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

FIRST APPEAL NO.1163 OF 2015
with
CROSS-OBJECTION NO.31 OF 2022

FIRST APPEAL NO.1163 OF 2015

The New India Assurance Co. Ltd.
Branch Office, Old bus stand,
Nirmal (A.P.)
presently through its
Deputy General Manager, Regional office,
4th Floor, Dr. Ambedkar Bhawan,
MECL Premises, Seminary Hills,
Nagpur

...APPELLANT

VERSUS

1. Samida Begum Mohd. Rafik Shaikh,
Aged 30 years, Occupation – Household,

2. Mohmadi Mohd. Rafik Shaikh,
Aged 11 years, Occupation – Student,

3. Mohd. Altamesh Mohd. Rafik Shaikh,
Aged 9 years, Occupation – Student,

4. Mohd. Tanfik Mohd. Rafik Shaikh,
Aged 5 years, Occupation – Student,

5. Hamidabi Abdul Rajjak,
Aged 55 years, Occupation – Household, } R. No.5 deleted as per Court's order dated 01/04/2022.

All R/o Bhaji Mandi,
Kuresh Nagar, Kamptee,
Tq. Kamptee, District Nagpur

Respondent Nos.2 to 4 minors through
their natural guardian mother respondent No.1

6. Bhaurao Nathuji Tumsare,
Aged Major, Occupation – Owner,
R/o. At Khapa, Post – Khapa,
Tahsil Tumsar, District Bhandara
or C/o. Yusuf Ahmad Khan
No.5-13, Moghalpura, Khanapur,
HDL, District Adilabad (A.P.).

...RESPONDENTS

<u>CROSS-OBJECTION NO.31 OF 2022</u>

The New India Assurance Co. Ltd.
Branch Office, Old bus stand,
Nirmal (A.P.)
presently through its
Deputy General Manager,
Regional office, 4th Floor,
Doctor Ambedkar Bhawan,
M.E.C.L. Premises, Seminary Hills,
Nagpur

...APPELLANT

VERSUS

1. Samida Begum Mohd. Rafik Shaikh,
Aged about 30 years,
Occupation – Household,

2. Mohmadi Mohd. Rafik Shaikh,
Aged about 11 years,
Occupation – Student,

3. Mohd. Altamesh Mohd. Rafik Shaikh,
Aged 9 years, Occupation – Student,

4. Mohd. Tanfik Mohd. Rafik Shaikh,
Aged about 5 years, Occupation – Student,

Cross-objector for 1 to 4.

5. Hamidabi Abdul Rajjak,
Aged about 55 years,
Occupation – Household,

R. No.5 deleted as per Court's order dated 01/04/2022.

All R/o Bhaji Mandi,
Kuresh Nagar, Kamptee,
Tq. Kamptee, District Nagpur

Respondent Nos.2 to 4 being minors
through natural guardian mother
respondent No.1

6. Bhaurao Nathuji Tumsare,
Aged Major, Occupation – Owner,
Resident At Khapa, Post – Khapa,
Tahsil Tumsar, District Bhandara
R/o. C/o. Yusuf AhmadKhan
No.5-13, Moghalpura, Khanapur,
HDL, District Adilabad (A.P.).

...RESPONDENTS

Shri A.W. Paunikar, Advocate for the appellant.
Shri R.S. Charpe, Advocate for respondent Nos.1 to 5.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : MARCH 23, 2023.
PRONOUNCED ON : JUNE 05, 2023

JUDGMENT :

Heard learned Counsel for the parties.

2. The appellant – New India Assurance Co. Ltd. preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award dated 05/08/2015 passed by the Motor Accident Claims Tribunal, Nagpur (hereinafter referred to as 'Tribunal' for short) in Claim Petition No.484/2009 by which Insurance Company was

directed to pay compensation of Rs.4,77,000/- inclusive of No Fault Liability along with interest @ 7.5% per annum from the date of filing of the petition till realization of the amount. The parties are hereinafter referred as per their original nomenclature.

3. The claimants have also filed cross-objection for enhancement of compensation.

4. The brief facts which are necessary to decide the appeal are as under :

A] The original petitioner No.1 who is the widow and petitioner Nos.2 to 4 are the children and petitioner No.5 is the mother of the deceased preferred the claim petition for grant of compensation on account of accidental death of Abdul Rafik Abdul Rajjak who died in an accident on 18/03/2009.

5. As per the contention of the petitioner, on 18/03/2009 at about 6.30 pm, deceased was proceeding by his motorcycle bearing No.MH-40-K-5268. The deceased was riding the said motorcycle on Nagpur to Kalmeshwar road, at the relevant time one Scorpio bearing No.MH-36–4338 came from the opposite direction driven in a rash and negligent manner and driver lost the control and dashed against the

motorcycle of the deceased. Due to the severe dash, deceased sustained grievous injuries and died on the spot. The alleged offending vehicle Scorpio was owned by respondent No.2 and validly insured with respondent No.1. Regarding the said accident, the crime was registered against the Scorpio driver vide Crime No.59/2009 at Kalmeshwar police station. As the said accident took place, due to the rash and negligent driving of Scorpio driver the claimants claimed the compensation under pecuniary and non-pecuniary damages.

