

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

FIRST APPAL NO. 1147 OF 2015

1. Dr. Priya w/o Rahul Deshpande,
Age; 37 years, Occupation; Professor,
Resident of Miraj, District; Sangli.
2. Miss. Sanika d/o Rahul Deshpande,
Age; 12 years, Occupation; Education,
U/G of her mother Applicant No. 1
APPELLANT
(Original Claimants)

VERSUS

- 1) Jagatarsingh Kishansingh Thandri,
Age; 55 years, Occupation; Business,
Resident of 37, Nanak Palace,
Pimpaliyarao, Indoor City,
12 Gurumeet Nagar,
Indoor (M.P.)
- 2) Bajaj Allianz General Insurance Co. Ltd.
Through its Legal Branch Manager,
Branch Office G.E. Plaza,
Airport Road, Yerwada,
Pune.
- 3) Mr. Arvind Manikrao Deshpande,
Age; 54 years, Occupation; Service,
C/o; Dr. Avinash Deshpande,
Manvi Medico Dental Center,
Indu Ganga Arcade,
Opposite CIDCO Community Hall,
Cidco N-2, Auangabad.
- 4) The New India Assurance Co.Ltd.
Division Office at Sangli,
Through; Divisional Manager, Legal Hub,
Ajay Engineering Compound,

Adalat Road, Aurangabad. **RESPONDENTS**
(Original Respondents)

- 5) Sudhkar s/o Annasaheb Deshpande,
Age; 60 years, Occupation; Pensioner,
Resident of Partur, District; Jalna.
- 6) Sau. Sunita w/o Sudhakar Deshpande,
Age; 55 years, Occupation; Household,
Resident of Partur, District; Jalna.

RESPONDENTS
(Original Claimants)

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Shri. P.S. Paranjape, Advocate for
Appellants/Claimants
Shri M.M. Ambhore, Advocate for respondent No. 4
Shri.S.G. Chapalgaonkar, Advocate for
Respondent No. 2
Respondent Nos. 1 & 3 served

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CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 17.12.2018

Date of Pronouncing Judgment: 01.2019

J U D G M E N T :

This appeal is directed by Original Claimants in MACP No. 205 of 2008, against the judgment and award passed by the Motor Accident Claims Tribunal Beed (hereinafter referred as 'MACT'), dismissing the claim petition for compensation.

2. Appellants are original claimant Nos. 1 and 2. Respondent No. 1 is owner of the offending tanker, respondent No. 2 is insurer of that tanker, respondent No. 3 is the owner of the car and respondent No. 4 is the insurer of that car which is involved in the accident. Respondent Nos. 5 and 6 are parents of the deceased, who were Original Claimant Nos. 3 and 4 respectively (hereinafter the parties are referred in accordance with their status in the original proceeding).

3. Facts, in nut shell, are that on 7.11.2007, the deceased who used to work as Assistant Lecturer in Government Medical College, Miraj, was proceeding towards his native place for Diwali festival by car No. MH-13/AC-0464. When they reached near Nagzari Shivar, on Georai to Aurangabad National High Way No. 211 at about 8.30 to 9.00 p.m., the car driven by the deceased suddenly dashed on the rear side of the offending tanker, which was wrongly parked on the middle of the road, without putting on parking indicators and reflectors. In that accident, the deceased

died on the spot. Claimant Nos. 1 and 2, who were also travelling by the said car as passengers, sustained minor injuries. Due to accidental death of the deceased on account of rash and negligent act of the driver of the offending tanker, the claimants filed claim petition before the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act').

4. Respondent Nos. 1 & 3, who are the respective owners of the offending tanker and car involved in the accident, were proceeded ex-parte, though served with summons issued by the Tribunal.

