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

FIRST APPEAL NO.734 OF 2013

APPELLANT : Oriental Insurance Company Ltd.
(Ori.Res.No.3) Khamgaon Branch, through the Regional Manager, Nagpur Regional Office (T.P. Hub), Shukla Bhavan, Dharampeth, Nagpur.

V E R S U S

RESPONDENTS :
(On R.A.)

1. Smt. Rizwana Parveen wd/o Naimkhan, Aged about: 35 years, Occ. Household.

2. Mushrafkhan s/o Naimkhan, Aged about : 13 years.

3. Mustiqueemkhan s/o Naimkhan, Aged about : 11 years.

4. Sufiyankhan Naimkhan, Aged about : 9 years.

5. Jaweriya Aheman d/o Naimkhan, Aged about : 8 years.

   Nos.2 to 5 are minors represented by Respondent No.1, their mother and Natural Guardian.

6. Salimkhan s/o Bilmillakhan, Aged about : 59 years, Occ. Nil,

7. Husenabi w/o Salimkhan, Aged about : 56 years, Occ. Household,

All R/o Khidkipura, Pimpalgaon Raja, Tq. Khamgaon, District Buldhana.

8. The New India Assurance Company Ltd. through its Divisional Manager, C/o ADCC Bank Building, 3rd Floor, Old Cotton Market Road, Akola, Tq. & District Akola.

9. Sabir Rahim Joad, Age Adult, Occ. Business, R/o 5/6, Moti Terrace Apartment, Near Indira Park Society, Nagar Road, Yeroda, Pune-411 006.

(Matter has been abated against R-10 vide Reg.(J)'s order dtd. 8/4/14.)

[10. Suryaprakash Sharma, Age Adult, Occ. Business, R/o N.H. 4, Hotel Jammu-Kashmir,Palavanhalligate, Chitra-Durga, Tq. & District Haridurg (Karnataka)].

Shri D. N. Kukday, Advocate for appellant.
Shri H. R. Gadhia, Advocate for respondent Nos.1 to 7.
Shri A. W. Paunikar, Advocate for respondent No.8.

WITH
FIRST APPEAL NO.1252 OF 2012

APPELLANTS :

1. Rizwana Parveen wd/o Naimkhan, Aged about 31, Occ. : Household.

2. Mushrafkhan s/o Naimkhan, Aged about 9 years,

3. Mustiqueemkhan s/o Naimkhan, Aged about : 7 years.

4. Sufiyankhan Naimkhan,
Aged about 5 years.

5. Jaweriya Aheman d/o Naimkhan,
Aged about 4 years.

Respondents No.2 to 5 are minors represented by claimant No.1/mother.

6. Salimkhan s/o Bilmillakhan,
Aged about 55 years, Occ.: Nil.

7. Husenabi w/o Salimkhan,
Aged about 52 years,
Occ. : Household.

All r/o Khidkipura, Pimpalgaon Raja,
Tq. Khamgaon, Dist. Buldhana.

V E R S U S

RESPONDENTS :

1. The New India Assurance Company Ltd., through its Divisional Manager, C/o ADCC Bank Building, 3rd Floor, Old Cotton Market Road, Akola, Tq. Dist. Akola.

(Insurer of Luxury Bus No.MH-12/EQ-6527) Policy No.153200/31/08/01/00007320, Policy Valid upto 5.08.2008 to 4.8.2009.

(Ref. to Reg.(J)'s order dtd. 28/1/14 matter has been dismissed against R.No.2).

[2. Sabir Rahim Joad, Aged adult, Occ. : Business, R/o 5/6, Moti Terrace Apartment, Near Indira Park Society, Nagar Road, Yeroda Pune-411 006.]

(Owner of Luxury Bus No.MH-12/EQ-6527)

3. The Oriental Insurance Company Ltd., through its Divisional Manager, In front of Head Post Office, Near Petrol Pump, Opp. Hotel Pratik Plaza, Old Bus Stand, Khamgaon (Insurer of TATA Truck No.KA-16/A-6794) Policy No.0422108/31/2009/2928.

