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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 1666 OF 2019
WITH
CIVIL APPLICATION NO. 2631 OF 2016
IN
FIRST APPEAL NO. 1666 OF 2019**

The New India Assurance Co. Ltd.
Add: No.45, 5th Floor, Moore Street,
Chanai – 600 001 having its Regional
Office at Sharda Centre, Erandwane,
Pune – 4.

... Appellant/
Applicant

Versus

1. Mr. Ashish Ravindra Kulkarni,
Age 22 years, Occ. Student,
2. Mr. Prabhakar Keshav Kulkarni,
Age 71 years, Occ. Nil
3. Mrs. Vijaya Prabhakar Kulkarni,
Age 68 years, Occ. Nil
All R/at. S. No. 44/3, Shri Mangal,
Erandwane, Surekh Housing Society,
Pune.
4. Mr. Sivaguru Somasundaram
Occ. Driver,
R/at Lalbahadur Street,
Nillathukudi, Mayitaduthrai.
5. Mrs. D. Vadhya,
Age Adult, Occ. Business,
R/at. 15, Raddiar Street,
T.N. Palayam Bahour,
Dist. Pondicherry,
VT 607402.

... Respondents

.....

Mr. Ketan Joshi for the Appellant.

Mr. Vishwanath S. Talkute for the Respondent No.1.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 27th NOVEMBER, 2019

PRONOUNCED ON : 19th DECEMBER, 2019

JUDGMENT :

. By this First Appeal filed under Section 173 of the Motor Vehicles Act, 1988, the appellant (original opponent no.3) has impugned the judgment and award dated 28th July, 2015 passed by the Motor Accident Claims Tribunal (MACT), Pune in Motor Accident Claim Petition (MACP) No. 130 of 2009, directing the appellant and the original opponent no. 2 to pay jointly and severally compensation of Rs.8,85,000/- including the interim compensation awarded under Section 140 of the Motor Vehicles Act along with cost and interest @ 6% per annum from the date of petition till realization of entire amount and proportioning the said amount between the respondent nos. 1 to 3 in the ratio of 20%, 40% and 40% respectively. By consent of parties, First Appeal is heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this appeal are as under:-

2. The respondent no.1 to 3 were the original applicants before the Tribunals whereas the respondent no.4 was the original opponent no.1, driver of the Innova Car bearing registration No. PY-01-AC-4466 (hereinafter referred as “offending vehicle”). The respondent no.4 has been deleted in this First Appeal. The respondent no.5 herein was the original

opponent no.2, who was the registered owner of the offending vehicle and was ensured with the appellant at the relevant time covering the date of accident. No notice was issued upon the respondent no.5.

3. It was the case of the respondent no. 1 to 3 that they are the legal heirs and representatives of the deceased Aniket R. Kulkarni. The respondent no.1 is brother and respondent nos. 2 and 3 are the grand parents of the deceased Aniket R. Kulkarni. On 17th June, 2008, the applicant along with Aniket R. Kulkarni were proceeding in Indica Car bearing registration no. TN-10-T-6077 and were going towards Pondicherry from Chennai. It was the case of the respondent nos.1 to 3 that the driver of the said car was driving the said car in slow and moderate speed by observing the traffic rules and regulations. At about 15:30 hours, when the said car reached at East Coast Road, Salavankuppan, opposite Tiger Caves, Tamilnadu, one Innova Car bearing registration no. PY-01-AC-4466 came from opposite direction in very high and excessive speed.

4. Due to such high speed, the driver of the offending vehicle could not control his vehicle and went to the wrong side of the road and gave violent dash to the said Indica Car, wherein the respondent no.1 with his family members were travelling. As a result of such violent dash, respondent no.1 and his family members sustained injuries. Driver of the Indica Car also sustained injuries. Father of the respondent no.1, Ravindra Kulkarni, his

brother Aniket Kulkarni and driver Selven died on the spot. Mother of the respondent no.1, Shailaja Kulkarni was severally injured and subsequently died.

