

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

FIRST APPEAL NO. 2321 OF 2015

New India Insurance Company Ltd.,
Branch Manager,
Adalat Road, Aurangabad,
Through its Divisional Manager/Authorized Signatory,
Mahesh Auto Compound, Adalat Road,
Aurangabad. Appellant...

Versus

1. Shobhabai W/o. Pandharinath Rathod,
Age : 42 years, Occu. Household,
R/o. Sindon-Bhinda, Tq. & Dist. Aurangabad.
 2. Bhima S/o. Dagadu Rathod,
Age : 69 years, Occu. Nil,
As above.
 3. Sunil S/o. Pandharinath Rathod,
Age : 23 years, Occu. Education,
R/o. As above.
 4. Jyoti D/o. Pandharinath Rathod,
Age : 21 years, Occu. Education,
R/o. As above.
 5. Usha D/o. Pandharinath Rathod,
Age : 17 years, Occu. Education,
 6. Anil S/o. Pandharinath Rathod,
Age : 15 years, Occu. Education,
- No. 5 and 6 are minors, U/G of Mother,
Respondent No. 1, Occupation & R/o. As above.
7. Mehendbhai S/o. Ghelabahi Udetra,
Age : Major, Occupation : Driver,
R/o. Khapat, Tq. & Dist. Porbandar,
Gujarat State.

8. Bharatibai Bhogesara,
Age : Major, Occupation : Business,
R/o. Ranakandona, Tq. Ranavav,
Dist. Porbandar, Gujarat State. Respondents...

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Mr S. G. Chapalgaonkar, Advocate for the appellant
Mr Shrikishan S. Shinde, Advocate for respondents No. 1 to 4

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WITH
CIVIL APPLICATION NO. 5129 OF 2018
IN
FIRST APPEAL NO. 2321 OF 2015

CORAM : A. M. DHAVAL, JJ.

DATE OF RESERVING THE JUDGMENT : 07TH AUGUST, 2018.

DATE OF PRONOUNCING THE JUDGMENT : 16TH AUGUST, 2018.

JUDGMENT :-

1. Heard. **Admit.** With the consent of the parties, the appeal is taken up for final disposal at admission stage.

2. This is an Appeal by the Insurance Company in MACP No. 105/2011 by judgment dt. 12.12.2014. The ld. Member, MACT, Aurangabad, allowed the claim petition to the tune of Rs. 8,79,000/- with interest of 7.5% and fastened the liability on all the respondents. Being aggrieved, the Insurance Company has preferred this Appeal.

3. As per the claim petition, on 26.03.2009 at 05:00 p.m., deceased Pandharinath was proceeding from his office at Garkheda, Tq. Khultabai, for darshan of Lord Bhadra Maruti. He was on his bike and his two friends were going on another bike. When they

reached Khultabad T-point, truck bearing No. GJ-25-T-5050 belonging to respondent No. 8 driven by respondent No. 7 rashly and negligently gave dash to the bike from rear side. As a result, Pandharinath sustained multiple injuries and then he was brought to the Civil Hospital (Ghati) at Aurangabad where he was declared dead. Crime was registered at C.R. No. I-444/2009 for offences u/s 279 & 304A of the Indian Penal Code and u/s 134 of the Motor Vehicle Act. The claimants claim that, Pandharinath was aged 32 years and was serving in Radhakrishna Mangal Karyalaya, Aurangabad, on a salary of Rs. 7,000/- p.m. Bhatta of Rs. 1,000/- + Bonus at Diwali. Claimant No. 1 is a widow, claimant No. 2 is father and claimant No. 3 to 6 are minor children of the deceased, who were all dependant upon him. With these pleadings, they claimed compensation of Rs. 10,00,000/-.

