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

FIRST APPEAL NO.36 OF 2021

Appellant : **Regional Manager,**
(On R.A.) National Insurance Co. Ltd.
(Orig. Resp. No.2) Office at Gokulpeth, Nagpur,
through Manager at Regional Office at 5th Floor,
Fidvi Tower, Mount Road, Sadar, Nagpur.

-- Versus --

Respondents : **1] Dr. Satyaprakash Rajput,**
(On R.A.) Aged 47 years, Occ. Not Known.
(Orig. Resp.No.1) R/o 76, Shankar Nagar, Nagpur or
R/o 1397 Napier Town, Jabalpur (MP).

(Orig. Claimants) **2] Smt. Vaishali wd/o Sunil Gadge,**
On R.A. Aged 36 years, Occ. Housewife.

3] Ku. Shreya s/o Sunil Gadge,
Aged 14 years, Occ. Nil.

4] Ku. Jivika s/o Sunil Gadge,
Aged 10 years, Occ. Nil.

Resp. Nos.3 & 4 being minor,
through Mother Resp. No.2.

Resp. No.2 to 4 R/o At Ajay Nagar,
Behind Dr. Golhar's Clinic, Hill Top, Ambazari,
Nagpur.

=-=
Mrs. Anita Mategaonkar, Advocate for the Appellant.
Shri A.R. Rishi, Advocate for Respondent Nos.2 to 4.
=-=

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATE : 23rd FEBRUARY, 2021.

ORAL JUDGMENT :-

The Appellant-Insurance Company has challenged the impugned judgment and award, dated 18/02/2019 passed by the Motor Accident Claims Tribunal, Yavatmal (hereinafter shall be referred to as the 'Tribunal' for short) in M.A.C.P. No.1229/2012.

02] By the impugned judgment and award, the Tribunal has awarded compensation of Rs.19,32,130/- inclusive of the compensation paid under Section 140 of the Motor Vehicles Act, 1988 (hereinafter shall be referred to as the "Act" for short) with interest at the rate of Rs.7.5% per annum from the date of petition till its final realization.

03] The Respondent Nos.2, 3 & 4, who were the Claimants in the petition filed under Section 166 of the Act, shall be hereinafter referred to as the 'Claimants'.

04] The Claimant No.1 is the widow and Claimant Nos.2 & 3 are the children of Sunil Gadge, who died due to the injuries sustained in a motor vehicular accident. It is the case of the Claimants that on 01/11/2012, deceased-Sunil Gadge was the pillion rider on motorcycle bearing No.MH-31/DH/1280. It is alleged that the driver of the offending vehicle i.e. WagonR Car bearing No.MP-20/FA/6453, suddenly opened the door of the car without observing traffic rules. As a consequence, the motorcycle dashed against the door. Said Sunil Gadge, who was the pillion rider on the motorcycle, fell down and sustained fatal injuries. The Claimants stated that the death of said Sunil Gadge was caused solely due to rash and negligent act of the driver of the offending vehicle.

05] The Claimant stated that the deceased was 38 years of age. He was a property dealer and was earning Rs.20,000/- per month. It is stated that the deceased was the only earning member. The Claimants, therefore, filed an application under Section 166 of the Act claiming total compensation of Rs.1,00,000/- from the owner and the insurer of the offending vehicle.

06] Respondent No.1, who is the owner of the vehicle, as well as the Appellant-Insurance Company raised a plea of composite negligence and non-joinder of necessary party to the driver, owner and the insurer of the motorcycle involved in the accident. They denied that the accident was caused due to rash and negligent act of the driver of the offending vehicle. They further denied the age as well as the income of the deceased and also denied their liability to pay any compensation to the Claimants.

07] The Appellant-Insurance Company further claimed that the driver of the offending vehicle was not holding a valid and effective driving licence and denied its liability to indemnify the insured for breach of terms and conditions of the policy.

08] The Tribunal, upon considering the evidence on record, has held that the accident was caused due to rash and negligent act of the driver of the offending vehicle. The Tribunal held that the deceased was about 40 years of age and considered his annual income as Rs.1,48,970/-. The Tribunal added 25% of the amount towards future prospects, deducted 1/3rd towards personal expenses and upon applying multiplier of 15, computed loss of dependency at Rs.18,62,130/-. The Tribunal also awarded Rs.40,000/- towards loss of consortium and Rs.30,000/- towards loss of estate and funeral expenses. The Tribunal thus awarded total compensation of Rs.19,32,130/-. This judgment and award is under challenge in the present appeal filed under Section 173 of the Act.

