IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.481 OF 2015
with
CROSS-OBJECTION NO.01 OF 2020

FIRST APPEAL NO.481 OF 2015

HDFC CHUBB General Insurance Co. Ltd.
5th Floor, Express Tower,
Nariman Point,
Mumbai 400021

...APPELLANT

VERSUS

1. Sau. Archana w/o Suhas Dandawate,
Age about 42 yrs., Occupation – Nil,

2. Kaustubh s/o Suhas Dandawate,
Age 17 yrs. - Minor,
through mother natural guardian
Sau. Archana Suhas Dandwate,
Occupation – Education,

3. Smt. Tarabai wd/o Narayanrao Dandawate,
Age 69 yrs., Occupation – Nil,

All R/o Khamgaon, Tq. Khamgaon,
District Buldana

4. Commander V.K. Janardhanan
(Neliyath Drushnan Janardhanan,
s/o V.K. Nair, Aged 42 yrs.,
Occupation – Naval Services,
Res. of 338, Sector 7,
Urban Estate, Gurgaon,
Second Address : M20, Notra,
Colaba, Mumbai – 5

Appeal is abated against R. No.3 and dismissed against R.No.4 as per R(J.) order dated 08/07/2014.

5. Hasan Ali s/o Ali Mohd.
Age 50 yrs.,
Occupation – Trader-Taxi Owner,
158, Lamington Cross Road,
Bori Bandar, 1st Lane,
R/25, Mumbai – 400007

6. Haidar Abbas Asamadi,
Age - 26 yrs., Taxi Driver,
23, A Wing, Room No.101,
Sultanabad, Beharambag Road,
Jogeshwari (W) Mumbai,

Appeal is dismissed against R.No.6 as per R(J.) order dated 23/09/2014.

7. United India Insurance Co. Ltd.
DO 13, 133, M.G. Road,
Mumbai - 400001

...RESPONDENTS

CROSS-OBJECTION NO.01 OF 2020

H.D.F.C. CHUBB General Insurance Limited
5th Floor, Express Tower,
Nariman Point, Mumbai 400021

...APPELLANT

VERSUS

1. Sau. Archana w/o Suhas Dandawate,
Age 55 yrs., Occupation – Household,

2. Kaustubh s/o Suhas Dandawate,
Age 20 yrs., Occupation – Unemployed,

Cross-objector Nos.1 and 2.

3. Smt. Tarabai wd/o Narayanrao Dandawate (dead)

Appeal is abated against R.No.3.

Both No.1 and 2 R/o Jalamb Naka,
Khamgaon, Tq. Khamgaon,
District Buldana

4. Commander V.K. Janardhanan
(Neliyath Drushnan Janardhanan,
s/o V.K. Nair, Age 50 yrs.,
Occupation – Naval Services,
R/o. 338, Sector 7,
Urban Estate, Gurgaon,
Second Address : M20, Notra,
Colaba, Mumbai – 5

Appeal is dismissed against R.No.4 as per Hon'ble Registrar (J.) order dated 08/07/2014.

5. Hasan Ali s/o Ali Mohd.
Age 58 yrs.,
Occupation – Trader-Taxi Owner,
158, Lamington Cross Road,
Bori Bandar, 1st Lane,
R/25, Mumbai – 400007

6. Haidar Abbas Asamadi,
Age 35 yrs., Taxi Driver,
23, A Wing, Room No.101,
Sultanabad, Beharanmbag Road,
Jogeshweari (W), Mumbai,

7. United India Insurance Co. Ltd.
DO 13, 133, M.G. Road,
Mumbai - 400001

...RESPONDENTS

Shri D.N. Kukday, Advocate for the appellant.
Shri A.J. Thakkar, Advocate for respondent Nos.1 and 2.
Shri M.R. Joharapurkar, Advocate for respondent No.7.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : MARCH 17, 2023.
PRONOUNCED ON : MAY 03, 2023

JUDGMENT :

Heard learned Counsel for the parties.

