

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 1072 OF 2007

The United India Insurance Co. Ltd.
Priyadarshani, 1st Floor, Eastern
Express Highway, Sion, Mumbai 400
022.

...Appellant

Versus

1. Smt. Vajarabai Narayan Sadaram
Age : 53 years (widow of deceased)
2. Mr. Ashok Narayan Sadaram
Age : 22 years (son of deceased)
Both residing at Pooja Enclave,
R. No.03, C – Wing, Kalina Village,
Santacruz, Mumbai – 400 029.
3. Babu Narayan Sadaram
Age : 36 years (married son of deceased)
R/at Pooja Enclave, R.No.202, IInd
floor, C-Wing, Kalina Village, CST Road,
Santacruz, Mumbai 400 029.
4. Carvan Motor Services,
A-3/1, Sector no.2, CBD Colony,
Opp. Kokan Bhuvan, Navi Mumbai

...Respondents

Ms. Varsha Chavan, for the Appellant.
Mr. T. J. Mendon, for Respondent nos.2 and 3.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 22nd NOVEMBER, 2021

PRONOUNCED ON: 4th DECEMBER, 2021

JUDGMENT:-

1. This appeal is directed against the judgment and award dated 7th November, 2006, in MACP No.1971 of 2002, passed by

the learned Member, Motor Accident Claims Tribunal, Mumbai (“the Tribunal”), whereby the petition came to be allowed and opponent no.1, the owner of the vehicle and opponent no.2, the insurer – appellant herein, were ordered to jointly and severally pay a sum of Rs.3,70,000/- along with simple interest at the rate of 7.5.% p.a. from the date of the petition till realization, by way of compensation for the death of Narayan Sadaram (“the deceased”) on account of use of the motor bus bearing no. MH-04/G-1071, under Section 166 of the Motor Vehicles Act, 1988 (“the M.V. Act, 1988”).

2. The background facts leading to this appeal can be stated in brief as under:

(a) Late Narayan was the husband of applicant no.1 and father of applicant nos.2 and 3. He was employed in Air India canteen. He drew a salary of Rs.11,074/- per month. The deceased was also supplying the milk by door to door delivery. On 26th June, 2002, at about 5.30 am., while the deceased was riding the bicycle to deliver the milk, the motor bus bearing registration no. MH-04/G-1071, gave a violent dash to the deceased on Kalina – Kurla road opposite Lucky Hotel, Kalina Santacruz (E). The deceased succumbed to the injuries sustained in the said accident. Crime was registered at CR

No.247/2002 under Sections 279 and 304A of the Indian Penal Code, 1860, at Wakola Police Station. As the death occurred on account of rash and negligent driving by the driver of the above-numbered bus, which was owned by opponent no.1 and insured with opponent no.2, the applicants preferred a claim for compensation under Section 166 of the M.V. Act, 1988.

(b) Opponent no.1 – owner did not appear despite service of notice. Hence the application proceeded *ex parte* against opponent no.1. Opponent no.2 – insurer entered appearance. However no written statement was filed. Hence the application proceeded without written statement against opponent no.2.

(c) The learned Member after appraisal of the evidence of Smt. Vajarabai Sadaram (PW-1), the wife of the deceased and Mr. Deepak Sanghal (DW-1) for opponent no.2 – insurer, and the documents tendered for his perusal, was persuaded to record the finding that the deceased suffered death in an accident involving the motor-bus bearing No.MH-04/G-1071, on account of negligent driving on the part of the driver of the said bus. The learned Member thus proceeded to determine the compensation under the head of loss of dependency and the conventional heads and directed opponent nos.1 and 2 to jointly

and severally pay the sum of Rs.3,70,000/- along with simple interest at the rate of 7.5% p.a. from the date of the application.

3. Being aggrieved by and dissatisfied with the aforesaid judgment and award opponent no.2 – insurer has preferred this appeal. The principal ground of challenge is the absence of reliable evidence to establish the involvement of the motor-bus bearing No.MH-04/G-1071 in the accident, in which the deceased allegedly met death. In the absence of clear proof of the involvement of the said vehicle the insurer could not have been fastened with the liability to pay the compensation, is the substantive ground of challenge to the impugned judgment and award.

