IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.3116 OF 2006

AND

INTERIM APPLICATION NO.1 OF 2019

The National Insurance Co. Ltd. .. Appellant

Vs.

Reshma Kishor Udhwani & Ors. .. Respondents

…

Ms. Shalini Shankar for the appellant.

Mr. Ankit R. Tripathi i/b Ms. Aishwarya Joshi for the applicants/ respondents.

…

CORAM: SMT. BHARATI DANGRE, J.

DATED : 22ND DECEMBER, 2021.

P.C:-

1. This first appeal filed by the Insurance Company, challenging the judgment and award passed by the MACT, Mumbai on 28/06/2006 in Application No.3507 of 2000 is admitted on 19/12/2006.

The implementation and execution of the impugned Award came to be stayed by directing the appellant to deposit an amount of Rs.7 lakhs before the Tribunal, within six weeks. The claimants were held entitled to withdraw Rs.5 lakhs initially, unconditionally. They were permitted to further seek withdrawal of amount of Rs.2 lakhs by an application being preferred before this court.

2. On 19/12/2006, this court passed the following order:

> *"1. Heard. Appeal is admitted.*
>
> *2. So far as Civil Application No.5338 of 2006 is concerned, it is for staying the award passed by the Motor Accident Claims Tribunal. The appellant to deposit Rs.Seven Lakhs before the tribunal within six weeks from today. Upon deposit, there will be ad interim stay to the execution of the award passed by the tribunal. All the claimants will be entitled to withdraw Rs.Five lakhs initially unconditionally. Thereafter they may apply for further withdrawal of Rs.Two lakhs to this court. Issue notice of the civil application, returnable six weeks. All the claimants under the Hindu Law are equally entitled for withdrawal."*

3. In furtherance of the said order, Interim Application No.1 of 2019 is filed by the claimants in the first appeal, seeking withdrawal of an amount of Rs.2 lakhs in terms of order dated 19/12/2006. It is informed that during the pendency of the appeal, claimant/respondent No.4 - Smt. Leelavati T. Udhwani, the mother of the deceased, had expired.

On the application being listed for hearing, the respective counsel expressed that the appeal itself be taken up for final hearing.

Heard learned counsel Mr. Ankit Tripathi with Mr. Aishwarya Joshi for the claimants and Mr. Shalini Shankar for the appellant, the Insurance Company.

4. On 24/09/2000, at around 10.45 a.m., Kishor T. Udhwani was waiting near the BEST bus stop at Kasturi Park Link Road. At that time, one motor car bearing No.AP-31-F-1129 coming from Malad side, in excessive speed, knocked him down. On being hit, he collapsed on the road. As he sustained injuries, the passers-by came to his rescue and he was taken to the nearest hospital in an auto-rickshaw. On the request of the injured, he was moved to Nanavati Hospital and his family members were informed about the accident. He was administered medical treatment in the said hospital and he succumbed to the injuries, on 09/10/2000.

5. The deceased, Kishor Udhwani, was aged 43 years on the date on which he met with the accident and he was in the service of M/s. Aakash Impex and was earning a monthly income of Rs.15,000/- when he succumbed to the accident.

On his death, his legal heirs viz. his wife Reshma, two minor children and his mother Leelavati Udhwani, aged 70 years, instituted a claim petition before the MACT at Mumbai vide Application No.3507 of 2000, in which, the compensation of Rs.30,00,000/- was claimed on behalf of the claimants along with interest at the rate of 12% per annum, from the date of application.

6. In the claim petition, the driver and the owner of the vehicle were impleaded as party respondent Nos.1 and 2 whereas, National Insurance Company was impleaded as respondent No.3.

The opposite party Nos.1 and 2 were proceeded ex-parte and the claim of the claimants was contested by the Insurance Company by filing written statement (Ex-15). The Insurance Company denied that the accident took place because of rash and negligent driving on the part of the driver and the claim of compensation was contested on the ground that it is highly excessive.

7. The MACT framed the following issues for consideration:

> *"1. Whether applicants prove that on 24/09/2020 at about 10.45 a.m. on Kasturi Park Link Road, near BEST Bus Stop, Malad (W), due to rash or negligent driving on the part of Maruti Car bearing No.AP-31-P-1129 death of deceased, Kishor Thawerdas Udhwani was caused?*
>
> *2. Whether applicants are entitled to claim compensation as prayed for? If yes, to what extent?"*

8. In support of the claim, claimant No.1, the widow of the deceased, filed her affidavit in evidence. She narrated the incident of accident, in which her husband sustained injuries by stating that, the Maruti car being driven in excessive speed, in rash and negligent manner, gave dash to her husband, who was waiting to board a bus to take him from Malad to Goregaon. On account of the impact, he sustained injuries and he collapsed on road and was taken to the hospital in an auto-rickshaw. She deposed that while under treatment, he succumbed to the injuries on 09/10/2000. She had also deposed that the Malad police have registered a criminal case against the driver of Maruti car by invoking Sections 279 and 338 of the I.P.C. i.e. for causing serious injuries due to rash and negligent driving. Upon death of her husband, Section 304(A) of the I.P.C. was added in the said C.R. on 09/10/2010.

