

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

**FIRST APPEAL NO. 2564 OF 2016
WITH
CIVIL APPLICATION NO. 14204 OF 2016**

M/s Shriram General Insurance
Company Limited,
through its Branch Manager,
10003-E-8, EPIP, RICO
Industrial Area, Sitapura,
Jaipur-303 202 (Rajasthan)
through it Branch Manager/
Authorized Signatory,
Adalat Road, Aurangabad

...Appellant
[Orig. Resp. No.3]

VERSUS

- 1] Surekha w/o Rajendra Nakhate,
age 26 years, occ. Household,
- 2] Prathamesh s/o Rajendra Nakhate,
age 4 years, occ. Minor,
- 3] Ashalata w/o Motiram Nakhate,
age 59 years, occ. Household,
- 4] Motiram s/o Digambar Nakhate,
age 64 years, occ. Agriculture,
- 5] Pratik s/o Rajendra Nakhate,
age 15 years, occ. Minor,

Petitioner Nos. 2 and 5 are minor,
U/g of their natural mother
petitioner no.1

All R/o Avargaon, Tq. Dharur,
District Beed

- 6] Santosh s/o Namdeo Jadhav,
age major, occ. Driver,
R/o Dighol Deshmukh,

Tq. Renapur, Dist. Latur,

7] Ankush s/o Namdeo Jadhav,
age major, occ. Driver,
R/o Dighol Deshmukh,
Tq. Renapur, Dist. Latur ...Respondents

...

Shri S.G.Chapalgaonkar, advocate for Appellant
Shri R.B.Deshpande, advocate for Resp. nos.1 to 5
Shri V.M.Lomte, advocate for Resp. nos. 6 and 7

...

CORAM : SUNIL K.KOTWAL, J.

DATE OF RESERVING

THE JUDGMENT : 10.12.2018

DATE OF PRONOUNCEMENT

OF JUDGMENT : 04.01.2019

J U D G M E N T :

This appeal is directed by M/s Shriram General Insurance Company Limited, against the judgment and award, passed by the Motor Accident Claims Tribunal, Majalgaon, in Motor Accident Claim Petition No. 7 of 2014, whereas compensation of Rs.40,17,602/- is awarded by the Tribunal and liability is saddled on original respondent no.2 owner of the offending Truck No. MH-20/AT-2468 and original respondent no.3 insurance company (present appellant).

2. Respondent nos. 1 to 5 in the appeal are original claimants. Respondent no. 6 is the driver and respondent no.7 is the owner of the offending vehicle.

3. Deceased Rajendra Nakhate, who was the Assistant to Engineer in B. and C. office, Latur Sub-Division, Renapur, on 23.2.2014, was returning to Renapur from Lakhmapur site by his motor cycle along with his colleague Sadashiv. Near Lakhmapur pati on Ambajogai-Latur road, the offending truck came from their backside and gave dash to the motor cycle of the deceased, due to rash and negligent driving by the driver of the truck. In that accident, deceased Rajendra sustained injuries and though he was rushed to Civil Hospital, Latur, he was declared as dead. The pillion rider Sadashiv also sustained comparatively minor injuries. Due to accidental death of deceased Rajendra, his dependents filed claim petition under Section 166 of the Motor Vehicles Act, 1988 and the award passed in that claim petition is the subject matter of the present appeal.

4. Heard Shri S.G.Chapalgaonkar, learned counsel for the appellant and Shri R.B.Deshpande, learned counsel for respondent nos. 1 to 5 (claimants). Shri V.M.Lomte, learned counsel, though represented respondent nos. 6 and 7, did not take part at the time of final hearing of the appeal.

5. Learned counsel for the appellant assailed the judgment and award, passed by the Tribunal, only on the ground of involvement of offending truck in above said motor vehicle accident and quantum of compensation as well as contributory negligence of the deceased. Learned counsel for the appellant submits that though accident occurred on 23.2.2014, the first information report to police station was lodged on 27.2.2014 without offering any explanation for the delay. He submits that even in the spot panchanama (Exh.29) prepared on 26.2.2014, registration number of the offending truck is not mentioned. He submits that the alleged eye witness Sadashiv (PW 2) is not trustworthy, as his injury certificate is not

placed on record to prove his presence on the spot along with the deceased.

