IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.785 OF 2004

1. Smt. Shashikala wd/o Jagdish Deotale,
2. Ajay Jagdish Deotale,
3. Amol Jagdish Deotale,
4. Ku. Bhagyashree Jagdish Deotale,
5. Smt. Rukhmabai Madhav Deotale (dead) - (deleted as per Court's order dated 05/10/2017)

All Adult, Nos.1 and 5 – Household,
& No. 2 to 4 students,
All R/o. Gayatri Nagar, Umari,
Tq. and Dist. Akola

...APPELLANTS

VERSUS

1. Vaibhav Vishnusa Jungade
Adult, Business,
R/o Ashray Nagar, Dabki Road,
Old City, Akola,
Tq. and Dist. Akola

2. United India Insurance Co.
By its Branch Manager,
Akola

...RESPONDENTS

Ms Rani Nitnaware, Advocate h/f Shri J.P. Junghare, Advocate for the appellants.
Shri B.P. Bhatt, Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : JANUARY 06, 2023.
PRONOUNCED ON : JANUARY 27, 2023.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard finally with the consent of learned Counsel for the parties.

2. By this appeal, the appellants who are the original claimants seeking enhancement of the compensation on account of accidental death of Shri Jagdish @ Ashok Deotale who died in an accident on 20/01/2002.

3. As per the contention of the appellants, appellant No.1 is the wife and the appellant Nos.2 to 4 are the children of deceased Jagdish @ Ashok Deotale. The accident took place on 20/01/2002 when the deceased was traveling in TATA Sumo bearing No.MH-30-L-5889 and was proceeding to take the darshan of Vaishno Devi. The claimant No.1-wife along with claimant Nos.3 and 4 were also traveling in the same vehicle. As per the contention of the appellants, the vehicle TATA Sumo was driven by its driver in a rash and negligent manner without observing the traffic rules and regulations. At the relevant time i.e. at about 5.30 a.m. when the vehicle reached upto Wahat-Rukaba, Gav-Sawala, G.I. Road. One truck was proceeding ahead, but as the driver of the TATA Sumo could not control his vehicle and dash against the truck which was halted by applying the breaks. Due to the said sudden and

severe dash deceased Jagdish succumbed to the death at the spot itself. As per the contention of the claimants, the vehicle TATA Sumo was driven by its driver in a rash and negligent manner which is owned by respondent No.1 and validly insured with respondent No.2. As the said accident took place due to rash and negligent driving of TATA Sumo driver, the offence was registered against the TATA Sumo driver vide Crime No.38/2002 under Section 279 and 304-A of the Indian Penal Code (hereinafter referred to as 'the IPC' for short).

4. It is further the contention of the appellants that at the time of accident, the deceased was working in the cotton mill at Akola and drawing income of Rs.5000/- per month. At the time of his death, he was aged about 45 years. Due to the accidental death of Jagdish, the entire family had suffered irreparable loss as there is nobody to look after the family members. If deceased would have survived till the age of 60 years, definitely his income would have been increased as he was a skilled worker. However, due to the accidental death of the deceased, the claimants have suffered loss of company as well as claimant No.1 is unable to give better education to claimant Nos.2 to 4. For all above these grounds claimants have claimed compensation of Rs.9,00,000/-. It is further the contention of the claimants that as the accident took place due to the rash and negligent driving of TATA Sumo driver, respondent

Nos.1 and 2 are jointly and severally liable to pay compensation to the appellants.

5. In response to the notice, respondent No.1 – owner remained absent whereas respondent No.2 – United India Insurance Company filed written statement and denied the contention of the appellants. As per contention of the respondent No.2 – Insurance Company that the accident in question took place due to the negligence of truck driver as he applied break suddenly due to which sumo driver dash against the truck. It is further the contention of the Insurance Company that as the said accident took place due to the negligent act of the truck driver as well as the claimants and deceased were traveling in the TATA Sumo as passengers, Insurance Company is not liable to pay compensation and hence claim petition deserves to be dismissed.

6. After considering the rival pleadings, learned trial Court has framed the issues. The claimants have adduced the evidence by examining claimant No.1 – Smt. Shashikala Deotale to substantiate the claim. The respondent No.2 – Insurance company has not adduced any evidence. After hearing both the sides and after due consideration to the pleadings and the evidence, the Tribunal pleased to pass an Award and granted compensation of Rs.1,59,500/- by considering the yearly income of the deceased as Rs.15,000/- per annum.

