

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

**FIRST APPEAL NO.3160 OF 2016
WITH
CIVIL APPLICATION NO.11382 OF 2016
IN FA/3160/2016**

The New India Assurance Co. Ltd.,
Through its In-charge (Legal Hub),
D.O. No.1, Adalat Road, Aurangabad,
Ravikant Rajendra Yadav,
Age 25 yrs., Occ. Service,
R/o Aurangabad.

... Appellant.

... **Versus** ...

- 1 Ujjawala w/o Santosh Gaikwad,
Age 25 yrs., Occ. Household,
- 2 Sheetal d/o Santosh Gaikwad,
Age 04 yrs., Minor, Occ. Nil,
- 3 Sayali d/o Santosh Gaikwad,
Age 02 yrs., Minor, Occ. Nil,

(No.2 and 3 are minors and U/G of
their natural mother i.e. Respondent No.1)

- 4 Gangaram Mahadu Gaikwad,
Age 56 yrs., Occ. Labour,
- 5 Jijabai w/o Gangaram Gaikwad,
Age 51 yrs., Occ. Household,

All r/o Datta Nagar, Rind road,
Udgir, Tq. Udgir, Dist. Latur.

- 6 Gopinath Pundlik Mehatre,
Age : major, Occ. Driver of the

offending Tempo No.MH 06/G-5015,
R/o Hanchanal, Tq. Deoni,
Dist. Latur.

- 7 Salik Nizamuddin Untawale,
Age : major, Occ. Owner of the
offending Tempo No.MH 06/G-5015,
R/o Gavandi Galli, Deoni,
Tq. Deoni, Dist. Latur.

... **Respondents.**

...

Mr. S.R. Bodade, Advocate for appellant

Mr. R.S. Shinde, Advocate for respondent Nos.1 to 5

Mr. R.B. Deshmukh, Advocate for respondent Nos.6 and 7

...

WITH

FIRST APPEAL NO.3161 OF 2016

WITH

CIVIL APPLICATION NO.11384 OF 2016

IN FA/3161/2016

The New India Assurance Co. Ltd.,
Through its In-charge (Legal Hub),
D.O. No.1, Adalat Road, Aurangabad,
Ravikant Rajendra Yadav,
Age 25 yrs., Occ. Service,
R/o Aurangabad.

... **Appellant.**

... **Versus** ...

- 1 Rupali w/o Digambar Gathade,
Age 23 yrs., Occ. Household,

2 Unnati d/o Digambar Gathade,
Age 4 yrs., Minor, Occ. Nil,

3 Samarth Digambar Gathade,
Age 3 yrs., Minor, Occ. Nil,

(No.2 and 3 are minors and U/G of
their natural mother i.e. Respondent No.1)

4 Tukaram Narayan Gathade,
Age 63 yrs., Occ. Nil,

All r/o Hanuman Nagar, Signal No.2,
Udgir, Tq. Udgir, Dist. Latur.

5 Gopinath Pundlik Mehatre,
Age : major, Occ. Driver of the
offending Tempo No.MH 06/G-5015,
R/o Hanchanal, Tq. Deoni,
Dist. Latur.

6 Salik Nizamuddin Untawale,
Age : major, Occ. Owner of the
offending Tempo No.MH 06/G-5015,
R/o Gavandi Galli, Deoni,
Tq. Deoni, Dist. Latur.

... **Respondents.**

...

Mr. S.R. Bodade, Advocate for appellant

Mr. R.S. Shinde, Advocate for respondent Nos.1 to 4

Mr. R.B. Deshmukh, Advocate for respondent Nos.5 and 6

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 24th JULY, 2019

PRONOUNCED ON : 18th SEPTEMBER, 2019

COMMON JUDGMENT :

1 Both these appeals have been filed by the insurance company – original respondent No. 3. First Appeal No.3160 of 2016 has been filed challenging the Judgment and Award passed in M.A.C.P. No.38/2015, whereas First Appeal No.3161 of 2016 has been filed challenging the Judgment and Award passed in M.A.C.P. No.37/2015. Both these petitions, under Section 166 of the Motor Vehicles Act, have been partly allowed by Member, Motor Accident Claims Tribunal, Udgir, Dist. Latur on 02.05.2016. The appeals are proposed to be disposed of by common Judgment.

