

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

FIRST APPEAL NO.552 OF 2018

Appellant : **Lalita wd/o Rajkumar Sawalkar,**
(Ori. Claimant on R.A.) Aged about 34 years, Occ. Household Work,
R/o Satod, Dedtalai,
Tah. Khankar, Dist. Burhanpur (M.P.)

-- Versus --

Respondents : **1] Laxmansingh s/o Khanu Marko,**
(Ori. Respondents on R.A.) Aged about Major, Occ. Not Known,
R/o Amravad Kolar Road, Post Hujuri,
Tah. Hujuri, Dist. Bhopal - 462015 (M.P.)
(Owner of Motor Cycle Pulsar bearing
Regd. No.MP-04-AF-1537)

2] Bajaj Allianz General Insurance Co.,
The Divisional Manager,
Bajaj Allianz General Insurance Co.,
GE Plaza, Air Port Road, Yerawada,
Pune - 411006, Tah. & Dist. Pune.

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Shri P.R. Agrawal, Advocate for the Appellant.
None for Respondent No.1.
Shri D.N. Kukday, Advocate for Respondent No.2.

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CORAM : **SMT. ANUJA PRABHUDESSAI, J.**
RESERVED ON : **16th FEBRUARY, 2021.**
PRONOUNCED ON : **12th MARCH, 2021.**

J U D G M E N T :-

Heard finally with consent at the stage of admission.

02] The Appellant herein has challenged the judgment and award,
dated 08/10/2014 passed by the Motor Accident Claims Tribunal, Achalpur

(hereinafter shall be referred to as the 'Tribunal' for short) in M.A.C.P. No.54/2007. By the impugned judgment, the Tribunal has dismissed the claim petition filed under Section 166 of the Motor Vehicles Act, 1988 (hereinafter shall be referred to as the 'Act' for short) on the ground that the Claimant has failed to prove the issue of negligence.

03] The Appellant hereinafter shall be referred to as the 'Claimant'. The Claimant is the widow of one Rajkumar Sawalkar, who died in a motor vehicular accident on 09/03/2007, near the farm of Hiralal Kasdekar, on Kusumkot-Dharni Road. It is the case of the Claimant that the deceased was pillion rider on a motorcycle bearing Registration No.MP-04-AF-1537, which was driven by one Sanjay Marko. The Claimant had stated that one unknown vehicle dashed against the motorcycle resulting in death of the rider as well as the pillion rider of the motorcycle. The Claimant had stated that the accident was caused due to rash and negligent driving of the driver of an unknown vehicle. The Claimant had further stated that the deceased was 30 years of age. He was a labourer and was earning income/wages of Rs.4,500/- per month. The Claimant had stated that she was solely dependent on the income of the deceased. She had initially filed petition under Section 166 of the Act. Subsequently, she filed an application for amendment and prayed that the said petition filed under Section 166 of the Act should be treated as petition under Section 163-A of the Act. The said application was allowed and, accordingly, the petition

under Section 166 of the Act was converted to petition under Section 163-A of the Act.

04] The Tribunal, upon considering the evidence adduced by the petitioner, dismissed the application vide its judgment and order dated 04/05/2013 mainly on the ground that the deceased was the pillion rider on the motorcycle, who is not covered by the expression “any person” in Section 163-A of the Act. The Tribunal has held that it was a hit and run case and for want of particulars of the offending vehicle, application under Section 163-A of the Act is not maintainable. Being aggrieved by the said judgment, the Claimant had challenged the said order before this Court in First Appeal No. 1292/2013. By order dated 09/04/2014, the said appeal was allowed by consent. The impugned judgment and order was set aside and the case was remanded with liberty to amend the pleadings and treat the application as filed under Section 166 of the Act. Pursuant to the said order, the Claimant carried out the amendment only by substituting Section from 163-A to 166 of the Act. The Claimant did not carry out any amendment in Paragraph 14(i) of the petition, wherein the details of the accident were narrated.

05] The Tribunal, after considering the material on record, by the impugned judgment and award, dated 08/10/2014, once again dismissed the petition mainly on the ground that the accident was caused due to

rash and negligent driving by the driver of an unknown vehicle. The Tribunal held that it was a hit and run case and since there was no material on record to indicate that the rider of the motorcycle was responsible for the accident, the claim petition under Section 166 of the Act was not maintainable. Being aggrieved by this judgment, the Claimant has filed this appeal under Section 173 of the Act.

