2024:BHC-AUG:22654



# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# BENCH AT AURANGABAD

**1123 FIRST APPEAL NO. 2376 OF 2020**

THE RELIANCE GENERAL INSURANCE CO. LTD., THR ITS LEGAL OFFICER.
*VERSUS*
VISHWANATH ABARAO GARAD AND ORS

Mr.S.S.Patil, Advocate for the appellant.
Mr.Manoj Shinde, Advocate for respondent No. 1 to 6.

**WITH**
**FIRST APPEAL NO. 209 OF 2022**
VISHWANATH ABARAO GARAD AND ORS
*VERSUS*
NAVNATH NIVRUTTI MAHADIK AND ORS

Mr.Manoj Shinde, Advocate for the appelants.
Mr.S.S. Patil, Advocate for respondent No.3- Insurance Company.

**CORAM : KISHORE C. SANT, J.**
**DATE : 05.09.2024**

**PC :-**

01. Both these appeals are arising out of judgment and order passed by the learned Member, Motor Accident Claims Tribunal, Osmanabad dated 28.01.2020 in MACP No.247 of 2018, whereby the petition of the original claimants came to be allowed, directing the insurance company to pay an amount of Rs. 1,05,11,616/-. The insurance company has filed First Appeal No.2376 of 2020, challenging only the extent of quantum; whereas First Appeal No.209 of 2022 is filed

by original claimants firstly to the extent that consortium is granted only to the wife and not to other claimants and secondly while allowing the claim, the learned Tribunal has deducted 10% amount holding that the deceased was also negligent, as he was driving the motor-cycle without wearing helmet.

02. Thus, before this Court the questions are as to whether the quantum is rightly decided and secondly in F.A. No. 209 of 2022 whether the learned Member has erred in deducting 10% amount towards contributory negligence and whether error is committed by not granting consortium to all the claimants except wife.

03. Learned Advocate Mr. Swapnil Patil vehemently argued that the Tribunal has not properly arrived at conclusion while deciding the quantum. The deductions towards personal expenses are not properly considered. While opposing the appeal filed by the claimants, learned Advocate submits that the Tribunal has rightly considered from the evidence that the deceased was not wearing helmet. He submits that considering the nature of injuries received to head of the deceased, it is clear that the deceased was driving without helmet. From the spot panchanama nothing is found to show that the deceased was wearing

helmet. In the spot panchanama there is reference to spectacles and shoes of the deceased. Had he worn helmet, certainly it would have been found on the spot. He submits that by wearing helmet, life of the decease could have been saved and thus it is clearly a negligence on the part of the deceased.

04. The learned Advocate for the claimants submits that the appeal filed by the insurance company is without any substance. A proof of income is on record in the nature of salary certificate, which shows that the deceased was receiving gross salary of Rs.71,858/- per month and there is no challenge to this. So far as contributory negligence is concerned, he submits that in the FIR dated 10.05.2018 lodged on next day by the brother of the deceased, he has clearly stated that the deceased had gone to Pitapur, Tal. Akkalkot by wearing helmet. In the claim petition also it is clearly mentioned that the deceased was wearing helmet. In the evidence of daughter of the deceased i.e. claimant No.3, it is also stated that the deceased was wearing helmet. There is only suggestion by the insurance company that the deceased was not wearing helmet. Non-finding of the helmet on the spot by itself will not lead to an inference that the deceased was not wearing a helmet. He then submits that even loss of estate is not granted by the learned Tribunal.

05. After hearing the parties, this Court finds that from the material it is seen that at two places there is reference of wearing helmet by the deceased; whereas the insurance company has merely given suggestion that the deceased was not wearing helmet. True it is that there cannot be burden on the insurance company to prove negative fact. However, it was specific defense of the insurance company that the deceased was not wearing helmet. It was, therefore, necessary to demonstrate something on record to show that the deceased was not wearing helmet. Merely non-finding of helmet on the spot of incident will not be sufficient to give finding in favour of the insurance company. About quantum, this Court does not find any illegality or error committed by the learned Tribunal as it has already come on record that the deceased was in service and was receiving gross salary of Rs.71,858/-. Thus, this Court finds that there is no merit in the appeal of the insurance company.

06. So far as appeal of the claimants is concerned, it is clearly seen that the learned Tribunal has granted amount of consortium only to the wife and not to other claimants. This is certainly an error committed by the learned Member of the Tribunal. This Court, thus, holds that the

learned Tribunal has committed error in not granting consortium to remaining claimants. Hence, following order :-

ORDER

(i) First Appeal No. 2376 of 2020 is dismissed with costs.

(ii) First Appeal No.209 of 2022 is allowed.

(iii) The impugned judgment and award is modified to the extent of deducting 10% amount towards negligence and non-grant of consortium amount to the appellants-claimants in First Appeal No.209 of 2022.

(iv) The appellants-claimants in First Appeal No.209 of 2022 are entitled to receive Rs.11,67,957/- along with interest as directed by the learned Tribunal from the date of lodging of the claim plus Rs.40,000/- towards consortium to each of the claimants.

(v) Decree be drawn up accordingly.

(vi) The Insurance Company to deposit enhanced amount in this Court within eight weeks from today.

(vii) The claimants are allowed to withdraw the remaining amount along with interest.

(viii) After deposit of enhanced amount, the claimants are permitted to withdraw the same along with interest.

**[KISHORE C. SANT, J.]**

snk/2024/sep24/fa2376.20