IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.986 OF 2017

1) Parwatabai Rushindar Gaikwad,
Age 25 years, Occupation Agriculture,

2) Samarth s/o Rushindra Gaikwad,
Age 05 years, Occupation Education,
Being Minor U/G of Appellant No.1
Natural Mother.

3) Bhimrao s/o Santu Gaikwad,
Age 54 years, Occupation Labour,

4) Santu s/o Mannu Gaikwad,
Since Deceased
Through Legal Representatives
Appellants No.1 to 3 and 5.

5) Hausabai Santu Gaikwad,
Age 54 years, Occupation Labour,

All R/o. Waghola Tq. Phulambri
Dist. Aurangabad. **...Appellants.**
(Org.Claimants)

VERSUS

1) Bhimrao Sundarrao Kale,
Age Major, Occupation Business,
R/o Panchanwadgaon Tq. and
Dist. Jalna.

2) National Insurance Company Ltd.,
Through Its Branch Manager
Hazari Chambers, In Front of
Divekar Auto, Kokanwadi Signal
Station Road, Aurangabad. **...Respondents.**
(Org.Respdts.)

....

WITH
FIRST APPEAL NO. 1211 OF 2017

1) Ashwini Santosh Shinde,
Age 25 years, Occupation Household,

2) Prasad Santosh Shinde,
Age 05 years, Occupation Education,
Being Minor U/G of Appellant No.1
Natural Mother.

3) Bhawadu Yadav Shinde,
Age 54 years, Occupation Labour,

All R/o. Pofala Tq. Phulambri
Dist. Aurangabad. **...Appellants.**
(Org.Claimants)

VERSUS

1) Bhimrao Sundarrao Kale,
Age Major, Occupation Business,
R/o Panchanwadgaon Tq. and
Dist. Jalna.

2) National Insurance Company Ltd.,
Through Its Branch Manager
Hazari Chambers, In Front of
Divekar Auto, Kokanwadi Signal
Station Road, Aurangabad. **...Respondents.**
(Org.Respdts.)

....

WITH
FIRST APPEAL NO. 1212 OF 2017

1) Bhimrao s/o Santu Gaikwad,
Age 53 years, Occupation Labour,

2) Machindra s/o Bhimrao Gaikwad,
Age 18 years, Occupation Education,

Both R/o. Waghola Tq. Phulambri
Dist. Aurangabad. **...Appellants.**
(Org.Claimants)

VERSUS

1) Bhimrao Sundarrao Kale,
Age Major, Occupation Business,
R/o Panchanwadgaon Tq. and
Dist. Jalna.

2) National Insurance Company Ltd.,
Through Its Branch Manager
Hazari Chambers, In Front of
Divekar Auto, Kokanwadi Signal
Station Road, Aurangabad. **...Respondents.**
(Org.Respdts.)

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Advocate For Appellants : Mr. M. R. Deshmukh.
Advocate For Respondent No.1 : Mr. S. S. Tope.
Advocate For Respondent No.2 : Mr. V. N. Upadhye.

....

CORAM : SMT.VIBHA KANKANWADI, J.

Date of Reserving The Judgment : 18-07-2019.

Date of Pronouncing The Judgment : 30-08-2019.

<u>JUDGMENT</u> :

1. All these appeals have been filed by the original claimants seeking enhancement in the compensation granted by Member, Motor Accident Claims Tribunal, Aurangabad.

2. The First Appeal No.986 of 2017 is filed by the claimants who had filed Motor Accident Claim Petition No.421 of 213, First Appeal No.1211 of 2017 is filed by the claimants who had filed Motor Accident Claim Petition No.419 of 2013, and First Appeal No.1212 of

2017 is filed by the claimants in Motor Accident Claim Petition No.420 of 2013. All of them had filed petitions under Section 166 of the Motor Vehicles Act which came to be decided by separate Judgments by the same Member on 10-11-2016, thereby partly allowing their claim petitions. (Motor Accident Claim Petition is hereinafter referred to as 'MACP' and Motor Accident Claim Tribunal is hereinafter referred to as 'MACT', for the sake of brevity)

