

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

FIRST APPEAL NO. 3532 OF 2018

WITH

CIVIL APPLICATION NO. 1849 OF 2018

IN

FIRST APPEAL (ST) NO. 42163 OF 2017

The New India Assurance Company Ltd.,
Divisional Manager, Akola, Through
The New India Assurance Company Ltd.,
Through its Authorized Official
And Divisional Manager, Legal Hub,
Adalat Road, Aurangabad. **...APPELLANT**

(Orig. Opponent No. 2)

VERSUS

1. Sunita W/o Gajanan Shinde,
Age; 22 years, Occ; Household,
2. Ashwini S/o Gajanan Shinde,
Age; 8 years, Occ; Education,
3. Shubham s/o Gajanan Shinde,
Age; 5 years, Occ; Education,

Respondent Nos. 2 & 3 are minor
Under Guardian of Respondent No. 1.

4. Anusayabai w/o Trimbak Shinde,
Age; 45 years, Occ; Nil,
5. Trimbak s/o Maroti Shinde,
Age; 55 years, Occ; Nil,

Respondent Nos. 1 to 5 R/o; Wangi,

Tq. Manwat, Dist; Parbhani.

6. Shankar s/o Bhikaji Borkar,
Age; Major, Occ; Business,
R/o; At Post Koyali (Khurd),
Tq. Risod, Dist; Washim.

....**RESPONDENTS**

(Respondent Nos. 1 to 5
are Orig. Claimants &
Respdt. No. 6 Orig.
Opponent No. 1.)

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Shri. A.S. Usmanpurkar, Advocate for Appellant
Shri. P.S. Agrawal, Advocate for Respondent Nos.1
to 5.

Mr. A.T. Jadhavar, Advocate for Respondent No. 6.

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CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 16/04/2019

Date of Pronouncing Judgment : 24/04/2019

JUDGMENT :

By consent of learned counsel for both
sides heard for final disposal at the admission
stage.

2. This appeal is directed by original
Opponent No. 2, in Motor Accident Claim Petition
No. 170 of 2012, against the judgment and award
passed by the Motor Accident Claims Tribunal,
Parbhani, whereby, compensation of Rs. 8,08,000/-

was granted and joint and several liability was fastened against original Opponent Nos. 1 and 2.

3. Respondent Nos. 1 to 5 are original claimants and respondent No. 6 is original Opponent No. 1, who is the owner of motorcycle No. MH-30-K-5103, involved in motor vehicular accident. (hereinafter parties are referred in accordance with their status as Opponent No. 1, Opponent No. 2 and Claimants).

4. Facts leading to the institution of this appeal are that on 19.11.2000 at about 9.00 p.m., Opponent No. 1 was riding the above said motorcycle by the road, that time, deceased Gajanan Shinde was travelling by the said motorcycle as pillion rider. When that motorcycle reached near Ghandaj Phata, one truck came from back side of that motorcycle and while overtaking, the back portion of the truck struck to the head of deceased, resulting into his instant death on the spot.

5. Offence was registered against the driver

of the unknown truck, who, immediately left the spot of the accident. Therefore, claimants who are dependents of deceased, filed the claim petition before the Tribunal for compensation against the owner and the insurer of motorcycle involved in the accident.

6. By filing written statement (Exh. 19), respondent No. 1 denied his liability by contending that at the time of accident, deceased himself was driving the motorcycle and he is responsible for accident.

7. The insurer of the motorcycle filed written statement (Exh. 20) and denied the contents of the petition by contending that the claim petition is filed by claimants in collusion with respondent No. 1 to extract huge amount from respondent No.2.

8. The next contention of respondent No. 2 insurer is that the insurance policy of the motorcycle, involved in the accident was not confirmed, as the series of the policy issued by

respondent, does not tally with the Cover Note produced by the claimants. The next contention of the insurer is that the risk of the pillion rider is not covered under the said policy of the insurance. The insurer also raised statutory defence under Section 149 of the Motor Vehicles Act, that the driver of the motorcycle did not hold valid and effective driving license at the time of accident, thereby the owner of the motorcycle committed breach of conditions of policy of insurance.

9. Heard Shri. A.S. Usmanpurkar, learned counsel for Appellant, Shri. P.S. Agrawal, learned counsel for Respondent Nos.1 to 5 and Mr. A.T. Jadhavar, learned counsel for Respondent No. 6.

