IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.34 OF 2013

The New India Assurance Co. Ltd.,
Through its Divisional Manager,
Adalat Road, near Mahesh Auto,
Aurangabad.

Through its authorized signatory,
Sr. Divisional Manager, Legal Hub,
Aurangabad D.O.I. Aurangabad.

… **Appellant**.

… **Versus** …

1 Anusabai wd/o Bhimrao Kakade,
Age 48 yrs., Occ. Nil,
R/o Shikshak Colony, Sillod,
Tq. Sillod, Dist. Aurangabad.

2 Santosh Bhimrao Kakade,
Age 16 yrs., Minor, U/G of his real
mother respondent No.1 herein.

3 Ganga Bhimrao Kakade,
Age 20 yrs., Occ. Education,

4 National Insurance Company Ltd.,
Through Mr. S.R. Bodade, Age 59 yrs.,
Occ. Regional Manager,
R/o National Insurance Company,
Near Railway road, Aurangabad.

5 Sikandar Laxman Karade,
Age 36 yrs., Occ. Driver,
R/o Kanchanwadi, Kashmir Nagar,
Aurangabad.

6 Sai Subhash Vaidya,
Age 43 yrs., Occ. Nil,
R/o P. No.106, Samarth Nagar,
Flat 6, Shubham Karoti Apt.,
Aurangabad.

… **Respondents**.

…

Mr. D.P. Deshpande, Advocate for the appellant

Mr. G.R. Syed, Advocate for the respondent Nos.1 to 3

Mr. H.A. Patankar, Advocate for the respondent No.4 - **absent**

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CORAM :SMT. VIBHA KANKANWADI, J.

RESERVED ON : 05th SEPTEMBER, 2019

PRONOUNCED ON : 09th OCTOBER, 2019

JUDGMENT :

1 Present appeal has been filed by original respondent No.3-insurance company challenging the Judgment and Award passed in M.A.C.P. No.137/2008 by Ex-Officio Member, Motor Accident Claims Tribunal, Aurangabad dated 26.09.2012, whereby the claim petition filed by the present respondent Nos.1 to 3 under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") came to be partly allowed.

2 The original claimants had come with a case that they are the widow and children of one Bhimrao Kashiba Kakade. Bhimrao was

proceeding at about 15.00 hours on 14.08.2007 to his house by walk. When he was near Sainik Shikshan Sanstha, Aurangabad; one car bearing No.MH 15/AH-1177 came in high speed and then gave dash to Moped bearing registration No.MH 20/R-5743 and then the Moped dashed to deceased Bhimrao. Claimants have contended that both the drivers of the vehicles involved in the accident were rash and negligent. Bhimrao had sustained serious injuries. He was admitted to Apex Hospital, Aurangabad for treatment, however, he succumbed to the injuries, two days thereafter. Offence has been registered against both the vehicles by police. Deceased was 50 years old person serving as a Clerk in Tahsil Office, Sillod. He was getting salary of Rs.7,200/- per month and therefore, the claimants had claimed compensation of Rs.6,00,000/- from the respondents. Respondent No.1 is the registered owner and driver of Indica car, which was insured with respondent No.3, on the date of the accident. Respondent No.2 was the driver of Moped and respondent No.4 was the registered owner of the said vehicle.

3 Respondent No.1 failed to file written statement. Respondent Nos.2, 3 and 4 have filed their respective written statements and denied all the averments in the petition. The Moped driver has blamed car driver for the accident and the insurance company of the car has blamed moped driver.

Age, occupation and income of the deceased has been challenged. The insurance company has taken statutory defences. Respondent No.4 has contended that moped was purchased by her father, when she was a student. After her education was over, her father sold the vehicle to respondent No.2. In the meantime, her marriage took place and she started residing with her husband. Due to the shifting of house by her father, the papers of the moped were misplaced and transfer could not be effected in the Regional Transport Office. However, according to her, the real owner of the moped is respondent No.2.

4 Taking into consideration the rival contentions, issues were framed. It appears that the claimants as well as respondent No.4 led the oral as well as documentary evidence. Other respondents relied on the documents, which were produced on record, in the form of certified copies, by the claimants. After considering the evidence and hearing both sides, the learned Tribunal has come to the conclusion, that the driver of both the vehicles were negligent. The car driver was responsible to the extent of 85%, whereas the moped driver was responsible to the extent of 15%. Accordingly, the amount of the compensation has been assessed. The claimants were granted compensation of Rs.6,20,000/-. Respondent Nos.1 and 3 were directed to pay compensation of Rs.5,02,000/-, jointly and severally, together

with interest @ 9% per annum, whereas the respondent Nos.2 and 4 were directed to pay compensation of Rs.93,000/- @ 9% per annum. The original respondent No.3 has challenged the said Judgment and Award, in this appeal.

