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

FIRST APPEAL NO. 2771 OF 2018

New India Assurance Company Limited,
Through it's Branch Manager,
Shivaji Chowk, Naik Nivas, Osmanabad,
Tq. & Dist. Osmanabad.

New India Assurance Company Limited,
Through it's Authorized Signatory/
Senior Divisional Manager/ In-charge
Legal Hub, Mahesh Compound,
Adalat Road, Aurangabad. ...**APPELLANT**
(Original Respdt. No.2)

VERSUS

1) Shubhangi wd/o Narhari Deshmukh,
Age; 49 years, Occ; Household,

2) Sagar Narhari Deshmukh,
Age; 27 years, Occ; Education,

3) Indirabai wd/o Dattatraya Deshmukh,
Age; 76 years, Occ; Household,

All R/o; Raikhel, Tq.Tuljapur,
Dist; Osmanabad.

4) Prakesh Devidasrao Kulkarni,
Age; Major, Occ; Business,
R/o; Kundalika Vaibhav,
B/14 Damakhadi, Tq. Roha,
Dist; Raigadh. ...**RESPONDENTS**
(Respondent Nos. 1 to 3
Orig. Claimants, Respdt Nos.
4 – Orig. Respdt. No. 1)

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Shri. M.R. Deshmukh, Advocate for Appellant
Shri. P.S. Chavan, Advocate for Respondent
Nos.1 to 3.

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CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment :27/03/2019

Date of Pronouncing Judgment :03/04/2019

JUDGMENT :

This appeal is directed against the judgment and award passed by the Motor Accident Claims Tribunal, Osmanabad (hereinafter referred to as the 'Tribunal') in Motor Accident Claim Petition No. 60 of 2016, (hereinafter referred to as the 'MACP'), where as compensation of Rs. 42,91,200/- was awarded by the Tribunal. The appellant is original respondent No. 2 the New India Assurance Company Ltd. (hereinafter referred to as 'Insurer'). Respondent No. 1 to 3 are the original claimants and respondent No. 4 is original respondent No. 1. He was registered owner of Ertiga car No. MH-06/BM-2339, involved in the accident. (hereinafter parties are referred in accordance with their status in the original proceeding as claimants, owner of offending vehicle and the insurer of the offending vehicle).

2. Facts leading to the institution of this

appeal in brief are that on 15.12.2015, the deceased who was relative of owner of the car was travelling by the offending car by Pune to Solapur National High Way No. 65. When the car reached near the spot of accident, near village Loni Deokar, at about 5.30 a.m., due to rash and negligent driving by the driver of the car, it gave dash to the tractor No. MH-42-Q-4202, from its back side, having attached two trailers bearing No. MH-42-F-4081 and MH-42-F-4080 loaded with sugar cane. It was proceeding towards Solapur. In that accident, the deceased and other two occupants travelling by that car, died on the spot. After inquiry by police, crime No. 494/2015 was registered against the driver of the car at Police Station Indapur, District Pune. Therefore, this claim petition was filed by the dependents of the deceased for compensation.

3. The owner of the car filed written statement (Exh. 13) and admitted the occurrence of the accident as well as the rash and negligent driving by the driver of the car. According to him, as the offending car was insured with

respondent No. 2 insurance company, the liability to pay compensation be saddled on the insurance company.

4. The insurance company filed written statement (Exh. 16) and denied the contents of the claim petition. The insurance company has taken the defence of contributory negligence on the part of the driver of the tractor, on the ground that he was plying the tractor without putting on reflectors, tail lamps or indicators, and therefore, the driver of the offending car could not locate the tractor. The insurance company has also taken defence of non-joinder of tractor owner and driver involved in the accident as necessary parties.

5. After considering the evidence placed on record the Tribunal held that the above said accident occurred only due to the sole rash and negligence driving by the driver of the offending car. Accordingly, joint liability was saddled against respondent Nos. 1 & 2 to pay the above said compensation. It is also held that the

breach of conditions of policy of the insurance could not be proved by the insurance company.

6. Heard Shri. M.R. Deshmukh, learned counsel for Appellant and Shri. P.S. Chavan, learned counsel for Respondent Nos.1 to 3 original claimants.