4. Orig. respondents No. 1 and 2 denied the factum of accident, involvement of the truck, age and income of the deceased. It is claimed that, respondent no. 1 was having valid driving license and the truck was duly insured with respondent No. 2. They claimed that, the accident did not take place due to negligence of respondent No. 7 – driver. Therefore, if any liability is found, the Insurance Company would be liable. Respondent No. 3 denied various

contentions in the petition and claimed that, the driver was not holding valid and effective license. The claimants examined three witnesses. The respondents did not lead any evidence. The ld. trial Judge accepted the case of the claimants on all points except the salary income of deceased at Rs. 8,000/- per month. The income of the deceased was assumed at Rs. 4,000/- per month. Future prospects of Rs. 2,000/- were awarded. 1/4th expenses were deducted towards personal expenses and with nominal compensation of Rs. 10,000/- and Rs. 5,000/- under the heads of consortium and funeral, the claim was allowed to the extent of Rs. 8,79,000/- with interest at the rate of 7.5% p.a.

5. Shri. S. G. Chapalgaonkar, learned counsel for the appellant – Insurance Company has challenged the manner of accident as stated in the claim petition and in the evidence. He relies on the copy of FIR lodged by a Police Constable present on the spot. He submits that, as per FIR, deceased-Pandharinath was coming from Khultabad side. He drove his bike rashly and negligently and gave dash to the divider and fell on the other side. Thereafter, he came under the wheels of truck moving from its own lane. He further argued that, the so-called eye witness examined by the claimants has not given any statement to the police and he was not cited as a

witness. Thus, there was rashness and negligence on the part of the deceased which resulted into accident. In any case, at least, it is a case of contributory negligence. Secondly, he submitted that, the driver of the vehicle was having license to drive the motor vehicle like transport vehicle and not heavy vehicle like truck. Therefore, there was breach of policy by the insurer (R-2). Hence, the Insurance Company should not be held liable. Alternatively, he argued that, the compensation awarded should be substantially reduced in view of the contributory negligence of the deceased and the order for pay and recover should be passed.

6. Per contra, learned Advocate Shri. K. S. Shinde, argued that, the FIR is not a substantial piece of evidence. The claimants have examined eye-witness and have taken a stand that the contents of the FIR were not correct. The deceased was proceeding towards Khultabad and that time he was dashed by the offending vehicle from the back side. The Insurance Company has not led any evidence and, therefore, the consistent evidence of eye-witness cannot be discarded. The claimants have also claimed that, in addition to service the deceased was doing dairy business and was earning Rs. 250/- per day.

7. On the basis of the arguments advanced, points for my consideration with my findings thereon are as follows:

(i) Whether the accident took place due to entirely rashness and negligence on the part of the truck driver and whether there was any contributory negligence by the deceased?

.....There was contributory negligence of the deceased to the extent of 50%.

(ii) Whether the decree of Rs. 8,79,000/- awarded by the learned trial Judge is excessive or just & reasonable and whether it needs any interference?

....In the affirmative.

(iii) The amount is modified to the tune of Rs. 3,59,000/- with interest at the rate of 7.5% p.a.

REASONS

8. The appellants have examined claimant No. 1 – Shobha, wife of the deceased. She has deposed the facts as per her evidence. She has no personal knowledge about the accident. With regard to the accident, she has admitted that, her husband was not having a driving license to drive the bike. It was purchased by him on loan and after his death, it was taken away by the finance company. The claimants have relied on following documents.

(i) Copy of FIR (Exh. 24)

- (ii) PM notes (Exh. 25)
- (iii) Insurance Policy (Exh. 26)
- (iv) Inquest panchanama (Exh. 27)
- (v) Form Com AA (Exh. 28).

9. The claimants have examined CW3 - Sanjay Medhe, who has posed himself as eye-witness. He stated that, on the day of the incident, he and his friend Bhadre all were proceeding to Khultabad for darshan of Lord Maruti. Pandharinath was riding a bike while he and Bhadre were on another bike. When they reached near Daulatabad T-point at 17:45, they noticed that one truck coming from their back side, went speedily and gave dash to the bike of Pandharinath. He noted its number as GJ-25-T-5050. The truck driver did not halt the vehicle and fled away. He was lying near the divider and sustained injuries to the skull. He admitted that, on the spot of accident, there was a traffic Police Chowki at a distance of 150 ft. He could not tell whether the truck went towards Mumbai or Daulatabad, but the accident took place before the turning point. He stated that, there was no road divider at the spot. He stated that, police had not recorded his statement and he had not lodged report at the police station.