4. I have heard Ms. Chavan, the learned Counsel for the appellant and Mr. Mendon, the learned Counsel for the respondents – original applicants, at length. With the assistance of the learned Counsels, I have also perused the pleading, the deposition of witnesses and the documents tendered for the perusal of the learned Member, which form part of the record and proceedings requisitioned by this Court.

5. Ms. Chavan, the learned Counsel for the appellant, strenuously submitted that the impugned judgment and award is wholly unsustainable for the singular reason of absence of

proof of involvement of the bus bearing no.MH-04/G-1071, which was insured with opponent no.2. Since the application was under Section 166 of M. V. Act, 1988, it was incumbent upon the applicants to establish negligence on the part of the driver of the said vehicle. In the absence of proof of involvement of the said vehicle in the accident, the learned Member committed a manifest error in returning a finding that the accident occurred due to the negligence on the part of the driver of the said bus. The edifice of this submission was sought to be built on the premise that in the first information report the vehicle number was not at all mentioned and the report was lodged to the effect that an unknown vehicle had knocked down the deceased.

6. Ms. Chavan further urged with a degree of vehemence that the learned Member committed a grave procedural error in allowing the applicants to place on record a copy of the charge-sheet lodged in CR No.247/2002, after conclusion of the hearing and, thereupon, arriving at the conclusion that the involvement and negligence were proved. On the first principles of law, according to Ms. Chavan, the charge-sheet could not have been read in evidence without providing an opportunity of hearing to

the opponents. Thus, the impugned judgment and award deserves to be quashed and set aside, urged Ms. Chavan.

7. As against this, Mr. Mendon, the learned Counsel for the respondents – original applicants, would urge that the endeavour on the part of the appellant – insurer to now question the involvement of the vehicle does not deserve countenance. Emphasis was laid on the fact that no such defence was raised before the Tribunal by filing a written statement and the application proceeded without written statement against opponent no.2 – insurer. Secondly, there was adequate material before the learned Member to arrive at the justifiable conclusion that the offending vehicle was involved in the accident, in the form of FIR and the statements of the witnesses recorded during the course of investigation. Thirdly, the charge-sheet was placed on record by the applicants pursuant to the direction of the learned Member of the Tribunal.

8. Mr. Mendon would further urge that having regard to the nature of the proceeding and the beneficial object of the M. V. Act, 1988, strict rules of evidence cannot be made applicable to the applications under Section 166 of the M. V. Act, 1988. What has to be seen is whether the death occurred on account of the “use” of the vehicle in question. In the case at hand,

according to Mr. Mendon, the applicants have established beyond the pale of controversy that the offending vehicle was involved in the accident and it occurred due to negligence on the part of the driver of the said vehicle. Resultantly, there is no substance in the appeal, urged Mr. Mendon.

9. I have given anxious consideration to the aforesaid submissions. First and foremost the fact that the appellant – original opponent no.2/insurer did not file written statement before the Tribunal, cannot be lost sight of. The averments in the application thus went untraversed. It is trite that in the absence of pleadings, no amount of evidence can be of any assistance to a party to substantiate its case. In view of the failure on the part of opponent no.2 to controvert the assertions in the application that the deceased met death on account of the accident involving the offending vehicle, insured with opponent no.2, the issue could have been decided against opponent no.2, on the principle of non-traverse alone.

10. The learned Member of the Tribunal appraised the evidence of applicant no.1 – Smt. Vajarabai Sadaram (PW-1) and found support to her claim in the FIR (Exhibit-9), scene of occurrence panchnama (Exhibit-10), inquest on the body of the deceased (Exhibit-11) and the postmortem report (Exhibit-12).

The latter indicated that the autopsy surgeon was of the opinion that the cause of death of the deceased was hemorrhage and shock due to multiple injuries (unnatural). Indisputably, first information report No.247/2002 was lodged against the driver of an unidentified vehicle. The identity of the vehicle, however, seems to have been revealed during the course of investigation, especially in the statement of Mohan Kakade, who informed the police that the bus bearing No.MH-04/G-1071 gave dash to the deceased. It is pertinent to note that Malaiyya Kayate, the first informant, refers to the said Mohan as the person as who gave the intimation about the accident which the deceased met.

