

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 29th June, 2015

+ MAC. APP. 592/2011

NEW INDIA ASSURANCE COMPANY LIMITED Appellant

Through: Mr. K.L. Nandwani, Advocate

versus

HARSH MISHRA AND ORS. Respondents

**Through: Mr. I.C. Mishra, Advocate for
Respondents no.1 to 3.**

**Mr. Arvind Kumar Patel, Advocate
for Respondents no.4 and 5.**

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The appeal is directed against the judgment dated 26.03.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of ₹6,80,600/- was awarded in favour of Respondents no.1 to 3 for the death of Mukesh Mishra, who suffered fatal injuries in a motor vehicular accident which occurred on 19.06.2006.
2. On appreciation of evidence, the Claims Tribunal found that the

accident was caused on account of rash and negligent driving of the vehicle bearing registration no. HR-38-D-3516 driven by Respondent Rattan Singh. The Claims Tribunal accepted the salary of the deceased to be ₹7700/- per month, deducted 50% towards personal and living expenses and applied the multiplier of 13 to compute the loss of dependency as ₹6,00,600/-. After adding a further sum of ₹80,000/- towards non-pecuniary damages, the overall compensation of ₹6,80,600/- was awarded.

3. The only ground of challenge raised by the Appellant Insurance Company is that proof of negligence is *sine qua non* in a petition under Section 166 of the Motor Vehicles Act, 1988 (the Act). Merely because of registration of a criminal case against the driver of the offending vehicle, negligence cannot be inferred, even on the touchstone of preponderance of probabilities. It is, therefore, stated that the impugned award cannot be sustained and is liable to be set aside.
4. It may be noted that while dealing with the issue of negligence, the Claims Tribunal was conscious of the fact that in a petition under Section 166 of the Act, it is the duty of the Claimant to prove that the accident was caused on account of rash and negligent driving of the driver of the offending vehicle.

5. Respondent Harsh Mishra, brother of the deceased himself entered the witness box as PW-1 and testified about the manner of the accident. It was established that Harsh Mishra was not an eye witness of the accident, yet, the Claims Tribunal opined that PW-1's testimony was corroborated by registration of a criminal case against the driver and referred to the judgment of this Court in *National Insurance Company Limited v. Pushpa Rana*, 2009 ACJ 287 and a report of the Supreme Court in *Kaushnuma Begum (Smt.) and Ors. v. New India Assurance Company Limited and Ors.*, (2001) 2 SCC 9 to hold that the issue of wrongful act or omission on the part of the driver of a motor vehicle involved in an accident is left to be of secondary importance and mere use or involvement of motor vehicle is enough to award compensation under Sections 166 and 140 of the Act. It will be appropriate to extract the relevant portion of the finding on negligence reached by the Claims Tribunal:-

“8.... In order to prove this issue the Ld. Counsel for the petitioner has relied upon the statement of the PW1, Sh. Harsh Mishra, brother of the deceased and he has deposed that the deceased was coming from his office on motorcycle bearing no. DL-4SAZ-0867 and when he had reached near Canara Bank, Captain Gaur Marg, New Delhi, a truck bearing no. HR-38D-3516 driven by Respondent no.1 in a rash and negligent manner crushed

the deceased. This witness was cross-examined by Ld. counsel for respondent no.3/Insurance Company but no such inconsistency or contradiction has emerged from his cross-examination which may throw doubt on his version regarding the accident. Statement of this witness also stands corroborated by the certified copies of the criminal case record filed i.e. the certified copy of chargesheet filed against the driver of the offending vehicle is Ex. PW1/3; the certified copy of FIR bearing No.344/06 PS Srinivaspuri. The certified copy of site plan and seizure memo of the offending vehicle have also been filed on record. To determine the negligence, I am being guided by the judgment of Hon'ble High Court of Delhi in 2009 ACJ 287, National Insurance Company Limited vs. Pushpa Rana wherein the Hon'ble High Court held that in case the petitioner filed the certified copy of the criminal record or the criminal record showing the completion of the investigation by the police or the issuance of charge sheet under Section 279/304-A IPC or the certified copy of the FIR or in addition the recovery memo on the mechanical inspection report of the offending vehicle, these documents are sufficient proof to reach to the conclusion that the driver was negligent. It was further held that the proceedings under the Motor Vehicles Act are not akin to the proceedings in a civil suit and hence strict rules of evidence are not required to be followed in this regard. Further, in Kaushnumma Begum & Ors. vs. New India Assurance Company Limited, 2001 ACJ 421 SC, the issue of wrongful act or omission on the part of driver of the motor vehicle involved in the accident has been left to a secondary importance and mere use or involvement of motor vehicle in causing bodily injuries or death to a human being or damage to property would made the petition maintainable under Section 166 and 140 of the

