

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1224 OF 2022

The Manager
 The Bajaj Allianz General Insurance Company Ltd.
 GE Plaza, Airport Road, Yerwada, Pune-411006

Appellant
 (Original
 Res.No.3)

Versus

- 1 Prabhavati Prakash Mohite
 Age-61 Yrs., Occu. Household
- 2 Prakash Nivrutti Mohite
 (Died during the pendency of Claim)
 Res. No.1 and 2 residing at Nandre, Tal : Miraj,
 District : Sangli
- 3 Shri. Anil Vishwanath Chivate (Owner)
 Age – 43 Yrs., Occu. Business,
 R/o. Chikurde, Tal. Walawa, Dist. Sangli.
- 4 Shri. Santosh Kumar Ugare (Driver)
 Age-43 Yrs., Occu. Job.
 R/o. Dudhgaon, Tal. Miraj, Dist. Sangli
- 5 Dipali Dashrath Magdum
 Age : 30 Years, Occ : Household
 Residing at Shivajinagar, House No. 2819
 Behind Shirol Panchayat Samiti, Shirol,
 Tal : Shirol, District : Kolhapur
- 6 KSL & Industrial Limited (Xylo owner)
 A.154, Krishna Chambers, Dombivali East,
 Mumbai – 421201

Respondents
 (Respondent
 Nos. 1 and 2
 are original
 Claimants &
 Res. Nos. 3
 to 6 are
 original Res.
 Nos. 1, 2, 4
 and 5
 respectively)

WITH
 FIRST APPEAL NO. 1225 OF 2022

The Manager
 The Bajaj Allianz General Insurance Company Ltd.
 GE Plaza, Airport Road, Yerwada, Pune-411006

Appellant
 (Original Res.
 No.2)

Versus

- 1 Shubhangi Tatyasaheb @ Kapil Patil
 Age-30 Yrs., Occu. Household

| | | |
|---|---|-------------|
| 2 | Ishwari Tatyasaheb @ Kapil Patil Age – 7 Years By and through guardian mother i.e. Respondent No.1. | Respondents |
| 3 | Padmini Vijay Patil Age-62 Urs., Occu. Household | |
| 4 | Vijay Vithoba Patil Age-67 Yrs., Occu. Respondent Nos. 1 to 4 are residing at Karnal, Tal : Miraj, District : Sangli | |
| 5 | Anil Vishwanath Chivate (Owner) Age – 43 Yrs., Occu. Business, R/o. Chikurde, Tal. Walawa, Dist. Sangli. | |
| 6 | Shri. Santosh Kumar Ugare (Driver) Age-43 Yrs., Occu. Job. R/o. Dudhgaon, Tal. Miraj, Dist. Sangli | |
| 7 | KSL & Industrial Limited (Xylo owner) A.154, Krishna Chambers, Dombivali East, Mumbai – 421201 | |

WITH
FIRST APPEAL NO. 1226 OF 2022

The Manager
The Bajaj Allianz General Insurance Company Ltd.
GE Plaza, Airport Road, Yerwada, Pune-411006

Appellant
(Original Res.
No.3)

Versus

| | |
|---|---|
| 1 | Bharati Shivaraj Patil Age-32 Yrs., Occ. Household |
| 2 | Shobhatai Bajirao Patil Age – 66 Years |
| 3 | Bajirao Rajaram Patil Age- 70 Yrs., Occu : None Res. Nos.1 to 3 are residing at Karnal, Tal : Miraj, District : Sangli (Died during the pendency of the claim petition) |
| 4 | Anil Vishwanath Chivate (Owner) Age -43 Yrs., Occu. Business, R/o. Chikurde, Tal. Walawa, Dist. Sangli |

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|---|--|-------------|
| 5 | Shri. Santosh Kumar Ugare (Driver) Age-43 Yrs., Occu. Job. R/o. Dudhgaon, Tal. Miraj, Dist. Sangli | Respondents |
| 6 | KSL & Industrial Limited (Xylo owner) A.154, Krishna Chambers, Dombivali East, Mumbai – 421201 | |

