

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,**BENCH AT AURANGABAD****FIRST APPAL NO. 963 OF 2005**

Shantaram Narsingrao Ghongade,
 Age; 55 years, being mentally affected
 through his next friend
 Mr. Vardhaman Narsingrao Ghongade,
 Age; 52 years, Occupation; Business,
 Resident of Shanti Nagar,
 Station Road, Ahmednagar.

APPELLANT
 (Original Claimant)

VERSUS

1. Mrs. Janabai K. Kakade,
 Age; Major, Occupation; Business,
 Resident of Near Adarsha School,
 Gavali Nagar, Bhore, Pune 411 033.
2. The New India Assurance Co. Ltd.
 Having its Divisional Office at
 Abbot Building near Ashoka
 Hotel, Ahmednagar.

RESPONDENTS

...
 Advocate Ms. S.D. Tambat/Dhumal for Appellant
 Advocate Mr. S.S. Sayyed and Mr. H.R. Gawali for Respondent
 No. 1 (Absent)
 Advocate Mr. M.R. Deshmukh, for Respondent No. 2
 ...

FIRST APPAL NO. 539 OF 2005

1. Smt. Nutan Dipak Kathed,
 Age; 40 years, Occupation; Household,
2. Aarti Dipak Kathed @ Arti w/o Rahul Bhagwat,
 Age; 22 years, Occupation; Education,
 Resident of Patil Traders, 3rd Floor,
 Bhondekar Road, Deccan Jimkhana,
 Pune – 411 043.

3. Pooja Dipak Kathed @ Pooja w/o
Sumit Gundecha,
Age; 20 years, Occupation; Education,
Resident of Flat No. E2, Padmavati,
Housing Society, Sambhajnagar,
Dhankawadi, Pune – 411043.

(As amended).

4. Madhu Dipak Kathed,
Age; 16 years, Occupation; Education,
5. Shriniwas Dipak Kathed,
Age; 12 years, Occupation; Education, **APPELLANTS**
(Original Applicants Nos. 1 to 5)

Appellants Nos. 4 & 5 being minors
through their guardian mother i.e.
appellant No. 1.

All above resident of Adat Bazar, Ahmednagar.

VERSUS

1. Sau. Janabai Kerubhau Kakade,
Age; Major, Occupation; Transport,
Resident of Nagar, Bhosari,
Pune – 39.
2. New India Assurance Co. Ltd.,
Abbot Building, Near Ashoka Hotel,
Ahmednagar. **RESPONDENTS**
(R. No. 1 & 2 Orig. R No. 1 & 2)

...
Advocate Mr. A.M. Gholap for Appellant
Advocate Mr. S.S. Sayyed and Mr. H.P. Gawali for Respondent
No. 1 (Absent)
Advocate Mr. M.R. Deshmukh for Respondent No. 2
...

FIRST APPAL NO. 155 OF 2007

New India Assurance Company Ltd.
 Having its Head and Registered Office
 At New India Assurance Building,
 87, M.G. Marg, Fort, Mumbai
 and Divisional Office at Near Ashoka
 Hotel Ahmednagar, Divisional Office
 at Aurangabad.

APPELLANT

(Original Respondent No. 2)

VERSUS

1. Shantaram Narsingrao Ghongade,
 Age; 55 years, Being mentally affected
 Through his next friend brother
 Vardhaman Narsingrao Ghongade,
 Age; 52 years, Occupation; Business,
 Resident of Shantisagar, Ahmednagar.
2. Mrs. Janabai K. Kakade,
 Age; Major Occupation; Business,
 Resident of Adarsha School,
 Gavalı Nagar, Bhosari,
 Pune – 39.

RESPONDENTS

(Original Petitioner)

(Ori. Respondent No. 1.)

...

Advocate Mr. M.R. Deshmukh for appellant
 Advocate Ms. S.D. Tambat/Dhumal for Sole Respondent

...

FIRST APPAL NO. 170 OF 2007

New India Assurance Company Ltd.
 Having its Head and Registered Office
 At New India Assurance Building,
 87, M.G. Marg, Fort, Mumbai
 and Divisional Office at Near Ashoka
 Hotel Ahmednagar, Divisional Office
 at Aurangabad.

APPELLANT

(Original Respondent No. 2)

VERSUS

1. Smt. Nutan Dipak Kathed,
Age; 40 years, Occupation; Household,
2. Aarti Dipak Kathed,
Age; 22 years, Occupation; Education,
3. Pooja Dipak Kathed @ Pooja w/o
Sumit Gundecha,
Age; 20 years, Occupation; Education,
4. Madhu Depak Kathed,
Age; 16 years, Occupation; Education,
5. Shriniwas Dipak kathed,
Age; 12 years, Occupation; Education,
6. Sarsabai Shantilal Kathed,
(Deleted as per order passed
below Exh. 15 by Lower Court)
7. Mrs. Janabai K. Kakade,
Age; Major, Occupation; Business,
Resident of Near Adarsh School,
Gawali Nagar, Bhosari, Pune.

Nos. 4 & 5 are minors Under
Guardianship of Mother No. 1.

Nos. 2 and 3 are become major,
Therefore shown as majors.

All resident of Ahmednagar.

RESPONDENTS

...
Advocate Mr. M.R. Deshmukh for Appellant
Advocate Mr. A.M. Gholap for Respondent Nos. 1 to 5
...

CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 25/10/2018

Date of Pronouncing Judgment : 27/11/2018

J U D G M E N T :

First Appeal No. 963 of 2005 is filed against the judgment and award passed by the Motor Accident Claims Tribunal, Ahamednagar (hereinafter referred to as the "MACT") in Motor Accident Claim Petition No. 125 of 2001 (hereinafter referred to as the "MACP") which is the injury claim and the First Appeal No. 155 of 2007 is the Counter Appeal filed by the Insurance Company of the offending truck, challenging the same award. Similarly, First Appeal No. 539 of 2005 is filed by the dependents of the deceased, who died in the same accident, against the judgment and award passed by the same Tribunal in MACP No. 1018 of 2000, for enhancement of the compensation. First Appeal No. 170 of 2007 is the Counter Appeal filed by the Insurance Company of the offending truck against the same judgment and award denying its liability. These four appeals being filed against the judgment and award passed by the same Tribunal, which arose as a result of one and the same motor vehicle accident, dated 21.06.2000, in which a Honda City Car bearing No. MH-16-L-123 and a Truck bearing No. MH-14/4641 were involved (hereinafter referred to as the "Offending Truck"), these four appeals are disposed of by this common judgment (hereinafter parties are referred in accordance with their status in original MACP proceeding).

2. Facts leading to the institution of these appeals are that

on 21.06.2000 the injured Shantaram Ghongade, along with his friends was proceeding towards Nashik from Ahmednagar by Honda City car bearing No. MH-16-L-123. Deceased Deepak Shantilal Kathed was driving that car in proper manner by following traffic rules. However, when that car reached near Konchi Ghat section on Loni - Sangemner road, the offending truck came from opposite direction in high speed and by crossing the road divider came towards wrong side of the road and gave forcible dash to the above said car, by which the injured and deceased were travelling. The accident occurred only due to rash and negligent driving by the driver of the offending truck. In that accident, injured Shantaram sustained head injuries as well as fracture injuries to the right hand and the right leg bones. The deceased Deepak Kathed died on the spot. The injured and the deceased were rushed to Pravara Rural Hospital, Loni. By that time, Police Station Sangemner was informed and the API Ramesh Karle rushed on the spot and prepared spot panchanama. After inquiry into the matter, he lodged First Information Report (hereinafter referred to as 'FIR') to Police Station Sangemner, alleging that the accident occurred due to rash and negligent driving by the driver of the offending truck. The injured Shantaram Ghongde was initially treated at Pravara Rural Hospital, however, considering the nature of the severe injuries, he was shifted to Rubi Hall Hospital, Pune, where he was operated and treated up to 20.07.2000. For follow up treatment he was admitted in

Daule Hospital, Ahmednagar on 21.7.2000, where further procedure and treatment for fracture injuries was given. As per the medical advice, the injured had undergone treatment of Physio Therapy. He had also obtained follow-up treatment for the head injuries from Dr. Somani, Ahmednagar, who is a Neuro Surgeon. By that time, dead body of Deepak Kathed was handed over to his relatives, after postmortem examination. As the above said accident occurred due to rash and negligent driving by the driver of the offending truck, these two different Motor Accident Claim Petitions came to be filed before the MACT, Ahmednagar.

3. In MACP No. 125 of 2001, the learned Tribunal awarded compensation of Rs. 7,31,408/- inclusive of No Fault Liability amount. In injury claim petition No. 1018 of 2000 compensation of Rs. 11,08,000/- inclusive of No Fault Liability amount was awarded. These judgments and awards are challenged by Claimants as well as by the Insurance Company in these four appeals.

4. Learned counsel for Claimants in injury claim, submits that the injured was business man, who was working partner of two different firms at Ahmednagar as well as at Shrirampur. Due to accidental injuries, the injured is unable to walk and sit at his business place. Therefore, he has lost his 100% earning capacity. However, though the injured was 50 years old on the date of

accident, the learned Tribunal awarded very meager amount of compensation, even ignoring the bills issued by the Doctors who treated the injured. He submits that even future loss of prospects due to injuries sustained by Claimants are not considered by the Tribunal as laid down by the Apex Court in “**National Insurance Company Ltd. vs Pranay Sethi and others**” [2018 (3) Mh.L.J. 70]. She submits that if it is proved that the driver of the offending truck did not hold effective and valid driving license to drive heavy motor vehicle, in that event, 'Pay and Recover' order can be passed against the Insurance Company. She has drawn my attention towards the disability certificate (Exh. 37) issued by Doctor Daule and other certificates (Exh. 51) issued by Doctor Somani and (Exh. 61) issued by Doctor Jems and prayed for enhancement of compensation.

5. In death claim, learned counsel for the Claimants submits that on the date of death of the deceased, in motor vehicular accident, he was 43 years old. Therefore, in view of verdict of the Apex Court in “**National Insurance Company Ltd. vs Pranay Sethi and others**” (supra), 25% future loss of earning, shall be considered while enhancing the compensation. He has also pointed out that there cannot be deduction of more than 1/4th amount towards the personal expenses of the deceased from his annual income. He submits that on the basis of First Information Report and spot panchanama, claimants can prove rash and negligent driving by the

driver of the offending vehicle. He has pointed out that the Insurance Company did not examine even the driver of the offending truck to prove the contributory or composite negligence of the deceased. She prays for substantial enhancement of the compensation.

6. Learned counsel for the Insurance Company fairly concedes that in death claim, there shall be 1/4th deduction from annual income of the deceased towards personal expenses of the deceased. He also submits that considering the age of the deceased, the multiplier of "14" shall be applicable and even 25% income shall be added in the annual income of the deceased towards the loss of future prospects. He fairly concedes that under conventional head, compensation of Rs. 70,000/- shall be awarded as ruled by the Apex Court in case of "**National Insurance Company Ltd. vs Pranay Sethi and others**" (supra).

7. In death claim, the learned counsel for the insurance company has pointed out that from the last income tax return of deceased, it can be gathered that out of his annual income, the amount of Rs. 25,000/- is shown towards the income from his house property. Even after the death of the deceased, this income towards rent, is continued and therefore, this amount shall be deducted from the gross annual income of the deceased while assessing the compensation amount.

8. Next submission of the learned counsel for the Insurance Company is that the wife of the deceased continued his business and therefore, there is no loss of income on account of death of the deceased. He has pointed out that the income tax returns are not filed by the claimants in Death Claim Petition to prove that after the death of the deceased, there is decrease in business income of the claimant. He submits that at the most compensation can be awarded towards loss of supervision by the deceased. He submits that quantum of compensation awarded to the Claimant in Death Claim needs to be reduced.