Learned counsel for the appellant has pointed out that by filing written statement (Exh.18) the owner of the offending truck disputed the involvement of the truck in the above said accident.

Next limb of the argument of learned counsel for the appellant is that though in the family of deceased dependents are five in number, the Tribunal has erroneously deducted 1/5th amount out of annual income of the deceased towards his personal expenses. He submits that even under conventional head, exorbitant compensation is awarded by the Tribunal, which needs to be reduced. He submits that there are arithmetical error in the calculations done by the Tribunal. He placed reliance on **"Anil and others vs New India Assurance Company Limited [(2018 2 SCC 482)]"**, **"Farzana Begum w/o Abdul Khadir vs Sk. Saleem Sk. Hyder and ors."** [2018 SCC Online Bombay 2705], **"National Insurance Company Limited Vs Nandabai wd/o Prakash @ Pralhad**

Dhumal and ors." [2018 (2) Mh.L.J. 91], and the judgment, passed by this Court in **Bajaj Allianz General Insurance Co. Ltd. Vs Tufel Habib Bagvan and another** on 7.6.2016 in Writ Petition No. 2840 of 2013.

6. Learned counsel for the claimants raised preliminary objection regarding maintainability of appeal on the ground that the insurance company did not obtain permission from the Tribunal under Section 170 (b) of the Motor Vehicles Act to take defences other than available under Section 149 of the Motor Vehicles Act, and therefore, this appeal under Section 173 of the Motor Vehicles Act by insurance company questioning the quantum of compensation is not maintainable. He placed reliance on "**Josphine James vs United India Insurance Co. Ltd. and another**" [2013 AIR SCW 6633].

Next contention of learned counsel for claimants is that in Motor Accident Claim Petitions, though initial burden lies on claimants

to prove their contention, the rules of evidence are not strictly applicable in such proceeding, like criminal trial, to prove the case beyond reasonable doubt. The claimants can prove their case even on the basis of preponderance of probability. Therefore, delay of 4 days in lodging first information report cannot be viewed with suspicion like in the criminal trial.

Next contention of learned counsel for claimants is that the Tribunal committed arithmetical error by deducting 1/5th amount towards personal expenses of the deceased for two times and even income tax is deducted twice from the income of the deceased.

Further contention of learned counsel for the claimants is that by examining the eye witness PW 2, whose name is mentioned in the first information report, the claimants have discharged their burden to prove the involvement of the offending vehicle. He prays for dismissal of the appeal subject to correction of arithmetical error committed by the Tribunal.

7. I have given my thoughtful consideration to the submissions of learned counsel for both the parties. The maintainability of the appeal filed by alone insurer of the offending vehicle is challenged by the respondents on the ground that no permission was obtained by the insurance company from the Tribunal under Section 170 (b) of the Motor Vehicles Act for taking defences to contest the proceeding other than provided under Section 149 (2) of the Motor Vehicles Act.

8. After going through the record and proceeding, it emerges that on 8.7.2015, the insurance company filed application for obtaining permission under Section 170 of the Motor Vehicles Act. However, that application was not expressly allowed by the Tribunal. Thus, position is that permission is not granted to the insurance company to take defences other than statutory defences available to it under Section 149 (2) of the Motor Vehicles Act. Therefore, question arises, whether the present appeal, filed only by the insurance

company, questioning the quantum of compensation and involvement of the offending vehicle, as well as on the ground of contributory negligence of the deceased, is maintainable. Undisputedly, these all defences are not available to the insurance company under Section 149 (2) of the Motor Vehicles Act.

9. No doubt, learned counsel for the insurance company placed reliance on **"United India Insurance Company Limited vs Shila Datta and others"** [AIR 2012 SC 86]. After going through the judgment, it becomes clear that though, the three Judges Bench of the Supreme Court has expressed its reservation against the correctness of legal position in **National Insurance Co. Ltd. Chandigarh vs Nicolletta Rohtagi and others** [2002 (7) SCC 456] on various aspects, the same has been referred to Larger Bench to determine the conflict of opinion in between two Benches of Three Judges regarding tenability of the appeal, where the insurer alone is the appellant before the High Court and where

insurer is only noticee under Section 149 (2) of the Motor Vehicles Act and not an impleaded respondent in the claim petition. Relevant point nos. (iii), (iv) and (v) were referred by Three Judges Bench of the Supreme Court to Larger Bench for consideration. However, in "**United India Insurance Company Limited vs Shila Datta and others**" (supra), while deciding Point No. (i) framed by the Supreme Court, the Apex Court observed that :

