

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

FIRST APPEAL NO. 1074 OF 1999

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|--|-----------------------|--|
| 1. Shri Mohamad Mobin son of |) | |
| Mohd. Sujat Khan |) | |
| Age: 55 years, Occ.:Nil. |) | |
| 2. Safia Khatun w/o Mohammed Mobin |) | |
| Since deceased, through heirs and legal |) | |
| representatives Applicant Nos.1 and |) | |
| 3 to 7 herein. |) | |
| 3. Miss Jhaveria Khatun Mohd. Mobin |) | |
| Age: 25 years. |) | |
| 4. Master Mohd. Matin Mohd. Mobin, |) | |
| Age: 18 years, Occ: Student |) | |
| 5. Miss Kulsum Banu Mohd. Mobin |) | |
| Age: 16 years, Occ: Student |) | |
| 6. Master Mohd. Mukim Mohd. Mobin |) | |
| Age: 15 years, Occ: Student |) | |
| 7. Master Mohd. Amin, |) | |
| Age: 17 years, Occ: Student |) | |
| All residing at Mohalla, Tharbaram Ganj, |) | |
| Opp. Sunahari Masjid at Lakhimpur, |) | |
| Khari, Dist. Lakhimpur (U.P.), |) | |
| (Appellants Nos.5, 6 and 7 being minors, |) | |
| represented by their father and natural |) | |
| guardian Appellant No.1 |) | |
| Mohd. Mobin S/o. Sujat Khan |)....Appellants | |
| | (Original Applicants) | |

Versus

1. The Maharashtra State Road)
Transport Corporation,)
Having its office at opp. Vandana)
Talkies, Old Bombay Agra Road,)
Thane, through its Manager.)
2. Shri Eknath Shivappa Katke)
Age: 38 years, Occ: Bus Driver,)
Residing at Indira Nagar, Rahiwasi Sangh,)
Opp. New Dharavi Police Station,)
Dharavi, Bombay – 17.)....Respondents
(Original Opponents)

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Mr. Akshay Kaudarkar i/by Rakesh S. Datar, for Appellants.
Mr. P. M. Bhansali i/by Mr. G. S. Hegde, for the Respondent No.1.

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CORAM : SHIVKUMAR DIGE, J.

DATE : 27th MARCH 2023.

JUDGMENT:

1. By way of this Appeal, Appellants/claimants are seeking enhancement of compensation.
2. It is contention of learned Counsel for the Appellants/claimants that learned Tribunal has considered that both the drivers i.e. bus driver and the motor cyclist were equally negligent in causing the

accident, and observed that the claimants will have to forgo the proportionate share of the compensation, which could have been recovered by them from the owner of the motor cycle if joined. Learned Counsel further submits that there is no negligence on the part of the Appellant for causing the accident as he was pillion rider. Hence, requested to allow the Appeal.

3. It is contention of learned Counsel for Respondent No.1 – Corporation that accident occurred due to negligence of deceased-motor cyclist as he gave dash to the offending bus coming from opposite direction. Learned Counsel further submits that no evidence was produced on record to prove the income of the deceased-motor cyclist. In spite of that learned Tribunal has considered monthly income of deceased at Rs.1,800/- which is on higher side. Learned Counsel further submits that while awarding compensation learned Tribunal has considered all the aspects and on that basis compensation is awarded. Learned Counsel relied on *Khenyei vs New India Assurance Company Ltd. & Ors.*¹

4. I have heard both learned Counsel. Perused the judgment and order passed by the Motor Accident Claims Tribunal, Thane (for

1. 2015 9 Supreme Court Cases 273.

short 'the Tribunal').

5. It is the claimants case that on 28.10.1989, the deceased was proceeding on the motor cycle with his friend from Thane towards Bhayander deceased was pillion rider when they reached near chena bridge on Ghodbunder road, the bus bearing No.MTF 9192 came from opposite direction in rash and negligence manner and gave dash to the motor cycle of deceased, due to said dash deceased sustained injuries and died while taking treatment. While dealing with the issue of negligence, the Tribunal has observed that the F.I.R was lodged by the driver of the offending bus. There is no mention in the F.I.R that on the seeing motor cycle coming from opposite direction, driver of the offending bus applied brakes and brought it to halt before the motor cycle approached and dashed against it. The spot panchnama further shows that there was drag mark on the road showing that the motor cycle was dragged 25 ft. with the bus.