9. In injury claim, learned counsel for the Insurance Company submits that from the cross-examination of Doctor Daule (PW 2) and Doctor Somani (PW 4), it can be gathered that due to injuries sustained by the Claimant in above said accident, there cannot be loss of income of the Claimant, as he runs business as distributor for Tata Tea Company, with the help of two employees. For running such business, the Claimant has to only supervise the work of distribution of articles to the shopkeepers. He has pointed out that the son of the Claimant has continued the partnership business of the claimant therefore, there is no loss of income of the deceased due to accidental injuries.

10. Next contention of the learned counsel for the Insurance

Company is that the medical evidence placed on record falls short to prove that due to accidental injuries, the Claimant has lost 100% earning capacity to work as distributor for Tata Tea Company.

11. In both claim petitions, the learned counsel for the Insurance Company has raised objection that in absence of evidence of any eye witness, merely on the basis of police papers, the claimant cannot prove rash and negligent driving by the driver of the offending truck. On the other hand, spot panchanama indicates occurrence of accident, due to contributory negligence by deceased.

12. Next submission of the learned counsel for the Insurance Company is that by examining defence witness (DW1), the insurance company has proved that on 21.6.2000 that i.e. on the date of the accident, the driver of the offending truck did not hold effective and valid driving license to drive heavy motor vehicle like truck. Therefore, the insurance company has proved that the owner of the offending truck has committed breach of condition of insurance policy that the truck should be driven by the person holding effective and valid driving license. He submits that as there was head on collision in between the truck and Honda City Car the contributory negligence on the part of the deceased is proved by the Insurance Company. Therefore, only 50% liability to pay compensation to the dependents of the deceased shall be saddled on Insurance

Company. However, he fairly concedes that so far as the injury claim is concerned, the claimant being third party, if there is composite negligence by the driver of the truck and the Honda city car, the Claimant has option to recover the compensation from any one of the party. He submits that due to breach of condition of policy of the insurance, the Insurance Company shall be exonerated. In the alternate, his contention is that the quantum of the compensation shall be reduced substantially.

13. In injury claim as well as in death claim, the parameters for determining the compensation are different. Therefore, I will consider point regarding compensation in injury claim and death claim separately. However, so far as the rash and negligent driving by the driver of the offending truck is concerned, that point can be determined by common reasons.

14. To prove rash and negligent driving by the driver of the offending truck in both claim petitions, no eye witness is examined by the Claimant. Even in the injury claim the injured did not depose before the Court, on the ground of his inability to recollect the occurrence due to loss of memory sustained due to accidental injuries. Therefore, in both claim petitions, only on the basis of police papers and oral evidence of Investigating Officer (Exh. 41), I have to examine whether the Tribunal has rightly held that the accident

occurred only due to rash and negligent driving by the driver of the offending truck.

15. No doubt, the legal position is absolutely settled that initial burden lies on the Claimant to prove rash and negligent driving by the driver of the offending truck on the basis of preponderance of probabilities. The claimants need not prove rash and negligent driving by the driver of the offending truck beyond reasonable doubt. Even if, the Claimants can bring on record probability that accident occurred due to rash and negligent driving by the driver of the offending truck. In that event the onus would shift on Insurance Company to prove innocence of the driver of truck or to prove contributory and composite negligence by the driver of the car involved in the accident.

16. Un-disputedly, in the case at hand, even the Insurance Company has not taken pains to examine the driver of the offending truck or any other eye witness named in the police report. For examination of the driver, the Insurance Company has simply obtained witness summons against the driver. No coercive steps have been taken by the Insurance Company to secure the presence of the driver of the offending truck to prove his innocence and to prove contributory negligence or composite negligence by the driver of the car involved in the accident.

17. The claimants in the death claim have examined Shri Ramesh Aarne (PW 2), who was Additional Police Inspector (for short "API") attached to Police Station, Sangamner. From his evidence, it emerges that on 21.6.2000 he rushed to the spot of accident for investigation, as soon as the information of the accident was received at Police Station, Sangemner. During inquiry by API Aarne (PW 2), it transpired that at the time of accident, the Honda City Car came from Ahmednagar side and the truck came from opposite direction in high speed and by going towards wrong side of the road gave dash to the car on its left side. API, Aarne (PW2) has duly proved FIR (Exh. 42) lodged by him after inquiry. He has also proved the spot panchanama of the spot of accident (Exh. 43) and the Postmortem Notes of the deceased (Exh. 44). From his cross-examination, it emerges that he did not mention the exact location of both vehicles involved in the accident in the spot panchanama (Exh. 43).

18. However, this infirmity in the investigation is not sufficient to discard evidence of API, Aarne (PW 2), for the reasons that in the cross-examination of this witness, it has been brought on record by the Insurance Company that on the spot of the accident the width of the tar road was 22 feet and there was 5 feet 'Kaccha' road to both sides of the tar road. On the spot the road passed in East-West direction and the car was coming from East towards West

and the truck was coming from West towards East. There was damage on right side head lamp and bumper of the truck and even the steering rod of the truck was in bend condition. The driver side wheel of the truck was at the distance of three feet from the road divider towards Southern side. This situation on the spot of accident as mentioned in the FIR clearly indicates that 'at the time of accident, the truck left its correct side and went towards wrong side of the road and after crossing the road divider, gave dash to the Honda City Car by which the deceased and injured were travelling'. The recitals of FIR (Exh. 42) further show that during inquiry, it also transpired that 'at the time of accident, the truck by crossing the road divider rammed over the Honda City Car and truck and the car were entangled with each other. To remove passengers from the said car, the truck was to be taken towards its reverse side and thereafter by break opening the doors of the car, the injured were taken out from the car. This situation on the spot of accident clearly indicates that at the time of accident the truck was in extremely high speed and due to rash and negligent driving by the driver of the offending truck, it crossed over the road divider and rammed over the Car which was coming from opposite direction. Due to such heavy dash, if the car was pushed towards middle side of the road, benefit of that situation cannot be given to the Insurance Company to hold that the Car was on wrong side of the road. Even assuming that car was on middle side of the road, it cannot be said that it was rash and negligent act

of the driver of the Car. Thus, the above discussed situation on the spot of accident, is more than sufficient to hold that accident occurred only due to rash and negligent driving by the driver of the offending truck. No evidence is available on record to indicate any negligence on the part of the deceased, who was driving the Honda City Car involved in the accident. In the circumstances, I have no hesitation to hold that learned Tribunal has rightly held that the above said motor vehicular accident occurred only due to rash and negligent driving by the driver of the offending truck. In absence of any evidence, on the part of the Insurance Company, it cannot be proved that there was contributory and composite negligence on the part of the deceased, who was the driver of the car involved in the accident.

