(2022) 01 BOM CK 0020

In the Bombay High Court

Case No : First Appeal No.1142 Of 2019, Cross Objection (St.) No.4431 Of 2021

National Insurance Company Limited APPELLANT

Vs

Ashok Rajaram Bambulkar And Others RESPONDENT

Date of Decision : 13-01-2022

Acts Referred:

Maharashtra Motor Vehicle Rules, 1989 — Rule 259, 260, 260(1), 260(2)
Motor Vehicles Act, 1988 — Section 140, 149(2), 166, 168
Income Tax Act, 1961 — Section 192(1), 201(1A)

Citation : (2022) 01 BOM CK 0020

Hon'ble Judges : N.J. Jamadar, J

Bench : Single Bench

Advocate : Amol Gatne, T.J. Mendon

Final Decision : Dismissed

Judgement

N.J. Jamadar, J

1. This appeal and cross objection are directed against the judgment and award dated 2nd December, 2014 passed by the learned Member, MACT, Mumbai

in MACP No. 1036 of 2013 whereby the application preferred by respondent Nos. 1 and 2/ original claimants for compensation under section 166 of the

Motor Vehicles Act, 1988 (MV Act, 1988) in respect of death of their son Milind Ashok Bambulkar (the deceased) in the vehicular accident, came to be

partly allowed by awarding a compensation of Rs. 8,87,000/- along with interest at the rate of 7.5% p.a. from the date of application till realization.

2. Shorn of superfluities, the background facts leading to appeal and cross objection can be stated as under:

(a) Milind, the deceased, then 25 years of age was working as an Office Assistant with Royal Art Electrodes Limited, Vasai. He drew salary of Rs. 10,000/-

p.m. On 18th May, 2013 at about 11.40 pm the deceased was riding a motor cycle bearing No. MH-02-CS 710 on his way to Pramila Nagar, Flyover bridge,

Dahisar (w), Mumbai. Mr. Sunil Patre was the pillion rider. When they reached Pramila Nagar Flyover bridge, a car, of Tata Indica make, bearing

registration No. MH-04-DE-9946 came from behind in a high speed. The driver of the said car lost control and gave a violent dash to the motor cycle from

behind. The deceased was dragged for a distance.

(b) After primary treatment at Bhagwati hospital, the deceased was shifted to Nair hospital, and therefrom to Bombay hospital, Mumbai. The deceased

succumbed to his injuries on 26th May, 2013. The accident occurred on account the negligence on the part of driver of the offending car, which was owned

by opponent No. 1/respondent No. 3 and insured with opponent No. 2/appellant herein. Hence, respondent Nos. 1 and 2/ original applicants preferred a claim

for compensation of Rs. 20 lakhs.

(c) The opponent No. 1 did not appear despite notice and hence the application proceeded ex-parte against opponent No. 1.

(d) The opponent No. 2/insurer resisted the application by filing written statement. The averments in the application adverse to the interest of the insurer

were denied. It was, inter alia, contended that the driver of the offending car was a necessary party and, in his absence, the application for compensation

could not be entertained and decided. It was further contended that the driver of the offending car was not at fault and the accident occurred due to the sole

negligence of the deceased. Even otherwise, the insurer was not liable to indemnify the insured as there was breach of condition of insurance.

(e) In the light of the rival pleadings, learned Member framed issues at Exhibit 15. The learned Member recorded evidence of applicant No. 1 Ashok

Babulkar (AW-1), the father of the deceased, and Satish Mohite (AW.2), who was then attached as a Senior Clerk with Bombay Hospital, Sunil Patre

(AW.3), the pillion rider on motor cycle driven by the deceased, and Mr. Karim Shaikh (AW.4) who was working as an Accountant in Royal Art Electrode

Limited, where the deceased was employed as an Office Assistant.

(f) After appraisal of the evidence and documents tendered for his perusal, the learned Member was persuaded to record the finding that the deceased met

death on account of injuries sustained in the accident, which took place due to negligence on the part of the driver of the offending car, there was no breach of conditions of insurance and the application was not bad in law for non-joinder of the driver of the offending car. The learned Member was not, however, persuaded to believe the testimony of the applicant and Karim Shaikh (AW.4) that the deceased was employed as an Office Assistant with Royal Art Electrodes Limited and drew salary of Rs. 9,449/- for the month of April, 2013, for the reason that the appointment letter and other particulars of employment were not placed on the record of the Tribunal. Thus, assessing the income of the deceased on notional basis at Rs. 3,000/- per month, the learned Member determined the compensation of Rs. 8,87,000/-.