5. After investigation, the Police from Mamallapuram, Dist. Kancheepuram registered a crime against the driver of the offending vehicle. The respondent no.5 herein was the registered owner of the offending vehicle and it was insured with the appellant at the relevant time. The respondent nos.1 to 3 filed claim petition before the MACT, Pune bearing MACP No. 131 of 2009. The respondent no.1 herein (original opponent no.1), who was the driver of the offending vehicle was deleted from the cause title of the claim petition subsequently. The respondent no.5 i.e. owner of the offending vehicle did not appear before the Tribunal in spite of service of notice. The matter proceeded *ex-parte* against her. The appellant (original opponent no.3) filed a written statement before the Tribunal. In the said written statement, the appellant admitted that the offending vehicle was duly insured with it at the relevant time covering the date of accident.

6. The appellant also raised an objection that the insured and insurer of the vehicle which met with accident were not joined as parties to the said claim petition and thus the said claim was bad for non-joinder of necessary parties and it deserves to be dismissed on this ground also. The appellant also denied that the accident took place due to rash and negligent driving on

the part of the driver of the said offending vehicle or that the said car was driven in high and excessive speed and thus the said driver of the said offending vehicle lost his control.

7. The Tribunal framed five issues for determination. The respondent no.1 entered the witness box, who was an eye witness to the accident. He was cross-examined by the appellant through its advocate. The respondent no.1 produced various documents in evidence before the Tribunal including the FIR. In his examination-in-chief, the respondent no.1 deposed, as to how the accident took place due to negligence of the driver of the offending vehicle.

8. The Tribunal held that the accident was as a result of the sole negligence on the part of the driver of the offending vehicle. The Tribunal also considered the Inquest Panchanama and held that it was clear that the deceased Aniket R. Kulkarni had sustained abrasions on abdomen, 7x5 cm lacerated on left foot, crushed head injury and other multiple injuries. The postmortem report disclosed that the death was caused due to shock due to head injuries. It is held that in the oral evidence of the respondent no.1, it was clearly deposed that his brother Aniket R. Kulkarni had sustained injuries and died in the road accident which was due to rash and negligence driving on the part of the driver of the offending vehicle. It is held by the Tribunal that since the accident had taken place due to the sole negligence

on the part of the driver of the offending vehicle and no negligence could be attributed to the driver of Indica Car, the driver, owner and the insurer company of Indica Car were not the necessary parties and thus the said claim petition was not bad for non-joinder of necessary parties.

9. The said Tribunal also held that the appellant had not proved any statutory defence and thus the owner of the said offending vehicle and the appellant were jointly and severally liable to pay the compensation to the respondent no.1. The said Tribunal allowed the compensation in the sum of Rs.8,85,000/- in favour of the respondent nos.1 to 3 and against the original opponent no.2 and the appellant herein jointly and severally.

10. Mr. Ketan Joshi, learned counsel for the appellant invited my attention to some of the findings rendered by the said Tribunal and submits that the finding of the Tribunal that the appellant had not proved any statutory defence is not correct. He submits that the Tribunal ought to have appreciated that the driver of the offending vehicle was fully drunk and was ultimately charge-sheeted under Section 185 of the Motor Vehicles Act, 1988 along with Section 279 of the Indian Penal Code, which itself is a Criminal Act and thus the appellant was not liable for vicariously liability of the driver of the offending vehicle. He submits that the Tribunal failed to appreciate that the role of the appellant contemplated under the provisions of Motor Vehicles Act, 1939 was of the indemnifier to the insured. He placed

reliance on the judgment of this Court in case of **Maimulna Begam v/s. Taju, 1989 (1) B.C.R. 673.**

11. It is submitted by the learned counsel that though no proof was produced by the respondent nos. 1 to 3 about the income of the said deceased, the Tribunal has erroneously considered the montly income of the said deceased at Rs.5,000/- and has considered the other heads of compensation based on the montly income of Rs.5,000/-.

