



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3198 OF 2017

Bajaj Allianz General Insurance Co. Ltd.,
Through its Branch Manager,
C.E. Plaza, Airport Road,
Yervada, Pune-411 006.
Through its Branch Manager/Authorized
Signatory, 2nd Floor, Rajendra Bhavan, Adalat
Road, Nex to LIC Building, Aurangabad. **...APPELLANT**
[Orig. Resp. No. 3]

VERSUS

1. Smt. Nabhabai Gorakh Gaikwad,
Age: 37 years, Occu: Household,
2. Radhabai Gorakh Gaikwad
Age: 16 years, Occu: Education,
3. Lalchand Gorakh Gaikwad
Age: 12 years, Occu: Education,
4. Jagdish Gorakh Gaikwad,
Age: 09 years, Occ: Nil,
Respondent Nos. 2 to 4 being minor
through their mother i.e. Respondent no. 1
All R/o. Kundane, Taluka Dist. Dhule.
5. Dnyaneshwar Hiranman Patil
Age: Adult, Occu: Driver,
R/o. Gotane, Tal. Dhule, Dist. Dhule.
6. Ranjanabai Hari Patil
Age: Adult, Occu. Owner of Tata goods
truck bearing registration number
MH-18-AA-8699
R/o. Baburle, Taluka & Dist. Dhule. **...RESPONDENTS**
[Resp. Nos. 1 to 4- Orig. Claimants
& Resp. No. 5 & 6- Orig. Resp. No. 1 & 2]

Mr. Mohit Deshmukh , Advocate for appellant
Mr. Shrikant S. Patil, Advocate for respondent Nos. 1 to 4

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CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 9th SEPTEMBER, 2024
PRONOUNCED ON : 9th OCTOBER, 2024

JUDGMENT :

1. Heard.
2. **Admit.** Taken up for final hearing with the consent of parties.
3. This appeal filed under Section 173 of Motor Vehicles Act, challenges judgment and award dated 28.11.2016 passed by learned Member, Motor Accident Claims Tribunal, Dhule, in M.A.C.P. No. 543 of 2012.
4. Facts leading to this first appeal, in brief, can be stated thus:

On 08.05.2012 Prasraj alias Parshuram Patil was not keeping well, therefore, Haushilal Krushna Patil and Gorakh Khandu Gaikwad took him on motorcycle to the hospital for treatment. On Nagpur-Surat road, within the area of village Ner, near Dhandai petrol pump, truck bearing No. MH-18-AA-7699 gave dash to the motorcycle and due to the injuries received in the accident Gorakh Gaikwad died during medical treatment. The truck driver was prosecuted in C.R. No. 115/2012. Claimants,

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therefore, filed claim contending that deceased was doing labour work on the boring machine vehicle. He was 34 years old and was getting salary of Rs. 6,000 to 7,000 per month. They, therefore, claimed compensation of Rs. 7,00,000/- along with interest.

5. Opponent Nos. 1 and 2/Driver and owner of offending vehicle did not appear in the Tribunal and claim proceeded *ex-parte* against them. Opponent No. 3/Insurance Company opposed the claim by filing written statement. It is claimed that offending truck was not involved in the accident. Accident is dated 08.05.2012 and report of the accident is given by rider i.e. Haushilal Deore against unknown vehicle. Therefore, offending truck cannot be said to be involved in the accident. It is further contended that driver of the offending truck was not holding valid and effective driving license and therefore there is breach of terms and conditions of policy. Hence, Insurance company is not liable to pay the compensation.

6. The Tribunal after recording evidence, allowed the claim and directed Opponent Nos. 2 and 3/owner and insurance company to jointly and severally pay compensation of Rs. 9,54,000/- along with interest @ 7% p.a. Insurance Company is

aggrieved by said judgment and award.