3. Being aggrieved by and dissatisfied with the impugned judgment and award, the insurer is in appeal.

4. The applicants/respondent Nos. 1 and 2 have also filed the cross objection being dis-satisfied with the quantum of compensation. The applicants have assailed the determination of loss of dependency on the ground that learned Member committed an error in not assessing the income of the deceased on the basis of positive evidence on record to the effect that the deceased was employed with Royal Art Electrode Limited and, instead, determining the same on the basis of notional income at a much lower threshold. The failure to award compensation towards the future prospects and under conventional heads is also sought to be assailed.

5. In the aforesaid backdrop, I have heard Mr. Amol Gatne, the learned counsel for the appellant and Mr. T.J. Mendon, the learned counsel for the respondent Nos. 1 and 2 at length. Learned counsels have taken me through the pleadings, depositions of the witnesses and the material before the Tribunal.

6. Mr. Gatne, the learned counsel for the appellant, would urge that the learned Member committed a grave error in law in holding that the application was not bad for non-joinder of the driver of the offending car. Amplifying the submission, Mr. Gatne would urge that it is not a case where the objection to non-joinder of the necessary party was raised by way of a technical defence, casually. In the written statement itself, the appellant insurer had raised the said ground of non-joinder with sufficient clarity. An issue (issue No. 2) was duly framed on the basis of pleadings of the parties. Nonetheless, the learned Member proceeded to decide the issue against the appellant, by simply observing that it hardly matters whether the driver was made a party, as ultimately the insurer was liable to pay the compensation. This approach of the Tribunal in the

face of the express statutory prescription under Rule 260 of the Maharashtra Motor Vehicle Rules, 1989 (Rules, 1989) is legally unsustainable. Therefore, on this count alone, the appeal deserves to be allowed, urged Mr. Gatne. In order to lend support to the aforesaid submission, Mr. Gatne placed a strong reliance on a judgment of the learned single judge of this Court in the case of New India Assurance Company Limited vs. Suman Bhaskar Pawar and Others2010 (1) Bom. C.R. 319.

7. Mr. Gatne would further urge that finding recorded by the learned Member that the impact occurred on account of negligence on the part of driver of the offending car is also not borne out by the record. In the circumstances, the insurer could not have been saddled with the liability to pay the compensation.

8. In opposition to this, Mr. Mendon, the learned counsel for the respondent Nos. 1 and 2/applicants strenuously submitted that the submission sought to be canvased on behalf of the appellant on the premise that the driver of the offending car was a necessary party, is not in consonance with law. It is well recognized that the driver of the offending vehicle, in a proceeding under section 166 of the Act for compensation, is not a necessary party. According to Mr. Mendon, the reliance sought to be placed on the judgment of this Court in case of Suman Pawar (supra) is not well founded. Reliance was palced on the judgment of another learned single judge of this Court, in the case of New India Assurance Co. Ltd. vs. Sitaram Devidayal Jaiswal and Others2012 ACJ 2647. wherein the aforesaid judgment in the case of Suman Pawar (supra) was explained. Reliance was also placed on the judgment of the Supreme Court in the case of Josphine James vs. United India Insurance Co. Ltd. and Another (2013) 16 Supreme Court Cases 711. to bolster up the submission that in a proceeding under section 166 of the Act, the driver is not a necessary party.

9. On the aspect of quantum of compensation, Mr. Mendon would urge that the learned Member of the Tribunal committed a grave error in law in not assessing loss of dependency by taking into account the salary which the deceased drew. Mr. Mendon urged, with a degree of vehemence, that in the face of evidence of official of the employer to the effect that the deceased was employed as an Office Assistant, it was not open to the Tribunal to discard the same on the premise that appointment order was not placed on the record of the Tribunal and, therefore, assess the income on notional basis. Mr. Mendon, would

urge that the Tribunal completely lost sight of the nature of the jurisdiction exercised by it and the object of the ameliorative provisions under section 168 of

the Act. It was further submitted that the Tribunal was in error in not taking into account future prospects and awarding appropriate amount under

conventional heads. Thus the compensation awarded by the Tribunal is required to be suitably enhanced to make it a just and fair compensation, submitted

Mr. Mendon.

10. To begin with since an endevour was made to urge the ground that the accident did not occur due to negligence on the part of the driver of the offending

car, it may be apposite to have recourse to the evidence of Mr. Sunil Patre (AW.3), the pillion rider. Mr. Sunil Patre (AW.3) informed the Tribunal that when

the motor cycle driven by the deceased, on which he was the pillion rider, was proceeding towards Dahisar (E) on Borivali Dahisar link road, the offending

car came from behind and gave dash to the bike. He was thrown off the bike. However, the deceased, who was holding handle of the motor cycle, was

dragged away by the car along with the bike for a distance of 10-15 fts. The driver of the car did not apply breaks. Apart from motor cycle on which he was

pillion rider, the offending car gave dash to another motor bike and a WagnoR car.