06] Shri P.R. Agrawal, learned Counsel for the Appellant submits that there was no eye witness to the accident. He submits that the Tribunal was required to conduct an enquiry as contemplated under Section 168 of the Act. He has relied upon the decision in Pushpabai Parshottam Udeshi & others vs. Ranjit Ginning and Pressing Co. Pvt. Ltd. & another - 1977 (2) SCC 745 to substantiate his contention that the Tribunal ought to have invoked the principle of *res ipsa loquitur*. He submits that the Spot-Panchnama sufficiently proves that the accident was caused due to negligence of the rider of the motorcycle. He further submits that the Respondents have not adduced any evidence to prove the contrary. Hence, the Tribunal has grossly erred in dismissing the petition for the reason that the Claimant has failed to prove the issue of negligence. Learned Counsel for the Appellant states that the deceased was a pillion rider and since the accident was caused due to rash and negligent driving by the rider of the motorcycle, the Respondent-Insurance Company is liable to pay the compensation.

07] *Per contra*, Shri D.N. Kukday, learned Counsel for the Respondent-Insurance Company submits that the averments in the claim petition clearly indicate that it was a hit and run case. The Claimant has not attributed any negligence to the rider of the motorcycle, on the contrary, has stated that the accident was caused due to rash and negligent driving by the driver of other vehicle. The evidence adduced before the Tribunal is also on the same lines. He submits that in view of such specific pleadings and evidence, the Tribunal was justified in recording a finding that the accident was not caused due to rash and negligent driving by the rider of the motorcycle and consequently absolving the Respondent-Insurance Company of its liability of indemnifying the insured, which is a *sine qua non* for grant of compensation under Section 166 of the Act.

08] I have perused the records and considered the submissions advanced by learned Counsel for the respective parties. The fact that the deceased was a pillion rider on motorcycle bearing Registration No. MP-04/AF/1537 is not in dispute. It is also not in dispute that the said motorcycle was involved in an accident and the husband of the Claimant had expired as a result of the injuries sustained in the said accident. The claim petition has been dismissed mainly on the ground that the Claimant had failed to prove that the accident was caused due to rash and negligent driving by the rider of the motorcycle. Hence, the only point

for consideration is, Whether Shri Rajkumar Sawalkar had died as a result of rash and negligent driving by the rider of the motorcycle?

09] It may be mentioned that the provisions of Sections 140, 163-A and 166 of the Act provide for payment of compensation to the victim of the accident, who are either injured persons or the legal heirs of the deceased. These provisions are in the nature of social welfare legislation, which have to be given liberal interpretation to subserve the object of the legislation. It is well settled that these proceedings are not akin to civil suits and strict rules of pleadings and evidence are not applicable while deciding the petition under these provisions. In fact, the Act, Section 168(1) in particular confers powers of the Claims Tribunal to conduct an inquiry, which is summary in nature to ascertain the facts necessary to award 'just compensation'.

10] In N.K.V. Bros. (P) Ltd. vs. M. Karumai Ammal & others - 1980 ACJ 435 (SC), wherein the Hon'ble Supreme Court has held that the Tribunal must take special care to see that the innocent victims do not suffer and drivers do not escape liability merely because of some doubt, here or some obscurity there. The Court should not succumb to niceties, technicalities and mystic maybes. The Court is bound to take broad view of the whole matter.

11] In United India Insurance Co. Ltd vs. Shila Datta & Ors. - AIR 2012 SC 86, while considering the nature of claim petition under the Act, Three Judge Bench of the Hon'ble Supreme Court has reiterated that a claim petition for compensation in regard to the motor accident is neither a suit nor an adversarial lis in the traditional sense. It is a proceedings in terms of and regulated by the provisions of Chapter XII of the Act which is a complete Code in itself. The Apex Court has culled out the following aspects in regard to the Tribunals and determination of compensation by the Tribunals.