2. The appellant - HDFC CHUBB General Insurance Co. Ltd. preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award dated 13/04/2011 passed by the Motor Accident Claims Tribunal, Khamgaon (hereinafter referred to as 'Tribunal' for short) in Claim Petition No.9/2006 by which Insurance Company was directed to pay compensation of Rs.28,50,000/- inclusive of No Fault Liability along with interest @ 7% per annum from the date of filing of the petition till realization of the amount. The parties hereinafter referred as per their original nomenclature.

3. The brief facts which are necessary to decide the appeal are as under :

A] On 11/12/2005, the deceased Swanand Suhas Dandwate was traveling in a taxi, driven by respondent No.4 – Haidar Abbas Asamadi bearing registration No.MH-01-G-2425. The said Taxi was dashed by the car owned by the respondent No.1 bearing registration No.HR-26-V-0939. Due to the severe dash by the car, the deceased sustained grievous and multiple injuries and died in the accident. The respondent No.3 – Hasan Ali s/o Ali Mohd. was the owner of the taxi and the car which is the offending vehicle was owned by respondent No.2. The Taxi in which deceased was traveling was insured with United India

Insurance Company Limited i.e. respondent No.5 and the offending car was insured with respondent No.2 – HDFC General Insurance Company.

4. As per contention of the claimants, the alleged accident took place due to the rash and negligent driving of the Accent car driver. Regarding the said accident, the crime was registered against the car driver at Azad Maidan, Mumbai police station vide Crime No.350/2005 on 11/12/2005.

5. It is further the contention of the claimants that deceased Swanand was elder son of claimant No.1 aged about 21 years and had completed his graduation in Engineering First Class. At the time of accident he was an employee of Mahindra and Mahindra Ltd. at Kandiwali, Mumbai. The deceased was a bright student and was selected in the campus interview. He was drawing Rs.21,596.97/- as a Gross Salary at the time of accident. Due to his death, claimant No.1 has lost her son. She has lost love and affection of her son. For all above these grounds she claimed compensation from the respondents.

6. In response to the notice, respondent No.2 resisted the claim on the ground that two vehicles involved in the accident hence, it is a case of contributory negligence. Therefore, the taxi driver is also responsible for the said accident and hence, there is a joint liability of

respondent Nos.3 to 5. The Insurance company has challenged the age and income of the deceased.

7. Respondent No.5 also resisted the claim on the ground that the taxi driver was not at all responsible for the said accident, and therefore, not liable to pay compensation. Respondent No.1, 3 and 4 though served with the notice did not appear in the case and case proceeded ex-parte against them.

8. The learned Tribunal recorded the evidence of claimant No.1. Besides her oral evidence, she placed reliance on the police papers i.e. cause of death certificate, F.I.R., spot panchnama, inquest panchnama, accident form and submitted that the oral evidence as well as documentary evidence shows that alleged accident took place due to the rash and negligent driving of Accent car driver bearing registration No.HR-26-V-0939.

9. Besides police papers, claimants also placed reliance on the Insurance policy to show that the offending vehicle was validly insured with respondent No.2. To show that the deceased was a brilliant student, his mark-list of Xth, XIIth standard and mark-list of Graduation in Engineering was also placed on record. The appointment letter at

Exhibit 63 also relied upon to show that the deceased was earning Rs.21,596.97/-.

10. The Insurance Company – respondent No.2 has not adduced any evidence in support of the contention. The learned Tribunal appreciated the evidence and held respondent Nos.1 and 2 are liable to pay compensation and directed to pay Rs.28,50,000/- inclusive of NFL amount.

11. Being aggrieved and dissatisfied with the judgment of the Tribunal, present appeal is preferred on the ground that the police papers sufficiently shows that two vehicles were involved in the accident and taxi driver has also contributed for the said accident. This fact is not considered by the Tribunal and exonerated the respondent Nos.3 to 5. The quantum of compensation is also challenged on the ground that the claimants failed to prove the income of the deceased.

12. The claimants have also filed cross-objection for enhancement of compensation on the ground that the Tribunal had not considered the future prospects and also not awarded the compensation under the consortium. Thus, claimants are entitled for enhanced amount of compensation.