2 **Common contentions in both the petitions:**

The claimants in both the petitions have come with a case that deceased Santosh Gangaram Gaikwad was riding motorcycle at moderate speed on Udgir-Bidar road. He was proceeding towards Marur. When the said motorcycle was near bridge in between Kamalnagar and Diggi village, Tata tempo bearing No.MH 06/G-5015 came from opposite direction and it had given dash to the motorcycle. As a result of which, Santosh and his

pillion rider Digambar Tukaram Gathade died on the spot. Though they were shifted to hospital, they were declared dead at the time of admission. Offence was registered on the basis of report filed by one Umakant Kadam against respondent No.1 Gopinath, who is said to be the driver of Tata tempo. The claimants in both the petitions have stated that they are the legal representatives of respective deceased. Respondent No.2 was stated to be the owner of the tempo and the said tempo was insured with respondent No.3 insurance company and the compensation was prayed against all the respondents, jointly and severally. Claimants in both the petitions have contended that Santosh and Digambar were Mason by profession and were earning Rs.400/- per day i.e. Rs.12,000/- per month. Therefore, claimants had claimed compensation of Rs.30,79,000/-, however, they restricted it to Rs.15,00,000/- for the purpose of Court fee.

3 The case proceeded without written statement against respondent Nos.1 and 2.

4 **Case of insurance company in both the petitions :**

The insurance company denied the involvement of the vehicle insured with it and the manner in which the accident is stated to have taken place as narrated in the petitions. The insurance company has denied that

respondent No.1 was responsible for the accident. It was stated that the deceased were without helmets. It was also contended that the petitions are liable to be dismissed on the ground of non joinder of owner and insurance company of the motor cycle. It was also stated that the tempo driver was not holding valid and effective driving licence on the date of accident, so also, it was contended that tempo had no valid permit on that day. It was tried to be contended that it was a case of contributory/composite negligence. Respondent No.3 sought exoneration on the ground of breach of terms of policy.

5 Issues were framed in both the cases. In both the cases only the claimants have adduced oral as well as documentary evidence. None of the respondents have adduced oral or/and documentary evidence. Therefore, taking into consideration the evidence on record and hearing both sides the learned Tribunal had come to the conclusion that both the deceased expired in vehicular accident, which was caused due to the negligence on the part of the driver of Tata tempo on 06.03.2015. Claimants were held to be entitled to get compensation. It was also held that the insurance company has failed to prove the breach of terms of policy and therefore, in both the petitions compensation has been awarded to the claimants at Rs.9,20,000/- together with interest @ 9% per annum. As aforesaid, the insurance company has

challenged both these awards.

6 Heard learned Advocate Mr. S.R. Bodade for appellant, learned Advocate Mr. R.S. Shinde for respondents/claimants in both the appeals and learned Advocate Mr. R.B. Deshmukh for respondent/driver and owner in both the appeals.

7 It has been vehemently submitted on behalf of the appellant insurance company that, in fact, the police papers show that four persons were travelling on the motorcycle that too without wearing helmets, when it met with accident on Highway, which itself is not permissible. There was violation of traffic rules by the motorcycle rider. It had collided with the tempo. Further, the Post Mortem report of deceased Santosh would show that he was under the influence of liquor. He was not holding any valid and effective licence to ride the motorcycle. Under such circumstance, it ought to have been considered by the Tribunal that he had contributed to the accident. Case of deceased Digambar was that of composite negligence. When there is contributory negligence or/ and composite negligence, then the owner and insurance company of the motorcycle were necessary party to the proceedings. They have not been made as party and therefore, the petitions ought to have been dismissed. He has placed reliance on the decision in **Menoka Mondal and others vs. Oriental Insurance Co. Ltd. and another,**

2015 (3) T.A.C. 621 (Cal.), wherein the accident was of the motorcycle and the deceased being rider of motorcycle solely contributed to the accident. It was held that, “The rider plus pillion rider were not wearing protective headgear, which was mandatory under Section 129 of the Act and therefore, there was violation of provisions of Section 128 of the Act and therefore, Tribunal has rightly dismissed the claim”. It was stated that illegal act of the motorcyclist cannot be approved.