- (i)** *A proceedings for award of compensation in regard to a motor accident before the Tribunal can be initiated either on an application for compensation made by the persons aggrieved (claimants) under section 166(1) or section 163A of the Act or suo moto by the Tribunal, by treating any report of accident (forwarded to the tribunal under section 158(6) of the Act as an application for compensation under section 166(4) of the Act.*
- (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)** *In a proceedings initiated suo moto by the tribunal, the owner and driver are the respondents. The insurer is not a respondent,*

but a noticee under section 149(2) of the Act. Where a claim petition is filed by the injured or by the legal representatives of a person dying in a motor accident, the driver and owner have to be impleaded as respondents. The claimants need not implead the insurer as a party. But they have the choice of impleading the insurer also as a party respondent. When it is not impleaded as a party, the Tribunal is required to issue a notice under section 149(2) of the Act. If the insurer is impleaded as a party, it is issued as a regular notice of the proceedings.

- (iv)** *The words 'receipt of an application for compensation' in section 168 refer not only to an application filed by the claimants claiming compensation but also to a suo motu registration of an application for compensation under section 166(4) of the Act on the basis of a report of an accident under section 158(6) of the Act.*
- (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)** *The award of the Tribunal should specify the person/s to whom compensation should be paid. It should also specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them. (Vide Section 168 of the Act).*
- (viii)** *The Tribunal should deliver copies of the award to the parties concerned within 15 days from the date of the award. (Vide Section 168(2) of the Act).*

12] Reverting to the facts of the present case, it is not in dispute that the husband of the Claimant was barely 30 years of age. His life has been cut short in a motor vehicular accident. It is on record that he was a pillion rider on motorcycle No. MP-04/AF/1537, which was driven by Sanjay Marko. There was a collision between the said motorcycle and an unknown vehicle near the farm of Hiralal Kasdekar on Kusumkot-Dharni Road. The Claimant had averred as well as deposed that the accident was

caused due to rash and negligent driving by the driver of the unknown vehicle.

13] It is to be noted that the Claimant had not witnessed the accident. She had possibly attributed negligence to the driver of an unknown vehicle relying upon the F.I.R. at Exh.45. The said F.I.R. was lodged by the brother-in-law of Sanjay Marko stating that the accident was caused due to rash and negligent driving by the driver of an unknown vehicle. The Tribunal has relied upon this F.I.R. in holding that the rider of the motorcycle was not guilty of rash and negligent act. It is not in dispute that the first informant had not witnessed the accident. He has not attributed negligence to the driver of the unknown vehicle based on any information received from an eye witness or any other reliable source. It has to be borne in mind that it is a normal human tendency to give a clean chit to the near and dear ones. In tune with the general human behaviour, the first informant had attributed negligence to the driver of the other vehicle rather than attributing negligence to his own brother-in-law. Under such circumstances, in my considered view, the Tribunal was not justified in attributing negligence to the driver of an unknown vehicle solely on the basis of the statement of the Claimant and/or the F.I.R. lodged by the brother-in-law of Sanjay Marko, who had not witnessed the accident and had no personal knowledge of the accident.

14] There can be no dispute that in a petition under Section 166 of the Act, the burden is on the Claimants to prove negligence of the driver of the offending vehicle. Nevertheless, in certain exceptional cases, it may not be possible for the claimant to discharge such burden by adducing direct evidence. Such difficulty can be avoided by applying the principle of *res ipsa loquitur*, keeping in mind that the standard of proof in such proceedings is not a proof beyond reasonable doubt, but has to be decided on the touchstone of preponderance of probabilities.

15] At this stage, it would be relevant to refer to the decision of Pushpabai Udeshi (*supra*), wherein the Apex Court has held thus :-

"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 as 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. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care."

16] In the instant case, the rider as well as the pillion rider had succumbed to the injuries sustained in the accident and there was no other eye witness, who could have best unfolded the details of the accident. Under these circumstances, it would be unreasonable to expect the Claimant to prove the issue of negligence. Hence, it is a fit case to apply the principle of *res ipsa loquitur*.

