IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3932 OF 2016

1. Sau. Kamalbai Damu Patil,
Age-65 years, Occ: Household,

2. Shri. Damu Zendu Patil,
Age-70 years, Occ: Nil,

3. Ku. Vidya Sunil Patil,
Age-15, Occ: Education,

4. Chi. Tejas Sunil Patil,
Age-13 years, Occ: Education
(Appellant no. 1 is grandmother and natural guardian of Appellant Nos. 3 and 4 as they are minor)
R/o.Pungaon, Tq.Pachora, Dist. Jalgaon

...Appellants
(Orig. Claimants)

Versus

1. Shri. Somnath Prabhakar Gurav,
Age-45 years, Occ: Transport Business,
R/o. Pimprala, Tq & Dist. Jalgaon

2. The United India Insurance Company
Ltd. Mansingh Market, Station Road,
Jalgaon.

3. Smt. Vidya Sunil Patil,
Age-34 years, Occ: Household,
R/o. Shiv Colony, Jalgaon,
Dist. Jalgaon

...Respondents

WITH
FIRST APPEAL NO. 4243 OF 2016

1. The United India Assurance Company

Through its Administrative Officer
TP Hub, Mahendra Pratapsingh Virat,
Age: 49 yrs, Occ: Service,
R/o Divisional Officer-I,
United India Insurance Co. Ltd,
Osmanpura, Jalgaon. **...Appellant (Orig. Respondent No. 2)**

Versus

1. Sau. Kamalbai Damu Patil,
Age-67 years, Occ: Household,
R/o. Pungaon, Tq. Pachora,
Dist. Jalgaon

2. Shri. Damu Zendu Patil,
Age-70 years, Occ: Nil,
R/o. As above.

3. Ku. Vidya Sunil Patil,
Age-35, Occ: Household,
R/o. As above.

4. Rajshree Sunil Patil,
Age: 17 yrs, Occ: Education,
R/o. As above.

5. Tejas Sunil Patil,
Age-15 years, Occ: Education
R/o. As above.
(No. 4 and 5 being minor, through
their mother as natural guardian)

6. Shri. Somnath Prabhakar Gurav,
Age-47 years, Occ: Business,
R/o. Pimprala, Jalgaon **...Respondents**

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Mr. M. M. Bhokrikar, Advocate for Appellants in FA83932/2016 & for Respondents in FA/4243/2016.
Mr. S. S. Rathi, Advocate for Respondents in FA/3932/2016 & for

Appellant in FA/4243/2016

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CORAM : R.M. JOSHI, J.

DATE : JANUARY 09, 2024

COMMON JUDGMENT:

1. These Appeals are filed under Section 173 of Motor Vehicles Act, 1988 by claimants for enhancement and by insurer for setting aside the impugned judgment and award dated 23.08.2016 passed in MACP No. 481/2009.

2. Claimants are parents, widow and children of deceased Sunil. It is their case that on 05.06.2009 deceased was riding motorcycle bearing no. MH-19-AF-9731 and luxury bus bearing no. MH-19-J-1206 came from behind in excessive speed and gave forceful dash to the motorcycle. As a result of the said accident, deceased died on the spot. Offence came to be registered against driver of the bus vide crime no. 61/2009 registered with Pachore Police Station. It is the case of the claimants that deceased was driver and an agriculturist earing Rs. 7,000/- per months. Age of the deceased is claimed to be 37 years. The claimants were dependent on the income of the deceased. Claim of Rs. 10 lacs was made.

3. Insurer filed written statement denying the case of the claimants. The factum of accident is not in dispute. It is however, denied that the accident has occurred due to the negligence of the driver of the bus and it is alleged that the rider of the motorcycle is responsible fo the same. There is also specific plea raised by the insurer that the driver of the bus was not holding valid and effective licence to drive the vehicle in question at the relevant time, so also there was no permit for plying the bus. On these counts, insurer denied liability of payment of any compensation to the claimants.

4. Learned Tribunal framed issued at Exh. 12. Claimant Kamalbai was examined at Exh. 18. Claimants placed reliance on police papers including FIR, spot panchnama, inquest panchnam etc. The insurer examined Mr. Nitin Rembhotkar, Investigator at Exh. 34 and also led evidence of Administrative Officer Mr. Rajendrakumar Saitwal at Exh. 38. They were examined in order to prove that the driver was not holding valid and effective license at the relevant time so also owner had no permit to ply the bus on the road.

5. Learned Counsel for the claimants submits that learned Tribunal has failed to consider the future prospects as held by Hon'ble

Apex Court in case of *National Insurance Co. Ltd Vs. Pranay Sethi & Ors, 2017 SCC OnLine SC 1270*. Thus, according to him, on this ground alone, the impugned award deserves modification by enhancement of compensation.

6. Learned Counsel for insurer submits that the insurer was able to prove that the driver of the bus was not holding valid and effective license at the relevant time so also owner had no permit to ply the bus on the road. Thus, according to him, these are breaches of conditions of insurance policy and for these reasons insurer is not liable to pay compensation. He further submits that the learned Tribunal has no power to order pay and recover.

