

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 590 OF 2018**

Transport Manager,)
Thane Municipal Transport)
Undertaking, Administrative Building,)
Road No. 27/34, Junction, Wagle Depot,)
Wagle Estate, Thane-400 604)... Appellant
(Org. Opponent)

Versus

1. Smt. Sharda Dhawalsingh Pariyar)
alias Thapa, aged: 44 years,)
2. Miss Pinky Dhawalsingh Pariyar)
alias Thapa, aged 18 years,)
3. Master Arjun Dhawalsingh Pariyar)
alias Thapa, aged 16 years, through his)
natural guardian and mother respondent no.1)
All 1 to 3 r/at: 37, Kadam Chawl, Dhobi Ali,)
Mavali Mandal, Thane (W) 400601)...Respondents
(Resp. 1 to 3 Org. Claimants)

Mr. N. R. Bubna, Advocate for the Appellant.

Mr. Tarun Kumar Sinha, Advocate for the Respondents.

CORAM : S. G. DIGE, J.

DATE : 1st MARCH 2023.

Judgment :

1. Being aggrieved and dissatisfied with the judgment and order passed by the Motor Accident Claims Tribunal, Thane, the appellant/original opponent preferred this appeal.

2. The brief facts of the case are as under :

On 24th March 2016, at about 10.20 am, deceased was proceeding on motor cycle from Khopat side to Vandana side in moderate speed, by left side of the road. When he reached in front of Malvan Tadka Hotel on Almeda Road, one TMT bus bearing No.MH-04-G-2830 came from the same direction in high speed and in rash and negligent manner and dashed the motor-cycle of the deceased, resulting to which, the deceased sustained multiple grievous injuries and died on the spot of accident. Offence was registered against the driver of the offending bus.

3. The claimants filed claim petition for getting compensation before the Motor Accidents Claims Tribunal, Thane (for short "the Tribunal"). The Tribunal passed the judgment and order which is under challenge.

4. It is contention of learned counsel for the appellant that the accident had occurred due to negligence of the deceased. At the time of the accident, the deceased was not wearing helmet. Postmortem report shows that the death of the deceased was caused due to head injury/cardiac arrest. Had the deceased worn helmet, he would not have died. As the deceased was not wearing the helmet, there is contributory negligence of the deceased in the said Accident but this fact is not considered by the Tribunal. Learned counsel further submits that the Tribunal has considered income of the deceased on higher side, on that basis, exorbitant and excessive compensation is awarded, which is not proper. Learned counsel further submits that the deceased was not possessing driving license at the time of accident. The Tribunal has considered the age of deceased at 42 years whereas his wife who deposed before the court was 45 year old. So the age of the deceased must be more than his wife, on the basis of age mentioned in the postmortem report, the Tribunal has applied multiplier while calculating compensation, which is not proper. Hence, requested to allow the appeal.

In support of his submissions, learned counsel for the appellant has relied upon the decision of the Hon'ble Apex Court in **Lachoo Ram and Ors. Versus Himachal Road Transport Corporation (2014) 13 SCC 254** and decision of this Court in **New India Assurance Company Limited versus Julius T. J. Freitas & Ors. 20202 (2) AIR Bom R 196.**

5. It is contention of learned counsel for respondents/claimants that there was no eye witness to the incident. The driver of offending bus came to know about the incident when he heard the sound and passengers told him about the accident. The appellant has taken the plea of not wearing helmet is afterthought, as immediately after the accident, the driver has not filed report to his superior that at the time of accident deceased was not wearing helmet. No other witness is examined by the appellant except driver of the offending bus to prove that the deceased was not wearing helmet. Learned counsel further submits that the deceased was working as watchman/security guard and he was also doing business. Considering the evidence on record, the Tribunal has considered monthly income of deceased properly. Hence, no interference is required in it.

6. I have heard both learned counsel, perused the judgment and order passed by the Tribunal.

7. In respect of the issue of not wearing helmet by the deceased, the appellant has examined the driver of the offending bus - Shri David Mavli at Exhibit "70". He has stated that on 24th March 2016 at 10.30 hours when he was proceeding towards Thane City, at the relevant time, he heard a loud noise at the backside of his bus, therefore, he stopped the bus and he got down from the bus and found that one person who was riding Activa bearing No. MH-04-EU-8673 had slipped and fallen down on road behind the bus and he had sustained injuries. He further stated that there was no impact between the bus and Activa. The motor cyclist fell at the backside of the bus and deceased died due to his sole negligence. Deceased was not wearing helmet at the relevant time of the accident. If deceased, at the relevant time, had been wearing helmet, then, he would not have died due to head injury. The bus did not dash the said motor cyclist. The deceased fell at the backside of the bus. In cross-examination, this witness admitted that he is unable to state the distance between the bus and motor-

cycle. From the evidence of this witness, it reveals that the accident had occurred due to falling down of the deceased from Activa-Motorcycle but did not give dash to motorcycle. The FIR, which is at Exhibit 18, falsifies the evidence of this witness. In the FIR lodged by the traffic police immediately after accident, it is stated that at the time of the accident, the Activa was lying in the middle of the road and one person had come under the right side driver wheel of the offending bus and there was injury to his head. It appears that only to avoid the liability, the driver of the offending bus had stated falsely before the Tribunal that the deceased fell from bike and died and his bus did not give dash to the deceased but the FIR immediately lodged after the accident shows that the accident occurred due to dash by the bus driver and the deceased had come under right wheel of the said bus. So considering the improved or afterthought evidence given by the driver of the offending bus, it cannot be considered that deceased was not wearing helmet. The appellant could have examined any passenger from the bus or other person present on the spot to prove that the deceased was not wearing helmet but it has not been done, hence, I do not see merit in the contention of learned counsel for the appellant at the time of the accident, the deceased was not wearing helmet and it be considered

as contributory negligence. The appellant has not examined any witness to prove that the deceased was not holding effective and valid driving license. Hence, I do not see any merit in this contention.

8. In respect of income of deceased, Vishal Gupta -CW2 at Exhibit "27" has stated that deceased Dhawalsingh Pariyar @ Thapa was working with them as a watchman-cum-cleaner and his last drawn salary was Rs.16,000/- per month. Accordingly, they issued certificate at Exhibit "28". Considering the evidence on record, the Tribunal has considered the monthly salary of deceased at Rs.10,000/- per month. I do not find any infirmity in it.

9. In respect of issue of age of deceased, it is contention of learned counsel for the appellant that the age of wife of the deceased CW1 is 45 years, so the age of the deceased must have been more than his wife. The postmortem report at Exhibit "21" shows that deceased was 40 years old at the time of accident, whereas it is the contention of learned counsel for the claimants that deceased was 42 year old at the time of accident. Merely because the wife is 45 year old, it cannot be a ground to consider that the age

of deceased was more than the age of his wife. The Tribunal has not considered the age mentioned in postmortem report but has considered the age stated by the wife of the deceased. In some cases, the age of wife can be more than husband and wife knows the exact age of the husband. Hence, I do not find any merit in the contention of learned counsel for the appellant that the age of deceased is considered on lower side. I have gone through case laws cited by learned counsel for appellant. Facts of cited case and present case are different, hence, not applicable to the present case.

10. In view of above, the appeal is devoid of merit and I pass following order :

ORDER

1. The appeal is dismissed. No order as to cost.
2. The claimants are permitted to withdraw the deposited amount along with interest accrued thereon.

3. The statutory amount be transmitted to the Tribunal along with accrued interest thereon. The parties are at liberty to withdraw it as per Rule.
10. Pending applications, if any, stand disposed of.

(S. G. DIGE, J.)