

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

FIRST APPEAL NO.704 OF 2004

Subhash s/o Maruti Nimbalkar
Died Through L.Rs

1A. Sanjay s/o Subhash Nimbalkar
Age : 40 years, Occu : Agril,

1B. Vijay s/o Subhash Nimbalkar
Age : 35 years, Occu : Agril,

Both R/o. Devli, Tal. Kallam,
Dist. Osmanabad

2. Shakuntala w/o. Subhash Nimbalkar
Age : 46 years, Occu : Household,
R/o. As above.

.. **Appellants**
(Original Claimants)

Versus

1. Deepak s/o Kantibhai Parmar
Age : Major, Occu : Contractor,
R/o. Wadgaon, Tq. Parli Vaijinath,
Dist. Beed.
(Owner of Jeep No. MH-23/B-1117)

2. National Insurance Co. Ltd.,
Nanded, through the Divisional Manager,
National Insurance Co. Ltd., Shubhray Towers,
Datta Chowk, Solapur.

.. **Respondents**
(Orig. Respondents)

.....

Shri P.S. Chavan, Advocate for appellants,
Shri Amol Joshi, Advocate, h/f. Shri Rajendra Deshmukh &
Shri V.N. Upadhye, Advocate for Respondent No.2.

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CORAM : P.R. BORA, J.
DATE : 08.03.2019

ORAL JUDGMENT :

1. The claimants in Motor Accident Claim Petition No.215 of 1997 have preferred the present appeal seeking enhancement in the amount of compensation awarded in the aforesaid claim petition decided by Motor Accident Claims Tribunal, Osmanabad (hereinafter referred to as the 'Tribunal') on 06.09.2003.

2. The appellants, who are hereinafter referred to as the claimants, had preferred the aforesaid claim petition claiming compensation of Rs.5,00,000/- on account of the death of their son namely Rajesaheb alleging the same to have been caused in a vehicular accident happened on 20.06.1997 having involvement of a motorcycle bearing registration no.MTZ-2765 (hereinafter referred to as the 'motorcycle') and a tata sumo bearing registration no. MH-23/B-1117 (hereinafter referred to as the 'tata sumo'). It was the case of the claimants that, deceased Rajesaheb was proceeding on the motorcycle along with Ranjeet Garad and Ankush Garad. Ranjeet Garad was plying the motorcycle and deceased Rajesaheb and Ankush were the pillion riders on the said motorcycle. It was the further case of the claimants that, when deceased Rajesaheb and other two were passing from village Dhoki, their motorcycle was

dashed by tata sumo coming from the opposite direction. It was alleged by the claimants that, the accident happened because of the rash and negligent driving of the driver of the tata sumo. In the accident so happened, Ranjeet, who was plying the motorcycle and the son of the present claimants namely Rajesaheb suffered the death, whereas Ankush suffered multiple injuries. As per the averments in the claim petition, deceased Rajesaheb was of the age of 22 years on the date of accident. According to the further averments in the petition, deceased was serving in Tata Engineering and Locomotive Company at Pune and was earning around Rs.10,000/- per month by way of his salary. The claimants, therefore, had claimed the compensation of Rs.5,00,000/-, as noted herein above, from the owner and insurer of the tata sumo jeep.

3. The owner and insurer of the offending tata sumo resisted the claim by filing their written statements. The involvement of the tata sumo itself was disputed by the respondents. The respondents also disputed the income of deceased Rajesaheb. Defence of contributory negligence was also taken by the respondents.

4. In order to substantiate the contentions raised in the petition, claimant no.1 Subhash Nimbalkar testified before the Court.

The certified copies of the police papers pertaining to the accident in question were also filed on record. Respondents did not adduce any oral or documentary evidence. The learned Tribunal, on its assessment of the evidence brought before it, though recorded a finding that the claimants were entitled to compensation of Rs.4,12,336/-, held the owner and insurer of the tata sumo responsible to pay to the claimants only 40% amount of the said compensation amounting to Rs.1,64,935/- with interest thereon at the rate of 9% per annum from the date of application till realization. The Tribunal held the rider of the motorcycle namely deceased Ranjeet negligent to the extent of 60% in occurrence of the alleged accident and as such, awarded the compensation from the owner and insurer of the tata sumo only to the extent of 40% of the total amount of compensation. Aggrieved by, the claimants have preferred the present appeal.

5. Shri P.S. Chavan, learned counsel appearing for the appellants – claimants assailed the impugned Judgment on various grounds. The learned counsel submitted that, the Tribunal has grossly erred in depriving the claimants from 60% of the total amount of compensation on the ground that, in occurrence of the alleged accident, the proportion of negligence on part of deceased

Ranjit was to the extent of 60%. The learned counsel submitted that, deceased Rajesaheb was a pillion rider and as such, no negligence could have been attributed on his part and the claimants were, thus, entitled for the total amount of compensation as was determined by the Tribunal.