Claimant No.1 deposed that she had incurred expenses of Rs.2,75,000/- for the treatment of her husband and she incurred an amount of Rs.10,000/- for performing the funeral and other religious rites.

9. The claimants placed on record various documents which included (a) certified copy of the FIR registered at Malad Police Station vide C.R. No.386 of 2000, (b) certified copy of spot panchanama dated 24/09/2000, (c) certified copy of FIR, adding Section 304(A) to the earlier C.R., (d) copy of death certificate

issued by Cooper Postmortem Centre, (e) original death certificate of the deceased issued by Municipal Corporation of Greater Mumbai, (f) Form No.16 for the Assessment Years 1998-99 and 1999-2000 of her husband, (g) computation of total income for the Assessment Years 2001-02, (h) xerox copy of salary certificate issued by the employer, (i) insurance policy of the offending vehicle, showing ownership and insurance particulars and (j) statement of medical bills, amounting to Rs.1,50,515.80 towards the expenses incurred in treating the deceased.

The aforesaid documents were admitted in evidence and exhibited at the instance of the claimants.

10. Claimant No.1 deposed that her husband was working with M/s. Aakash Impex as a full time consultant, coordinating fabric for dying and printing with different processing mills in Mumbai and Surat and earning Rs.15,000/- per month, out of which, he was contributing Rs.10,000/- towards household expenses to cater to the needs of the family, which included his wife, mother and two minor children. She also deposed that her husband was 43 years' old at the time of death and was possessing robust health, without any ill habits. She claimed compensation of Rs.30,00,000/- with interest at 12% per annum from the date of application.

11. The insurer cross-examined the claimants and in the cross-

examination, the widow admitted that she had not witnessed the accident as she was at home. The suggestion that the deceased was not admitted in the hospital was denied by her and also the suggestion that no medical expenses were incurred in the treatment. She also denied the suggestion that the claim was exorbitant.

12. In support of the claim, the claimants also examined one Manoj Mworjani, the attorney holder of the proprietor of M/s. Aakash Impex. He deposed that the firm manufactures garments for exports and he manages the business of the firm, who had engaged 60 employees. He deposed before the MACT that the deceased was serving as Consultant in the firm and his monthly salary was Rs.15,000/-. He had issued a certificate, certifying the employment of the deceased from 10/04/2000 till 30/09/2000 and the said certificate was exhibited at Exh.27. In the cross-examination by the insurer, the witness deposed that he cannot produce the Attendance Register due to the time lapse and stated that the salary record and vouchers are with the Chartered Accountant. The suggestion that the deceased was not working with him and he was not paid salary of Rs.15,000/- was denied by him.

13. In the wake of the material placed before the Tribunal in the form of documentary evidence as well as the depositions, the Tribunal accepted the position that claimant No.1 i.e. wife of the

deceased did not witness the accident. On the basis of the facts as contained in the FIR, the Tribunal recorded that the deceased, who was waiting near the bus stop, was hit by a rashly and negligently driven car, coming from the opposite side. The contest of the claim by the insurer was infused by recording that the insurer has not examined the driver of the offending vehicle to prove the negligence on the part of the deceased, since the Insurance Company denied that the accident had taken place due to rash and negligent act on the part of the car driver. From the narration in the FIR, the Tribunal recorded that the deceased was waiting near the bus stop and, therefore, he is not negligent in any manner, but the car driver, who was driving the car at high speed dashed him and, therefore, no negligence can be attributed to the deceased, but the driver of the car was negligent in causing the accident, in which Kishor Udhwani, the victim succumbed, after being offered treatment till 09/10/2000.

The Tribunal, therefore, answered issue No.1 in the affirmative by recording that the deceased met with the accident due to rash and negligent driving on the part of the driver of the Maruti car, which was insured with the Insurance Company.

14. The factum of the accident was thus held to be proved from the contents of the FIR and since claimant No.1 i.e. the widow of the deceased in her deposition has made a reference to the lodging of the FIR and the FIR was allowed to be exhibited by the Insurance Company and no objection was raised about it’s

contents, the Tribunal was justified in placing reliance upon the said FIR, which attributed rash and negligent driving to the accused, resulting in death of the deceased and thereby invoking Section 304(A) of the IPC against the accused.

15. While answering the issue about the grant of claim, the Tribunal recorded that the amount of compensation claimed in the application is Rs.30,00,000/-. As far as the medical expenses are concerned, claimant No.1 had deposed that she had incurred expenses of Rs.2,75,000/- for the treatment and the medical bills for the total amount of Rs.1,50,000/- were produced on record at Ex-28.