19. In the circumstances, when the accident occurred due to rash and negligent driving by the driver of the offending truck, the responsibility lies on the owner and the driver of the truck to pay compensation to the injured and to the dependents of the deceased. Undisputedly, on the date of accident the offending truck was duly insured with respondent No. 2 Insurance Company. Therefore, being insurer of the offending truck, even Insurance Company will be liable to indemnify the owner of the offending truck, provided no breach of condition of the policy of the insurance is proved by the Insurance Company. In the case at hand, the insurance company has taken defence that on the date of accident, the driver of the offending truck

did not hold effective and valid driving license.

20. Even policy of the insurance of the offending truck shows that unless the insured truck is driven by a person holding effective driving license at the time of accident and is not disqualified from holding or by obtaining such license, the policy of the insurance will not cover the risk of liability of the owner of that truck.

21. In the case at hand, by examining Dhanraj Kamble (DW 1) who is the employee of Regional Transport Office (for short 'RTO'), Pimpri Chinchwad, the insurance company has proved that driving license of the driver of the offending truck was renewed only upto 17.11.1999 to drive Heavy Goods Vehicle. Thereafter, the said driving license was renewed only on 27.6.2000. The accident occurred on 21.6.2000. Thus, it is clear that on the date of accident the driver of the offending truck did not hold effective and valid driving license to drive Heavy Goods Vehicle like truck involved in the accident. During the cross-examination of Dhanraj Kamble (DW 1), it has been brought on record that the driver of the offending truck was not disqualified for obtaining driving license to drive Heavy Goods Vehicle. However, because driver of the offending truck was not disqualified from obtaining driving license to drive Heavy Goods Vehicle, it does not mean that the condition of policy of the insurance is fulfilled by the owner of the offending vehicle. Under the terms of

the policy, the first condition was that the driver should hold effective and valid driving license. As observed above, the driver of the offending truck did not hold effective and valid driving license on the date of occurrence of the accident and there was clear breach of condition of policy of the insurance.

22. The learned Tribunal ignored this breach of condition of policy of insurance, simply on the ground that it is minor breach. However, once breach of condition of policy is proved by the insurance company, whether the breach is major or minor, it does not make any different. Otherwise also, driving of Heavy Goods Vehicle without holding effective driving license does not amount to minor breach, but it amounts to major breach of condition of policy of the insurance. Therefore, I have no hesitation to hold that the insurance company has duly proved that the owner of the offending truck committed breach of condition of policy of the insurance.

23. As observed above the accident occurred due to rash and negligent driving by the driver of the offending truck. Therefore, statutory liability lies on the owner and driver of the offending truck to pay compensation to the dependents of the deceased. As the Insurance Company has proved that the owner of the offending truck has committed breach of conditions of policy of the insurance, the Insurance Company is not liable to indemnify the owner of the

offending vehicle.

24. In the case at hand, even respondent No. 1 who is the registered owner of the offending truck did not appear and she was proceeded ex-parte. Even the driver of the offending truck did not comply the provisions of Section 134 (c) of the Motor Vehicles Act, 1988, by giving following information in writing to the Insurance Company : a) Insurance Policy Number and also its validity, b) The date and time of the accident, c) Particulars of persons injured and killed in the accident, d) Name of the driver and particulars of his driving license.

25. In the case of **“Pappu and others Vs. Vinod Kumar Lamba and another” [(2018) 3 SCC 208]**, the Apex Court observed that,

“In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in

the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving license. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving license of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving license. Without disclosing the name of the driver in the

Written Statement or producing any evidence to substantiate the fact that the copy of the driving license produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle”.

26. Considering the inaction on the part of respondent No. 1 even after occurrence of the accident by offending truck, I have no hesitation to hold that by examining the employee of R.T.O. Office (DW 1), the Insurance Company has proved that the driver of the offending vehicle did not hold effective driving license and thereby committed breach of policy of the insurance, the insurance company deserves to be absolved from its liability to indemnify respondent No. 1 – owner of the offending truck.

27. However, in the case of **“Pappu and others Vs. Vinod Kumar Lamba and another”** (supra) the Apex Court gave directions to the insurance company to pay the compensation amount to the Claimants in the first instance and later on to recover the same from original respondent No. 1, owner of the offending truck. Therefore,

though insurance company of the offending truck needs to be exonerated, directions to pay and recover, deserves to be issued by this Court.

28. Now question arises as to what should be the quantum of the compensation payable to the original claimants. Initially, I will consider the quantum of compensation payable in Death Claim i.e. in MACP No. 1018 of 2000, which is the subject-matter in First Appeal No. 539 of 2005.

29. In Death Claim Petition, for determining the quantum of compensation, the age of the deceased plays important role. In the case at hand, though birth certificate of the deceased Deepak Kathed is not filed on record, the claimants have filed driving license of the deceased, which shows that the date of birth of the deceased was 18.10.1957. Thus, on the date of accident i.e. on 21.6.2000 the deceased was 43 years old. Therefore, in view of the guidelines issued by the Apex Court in **“Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.”**, [AIR 2009 SC 3104], the multiplier of “14” will be applicable in the case at hand while determining the quantum of compensation.