6. In order to support his contentions, the learned Counsel placed his reliance on the following Judgments :

(i) **T.O. Anthony Vs. Karvarnan and others, 2008 (5) Mh.L.J. 7.**

(ii) **A.P.S.R.T.C. and Anr Vs. K. Hemalatha and Ors, 2008 AIR SCW 4712.**

7. The learned counsel also relied upon the Judgment delivered by this Court in First Appeal No.1193 of 2012 decided on 24.01.2019.

8. The learned counsel further submitted that, the Tribunal has also erred in holding the salary of deceased Rajesaheb to the tune of Rs.4,965/- per month only. The learned counsel submitted that, the salary slips produced on record clearly demonstrate that, deceased Rajesaheb was drawing salary more than Rs.10,000/- per month. The learned Counsel further submitted that, the Tribunal has also erred in not considering the future prospects of the deceased

while determining the amount of dependency compensation. The learned counsel further submitted that, the Tribunal has also committed an error in not awarding the adequate amount towards the non-pecuniary damages. The learned Counsel, in the circumstances, prayed for adequate enhancement in the amount of compensation in view of the evidence on record.

9. Shri Upadhye learned counsel appearing for respondent no.2 - Insurance Company resisted the submissions advanced on behalf of the appellants – claimants. The learned counsel submitted that, in fact there is no cogent evidence on record to show that, on the date of accident deceased Rajesaheb was in the employment of TELCO. The learned counsel submitted that, the documents on record at Exhs.47 to 53 pertains to the period prior to the date of accident. The learned counsel submitted that, in such circumstances, the amount of dependency compensation must have been determined by the Tribunal holding the income of the deceased notionally to the tune of Rs.3,000/- per month. The learned counsel submitted that, when the claimants failed in bringing on record any cogent evidence to show that, on the date of accident deceased was in the permanent employment of the TELCO or with any other organization, there was no reason of considering future prospects of the deceased. The

learned counsel further submitted that, the Tribunal has also erred in deducting only 1/3rd of the income of deceased Rajesaheb towards his personal expenses, when parents were the only dependents on his income. The learned Counsel submitted that, the Tribunal was also right in deducting 60% of the total amount of compensation towards negligence on part of the deceased motorcyclist. Relying upon the judgment of the Division Bench of Madras High Court in the case of **Tamil Nadu State Trans. Corpn. Ltd. Vs Abdul Salam And Ors, 2004 ACJ 1827**, the learned Counsel submitted that, when the motorcycle is meant for two persons viz. the rider and the pillion rider, travelling of three persons was not only illegal, but also unauthorised. The learned counsel submitted that, in such circumstances, some blame has to be attributed even on part of deceased Rajesaheb and to that extent, the amount of compensation needs to be deducted from out of the total amount of compensation determined by the Tribunal. The learned counsel, in the circumstances, while praying for dismissal of the appeal filed by the claimants also prayed for necessary modification in the impugned judgment and award.

10. I have given due consideration to the submissions made by the learned Counsel appearing for the respective parties. I have also

perused the impugned judgment and the evidence on record.

11. First I would like to deal with the quantum of compensation. It is not in dispute that, deceased Rajesaheb at the relevant time was aged about 22 years and was a bachelor. It is the case of the claimants that, deceased Rajesaheb was in the employment of TELCO. Reliance is placed on the documents at Exhs.47 to 53. On perusal of the said documents, what is revealed is the fact that, deceased Rajesaheb was in the employment of TELCO as a temporary fitter during the period between 01.07.1996 to 29.01.1997. The document at Exh.47 makes the aforesaid position clear. The documents at Exhs.48 to 52 are the payment slips of the months July-1996 to December-1996. The document at Exh.53 dated 18.02.1997 provides the particulars in regard to the payment towards full and final salary settlement. On perusal of the aforesaid documents, I found substance in the submissions made by Shri Upadhye, learned counsel appearing for the respondent – Insurance Company that, the claimants have not brought on record any cogent evidence to show that, on the date of accident i.e. on 20.06.1997 deceased Rajesaheb was in the employment of TELCO. In the circumstances, in fact, the Tribunal also could not have determined the amount of compensation on the basis of the aforesaid

documents.