13. Heard Shri D.N. Kukday, learned Counsel for the appellant. He submitted that Exhibit 49 – spot panchnama shows that the accident took place due to the dash between the two vehicles thus, negligence of taxi driver is also responsible for the said accident. As there was head on collision between the two vehicles, both the vehicle drivers contributed for the said accident. The claimant has added both the vehicle drivers and owners as a party. Considering that the accident took place due to the rash and negligent driving of both the vehicle drivers, they are liable to pay 50% of the compensation. He further challenged the quantum of compensation by submitting that no evidence was adduced to show that the deceased was working. The claimants are not dependent on the deceased. Mere filing of the document not sufficient hence, the judgment and award of the Tribunal deserves to be quashed and set aside.

14. In support of his contention, he placed reliance on ***The Apsrtc represented by its Regional Manager, Anantapur Vs. Mallagundla Nagarjuna and ors., 2022 ACJ 2375,*** wherein the Hon'ble Apex Court has held that the accident occurred due to contributory negligence, and therefore, negligence is to be shared in the ratio of 50:50.

15. *Per contra,* Shri A.J. Thakkar, learned Counsel for respondent Nos.1 and 2 and Shri M.R. Joharapurkar, learned Counsel for

respondent No.7, submitted that there is no evidence as to the contributory negligence. No head on collision between the two vehicles. They further submitted that the claimants are at liberty to sue any of the tortfeasor or all of them for recovery of amount of compensation. In composite negligence extent of liability of each of them neither required to be separately ascertained nor required to be determined by the Court for the purpose of payment of compensation. Even if, claimant implead all joint tortfeasors and Court is able to determine their *inter se* liability, their liability would remain joint and several. As far as the quantum of compensation is concerned, he submitted that the trial Court ought to have considered his income as Rs.21,000/- per month, after adding 40% future prospects the amount of compensation comes to Rs.31,75,200/- but the Tribunal has awarded only Rs.28,50,000/-. Thus, the claimants are entitled to receive enhanced amount of compensation.

16. After hearing both the sides and on perusal of the evidence, following points arise for my consideration :

(i) Whether respondent No.2 established that the accident is the result of contributory negligence on account of negligence of both the vehicle drivers.

(ii) Whether the claimants are entitled for enhanced amount of compensation.

17. There is no dispute that the death of the deceased Swanand was caused in an unfortunate accident which took place on 11/12/2005 when deceased was traveling in a taxi at CTO junction, in front of Parshi Bawadi within the jurisdiction of Azad Maidan, Mumbai police station. There is no dispute that the deceased was traveling in a taxi bearing registration No.MH-01-G-2425. The said taxi was dashed by Accent car bearing registration No.HR-26-V-0939. Regarding the said accident, crime was also registered against the Accent car driver. The police papers i.e. First Information Report at Exhibit – 48 shows that crime was registered on the basis of FIR lodged by the taxi driver. The recitals of the FIR shows that Accent car driver has driven his car in a rash and negligent manner and dashed against the taxi and death of the deceased is caused who was traveling in the said taxi.

18. Admittedly, PW-1 - Archana Suhas Dandwate who is the mother of the deceased has not witnessed the said accident. No eye-witness is examined by the claimants to prove the contentions. The claimants have only adduced the evidence of PW-1 - Archana Suhas Dandwate. She narrated about the occurrence of the accident on the basis of police papers. Her evidence further shows that she has not witnessed the said accident.

19. On perusal of the FIR and spot panchnama, it reveals that the crime was registered on the basis of report lodged by taxi driver - Mr. Haidar Abbas Asamadi. The spot panchnama shows that the alleged accident took place at CTO junction, near Parsi Bawadi, near Bombay High Court, Mumbai. At the spot of incident, taxi was seen facing towards Parshi Bawadi i.e. western side. The damage was caused towards the right side of the Taxi. Accent car was also seen at the spot of incident facing towards Hutatma square and damage was caused towards the front portion of the said Accent car.