10. Learned counsel for the respondents argued that, when there is oral evidence about the nature of accident, the same cannot

be contradicted by the contents of the FIR. When the dash is given by truck driver from the back side and the charge-sheet was filed against him and when the respondents have not examined truck driver or any other witness, the learned trial Judge has rightly believed the evidence of the claimants to hold the truck driver fully rash and negligent.

11. Shri. Chapalgaonkar, learned counsel for the Insurance Company relied on *Oriental Insurance Co. Ltd. V/s. Premlata Shukla and Ors.*, reported in 2007 AIR SCW 3591 and submitted that the claimants have relied on the FIR and the spot panchanama to prove the factum of the incident. The FIR is lodged by the Police Constable present there. The claimants cannot take a turn around and start disputing some of the facts of the FIR which are inconsistent with their case.

12. The proceedings u/s 166 of the Motor Vehicles Act are summary in nature. The police documents like FIR, spot panchanama etc. can be looked into. (Reliance on *Oriental Insurance Co. Ltd. vs. Sangita Dattatraya Jamdade* reported in 2006 ACJ 971).

13. It is no doubt true that the story narrated in the FIR may not be binding and conclusive but by reliable evidence it should be

shown as incorrect. In the present case, the claimants themselves were not present at the time of the accident. The truck driver did not halt the vehicle and fled away. The respondents have filed computer print out of the relevant case from NJDG. It shows that, the accused has absconded and therefore the case came to be closed u/s 258 of the Cr.P.C. Thus he could not be examined.

14. As far as CW3 Sanjay is concerned, he is deposing a story which is not there in the FIR. He has admitted that, he had not lodged report to the police nor his statement was recorded by the police. If he claims that, he was friend of the deceased and he was proceeding along with the deceased and had seen the accident, his conduct subsequent to the accident is totally inconsistent with the facts he is deposing. No friend who has seen his friend meeting with an accident and dying would behave in such fashion. Having regard to the common course of natural events, if Sanjay was eye-witness, he would have lodged report to the police and he would have been present along with his friend Pandharinath to the hospital and would have participated in the funeral. His evidence shows that, after watching the incident, he did nothing.

15. On going through the evidence of Sanjay by applying yardstick of a prudent man, I find that, he must not have seen the

accident. His evidence is totally contradictory to the contents of the FIR. The FIR shows that, deceased Pandharinath was returning from Khultabad to Aurangabad. Khultabad is 32 kms away from Aurangabad. He was not holding any driving license. He gave dash to the divider and fell on the other side of the road. It is totally silent about any other person accompanying the deceased on another bike. In the light of these facts, learned advocate for the appellant rightly relied on the judgment in the case of Premlata (supra), wherein it is observed that,

“13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn around and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.

14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be

relied upon. In *Hukam Singh (supra)*, the law was correctly been laid down by the Punjab and Haryana High Court stating;

"8. Mr. G.C. Mittal, learned counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Ram Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to approbate and reprobate."

16. In Premlata's case (*supra*), the FIR had disclosed that the deceased was travelling in a Tempo Trax and it was given dash by a truck by rash and negligent driving and the same could not be traced

out. Claim was filed against Tempo Trax. It was held that as per FIR, the truck driver was rash and negligent and the claimants cannot lead evidence and cannot put up a case contrary to the said facts unless those are shown to be wrong.

17. I, therefore, find that the evidence of CW3-Sanjay is not reliable. The deceased had left the office at Garkheda at 5:00 pm as claimed by the claimants. When once CW3 is disbelieved for inherent improbabilities, the only evidence is about FIR. The charge-sheet was filed against the driver of the truck and the respondents have not examined him. The evidence shows that, when the deceased fell on the road from his bike near the T-point, the truck came from the back side at a high speed and ran over him. The truck driver did not halt the vehicle. The PM notes disclosed “crush injury to head with blunt trauma to chest and abdomen”. Considering these facts, I hold that, the deceased and truck driver both were rash and negligent to the extent of 50% each. The learned Judge has not considered these aspects in proper perspective and held the truck driver as fully rash and negligent. The said finding is not sustainable.