7. Learned counsel for insurance company assailed the judgment of the tribunal on two grounds. First ground is the non-joinder of the owner and the driver of the tractor involved in the accident. The second ground raised by learned counsel for appellant is of exorbitant compensation awarded by the Tribunal. In addition to these two grounds, learned counsel for appellant submits that as the above said accident is the case of composite negligence, there should apportionment of compensation in between the owner of the tractor and car, as well as respective insurer of the vehicle regarding the liability to pay compensation.

8. Learned counsel for appellant has placed

reliance on Rule 260 and 261 of Maharashtra Motor Vehicle Rules in support of his contention regarding non-joinder of necessary parties.

9. Learned counsel for appellant submits that as the spot panchanama (Exh. 24) shows that one trailer of the tractor turned turtle, it indicates that while proceeding by the road, the last trailer suddenly came on the road in front of the car and therefore, accident occurred. He submits that if the driver had taken proper care by putting on tail lamp and by fixing reflectors on the rear portion of the trailers, the accident could have been avoided. The some and substance of his argument is that as this is the case of composite negligence the presence of owner and driver of offending tractor and trailer as party to the proceeding is mandatory.

10. The next contention of the learned counsel for appellant is that the monthly salary slip (Exh. 38 to 41) shows that the income of the deceased was less than the annual package, shown in the pay slip (Exh. 37). Thus, the annual

income considered by the Tribunal is exorbitant. His next contention is that as the deceased was about to retire within four years from the date of this accident, the split multiplier should have been applied by the Tribunal, because after retirement, the income of the deceased would be substantially reduced. He also submits that addition of 15 % amount in the monthly salary of deceased towards the loss of future prospects is un-warranted, in view of advance age of the deceased as 54 years. He placed reliance on **"Chaya w/o Dilip Tamte and ors v. Suresh s/o Gurusidappa Karanje and Anr" [decided by Single Judge of this Court on 27.2.2014 in First Appeal No. 985 of 2012]** and **"Smt. Shantha Ramamurthy and others v. Kanika Raj and another" [2005 ACJ 1946],** wherein this Court and Karnataka High Court has considered the theory of split multiplier.

11. Learned counsel for respondent supported the judgment and award passed by the Tribunal on the ground that the case in hand is not the accident due to composite negligence. He submits

that on behalf of insurance company, no evidence has been placed on record to prove its theory of composite negligence. Therefore, the owner and driver of the tractor are not necessary parties.

12. Regarding the theory of split multiplier, the learned counsel for claimant submits that in view of the law settled by the Apex Court in **"Smt. Sarla Verma and Ors. v. Delhi Transport Corporation and Anr" [AIR 2009 Supreme Court 3104]**, and in **"Puttamma and others v. K.L. Narayana Reddy and another" [(2013) 15 Supreme Court Cases 45]**, and **"National Insurance Company Ltd. vs Pranay Sethi and others" [2018 (3) Mh.L.J. 70]**, split multiplier method can not be adopted.

13. The next contention of learned counsel for respondent/claimants is that while considering annual income of the deceased along with pay package, the perks which are beneficial to their family needs to be considered in view of **"National Insurance Co. Ltd. v. Indira Srivastava and Ors" [AIR 2008 Supreme Court 845]**.

14. After hearing learned counsel of both parties, following points arise for my consideration, I have recorded my findings against each point for the reasons stated below :

SR. No.	POINTS FOR DETERMINATION	FINDINGS
1)	Whether the Motor Accident Claim Petition is bad for non-joinder of tractor, owner and driver as necessary parties ?	No.
2)	Whether the accident occurred due to composite negligence of the driver of car and the driver of the tractor ?	It is not the case of composite negligence. The driver of car is solely rash and negligent, while driving the car.
3)	What would be the just and reasonable compensation payable to the claimants ?	As per final order.

R E A S O N S

AS TO POINT NOS. 1 & 2 :-

15. The question regarding the non joinder of owner and driver of the tractor involved in the accident arises only if, the insurance company can prove that the accident occurred due to composite negligence of driver of car and tractor.