5. Respondent No. 2, who is the insurer of the offending tanker by filing written statement (Exh.14), admitted that on the date and time of the accident, the tanker was duly insured and the respondent No. 2 was insurer of the said tanker. He raised defence which was available under Section 149 (2) of the M.V. Act including the breach of conditions of policy of the insurance as the driver of tanker did not hold effective and valid driving license. Respondent No. 2 denied

the occurrence of the accident due to negligence on the part of driver of the offending tanker by wrong parking of tanker on road without putting on the parking indicators and reflectors. According to respondent No. 2, the spot panchanama and the site map shows that the deceased was responsible for the occurrence of the accident. According to respondent No. 2 the claim is bad for non joinder of the driver of the offending tanker.

6. Even, respondent No. 4 insurer of the car involved in the accident, opposed this claim petition by contending that the deceased did not hold effective and valid driving license while driving the car. According to respondent No. 4 the accident occurred only due to negligence on the part of driver of the tanker and therefore, respondent No. 4 is not liable to pay any compensation to the Claimants.

7. After considering the oral and documentary evidence placed on record by both parties, the Tribunal held that accident occurred only due to rash and negligent driving by the

deceased and in the result the claim petition was dismissed in toto.

8. Heard Shri P.S. Paranjape, learned counsel for Claimants, Shri S.G. Chapalgaonkar, learned counsel for respondent No. 2 i.e. insurer of the offending tanker and Shri M.M. Ambhore, learned counsel for respondent No. 4 i.e. insurer of car involved in the accident.

9. Learned counsel for claimants submits that though evidence of the eye witness Dr. Priya Deshpande (PW 1) was fully corroborated by police papers regarding negligence on the part of the driver of the tanker, the Tribunal erroneously disbelieved her evidence and relied on the interested testimony of the driver of the offending tanker. He submits that the spot panchanama with site map, clearly indicates the parking of the tanker by its driver on the middle of the road, without putting on parking signals and reflectors. He submits that as the deceased was driving car at night hours, he did not notice stationary tanker parked on the middle portion of

the road and therefore he collided with tanker from its rear side. He submits that as the rash and negligent act of the driver of the tanker is established by the claimants, they are entitled for compensation from respondent Nos. 1 and 2.

10. Next contention of the learned counsel for the appellants is that at the relevant time, the deceased was serving as Assistant Lecturer, in Government Medical College, Miraj and used to draw monthly salary of Rs. 19,000/-. The deceased was 35 years old. Therefore, in the monthly income of the deceased 50 % amount is to be added towards the loss of future prospects, in accordance with the guidelines issued by the Apex Court in **"National Insurance Company Ltd. vs Pranay Sethi and others"** [2018 (3) Mh.L.J. 70].

11. Learned counsel for insurer of the offending tanker submits that this is the fit case which should be remanded to the Tribunal for retrial, as the salary slip of the deceased is not filed on record to ascertain his monthly income.

He submits that even the spot panchanama is not in the scale and therefore it cannot indicate that the offending tanker was parked on the middle portion of the road. He submits that even issue No. 3 regarding the breach of condition of policy of the insurance by the owner of offending tanker is not decided by the tribunal.

12. In the alternate, the contention of the learned counsel for the insurer is that the spot panchanama, which does not make it clear, whether the parking signals were on or not. On the other hand, on the basis of evidence of driver (DW 1) the insurer has duly proved that the offending tanker was parked by the side of the tar road by putting the parking signal on and by keeping car stationed around the stationary tanker. Thus, the driver of the offending tanker cannot be held responsible for the occurrence of the accident.

13. Learned counsel for the insurer of the car involved in the accident submits that the deceased was driving car in the capacity of owner and it was borrowed from his relative. Therefore,

the risk of the deceased is not covered under the policy of the insurance, though it is comprehensive policy.

