

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

FIRST APPEAL NO.926 OF 2018

Sow Sundrabai w/o Rajendra Jaybhaye,
Age : 43 years, Occu.: Household,
R/o.: Wamanbhau Nagar, Pathardi,
Taluka Pathardi, District : Ahmednagar

.... APPELLANT
(Orig. R./No.1)

VERSUS

1. Smt. Chaya w/o Vishwas Sasane,
Age : 33 years, Occu.: Household,
R/o.; Sirsathwadi, Taluka Pathardi,
District : Ahmednagar.
2. Master Vaibhav s/o Vishwas Sasane,
Age : 14 years, Occu.: Education,
R/o.: As above.
3. Ku. Priti d/o Vishwas Sasane,
Age : 11 years, Occu.: Education,
R/o.: As above.

(Respondent Nos. 2 & 3 are minor
under guardian their mother
Respondent No.1).

4. Bhaskar s/o Waman Sasane,
(Deleted as per order dated 14/07/2017)
5. Shobha w/o Bhaskar Sasane,
Age : 55 years, Occu.: Household,
R/o.: Sirsathwadi, Taluka : Pathardi,
District : Ahmednagar.
6. The New India Assurance Co. Ltd.
C/o.: Divisional Manager,

Abbot Building, Behind Ashoka Hotel,
Nagar Aurangabad Road,
Ahmednagar.

... RESPONDENTS
(R.No.1 to 5 are Orig.
Petitioner & R.No.6
Original Respondent No.2)

.....
Advocate for Appellant : Mr. S. S. Jadhavar h/f
Mr. Manoj R. Khutwad
Advocate for Respondent Nos.1 to 3 and 6: Mr. R. B. Dhakane
Advocate for Respondent No.6 : Mr. S. G. Chapalgaonkar

....
CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 23/09/2022
PRONOUNCED ON : 22/11/2022

....

JUDGMENT :

1. The appellant i.e. original respondent No.1 and the owner of the offending jeep involved in the accident, has preferred this appeal challenging the judgment and award passed by the learned Motor Accident Claim Tribuna, Ahmednagar (hereinafter referred to as the learned Tribunal) in M.A.C.P. No. 466 of 2006, whereby the learned tribunal has directed the appellant to pay compensation to the present respondent Nos.1 to 5 i.e. the original claimants by exonerating the present respondent No.2 - insurance company from the liability of paying compensation. During the pendency of this appeal, respondent No.4 - Bhaskar s/o Waman Sasane i.e. father of the deceased, expired and therefore, his name was deleted under the order dated 14/07/2017.

2. The appellant has filed this appeal only on the ground that the learned Tribunal has wrongly exonerated the insurance company from the liability of paying compensation without

considering the nature of policy and without there being any evidence that the offending jeep was being driven at the relevant time for hire and reward purpose. The learned counsel for the appellant pointed out that the offending jeep was insured with respondent No.2 - insurance company at the time of accident under a comprehensive policy and therefore, the insurance company was certainly liable for paying compensation to the original claimants. He further, submits that the insurance company in its written statement had contended that the jeep was being used for hire and reward purpose at the time of accident and therefore, the burden of proving the said fact was definitely upon the insurance company by leading satisfactory evidence. He pointed out that despite such defence was raised, the insurance company did not lead evidence. The appellant not being an eye witness of the accident, could not have been burdened to establish the said fact since it was not the case of appellant at all. The learned counsel for the appellant further pointed out that the learned Tribunal has drawn wrong inference that the deceased was a fare paying passenger only on the basis that the respondent No.1 had admitted that she was not related to the appellant.

3. On the contrary, the learned counsel for respondent No.2 - insurance company supported the impugned judgment and stated that the learned Tribunal rightly held that the deceased was a fare paying passenger at the time of incident and therefore, under the terms and conditions of insurance policy, his risk was not at all covered. In the alternative, the learned counsel for the insurance company submitted that if this court comes to the conclusion that the insurance company is also liable for paying compensation, then the pay and recover order be passed.

4. On the other hand, the learned counsel for the original claimants, who are the present respondent Nos.1 to 3 & 5, vehemently argued that this court may fix the liability of paying compensation upon the insurance company along with the appellant but the compensation needs to be increased or enhanced since the learned Tribunal has wrongly considered the income of the deceased as Rs.3,000/- per month. He pointed out that in the light of subsequent judgments, the future prospects and types of consortium for which the claimants are entitled, also to be awarded. He relied on the following judgments.