7. Being aggrieved and dissatisfied with the judgment and award of the Tribunal, present appeal is preferred on the ground that learned trial Court failed to consider that the deceased was a skilled worker and working in ginning factory and was earning Rs.5000/- per month. The tribunal had also not considered that five dependents were depending on the income of the deceased and erroneously deducted $^1/_3$ from the income for personal expenses. The judgment and award passed by the tribunal granting compensation at the inadequate rate which is absolutely arbitrary, illegal and contrary to law. It is submitted that the learned Tribunal ought to have considered the notional income of the deceased while calculating the compensation. For all above these grounds, the claimants have claimed the enhanced compensation amount.

8. Heard Ms Rani Nitnaware, learned Counsel for the appellant. She submitted that the tribunal had not considered the notional income of the deceased though the evidence is not adduced. The evidence regarding the fact that the deceased was working in ginning mill and skilled worker is not challenged by the Insurance company. The annual income of the deceased was Rs.60,000/- per annum but the Tribunal had not considered the same. The claimants are also entitled to receive the benefit. In view of the judgment of the Hon'ble Apex Court in ***Sarla***

Verma (Smt) and ors. Vs. Delhi Transport Corporation and anr. (2009) 6 SCC 121 as well as ***National Insurance Company Limited Vs. Pranay Sethi and ors. (2017) 16 SCC 680***. She also placed reliance on ***Magma General Insurance Company Limited Vs. Nanu Ram alias Chuhru Ram and ors. (2018) 18 SCC 130*** and submitted that the appellants/claimants are entitled to receive the compensation under the head of spousal consortium, parental consortium and filial consortium. In view of the judgments relied upon by her, she claimed the enhanced compensation.

9. On the other hand, Shri Bhat, learned Counsel for respondent No.2 – Insurance Company submitted that claimants has not adduced any evidence to show that the yearly income of the deceased was Rs.60,000/- per annum. In absence of the evidence, the tribunal has rightly considered the income as Rs.15,000/- per annum. Considering the age of the deceased mentioned in the post-mortem report, the multiplier was applied and compensation is calculated. The tribunal has rightly calculated the compensation by applying the multiplier of 13. The appellants are not entitled to claim compensation in view of judgment of *Sarla Verma* (supra) and *Pranay Sethi and ors.* (supra) as the accident took place in the year 2002. He also placed reliance on ***Kishan Devi and ors. Vs. Oriental Insurance Co. Ltd. and ors. 2019 ACJ 1366*** wherein the Hon'ble Apex Court had considered the compensation

under the head of loss of consortium, loss of estate and funeral expenses @ 40,000/- and 15,000/- each, therefore, contention of the appellant that they are entitled for the consortium in view of judgment of *Magma General Insurance Company Ltd.* (supra) is not acceptable. He further placed reliance on the judgment of ***National Insurance Co. Ltd. Vs. Rajendra Singh and ors. 2019 ACJ 1368*** wherein Hon'ble Allahabad High Court was held that unless income is established notional income cannot be taken into consideration. He also placed reliance on ***Smt. Archana and ors. Vs. Kalyan Singh and ors. 2022 (4) T.A.C. 424 (S.C.)*** and submitted that the appellant is entitled to claim the interest @ 6% per annum on enhanced compensation amount and lastly he placed reliance on ***Fakir Chand Taneja and ors. Vs. Oriental Insurance Co. Ltd. and anr. 2022 (4) T.A.C. 440 (S.C.)*** wherein it is held that for purpose of computation of compensation, actual income less tax paid is to be taken. He further relied upon the observation that the conventional amounts of Rs.15,000/- for loss of estate and funeral expenses and Rs.40,000/- for loss of consortium will have to be added and not the consortium as per the judgment of *Magma General Insurance Company Ltd.* (supra).

10. After hearing both the sides following points arise for consideration :

(i) whether the claimants have made out the case for enhancement of compensation and if so what is the amount?

11. Before the Claims tribunal, claimant No.1 who is wife of deceased stepped into the witness box and adduced her evidence. The involvement of the vehicle and occurrence of the accident is not disputed. Though Insurance Company has raised the defence that said accident took place due to the rash and negligent driving of the truck driver however, Insurance Company has not adduced any evidence to that effect. Insurance Company has also raised the defence that the claim of the claimant is bad in law for non-joinder of necessary parties i.e. truck owner in the Insurance Company of the truck. However, it is well settled that when there are more tortfeasors, claimant has a choice to claim the compensation against both the tortfeasors or any of the tortfeasor. Moreover, the Insurance Company has not challenged the finding of the tribunal holding the Insurance Company liable to pay the compensation.

