**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**Miscellaneous Appeal No.137 of 2016**

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The Divisional Manager National Insurance Company Ltd. Shanti Market, Near Gandhi Maidan Gaya Represented through the Chief Regional Manager and the Constituted Attorney, Regional Office, National Insurance Company Ltd. 4th Floor, Sone Bhawan Birchand Patel Marg, P.S. Sachivalaya, Dist. Patna.

... ... Appellant/s

Versus

1. Urvashi Kumari Wife of Late Rakesh Kumar
2. Sachidanand Singh Wife of Late Ram Naresh Prasad Singh
3. Naina Devi wife of Sachidanand Singh
4. Nirmal Kumar Minor Son of late Rakesh Kumar represented through his Mother and legal guardian Urvashi Kumari, All are resident of Mohalla Chand Chaura, Ps Civil Line, District Gaya Bihar.

... ... Respondent/s

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**Appearance :**

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| For the Appellant/s | : | Mr.Raj Kumar Singh Vikram, Adv. |
| For the Respondent/s | : | Mr.Shailendra Kumar, Adv. |

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**CORAM: HONOURABLE MR. JUSTICE KHATIM REZA**

ORAL ORDER

24 06-02-2024 Heard Mr. Raj Kumar Singh Vikram, learned counsel for the appellant, as well as Mr. Shailendra Kumar, learned counsel for the respondent No. 1 to 4.

2. This Misc. Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award dated 28-05-2015 and 13-08-2015, respectively, passed by the Additional District Judge- 1st- cum- Motor Accident Claims Tribunal, Gaya, (hereinafter referred to as 'the Tribunal') in M.A.C. Case No. 21/2010/165/2010 (D.J.), whereby the learned Tribunal has allowed the claim application and awarded

compensation of Rs 15,76,000/- in favour of the claimants, out of which Rs 50,000/- was already paid to the claimants as a*d interim* compensation along with 6% interest per annum from 13-08-2010, till the actual payment. The payment shall be made by the account payee cheque and the two-third (2/3rd) of the said amount shall be paid through payee cheque in the name of Applicant No. 1, who shall receive on her behalf and on behalf of her minor son, Applicant No. 4, and the remaining one-third (1/3rd) amount of the said compensation shall be paid jointly to Applicants Nos. 2 and 3 (parents of the deceased).

3. The case of the claimants- respondent No. 1 to 4, is that deceased Rakesh Kumar was going to Wazirganj on a motorcycle bearing No. BR-2E-5854 and, at the same time, another motorcycle bearing No. BR-2H-3076 was also coming and when they reached near village Bhindash on Gaya- Nawada Road, all of a sudden, a Magic van bearing No. BR-2H-1987 came being driven by rashly and negligently from wrong side and dashed the motorcycle of Rakesh Kumar and two other motorcycles also, and both the motorcyclists got serious injuries and both were sent to A.N.M.M.C.H. Gaya, for treatment. Thereafter, Rakesh Kumar was referred to P.M.C.H. for better treatment, but he died in the same night. The claimants-

respondents claimed that the deceased was a permanent Government employee, aged about 34 years and earning Rs. 12,000/- per month. An FIR was lodged at P. S. Wazirganj, on the information of Akhila Prasad Singh, as Wazirganj PS Case No. 108 of 2010, for the offences punishable under Sections 279, 337, 338, 304(A) and 427 of the IPC, and after investigation, charge sheet was also submitted against the driver of Tata Magic van. The said claim application has been filed for compensation of Rs. 16,32,000/- on the basis of monthly income of Rs 12,000/- per month.