" 11. Therefore, where the insurer is a party- respondent, either on account of being impleaded as a party by the tribunal under section 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it will be entitled to contest the matter by raising all grounds, without being restricted to the grounds available under section 149(2) of the Act. The claim petition is maintainable against the owner and driver without impleading the insurer as a party. When a

statutory notice is issued under section 149(2) by the tribunal, it is clear that such notice is issued not to implead the insurer as a party-respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party-respondent. But it can however be made a party-respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal under section 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party-respondent, it can raise all contentions that are available to resist the claim. "

10. Thus, in the claim petition before the Tribunal, as appellant insurance company was party to that proceeding, it can raise all contentions

available to resist the claim. Section 149 (2) of the Motor Vehicles Act does not create any bar. In the case of **"United India Insurance Company Limited vs Shila Datta and others"** (supra), even it is held that joint appeal by owner of the vehicle and insurer is also maintainable. However, as the point regarding maintainability of appeal, filed by the insurer alone, before the High Court, is referred to Larger Bench for consideration, the judgment of Three Judges Bench of the Apex Court in **"National Insurance Co. Ltd. Chandigarh vs Nicolletta Rohtagi and others"** holds the field.

11. The Division Bench of the Apex Court in **"Josphine James vs United India Insurance Co. Ltd. and another"** (supra) observed that :

“ The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (supra)and earlier

decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to supra though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of

the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V.Act."

12. Thus, in view of the above discussed legal position, I have no hesitation to hold that the insurance company alone is not entitled to file appeal questioning quantum of compensation awarded in favour of the claimants, in absence of permission from the Tribunal under Section 170 (b) of the Motor Vehicles Act. On this count alone, this appeal is not tenable and deserves to be dismissed.

13. Otherwise also, to prove the involvement of offending truck in above said accident, the claimants have placed on record the first information report (Exh.27) lodged by father of the deceased, on 27.2.2014, who has specifically mentioned the registration number of offending truck in the first information report. It is mentioned in the first information report that on 23.2.2014 the offending truck gave dash to the

motor cycle of deceased and Sadashiv Thorat (PW 2) from the back side of motor cycle. In addition to this, claimants have examined the eye witness Sadashiv Ramakant Thorat (PW 2), who was pillion rider on the motor cycle of the deceased and whose name is mentioned in the first information report as sole eye witness to the occurrence. Sadashiv Thorat (PW 2) has categorically deposed before the Court regarding dash given by offending truck to the motor cycle of the deceased from its back side. This witness has specifically deposed before the Court that at the time of accident he had seen the registration number of the Truck.

14. The evidence of Sadashiv Thorat (PW 2) is assailed on the ground that though he is eye witness of the occurrence, he did not file first information report at the earliest about the occurrence of the accident. However, it cannot be ignored that after the occurrence of the accident, this witness, who also sustained injuries, immediately rushed the deceased to the hospital. Therefore, it was natural that after the accident

he did not immediately lodge the first information report. No doubt, from his cross-examination, it emerges that he was present when spot panchanama was prepared by police on 26.2.2014. However, it was the duty of the investigating officer to obtain first information report from this eye witness on 26.2.2014 when he was available to the police. For the negligence on the part of the investigating officer to obtain first information report from the eye witness of the occurrence, the contention of this witness cannot be discarded. So also, the spot panchanama is prepared only as a supporting evidence regarding situation on the spot. Therefore, it is not necessary to mention the registration number of offending vehicle in the spot panchanama. Otherwise also, the spot panchanama (Exh.29) shows that registration number of offending vehicle and dash given to the motor cycle of the deceased by this offending truck is specifically mentioned in the spot panchanama. Thus, I do not find any substance in the objection raised by the learned counsel for appellant regarding non-mention of registration number of

offending truck in the spot panchanama.

