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

First Appeal No. 04234 of 2016

District : Jalna

Maharashtra State Road Transport Corporation, Wahtuk Bhavan, Mumbai, through its Divisional Controller, MSRTC, Jalna. Taluka & District Jalna.	.. Appellant (Original respondent no.01)

versus

1. Smt. Kausabai w/o. Jalindar Karde,
   Age : 38 years,
   Occupation : Household.

2. Atul s/o. Jalindar Karde,
   Age : 21 years,
   Occupation : Education.

3. Rahul s/o. Jalindar Karde,
   Age : 17 years,
   Occupation : Education.

4. Gangadhar s/o. Vinayak Karde, .. Respondents
   Age : 70 years, (Nos.1 to 4 -
   Occupation : Nil. Original petitioners)

   Respondents no.1 to 4
   All R/o. Kajala,
   Taluka Badnapur,
   District Jalna.

5. Rajendra Sukhdeo Barkul,
   Age : Major,
   Occupation : Driver,
   R/o. Near Vitthal Mandir,
   Yermala,
   Taluka Kalamb,
   Dist. Osmanabad.

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Mr. D.S. Bagul, Advocate, for the appellant.

Mr. V.M. Humbe, Advocate, for respondents no.01 to 04.

Respondent no.05 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 24TH JUNE 2019

ORAL JUDGMENT :

01. Present appeal has been filed by the original respondent no.01 challenging the judgment and award passed in Motor Accident Claim Petition No. 200 of 2014, by learned Member of the Motor Accident Claims Tribunal, Jalna, on 18-04-2016.

02. Present respondents no.01 to 04 are the original claimants. They have come with a case, that deceased Jalindar Karde, in respect6 of whose death they were claiming compensation as legal representatives, was serving as security man with Jalna Merchants' Co-operative Bank Ltd., Jalna, as well as he was working as agent with Life Insurance Corporation of India. He was aged 43 years. On the date of the accident i.e. 28-11-2014, he was proceeding on his motorcycle bearing No. MH-21/AJ-2484 at about 01.00 p.m. from Ambad-Jalna Road. When he was near Haratkheda Phata, at that time he was dashed by S.T. Bus bearing No. MH-14/BT-3495 which

had come from opposite direction in rash and negligent manner and with high speed. As a result of dash, he had sustained severe injuries. He died in the said accident. It was contended that original respondent no.02 was driving the said S.T. bus and because of his negligence, the accident had taken place. As regards income of the deceased is concerned, it was stated that he was getting salary of Rs. 8,680/- per month as Security Guard. Then he was also serving as Pigmy Agent with Kolpe Multi-State Co-operative Bank, Jalna and then with Shri Vyankatesh Multi-State Co-operative Credit Society, Jalna. It was also stated that he had irrigated lands at village Kajala and Nipani Pimpalgaon. The yearly income of the deceased was computed at Rs. 3,34,160/-. As per the calculation, the claimants were claiming compensation of Rs. 39,34,300/-. *[Parties are referred as per their status before the Tribunal.]*

03. Both the respondents had filed written statement at Exhibit 22. They have denied all the contentions in the petition. Age, income and occupation of the deceased has been challenged. So also, factum of accident and the manner in which it had taken place is also challenged.

04. Taking into consideration rival contentions, issues were framed. Parties have led oral as well as

documentary evidence. Taking into consideration the evidence on record, learned Member of the Motor Accident Claims Tribunal, Jalna, has partly allowed the petition. Respondents no.01 and 02 were directed to pay amount of Rs. 17,12,790/- jointly and severally to the claimants together with interest at the rate of 7 % per annum from the date of filing of the petition till actual realization of the entire amount. Hence, original respondent no.01 has filed the present appeal.

05. Heard learned Advocate Mr. D.S. Bagul appearing for the appellant. Heard learned Advocate Mr. V.M. Humbe appearing for respondents no.01 to 04. None for respondent no.05 though served.

06. It has been vehemently submitted on behalf of the appellant, that the learned Member of the Tribunal has not taken into consideration the fact that the deceased had contributed to the accident. In fact, he was driving the motorcycle from wrong side and, therefore, learned Member ought not to have saddled the compensation only on the respondents. It was further submitted that the learned Member has not computed the income of the deceased properly, so also, future prospectus as well as non-pecuniary damages have not been calculated properly.

