IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 110 OF 2023

United India Insurance Company Limited Motor Third Claim Party Hub 5th Floor, Sterling Cinema Building 65, Murzban Road, Mumbai – 400 001	Appellant /Original Opposite Party No.2.

Versus

1. Rajnidevi Gopal Mohta Age : 30 years, Occ : Housewife 2. Nikita Gopal Mohta Age : 4 years, Occ : Student 3. Nikhil Gopal Mohta Age : 2 years, Occ : NIL 4. Kanhaiyalal Narayandas Mohta Age : 68 years, Occ : Housewife 5. Sarojdevi Kanhaiyalal Mohta Age : 60 years, Occ: Housewife (Applicant Nos. 2 and 3 are minors, hence they are represented by the Applicant No.1 – Rajnidevi Gopal Mohta being their mother and natural guardian) All R/at B-6, R. No. 303, 3rd Floor, Vedant Complex, Vartaknagar, Thane	Original Applicant Nos.1 to 5
6. Tribhivan P. Vishwakarma Pyarelal Yadav Chawl, Vijaynagar Pipeline, Vartaknagar, Thane (Owner of Bajaj M-80 Scooter No.: MH-05/Q-4299)	Original Opposite Party No.1. Respondents

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Mr. Rahul Mehta i/b. KMC Legal Venture, Advocate for the Appellant.
Mr. S. P. Shetty i/b. Ms. Deepti B. Mistry, Advocate for Respondent Nos. 1 to 5.

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CORAM : SHIVKUMAR DIGE, J.
DATE : 18th DECEMBER, 2023

JUDGMENT :

1. The issues involved in this appeal are, there was contributory negligence of the deceased in the said accident and the Tribunal has considered income of deceased on higher side and compensation awarded under other heads are on higher side.

2. It is the contention of learned counsel for appellant that at the time of accident the deceased was riding the motorcycle and there was head on collusion between two motorcycles but the Tribunal has considered negligence of the deceased only 25% it should be 50%. The accident caused due to sole negligence of the deceased but it was not considered by the Tribunal. Learned counsel further submitted that that the Tribunal has considered monthly income of deceased at Rs.1,07,629/- without any evidence on record, it is on higher side. He further submitted that the Tribunal has awarded Rs.4,25,000/- under the other heads i.e. consortium and love and affection which is on higher side, hence requested to allow the appeal.

3. It is contention of learned counsel for the respondent Nos.1 to 5/ claimants that offence was registered against the rider of offending motorcycle. No evidence was laid before the Tribunal by the appellant to prove the negligence of the deceased. In spite of that, the Tribunal has erroneously fixed 25% contributory negligence on deceased, as claimants did not want to prolong the matter hence, they have not filed appeal against the said finding. Learned counsel further submitted that the deceased was working with T.C.S. as an Assistant Consultant since 11.08.1997 and his monthly salary was of Rs.1,07,629/-. The income tax returns of the deceased are filed on record, on that basis the Tribunal has considered monthly income of deceased which is proper. Learned counsel further submitted that the Tribunal has awarded consortium amount as per the evidence on record and no interference is required in it.

4. I have heard both the learned counsel. Perused the Judgment and Order passed by the Motor Accident Claims Tribunal, Thane (for short "**the Tribunal**"). It is claimant's case that on 31.03.2007 at about 10:15 a.m. the deceased was proceeding on Honda Scooter No. MH-31/AY-4878 and he was riding scooter with moderate speed with due care and caution. When he near Nirmaladevi Dighe Hospital, at that time one Bajaj M-80 Scooter MH-05/Q-94299 which was coming from opposite direction came in high and excessive speed in rash and negligent manner. The rider of the said M-80 scooter lost control of his vehicle and dashed against the scooter of the deceased. The dash was so severe that the deceased was thrown away and fell down on the road, due to which deceased sustained multiple injuries and he succumbed to injuries. The offence was registered against the rider of M-80 Scooter. The claimants have examined Ganesh Sharma who was eye witness to the said accident. He has stated that the accident caused due to negligence of the rider of the M-80 Scooter. Mr. Subhash Apte, another eye witness has stated that he saw the accident and it was caused due to negligence of rider of M-80 Scooter. Defendant examined DW-1 S. C. Vishwakarma, the rider of M-80 Scooter examined. He has stated that on 31.03.2007 he was proceeding from his shop, when he reached opposite Nirmaladevi Dighe Hospital he saw that one Activa Scooter was coming from opposite direction. To avoid collusion, he applied break but it was in vain and the said scooter dashed his M-80 scooter. He further submitted that the said accident caused due to negligence of deceased. In cross examination, he stated that he had seen the rider of Activa Scooter from distance at about 40 ft. and he was trying to overtake the rickshaw after honking. He has also admitted that he did not overtake the rickshaw because it was being driven slowly. There was also a pillion rider with him.

5. Considering the evidence on record the Tribunal has considered contributory negligence of 75% of rider of M-80 Scooter and 25% of deceased. In my view, considering the evidence of eye witnesses who are independent witnesses the Tribunal has wrongly considered 25% negligence of the deceased, which is not proper, but the claimants have not challenged the contributory negligence of deceased as they do not want to prolong the matter, hence I am considering issue of negligence as per the observations of the Tribunal. In respect of the issue of income claimants have examined PW-1 K.N.Mohta, he has stated that deceased was his son and he was working as an Assistant Consultant with TATA Consultancy Services (T.C.S.) and was getting salary of Rs.1,07,629/-. He has produced income tax returns of the deceased for the year 2004-2005, 2005-2006 and 2006-2007. These are at Exhibit-36/1 to 36/3. The salary slip of deceased is at Exhibit-35. Nothing elicited in the cross examination of this witness.

6. In support of evidence of PW-1, claimants have examined PW-2 Sanket Acharya, Senior Executive with TCS, Andheri, he has stated that deceased was employee of TCS and was getting salary of Rs.1,07,629/-. Considering the evidence on record the Tribunal has considered annual income of deceased at Rs.6,55,000/- after deducting income tax returns and other taxes, I do not find any infirmity in it.

In respect of the other heads, the Tribunal has awarded Rs.1,00,000/- for loss of consortium, Rs.2,00,000/- for loss of love and affection and care and guidance to minor children (Rs.1,00,000/- each). Total comes to Rs.4,25,000/-. As per the view of Hon'ble Apex Court in the case of ***Magma General Insurance Co. Ltd. Vs. Nanu Ram***[1]*,* each

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claimant is entitled for Rs.48,000/- as consortium, there are five claimants, it comes to Rs.2,40,000/- as consortium amount, Rs.16,500/- towards funeral expenses and Rs.16,500/- towards loss of estate it comes to Rs.33,000/-. The total compensation comes to Rs. 2,76,000/-. If this amount deducted from the amount considered by the Tribunal i.e. Rs.4,25,000/-, it comes to Rs.1,49,000/-. The respondent Nos.1 to 5/ claimants are entitled for this amount.

7. In view of above, I pass following Order:

i. The appeal is partly allowed.

ii. The appellant is permitted to withdraw Rs.1,49,000/- out of deposited amount with proportionate interest.

iii. The respondent Nos.1 to 5/ claimants are permitted to withdraw balance deposited amount along with accrued interest thereon.

iv. Statutory amount be transmitted to the Tribunal. The parties are at liberty to withdraw it as per Rule.

v. Pending applications, if any, stand disposed off.

8. The appeal is disposed off.

SONALI SATISH KILAJE
Digitally signed by SONALI SATISH KILAJE Date: 2023.12.23 19:07:54 +0530

(SHIVKUMAR DIGE, J.)