

**(2019) 01 BOM CK 0146**

**In the Bombay High Court**

**Case No :** First Appeal No. 718 Of 2010, Ca 11062 Of 2015, Fa 718 Of 2010

National Insurance Company Ltd

APPELLANT

Vs

Rupali Kailas Mamode

RESPONDENT

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**Date of Decision :** 14-01-2019

**Acts Referred:**

**Citation :** (2019) 01 BOM CK 0146

**Hon'ble Judges :** P.R. Bora, J

**Bench :** Single Bench

**Advocate :** Atul B. Gatne

**Final Decision :** Partly Allowed

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**Judgement**

P.R. Bora, J

1. Present appeal is filed by the appellant Insurance Company against the Judgment and award passed by the Motor Accident Claims Tribunal at Aurangabad in Motor Accident Claim Petition No.120 of 2007 decided on 12.10.2009.

2. Present respondent Nos.1 to 5 (hereinafter referred to as 'the claimants') had preferred the aforesaid claim petition claiming compensation on account of death of Kailas Mamode alleging the same to have been caused in a vehicular accident happened on 31.07.2006 having involvement of a Bus bearing registration No.MH-20 W-9166 owned by present respondent No.6 and insured with the appellant Insurance Company. It was the contention of the claimants that on 31.07.2006, when deceased Kailas was proceeding on his Motorcycle, was dashed by the offending Bus near Mondha Naka Chowk on Jalna Road, Aurangabad and in the accident so happened, was severely injured. It was the further contention of the claimants that though deceased Kailas was immediately removed to Government Hospital and Training Institute (GHATI) and thereafter, was also taken to Apex Hospital, he could not survive and succumbed to the injuries caused to him in the alleged accident on 08.08.2006 while under

treatment in Apex Hospital.

3. According to the claimants, the alleged accident happened because of absolute negligence on part of the driver of the Bus. The claimants had therefore claimed compensation of Rs.32,00,000/- from the owner and insurer of the said Bus. It was the contention of the claimants that at the time of accident, deceased Kailas was aged about 32 years and was earning Rs.15,000 to Rs.16,000/- per month from his business of Architect and Contractor. In order to prove the income of deceased Kailas, the claimants had mainly relied upon the income tax returns submitted by deceased Kailas of the period preceding three years of his death. The learned Tribunal, after having assessed the oral and documentary evidence brought before it, held the claimants entitled for compensation of Rs.31,15,335/-. Aggrieved thereby, the appellant Insurance Company has preferred the present appeal.

4. Shri A.B.Gatne, learned Counsel appearing for the appellant Insurance Company challenged the impugned award only on the quantum of compensation as has been determined by the Tribunal. The learned Counsel submitted that the Tribunal has committed an error in holding the income of deceased Kailas to the tune of Rs.1,67,582/- per annum on the basis of the income tax return submitted by deceased Kailas for assessment year 2006-2007. The learned Counsel pointed out that the income of deceased Kailas as per the income tax return submitted by him for the assessment year 2005-2006 was Rs.1,05,224/-, whereas it was Rs.89,964/- in the assessment year 2004-2005. The learned Counsel submitted that without considering the income of deceased Kailas for the previous three years, the Tribunal has considered the income of deceased Kailas only of the year 2005-2006 that too based on the income tax return submitted by him for the said assessment year. Relying on the Judgment of the Hon'ble Apex Court in the case of ICICI Lombard General Insurance Company Ltd., Vs. Ajay Kumar Mohanty and Another [(2018) 3 Supreme Court Cases 686] and another Judgment of the Hon'ble Apex Court in the case of Reliance General Insurance Company Limited Vs. Shalu Sharma and others [(2018) 2 Supreme Court Cases 753], the learned Counsel submitted that if the income of the deceased was to be assessed by the Tribunal on the basis of the income tax returns submitted by the deceased, the Tribunal must have considered his tax returns for the preceding three years of his death and must have assessed his income on the basis of average of the income for preceding three years and could not have assessed his income merely on the basis of last year income tax return submitted by the deceased.

5. The learned Counsel further submitted that the Tribunal has also erred in not deducting the amount of Income Tax from the said income while assessing the amount of compensation. The learned Counsel submitted that having regard to the income of deceased for last three years as was shown by him in the income tax returns submitted by him, his average annual income comes to Rs.1,44,168=68 paise. According to the learned Counsel, the Tribunal must have

held the aforesaid income of the deceased as a base for assessing the amount of compensation instead of Rs.1,67,582/- as has been held by the Tribunal. The learned Counsel, therefore, prayed for modification in the award to the aforesaid extent and to allow the appeal filed by the Insurance Company to the said extent.

