IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1913 OF 2018

New India Assurance Company Ltd.,
A Company registered under the
Companies Act – a Subsidiary of
General Insurance Company of India,
having its Divisional Office at
Adalat Road, Aurangabad, through
its Authorized Signatory **APPELLANT**

VERSUS

1. Smt. Jayashri Raju Kadam,
Age : 43 years, Occu. Household,
R/o Panodi, Tal. Sangamner,
A/P Ward No.1, Shrirampur,
District Ahmednagar

2. Priyanka Raju Kadam,
Age : 20 years, Occu. Education,
R/o as above

3. Rahul Raju Kadam,
Age : 18 years, Occu. Education,
R/o as above

4. Prajakta Raju Kadam,
Age : 16 years, Occu. Education,
U/g Respondent No.1

5. Shakuntala Philip Kadam,
Age : 65 years, Occu. Nil,
R/o as above

6. Philip Petras Kadam,
Age : 60 years, Occu. Nil,
R/o as above

7. Manisha Raju @ Rajendra Kadam,
Age : 33 years, Occu. Household,
R/o Sangamner Road, Taluka
Sangamner, District Ahmednagar

8. Prajakta Raju @ Rajendra Kadam,
   Age : 11 years, Occu. Education,
   U/g Respondent No.7

9. Rohit s/o Raju @ Rajendra Kadam,
   Age : 5 years, Occu. Nil,
   U/g Respondent No.7

10. Ismail Pirmohmmad Shaikh,
    Age : Major, Occu. Business,
    R/o Near Pune Naka,
    Naikwadpura, Tq. Sangamner,
    District Ahmednagar **RESPONDENTS**

Mr. A.B. Kadethankar, Advocate for the appellant
Mr. Shaikh Mazhar A. Jahagirdar, Advocate for respondent Nos.1 to 6
Mr. R.L. Kute, Advocate for respondent Nos.7 to 9

CORAM : SUNIL K. KOTWAL, J.

DATE : 26th MARCH, 2019

ORAL JUDGMENT :

New India Assurance Company Ltd. has filed this appeal against the judgment and award passed by the Motor Accident Claims Tribunal ("Tribunal", for short), Shrirampur in Motor Accident Claims Petition ("MACP", for short) No.171/2013. The appellant was respondent No.2 and respondent No.10 was respondent No.1 in MACP No.171/2013. Respondent Nos.1 to 9 in the appeal are original claimants. Hereinafter, the parties are referred in accordance with their status in the original claim proceeding, as claimants, owner of vehicle and insurer of the vehicle.

2. Facts leading to institution of this appeal are that on 8th April, 2013, at about 9.00 p.m., the deceased Raju Kadam was waiting by the side of road for vehicle for going to village Panodi, Taluka Sangamner. That time, Tata Indica Car bearing registration No. MH-04-CT-4846 (offending car) came from Sangamner direction and gave dash to deceased Raju, who was standing to the extreme left side of the road. Injured Raju Kadam was rushed to the hospital of Dr. Tambe, where he was declared as dead. Therefore, Police Station, Sangamner was informed. In the result, Crime No.56/2013 was registered against the driver of offending car. The claimants being dependents of deceased Raju, filed claim petition for compensation before the Tribunal.

3. The owner of the offending car filed written statement (Exh-24) and denied the rash and negligent driving of the car by his driver. Contention of owner of the offending car is that on the date of accident, his driver namely Somnath Ramaji Mayyad was driving the car in proper manner. However, when the car reached to Panodi area, deceased Raju Kadam hurriedly tried to

cross the road and came below the car of respondent No.1. In the alternate contention of the owner of the car is that on the date of accident, the car was duly insured with respondent No.2 Insurance Company and driver of the car held effective and valid driving licence on the date of accident. Therefore, the compensation needs to be recovered from respondent No.2 Insurance Company.

4. By filing written statement (Exh-21), the Insurance Company has admitted that on the date of accident, the offending car was duly insured with respondent No.2 Insurance Company. Contention of Insurance Company is that on the date of accident, the driver of the offending car did not hold valid and effective driving licence to drive the car and thereby the owner of the vehicle had committed breach of conditions of the policy of insurance. Even involvement of offending car in aforesaid accident is denied by Insurance Company. In other words, the Insurance Company denied the entire claim of the claimants.

5. The Tribunal framed issues at Exh-27. After considering the evidence placed on record by both the parties, the Tribunal partly allowed the claim petition

and awarded compensation of Rs.40,07,135/- and joint and several liability to pay the compensation was fastened against respondent Nos.1 and 2 i.e. owner and insurer of the vehicle. However, claim of petitioner No. 7 Manisha Raju @ Rajendra Kadam was dismissed. The said judgment and award is challenged only by insurer of the offending vehicle.

