

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

FIRST APPEAL NO. 2106 OF 2018

The New India Assurance Co. Ltd.
Through its Authorized Official
and Divisional Manager, Legal Hub,
Adalat Road, Aurangabad.

Appellant.

Versus

1. Pratiksha Hemchandra Kulkarni
Age : 34 yrs, occu.: household
R/o Washi, District Osmanabad.
2. Devyani Hemchandra Kulkarni
Age : 13 yrs, occu.: education
R/o as above.
3. Rasika Hemchandra Kulkarni
Age : 10 yrs, occu.: education
R/o as above.
4. Suyog Hemchandra Kulkarni
Age : 7 yrs, occu.: education
R/o as above.

(Respondent Nos. 2 to 4 under
guardianship of respondent
No.1, mother).

5. Vishwasrao Baburao Khedkar
Age : 45 yrs, occu.: business
R/o Sant Dnyaneshwar Nagar,
Behind Govt. TIT, Beed.

Respondents.

Mr. A.S. Osmanpurkar, Advocate for the appellant.
Mr. P.D. Dadpe, Advocate for respondent Nos.1 to 4.

CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 2 April 2019.

Judgment pronounced on : 16 April 2019.

JUDGMENT.

. This appeal is directed by New India Assurance Company Limited, who was respondent No.2 in Motor Accident Claim Petition (M.A.C.P.) No.73/2014, against the judgment and award passed by the Motor Accident Claims Tribunal (hereinafter referred to as the “Tribunal”), Bhoom.

2. Respondent Nos.1 to 4 are original claimants and respondent No.5 is original respondent No.1 (owner of offending vehicle). Hereinafter the parties are referred to in accordance with their status in the original claim proceeding as “claimants”, “owner of offending vehicle” and “insurer of offending vehicle”.

3. The facts leading to institution of this appeal are that on 05.07.2011 when deceased Hemchandra was proceeding by Keij to Beed road by his motorcycle bearing registration No. MH-23-C-3597, the offending vehicle i.e. car bearing registration No.MH-23-E-9421 came from opposite direction and due to rash and negligent driving by the driver of car, gave dash to the

motorcycle of deceased resulting into his death. Therefore, the claim petition was filed by the claimants before the Tribunal for compensation.

4. Opponent No.1 / owner of the offending car admitted the claim as well as rash and negligent driving by driver of his car. Only opponent No.2 / Insurer of the offending vehicle resisted the claim contending that the accident occurred due to rash and negligent driving of the deceased. The age and income of deceased was also disputed in the insurer.

5. After considering the evidence on record, the Tribunal awarded compensation of Rs. 28,66,595/- (inclusive of compensation under no fault liability). Therefore, this appeal.

6. Heard Mr. A.S. Osmanpurkar, learned Counsel for the appellant/insurer and learned Counsel Mr. P.D. Dadpe for respondent Nos.1 to 4 / claimants.

7. Learned Counsel for the appellant submits that the appellant is challenging only the quantum of compensation awarded by the Tribunal, and therefore, the issue regarding rash and negligent driving of the offending vehicle needs no more consideration.

8. Next contention of learned Counsel for the appellant is that the employer of deceased (PW-2) though stepped in witness box to prove the income of deceased and though he has proved salary slip (Exh.37), no supporting documents have been filed by this witness to prove genuineness of this salary slip. He submits that the appointment order (Exh.36) of the deceased as well as salary slip (Exh.37 nowhere show registration number of the shop where the deceased used to work as Long Arm Representative (hereinafter referred to as "L.A.R."). He submits that the salary slip and appointment order also do not bear outward number of the shop. No muster roll is produced by the employer (PW-2) in support of his contention regarding employment of deceased and his income. Thus, the contention of learned Counsel for the appellant is that the income of deceased as specified in salary slip, is not at all proved by the claimant. In support of his contention learned Counsel for the appellant has placed reliance on the judgment delivered by learned Single Judge of this Court on 8 February 2016 in *First Appeal No.848 of 2007 (Uttamrao Narayan Tonde and others Vs. M/s Road Carriers of India and others)*.

9. The next contention of the learned Counsel for appellant is that under non-pecuniary heads, the learned Tribunal awarded exorbitant compensation which needs to be reduced in view of the law settled by the Apex Court in the case of **“National Insurance Co. Ltd. Vs. Pranay Sethi and others” [2018 (3) Mh.L.J. (SC) 70]**.

10. In reply, learned Counsel for the claimants submits that when employer Shrikrishna Soni (PW-2) himself entered in witness box and deposed before the Court regarding employment of deceased as L.A.R. and when he has proved salary slip (Exh.37) as well as appointment order (Exh.36) of the deceased, corroboration by other documentary evidence is unworthy.

11. The next contention of learned Counsel for the claimants is that the Tribunal unnecessarily deducted 10% amount from the annual income of the deceased towards income-tax and other deductions. In the alternate, his contention is that the matter may be remanded for trial for awarding opportunity to the claimants to produce and prove additional documentary evidence in support of their contention regarding the income of deceased.

12. Though learned Counsel for the appellant placed reliance on the judgment in *First Appeal No.848 of 2007 (Uttamrao Narayan Tonde Vs. M/s Road Carriers of India)* (supra), where the salary certificate issued on letter head of the Coaching Class was disbelieved, the ratio of that case is distinguishable on the ground that the deceased was relative of the proprietor of Coaching Class where the deceased used to work as a Regional Manager.

