(2014) 09 BOM CK 0101

Bombay High Court (Goa Bench)

Case No: First Appeal No. 317 of 2008

Menino Mario Fernandes		APPELLANT
	Vs	
Satyawan Guno Naik		RESPONDENT

Date of Decision: Sept. 11, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22
- Evidence Act, 1872 - Section 106
- Motor Vehicles Act, 1988 - Section 147, 147(1)(b), 165, 166, 173
- Penal Code, 1860 (IPC) - Section 279, 304-A

Citation: (2014) 6 ABR 364

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: S.S. Kakodkar, Advocate for the Appellant; E. Afonso, Advocate for the Respondent

Final Decision: Partly Allowed

Judgement

B.P. Dharmadhikari, J.

5th September, 2014.

1. By this Appeal filed u/s 173 of the Motor Vehicles Act, the claimants question the Judgment dated 24.09.2008 delivered by Motor Accident Claims Tribunal, South Goa, Margao, in Claim Petition no. 51 of 2008 dismissing the same.

2. The basic facts are not in dispute. The deceased Josepha Fernandes @ Josepha Da Silva, aged about 45 years, was the wife of appellants No. 1. The other appellants are the brothers and sisters of the deceased and their respective spouses, as they qualified to be heirs in view of the local law. The learned Counsel for claimants, particularly on behalf of appellants No. 1, has submitted that they may not qualify as

dependents. The accident has taken place on 17.06.2007 when deceased was proceeding towards Pontemol on Curchorem market, Mirabag road, on a motorcycle bearing no. GA-02-Q-4957. She fell down from motorcycle near Kens Corner Bar and Restaurant at about 14.50 hours. The motorcycle was being driven by respondent no. 1. Respondent no. 1 fled away with the motorcycle. The deceased succumbed to her injuries on the very same day. The claimants state that she was working as a labourer, was healthy and supporting the family. She was earning about Rs. 4,500/- per month and in addition was also performing her daily duties as a housewife. They, therefore, sought compensation of Rs. 6,08,000/-. Respondent No. 1 did not contest the proceedings. Respondent no. 2-Insurance Company, filed written statement and opposed the claim. It contended that deceased was a gratuitous passenger and being pillion rider, Insurance Company was not bound to indemnify respondent No. 1 in relation to the accident. It also submitted that the Insurance policy did not cover such accident when motorcycle was used for hire and reward. They also denied the age of the deceased.

3. The Motor Accident Claims Tribunal (MACT), framed the following issues and answered the same as mentioned against these issues:

4. Respondent no. 3 before this Court is one of the claimants and has no interest adverse to that of the appellants.

5. Advocate Shri S.S. Kakodkar appearing for the Appellants, has invited attention to evidence of two eye witnesses namely AW. 2-Sandeep Kakodkar and AW. 4-Dinesh Komarpant. He has also pointed out the sketch map to urge that the road was straight and sufficiently wide. According to him, in this situation, the deceased fell down and back side of her head got fractured only because of rash and negligent driving by respondent No. 1. He has shown the postmortem report to submit that multiple or severe fracture shown therein is due to fall on back and the fall must be attributed to the speed, as also the rash and negligent manner in which the motorcycle was being driven. He contends that in this situation, the finding by the MACT that the claimants did not establish rash and negligent driving by respondent No. 1 is unsustainable.

6. Without prejudice to these submissions, he points out the yardsticks to be applied by the MACT to find out whether there was any rashness or negligence. He submits that proof beyond doubt is not the requirement of law and the reasonable probability is more than sufficient. He also contends that registration of FIR and filing of chargesheet against the delinquent driver is held sufficient by the Honourable Apex Court to prove negligence for said purpose. He has invited attention to the deposition of Investigating Officer, AW. 3 Khema Patil.

7. In the alternative, he has also invoked the principle of res ipsa loquitur. He contends that fall of a passenger occupying the pillion rider seat on motorcycle on a proper road speaks for itself and shows that respondent No. 1-driver was driving

the vehicle in a rash and negligent manner. The evidence of AW. 2 and AW. 4, is pressed into service to show that they had witnessed the accident and they have stated that the motorcycle was being driven in speed. In this situation, the failure of respondent No. 1 either to file written statement in defence or to enter the witness box to explain how the accident occurred, according to him, is fatal and by applying said principle, the MACT ought to have recorded the finding in favour of the claimants.

