THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 2892 of 2018

The New India Assurance Co. Ltd.
Through its Divisional Manager,
Adalat Road Aurangabad.
Through its authorised signatory,
Sr. Div. Manager,
Aurangabad D. O. Legal Hub, Aurangabad. **… APPELLANT** /
Orig. Resp. No.4

VERSUS

1. Vijay Pandurang Deshmukh Died
Through L.Rs.
Jamwantabai Pandurang Deshmukh,
Age 75 yrs, Occ. Household,
R/o Room No. E-12- S.T. Colony,
Bhusawal Road, Jalgaon Dist. Jalgaon. Orig. Claimant.

2. Krishna s/o Roduba Phakre,
Age Major, Occ. Owner,
R/o Mondha Khurd, Tq. Sillod,
Dist. Aurangabad.

3. Kashinath S/o Bhagaji Jadhav,
Age 45 yrs, Occ. Driver,
R/o Bharadi, Tq. Sillod,
Dist. Aurangabad.

4. Shaikh Samdani S/o Shaikh Rabbani,
Age 52 yrs, Occ. Owner and Driver,
R/o Mangrool, Tq. Sillod,
Dist. Aurangabad. **… RESPONDENTS** /
Orig. Claimant & Resp. Nos.1 to 3

AND

FIRST APPEAL NO. 2453 of 2018

The New India Assurance Co. Ltd.
Through its Divisional Manager,
Adalat Road Aurangabad.
Through its authorised signatory,
Asst. Manager, Legal Hub,
Aurangabad D. O. Aurangabad. … **APPELLANT** /
Orig. Resp. No.4

VERSUS

1. Vimal W/o Damu Borde,
Age 52 yrs, Occ. Labour,
R/o Mangrool, Tq. Sillod,
Dist. Aurangabad. Orig. Claimant.

2. Krishna s/o Roduba Phakre,
Age Major, Occ. Owner,
R/o Mondha Khurd, Tq. Sillod,
Dist. Aurangabad.

3. Kashinath S/o Bhagaji Jadhav,
Age 45 yrs, Occ. Driver,
R/o Bharadi, Tq. Sillod,
Dist. Aurangabad.

4. Shaikh Samdani S/o Shaikh Rabbani,
Age 52 yrs, Occ. Owner and Driver,
R/o Mangrool, Tq. Sillod,
Dist. Aurangabad. … **RESPONDENTS** /
Orig. Claimant & Resp. Nos.1 to 3

…

Mr. Dhananjay P. Deshpande, Advocate for Appellant, in both appeals.

Mr. P. C. Mayure, Advocate for Respondent No.1, in both appeals

Mr. M. S. Deshpande, Advocate for Respondent Nos.2 & 3, in both appeals. (Absent)

Mr. S. N. Deshmukh, Advocate for Respondent No.4, in both appeals (Absent)

…

CORAM : **SHRIKANT D. KULKARNI, J.**

RESERVED ON : 10th January, 2022.

PRONOUNCED ON : 25th April, 2022.

ORDER:

. The insurance company has preferred these two appeals against two impugned judgment and award passed by the Motor Accident Claims Tribunal, Aurangabad, however, arising out of same accident. Hence, both the appeals are being disposed of by common order at admission stage with consent of both the sides.

2 On 24th March, 2012, Partibha Warpe (since deceased) and Vimal Borde were travelling in Ape-rickshaw bearing registration No.MH-21-M-2381 from Mangrool to Sillod on Ajanta-Sillod road. The Ape-rickshaw reached near Amol Dhaba about 10:00 a.m. when tractor bearing registration No.MH-28-B-4049 with trolley No.MH-20-AB-9230 came to its wrong side and gave dash to the Ape-rickshaw coming from opposite side and resulted into an accident. Partibha Warpe sustained serious injuries and she was shifted to the

Government Hospital at Sillod when she was declared dead on the same day. Whereas Vimal Borde (injured) sustained injuries in the accident. She was also taken to the Government Hospital at Sillod for medical treatment. On the basis of complaint given by Police Head Constable Ashok Jawale, FIR came to be registered against the driver of tractor. Spot *Panchanama* and other investigation was conducted.

3 Heard Mr. Dhananjay Deshpande, learned counsel for appellant/insurance company and Mr. P. C. Mayure, learned counsel for respondent No.1/original claimant, in both the appeals.

4 Mr. Deshpande, learned counsel for insurance company vehemently submitted that deceased Partibha Warpe and injured Vimal Borde were travelling in Ape-rickshaw as fare paying passengers. He submitted that insurance policy of Ape-rickshaw is that of private car policy. It specifically excludes fare paying passengers. At the time of accident, Ape-rickshaw was being used commercially by the owner without permit and therefore, risk of the deceased and injured are not covered by the policy. The Tribunal has not considered all these aspects and allowed the claims. He, therefore, urged to allow the appeals preferred by the insurance company.

5 Mr. Deshpande has placed his reliance in case of ***Mangla Ram Vs. Oriental Insurance Company Limited and others***, reported in, ***(2018) 5 Supreme Court Cases 656***.