(Matter abated against R-4 vide Reg.(J)'s order dtd. 27/8/13)

[4. Suryaprakash Sharma, Aged-adult, Occ.: Business, R/o N.H.4,Hotel Jammu-Kashmir, Palavanhalligate, Chitra-Durga, Tq. Dist. Haridurg, (Karnataka), Legal heirs of Truck Owner No.KA-16/1-6794].

Shri H. R. Gadhia, Advocate for appellants.
Shri A. W. Paunikar, Advocate for respondent No.1.

CORAM:- S. M. MODAK, J.
DATED : 08/12/2020.

ORAL JUDGMENT :

1. Heard Shri Gadhia, learned advocate for the original claimants/appellants in First Appeal No.1252/2012 and Shri Kukday, learned advocate for Insurance Company of the truck in First Appeal No.734/2013 and Shri Paunikar, learned advocate for the Insurance Company of the bus.

2. The legal representatives of the deceased, who is bus a driver, have filed a petition under Section 163-A of the Motor Vehicles Act, 1988 before the Claims Tribunal. Though there is a statutory cap on the income of the deceased, the legal representatives have decided to file a petition under Section 163-A of the Motor Vehicles Act with a case that deceased was having annual income more than Rs.40,000/-. The maintainability of the petition was challenged on behalf of the Insurance Company before the Claims Tribunal. The Claimants have decided to restrict their claim within limitation permissible as per Section 163-A of the Motor Vehicle Act. The Claims Tribunal allowed the amendment. The evidence was adduced on behalf of the claimants only. However, when the Claims Tribunal has decided the petition, it had gone into the issue of negligence (though it was not expected). The Tribunal has held the bus driver as well as truck driver were responsible for the accident 50% each. Accordingly, while doing the apportionment, the Tribunal held that the legal representatives are entitled only to 50% of the compensation.

3. The claimants as well as the Insurance Company of the truck are aggrieved by the said Judgment. The Insurance Company of the truck says that basically, petition was not at all maintainable. It is on the basis of pronouncement by the Hon'ble Supreme Court in the case of **Deepal Girishbhai Soni and others Vrs. United Insurance Co. Ltd., Baroda**, reported in **AIR 2004 SC 2107.** According to them, the scaling down of the compensation is not permissible. Whereas, the claimants are desirous of getting more compensation and hence, they have come in by way of separate appeal.

4. Now, the claimants have sought permission to convert the petition under Section 166 of the Motor Vehicle Act, 1988. The claimants have relied upon two Judgments delivered by this Court.

a) **New India Assurance Co. Ltd. Vrs. Ashabai and others**, reported in **I(2009) ACC 800**.

b) **The New India Assurance Co. Ltd. Vrs. Smt. Vaishali w/o Somnath Dusad and others** in First Appeal No.267/2001 at Aurangabad Bench.

5. Every one knows that if they have to file petition under Section 163-A of the Motor Vehicle Act, there are two parameters. One it is on No Fault Liability. It means that the issue of negligence never arises in such petition and second parameter is that the compensation has to be payable as indicated in Schedule-II. As per the Schedule-II, there is maximum cap on annual income of the deceased and it is Rs.40,000/- per annum. I think that the learned Claims Tribunal has committed fault in two aspects. One is when the claimants have decided to restrict their claim, the Claims Tribunal ought not to have gone into the issue of negligence. Secondly, the Claims Tribunal has gone to the extent of holding that the deceased driver of the bus and the driver of the truck is 50% responsible each to the accident. This finding is against the provisions of Section 163-A of the Motor Vehicle Act and it needs to be set aside. Probably, the view taken in **Deepal Soni's case** and **Ashabai's case** was not brought to the notice of the Tribunal by either of the parties. If it could have been brought, then Tribunal ought to have dismissed the petition.