8. He also submitted that the insurance policy and terms and conditions thereof, expressly cover the occupant i.e. the pillion rider and, as such, answer to issue no. 5 recorded by the MACT is wrong. He has relied upon Section II(1)(i) of the Two Wheeler Package Policy to substantiate his contention. According to him, burden to show that deceased had hired the motorcycle of respondent No. 1 was upon respondent No. 2-Insurance Company. He points out that motorcycle was not to be used as a "taxi'' and was a private vehicle. In this situation, if its use contrary to provisions of Motor Vehicles Act was to be shown, the burden lay upon the shoulders of respondent No. 2. He has invited attention of the Court to a statement made by Aw. 4-Dinesh at the beginning of his cross examination. He submits that said sentence is recorded by Presiding Officer and it does not mean that respondent No. 1 who owned the motorcycle used to carry passengers by accepting fare.

9. He contends that the said sentence must be given its plain literal meaning and inference that respondent No. 1 was indulging in charging fare for carrying passenger as pillion rider on his motorcycle drawn by the MACT on its basis, is erroneous and unsustainable.

10. In anticipation of the argument on the nature of policy, learned Counsel has also attempted to demonstrate that the package policy with which this Court is concerned in the present matter is already held to be comprehensive policy securing occupants like the deceased.

11. Lastly, he submitted that the compensation has been worked out on lesser side because of use of old precedent. According to him, the Award ignores that for loss of consortium, an amount of Rs. 1,00,000/- has been sanctioned while amount of Rs. 25,000/- is being awarded towards funeral expenses. He further states that the amount of Rs. 3,27,000/- has been worked out ignoring the stand of claimant that deceased was working as a labourer. He also draws support from the evidence of Aw. 4 to hold that the deceased was engaged as labourer in toddy business and there is nothing on record to show that the contention of appellant No. 1 that she was drawing an amount of Rs. 4,500/- per month is incorrect. He submits that calculations by applying a multiplier of 13 and by accepting the annual income of Rs. 36,000/-, is incorrect. He states that the annual income ought to have been worked out by accepting monthly income of Rs. 4,500/-.

12. He further states that proceedings filed were u/s 166 of Motor Vehicles Act and, therefore, future potentials and dependency of claimants on deceased also need assertion. He submits that law which restricted such consideration only to secured employment or fixed salary earners, has undergone change and the benefit must be given to the labour class who works on daily wages. He also pointed out that at present, minimum wages in State are three times the charges which deceased was earning at the time of accident. He contends that thus the claim should have been "justly" worked out by the MACT. He submits that quantification of claimed amount of claimants is not determinative and sitting in welfare jurisdiction, the Court is duty bound to work out a just compensation for the claimants.

13. He has relied upon various Judgments to buttress his contentions. I find it appropriate to refer to those Judgments as and when occasion therefor arises.

14. Advocate Shri E. Afonso, appearing for the Respondent no. 2, has submitted that the terms and conditions of the policy have been looked into by the MACT. He contends that though issue no. 4 is answered against respondent No. 2, in present hearing, he can point out that said finding is erroneous. He states that policy in present matter though cited as package policy, needs to be understood in the background of mandate of Section 147 of the Motor vehicles Act. Thus construed, according to him, the policy clearly shows that it excluded persons carried on hire or reward. He submits that the finding of the MACT that deceased was not a gratuitous pillion rider is based upon appreciation of evidence and it is not perverse. He relies upon the evidence of AW. 4 and draws support from F.I.R. as recorded by AW. 3-Investigating Officer. Claimants have not brought on record the circumstances in which deceased could have been permitted to ride his motorcycle as a pillion rider gratuitously by Respondent no. 1. As deceased was not a "third party", the MACT had no jurisdiction to entertain the claim petition as filed.

15. He argues that the burden to bring on record the negligence, was upon the claimants and they have failed to discharge it. Eye witnesses merely stating that motorcycle was in speed, does not imply any rashness or negligence. He submits that the MACT has correctly found that mere assertion or use of words like "rash and negligence" is not sufficient to cast any liability upon respondent No. 1. Res ipsa loquitur is not applicable in the present facts, as there is no evidence brought on record to show that deceased could not have been blamed for fall. He states that when a vehicle enters on wrong side and accident takes place or then a passenger travelling in a public transport is injured, such doctrine is usually invoked looking to the facts and situation. Here merely because a passenger fell down from a running motorcycle, said doctrine or principle cannot be used. He submits that respondent No. 1 was driving the motorcycle and it may happen that he might not have learnt about the fall of deceased from his motorcycle. He submits that in this situation, the burden was upon the claimants to show that the respondent No. 1 did something with his vehicle which caught her unawares and deceased could not keep her

balance and fell down. Learned Counsel submits that in absence of this material, finding arrived at by the Trial Court cannot be interfered with by this Court.