16. At the out set, I must make it clear that when the deceased was travelling as passenger by the offending car, the question of contributory negligence does not arise. If accident occurred due to negligence on the part of driver of car as well as the driver of the tractor then, it would be the case of composite negligence. Therefore, I have only to ascertain whether the accident occurred due to composite negligence by the driver of car and the driver of the tractor.

17. In the case at hand, the owner of offending car has admitted the occurrence of the accident due to sole negligence of driver of the car, who gave dash to the tractor and trailer from its back side, which was proceeding by the road in front of the car. Shubhangi (PW 1), is not the eye witness of the accident. Therefore, admissions given by her in cross-examination, regarding ignorance about the manner in which the accident occurred, do not carry any importance. However, in the case at hand, after occurrence of the accident, the driver of the car initially, submitted information about the occurrence of the

accident to Police Station, Indapur. From First Information Report (for short 'FIR') (Exh. 21), it emerges that the driver of the car had no where stated in his information to police station that the accident occurred due to not putting on the indicator, tail lamp or not fixing reflectors on tractor and trailers. Even this driver did not inform police that the last trailer of tractor suddenly came on the road and therefore, accident occurred. On the other hand, the driver of the car had informed the police that when he was travelling by car by Pune to Solapur High Way, that time near Loni Deokar, M.I.D.C. diversion, his car suddenly gave dash to the tractor which was proceeding in front of car. Thus, even the accidental information to the police by the driver himself shows that the accident occurred due to rash and negligent driving by the driver of the car, which gave dash to the tractor which was proceeding in front of car.

18. In addition to this, police papers shows that after inquiry regarding occurrence of the accident, police head constable Mr. Dattatraya

Shantram Jadhav lodged FIR (Exh. 21) to Police Station Indapur. The recitals of the FIR (Exh. 21) shows that accident occurred, due to rash and negligent driving of the driver of the offending car, which gave dash to the tractor and trailer, from its back side. On the basis of this FIR (Exh. 21), even offence was registered against only the driver of the car for rash and negligent driving. The recitals of this FIR are also corroborated by the spot panchanama (Exh. 22), which shows that after the accident, the bonnet and front portion of car sustained heavy damages and due to impact of the car, the last trailer No. MH-42-F-4080 turned turtle on road. This spot situation clearly indicates that accident occurred because driver of car drove it at high speed and therefore suddenly gave dash to the tractor and trailer from its back side. The spot panchanama, no where indicates that reflectors were not affixed on the trailer or there were no indicators or tail lamps to the tractor. Otherwise also, when the tractor was proceeding by road, in early morning hours, it was not necessary to the driver of the tractor to put on the indicators. When the insurance company has taken defence of absence of reflectors and indicators or tail lamp on the tractor and trailer, it was the duty of the insurer to examine, at least a panch witness, on spot panchanama, to positively prove these facts. At least insurance company should have examined the driver of the offending car, who could have definitely deposed regarding occurrence of accident due to the lack of reflectors on the trailer or indicators of the tractor.

19. In such circumstances, as no evidence has been brought on record by the insurer of the offending car to prove the theory of composite negligence or negligence on the part of driver of the tractor, involved in the accident, I have no hesitation to hold that the insurance company miserably failed to prove that occurrence of the accident is the case of composite negligence of the driver of the tractor and car. On the other hand, in view of above discussed material on record and circumstances reflected from the spot panchanama, the accident occurred solely due to rash and negligent driving by the driver of

offending car.

20. As it was not the case of composite negligence, the driver and owner of tractor involved in the accident are not necessary parties, as this proceeding can be disposed of even in their absence. Otherwise also, this Court has considered Rule 260 of Maharashtra Motor Vehicles Rules, 1989 in **"New India Assurance Company Ltd. v. Sitaram Devidayal Jaiswal and others" [2012 (2) Mh. L.J. 710]** and this Court has made it clear that

> "whenever the contention pressed into service by any of the opponents to the claim petition or the persons to whom the notice of the claim petition is issued under Rule 260 that the driver of a vehicle is a necessary party, the Tribunal is under an obligation to examine the said contention and if found correct, issue a notice to the driver. As the law is that the responsibility of issuing the notice to the proper parties is entrusted to the Tribunal, if a contention regarding non-joinder is not raised, the claimant cannot be allowed to suffer on the ground that the Tribunal has failed to perform its duty."