12. It is submitted by the learned counsel for the appellant that the Tribunal has awarded Rs.25,000/- towards funeral expenses and Rs.50,000/- towards love and affection which compensation could not have been more than Rs.70,000/- in total. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of **National Insurance Company Ltd. v/s. Pranay Sethi and Ors., (2017) 16 SCC 680.**

13. Mr. V. S. Talkute, learned counsel for the respondent no.1 on the other hand strongly placed reliance on the findings rendered by the Tribunal in support of his submissions. He submits that the respondent no.1 was the eye witness to the accident and was examined as a witness. No evidence was led by the appellant before the Tribunal. He submits that the Tribunal has considered the entire evidence led by the respondent no.1 including the documentary evidence and has rightly held that the accident was the result of

sole negligence of the driver of the said offending vehicle.

14. Learned counsel placed reliance on the judgment of Division Bench of this Court delivered on 30th November, 2018 in case of ***The New India Assurance Co. Ltd. v/s. Mr. Ashish Ravindra Kulkarni and Ors.*** which judgment was delivered in the First Appeal filed by the appellant herein impugning the judgment and order dated 28th July, 2015 passed by the MACT, Pune arising out of the same accident. He submits that the grounds raised in this First Appeal are identical to the grounds raised in the said First Appeal (Stamp) No. 8524 of 2016 which were rejected by this Court after considering the evidence led by the original applicant in the said matter. He submits that the said judgment of the Division Bench of this Court clearly applies to the facts of this case. He submits that various claims for compensation have been awarded by the Division Bench of this Court to the original applicant including future prospectus, funeral expenses, loss of estate, loss of parental and filial consortium.

15. It is submitted by the learned counsel for the respondent nos.1 to 3 that the Tribunal has rightly considered the claim for compensation based on the monthly income of Rs.5,000/- per month and has rightly computed the other compensation. He has no objection, if the claim towards funeral expenses awarded at Rs.25,000/- and Rs.50,000/- towards love and affection, is reduced to Rs.70,000/- in toto.

16. It is submitted by the learned counsel for the respondent no. 1 to 3 that the rate of interest awarded at 6% p.a. by the Tribunal is on lower side. He submits that the said rate of interest shall be enhanced to 9% p.a. or atleast 7.5% p.a., which was awarded by the Division Bench of this Court in the judgment dated 30th November, 2018 in First Appeal (Stamp) No. 8524 of 2016 filed by the appellant herein arising out of the same accident. Learned counsel for the respondent no.1 placed reliance on the judgment of this Court (Aurangabad Bench) in case of ***New India Assurance Company Ltd. v/s. Sunita and Ors.***, decided on 4th January, 2019 in ***First Appeal No. 3001 of 2009*** and in particular paragraph 23 and would submit that this Court in the said judgment had enhanced the rate of interest to 9% p.a.

17. Mr. Ketan Joshi, learned counsel for the appellant in rejoinder submits that the Special Leave Petition filed by his client against the judgment of the Division Bench of this Court in case of ***The New India Assurance Co. Ltd. v/s. Mr. Ashish Ravindra Kulkarni and Ors.*** dated 30th November, 2018 is pending before the Hon'ble Supreme Court. He however states that the Hon'ble Supreme Court has not granted any stay on the said judgment or the operative part of the order enhancing the amount till date. The appellant has already deposited the entire amount awarded by the Tribunal before the MACT, Pune. The respondent no.1 has not withdrawn any amount so far.