16. In so far as upward revision of compensation is concerned, learned Counsel argues that beyond stating that deceased was working as labourer, no cogent material has been produced on record to prove the said employment or her earnings. Learned Counsel invites attention to the deposition of AW. 4-Dinesh to show that Dinesh in his examination in chief, stated that deceased was labourer by profession and in cross examination, has stated that she was engaged in business of manufacturing toddy. This claim, according to him, is inconsistent and does not inspire confidence. Because of this position of evidence on record, claimants chose to rely upon the Judgment of Hon''ble Apex Court reported in 2001 (1) SCC 97 in case of Lata Wardhan & Ors. vs. State of Bihar and relied upon the deeming fiction and took advantage thereof. He contends that, thus, in the absence of any specific evidence and on the basis of the law as laid down by the Hon''ble Apex Court, the MACT has correctly worked out the compensation and any upward revision, therefore, in present facts is not warranted because the claimants could not establish any employment of deceased.

17. He further submits that the alleged future prospects or future potentials of deceased to support her family in this situation is also not relevant. By way of precaution, he adds that in any case, as employment has not been proved, there is no question of looking into such future potential. He has also relied upon some Judgments to support his contentions.

18. By inviting attention to the provisions of Section 147 of the Motor Vehicles Act, learned Counsel has submitted that in any case, the deceased could not have been recognised as third party and, therefore, the MACT should not have taken cognizance of the dispute as filed. He, therefore, seeks dismissal of the Appeal.

19. Advocate Shri S.S. Kakodkar, in his reply, points out that there is no defence of deceased not being third party before the MACT and, as such, such a question cannot be permitted to be raised in appeal. However, he relies upon the terms and conditions of the policy to urge that deceased is covered by the same. To substantiate his submissions, he has also invited attention of the Court to language of Section 165 of the Motor Vehicles Act.

11th September, 2014.

20. In the light of arguments advanced, following points arise for determination:

1. Whether the appellants prove that accident occurred on account of rash/negligent riding of motorcycle bearing No. GA-02/Q-4957 by respondent No. 1?

2. Whether the deceased was a gratuitous pillion rider on the said motorcycle?

3. Whether the claimants prove that compensation of Rs. 6,08,000/- awarded by the MACT-III, South Goa, Margao is unjust?

4. Whether respondent No. 2-Insurance Company is liable to indemnify respondent No. 1 towards the said liability?

21. Accidental death of Josepha Fernandes on 17th June, 2007 is not in dispute. Involvement of the vehicle No. GA-02/Q-4957, driven by respondent No. 1 in the said accident, is also not in dispute. The mode and manner in which the accident took place i.e. the deceased falling down from a running motorcycle on her backside and suffered fracture of her back head, is also not in dispute. The MACT has framed an independent issue to find out whether the deceased suffered injuries in the accident that resulted in her death and answered it in the affirmative. This exercise by the MACT is not in dispute here.

22. In so far as point No. 1 is concerned, the MACT has answered it in the negative, after holding that both eye witnesses did not state which act of rider of the motorcycle constituted rash or negligent act. It takes note of the fact that both eye witnesses, namely AW. 2 Sandeep and AW. 4 Dinesh state that the vehicle was being driven in a fast speed, rashly and negligently. It has then considered the fact that the accident was witnessed by these persons from a distance of about 30 to 40 metres and the width of road, as per sketch of the spot of accident, was about 4.90 metres. In addition, it had a katcha road on its both sides. The road was straight and there was no evidence of any heavy traffic on it. It has then relied upon judgment in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and held that the witnesses did not point out why they called riding of his motorcycle by respondent No. 1 rash and negligent. According to it, there was no evidence to prove that in the process of riding in fast speed, respondent No. 1 lost control over the motorcycle. It also concluded that there was no evidence about omission on part of said respondent to take proper care or precaution ordinarily expected of him. It then noted that in absence of such material on record, it was not necessary for respondent No. 1 to enter witness box and his absence was not sufficient to draw adverse inference against him.