13. In the case at hand to prove the income of deceased, the claimants have examined Shrikishan Soni (PW-2) who is the owner of the shop "Sujit Enterprises" and from his evidence, it emerges that he was Distributor of Parachute, Philips and Godrej companies for Latur and Osmanabad Districts. From his evidence it emerges that the deceased used to work in that shop as a Salesman and on 25.06.2003 the deceased was appointed as a Long Arm Salesman. This witness has duly proved appointment letter (Exh.36) and letter (Exh.37) regarding monthly salary paid to the deceased. This witness has also made it clear that in addition to monthly salary, quarterly incentive was also given to deceased and other Sales Representatives.

14. It is to be noted that Shrikishan Soni (PW-2) is neither a relative of deceased nor in any other manner he is concerned with the claimants, to oblige the claimants. No doubt, from his cross-examination it emerges that Sujit Enterprises is a Firm and appointment letter (Exh.36) and salary letter (Exh.37) do not bear registration number of the Firm. However, when the employer himself is in the witness box before the Court, the absence of registration number of the Firm in the letter signed by this witness, cannot be doubted.

15. Learned Counsel for the appellant has given much importance to the fact that outward number is not mentioned in the appointment letter (Exh.36) and salary letter (Exh.37). However, it cannot be ignored that in the cross-examination of Shrikishan Soni (PW-2) it has been brought on record by the Insurance Company that in his shop inward an outward register is not maintained. It is to be noted that while issuing summons to this witness he was not directed to bring muster roll of the above-said shop. Therefore, only because this witness has not brought muster roll of his shop to prove the employment of deceased, his testimony cannot be doubted. On the other hand,

this Court in the case of “**Sushila wd/o Subhash Mendhe Vs. National Insurance Co. Ltd.**” [2018 (3) Mh.L.J. 311] consistently held that when the employer is examined by the claimant to prove the income of deceased, other supporting evidence in the form of accounts or other documents is not at all necessary to prove monthly or annual income of the deceased. In the circumstances, I do not find any substance in the objection raised by learned Counsel for the appellant that the monthly income of deceased is not proved. On the other hand, I hold that on the basis of appointment order (Exh.36) and salary letter (Exh.37), the claimants have duly proved that monthly income of deceased was more than Rs. 17,900/-.

16. It cannot be ignored that the deceased was only 38 years old because in postmortem notes (Exh.29) his age is shown as 38 years as well as in driving licence (Exh.33) the date of birth of deceased is mentioned as 26.01.1974. As the deceased was in the employment of Sujit Enterprises as monthly salaried employee and as he was below the age of 40 years, in view of the judgment in the case of “**National Insurance Co. Ltd. Vs. Pranay Sethi**” (supra) there shall be addition of 40% of the

actual salary of the deceased. Thus, the monthly income of deceased comes to Rs. 25,060/-. It follows that his annual income comes to Rs. 3,00,720/-.

17. As in the family of the deceased number of dependents are 'four', in view of the guidelines issued in the case of **“Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.”**, (AIR 2009 SC 3104), out of annual income of the deceased, one-fourth amount i.e. Rs. 75,180/- is to be deducted towards personal expenses of the deceased. Thus, the income of deceased available to the family comes to Rs. 2,25,540/- per annum. As per the guidelines issued by Apex Court in the case of **Sarla Varma Vs. Delhi Transport Corp.** (supra), considering the age of deceased in between 36 and 40 years, the multiplier of '15' will be applicable in the case at hand. Thus, the loss of dependency comes to Rs. 33,83,100/-.

18. After going through the award, it emerges that relying on the case of **“Rajesh and others Vs. Rajbirsing and others”** reported in (2013 ACJ 1403), the Tribunal awarded compensation of Rs. 25,000/- towards funeral expenses, Rs.1,00,000/- towards loss of consortium and Rs. 1,50,000/-

towards loss of love and affection by claimant Nos.2 to 4. However, in view of the law settled by larger Bench of the Apex Court in the case of “**National Insurance Co. Ltd. Vs. Pranay Sethi**” (supra), the case of *Rajesh Vs. Rajbir* (supra) is not a good law. In the case of “**National Insurance Co. Ltd. Vs. Pranay Sethi**” (supra) the Apex Court held that under conventional heads the following compensation can be awarded.

Loss of consortium	:- Rs. 40,000/-
Loss of estate	:- Rs. 15,000/-
Funeral expenses	:- Rs. 15,000/-

19. Thus, just and reasonable compensation payable to the claimants under different heads, is as under :-

Loss of dependency	:- Rs. 33,83,100/-.
Loss of consortium	:- Rs. 40,000/-
Loss of estate	:- Rs. 15,000/-
Funeral expenses	:- <u>Rs. 15,000/-</u>
Total :-	<u>Rs. 34,53,100/-</u>

(Rupees Thirty Four Lakh Fifty Three Thousand and Hundred)

20. However, the Tribunal has awarded compensation of Rs. 28,66,595/- to the claimants. In view of the case of “**Ranjana Prakash and others Vs. Divisional Manager and another**”

[2012 AIR SCW 848] the Apex Court observed that in an appeal by the owner/insurer, the claimant will not be entitled to seek enhancement of the compensation by urging any new ground in absence of any cross-objection or cross-appeal. Relevant para Nos. 7 and 8 are reproduced as under :

“ 7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seeks compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation. “

21. Thus, as the compensation awarded by the Tribunal is less than the actual entitlement of the claimants as determined by this Court, the appeal filed by Insurance Company challenging the correctness of the quantum of compensation awarded by the Tribunal deserves to be dismissed.

22. Accordingly, First Appeal No.2106 of 2018 is dismissed. Parties to bear their respective costs of the appeal.

23. If any compensation amount is deposited in this Court by the appellant / insurer, the same be remitted to the

Tribunal and the claimants are permitted to withdraw the same from the Tribunal after the period of appeal is over.

(SUNIL K. KOTWAL)
JUDGE

vdd/