09] Mrs. Anita Mategaonkar, learned Counsel for the Appellant contends that the driver of the offending vehicle had driven the vehicle without a valid and effective driving licence. She further states that the number of driving licence was not mentioned in Form-AA (Exh.38) and Report under Section 158(5) & (6) of the Act. She further submits that the concerned Police Officer had not submitted the report within 30 days from the date of recording of the information. She, therefore, contends that there was breach of sub-sections (5) & (6) of Section 158 of the Act. She has further submitted that the Claimants have not examined any independent witness to prove the issue of rash and negligent act. It is also stated that the Appellant-Insurance Company was not afforded adequate opportunity to examine the driver of the offending vehicle and the concerned Police Officer to prove the defence of breach of terms and conditions of the policy.

10] *Per contra,* Shri A.R. Rishi, learned Counsel for the Claimants submits that the driver of the offending vehicle had suddenly opened the door of the vehicle, which hit the motorcycle on which the deceased was the pillion rider. He submits that the driver of the vehicle was charge-sheeted for causing death of the deceased-Sunil Gadge due to his negligent act. He submits that the Appellant-Insurance Company did not adduce evidence despite opportunity given. He further submits that the compensation awarded by the Tribunal is not "just compensation" and that this Court can enhance the compensation even in the absence of cross-objection. He also submits that the deceased was 38 years of age and a property dealer. He had produced Income Tax Returns, which were submitted prior to the date of accident. He submits that the Tribunal has erred in considering the aggregate average income, when the Income Tax Returns filed before the date of the accident amply prove that the income of the deceased was Rs.1,75,464/- per annum. The deceased was 38 years of age and as such as per the dictum of the Apex Court in *National Insurance Company Ltd. vs. Pranay Sethi & others - 2018(3) Mh.L.J. 70,* 40% of the income ought to have been added towards future prospects. He, therefore, submits that the compensation awarded by the Tribunal needs to be enhanced.

11] I have perused the record and considered the submissions advanced by the learned Counsel for the respective parties. The points for my consideration are -

- **i.** Whether the accident was caused due to rash and negligent act of the driver of the offending vehicle?
- **ii.** Whether the Appellant-Insurance Company is not liable to indemnify the insured for breach of terms and conditions of the policy?
- **iii.** Whether the compensation awarded by the Tribunal is 'just compensation'?

12] It is not in dispute that deceased-Sunil Gadge had expired as a result of the injuries sustained in a motor vehicular accident, involving WagonR Car bearing No.MP-20/FA/6453. It is the case of the

Claimants that the driver of the said Car had suddenly opened the driver's side door of the Car without any indication, due to which the motorcycle on which the deceased was a pillion rider, dashed against the door of the WagonR. The Claimants have relied upon the F.I.R. at Exh.34 and other investigation records at Exh.35 to Exh.38. A perusal of the said documents clearly indicates that charge-sheet had been filed against the driver of the offending car for causing death of Sunil Gadge due to his rash and negligent act. The Respondents have not examined the driver of the offending vehicle and have not adduced any rebuttal evidence to explain the circumstances under which the accident was caused.

13] It is to be noted that in the petition filed under Section 166 of the Act, the issue of rash and negligent act has to be established on the touchstone of the preponderance of probabilities. In the instant case, the evidence on record sufficiently proves that the accident was caused due to sudden opening the door of the car on a public road. The driver of the vehicle had by this negligent act endangered the life and safety of other users of the road. The deceased, who was a pillion rider, was not in any manner responsible for the accident. Even if, it is construed as composite negligence, it is well settled that the injured or the legal representatives of the deceased can proceed against any one of the tortfeasors to recover the compensation.

14] The Appellant-Insurance Company has raised the plea of breach of terms and conditions of the policy. It is well settled that the onus is always upon the Insurance Company to prove that the driver had no valid driving licence and that there was breach of terms and conditions of the policy. In the instant case, the Appellant-Insurance Company had filed an application for directing the Police Authority to produce the driving licence. Order dated 28/01/2009 indicates that the Counsel for the Respondent-Insurance Company was absent and that the Insurance Company had not adduced evidence though the Claimants had closed their evidence on 29/01/2018. It was under these circumstances that the Tribunal had closed the evidence of the Respondents. Having failed to adduce evidence, despite opportunity given, the Appellant-Insurance Company cannot now complain that no opportunity was given to them to adduce evidence.