6. Heard Shri A.B. Kadethankar, learned counsel for the appellant, Shri Shaikh Mazhar A. Jahagirdar, learned counsel for respondent Nos.1 to 6 and Shri R.L. Kute, learned counsel for respondent Nos.7 to 9.

7. Learned counsel for the Insurance Company submits that the accident occurred on 8^{th} April, 2013. However, FIR (Exh-39A) was lodged on 15^{th} April, 2013 against unknown vehicle. The chargesheet was filed on 18^{th} June, 2013. He submits that though the statements of two persons were recorded by police as eye witnesses of the occurrence, those persons were not examined before the Tribunal. Therefore, on the basis of only copies of statements of two eye witnesses recorded by the police, the claimants cannot prove the involvement of the offending car in the aforesaid accident.

8. Next contention of learned counsel for the appellant is that even the Investigating Officer (PW3) did not take pains to prove the police statements of the eye witnesses and merely by filing of copies of statements of the eye witnesses, claimants cannot prove involvement of the offending vehicle in aforesaid accident.

10. Next contention of learned counsel for the appellant is that the compensation awarded by the Tribunal is exorbitant and needs to be reduced.

11. Learned counsel for respondent Nos.1 to 6 submits that merely on the basis of delay in lodging FIR, claim petition cannot be dismissed. He submits that the owner of the offending vehicle filed written statement (Exh-24) and admitted involvement of offending vehicle in abovesaid accident.

12. Next contention of learned counsel for respondent Nos.1 to 6 is that the spot panchanama (Exh-39B) with sketch map indicates that the spot of the accident is at the edge of the road as shown in the sketch map, which is part and parcel of spot panchanama.

13. Learned counsel for respondent Nos.1 to 6 has drawn my attention towards salary slip of the deceased to show the actual monthly income of the deceased. Learned counsel for respondent Nos.1 to 6/claimants has drawn my attention to the decision in the case of ***"Khatri Vs. State of Bihar" [1981 (2) SCC 493]***, to substantiate his contention that copies of the statements of the witnesses recorded by the police can be read in evidence without its formal proof.

14. The crux of this matter is whether the involvement of offending car is proved by the claimants or not. Learned counsel for the appellant has pointed out that in the police papers, the statements of two so called eye witnesses namely Sanjay Tabaji Muntonde and Nivrutti Tukaram Kamble were recorded on 16th April, 2013 (Exh-39 and Exh-40). However, these two eye witnesses are not examined by the claimants to prove the occurrence of the accident and identification of the car involved in the accident. He submits that mere filing of copies of police statements of witnesses, without its formal proof, is not sufficient to prove the contents of those statements.

15. On the other hand, learned counsel for claimant Nos.1 to 6 submits that in civil proceeding, the bar under Section 162 of the Code of Criminal Procedure is not applicable and therefore, the copies of police statements of two eye witnesses can be read in evidence to prove the involvement of offending car. He placed reliance on ***Khatri Vs. State of Bihar*** (supra).

16. Important fact to be noted is that though claimants placed on record copies of police statements of Sanjay Tabaji Muntonde and Nivrutti Tukaram Kamble, who are residents of Shiblapur, Taluka Sangamner, the claimants have not taken pains to examine their two star witnesses. Most surprising thing is that though Investigating Officer PSI Devyani Patil (PW3) is examined on behalf of claimants, she has merely referred the presence of these two eye witnesses on the spot, but in her entire evidence, she has not taken pains to prove the contents of these two eye witnesses. Thus, obviously mere filing of statements of these two eye witnesses does not dispense the proof of contents of those statements by examining those two eye witnesses. Thus, in absence of Sanjay Muntonde and Nivrutti Kamble as witnesses before the Tribunal, on the basis of their

statements before the police, the claimants cannot prove involvement of offending vehicle in the aforesaid accident.

17. However, it cannot be ignored that the owner of the offending vehicle filed written statement (Exh-24) and in paragraph No.9 of the written statement, he categorically admitted the involvement of offending vehicle i.e. Tata Indica Car No. MH-04-CT-4846 in the abovesaid accident. He merely pleaded that the accident occurred because deceased Raju suddenly tried to cross the road. However, to prove this contributory negligence of the deceased, the owner has not examined his driver as witness to prove his contention regarding negligence on the part of the deceased. But the fact remains on record that owner of the offending car himself has admitted the involvement of his vehicle in aforesaid accident resulting into the death of deceased Raju. Thus, I have no hesitation to hold that on the basis of this admission, the involvement of the offending vehicle in the accident is duly proved by the claimants.