8. Further reliance has been placed on the decision in **Ajay Canu vs. Union of India and others, AIR 1988 SC 2027**, wherein rule 498-A of the Motor Vehicles Rules have been interpreted. Further reliance has been placed on **S. Rajaseekaran vs. Union of India and others, 2014 CJ (SC) 1385**, wherein Section 129 of the Motor Vehicles Act was considered. In **State of Tamil Nadu Represented by its Secretary Home, Prohibition and Excise Department and others vs. K. Balu and another, 2017 (1) T.A.C. 688 (S.C.)**, wherein taking into consideration the fact of traffic and drive cases, directions were given.

9 It has been further submitted on behalf of the insurance company that the learned Tribunal did not consider the point of breach of terms of policy. The permit of the tempo was not produced on record and therefore, it ought to have been held that the tempo had no valid and

effective permit on the date of the accident to ply the vehicle on the road. So also, the tempo driver was not holding valid and effective driving licence to drive a commercial vehicle. He relied on the decision in Amrit Paul Singh and another vs. TATA AIG General Insurance Co. Ltd.and others, AIR 2018 Supreme Court 2662, wherein, when it was proved that the offending vehicle had no permit, use of vehicle in public place without permission, it was considered as fundamental statutory infraction and therefore, 'pay and recover' order was passed.

10 It has been submitted on behalf of respondent Nos.6 and 7 that the driving licence of the driver has been produced at Exh.30 and it is of proper category, therefore, there is absolutely no breach of permit of policy, so also, as regards permit, no evidence was led by the insurance company.

11 It has been submitted on behalf of the claimants in both the appeals that none of the respondents have adduced any evidence to prove contributory negligence or composite negligence. Reliance has been placed on the decision in United India Insurance Co. Ltd., Parbhani vs. Sayaji Masuji Shinde and others, 2009(3) Mh.L.J, 539, wherein it is held that *the certified copy of F.I.R., spot panchnama and inquest panchnama produced by petitioners are the public documents and then it will have to be read in evidence without any additional proof*. It was submitted that taking into consideration

the documentary evidence on record, it is very much clear that the motorcycle was going from its left side and then it was hit by the tempo. The learned Tribunal has therefore, rightly invoked the principles of *res ipsa loquitur*. The learned Tribunal has rightly held that the respondent No.1 was only responsible for the accident. Further, by relying upon the decision in **State of Maharashtra and others vs. Kamaladevi Kailashchandra Kaushal and others, 2017(4) Mh.L.J., 824**, it was submitted that since the driver of the offending vehicle has not been examined, adverse inference should be drawn. Accordingly adverse inference has been rightly drawn in these two cases. Therefore, there was no question of non joinder of necessary parties to the proceedings.

12 Learned Advocate appearing for the claimants submitted that though the claimants have not filed any appeal, yet, in view of the decision in **Kamaladevi** (supra), it is the statutory duty even upon an Appellate Court to determine and award just compensation, irrespective of whether same has been claimed by the claimant or not. Though there was no evidence regarding income of the deceased persons and notional income ought to have been considered, yet, the Tribunal has taken notional income of Rs.5,000/- only which ought to have been taken @ Rs.6,500/- per month. Reliance has been placed on the decision in **Jitendra Khimshankar Trivedi and others**

vs. Kasam Daud Kumbhar and others, 2015 AIR SCW 1067, wherein it is stated that even though claimants have not filed any appeal against award passed by the tribunal, the enhancement in the compensation can be granted. Further reliance has been placed on Syed Sadiq and others vs. Divisional Manager, United India Insurance Company Ltd., 2014(4) Mh.L.J., 538, wherein the notional income of a vegetable vendor was taken @ Rs.6,500/- per month. He, therefore, prayed for enhancement in the compensation and also submitted that the claimants are ready to deposit the deficit Court fee in that case.

13 The learned Advocate appearing for the claimants also submitted that in two of the sister petitions, which were filed legal representatives of other deceased persons in Karnataka, the present appellant – insurance company has satisfied the award that was passed. He has produced the photo copies of the Award passed in those two cases.

14 Taking into consideration the above said submissions, following points arise for determination. Findings and reasons for the same are as follows.

- 1 Whether deceased Santosh had contributed to the accident in any manner ?