20. Shri Kukday, learned Counsel for the appellant vehemently submitted that the alleged accident took place due to the contributory negligence of taxi driver also. Admittedly, in support of the contention, the appellant – Insurance company neither examined the Accent car driver nor adduced any evidence to show the contributory negligence of the taxi driver. He simply placed reliance on the spot panchnama. The spot panchnama shows that the damage was caused to the taxi towards the right side whereas damage to the Accent car was towards front portion.

21. Whether the said accident took place due to the contributory negligence or composite negligence, is the material aspect. The principle underlying the doctrine of contributory negligence is the application of

the maxim '*in pari delicto, potior est conditio defendentis*' which means when both parties are equally to blame, neither can hold the other liable. There is clear difference between the contributory negligence and composite negligence. Where a person is injured without any act or omission from his part, but as combined effect of the negligence of two or more persons, it is a case of composite negligence and not a case of contributory negligence. The expression contributory negligence applies solely to the conduct of the claimant, in a case of personal injury and in case of compensation for death, it applies to the conduct of the victim. It means that there was an act or omission from the part of the injured claimant or victim, which has materially contributed to the damage. In the instant case, neither the petitioner was driving the vehicle nor he was a driver of the other vehicle, he was traveling in the vehicle. Thus, it is clear that there was no act or omission on the part of the injured petitioner to contribute the said accident. Thus, the contention of the Insurance Company that being it is a contributory negligence, petitioner is not entitled to receive the compensation only from the appellant but also from the taxi driver is not acceptable. It is well settled that right of the claimants to recover the damages from the tortfeasor is well settled. Once Court comes to the conclusion that the case is one of composite negligence, damages cannot be apportioned. Petitioner is entitled to recover entire compensation from all or any of the joint tortfeasor. The

liability in the case of composite negligence, normally should not be apportioned, as both the wrongdoers are jointly and severally liable for the whole loss. It is the choice of the petitioner either to claim compensation from both the tortfeasors or any of them. Thus, the tentativeness for the purpose of contribution between two joint tortfeasors do not at all affect the right of the petitioner to recover the full damages.

22. The Hon'ble Apex Court in the case of ***T.O. Anthony Vs. Karvarnan and ors, 2008(3) ALL MR 902*** held as composite negligence refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the Court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the

part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by the reason of negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

23. In the present case, the deceased had not contributed to the said accident but death of the deceased was caused due to the negligence of Accent car driver. Even if, the involvement of the two vehicles is considered, they can be treated as two tortfeasors. In such a case, each tortfeasor is jointly and severally liable to pay the compensation. In such a case, the claimants are at liberty to proceed either against both of them or any of them.

24. Shri Joharapurkar, learned Counsel rightly relied upon *Khenyei Vs. New India Assurance Company Limited and ors. (2015) 9 SCC 273* wherein the Hon'ble Apex Court held that the accident occurred due to negligence of drivers of both the vehicles that had collided causing the accident. When the accident occurred due to composite negligence of more than one person, held, they being joint tortfeasors, would be liable jointly as well as severally to pay compensation. Hence, claimant entitled to sue any of the joint

tortfeasors or all of them for recovery of entire amount of compensation. Extent of liability of each of them separately is neither required to be established by claimant, nor required to be determined by Court/Tribunal for purpose of payment of compensation. Even if claimant impleads all joint tortfeasors and Court/Tribunal is able to determine their *inter se* liability, their liability would remain joint and several. Therefore, the contention of the Insurance company that the judgment and award is liable to be set aside or modified by holding the appellant – Insurance company 50% liable and taxi driver to the extent of 50%, is not sustainable.

25. As far as the contention of the appellant is concerned that they are entitled for enhancement of compensation, the claimants have filed the cross-objection. The evidence is adduced by claimant No.1 testifying that her son had completed degree of Engineering and was receiving Rs.21,596/- per month as a salary. He was 21 years of age at the time of accident. She placed reliance on the appointment letter issued by Mahindra and Mahindra Ltd. appointing the deceased as a Graduate Engineer Trainee under the Company Trainee Scheme at Exhibit 63 which shows that deceased was getting Stipend and allowances to the tune of Rs.21,596.97/-. Admittedly, during the cross-examination, this letter was not denied by the Insurance company. Only

suggestion was given that the deceased had not completed Engineering at the time of accident, which she had denied. Only suggestion was given that she is deposing false, regarding the income of the deceased. The letter at Exhibit 63 further supported by mark-list of the deceased of Secondary and Higher Secondary examination, which shows that the deceased was a bright student. The mark-list at Exhibit 61 shows that he had completed the Degree of Engineering. Thus, sufficient evidence is brought on record by the claimants to show that the deceased was working as a Trainee and was receiving Stipend as well as allowances to the tune of Rs.21,596.97/-.

