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

First Appeal No. 02880 of 2017

District : Osmanabad

The New India Assurance Company Ltd., a Subsidiary of the General Insurance Corporation of India and a company Incorporated under the Companies Act, having one of its Divisional office at Adalat Road, Aurangabad, Through its Manager (Legal Hub) & Authorized signatory. .. Appellant (Original respondent no.02)

versus

1. Chandrakala w/o. Sambhaji Karkar,
   Age : 44 years,
   Occupation : Household,
   R/o. Javala (Ni),
   Taluka Paranda,
   Dist. Osmanabad.

2. Pranita d/o. Sambhaji Karkar,
   Age : 17 years,
   u/g. R.No.1.

3. Prashant s/o. Sambhaji Karkar,
   Age : 14 years,
   u/g. R.No.1.

4. Gurudas s/o. Manohar Karkar,
   Age : 82 years,
   Occupation : Nil,
   R/o. as above.

5. Kusum w/o. Gurudas Karkar, Age : 70 years, Occupation : Nil, R/o. as above. 6. Rita Rajnikant Panhalkar, Age : Major, Occupation : Business, R/o. B-27, Ashoka Kalewadi, Thergaon, Pune (owner of MH-14/AH-5156)	.. Respondents (Nos.1 to 5 - Original claimants & No.6 - Original respondent no.1) .. Appeal already dismissed as against respondent no.6.

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Mr. Ajit B. Kadethankar, Advocate, for the appellant.

Mr. A.S. Shelke, Advocate, for respondent nos.1 to 5.

Appeal dismissed as against respondent no.6 as per Court's order dated 27.09.2013, passed in Civil Application No. 7595 of 2013.

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CORAM : SMT. VIBHA KANKANWADI, J.

Date of reserving the judgment : 16th October 2018

Date of pronouncing the judgment : 19th October 2018

JUDGMENT :

01. Present appeal has been filed by the Insurance Company under Sec. 172 r/w. 166 of Motor Vehicles Act, 1988 challenging the judgment and award passed by learned Motor Accident Claims Tribunal Osmanabad in M. A. C. P. No. 49 of 2011 on

06-12-2012; whereby the claim petition filed by respondent No. 1 to 5 came to be partly allowed. Hereinafter the parties are referred as per their nomenclature before the Tribunal.

02. The brief facts leading to the main petition before the Tribunal were that the claimants were the legal representatives of one Sambhaji Karkar. Accident had taken place at about 11.30 a.m. On 29-12-2010. Deceased was the pillion rider on motorcycle bearing No. MH-13-AA-4656. One Ranjeet was driving the motor cycle at that time, who was the cousin of the deceased. Their motorcycle was proceeding on road from Barshi to Yedshi. When they were in front of Raygad Dhaba, their motorcycle was dashed by one Indica Car bearing No. MH-14-AH-5156. Offence came to be registered on the basis of report lodged by Ranjeet. Driver of the car was prosecuted by police. The said car was owned by respondent No. 1 and it was insured with respondent No. 2 Company on the date of the accident.

03. It was the further contention of the claimants that claimant No. 1 is the widow, No. 2 and 3 are children and Nos. 4 & 5 are the parents of the deceased. All of them were dependent on deceased. Deceased was an agriculturist. He was also doing business of selling milk. His income was

Rs.13,200/- p. m. from milk business. He was aged 45 at the time of death. They had claimed compensation of Rs.15,00,000/- from both the respondents.

04. Respondent No. 1 and 2 had filed their separate written statement and contested the claim. They had denied the averments in respect of the manner in which the accident took place, as narrated in the Petition. It is an admitted fact that the car owned by respondent No. 1 was insured with respondent No. 2 on the date of accident. It has been tried to contend by both of them that car driver was not negligent, but the accident took place due to the negligence of motorcycle driver. It was contended by respondent No. 2 that the driver of the car was not holding valid and effective driving license on the date of accident.

05. After the written statements were filed by the respondents, issues came to be framed. Claimants have examined the widow of the deceased. Reliance was placed on the police papers. Respondents have not led oral evidence. After taking into consideration, the evidence and hearing both sides, the learned Trial Court has come to the conclusion that claimants have proved negligence of driver of the car to the extent of 65% only. That means it was considered as contributory negligence case. The

learned Tribunal has considered and calculated the income of the deceased at Rs.10,000/- p. m. and compensation has been awarded at Rs.8,00,000/- inclusive of '*no fault liability*' claim amount. Thus, the respondent Nos. 1 and 2 were directed to pay compensation of Rs.7,50,000/- to the claimants. This judgment and award is under challenge in this appeal. The appeal has been preferred mainly on the ground of quantum of compensation.

06. Heard learned Advocate appearing for appellant-Company and learned Advocate Shri. A. S. Shelke for respondent Nos. 1 to 5 (original claimants). The appeal was dismissed against respondent No. 6 vide order dated 27-09-2013 passed in C. A. No. 7595 of 2013.

07. It has been submitted by the learned Advocate for appellant that the learned Tribunal has not appreciated the evidence properly while calculating the quantum. Without any proper proof, the income of the deceased has been assessed at Rs.10,000/- p.m. Claimants had produced on record 7/12 extract of land of deceased. He had 4 H 93 R land, which was sugarcane growing. He was also carrying out milk business. Claimants have produced documentary evidence to show that in 2010, he had received amount of Rs.1,78,000/- for whole year.

Then in 2009, he received amount of Rs.1,34,009 and in 2008 it was around Rs.1,66,153/-. It was the yearly income, which was separate from income from agricultural land. Therefore, there was no evidence to show that deceased was earning more than Rs.10,000/- per month. Learned Advocate for appellant submitted that compensation awarded by the learned Tribunal was not based on logic. He submitted that compensation of Rs.4,81,840 as calculated by him would be just and proper.