30. To prove the income of the deceased, the claimants have filed Income Tax Returns for the assessment year 1997 – 2000.

The Income Tax Return of the preceding year of the death of the deceased, is relevant for determining his annual income at the time of his death. Therefore, I have considered the Income Tax Return of the deceased for the assessment year 1999 – 2000 (Exb. 62).

31. After going through the income tax return for the assessment year 1999-2000 (Exh. 62), it emerges that the gross annual income of the deceased for the year 1999-2000 was Rs. 2,04,714.12/-. Out of this income, from the house property, the income of Rs. 25,000/- was received by the deceased. Even after the death of deceased the claimants continued to receive income from the house property as rent. Therefore, the income from the house property is to be deducted from the gross income of the deceased. In addition to this, the deceased had paid income tax of Rs. 23,411/- for the assessment year 1999-2000. Therefore, in view of **“Vimal Kanwar and Others vs Kishore Dan and Others”** reported in [(2013) 7 SCC 476], and **“Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.”** (supra), the income tax of Rs. 23,411/- is to be deducted from the gross annual income of the deceased to assess his annual income, as contribution to his family. After deducting this amount, the annual income of the deceased comes to Rs. 1,56,303.12 ps.

32. As per the guidelines issued by the Apex Court in

“National Insurance Company Ltd. vs Pranay Sethi and others”

(supra) as the deceased was in between the age of 40 to 50 years, 25% income has to be added in the annual income of the deceased, towards the loss of future prospects. Thus, if this 25% income i.e. Rs. 39,075.78 ps. is added in the above referred annual income of Rs. 1,56,303.12 ps., the annual actual income of the deceased is assessed as Rs. 1,95,378.90ps.

33. As in the family of the deceased, claimants are five in number, in accordance with the guidelines issued by the Apex Court in **“Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.”** (supra), 1/4th amount has to be deducted from this annual income towards personal expenses of the deceased. After deducting this 1/4th amount i.e. Rs. 48,844.73 ps. from the actual annual income of Rs. 1,95,378.90, the annual contribution of the deceased to his family is assessed as Rs. 1,46,534.18 ps.

34. As observed above, considering the age of the deceased the multiplier of '14' is applicable in the case at hand. On applying multiplier '14' the total loss of dependency comes to Rs. 20,51,478.45 ps.

35. Though the learned counsel for the Insurance Company has submitted that after the death of deceased, the claimant No. 1

Nutan continued the business and she has started earning, this Court has considered such situation in the case of “**Halimabai and others vs Rakesh Kumar Mukhasia and others**” reported in [2004 ACJ 374] . This Court took a view that mere fact that widow of the deceased had continued the business after the death of the deceased, is not a reason to discard the claim for compensation. Therefore, only because after the death of the deceased the claimant No. 1, who is the only Commerce Graduate, attempted to earn some income from the work shop of the deceased to maintain her minor children and old grandmother, the claim of the claimant for grant of compensation as dependents of the deceased cannot be rejected. Thus, I hold that the claimants are entitled to compensation of Rs. 20,51,478/- under the head of loss of dependency.

36. In addition to this, the claimants are also entitled to following compensation under the conventional heads as ruled by the Apex Court in “**National Insurance Company Ltd. vs Pranay Sethi and others**” (supra) :

Sr. No.	Description	Amount in Rs.
1)	Loss of consortium	40,000/-
2)	Loss of estate	15,000/-
3)	Funeral expenses	15,000/-
	Total =	70,000/-

37. Thus, the claimants are entitled to total following compensation under different heads :

Sr. No.	Description	Amount in Rs.
1)	Loss of dependency	20,51,478/-
2)	Loss of consortium	40,000/-
3)	Loss of estate	15,000/-
4)	Funeral Expenses	15,000/-
	Total =	21,21,478/-

38. The claimants are entitled to interest on this compensation amount @ 9% per annum, as held by the Tribunal considering the rate of interest prevailing at the time of occurrence. This compensation shall also be inclusive of compensation received by the claimants under No Fault Liability. Thus, First Appeal No. 539 of 2005 deserves to be partly allowed to enhance the compensation to the tune of Rs. 21,21,478/-. So also the counter First Appeal No. 170 of 2007 filed by the Insurance Company deserves to be partly allowed to exonerate the Insurance Company from its liability to indemnify the owner of the offending truck. However, pay and recover order has to be passed against the Insurance Company, considering the factual situation that it will be impossible for one widow and her minor children to recover the compensation from the owner of the offending truck. To that extent, the award passed by the MACT, Ahmednagar, in MACP No. 1018 of 2000 deserves to be modified.

39. Now, I proceed to examine the quantum of compensation payable to the injured in MACP No. 125 of 2001, which is the subject matter of First Appeal No. 963 of 2005.

40) To substantiate his contention, the claimant has examined six witnesses. Wardhaman Ghongade (PW 1) is the brother of the injured, who filed the claim petition on behalf of the injured. Doctor P.M. Daule (PW 2) is the Orthopedic Surgeon and Doctor Ravindra Somani (PW 4) is the Neuro Surgeon. Dr. Jems is Physio Therapist (PW 3), Mukund Prasad (PW5) is the employee of Parle Paroducts Ltd. Company, which appointed the son of Claimant as distributor at Shrirampur. Suresh Panikar (PW 6) is the Deputy Manager of Tata Tea Company, which appointed the injured as distributor at Ahmednagar from 1986 onwards.

