

GAHC010061032017



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : MACApp./669/2017

SMT RANU RAJBONGSHI and 2 ORS
AGED 32 YEARS, W/O LATE DILIP RAJBONGSHI

2: AKASH RAJBONGSHI

AGED 11 YEARS
S/O LATE DILIP RAJBONGSHI

3: BHRIGU RAJ RAJBONGSHI
AGED 5 YEARS
S/O LATE DILIP RAJBONGSHI
ALL ARE R/O VILL. MADAN MOHAN SAKHOWA
P.O. BAR AJARA
P.S. NALBARI
DIST. NALBARI
ASSAM

VERSUS

THE DIVISIONAL MANAGER THE UNITED INDIA INSURANCE CO LTD and
2 ORS
GUWAHATI DIVISIONAL OFFICE, COLLEGE HOSTEL ROAD, PANBAZAR,
GHY-01, INSURER OF VEHICLE NO. AS-25-AC/6878 FORCE TRAVELLER
POLICY NO. 1302023114P110697109 VALID UPTO 04/03/2016

2: ALI AHMED
S/O MD. ABDUL BAREK
R/O VILL. MEDHIPARA
HOUSE NO. 35
P.O. GARIGAON
P.S. JALUKBARI
DIST. KAMRUP M
ASSAM

3:INTAJ ALI

S/O EAKUB ALI
R/O VILL. DALAITOLA
P.O. SONIADI
P.S. HAOJ
DIST. KAMRUP R
ASSAM
DRIVER OF VEHICLE NO. AS-25-AC/6878 FORCE TRAVELLER DRIVING
LICENSE NO. AS-1420040026778 VALID UPTO 16/07/2016 PIN 78001

Advocate for the appellants : Mr. J. Kalita

Advocate for the respondents : Mr. R.Goswami

Date of hearing : **04.06.2024**

Date of Judgment : **14.06.2024**

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGMENT & ORDER (CAV)

Heard Mr. J. Kalita, learned counsel for the appellant along with Mr. R. Goswami, learned counsel for the respondent No.1/Insurance Company Ltd. It is submitted at the bar that the respondent Nos. 2 & 3 are proforma respondents since the instant appeal is for enhancement of the awarded amount of Rs.29,26,900/-with an interest @ 6 % p.a, granted by the learned Tribunal, Nalbari in MAC Case No. 298/2015 dated 09.08.2016.

2. Brief facts of the case as narrated by the claimant, is that on 11.11.2015 at 5:30 PM, while the deceased victim, husband of claimant No.1 was returning

from his work place by riding on his Motorcycle, when he reach Mugkuchi, a Traveller vehicle, bearing registration No.AS-25-AC/6878 (Force Traveller) driven in a rash and negligent manner hit the deceased victim who was on the wrong side of the road. As a result of the accident, the deceased victim Mr. Dilip Rajbongshi sustained serious injuries and was taken to Phuleswari Nursing Home, Nalbari. He was then referred to GNRC Hospital, Guwahati but he succumb to his injuries on the way to GNRC Hospital. The PME examination of the deceased was done at Gauhati Medical College& Hospital. A case was registered vide Nalbari P.S. Case No. 786/2015 under Section 279/304(A)/427 IPC. The case of the claimant, on filing the claim application was that the offending vehicle which was driven in a rash and negligent manner was insured with the O.P. No. 1/the United India Insurance Co.Ltd. and the vehicle had a valid insurance coverage at the time of the accident, the claimants claim compensation of Rs.60,00,000/- due to the death of their husband/father on account of the vehicular accident.

3. The claimants in support of their case produced 3 (three) claimants witnesses and exhibited all the relevant documents such as Accident information report, PME report, MVI report, insurance policy and Salary certificate was exhibited as Ext-4 by PW No.3.

4. The opposite parties filed their written statements where O.P No.1/Insurance Company stated that at the time of the accident, the driver drove the vehicle without a proper driving license and further denied all the allegations made by the claimants. The O.P. No.2 is the owner of the offending vehicle and O.P No. 3 was the driver. Both, O.P. No.2 & O.P. No.3 in their respective written statements admitted that the accident had occurred but stated that the accident was due to the fault of the deceased victim. O.P. No.2 further stated that the vehicle driven by O.P. No.3 was duly insured with the O.P. No.1/Insurance Company and had a valid insurance coverage at the time of the accident.