COMMON FACTS :

3. All the petitions were death claims. Deceased in MACP No.421 of 2013 - Rushindra Bhimrao Gaikwad and deceased in MACP No.420 of 2013 - Tulsabai Bhimrao Gaikwad are the son and mother. They were proceeding on motorcycle driven by Rushindra. They had reached on the turn in Ranjangaon Shivar around 07.30 hours on 11-05-2013. They were proceeding from Panfulambri side towards Rajur. Deceased in MACP No.419 of 2013 is one Santosh Bhawadu Shinde who was proceeding on his motorcycle at the same time and in the same direction. Both the motorcycles were dashed by one Tata 407 truck bearing No.MH-21/ 8958 which had come from opposite direction. It has been alleged in all the petitions that, the said accident took place due to the sole negligence on the part of respondent No.1 who was driving the said truck. He is also the owner of the said truck and the said truck was insured with respondent No.2 on the date of the accident. Therefore, it is

contended that, both the respondents are liable to pay compensation to the claimants jointly and severally.

SEPARATE PLEADINGS :

4. **(A) IN MACP No.421 of 2013 :**

Claimants contend that, deceased was 22 years old agriculture labour, earning Rs.6,000/- per month and as per the particulars of the claim compensation of Rs.11,87,000/- has been claimed.

(B) IN MACP No.420 of 2013 :

Deceased Tulsabai was aged 45 years and agriculture labour, earning Rs.5,000/- per month. Compensation that was claimed by the claimants therein is Rs.5,00,000/- with interest.

(C) IN MACP No.419 of 2013 :

Deceased Santosh was 24 years old person serving as Supervisor with one Alka Engineering Company, earning Rs.9,500/- per month. Compensation claimed was to the extent of Rs.15,83,000/- restricted to Rs.14,00,000/- for the purpose of Court fees.

CONTENTIONS IN THE WRITTEN STATEMENT :

5. Respondents No.1 and 2 filed their separate written statements. They denied in each of the petition age, occupation and income of the deceased. The fact of accident as well as the allegations in respect of negligence on the part of respondent No.1

has been denied by both of them. The Insurance Company respondent No.2 has stated that, the driver of the truck was not holding valid and effective driving licence at the time of alleged accident, and therefore, there is breach of terms of policy. Another fact which has been raised by the Insurance Company is that, after investigation, police have lodged offence under Section 304 of Indian Penal Code alleging that the death has been intentionally caused, and therefore, it cannot be said that it was an accident, and therefore, the Insurance Company is not liable to pay compensation.

6. Taking into consideration the rival contentions, issues were framed. Only claimants have led oral as well as documentary evidence. Respondents have not led any oral or documentary evidence. Therefore, taking into consideration the evidence on record and after hearing both the sides, the learned Tribunal has come to the conclusion that, deceased in all the respective petitions expired due to accidental injuries. Both the drivers of the motorcycle had contributed to the extent of 10 % to the accident. All the claimants are entitled to get compensation and accordingly the petitions have been partly allowed. In MACP No.420 of 2013, compensation has been granted to the extent of Rs.5,37,000/-, in MACP No.419 of 2013 compensation of Rs.9,83,160/- has been granted and in MACP No.421 of 2013 compensation of Rs.9,83,160/- has been granted.

7. Being dissatisfied with the above said awards these appeals have been filed by the original claimants for enhancement. It will not be out of place to mention here that, since the respondents No.1 and 2 have not filed any appeal or even cross-objection in these appeals challenging the findings given by the learned Tribunal. The scope of the appeals is limited, and therefore, it is not necessary to deal with the negligence aspect, so also the fact that all the deceased expired due to the vehicular accident involving truck driven and owned by respondent No.1 and insured with respondent No.2. So also it is not necessary to deal with the point regarding joint and several liability of the respondents No.1 and 2 as the Insurance Company has failed to prove breach of terms of policy.