08. Per contra, the learned Advocate for respondent Nos. 1 to 5 has supported the reasons given by learned Tribunal while awarding compensation of Rs.7,50,000/-. In order to buttress his submissions, he has relied on the decision in ***Divisional Office, United India Insurance Co. Ltd. Solapur v/s. Pramila Raman Ghatule and others {2016 (4) Mh. L. J. 847}***; wherein compensation has been awarded on the basis of Rs.10,000/- p. m. Total compensation has been awarded to the tune of Rs.8,80,000/-.

09. In this case, the learned Tribunal has held the respondent Nos. 1 and 2 liable to the extent of 65% only. Claimants have not filed any appeal, challenging the said decision. They have also not filed any appeal for enhancement, since their claim

was only partly allowed. Therefore, when this appeal has been filed only by the insurance company, that too on the point of quantum; then the scope of the appeal is limited.

10. The learned Tribunal has considered that there was no fix income for deceased. The agricultural land remained with the family, therefore, there was no loss or change. Brothers of deceased were the joint holders of the land. In fact, there was no discussion made by learned Tribunal as to how he had arrived at the conclusion that deceased might have been earning Rs.10,000/- p. m. A hypothetical figure has been considered, which can not be allowed. I agree with the finding that since the agricultural land remained with the family. However, deceased was cultivating it. Claimants are deprived of his knowledge which was giving proper yield. Therefore, there is certainly monetary loss to the claimants. Though the holding was 4 H 93 R, there was share of brothers of deceased in the same. They were taking sugarcane crop. There is no proof of income from sugarcane, by examining the person from Sugar Factory. Though the claimants have produced on record, milk business receipts, they have not been properly proved by examining the person from the dairy. Only the fact is required to be taken into consideration that

there was additional source of income for deceased. Therefore, when there is no proof of income, we are required to invoke the notional income theory. Deceased had expired in 2010, therefore it would be appropriate to infer that deceased might have been earning at least Rs.6,000/- p. m. from agriculture. This amount is considered on the basis of the fact that though the agriculture land is shared by deceased with his brothers, he could have earned Rs.200/- p. m. from labour work. Further from another source of income, he might have been getting amount of Rs.2,000/- p. m. more. Thus, deceased might have been earning Rs.8,000/- p. m. When the assessment of the compensation is being considered now in this appeal also, then the present decisions of the Hon'ble Apex Court are also required to be considered. In **National Insurance Co. Ltd. vs Pranay Sethi [Special Leave Petition (Civil) NO. 25590 of 2014]** decided on 31st October, 2017, it has been held that, "In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation". Therefore, in this case, the deceased was self employed and his age was 50 at the time of accident. Hence 10% of his income would be the necessary addition in the income for computation. Therefore, taking into consideration the income of the deceased at the rate of Rs. 8000 per month, and additional income, his total income per month would be Rs. 8800/- (Rs. 8000 + 800) annum would be Rs. 1,05,600/- (Rs. 8,800 x 12). Taking into consideration the number of family members and ratio laid down in ***Sarla Verma and Others v. Delhi Transport Corporation and Another*** reported in **(2009) 6 SCC 121**, $1/5^{th}$ of the income is required to be deducted towards personal expenditure. That amount comes to Rs.21,120/- p.m. ($1/5^{th}$ of Rs.1,05,600). Therefore, the dependency of the claimants would be Rs. 84,480/– (Rs.1,05,600 – 21,120) per annum. Deceased was 50 years of age at the time of death. Taking into consideration the decision in ***Sarla Verma*** (Supra), the just multiplier would be '11'. After applying the multiplier the total loss of future income for the claimants would be Rs. 9,92,280/–. Amount towards contributory negligence of the vehicle driver is held to the extent of 35%. Therefore, that much amount is required to be deducted from the said amount. It comes to Rs.3,25,248/- (35% of Rs.9,92,280/-). The amount to which the respondent No. 1 and 2 would be liable is Rs. 6,67,032/- (Rs.9,92,280 – 3,25,248). It is rounded up to Rs.6,67,050/-.

11. In ***National Insurance Co. Ltd vs Pranay Sethi*** (Supra) it has been observed that, "Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively". Therefore, further amount of Rs.70,000/- is added under the said heads. Thus, total amount of compensation would be Rs. 7,37,050/- (Rs. 6,67,050 + 70,000). This amount is inclusive of amount of '*no-fault liability*'. Hence, award is required to be passed to the extent of Rs. 6,87,050/- (Rs. 7,37,050 – 50,000).

12. The learned Tribunal has wrongly arrived at the conclusion that deceased might have earned Rs.10,000/- p. m. The calculation of income by the learned Tribunal was without any basis. No reasons are given for arriving at the said figure. The award is on higher side taking into consideration the evidence adduced before the Tribunal. Hence, the appeal deserves to be partly allowed.

13. In the result following order is passed.

ORDER

(1) The appeal is partly allowed.

(2) The award passed in MACP No. 49 of 2011 by learned M. A. C. T., Osmanabad is hereby modified to Rs. 6,87,050/- (Rupees Six Lakh Eighty Seven Thousand and Fifty Only) from Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand Only);

(3) The award amount will carry interest at the rate of 7.5% from the date of petition till the date of realization;

(4) The instructions in respect of distribution of amount amongst claimants would be the same as directed by learned Tribunal.

(5) Remaining amount from the deposited amount be given to claimants. The excess amount deposited by appellant be refunded to it.

(Smt. Vibha Kankanwadi)
JUDGE

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