14. With the assistance of learned counsel for both parties, I have carefully gone through the oral as well as documentary evidence placed on record by either parties. Claimant Dr. Priya Deshpande (PW 1), who was one of the passenger travelling by the car at the time of accident, has categorically deposed before the Court that on the date of accident when the car driven by the deceased Rahul reached near Nagzari, the car suddenly collided with the offending tanker which was parked in the middle portion of the high way. In her cross-examination, it has been also brought on record that at the time of parking tanker on high way the driver did not put on the parking signals as well as reflectors. According to this witness, accident occurred only on account of negligence on the part of the driver of the offending tanker. She has duly proved the copy of FIR (Exh. 30), spot panchanama (Exh. 31), policy of the insurance of the tanker (Exh. 33) and the

Postmortem report of the deceased (Exh.36). Though it was suggested in her cross-examination that the offending tanker was parked by the side of the road and the accident occurred due to negligence on the part of deceased, she stood constant and denied this suggestion. In short, nothing could be elicited to disbelieve the version of this witness regarding the occurrence of the accident.

15. On the other hand, on behalf of insurer of the offending tanker, driver Motilal Chavan (DW 1) was examined. This witness also deposed in his evidence that when he was driving tanker by Beed to Indore road at the distance of 5/6 kilometer from Georai due to mechanical defect the tanker was stopped and he parked that tanker below the tar road facing towards North. This witness has further made it clear that as it was night time, he put on parking lights and put stones around the tanker as indications to the other vehicles passing by the national high way. From his cross-examination, it emerges that he did not inform police in writing about the occurrence of the

accident. From his cross-examination, it has been brought on record that after the accident the driver was arrested by the police and he is facing criminal trial for rash and negligent act. Even by putting that question the Tribunal has brought on record that the road behind the tanker was straight and the colour of the tanker was red.

16. Thus, after going through the oral evidence placed on record by both parties, it becomes clear that the said evidence is only word against word. The Tribunal has disbelieved the testimony of Dr. Priya (PW 1), because, she is beneficiary. However, the Tribunal failed to consider that even the driver of the tanker Motilal (DW 1) was facing criminal trial and as the sword of conviction was hanging over his neck, he can not admit his negligence before the Court. Otherwise also it is very hard to accept that for some monetary benefits Dr. Priya Deshpande would make false allegations against the driver of the tanker, who was totally stranger person.

17. Another most important aspect is that the

version of Dr. Priya Deshpande (PW 1) regarding wrong parking of tanker and not taking necessary precaution by the driver of the tanker, is fully corroborated by the copy of FIR (Exh. 30), which speaks that at the time of accident, the tanker was parked due to break down, on the tar road, without putting on the parking lights. FIR indicates that accident occurred due to negligence on the part of driver of the tanker. Even, spot panchanama (Exh. 31), fully corroborates the oral version of Dr. Priya Deshpande (PW 1). The spot panchanama shows that incident occurred on Georai to Aurangabad National High Way No. 211, on this road, the red colour offending tanker loaded with molasses was parked on the road. The spot panchanama does not indicate that the tanker was parked by the side of tar road i.e. on clay road. The spot panchanama does not show that the indicators of the tanker were on or there were reflectors on the tanker. The site map, which is the part of the spot panchanama, also makes the situation much clear that the offending tanker was parked on the middle portion of the road which passes from south towards north. The Tanker as

well as car of the deceased were passing towards north. It means, that both vehicles were proceeding towards north. The site map, nowhere shows that the driver of the tanker had put stones around the tanker as indicators to the other vehicles passing by the road.

18. Thus, if police papers are considered along with oral testimony of Dr. Priya Deshpande (PW 1), it becomes clear that each and every contention of Dr. Priya (PW 1) is fully corroborated by the situation on the spot reflecting from the spot panchanama, site map and the contents of the FIR. It is to be noted that the spot panchanama was prepared by police from the Police Station, Georai, which is neither the native place of the claimants, nor of the driver of the tanker. Thus, the Police Officer, who prepared these documents, was totally independent person. When these police papers prepared by the independent agency, fully corroborated the version of Dr. Priya (PW 1), regarding the negligence on the part of the tanker driver, by parking it on the middle of the road, without putting on the

parking indicators and reflectors, the interested testimony of the driver of the tanker (DW 1) cannot be believed. Otherwise also, no reliance can be placed on the testimony of driver of the tanker (DW 1), which is not at all corroborated by the situation on the spot reflecting from police investigation papers. In the circumstances, I have no hesitation to hold that the finding of the learned Trial Court is absolutely perverse regarding the occurrence of the incident due to rash and negligent driving by the deceased Dr. Rahul. On the other hand, I hold that the claimants have duly proved that the motor vehicular accident resulting into the death of Dr. Rahul Deshpande, occurred only due to rash and negligence act of the driver of the offending tanker.