The learned Tribunal framed the following issues :

- i) *Whether Dilip Rajbongshi, the husband of claimant No.1, died on 11.11.2015 at 5:30 pm at Mugkuchi on Nalbari Hajo Road due to rash and negligent driving of the driver of the offending vehicle ?*
- ii) *Whether the claimants are entitled to get any compensation as prayed for, and if so, to what extent and from whom ?*
- iii) *To what other relief or reliefs the claimants are entitled to?*

5. Thereafter, after the considering the evidence available on record, the learned Tribunal held that the deceased victim had died due to the accident on 11.11.2015, which was caused due to the rash and negligent driving of the driver of the vehicle. The learned Tribunal found that the monthly income of the deceased victim was Rs. 28,689/- as per the income certificate exhibited. The learned tribunal deducted Rs.600 shown as M.A in the salary certificate and Rs.861 show as 'others'. A total of Rs.1461/- was thus deducted from the monthly salary and the learned Tribunal held the monthly salary to be = Rs.27,228/- p.m.

6. Thus, applying the principles laid down in the case of **Rajesh & Others Vs. Rajbir Singh and Ors.** reported in **(2013) 9 SCC 54**, the learned tribunal added 30% toward future prospects and deducted 1/3 per month for personal expenses = Rs.23,598/- p.m. The age of the deceased at the time of his death was also held to be more than 45 years running *i.e* 46 years, therefore the appropriate multiplier was 13. Thereafter, the annual income with the multiplier was calculated = $23598 \times 12 \times 13 = \text{Rs. } 36,81,288/-$.

Applying the principles laid down in the case of **Shyamwati Sharma &Ors Vs. Karam Singh &Ors** reported in **(2011) 1 SCC (Cri) 288**, the learned Tribunal deducted 30% as income tax returns of the deceased from the total amount of *i.e* $\text{Rs. } 36,81,288 - 11,04,386 = 25,76,902$ which was rounded to $\text{Rs. } 25,76,900$.

7. The learned Tribunal then calculated the total amount of compensation entitled to the claim as below :-

1. Loss of dependency : Rs.25,76,900/-
2. For funeral expenses : Rs. 25,000/-
3. For pain and suffering of the Claimants due to the death of deceased : Rs. 25,000/-
4. For loss of love and affection & care and guidance of the minor children of the deceased : Rs.2,00,000/-
5. For loss of consortium due to death of her husband : Rs.1,00,000/-

Total compensation : Rs.29,26,900/-

8. The learned Tribunal also held that from the MVI report exhibited as Ext. 5(8), it cannot be said that the accident took place due to the sole negligence on the part of the driver of the offending vehicle. The learned Tribunal was of the view that some contributory negligence on the part of the deceased had also come to the light from the evidence of CW-1 and the Tribunal determine the negligence of both the vehicles at the ratio of 90 : 10. As the deceased was found 10% negligence for the said accident, therefore, 10% from Rs.29,26,900/- was deducted, which comes to Rs.26,34,210/- (Rupees twenty six lakhs thirty four thousand two hundred ten) only. The said amount was awarded to the claimants.

9. As a result, the learned Tribunal ordered that the total amount of compensation to the tune of 26,34,210/- is awarded to the claimants. The O.P. No./1 was directed to pay the said amount of compensation to the claimant No.2 within 60 days from the day of the Judgment & Order failing which an interest will be calculated @ 6% p.a. on the awarded amount from the date of filing the application till realization.

It was further held that on receiving the compensation amount Rs.5,00,000/- each in the name of 2 (two) minor children of the deceased were to be deposited for the future education, marriage etc in a Nationalised Bank in a fix deposit scheme till the minor children attain majority.

10. Aggrieved by the instant Judgment & Order, the appellant had preferred to the instant appeal for the enhancement of the awarded amount.