17] It is in evidence that the deceased was proceeding from Kusumkot to Dharni. The Spot-Panchnama, genuineness of which is not in dispute, indicates that the said road is a straight road having width of 18 feet with 5 metre slope on either side. The said road runs in west-east direction. The Spot-Panchnama reveals that the motorcycle had fallen in the field, which is towards the southern side of the road. The dead bodies were lying on the southern side at a distance of about seven feet from the tar road. The motorcycle had also fallen on the southern side of the road at a distance of about three feet from the dead bodies. The Spot-Panchnama further reveals that there were brake marks of the motorcycle to the extent of about 25 feet. The Spot-Panchnama thus reveals that the motorcycle, which was proceeding towards Dharni, had gone on the wrong side of the road, gone down the slope and fallen in the field. The fact that there were brake marks to the extent of 25 feet also indicates that the rider of the motorcycle was at fast speed and he was unable to stop and control the vehicle despite applying breaks. Applying the principle of doctrine of *res ipsa loquitur*, it can be inferred that the motorcycle was driven at a fast speed. The rider had not exercised reasonable care and caution, which had resulted in the motorcycle death of the rider as well as the pillion rider of the motorcycle. The facts and circumstances thus prove that the accident was caused due to rash and negligent driving of the rider of the motorcycle. Hence, even if it is considered to be a case of composite negligence, the claimant is entitled

to proceed against the Respondents being the joint tortfeasors.

18] As regards quantum of compensation, the Tribunal has held that the deceased was within the age group of 30 to 34 years of age. He was a labourer and his earning has been considered as Rs.3,000/- per month. The Tribunal had computed loss of dependency at Rs.3,74,000/-. It is seen that the compensation awarded by the Tribunal on other conventional heads is not in consonance with the guidelines laid down by the Apex Court in National Insurance Company Limited vs. Pranay Sethi & others - (2017) 16 SCC 680 and Sarla Verma (Smt) & others vs. Delhi Transport Corporation & another - (2009) 6 SCC 121. Hence, the compensation assessed by the Tribunal cannot be considered as “just compensation”

19] As noted above, relying upon the age recorded in the Postmortem Report, the Tribunal has held that the deceased was between the age group of 30 to 34 years. There is no serious challenge to these findings. The income of the deceased has been considered at Rs.36,000/- per annum. Considering the age of the deceased and the fact that he was a self-employed, 40% of income is required to be added towards future prospects. Considering the number of dependents, 1/3rd is required to be deducted towards personal and living expenses of the deceased. The Claimant, who is a young widow, is entitled for compensation towards loss of spousal consortium in addition to the

compensation towards loss of estate and funeral expenses. Hence, considering the dictum of the Apex Court in Pranay Sethi and Sarla Verma (supra), the compensation payable to the Claimant is assessed as under :

S.N.	Particulars	Amount
(i)	Annual Income of deceased	Rs. 36,000/-
(ii)	Future prospect 40% of actual salary	Rs. 14,400/-
(iii)	Total income of deceased	Rs. 50,400/-
(iv)	1/3 rd deduction towards personal expenses considering the number of dependents	Rs. 16,800/-
(v)	Multiplicand (iii-iv)	Rs. 33,600/-
(vi)	Multiplier applicable	16
(vii)	Loss of Dependency (Rs.33,600 x 16)	Rs.5,37,600/-
(viii)	Loss of Spousal Consortium	Rs. 40,000/-
(ix)	Loss of Estate	Rs. 15,000/-
(x)	Funeral Expenses	Rs. 15,000/-
	Total Compensation	Rs.6,07,600/-

20] The vehicle involved in the accident was owned by Respondent No.1 and insured by Respondent-2. Hence, Respondent Nos.1 & 2 are jointly and severally liable to pay to the Claimant compensation of Rs.6,07,600/-. It is to be noted that the Claimant had converted the petition under Section 166 of the Act pursuant to the remand order, hence, she would be entitled for interest from the date of amendment i.e. 01/09/2014. Under the circumstances and in view of the discussions supra, the following order is passed :

ORDER

- i.** The appeal is allowed.
- ii.** The impugned judgment and award, dated 08/10/2014 passed in M.A.C.P. No.54/2007 is set aside.
- iii.** The Claimant is held to be entitled for compensation of Rs.6,07,600/- with interest at the rate of 7% per annum from 01/09/2014 till the date of final realization.
- iv.** The Respondent-Insurance Company is directed to deposit the amount of compensation before the Tribunal within a period of three months.
- v.** The Tribunal to disburse the amount along with interest in favour of the claimant.
- vi.** The appeal stands disposed of with no order as to costs.

(SMT. ANUJA PRABHUDESSAI, J.)