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

**FIRST APPEAL (STAMP) NO. 28929 OF 2014
WITH
CIVIL APPLICATION NO. 991 OF 2015**

The New India Assurance Co. Ltd.
Policy Issuing Office at 2883,
Vasant Dutey Road, Mahad,
District Raigad,
Through Mumbai Regional Office – V,
Vindhya Commercial Complex, 2nd Floor,
Section 11, CBD Belapur,
Navi Mumbai – 400 614.

... Appellant
(Org. Insurer)

Versus

1. Smt. Sushama mahendra Sonawane
Aged 32 years, Occupation Housewife,
Widow of the deceased
2. Master Viraj Mahendra Sonawane
Aged 10 years, Occupation Student,
Son of the deceased
Respondent No.2 being minor through
Respondent Nos. 1 and 2 mother natural
guardian and next friend
Both residing at B/26/41,
Vijay Nagari Complex, Ghod Bunder Road,
Waghbil Naka, Thane – 400 607.
3. Mr. Laxman Bageshwar Yadav,
602, Maharani, Sector 17, Vashi,
Navi Mumbai, Dist. Thane.

... Respondents
(Resp. 1-2 Org. Claimants,
Resp. 3 Org. Opp. Party)

.....

Mr. Devendranath S. Joshi for the Appellant and for the Applicant in
CAF/991/2015.

Mr. U.N. Mehta along with Ms. Swati Uday Mehta for the Respondent Nos.
1 and 2.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 27th NOVEMBER, 2019

PRONOUNCED ON : 20th DECEMBER, 2019

JUDGMENT :

. By this First Appeal filed under Section 173 of the Motor Vehicles Act, 1988, the appellant (original opponent no.2) has impugned the judgment and award dated 4th January, 2014 passed by the Motor Accident Claims Tribunal (MACT), Thane in Motor Accident Claim Petition (MACP) No. 608 of 2008 allowing the application filed by the respondent nos. 1 and 2 (original applicants) partly and directing the appellant and original opponent no. 1 to pay jointly and severally an amount of Rs.29,51,000/- to the respondent nos. 1 and 2 with interest @ 7% p.a. from the date of application till its realization. By consent of appellant and the respondent nos. 1 and 2, contesting parties, the First Appeal is heard finally. Some of the relevant facts for the purpose of deciding this First Appeal are as under:-

2. The respondent nos. 1 and 2 were the original applicants (claimants) before the Tribunal whereas the appellant was the original opponent no.2. The respondent nos. 1 was wife of the deceased Mahendra N. Sonawane, whereas the respondent no.2 was son of the said deceased. On 21st February, 2007 at 6:30 a.m. the said deceased was proceeding to Nashik by his Matiz Car bearing registration No.MH-12-AX-6678 along with his mother late Savita N. Sonawane. The said deceased was proceeding by Mumbai-Agra

Road at a moderate speed and when his vehicle was within its lane of Mumbai-Agra highway, proceeding from Mumbai to Nashik and when the said vehicle reached near Gangaram Pada, opposite Soni Nursery and house of Mr. Vijay Salunke, at Villa Vadva, on the said highway, offending truck bearing registration no. MH-04-AL-7773 which was being driven very rashly, negligently, without observing rules of traffic and without proper lookout and which was at excessive speed could not controlled by its driver.

3. The said truck suddenly left its track and came to the wrong side and rammed into the car of the deceased. As a result thereof, the front side of the said vehicle driven by the said deceased came below the body of the truck and got crashed. As a result of the said accident, the said deceased Mahendra Sonawane and his mother Savita Sonawane died on the spot. Their bodies were removed out of the car after lifting the truck with the help of the crane. The said deceased as well as his mother were later declared as dead by the Indira Gandhi Memorial Hospital, Bhiwandi. The postmortem of the dead bodies was carried out. An offence was registered vide C.R.No.I-29/2007 dated 21st February, 2007 by Bhiwandi Police Station.