4. On summon, National Insurance Company Limited, (Insurer), appeared and filed written statement. The Opposite Party No.2, namely, Ganauri Prasad, who is the owner of the offending vehicle, has not appeared despite service of summon. The Insurer of the offending vehicle has pleaded in his written statement that the claim of the applicants is not maintainable as the claimants never informed the Insurance Company regarding alleged accident, neither insurer of the motorcycle nor driver of the offending vehicle, namely, Pappu Gupta, was made party to the claim case and as such, the petition suffers from non-joinder and mis-joinder of necessary parties. The manner of occurrence was denied and plea of contributory negligence was also taken

and in absence of Insurer of both the vehicles, the only opposite party No.1- appellant, is not liable for payment of compensation. Contributory negligence of the deceased should also be considered as the manner of occurrence is denied by the Insurance Company. The appellant did not admit that the driver of the Magic Van was having valid license on the alleged date of occurrence. Opposite party-appellant denied the age, occupation and income of the deceased and the amount of compensation shown in the application, is highly excessive and it has also been wrongly calculated. The deceased was also not having a valid license to drive motorcycle and, therefore, the contributory negligence on his part cannot be denied and it is the liability of the applicants- respondents to prove that the deceased was having a valid driving license to drive the motorcycle.

5. On the basis of pleadings, four witnesses examined on behalf of the applicants- respondents and also exhibited relevant documents relating to the said accident.

6. On the other hand, no evidence has been adduced by the opposite party No. 1-Appellant. The owner of the vehicle has not appeared, and the driver of the offending Magic van bearing No. BR2H1987 has been charge-sheeted for the offence

punishable under Section 304 ( A ) of the Indian Penal Code, along with other sections. The learned Tribunal, after analyzing the evidence adduced by the claimants, materials on record, has held that the deceased died in a vehicular accident caused by rash and negligent driving of the Magic van bearing No. BR2H1987 on 28-04-2010. Postmortem report ( Exhibit 4 ) has been marked on the basis of admission of Opposite Party No. 1-(Insurance Company) which also supports this fact that cause of death of Rakesh Kumar was excessive bleeding due to injuries caused by hard and blunt object and post-mortem of the dead body was conducted at PMCH on 19-04-2010 by Dr. Anil Kumar. Therefore, on the basis of these documentary evidences which have not been controverted by Opposite Party No. 1-Appellant, it has been held that at the time of alleged accident offending vehicle i.e. Tata Magic bearing No. BR-2H-1987 was coming from Wazirganj side and it dashed into two motorcycles and such circumstance indicates that there was negligency on the part of the driver of the Magic Van. However, after instituting the case as Wazirganj PS Case No. 108 of 2010, the occurrence was investigated by the police. After investigation, the police has submitted charge sheet only against the driver of offending Magic van bearing No. BR2H1987 and, under these circumstances, *prima facie,* there is no case of contributory negligence on the part of the deceased. Moreover, in absence of any evidence with regard to contributory negligence on the part of the deceased, it cannot be presumed only on the basis of pleadings of the Insurance Company that there was contributory negligence on the part of the deceased also.

7. The learned Tribunal has held that the deceased Rakesh Kumar was a permanent employee in Health Department, Wazirganj, and he was posted as Senior Treatment Supervisor and used to earn Rs 12,000/- per month after considering the evidences adduced by the applicants-respondents that the deceased was employee of Health Department and he was earning Rs 12,600 per month. Learned Tribunal, considered the evidence of AW3, namely Javed Akhtar, who has stated in his examination-in-chief that the deceased was posted as Senior Treatment Supervisor to work at Tuberculosis Centre, Wazirganj, Gaya, and he was getting Rs 12,600/- per month but, during his cross-examination he has stated that appointment of deceased on the said post was made on contract basis on 27-07-2008 and his contract had already been terminated last year. The certificate of earning has already been marked as Exhibit 1 issued by the District Tuberculosis

Officer for the proof that monthly income of the deceased in the month of April 2009 was Rs 12,600/. It also appears from the said certificate that there was a provision of increase in salary 5% yearly, but it does not appear from this certificate that the job of the deceased was of regular nature. The learned Tribunal further held that on the basis of evidence of this witness on the date of accident, the deceased was not employed at the District Tuberculosis Office, Wazirganj, as his contract had already been terminated in 2009, therefore, the learned Tribunal held that the deceased was unemployed at the time of accident. Therefore, the learned Tribunal, considering all these circumstances, has held that despite the fact that the deceased was unemployed at the time of accident, his monthly income ought to be presumed at least Rs 12,000 per month without any adding to this amount.

