

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 189 OF 2014

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Division Manager)
The New India Assurance Co. Ltd.)
D. O. 5 Atur Chambers,)
II Floor, Camp, Pune)....Appellant

Versus

1. Sharda Kapoorchand Goda)
Age 23 years, Occ: Household)
2. Kunal Kapoorchand Goda)
Age 1^{1/2} years, Occ. Nil)
(Applicant No. 2 is minor, hence)
claiming through his mother)
i.e. applicant no.1.)
At present R/o Ambedkar Colony,)
Desuri Road, Rani Station,)
Tal: Bali. District: Pali)
Rajasthan State.)
3. Shutam Electronics)
Age Mjor, Occu. Bus Driver)
Residing at Sanaswadi, Tal. Shirur)
District Pune.)....Respondents

Mr. Shrikant M. Dange for the Appellant
Mr. Yogesh Pande for the Respondent Nos. 1 & 2.

CORAM : SHIVKUMAR DIGE, J.

DATE : 15th MARCH 2023.

JUDGMENT. :

1. The issues involved in this appeal are contributory negligence of deceased and income of deceased considered on higher side.

2. It is contention of learned counsel for the Appellant that accident took place, when deceased was trying to over take the other vehicle and he gave dash to the offending bus, but the tribunal has considered only 10% contributory negligence of deceased which is not proper, it should be 50%.

3. Learned counsel further submits that the tribunal has considered monthly income of deceased at Rs. 12,000/-, which is on higher side. No evidence was produced on record to show that deceased was earning Rs.12,000/- per month. It has come on record that deceased has left his job and at the time of accident. He was unemployed, but this fact is not considered by the tribunal. Hence, requested to allow the appeal.

4. It is contention of learned counsel for the

respondents/claimants that deceased was horse trainer and working at Dubai and he was getting yearly income more than Rs.1 Crore but this fact is not considered by the tribunal. The claimants have filed cross-objection for enhancement of compensation but, it is not registered it is pending.

5. Learned counsel further submits that the accident was occurred due to sole negligence of the driver of offending bus, but tribunal has wrongly fixed 10% liability on the deceased.

6. I have heard both learned counsel, perused judgment and order passed by the Motor Accident Claims Tribunal (for short 'the Tribunal'), while dealing with the issue of negligence the tribunal has observed that the driver of offending bus examined himself to prove the negligence of deceased and in cross-examination he admitted that he saw motorcycle from long distance, when he saw motorcycle from long distance and it was coming from opposite direction, being heavy vehicle, it was responsibility of the bus driver to take appropriate precaution to allow overtaking of motorcycle but he failed to take necessary care. Hence, the tribunal has considered 10% contributory negligence of deceased and 90% of driver of offending bus. In my view, when driver of offending bus had seen the motorcycle of

deceased is coming from opposite direction then, he had opportunity to avoid the accident. It is settled principle of law, that if the driver get opportunity to avoid the accident and if he didn't do it, negligence would be on the driver, who did not take proper care to avoid the accident. In the present case the driver has not taken proper care to avoid the accident. Hence, it cannot be said that there was 50% contributory negligence of the deceased and negligence considered by the tribunal is proper. I do not find any infirmity in it. In respect of income of deceased, it is the case of the claimant's that deceased was earning \$.10,600 per annum, as per the Indian Currency his income was Rs. 7,20,000/- in the year 2005-06. Deceased was 28 years old at the time of accident. While dealing with issue of income the tribunal has observed that considering the qualification and work experience of the deceased in Dubai and other Foreign Countries his income in Indian currency is to be assessed at Rs. 12,000/- per month. I do not find any infirmity in it as deceased was earlier working in the Dubai and other Foreign Countries. Moreover, the tribunal has not awarded future prospects, if the amount of future prospects included in this amount, this amount would be the just amount.

7. The learned counsel for the claimant submits that if this Court is considering Rs.12,000/- per month as income of deceased. He would not press relief claimed in his cross-objection his statement is accepted.

8. It is contention of learned counsel for the respondent/claimant that consortium amount is not awarded by the tribunal.

9. It is contention of learned counsel for the appellant that in appeal filed by the appellant claimants cannot claim consortium amount. In my view, it is settled principle of law that claimants are entitled for just compensation. Moreover, the claimants have filed cross-objection but this Court is dismissing the appeal. Hence, they are not going to press it. As per view of Hon'ble Apex Court in the case of ***Magma General Insurance Co. Ltd. vs. Nanu Ram, 2018 ACJ 2782 (SC)***, each claimant is entitled for Rs. 40,000/- as consortium amount, there are three claimants. They are entitled for Rs. 1,20,000/-, and Rs. 15,000/- for funeral expenses and Rs.15,000/- for loss of estate total of it comes to Rs. 1,50,000/-. The tribunal has awarded for Rs. 10,000/- for loss of estate, if this amount deducts from it, it comes to Rs. 1,40,000/-.

10. Learned counsel for the claimants submits that claimant be

permitted to withdraw the cross objection if registered. Permission is granted.

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

ORDER

- i. Appeal is dismissed. No order as to cost.
- ii. The claimants are entitled additional amount of Rs. 1,40,000/-, @ 7.5% from 1st October 2017 till realization of the amount. The appellant is directed to deposit additional amount along with accrued interest within six weeks.
- iii. The claimants are permitted to withdraw the deposited amount along with accrued interest thereon.
- iv. The statutory amount be transmitted to the tribunal. The parties are at liberty to withdraw it as per Rule.
- v. The appeal is disposed of.

(SHIVKUMAR DIGE, J.)