11. In the backdrop of the aforesaid facts, Ms. Chavan canvassed a two-pronged submission. One, the involvement of the vehicle cannot be said to have been established as the said Mohan Kakade was not examined as a witness for the applicants. Two, an inference about the involvement of the vehicle could not have been drawn on the basis of the conclusion arrived at by the investigating officer in the report submitted under Section 173 of the Code of Criminal Procedure, 1973 ("the Code"), post completion of investigation in FIR No.247/2002, which was filed after the conclusion of the hearing along with the application Exhibit-23.

12. At the outset, it is imperative to note that, the roznama of the proceedings before the Tribunal reveal that the Tribunal had directed the applicants to place on record the copy of the charge-sheet, as is evident from order dated 18th September, 2006, and the order sheet of even date. Pursuant to the said direction, the applicants had placed copy of the charge-sheet on the record of the Tribunal, which reveals that the driver of the offending vehicle was prosecuted for the offence punishable under Section 304-A of the Penal Code and Section 134(a) and (b) of the M. V. Act, 1988, for having caused death of the deceased by driving the offending vehicle bearing No.MH-04/G-1071, in a rash and negligent manner.

13. Whether the aforesaid approach of the Tribunal is justifiable? Ms. Chavan, the learned Counsel for the appellant urged that it was not, as it was incumbent upon the applicants to establish that the offending vehicle was involved in the accident and the impact occurred due to the negligence on the part of the driver of the offending vehicle. To bolster up this submission, the learned Counsel for the appellant placed reliance on the judgments in the cases of *Minu B. Mehta vs. Balkrishna Ramchandra Nayan*,¹ *Ranjana Prakash and others*

1(1977) 2 SCC 441.

*vs. Divisional Manager and another*², *The New India Assurance Co. Ltd. vs. Smt. Alpa Rajesh Shah*,³ *Surendra Kumar Arora and anr. vs. Dr. Manoj Bisla & ors.*⁴ and *Mr. Pukh Raj Bumb vs. Jagannath Naik and ors.*⁵

14. I have perused the aforesaid pronouncements. Reference to the principles enunciated therein, does not seem warranted for the purpose of the determination of the controversy at hand as the same hinges upon the correct appreciation of the nature of the proceedings under Section 166 of the M.V. Act, 1988, the standard of proof to decide the aspect of negligence, and the approach expected of the Tribunal and Court in determining the claim for compensation.

15. Mr. Mendon, the learned Counsel for the respondents, rightly placed reliance on the judgment of the Supreme Court in the case of *Bimla Devi and others vs. Himachal Road Transport Corpn. & ors.*⁶, wherein the Supreme Court expounded the nature of the proceedings under Section 166 of the M. V. Act, 1988, and the function of the Tribunal. The observations in paragraphs 11 to 15 are material and hence extracted below:

2(2011) 4 SCC 639.

32014(2) MhLJ 17.

4(2012) 4 SCC 552.

52014(4) MhLJ 447.

6(2009) 13 Supreme Court Cases 530.

“11. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimant's predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post-mortem report vis-a-vis the averments made in a claim petition.

12. The deceased was a Constable. Death took place near a police station. The post-mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus-stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

13. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos.2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored.

14. Some discrepancies in the evidences of the claimant's witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos.2 and 3.

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.”

16. The Supreme Court has enunciated the law that while dealing with an application under Section 166 of the M. V. Act, 1988, a Tribunal *stricto sensu* is not bound by the pleadings of the parties. Strict proof of an accident caused by a particular vehicle in a particular manner may not be possible to be done by the claimants. These aspects are to be established on the touchstone of preponderance of probability.

17. The issue of nature of proceedings again came up for consideration before a Three Judge Bench of the Supreme Court in the case of *United India Insurance Company Limited vs. Shila Datta and others*.⁷ The Supreme Court enunciated in clear and explicit terms that a claim for compensation filed before the Tribunal is neither a suit nor an *adversarial lis* in a traditional sense. It is a proceeding in terms of and regulated by the provisions of Chapter XII of the Act, which is a complete Code in itself. The Supreme Court enumerated the significant aspects as regards the determination of compensation by the Tribunal. The following propositions are instructive and, thus, extracted below:

⁷(2011) 10 Supreme Court Cases 509.

“(i)

(ii) The rules of pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are *suo moto* initiated by the Tribunal.