15. The inquest panchanama (Exh.30) is of dead body of the deceased and details of the occurrence need not be mentioned in the inquest panchanama. Even, the postmortem report (Exh.32) of the deceased shows that the cause of death of deceased was multiple injuries, which are possible in road traffic accident only. Even in the report to police station by Medical Officer after the death of deceased (Exh.55), there is specific reference regarding accidental death of the deceased in motor vehicle accident. Thus, by no stretch of imagination, it can be said that the case of the appellant is fabricated case and the documentary evidence prepared by the investigating officer is fabricated evidence.

16. On the other hand, by examining the Head Constable Vitthal Bidve (DW 1) by Opponent No.3 insurance company, all the police papers are brought on record. Even the contents of spot panchanama are proved by this witness. Even the

spot panchanama together with sketch map shows that the spot of the accident is at the distance of 4 feet from the road divider. Thus contention of learned counsel for the insurance company is not acceptable that the deceased was driving the motor cycle by the middle portion of the road. In the circumstances, I have no hesitation to hold that more than sufficient evidence is placed on record by claimants to prove the involvement of offending truck in the said accident, on the basis of preponderance of probability.

17. So far as contributory negligence of the deceased is concerned, the evidence of driver of offending truck, namely Santosh Jadhav (DW 1) falls short, as he nowhere whispered in his evidence regarding contributory negligence of the deceased while driving his motor cycle. This witness has simply denied the involvement of offending truck by deposing that on the date of accident the offending truck was at Mauje Bhatumba. In view of testimony of eye witness of the occurrence, the evidence of Santosh Jadhav (DW 1) does not carry any

importance, which is not supported by any supporting documentary evidence. In the circumstances, I have no hesitation to hold that even the insurance company cannot prove the contributory negligence of the deceased.

18. Undisputedly, on the date of accident, the offending truck was insured with original respondent no.3 insurance company. As the claimants have proved that the deceased died in motor vehicle accident due to rash and negligent driving by driver of the offending truck, the driver, owner as well as insurer of the offending truck are jointly and severally liable to pay compensation to the claimants.

19. It is suffice to say that the ratio of **"Anil and others vs New India Assurance Company Limited (supra), "Farzana Begum w/o Abdul Khadir vs Sk. Saleem Sk. Hyder and ors." (supra), "National Insurance Company Limited Vs Nandabai wd/o Prakash @ Pralhad Dhumal and ors." (supra), and Bajaj**

Allianz General Insurance Co. Ltd. Vs Tufel Habib Bagvan and another is distinguishable on facts.

20. If, I consider the correctness of quantum of compensation, it emerges that on the date of accident the deceased was 31 years old, as his driving license (Exh.36) shows his date of birth as 15.2.1983. Therefore, in the case at hand, in view of law settled by the Apex Court in "**Smt. Sarla Verma and Ors. vs Delhi Transport Corporation and Anr.**" [2009 (5) Mh.L.J. 775], multiplier of 16 is applicable.

From the salary slip (Exh.35) of the deceased, it emerges that his gross monthly salary was Rs.23,170/-. Out of this salary, after deducting professional tax of Rs.200/- per month, the monthly salary comes to Rs.22,970/-. It follows that his annual salary comes to $\text{Rs.}22970 \times 12 = 275640/-$.

After deducting 10 per cent income tax from the taxable income of the deceased of Rs.25,640/-, his annual income comes to $\text{Rs.}275640 - 2564 = 273076/-$.

In accordance with law settled by the Apex Court in "**National Insurance Company Ltd. Vs Pranay Sethi and others**[2018 (3) Mh.L.J. 70], as the deceased was below the age of 40 years, in permanent service, 50 per cent amount is to be added in his annual income. Thus, annual income of the deceased comes to Rs.273076+136538=409614/-. Income tax cannot be deducted from this notional enhancement.

In the family of the deceased, the total number of dependents is five. Therefore, in accordance with guidelines issued by the Apex Court in "**Smt. Sarla Verma and Ors. vs Delhi Transport Corporation and Anr.**" (supra), $1/4^{\text{th}}$ amount is to be deducted towards personal expenses of the deceased from his annual income. Thus, annual contribution by deceased to his family comes to Rs.409614-102403=307211/-. On applying multiplier of 16, the loss of dependency comes to Rs.307211x16=4915376/-.