12. Now only issue raised in the appeal is for the enhancement of the compensation. To prove the income of the deceased, claimant No.1 – wife of the deceased Smt. Shashikala Deotale stepped into the witness box and testified that the deceased Jagdish @ Ashok was working in the ginning factory at Akola and was getting income of Rs.5000/- per month. At the time of death, he was aged about 45 years. She further testified that if he did not met with an accident he would have survived

up to age of 60 years and in future definitely his income would have been increased. Admittedly, no documentary or oral evidence is adduced by examining the ginning mill owner or the accountant of ginning mill to show that deceased was drawing income of Rs.5000/- per month as he was working skilled worker in the said ginning mill. Admittedly, the claimant has not adduced the evidence to show that deceased was a skilled worker. It is also not disputed that the claimant has not adduced the evidence regarding the age of the deceased. In absence of the proof regarding the age of the deceased the age mentioned in the post-mortem report is to be accepted. As per the post-mortem report, the age of the deceased is 50 years. Therefore, considering the age mentioned in the post-mortem report, the multiplier in view of the judgment of *Sarla Verma (supra)* is to be applied.

13. As already observed that no evidence is adduced by the claimants to show that the deceased was a skilled worker and was getting Rs.5000/- per month. In ***Sri Ramachandrappa Vs. The Manager, Royal Sundaram Alliance Insurance Company Ltd. 2011(7) ALL MR 774 (S.C.)*** the Hon'ble Supreme Court has fixed the monthly income of the deceased as Rs.4500/- who died in an accident in 2004 who was labour. The Hon'ble Apex court found fault with the claims tribunal, in reducing the monthly income from Rs.4500/- to Rs.3000/- for the purpose of

computing the loss of contribution to the family and by fixing Rs.4500/- as monthly income computed the loss of contribution to the family. In a given case, where there is no evidence regarding employment and income earned by the deceased, the claims tribunal having regard to the number of dependents in other circumstances, can fix a reasonable income for the purpose of computing the loss of contribution to the family. At the time of filing the claim petition, the wife of the deceased as well as a mother of the deceased were dependent, on the deceased.

14. Appellant No.2 – Ajay Jagdish Deotale and appellant No.3 – Amol Jagdish Deotale both have attained the age of majority and were not dependent on the income of the deceased. Claimant No.1 in her cross-examination has admitted that claimant Nos.2 and 3 are working as a labourer and earning Rs.30/- to 40/- per day. Thus, considering the same, only claimant No.1 - Shashikala Deotale, claimant No.4 – Ku. Bhagyashree Jagdish Deotale, who was minor and claimant No.5 – Smt. Rukhmabai Madhav Deotale were the dependents on the income of the deceased. During the pendency of the appeal, claimant No.5 – Smt. Rukhmabai Deotale also died, therefore, dependency of claimant Nos.1 and 4 is to be considered.

15. The deceased is survived by five claimants i.e. wife, two sons, one daughter and mother. Mother subsequently died, two sons are

major. In view of the judgment referred above the notional income of the deceased can be taken into consideration @ Rs.3000/- per month. As per the decision reported in *Sarla Verma* (supra) the Claims Tribunal has deducted $^1/_3$ amount however, claims tribunal has considered the income as Rs.15,000/- per annum. The claims tribunal ought to have considered the notional income @ Rs.3000/- per month and yearly income which comes to Rs.36,000/-. The deceased was 50 years of age as per the post-mortem report. Therefore, in view of judgment of *Sarla Verma* (supra) the multiplier applied is to be 13.

16. It is well settled that just and reasonable compensation is to be awarded. In ***R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. AIR 1995 SC 755*** wherein the Hon'ble Apex court held as follows :

> *"In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of disability caused. But all the aforesaid elements have to be viewed with objective standards."*

17. In another judgment in ***Divisional Controller, KSRTC Vs. Mahadeva Shetty and anr. (2003) 7 SCC 197*** in paragraph No.12, the Supreme Court has held that :

> *"Broadly speaking, in the case of death the basis of compensation is loss of pecuniary benefits to the dependents of the deceased which includes pecuniary*

> *benefits to the dependents of the deceased which includes pecuniary loss, expenses etc. and loss to the estate. The object is to mitigate hardship that has been caused to the legal representatives due to the sudden demise of the deceased in the accident. Compensation awarded should not be inadequate and should neither be unreasonable, excessive, nor deficient. There can be no exact uniform rule for measuring the value of human life and the measure of damage cannot be arrived at by precise mathematical calculation; but amount recoverable depends on broad facts and circumstances of each case. It should neither be punitive against whom claim is decreed nor should it be a source of profit for the person in whose favour it is awarded."*

In paragraph No.15 in the said judgment, the Hon'ble Supreme Court has held that :

> *"Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just", a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness, and non-arbitrariness. If it is not so, it cannot be just."*