2 Whether the insurance company had proved breach of terms of policy ?

3 Whether the claimants are entitled to get enhancement in the compensation ? If yes, to what extent ?

REASONS

15 **Point No.1 :**

At the outset, it is to be noted that the insurance company want to say that since Santosh was allegedly under the influence of liquor and he along with three pillion riders, all of them were not wearing the protective headgears, had contributed to the accident. Here, the insurance company has not led any oral evidence and relied on the certified copies of the police papers only. It will not be out of place to mention here that no offence has been registered as against deceased Santosh for carrying four persons on the motorcycle, though it appears to be a true fact, from the police papers, on which even the claimants are relying. Though he had not followed the traffic rules by allowing three pillion riders and none of them were wearing protective headgear, it cannot amount to contributing to the accident. Though it is traffic violation, for that purpose different provision is provided. The learned Tribunal had considered the decision in **New India Insurance**

Company Ltd. vs. Shardadevi, 2013 A.C.J. 652 (Allahabad) and also **Rupinder Sharma vs. Basant Kumar, 2014 A.C.J. 869 (P & H)**. In both these cases it has been stated by the respective High Courts that breach of rules in driving two wheeler without helmet or allowing 2 or 3 pillion riders cannot be treated as contributory negligence. No doubt, it appears that the Calcutta High Court did not agree with the other two High Courts but then for contributing to an accident something else is required not mere traffic violation of rules of the nature alleged herein. It can be seen from the spot panchnama that Santosh was proceeding from the left side of his road which was as per traffic rules. On the contrary, the offending vehicle had come from the opposite side, went to its wrong side and gave dash to the motorcycle. The width of tar road as per the spot panchnama is 22 feet and then it had 5 feet margin on the left side of the offending tempo. The distance of the southern edge from the spot of the accident is about 14 feet, that means, about 3 feet the tempo had gone towards its wrong side before giving dash to the motorcycle. Under such circumstance, when the picture is very much clear and it has not been disputed by the respondents by adducing any cogent evidence, there was no scope for Santosh to contribute to the accident in any manner. Even as regards the contents of the Post Mortem Report to the extent of liquor smell is concerned, unless it would have been proved that he was 'under the influence of liquor', his heirs could not have

been debarred from claiming compensation. Mere drinking of liquor is no offence but anything done contrary to the law “under the influence” is an offence. Therefore, there is absolutely no point raised by the appellant for holding deceased Santosh contributorily liable to the accident or taking the case of representatives of Digambar as that of composite negligence case. Hence, the point is answered in the negative. The ratio laid down in the decisions by the appellant cannot be disputed. As regards **2017 (1) T.A.C. 688** and **AIR 1988 Supreme Court 2027**, but it is to be noted that those are the pronouncements on different point, regarding directions to be given to the State, as to what should be the rules and powers of the State to make rules. These authorities have no bearing on the facts of this case.

16 **Point No.2 :**

At the costs of repetition it can be said, that the insurance company, though had taken the defence of breach of terms of policy and was duty bound to prove it, did not lead any evidence. The driving licence of respondent No.1 is on record, which shows that he was entitled to drive the offending vehicle. So, on that point it cannot be stated that there is any breach of terms of policy.

17 As regards the permit also, no positive and cogent evidence has

been adduced by the insurance company. Again it can be said, that the ratio laid down in **AIR 2018 SC 2662** cannot be disputed, but for that purpose the insurance company ought to have led evidence. Mere non production of the document of permit by the claimants or the respondent Nos.1 and 2 will not allow us to infer that the vehicle had no permit. Hence, this point is also answered in the negative. When the insurance company failed to prove the breach of terms of policy then it is liable to pay compensation to the claimants together with respondent Nos.1 and 2, jointly and severally.

18 **Point No.3 :**

Now, coming to the prayer of the claimants, though they have not filed any appeal, in view of the decision in **Jitendra Trivedi** (supra) by Hon'ble Apex Court though in that case the enhancement was granted under Section 142 of the Constitution of India, yet, the principle, that has been, laid down is that the Motor Accident Claims Tribunal is duty bound to award just and reasonable compensation. Thereafter, after taking note of the decisions power of Courts in awarding reasonable compensation explained in **Nagappa vs. Gurudayal Singh and others, (2003) 2 SCC 274, Oriental Insurance Company Ltd. vs. Mohd. Nasir and another, 2009 (6) SCC 280 and Ningamma and another vs. United India Insurance Company Ltd., (2009) 13 SCC 710** it was observed that, “even though the claimants have not filed

any appeal, it is obligatory on the part of the appellate Court to award just and reasonable compensation. It would be appropriate to increase the compensation". The said principle equally applies in this case also. Therefore, there is no hurdle in considering the prayer of the claimants to enhance the compensation.