Act. It is also settled law that the term rashness and negligence has to be construed lightly while making a decision on a petition for claim for the same as compared to the word rashness and negligence as finds mention in the Indian Penal Code. This is because the chapter in the Motor Vehicle Act dealing with compensation is a benevolent legislation and not a penal one.

9. In view of the above discussions and particularly in view of no controverting evidence on behalf of driver of the offending vehicle, it stands proved on record that deceased had sustained fatal injuries due to rash and negligent driving of respondent no.1 while driving the offending vehicle....”

6. ‘Negligence’ is failure to take proper care which a reasonable man would have taken under the circumstances. There may be cases where an inference of negligence can be derived from the manner in which the accident takes place. For instance, where a motor vehicle goes up the pavement and strikes against a pedestrian or where the tyre of a motor vehicle bursts, it loses control and collides against a pedestrian or where the said vehicle on turning turtle causes injuries to the passengers or when a motor vehicle moving on a bridge collides against the railing and falls into a Canal. In such cases, the principle of strict liability as laid down in *Rylands v. Fletcher [1861-73] All E.R. 1* would be applicable.
7. The applicability of the principle of *res ipsa loquitur* was explained by the Supreme Court in *Pushpabai Purshottam Udeshi and Ors. v.*

Ranjit Ginning & Pressing Co. (P) Ltd. and Anr., AIR 1977 SC 1735. It was observed that in certain situations, there is hardship caused to the Plaintiff to prove the manner of the accident. In such cases, applying the principle of '*res ipsa loquitor*', the onus to prove how the accident happened would shift on the Defendant. In *Pushpabai Purshottam Udeshi and Ors. (supra)*, the Supreme Court observed:-

"6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states : "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged

negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged a negligence 'tells its own. story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part.....”

8. The issue of proof of negligence in a petition under Section 166 of the Act has been constantly raised before the Supreme Court and it is consistently being held that proof of negligence is essential before a person or his master can be held liable to pay the compensation.

9. In *Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.*, 1977 (2) SCC 441, a plea was raised that mere use of motor vehicle is enough to make the owner liable to pay compensation.

The contention was however, repelled and it was held as under:-

“23. The Indian Law introduced provisions relating to compulsory insurance in respect of third party insurance by introducing Chapter VIII of the Act. These provisions almost wholly adopted the provisions of the English law. The relevant sections found in the three English Acts Road Traffic Act, 1930. The Third Parties (Rights against Insurers) Act, 1930 and "the Road Traffic Act, 1934 were

incorporated in Chapter VIII. Before a person can be made liable to pay compensation for any injuries and damage which have been caused by his action it is necessary that the person damaged or injured should be able to establish that he has some cause of action against the party responsible. Causes of action may arise out of actions for wrongs under the common law or for breaches of duties laid down by statutes. In order to succeed in an action for negligence the plaintiff must prove (1) that the defendant had in the circumstances a duty to take care and that duty was owed by him to the plaintiff, and that (2) there was a breach of that duty and that as a result of the breach damage was suffered by the plaintiff. The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his employment. Apart from it in common law the master is not liable for as it is often said that owner of a motor car does not become liable because of his owning a motor car.

