

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION NO.38/2020
IN FIRST APPEAL NO. 988/2010.

WITH

MISC. CIVIL APPLICATION NO.39/2020
IN FIRST APPEAL NO. 35/2011.

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MISC. CIVIL APPLICATION NO.38/2020
IN FIRST APPEAL NO. 988/2010.

National Insurance Company Ltd.,
through its Manager, Division ix 18,
Rabindra Sarani, Poddar Court,
Gate No.4 [6th Floor], Kolkatta
West Bengal.

... **APPLICANT.**

VERSUS

1.Swati Anil Dhamande,
Aged about 46 years, Occupation Housewife,
resident of Ramnagar, Near Circus Ground,
Wardha.

2.Anshul Anil Dhamande,
Aged about 26 yers, Occupation Education.

3.Devershi Anil Dhamande,
Aged about 23 years, Occupation Edcuation,

Both are through their Natural Guardian
Mother Smt. Swati Anil Dhamande,
(Appellant No.1).

4.Smt. Vijaya Vitthalrao Dhamande,
Aged about 64 years, Occupation Nil.
Resident of R.K. Colony, Pulgaon,

District Wardha.

5.Jamuna Transport Corporation Ltd.,
11, Polock Street Kolkatta-1,
State West Bengal.

6.Sunil Babural Mendhe,
Sunny Constructions, Opp. Deshmukh
Hospital, Nandanwan Nagpur,
Maharashtra.

7.I.C.I.C.I/Lombard General Insurance
5th Floor landmark Plot no.56, Wardha
Road, Ramdaspeth, Nagpur
State of Maharashtra.

8.Santosh Kumar Rajendra Singh Yadav,
r/o. Dildar Nagar, P.S. Dildar Nagar,
Bindupura, District Gazipur U.P
and c/o. amuna Transport Corporation Ltd.,
11, Polock Street Kolkatta-1,
State West Bengal.

... NON-APPLICANTS.

WITH

MISC. CIVIL APPLICATION NO.39/2020
IN FIRST APPEAL NO. 35/2011.

National Insurance Company Ltd.,
Kolkatta, through its Regional
Manager, Rgional office at
'Manglam Arcade, Dharampeth,
Nagpur.

... APPLICANT.

VERSUS

1.Swati Anil Dhamande,
Aged about 48 years, Occupation Housewife,

2.Anshul Anil Dhamande,
Aged about 24 yers, Occupation Education.

3. Devershi Anil Dhamande,
Aged about 22 years, Occupation Education,

(Respondent No.1 to 3 r/o.
Mr. Kashikar Mangalwadi Road, Ramnagar,
Wardha)
(Respondent Nos. 2 and 3 being minor
through their Natural Guardian
Mother Respondent no.1).

4. Smt. Vijaya Vitthalrao Dhamande,
Aged about 63 years, Occupation Nil.
Resident of R.K. Colony, Pulgaon,
District Wardha.

5. Jamuna Transport Corporation Ltd.,
11, Pollock Street Kolkatta-1,
State West Bengal.

6. Sunil Babural Mendhe,
Sunny Constructions, Opp. Deshmukh
Hospital, Nandanwan Nagpur,
Maharashtra.

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5th Floor landmark Plot no.56, Wardha
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r/o. Dildar Nagar, P.S. Dildar Nagar,
Bindupura, District Gazipur U.P.
and c/o. Jamuna Transport Corporation Ltd.,
11, Pollock Street Kolkatta-1,
State West Bengal.

... **NON-APPLICANTS.**

Shri A.M. Kukday, Advocate for the Applicant.
Shri R.S. Nagpure, Advocate for Respondent Nos. 1 to 4/Claimants.

**CORAM : R.K. DESHPANDE &
VINAY JOSHI, JJ.**

DATE OF RESERVING THE ORDER : 24.01.2020
DATE OF PRONOUNCEMENT : 28.01.2020

ORAL ORDER (PER VINAY JOSHI, J.) :

Heard finally by consent of learned Counsel appearing for the parties.