21. In the case at hand, though respondent No. 2 insurer has raised contention of non-joinder

of owner and driver of tractor as the accident occurred only due to sole negligence of the driver of car, the Tribunal is not expected to issue notice to the driver or owner of the tractor. In the circumstances, the claim petition is not bad for non-joinder of necessary party. I answer point nos. 1 and 2 accordingly.

AS TO POINT NO. 3 :-

22. While determining reasonable compensations payable to the claimants in death claims, the age, occupation and income of the deceased play important role. In the case at hand, on the date of accident, the deceased was 54 years old, as his School Leaving Certificate (Exh. 48) shows that his date of birth is 6.6.1961 and the accident occurred on 16.12.2015. Therefore, in view of law laid down by the Apex Court in **"Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr"** (supra), the proper applicable multiplier is of '11'. The Tribunal has also rightly applied the multiplier '11', while determining the loss of dependency.

23. Though learned counsel for appellant argued the theory of application of split multiplier, in the case of **"Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr"** (supra) the Apex Court has considered all the aspects to bring uniformity in applicability of proper multiplier on the basis of the age of respective victim or deceased. For advance age, the Apex Court has applied lessor multiplier than the young person. Thus, due care has been taken while determining proper multiplier in the case of victim or deceased of advance age.

24. So also, though on behalf of claimant, the concerned staff member (PW 2) of Unichem Laboratories Ltd. Roha, Dist. Raigad was examined by the claimants, to prove the annual income of the deceased, in the cross-examination of Ms. Kiran Bandu Tathare (PW 2), it has been not brought on record by the insurer the age of retirement of the deceased. Even it has been not made clear whether the service of the deceased was pensionable or not and what would be the approximate pension of the deceased on

superannuation. In such circumstances, as there are not reasons on record to apply split multiplier due to future retirement of the deceased, the theory of split multiplier need not be considered. Even the Apex Court in **"Puttamma and others v. K.L. Narayana Reddy and another"** (supra), has made it clear that in absence of any specific reasons and evidence on record the Tribunal or Court should not apply the split multiplier in routine course. The multiplier should be applied as per the decision of the Supreme Court in **"Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr"** (supra).

25. In view of this settled position of law the ratio of **"Chaya w/o Dilip Tamte and ors v. Suresh s/o Gurusidappa Karanje and Anr"** (supra) and **"Smt. Shantha Ramamurthy and others v. Kanika Raj and another"** (supra) is of no help to the insurer to substantiate its contention regarding applicability of split multiplier on account of retirement of deceased.

26. By examining Ms. Kiran Bandu Tathare (PW 2), the claimants have duly proved revised annual package payable to the deceased by Unichem Laboratories Ltd. Roha, where the deceased worked as Senior Manager (Exh. 37). The revised package structure applicable w.e.f. 1st April, 2015 (Exh. 37), shows that total annual package payable to the deceased was 5,10,231/-.

27. Learned counsel for appellant has placed reliance on monthly pay slips (Exh. 38 to 41) of the deceased to show that the gross monthly income of the deceased is shown as Rs. 37,588/- and his net salary in the month of August, 2015 (Exh. 38) is shown as Rs. 39,572/-. However, no questions are put up to PW 2, on behalf of Insurer to explain this anomaly. In the circumstances, on the basis of oral testimony of Ms. Kiran wd/o Bandu Tathare (PW 2) and letter of revised compensation (Exh. 36) issued by the Company, as well as revised compensation structure (Exh. 37), I have no hesitation to hold that the annual income of the deceased is to be considered as Rs. 5,10,231/-. The Form No. 16 (Exh. 49) placed on

record shows that during the assessment period from 1.4.2013 to 31.3.2014 and in assessment year 2014-15, the total income tax of Rs. 5,631/- was deducted from annual income of the deceased. However, from the revised package (Exh. 37), it can be gathered that in addition to other allowances, conveyance allowance of Rs. 1,000/- p.m. was awarded to the deceased. This allowance being personal allowance of deceased, needs to be deducted from the annual income of the deceased, in view of law settled by the Apex Court in **"National Insurance Co. Ltd. v. Indira Srivastava and Ors"** (supra). The other deductions towards payment of contributory provident fund, gratuity and other funds cannot be deducted as those facilities are being provided for the entire family of the deceased. Thus, after deducting the annual conveyance allowance of Rs. 12,000/- together with income tax of Rs. 5631/- and professional tax of Rs. 2400/- from annual income of Rs. 5,10,231/- the salary of the deceased available to the dependents comes to Rs. 4,90,200/- p.a.