11. Nothing material could be elicited in the cross examination of Mr. Sunil Patre (AW.3). He gave a vivid account of the manner in which the accident

occurred. The existence of opportunity to Mr. Sunil Patre (AW.3) to witness the events as they unfolded can hardly be questioned. In the circumstances, the

learned Member of the Tribunal was well within his rights, in recording the finding that the impact occurred due to negligence on the part of the driver of the

offending car.

12. Mr. Gatne, learned counsel for the appellant, would urge that such finding could not have been recorded against the driver of the offending car without

impleading him as a party/ opponent to the application and, in the least, without giving notice as envisaged by Rule 260 of the Rules, 1989. A submission was

forcefully canvassed on behalf of the appellant that impleadment of the driver of the offending vehicle as a party opponent is the mandate of the statutory

prescription. In any event, according to Mr. Gatne, the Tribunal is enjoined to issue a notice to the driver of the offending vehicle under Rule 260 of the Rules,

1989. In the absence thereof, the jurisdictional condition to award the compensation cannot be said to have been fulfilled. According to Mr. Gatne, what exacerbates the situation at hand is fact that a specific ground of non-joinder of necessary party was raised in the written statement by the insurer and even

the Tribunal framed an issue of non-joinder and, yet, on the one hand, the applicants made no effort to implead the driver, and, on the other hand, the Tribunal

determined the said issue without adequate consideration of facts and law.

13. As the thrust of the submission was based on Rule 260 of the Rules, 1989, it may be expedient to extract the same:-

260. Notice to the parties involved.-

(1) If the application is not dismissed under Rule 259, the Claims Tribunal shall. send to the owner or the driver of the vehicle or both involved in

the accident and its insurer, a copy of the application, and the annexures thereto together with the notice of the date on which the parties shall

enter their appearance either in person, or through their duly authorised agents, and may also file their written statement, if any, with additional

copies of the same, for being furnished to the other parties connected with the matter. It will dispose off the application, and may call upon the

parties to produce on that date any evidence which they may wish to tender.

(2) The service of the notice shall be effected on the owner, the driver and the insurer of the vehicle in question. as the case may be, by way of

personal service, through the bailiff or by Registered Post A/D or both.

(3) Where the applicant makes a claim for compensation under Section 140, the Claims Tribunal shall give notice to the owner and insurer, if any,

of the vehicle involved in the accident directing them to appear on the date, not later than fifteen days from the date of issue of such notice. The

date so fixed for such appearance shall also be not later than fifteen days from the receipt of the claim application filed by the claimant. The

Claims Tribunal shall state in such notice that in case they fail to appear on such appointed date, the Claims Tribunal shall proceed ex-parte on

the presumption that they have no contention to make against the award of compensation.

14. Laying emphasis on the opening part of sub rule (1) of Rule 260 which employs the word â??shallâ?, Mr. Gatne strenuously submitted that the provisions

of Rule 260 are mandatory and not directory. Amplifying the submission, it was urged that the issue of notice to the driver of the offending vehicle is not a matter of procedural compliance only as the question of liability to pay compensation primarily hinges upon the determination that the death or injury in a

vehicular accident resulted on account of the negligence on the part of the driver of the offending vehicle. Such finding, according to the Mr. Gatne, cannot

be recorded without providing an opportunity of hearing to the driver. Thus, the non impleadment of the driver was fatal to the tenability of the application,

especially when a specific plea of non-joinder was raised at the first possible opportunity by the insurer.

15. To bolster up this submission, Mr. Gatne placed a strong reliance on the judgment of this Court in the case of Suman Pawar (supra), wherein after

adverting to the provisions contained in Rule 260, extracted above, few propositions were enunciated. Paragraphs No. 14 to 16 of the aforesaid judgment are

material and hence extracted below:

14. The aforesaid Rule 260(1), states that the Claims Tribunal shall, send to the owner or driver of the of the vehicle or both involved in the

accident and its insurer, the copy of the application, and annexures thereto, together with notice of the date on which the parties shall enter their

appearance, either in person or through their duly authorized agents and may also file their written statement, if any, with additional copies of the

same, for being furnished to the other parties connected with the matter. The sub rule (2) of Rule 260 requires that the service of notice shall be

effected on the owner, driver and insurer of the vehicle in question, as the case may be, by way of personal service through bailiff or by

