Respondent**.

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Mr. A.P. Avhad, Advocate for the appellants.
Mr. B.S. Deshmukh, Advocate for the respondent.

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CORAM : SUNIL K.KOTWAL,J.

Judgment reserved on : 27th August 2018.
Judgment pronounced on : 4th September 2018.

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

1. The original claimants in Motor Accident Claim Petition No.693 of 2012 have preferred this appeal against the judgment of Motor Accident Claims Tribunal, Ahmednagar claiming enhancement of the compensation. No cross appeal or cross objection has been filed by the respondent Corporation against the Award passed by the learned Tribunal. Therefore, in this appeal, the discussion will be restricted with "just and reasonable compensation".

2. Heard strenuous arguments submitted by Mr. A.P. Avhad, learned Counsel for the appellants and Mr. B.S. Deshmukh, learned Counsel for the respondent.

3. Learned Counsel for the appellants submitted that though the learned Tribunal held that due to accidental death of deceased the claimants sustained total damages of Rs. 9,23,000/-, on the ground of contributory negligence on the part of deceased, only 50% liability was fastened against the respondent, and therefore, the Award for total compensation of Rs. 4,61,500/- was passed in favour of the claimants. He submits that there was absolutely no evidence on record against the deceased to hold that there was contributory negligence on the part of deceased. He submits that the finding of Tribunal regarding contributory negligence on the part of deceased needs to be set aside. He placed reliance on the judgment of the Apex Court in the case of

"Mangla Ram Vs. Oriental Insurance Company" delivered on 6th April 2018 in **Civil Appeal Nos.2499-2500 of 2018**, wherein the Apex Court held that when the respondent did not produce evidence about driving of motorcycle negligently by the appellant, that fact cannot be assumed. He also placed reliance on the judgment in the case of Manager, **"New India Insurance Company Ltd., Raigad Vs. Smt. Vimala Sharma and others"** passed by Chattisgarh High Court on 05.10.2017 in **M.A.C. No.1231 of 2009**. In that case, because the Insurance Company did not lead any evidence before the Tribunal to satisfy the contention of contributory negligence, it was held that there was no contributory negligence.

4. The next submission of learned Counsel for the appellants is that the quantum of compensation assessed by the Tribunal is highly inadequate as it did not consider the income of deceased out of tractor business. He submits that the registration certificate of tractor is produced by the petitioner and in addition to this, witnesses are examined by the claimants to substantiate this contention.

5. On the other hand, learned Counsel for the respondent submits that from the spot panchnama, it emerges that on the spot of accident there were brake marks on road up to the distance of 45 ft. and the spot of the collision between motorcycle of deceased and S.T. Bus is in the middle portion of the road. He also points out

that in addition to spot panchnama even the respondent has examined S.T. bus driver, who was driving the bus involved in the accident. He submits that this is not a case of “no evidence” of contributory negligence.

6. Regarding quantum of compensation, the submission of learned Counsel for the respondent is that there is no documentary proof regarding tractor business of the deceased or regarding his actual income out of that business. Therefore, the Tribunal rightly awarded compensation on the basis of notional income of Rs.3,000/- per month of the deceased.

7. The next submission of learned Counsel for the respondent is that though the deceased was 40 years old, the Tribunal erroneously added 50% income of deceased while assessing the loss of dependency. He also points out that the Tribunal awarded exorbitant compensation under non-pecuniary damages which needs to be reduced. He placed reliance on the case of **“National Insurance Company Ltd. Vs. Pranay Sethi”** reported in **(AIR 2017 SC 5157)**.

8. The appellants have assailed the Award passed by the Tribunal on two grounds. The first ground is that, in absence of any evidence on the part of respondent the Tribunal held that there was contributory negligence on the part of deceased, and therefore, there should be apportionment of 50% liability in between the

respondent and the deceased. The second ground of objection is regarding grant of inadequate compensation to the claimants.

9. So far as the defence of respondent regarding contributory negligence on the part of deceased, who was driving the motorcycle at the time of accident is concerned, the respondent has placed reliance on the spot panchnama of the spot of accident and oral testimony of S.T. Bus driver namely Harishchandra Nemane (DW-1).

10. In the case at hand, the respondent Corporation has not filed appeal or cross objection against the finding of the Tribunal about rash and negligent driving of the driver of S.T. Bus involved in the accident. Therefore, that point needs not to be reconsidered in this appeal. No doubt, on behalf of the claimants only the widow of deceased namely Rukhmini Kedar (PW-1) is examined. In her testimony before the Tribunal she declined that at the time of occurrence of the accident, the deceased was driving his motorcycle in rash and negligent manner while talking on mobile phone. However, from the cross-examination of Rukhmini Kedar (PW-1) , it emerges that she is not an eye witness of the accident. Therefore, she cannot prove whether at the time of accident the deceased was driving the motorcycle in rash and negligent manner while talking on mobile phone.