07. Per contra, learned Advocate appearing for

respondents no.01 to 04 has supported the reasons given by the learned Tribunal.

08. Taking into consideration the rival contentions, following points are arising for my determination. Findings and reasons for the same are as follows :-

> *(I) Whether opponents had proved that deceased had contributed to the accident ?*

> *(II) Whether the applicants are entitled to get entire compensation as calculated by the learned Member or any interference is required ?*

09. Both the points are taken together for discussion for the sake of convenience and to avoid repetition. It is to be noted that a specific issue in respect of contributory negligence was framed and the burden was on respondents no.01 and 02 to prove the same. Perusal of the written statement, however, basically shows that the plea of contributory negligence was never taken by the opponents. Issues will arise only when there is positive assertion and denial thereof. Though there is positive assertion by the claimants, that the accident had taken place due to the negligence on the part of respondent no.02 and the same has been specifically denied by the respondents, the issue that will arise is only in

respect of negligence alleged as against respondent no.02. There were absolutely no contentions raised in respect of contribution to the accident by the deceased in the written statement by the respondents. For raising that point, respondent no.02 will have to accept that to some extent, he is then negligent, which has not been done in this case. Under such circumstance, in fact, there was no occasion for the Tribunal to frame issue in respect of contributory negligence. However, said issue was, in fact, framed in this case and, therefore, there was positive opportunity for the opponents to prove that there was a contributory negligence of the deceased.

10. Respondent no.02 has examined himself and his examination in chief would show that he intended to say that the accident had taken place due to the sole negligence of the deceased. There was no whisper about contribution by the deceased to the accident to any extent. On the contrary, in his cross examination, he has admitted that he had been prosecuted by police. He never challenged his prosecution with the higher authorities. Perusal of the *panchanama* of the spot Exhibit 29 and the sketch appended to the same would show that the accident had taken place towards western half of the road which was the correct side of the motorcycle. Therefore, even from the spot, we cannot gather that there was any negligence on the part of the deceased. Hence,

that point will have to be answered in the negative.

11. Now, coming towards the quantum, it is now required to be seen as to whether the Tribunal had assessed the income properly. Taking into consideration the fact that the applicants had proved that the accident had taken place due to the negligence on the part of opponent no.02, they are entitled to get compensation and the respondents no.01 and 02 being driver and employer, were jointly and severally liable to pay the said compensation amount. In order to prove the income of the deceased, the applicants have examined PW 02 Avin Hadke, who was the employee of LIC and he has produced copy of the license given to deceased as agent and the details of commission given to deceased. It was tried to be contended that since the applicants had come with a case, that deceased was also employee with Jalna Merchants' Co-operative Bank Ltd. as Security Guard, he could not have taken up the work as agent with LIC. In order to prove the another source of income of the deceased, applicants have examined PW 03 Ramprasad Jaju, who was the employee of the Bank. He has produced the appointment letter of the deceased and other documents including the salary certificate Exhibit 59 to consider the amount of the salary which he was getting. Therefore, it can be said that the applicants had led evidence to prove that there were

two independent sources of income for the deceased. The license copy as well as the appointment letter do not show that deceased could not have taken up either of the job in view of either of it. In other words, it has not been brought on record to show that in view of his employment as Security Guard with Jalna Merchants' Co-operative Bank Ltd., deceased could not have sought job as agent with LIC and vice versa. When there is no prohibition in the service rules of deceased or in the contract, then there is no substance in the point raised by the appellant in that respect. Both the sources are required to be taken into consideration while computing the income.