Registered post A/D or both. Thus, both the provisions of sub-rule (1) and (2) are mandatory and are required to be followed by the Claims

Tribunal, to involve the owner, driver and insurer of the vehicle in question, in the manner prescribed. It is in the light of this, the Claims Tribunal

has to pass an award under section 168 of the Motor Vehicles Act, 1988 as to the amount of compensation to be paid by the insurer or owner or

driver of the vehicle involved in the accident or by all or in all them, as the case may be. It is not necessary that in every case, where the driver of

the offending vehicle is found to be rash and negligent in driving vehicle, that he shall be held liable to pay compensation. It will depend upon the

facts and circumstances of each case and instead, the Tribunal may direct only the owner and the insurer of the vehicle to pay the compensation,

however, the involvement of driver in accordance with rules, in claim petition would be must.

15. The next question would be whether after compliance with aforesaid provision, will it be necessary to examine the driver of offending vehicle

as witness ? It is for the parties to decide in the facts and circumstances of the case, whether to examine the driver as witness to prove either

negligence or to prove breach of policy or any defence under section 149 (2) of said Act, since it will be the question of burden of proof and the

quantum of proof. However, in such situation, the proceedings of claim petition cannot vitiate on the ground of non-involvement of the driver of

offending vehicle.

16. In view of the above, my findings on all aforesaid aspects are summarised are as under :-

(i) Meena Varial's Case decided by the Apex Court does not lay down a law that driver of offending vehicle is necessary party in all cases and in

his absence, the Judgment and Award shall vitiate.

(ii) In an unreported Judgment of this Court in First Appeal No.3839/2008 (National Insurance Company Ltd., V/s Vachista) decided on

14.09.2009, it has not been laid down that driver of the offending vehicle was not necessary party, in case of claim petition under Motor Vehicles

Act.

(iii) In Machindranath's case the contention that, the driver of the offending vehicle was necessary party in a claim petition and in his absence the

entire judgment and award would vitiate, has been rejected.

(iv) In view of the Judgment of the Apex Court in Machindranath's case, the driver of the offending vehicle would be a proper party or he should

at least be examined, as witness on the allegations of rash and negligent driving on his part and without his involvement, no adverse finding on

negligence can be made against him and if any such finding is recorded, same would vitiate the proceedings.

(v) No decree or award can be made personally against the driver of the offending vehicle unless he is involved in a claim petition either as party

or at least as witness.

(vi) If there are specific rules involving the driver in a claim petition in particular manner, then the matter would be governed by the said rules and

its compliance will have to be shown.

(vii) The requirement of Rule 260(1) and (2) of the Maharashtra Motor Vehicles Rules, 1989 is mandatory and the Tribunal shall send to the

owner or driver of the vehicle or both, involved in the accident and its insurer, a copy of the application and annexures thereto, together with

notice of the date on which the parties shall enter their appearance.

(viii) The service of notice shall be effected on owner, driver and insurer of the offending vehicle in question, as the case may be, by way of

personal service, through the bailiff or by Registered Post A/D or both, as the Tribunal may deem fit and proper.

(ix) If the driver or owner or insurer of the offending vehicle does not respond to the notice so issued and duly served, the Tribunal may proceed

exparte and pass an award against any of them or all of them and the proceedings shall not vitiate for not calling a driver and examining him as

witness.

In view of all aforesaid findings, it is not necessary to consider other grounds of challenges along with the judgments cited by the learned

Counsels for the parties. What is required to be done now in the instant case is, to set aside the judgment and award passed by the Tribunal on

17.11.2008 in M.A.C.P. No.607/2005, which is impugned in the present Appeal, on the ground that there is non-compliance of mandatory

requirement of Rule 260(1) and (2) of the Maharashtra Motor Vehicles Rules, 1989 with further directions to follow the mandate of Rule 260(1)

and (2) of the Maharashtra Motor Vehicles Rules, 1989 by sending to the owner or driver of the vehicle or both involved in the accident, a copy of

application and annexures thereto, together with a notice of date on which they shall enter their appearance. Such notice shall be sent either

through bailiff or by registered post acknowledgment due or both, as Tribunal deems fit and proper.

16. Per contra, Mr. Mendon, the learned counsel for the respondent Nos. 1 and 2 submitted that the aforesaid submission on behalf of the appellant looses

sight of the nature of the proceeding under section 166 of the MV Act, 1988. Mr. Mendon, would submit that it has been authoritatively laid down that in a proceeding under section 166 of MV Act, 1988, in no case, a driver can be said to be a necessary party. Thus, the entire edifice of the submission that the

application was bad for non-joinder of necessary party falls through. In any event, according to Mr. Mendon, the aforesaid judgment in the case of Suman

Pawar (supra) was explained by another learned single Judge of this Court in the case of Sitaram Jaiswal (supra). Thus, not much mileage can be drawn

from the said pronouncement in the case of Suman Pawar (supra).