26. It is well settled that the claimants are entitled for 'just compensation'. The concept of 'just compensation' is dealt by Section 168 of the Motor Vehicles Act, 1988. The concept of 'just compensation' has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The conception of 'just compensation' has to be viewed through the prism of fairness, reasonableness. In case of a death, the legal heirs of the deceased cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the Tribunal is quite wide, yet it is

obligatory on a part of the Tribunal to be guided by the expression, i.e., just compensation. The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and after applying the appropriate multiplier. The formula relating to multiplier has been clearly stated in the case of *Sarla Verma Vs. DTC (2009) 6 SCC 121* and it has been approved in the case of *Reshma Kumari Vs. Madan Mohan (2013) 9 SCC 65*. In view of the principles laid down by the Hon'ble Apex Court, the compensation is to be determined.

27. On perusal of the judgment of the Tribunal, it is apparent that the Tribunal had considered the income of the deceased as Rs.21,000/- after deducting one third for personal expenses and by applying multiplier of 17. Admittedly, the Tribunal had not considered the future prospects while calculating the compensation. The Constitution Bench of the Hon'ble Apex Court in the case of ***National Insurance Company Ltd. Vs. Pranay Sethi (2017) 16 SCC 680*** held that 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 and where the deceased was between

the age of 40 to 50 years an addition of 25% would be reasonable. By applying this principle, the compensation to be awarded to the claimants.

28. Learned Counsel Shri Kukday submitted that claimant No.1 was not dependent. Admittedly claimant No.1 is the mother and claimant No.2 is the minor brother of the deceased. Admittedly, claimant No.1 was not serving anywhere or was not having any source of income. Being mother, she was dependent on the deceased. Minor brother is also a dependent of deceased. In view of judgment of *Sarla Verma* (supra), considering the age of the deceased multiplier applied would be 18. After necessary deductions, the income of the deceased is to be considered as Rs.21,000/- per month. His yearly income comes to Rs.2,52,000/-. As the deceased was unmarried 50% is to be deducted. After deduction of 50% his yearly income comes to Rs.1,26,000/-. After adding 40% towards future prospects it comes to Rs.50,000/-. Thus, Rs.1,26,000 + Rs.50,000/- = Rs.1,76,000/-. Admittedly, the deceased was 21 years of age, so multiplier would be 18. After multiplying Rs.1,76,000/- x 18 it comes to Rs.31,68,000/-. Besides the compensation amount, the claimant No.1 is also entitled to receive the amount of Rs.15,000/- towards loss of estate and Rs.15,000/- towards funeral expenses. The trial Court has awarded Rs.4000/- towards the

funeral expenses. So additionally claimants are entitled to receive Rs.11,000/- towards funeral and Rs.15,000/- towards the loss of estate. Thus, total amount of Rs.31,94,000/-, the claimants are entitled to receive.

29. In view of the above facts and discussion, the appeal of the appellant is devoid of merits and liable to be dismissed. The cross-objection deserves to be allowed partly. Hence, I pass the following order :

(i) The appeal is dismissed and the cross-objection is partly allowed.

(ii) The claimants are entitled to receive compensation of Rs. 31,94,000/- (Rs. Thirty one lacs ninety four thousand) towards full and final amount of compensation.

(iii) The appellant-Insurance Company is directed to deposit the enhanced amount of compensation after deducting the compensation amount awarded by the Tribunal along with interest @ 7% per annum from the date of application till realization of the amount.

(URMILA JOSHI-PHALKE, J.)

*Divya