11. However, the burden lies on respondent to prove that at the time of accident the deceased was driving his motorcycle in rash and negligent manner i.e. by the middle portion of the road while talking on mobile phone. To substantiate this contention, the respondent Corporation examined S.T. Bus driver Harishchandra Nemane (DW-1), who deposes that at the time of the accident the deceased drove the motorcycle at a speed while talking on mobile phone.

12. It is to be noted that regarding contributory negligence contention of the respondent is that, at the time of accident the deceased was driving the motorcycle at a speed by the middle portion of the road and that time he was talking on mobile phone. Learned Counsel for the respondent has also drawn my attention to the spot panchnama (Exh.18) which shows that the spot of the accident is in the middle portion of the road and there were brake marks of tyre of S.T. Bus up to 45 ft. from the spot of the accident. The spot panchnama also shows that after the accident, the motorcycle was dragged up to the distance of 15 ft. from the spot of the accident. The spot panchnama also shows that on the motorcycle of the deceased there was dent on the right side of the petrol tank and colour of S.T. Bus stuck on the dickey of the motorcycle. Even the handle of motorcycle of right side was bent and the side mirror was in broken condition. Thus, the damages on

right side of the motorcycle indicate that S.T. Bus driven by the driver of S.T. Bus gave dash to the right side of the motorcycle and it was not head-on collision in between the motorcycle and S.T. Bus. In the circumstances, only because in the spot panchnama the spot of accident is shown in the middle portion of the road, inference cannot be drawn that the deceased was driving the motorcycle by the middle portion of the road. Surprising thing is that the driver of S.T. Bus namely Harishchandra Nemane (DW-1), during his entire evidence, nowhere deposed that the deceased was driving the motorcycle by the middle portion of the road. Therefore, by no stretch of imagination it can be held that at the time of accident the deceased drove his motorcycle by middle portion of the road.

13. Another important aspect is that though the driver of S.T. Bus, Harishchandra Nemane (DW-1) deposes that at the time of accident the deceased was talking on mobile phone while driving, the spot panchnama (Exh.18) nowhere shows that mobile phone of the deceased was found lying on the spot. Was the deceased talking on phone at the time of accident, certainly his damaged mobile phone would have been found on the spot and it would have been noted in the spot panchnama. Thus, the spot panchnama falsifies the contention of S.T. Bus driver Harishchandra Nemane (DW-1) that at the time of accident the deceased was driving the motorcycle in rash and negligent manner while talking on mobile

phone. On the other hand, the visible brake marks of S.T. Bus from the spot of accident up to the distance of 45 ft. indicate the extreme high speed of S.T. Bus.

14. In the circumstances, absolutely no reliable evidence is available to prove the contributory negligence on the part of deceased, as alleged by the respondent Corporation.

15. I hold that ignoring the above discussed circumstances on record, the learned Tribunal erroneously held that there was contributory negligence on the part of deceased. I hold that the respondent has failed to prove that the accident occurred due to contributory negligence by the deceased. It follows that only 50% liability fastened against the respondent to pay compensation is incorrect. On the other hand, the respondent is liable to pay entire compensation amount to the claimants, on account of accidental death of deceased.

16. Now coming to the correctness of the finding of learned Tribunal regarding the quantum of compensation. There cannot be any dispute regarding the principle that in motor accident claims the assessed compensation should be “just and reasonable”. Undisputedly, in the case at hand, the deceased was the only earning member of the family, having wife, three minor children and old mother. According to the claimants, at the time of death the deceased was 35 years old and he used to earn around Rs.20,000/-

per month by running dairy business, Rs. 15,000/- per month from tractor business and Rs. 1,00,000/- per annum out of agricultural income. In addition to oral testimony of claimant Rukhmini (PW-1), the claimants have also examined Shankar Bodkhe (PW-2) who deposes regarding payment of Rs. 16,000/- to the deceased for performing ploughing and levelling operations by his tractor in the year 2011.

17. Learned Counsel for the respondent assailed this evidence on the ground that it is not supported by any documentary evidence. Even the learned Tribunal disbelieved the evidence placed on record by the claimants on the ground of non filing of income tax returns, R.C. Book of the tractor and receipts regarding other income of the deceased. The Tribunal accepted only income of Rs. 3,000/- per month on account of lack of supervision of agricultural land, on account of death of deceased.

18. However, after careful scrutiny of the record and proceeding, it emerges that to prove the ownership of tractor, the claimants have placed on record xerox copy of R.C. Book which shows that the deceased Popat Baburao Kedar was the owner of Tractor No. MH-16-AM-1689 (Alongwith Exh.47). Even claimant Rukhmini Kedar (PW-1) has referred this copy of R.C. Book in her examination-in-chief. However, the learned Tribunal lost sight of this copy of R.C. Book of the tractor of deceased. Even the evidence of

Shankar Bodkhe (PW-2) regarding payment of Rs. 16,000/- to the deceased for performing ploughing and levelling operations in his field by the deceased with the help of his above mentioned tractor, is disbelieved by the learned Tribunal, for the reason that no receipt was filed on record. However, it cannot be ignored that in the villages, for such miscellaneous agricultural operations generally no receipts of payment are issued. Therefore, only on account of non filing of receipt in support of evidence of Shankar Bodkhe (PW-2), his evidence cannot be disbelieved when otherwise nothing could be elicited in his cross-examination to disbelieve him. I hold that the evidence of Shankar Bodkhe (PW-2) together with the copy of R.C. Book of the tractor of deceased is certainly sufficient to hold that there was income to the deceased by performing agricultural operations with the help of his tractor.