4. The respondent nos. 1 and 2 made various claims by filing MACP No. 608 of 2008 against the driver of the offending vehicle and the appellant in the sum of Rs.60,00,000/- along with interest @ 12% p.a. from the date of application till payment. The original opponent no.1 did not appear before

the Tribunal and also did not file any written statement. The appellant herein resisted the claim by filing written statement and contended that the said claim petition was hit by non-joinder of parties and there was no cause of action against the appellant. It was the case of the appellant that as per the police papers, there were two vehicles involved in the motor vehicular accident i.e. the Matiz Car driven by the said deceased and the motor truck bearing registration no. MH-04-AL-7773. It was also urged that respondent nos. 1 and 2 herein had not impleaded the owner and insurer of the Matiz Car as necessary parties and thus the said claim was bad for non-joinder of necessary parties.

5. Mr. D.S. Joshi, learned counsel for the appellant invited my attention to some of the findings rendered by the Tribunal in the impugned judgment and award and would submit that the Tribunal has not considered the contributory negligent on the part of the deceased in the impugned judgment and award. He however fairly submitted that no evidence was led by the appellant before the Tribunal.

6. The next submission of the learned counsel for the appellant is that the driver of the offending vehicle was not examined by the respondent nos. 1 and 2 thus the Tribunal could not have awarded any compensation against the appellant on the ground of negligence on the part of the said driver of the offending vehicle.

7. In so far as the quantification of the claim awarded by the Tribunal is concerned, it is submitted by the learned counsel that the income tax return of the said deceased was filed by the respondent nos. 1 and 2 after the demise of the said deceased and thus such income tax return could not have been considered by the Tribunal. He submits that the respondent no.1 who was widow of the said deceased was remarried within 1 year of the date of demise of the said deceased and thus could not have filed any application for compensation arising out of the death of the said deceased being not a dependent. He submits that the accident had taken place on 21st February, 2007. The respondent no.1 was remarried on 13th March, 2008. The claim petition was filed by the respondent nos.1 and 2 only on 29th August, 2008.

8. Mr. U.N. Mehta, learned counsel for the respondent nos. 1 and 2 on the other hand submits that his client had already produced the copy of the Spot Panchanama, FIR, Truck Sketch, Inquest Panchanama and Postmortem Report. He submits that the documents produced by the respondent no.1 who was examined as a witness clearly showed that the driver of the offending vehicle was negligent. The truck bounced upon the bonnet and cabin of the car. He submits that the Tribunal thus rightly rendered a finding that the driver of the offending vehicle was solely responsible. The appellant did not examine the said driver of the offending vehicle.

9. In so far as the issue raised by the learned counsel for the appellant that the Tribunal had not considered the contributory negligence on the part of the deceased is concerned, learned counsel submits that the Tribunal has rightly rendered a finding that driver of the offending vehicle was solely responsible by considering the evidence produced on record in detail. It was for the appellant to examine the driver of the offending vehicle to prove that the said deceased was negligent and not the said driver of the offending vehicle.

10. In so far as the quantification of the claim awarded by the Tribunal is concerned, it is submitted by the learned counsel for the respondent nos. 1 and 2 that the Tribunal had rightly considered Form No. 16 filed by the respondent no.1 showing the income of the said deceased in the respective income tax returns.

11. In so far as the submission of the learned counsel for the appellant that in view of the remarriage of the respondent no.1 within 1 year from the date of demise of the said deceased and thus she could not be considered as a dependent of the said deceased and could not make any claim for compensation is concerned, it is submitted that the position of the widow for considering her claim as a dependent has to be considered on the date of the accident and not thereafter.

