IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1608 OF 2024

	United India Insurance Co. Ltd. R/o. Bharati Bhavan, 6th Floor, L.B.Shastri Road, Pune. Through T.P.Hub Mumbai 2, Union Co-op Ins. Building, 23rd Floor No.5, Sir P.M.Road, Fort, Mumbai - 400001	...	Appellant
	Versus		
1	Periyadan Kavanlal Mohanan Age : 58 Years, Occ : Service		
2	Sujata Mohanan Nair Age : 51 Years, Occ : Housewife		
3	Pranav Mohanan Nair Age : 21 Years, Occ : Education All Res. No.1 to 3 R/o :- Flat No.3, Anusaya Apartment, Kalanagar, Jail Road, Nashik Road, Nashik		
4	M/s. Jay Shriram Tours & Travels Prop. Sushant Kulkarni Age : 45 Yrs., Occ : Vehicle Owner R/o. Vetal Galli, Tuljapur, Tal : Tuljapur, Dist. Osmanabad – 413601	...	Respondents

....

Mr. Amol A. Gatne, Advocate for the Appellant.
Mr. Yogesh Pande, Advocate for Respondent Nos. 1 to 3.

CORAM : SHIVKUMAR DIGE, J.
DATED : 17th DECEMBER, 2024.

ORAL JUDGMENT :

1. This appeal is preferred by the Appellant/Insurance Company against the judgment and order passed by the Motor Accident Claims Tribunal, Pune (for short "the Tribunal").

2. It is contention of learned counsel for the Appellant that accident occurred due to sole negligence of the deceased, as at the time of accident, deceased was not wearing a helmet and was riding the motorcycle in BRTS Lane, which is exclusive for PMT buses, while other vehicles are prohibited. Therefore, both drivers were in violation of the rules. The Tribunal should have considered 50% contributory negligence of drivers of both vehicles. Learned counsel further submitted that it is settled principle of law that, while considering the salary of the deceased, the Tribunal has to consider the last drawn salary and not the average salary. Learned counsel further submitted that the tribunal has considered the incentive as part of the salary, and that too, in an amount higher than the basic salary. The incentive should have been deducted from the salary. Learned counsel further submitted that the Tribunal has considered conveyance allowance as part of the salary, which should have been deducted, as it would not benefit the family of the deceased. Learned counsel further submitted that the tribunal has not considered evidence produced on record properly and has passed an erroneous judgment and order hence, requested to allow the appeal.

3. It is contention of learned counsel for the Respondent Nos. 1 to 3/claimants that, to prove the negligence of the deceased, no witness has been examined by the Appellant/Insurance Company nor any defence was taken in written statement filed by the Appellant that the motorcycle of the deceased was riding in BRTS Lane which is prohibited for other vehicles. Learned counsel further submitted that the deceased was permanent employee but the Tribunal has considered 40% future prospects, it should be 50%. Learned counsel further submitted that, to prove the negligence of the deceased, no evidence led before the Tribunal by the Appellant/Insurance Company. The order passed by the Tribunal is legal and valid and no interference is required in it and requested to dismiss the Appeal.

He relied on ***National Insurance Company Limited vs. Nallini and Ors. 2024 ACJ 1637 SCC [SLP (c) No. 4230 of 2019 decided on 11.07.2024.***

4. I have heard both learned counsel. Perused the judgment and order passed by the Tribunal.

5. It is claimant's case that on 15th June, 2018 at around 1:15 a.m. in the midnight, the deceased - Ashad Nair was riding his motorcycle from Sadalbaba Chowk towards Sangamwadi. At that time, the offending car came from wrong side, moving at high and excessive speed. The car driver lost his control and dashed to the motorcycle. Due to dash, the deceased and his friend died. To prove the negligence of car driver, the claimants have relied on the police papers and FIR was lodged against the driver of offending car.

6. It is contention of learned counsel for the Appellant that the deceased was riding his motorcycle in BRTS Lane, which was prohibited to other vehicles. Therefore, there is contributory negligence of both the drivers. However, to prove the negligence of the deceased, the driver of offending car did not step into witness box. It appears from the police papers that the driver of offending car drove the car in rash and negligent manner and coming from wrong side, he gave dash to the motorcycle of the deceased. It shows accident occurred due to sole negligence of car driver.