6. It is further the contention of the claimants that the deceased was Supervisor and supervising the building works and drawing salary of Rs.7,500/- per month. Due to the death of the deceased, the claimants have lost the bread earner of the family. At the time of accident, deceased was aged about 32 years. Hence, the claimants are entitled for compensation.

7. In response to the notice, the respondent No.1 – Insurance company resisted the claim and raised the defence of contributory negligence on the part of the deceased. As per contention of the Insurance company, the Scorpio driver is not only responsible for the said accident but the deceased was also responsible for the said accident. It is further the defence of the Insurance Company that Scorpio driver

was not having valid driving license at the time of accident and it amounts to breach of terms and conditions of insurance policy hence, Insurance Company is not liable to pay compensation.

8. To substantiate the contention, claimant No.1 adduced her evidence by examining herself vide Exhibit 24. Besides her oral evidence, she further placed reliance on the police papers i.e. FIR (Exhibit 25), spot panchnama (Exhibit 26), Inquest panchnama (Exhibit 27), post-mortem report (Exhibit 28), driving license (Exhibit 29). The respondent – Insurance Company has examined Gopal Shiwaji Kopnar, the official of Road Transport Office to prove that the Scorpio driver was not having valid driving license. As per the evidence of said Gopal Shiwaji Kopnar, the driving license No.MH-31/04/308823 was issued to one Rajesh Kumar Yadav and not to the Sheikh Jakir Pathan. So it is a fake license. Thus, the Insurance Company is not liable to pay compensation.

9. After appreciating the evidence, the Tribunal has come to the conclusion that Insurance Company has proved that the owner of the offending vehicle has contravened the terms and conditions of the policy hence, Insurance Company is not liable to pay compensation and directed to pay the Insurance Company and recover it from the owner.

10. Being aggrieved and dissatisfied with the judgment and award, present appeal is preferred by the Insurance Company on the ground that the learned Tribunal has committed an error in fastening the liability of payment of compensation to the claimants and then recovering it to the owner. When it is held that the owner has committed the breach of the terms and conditions of policy the Tribunal had further not considered the contributory negligence of the deceased and entire liability is fastened on the Insurance Company. Therefore, the judgment and award deserves to be set aside to the extent of liability of the Insurance Company and Insurance company is to be exonerated from the liability. The claimants also challenged award by preferring cross-objection on the ground that the learned Tribunal awarded inadequate compensation.

11. Heard Shri A.W. Paunikar, learned Counsel for the appellant - Insurance Company. He reiterated the contentions that it is proved by the Insurance company that the owner of the offending vehicle has contravened the terms and conditions of the policy. The Tribunal had also not considered the contributory negligence of the deceased and awarded the compensation by saddling the responsibility on the Insurance Company. The directions of the Tribunal are also erroneous and liable to be set aside.

12. *Per contra*, Shri Charpe, learned Counsel supported the judgment of the Tribunal and submitted that no interference is called for. In support of his contention, he further submitted that the claimants are entitled to receive the enhanced amount of compensation.

13. After hearing both the sides and on perusal of the record with the able assistance of learned Counsel for both the parties, following points arise for my consideration :

(i) Whether the Tribunal is justified in directing the Insurance Company to pay the amount of compensation and recover the same from the owner?

(ii) Whether deceased has contributed for the said accident?

(iii) Whether the claimants are entitled for enhanced amount of compensation?

14. There is no dispute that the deceased met with an accident on 18/03/2009 when he was proceeding on his motorcycle bearing No.MH-40-K-5268. There is also no dispute that the deceased was riding the said motorcycle and his motorcycle was dashed by Scorpio Car bearing No.MH-36-4338. Admittedly, the crime was registered against the Scorpio driver vide Crime No.59/2009.

15. To substantiate the contention that the alleged accident took place due to the rash and negligent driving of Scorpio Car driver, the claimant No.1 stepped into the witness box vide Exhibit 24 and narrated about the occurrence of the accident. Admittedly, she is not the eye-witness of the accident. To prove the negligence of Scorpio car driver, the claimants placed reliance on police papers FIR (Exhibit 25) which shows that the crime was registered against the Scorpio driver. The recitals of the FIR shows that the alleged accident took place as Scorpio driver could not control his vehicle and dashed against the motorcycle. The spot panchnama (Exhibit 26) is also on record which also not supports the contention of the Insurance Company that the deceased has contributed to the said accident. Admittedly, Insurance Company has not examined the Scorpio driver to prove that the deceased has contributed to the said accident.

16. Whether the said accident took place due to the contributory negligence or composite negligence, is the material aspect. The principle underlying the doctrine of contributory negligence is the application of the maxim '*in pari delicto, potior est conditio defendentis*' which means when both parties are equally to blame, neither can hold the other liable. There is clear difference between the contributory negligence and composite negligence. Where a person is injured without any act or

omission from his part, but as combined effect of the negligence of two or more persons, it is a case of composite negligence and not a case of contributory negligence. The expression contributory negligence applies solely to the conduct of the claimant, in a case of personal injury and in case of compensation for death, it applies to the conduct of the victim. It means that there was an act or omission from the part of the injured claimant or victim, which has materially contributed to the damage.