7. Heard learned advocate for appellant/Insurance Company and learned advocate for respondent Nos. 1 to 4/Claimants.

8. Learned advocate for appellant submits that offending truck was not at all involved in the accident and the FIR of the accident dated 08.05.2012 was lodged in 13.05.2012 by the investigating officer stating that unknown vehicle gave dash to the motorcycle. He therefore submits that burden of proving involvement of offending truck is not discharged by the claimants and merely because charge sheet is filed against driver of offending truck that by itself is not sufficient to hold that accident has occurred due to rash and negligent driving of the truck. He submits that wife of deceased was of 32 years of age at the time of deposition, hence, deceased cannot be said to be of 24 years old, particularly, in view of the fact that claimant No. 1 and deceased were having three children aged, 11 years, 7 years and 4 years. He therefore submits that Tribunal has erred in applying multiplier of 18 and multiplier of 15 at the most can be said to be applicable in the facts of the present case as deceased would be in the age of group of 36-40 years. He

submits that towards loss of love and affection and consortium amount of Rs. 1,00,000/- and towards funeral expenses Rs. 25,000/- is awarded, which is excessive and contrary to decision in *Pranay Sethi*. He therefore, submits that first appeal may be allowed by quashing the impugned judgment and award.

9. Learned advocate for respondents No. 1 to 4/claimants, on the other hand, supported the impugned judgment and award. He submits that Tribunal has wrongly assessed the income of deceased and failed to calculate compensation under the head 'future prospects'. Circular issued by Central Government specifying monthly wages of unskilled workers at Rs. 8,000/- is not considered by the Tribunal. He submits that, therefore, claimants are entitled for enhanced compensation. In support of his arguments he relied on *Ningamma And Anr. v. United India Insurance Co. Ltd.*, AIR 2009 SC 3056, *Jitendra Khimshankar Trivedi v. Kasam Daud Kumbhar*, 2015 AIR SCW 1067, *National Insurance Company Limited v. Pranay Sethi*, AIR 2017 SC 5157, *Oriental Insurance Co. Ltd. v. Mohd. Nashir and Anr.*, 2009 AIR SCW 3717, *Kelkar and Kelkar v. Shripad Narayan Gore*, AIRONLINE 2019 BOM 2200, *United India Insurance v. Kunti Binod Pande*, AIRONLINE 2019 BOM

1446, *Nagappa v. Gurudayal Singh and others*, AIR 2003 SC 674 and decision of learned Single Judge in First Appeal No. 4258 of 2017.

10. In reply, learned advocate for appellant vehemently opposed the prayer of claimants to award just and fair compensation on the ground that no cross appeal is filed by claimants. By relying on *Ranjana Prakash and Ors v. Divisional Manager and Anr.* 2012 AIR SCW 848 and *Dheeraj Singh vs. Greater Noida Industrial Development Authority & Ors.*, AIR 2023 SC 3110 he submits that in absence of appeal or cross objection, prayers for enhancement of compensation cannot be entertained. He also placed reliance on *New India Assurance Company Ltd, Aurangabad v. Sunita Balaji Pandit Alias Potdar*, AIRONLINE 2019 BOM 1222.

11. Heard learned advocate for appellant and learned advocate for claimants at length. Perused the record and the citations relied upon by the parties.

12. It appears from the record that accident occurred on 08.05.2012 and FIR (Exhibit-14) is registered by police constable Rajendra Patil on 13.05.2012 against unknown vehicle. It is mentioned in the FIR that while taking deceased to the hospital,

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one unknown truck dashed motorcycle, while overtaking another vehicle. Truck number and driver's name could not be known. On the same day, statement of Sanjay Kapoor (Exhibit-15), who claims to be an eye witness to the accident is recorded. He has stated that while he was going on his motorcycle along with Sanjay Saindane towards Dhule they saw that in front of Dhandai petrol pump one unknown truck going towards Ner from Kusumba gave dash to the motorcycle going in front of them and sped away from the spot. They therefore chased the truck and saw its number as MH-18-AA-7699. However, they could not catch the truck as it was being driven in high speed. Admittedly, charge sheet is filed against the truck driver for causing accident by rash and negligent driving. In this view of the matter, there appears no substance in the contention of appellant that offending truck was not involved in the accident. Admittedly, no material is brought on record by the appellant in support of its contention that offending truck was not involved in the accident.

