IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2079 OF 2018

New India Assurance Co. Ltd.,
Through: its Branch Manager,
Local Office at Jalna,
Dist. Jalna

New India Assurance Co. Ltd,
Through its Divisional Manager/
Authorized Signatory, Mahesh Auto
Compound, Adalat Road, Aurangabad
Dist. Aurangabad ...Appellants

Versus

1. Smt. Varsha W/o Sanjay Mule,
Age: 36 Years, Occ: Household,

2. Ku. Nikita D/o Sanjay Mule,
Age: 12 Years, Occ: Education,

3. Ku. Sanika D/o Sanjay Mule,
Age: 11 Years, Occ: Education,

4. Vedant S/o Sanjay Mule,
Age: 6 Years, Occ: Education,

(Respondent Nos. 2 to 4 being
minor u/g of their mother i.e.
Respondent No.1)

5. Padmakar S/o Narharrao Mule,
Age: 71 Years, Occ: Nil,

6. Anuratha W/o Padmakar Mule,
Age: 65 Years, Occ: Household,

All R/o Mantha, Tq. Mantha,
Dist. Jalna.
At present: Kasba, Near Vithal
Mandir, Old Jalna,

Tq & Dist. Jalna

7. Pramod S/o Chandrakant Naik,
Age: Major, Occ: Transport,
R/o Plot No. 125/5, Bajaj
Nagar, Jai Bhavani Chowk,
Waluj, Dist. Aurangabad **...Respondents**

WITH
CIVIL APPLICATION NO. 9078 OF 2018
***

Mr. S. R. Bobade, Advocate for Appellants
Mr. B. R. Kedar, Advocate for Respondent Nos. 1 to 6
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CORAM : R.M. JOSHI, J.

RESERVED ON : JANUARY 05, 2024
PRONOUNCED ON : JANUARY 09, 2024

JUDGMENT

1. This Appeal is filed under Section 173 of the Motor Vehicles Act, 1988 taking exception to the judgment and award dated 05.04.2018 passed in MACP No. 171/2015 by Tribunal granting compensation in case of death claim.

2. Parties are referred to as claimants, owners and insurer for the sake of convenience.

3. Claimants are wife, children and parents of deceased Sanjay who died on 06.06.2015 as while under treatment in the Hospital pursuant to motor vehicular accident occurred on 18.05.2015. It is the case of the claimants that the deceased was travelling along with Gorakh on motor

cycle bearing no. MH-20-CV-5154 as pillion rider. It is their further case that while the motor cycle was driven a dog came across it suddenly and hence, while avoiding dash, the motor cycle became uncontrollable and resulted into occurrence of accident in which Sanjay sustained injuries. He died during treatment in hospital. According to the claimants, deceased was employed with N.R.B. Bearings Company Ltd and was drawing net salary of Rs. 7895/-. Claimants raised claim of Rs. 20 lacs.

4. Owner filed written statement at Exh. 18 denying the averrments in the claim Petition. It is further not disputed that he is owner of the motor cycle in question. There is not further dispute about the fact that the deceased was pillion rider on the motor cycle which was driven by Gorakh against whom offence is registered. It is further claimed that the motor cycle was duly insured with insurer under a valid policy.

5. Insurer filed written statement vide Exh. 17 denying the contentions of the claimants in the claim Petition. There is no dispute about the fact that the motor cycle in question was duly insured with the insurer under a valid insurance policy. It is however, claimed by insurer that owner did not inform about the accident to the insurance company, which is breach of the condition of insurance policy. According to it, motor cycle was necessary to be sent for examination by the Regional Transport Office, however, the same was not sent. It is also claimed that the report lodged in

respect of the accident is belated in order to make a false claim by involving motorcycle in question. There is specific denial of the occurrence of the accident involving motorcycle in question and causing of injuries to the deceased resulting into his death.

6. Learned Tribunal framed issues vide Exh. 19. Claimants examined claimant no. 1 Varsha at Exh. 36 and relied upon the first information report Exh. 38, spot panchnama Exh. 39, MLC Exh. 40, inquest panchnama and pm notes Exh. 41 and 42, vehicle registration certificate Exh. 43. Claimants also led evidence of Ganesh (PW 2) Exh. 49 who is accountant working with Max Superspeciality Hospital, Aurangabad for proving medical bills Exh. 50. Sanjay (PW 3) was examined in order to prove the employment and income of deceased Exh. 61. On the other hand, insurer examined Pandharinath, PSI, Kadim Jalna Police Station Exh. 71. Insurer also summoned owner as its witness who was examined at Exh. 72.