WITH
FIRST APPEAL NO. 1227 OF 2022

The Manager
The Bajaj Allianz General Insurance Company Ltd.
GE Plaza, Airport Road, Yerwada, Pune-411006

Appellant
(Original
Res.No.3)

Versus

| | | |
|---|---|-------------|
| 1 | Varsharani Anantkumar Khot Age – 39 Yrs., Occu. Housework | Respondents |
| 2 | Swarup Anantkumar Khot Age -15 Yrs., Occu. Education | |
| 3 | Swara Anantkumar Khot Age – 7 years, Respondent Nos. 2 and 3 are minor Hence by and through their natural guardian i.e. mother Res. No.1 Varsharani Anantkumar Khot | |
| 4 | Shantanath Balu Khot Age – 67 Yrs., Occu | |
| 5 | Shrimanti Shantanath Khot Age – 89 Yrs., Occu. Housework | |
| 6 | Rupabai Balu Khot (Died during the pendency of the claim petition) Respondent Nos. 1 to 6 are residing at Nandre, Tal : Miraj, District : Sangli | |
| 7 | Shri. Anil Vishwanath Chivate (Owner) Age – 43 Yrs., Occu. Business, R/o. Chikurde, Tal. Walawa, Dist. Sangli. | |
| 8 | Shri. Santosh Kumar Ugare (Driver) Age-43 Yrs., Occu. Job. R/o. Dudhgaon, Tal. Miraj, Dist. Sangli | |

Respondents

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Mr. Sarthak S. Diwan Advocate for the Appellant in all appeals.
Mr. Akshay Kulkarni a/w. Mr. Avesh Ghadge, Advocate for Respondent No.1 in all appeals.

CORAM : SHIVKUMAR DIGE, J.
DATE : 28th MARCH, 2024.

ORAL JUDGMENT :

1. All these four appeals are preferred by the appellant/Insurance Company against the Judgment and Order passed by the Motor Accident Claims Tribunal, Sangli (for short “**the Tribunal**”). As all the appeals are out of the same accident and on same issue, hence I am deciding it by this common Judgment.
2. It is contention of learned counsel for the appellant that accident occurred due to sole negligence of driver of xylo vehicle. The Tribunal has completely erred in not relying on panchanama produced on record which specifically shows the manner in which the accident had occurred. The learned counsel further submitted that the Tribunal has not considered statements given by the witnesses before the police authorities. The Tribunal has considered yearly income of deceased at Rs.8,73,898/- which is on higher side without any evidence on record. Hence requested to allow the appeal.
3. It is contention of learned counsel for respondents/claimants that no evidence is produced on record by the appellant/Insurance

Company to prove the negligence of the deceased. The claimants have examined Santosh Daitya who was occupant in the xylo and who has witnessed the accident. He has stated that accident occurred due to negligence of the driver of tanker. But the Tribunal has considered 50% contributory negligence of the deceased. Learned counsel further submitted that driver of tanker did not step into the witness box to prove the negligence of the deceased. Learned counsel further submitted that to prove the income of deceased income tax returns provided on record on the basis of income tax returns the Tribunal has considered income of the deceased which is proper. The Tribunal has considered all the aspects while passing Judgment and Order. No interference is required in it.