11. Mr. J. Kalita, learned counsel for the appellant submitted that the learned Tribunal had erred in considering the age of the deceased victim to be more than 45 years and running for non-production of Birth Certificate. The learned counsel submitted that the learned Tribunal did not give due consideration to the driving licence and the Voter identity card of the deceased which showed that the deceased was less than 45 years of age when he died.

12. The learned counsel submitted that the learned Tribunal had wrongly deducted 30% of the awarded amount as income tax of the deceased person which is against the established principles of law. The learned counsel submitted that the learned Tribunal should have deducted only 10% towards the income of the deceased as during the time of his death as per the income tax notification, 10% tax should have been deducted since the income of the deceased was then less than Rs. 5,00,000/- per annum.

13. The learned counsel also submitted that the learned Tribunal had erred in deciding that there was contributory negligence since there was no evidence to show that the accident was because of the negligence on the part of the deceased person and in such absence of any such evidence, the learned Tribunal should not have deducted 10% towards contributory negligence. The learned counsel submitted that the respondent did not adduce any evidence to the fact that the accident was due to the contributory negligence on the part of the deceased victim. The learned counsel relied upon the Judgment of the Apex Court in **Usha Rajkhowa & Ors vs. M/S Paramount Industries & Ors** reported in **2009 14 SCC 71**, para 20-22.

14. The learned counsel for the appellant further submitted that the learned Tribunal had erred in deducting 1/3rd of the income of the deceased towards the head of personal and living expenses which is not consonance with the Judgment of the Apex Court in **Rajesh v. Rajbir Singh, (2013) 9 SCC 54** para **19-20** wherein the Apex Court had held that if the income of the deceased was dependent by 4 to 6 dependant members, the deduction towards personal and living expenses should be 1/4th.

15. The learned counsel also submitted that the interest on the awarded amount should be 7.5% from the date of filing the claim petition till realization. The learned counsel for the appellants also submits that the Judgment of the Apex Court in Pranay Sethi will not be applicable in the instant case since the Judgment in Pranay Sethi was passed in 2017 while the instant case, the Judgment was passed in 2016. And submits that the operation of the Pranay Sethi's cases will not operative retrospectively unless and until it is specially mentioned in the judgment.

16. The learned counsel for the appellant further submits that the respondent cannot raise any objection to reduce the awarded amount given by the Tribunal since no cross appeal was filed by the respondent. In this regard the learned counsel relied upon the Judgment of the Apex Court in **Ranjana Prakash & Ors. Vs. The Divisional Manager & Anr.** reported in **2011 14 SCC 639.**

17. Mr. R. Goswami, learned counsel for the respondent No.1/Insurance Company Ltd. on the other hand submits that on the question whether the 5 Bench Judgment of the Apex Court in the case of **National Insurance Co.Ltd. Vs. Pranay Sethi** reported in **2017 16 SCC 608** would be applicable in appeals arising out of cases which were passed by the learned Tribunal before 03.10.2017, which is the date in which the judgment of **Pranay Sethi (Supra)** was passed, he submits that the case of the said case of **Pranay Sethi (Supra)** applies to all pending cases/appeals in all of which the amount under the conventional head like loss of consortium have been awarded as per **Pranay Sethi (Supra)** case, since an appeal is a continuation of a suit and therefore the judgment governing the field on the day would be applied in the appeal even if it was different from the claim which was disposed of by the Tribunal.

In support of his submission, the learned counsel has cited the decision of the Apex Court in **Sarup Singh @ Ram Sarup vs. HDFC ERGO General Insurance Company Ltd. & Ors. 2022 STPL 12493 SC** and therefore, the learned counsel submits that the conventional head granted by the learned Tribunal should have been as per the amount granted in the case of **Pranay Sethi (Supra).**

18. The learned counsel for the respondent No.1 submits that the service record or the birth certificate was not produced before the learned Tribunal and the learned member had applied one step higher multiplier applicable to 46 to 50 years. The learned counsel further submits that if the age of the deceased victim was taken as 35 years then the multiplier should be 14 as per **Pranay Sethi (Supra) and Sarla Verma Vs. Delhi Transport Corporation** reported in **2009 6 SCC 121**. If the age is more than 45 years than the multiplier should be 13. The learned counsel for the respondent No.1 submits that it is a settle possession of law has laid down in **Sarla Verma (Supra)** and also followed in **Pranay Sethi (Supra)** and the multiplier should as per what is laid down by the Apex Court and not as per second schedule and attach to Section 163 (A) of the MV Act.