7. Learned Counsel for insurer takes exception to the judgment and award on the ground that the report in respect of accident occurred on 18.05.2015 is lodged after 1 ½ month i.e. in August, 2015, which according to him creates serious doubt about its genuineness. It is argued that initial burden is on the claimants to prove factum of occurrence of accident and the sustainability of the injuries by the deceased during the said accident. It is submitted that learned Tribunal failed to take into consideration the said

vital aspect before granting compensation to the claimants. It is claimed that the claim has been filed in collusion with owner. According to him, owner is interested witness and hence, he did not support insurer. It is further claimed that the owner has failed to inform insurance company about occurrence of accident and as such, there is breach of condition of insurance policy. On the quantum of the compensation, it is contended that there is no order of appointment of the deceased in the company and merely on the basis of salary certificate it cannot be held that the income of the deceased is proved. It is further claimed that the Petition is hit by non-joinder of necessary party as driver was not made Respondent therein. Alternatively, it is submitted that in case this Court finds no infirmity in the compensation being granted in favour of the claimants, the order of pay and recovery be passed against owner for breach of condition of insurance policy.

8. There is no dispute about the fact that the deceased Sanjay died on 06.06.2015. Evidence on record indicates that he died while being under medical treatment at Max Superspeciality Hospital. PM notes indicate that cause of death is head injury along with other injuries caused to the deceased. Those injuries apparently support the case of motor vehicular accidental injuries. Further admittedly crime bearing no. 184/2015 came to be registered against Gorakh being rider of the motorcycle at the relevant time. Claimant No. 1 Varsha in her testimony has deposed about the

receiving intimation of the accident and visiting the spot immediately. She has further claimed that at the spot of accident deceased had informed about manner in which the accident has occurred. He has also stated about motorcycle being driven by Gorakh at the relevant time. Though this witness was cross-examined on behalf of insurer except with suggestion that accident has not occurred involving motorcycle in question, there is no other cross-examination conducted of this witness in order to hold that she is deposing falsely. The contention of this witness of she having taken her husband to hospital is corroborated by the documentary evidence on record as well as evidence of Ganesh (PW 2), who has categorically stated about the admission of Sanjay in the hospital till the time of his death.

9. The claimant has also placed on record FIR and spot panchnama indicating registration of crime against the rider Gorakh. The genuineness of the said document is not challenged in the cross-examination. There is nothing on record to indicate that the said documents are not reliable. The procedure to be followed for deciding the claim Petition is summary in nature. Strict rule of procedure/evidence are not applicable thereto. The Tribunal is required to consider as to whether the case of the claimant is proved on preponderance of probabilities. Considering the evidence on record the claimant has discharged initial burden of proving the occurrence of accident, involvement of motorcycle therein and death of

deceased owing to the said accident on probabilities.

10. Insurer is claiming that the delay in lodging of the FIR creates doubt about the genuineness thereof. Once the claimant is successful in discharging the initial burden of proving the factum of occurrence of accident, the onus shifts upon insurer to prove that it could be a case of concoction by lodging false report. Insurer examined Pandharinath, PSI attached to Kadim Jalna Police Station. This witness investigated into the crime bearing no. 184/2015. It is also stated by him in his evidence that in the said crime AD was registered earlier on 30.05.2015. Documents of enquiry of A.D. are not called upon to be produced. No further evidence is led by the insurer in order to hold that this is a case of fabrication/concoction of the report. The Hon'ble Apex Court in case of *Ravi Vs. Badrinarayan, AIR (SC) 2011, 1226*, has held that the delay in lodging of the FIR cannot become a sole ground to doubt the claimants' case. The Apex Court has considered the indian conditions wherein one cannot expect the common man to rush police station instead preference is given to give treatment to the victim. It is held that under these circumstances unless there is indication of fabrication or concoction to implicate innocent persons, the delay in lodging FIR cannot became ground to deny justice to victim. These observations made by the Apex Court squarely apply to the present case. Insurer was unable to show any mala fides/concoction in the

FIR in order to discard the same. On sole ground that the report is lodged belatedly, it is not the fit case to dismiss the claim Petition. Learned Tribunal has rightly taken into consideration the judgment cited (supra) and the facts of the present case in order to reject contention of insurer in this regard.

11. The claimants have pleaded about employment of deceased with NRB Company ltd with gross income of Rs. 8130/-. To support the said claim, claimants cross-examined Sanjay at Exh. 61 who is working as an accountant with the said company. He deposed about employment of the deceased as machine operator. He further claimed that computerized salary sheet was provided. He identified the salary sheet of February, 2015 wherein the salary of deceased was shown of Rs. 7452/- with deductions towards PF, professional tax of Rs. 1027/-. As per this witness in March, 2015 deceased has received gross salary of Rs. 8130/- and net amount receivable by him was Rs. 7026/-. Thus, salary sheets (Exh. 63 & 64) for February, 2015 and March, 2015 are duly proved through this witness. This witness has also claimed enhancement of the salary every six months as per the increase in DA. During the cross-examination of this witness it has come on record that the work of operator falls in the category of skilled worker. There is no suggestion made to the witness that the deceased was never employed with the company. The witness was not able to tell since when deceased was employed, but that would not be enough to disbelieve his evidence of

employment of deceased. There is further no dispute about the salary received by the deceased. The claimants, therefore, have proved the income of the deceased which was rightly taken into consideration for the purpose of computation of compensation by the Tribunal.