17. The nature of the proceeding for compensation for death or injury, caused in a motor vehicle accident, and the liability of the owner and driver of the

offending vehicle came up for consideration before the Supreme Court in the case of Machindranath Kernath Kasar vs. D.S. Mylarappa and Others(2008)

13 Supreme Court Cases 198.. After adverting to the object of the enactment of the MV Act, 1988 and the various provisions of the Act, Supreme Court

expounded the legal position in the following words.

â??28. When a damage is caused by an act of negligence on the part of a person, the said person is primarily held to be liable for payment of

damages. The owner of the vehicle would be liable as he has permitted the use thereof. To that effect only under the Motor Vehicles Act , both

driver and owner would be jointly liable. This, however, would not mean that they are joint tortfeasers in the strict sense of the term. There exists a

distinction between the liability of the owner of a vehicle which was used in commission of the accident and that of the driver for whose negligence

the accident was caused, but the same would not mean that the owner and the driver are joint tortfeasers in the sense as it is ordinarily

understood.

29. The Karnataka Rules, therefore, were required to be construed having regard to the appropriate interpretative principles applicable thereto.

Common law principles were therefor required to be kept in mind. In this case, we are not required to lay down a law that even in absence of any

rule, impleadment of the driver would be imperative.

30. It is however, of some interest to note the provisions of Section 168 of the Motor Vehicles Act. In terms of this aforementioned provision, the

Tribunal is mandatorily required to specify the amount which shall be paid by the owner or driver of the vehicle involved in the accident or by or

any of them. As it is imperative on the part of the Tribunal to specify the amount payable inter alia by the driver of the vehicle, a fortiori he should

be impleaded as a party in the proceeding. He may not, however, be a necessary party in the sense that in his absence, the entire proceeding shall

not be vitiated as the owner of the vehicle was a party in his capacity as a joint tortfeaser.

31. Appellant not only made averments as regards absence of negligence on his part; he made specific allegations against the driver of the truck.

The driver of the truck alone would have been competent to depose. In a given case, like the present one, the owner of the truck may not defend

the action at all keeping in view the fact that the vehicle was an insured one. There are some decisions of this Court, where even a plea has been

raised that the insured company would not be an aggrieved person in such an extent although such a contention has been negatived by this Court.

32. The principles of natural justice demand that a person must be given an opportunity to defend his action.

(emphasis supplied)

18. The necessity of impleading the driver as a party to the proceeding is indicated in the aforesaid pronouncement. However, the Supreme Court has

categorically observed, in clear and explicit terms, that the driver of the offending vehicle was not a necessary party in a claim petition so as to entail the

consequence of vitiating the judgment and award, where a driver has not been impleaded as party respondent. The import of the aforesaid judgment of the

Supreme Court is that, in a given case, the driver of the offending vehicle may be a proper party or, in the least, he ought to be examined as a witness before

an adverse finding on negligence can be made against him.

19. In the case of Sitaram Jaiswal (supra) this Court adverted to the aforesaid pronouncement in the case of Machindranath Kasar (supra) and the judgment

of this Court in the case of Suman Pawar (supra) and also noted the text of Rule 260 of the Rules, 1989 extracted above. Thereafter, the legal position was

culled out in paragraph Nos. 10 and 11 as under:

10. Thus, the law is that the claimant while filing a claim application is under no obligation to ensure that all necessary and proper parties are

impleaded as opponents to the claim petition. Considering the nature of the proceedings, the responsibility is of the Tribunal to ensure that the

notices are issued to all the necessary parties. This power can be exercised by the Tribunal at any stage of the proceedings.

11. It is a matter of common knowledge that while defending a claim petition, diverse defences are raised in the written statements by the owners

and especially the Insurers. However, in many cases, we find that all the defences pleaded are not pressed into service at the time of final hearing.

