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

FIRST APPEAL NO.321 OF 2020
with
CROSS-OBJECTION NO.37 OF 2022

FIRST APPEAL NO.321 OF 2020

National Insurance Company Ltd.
having its Regional Office at
5th Floor, Fidvi Towers,
Opposite Saraf Chambers,
Sadar, Nagpur – 441 001
and also having its Divisional Office
at Plot Number 40, Durga Sadan,
Balraj Marg, Dhantoli, Nagpur
through its Regional Manager

...APPELLANT

VERSUS

1. Mrs. Rajeshwari wd/o Ajay Wanjari,
Aged 37 years, Occupation – Housewife,

2. Aditya Ajay Wanjari,
Aged 13 years
(minor through his mother and
natural guardian - respondent number 1)

3. Mrs. Shantabai Nivrutti Wanjari
Aged 72 yrs.,

All respondent Nos.1 – 3 are
R/o.Quarter number A-120,
Near Lakshmi Narayan Temple,
Nandanvan Colony,
Nagpur 400 024

4. M/s Saini Transport Co.,
1149, Central Avenue,
Gandhibagh, Nagpur

...RESPONDENTS

CROSS-OBJECTION NO.37 OF 2022

National Insurance Company Ltd.
having its Regional Office at
5th Floor, Fidvi Towers,
Opposite Sarag Chambers,
Sadar, Nagpur

...APPELLANT

VERSUS

1. Rajeshwari wd/o Ajay Wanjari,
Aged about 39 years,
Occupation – Housewife,

2. Aditya s/o Ajay Wanjari,
Aged about 15 years
Occupation - Student
(minor through his mother and
natural guardian - respondent No.1)

3. Mrs. Shantabai Nirutti Wanjari
Aged about 74 yrs.,
Occupation – Nil,

Cross-objector Nos.1 to 3.

All respondent Nos.1 – 3 are
R/o.Quarter No.A-120,
Near Lakshmi Narayan Temple,
Nandanvan Colony,
Nagpur 400 024

4. M/s Saini Transport Co.,
1149, Central Avenue,
Gandhibagh, Nagpur

...RESPONDENTS

Ms Anita Mategaonkar, Advocate for the appellant.
Shri K.P. Mirache, Advocate for respondent No.3

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : MARCH 02, 2023.
PRONOUNCED ON : MAY 04, 2023

JUDGMENT :

Heard. **ADMIT.**

2. The appellant - National Insurance Company Limited preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award dated 26/03/2019 passed by the Motor Accident Claims Tribunal No.4, Nagpur (hereinafter referred to as 'Tribunal' for short) in Claim Petition No.1070/2014 by which the Insurance Company was directed to pay compensation of Rs.16,78,112/- 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 brief facts which are necessary to decide the appeal are as under :

A] On 07/08/2014, at about 10.00 pm, the deceased - Ajay s/o Nivrutti Wanjari was proceeding on his motorcycle bearing registration No.MH-31-BE-5034 along with pillion rider – Devidas Shende from Besa road towards Manewada Chowk. At the relevant time, tipper bearing registration No.MH-31-CB-6361 came in an excessive speed in a rash and negligent manner and could not control his vehicle and dashed against the motorcycle. Due to the severe dash the deceased who was riding the motorcycle sustained grievous injuries and succumbed to the injuries on the spot. The said accident took place due to the rash and negligent driving of tipper driver, hence crime was registered against him vide Crime No.241/2014 at Ajni police station, Nagpur. The offending vehicle was owned by respondent No.1 and validly insured with respondent No.2. As the said accident took place due to the rash and negligent driving of the tipper driver, the claimants who are the wife, son and mother of the deceased claimed the compensation.

4. It is further contention of the claimants that at the time of accident, deceased was 43 years of age and was Civil Engineer working with Atharva Infrastructures, Nagpur and was getting Rs.32,000/- per month. Due to the death of the deceased, the claimants have lost the bread earner of the family. Claimant No.1 lost love and affection of husband, claimant No.2 lost love and affection of his father and claimant No.3 has lost her son. For all above these grounds, the claimants have claimed the compensation under the pecuniary and non-pecuniary heads.

5. In response to the notice, respondent No.2 filed its reply and contested the claim on the ground that the deceased who was riding the

motorcycle was also responsible for the said accident. Thus, the deceased has contributed for the said accident and there is no sole negligence of the tipper driver. Respondent No.1 adopted the reply filed by respondent No.2.