6. Shri P.F.Patni, learned Counsel appearing for the original claimants supported the impugned Judgment and award. The learned Counsel submitted that the Tribunal has rightly considered the income of the deceased of the immediate preceding year of his death and has accordingly determined the amount of compensation payable to the claimants. The learned Counsel submitted that the Tribunal has passed a well reasoned order and no interference is required in the Judgment and award so passed. He, therefore, prayed for dismissal of the appeal.

7. I have given due consideration to the submissions advanced on behalf of the appellant Insurance Company and the learned Counsel appearing on behalf of the original claimants. I have perused the impugned Judgment and the evidence on record.

8. Perusal of the impugned Judgment reveals that the Tribunal has held the income of deceased Kailas to the tune of Rs.1,67,582/-. Deceased Kailas in the income tax returns submitted by him for the assessment year 2006-2007 had shown his income for the said period to the tune of Rs.1,67,582/-. It is thus evident that based on the income tax returns submitted by deceased Kailash for preceding year of his death, the Tribunal has held the income of deceased Kailas to the said extent and has accordingly assessed the amount of compensation payable to the claimants. The precise objection has been raised by the appellant Insurance Company as about the manner in which the Tribunal has held the income of deceased Kailash for the purpose of determining the amount of compensation. As was argued by Shri Gatne, learned Counsel appearing for the Insurance Company, when the Tribunal has determined the income of the deceased only on the basis of income tax returns submitted by him, the Tribunal should not have merely relied upon the income tax returns of the deceased only of the preceding year and must have taken into account the income tax returns of atleast more two preceding years and should have drawn average income of the deceased on the basis of his income as per the income tax returns for preceding three years of his death. In order to support his contention, the learned Counsel relied upon two Judgments of the Hon'ble Apex Court cited supra.

9. In the case of ICICI Lombard General Insurance Company Limited (supra), the Motor Accident Claims Tribunal had computed income of the claimant therein on the basis of the evidence other than the income tax returns of the said claimant and on that basis has determined amount of compensation payable to him. The Tribunal in the said matter had awarded the compensation of Rs.22,85,322/-. The High Court in the appeal filed by the Insurance Company reduced the compensation to Rs.12,00,000/-. The Insurance Company, however, was not satisfied with the order passed by the High Court and hence preferred the Appeal

before the Hon'ble Apex Court. It was throughout the contention of the appellant Insurance Company in the said matter that the Tribunal should have computed the income of the claimant by drawing his average income on the basis of the income tax returns submitted by him for preceding three years of his accident. Perusal of the Judgment passed by the Hon'ble Apex Court reveals that the contention as was raised by the appellant Insurance Company has been accepted by the Hon'ble Apex Court. I deem it appropriate to reproduce herein below the observations made by the Hon'ble Apex Court in paragraph No.7 of the said Judgment, which read thus:-

"7. On perusing the order of the Tribunal, we find merit in the contention of the insurer that while calculating the income in paragraph 10 of its order, the Tribunal has committed an error of computation. The Tribunal has on the basis of the income tax returns for 2007, 2008 and 2009 arrived at an average income of Rs. 1,45,231/-. However, the Tribunal has thereafter noted that the average income comes to Rs. 2,62,372/-. Ultimately, the Tribunal proceeds on the annual income of Rs. 2,22,000/- on the basis of the testimony of the claimant that he was earning Rs. 18,500/- per month. This is contradictory. In our view, on the basis of the finding of the Tribunal that the average income of the claimant for the previous three years was Rs. 1,45,231/-, it would be necessary to take into account the evidence of PW2 that the disability is to the extent of 55 per cent. In other words, the loss of earning as a result of the aforesaid disability would work out to Rs. 79,877/- per year. "

10. From the observations as aforesaid, it is quite evident that the Hon'ble Apex Court has determined the income of the claimant in the said case by drawing the average of his income earned by him during last three years as per the income tax returns submitted by him.

11. In the case of Reliance General Insurance Company (supra), the Motor Accident Claims Tribunal had determined the income of the deceased on the basis of his income tax returns submitted for preceding three years' of his death. The method so adopted by the Tribunal in determining the amount of compensation is approved by the Hon'ble Apex Court in the said Judgment. Paragraph No.5 of the said Judgment is relevant in this regard, which reads thus:-

"5. The Tribunal has held that the annual income of the deceased (on the basis of the income tax returns for 2010-11, 2011-12 and 2012-13) would be Rs 1,81,500. Adding a component of 25% for future prospects, the income would stand at Rs 2,26,875. Deducting an amount of one-fourth towards personal expenses, the loss of dependency per annum works out to Rs. 1,70,156. Applying a multiplier of 14, the total loss of dependency would work out to Rs 23,82,187. The Tribunal has awarded a sum of Rs.3,14,335 towards medical expenses. An addition of Rs.70,000 would be required to be made in terms of the decision in Pranay Sethi on account of the conventional heads of loss of estate (Rs 15,000), loss of consortium (Rs 40,000) and funeral expenses (Rs 15,000). Hence, the total compensation is quantified at Rs. 27,66,522 on which the

claimants would be entitled to interest @ 9% p.a. from the date of the filing of the claim petition. The apportionment shall be carried out in terms of the award of the Tribunal. We order accordingly."