18. Mr. Ketan Joshi, learned counsel for the appellant in rejoinder submits that since the respondent no.1 has not filed any cross-objection or cross-appeal against the judgment and award of the MACT, Pune, which is impugned by his client, this Court cannot enhance any compensation already awarded by the said Tribunal or ever any new compensation at this stage in the First Appeal filed by his client. In support of this submission learned counsel placed reliance on the judgment of Supreme Court in case of ***Ranjana Prakash and Others v/s. Divisional Manager and Another, (2011) 14 SCC 639*** and in particular paragraphs 6 to 8. He also placed reliance on the judgment of this Court in case of ***United India Insurance Company Ltd. v/s. Rajani Suresh Bhore and Ors., 2018 (6) ALL MR 242*** and in particular paragraphs 2, 21 and 30. It is submitted by the learned counsel for the appellant that since the respondent no.1 even otherwise has not paid any Court fees on the additional claims made across the bar in the First Appeal filed by the appellant, no relief for enhancement of claim can be considered by this Court on this ground also.

19. Learned counsel for the respondent no.1 placed reliance on the judgment of this Court (Aurangabad Bench) in case of ***The New India Assurance Company Ltd. v/s. Ujjanwala and Ors.,*** decided on 18th September, 2019 in ***First Appeal No. 3160 of 2016*** and in particular paragraph 18 in support of the submission that though the respondent no.1

has not filed any cross-objection, this Court has ample power to enhance compensation to award just compensation even in absence of any cross-objection or cross-appeal.

20. Learned Counsel for the respondent no.1 submits that since the Tribunal had not awarded the compensation under the statutory heads under the provisions of Motor Vehicles Act, this Court has ample power to award such claims even in absence of any cross-objection filed by the original application to do complete justice in the matter.

21. Mr. Talkute, learned counsel for the respondent no.1 submits that if this Court enhances the claims made by his client at this stage, if any additional court fee is payable by his client, the same would be paid by his client as maybe directed by this Court.

REASONS AND CONCLUSION

22. The respondent nos. 1 to 3 are the legal heirs and representatives of the deceased Aniket R. Kulkarni. Admittedly, the respondent no.1 is the brother and the respondent nos. 2 and 3 are grand parents of the said deceased. A perusal of the record indicates that the respondent nos. 1 to 3 had examined the respondent no.1 as one of the witness who was an eye witness to the said accident and was cross-examined by the appellant

through its advocate. The Tribunal considered the oral evidence as well as documentary evidence made by the respondent nos. 1 to 3. On perusal of the documents produced on record, it is clear that the said deceased had sustained abrasions on abdomen, 7x5 cm lacerated on left foot, crushed head injury and other multiple injuries. The said deceased ultimately succumbed to the injuries suffered by him in the said road accident. The appellant admittedly did not lead any oral evidence before the Tribunal. The Tribunal in these circumstances, in my view, rightly rendered a finding that the driver of the offending vehicle was solely responsible for the said accident causing death of the said deceased. The initial burden of proof which was on the respondent nos. 1 to 3 that the driver of the offending vehicle was solely responsible for the rash and negligent driving was discharged. The said initial burden was shifted to the appellant which burden the appellant failed to discharge.

23. In so far as the submission of the learned counsel for the appellant that the driver of the offending vehicle was drunk and thus the appellant was not vicariously liable for the alleged negligence on the part of the driver of the offending vehicle is concerned, similar allegations made by the appellant in the First Appeal arising out of the said accident and similar grounds which are raised in this appeal are already rejected by the Division Bench of this Court in First Appeal (Stamp) No. 8524 of 2016. Though, the appellant has preferred Special Leave Petition against the said judgment of the Division

Bench of this Court dated 30th November, 2018 in case of ***The New India Assurance Co. Ltd. v/s. Mr. Ashish Ravindra Kulkarni and Ors.*** (supra) admittedly no stay of the judgment or operative part of the judgment delivered by this Court in the said appeal has been granted till date. It was for the appellant to examine the said driver of the offending vehicle which the appellant failed to examine.