17. In the instant case, neither FIR nor spot panchnama supporting the contention of the Insurance Company that the deceased has contributed the said accident. The Insurance Company has also not adduced any evidence by examining either Scorpio driver or any other witness to prove the contributory negligence of the deceased. Thus, the contention of the Insurance Company that the deceased has also contributed for the said accident is not supported by any evidence.

18. The Insurance Company has raised the ground that the Tribunal after appreciating the evidence held that the Scorpio driver was not holding valid driving license and the owner has committed the breach of terms and conditions of policy. The direction of the Tribunal to the appellant – Insurance Company to pay and recover is erroneous. In ***United India Insurance Co. Ltd. Vs. Suresh K.K. and anr., 2008 ALL***

SCR 1886, Manager, National Insurance Co. Ltd. Vs. Saju P. Paul and anr., 2013 ALL SCR 486 and Manuara Khatun and ors. Vs. Rajesh Kr. Singh and ors. reported in 2017 ALL SCR 599, the Hon'ble Apex Court consistently held that despite exoneration of Insurance Company from the liability to pay the compensation to the claimants, directions can be issued to the Insurance Company to first pay the compensation to the original claimants and subsequently recover it from the owner of the offending vehicle by simply initiating the proceeding before the executing court without filing any suit. Thus, the directions issued by the Tribunal considering it would be difficult for the claimants to recover the amount of compensation from the owner is legal one and no error is committed by the Tribunal by giving such directions. Therefore, the grounds raised by the Insurance Company is not sustainable.

19. So far as the enhancement of the compensation is concerned, the Tribunal had considered the income of the deceased by taking into consideration the notional income. Though the claimants claimed that the deceased was earning Rs.7,500/- per month however, no evidence is adduced by the claimants, and therefore, by taking into consideration the notional income the amount of compensation is awarded by the Tribunal. Admittedly, no evidence is adduced to show that the deceased was earning Rs.7500/- per month. Even it is considered that the

deceased was doing the labour work then he could get Rs.150/- to Rs.200/- per day. This aspect is also considered by the Hon'ble Apex Court in the Case of ***Sri Ramachandrappa Vs. The Manager, Royal Sundaram Alliance Insurance Company Ltd. 2011(7) ALL MR 774 (S.C.)*** wherein the Hon'ble Apex Court has fixed the monthly income of the deceased as Rs.4500/- who died in an accident in the year 2004 who was a labour. In the present case, the accident occurred in the year 2009 so notional income of the deceased ought to have considered Rs.4500/- per month. The yearly income of the deceased comes to Rs.54,000/-. After deducting 1/4th the income of the deceased comes to Rs.40,500/-. The Hon'ble Apex court in the case of ***National Insurance Co. Ltd. Vs. Pranay Sethi, 2017 (16) SCC 680*** 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."*

20. 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.

21. 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 if the yearly income of the deceased is taken into

consideration after adding 40% it comes to Rs.56,700/-. The deceased was 32 years of age. So the multiplier applied is to be 16. After adding the multiplier of 16 the amount of compensation comes to Rs.9,07,200/-. Besides the said amount of compensation the claimant No.1 is entitled to receive Rs.40,000/- as a spousal consortium, claimant Nos.2, 3 and 4 are entitled to receive Rs.40,000/- each, as parental consortium. The tribunal has awarded Rs.10,000/- towards funeral expenses, so claimants are entitled to receive additional amount of Rs.5000/- towards funeral expenses and amount of Rs.15,000/- each towards the loss of estate. As the claimants had already received an amount of Rs.25,000/- towards loss of love and affection, therefore, the amount of Rs.25,000/- is to be deducted from the amount of consortium. As the amount of consortium is to be paid for company, care, health, comfort, guidance, solace and affection of the deceased thus, after deducting Rs.25,000/- from the consortium amount the total amount which the claimants are entitled to receive towards compensation is (11,32,200/- (-) 25000/-) = Rs.11,07,200/-.

22. The claimants are entitled to receive the enhanced amount of compensation considering the law laid down by the Hon'ble Apex Court in the case of *Pranay Seth*i (supra).

23. In view of the above facts and discussion, the appeal of the appellant is devoid of merits and liable to be dismissed. The cross-objection deserves to be allowed partly. Hence, I pass the following order :

(i) The appeal is dismissed and the cross-objection is partly allowed.

(ii) The claimants are entitled to receive compensation of Rs.11,07,200/-(Rs. Eleven lacs seven thousand and two hundred) towards full and final amount of compensation.

(iii) The appellant-Insurance Company is directed to deposit the enhanced amount of compensation after deducting the compensation amount awarded by the Tribunal along with interest @ 7% per annum from the date of application till realization of the amount.

(URMILA JOSHI-PHALKE, J.)

**Divya*