In addition to this, the claimants are

entitled to following compensation under conventional head :

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

Thus, the claimants are entitled to total following compensation under different heads :

Loss of dependency	: Rs.49,15,376/-.
Loss of consortium	: Rs. 40,000/-
Loss of Estate	: Rs. 15,000/-
Funeral expenses	: Rs. 15,000/-

Total	: Rs.49,85,376/-

Thus, the claimants are entitled to total compensation of Rs.49,15,376/-.

21. However, it cannot be ignored that in this appeal filed by the insurance company for reduction of quantum of compensation amount, no cross appeal or cross-objection is filed by the claimants.

22. Now, question to be determined, whether in absence of cross-objection by the claimants, this Court can enhance the compensation. In 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. "

23. Thus, in this case, the Division Bench of Apex Court has made it clear that where the appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, High Court has to examine the facts and by applying the

relevant principles, initially shall determine the just and fair compensation. If the compensation determined by the High Court is higher than compensation awarded by the Tribunal and if it is the appeal preferred by the claimants, then only High Court can allow the appeal and enhance the compensation. However, position is different when the appeal is preferred by Insurance Company or by the owner for reduction of the compensation. In such case, if the compensation determined by the High Court is more than the compensation awarded by the Tribunal, the only course available is to dismiss the appeal. However, if the compensation determined by the High Court is less than the compensation awarded by the Tribunal, then by allowing the appeal, High Court can reduce the quantum of compensation.

24. The case of **"Ranjana Prakash and others Vs. Divisional Manager and another"** (supra) is also followed by this Court in **"United India Insurance Co. Ltd. Vs. Rajani Suresh Bhore"** [(2017) 5 AIR Bom

R 592]. No doubt, in **Jitendra Khimshankar Trivedi Vs. Kasam Daud and others [(2015) 4 SCC 237]** in para No.12 of the judgment the Apex Court observed that :

“13. The tribunal has awarded Rs.2,24,000/- as against the same, claimants have not filed any appeal. As against the award passed by the tribunal when the claimants have not filed any appeal, the question arises whether the income of the deceased could be increased and compensation could be enhanced. In terms of Section 168 of the Motor Vehicles Act, the courts/tribunals are to pass awards determining the amount of compensation as to be fair and reasonable and accepted by the legal standards. The power of the courts in awarding reasonable compensation was emphasized by this Court in Nagappa vs. Gurudayal Singh & Ors. (2003) 2 SCC 274, Oriental Insurance Company Ltd. vs. Mohd. Nasir & Anr.(2009) 6 SCC 280, and Ningamma & Anr. vs. United India Insurance Company Ltd.(2009) 13 SCC 710. As against the award passed by the tribunal even though the claimants have not filed any appeal, as it is obligatory on the part of courts/tribunals to award just and reasonable compensation, it is appropriate to increase the compensation. ”

25. However, after carefully going through this judgment, it emerges that while enhancing the compensation, the Apex Court exercised jurisdiction

under Article 142 of the Constitution of India, which High Court does not possess. Thus, though compensation determined by this Court in the case at hand is more than awarded by the Tribunal, this Court cannot enlarge the scope of this appeal and cannot enhance the compensation more than awarded by the Tribunal. However, by exercising its jurisdiction under Order 41 Rule 33 of the Code of Civil Procedure, this court can only enhance the rate of interest to the extent of nine per cent per annum from the date of filing of claim petition till realization of the entire compensation amount.

26. In view of this settled position of law, in the appeal filed by the insurance company, this Court cannot enhance quantum of compensation. However, the appeal preferred by the insurance company claiming reduction of compensation deserves to be dismissed, as not maintainable as well as on merits.

27. Accordingly, First Appeal No. 2564 of 2016 is dismissed. However, award be modified to

enhance interest on compensation at the rate of 9 per cent per annum from the date of filing claim petition till realization. The compensation amount deposited in this Court be transmitted to the Motor Accident Claims Tribunal, Majalgaon in Motor Accident Claim Petition No. 7 of 2014. The claimants are permitted to withdraw compensation amount in accordance with the award passed by the Tribunal and modified by this Court. In view of dismissal of Appeal, Civil Application No. 14204 of 2016 also stands disposed of. Parties to bear their respective costs of appeal.

[SUNIL K.KOTWAL, J.]

dbm