12. In support of this submission, learned counsel placed reliance on the judgment of Punjab and Haryana High Court in case of ***National Insurance Co. Ltd. v/s. Nidhi Goel and others, 2018 ACJ 2732*** and in particular paragraphs 12 and 13. He also placed reliance on the judgment of this Court in case of ***New India Assurance Co. Ltd. v/s. Mona and others, 2011 ACJ 662*** and in particular paragraph 7. On the issue of contributory negligent raised by the learned counsel for the appellant, learned counsel for the respondent nos. 1 and 2 placed reliance on the judgment of Allahabad High Court in case of ***Prabandhak, U.P. Rajya Sadak Parivahan Nigam v/s. Rabia Begum and others, 2015 ACJ 1492*** and in particular paragraph 28 and would submit that the burden was on the appellant to prove the contributory negligence on the part of the said deceased, which burden the appellant failed to discharge.

13. Learned counsel for the respondent nos. 1 and 2 placed reliance on the judgment of Jammu and Kashmir High Court in case of ***Union of India and others v/s. Nusrat Khan and another, 2009 ACJ 2875*** and in particular paragraph 17 and would submit that driver of the offending vehicle is not a necessary party but a proper party. In support of this submission, he also placed reliance on the judgment of Rajasthan High Court in case of ***Dayabhai v/s. Shri Gopal, 2010 (1) T.A.C. 945 (Raj.)***, the judgment of this Court in case of ***New India Assurance Co. Ltd. v/s. Babruwan and others, 2009 ACJ 2871***, judgment of Gujarat High Court in case of ***New India***

Assurance Co. Ltd. v/s. Cargo Motors Ltd. And others, 2009 ACJ 2771.

14. Learned counsel for the respondent nos. 1 and 2 placed reliance on the judgment of Supreme Court in case of ***Navjyot Singh and others v/s. Delhi Transport Corporation and others, 2018 ACJ 540***, in support of the submission that since the said deceased was self-employed, reliance on the income tax return to prove income of the said deceased including Form No. 16 was proper.

15. Learned counsel also relied upon paragraph 5 of the said judgment in support of the submission that the Tribunal ought to have allowed interest @ 9% p.a. instead of 7% p.a. Learned counsel also placed reliance on the unreported judgment of this Court in case of ***New India Assurance Company Limited v/s. Smt. Rajni Harshwardhan Sharma*** in First Appeal No. 445 of 2015 and would submit that Division Bench of this Court had awarded interest @ 9% p.a. It is lastly submitted by the learned counsel that the respondent no.2 has now become major and thus order of investment made by the Tribunal in respect of the compensation due and payable to the respondent no.2 shall be modified and an order be passed to release the payment of compensation to the extent of 50% in favour of the respondent no.2 directly.

REASONS AND CONCLUSIONS :-

16. I have heard the learned counsel for the appellant (original opponent no.2) and the learned counsel for the respondent nos.1 and 2 (original applicants) and have perused the pleadings, documents and evidence produced on record by the parties.

17. The Tribunal framed three issues for determination. It is not in dispute that the respondent nos.1 and 2 (original applicants) examined the witness who produced various documents including inquest panchnama, Post Mortem report and cause of death certificate in addition to the FIR and Spot panchanama. The said witness was cross-examined by the appellant's counsel. The respondent nos.1 and 2 had also examined Mr.Raveendran P.M., Chartered Accountant of the said deceased who was also cross-examined by the appellant's counsel.

18. The said witness examined by the respondent nos.1 and 2 produced income-tax returns for the year 2004 to 2007 along with the statements of income, PAN card and various other documents. He had also annexed Form 16 along with the respective income tax returns. The account statement of the said deceased issued by the Bank of Maharashtra was also produced. Certificate of Import and Export Code i.e. I.E.C. issued by Ministry of Commerce was also annexed with income tax returns.

19. The respondent no.1 deposed that the said deceased prior to his death was working as Director of M/s.Ceal Shipping & Logistics Pvt. Ltd. and in the year 2004-05, he was drawing a salary of Rs.1,70,000/- p.a. In the year 2005-06, he was drawing salary of Rs.1,80,700/- p.a. In the year 2006-07, he was drawing salary of Rs.2,10,000/- p.a. His salary was increasing every year. The said witness also deposed that the said deceased was also running a proprietary concern M/s.Venkateshwara Sales Corporation and was exporting flowers to U.K. The said witness also produced the license obtained from Ministry of Commerce, Government of India. The Government of India had allotted him the import-export code.