12. In all five persons were dependent on the deceased. Hence, learned Tribunal has rightly deducted 1/5th amount towards his personal expenses. The deceased was aged 43 years as shown in PM report and his age is rightly considered by Tribunal to determine amount of compensation by applying multiplier of 14. Learned Tribunal has also taken into consideration the future prospects and by following the dictum of Hon'ble Apex Court in case of *National Insurance Co. Ltd Vs. Pranay Sethi & Ltd, 2017 SCC OnLine SC 1270*, the additional amount of 25% towards future prospects was considered by the learned Tribunal. Similarly, the order of amount of interest @ 7% p.a. is also justified. Learned Tribunal, therefore, has rightly determined the amount of compensation payable to the claimants. On the basis of evidence on record no interference is caused therein.

13. Learned Counsel for Claimants sought enhancement on the ground that the Tribunal has not granted consortium to the claimants except for Claimant No. 1 wife. By relying upon the judgment of Hon'ble Apex Court in case of *Magma General Insurance Vs. Nanu Ram, 2018 DGLS (SC)*

909 it is contended that filial consortium is entitled to receive even by the children and parents of deceased. Thus, according to him, claimant nos. 2 to 6 are independently entitled for compensation of Rs. 40,000/- towards filial consortium.

14. Learned Counsel for insurer has opposed the said contention by relying upon following judgments : *Kurvan Ansari and Another, 2022 ACJ 166*, *New India Assurance Co. Ltd Vs. Somwati and Others, 2020 ACJ 2321*, *United India Insurance Co. Ltd Vs. Satinder Kaur and Others, 2020 ACJ 2131*, *Beli Ram Vs. Rajinder Kumar and Another, 2020 ACJ 3000*, *Satpalsingh Dharamsingh Chowdhary Vs. Ashok G. Raut, LAWS (BOM)-2005-2-45* & *United India Insurance Co. Ltd Vs. Rakesh Kumar Arora, LAWS (SC)-2008-9-129*.

15. Judgment cited by the claimants as well as relied upon by the insurer clearly shows that each parent and each child of the deceased is entitled for the filial consortium towards loss caused on account of death of deceased. In the judgment of Kuruvan Ansari (supra) it is held that claimant is not entitled for compensation towards love and affection once compensation granted for loss of consortium. In the instant case, no compensation is granted by Tribunal under this head. Hence, judgments cited supra by Insurer are not helpful to support the contention of insurer.

16. It is settled law that even without filing separate appeal or cross-objection, claimant can seek enhancement of compensation in view of judgments of Hon'ble Apex Court in case of *Nagappa Vs. Gurudayal Singh and Others, (2003) 2 SCC 274* and *Jitendra Khimshankar Trivedi and Others Vs. Kasam Daud Kumbhar and Others, (2015) 4 SCC 237*. This Court, therefore, finds no impediment in enhancing the compensation by adding a sum of Rs. 40,000/- each towards loss of filial consortium for claimant nos. 2 to 6.

17. The insurer challenges maintainability of claim for non-joinder of rider of motorcycle to the claim petition. Needless to say that strict procedure is not applicable in the enquiry which is summary in nature. Claimants are entitled to seek compensation from rider as well as owner at first instance being joint tortfiesors. If compensation is claimed from rider, he would be necessary party as in his absence no liability can be fixed upon him. However, vicarious liability of owner to compensate victim does not get discharged in absence of rider. It is open for the claimant to raise claim against both joint tortfeasors or either of them. In any event, owner has appeared in this proceeding and it was always open for him to lead evidence to show that driver of offending jeep was not negligent and consequently driver is not liable to pay compensation on the basis of vicarious liability for act of his agent. Owner has failed to prove the same. Having regard to

the nature of claim, rider is not necessary party and no prejudice is shown to have caused to the merit of the case, on account of his absence. Hence, issue raised about maintainability of claim for non joinder of necessary party, sans merit.

18. Learned Counsel for insurer in alternatively has sought direction to pay and recovery of compensation from owner. It is contended that the owner has failed to communicate factum of accident to the insurer and hence, it amounts to breach of condition of insurance policy. Though such defence is taken in written statement, no evidence is led by insurer to that effect. It is material to note that though owner was called as witness, but no suggestion is made to him that he failed to inform insurer about accident. Insurer, therefore, has failed to prove breach of condition of policy. Hence, question of directing pay and recovery from the owner does not arise.

19. In view of above, appeal is disposed of with modification of award as discussed herein above. Hence, the order:

O R D E R

(a) First Appeal is disposed of.

(b) Impugned judgment and award dated 05.04.2018 passed in MACP No. 171 of 2015 is modified. Claimant Nos. 2 to 6 are held to be entitled to receive Rs. 40,000/- each towards consortium. Insurer is directed to pay Rs. 40,000/- each to claimant nos. 2 to 6 as consortium, which shall be in addition to amount of compensation awarded by impugned judgment and award.

(c) Claimants to pay Court fee on enhanced compensation as per rules.

(d) Rest of judgment and award to remain unchanged.

(e) Amount deposited by insurer is permitted to be withdrawn.

(f) No order as to costs.

(g) In view of disposal of Appeal, pending application is also disposed of.

(R. M. JOSHI, J.)

Malani