18. The ratio in ***Khatri Vs. State of Bihar*** (*supra*) is not applicable in the case at hand because the question of application of bar under Section 162 of the

Code of Criminal Procedure is not involved in the case at hand. The question before the Apex Court was whether certain documents called for by the Court are liable to be produced by the State or their production is barred under some provisions of the law. In that writ petition, CID report submitted by Shri L.V. Singh, DIG and other relevant police papers were called by the Court and its production was objected by the State on the ground of bar under Sections 162 and 172 of the Code of Criminal Procedure. Thus, the ratio in the case before the Apex Court was altogether different and it is not relevant for deciding the controversy in the case at hand.

19. As involvement of the offending car is established on the basis of admission given by the owner of the car in his own written statement, the claimants were not expected to bring on record additional evidence to prove the involvement of the offending vehicle.

20. On behalf of claimants, Jayshri Kadam (PW1) stepped into witness box and she deposed regarding knocking down of her husband when he was waiting for the bus for going to Panodi. No doubt, this witness is not eye witness of the occurrence. However, her contention

is also corroborated by FIR (Exh-39A) and spot panchanama (Exh-39B) with sketch map, which shows that the spot of occurrence of the accident is on the edge of Sangamner to Shiblapur road. This circumstantial evidence indicates that the offending car gave dash to deceased Raju Kadam when he was standing on the edge of the road. This amounts to rash and negligent driving by the driver of the offending car. In Motor Accident Claim proceeding, the claimants have to prove their contention only on the basis of preponderance of probability and proof beyond reasonable doubt like criminal trial is not expected in such proceeding. The admission of owner of the offending car together with above referred circumstantial evidence on record is, therefore, sufficient to hold that on 8th April, 2013, deceased Raju Kadam met with an accident only due to rash and negligent driving by the driver of the offending car. The post-mortem report (Exh-50) is sufficient to hold that Raju Kadam died in the abovesaid accident.

21. The finding of the Tribunal that on 8th April, 2013, Raju Philip Kadam died in motor vehicular accident due to rash and negligent driving of Tata Indica Car No.MH-04-CT-4868, cannot be faulted with.

22. Next question arises whether the Insurance Company can prove its defence regarding breach of terms and conditions of policy of insurance. However, to prove that the driver of the offending car did not hold valid and effective licence, the Insurance Company did not take pains to examine any witness from R.T.O. Office. Therefore, I have no hesitation to hold that the Insurance Company of offending car failed to prove that the owner of the offending car committed breach of terms and conditions of police of insurance.

23. Now the question arises as to what would be the just and reasonable compensation payable to the claimants.

24. At the outset, I must make it clear that claim of second wife of deceased Raju Kadam namely Manisha Raju Kadam is already dismissed by the Tribunal. Against that finding, no cross-objection is filed by the claimant No.7 Manisha Kadam. Thus, only claimant Nos.1 to 6, 8 and 9 are entitled to compensation for the accidental death of Raju Kadam and respondent Nos.1 and 2 being owner and insurer of the offending vehicle are jointly and severally liable to pay the compensation of

these claimants.

25. By examining Rahul Padale (PW2), Junior Clerk from the office of the Superintendent of Police, the claimants have proved the copy of first page of the service-book of deceased Raju Kadam (Exh-36), which shows that deceased Raju Kadam was in service of Police Department as Police Constable. This witness has also proved the salary slip of deceased Raju of the month of March, 2013 (Exh-37) and of the month of February, 2013 (Exh-38). The gross salary of deceased Raju Kadam was Rs.21,672/- per month. Out of this amount, the washing allowance of Rs.100/- and Professional Tax of Rs.200/- deserve to be deducted. Thus, after deducting the amount of Rs.300/-, the gross monthly income of deceased Raju comes to Rs.21,372/-. From the service-book, it emerges that date of birth of deceased Raju was 1st June, 1964. Thus, on the date of accident, deceased Raju was 48 years old. AS he was in permanent service, in view of law settled by the Apex Court in ***"National Insurance Company Limited Vs.Pranay Sethi and others" [2018 (3) Mh.L.J. SC 70,*** there should be addition of 30% of actual salary towards loss of future prospect of the deceased. Thus, after addition of this 30% of actual salary, the

monthly salary of deceased Raju comes to Rs.27,783/-. It follows that his annual income is Rs.3,33,396/-. As in the family of the deceased, there are more than five dependents, in view of the guidelines issued in ***"Sarla Varma and others Vs. Delhi Transport Corporation and another (AIR 2009 SC 3104)***, 1/5th income is to be deducted towards personal expenses of the deceased. Thus, after deducting 1/5th amount, the income of the deceased available to the dependents comes to Rs.2,66,717/-. Considering the age of deceased at the time of his death as 48 years, multiplier of 13 is applicable in the case at hand. Thus, loss of dependency comes to Rs.34,67,321/-.