2. Both review petitions arise out of common judgment and order dated 09.12.2018, passed by this Court in First Appeal No.988./2010 along with First Appeal No. 35/2011. These Review Petitions are by the National Insurance Company, the respondent no.2 in both appeals. Likewise, the review petitioner was respondent no.2 in the original proceeding bearing M.A.C.P No.92/2007, decided by the Motor Accident Claims Tribunal, Wardha.

3. Unfortunate death of one Anil Dhamande in a vehicular accident dated 07.11.2006 has occasioned his legal heirs to approach to the Claims Tribunal in terms of Section 166 of the Motor Vehicles Act to seek compensation. On examination of oral and documentary evidence, the Tribunal was pleased to pass an

award in the sum of Rs.69,78,500/- along with future interest @ 7.5% p.a. The concerned accident was the outcome of head on collision in between a Lancer Car and a Container-Truck. Deceased was occupant of Lancer car bearing Registration No. MH-26-C-555. Review petitioner, was the Insurer of the Container (Truck) bearing registration No.WB-23-6737.

4. The Tribunal held that the accident occurred due to the rash and negligent driving of the driver of the truck. Accordingly, joint and several liability was fastened on the owner, driver and insurer (review petitioner) of the offending vehicle namely – Truck. Being dissatisfied by the said award, the original claimants preferred First Appeal No.988/2010 for enhancement of compensation, whilst the insurer of the Truck filed First Appeal No.35/2011 for setting aside the liability fastened on it.

5. This Court dealt with two vital issues on merits, which pertained to negligence and the assessment of compensation amount. On re-examination of the evidence and hearing both the sides, this Court has held that the accident in question was the outcome of the rashness and negligence on the part of the driver of the offending Truck. This Court has reassessed the evidence on the point of compensation and ultimately held that the claimants are

entitled for enhanced compensation to the tune of Rs.1,55,70,370/- along with future interest. Decision of this Court was questioned by the insurer of the Truck [review petitioner] before the Hon'ble Supreme Court by filing Special Leave Petition No. 7538-7539 of 2019. It appears from the orders of the Hon'ble Supreme Court that the review petitioner canvassed that though Anil Dhamande died, , his widow continued with the business, and hence, there was no loss of income. In that regard, the Hon'ble Supreme Court has observed that the said point has not been dealt with by this Court and accordingly permitted petitioner to withdraw the Special Leave Petition with liberty to file review petition. In the wake of such position, these review petitions have come for scrutiny.

6. The learned counsel for the review petitioner would submit that this Court erred in assessing annual income of the deceased. The line of argument is that despite death of Anil, his widow [claimant no.1-Swati] has continued with the business and therefore, there was no loss of income. Rather this submission is based on certain admissions given by P.W.1 Swati in her evidence. True, P.W.1 Swati stated in her evidence that after death of her husband, she is looking after the work of the firm. She also stated that Anil Construction Firm is still in existence and she is proprietor of the firm.

7. Before appreciating the admission, one has to revisit the background facts of the case. It is petitioner's case that deceased Anil was a Civil Contractor by occupation and was running a construction business in the name and style as "Anil Constructions". Deceased Anil was undertaking government contracts through P.W.D, Municipal Council, Zilla Parishad etc. In support of said contention, petitioner has produced several work orders issued by P.W.D. and Municipal Council, Wardha about allotment of construction work. Rather this was not disputed by the review petitioner.

8. Pertinent to note that though it has been argued that after demise of Anil, his widow is running the firm, however, such defence has not been taken in the written statement. For the said reason also the evidence without pleading cannot be considered. Be that as it may, one has to see what is the impact of said admission. Can it be the basis to say that there is no loss of income at all. The submission in this regard is totally devoid of any merit. Admittedly deceased Anil was a Civil Contractor to whom government construction contracts were awarded by the local authorities like P.W.D., Zilla Parishad, Municipal Council etc. It is unrealistic to accept that even after demise of Anil, the government agencies have continued to assign the contract to his widow, who does not hold

any experience and qualification. The admission given by the widow can be construed in the manner that for said year she continued and completed the ongoing contract work, and nothing else. However, even for completing said work, she must have required to engage services of another civil engineer for which obviously one has to pay. Therefore, the admission of widow can be read only to the extent that for said year some how she has pulled on the works which was underway. Always admissions are to be read contextually. It is not possible to draw any other inference for said admission.