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 27. This plea ignores the basic requirements of the owner's liability and the claimant's right to receive compensation. The owners' liability arises out of his failure to discharge a duty cast on him by law. The right to receive compensation can only be against a person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to compensate anyone else. The Claims Tribunal is a tribunal constituted by the State Government for expeditious disposal of the motor claims. The general law applicable is only common law and the law of torts. If under the law a person becomes legally liable then the person suffering the injuries is entitled to be compensated and the Tribunal is authorised to determine the amount of compensation

which appears to be just. The plea that the Claims Tribunal is entitled to award compensation which appears to be just when it is satisfied on proof of injury to a third party arising out of the use of a vehicle on a public place without proof of negligence if accepted would lead to strange results. (emphasis supplied)

28. Section 110(1) of the Act empowers the State Government to constitute one or more Motor Accidents Claims Tribunals for such area as may be specified for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death or bodily injury to persons. The power is optional and the State Government may not constitute a Claims Tribunal for certain areas. When a claim includes a claim for compensation the claimant has an option to make his claim before the Civil Court. Regarding claims for compensation therefore in certain cases Civil Courts also have a jurisdiction. If the contention put forward is accepted so far as the Civil Court is concerned it would have to determine the liability of the owner on the basis of common law or torts while the Claims Tribunal can award compensation without reference to common law or torts and without coming to the conclusion that the owner is liable. The concept of owner's liability without any negligence is opposed to the basic principles of law. The mere fact that a party received an injury arising out of the use of a vehicle in a public place cannot justify fastening liability on the owner. It may be that a person bent upon committing suicide may jump before a car in motion and thus get himself killed. We cannot perceive by what reasoning the owner of the car could be made liable. The proof of negligence remains the linch pin to recover compensation. The various enactments have attempted to mitigate a possible injury to the claimant by providing for payment of the claims by insurance.

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30. *A person is not liable unless he contravenes any of the duties imposed on him by common law or by the statute. In the case of a motor accident the owner is only liable for negligence and on proof of vicarious liability for the acts of his servant The necessity to provide effective means for compensating the victims in motor accidents should not blind us in determining the state of law as it exists today.*”

10. In para 37 of the report, the Supreme Court referred to a Division Bench judgment of the Madras High Court in *M/s. Ruby Insurance Company Limited v. Govindaraj*, AAO Nos. 607/1973 and 296/1974, delivered on 13.12.1976, where it was suggested to have a social insurance so as to provide cover for the Claimant irrespective of proof of negligence.
11. The correctness of the judgment in *Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.*, 1977 (2) SCC 441 was doubted by the Supreme Court in *Gujarat State Road Transport Corporation, Ahmedabad v. Ramanbhai Prabhatbhai and Anr.* (1987) 3 SCC 234 and it was observed that the Supreme Court’s observations in *Minu B. Mehta (supra)* that proof of negligence is must and that a person is not liable unless he contravenes any of the duties imposed on him by the common law or by the statute were in the nature of *obiter dicta*.

12. The matter came to be re-examined by a three Judge Bench of the Supreme Court in *Oriental Insurance Company Limited v. Meena Variyal and Ors.*, (2007) 5 SCC 428 and it was held that *obiter dicta* of the Supreme Court in the absence of a direct pronouncement on that question is binding on the High Courts. In paras 25 to 27, it was held as under:-

“25. In that decision, this Court considered the question whether in a claim for compensation under the Motor Vehicles Act, 1939, proof of negligence was essential to support a claim for compensation. On the facts in that case, their Lordships found that the appeal was liable to be dismissed subject to certain directions issued therein. But their Lordships, in the light of the fact that the High Court had discussed the law on the question and it was of some importance, felt that it was necessary to state the position in law. Noticing that the liability of the owner of the car to compensate the victim in a car accident due to negligent driving of his servant is based on the law of tort, the Court discussed the scheme of the Act of 1939 and the law on the question. Regarding the view of the High Court that it was not necessary to prove negligence, the Court held: (Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] , SCC pp. 455-56, para 33)

“33. The reasoning of the two learned Judges is unacceptable as it is opposed to basic principles of the owner's liability for negligence of his servant and is based on a complete misreading of the provisions of Chapter VIII of the Act. The High Court's zeal for what it considered to be protection of public good has misled it into adopting a course which is nothing short of legislation.”

