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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 368 OF 2022

Reliance Gen Insurance Co. Ltd.)
4th Floor, Chintamani Avenue)
Next to Virwani Industrial Estate,)
Off Western Express Highway)
Goregaon (E), Mumbai-400053)....Appellant

Versus

1. Smt. Charuta Sameer Sawant)
Aged: 38 years, widow of the Deceased)
2. Shri. Shantaram Anaji Sawant)
Aged about 70 years, Father of the deceased)
3. Smt. Shubhangi Shantaram Sawant)
Aged about 62 years, mother of the deceased)
4. Master Parv Sameer Sawant)
Aged about 3 years, Minor son of the)
deceased. Since the applicant no.3)
being minor through his N.F. & Mother)
Smt. Charuta Sameer Sawant)
all residing At K-603, Sai Usha Complex)
Sahakari Housing Society, Khandelwal)
Road Bhandup (West), Mumbai-400078)...Original
Ciamants
5. Mr. Rathi Mutthu Swamy)
Shantaram Thakur Compound)
Sase Nagar, Vasai Road (East), Vasai)
Dist-Palghar 401202)
(owner of M/Lorry No. Mh-04-EL-5300))....Respondents

Ms. Shalini Shankar for the Appellant.
Mrs. Varsha Chavan for the Respondents.

CORAM : S. G. DIGE, J.

DATE : 17th FEBRUARY 2023.

JUDGMENT :

1. The issues involved in this appeal are, accident was occurred due to negligence of deceased and deceased was not wearing helmet at the time of accident.

2. It is contention of learned counsel for the appellant that the accident had occurred due to sole negligence of deceased but, this fact was not considered by the Tribunal.

3. The learned counsel further submits that at the time of accident deceased was not wearing helmet which was mandatory. So there was contributory negligence of deceased in the said accident. But, this fact is not considered by the tribunal. The learned counsel relied on *New Assurance Co. Ltd. vs. Julis T. J. Freitas LAWS(BOM)-2019-12-227.*, *Anisabee Shaikh Javid @ Javed Patve vs. Suresh*

Dhirsing Padvi LAWS(BOM)-2018-10-201, and Order of this Court in FIRST APPEAL (ST) NO. 26961 OF 2017 (Coram: R. D. Dhanuka, J.) in the matter of Branch Manager, Reliance General Insurance Co. Ltd. vs. Smt. Anjana Narayan Kamble & Ors.

4. It is contention of learned counsel for the respondents/claimant that deceased was driving motorcycle on left side of the road, at that time, driver of the offending truck took the offending truck suddenly on left side and dashed the deceased due to which accident occurred. There was no negligence of the deceased in the said accident.

5. The learned counsel further submits that not wearing helmet cannot be a ground to consider contributory negligence. Moreover this defense was not taken by the appellant before the tribunal in written statement filed before the tribunal nor witness was cross-examined in that regard. It has not come on record whether deceased was wearing helmet or not. Hence, this ground cannot be considered at appellate stage and requested to dismiss the appeal.

6. I have heard both learned counsel, perused judgment and

order passed by the Motor Accident Claims Tribunal, Mumbai (for short '**the Tribunal**'). It is contention of learned counsel for the appellant that as deceased was not wearing helmet, at the time of accident, the Tribunal should have considered his contributory negligence as held by this Court in the judgment cited by her. It appears from record that FIR was lodged against the driver of offending truck, from the FIR it reveals that the offending truck was going on the road and suddenly the driver of offending truck took the truck on the left side of the road and dashed the motorcycle of deceased, due to said accident, deceased died. It shows that, the accident had occurred due to sole negligence driver of offending truck.

7. In respect of the issue of not wearing helmet by the deceased, the appellant has not taken plea in the written statement filed before the tribunal that deceased was not wearing helmet at the time of accident nor any suggestion was given to the witness in cross-examination. It has not come on record that whether deceased was wearing helmet or not at the time of accident. So, this ground cannot be considered at appellate stage. The facts of the cited case laws by

the learned counsel for the appellant are not applicable to present case. As in the present case, there was no plea of appellant before the tribunal that deceased was not wearing helmet at the time of accident and no evidence was produced on record before the tribunal, that deceased was not wearing the helmet.

8. Though there are four claimants, the tribunal has given consortium amount only to two claimants. It is contention of learned counsel for the claimants that remaining claimants are entitled for consortium amount. It is contention of learned counsel for the appellant that there is no appeal filed by the claimants for enhancement of compensation. They are not entitled for consortium amount. In my view, it is settled principle of law that the claimant are entitled for just compensation as per view of Hon'ble Apex Court in the case of ***Magma General Insurance Co. Ltd. vs. Nanu Ram, 2018 ACJ 2782 (SC)***, the claimants are entitled for consortium amount, hence Rs. 44,000/- each is awarded as consortium amount to the remaining two claimants.

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

ORDER

- i. Appeal is dismissed. No order as to cost.
 - ii. The claimants are entitled for Rs.88,000/- at the rate of interest 7.5% per annum from 1 January, 2018 till realization of the amount.
 - iii. The appellants are directed to deposit the additional amount along with accrued interest thereon, within three weeks from today after the receipt of the order before the tribunal.
 - iv. The claimants are permitted to withdraw the deposited amount along with accrued interest thereon.
 - v. The statutory amount be transmitted to the tribunal along with accrued interest thereon, parties are at liberty to withdraw it, as per Rule.
10. The application stands disposed of.
11. The pending applications, if any, stands dismissed of.

(S. G. DIGE, J.)