12. Having regard to the evidence on record, the objection raised on behalf of the claimants that, the Tribunal has failed in considering the salary income of deceased Rajesaheb cannot be given any weightage. The question therefore arises, on what basis, the income of deceased Rajesaheb on the date of accident can be determined. Though there may not be sufficient evidence to show that, on the date of accident deceased Rajesaheb was in the employment of TELCO, the fact remains that, deceased Rajesaheb was in the employment of TELCO during the period between 01.07.1996 to 29.01.1997 i.e. for the period about 7 months. There may also not be any difficulty in recording a finding that, deceased Rajesaheb was qualified to be appointed as fitter. In the circumstances, the income of deceased Rajesaheb can be reasonably determined on the basis of the service certificate at Exh.47. As prescribed in Exh.47, the last drawn salary of deceased Rajesaheb was Rs.4965.50 paise. The aforesaid amount includes the health allowance and washing allowance. Both the aforesaid amounts, being personal allowances cannot be considered as an income of deceased Rajesaheb. Excluding the said amount, the income of deceased Rajesaheb can be notionally held to the tune of Rs.4500/- per month

i.e. Rs.54,000/- per annum.

13. In view of the law laid down by the Hon'ble Apex Court first in the case of **Smt. Sarla Verma and Ors Vs. Delhi Transport Corporation and Anr**, AIR 2009 SC 3104 and thereafter in the case of **National Insurance Company Limited Vs. Pranay Sethi and Ors**, AIR 2017 SC 5157, 40% of the total income of deceased Rajesaheb has to be added in his said income towards his future prospects for the purpose of assessing the amount of dependency compensation, which comes to Rs.75,600/- per annum. Since deceased Rajesaheb was a bachelor and the claimants are the parents of the deceased, $\frac{1}{2}$ of his total income was liable to be deducted towards his personal and living expenses. Deducting the said amount, the amount of dependency compensation can be determined on the basis of the remaining amount of Rs.37,800/-. Having regard to the age of deceased Rajesaheb, the appropriate multiplier in the present case would be of 18. Applying the said multiplier, the amount of compensation comes to Rs.6,80,400/-. The appellants – claimants are also entitled for the compensation of Rs.30,000/- towards the funeral expenses and loss of estate. The total amount of compensation payable to the appellants – claimants thus comes to Rs.7,10,400/-.

14. The next question arises, whether any amount can be deducted from out of the aforesaid amount on account of the negligence on part of the deceased motorcyclist and / or on account of the alleged negligence of deceased Rajesaheb? It is not in dispute that, deceased Rajesaheb was a pillion rider on the motorcycle, which was being driven by deceased Ranjeet. In the aforesaid circumstances, as was argued by the learned counsel for the claimants, it was the case of composite negligence of the deceased motorcyclist and the driver of the offending tata sumo. Perusal of the impugned judgment also reveals that, the Tribunal has also recorded a conclusion that, the alleged accident happened as a result of composite negligence of the deceased motorcyclist namely Ranjeet and the driver of the offending tata sumo. After having recorded finding as such, the Tribunal, in fact, could not have deducted any amount from out of the total amount of compensation while deciding the claim petition of the legal heirs of the deceased pillion rider. As has been held by the Hon'ble Apex Court in the case of **T.O. Anthony** (cited supra) 'where a person is injured or suffers death as a result of negligence on part of two or more wrong doers, the injured or legal heirs of the deceased, as the case may be, get the choice of proceeding against all or any of the wrong doers. Each wrong doer is

jointly and severally liable to the injured or to the legal heirs of the deceased for payment of the entire damages.' The Hon'ble Apex Court has further held that, 'in such cases, the injured or the legal heirs of the deceased need not establish the extent of responsibility of each wrong doer separately nor it is necessary for the Court to determine the extent of liability of each wrong doer separately.'

15. The Hon'ble Apex Court in its subsequent judgment in the case of **A.P.S.R.T.C. and Anr Vs. K. Hemalatha and Ors** (cited supra) has reiterated the view taken in the case of **T.O. Anthony** (cited supra).

16. Ordinarily no liability can be fastened on a passenger for the negligence of the driver resulting in occurrence of an accident. Applying the said principle, normally a pillion rider may not be blamed if the said motorcycle meets with an accident and in such cases, in usual course, it will be assumed that, the accident happened either because of the negligence on part of the motorcyclist or driver of the other vehicle involved in the said accident or because of the negligence of both. The question arises, what would be the position if there are more than one pillion rider on a motorcycle? As held by the Division Bench of the Madras High Court in the case of **Tamil**

Nadu State Trans. Corpn. Ltd (cited supra) 'when three persons travelled on a motorcycle, which is meant for two persons, the conduct of the persons who travelled in such a manner is liable for contributory negligence; especially when their action is contrary to the statute.' I deem it appropriate to reproduce herein below the observations made and the conclusions recorded by the Division Bench of the Madras High Court in paras-7 to 12 of the aforesaid Judgment, which read thus :