20. In so far as the submission of the learned counsel for the appellant that the respondent nos.1 and 2 ought to have examined the driver of the offending vehicle and not having examined, the Tribunal could not have rendered a finding of negligence on the part of the said driver is concerned, in my view, there is no substance in this submission of the learned counsel for the appellant. It was for the appellant to examine the said driver of the offending vehicle to prove that the said deceased was responsible for the said accident or there was any contributory negligence on his part for the accident which had taken place. Learned counsel for the appellant did not dispute before this Court that no evidence was led by the appellant before the Tribunal.

21. The Allahabad High Court in case of ***Prabandhak, U.P. Rajya Sadak Parivahan Nigam v/s. Rabia Begum and others (supra)*** has held that burden was on the insurer to prove contributory negligence on the part of the deceased. In my view the appellant had failed to discharge such burden to prove by not leading any evidence.

22. A perusal of the findings rendered by the Tribunal clearly indicates that after considering large number of the documents produced by the respondent nos.1 and 2 in evidence which were not disputed by the appellant, when those documents were exhibited, the Tribunal rightly rendered a finding that the driver of the offending vehicle was solely responsible for the rash and negligent driving of the offending vehicle. I do not find any infirmity in the said finding of fact rendered by the Tribunal.

23. In so far as the quantification of claim awarded by the Tribunal is concerned, a perusal of the judgment and award indicates that the Tribunal has considered the oral and documentary evidence led by the respondent nos.1 and 2 and the Chartered Accountant of the said deceased who had produced various proof of income including income tax returns and Form 16 for several years. The said evidence of the Chartered Accountant or of the respondent no.1 was not shattered in the cross-examination by the appellant.

24. In so far as the submission of the learned counsel for the appellant

that the respondent no.1 having remarried within one year from the date of death of the said deceased and thus could not have been awarded any claim for compensation as the said respondent no.1 was allegedly not dependent on the said deceased is concerned, in my view, the status of the widow as dependent has to be considered on the date of death of the said deceased and not on the date of filing the claim for compensation.

25. The Punjab and Haryana High Court in the case of ***National Insurance Co. Ltd. Vs. Nidhi Goel & Ors. (supra)*** has held that there is no bar under the Motor Vehicles Act, 1988 against a widow from claiming compensation on account of her re-marriage. After the death of her husband, the widow continues to represent his estate irrespective of her re-marriage because she inherits part of the estate of her deceased husband. It is held that the said Motor Vehicles Act is a social welfare legislation and should be interpreted so as to fulfill its objective with which it was enacted. It is also held that though the said widow got re-married within about three months of the death of her husband, she was entitled to claim for compensation. The principles of law laid down by the Punjab and Haryana High Court are applicable to the facts of this case. I respectfully agree with the views expressed by the Punjab and Haryana High Court.

26. In my view, merely because widow of the said deceased was remarried within one year from the date of death of the deceased or even

within the shorter period, that would not make the widow dis-entitled to make claim for compensation on the ground that the said widow was not dependent on the date of filing claim application. Such widow continues to represent the estate of the said deceased and thus was entitled to make claim for compensation irrespective of change of her marital status after demise of the said deceased. The status of the claimant as dependent has to be considered on the date of death of the said deceased and not on the date of date of making an application for seeking compensation arising out of such death of the husband. The Tribunal thus rightly considered the claim of the respondent no.1 being widow of the said deceased in view of the death of her husband due to the said accident, along with the claim of the respondent no.2 being also one of the legal heirs and representative of the said deceased.

27. This Court in the case of ***New India Assurance Co. Ltd. v/s. Mona and others (supra)*** has held that Section 166 of the Motor Vehicles Act is a social legislation and the same must be interpreted to further its objective. Remarriage cannot be an impediment in claiming compensation nor can it be a ground to reduce the compensation to which the widow is otherwise entitled to. In my view, the said judgment of this Court squarely applies to the facts of this case. I am respectfully bound by the said judgment.