8. Heard learned advocate Mr. M. R. Deshmukh for all the appellants, learned advocate Mr. S. S. Tope for respondent No.1 in all the matters, and learned advocate Mr. V. N. Upadhye for respondent No.2 in all the matters. It has been vehemently submitted on behalf of the appellants that, the learned Tribunal had not considered the evidence properly, while assessing the quantum of compensation. In appeal No.986 of 2017, since there was no evidence for income, the Tribunal had taken the notional income at Rs.4500/- per month, however future prospects have been added to the extent of 30 % only when in fact it ought to have been 40 %.

Thereafter, taking into consideration the dependency of the claimants, the deduction ought to have been 1/4th. There was absolutely no evidence led by respondents to prove contributory negligence. In fact no such point was raised by them, and therefore, there was no issue framed to that extent. Therefore, the learned Tribunal ought not to have held deceased Rushindra liable to the extent of 10 % for contributing to the accident. He placed his reliance on the decision in, *Syed Sadiq And Other Versus Divisional Manager, United India Insurance Company Limited*, reported in *(2014) 2 Supreme Court Cases 735*, wherein though the accident had taken place in the middle of the road, it was held that in absence of any evidence to prove contributory negligence by appellants (original claimants), they cannot be fastened with such liability. Further in First Appeal No.1211 of 2017 deceased was 24 years old person doing service with Alka Engineering as Supervisor, it was contended that, he was earning Rs.9,500/- per month but though evidence was not led, his income ought to have been considered as Rs.6,000/- per month. In MACP No.1212 of 2017, she was the pillion rider, aged 48 years, notional income has been wrongly taken at Rs.3,000/- per month and future prospects have not been given, therefore, he prayed for enhancement in the compensation.

9. Per contra, the learned advocates appearing for the

respondents supported the reasons given by the learned Tribunal. It was submitted that, from the document on record i.e. the spot panchanama, it is evident that both the motorcyclists had come to their wrong side when their vehicles colluded with the truck. Under such circumstance, the finding given by Tribunal that those drivers of the motorcycle contributed to the extent of 10 % to the accident, was correct. No evidence was adduced on the point of income and therefore the Tribunal was justified in invoking notional income theory.

10. Taking into consideration the scope as well as the arguments advanced, following points arise for my determination, findings and reasons for the same are as follows ;

(1) Whether the learned Tribunal was justified in holding the drivers of the motorcycles liable to the extent of 10 % for contributing to the accident ?

(2) Whether the amount of compensation granted by Tribunal needs enhancement ? If yes, to what extent ?

<u>POINT NO. 1</u> :

11. At the outset it can be said that, there is no positive evidence led by the respondents on the point of the manner in which the accident took place. In fact though respondent No.1 who was the driver as well as owner of the offending truck filed written statement and denied all the allegations; he preferred not to enter the witness

box, and therefore, adverse inference ought to have been drawn against him by the Tribunal. Both the respondents had not taken defence of contributory negligence, and therefore, in view of the ratio laid in *Syed Sadiq And Others Versus Divisional Manager (Supra)*, the Tribunal was not justified in arriving at the said conclusion regarding 10 % contributory negligence on the part of both the drivers of the motorcycles. The learned Tribunal has relied on the spot panchanama in order to arrive at the said conclusion. Perusal of the said spot panchanama as well as the FIR would show that, FIR has been lodged by a person by name Somnath Pawar who was the PSI. Prior to that medico-legal Case was registered. The spot panchanama has been drawn on 11-05-2013, i.e. on the same day of the accident. Accidental death was reported. One witness by name Kalyan Rambhau Kolte was present at the time of execution of the spot panchanama, whose statement has been made part of the panchanama wherein he has stated that, he was in his house and after hearing the noise, he came out of the house and went to the spot. Then he has shown the said spot in the map drawn by the panchas and the Investigating Officer, one point which is towards the Southern end of the road has been shown as spot of accident. It is to be noted that, Rambhau Kolte's house is towards Southern side. Said Rambhau who showed the spot cannot be said to be an eye-witness as he was inside the house, and therefore, merely by showing a spot as spot of impact, it cannot be taken as it is. If the contents of the spot panchanama are shown, it shows about the position of motorcycles and the blood on the spot. Statement of eye-witness either in the form of statement recorded under Section 161 of Code of Criminal Procedure has not been produced nor any eye-witness has been examined in these cases by the claimants. When respondent No.1 himself was also an eye-witness, he has not entered the witness box, under such circumstance merely on the basis of spot panchanama, the learned Tribunal ought not to have held deceased Rushindra and deceased Santosh contributed to the accident to the extent of 10%. That finding deserves to be set aide and no deduction in the amount of compensation can be made on that count. Point is therefore answered in negative.