19. No evidence has been placed on record by insurer to prove that driver of tanker did not hold driving license at the time of accident. Therefore, respondent No. 2 Insurance Company failed to prove the breach of conditions of policy of insurance by owner of offending tanker. As

negligence of deceased is not proved, the liability of respondent Nos. 3 and 4 needs no consideration.

20. When the claimants have proved that Dr. Rahul Deshpande died in the motor vehicular accident due to rash and negligent act of the driver of the offending tanker, the claimants are certainly entitled to compensation from the respondent Nos. 1 and 2 who are owners and insurer of the offending tanker respectively. In the circumstance, no liability can be saddled on the owner and insurer of the car involved in the accident.

21. Now question arises about the just and fair compensation. From the postmortem report of the deceased Rahul Deshpande (Exh. 36), it becomes clear that at the time of his death, he was 35 years old. Therefore, in view of law settled by the Apex Court in "**Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr**" [AIR 2009 Supreme Court 3104] the multiplier of '16' is

applicable.

22. Regarding the monthly income of the deceased, Dr. Priya Deshpande (PW 1) categorically deposed on oath that as Assistant Lecturer in Government Medical College, Miraj, the deceased used to draw monthly salary of Rs. 20,000/-. In the entire cross-examination of Dr. Priya Deshpande (PW 1), her contention regarding monthly salary of the deceased at the rate of Rs. 20,000/- per month, is not at all disputed by respondent No. 2 or respondent No. 4. Thus, on the basis of un-challenged testimony of Dr. Priya Deshpande (PW 1), only one conclusion has to be drawn that at the time of death, deceased used to draw monthly salary of Rs. 20,000/- per month as Assistant Lecturer in Government Medical College, Miraj. In the circumstances, even, in absence of salary slip of deceased, income of the deceased can be proved. Otherwise also, it cannot be ignored that deceased was well qualified doctor, therefore, his notional income cannot be less than 20,000/- per month.

23. As Dr. Priya Deshpande (PW 1) has not

made it clear, whether the deceased was in permanent service or he was temporary employee of the Government Medical College, in accordance with law settled by the Apex Court in **"National Insurance Company Ltd. vs Pranay Sethi and others"** (supra), as the deceased was below the age of 40 years, 40% amount is to be added in the monthly income of the deceased. Thus, monthly income of the deceased comes to Rs. (20,000 + 8,000) Rs. 28,000/-. Thus it follows that his annual income was (28,000 x 12) Rs. 3,36,000/-.

24. Though, claimant Dr. Priya Deshpande (PW 1) admitted in her cross-examination that on the date of deposition i.e. on 21.2.2013, she worked as Assistant Professor in Government Medical College, it cannot be held that even on the date of accident i.e. on 7.11.2007 the claimant Dr. Priya Deshpande (PW 1) was drawing salary of Rs. 40,000/- per month as Assistant Lecturer. No document is placed on record by respondents to show that on the date of accident, the claimant Dr. Priya Deshpande (PW 1) was also

in Government service having permanent source of income.

25. So also, because, the claimant No. 3 is pensioner, on account of his meager pension, inference cannot be drawn that he is not dependent of the deceased. In the circumstances, in the family of deceased number of dependents are four. Considering the verdict of Apex Court in "**Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr**" (supra), $1/4^{\text{th}}$ income is to be deducted from the annual income of the deceased towards his personal expenses. After deducting $1/4^{\text{th}}$ annual income i.e. $(3,36,000 \div 4)$ Rs. 84,000/- from the annual income of the deceased, his annual contribution to his family comes to Rs. 2,52,000/-. The amount of Rs. 2,52,000/- is the proper multiplicand which is to be multiplied by the multiplier of '16'. Thus, the loss of dependency comes to $(2,52,000 \times 16)$ Rs. 40,32,000/-.