6. The eye witnesses John and Anwar had not come forward before the Tribunal for giving evidence about the accident as well as driver of the offending bus has not been charge-sheeted for the committed offence. The Tribunal further observed that, the motor

cyclist should have taken care while negotiating the curve, whether in excessive speed or optimum speed that it gets sufficient thoroughfare for crossing the bus vehicle coming from the opposite direction and the bus driver and the deceased-motor cyclist were equally negligence in causing the accident. The Tribunal determined that the entire responsibility to avoid the accident cannot be thrown on the bus driver and on that basis the Tribunal has fixed the compensation, which could have been recovered by them from the owner of the motor cycle.

7. Considering the evidence on record, in my view, it has come on record that accident occurred when there was U turn and bus was going on ascending slop of the road. It shows that the bus was not in high speed, whereas the deceased was pillion rider on motor cycle which was going on in descending position of the road. The deceased-motor cycle rider had seen the bus coming in ascending position in spite of that rider of motor cycle did not slow down speed of his motor cycle and gave dash to the offending bus. The bus driver went himself to the police station and lodged complaint. The facts leading from the evidence on record and looking to the evidence of DW1 Eknath Katke, who was driving the offending bus. It appears that the accident occurred due to contributory negligence of offending bus driver and

the motor cyclist. Hence, I do not find infirmity in the observation of the Tribunal about the contributory negligence.

8. The Tribunal has observed that the claimants have to forgo remaining 50% share of the compensation which could have been recovered from the owner of the motor cycle if joined, I am unable to understand the observations of the Tribunal as it is settled principle of law that, when there was composite negligence of the drivers of both vehicles, the claimants can recover the compensation from any one of the tortfeasors. Hence, I am setting aside this observation's of the Tribunal. It is contention of learned counsel for Respondent No.1 that permission be given to the Respondent No.1 to recover the amount from other tortfeasor, as held by Hon'ble Apex Court in the case of *Khenyei (supra)*. The Hon'ble Apex Court in this case has observed that

“22.4 It would not be appropriate for the Court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.”

In my view, it is choice of the Appellant to recover the compensation amount from other joint tortfeasor.

9. The Tribunal has not awarded future prospects as per the view of Hon'ble Apex Court in the case of ***National Insurance Co. Ltd. vs. Pranay Sethi***² claimants are entitled for 40% future prospects. The Tribunal has awarded as consortium amount of Rs.15,000/- for the mental shock agony and Rs.3,000/- for funeral expenses, as per the view of Hon'ble Apex Court in the case of ***Magma General Insurance Co. Ltd. vs. Nanu Ram***³ claimants are entitled for Rs.40,000/- each with 10% increase and Rs.16,500/- for funeral expenses and Rs.16,500/- for loss of estate. The Tribunal has applied multiplier of ten (10). At the time of accident, the deceased-pillion rider was 20 years old so multiplier should be eighteen (18). Hence, I am considering this multiplier.

10. Considering the above calculations the claimants are entitled for following compensation:

Particulars	Amount
Income	Rs. 1800.00
40% future prospects	Rs. 720.00
	<u>Rs. 2,520.00</u>
Deduction towards personal expenses 1/2	Rs. 1,260.00

2. 2017 ACJ 2700 (SC)

3. 2018 ACJ 278 (SC)

Total Income Rs.1,260.00 X12	Rs.	15,120.00
Rs. 15,120 X 18 (multiplier)	Rs.	2,72,160.00
Loss of consortium Rs.44,000/- x 6(family members)	Rs.	2,64,000.00
Loss of Estate	Rs.	16,500.00
Funeral Expenses	Rs.	16,500.00
Total Compensation	Rs.	5,69,160.00

The Tribunal has awarded compensation of Rs.1,75,000/- if this amount is deducted from the amount considered by this Court it comes to Rs.3,94,160/-. The claimants are entitled for enhanced amount of Rs.3,94,160/-.

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

ORDER

- i. Appeal is allowed.
- ii. The claimants are entitled for enhanced amount Rs.3,05,160/- at the rate of 7.5% from the date of filing claim Petition till realization of the amount, out of this amount Rs.2,64,000 is consortium amount. On this amount claimants are entitled @ 7.5% from 1st November 2017 till

realization of amount.

- iii. The Respondents are directed to deposit the enhanced amount along with accrued interest thereon within six weeks after receipt of the order.
 - iv. The claimants are permitted to withdraw award amount and enhanced amount along with accrued interest thereon.
12. Pending applications, if any, are also disposed of.

(SHIVKUMAR DIGE, J.)