- I) Maj. Genl. A.S. Gauraya and another vs. S. N. Thakur and another, reported in AIR 1986 SC 1440;*
- II) Reliance General Insurance Co. vs. Manju wd/o. Vikram Choudhary and others, reported in 2021 (6) ALL MR 171;*
- III) Commandant, C.A.D. Camp, Pulgaon vs. Ashappa s/o Narsimalu Sahare, reported in 2022(4) ALL MR, 321;*
- IV) Vimla Devi and others vs. National Insurance Company Limited and another, reported in (2019) 2 SCC 186;*
- V) Ramla and others vs. National Insurance Company Limited and others, reported in (2019) 2 SCC 192 and*
- VI) Magma General Insurance Company Limited vs. Nanu Ram Alias Chuhru Ram and others, reported in (2018) 18 SCC 130 and others.*

5. Heard rival submissions and also perused the impugned judgment and award alongwith record and proceedings of the Motor Accident Claim Petition No. 466 of 2006.

6. Admittedly, the learned Tribunal has directed only the appellant to satisfy the award. Further, this appeal is filed only on

the ground that the insurance company is wrongly exonerated. It is not in dispute that the insurance policy, with which the offending jeep was insured, was valid and in force on the date of accident. Further, it is not disputed that the said policy was a comprehensive policy and the jeep involved in the accident was insured as a private car. It is significant to note that though the insurance company in its written statement raised defence that the deceased was travelling in the jeep at the time of accident as a fare paying passenger and the jeep was being used for unauthorized purpose and in the breach of terms and conditions of the policy, but to establish the said fact, the insurance company has not led any evidence. On going through the impugned judgment it is evident that the learned Tribunal has drawn such inference only by relying upon the cross-examination of one of the claimants i.e. present respondent No.1- Chaya Vishwas Sasane. The learned Tribunal has observed that since the respondent No.1 Chaya had admitted that she was not related to the present appellant, the only inference to be drawn that the deceased was travelling in the offending jeep as a fare paying passenger and as she could not pointed out on what reason the driver of the offending jeep allowed the deceased to travel in the jeep. Though it is admitted that the jeep was insured as a private car, but the cross-examination of the claimant- Chaya clearly indicates that she had flatly denied the suggestion put to her by the insurance company that the deceased was travelling in the offending jeep at the time of accident as a fare paying passenger.

7. It is well settled that the burden of proving the facts is upon the person who asserts it. In the instance case, when the claimant - Chaya has clearly denied the suggestion that her

husband was occupant of the offending jeep as a fare paying passenger, then it was certainly for the insurance company to adduce specific and cogent evidence to establish the fact that the driver of the offending jeep was carrying the deceased as a fare paying passenger. Mere admission on the part of the claimant - Chaya in the cross-examination that she was not related to the appellant, cannot establish the fact that the deceased was a fare paying passenger. The deceased might be travelling in the said jeep gratuitously. Further, in that case, the policy of the jeep being a comprehensive policy was sufficient to cover the risk of such gratuitous passenger. Therefore, I come to the conclusion that the learned Tribunal has definitely made a serious mistake in drawing wrong inference merely by relying on the cross-examination of the claimant - Chaya that the deceased was a fare paying passenger in the offending jeep.

8. It is extremely important to note that the injured claimant had in fact relied on the judgment of this court reported in ***2010 AC 556 (Bom) Bombay High Court in New India Assurance Company Ltd. vs. Vimal Tanaji Salunkhe and others***, wherein it is held that there was no evidence adduced by the insurance company to prove its allegation that the vehicle was being used for hire and reward. It has also been observed in the said judgment that since the insurance company had not examined any eye witness to prove its contention, it was negatived. This court in the said judgment had in fact held that the Tribunal was justified in not absolving the insurer from its liability to pay the compensation. The said judgment was in fact squarely applicable in the instant matter, but the learned Tribunal unfortunately ignored this aspect, even though the facts of that case were identical with the facts of

instant case and wrongly gave too much weightage to the fact that the injured not being the relative of present appellant. Thus, in absence of any evidence from the insurance company such inference drawn by the learned Tribunal for exonerating the insurance company is totally erroneous.

9. The learned counsel for the claimants, who are present respondent Nos.1 to 3 and 5 has vehemently argued that the compensation was wrongly calculated by the learned Tribunal by ignoring the proved document in respect of income of the deceased. He pointed out that the learned Tribunal should have considered the income of the deceased to the extent of Rs.5,500/- per month as mentioned in certificate Exhibit-29 issued by the employer Shivram Namdeo Khedkar, who was also examined as witness No.2 of the claimants for proving the contents of the aforesaid salary certificate. The learned counsel for the original claimants also submits that there is no necessity of filing cross-objection or cross-appeal for the purpose of enhancement of the compensation since it is the duty of the Tribunal or the higher courts to determine just compensation considering the nature of litigation being a beneficial one. He relied on following judgments.