23. Perusal of evidence of AW. 1 husband of deceased shows that deceased was having good physique and was healthy. Neither AW 2 Sandeep, nor AW. 4 Dinesh deposed against her. They have watched the accident and they do not point out any act on part of the deceased which may result in her falling down. The evidence shows that a normal lady was riding pillion on a motorcycle which was being driven in a speed and she fell down. Perusal of postmortem report shows head injuries i.e. fractures, to be the cause of death. The sketch of those injuries on record shows more than one fracture to the backside of skull, resulting in damage to brain. The fracture lines on skull indicate the force with which back of head of the deceased had collided with the road surface.

24. The MACT ought to have seen that fall of a normal healthy lady from motorcycle could not have been automatic and must have been triggered by something unexpected. Both the eye witnesses have categorically stated that the vehicle was driven in speed, rashly and negligently. Thus, they have seen the vehicle being driven in speed. The witnesses are aware of the road conditions and they deposed that the motorcycle was in high speed and was being driven rashly and negligently.

25. The conduct of respondent No. 1, in this situation, becomes significant. He preferred to flee away from the spot and did not come to the help of the injured-a victim of the accident who had fallen down from his motorcycle. In this situation, it was for respondent No. 1 to explain that he was driving the motorcycle with due care and precaution. The claimants before the MACT pleaded rash and negligent driving, pointing out fast speed of the motorcycle. The allegations were directed against respondent No. 1 and respondent No. 1 has chosen not to counter the same. Merely because the road was wide or then there was no heavy traffic or then the road was broad, that by itself may not always eliminate rashness and negligence. The MACT could not have held that the claimants have failed to prove the negligence on part of respondent No. 1. The eye witnesses found driving of respondent No. 1 unsafe and have deposed accordingly. The burden was, therefore, upon respondent No. 1 to show that he had taken due care and caution. The feeling of guilt is apparent from the fact that he did not even discharge his obligation to attend to the victim and preferred to leave the spot. Learned Counsel for respondent No. 2-Insurance Company has argued that respondent No. 1 may not have realised that the victim had fallen down of his motorcycle. This cannot be accepted. A motorcycle is balanced on two wheels and when a pillion rider loses balance and falls down, the impact of said loss of balance would be automatically felt by the rider who has to maneuver his motorcycle to keep it on wheels. Here, after some investigation, an offence is already registered against respondent No. 1. We, therefore, find the evidence on record, sufficient to conclude that the claimants have established negligence on part of respondent No. 1. I am, therefore, not in a position to accept the findings recorded by the MACT against issue No. 1 and answer point No. 1 in the affirmative i.e. in favour of the present appellants.

26. In Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others, the Honourable Apex Court noted that the deceased constable died when a bus was reversed without blowing any horn and dashed him. The accident was denied by the conductor and driver of the vehicle. They came with a plea that the deceased had died previous evening. The driver stated that he found, in the morning, dead body wrapped in a blanket. The postmortem indicated death due to brain injury. The Honourable Apex Court noted that the trial Court was required to apply principle underlying burden of proof in terms of the provisions of Section 106 of the Evidence Act and finding of dead body wrapped in a blanket in early hours, was required to be proved by the respondent-Road Transport Corporation. In the process, the Honourable Apex Court noted that strict proof of an accident caused by a particular

bus, in a particular manner, may not be available with the claimants who were to establish their case on touch stone of preponderance of probability and the standard of proof beyond reasonable doubt could not have been applied. The Honourable Apex Court did not accept the application of mind by the High Court.

27. In an unreported judgment delivered here on 11th July, 2013 in First Appeal No. 32/2013 in the case of Pukh Raj Bumb vs. Jagannath Atchut Naik and ors., the Division Bench has placed reliance upon another judgment of the Honourable Apex Court reported at Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another, and applied the very same standard. Though parties have relied upon other judgments also in this respect, I do not find it necessary to reiterate the well settled law in this respect. Those judgments are (1) Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, ; (2) 2010 (6) ALL. MR 747, in the case of New India Assurance Co. Ltd. vs. Keshaorao Manikrao Mete & ors. (3) Kusum Lata and Others Vs. Satbir and Others, ; and (4) Dulcina Fernandes and Others Vs. Joaquim Xavier Cruz and Another, In Pushpabai Parshottam Udeshi and ors. (supra), Honourable Apex Court has also considered the principle of res ipsa loquitur. In absence of any plea to the contrary by respondent No. 1, in the light of discussion above, I find that the claimants have established that the motorcycle was under management of respondent No. 1 and the deceased would not have fallen down of his motorcycle, had he used proper care. The very fact of the deceased falling down from a running motorcycle indicates absence of due care and caution on part of respondent No. 1.