26. In addition to this, as ruled by the Apex

Court in “**National Insurance Company Ltd. vs Pranay Sethi and others**” (supra), the claimants are entitled to following compensation under conventional heads :

Sr. No.	Particulars	Amount in Rs.
1)	Loss of consortium	40000
2)	Loss of estate	15000
3)	Funeral expenses	15000
	Total	70,000

27. Accordingly, I hold that claimants are entitled to following total compensation under different heads :

Sr. No.	Particulars	Amount in Rs.
1)	Loss of dependency	40,32,000
2)	Loss of consortium	40,000
3)	Loss of estate	15,000
4)	Funeral expenses	15,000
	Total	41,02,000

28. As the claimants were compelled to knock

the doors of this Court for getting their legitimate claims, respondent Nos. 1 and 2 are jointly and severally liable to pay this compensation amount with interest thereon at the rate of 9 % per annum from the date of filing of claim petition till realization of the amount. Considering advance age of respondent No. 5 (claimant No. 3) Sudhakar Annasaheb Deshpande and respondent No. 6 (claimant No. 4) Sau. Sunita w/o Sudhakar Deshpande, out of the compensation amount, only 2,00,000/- each be paid to respondent Nos. 5 & 6 (claimant Nos. 3 and 4). Remaining compensation amount shall be equally apportioned in between the appellants (claimant Nos. 1 and 2). Compensation amount of the share of minor claimant No. 2 shall be invested in Fixed Deposit in any nationalized Bank, till she attains majority. It follows that this Appeal and the Claim Petition, deserves to be partly allowed.

29. Accordingly, First Appeal No. 1147 of 2015 is partly allowed with proportionate costs payable jointly and severally by respondent Nos. 1 and 2 to the claimants. The award passed by Motor

Accident Claims Tribunal, Beed in MACP No. 205 of 2008 is set aside and modified as under :

"a) Claim petition is allowed with costs.

b) Respondent Nos. 1 and 2 do jointly and severally pay compensation of Rs.41,02,000/-(Rupees Forty One Lac Two Thousand Only) with interest thereon at the rate of 9% per annum from the date of filing of the claim petition till realization of compensation amount.

c) Compensation shall be inclusive of compensation received under No Fault Liability.

d) On deposit of the compensation amount before the Tribunal, Rs. 2,00,000/- each be paid to respondent No. 5 (claimant No. 3) Sudhakar Annasaheb Deshpande and respondent No. 6 (claimant No. 4) Sau. Sunita w/o Sudhakar Deshpande with proportionate interest thereon.

e) Remaining compensation amount shall be equally apportioned in between claimant Nos. 1 and 2.

f) The share of claimant No. 2 Miss. Sanika d/o Rahul Deshpande, shall be invested in fixed deposit in any nationalized bank, through claimant No. 1, till appellant/ Claimant No. 2

attains the majority.

g) The quarterly accrued interest on fixed deposit amount shall be paid to the claimant No. 2, through her mother claimant No. 1.

h) Premature withdrawal is not permissible.

i) The concerned bank be informed accordingly.

j) Compensation amount of the share of claimant No. 1, Nos. 3 and 4 shall be paid to them by separate account payee cheques issued in their respective names, through the Tribunal.

k) Respondent Nos. 1 and 2 shall jointly and severally pay costs of the claim petition to the claimants.

l) Respondent Nos. 3 and 4 are exonerated and petition is dismissed against him.

m) Award be drawn up accordingly."

30. Deficit court fees if any, shall be recovered from the claimants.

31. Appeal is disposed of in above said terms.

(**SUNIL K. KOTWAL**)
JUDGE

mahajansb/