Whenever a contention is pressed into service by any of the opponents to the claim petition or the persons to whom the notice of the claim petition

is issued under Rule 260 that the driver of a vehicle is a necessary party, the Tribunal is under an obligation to examine the said contention and if

found correct, issue a notice to the driver. It is obvious that if such contention is not pressed by the party to whom the notice is served, the said

party cannot be allowed to raise the said contention for the first time in the appeal. A claimant cannot be allowed to suffer as he is under no

obligation to implead any party as the opponent to the claim petition. In such a case, if the driver is aggrieved by the adverse finding recorded

against him by the award of the Tribunal, he has a remedy of preferring an appeal against the award after obtaining a leave of the Appellate

Court. If neither the owner nor the Insurer raises a contention before the Tribunal regarding the non-joinder of the driver, it is not open for them

to contend in the appeal that the driver was a necessary party and that the award is vitiated because of non-joinder of the driver. The

observations made by this Court in the case of New India Assurance Company Ltd. Vs. Suman Bhaskar Pawar and others, 2010 (2) Mh L J 177 in

clause (iv) of paragraph No.16 will apply only when specific defence of non-joinder of the driver is pressed into service either by the owner or by

the Insurer. If they fail to raise the said contention, the same is not available for them in the appeal. Needless to say that the same will remain

available to the driver who is not made party. As the law is that the responsibility of issuing the notice to the proper parties is entrusted to the

Tribunal, if a contention regarding non-joinder is not raised, the claimant cannot be allowed to suffer on the ground that the Tribunal has failed

to perform its duty. Even if a contention regarding non-joinder of driver is raised at the time of final hearing of a claim petition, if the said

condition is correct, the Tribunal can issue notice to the driver at any stage.

(emphasis supplied)

20. This Court has held in no uncertain terms that a claimant is under no obligation to ensure that necessary and proper parties are impleaded as opponent to

the petition. Conversely, it is the obligation of the Tribunal to ensure that notice is issued to all the necessary parties. The Tribunal is empowered to do so at

any stage of the proceeding. However, a claimant cannot be made to suffer the consequences of non-impleadment as the claimant is under no obligation to

implead any party as the opponent to the claim petition. This Court has gone a step further to hold that even where the ground of non-joinder or no notice to

the driver is raised in the written statement, the owner or the insurer cannot be permitted to draw mileage therefrom if the said ground was not effectively

pursued.

21. Indeed, in the case at hand, the insurer has raised the ground of non-joinder of the driver in the written statement and the Tribunal had also framed an

issue on the basis of the pleadings in the written statement. Nay the Tribunal has adverted to this aspect of the matter in the impugned judgment. Yet, in my

considered view, that by itself does not justify an inference that the said ground was effectively persued by the insurer. No effort seems to have been made

on behalf of the insurer to summon and examine the driver of the offending vehicle. Nor the ground of no negligence on the part of driver was pursued by the

insurer to the hilt.

22. Even otherwise, in the peculiar facts of the case, especially in the face of the evidence of Sunil Patre (AW.3), who was the pillion rider on the motor

cycle driven by the deceased, the failure on the part of the Tribunal to issue notice to the driver does not seem to have resulted in failure of justice. As

indicated above, the testimony of Sunil Patre (AW.3) gives a vivid account of the manner of the accident. Sunil Patre (AW.3) has deposed to the fact that

the driver of the offending car had not only knocked down the motor cycle driven by the deceased and dragged him, but had also dashed another motor cycle

and a WagnoR car, as the said driver had lost control over the car. The nature of the accident speaks for itself in volumes, and the negligence on the part of

the driver of the offending car becomes writ large.

23. Mr. Mendon also invited the attention of the Court to the judgment of the Supreme Court in the case of Josphine James (supra) to lend support to the

submission that the Supreme Court has approved the position in law that non impleadment of the driver of the offending vehicle is not fatal to the proceeding

under MV Act, 1988. Paragraph 13 of the said judgment reads as under:

13. It is an undisputed fact that the son of the appellant died in a motor vehicle accident on 12.6.1998, who was the sole earning member of the

family. The respondent driver and insurer were initially impleaded as parties but notice could not be served to the driver despite repeated efforts.

The driver was therefore later on deleted from the array of parties on the basis of the decisions of various High Courts including Delhi High Court

wherein it was held that non-impleadment of driver of the offending vehicle is not fatal to the proceedings in view of the fact that the liability of the

owner and the insurer of the offending vehicle is joint and several. The insured was placed ex-parte since he remained absent despite the service

of notice upon him in the proceeding whereas the Insurance Company filed written statement wherein it has admitted that on the date of accident

the offending truck stood duly insured with it and the insured was respondent No. 2 in the proceedings before the Tribunal.

(emphasis supplied)

24. In the aforesaid view of the matter, I am not persuaded to accede to the submission of the appellant that the non impleadment of the driver of the

offending car or absence of notice to the driver, under Rule 260 of the Rules, 1989 vitiated the proceeding before the Tribunal.