28. This brings me to consideration of the most important point. Learned MACT has framed issue No. 5 and cast burden upon respondent No. 2-Insurance Company to show that the deceased had hired the motorcycle of respondent No. 1. In the light of material on record, I have framed the question in this respect as mentioned supra. Evidence of AW. 2 Sandeep shows that the said motorcycle was having black colour. Initially, in cross examination, he stated that it was a black and yellow motorcycle, meaning thereby a motorcycle registered with the Regional Transport Authority under the M.V. Act as a "taxi". However, immediately, thereafter, he has added that the colour of the motorcycle was black and he could not state whether it had also yellow colour. Evidence of AW. 4 Dinesh shows that it was a black colour motorcycle. He, therefore, does not say that it was a "taxi". Most important witness in this connection is AW. 3 Khema Patil. He is a police officer who has investigated the accident. He has deposed that charge-sheet under Sections 279, 304-A of I.P.C. was filed against respondent No. 1 about the said accident. He has stated that respondent No. 1 is not a "motorcycle pilot", implying thereby he does not run taxi motorcycle. He also stated that respondent No. 1 did not hire motorcycle. This statement was made by him in his cross examination conducted by respondent No. 3. However, respondent No. 2-Insurance Company has placed before the MACT a copy of Insurance Certificate cum Policy Schedule and Two Wheeler Package Policy. The said policy nowhere shows that the motorcycle was registered as a "taxi" vehicle

and authorised to carry passengers for hire. Respondent No. 2 has deposed about respondent No. 1 not in the business of hiring motorcycles, as respondent No. 1, in law, does not possess any such authority. Material on record, therefore, shows that respondent No. 1 was having his private motorcycle and was not having any taxi permit. The burden to show that respondent No. 1 was legally transporting passengers on his motorcycle was definitely upon the claimants and they have failed to discharge it.

29. However, FIR dated 18th June, 2007 lodged by AW. 3 Khema shows a statement that after inquiry he learnt about the deceased hiring the motorcycle at Municipal Building at Curchorem and her falling down from the running motorcycle. He has also then mentioned that further inquiry revealed that respondent No. 1 rode his motorcycle in a rash and negligent manner and fled away from the spot. The FIR does not mention any taxi permit. A bare reading of this FIR establishes that the deceased hired the motorcycle of respondent No. 1 for her journey. AW. 4 Dinesh has, in his cross examination, stated that he was knowing respondent No. 1 Satyawan Naik, who was a driver i.e. rider of the motorcycle. Next sentence as recorded by the Presiding Officer, MACT reads "He hires the motorcycle from Curchorem market taking passengers". This sentence is required to be reproduced as it is because of the arguments advanced by the respective Counsel. According to Advocate Shri Kakodkar this sentence shows that Satyawan himself used to travel on motorcycle taken on hire from Curchorem market. While, according to Advocate Afonso, this statement shows that Satyawan used to take passengers on hire on his motorcycle from Curchorem market. The MACT has answered issue No. 5 framed by it in the affirmative i.e. in favour of respondent No. 2-Insurance Company. In the light of the oral evidence noted supra, I do not find anything wrong with that finding. Honourable Apex Court has, in the judgment noted supra, found that in a given case filing of an FIR and charge-sheet against offending vehicle is sufficient to prove negligence. Here, AW. 3 Khema Patil, Investigating Office has specifically found that respondent No. 1 had carried the deceased as a passenger and the deceased boarded with the motorcycle as pillion rider, as a customer. Deceased hired the services of respondent No. 1 for her transport. Statement of AW. 4 Dinesh reproduced supra, also does not indicate otherwise. His earlier sentence shows that he knew Satyawan as a driver of motorcycle. He implies Satyawan therefore was in the business of carrying passengers on motorcycle and he used to take passengers from Curchorem market on hire, on his motorcycle. Taking overall view of the matter, I find no substance in the efforts of Advocate Shri Kakodkar to put any other interpretation on the sentence reproduced supra in deposition of AW. 4 Dinesh.