13. In the light of aforesaid documents, claimants have discharged their prima facie burden of proving that offending truck is involved in the accident and accident occurred due to rash and negligent driving of the offending truck. There is no

merit in the submission of appellant that claimants have failed to discharge burden of proving involvement of offending truck in the accident.

14. There appears substance in the contention of appellant that age of the deceased was not 24 years at the time of accident. Wife of the deceased has filed claim petition on 13.07.2012. In the cause title she has stated her age as 32 years. Age of Claimant No. 2- Radhabai daughter of deceased is mentioned as 11 years, claimant No. 3 and claimant No. 4 sons of deceased, their age is mentioned as 7 years and 4 years respectively. In provisional post mortem report age of the deceased is mentioned as 24 years. Final post mortem report is not placed on record. Considering the fact that daughter of the deceased was 11 years old at the time of accident and his wife was 32 years old, age of the deceased must be within the age group of 35-40 years. The Tribunal has erred in taking age of deceased as 24 years.

15. Learned advocate for claimants by relying on Rule 33 of Order 41 of CPC and Nagappa (supra) and Jitendra Trivedi (supra) has submitted that Appellate Court is empowered to award just and fair compensation, even if no appeal is preferred

by claimants for enhancement. Rule 33 of Order 41 reads thus:

ORDER 41 RULE 33

"33. Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

[Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]"

The above provision enables the appellate Court to exercise powers in favour of all or any of the respondents, though said respondents or parties may not have filed any

appeal or cross objection. In this view of the matter also the Appellate Court is entitled to consider the case of claimants for awarding them just and fair compensation.

16. Nagappa (supra) and Jitendra Trivedi (supra) are rendered in the matters arising out of Section 158(6) and 168 of M.V. Act. In Jitendra Trivedi (supra) it is held:

"13. The tribunal has awarded Rs.2,24,000/- as against the same, claimants have not filed any appeal. As against the award passed by the tribunal when the claimants have not filed any appeal, the question arises whether the income of the deceased could be increased and compensation could be enhanced. In terms of Section 168 of the Motor Vehicles Act, the courts/tribunals are to pass awards determining the amount of compensation as to be fair and reasonable and accepted by the legal standards. The power of the courts in awarding reasonable compensation was emphasized by this Court in Nagappa vs. Gurudayal Singh & Ors., Oriental Insurance Company Ltd. vs. Mohd. Nasir & Anr., and Ningamma & Anr. vs. United India Insurance Company. As against the award passed by the tribunal even though the claimants have not filed any appeal, as it is obligatory on the part of courts/tribunals to award just and reasonable

compensation, it is appropriate to increase the compensation."

17. In Nagappa (supra) it is held that, "Award need not be limited to the amount specified in claim petition. Only embargo is that it should be 'Just' compensation. No limitation is prescribed by M.V. Act for claiming compensation and if evidence on record justifies enhanced compensation, Tribunal is not barred from awarding compensation in excess of amount claimed."

18. This Court in Kunti Pande (supra) has observed;

"27. This Court shall first decide the issue whether the original applicant is required to file any cross-appeal or cross-objection for seeking enhancement of the claims not awarded by the Tribunal or for seeking additional claim for compensation under various heads in the First Appeal filed by the Insurance Company impugning the part of the judgment and award rendered by the Tribunal.

28. Learned counsel for the appellant and the respondent nos. 1 to 4 have relied upon several judgments in support of their rival contentions on this issue which are being referred to and dealt with in the later part of this judgment. The Supreme Court in case of Ramla and Ors. v/s. National Insurance Company Limited and Ors.,

(2019) 2 SCC 192 has held that there is no restriction that the Court cannot award compensation exceeding the claim amount, since, the function of the Tribunal or Court under Section 168 of the Motor Vehicles Act, 1988 is to award 'just compensation'. The Motor Vehicles Act is a beneficial and welfare legislation. A 'just compensation' is one which is reasonable on the basis of evidence produced on record. It cannot be said to have become time barred. Further, there is no need for a new cause of action to claim an enhanced amount. The Supreme Court adverted to its earlier judgment in case of Nagappa v/s. Gurudayal Singh, (2003) 2 SCC 274, in case of Magma General Insurance Co. Ltd. (supra) and in case of Ibrahim v/s. Raju, (2011) 10 SCC 634.