25. This propels me to the aspect of the justness of loss of dependency determined by the Tribunal.

26. Mr. Karim Shaikh (AW.4) endevoured to impress upon the Tribunal that he was working as Accountant in Royal Art Electrodes Limited, Vasai. The

deceased was working as an Office Assistant. For the month of April, 2013, net salary of the deceased was Rs. 9,449/-. The pay slip for the month of April,

2013 (Exhibit 43) came to be proved in the evidence of Karim Shaikh (AW.4). In addition, Karim Shaikh (AW.4) placed on record the extract from salary

register for the month of April and May, 2013 (Exhibit 46); extract from leave register (Exhibit 47) and register of attendance (Exhibit 48). During the course

of cross examination of Karim Shaikh (AW.4), it was elicited that he had not brought the appointment letter of the deceased. According to Karim Shaikh

(AW.4), the deceased was not liable to pay income tax.

27. The Tribunal was not prepared to place reliance on the aforesaid evidence.

Two reasons weighed with the Tribunal. One, the failure on the part of the

applicant and employer to place on record the appointment letter of the deceased and the documents to evidence the terms and conditions of the contract of

service between the deceased and the alleged employer. Two, the deceased had not filed income tax returns. Even if it was assumed that the salary of the

deceased for the month of April, 2013 was Rs. 9,449/-as deposed to by Karim Shaikh (AW.4), it was obligatory on the part of the deceased to file a Nil

income tax return and, in the absence thereof, mere filing of extract of salary and attendance register was of no avail to the applicants, held the Tribunal.

28. Mr. Mendon, learned counsel for the applicants submitted that the aforesaid approach of the Tribunal is wholly unsustainable. This submission appears to

carry conviction. First and foremost, there was no justifiable reason to discard the testimony of Karim Shaikh (AW.4). It is imperative to note that it was not

a bald assertion, unsupported by contemporaneous record, that the deceased was employed with Royal Art Electrodes Limited. In addition to salary

certificate, Karm Shaikh (AW.4) the Accountant of the employer, placed on record the relevant documents namely extract of salary register (Exhibit-46),

extract of leave record (Exhibit 47) and attendance register (Exhibit-48). Failure on the part of the applicants or for that matter the employerâ??s witness to

place on record the appointment letter could not have been exalted to such a pedestal as to throw the evidence of Karim Shaikh (AW.4) overboard. The

Tribunal completely misdirected itself in ignoring the positive evidence that the deceased was employed with Royal Art Electrodes Limited.

29. The second ground of not placing the income tax returns, without recording a categorical finding that the deceased was liable to pay income tax, in the

given financial year, stands on an equally infirm foundation. Karim Shaikh (AW.4) made a categorical statement that the deceased was not liable to pay

income tax. The Tribunal, it seems, also lost sight of the fact that had the deceased been liable to pay tax, it was the responsibility of the employer to deduct

tax at source. In the absence of any such material, it was impermissible to discard the evidence of Karim Shaikh (AW.4) on the premise that the deceased

had not submitted return of income.

30. A useful reference, in this context, can be made to the judgment of the Supreme Court in the case of Vimal Kanwar and Others vs. Kishore Dan and

Others(2013) 7 Supreme Court Cases 476. wherein the Supreme Court inter alia considered the question whether the income tax is liable to be deducted for

determination of compensation under the MV Act, 1988. The observations of the Supreme Court in paragraphs No. 22 and 23 are material and, hence,

extracted below:

22. The third issue is â??whether the income tax is liable to be deducted for determination of compensation under the Motor Vehicles Actâ??

23. In the case of Sarla Verma & Anr, this Court held

â??20 Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation.â??

This Court further observed that:(SCC p.134, para 24)

â??24. â?¦â?¦.. â?¦...Where the annual income is in taxable range, the word â??actual salaryâ?? should be read as â??actual salary less taxâ??.

Therefore, it is clear that if the annual income comes within the taxable range income tax is required to be deducted for determination of the actual

salary. But while deducting income- tax from salary, it is necessary to notice the nature of the income of the victim. If the victim is receiving income

chargeable under the head â??salariesâ? one should keep in mind that under Section 192 (1) of the Income-tax Act, 1961 any person responsible

for paying any income chargeable under the head â??salariesâ? shall at the time of payment, deduct income-tax on estimated income of the

employee from â??salariesâ? for that financial year. Such deduction is commonly known as tax deducted at source (â??TDSâ?? for short). When

the employer fails in default to deduct the TDS from employee salary, as it is his duty to deduct the TDS, then the penalty for non-deduction of TDS

is prescribed under Section 201(1A) of the Income-tax Act, 1961. Therefore, in case the income of the victim is only from â??salaryâ?, the

presumption would be that the employer under Section 192 (1) of the Income-tax Act, 1961 has deducted the tax at source from the employeeâ??s

salary. In case if an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the

employer failed to deduct the TDS from the salary of the employee. However, there can be cases where the victim is not a salaried person i.e. his

income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income tax and no further tax has to be deducted from the

income.â??