12. As regards the income from job as Security Guard, deceased was getting Rs. 8,680/- per month. Taking into consideration salary certificate Exhibit 59, the amount which can be deducted is only the professional tax to the tune of Rs. 175/- in view of the decisions laid down in *Raghuvir Singh Matolya & others Vs. Hari Singh Malviya & others* [(2009) 15 SCC 363] and in *Shyamwati Sharma & others Vs. Karam Singh & others* [2010 ACJ 1968 (SC)]. Therefore, after deduction of the professional tax only from the gross salary, the amount which would be permissible is Rs. 8,505/- per month. Yearly it would be Rs. 1,02,060/- (Rs. 8,505 per month X 12 months). In addition to the same, if we consider the testimony of PW 02 Hadke and the reasons given by the learned Tribunal in arriving at

an average of yearly commission, Rs. 12,000/- would be an appropriate income. After adding the said yearly income, the total income available for our calculation purpose of the deceased would be Rs. 1,14,060/- (Rs. 1,02,060/- + Rs. 12,000/-). Further, in view of the decision in *National Insurance Company Limited Vs. Pranay Sethi & others* [AIR 2017 SC 5157] and the fact that the deceased was 43 years of age, 25 % of the income is required to be added towards future prospectus.

13. At this stage, learned Advocate appearing for respondents no.01 to 04 has relied on the decision of the Hon'ble Apex Court in *Sureshchandra Bagmal Doshi & another Vs. New India Assurance Company Ltd. & others* [(2018) 15 SCC 649], wherein it has been held that *"Where the assessment is based on actual evidence led to the satisfaction of the Tribunal / Court, increase in income that can be granted as future prospects can be taken at a higher level than the standard percentage."* It was submitted that in this case, Hon'ble Apex Court has granted 100 % increase. It is to be noted that in para no.11 of the judgment, Hon'ble Apex Court has clearly stated that when there is evidence adduced to the satisfaction of the Tribunal, the level of future prospectus can be increased. Here, there is no evidence led in respect of the future increase that was permissible to deceased. Therefore, the said

ratio cannot be made applicable to the facts of this case.

14. Taking into consideration the 25 % of the yearly salary of deceased Jalindar, which comes to Rs. 28,515/-, yearly income of the deceased would be Rs. 1,42,575/-. Out of the same, taking into consideration the number of family members as well as the decision in *Sarla Verma & others Vs. Delhi Transport Corporation & another* [(2009) 6 SCC 121], after deducting 1/4th amount, it comes to Rs. 35,643/-. Therefore, dependency would be Rs. 1,06,931/- per annum. Further, taking into consideration age of the deceased and decision in *Sarla Verma (supra)*, the just multiplier in this case would be 14. After applying the the multiplier, total future loss of deceased would be to the extent of 14,97,020/- (Rs. 1,06,930 X 14). Further, so far as non-pecuniary damages are concerned, we are definitely guided by the decision in *Pranay Sethi's case (supra)* and, therefore, maximum that can be allowed is Rs. 70,000/-. Thus, original claimants were entitled to get compensation of Rs. 15,67,020/- (inclusive of '*no fault liability*' amount), jointly and severally from respondents no.01 and 02. Taking into consideration that the basis on which the compensation was calculated by the Tribunal was wrong, the award deserves to be modified to that

extent by allowing the appeal partly. Point no.02 is answered accordingly.

15. For the aforesaid reasons, following order is passed :

(a) The appeal is hereby partly allowed.

(b) Clause 2 of the operative order in the award passed by the learned Member of the Motor Accident Claims Tribunal, Jalna, in M.A.C.P. No. 200 of 2014, on 18-04-2016, is hereby set aside and modified to the extent of quantum, as follows :-

> *"2. Respondents no.01 and 02 do jointly and severally pay amount of Rs. 15,67,020/- [Fifteen lacs sixty seven thousand twenty only] to the claimants (inclusive of 'no fault liability' amount)."*

It is clarified, that rest of the award would be as it is.

(c) It is further clarified, that the entire amount was deposited by the appellant in this case and 50 % of the same has been withdrawn under the orders of this Court by respondents no.01 to 04. Under such circumstance, as regards rest 50 % amount is concerned, it would be as per the modified award and excess, if any, deposited by the appellant, be refunded to the appellant. Further, it is clarified, that before refund is awarded, calculation should be done in respect of interest. Respondents are permitted to withdraw the amount after the calculation.

(d) Award be drawn accordingly.

(Smt. Vibha Kankanwadi)
JUDGE

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