18. In ***Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka 2010 ACJ 38 (SC)***, a three-Judge Bench was dealing with a case arising out of the complaint filed under the Consumer Protection Act, 1986. While enhancing the compensation awarded by the National Consumer Disputes Redressal Commission the bench made the following

observations which can appropriately be applied for deciding the petitions filed under Section 166 of the Act. It is reproduced for reference :

> *"We must emphasise that the court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, the court must not be chary of awarding adequate compensation. The "adequate compensation" that we speak of, must to some extent, be a rule of thumb measure, and as a balance has to be struck, it would be difficult to satisfy all the parties concerned.... At the same time we often find that a person injured in an accident leaves his family in greater distress, vis-`-vis a family in a case of death. In the latter case, the initial shock gives way to a feeling of resignation and acceptance, and in time, compels the family to move on. The case of an injured and disabled person is, however, more pitiable and the feeling of hurt, helplessness, despair and often destitution enures every day. The support that is needed by a severely handicapped person comes at an enormous price, physical, financial and emotional, not only on the victim but even more so on his family and attendants and the stress saps their energy and destroys their equanimity."*

19. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future running however, as far as possible should be based on certain principles. A person may have bright future prospect, he might have become eligible to promotion immediately, there might have been chances of an immediate pay revision whereas in another the nature of

employment was such that he might not have continued in service, his chance of promotion, having regard to the nature of employment may be distant or remote. It is therefore, difficult for any Court to lay down rigid test which should be applied in all situation. There are divergent views in some cases it has been suggested that some sort of hypothesis or guess work may be inevitable. That may be so. The several other factors should be taken into consideration including the education of the dependents, the nature of the job. In the light of change societal conditions future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification, his past performance but also other relevant factors.

20. Having regard to the above facts in the present case, admittedly there is no evidence as to the income of the deceased. There is no evidence as to the fact that the deceased was a skilled worker. The question arises whether Court can take into consideration the increase of income or future prospects of the employees who employed in unorganised sector or self employed persons. The Hon'ble Apex Court in *Pranay Sethi* (supra) in paragraph No.13 observed that :

> *"Although the wages/income of those employed in unorganised sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who*

are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching clothes. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason, etc."

21. Hon'ble Apex Court further held that therefore, we do not feel that while making the observation in the last three lines of paragraph No.24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is a self employed or who is paid fixed wages. Rather it would be reasonable to say that a person who is self employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes victim of an accident then the same formula deserves to be applied for calculating the amount of compensation. The Hon'ble Apex Court further held that the degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where

the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years and the addition should be 10% between the age of 50 to 60 years.

22. Having regard to the observation of the Hon'ble Apex Court referred above and on the principles of law discussed by the Hon'ble Apex Court in the present case, the notional income of the deceased is to be taken into consideration as Rs.3000/- per month. After considering the income of Rs.3000/- per month and addition of 10% towards future prospects it comes to Rs.3300/- per month.

23. The yearly income of the deceased comes to Rs.39,600/-. After deducting $^1/_3$ towards the personal expenses the yearly income comes to Rs.26,400/- multiplier by 13 as per the judgment of *Sarla Verma* (supra). Thus, the appellants are entitled for the compensation of Rs.4,03,700/-. In addition to that appellant No.1 is entitled to receive additional amount of Rs.35,000/- towards the spousal consortium. As the rest of the appellants have already attained the age of majority, appellant No.4 has also attained the age of majority during the pendency of the appeal and her marriage may have been performed therefore, only appellant No.1 is entitled for the amount towards the consortium. The appellants are also entitled to receive the conventional amount of

Rs.12,500/- towards loss of estate and Rs.13,000/- towards funeral expenses as trial Court granted Rs.2500/- and Rs. 2000/- respectively. Thus, the appellants are entitled to receive enhanced compensation of amount after deducting Rs.1,59,500/-.

24. Learned Counsel for the Insurance Company placed reliance on the judgment of the Hon'ble Apex Court in the case of *Smt. Archana and ors.* *(supra)* wherein Hon'ble Apex Court has awarded interest @ 6% per annum on enhanced sum. In view of that in the present case also the appellants are entitled to receive interest @ 6% per annum on enhanced amount of compensation from the date of the claim petition till respondent No.2 – Insurance company deposits the amount. Hence I proceed to pass the following order :

(i) Appeal is partly allowed.

(ii) The appellants are entitled to receive enhanced amount of compensation Rs.2,44,200/- on interest @ 6% per annum from the date of petition till realisation of the amount.

(iii) The amount of compensation to be apportioned as 40% to the claimant No.1 and 20% each to the claimant Nos.2 to 4.

(iv) Award be drawn accordingly.

(URMILA JOSHI-PHALKE, J.)

**Divya*