12. Considering the import of the aforesaid two Judgments of the Hon'ble Apex Court, the contention so raised on behalf of the appellant Insurance Company that the Tribunal has erred in instant matter in determining the income of deceased Kailas on the basis of his last income tax return, has to be upheld. It is evident that though the claimants had filed on record the income tax returns submitted by the deceased for assessment years of 2004-2005, 2005-2006 and 2006-2007, the learned Tribunal had determined the income of deceased Kailas only on the basis of last income tax return submitted by him and kept out of consideration the income as was shown in the income tax returns of the preceding two years. In view of the law laid down by the Hon'ble Apex Court in the Judgments cited supra, the mistake so committed by the Tribunal needs to be rectified and consequently, the amount of compensation needs to be modified.

13. One more submission was made by Shri Gatne, learned Counsel appearing for the appellant Insurance Company that while computing the income of the deceased, the amount paid by the deceased towards income tax, was liable to be deducted, which has not been deducted by the Tribunal. The contention so raised also deserves to be accepted.

14. In view of the law laid down by the Hon'ble Apex Court in the aforesaid two Judgments, income of deceased Kailas has to be computed on the basis of the income tax returns submitted by him for preceding three years of his death, drawing average of his income in the said period of three years.

15. The income tax returns submitted by deceased Kailas for the assessment years 2006-2007, 2005-2006 and 2004-2005 are available on record. In the assessment year 2006-2007, income of deceased Kailas was shown as Rs.1,67,582/- and he had paid income tax of Rs.3,185/- for the said period. In the assessment year 2005-2006, income of deceased Kailas was shown as Rs.1,05,224/- and he had paid income tax of Rs.10,020/- for the said period. In the assessment year 2004-2005, income of deceased Kailas was shown as Rs.89,964/- and he had paid income tax of Rs.6,980/- for the said period.

16. On the basis of income of deceased as was shown by him in the income tax returns for the preceding three years, his average income can be drawn as per the guidelines laid down in the Judgments of the Hon'ble Apex Court cited supra, which comes to Rs.1,14,195/-.

17. Having regard to the guidelines laid down by the Hon'ble Apex Court in the case of National Insurance Company Limited Vs. Pranay Sethi and others [(2017) 16 SCC, 680], 40% of the aforesaid existing income of deceased Kailas will have to be added in his said income towards the future prospects. Added the same towards future prospects, the income of deceased Kailas for the purpose of assessing dependency compensation payable to the claimants would come to

Rs.1,59,873/-. Having regard to the number of dependents on the income of deceased Kailas, only 1/4th of the said amount would be liable to be deducted towards the personal expenses of deceased Kailas. Deducting the said amount, the net amount payable to the claimants by way of dependency compensation can be arrived at by applying the multiplier of 16 considering the age of deceased Kailas. Calculated the compensation in the said manner, it comes to Rs.19,18,476/-. The claimants are also entitled for the further sum of Rs.70,000/- towards non-pecuniary damages i.e. loss of estate, loss of consortium and funeral expenses. The total compensation payable to the claimants thus comes to Rs.19,88,476/-. It appears to me that in the facts and circumstances and evidence brought on record in the present case, this would be just and fair compensation payable to the claimants. The impugned award, therefore, needs to be modified to the aforesaid extent.. In the result, the following order is passed:-

#### ORDER

I). Appeal is partly allowed.

II). The award passed in Motor Accident Claim Petition No.120 of 2007 is modified as under:-

a). Respondent Nos.1 to 5 i.e. original claimants are held entitled to the total compensation of Rs.19,88,476/- jointly and severally from appellant Insurance Company and respondent No.6 inclusive of amount of no fault liability with interest @ 9% p.a. from the date of presentation of the claim petition till its realization.

b). Out of the said amount, Rs.4,00,000/-each be invested in Fixed Deposit Receipt in any Nationalized Bank in the names of original claimant Nos.2 and 3 namely Kum.Sejal Kailas Mamode and Kum.Vedica Kailas Mamode for the period till they attain the age of majority, Rs.50,000/- be paid to original claimant No.5 namely Smt.Nirmala Gokul Mamode, Rs.1,50,000/- be paid to original claimant No.4 Smt.Shantabai Gokkuljiv Mamode and balance amount be paid to original claimant No.1 namely Smt.Rupali Kailas Mamode.

III). Modified award be prepared accordingly.

IV) After disbursement of the amount of compensation as per the modified award, amount, if any, remains in balance, the same shall be refunded to the appellant Insurance Company with the interest accrued thereon.

V). Pending civil application stands disposed of.