24. In so far as the submission of the learned counsel for the appellant that there was no proof of income of the said deceased produced by the respondent nos. 1 to 3 and thus the Tribunal could not have considered the monthly income of the said deceased at Rs.5,000/- and could not have considered the other heads of compensation based on the basis of the monthly income of Rs.5,000/- is concerned, in my view, the compensation awarded by the Tribunal after considering the facts and circumstances of the case that the said deceased had passed CPT examination and considering the age of the said deceased, by considering the monthly income of Rs.5,000/- of the said deceased is proper and 'just compensation'. The Tribunal has also rightly granted future prospect at 50% of the monthly income thereby considering yearly income at Rs.90,000/-. The Tribunal rightly considered the half amount towards living and personal expenses of the said deceased out of the said deceased yearly income for the purpose of arriving at loss of dependency. The Tribunal has rightly applied multiplier of 18 to the yearly dependency of Rs.45,000/- and rightly awarded loss of dependency at

Rs.8,10,000/-. There is no merit in the submission of the learned counsel that the Tribunal could not have considered even Rs.5,000/- p.m. as the income of the said deceased.

25. In so far as the rate of interest awarded by the Tribunal at 6% p.a. to the respondent nos. 1 to 3 is concerned, though the respondent nos. 1 to 3 have urged before this Court that rate of interest shall be enhanced to 9% p.a. or atleast 7.5% p.a. as awarded by the Division Bench of this Court in the judgment delivered on 30th November, 2018 in First Appeal (Stamp) No. 8524 of 2016 is concerned, in my view since in the another First Appeal decided by the Division Bench of this Court arising out of the same accident has awarded interest @ 7.5% p.a. from the date of application till realization, I am inclined to accept the submission of the learned counsel that the respondent nos. 1 to 3 that they would be entitled to interest @ 7.5% p.a. from the date of application till realization. The amount of compensation awarded by the Tribunal in sum of Rs.75,000/- towards funeral expenses and love and affection is reduced to Rs.70,000/-. In my view, there is thus no merit in this first appeal filed by the appellant.

26. I therefore pass the following order:-

- (a) Operative part of the judgment and award dated 28th July, 2015 passed by the M.A.C.T., Pune is modified as under:-

(i) Appellant and the respondent no.5 are directed to pay jointly and severally compensation of Rs.8,85,000/- (including interim compensation awarded under Section 140 of the Motor Vehicles Act), along with cost and interest @ 7.5% per annum, from the date of petition, till realization of entire amount to the applicant, in following manner :

(ii) Out of the total compensation, 20% compensation to be paid to the respondent no.1 and 40% compensation to be paid to each of the respondent nos. 1 and 3.

(iii) Office is directed to transmit statutory deposit of Rs.25,000/- to the M.A.C.T., Pune expeditiously. The respondent nos. 1 to 3 would be entitled to recover the decretal amount as modified by the judgment, out of the amount deposited. If there is any deficit in depositing the amount by the appellant, the appellant to deposit the balance amount with the M.A.C.T., Pune within two weeks from the date of such computation of amount by the M.A.C.T., Pune. If there is any surplus found by the M.A.C.T., Pune after releasing the payment due and payable to the respondent nos.1 to 3 out of the amount deposited by the appellant, same shall be refunded to the appellant on production of an authenticated copy of this order.

- (b) If any additional payment of Court fees is required to be paid by the respondent nos.1 to 3, in view of the additional compensation awarded by this Court, the respondent nos.1 to 3 shall pay such additional Court fees upon computation thereof by the M.A.C.T. in M.A.C.P. No. 131 of 2009 within two weeks from the date of such computation.
- (c) The M.A.C.T. to permit the respondent nos.1 and 3 to withdraw the amount out of the amount deposited by the appellant as payable under the judgment and award dated 28th July, 2015 modified by this order, upon production of an authenticated copy of this order.
- (d) First Appeal No. 1666 of 2019 is disposed off on aforesaid terms. There shall be no order as to cost.
- (e) In view of the disposal of the First Appeal, Civil Application No. 2631 of 2016 stands disposed of.
- (f) Parties as well as M.A.C.T., Pune to act on an authenticated copy of this order.

(R.D. DHANUKA, J.)