Their Lordships also noticed that proof of negligence remained the lynchpin to recover compensation. Their Lordships concluded by saying: (Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] , SCC pp. 456-57, para 37)

“37. We conclude by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case.”

26. *Learned counsel for the respondent contended that there was no obligation on the claimant to prove negligence on the part of the driver. Learned counsel relied on Gujarat SRTC v. Ramanbhai Prabhatbhai [(1987) 3 SCC 234 : 1987 SCC (Cri) 482] in support. In that decision, this Court clarified that the observations in Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] are in the nature of obiter dicta. But, this Court only proceeded to notice that departures had been made from the law of strict liability and the Fatal Accidents Act by introduction of Chapter VII-A of the 1939 Act and the introduction of Section 92-A providing for compensation and the expansion of the provision as to who could make a claim, noticing that the application under Section 110-A of the Act had to be made on behalf of or for the benefit of all the legal representatives of the deceased. This Court has not stated that on a claim based on negligence there is no obligation to establish negligence. This Court was dealing with no-fault liability and the departure made from the Fatal Accidents Act and the theory of strict liability in the scheme of the Act of 1939 as amended. This Court did not have the occasion to construe a provision like Section 163-A of the Act of 1988 providing for compensation without proof of*

negligence in contradistinction to Section 166 of the Act. We may notice that Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] was decided by three learned Judges and the Gujarat SRTC case [(1987) 3 SCC 234 : 1987 SCC (Cri) 482] was decided only by two learned Judges. An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority. On a careful understanding of the decision in Gujarat SRTC [(1987) 3 SCC 234 : 1987 SCC (Cri) 482] we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163-A of the Act of 1988, we are persuaded to think that the so-called obiter observations in Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163-A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta case [(1977) 2 SCC 441 : (1977) 2 SCR 886] deserve to be ignored.

27. We think that the law laid down in Minu B. Mehta v. Balkrishna Ramchandra Nayan [(1977) 2 SCC 441 : (1977) 2 SCR 886] was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163-A of the Act providing for

payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163-A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.”

13. The question again came up for consideration before the Supreme Court in *Surender Kumar Arora and Anr. v. Manoj Bisla and Ors.*, (2012) 4 SCC 552. In the said case, the Motor Accident Claims Tribunal dismissed the petition under Section 166 of the Act as the Appellants (the Claimants) had failed to prove negligence on the part of the driver of the vehicle involved in the accident. On the

basis of the evidence of Respondent no.1 (the driver), the Claims Tribunal came to the conclusion that the driver of the vehicle was not driving it in a rash and negligence manner. The appeal preferred to the Delhi High Court against the same was also dismissed holding that in a petition under Section 166 of the Act, the parents of the deceased were to establish that the vehicle was driven by Respondent no.1 in a rash and negligent manner which they failed to do so in the present case. The Supreme Court negated the contention that the Claims Tribunal ought to have awarded compensation since the deceased was proved to be riding in the vehicle which was driven by Respondent no.1. Reliance placed on *Kaushnuma Begum (Smt.) and Ors. v. New India Assurance Company Limited and Ors.*, (2001) 2 SCC 9 was held to be of no consequence observing that the *dicta* of the Supreme Court in *Kaushnuma Begum (Smt.)* would be applicable only in a petition under Section 163-A of the Act. The Supreme Court approved the ratio of the earlier decision in *Oriental Insurance Company Limited v. Meena Variyal and Ors.*, (2007) 5 SCC 428 and held that once the legal representatives of the deceased opt to approach the Tribunal under Section 166 of the Act, they have necessarily to establish negligence of the driver or owner of the vehicle

concerned.

