IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1001 OF 2022

1. Sandip Prakash Raut)
   40 years, Occ: Business,)

2. Yuvraj Prakash Raut)
   Age: 37 years, Occ: Service,)
   Both residing at 527, 'A' Ward,)
   Shivaji Peth, Kolhapur) ….Appellant
   (Original Claimants)

Versus

1. Vijay Santu Nangare)
   Age: 48 years, Occ: Business,)
   Residing at 4/401, Manik)
   Co-operative Housing Society,)
   Sitaram Jadhav Marg,)
   Lower Parel, Mumbai - 400 013)

2. Divisional Manager)
   ICICI Lombard General Insurance)
   Company Limited,)
   R/o. Hall No. 32, Omkar Plaza,)
   Bagal Chowk, Near ICICI Bank,)
   Kolhapur) ….Respondents

Mr. Jayant Bordeskar for the Appellants.
Ms. Varsha Chavan for the Respondents.

FIRST APPEAL NO. 721 OF 2022

ICICI Lombard General Insurance)
Company Limited)
2nd Floor, Meher House, Cawasji)
Patel Street,)
Fort, Mumbai 400 023 / Hall No. 32)
Omkar Plaza Bagal Chowk,)
Near ICICI Bank, Kolhapur.) ....Appellant

Versus

1. Sandip Prakash Raut)
   Aged 35 years, Occupation : Business)

2. Yuvraj Prakash Raut)
   Aged 32 years, Occupation: Service)
   Both residing at 527, A ward, Shivaji)
   Peth, Kolhapur.)

3. Vijay Santu Nangare)
   Aged 43 years, Occ : Business)
   R/o 4/401`, Manik Co-operative)
   Housing Society, Sitaram Jadhav)
   Marg, Lower Parel,)
   Mumbai - 400 013) ....Respondents

Ms. Varsha Chavan for the Appellants.
Mr. Jayant Bordeskar for the Responents.

CORAM : SHIVKUMAR DIGE, J.

DATE : 28 MARCH 2023.

JUDGMENT :

1. By way of this appeal appellants/claimants are seeking enhancement of compensation. The respondent/insurance company also preferred the appeal against the impugned judgment and order. As both appeal are arising out of the same judgment and order, I am deciding it by common judgment.

2. It is contention of learned counsel for the appellants/claimants that deceased was riding on motorcycle as a pillion rider then also the Tribunal has considered 50% contributory negligence of the deceased and has deducted the amount of Rs. 8,15,200/- from compensation amount which is improper. Hence, requested to allow the appeal.

3. It is contention of learned counsel for the respondent/insurance company that the accident occurred due to sole negligence of rider of motorcycle and considering this fact the Tribunal has rightly deducted compensation of Rs. 8,15,200/- of deceased and no interference is required in it. Learned counsel further submits that while considering the income of deceased, the Tribunal has considered it on higher side

as it has come on record that yearly income of deceased was Rs. 50,000/- per year but Tribunal has considered Rs. 7,000/- per month as income of deceased which is on higher side. Learned counsel further submits that all the claimants are major and earning in spite of that the Tribunal has awarded dependency amount. Hence, requested to allow the appeal filed by the insurance company and dismiss filed by the claimants.

4. I have heard both learned counsel, perused judgment and order passed by the Motor Accidents Claims Tribunal, Kolhapur (for short 'the Tribunal). It is the claimants case that on 1st May, 2017, at about 2:20 p.m. The deceased Babita Raut along with her daughter-in-law Trupti Raut and two grandchildren were proceedings towards village Kagal from Kolhapur by Activa No. MH-09-DU-7539. Trupti was driving motorcycle and remaining three were the pillion riders. When they reached to the spot of accident, one Maruti Ertiga Car MH-01-BK-8252 driven by opponent no. 1 came from backside in high speed, rashly and negligently and gave dash to Activa from backside. The FIR was lodged against the Ertiga Car driver. Admittedly, the deceased was pillion rider on the Activa motorcycle. So no question of her

contributory negligence arises but Tribunal has wrongly considered her contributory negligence. Hence, I am setting aside the contributory negligence of the deceased. To prove the income of deceased the claimants have examined PW-2 Anita Jadhav. She has stated that she runs a Mahila Bachat Gat and she knows the deceased Babita. She further stated that Babita had obtained loan of Rs. 50,000/- from their Bachat Gat and she repaid it. In cross-examination, this witness admitted that there is over-writing of name of Babita. The claimants examined PW-3 Nilesh Ingale Branch Manager of Ujjivan Small Finance Bank at Exhibit-'45'. He has stated that Rs. 95,000/- loan was given to deceased Babita and she repaid Rs. 69,840/- out of the said amount. In cross examination this witness admitted that as per the financial annual report, the net business income was Rs. 15,240/-. This witness further admitted that he does not have any record to show that as to what business the deceased Babita was doing. The claimants examined Nilesh Gawade PW-4 at Exhibit 49 Area Manager in Suryoday Small Finance Bank, Kolhapur. He has stated that he knows deceased Babita and loan of Rs. 22,000/- was sanctioned to deceased Babita.

5. PW1 Sandip Raut has stated that deceased Babita was doing the business of Mess and from said business, she was earning Rs. 12,000/- to Rs. 15,000/- per month and she was repaying loan installments obtained from various banks. In cross-examination he has admitted that, at present his wife is running mess and at the time of accident his wife was not having driving license and there is no documentary evidence to show that his mother was running the mess. From the evidence of these witnesses. It appears that deceased was running the mess, she had borrowed the loan from various financial institutions and she repaid said the loan amount. The tribunal has considered Rs. 7000/- as monthly income of the deceased. I do not find any infirmity in it. It is contention of learned counsel for the appellant that managerial loss cannot be Rs. 7,000/- per month. In my view, deceased was running the mess. It is the case of the claimant's that she was earning Rs. 12,000/- to Rs. 15,000/- per month, she had obtained the loans from various Financial Institutions and she had repaid said loans hence managerial loss at Rs. 7,000/- considered by the Tribunal is proper

6. Learned counsel for the respondent/insurance company,

submits that as per the view of Hon'ble Apex Court in the case of ***Khenyei vs. New India Assurance Company Ltd. & Ors. Supreme 2015 (SC) 397*** , Insurance Company can recover the amount from the owner of Activa. Insurer has right to take appropriate action as per their wish. In my view, it is choice of insurance company to act as per ratio laid down by Hon'ble Apex Court. The tribunal has deducted Rs. 8,15,000/- as contributory negligence of the deceased as observed earlier deceased was pillion rider hence her contributory negligence can't be considered.

7. In view of above, I pass following order.

ORDER

i. Appeal no. 1001 of 2022 is partly allowed.

ii. The claimants are entitled for Rs. 8,15,200/- as per interest awarded by the Tribunal from the date of filing application till realization of the amount.

iii. The respondents insurance company is directed to deposit the above referred amount along with accrued interest thereon, within six weeks after receipt of the order.

iv. The claimants are permitted to withdraw deposited amount alongwith accrued interest thereon.

v. The Appeal filed by the insurance company appeal no. 721 of 2022 is dismissed. No order as to cost.

vi. The statutory amount be transmitted to the Tribunal along with accrued interest thereon. The parties are at liberty to withdraw it, as per rule.

(SHIVKUMAR DIGE, J.)