6 Per contra, Mr. P. C. Mayure, learned counsel for claimants supported the findings recorded by the Tribunal. He submitted that the Tribunal has considered the defence raised by the insurance company and turned down the same. He submitted that no evidence was produced by the insurance company in order to show that deceased Partibha Warpe and injured Vimal Borde were travelling in the Ape-rickshaw as fare paying passengers. He submitted that the Ape-rickshaw was having private car policy at the time of accident and it covers the risk of occupants. Mr. Mayure submitted that no case is made out by the insurance company to interfere with the impugned judgment and award passed by the Tribunal. There is no merit in the appeals. He further submitted that in view of the provisions of Section 166 of the Motor Vehicles Act, 1988, mother-in-law of the deceased can prosecute the claim and appeal. He has placed his reliance in case of ***N. Jayasree and others Vs. Cholamandlam MS General Insurance Company Limited***, reported in, ***(2021) 12 SCALE 585***.

7 Mr. Mayure submitted that the case in hand is a case of composite negligence. It is a case of liability of joint tort feasors. The claimant can sue both or any one of joint tort feasors and recover amount. He has placed his reliance in case of ***Khenyei Vs. New India Assurance Co. Limited and Ors***, reported in, ***2015 AIR SCW 3169*** (Supreme Court). He, therefore, urged to dismiss both the appeals.

8 Perused the impugned judgment and award passed by the Tribunal in MACP No.622 of 2012 and MACP No.674 of 2012 and the evidence produced before the Tribunal. I have considered the submissions made by the learned counsel for both the sides.

9 The insurance company/appellant in both the appeals has raised defence that deceased Partibha Warpe and injured Vimal Borde were travelling in the Ape-rickshaw as fare paying passengers, which was not permissible and their risk is not covered. On going through the insurance policy of Ape-rickshaw vide Exhibit-52, it is noticed that it is a private car package policy. The insurance company has not examined any witness in order to prove its defence that deceased Partibha Warpe and injured Vimal Borde were travelling in the Ape-rickshaw as fare paying passengers. Mere raising defence in

the written statement is not any way sufficient. It requires evidence to prove the defence. The insurance company has failed to prove its defence for want of evidence. Apart from that, as pointed out earlier, the Ape-rickshaw had private car package policy. In absence of any evidence from the insurance company that deceased Partibha Warpe and injured Vimal Borde were travelling in Ape-rickshaw as fare paying passengers, their risk is covered as being occupants in view of private car package policy. The occupants (deceased Partibha Warpe and injured Vimal Borde) fall in the definition of third-party in absence of any contrary evidence.

10 Moreover, it is a case of composite negligence. It is for the claimants to sue both or any one of joint tort feasors as held in case of ***Khenyei Vs. New India Assurance Co. Limited and Ors*** (supra).

11 So far as issue of prosecuting the claim in MACP No.622 of 2012 at the hands of mother-in-law is concerned, it can be entertained. The mother-in-law falls in the definition of legal representative of the deceased, who can lodge a claim for compensation under the provisions of the Motor Vehicles Act. In MACP No.622 of 2012, after death of Partibha, the claim was filed by

her husband Vijay and after the death of Vijay, his mother (mother-in-law of deceased) has prosecuted the claim. There is no legal defect in view of citation in case of ***Montford Brothers of St. Gabriel and another Vs. United India Insurance and another etc.***, reported in, ***(2014) 3 SCC 394****,* wherein it is held by the Honorable Supreme Court as under:

> "8. The only issue noted above requires to look into Section 166 of the Motor Vehicles Act, 1988, (hereinafter referred to as 'The Act'). Sub- section (1) of Section 166 is relevant for the purpose. It provides thus:
>
> > 166. Application for compensation: (1) An application for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 165 may be made–
> >
> > (a) by the person who has sustained the injury; or
> >
> > (b) by the owner of the property; or
> >
> > (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
> >
> > (d) by any agent duly authorised by the person inured or all or any of the legal representatives of the deceased, as the case may be:

> Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as Respondents to the application.

9. The Act does not define the term “legal representative” but the Tribunal has noted in its judgment and order that clause (C) of Rule 2 of the Mizoram Motor Accident Claims Tribunal Rules, 1988, defines the term ‘legal representative’ as having the same meaning as assigned to it in clause (11) of Section 2 of the Code of Civil Procedure, 1908, which is as follows:

> “Section 2(11) ‘Legal representative’ means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

10. From the aforesaid provisions it is clear that in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically

> an issue of fact and may be decided one way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claiming to be a legal representative has the locus to maintain an application for compensation u/s 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue."

12 As such, the claim prosecuted by the mother-in-law of the deceased cannot be said to be defective in the eye of law.

13 In case of ***Mangla Ram Vs. Oriental Insurance Company Limited and others*** (supra), it is held by the Honorable Supreme Court that reappreciation of evidence at appellate stage is permissible if findings of Court below are perverse or there are apparent errors on the face of record.

14 On studying the impugned judgment and award passed by the Tribunal, I do not see any manifest error on the part of the Tribunal while recording the findings. The findings are based upon evidence. The insurance company has miserably failed to prove its defence for want of evidence. I do not see any error on the part of the Tribunal while allowing the claims partly.

15 While deciding a claim petition under Section 166 of the Motor Vehicles Act, 1988, Tribunal is not bound by the pleadings of the parties. It is the function of the Tribunal to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of the driver of motor vehicle. The Tribunal needs to take a holistic view of the matter. Strict proof is not necessary. A summery inquiry is contemplated under the Motor Vehicles Act, 1988. Having regard to the above reasons and discussion, I do not find any merit in the appeals preferred by the insurance company. Hence, the following order is passed:

O R D E R

I. Both appeals stand dismissed.

I. No order as to costs.

III. In view of dismissal of first appeals, pending civil applications, if any, also stand disposed of.

IV. R & P be sent back to the concerned Tribunal.

[SHRIKANT D. KULKARNI, J.]

nga