6. In support of the contention, claimant No.1 stepped into the witness box and filed affidavit of her evidence and reiterated the contentions regarding the occurrence of the accident. Besides her oral evidence, she had examined PW-2 - Chandrakant Baburao Suramwar vide Exhibit 31 to prove the income of the deceased. The respondent No.1 examined Shaileshkumar Vinodkumar Gautam – tipper driver to prove the contributory negligence of the deceased. Besides the oral evidence, claimants placed on record Accident Form-AA (Exhibit 25), FIR (Exhibit 26), Spot panchnama (Exhibit 27), Inquest panchnama (Exhibit 28), Post-mortem report (Exhibit 29), Salary certificate (Exhibit 32), etc.

7. After appreciation of the evidence, the Tribunal held that the Insurance company is liable to pay compensation of Rs.16,78,112/- inclusive of N.F.L. amount with interest @ 7.5% per annum from the date of the petition till realization of the amount of compensation.

8. Being aggrieved and dissatisfied with the judgment and award, present appeal is preferred on the ground that the learned Tribunal had not considered that the deceased who was motorcycle rider is also responsible for the said accident. It is further raised that the learned Tribunal ought to have considered 25% towards the future prospects whereas Tribunal had considered 40% towards the future prospects, thus, quantum of compensation awarded by the Tribunal is excessive and exorbitant one. Hence, judgment and award deserves to be modified.

9. Heard Ms Mategaonkar, learned Counsel for the appellant. She submitted that the motorcycle rider was also negligent and contributed to the said accident. The appellant has adduced the evidence of the tipper driver which shows that the motorcycle of the deceased dashed against the rear side of the tipper. Thus, the accident took place due to the negligence of the deceased but this fact is not considered. She further submitted that admittedly, the deceased was 43 years of age towards future prospects, the claimants are entitled to receive the compensation by adding 25%. However, the Tribunal had added 40% of the amount towards future prospects, and therefore, compensation awarded by the Tribunal is excessive and exorbitant one.

10. *Per contra*, Shri Mirache, learned Counsel submitted that the judgment and award passed by the Tribunal holding Insurance Company liable is just and proper one. He further submitted that the claimants have claimed enhanced compensation. Hence, no interference is called for. He supported the judgment of the Tribunal.

11. Having heard both the sides and perusal of the record, the points arise for consideration is :

(i) Whether the Tribunal has justified in holding the tipper driver negligent for the said accident?

(ii) Whether the quantum of compensation is excessive and exorbitant one?

12. There is no dispute that the death of the deceased – Ajay was caused in vehicular accident which took place on 07/08/2014 at about 10.00 pm. As per the allegation of the claimants, the said accident took place due to the rash and negligent driving of the tipper driver. Admittedly, claimant No.1 - Rajeshwari who is the wife of the deceased adduced her evidence. She has not witnessed the said accident. Thus, she is not the eye-witness of the accident. The claimants relied upon the police papers. Regarding the said accident, Vinayak Vilas Patil, Assistant Police Inspector lodged the FIR. The recitals of the FIR shows that the accident took place between offending vehicle Tipper bearing No.MH-

31-CB-6361 and the motorcycle bearing No.MH-31-BE-5034. The recitals of the FIR shows that the said accident took place as tipper driver has driven his vehicle in an excessive speed and gave dash to the motorcycle. Due to the said dash, deceased sustained grievous injuries and died on the spot. The recitals of the spot panchnama (Exhibit 27) discloses that the alleged accident took place in Manewada Chowk on Ring Road, Manewada Square to Hudkeshwar.

13. On perusal of the panchnama, it reveals that the back portion of the motorcycle was damaged. This fact is sufficient to show that the motorcycle was dashed from the back side. Thus, the alleged accident took place as offending vehicle dashed the motorcycle from the back side. Thus, admittedly the accident is not the result of head on collision. Whether the said accident took place due to the contributory 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.

14. The expression contributory negligence applies solely to the conduct of the claimant, in 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.

15. In the present case, the police papers clearly shows that the motorcycle was dashed from the back side. It is not a head on collision. Though Insurance Company has adduced the evidence of tipper driver but it is not supported by the police papers. The evidence of the tipper driver is contrary to the police papers. The tipper driver PW-1 stated that he heard the sound of dash to the rear side of his tipper and thereafter he came to know regarding the accident. However, the spot panchnama shows that the motorcycle was damaged towards the back side. It means that the motorcycle was dashed from the back side. Thus, the evidence on record sufficiently shows that it was the tipper driver who has not taken due care and caution while driving the tipper and dashed the motorcycle from the back side. Thus, the appellant failed to prove that the deceased has also contributed for the said accident.

