

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

74 FIRST APPEAL NO.121 OF 2014

M/s. Shriram General Insurance Company Ltd.
10003 E-8 RIICO Industrial Area,
Sitapur, Jaipur, 302022
through its Officer (Legal)

**...APPELLANT
(Ori. Resp No.2)**

VERSUS

1. Manisha W/o. Rohidas Dahiphale,
Age-24 years, Occu- Household,
2. Dnyaneshwari D/o. Rohidas Dahiphale,
Age-2 ½ years,
Minor U/g of No. 1 above
3. Bhagubai Mahadeo Dahiphale,
Age-45 years, Occu-Household,
4. Mahadev Vinayak Dahiphale,
Age-50 years, Occu- Agriculture
5. Onkar Rohidas Dahiphale, **...Ori. Claimants**
Age-1 years, Minor U/g No. 1 above
All R/o. Malegaon (Chakla)
TQ. Shiriur (K), Dist. Beed
6. Shantappa Khandu Kavale, **...RESPONDENT**
Age-Major, Occu-Business,
Truck Owner,
R/o. House NO. 8/127, Mantha,
Tq. Basavkalyan, Dist. Bider (Karnataka)

Mr. Vinayak Narayan Upadhye, Advocate for the appellant

Mr. M. R. Deshmukh, Advocate for respondent Nos. 1 to 5

Mr. A. B. Kharosekar, Advocate for respondent No.6

CORAM : S. G. DIGE, J.

DATE : 01st August, 2022

JUDGMENT:

1. Being aggrieved and dissatisfied by the judgment and award passed by Member, Motor Accident Claim Tribunal, Beed the present appeal is preferred by original respondent No.2-Insurance Company.

2. Brief facts of the case are as under:-

a] On 11-12-2010, the deceased Rohidas Dahiphale was proceeding on motorcycle TVS Star bearing registration No. MH-45-R-8976 alongwith one Hanumant Vitthal Kumabhar. The deceased was driving the said motorcycle in slow and

moderate speed from its correct side and going to Hadapsar, Pune. When the deceased reached in the vicinity of Boripardhi, Tq. Daund, Dist. Pune at Chaufala Chowk on Solapur-Pune Highway at about 04.00 pm, one truck bearing registration No.KA-39/6413 [for short 'the offending truck'] came from back side in high and excessive speed and in rash and negligent manner and gave forceful dash to the said motorcycle of the deceased from the backside. Due to which the deceased and pillion rider Hanumant Kumbhar fell on the road and sustained grievous injuries on their person. The deceased came under the wheel of offending truck and died on the spot. Pillion rider sustained injuries. On the same day, Hanumant lodged first information report in respect of the accident. A crime was registered against the driver of the offending truck.

b] The respondent Nos.1 to 5 legal heirs of deceased had filed claim petition before the Motor Accident Claim Tribunal (for short 'the Tribunal') for compensation. After considering the evidence on record, and after hearing the parties, the tribunal has granted compensation of Rs.22,32,000/- to the claimants. The said judgment and order is under challenge.

3. The learned counsel for the appellant has raised two grounds in his submission; 1) sole negligence of deceased; and 2) quantum of salary of the deceased considered by the tribunal is on higher side. It is the contention of the learned counsel for the appellant that the accident was occurred due to sole negligence of the deceased. The deceased first gave dash to the divider and fell on ground. Thereafter, he came under the wheel of truck. Spot panchanama also corroborates that

the accident was occurred near divider. The learned counsel for the appellant further submits that the salary of deceased considered by the tribunal is on higher side. The evidence of PW-2 shows that deceased was getting less salary. But, the tribunal has considered Rs.9000/- salary which is inappropriate and on that basis calculations are done. Salary slip shows deceased was getting salary of Rs.6483/-. If the professional tax of Rs.75 is deducted from it, it comes to Rs. 6308/-. But, this salary was not considered by the learned tribunal and it is considered as Rs.9000/- which is on higher side.

4. It is the contention of the learned counsel for the respondents that the grounds raised in respect of sole negligence of deceased was not pleaded in the written statement filed by the appellant-the original

respondent No.2 before the tribunal. Hence, at this stage, this ground cannot be considered. The First Information Report was lodged immediately after the accident. In the said report it is mentioned that the accident was occurred due to dash by the offending truck from the backside. The first information report was lodged by the pillion rider. Hence, it cannot be ignored. The learned counsel further submits that to prove their case, the appellant did not examine the driver of the offending truck. In the evidence of Mahesh Sarnaik [PW-2] it has come on record that the deceased would have got Rs.9000/- per month as salary. On that basis, the trial court has awarded compensation. The judgment and order passed by the tribunal is legal and valid.

5. I have heard all the learned counsels for the parties. Perused the judgment and order

passed by the tribunal.