10. Learned counsel for appellant submits that neither it is the pleading of the claimants that whether the accident occurred due to rash and negligent driving of the driver of the motorcycle, nor any evidence is on record to prove the rash and negligent driving by respondent No. 1. He submits that claimant Sunita (PW 1) is not the eye

witness of the accident and her testimony is of no help to prove rash and negligent driving by the driver of the motorcycle.

11. The next contention of the learned counsel for appellant is that even the police papers show that accident occurred due to rash and negligent driving by the driver of the unknown truck, who immediately left the spot, after occurrence of the accident. He submits that even registration number of the offending truck is not mentioned in the FIR. As the negligence of Opponent No. 1 is not proved, the liability to pay compensation cannot be fastened against the owner and the insurer of motorcycle involved in the accident. To substantiate this contention, he placed reliance on **"New India Assurance Co. Ltd. V. Bismillah Bai and Ors"** [AIR 2009 SC (Supp) 2289], **"Lachoo Ram and Ors v. Himachal Road Transport Corpn"** [2014 AIR SCW 1081] and **"Oriental Insurance Co. Ltd., V. Premlata Shukla and ors."** [2007 AIR SCW 359] .

12. The next contention of learned counsel

for respondent is that at the time of accident, three persons were travelling by the motorcycle involved in the accident, thereby the owner of the motorcycle committed breach of condition of policy of the insurance.

13. The next contention of the learned counsel for appellant is that the Tribunal has considered the notional income of the deceased @ Rs. 4,500/- per month, though in the pleadings, claimant claimed that the deceased used to earn Rs. 2,000/- per month. He submits that the Tribunal awarded exorbitant compensation under the pecuniary heads as well as under the conventional heads.

14. Learned counsel for claimants submits that in the pleadings of insurance company, it has nowhere challenged the maintainability of claim petition under Section 166 of the Motor Vehicles Act. He has drawn my attention towards para 12 of the judgment and submits that the Tribunal after considering the situation of the spot rightly held that accident occurred due to rash and negligent

driving by the driver of the motorcycle.

15. The next contention of the learned counsel for claimants is that no evidence has been placed on record by the insurer of the motorcycle to prove breach of conditions of policy of insurance by the owner by allowing three riders to travel by the motorcycle. The contention of the learned counsel for claimants is that the tribunal has jurisdiction to determine the just and reasonable compensation, which may be even more than claimed by the claimants. Learned counsel for owner of the motorcycle supports the judgment passed by the Tribunal.

16. After hearing learned counsel of both parties, following points arise for my consideration, I have recorded my findings against each point for the reasons stated below :

SR. No.	POINTS FOR DETERMINATION	FINDINGS
1)	Do claimants prove that on 19.11.2000, deceased died in motor vehicular accident, due to rash and negligent driving of motorcycle by	No.

	Opponent No. 1 ?	
2)	Does the insurer of motorcycle prove that the owner of the motorcycle has committed breach of condition of policy of the insurance ?	No.
3)	Whether the claimants are entitled for compensation, if Yes, what is the quantum ?	Claimants are not entitled for compensation.
4)	What order ?	Appeal is allowed and the Claim Petition is dismissed.

R E A S O N S

AS TO POINT NO. 1 :-

17. This claim petition for compensation is filed under Section 166 of the Motor Vehicles Act. Therefore, the initial burden lies on claimants to prove that the deceased died in motor vehicular accident, due to rash and negligent driving of the motorcycle by Opponent No. 1. In the case of **"New India Assurance Co. Ltd. V. Bismillah Bai and Ors"** [supra], **"Lachoo Ram and Ors v. Himachal Road Transport Corpn."** [supra] and **"Oriental Insurance Co. Ltd., V. Premlata Shukla and ors."** [supra], the Apex Court has laid down the legal principle that unless rash and negligent driving

of the driver of the vehicle involved in the accident is proved, the petition under Section 166 of the Motor Vehicles Act is not tenable. Only because the vehicle is involved in the accident, the owner and insurer of that vehicle cannot be held liable to pay compensation, unless it is shown that an accident was caused by rash and negligent act of the driver of the vehicle involved in the accident.

18. I have to assess the evidence placed on record by the claimants to ascertain whether claimants have discharged their initial burden to prove the occurrence of the accident, due to rash driving of the motorcycle by Opponent No.1.