18. The second contention raised is breach of policy. There is no dispute that respondent No. 1 – Mehendbhai was driving the truck and the Police have filed charge-sheet against him. Respondents No. 1 and 2 have filed Written Statement (Exh. 30) wherein it is

specifically stated that the driving license of respondent No. 1 was valid. The truck driver has not been prosecuted for driving the vehicle without license. Respondent No. 3 in written statement (Exh.18) claimed that, the person who was driving the vehicle had no effective license on the date of accident. There was no specific defence that the driving license of respondent No. 1 was not valid for driving the truck. Copy of the driving license of respondent No. 1 is filed by the claimants but it is not clear and legible. There is no evidence led by respondent No. 3 to show breach of policy. Hence, the claim that the respondent No. 3 is not liable to pay the compensation on the ground of breach of policy cannot be accepted.

19. In the light of the facts, the issue that remains is of only quantum. Claimant No. 1 deposed that, her husband was earning Rs. 250/- per day by doing dairy business and was getting Rs. 8,000/- as salary by serving in Radhakrishna Mangal Karyalay. CW2 is cousin of Pandharinath. He has deposed that, he was paying Rs. 7,000/- plus Rs. 1,000/- to deceased Pandharinath. Besides, Pandharinath was running a milk business but besides the certificate at Exh. 33, no documentary evidence of dairy business has been produced by CW2 about income source of the deceased. The claimants have also not produced any documentary evidence. In the spot panchanama, the

occupation of Pandharinath was shown as agriculture. Considering the facts, learned trial Judge assumed income of the deceased at Rs. 4,000/-. It is well settled that, when there was no documentary evidence about income of the deceased, it can be assumed to be income of daily labourer. The ld. Trial Judge held his income at Rs. 4,000/- per month instead of Rs. 4,500/-. The increase of 50% on account of future prospects was not applicable to the case of the deceased. If he was not in permanent employment nor he was employed or employee having fixed salary. In such case, the guidelines in Sarla Verma (Smt) & Ors. Vs. Delhi Transport Corporation & Anr. reported in (2009) 6 SCC 121 as well as National Insurance Company Ltd. vs. Pranay Sethi & Ors. reported in (2017) 16 SCC 680, of future prospects are not applicable. I therefore assume his income at Rs. 4,500/- per month i.e. Rs. 54,000/- p.a. Since there were six dependants, as per Sarla Verma's judgment (supra), the deduction towards personal expenses would be $1/4^{\text{th}}$. The loss of income would be Rs. 40,500/-. His age was 32 years, the multiplier applicable would be 16. The compensation for loss of income would be Rs. 6,48,000/-. Besides, as per judgment in Pranay Sethi's case (supra), the claimants were entitled for loss of consortium to Rs.40,000/-, loss of estate Rs. 15,000/- and funeral expenses Rs. 15,000/-, total Rs. 7,18,000/-. Considering 50%

contributory negligence, the claimants are entitled for Rs. 3,59,000/- along with 7.5% and proportionate costs. The point formulated by me are answered accordingly. Hence, I pass the following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The judgment and decree of the trial Court in MACP No.105/2011 is hereby set aside and modified as follows.
- (iii) The appellant and respondents No. 6 & 7 do jointly and severally pay to the claimants of Rs. 3,59,000/- with interest of 7.5% p.a. with proportionate costs.
- (iv) The payment made earlier shall be adjusted/refunded, if excessive payment is received by the claimants.
- (v) The amount deposited in the court to the satisfaction of the decree be paid to the claimants and the balance amount be refunded to the appellant-Insurance Company.
- (vi) Award amounting to decree shall be drawn up accordingly.
- (vii) Civil Application stands disposed of.

[A. M. DHAVALE]
JUDGE