26. In addition to this, the claimants are entitled to following compensation under conventional heads :-

(i)	Loss of Consortium	Rs. 40,000/-
(ii)	Loss of Estate	Rs. 15,000/-
(iii)	Funeral Expenses	Rs. 15,000/-
	Total :	Rs. 70,000/-

Thus, the claimants are entitled to total compensation under different heads as follows :-

(i)	Loss of Dependency	Rs.34,67,321/-
(ii)	Loss of Consortium	Rs. 40,000/-
(iii)	Loss of Estate	Rs. 15,000/-
(iv)	Funeral Expenses	Rs. 15,000/-
	Total :	Rs.35,37,321/-

27. On this compensation amount, the claimants are also entitled to interest at the rate of 9% per annum from the date of filing of claim petition till full realisation of compensation amount. This compensation shall be inclusive of "No Fault Liability" compensation of Rs.50,000/-.

28. Claimant No.5 Shakuntala Philip Kadam and claimant No.6 Philip Petras Kadam being old aged parents of the deceased, their share in the compensation amount shall be less than claimant Nos.1 to 4, 8 and 9. Considering probable remaining life span of parents of the deceased, I hold that they are entitled to Rs.1,50,000/- each out of the total amount of compensation with proportionate accrued interest. Claimant No.1 being widow, claimant Nos.2, 3 and 4 being children and claimant Nos.8 and 9 being illegitimate children of deceased Raju, are entitled to equal share

in the remaining compensation amount. Claimant Nos.4, 8 and 9 being minor children, compensation of their share needs to be invested in fixed deposit in any nationalized bank till they attain majority. The award passed by the Tribunal needs to be modified to reduce the quantum of compensation payable to the claimants and to make the proper apportionment amongst the claimants.

29. It follows that this First Appeal filed by the Insurance Company deserves to be partly allowed. Accordingly, First Appeal No.1913/2018 is partly allowed. The award passed by the Motor Accident Claims Tribunal, Shrirampur in Motor Accident Claims Petition No.171/2013 is modified as under :-

"(i) The petition is partly allowed with proportionate costs.

(ii) Respondent Nos.1 and 2 do jointly and severally pay the compensation of Rs.35,37,321/- (inclusive of No Fault Liability compensation) to petitioner Nos.1 to 6, 8 and 9, with interest at the rate of 9% per annum from the date of institution of claim petition till full realisation of compensation amount.

(iii) On deposit of this compensation amount before the Tribunal, the amount of Rs.1,50,000/- each with proportionate accrued interest thereon shall be paid to claimant No. 5 Shakuntala Philip Kadam and claimant No.6 Philip Petras Kadam, by separate account payee cheques issued in their respective names through the Tribunal.

(iv) The remaining compensation amount shall be equally apportioned in between claimant Nos.1 to 4, 8 and 9. Compensation amount of the share of claimant Nos.1 to 3 shall be paid to them by separate account payee cheques issued in their respective names through the Tribunal.

(v) Compensation of the share of claimant No. 4 Prajakta Raju Kadam shall be invested in fixed deposit in any nationalized bank through her mother Smt. Jayashri Raju Kadam for a period of five years. The quarterly accrued interest thereon be paid to her through her mother Smt. Jayashri Raju Kadam.

(vi) Compensation amount of the share of claimant

No.8 Prajakta Raju @ Rajendra Kadam shall be invested in fixed deposit in any nationalized bank through her mother Manisha Raju @ Rajendra Kadam for a period of five years. The quarterly accrued interest thereon be paid to her through her mother Smt. Manisha Raju @ Rajendra Kadam. Compensation amount of the share of claimant No.9 Rohit Raju @ Rajendra Kadam shall be separately invested in fixed deposit in any nationalized bank through his mother Smt. Manisha Raju @ Rajendra Kadam for a period of five years and the fixed deposit shall be renewed at the interval of every five years till claimant Nos.8 and 9 attain majority. Quarterly accrued interest on their respective fixed deposit amounts shall be paid to them through their mother Smt. Manisha Raju @ Rajendra Kadam.

(vii) Pre-mature withdrawal of fixed deposit amount is not permissible. Concerned bank be informed accordingly.

(viii) Claim of petitioner No.7 Smt. Manisha Raju @ Rajendra Kadam stands dismissed.

(ix) The deficit court fees, if any shall be recovered from the petitioners.

(x) The award be drawn accordingly.”

30. The parties shall bear their respective costs of the appeal.

[SUNIL K. KOTWAL]
JUDGE

npj/fa1913-2018