

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.392 OF 2012
WITH
CROSS OBJECTION (STAMP) NO.15894 OF 2012
IN
FIRST APPEAL NO.392 OF 2012**

The Oriental Insurance Co. Ltd.Appellant

Versus

Mr. Walter Alexander Lobo and Ors. Respondents

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Mr. Sandeep S. Jinsiwale for the Appellant.

Mr. T.J. Mendon for Respondent Nos.1 and 2.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 17th JUNE, 2022.

P. C. :-

1. The appeal under Section 173 of the Motor Vehicle Act, filed by the Appellant-Insurance Company and the Cross Objection by Respondent Nos.1 and 2, who are the original Claimants assail Judgment and Award dated 06/08/2011 passed by M.A.C.T., Thane, in M.A.C.P No.236 OF 2007, partly allowing the application under Section 166 of the Motor Vehicles Act, 1988 and awarding compensation of Rs.19,70,383/- inclusive of N.F.L. amount of Rs.50,000/- along with interest @ 7% p.a. from the date of the application till its realisation.

2. The Claimants are the parents of the deceased Colin Walter Lobo, who expired in a motor vehicular accident on 26/02/2007. The deceased, who was a rider of motor cycle bearing No.MH-43-B-7166 was proceeding from Vashi to Kharghar by Palm Beach Road. It is the case of the Claimants that at Nakwa Sitaram Bhagat Chowk, a dumper bearing No. MH-04 CU 8402 came from Moraj Residency side without giving any signal and dashed against the motor cycle of the deceased. The rider, Colin Lobo sustained injuries in the accident and he was shifted to the Shushrusha Hospital. He succumbed to the injuries on 03/03/2007.

3. The Claimants alleged that the deceased was 20 years of age. He was working as a Manager in M/s. Spanco Tele System and Solutions Ltd., Deonar, Mumbai and was earning Rs.25,000/- per month. The Claimants have alleged that the death of Colin was solely due to the rash and negligent driving of the offending vehicle, which was insured with the Appellant-Insurance Company. The Claimants therefore filed an application under Section 166 of the Motor Vehicle Act claiming total compensation of Rs.30,00,000/-.

4. The owner and driver of the offending vehicle did not contest the proceedings. The Appellant-Insurance Company claimed that the accident was caused due to rash and negligent driving of the rider of the motorcycle. The Appellant-Insurance Company also denied its liability to indemnify the insured.

5. The Claims Tribunal upon considering the evidence adduced by the respective parties and relying upon the scene of accident panchanama, held that the deceased as well as the driver of the offending dumper was responsible for accident and that it was a case of contributory negligence. The Tribunal considered the income of the deceased @ ₹.18,000/- p.m. Considering the age of the deceased, the Tribunal applied the multiplier of 18 and deducting 50% towards personal expenses computed loss income at ₹.38,88,000/-. The Tribunal deducted 50% towards contributory negligence and assessed loss of dependency at ₹.9,72,000/-. The Tribunal also awarded compensation of ₹.5,02,383/- towards medical expenses, ₹. 4,86,000/- towards future prospect and ₹.10,000/- towards loss of estate and funeral expenses. Thus, the Tribunal awarded total compensation of ₹.19,70,383/-. Being aggrieved, the Appellant -Insurance Company as well as the Claimants have challenged this Judgment and Award.

6. Mr. Jinsiwale, learned counsel for the Appellant-Insurance Company claims that the accident was at a junction and was caused solely due to rash and negligent driving of the driver of the offending vehicle. He claims that the Tribunal has erred in attributing contributory negligence to the driver of the offending vehicle. While challenging the mode of assessment of the compensation, he submits that the Tribunal has not made any deductions towards personal expenses from the amount computed towards future prospects. He submits that the compensation awarded by the Tribunal is not just and reasonable.

7. Per contra, Mr. T.J. Mendon, learned counsel for the Claimants submits that the direct evidence of PW5 which proves negligence of the driver of the offending vehicle would prevail over the spot panchanama. He has relied upon the decision of the Supreme Court in *JJU Kuruvila and Ors. vs. Kunjamma Mohan and Ors.* {(2013) 9 SCC 166 to substantiate his contention that inference of negligence cannot be drawn from mere position of the vehicle as shown in panchanama. He contends that the Tribunal was not justified in attributing negligence to the deceased and in deducting 50% towards

contributory negligence. He further submits that the compensations awarded by the Tribunal on the other conventional heads is not in consonance with the decision of the Supreme Court in ***National Insurance Co. Ltd. Vs. Pranay Sethi and Ors. 2017 ACJ 2700***. He therefore contends that the compensation awarded by the Tribunal is not just and reasonable.

8. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

9. The challenge in this appeal and cross-objection is to the finding recorded on the issue of negligence and the quantum of compensation.