29. Supreme Court in case of Andhra Pradesh State Road Transport Corporation v/s. M. Ramadevi and Ors. (supra) after adverting to its earlier judgment in case of Nagappa v/s. Gurudayal Singh (supra) rejected the contention that when there was no cross- appeal or no cross-objection filed by the claimants in the appeal filed by the appellant-corporation, the High Court could not have enhanced the amount. The Supreme Court enhanced the compensation awarded by the Tribunal in the said judgment. The Supreme Court in case of Sanobanu Nazirbhai Mirza and Ors. (supra) adverted to its earlier judgment in case of

Nagappa v/s. Gurudayal Singh (supra) and enhanced the amount of compensation.

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34. A Division Bench of this Court in case of National Insurance Co. Ltd. v/s. Ms. Vaishali Harish Devare and Ors. (supra) has held that even if there is no cross-appeal or cross-objection preferred by the claimants, the exercise of determining the just compensation will have to be carried out. Such adjudication can be made even without taking recourse to Rule 33 of Order XLI of Code of Civil Procedure.

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37. In so far as the judgment of Supreme Court in case of Ranjana Prakash & Ors. v/s. Divisional Manager and Anr. (supra) is concerned, the said judgment has been interpreted by this Court in various judgments already referred to aforesaid and after considering the later judgment of the Supreme Court, it is held by this Court that filing of substantive appeal or cross-objection by the claimant for seeking enhancement of the claims is not necessary. The principles of law laid down by the later judgment of Supreme Court and this Court in large number of judgments referred to aforesaid, apply to the facts of this case. The reliance placed by the learned counsel for the appellant on the judgment delivered by Shri Justice G.S. Patel on 29th June, 2017 in case of United India Insurance

Company Limited v/ s. Rajani Suresh Bhore and Ors. (supra) is misplaced. The judgment of the Supreme Court in the aforesaid judgment taking a different view, apply to the facts of this case. I am respectfully bound by the said judgment.

38. In my view, there is thus no embargo on this Court to enhance the claims not awarded by the Tribunal in favour of the original claimant. Those compensation can be awarded to grant "just compensation" in favour of the claimant to do complete justice in the matter. In my view, there is thus no substance in the submission of the learned counsel for the appellant that various judgments referred to and relied upon by the learned counsel for the respondent nos. 1 to 4 had not considered the provisions of Order XLI Rule 33 of the Code of Civil Procedure, 1908. The Division Bench of this Court in case of National Insurance Co. Ltd. v/s. Ms. Vaishali Harish Devare and Ors. (supra) had considered the provisions of Order XLI Rule 33 of Code of Civil Procedure in the said judgment. In my view, since it is the statutory obligation of the Tribunal and also the Court to do complete justice to the parties and award "just compensation", there is no restriction to enhance the compensation in appropriate case even in absence of cross-appeal or cross-objection. Appeal proceedings are in continuation of proceedings before Tribunal. In my view, claimant can be permitted to pay an

additional amount of Court fees, if any on the additional compensation, allowed by the Appellate Court on the differential amount."

I am in respectful agreement with the aforesaid observations.

19. Decision in Nagappa (supra) and Jitendra Trivedi (supra) are consistently followed by this Court. Same is followed at Principle Seat in Kelkar and Kelkar (supra), Kunti Pande (supra), First Appeal No. 4258 of 2017, so also by this Court in First Appeal Nos. 2689/2015, 1/2017 and 2665/2015.

20. In Ranjana Prakash (supra), Apex Court has held:
"The fact that claimants did not independently challenge the award will not, therefore, come in the way of their defending the compensation awarded, on other grounds. This principle also flows from O.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 be require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate Court to enable it to do complete justice between the parties. Order 41, Rule 33 of the Code can, however, be pressed into service to

make the award more effective or maintain the award on other grounds or to make the order parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief.”