19 In both the matters it was contended by the claimants that Santosh as well as Digambar were Mason by profession and they used to earn Rs.400/- per day i.e. Rs.12,000/- per month. However, except the bare words of the widows in both the cases there was nothing on record. Therefore, tribunal was justified in invoking notional income. The claimants intend to rely on **Syed Sadiq's** (supra) case, where the Apex Court had taken the notional income of a vegetable vendor @ Rs.6,500/- per month. We cannot apply the said ratio here, for the simple reason that selling vegetable is a 'business', whereas work as Mason is basically daily earning work and unless the work is available on that day there will not be income. Further, there is no evidence on record produced by the claimants that Santosh and Digambar were working as 'Mason'. Therefore, they will have to be ranked as 'Labour', that too they are coming from rural area where there would be scarcity of availability of even labour work. Therefore, the learned Tribunal was justified in holding their notional income @ Rs.5,000/- per month.

However, the learned Tribunal erred in not granting any amount towards future prospect. Since the decision in **National Insurance Company Ltd. vs. Pranay Sethi and others, (2017) 16 SCC 680** is holding field, we are required to calculate the future prospect at the said rate. Taking into consideration the occupation of the deceased Santosh as well as Digambar as labour and in view of para 64(IV) of the **Pranay Sethi**, they are 'self employed' and therefore, 40% of the established income i.e. the notional income is required to be added, as they are below the age of 40. Their respective age is 25 and 29. Therefore, the addition of 40% i.e. Rs.4,000/- per month will have to be given as future prospect and therefore, the income would be Rs.7,000/- per month. Yearly it would be Rs.84,000/- (Rs.7,000/- per month x 12 months). Taking into consideration the number of family members in both the petitions 1/4th amount is required to be deducted towards personal expenditure of the deceased persons. That amount comes to Rs.21,000/-. After deduction of the personal expenditure the dependency of the claimants would be Rs.63,000/-. Taking into consideration their age the just multiplier in this case would be 17 and after applying the multiplier the amount of compensation would be Rs.10,71,000/-. Further, taking into consideration para No.64 (VIII) of **Pranay Sethi's** case, amount of Rs.70,000/- is required to be granted towards non-pecuniary damages and thus, in both the petitions the respective claimants are entitled to get

Rs.11,41,000/-. The calculation made by the Tribunal was not proper and therefore that deserves to be modified and necessary direction is required to be given to the claimants to pay the deficit Court fee. Point is answered accordingly.

For the aforesaid reasons, I proceed to pass following order.

ORDER

1 First Appeal No.3160 of 2016 and First Appeal No.3161 of 2016 are hereby dismissed. Prayer of the original claimants for enhancement in the compensation is allowed.

2 The Civil Applications stand disposed of accordingly.

3 However, the Judgment and Award passed in M.A.C.P. No.38/2015 and M.A.C.P. No.37/2015 by Member, Motor Accident Claims Tribunal, Udgir dated 02.05.2016 are hereby set aside and modified to the extent of quantum only as follows.

“The respondent Nos.1 to 3 shall pay, jointly and severally, a sum of Rs.11,41,000/- (Rupees Eleven Lacs Forty One Thousand only) to the claimants towards compensation including the No Fault Liability amount already paid with interest thereon @ 9% per annum from the date of the petition till actual realization and the claimants shall share the same equally.”

4 Amount deposited uptill in both the matters, be adjusted towards the modified Award and deficit be deposited in this Court by the respondent Nos.1 to 3 within a period of two months from the date of this order.

5 It is clarified that the rest of the Award be maintained as it is, as regards disbursement of the amount is concerned.

6 The claimants in both the petitions to deposit the deficit Court fee within a period of one month from today.

7 No order as to costs.

(Smt. Vibha Kankanwadi, J.)

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