19. In addition to this, the claimants have filed copies of record of right (Exhs.30 to 39) which show that the deceased was the owner of 1 Hectare 54.17 Aar agricultural land. The crop statements of this land show that dry crop yield of Bajra and Jowar is taken from this land. Thus, certainly there was separate income to the deceased from his agricultural land. In addition to this, it must be considered that at the time of death the deceased was able bodied 35 years old person. Thus, one can imagine earning capacity of such young person who is the owner of tractor and the

above-said agricultural land. It is to be noted that being an agriculturist, it was natural that the deceased did not submit income tax returns regarding his income. However, under such circumstances, at least on guess work, after considering the earning capacity of the deceased as an agriculturist and tractor owner, I hold his notional monthly income is at the rate of Rs.6,000/- per month.

20. Thus, the annual income of the decease is calculated as Rs. 72,000/-. The deceased being self employed person of 35 years old, the additional income 40% is to be added in view of the law laid down by the Apex Court in the case of **“National Insurance Co. Ltd. Vs. Pranay Sethi and others”** (supra) . Thus, the total annual income of deceased comes to Rs. 1,00,800/- (72,000 + 28,800). In view of the law laid down by the Apex Court in the case of **Smt. Sarla Verma Vs. Delhi Transport Corporation, [(2009) 6 SCC 121]**, after considering the five dependents in the family of deceased, one-fourth amount will have to be deducted from the annual income of the deceased towards his personal expenses. Thus, the annual income of deceased available for claimants for determination of loss of dependency is Rs. 75,600/- (1,00,800 – 25,200). In view of the law laid down by the Apex Court in case of **Sarla Varma..** (supra), considering the age of deceased i.e. 35 years, applying the multiplier of “16”, the amount towards loss of dependency would be Rs.12,09,600/- (75,600 x 16).

21. Thus, the claimants are entitled to compensation of Rs. 12,09,600/- under the head "loss of dependency". In addition to this, as held by Apex Court in the case of **"Prayan Sethi"** (supra), the claimants are entitled to following non-pecuniary compensation :

Loss of consortium	:	Rs. 40,000/-
Funeral expenses	:	Rs. 15,000/-
Loss of Estate	:	Rs. 15,000/-

22. Thus, the claimants are entitled to get total compensation as under :-

Loss of dependency	:	Rs. 12,09,600/-
Loss of consortium	:	Rs. 40,000/-
Funeral expenses	:	Rs. 15,000/-
Loss of Estate	:	Rs. 15,000/-
Total	:	Rs.12,79,600/-

23. Claimants are entitled to interest at the rate of 9 % per annum on the above-mentioned compensation amount from the date of filing of petition till its realisation. This compensation amount shall be inclusive of the interim compensation amount of Rs.50,000/- received by the claimants under the head "no fault liability".

24. The respondent Corporation is liable to pay this entire compensation amount to the claimants.

25. It follows that the appeal deserves to be partly allowed with proportionate costs.

26. Hence, the following order.

ORDER

1) First Appeal No. 3795 of 2017 is partly allowed with proportionate costs.

2) The Judgment and Award passed by the Tribunal in M.A.C.P. No.693/2012 is modified as under :-

"i) Respondent - Maharashtra State Road Transport Corporation do pay an amount of Rs.12,79,600/- (Rupees Twelve Lakh Seventy Nine Thousand Six Hundred), including "No Fault Liability" amount, to the appellants towards compensation alongwith interest at the rate of 9 % per annum from the date of application till realization.

ii) On deposit of the amount of compensation in the Tribunal, it be distributed equally amongst the appellant Nos.1 to 5.

iii) The Share in the compensation amount of applicant Nos.2 to 4 being minors, be deposited in their names in any Nationalized Bank of the choice of applicant No.1 Smt. Rukhmini Popat Kedar, under her guardianship, till applicant Nos.2 to 4 become major, and applicant No.1 is at liberty to withdraw the accrued monthly interest for the welfare of minor applicants, if she desires so.

iv) Out of the amount of share of applicant Nos.1 and 5, 50% amount each be paid to them by account payee cheques and 50% each amount be kept in their names in fixed deposits in any Nationalize Bank of their choice, for the period of three years.

v) The deficit Court fee stamp, if any, be recovered from the applicants before handing over cheques to them.

vi) Award be drawn up accordingly”.

(SUNIL K. KOTWAL)
JUDGE

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