21. Since decision in Jitendra Trivedi (supra) is being consistently followed by this Court in catena of decisions and in view of settled legal position that if two interpretations are possible then one favorable to the claimants needs to be considered, as provision under Section 166 of M.V. Act is welfare legislation, this Court is inclined to follow decision in Jitendra Trivedi (supra) and Nagappa (supra). In Ranjana Prakash (supra) it is observed that, power under Rule 33 Order 41 is entrusted to the Appellate Court to enable it to do complete justice between the parties. Decision in Jitendra Trivedi (supra) is subsequent to Ranjana Prakash (supra).

22. In the light of aforestated reasons, there is no merit in the objection by the appellant that in absence of appeal filed by claimants they are not entitled to seek just and fair compensation in the appeal filed by insurance company.

23. Before the Tribunal claimants contended that

deceased was working as labour on vehicle on which boring machine was installed and he was earning Rs. 6,000-7,000 wages per month. The Tribunal has held that claimants have not brought any document on record to show income of the deceased. The Tribunal has assessed notional income of deceased at Rs. 4,500/- per month. Accident has taken place on 08.05.2012. In view of notification published by Ministry of Labour and Employment under section 4(1B) of the Employee's Compensation Act, 1923, in Gazette of India on 31.05.2010, the Central Government has specified minimum monthly wages of unskilled workers at Rs.8,000/- p.m. Judicial notice of the same can be taken and notional income of deceased has to be considered at Rs. 8,000/- per month.

24. The Tribunal has erred in denying compensation under the head 'future prospects' on the ground that there is no evidence about income of the deceased.

Considering that the age of deceased was within the age group of 35-40 years, 40% future prospects needs to be added in terms of decision in Pranay Sethi (supra). Considering said age group, multiplier of 15 would be applicable in the present case.

25. Claimants are justified in contending that the Tribunal has failed to award consortium and loss of love and affection, in view of ratio in *Pranay Sethi (supra)* and ***Magma General Insurance Co. Ltd. vs. Nanu Ram Alias Chuhru Ram and Others*** (2018) 18 SCC 130. Therefore claimants are entitled for Rs. 40,000/- each i.e. 1,60,000/- plus 20% (Rs. 32,000/-) which comes to Rs. 1,92,000/- towards consortium and loss of love and affection.

26. For the aforestated reasons, claimants are entitled for following compensation:

Sr. No.	Heads	Amount in Rs.
1	Notional Income (8000 x 12)	96,000/-
2	Future Prospects 40% i.e. 38400 (96,000 + 38,400)	1,34,400/-
3	Less 1/4th Deduction i.e. Rs. 33600 (1,34,400 – 33,600)	1,00,800/-
4	Multiplier of 15 (1,00,800 x 15)	15,12,000/-
5	Non Pecuniary Damages- i) Consortium and Loss of Love and Affection- Rs. 1,92,000/- ii) Funeral Expenses- Rs. 25,000/-	2,17,000/-
	Total compensation to be paid	17,29,000/-
	Compensation awarded by Tribunal	9,54,000/-
	Total Enhanced Compensation (17,29,000 – 9,54,000)	7,75,000/-

27. In the result, following order:

ORDER

- (I) First Appeal filed by Appellant-Insurance Company is dismissed.
- (II) Impugned judgment and award dated 28.11.2016 passed by Member, M.A.C.T. Dhule, in M.A.C.P. No. 543 of 2012 is modified to the effect that claimants are held entitled for enhanced compensation of Rs. 7,75,000/- along with interest @ 7% p.a from the date of claim petition till its realization.
- (III) Appellant/Insurance Company to deposit amount of enhanced compensation along with accrued interest in the Tribunal within 12 weeks from the date of uploading of this judgment.
- (IV) Rest of the award is maintained.
- (V) Claimants to pay deficit Court fees, if any, on enhanced compensation as per rules.

[NITIN B. SURYAWANSHI, J.]