41) On behalf of Claimant, Wardhaman Ghongade (PW 1) deposed that due to accidental head injuries and fracture to the right hand and leg, the injured lost his memory and after the accident due to disability to the injured, his business of distributor-ship for Tata Tea Company was stopped. According to the Claimant, due to permanent disability, he sustained 100% loss of earning capacity. The Claimant placed reliance on disability certificate (Exh. 37), which shows 30% of permanent disability to the claimant due to brain injury and fracture injuries. Doctor P.M. Daule (PW 2) has duly proved the

disability certificate (Exh. 37). He deposed that due to disability, the injured would not be in a position to work as he used to work before to the accident. The Physio Therapist Mr. James (PW 3) does not say anything about the physical disability of the claimant. Even Doctor Ravindra Somani (PW 4) who is the Neuro Surgeon deposed regarding episodic aggressiveness of injured due to brain injury, which affected the working capacity of the injured. He has proved the certificate (Exh. 51).

42) The law regarding the payment of compensation in injury claim is settled by the Apex Court in **“Rajkumar vs Ajaykumar and another” [2011 (2) Mh. L.J. 569]**. The Apex Court made it clear that in personal injury cases the compensation has to be awarded under following heads :

“Pecuniary damages (Special Damages) :-

- i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing, food and miscellaneous expenditure.
- ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:
 - a) Loss of earning during the period of treatment;
 - b) Loss of future earnings on account of permanent disability.
- iii) Future medical expenses.

Non pecuniary damages (General Damages) :-

- iv) Damages for pain, suffering and trauma as a consequence of the injuries.
- v) Loss of amenities (and/or loss of prospects of

- vi) marriage).
- vi) Loss of expectation of life (shortening of normal longevity).

43. In this case, the Apex Court has made it clear that in routine personal injury cases, compensation will be awarded only relating to treatment, hospitalization, medicine, transportation, nourishing, foods, miscellaneous expenditure and the loss of earning during the period of treatment, as well as for pains, sufferings and Trauma as the consequences of injuries. However, the Apex Court has made it clear that only in serious cases of injuries where there is specific medical evidence corroborating the evidence of the claimant, only then the compensation is granted under the heads of loss of future earning on account of permanent disability, future medical expenses, loss of amenities, loss of expectation of life.

44. In this case, the Apex Court has also made it clear that the amount of compensation does not depend on percentage of disability, but it depends on loss of earning capacity of the injured. The Tribunal has first to ascertain what activities the Claimant would carry on, inspite of permanent disabilities and what he could not do as a result of permanent disability. The second step to ascertain is avocation, profession and the nature of work before the accident as also his age. The third step is to find out whether the claimant is totally disabled from earning any kind of livelihood or whether inspite

of permanent disability the claimant could still effectively carry on activities and functions which he was earlier carrying on or whether he was prevented or restricted from discharging his previous activities and functions, but would carry on some other lesser scale of activities and functions, so that he continues to earn or can continue to earn his livelihood. The Tribunal should not be a silent spectator, when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. In this judgment, the Apex Court has summarized the principles discussed as follows :

“(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors”.

45. Similar view was also expressed by the Apex Court in **“Arvind Kumar Mishra vs New India Assurance Co. Ltd. & Anr” [(2010) 10 SCC 254]**. The Three Judges of the Apex Court in **“Jagdish vs. Mohan and Ors” [AIR 2018 Supreme Court 1347]** have also expressed that the principle laid down in **“Arvind Kumar Mishra vs New India Assurance Co. Ltd. & Anr”** (supra) and **“Rajkumar vs Ajaykumar and another”** (supra) must be followed by the Tribunals and High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled as permanently or temporarily.

46. Keeping in mind the above discussed legal principles settled by the Apex Court, now I proceed to determine the quantum of compensation payable to the Claimant on account of his physical permanent disability. As ruled by the Apex Court, only because Doctor Daule (PW 2) certified that the Claimant sustained 30% permanent disability, compensation cannot be awarded to the Claimant holding that he sustained 100% loss of earning capacity. On the other hand, after going through the evidence of Doctor Daule (PW 2), it reveals that he has not made it clear in his entire deposition, as to the exact nature of the disabilities sustained by the Claimant and inability of the Claimant to run his profession as distributor for the Tata Tea Company. Even he can not bifurcate the

percentage of disability due to brain injury and fracture injuries.

47) The permanent disability certificate (Exh. 37) indicates that it was issued on 26.12.2000 and the percentage of the permanent disability was assessed on that particular date i.e. before the recovery of the injured. From the evidence of Doctor Daule (PW 2), it emerges that even before 26.12.2000 the fixtures and interlock nailing were removed. From his cross-examination, it becomes clear that when the infection was under control, the fixtures were removed and the interlock nails were removed when the bones got united. Thus, it become clear that up to 26.12.2000 the bones of the injured were united and his other injuries were cured. Even Doctor Somani (PW 4), has admitted in his cross-examination that there was improvement in the physical health of the Claimant when the Claimant approached this Doctor on 26.6.2004 for obtaining certificate (Exh. 51). Doctor Somani has made it clear that the injured Claimant was able to speak and walk when he approached him for certificate. He has also made it clear that the injured has considerable understanding of questions and he was able to answer it. He admits that the injured does not fall within the category of mentally affected, but he has only behavioral problem. In view of this admission by Doctor Somani, who had occasion to observe the physical and mental condition of the Claimant on 26.6.2004, the

permanent disability certificate (Exh. 37) has become useless piece of the evidence which indicates that the injured was unable to walk and stand due to the fracture. If permanent disability certificate (Exh. 37) is considered along with the evidence of Doctor Somani (PW 4) and Dr. Jems (Pw 3), it becomes clear that from the date of issuing of permanent disability certificate i.e. from 26.12.2000 till 2004, when Doctor Somani examined the injured, there was almost full recovery in the physical and mental condition of the injured. The behavioral aggressiveness of the Claimant cannot be termed as disability to run the business of distributor.

48. From the cross-examination of Vardhman Ghongade (PW 1), it becomes clear that the business of distributorship for Tata Tea Company run by the Claimant is partnership business and after the accident, the son of the Claimant Niranjana came to Ahmednagar and extended his helping hand to continue the business. Thus, by no stretch of imagination, it can be said that on account of permanent disability, the business of distributorship of the Tata Tea Company was closed down and thereby the Claimant sustained 100% loss of income.