10. In reply to the submissions made on behalf of original claimants, the learned counsel for respondent No.6 - the insurance company also relied on following judgments mentioning that in what circumstances the court can decide just compensation.

1) Ranjana Prakash and others vs. Divisional Manager and another, reported in 2011 DGLS (SC) 590 and

II) United India Insurance Company Limited vs. Rajani Suresh Bhore and others, reported in 2017 DGLS (Bom.) 2302.

11. This court has already arrived at a conclusion that respondent No.6 - insurance company under the comprehensive policy, which is exhibited in other accident claim arising out of the same accident, is liable to pay compensation alongwith the appellant to the claimants jointly and severally. Under such circumstance, the important aspect is that whether in absence of any cross-objection or cross-appeal, this court can enhance the compensation amount granted by the learned Tribunal. The learned counsel for the respondent No.6- insurance company heavily relied on the judgment of the Hon'ble Apex Court in ***Ranjana Prakash*** (supra), wherein following observation is made:

"8. *Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner / insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner / insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation.*"

Thus, he contends that the High Court cannot obviously increase the compensation in an appeal by owner / insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation. Further, he has also relied on the judgment of this court in the case of ***United Insurance Company Ltd. Vs. Rajani*** (supra), wherein it has been observed in para No.37 as follows :

"37. *Courts do bear this in mind. If a claimant wants a substantive increase, and it is not shown that the award is less than just, then an appeal is required. The court and the opposing insurer must know the grounds on which enhancement is sought. it is not to be left to sheer guesswork, leave alone to whim an caprice. After all, the concept of 'just' includes the concept of moderation and balance.*"

12. However, in the recent judgment passed by the Single Judge of this Court at Nagpur in the case of ***Reliance General Insurance Co. vs. Manju Vikram Choudhary and others*** (supra) this court has considered its another judgment at Principal Seat of Bombay in the case of ***Kelkar and Kelkar vs. Shripad Narayan Gore and others (First Appeal No. 956 of 2022)***, wherein the case of ***Ranjana Prakash*** (supra) is discussed. It is held that there is no necessity of filing any cross-appeal or cross-objection by the claimant for seeking enhancement of the claim. In the aforesaid judgment in para 14 & 15 it is observed as follows :

"14. *Similar view has been taken in Choramandalam Ms General Insurance Company Ltd. vs. Sumitra Wd/o. Debu Vishwa in First Appeal No. 1116 of 2015 as well as in United India Insurance Co. Ltd. and others vs. Kunti Binod Pande and others. in First Appeal (St.) No. 5735 of 2016. In the case of Choramandalam (supra), learned Single Judge of this Court (R. D.*

Dhanuka, J.), after considering the above referred judgments has held thus :

"37. In so far as the judgment of Supreme Court in case of Ranjana Prakash and Others vs. Divisional Manager and Anr. (supra) is concerned, the said judgment has been interpreted by this Court in various judgments already referred to to aforesaid and after considering the later judgment of the Supreme Court, it is held by this Court that filing of substantive appeal or cross-objection by the Claimant for seeking enhancement of the claims is not necessary. The principles of law laid down by the later judgment of Supreme Court and this Court in large number of judgments referred to aforesaid, apply to the facts of this case."

15. As stated earlier, a statutory duty has been cast on the Tribunal to award 'just compensation'. The appeal being continuation of original proceedings, the Appellate Court is also bound by the statutory mandate to determine 'just compensation' notwithstanding the quantum of compensation claimed by the Claimants. This is the power conferred on the Court under Order XLI 33 of the Code of Civil Procedure to do complete justice to the parties. Hence, it is reiterated that there is no restriction to enhance the compensation in appropriate cases even in the absence of cross appeal or cross- objection."

13. Thus, now it is settled in the light of subsequent judgment of the Hon'ble Apex Court that there is no necessity of substantive appeal or cross-objection by the claimant for seeking enhancement of the claim. As such, the submission of the learned counsel for respondent No.6 - insurance company that a substantive appeal for cross-objection is required by the claimant for seeking enhancement of the compensation amount, has no force.

14. Further, this court in the aforesaid judgment in case of *Reliance General Insurance Company* (supra) has also observed that the manner of determination of compensation has changed under the subsequent judgment of the Hon'ble Apex Court when decision of *Sarla Verma (2009(4) ALL MR 429* was modified in subsequent cases of *Pranay Sethi [2018 ALL SCR 953]* and *Magma General Insurance Co. Ltd. vs. Nanu Ram Alias Chuhru Ram (2018) 18 SCC 130*, whereby heads of compensation towards future prospects and types of consortium were added. It is specifically held further that benefit of aforesaid changes needs to be given to the claimants not only in prospective manner but also in all pending proceedings and even in the pending appeals. Therefore, considering this aspect I have to work out the compensation amount afresh by taking in to consideration the subsequent mode of calculating the compensation as per the observation in the aforesaid subsequent judgments.