4. It is claimant's case that on 14.09.2015 some persons from Mumbai had come to Jaysingpur in Mahindra Xylo No. MH-05-AS-8741. Deceased Mr. Anant Kumar was driving the said xylo vehicle. The deceased in other appeals were passengers in the said vehicle. The said jeep was proceeding from Jaysingpur to Karnal, Nandre. When the said vehicle entered into the jurisdiction of village Udgaon near bus stand at about 1.15 a.m. the driver of xylo gave signal to one tanker which was proceeding ahead of it and he had attempted to overtake the said tanker but the said vehicle did not give space to overtake. The deceased was trying to overtake the said tanker at curve at relevant time said unknown

tanker gave dash to the left side of xylo as a result of which the front left side tyre of xylo got burst. The driver of xylo tried to control the jeep at the relevant time one TATA Tanker No. MH-10-BR-1010 suddenly came from Sangli side. It was in high speed and driver of the said vehicle was driving it in rash and negligent manner. It gave dash to the xylo from front side and dragged xylo towards left side of the road. Due to dash the xylo turned turtle. The deceased and other three passengers died on the spot. The offence was registered against the deceased.

5. To prove the negligence of the driver of tanker, the claimants have examined CW-4 Sachin Jamkhandikar at Exhibit-65 who was occupant of the xylo but he remained absent for cross examination hence the Tribunal has not considered his evidence. The claimants have examined Mr. Santosh Daitya - CW-5 he has stated that on 14.09.2015 at about 12.30 pm he and his friends were returning to Nandre from Karnal, he and Sachin Jamkhandikar had occupied the last seat in the xylo and deceased Anantkumar was driving the said vehicle. Some of his friends had occupied front and middle seat of the xylo. At about 1.15 am when the xylo reached within the jurisdiction of village Udgaon near S.T.bus stop, it was trying to overtake one unknown tanker by giving signal. When the xylo was overtaking the said tanker on the slight curve, the said tanker gave dash to the xylo to its left side as a result of which the xylo

was got faltered, it lost its balance and the front left tyre of the xylo got burst. The deceased driver was trying to control the said vehicle. At the relevant time the offending tanker was coming from opposite direction. Without attending to the circumstances of the road, the driver of tanker did not take tanker to the side of the road and dashed against the xylo which had already lost the control due to the dash given by unknown tanker. The xylo toppled down towards southern side. However, the offending tanker did not stop and dragged the xylo in the direction of village Nrusinhvadi. The driver of tempo fled away from the incident spot. He further stated that accident occurred due to negligence of driver of tanker. He further stated that he received injuries in the accident. He was admitted in the hospital. He was under shock of sudden death of his friends. The police came to him and took his signature on the statement which was not narrated by him. The police did not record his true statement. He further stated that police recorded wrong statement in his name to save the driver of tanker from criminal action. The police on the basis of false investigation registered the crime against the deceased driver of xylo. He further stated that he has stated the true facts of the accident to the father of the deceased. The father of deceased Kapil Patil and Shivraj Patil had filed a private complaint bearing No. SCC 101/2016 against the driver of tanker. In cross examination he admitted that when

xylo was going towards Sangli, one tanker was going ahead of their vehicle. He further admitted that the driver of xylo tried to overtake the said tanker and the said tanker gave dash to front side of the xylo, the left front tyre of xylo got burst. He further admitted that due to said dash the xylo lost its balance. He further admitted that for considerable time the driver of xylo was trying to overtake the said tanker and the driver of tanker did not allow the xylo to overtake. He admitted that as the tanker had given dash to the front side of the xylo and as a result of which the left side tyre got burst. He further admitted that due to said dash the xylo lost its balance. It dashed against the offending tanker. He volunteered that the offending tanker gave dash to xylo. He further admitted that after the accident he became unconscious.

6. The claimants have examined Rajendra Aadke CW-6 at Exhibit-80. He stated that on the date of incident he was going in his vehicle from Mumbai to Jaysingpur. At around 1.15 am he reached near Udgao and he saw the accident between the xylo jeep and milk tanker of Swabhiman Milk Sangh. The tanker of Swabhiman Milk Sangh was belonging to member of parliament Raju Shetty and police recorded his statement after 10 to 12 days after the accident. He had read the statement written by the police. He informed the police that he had not seen accident but it is mentioned in the statement that he had seen it but police told him that it