To prove the fact that BRTS Lane is prohibited for other vehicles. No evidence is led on record. It is settled principle of law that, if any, defence is taken it has to be substantiated by leading evidence as held by Hon'ble Apex Court in the case of ***National Insurance Company Limited Vs. Chamundeswari & Ors. C.A. @ SLP(c) No.4705 OF 2019.*** The Appellant-Insurance Company has not examined any witness to prove that the accident occurred due to negligence of the deceased and he was not wearing helmet. Hence I do not see merit in contention that accident occurred due to contributory negligence of the deceased.

To prove the income of the deceased, the claimant No.1 has examined himself. He has stated that the deceased was working in company and he was getting annual package of Rs.8,50,000/-, his appointment letter is at Exhibit-30. Payment slips of the deceased are at Exhibit-33 & 34 and bank statement is at Exhibit-35.

7. While dealing with the issue of income of the deceased, the tribunal has observed that as per payment slip at Exhibit 33, net salary after deducting the income tax and professional tax for the month of April, 2018 comes to Rs.59,309/- and from month of the May 2018, it comes to Rs.56,606/. The average monthly salary of the deceased, comes to Rs.57,808/-. On that basis the Tribunal has considered monthly income of the deceased at Rs.57,808/-. I do not find infirmity in it.

8. It is contention of learned counsel for the Appellant that the tribunal should have considered last drawn salary of the deceased and the tribunal has considered conveyance allowances and incentive as a part of salary. In my view, the documents produced on record shows that the gross salary of the deceased was Rs.67,821/- including HRA , TA and basic. The deceased had joined the Alloha Technology Company in the month of April and within two months after joining unfortunately he died. Though, the salary slip shows about the incentives but there is no clarification mentioned about the incentive. The net payable salary shows at Rs.59,009/- and Rs.56,606/-. As per the evidence produced on record and evidence of the claimant No.1, it appears that the deceased was getting annual package of Rs.8,50,000/- if this amount considered as gross salary it would go more than Rs.60,000/-. The Tribunal has considered average of two months salary, it shows that the salary of deceased was fluctuating and, on that basis, the tribunal has rightly considered average of both months salary. I do not find infirmity in it. Moreover, it appears from record that the deceased was on probation it shows that he was salaried employee. Though, the probation was not completed, the tribunal should have considered 50% future prospects, but the tribunal has not considered it. In my view, as the tribunal has considered average income. If amount of 10% future prospects which was not granted by the tribunal is adjusted in the amount considered as average salary, it would suffice to the claimants.

9. I have gone through the case laws cited by the learned counsel for the Appellant, the facts of cited case and present case are different. As in the present case, no evidence is led by the appellant before the tribunal to prove the negligence of the deceased before the tribunal. The salary slips of deceased are produced on record. Learned counsel for the appellant- Insurance Company has not disputed it before the Tribunal. The salary/payslip and other documents are exhibited. There is no cross examination about the incentive, other allowances and income of the deceased by learned counsel for the appellant /Insurance company. If the witness was not cross-examined on the income of the deceased or it was not disputed before the Tribunal without pointing out to the witness in cross examination, the said issue cannot be disputed in the appeal. The learned counsel for the appellant should have asked the PW-1 about the difference in salary so as to enable the claimants to examine the other witness but it was not done. Hence, I do not see merit in the contention that the income of the deceased considered by the Tribunal is on higher side.

10. It is the contention of learned counsel for the appellant that the Tribunal should not have given interest on the future prospects. In my view as per the view of Hon'ble Apex Court in the case of ***National Insurance Co. Ltd. vs. Pranay Sethi, 2017 ACJ 2700(SC)*** , the claimants are entitled for future prospects. The interest given on the future prospects is not illegal or perverse.

11. In view of the above, I pass following order.

ORDER

(i) The Appeal is dismissed.

(ii) The claimants/respondent Nos. 1 to 3 are permitted to withdraw deposited amount along with accrued interest thereon.

(iii) The statutory amount be transmitted to the Tribunal.

The parties are at liberty to withdraw it as per rule.

(iv) Pending applications, if any, stand disposed off.

(v) R & P be sent back to the Tribunal.

(SHIVKUMAR DIGE, J.)