30. The motorcycle, in question, does not have a taxi permit and the deceased, admittedly, was occupying the pillion seat on it. The circumstances in which the deceased occupied that seat, therefore, needed to be brought on record by the present appellants if they wanted to contend that the deceased was a gratuitous passenger on said motorcycle. The purposes for which the deceased left home,

where she was proceeding and whether respondent No. 1 was acquainted with her or gave lift to her, are the questions which needed to be answered by the claimants. If respondent No. 1 was not doing said "taxi" business, his means of livelihood could have been brought on record by them. Burden to answer these questions could not have been and cannot be cast upon respondent No. 2-Insurance Company. The appellants have, admittedly, not brought on record any such material. In a State where motorcycle taxis are allowed and several motorcycle riders ply without such permits and ferry passengers from one point to other, after accepting hire charges, burden to show that the deceased was a gratuitous passenger on motorcycle of respondent No. 1 was definitely upon the appellants. They have failed to discharge that burden. In this situation, I have to conclude that the deceased did hire the motorcycle of respondent No. 1 for transporting her on the fateful day. Honourable Apex Court in Dulcina Fernandes and others vs. Joaqum Xavier Cruz and another (supra), in paragraph 8 has noted that CW. 2 then working as Head Constable of Maina Curtorim Police Station had deposed that a criminal case was registered against the first respondent in connection with the accident and after investigation, he was charge-sheeted. Honourable Apex Court noted that respondent No. 1 was then acquitted, but it gave importance to the fact that upon investigation, case was registered against the first respondent, as prima facie material showing that negligence was found to put him on trial. This observation of the Honourable Apex Court would apply with full vigour for the purposes of answering first question, as also this question.

31. Learned Counsel for respondent No. 2-Insurance Company has stated that the deceased cannot be accepted as third party for the purposes of Section 147(1)(b) of the M.V. Act, 1988. He contends that whether she is a gratuitous passenger or a passenger for hire, once she becomes an occupant, the status is not that of third party and, therefore, the claim petition filed was not maintainable. He also draws support from the judgment of the Honourable Apex Court reported at Oriental Insurance Co. Ltd. Vs. Sudhakaran K.V. and Others, of the said judgment shows the observation of the Honourable Apex Court that a pillion rider would be covered under insurance risk only in case additional cover is purchased under the contract of insurance. Its observations in paragraph 25 show the importance of the terms and conditions of the insurance contract in this connection. Advocate Shri Kakodkar invited our attention to the judgment reported at United India Insurance Co. Ltd. Vs. Anubai Gopichand Thakare and Others, in the case of United India Insurance Co. Ltd. vs. Anubai Gopichand Thakare and ors. In this judgment, in paragraph 9, learned Single Judge of this Court has considered expression "third party" and also noted judgment of the Honourable Apex Court reported at Dr. T.V. Jose Vs. Chacko P.M. alias Thankachan and Others, in the case of Dr. T.V. Jose vs. Chacko P.M. alias Thankachan and others. Learned Single Judge has found that third party policy does not cover liability to gratuitous passengers who are carried for hire or reward. It also found that said phrase needs to be construed in each case with reference to the

terms of the insurance policy. If risk is covered under the said contract, he or she would be third party and not otherwise. This discussion is also helpful in answering the next question. i.e. about liability of respondent No. 2-Insurance Company to indemnify respondent No. 1 motorcycle owner/driver.

32. In this respect, it is important to note that the trial Court has framed issue No. 4 and answered it against the Insurance Company. It, therefore, found respondent No. 2-Insurance Company liable to indemnify respondent No. 1 in the matter. Its consideration, in this respect, is contained in paragraphs 23 onwards of this judgment. In paragraph 26 it states that the terms and conditions of the policy must be seen to answer that question. It then takes note of the fact that the policy before it was a package policy. According to Advocate Shri Kakodkar, package policy means a comprehensive policy as against Act only or third party policy. According to Advocate Shri Afonso, terms and conditions of the policy are determinative. Parties have cited various judgments in this connection. Shri Afonso has also produced a legible copy of the Certificate-cum-Policy-Schedule which is at page 67 of the paper book. In The General Manager, United Insurance Co. Ltd. Vs. M. Laxmi and Others, Honourable Apex Court has considered similar issue. In paragraph 4 and paragraph 6 it noted that Circular dated 2nd June, 198 referred to comprehensive policy. It stated that standard form for motorcycle should cover liability to pillion passengers in case of comprehensive policy and found that as noted by the MACT in the matter before it, policy with which it was concerned, was only an Act Policy.