10. It is not in dispute that Collin, son of PW1, had expired due to the injuries sustained in a motor vehicular accident. Involvement of the offending vehicle in the said accident is also not in dispute. The evidence of PW5-Sunil Talekar indicates that on 26/02/2007 at 5.45 a.m. while he was waiting for a bus near Sanpada circle, he saw a motorcycle proceeding from Vashi towards Belapur. He has stated that a dumper came from Moraj Residency and while crossing the road, the dumper dashed against the motorcycle. He has stated that the driver

went ahead and fled from the scene of the accident. He and his friend Nitesh Chavan saw the rider of the motor cycle lying at the spot of the accident in an injured condition. He was unable to talk. They checked his pocket and found his identity card and a phone number of an advocate. They contacted the said Advocate and ascertained the identity of the injured. The said Advocate gave the phone number of Walter Lobo, Claimant No.1, the father of the deceased. They contacted the Claimant No.1 and informed him about the accident. He requested them to take the injured to the nearest hospital. PW5 has deposed that they admitted the injured in Shushrusha Hospital.

11. PW5 has categorically deposed that the accident was due to the negligence of the driver of the dumper. In his cross examination he has stated that his statement was not recorded by the police. He has denied the suggestion that he had learnt about the accident only after hearing the sound of impact. He has stated that the front portion of the dumper had dashed against the motor cycle and thereafter the rider fell in between rear front and wheel of the dumper. He has denied the suggestion that the motor cycle dashed against the dumper since the rider was unable to control the motorcycle due to high speed. He has stated that he had not seen the condition of the motorcycle as he was

busy attending to the injured.

12. The evidence of this witness proves that the accident was caused due to rash and negligent driving by the driver of the offending vehicle. His presence at the spot of the incident is not disputed. His evidence cannot be disbelieved merely because his statement was not recorded by the police. Moreso, when there is absolutely no material on record to indicate that this witness had reasons to depose in favour of the Claimants. The learned Judge has discarded the evidence of the witness without assigning any reasons and has attributed contributory negligence only on the basis of position of the vehicle and damage caused to the motorcycle as recorded in the panchanama. In this regard it will be relevant to refer to the decision in *Jiju Kuruvila* (supra) wherein the Hon'ble Apex Court while considering the contributory negligence held as under:-

“20.5. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be

drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.”

13. In the instant case, as stated above, there is a direct evidence of PW5 hence the learned Judge could not have involved the principle of res ipsa loquitur. Moreover, the driver of the offending vehicle had not stepped into the witness box and had not explained the circumstances under which the accident was caused. In the absence of any material to controvert the evidence of PW5, the Tribunal was not justified in discarding the evidence of PW5 and attributing negligence to the deceased. Thus, the findings of contributory negligence cannot be sustained.

14. As regards the quantum of compensation, the evidence on record reveals that the deceased was 20 years of age. The evidence of PW2, PW3 and PW4 vis-a-vis appointment letter at Exhibit 65, confirmation letter at Exhibit-66 and salary certificate at Exhibit-67 amply proves that the deceased was working as a manager in a private company. He had joined the said company in August-2006 and was appointed on probation for six months. After completing the probation period, he was confirmed in service on 28/03/2007. Salary certificate

at Exhibit-68, which is for the month of January-2007 reveals that as on the date of the accident, the deceased was earning gross salary of Rs. 18,629/-. Upon deducting amount of Rs.200/- paid towards travelling allowance, the income of the deceased is considered as Rs.18,429/- p.m. i.e. Rs.2,21,148/- per annum. The deceased was in permanent employment, hence as per the judgment of the Apex Court in *National Insurance Co. Ltd vs Pranay Sethi* in *Special Leave Petition (Civil) No.25590 of 2014*, 50% need to be added towards future prospect and considering that he was a bachelor 50% needs to be deducted towards his personal expenses. The deceased was 20 years of age hence applying multiplier of 18, loss of dependency works out to Rs.29,85,498/-. The Claimants are the parents of the deceased. Hence, they are entitled for filial consortium of Rs.88,000/-. The Claimants are entitled for compensation of Rs.33,000/- towards funeral expenses and loss of estate. The evidence adduced by the Claimants also proves that they had incurred expenses of Rs.5,02,383/- on the treatment of the deceased while he was admitted in Shushrusha Hospital. The Claimants are thus entitled for compensation as under:-

Head		Compensation awarded
(i)	Annual Income of the deceased	Rs.2,21,148/- (Rs.18429 x 12)
(ii)	Addition of 50% towards future prospects	Rs.2,21,148+50% =3,31,722

(iii)	Deduction towards personal expenses	Rs.3,31,722-50%=1,65,861
(iv)	Loss of dependency on applying multiplier of 18	Rs.1,65,861 x 18=29,85,498
(v)	Loss of estate and funeral expenses	Rs.33000/-
(vi)	Medical expenses	Rs.5,02,383/-
(vii)	Loss of filial consortium	Rs.88,000/-
	Total compensation	Rs.36,08,881/-

15. As stated earlier the Tribunal has awarded compensation of Rs.19,70,383/-. While the evidence on record indicate that the Claimants are entitled for total compensation of Rs.36,08,881/-, which in my considered view is just and reasonable compensation.

16. Under the circumstances, the Appeal has no merits and is accordingly dismissed. The cross objection is allowed. Appellant-Insurance Company is directed to pay to the Claimants additional amount of Rs. 16,38,498/- with interest @ 7% per annum from the date of petition till realization of the above amount. Award be modified accordingly.

17. In view of the disposal of the appeal, Civil /Interim Application (s), if any, stand (s) disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)