28. As deceased was 54 years old, having permanent job in Unichem Laboratories Ltd. Roha, in view of guidelines issued by the Apex Court in "**National Insurance Company Ltd. vs Pranay Sethi and others**" (supra), the addition of 15% is to be made in the annual income of the deceased. Thus, the annual income of deceased comes to Rs. 5,63,730/-.

29. In view of "**Smt. Sarla Verma and Ors. v. Delhi Transport Corporation and Anr**" (supra) from annual income of the deceased 1/3rd amount i.e. Rs. 1,87,910/- is to be deducted towards personal expenses of the deceased. Thus annual contribution of the deceased towards his family comes to Rs. 3,75,820/-. After applying multiplier of '11' loss of dependency comes to Rs. 41,34,020/-. In addition to this, claimants are also entitled to following compensation under conventional heads :

a)	Loss of consortium	=	Rs.	40,000/-
b)	Loss of estate	=	Rs.	15,000/-
c)	Funeral expenses	=	Rs.	15,000/-
	Total	=	Rs.	70,000/-

(Rs. Seventy Thousand Only)

30. Thus the claimants are entitled following

compensation under different heads :

a)	Loss of dependency=	Rs.	41,34,020/-
b)	Loss of consortium=	Rs.	40,000/-
c)	Loss of estate =	Rs.	15,000/-
d)	Funeral expenses =	Rs.	15,000/-
	Total =	Rs.	42,04,020/-

(Rs. Forty Two Lac Four Thousand and Twenty Only)

31. The claimants are also entitled to interest on this compensation @ 9% p.a. from the date of filing of the petition till realization.

32. However, after going through the award passed by the Tribunal, it emerges that the Tribunal has awarded compensation of Rs. 42,91,200/- with interest @ 9 % p.a., from the date of filing of the petition till realization. The total amount of compensation of Tribunal needs to be reduced in view of my above said findings. I answer point No. 3 accordingly and proceed to pass following order :

ORDER.

1. First Appeal No. 2771 of 2018 is partly allowed.

2. Award passed by the Motor Accident Claims Tribunal, Osmanabad, in MACP No. 60 of 2016, is set aside and modified as under :

“a) Petition is partly allowed.

b) Respondent Nos. 1 and 2 do jointly and severally pay compensation of Rs. 42,04,020/-(Rs. Forty Two Lac Four Thousand and Twenty Only) to the claimants with interest thereon @ 9% per annum from the date of filing of this petition till realization of the entire amount.

c) This compensation amount includes the compensation awarded under the 'No Fault Liability'.

d) On deposit of the entire compensation before the Tribunal, Rs. 2,50,000/- (Rs. Two Lac Fifty Thousand Only) be paid to the claimant No. 3 Indirabai wd/o Dattatraya Deshmukh with proportionate interest thereon through the Tribunal by separate account payee cheque.

e) Remaining compensation amount

shall be equally apportioned in between claimant Nos. 1 and 2 and out of their shares, 50% (fifty percent only) amount shall be separately invested in Fixed Deposit in any Nationalized Bank of their choice for the period of five years in their respective names.

f) Premature withdrawal is not permissible.

g) Remaining compensation of the share of claimant Nos. 1 and 2 shall paid to them, through the Tribunal by separate account payee cheques.

h) Award be drawn up accordingly."

3. Parties shall bear their respective costs of the appeal.

4. Appeal is disposed of in the above said terms. If compensation amount is deposited in this Court, the claimants are permitted to withdraw it from Tribunal in accordance with modified award. Balance amount be refunded to insurance company. The deposited compensation amount be remitted to

the Tribunal for its disbursement as above.

(SUNIL K. KOTWAL)
JUDGE

mahajansb/