15] Be that as it may, in *National Insurance Co. Ltd. vs. Swaran Singh & others – (2004) 3 SCC 297*, the Apex Court has held that to avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time. In the instant case, the Appellant-Insurance Company has failed to establish “breach” on the part of the owner of the vehicle and has further failed to prove that absence of the driving licence was the main or contributory cause of action. The delay in lodging the F.I.R. or not furnishing the particulars of the driving licence in Form-AA are not the grounds on which the Appellant-Insurance Company can be absolved of its liability of indemnifying the insured. The offending vehicle was duly insured by the Appellant-Insurance Company and having failed to prove “breach”, the Appellant-Insurance Company is liable to indemnify the insured.

16] As regards the quantum of compensation, the evidence on record clearly indicates that the deceased was born on 05/06/1972. he was about 40 years of age as on the date of the accident. The evidence of CW-1 Smt. Vaishali reveals that the deceased was a property dealer and he was self-employed. She has produced Income Tax Returns for the assessment years 2008-2009, 2009-2010 and 2010-2011 at Exh.41 collectively. These Income Tax Returns were filed prior to the date of the accident. The Income Tax Return for the year 2008-2009 shows that the deceased had declared his annual income as Rs.1,19,655/-. The income for the assessment year 2009-2010 was Rs.1,51,790/-. Whereas, the Income Tax Return filed immediately before the death of the deceased for the assessment year 2010-2011 indicated that the income of the deceased was Rs.1,75,464/-. The Tribunal, in my considered view, was not justified in computing the compensation on the basis of average income of these three assessment years. As noted above, the Income Tax Return for the assessment year 2010-2011 were filed prior to the date of the accident and indicated that the income of the deceased prior to his death was Rs.1,75,464/- and the tax payable on the said amount was Rs.674/-. Thus, the Tribunal was required to compute the compensation on the basis of the annual income of Rs.1,74,790/- and not on an average income of Rs.1,48,970/-.

17] The income of the deceased was Rs.1,74,790/- per annum. The deceased was self-employed and was within the age group of 41 to 45 and, hence, as per the decision of the Apex Court in *Pranay Sethi (supra)*, 25% amount is required to be added towards future prospects. Hence, upon adding this 25%, the amount works out to Rs.2,18,488/-. Considering the number of dependents and upon deducting 1/3rd towards personal expenses, the income works out to Rs.1,45,659/-. The deceased was above 40 years of age and, hence, on applying appropriate multiplier of 14, loss of dependency works out to Rs.20,39,226/-. Claimant No.1, being the widow and Claimant Nos.2 & 3, being the minor children of the deceased, are entitled for compensation of Rs.40,000/- each towards loss of spousal consortium and parental consortium. In addition, the Claimants are also entitled for compensation of Rs.30,000/- towards loss of estate and funeral expenses. The Claimants are, therefore, entitled for total compensation of Rs.21,89,226/-, which in my view is 'just compensation'.

18] It is pertinent to note that the Claimants had sought compensation of Rs.1,00,000/-. In the case of *Nagappa vs Gurudayal Singh & others - (2003) 2 SCC 274,* the Apex Court has held that the only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation. Hence, the Claimants cannot be deprived of just compensation for the reason that they had claimed compensation of Rs.1,00,000/- or for the reason that they have not filed cross-objection. Reliance is placed on the recent decision of the Apex Court in *Surekha & others vs. Santosh and others – 2020 ACJ 2156* and the decision of the Division Bench of this Court in *National Insurance Co. Ltd. vs. Vaishali Harish Devare & others – 2013(1) Mh.L.J. 411.*

19] Under the circumstances, it is held that the Claimants are entitled for enhanced compensation of Rs.21,89,226/-. Hence, the following order :

I. The appeal filed by the Appellant-Insurance Company is dismissed.

II. It is held that the Claimants are entitled for compensation of Rs.21,89,226/-/- with interest at the rate of 7.5% per annum.

III. The Appellant-Insurance Company to deposit the balance amount of compensation before the Tribunal, within a period of six weeks.

IV. Claimant No.1 shall be entitled to withdraw compensation of Rs.7,35,000/- with proportionate interest accrued thereon.

V. Claimant Nos.2 & 3 shall be entitled for compensation of Rs.7,27,113/- each with proportionate interest accrued thereon.

VI. Claimant Nos.2 & 3, being minors, the amount of compensation awarded in their favour with proportionate interest accrued thereon be invested in any nationalized bank under fixed deposits initially for a period of six years with further renewal till the period they attain the age of majority.

VII. The appeal stands disposed of accordingly with no order as to costs.

VIII. The Claimants to pay deficit court fees within four weeks.

IX. In view of the disposal of the present appeal, Civil Application (CAO) No.2365/2019 stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)

**sandesh*