49. Otherwise also, from the cross-examination of Vardhaman Ghongade (PW 1), it emerges that the document

showing the dissolution of partnership firm is not produced on record to show that the partnership firm business of distributorship for the Tata Tea Company was closed down. Even no documents regarding the profit and loss account and the balance-sheet of the firm of the Claimant are filed on record to show that the Claimant sustained loss due to the accidental injuries. From the cross-examination of Vardhaman Ghongade (PW1), it becomes clear that two to three persons are serving in the partnership firm of the Claimant to run the business of distributorship for Tata Tea Company. The nature of the work of this business is to obtain the orders and supply the delivery of the goods received from the Tata Tea Company to the customers as per their requirements. Thus, as admitted by Doctor Somani (PW 4), when the Claimant was able to walk and was in fit mental condition to talk as well as understand the questions, he can definitely run the business of distributorship, even after the accidental injuries. From the cross-examination of Doctor Jems (PW 3), it becomes crystal clear that the Claimant has full understanding and he was co-operative. In such circumstances, by no stretch of imagination, it can be held that due to accidental injuries the Claimant has become physically disabled to run his business of distributorship.

50. The Claimant has examined Suresh Panikar (PW 6),

who is the Deputy Manager of Tata Tea Company to show that after the accident, the sale of Tata Tea Company articles through the Claimant was reduced from 14,000 Kg. per month to 9800 Kg. per month. Assuming that there was reduction of sale of Tata Tea Goods of the partnership firm of the Claimant. However, reduction of such sale cannot be connected with the accidental injuries of the Claimant, because in business, such ups and downs are normal, due to change in the market situation and business competitions in between the Companies. Otherwise also, evidence of Suresh Panikar (PW 6) is of no use to prove the loss of income of Claimant, because this witness has not brought on record any other documentary evidence, such as Sale Register or the Stock Register to show the reduction in sale. Only single letter (Exh. 61) issued by Shri Gauri to the Tata Tea Company, is not sufficient to prove the loss of income of the Claimant due to accidental injuries.

51. The Claimant has examined Mukund Kumar (PW 5) to show that Shantisagar Agency at Shrirampur run by his son Niranjan was closed down on account of the accident of the Claimant. Reliance was placed on the letter (Exh. 57-A) sent by this witness to Shantisagar Agency. However, this letter shows that it was addressed to the brother of the injured i.e. Shri Vardhaman and not to the son of the Claimant. As admitted by this witness, no document

is placed on record to show that Shantisagar Agency was terminated by the Parle Product Company. Thus, on the basis of testimony of Mukund Kumar (PW 5), the Claimant cannot prove that Shantisagar Agency run by his son was closed down due to the permanent disability sustained by the Claimant. Otherwise also assuming that the son of the Claimant sustained any loss due to shifting from Shrirampur to Ahmednagar, in the present injury claim petition no compensation can be awarded for the loss sustained by the son of the Claimant.

52. In the circumstances, neither the Claimant has proved that due to the accidental injuries on account of his permanent disability he sustained loss of earning capacity, nor he has proved the loss sustained in his business of distributor-ship. Therefore, no compensation can be awarded to the Claimant under the head of loss of future income.

53. Regarding the medical expenditure for the treatment to the Claimant after the accident, the Claimant has placed on record cash memos and receipts issued by Rubi Hall Hospital, Pune and the Pravara Medical Trust. These documents are not disputed by the Insurance Company. As observed by the Tribunal, the medical expenses to the tune of Rs. 1,43,211/- in connection with the

treatment at Rubi Hall Hospital, Pune and the medicine bills of Rs. 65,162/- as well as Pravara Hospital bills of Rs. 500/- are not disputed by the Insurance Company. Thus, the Claimants are entitled to compensation of Rs. $(1,43,211 + 65,162 + 500) = 2,08,873/-$ regarding the treatment at Rubi Hall Hospital, Pune and the Pravara Hospital Loni.

54. The dispute is regarding the bills issued by Doctor Daule (PW 2) Hospital and by Doctor Jems (PW 3). The Tribunal doubted the bills issued by Doctor Daule Hospital on the ground of variance in nursing charges and bed charges in the bills issued on different dates. However, Doctor Daule (PW 2) when proved these bills (Exh. 34, 35 and 36) issued on 8.8.2000, 27.12.2000 and 16.7.2003, no question was put to this witness regarding the variance in the bed charges and nursing charges. Had such questions asked to this witness, certainly he would have furnished the explanation for such variance. So also, as these bills are issued on different dates, there can be changes in bed charges and nursing charges during that respective period. Thus, merely on the basis of variance in bed charges and nursing charges the bills issued by Doctor Daule (Exh. 34 to 36) cannot be doubted. On the other hand, I hold that on the basis of bills (Exh. 34 to 36) issued by Doctor Daule Hospital, the Claimant has proved the medical expenditure of Rs. $(45,450 + 16,450 + 8,050) = 69,950/-$.

55) So also the bill of Rs. 15,000/- (Exh. 40) and Rs. 16,500/- (Exh. 41) proved by Doctor Jems (PW 3) towards Physio Therapy treatment given to the Claimant from 20.7.2000 to 26.6.2001 cannot be doubted, only because no supporting documentary evidence has been placed on record by this Doctor. Thus, I hold that the Claimant is also entitled to compensation of Rs. 31,500/- towards the physio therapy treatment. Thus, the Claimant is entitled to total compensation of Rs. 3,10,323/-, under the need of medical expenditure.