7. As far as occurrence of incident is concerned, there is no serious dispute is made by the parties that on 05.06.2009 accident occurred involving motorcycle bearing no. MH-19-AJ-3791 and luxury bus bearing no. MH-19-J-1206. The initial burden is on the claimants to prove that the accident has occurred due to the negligence of the driver of luxury bus. Though claimants have not examined any eye witness to the accident, however, documentary evidence is placed on record to indicate that offence came to be registered against the driver

of the bus. Reliance is also placed on spot panchnama, which indicates that the driver of the bus is responsible for the occurrence of the accident. Once, claimants discharged initial burden of proving the manner in which accident has occurred, the onus shifts upon the other side to prove contrary.

8. Insurer though examined two witnesses, they have no personal knowledge about the occurrence of accident. Thus, no evidence in rebuttal is led by the insurer in order to prove the accident did not occur due to the negligence on the part of the driver of the bus but it is attributable to the rider of motorcycle. Learned Tribunal has, therefore, rightly decided the issue of negligence in favour of the claimants.

9. Claimants have claimed that the deceased was driver and also an agriculturist and was earning Rs. 7,000/- per months. During the course of cross-examination, except for the suggestion that she is deposing falsely about deceased driving tractor and earning Rs. 7,000/-, nothing is elicited in order to disbelieve the testimony of claimants in this regard. Apart from this, from her evidence it has come on record that family owns ancestral land. This also supports the

case of claimants that apart from working as driver he was also doing agricultural work. Learned Tribunal has held that claimants have proved the income of the deceased to the extent of Rs. 5,000/-. Having regard to the evidence on record, the said findings is not perverse. Claimants have proved that the deceased was aged about 37 years at the time of his death and five persons were dependent on his income. Learned Tribunal after rightly taking into consideration the income, age and dependency to ascertain the compensation @ Rs. 6,75,000/-. Apart from the compensation for loss of dependency, the compensation is also granted on other heads which is justified.

10. Learned Tribunal, however, has refused to grant future income on the ground that the no evidence is led to show that genuine prospects of enhancement of earnings in the deceased. This finding is not sustainable in view of the judgment of Hon'ble Apex Court in case of Pranay Sethi (supra). Supreme Court in said judgment has observed thus:

> *57. …*
> *…*
> *We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal*

representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. 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 25% where the deceased was between the age of 40 to 50 years would be reasonable.

As per the said judgment, having regard to the age of deceased an additional amount of 40% of compensation needs to be granted as compensation towards future prospects. Hence, impugned judgment deserves modification to that effect.

11. As far as challenge to the judgment and award by the insurer is concerned, the aforestated discussion clearly shows that there is no error committed by learned Tribunal in arriving at just and reasonable compensation on the basis of material evidence on record.

The second limb of objection about the direction of the Tribunal to pay and recovery. Admittedly, contract of insurance was subsisting between owner and insurer. This is not the case covered by Section 149(2) of the Act. Breach of condition of policy by owner would not disentitle the third party to claim compensation from both. Provision of Section 146 of the Act makes it mandatory to cover the risk of third party. The insurer, therefor,e is liable to satisfy the award in favour of third party, though it may be open for it to recovery the same from owner. This Court finds no impropriety in the direction issued by the Tribunal to the insurer to satisfy award by passing order of pay and recover. In view of this, no interference is called for in the direction of Tribunal to Respondent No. 2 insurer to satisfy the claim and recover the same from owner.

12. Learned Counsel for insurer submits that since the future prospects as per its nomenclature are prospective in nature, the interest cannot be granted from the date of filing of the Petition but at the most it could be from the date of award.

13. Section 171 of the Act empowers Tribunal to grant interest in addition to amount of compensation. This provision gives discretion

to award simple interest at the rate and from the date not earlier than date of claim. Interest is compensation for forbearance of money legitimately payable to the claimant. It is the duty of Tribunal to determine rate of interest, which in this case is applied @ 7.5% pa from the date of filing of the Petition till realisation of amount. The Tribunal ought to have granted compensation taking into consideration future prospects and merely because the said error is rectified by this Court, there cannot be any justification to grant interest on such enhanced compensation from the date of award and not from the date of filing of the Petition. This Court finds no reason to accept the contentions of learned Counsel for the insurer in that regard.

14. In view of above, following order is passed. Hence, the order:

O R D E R

(a) First Appeal No. 4243/2016 stands dismissed.

(b) First Appeal No. 3932/2016 is partly allowed. Impugned judgment and award dated 23.08.2016 passed in MACP No. 481/2009 is modified. Claimants are entitled to receive 40% amount of total compensation of Rs. 8,80,000/- towards future prospects.

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

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

(e) Amount deposited (along with interest) by insurer is permitted to be withdrawn by Claimants.

(f) No order as to costs.

(g) In view of disposal of Appeals, pending applications, if any, are also disposed of.

(R. M. JOSHI, J.)

Malani