POINT NO. 2 :

12. Now turning towards quantum, it would be desirable to have computation of quantum case wise ;

(A) First Appeal No.986 of 2017 (MACP No.421 of 2013) : -

Deceased was an agriculture labour. Tribunal could not have ask for any documentary evidence to prove income from such source because the agriculture labour work is in fact a daily wage job and not fixed with anybody. The notional income has been taken @ Rs.4,500/- per month. In Syed Sadiq's case (Supra), the injured claimant was vegetable vendor whose income was taken @ of

Rs.6,500/- per month. Same ratio cannot be applied here for the simple reason that, vegetable vendor does business and that act is not expected from agriculture labour. What is important in this case is that, widow and son were dependent on Rushindra. He was also maintaining a two wheeler. Under such circumstance the learned Tribunal ought to have considered his income, since he is also coming from a rural area namely Waghola Tq. Fulambri Dist. Aurangabad at Rs.5,000/- per month. Further in view of the decision in, *National Insurance Company Ltd. Versus Pranay Sethi and others,* reported in *2017 SCC Online SC 1270 : 2017 ACJ 2700,* taking into consideration the fact that deceased was a self employed person, 40 % of the said notional income is required to be added towards future prospects which comes to Rs.2,000/- per month (40% of Rs.5,000/- per month). Thus the income of the deceased would be Rs.7,000/- per month and yearly it would be Rs.84,000/- (Rs.7,000 per month X 12 months).

13. Here in this case, the father and grand-parents have been shown to be dependent on Rushindra, however it is to be noted that, the father's occupation is stated to be labour, even grand-parents occupation is also said as labour. When father is alive, responsibility to maintain grand-parents would be of father in this case. That means, claimants No.4 and 5 are the responsibility of claimant No.3. It will not be out of place to mention hereby even that, even for

Tulsabai claimant No.3 Bhimrao is shown as dependent, therefore liability of Rushindra was only the widow and son. In other words claimants No.3 to 5 are not entitled to get compensation in this matter and it has been so rightly not given by the Tribunal. Therefore, for personal expenditure we will have to consider only the widow and son. Under such circumstance, the Tribunal was justified in deducting 1/3rd of the income, however taking into consideration the fact that the income of deceased was Rs.84,000/- per annum, he could have spend 28,000/- per annum on himself i.e. 1/3rd of 84,000/- per annum. Therefore, the dependency of claimants No.1 and 2 would be to the extent of Rs.56,000/- per annum. Taking into consideration the age of deceased as 22 and the decision in, *Sarla Verma and others v. Delhi Transport Corporation and another,* reported in (*2009) 6 SCC 121,* to just multiplier in this case would be 18. After applying multiplier the total future loss of income for the claimants No.1 and 2 would be Rs.10,08,000/-. Further in view of the decision in, *National Insurance Company Ltd. Versus Pranay Sethi and others (Supra),* they are entitled to get Rs.70,000/- towards non pecuniary damages. Thus, the total amount of compensation to which the claimants are entitled to is Rs.10,78,000/-. The amount that has been granted by the Tribunal i.e. Rs.9,83,116/- is on the lesser side, and therefore, that deserves enhancement.