56. The accident occurred on 21.6.2000 and on the same date the injured was admitted at Pravara Hospital Trust at Loni and shifted to Rubi Hall Hospital, Pune till 20.7.2000. Thereafter, on 21.7.2000 he was admitted in Daule Hospital, Ahmednagar and discharged on 8.8.2000. Subsequently, again he was admitted in Daule Hospital on 23.12.2000 and was discharged on 26.12.2000. Lateron, he was admitted on 15.7.2003 and discharged on 16.7.2003 from Daule hospital. The Claimant was never admitted in Hosiptal of Doctor Somani. Thus, the Claimant was hospitalized from 21.6.2000 for the period of total 51 days. From the income tax return of the Claimant for the assessment year 1999 to 2000, it reveals that gross income of the Claimant in the year 1999 – 2000 was Rs. 75,390/-. The Claimant has paid income tax of Rs. 3,205/-. After deducting this income tax from the gross income of the Claimant his annual

income is assessed as Rs. 72,185/-. Thus, his monthly income is assessed as Rs. 6,015/-. The daily income of the Claimant comes to Rs. 200/-. As the Claimant was hospitalized for the period of 51 days, he sustained loss of income of Rs. $(200 \times 51) = \text{Rs. } 10,200/-$. Thus, the Claimant is entitled to compensation of Rs. 10,200/- for the hospitalization period under the head of actual loss of income.

57. As the Claimant was hospitalized for the period of 51 days, somebody from his family must have attended him in the hospital. On guess work the expenditure of attendant is assessed as Rs. 500/- per day in the year 2000. Thus, for 51 days the Claimant has spent amount of Rs. $(500 \times 51) = 25,500/-$ towards attendant charges. Therefore, the Claimant is entitled to compensation of Rs. 25,500/- under the head of attendant charges. Therefore, no separate compensation can be awarded for lodging and boarding.

58. Considering the head injury as well as fracture of bone of the right hand and right leg, I hold that under the head of pains, sufferings and trauma, the Claimant is entitled to compensation of Rs. 50,000/-. However, as observed above, the Claimant cannot prove physical disability sustained by him on account of accidental injuries. On the other hand, from the cross-examination of Doctor Daule (PW 2) and Doctor Somani (PW 4), it emerges that the bones of the Claimant are united and he is mentally fit to do his

routine work. Therefore, no compensation can be awarded under the head of loss of amenities and enjoyment of life.

59. From the evidence on record, it emerges that after the accident the Claimant was shifted to Pravara Hospital Trust at Loni, from there to Rubi Hall Hospital, Pune and subsequently to Daule Hospital, Ahmednagar. Therefore, though bills of transportation are not filed by the Claimant, on guess work considering the distance in between the Ahmednagar, Pune and Pravara Trust, I hold that the Claimant is entitled to transportation charges of Rs. 10,000/-.

60. So also, Doctor Daule (PW 2), has proved certificate (Exh. 38) regarding future medical expenditure of Rs. 20,000/- for removal of implant from the body of the Claimant. Thus, the Claimant is also entitled to compensation of Rs. 20,000/- towards future medical expenditure. The Claimant is entitled for total following compensation under different heads :

Sr. No.	Description	Amount in Rs.
1)	Loss of actual earning during hospitalization period	10,200/-
2)	Medical expenses	3,10,323/-
3)	Future medical expenditure	20,000/-
4)	Transportation charges	10,000/-
5)	Compensation under Pains, Sufferings and Trauma	50,000/-

6)	Attendance Charges	25,500/-
	Total =	4,26,023/-

61. In view of this discussion the First Appeal No. 963 of 2005 filed by the injured/Claimant for enhancement of compensation deserves to be dismissed. On the other hand, First Appeal No. 155 of 2007 filed by the Insurance Company deserves to be partly allowed to reduce the compensation to the tune of Rs. 4,26,023/- and for exonerating the Insurance Company with direction to pay compensation and later on recover it from respondent No. 1 the owner of the offending vehicle.

62. Accordingly, First Appeal No. 963 of 2005 is dismissed and First Appeal No. 155 of 2007 is partly allowed. First Appeal No. 539 of 2005 is partly allowed and the First Appeal No. 170 of 2007 is also partly allowed.

63. In MACP No. 125 of 2001, the award passed by MACT, Ahmednagar is modified to reduce the compensation awarded in favour of the Claimant to the tune of Rs. 4,26,023/- with interest thereon @ 9% per annum from the date of filing of the petition till realization. This compensation shall be inclusive of compensation received under No Fault Liability. The Insurance Company (Original Respondent No. 2) is exonerated from its liability to indemnify

respondent No. 1 i.e. the owner of the offending truck. Though, Insurance Company is exonerated, direction is issued to respondent No. 2 Insurance Company to first pay compensation to the original Claimant in accordance with the modified award and thereafter to recover it from the original respondent No. 1 by initiating proceeding before executing Court as if the dispute between the insurer and the owner was subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. The Tribunal shall obtain security from the owner of the truck, for the entire amount which the insurer will pay to the Claimant. The Tribunal shall attach the truck bearing No. MH-14/4641 as part of the security. If necessity arises, the Tribunal shall take assistance of Regional Transport Officer concerned. Apportionment of compensation amount and investment as per the award passed by the Tribunal.

64. Award passed by the MACT in MACP No. 1018 of 2007 is modified to enhance the compensation to the tune of Rs. 21,21,478/-. with interest thereon @ 9% per annum from the date of filing of the petition till realization of amount, which shall be inclusive of compensation under No Fault Liability.

65. Respondent no. 2 Insurance Company is exonerated from its liability to indemnify respondent No. 1. Though respondent

No. 2 Insurance Company is exonerated from its liability, direction is issued to Respondent No. 2 to first pay compensation to the Original Claimant in accordance with the modified award and thereafter recover it from Original Respondent No. 1/ the owner of the offending truck bearing No. MH14/4641, by initiating proceeding before Executing Court, as if the dispute between the insurer and the owner was subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of Insurer. The Tribunal shall obtain security from the owner of the truck for the entire amount, which the insurer will pay to the Claimant. The Tribunal shall attach offending truck bearing No. MH-14/4641 as part of the security. If necessity arises, the Tribunal shall take assistance of Regional Transport Officer concerned.

66. Parties to bear their respective costs of the appeals.

(SUNIL K. KOTWAL)
JUDGE

mahajansb/