(iii) (iv)

(v) Though the tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. On receipt of an application (either from the applicant or *suo motu* registration), the Tribunal gives notice to the insurer under Section 149(2) of the Act, gives an opportunity of being heard to the parties to the claim petition as also the insurer, holds an inquiry into the claim and makes an award determining the amount of compensation which appears to it to be just. (Vide Section 168 of the Act).

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to the assist it in holding the enquiry (vide Section 169 of the Act).

(vii) (viii)

We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.”

18. A profitable reference can also be made to the judgment of the Supreme Court in the case of *Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another*⁸ in the said case, the claimants were non-suited by the Tribunal on the premise that the claimants failed to prove negligence on the part of the driver of the offending vehicle. One of the reasons ascribed was the non-examination of pillion rider by the claimants, in support of the claim.

8(2013) 10 Supreme Court Cases 646.

19. Adverting to the pronouncement of the Supreme Court in the cases of *Bimla Devi* (supra) and *Shila Datta* (supra), the Supreme Court held that keeping in view of the nature of the jurisdiction that is exercised by a Tribunal under the Act, it was not correct on the part of the Tribunal to hold against the claimants for their failure to examine the pillion rider. The fact that a criminal case was registered against the driver of the offending vehicle and he was sent up for trial was considered by the Supreme Court, despite the acquittal of the said driver in the resultant prosecution, holding, *inter alia*, that what cannot be overlooked is the fact that upon the investigation of the case registered against the first respondent, *prima facie*, materials showing negligence were found to put him on trial.

20. In the case of *Mangala Ram vs. Oriental Insurance Company Limited and others*,⁹ the Tribunal had recorded the finding of negligence against the driver of the offending vehicle, on the basis of the FIR and the charge-sheet. The Tribunal had proceeded on the premise that there was no reason to disagree with the opinion of the investigating agency as regards the negligence on the part of the driver of the offending vehicle. The High Court had, however, reversed the finding on the premise that since the oral evidence regarding the involvement of the

9(2018) 5 Supreme Court Cases 656.

offending vehicle was discarded by the Tribunal, a contrary finding could not have been recorded on the basis of the police papers. The Supreme Court referred to its previous pronouncements, including the decisions in the case of *Bimla Devi* (supra) and *Dulcina Fernandes* (supra), and ruled that the High Court committed manifest error in reversing the holistic view of the Tribunal with reference to the statements of witnesses forming part of the charge-sheet, FIR, jeep seizure report in particular.

21. The aforesaid pronouncements indicate that the legal position has crystallized to the effect that the Tribunal constituted under Section 165 of the M. V. Act, 1988, is not to be hidebound by the strict rules of procedure and evidence. In the light of the jurisdiction exercised by the Tribunal, it is enjoined to take a holistic view of the matter, and, on the basis of the material placed before it, arrive at a justifiable conclusion as regards the involvement of the vehicle and negligence on the touchstone of preponderance of probability. Such a finding of involvement and negligence can, in a given case, be based on the report filed by the police under Section 173 of the Code, post investigation into the report of death or injury having been caused by driving the vehicle in a rash and negligent manner.

There is no warrant to discard the investigation papers as untrustworthy. Often they reflect the contemporaneous state of affairs.

22. On the aforesaid touchstone, reverting to the facts of the case, in my considered view, the approach of the learned Tribunal in calling for the charge-sheet was commendable. It is not the case that on the day of occurrence, the identity of the offending vehicle was not revealed. The statement of Mohan Kakade recorded on the very day of occurrence revealed the identity of the offending vehicle. What is of significance is the fact that the source of information of the first informant was the narration of facts by the said Mohan Kakade, which is specifically mentioned in the first information report. In this view of the matter, the Tribunal was within its rights in taking into the account the report under Section 173 of the Code and the conclusion arrived at by the investigating agency regarding the negligence on the part of the driver of the offending vehicle.

23. I do not find any justifiable reason to take a different view of the matter. Thus, I am not persuaded to accede to the submission on behalf of the appellant that the aspects of involvement and negligence have not been proved. Resultantly, the appeal fails.

24. Hence, the following order:

: O R D E R :

- (i) The appeal stands dismissed with costs.
- (ii) Award be drawn accordingly.

[N. J. JAMADAR, J.]

**SANTOSH
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