14. **(B)** First Appeal No.1212 of 2017 (MACP No.420 of 2013) : -

In this case deceased was Tulsabai, her husband and another son are the claimants. It was stated that, she was doing agriculture labour work. The Tribunal in absence of any evidence had considered her income as Rs.3,000/- per month, however it is to be noted that, the accident had taken place in the year 2013 and the notional income of Rs.3,000/- was considered by Hon'ble Supreme Court in *Municipal Corporation of Delhi vs. Association of Victims of Uphar Tragedy & Ors.*, reported in *(2012) ACJ 48,* wherein the incident had taken place in 1999. Definitely the said notional income has undergone change by the passage of years, and therefore, it would have been appropriate for the Tribunal to hold that the income of deceased in this case was Rs.4,500/- per month. Further taking into consideration the fact that, as per post- mortem the age of Tulsabai was 50 and taking her as self-employed being an agriculture labour, 30 % is required to be added towards future prospects. That amount comes to Rs.1350/-. Thus, the income of Tulsabai would have been Rs.5850/- per month. Yearly it would have been Rs.70,200/- (Rs.5850 per month x 12 months). Since the claimants who are two in number dependent on her, 1/3rd of the said amount is required to be deducted towards personal expenditure. That amount comes to Rs.23,400/-. Therefore, after deduction the dependency of the claimants would be Rs.46,800/- per month. Further taking into consideration the age of the deceased as 50 and decision in case of *Sarla Verma (Supra)*, the just multiplier in this case would be 13, therefore the total loss of income for the claimants would be Rs.6,08,400/- (Rs.46,800 X 13). Further taking into consideration the decision in, *National Insurance Company Ltd. Versus Pranay Sethi (Supra)*, maximum that can be awarded under non pecuniary damages is Rs.70,000/-, and therefore, the claimants are entitled to get in all compensation of Rs.6,78,400/-. The Tribunal has awarded Rs.5,37,000/- which is on the lesser side, and therefore, that deserves to be enhanced.

15. **(C)** First Appeal No.1211 of 2017 (MACP No.419 of 2013) : -

In this case deceased was 24 years old person. Though it was contended that, he was serving as supervisor (Mukadam) with Alka Engineering and getting Rs.9,500/- per month, absolutely no evidence has been adduced. However, it was not justified on the part of the tribunal to hold his income at Rs.4,500/-. It is now considered equivalent to deceased Rushindra i.e. at Rs.5,000/- per month. Almost all the parameters are same, as per the calculation in the case of Rushindra i.e. First Appeal No.986 of 2017, hence it is not reproduced. The amount of future prospects, personal deduction multiplier and non pecuniary damages are same, therefore the claimants in this case are also entitled to get Rs.10,78,000/-. The Tribunal has awarded amount of Rs.9,83,160/- which is on the lesser side, and therefore, that amount is also required to be enhanced accordingly. The point No.2 is therefore answered accordingly. For the aforesaid reasons, following order is passed.

ORDER

1) All the appeals are partly allowed.

2) The Judgment and award passed by learned Member, M. A. C. T., Aurangabad in Motor Accident Claim Petition No.421 of 213, Motor Accident Claim Petition No.419 of 2013, and Motor Accident Claim Petition No.420 of 2013 on 10-11-2016 are hereby set aside to the extent of quantum only and modified as follows:

(a) "Respondents No.1 and 2 should pay amount of Rs. Rs.10,78,000/- (in words rupees ten lakh seventy-eight thousand) to the claimants No.1 and 2 in M. A. C. P. No. 421 of 2013, jointly and severally"

(b) "Respondents No.1 and 2 should pay amount of Rs. Rs.6,78,400/- (in words rupees six lakh seventy-eight thousand four hundred) to the claimants No.1 and 2 in M. A. C. P. No. 419 of 2013, jointly and severally"

(c) "Respondents No.1 and 2 should pay amount of Rs. Rs.10,78,000/-(in words rupees ten lakh seventy-eight thousand) to the claimants No.1 and 2 in M. A. C. P. No. 420 of 2013, jointly and severally"

3) Rest of the award is hereby maintained as it is.

4) Amount deposited as per the award passed by the Tribunal be adjusted towards the modified award.

5) After the deficit amount is deposited by respondents, then it be disbursed as per the award to the respective claimants.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.