19. The learned counsel for the respondent No.1 further submits that it is a settle position of law especially in the case of employee person and it is the burden of the claimant to establish the material facts that that it is necessary for the claimant to establish the monthly income and on what basis the compensation could be adjust as payable. In support of the submission, the learned counsel has relied on the Judgment of the Apex Court in **Oriental Insurance Company Vs. Meena Variyal & Ors.** reported in **2007 STPL 8008 SC**. The learned counsel submits that the learned Tribunal should have asked the claimants to produce evidence in support of the monthly salary or income earns by the deceased from its employer company.

20. The learned counsel for the respondent No.1 further submitted that the claim under the Motor Vehicles Act is a claim for compensation arising out of an accident and is a beneficial piece of legislation which, however cannot allow the member of the Tribunal, trained in law to forget all the basic principle of establishing liability and establishing the quantum of compensation payable. In the instant case, the claimant could have got the employer/company to produce the relevant documents to show the income that was given to the deceased from his employer. The learned counsel submits that the ratio of the above Judgment should have applied with greater degree when the question of age/date of birth of the victim is to be proved. The learned counsel has relied the decision of the Apex court in **Syed Basheer Ahmad vs. Mohammad Jameel** reported in **(2009) 2 SCC 225**and the decision of this court in **Anti Das vs. M. Bhattacharjee – 2007 (4) GLT 172.**

21. The learned counsel for the respondent further submits that the evidence of CW- 1 and CW 2 cannot be relied upon and Ext. 5(7) does not support the version of the claimant that the offending vehicle had come from the wrong side of the road and hit the deceased.

22. I have heard the submissions made by the learned counsels for both the parties and have also perused the documents on record. It is an admitted fact that the incident occurred on 11.11.2015 at 5:30 PM, where the victim, Mr. Dilip Rajbongshi, husband of claimant No.1,met with an accident with the Traveller vehicle, bearing registration No.AS-25-AC/6878 (Force Traveller) and succumbed to his injuries on the way to GNRC Hospital, Guwahati. A case was registered vide Nalbari P.S. Case No. 786/2015 under Section 279/304(A)/427 IPC. It is also not disputed that the accident vehicle had a valid insurance coverage at the time of the accident.

23. This court finds that the monthly income of the deceased is proved by CW 3, who had exhibited Ext.4, which is the salary slip of the deceased victim showing the gross income of the deceased was Rs. 28,689/-. The learned tribunal held the monthly salary to be = Rs.27,228/- p.m after statutory deducting of Rs.600 shown as M.A in the salary certificate and Rs.861 show as 'others'. This point was not disputed or challenged in the pleadings of the appellant. Thus this court finds that the monthly salary of the deceased can be taken as Rs.27228/-

24. With regards to the age of the deceased victim, though no birth certificate was produced, it is seen that the claimant had stated that the deceased was running 45 years of age and the PME report has also recorded the age as 45 years. The driving licence and voter's identity card also showed the age of the deceased was less than 45 years of age, thus this court finds that the age of the deceased Mr. Dilip Rajbongshi should be taken as 45 years since there is no basis or reasoning of the learned Tribunal for taking the age of the deceased victim to be more than 45 years at the time of his death.

25. For the calculation of the compensation to be awarded to the claimants, this court finds it relevant to refer to the judgment of the Constitution Bench of the Apex Court in the case of **National Insurance Co. Ltd v. Pranay Sethi, (supra)** more particularly paragraph 59.1 and the sub- No. 59.2 which are quoted herein below:—

“59.1 The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in SarlaVerma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2 As Rajesh has not taken note of the decision in Reshma Kumar, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent".