16. As regards the amount of compensation is concerned, it is submitted by learned Counsel Ms Mategaonkar, that the Tribunal has awarded the compensation by adding 40% towards the future prospects. Admittedly, deceased was 43 years of age. Therefore, Tribunal ought to have added 25% towards the future prospects while awarding the compensation. However, the Tribunal added 40%, and therefore,

amount of compensation requires to be reduced. The appellant has not challenged the income of the deceased. Claimant has examined PW-2 – Chandrakant Baburao Suramwar who testified that he was running Atharva Construction Firm and deceased was getting Rs.42,000/- per month along with petrol allowance. During his cross-examination, it came on record that his firm was a Registered Partnership Firm. It further came in his evidence that in the Firm's Salary Register was not maintained and Income Tax was also not deducted. He produced on record Salary Certificate Exhibit 32. The Tribunal had considered the evidence of the deceased @ Rs.10,000/- per month and by adding 40% the compensation was awarded.

17. As per the evidence of claimant No.1, deceased had completed Diploma in Civil Engineering and was working with the construction company. Admittedly, no document is brought on record to show that the deceased was Civil Engineer. The Salary Certificate Exhibit 32 shows that the deceased was employee in the firm on the post of Senior Sight In-charge Engineer. During cross-examination, the claimant No.1 had admitted that she has not produced any document on record to show that the deceased was Diploma in Civil Engineering. Taking into consideration, the certificate issued by Construction Firm which shows that the deceased was working as a Senior Sight In-charge. The amount

considered by the Tribunal of Rs.10,000/- per month is very meager amount.

18. Considering the evidence on record, the income of the deceased is to be taken into consideration as Rs.15,000/- per month. The yearly income of the deceased comes to Rs.1,80,000/-. After deducting 1/3rd it comes to Rs.1,20,000/-. Admittedly, the deceased was 43 years of age as per the post-mortem report. The Hon'ble Apex Court in ***National Insurance Co. Ltd. Vs. Pranay Sethi, 2017 (16) SCC 680*** wherein it is held that 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 40%, and where the deceased was between the age of 40 to 50 years an addition of 25% would be reasonable. In view of that the claimants are entitled to receive compensation after adding 25% (1,20,000/- + 25% (Rs.30,000/-) = 1,50,000/-) towards future prospects it comes to Rs.1,50,000/-. The deceased was 43 years of age, therefore, the multiplier applied is to be 14 (Rs.1,50,000/- x 14 = Rs.21,00,000/-) it comes to Rs.21,00,000/-. Claimant No.3 is the mother of the deceased. The Hon'ble Apex Court in the case of ***Magma***

General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram, 2018 (18) SCC 130 held by referring the judgment of Constitution Bench in *Pranay Sethi* (supra) wherein the Hon'ble Apex Court observed that in legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training." Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit. The Motor Vehicles Act is a beneficial legislation with an object of providing relief to the victim or their family.

19. Claimant No.3 – mother is entitled to receive consortium of Rs.40,000/- under the head of filial consortium. Thus, after adding Rs.40,000/-. In addition to that the claimants are also entitled to receive loss of estate Rs.15,000/- each. The Tribunal has awarded only

Rs.15,000/-. Thus, in addition, the claimants are entitled to receive the compensation of Rs. (Rs.21,00,000/- + Rs.40,000/- + Rs.30,000/-) = Rs.21,70,000/-.

20. It is well settled that the claimants are entitled for 'just compensation'. The concept of 'just compensation' is dealt by Section 168 of the Motor Vehicles Act, 1988. The concept of 'just compensation' has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The conception of 'just compensation' has to be viewed through the prism of fairness, reasonableness. In case of a death, the legal heirs of the deceased cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the Tribunal is quite wide, yet it is obligatory on a part of the Tribunal to be guided by the expression, i.e., just compensation. The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and after applying the appropriate multiplier. The formula relating to multiplier has been clearly stated in the case of *Sarla Verma Vs. DTC (2009) 6 SCC 121* and it has been approved in the case of *Reshma Kumari Vs. Madan Mohan (2013) 9 SCC 65*. In view of the

principles laid down by the Hon'ble Apex Court, the compensation is to be determined.

21. In view of the above discussion, the claimants are entitled to receive the compensation amount of Rs.21,70,000/-.

22. 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.21,70,000/- (Rs. Twenty one lacs seventy thousand) 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*