33. Before proceeding further, it is important to note that the provisions of Order XLI, Rule 22 of C.P.C., read with Rule 33 thereof enables respondent No. 2 to urge before this Court that the findings on issue No. 4 by the MACT ought to have been in its favour. Reference can be made to the judgment of the Honourable Apex Court reported at Ranjana Prakash and Others Vs. Divisional Manager and Another, Samundra Devi and Others Vs. Narendra Kaur and Others, In the judgment in the case of Surjansingh Vs. Smt. Jasbir Kaur, Jaspalsingh Nagra and Gurupalsingh Nagra, I have taken a view which is in favour of respondent No. 2-Insurance Company.

34. Reference to various binding precedents shows the importance of the terms and conditions of the insurance policy in this connection. Learned MACT in para 26 has reproduced only clause 1 of Section II of the Two Wheeler Package Policy. The complete provision, as contained in the said package policy relevant in case of death of a victim is as under:

"Section II-Liability to Third Parties

1. Subject to the limits of liability as laid down in the Schedule hereto the Company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of

i. death of or bodily injury to any person including occupants carried in the insured vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured."

Thus, later part i.e. part "i" is not reproduced by the MACT in the impugned judgment and award. Only on the strength of part of clause, the MACT concluded that respondent No. 2-Insurance Company has to indemnify the insured in the event of the accident caused by or arising out of the use of the insured vehicle. However, the later clause reveals that death or bodily injury to any person, including occupants carried in the insured vehicle is covered under the policy, provided such occupants are not carried for hire or reward. Thus, if the deceased is not a gratuitous passenger and is being carried for hire or reward, respondent No. 2-Insurance Company is not liable to indemnify respondent No. 1. The Certificate-cum-Policy-Schedule on record, in its "limitation" clause also exonerates the Insurance Company if the motorcycle is used for the purposes of carrying passengers for hire or reward. As the MACT has lost sight of this clause "i", its findings on issue No. 4 against respondent No. 2 cannot be sustained. Said issue needs to be answered in favour of respondent No. 2 and accordingly, I answer the question framed supra in its favour by holding that respondent No. 2-Insurance Company is not liable to indemnify respondent No. 1 in this case.

35. The last question about justness of compensation awarded now needs to be answered. Mr. Kakodkar has urged that principle "pay and recover" recognized in National Insurance Co. Ltd. Vs. Swaran Singh and Others, also needs to be made applicable here. Advocate Mr. Afonso has stated that in National Insurance Co. Ltd. Vs. Parvathneni and Another, the said issue has been placed before the Larger Bench by the Honourable Apex Court itself. However, in view of the answer recorded supra, exonerating respondent No. 2 in the matter, I am not required to delve into the controversy.

36. Though use of multiplier of 13 by the MACT, looking to the fact that the age of the deceased was 45, is not seriously in dispute before this Court, the learned Counsel for the appellants has attempted to demonstrate the fact that addition on account of future prospects has not been made and employment of the deceased proved on record, has been lost sight of. Santosh Devi Vs. National Insurance Company Ltd. and Others, is the judgment of the Honourable Apex Court which shows reference to leading judgment of the Honourable Apex Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, There, in para 24, the Honourable Apex Court found that addition of 50% of actual salary needed to be made to the actual salary income of the deceased towards future prospects if the deceased was below 40 years and had a permanent job. The said percentage has been worked out at 30%, since the deceased was between 40 to 50

years of age. Here the deceased Josepha was 45 years old. The Honourable Apex Court, after noticing the above observations, in paragraph 14, found it difficult to deny the similar benefits to a person who is self employed or was on a fixed salary, without provision for annual increment. The Honourable Apex Court, in paragraph 18 also extended 30% increase to a self employed person or a person engaged on fixed wages. In Rajesh and Others Vs. Rajbir Singh and Others, the Honourable Apex Court has extended similar benefits and also noted in paragraph 20 that it would be just and reasonable that Courts award at least Rs. 1,00,000/- towards loss of consortium. In paragraph 21, judicial notice of the increasing price index and funeral expenditure, has been taken and the Honourable Apex Court found it just to award an amount of Rs. 25,000/- on that count. In Arun Kumar Agrawal and Another Vs. National Insurance Company and Others, in paragraphs 20 onwards upto paragraph 27, the Honourable Apex Court has considered the important and invaluable services rendered by wife or mother to the family. In paragraph 25, the Honourable Apex Court has made reference to the judgment reported at Lata Wadhwa and Others Vs. State of Bihar and Others, Very same judgment has been referred by the MACT in paragraph 18 to calculate the per month earning of the deceased Josepha at Rs. 3,000/-.