31. In view of the aforesaid pronouncement, in the absence of any cogent material to draw an inference that it was incumbent on the part of the deceased to

file return of income, the Tribunal committed a grave error in recording the finding that the deceased was not employed with Royal Art Electrodes Limited,

for the specious reason that there was no proof of filing of income tax returns. The Tribunal approached the issue from a completely incorrect perspective.

Karim Shaikh (AW.4) categorically affirmed that the deceased was not liable to pay income tax. Nor any endevour was made on behalf of the appellant to

establish the fact that the deceased was liable to pay income tax. In this view of the matter, the Tribunal was not at all justified in assessing the income of the

deceased on notional basis.

32. The connotation of the term â??incomeâ? for the purpose of determination of just compensation under section 168 of the MV Act, 1988 came up for

consideration before the Supreme Court in the case of National Insurance Co. Ltd. vs. Indira Shrivastava and Others (2008) 2 Supreme Court Cases 763.

The Supreme Court, after adverting to the various pronouncements and etymological meaning of the term â??incomeâ?, expounded the connotation of the

term â??incomeâ?? as under:

â??19] The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for

computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as

contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory

amount of tax payable thereupon must be deducted.

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21] If the dictionary meaning of the word 'income' is taken to its logical conclusion, it should include those benefits, either in terms of money or

otherwise, which are taken into consideration for the purpose of payment of income-tax or profession tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute.â??

(emphasis supplied)

33. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note that the Tribunal recorded a finding that the salary slip for the

month of April, 2013 indicated that the net salary of the deceased was Rs.9,449/-. From the perusal of a copy of the salary slip for the month of March, 2013,

which was tendered on behalf of the appellant, what can be lawfully deducted therefrom is the professional tax of Rs. 175/-.

34. I am therefore persuaded to hold that the deceased was employed with Royal Art Electrodes Limited and drew salary of Rs. 9,449/- for the month of

April, 2013. Deducting Rs. 175/- towards professional tax, net monthly salary would be Rs. 9,274/-. Since the deceased was a bachelor, deducting Â½

towards personal and living towards personal and living expenses, the annual income would come to Rs. 55,644/- (9,274 x 12 x Â½ towards personal and

living).

35.

36. There is evidence to indicate that the deceased was 25 years of age. Since the deceased was below 40 years of age and was in a private employment, in

view of the pronouncement of the Constitution Bench in the case of National Insurance Company Limited vs. Pranay Sethi and Others(2017) 16 Supreme

Court Cases 680. 40% of the income is required to be added towards the future prospects. The multiplicand would thus be Rs. 77,902/- (55,644/- + 22,258/-

[40% of 55,644/-]).

37. Having regard to the age of the deceased, the multiplier of â??18â?? is required to be applied. Thus, the loss of dependency would come to Rs.

14,02,236/- (77,902 x 18). In addition to the loss of dependency, under the conventional heads, in view of the standardization of the compensation thereunder,

in the case of Pranay Sethi (supra), the applicants are entitled to Rs. 15,000/- towards loss of estate, Rs. 15,000/- towards funeral expenses and Rs. 40,000/-

each towards filial consortium.

38. There is no dispute over the fact that the applicants had incurred expenses of Rs. 3,91,493/- towards the medical treatment of the deceased, which was

duly proved in the evidence of Satish Mohite (AW.2).

39. The applicants are thus entitled to compensation under the following heads:

Expenses towards medical treatment Â - 3,91,493/-

Loss of dependency Â

- 14,02,236/-

Loss of estate

Â Â

- 15,000/-

Funeral expenses

Â - 15,000/-

Filial consortium

Â - 80,000/-

Â 19,03,729/-

40. The upshot of the aforesaid consideration is that the appeal deserves to be dismissed and cross objection preferred by the respondent Nos. 1 and 2/

original applicants, for enhancement in the quantum of compensation, deserves to be allowed.

Hence, the following order:

ORDER

1] The appeal stands dismissed with costs.

2] The cross objection stands allowed with costs.

3] The impugned award stands modified as under:

(i) The appellant and respondent No. 3/ original opponent Nos. 1 and 2 do jointly and severally pay a sum of Rs. 19,03,729/- along with interest @ 7.5% p.a.

from the date of application till realization, to the applicants.

(ii) The amount already deposited by the opponent Nos. 1 and 2 or either of them, shall stand deducted from the amount of compensation awarded under this

order.

4] Award be drawn accordingly.