8. After considering the documentary evidence, the Tribunal has held that the deceased was graduate and he had got training for hospitality of tuberculosis patient. The age of the deceased, at the time of accident, was 35 years, therefore, considerable multiplier for the age group of 35 years shall be 16. The total amount after using multiplier shall be Rs 15,36,000/-. After addition of consortium amount of Rs 20,000/-, funeral expenses of Rs. 5,000/- and loss of estate of

Rs. 10,000/-. The total amount of compensation shall be 15,76,000/-. The learned Tribunal directed to pay the aforesaid amount of compensation together with interest of 6% per annum from the date of admission of the case i.e., 13-08-2010 till its realization.

9. Aggrieved by the impugned judgment and award passed by the Tribunal, the Insurance Company preferred present Misc. Appeal and challenged the aforesaid judgment and award.

10. The learned counsel for the appellant has submitted that the said accident was caused by rash and negligent driving. It is further submitted that the deceased was not an employee at the time of accident and, in such circumstances, fixation of monthly income of Rs. 12,000/- by the Tribunal is illegal and unjustified. Merely on presumption, income should not have been fixed. The learned Tribunal has wrongly assessed the age and income of the deceased and the amount of compensation is excessive and exorbitant.

11. On the other hand, learned counsel for the claimants-respondents has challenged the quantum of compensation awarded by the Tribunal without filing cross-appeal, placing reliance in the case of ***Surekha and Ors. V***

***Santosh and Ors.*** reported in ***2020 SCC Online SC 1312***, wherein the Hon'ble Apex Court held that :-

> *"the court should not take a hypertechnical approach and ensure that just compensation is awarded to the affected person or the claimant."*

12. The learned counsel for the claimants-respondents submits that the learned Tribunal failed to consider future prospect in calculating the quantum of compensation in terms of the settled principle laid down in the case of ***National Insurance Company Ltd. v. Pranay Sethi***, reported in (***2017)16 SCC 680***. It is further submitted that the Tribunal erroneously failed to add compensation for the loss of consortium as per latest judgment of Hon'ble Apex Court.

13. Having heard the learned counsel for the appellant as well as learned counsel for the respondents and perusal of the records, as also judgments of the Hon'ble Apex Court (supra), this Court finds that there is no dispute on applying multiplier of 16 in the instant case (age of the deceased, 35 years). Further, there is no dispute regarding deduction in living expenses that is one-third( 1/3rd ) of the income of the deceased.

14. On analyzing the annual income of the deceased, being an employee of the State Government, although on a

contractual basis, before one year of the accident, but the monthly income of the deceased has been sufficiently proved by evidence adduced by the claimants and same has not been rebutted by the Insurance Company. On adding the future prospect, in view of the judgment of the Hon'ble Apex Court in ***Pranay Sethi*** (supra), this Court has no doubt that in this case, 40% (deceased below 40 years of age) of the established income of the deceased would be entitled to be added while computing total loss of dependency. Paragraph 59.4 of the case of ***Pranay Sethi*** (supra), reads as under:-

> ***"59.4.*** *In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."*

15. In the case of ***Pranay Sethi*** (supra), the Hon'ble Apex Court has recognized three categories of conventional heads-(i). Funeral expenses at Rs. 15,000/, (ii). Estate loss at Rs. 15,000/- (iii). Loss of consortium at Rs. 40,000/-. While discussing the meaning of the word 'consortium', the Hon'ble

Supreme Court in the case of ***Pranay Sethi*** (supra), though did not approve the principles laid down in ***Rajesh and others v. Rajbir Singh and others (2013) 9 SCC 54,*** but revisited the principles on fixation of conventional heads after quoting paragraph 17 of ***Rajesh v. Rajbir Singh***( supra), which reads as under :-

> *"17... In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non- pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately*

*compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."*

16. It is well settled by the judicial pronouncement that the widow of the deceased would be entitled for a spousal consortium and minor children would get parental consortium. In case of parents, if dependant on the deceased, they would be entitled for filial consortium. In the case of ***Janabai WD/O Dinkarrao Ghorpade & Others Vs. ICICI Lombard Insurance Company Limited,*** reported in ***(2022)10 SCC 512,*** the Hon'ble Apex Court has awarded Rs 40,000/- each on account of spousal and parental consortium. In the present case, widow, Respondent No. 1 would be entitled for Rs 40,000/- as spousal consortium whereas, Respondent No. 4 would be entitled for Rs 40,000/- on account of parental consortium and Respondents Nos. 2 and 3, (father and mother of the deceased), would be entitled for Rs 40,000/- each on account of filial consortium. They would also be entitled for the claim on account of funeral expenses at Rs 15,000/- and estate loss at Rs 15,000/-.

17. In this appeal, respondents did not file any cross-appeal for enhancement of compensation amount. It is a well-

settled principle that the Court under Order XLI, Rule 33 has power to make an order to enhance the compensation even though the claimant has not filed any cross-appeal or objection.

18. In the case of ***Ranjana Prakash and others vs Divisional Manager and another*** reported in ***(2011)14 SCC639***, it has been held as follows.

> *"The principle also flows from Order 41, Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if respondent had not filed any appeal or cross-objection."*

19. On the point of just compensation, the Hon'ble Apex Court in the case of ***Ramla and others vs National Insurance Company Ltd. & others*** reported in ***(2019)2 SCC 19***2 has held as follows:-

> *"There is no restriction that the Court cannot award compensation exceeding the claimed amount, since the function of the Tribunal or court under Section 168 of the Motor Vehicles Act, 1988 is to award 'just compensation'.*"

20. Considering all aspect of the matter in the light of the aforesaid decisions of the Hon'ble Apex Court, the claimants

are awarded compensation in the manner as indicated in the chart mentioned below and the impugned judgment and award passed by the Claims Tribunal is modified to the aforesaid extent.

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| Name | Rakesh Kumar |
| Age | 35 years |
| Month income of the deceased | 12,000/- |
| Annual Income of the deceased | Rs. 12000 x12=1,44,000/- |
| Future Prospect @ 40% deceased being less than 40 years | 1,44,000 x 40% = Rs. 57,600/- |
| Annual income + Future Prospect | Rs. 1,44,000 + 57,600 = 2,01,600/- |
| 1/3 deduction towards personal and living expenses | Rs. 67,200 |
| 2/3 Family contribution | 2,01,600 -67,200 = 1,34,400/- |
| Multiplier based on age of 35 years | 16 |
| Amount of compensation | Rs. (1,34,400 x 16= Rs. 21,50,400/- |
| Loss of estate | Rs. 15,000/- |
| Loss of spousal consortium | Rs. 40,000/- |
| Loss of parental consortium for minor son | Rs. 40,000/- |
| Filial consortium ( mother & Father) | Rs.40,000x2= 80,000/- |
| Funeral Expenses | Rs. 15,000/- |
| Total amount of compensation | Rs. 21,50,400 + 1,90,000 =23,40,400/- |
| Ad interim compensation already paid | Rs. 50,000/- |
| Total | Rs. 23,40,400 – 50,000 = Rs. 22,90,400/- |

21. Accordingly, this Misc. Appeal, filed by the

Insurance Company, is hereby dismissed with modification in the quantum of compensation, as aforesaid. Thus, the amount of compensation is enhanced from Rs. 15,76,000 to Rs. 23,40,400/- The amount of interim award i.e., Rs.50,000/- as paid by the Insurance Company shall be deducted from the aforesaid awarded amount. The modified amount shall carry interest at the rate of 6% per annum from the date of claim petition till realization. The due amount be paid by the appellant, that is, the Divisional Manager, National Insurance Company Ltd, within a period of three (03) months from the date of receipt/production of a copy of this order.

22. Office is directed to return the statutory amount to the Insurance Company, i.e., appellant, which was deposited at the time of filing of this appeal.

**(Khatim Reza, J)**

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