37. In Laxmi Devi and Others Vs. Mohammad Tabbar and Another, the Honourable Apex Court has found that it was nobody''s case that the deceased was not working. The wife of the deceased entered witness box and had deposed that the deceased was earning Rs. 140/- per day. At the time of the accident, the age of the deceased was 35 years. However, the Court ignored the exaggeration and accepted figure of Rs. 100/- per day or Rs. 3000/- per month, to be correct. It then made provision on account of the fact that the claimant would get only 6% interest and proceeded to apply a higher multiplier of 14, instead of 12. In (2011) 14 SCC 639 in the case of Ranjana Prakash and others vs. Divisional Manager and another, the Honourable Apex Court has accepted addition for future prospects of employment of the deceased who was a Bank Manager, aged 46 years. 30% of current income was added towards future prospects after permitting deduction on account of income tax from annual income, to arrive at income for calculating the compensation. Even in the unreported judgment of this Court in First Appeal No. 307 of 2007, in the case of Laurinda Gomes and ors. vs. Janu Gaude and another, decided on 23rd August, 2013, the addition on account of future prospects at 30% has been accepted. Though some more judgments have been cited which followed the judgment of the Honourable Apex Court in Sarla Verma vs. DTC (supra), in the light of the judgment of the Larger Bench reported at Reshma Kumari and Others Vs. Madan Mohan and Another, which approves the same, I do not find it necessary to dwell more on those judgments.

38. The husband of the deceased has deposed that the deceased, apart from housewife, was working as labour and earning an amount of Rs. 4500/- per month. He has deposed that she was having a good physique and was healthy. His cross

examination reveals that his wife was working as a labour in fields and gardens. He has denied that she was not earning Rs. 4500/- per month. Other witness in this respect is AW. 4 Dinesh. He has deposed that the deceased was from his village and he knew her. In his cross examination he has stated that the deceased was engaged in business of manufacturing toddy. His evidence does not show that she was not earning daily wages or she herself was doing business of toddy manufacture. Evidence of the husband and this witness shows that the deceased was doing labour work and supporting her family. In this situation, an amount of Rs. 150/- per day as deposed by her husband could not have been doubted, as there was no material to the contrary, on record. It is to be noted that respondent No. 2-Insurance Company has only contested the proceedings. The claimants, in their claim petition, stated that Josepha was earning Rs. 4500/- per month and claimed compensation accordingly of Rs. 6,08,000/- in paragraph 22. These assertions or calculations were not questioned by respondent No. 1 who happens to be the owner of the motorcycle and also its driver. In this situation, the trial Court ought to have accepted the unrebutted assertions of the claimants and calculation of compensation ought to have been worked out on the basis of said earning of Rs. 4500/- per month.

39. Deducting amount of Rs. 1500/- per month for personal expenditure of the deceased, dependency of the claimants worked out to Rs. 3000/- per month i.e. Rs. 36,000/- per year. Multiplying this by 13, the total amount of compensation works out to Rs. 4,68,000/-. 30% earning needs to be added for future prospects. Thus said 30% works out to Rs. 9800/-. When this is added to Rs. 36,000/-, the product is Rs. 45,800/-. Considering this figure and the deceased being lady, it is not necessary to order deduction on account of income tax. This product needs to be multiplied by 13 and the compensation works out to Rs. 6,36,400/-. This needs to be added by Rs. 1,00,000/- on account of loss of consortium and Rs. 25,000/- on account of funeral expenses. The total, thus, works out to Rs. 7,61,400/-. This Court, therefore, finds that the claimants are entitled to recover from respondent No. 1 an amount of Rs. 7,61,400/- on account of death of Josepha Fernandes alias Josefa da Silva. Grant of interest at the rate of 9% by the MACT on the said amount from the date of application till its realisation is maintained. Accordingly, the last question stands answered.

40. The appeal is, thus, allowed partly. The appellants are entitled to recover an amount of Rs. 7,61,400/- from only respondent No. 1, with interest calculated at Rs. 9% per annum, on the said sum from the date of filing of their application u/s 166 of the M.V. Act, before the MACT, till its realisation. They are also entitled to proportionate costs from said respondent No. 1.