6. As per the Judgment given by the Hon'ble Apex Court (earlier view) in case of **Oriental Insurance Co. Ltd., etc. Vrs. Hansrajbhai V. Kodala and others**, reported in **I(2001) ACC 618 (SC),** scaling down of the income was held permissible. However, this view was set aside by the Hon'ble Apex Court in case of **Deepal Soni (supra)**. So, under such circumstances, it is for the claimant to decide whether to go on with such petition or whether to go under Section 166 of the Motor Vehicle Act. The option adopted by the Claimants about the scaling down of the income was not permissible as held in **Deepal Soni's case**. Now, the claimants have decided to go under Section 166 of the Motor Vehicle Act.

7. As held by this Court in **Ashabai's case** (supra), conversion can be granted by the Court. This Court has considered the deletion of the provisions in Section 166 of the Motor Vehicles Act pertaining to prescribing the limitation for filing petition. By taking cognizance of such deletion, it has been observed that under such circumstances, the parties can be permitted to convert a petition under Section 163-A to Section 166 of the Motor Vehicle Act. It has been further observed that the conduct of the parties will have to be considered while granting such liberty. It has been

held in para 15 of that Judgment that the parties therein have acted as per the legal advice. So, the litigant should not suffer for that. So, I am inclined to grant permission to the claimants to convert present petition into a petition under Section 166 of the Motor Vehicles Act. The matter also needs to be remanded. This Court could have remanded only on the point of income and compensation. But, in that eventuality, parties were deprived of opportunity to lead evidence. Now, all parties can participate in the enquiry with full knowledge that issue of negligence is involved.

8. Shri Kukday, learned advocate brought to my notice the issue of grant of interest, if at all, the Claims Tribunal (after the remand) will allow the petition. He read over para 18 of **Ashabai's Judgmen**t. According to him, if the petition is allowed, question of grant of interest will arise. And in present set of facts, interest cannot be from the date of petition but it will be from date of proposed amendment. Mr. Kukday, learned advocate may be right in his submission. But, this Court will have to keep the issue open to be decided by the Claims Tribunal after the matter is remanded. It is true that in this case also, the Claims Tribunal can

decide the issue of entitlement of interest and from which date it may be granted.

9. So, I am inclined to set aside the Judgment by granting liberty to claimants to convert the petition. Earlier, Claims Tribunal granted permission to scale down the annual income to Rs.40,000/-. But, now on the basis of interpretation in case of **Ashabai's case** liberty is granted to convert present petition to a petition under Section 166 of Motor Vehicles Act. It is made clear that all contentious issues are kept open. Shri Paunikar, learned advocate for the Insurance Company of the bus requested to issue directions to claimants to delete them. It is in view of contentions that the deceased cannot be said to be a third party so far as Insurance Company of the bus is concerned. I think that they have got liberty to agitate that issue before the Claims Tribunal only. In view of that, following order is passed.

ORDER

I] First Appeal No.734/2013 is allowed.

II] The Judgment dated 18/09/2012 passed by the Motor Accident Claims Tribunal, Khamgaon in M.A.C.P. No.67/2009 is set aside.

III] The claimants are granted permission to convert their petition from under Section 163-A to Section 166 of the Motor Vehicles Act, 1988 by carrying out necessary amendment.

IV] The respondents in that petition are permitted to carry out amendment in the written statement or to file additional written statement.

V] Both the sides are given liberty to adduce fresh evidence.

VI] All the parties are directed to appear before the Motor Accident Claims Tribunal, Khamgaon on 18/01/2021.

VII] The Motor Accident Claims Tribunal, Khamgaon may issue notice to respondent Nos.2 and 4 in original petition.

VIII] Contentions of all the parties are kept open.

IX] The Motor Accident Claims Tribunal, Khamgaon is directed to decide petition within a period of one year from today.

X] The appellant in First Appeal No.734/2013 is entitled to get back mandatory deposit of Rs.25,000/- and entire decretal amount deposited by them in this Court along with accrued interest.

XI] Parties to bear their own cost.

10. In view of above directions, First Appeal No.1252/2012 is disposed of.

11. In view of disposal of First Appeal, all civil applications, pending if any, are disposed of.

[JUDGE]

Choulwar