14. Thus, there is no manner of doubt that in a Claim Petition under Section 166 of the Act, negligence is required to be proved by the victim or the legal representatives of the victim. On the other hand, compensation is payable as per the structured formula under Section 163-A of the Act simply on proof of involvement of the offending vehicle (without proof of negligence).
15. It is also well settled that the standard of proof required in a criminal case is beyond reasonable doubt whereas in a civil case including the petition under Section 166 of the Act, negligence is required to be proved only on the touchstone of preponderance of probabilities.
16. There are umpteen authorities on the subject. A reference at this juncture may be made to *Bimla Devi and Ors. v. Himachal Road Transport Corporation and Ors.*, (2009) 13 SC 530 wherein the Supreme Court held as under:-

“15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.”

17. The question for consideration before me here is whether mere registration of a criminal case is enough to prove the negligence on the touchstone of preponderance of probabilities. To my mind, the answer to this question will be in negative. As stated earlier, negligence is failure to take proper care a reasonable man would have taken under the circumstances. Though it is not always necessary that an eye witness must be produced to prove negligence, every fact must be proved either by direct or indirect evidence.
18. This Court has time and again held that the Claims Tribunal is expected to hold an inquiry to decide a claim petition filed under Section 166 of the Act. If appropriate evidence is not produced by any party, the Claims Tribunal itself is expected to call for such evidence.
19. In the case of *Manvendra Pal Singh and Ors. v. Mohd. Sabir and Ors.*, MAC. APP. 2/2012, decided on 06.09.2012, it was held as under:-

“There were eye witnesses cited in the criminal case. The Claims Tribunal while holding inquiry under

Section 168 of the Act was under obligation to ask the Claimants to produce eye witnesses or suo moto summon the eye witness/witnesses and other material evidence with regard to the manner of the accident.”

20. A perusal of the FIR reveals that Constable Mohd. Tahir was an eye witness to the accident. Even if he was not produced by the Respondents, he ought to have been summoned by the Claimants.
21. To sum up, in view of the law laid down in *Oriental Insurance Company Limited v. Meena Variyal and Ors.*, (2007) 5 SCC 428, *Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.*, 1977 (2) SCC 441 and *Surender Kumar Arora and Anr. v. Manoj Bisla and Ors.*, (2012) 4 SCC 552, there is no manner of doubt that negligence is required to be proved by the person claiming compensation under the Act and that negligence is required to be proved on the touchstone of preponderance of probabilities.
22. In *Surender Kumar Arora and Anr. v. Manoj Bisla and Ors.*, (2012) 4 SCC 552, the Supreme Court categorically stated that *Kaushnuma Begum (Smt.) and Ors. v. New India Assurance Company Limited and Ors.*, (2001) 2 SCC 9 shall be applicable only to the claim petitions filed under Section 163-A of the Act.

23. In view of the above, the law laid down in *National Insurance Company Limited v. Pushpa Rana*, 2009 ACJ 287 shall be confined to the facts of the said case and not be considered as a binding precedent. The finding on negligence reached by the Claims Tribunal, therefore, cannot be sustained; the same is accordingly set aside.
24. The matter is remanded back to the Claims Tribunal for its decision in accordance with law. The Claims Tribunal shall be at liberty to summon the eye witness, the investigating officer of the case, or any other witness to form an opinion if there was any negligence on the part of the driver of the offending vehicle.
25. It is further made clear that the Claims Tribunal shall be at liberty to go into the question of quantum of compensation afresh in view of the latest law and the conclusion reached by it in the order dated 26.03.2011 shall not be binding. Both the parties will be entitled to lead further evidence, if they so desire.
26. The appeal is allowed in above terms.
27. Parties are directed to appear before the Claims Tribunal on 28.07.2015.
28. Since the matter relates to an accident which occurred in the year 2006, the Claims Tribunal shall endeavour to dispose of the case

urgently, in any case, within a period of four months.

29. The statutory amount shall be refunded to the Appellant Insurance Company.
30. Pending application also stands disposed of.

G.P. MITTAL)
JUDGE

JUNE 29, 2015
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