“7. The only contention of the learned counsel for the appellant is that the deceased was travelling as one of the pillion riders in the motor cycle. It is an admitted case that three persons travelled in the motor cycle. When the motor cycle is meant for two persons viz., the rider and a pillion rider, the travelling of three persons is not only illegal but also unauthorised. When three persons are travelling in a motor cycle, sitting in a cramped manner, the rider of the motor cycle may not be in a position to have total control of the same. When three persons travelled in the motor cycle and the accident occurred due to an illegal act, none of the victims or their legal representatives are entitled for any compensation. Hence the Tribunal is not correct in awarding the compensation under the Award. Even otherwise, the Tribunal ought to have reduced the compensation by making a deduction towards contributory negligence by the rider as well as the pillion riders of the motor cycle, as they travelled in the motor cycle contrary to the provisions of the Act as well as the conditions of their own insurance policy.

8. The learned counsel for the respondents vehemently contended that the deceased being a pillion rider, no negligence can be attributed to him. There is absolutely no evidence with regard to any negligence on the part of the rider of the motor cycle. In such circumstance, there cannot be any contributory negligence, as contended by the learned counsel for the appellant. Three persons travelling in a motor cycle is a

common affair as on today and hence that also cannot be a ground to refuse the compensation.

9. We carefully considered the above contentions of the respective counsels. We find some force in the contention of the learned counsel for the appellant. There is no gain say in saying that now-a-days it has become the normal course that three persons are travelling in a motor cycle.

10. We are concerned as to whether such action of the individuals is permissible under law. The motor cycle and any other two wheelers are meant only for two persons, the rider and a pillion rider. If more than two persons are travelling in a motor cycle or any other two wheeler, undoubtedly such action of the individual would become illegal and unauthorised. It is an awful sight when we come across three persons travelling in a motor cycle. They are sitting in such a cramped manner that the rider of the motor cycle almost sitting on the petrol tank or at the front edge of the seat. When he was sitting in such a position, naturally because of the restricted movement of his legs, he cannot have the complete control over the brake. The movements of his hands also so restricted. When that be so, this court is of the opinion that definitely the rider of the two wheeler cannot have full control over the vehicle.

11. Apart from that, when three persons are travelling in a motor cycle, two as pillion riders, any unusual movement of the pillion riders would make the rider of the motor cycle to loose his control over the vehicle. Even though such travelling of three persons in a motor cycle is contrary to the statute, still the enforcement wing do not care to take note of the same and failed to take action against their illegal action. Virtually because of the failure on the part of the enforcement wing, such travelling of three persons in the two wheelers has become a regular sight. Even though the highway patrolling is available but it is a rare sight to see a highway patrolling vehicle. The travelling of three persons has become rampant in the mofussils and in the City; especially among the youngsters like the college students. When that be the case, the enforcing authority is expected to enforce the statute with some strictness to avoid any untoward incident. There is no purpose in conducting the Road Safety Week without infusing the road sense in compliance of the Rules and Regulations of

the statute in the minds of those who are using the vehicles.

12. When three persons travelled in a motor cycle which is meant for two persons, this court is of the view, the conduct of the persons who travelled in such a manner are liable for contributory negligence; especially when their action is contrary to the statute.”

17. In the instant matter also, when three persons travelled by a motorcycle, which is meant for two persons, the conduct of deceased Rajesaheb, who travelled in such a manner is liable for contributory negligence. Though learned Counsel Shri Upadhye was persuasive in his submission that, the proportion of such negligence shall be held to the extent of 50%, I find it difficult to agree with his said submission. Having considered the facts on record, I hold the negligence on part of deceased Rajesaheb to the extent of 10%. It is, thus, evident that, the claimants shall not be entitled for the compensation to the aforesaid extent from out of the total amount of compensation determined by this Court. As discussed herein above, this Court has determined the amount of compensation to the tune of Rs.7,10,400/-; the claimants shall be entitled to receive 90% of the said amount which comes to Rs.6,39,360/- jointly and severally from the owner and insurer of the tata sumo.

18. In the foregoing circumstances and for the reasons recorded above, the following order is passed.

ORDER

(i) The Judgment and Award passed in Motor Accident Claim Petition No.215 of 1997 is modified as under :

(a) The claimants are held entitled for the total compensation of Rs.6,39,360/- inclusive of the NFL compensation jointly and severally from respondent nos.1 and 2 with interest thereon at the rate of 9% per annum from the date of filing of the petition till realization of the said amount.

(ii) The appeal is allowed in the aforesaid terms.

(iii) Pending Civil Application, if any, stands disposed of.

(P.R. BORA)
JUDGE