28. In so far as the submission of the learned counsel for the appellant

that no reliance on the income tax returns alone could be placed by the respondent nos.1 and 2 to show the income of the deceased is concerned, Supreme Court in the case of ***Navjyot Singh and others v/s. Delhi Transport Corporation and others (supra)*** has held that the said deceased was self-employed and thus reliance placed on the income tax returns of the said deceased including Form No.16 was proper.

29. In so far as the submission of the learned counsel for the appellant that the claim filed by the respondent nos.1 and 2 was bad for non-joinder of the driver of the offending vehicle is concerned, the Jammu and Kashmir High Court in case of ***Union of India and others v/s. Nusrat Khan and another (supra)*** has held that the driver of the offending vehicle is not a necessary party but proper party. Similar views has been also taken by the Rajasthan High Court in case of ***Dayabhai v/s. Shri Gopal (supra)***, by this Court in case of ***New India Assurance Co. Ltd. v/s. Babruwan and others (supra)*** and by the Gujarat High Court in case of ***New India Assurance Co. Ltd. vs. Cargo Motors Ltd. and others (supra)***. I respectfully agree with the views expressed by the Jammu and Kashmir High Court, Rajasthan High Court and the Gujarat High Court. The principles of law laid down by this Court are applicable to the facts of this case. I am respectfully bound by the said judgment.

30. In my view, the driver of the offending vehicle is not a necessary

party but is proper party. The said claim thus could not have been rejected even otherwise on that ground by the Tribunal. It was for the appellant to examine the said driver of the offending vehicle as one of the witnesses which the appellant has failed in this case.

31. During the course of arguments, learned counsel for the respondent nos.1 and 2 also pressed in service an unreported judgment of this Court in case of ***New India Assurance Company Limited v/s. Smt. Rajni Harshwardhan Sharma (surpa)*** in support of the submission that the rate of interest @7% was on the lower side and ought to have awarded @9% p.a. In my view, in the facts and circumstances of this case, the Tribunal ought to have been awarded interest @9% p.a. Judgment of this Court in case of ***New India Assurance Company Limited (supra)*** applies to the facts of this case.

32. For the reasons recorded aforesaid, I do not find any infirmity in the findings rendered and the conclusions drawn by the Tribunal in awarding compensation except to the extent of rate of interest awarded by the Tribunal @7% p.a. Appeal is devoid of merit.

33. I therefore pass the following order :-

- (i) The appellant and the respondent no.3 are jointly and severally liable to pay an amount of Rs.29,51,000/- to the

respondent nos.1 and 2 with interest @9% p.a. from the date of claim petition till its realisation. The said amount shall be paid equally to the respondent nos.1 and 2.

- (ii) Since the respondent no.2 has attained the age of majority, the order passed by the Tribunal to invest 50% share of the respondent no.2 in the Fixed Deposit is modified to the effect that the respondent no.2 would be entitled to be paid with his share.
- (iii) The respondent nos.1 and 2 would be entitled to recover the entire amount awarded by the Tribunal by judgment and award dated 4th January 2014 duly modified by this order out of the amounts deposited by the appellant before the Tribunal.
- (iv) The operative part of the judgment and award passed by the Tribunal stands modified to the aforesaid extent.
- (iv) In view of the aforesaid order, if there is any shortfall in recovering the amount by the respondent nos.1 and 2, the appellant shall deposit the balance amount with the Tribunal within two weeks from the date of computation of shortfall. If the Tribunal finds any surplus amount deposited by the appellant, Tribunal shall refund the said surplus amount to the appellant within four weeks from the date of such computation.

- (v) If there is any shortfall in payment of Court fees, the appellant shall pay the deficit within two weeks from the date of computation by the Tribunal. Respondent Nos. 1 and 2 would be at liberty to withdraw amount only upon payment of deficit Court fees, if any.
- (vi) First appeal is disposed off on aforesaid terms. No order as to costs. Parties as well as the Tribunal to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)