15. The learned counsel for the claimants, who are respondent Nos.1 to 3 and 5 have already submitted written notes of argument inclusive of calculation of compensation by relying on the circular whereby income of a skilled person is held to be Rs.9,000/- per month as reflected in notification issued by the Central Government under Section 4 of the Employees Compensation Act. However, such notification cannot be relied upon for computing the amount of compensation but the evidence on record needs to be scrutinized in respect of income of the deceased. The learned Tribunal has considered the notional income of the deceased to the tune of Rs.3,000/- per month and then calculated the amount of compensation to the extent of Rs.4,75,000/- inclusive of 'no fault liability'. However, it is extremely important to note that the

claimants before the learned Tribunal had in fact examined the employer of the deceased, who had issued salary certificate. The said witness i.e. Shivram Namdeo Khedkar i.e. CW-2 has also proved the contents of the said salary certificate, which is at Exhibit-29. It appears that the learned Tribunal did not find the said certificate trustworthy merely on the ground that the said employer could not place on record the receipts relating to the payment made to the deceased Vishwas. Such approach of the learned Tribunal is *prima facie* erroneous since the said employer has categorically stated that he used to pay monthly salary of Rs.4,000/- per month alongwith per day Bhatta of Rs.50/- to the deceased. It was not proper on the part of the learned Tribunal to ignore such exhibited document in respect of income of the deceased duly proved by the concerned witness. As such, the compensation needs to be worked out afresh considering the income of the deceased to the tune of Rs.5,500/- per month.

16. By considering the income of the deceased as Rs.5,5,00/- per month, his yearly income comes to Rs.66,000/-. Further, as per the observation of the Hon'ble Apex Court in the case of ***Pranay Sethi*** (supra), 40% addition under the head of future prospects of the aforesaid amount considering the age of 29 years of the deceased is required to be added. On such addition, the yearly income of the deceased comes to Rs.92,400/-. Since the deceased was maintaining family of five members, the deduction on account of his personal expenses must be 1/4th as per the observation of the Hon'ble Apex Court in ***Sarla Verma*** (supra) case. By making such deduction, the amount of yearly income of the deceased comes to Rs.69,300/-. If an appropriate multiplier of 17 as per the ***Sarla Verma's*** (supra) case is applied to the aforesaid yearly

income, then the loss of dependency comes to Rs.11,78,100/-. Further, the amount of consortium as defined by the Hon'ble Apex Court in the case of *Magma General Insurance Co. Ltd.* (supra) comes to Rs.1,60,000/- i.e. Rs.40,000/- each in respect of the respondent Nos.1 to 3 & 5 - claimants. Moreover, an amount of Rs.15,000/- as funeral expenses and an amount of Rs.15,000/- towards the loss of estate are required to be added while determining the just and proper compensation. As such, respondent Nos.1 to 3 and 5 are now entitled for compensation of Rs.13,68,100/- (11,78,100 + 1,60,000 + 30,000). This court has already taken a view in its earlier judgment that the compensation granted under non-pecuniary heads such as consortium, funeral expenses and loss of estate in view of subsequent judgments shall not carry any interest. Therefore, the compensation of Rs.1,90,000/- granted in this matter under the aforesaid heads shall not carry any interest. The learned Tribunal has granted rate of interest @7.5 p.a. However, since I am deciding the compensation amount today, the prevailing rate of interest @ 6% p.a. will be applicable. In view of the same, following order is passed.

ORDER

- I) The appeal is hereby partly allowed and the judgment and award in M.A.C.P. No. 466 of 2006 passed by the learned Tribunal is hereby set aside to the extent of exonerating present respondent No.6 - insurance company from the liability of paying compensation.
- II) The appellant as well as respondent No.6 - insurance company shall jointly and severally pay the compensation of Rs.11,78,100/-

inclusive of 'No Fault Liability' amount to the respondents - claimant Nos.1 to 3 and 5 alongwith interest @6% p.a. from the date of motor accident claim petition till its realization within three months from the date of this judgment.

- III) The appellant and respondent No.6- insurance company shall also jointly and severally pay the amount of Rs.1,90,000/- (without any interest) to respondent Nos.1 to 3 and 5 in addition to the aforesaid amount of compensation within the same period.
- IV) The amount of compensation, if paid earlier by the appellant, be deducted from the aforesaid amount.
- V) Respondent Nos.1 to 3 and 5 shall pay the deficit court fees on the enhanced amount of compensation within two weeks after it is determined by the office.
- VI) Pending civil applications, if any, stand disposed of accordingly.
- VII) The appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)