is part of investigation. Thereafter, he signed on it. In cross examination he admitted that he has not complained against the police officer about taking signature on wrong statement. The respondents have examined defence witness Investigating Officer Shamrao Kadam at Exhibit-95. He has stated that he received information from police station about the accident hence he reached to accident spot, he took out the dead person from xylo jeep with help of people and admitted the injured in the hospital. One Mr. Jahangir had given report to the police. As per his report entry was taken in police diary. He recorded the statement of eight witnesses on 14.09.2015. He recorded the statement of Santosh Daitya as per his say. He recorded the statement of Rajendra on 15.09.2015. He further stated that accident occurred due to negligence of the driver of xylo. He has stated that the office of member of Parliament Raju Shetty is at 200 ft. distance from the police station. He further stated that the offending tanker was carrying milk of Swabhiman Milk Sangh. He further stated that the driver of offending tanker did not report the accident to the police. In cross examination he admitted that front portion of the tanker and front portion of the xylo were damaged.

7. While dealing with the issue of negligence the Tribunal has observed that the deceased driver of xylo was helpless to avoid the accident after it was dashed by ongoing unknown tanker while overtaking

it. Admittedly, there is collision between the xylo and the offending vehicle. It was expected from driver of offending vehicle to show reasonable care, precaution and vigilance demanded by the circumstances but it was not taken by him. He did not step into the witness box nor appellant/Insurance Company did bother to examine him as a witness. Considering the evidence on record the Tribunal has considered 50% contributory negligence of driver of offending tanker and 50% contributory negligence of deceased driver of xylo. I do not find infirmity in it. In my view, front portion of both the vehicles were damaged it shows that it was head on collision. The eye witness has stated that accident occurred due to negligence of the driver of offending tanker. As per view of *National Insurance Company Ltd. Vs. Chamundeshwari and Ors., 2021 ACJ 2558*, weightage has to be given to the evidence led before the Court than the contents of FIR. Hence, I do not see merit in the contention that accident occurred due to sole negligence of the deceased driver of xylo. The deceased in F.A. No. 1224 of 2022, F.A. No. 1225 of 2022 and F.A. No. 1226 of 2022 were occupants in the xylo car, so no question of their contributory negligence arises.

7.1. It is contention of learned counsel for the appellant that the Tribunal has considered income of the deceased in Appeal No. 1227 of 2022 on higher side. The Tribunal has considered annual income of the

deceased at Rs.8,97,898/- as per last income tax returns. It is settled principle of law that it should be as per the average of last three years income tax returns. The average income of the deceased of last three years comes to Rs.8,15,729/-, I am considering this income as income of the deceased. After calculating by this amount the excess amount comes to Rs. 2,95,085/-, the applicant-Insurance Company is entitled for this amount.

It is contention of learned counsel for the appellant/Insurance Company that income of the deceased in Appeal No. 1226 of 2022 is considered on higher side. It is claimant's case that deceased was working as a Manager in Chaugule Industries at Sangli and he was earning salary of Rs. 11,000/- per month and he was getting Rs.3,000/- from milk business. To prove the income of the deceased the claimants have examined Manager of Chaugule Industries – Priti. She has produced 10 salary slips of the deceased on record. It is at Exhibits-41 and 40. Considering all the salary slips the Tribunal has considered average salary of Rs.10,000/-. I do not find infirmity in it.

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

ORDER

i. **F.A. 1224 of 2022, F.A. 1225 of 2022 and F.A. 1226 of 2022** are dismissed.

- ii. F.A. No. 1227 of 2022 is partly allowed. The appellant is permitted to withdraw Rs.2,95,085/- along with proportionate interest.
- iii. The claimants in all appeals are permitted to withdraw deposited amount along with accrued interest.
- iv. The statutory amount in all appeals along with accrued interest be transferred to the Tribunal. Parties in the respective appeals are permitted to withdraw it as per rule.
- v. All pending applications, if any are disposed of.

(SHIVKUMAR DIGE, J.)

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