6. The issues involved in this appeal is whether the accident was occurred due to sole negligence of the deceased and whether while awarding the compensation, salary of deceased is considered on higher side. Firstly I would deal with the issue of sole negligence. The accident was occurred on 11-12-2010, and first information report is lodged on same day by Hanumant Kumbhar who was pillion rider on the vehicle of the deceased. His oral evidence is at Exh.45/C, he has stated that when he and deceased were proceeding on the motorcycle towards Pune, the driver of the offending truck was driving truck in rash and negligent manner and without following traffic rules. He gave dash to the motorcycle from the backside. The deceased Rohidas sustained grievous injuries and died on the spot. This witness also

sustained grievous injuries. On the same day, this witness lodged the complaint against the driver of the offending truck. Said accident was occurred due to negligence of the driver of the offending truck.

7. In cross-examination this witness admitted that the deceased was driving the motorcycle and his motorcycle touched to the divider and he fell down and died. When specific suggestion was given to this witness that offending truck did not dash their motorcycle. This witness denied the said suggestion. This witness also denied the suggestion that the accident was occurred due to negligence of deceased-Rohidas.

8. The spot panchanama Exh.34 shows that accident occurred in the square and between the open space of two dividers. The spot panchanama

shows that the motorcycle was completely damaged from the backside. It proves that dash was given from backside. From the spot panchanama, it also shows that the offending truck was standing on the road and driver side guard of the said truck was damaged. There was damage to the bumper from the driver side, it was pressed in inner side. It shows dash was given to the motor cycle. There is no pleading in the written statement of the appellant that the said accident was occurred due to dash given by the deceased to the divider. Mere admission of the witness that the accident was occurred due to dash given to the divider and fell on the road, cannot be considered as a gospel truth, when it appears from the record that immediately after the accident, the first information report was lodged and in the said report, it is mentioned that dash was given from the backside to the motorcycle by

offending truck. The spot panchanama shows that the motorcycle was completely damaged from the backside. Had it been it skidded on the road by giving dash to the divider. It could not have been damaged from the backside. Nor there was damage caused to the guard of offending truck on front side. It proves the negligence of the driver of the offending truck and not the deceased. Moreover appellant has not examined driver of the truck to prove sole negligence of deceased. In absence of cogent evidence theory of sole negligence cannot be accepted.

9. The issue in respect of consideration of salary of the deceased on higher side the tribunal has considered Rs.9000/- monthly income of the deceased. It has come in the evidence of PW-2 Mahesh Sarnaik, who is employer of the deceased that the deceased was working in their company as security guard. He

was permanent employee of their company. There are 3 types of working hours given to the security guard i.e. 8 hours, 12 hours and 16 hours. Salary of Rs.24.32 paise per hour was given to the security guard. Exh. 43 and 44 are the salary slips of the deceased for the month of November, 2010. As per Exh.43 salary of Rs.5083/- is shown and working for more hours salary is given of Rs.3227/-. So, the salary of Rs.8310/- was given to the deceased for November, 2010. He further stated that considering the total salary and dareness allowance, the deceased would have got Rs.9000/- per month. The tribunal has considered Rs.9000/- per month as salary of the deceased, but no specific reasons are given for that. In my view the deceased was permanent employee, he was getting salary more than Rs. 5000/- per month. He was working for extra hours hence got more salary. Every month the

deceased must have been working for extra hours that's why he got more salary and PW-2 has stated that deceased would have got Rs.9000/- per month as salary. As deceased has received Rs.8310/- salary for last month, hence, I am considering his last month salary i.e. Rs. 8310/- as income of the deceased.

10. On the basis of it, the respondents/original claimants are entitled for following amount:-

Sr. No.	Particulars	amount
1.	Monthly income	Rs.8310/-
2.	50% addition towards future prospects (deceased in permanent employment salary slip on record with PF and tax deductions as per Pranay Sethi Judgment)	Rs.4155/-
3.	Monthly income after addition of future prospects	Rs.12,465/-
4.	Deduction towards personal and living expenses 1/4th (since number of	Rs.3116/-

dependents are 5)

5. Dependency monthly income (Rs.13500-3375) Rs.9349/-
6. Multiplier (17 instead of 18 as adopted by tribunal) 17
deceased was 26 years of age as per Exh.41
School leaving certificate
7. Dependency Compensation Rs.19,07,196/-
(9349x12x17)
8. Non pecuniary
 - a] consortium to each claimant @ Rs.40,000/-=
Rs.2,00,000/- 5 claimants
(5x40,000) (As per the Magma General Insurance Co. Ltd. V Nanu Ram Churu Ram reported in (2018) 18 SCC 130)
 - b] Loss of Estate Rs.15,000/-
 - c] Funeral Expenses Rs.15,000/-
9. Total Compensation Rs.21,37,196/-
(Rs.19,07,196 Plus Rs.2,30,000)

Tribunal has awarded
Rs.22,32,000/-

22,32,000 - 21,37,196= Rs.94,804

11. The tribunal has awarded

(14)

fa121.14

Rs.22,32,000/-. It will be reduced by Rs.94,804/-. The respondent Nos. 1 to 5 have to refund this amount to the appellant. In view of above, I pass the following order.

ORDER

- a. The appeal is partly allowed.
- b. The respondent Nos. 1 to 5 shall refund amount of Rs.94,804/- to the appellant, if it is withdrawn by them.

[S. G. DIGE, J.]

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