16. Learned counsel for the claimants submitted before the Tribunal that other medical bills were lost and believing the said documents and considering the fact that the deceased was under treatment from the date of accident till 09/10/2000, the Tribunal granted the claim of medical expenses to the tune of Rs.2,00,000/-. The amount of Rs.20,000/- came to be awarded towards pain and suffering of the family since the deceased was hospitalized.

17. Considering the monthly income of the deceased to be Rs.15,000/- per month, which was depicted on the basis of the salary certificate exhibited through AW-2 and on the basis of the tax returns, the income was calculated as Rs.15,000/- and by

applying the multiplier of 15, the amount of Rs.18,00,000/- was arrived at as total loss to the family. In addition, an amount of Rs.10,000/- came to be awarded towards loss of consortium and loss of love and affection. An amount of Rs.10,000/- came to be awarded towards loss of expectation of life and additional amount of Rs.10,000/- towards loss of estate. An amount of Rs.5,000/- was awarded towards funeral expenses.

18. In totality, the compensation of Rs.20,55,000/- was awarded to the claimants with bifurcation as under:

Particulars	**Amount (Rs.)**
Medical Expenses	2,00,000.00
Pain and Suffering	20,000.00
Loss to the family	18,00,000.00
Loss of consortium	10,000.00
Loss of expectation of life	10,000.00
Loss of estate	10,000.00
Funeral expenses	5,000.00
Total ...	**20,55,000.00**

19. The opposite party Nos.1 and 2 and the insurer were jointly and severally held liable to pay an amount of Rs.20,55,000/- inclusive of the amount under Section 140 of the Motor Vehicles Act towards No Fault Liability compensation along with the future interest at the rate of 7.5% per annum from

the date of filing of the application till the date of realization. The apportionment of the compensation amount was also directed in the judgment and claimant Nos.2 and 3 were held entitled for compensation of Rs.3,00,000/- each, out of which, an amount of Rs.1,00,000/- was directed to be invested in Fixed Deposit for five years. Claimant No.4, the mother, was held entitled for an amount of Rs.2,00,000/- along with interest and the remaining amount was directed to be paid to claimant No.1.

20. On perusal of the impugned judgment, where compensation is awarded to the claimants on the basis of the loss of the earning member of the family, I do not feel that there is any scope for interference. The Insurance Company contests grant of compensation on the ground that the compensation is awarded, without the negligence being pleaded and proved and, the liability which is to be fastened under the Motor Vehicles Act being based on TORT, it is necessary to prove negligence. The aforesaid submission deserves to be rejected since no contrary evidence is brought on record to prove that the deceased was negligent or he was responsible for contributing to the negligence. As against the claim of the claimants that the accident occurred due to rash and negligent driving of the car driver, since the FIR as well as the death certificate and the postmortem report filed on record, indicate that the deceased died an accidental death and since the FIR records that the deceased was standing at the bus stop, when he was hit by the

offending vehicle, which was being driven rashly and negligently and this assertion contained in the FIR being not disputed by the Insurance Company and the FIR is permitted to be exhibited by applying the principle of *res ipsa loquitur,* the Tribunal is justified in holding that the accident took place on account of rash and negligent driving of the offending vehicle, which is insured with the Insurance Company.

21. As far as the claim of the Insurance Company about awarding the amount exorbitantly is concerned, every head under which the compensation has been awarded under the impugned award, is accounted for and since the salary certificate (Exh.27) depicts the income of the deceased at Rs.15,000/-, which was not controverted by the Insurance Company, the income of the deceased had come on record.

22. Considering that the age of the deceased is between 40 and 50 years, multiple of 15 has been applied. The claim of the Insurance Company that the salary of the deceased ought to have been presumed, at the most, at Rs.3,000/- is a baseless argument, which does not require any consideration. The claimants have examined AW-2, who established the employment of the deceased and also his earning at Rs.15,000/- per month. In the wake of the above, since no fault can be found in the impugned judgment and order, directing payment of compensation in favour of the claimants, the first appeal deserves to be dismissed

and is dismissed.

23. On dismissal of the first appeal, the Insurance Company shall make payment of compensation to the respondents and the share of respondent No.4 shall be paid to respondent Nos.1 to 3, who are her legal heirs.

24. The appellant shall ensure that the balance amount of compensation is deposited in the Tribunal within a period of six weeks from today and the Tribunal is directed to release the payment in favour of the claimants on dismissal of the first appeal. On failure to deposit the said amount, the Tribunal shall permit execution against the Insurance Company. In the wake of dismissal of the first appeal, Interim Application No.1 of 2019 is also disposed off.

[SMT. BHARATI DANGRE, J.]

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