9. It was not a grocery shop which a lady can continue after her husband. Even in such contingency also she would get income on her own exertion. It is a specific case that deceased Anil was a qualified civil contractor having specific skill. Number of documents are on record to show that local authorities and government agencies have assigned the contracts which vouch about his credentials. It cannot be a matter of inference that after death of Anil, neither a lady, having no qualification is able to apply for government contracts, nor such contracts would be assigned to her, who does not possess any skill. There has to be a positive evidence led. Therefore the argument advanced in this regard is totally misconceived, which requires no consideration at all. This Court has

assessed the annual loss of dependency on the basis of Income Tax returns of three preceding years. The said finding is based on the sound reasons which cannot be a subject matter of review.

10. Though the learned counsel for the review petitioner has not re-argued the ground of negligence, the same appears in the memo of review petition. Therefore, to avoid the risk of non consideration of said ground raised in review, we have assessed the matter from said angle also. It is stated in the memo of review petition that this Court ought to have held that it was a case of contributory negligence, instead of sole negligence of the truck driver. The argument is beyond the parameters of review. Law in this regard is fairly well settled. The Hon'ble Supreme Court in a reported case of **Lily Thomas .vrs. Union of India (AIR 2000 SC 1650)**, held that the scope of review is very limited. The mistake apparent on the face of record cannot mean error which has to be fished out and searched. In another case of **M/s. Thungabhadran Industries Ltd. .vrs. The Govt. of A.P (AIR 1964 SC 1372)**, it is ruled by the Hon'ble Supreme Court that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could

reasonably no two opinions entertained about it. In another decision of Hon'ble Supreme Court in case of **Smt. Meera Bhanja .vrs. Smt. Nirmala Kumar (AIR 1995 SC 455)**, it is expressed that error apparent means an error which strikes at once by mere looking at record and would not require any long drawn process of reasoning. In view of this settled proposition of law, prima facie we do not find any error apparent on the face of record to reassess the material on the point of negligence.

11. Apart from that we have revisited the evidence on the point of negligence. This Court in paragraph nos.5 to 7 of its judgment under review has elaborately assessed the oral as well as documentary evidence. This Court has considered and assessed the evidence on the point of negligence on the basis of law laid down by the Hon'ble Supreme Court in case of **Bimladevi .vrs. Himachal Pradesh State Road Transport Co. (AIR 2009 SC 2819)** and **Kasam Lata .vrs. Satbir [2011 (3) Mh.L.J. 722 SC]**. On the touchstone of preponderance of probabilities, on assessment of evidence of eye witness and police papers, inference of sole negligence of truck driver was drawn. It is observed that the version of the truck driver cannot be relied unless it is corroborated. The finding of negligence of truck driver is based on the evidence of P.W.4-Sandeep Panpaliya, who was mere occupant of the car, meaning thereby had ample

opportunity to see the occurrence. Moreover, his evidence is well supported by police papers and particularly spot panchnama annexed with the rough sketch. According to us the finding of negligence is based on reasons and therefore, no different view is possible.

12. On reassessment of facts and legal position, we do not find any error apparent on the face of record so as to review the decision. In view of above, review petitions are totally devoid of merits, hence, the same are dismissed. No costs.

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Later on.

13. At this stage, the learned Counsel for the original claimants submitted that partial amount has been withdrawn by the claimants, and they may be permitted to withdraw the remaining amount deposited in the Court. We do not find any hurdle in releasing the amount to the rightful claimant. Hence, we permit original claimants to withdraw the remaining amount, as per the award, along with accrued interest, if any.

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