19. Though in the written statement, Opponent No. 1 contended that at the time of accident he was not driving motorcycle but deceased was driving the same. To substantiate this contention, Opponent No. 1 did not enter into the witness box. On the other hand, though on behalf of claimants, Sau. Sunita (PW 1) deposed on oath that at the time of accident Opponent No. 1 was driving

motorcycle and the deceased was the pillion rider, from her cross-examination it emerges that she was not eye witness of the accident and she was not able to tell as to who was driving the motorcycle. However, from the copy of final report of investigation of police (Exh. 23) and the copy of FIR (Exh. 24), it emerges that at the time of accident Opponent No. 1 was driving the motorcycle. However, from these police papers, it also emerges that accident occurred when one unknown truck came from back side of the motorcycle gave dash to the motorcycle, resulting into instant death of the deceased on the spot. Neither the Final Report, nor the First Information Report show that accident occurred due to rash and negligent driving by the driver of the motorcycle.

20. After going through the judgment passed by the Tribunal, it emerges that on the basis of spot panchanama (Eh. 25), the Tribunal held that accident occurred due to rash and negligent driving by the driver of the motorcycle i.e. by Opponent No. 1, because, the pool of blood was

found on the middle portion of the road.

21. On the basis of pool of blood on the middle portion of the road, the Tribunal came to conclusion that the driver of the motorcycle was driving it by the middle portion of the road. But this observation of the Tribunal is against the contents of the spot panchanama (Exh. 25). The recitals of the spot panchanama (Exh. 25) indicate that on the spot of accident the width of the tar road was 23 feet and the dried pool of blood was found on the Southern side i.e. on the left side of the road. This indicates that at the time of accident, the driver of the motorcycle was driving the motorcycle by the left side of the road and not from the middle side of the road. So also, it cannot be ignored that as per the contents of the FIR and the Final Report, the accident occurred when the truck came from the back side of the motorcycle and gave dash to the motorcycle. This circumstance indicates that it was the sole negligence on the part of the driver of the unknown truck, which gave dash to the motorcycle, which was proceeding by the left side of the road.

Even in the claim petition, the claimants have nowhere pleaded that the accident occurred due to rash and negligent driving of the motorcycle by Opponent No. 1 or the Opponent No. 1 was driving the motorcycle by the middle portion of the road. Thus, obviously, neither the oral nor documentary evidence is available on record to prove the rash and negligent driving by the driver of the motorcycle involved in the accident. In the circumstances, when rash and negligent driving of the motorcycle by Opponent No. 1 is not proved by the claimants, liability to pay compensation, for the accidental death of deceased cannot be fastened against Opponent Nos. 1 and 2. Accordingly, I answer point No. 1 in the negative.

AS TO POINT NO. 2 :-

22. The learned counsel for insurer submits that by allowing three riders to travel by the motorcycle at the time of accident, the owner of motorcycle committed breach of condition. This defence is not raised in the written statement of Opponent No. 2. In the written statement, Opponent No. 2 has raised only objection that the driver of

the offending motorcycle did not hold effective driving license at the time of accident. However, to substantiate this contention, no evidence has been brought on record by the insurer of the motorcycle. Therefore, the Tribunal is justified while holding Opponent No. 2 insurer of the motorcycle has failed to prove breach of condition of policy of insurance by the owner of the offending motorcycle. I answer point No. 2 in the negative.

AS TO POINT NO. 3 :-

23. In view of my finding against point No. 1, as the claimants failed to prove that accident occurred due to rash and negligent driving of the motorcycle by Opponent No. 1, claimants are not entitled to compensation under section 166 of the Motor Vehicles Act. I answer point No. 3 accordingly.

24. In view of above discussion, the award passed by the Tribunal, awarding compensation of Rs. 8,08,000/- in favour of claimants, fastened the liability against Opponent Nos. 1 and 2 is

incorrect and deserves to be set aside by allowing this appeal. Accordingly First Appeal No. 3532 of 2018 is allowed. The judgment and award passed by the Motor Accident Claims Tribunal, Parbhani in Motor Accident Claim Petition No. 170 of 2012 is set aside and MACP No. 170 of 2012 is dismissed.

25. The compensation and the statutory deposit amount deposited by the appellant/Insurer in the court, be refunded to the appellant/ The New India Assurance Company Ltd., after the period of appeal is over.

26. If 50% amount of compensation deposited by the appellant is withdrawn by the claimant Nos. 1,4 and 5, then they shall re-deposit the same amount with accrued interest thereon in the Court, within the period of three months from the date of passing of this order.

27. Civil Application 1849 OF 2018 in First Appeal (St.) No. 42163 of 2017 is disposed of.

(**SUNIL K. KOTWAL**)
JUDGE

mahajansb/