26. Thus this court that for determination of the multiplicand, the deduction for personal and living expenses, the decision of the Apex court in **Sarla Verma (supra)** would be applicable in the instant case. This court finds that from the evidence adduced and documents on record, the age of the deceased victim is 45 years running at the time of his death, thus the multiplier to be applied for the age between 41 to 45 years will be 14.

Likewise as the deceased was between the age of 40 to 50, thus an addition of 30%, is required to be added on account of future prospects. Also taking into consideration that there were three dependents on the deceased i.e. wife and two children, 1/3 of the amount is required to be deducted in terms with paragraph 30 of the judgment of the Supreme Court in Sarla Verma (supra).

27. This court also finds that the case of **Pranay Sethi, (supra)** will be applicable since an appeal is a continuation of the case and thus while considering the compensation under conventional heads, the reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000, Rs 40,000 and Rs 15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years as laid down in **Pranay Sethi (Supra)**.

28. This court also finds that the income-tax slab for period 2014 -2015, at that relevant point of time, would be deduction of 10% instead of 30%.

29. In view of the above, the commutation of compensation is worked out as below:

| SI.No. | HEADS | Amount awarded |
|---------------|--|-------------------------------------|
| | | Rs. |
| 1. | Monthly income of the deceased | 27228/- |
| 2. | Add 30% Future prospect | 27228+8168=35396 |
| 3. | 1/3 towards personal expenses | 35396-11799=23597 |
| 5. | Annual loss of dependency | 23597x12=283164 |
| 6. | Multiplier'14' | 283164x14=3964296 |
| 7. | Deduct 10% Income tax returns | 3964,296- 396429=3567867 |
| | Total loss of dependency | Rs.3567,867.00 |
| 8. | Loss of estate (Increase by 10%) | Rs.16,500.00 |
| 9 | Loss of spousal consortium for wife and parental consortium for 2 children (increase by 10%) 44,000 x 3 | Rs. 132000.00 |
| 10. | Compensation towards funeral expenses (Increase by 10%) | Rs. 16,500.00 |
| | TOTAL COMPENSATION | Rs.37,32,867/- |

30. This court has also perused the evidence on record wherein the claimant CW1 and the eye witness CW2 have both stated that the accident occurred due to the rash and negligent driving of the vehicle, bearing registration No.AS-25-AC/6878 (Force Traveller). A case was registered vide Nalbari P.S. Case No. 786/2015 under Section 279/304(A)/427 IPC. It is seen that no evidence was

adduced by the opposite parties to show that the accident occurred due to the contributory negligence of the deceased victim.

The Apex court in **Usha Rajkhowa & Ors vs. M/S Paramount Industries & Ors(*supra*) had observed that** (quote)

“22. Keeping these principles in mind, we find that there was absolutely no evidence to suggest that there was any failure on the part of the car driver to take any particular care or that he had breached his duty in any manner. Such breach on his part had to be proved by the insurance company as it was its burden and for that, the panchnama of the spot, showing tyre marks caused by brakes, and the panchnama of the damaged car and the truck could have been brought on record. The insurance company has obviously failed to discharge its burden.”

31. This court finds the observation made in the above cited case would also be applicable in the instant case and accordingly since no evidence is produced by the opposite parties to prove the contributory negligence of the deceased driver, this court sets aside the finding of the learned Tribunal that accident was due to the contributory negligence of the deceased victim and where the learned Tribunal had determined the negligence of both the vehicles at the ratio of 90 : 10.

32. In view of the reasons stated above, the present appeal stands partially allowed and the judgment and award passed by the learned is modified and it is held that the appellants/claimants are entitled to a total sum of Rs.37,32,867/- (*Rupees thirty seven lakhs thirty two thousand eight hundred sixty seven*) with interest of 7.5% from the date of filing the claim petition till realization. No costs.

33. Any previous deposit made by the Insurance Company for the realization

of the awarded amount is to be deducted accordingly.

34. MAC. Appl./669 of 2017 stands disposed of as above.

35. No cost imposed.

JUDGE

Comparing Assistant