

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 878 OF 2019**

Bombay Electric Supply and Transport)
Undertaking, a Public Undertaking of)
Municipal Corporation of Greater Mumbai)
Having its office at Electric House, Colaba,)
Mumbai – 400 005) Appellant

Versus

- 1 Mrs. Nirmala Devdas Shetty)
Widow of Deceased, aged 38 years)
- 2 Kum Diksha Devdas Shetty)
Minor Daughter of Deceased,)
aged 12 years)
- 3 Mast. Hardik Devdas Shetty,)
aged 6 years, Minor Son of the Deceased)
- 4 Mrs. Sharda Sanjeeva Shetty)
Aged 65 years, Mother of deceased)
All residing at Room No. 403,)
G Wing, Bldg No.3, Kukreja Complex,)
L B S Marg, Bhandup (W), Mumbai- 400 078) Respondents

Mr. Bhavesh Wadhwani i/b. M. V. Kini and Co., Advocates for the Appellant.

Ms. Varsha Chavan, Advocate for Respondent Nos. 1 to 4.

CORAM : SHIVKUMAR DIGE, J.

DATE : 25th JANUARY, 2024.

Oral Judgment :

1. The issues involved in this appeal are contributory negligence of the deceased and compensation amount is awarded on higher side under non-pecuniary heads.

2. It is contention of learned counsel for the appellant that there was contributory negligence of the rider of motorcycle in the accident, on which, the deceased was a pillion rider but this fact is not considered by the Tribunal. The claimants have not added rider of the motorcycle as party. Hence, requested to allow the appeal.

He relied upon the judgment of Hon'ble Apex Court in the case of **Andhra Pradesh State Road Transport Corporation and Anr. versus K. Hemlatha and ors. (2008) 6 SCC 767.**

3. It is contention of learned counsel for respondents/claimants that it is settled law that it is the choice of the claimants to recover the compensation from any of the tortfeasors. Learned counsel further submitted that the question of contributory negligence of deceased would not arise as he was pillion rider on the said motorcycle. The Tribunal has considered all the aspects while passing the judgment and order, hence, no interference is required in it. She relied on **Khenyai versus New India Assurance Co.Limited and ors. reported in AIR 2015 SCC 2261.**

4. I have heard both learned counsel, perused the judgment and order passed by Motor Accident Claims Tribunal, Mumbai (for short "the Tribunal").

5. While dealing with the issue of negligence, the Tribunal has observed that being a heavy vehicle, the driver of the bus was expected to be more careful. The driver of the offending bus in cross-examination

admitted that motor-cyclist also lodged a complaint in police -station on the same day, so the conduct of the motor- cycle rider to make a complaint against bus driver becomes relevant under Section 6 of the Evidence Act , in as much as had the motor-cycle rider been at fault, he would not have ventured to lodge report against the driver. I do not see infirmity in it.

It is contention of learned counsel for the appellant that FIR was lodged against the rider of the motor-cycle. In my view, the issue of contributory negligence would not come in this appeal as the deceased was a pillion-rider. Hence, I do not see merit in the contention of the appellant that there was contributory negligence of the deceased.

In respect of non-joining of rider of motorcycle as a party, as per the view of Hon'ble Apex Court in the case of **Khenyai (supra)**, it is the choice of the claimants to claim compensation from any of tortfeasor.

The Tribunal has awarded Rs.1,00,000/- towards loss of consortium, Rs.1,00,000/- for two children each for loss of love and affection, Rs.25,000/- to the mother. The total comes to Rs.3,25,000/-, which is on higher side. As per the view of Hon'ble Apex Court in **Magma General Insurance Co. Ltd. vs. Nanu Ram, 2018 ACJ 2782 (SC)**, each claimant is entitled for Rs.48000/- as consortium amount, Rs.18,000/- for loss of estate and Rs.18000/- for funeral expenses. There are four claimants. The total comes to Rs.2,28,000/-. If this amount is deducted from Rs.3,65,000/- awarded by the Tribunal, it comes to Rs.1,37,000/-.

This is an excess amount. The appellant – B.E.S.T. is entitled for this amount.

6. In view of above, I pass the following order :

O R D E R

1. The appeal is partly allowed.
 2. The appellant-B.E.S.T is permitted to withdraw Rs.1,37,000/- along with proportionate interest thereon out of the deposited amount.
 3. The respondents/claimants are permitted to withdraw the balance deposited amount along with proportionate interest thereon.
 4. The statutory amount be transmitted to the Tribunal along with accrued interest thereon. The parties are at liberty to withdraw it as per Rule.
7. Pending applications, if any, stand disposed of.

(SHIVKUMAR DIGE, J.)

Note: The above matter is corrected in view of the order dated 26th February 2024.