5 Heard learned Advocate Mr. D.P. Deshpande for the appellant and learned Advocate Mr. G.R. Syed for respondent Nos.1 to 3, the original claimants. Learned Advocate for respondent No.4 Mr. H.A. Patankar was absent. Respondent Nos.5 and 6 though served, remained absent.

6 It will not be out of place to mention at the beginning itself, that the other respondents have not challenged the said Judgment and Award in respect of their liability. They have also not challenged the quantum. Even the claimants have not challenged the quantum, that has been awarded. Taking into consideration the contents of the appeal memo and the submissions, following points arise for determination; findings and reasons for the same are as follows.

1 Whether the Tribunal was justified in holding the driver of car negligent of 85% and to that of moped 15% ?

2 Whether any interference is required ?

REASONS

7 It has been vehemently submitted on behalf of the appellant, that in fact, the insurance company had challenged the involvement of the car in the said accident. It is not in dispute, that the car was insured with the appellant, on the date of the accident, however, the evidence on record would show, that the First Information Report was given belatedly and there was no explanation for that belated First Information Report. Claimants have examined only the widow, who had admittedly not seen the accident. Therefore, on the point of negligence of any vehicle, the burden never shifted on the respondent to disprove anything. Apportionment itself was not proper, when the Tribunal held the ratio of negligence as 85 : 15 %. He, therefore, prayed for exonerating the insurance company, on the point of negligence itself is not proved by the claimants.

8 Per contra, the learned Advocate appearing for the original claimants supported the reasons given by learned Tribunal while proceeding the petition.

9 The perusal of the evidence, that has been led, would show that the claimants examined CW 1 Anusayabai, who was the widow of the deceased. Her examination-in-chief is nothing but the replica of her petition

and in her cross-examination she has categorically stated, that she has not witnessed the accident. No doubt, the claimants have not examined any eye witness. However, it is to be noted from the written statement filed by the respondent No.2, that he is not denying the fact of accident. He is only denying the allegation of negligence and it is stated that as the Indica car driver was negligent, it had dashed to the moped and then moped had dashed to Bhimrao. We cannot ignore the contents of the said written statement. Perusal of the evidence of CW 1 Anusayabai would show that when respondent No.3 had cross examined her, it was extracted from her that the car and motorcycle gave dash to her husband. Though she has stated that she had not seen the accident, that means, the said question or extraction by the insurance company was against its own interest and written statement. It appears that the said cross-examination was taken in a very casual manner. But now, the insurance company has raised the point of involvement of both the vehicles, in the said accident. Said approach of the insurance company is undesirable.

10 The insurance company has not raised any objection, when the certified copies of the First Information Report and other police papers were exhibited, that means, the insurance company also wanted to rely on these documents. As per the First Information Report, the offence has been

registered against both the vehicles. The contents of the spot panchnama would show that deceased was proceeding from the left side of his road i.e. western side, when he was dashed. Therefore, these documents were also speaking against the respondent No.1, who was driving the car, at the relevant time. It appears that respondent No.3-insurance company had taken permission under Section 170 of the Act, to contest the matter, on all the grounds. However, it did not lead any evidence to support its written statement. When the respondent No.1 failed to file written statement and even though the said permission was taken by respondent No.2 and the respondent No.2 did not examine respondent No.1, who was the driver of the car, then, definitely adverse inference was required to be drawn against them and accordingly it has been rightly drawn.

11 Now, as regards the apportionment of the negligence is concerned, the learned Tribunal has given reasons for arriving at such conclusion. It is stated that the car was a big vehicle as compared to the moped. Merely because involvement of both the vehicles has been proved, it cannot be stated that both the vehicles or the owner, driver were responsible to the extent of half of the amount of compensation, that would be awarded. If we peruse the spot panchnama, it can be seen, that the width of the tar road is 20 feet and the accident had taken place on the bridge. The car

driver could have definitely given way to the moped driver and therefore, the said apportionment can be said to be justified, taking into consideration the situation as shown in the spot panchnama. Another fact can not be ignored is that the car had given dash to moped first and then moped has dashed the deceased. That means only car driver could have avoided the accident. His contribution in the said accident is more as compared to moped driver. No fault can be found in the Judgment and Award passed by the Tribunal to that effect. No such circumstance was there to hold both the vehicles liable equally.

12 As aforesaid, none of the respondents including the present appellant also are challenging the quantum, that has been awarded by the learned Tribunal. Under such circumstance, on the basis of the evidence, the Judgment and Award rendered by the Tribunal is correct and it requires no interference. There is no merit in present appeal. It deserves to be dismissed. Accordingly, it is dismissed. No order as to costs.

(Smt. Vibha Kankanwadi, J.)

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