IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1449 OF 2004

1. Bhagwan Natu Patil
Age : 56 years, occ : service

2. Mangalabai w/o Bhagwan Patil
Age : 51 years, occ : household
Both r/o 30, Laxmi Nagar,
Deopur, District Dhule. Appellants
(original petitioners)

Versus

1. Rajendra Thansing Rajput
Age : 35 yrs, occ : service
R/o Varshi, Taluka Sindkheda,
District Dhule

2. Ramesh Anandrao Patil
Age : major, occ : agri.,
R/o Shirud, Taluka Dhule,
District Dhule.

3. Oriental Insurance Co. Ltd.
Through Branch Manager,
Oriental Insurance Co. Ltd.,
Lane No.2, Dhule. Respondents
(original respondents)

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Mr. R.B. Temak, Advocate for the appellants.
Mr. A.H. Korhalkar, Advocate for respondent Nos.1 and 2.
Mr. M.K. Goyanka, Advocate for respondent No. 3.

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CORAM : **SANDIPKUMAR C. MORE, J.**

Judgment Reserved on : 16.02.2023.
Judgment pronounced on : 26.04.2023.

Judgment :

1. The appellants being the parents of deceased Deepak Bhagwan Patil, who died in motor accident on

14.07.1999, have challenged the judgment and award dated 10.02.2004 passed by the learned Member, Motor Accident Claims Tribunal, Dhule (hereinafter referred to as the “learned Tribunal”) whereby their Motor Accident Claim Petition No.1025/1999 has been dismissed.

2. Deceased Deepak, who born on 01.07.1970, was unmarried son of the appellants-claimants. On 14.07.1999 he was coming to Varshi from Nardana on a motorcycle bearing registration No. MH-18-B-2754 as a pillion rider. The present respondent No.1 was riding the said motorcycle which was owned by present respondent No.3 Ramesh Patil and insured with respondent No.3 – Insurance Company. At about 11.00 p.m. one unknown truck gave dash to the said motorcycle from backside, and therefore, respondent No.1 and as well as Deepak both sustained injuries. The said truck fled from the spot and when Deepak was shifted to Civil Hospital, Dhule, he succumbed to the injuries sustained by him. Therefore, the appellants filed the aforesaid claim petition.

3. Before the learned trial Court respondent Nos.1 and 2 did not file written statement despite appearance, whereas respondent No.3 Insurance Company opposed the claim petition vide written statement (Exh.16) mentioning that

the accident had taken place due to dash given by unknown truck and nothing was on record that the motorcycle rider i.e. respondent No.1 was at fault. According to it, the motorcycle involved in the accident was not being driven negligently or rashly, and therefore, the Insurance Company denied its liability of paying compensation. The learned Tribunal, after trial, dismissed the claim petition and hence this appeal.

4. Learned Counsel for the appellants submits that though the First Information Report (F.I.R.) indicates that dash to the motorcycle involved in the accident was given by unknown truck from backside, but the spot panchnama indicates that the said dash was given by unknown truck to the said motorcycle when it was being driven from middle portion of the road, and therefore, respondent No.1 i.e. the rider of the said motorcycle was also negligent. He claimed that the learned Tribunal wrongly dismissed the claim by holding that negligence of motorcycle rider was not proved and the accident took place due to dash given by unknown truck. He relied on the following judgments :

(i) ***Kaushnuma Begum (Smt) and others vs New India Assurance Co. Ltd., (2001) 2 SCC 9***

(ii) ***Ajay Ramesh Bhoir vs Avinash Shantaram Jodial Shrivane & another, 2004 (2) Bom.C.R. 36***

(iii) Lalita vs Laxmansingh and another, 2021 SCC Online Bom 374

5. On the contrary, learned Counsel for respondent Nos. 1 and 2 opposed the claim of the appellants and supported the impugned judgment. He prayed for dismissal of the appeal.

6. On the other hand, learned Counsel for respondent No.3 - Insurance Company strongly opposed the submissions made on behalf of the appellants. He pointed out that there was no negligence on the part of respondent No.1, and therefore, the Insurance Company is not liable to pay the compensation. Further, he submits that though the motorcycle involved in the accident was insured with respondent No.3 Insurance Company at the time of accident, but it was only under "Act Policy" not covering the risk of pillion rider. Thus, he submitted that even if this Court comes to the conclusion that the motorcycle rider was negligent, but considering the conditions of policy, respondent No.3 needs to be exonerated from paying the compensation. In support of his submission, learned Counsel for the Insurance Company relied on the judgment in the case of ***Oriental Insurance Company Limited vs Sudhakaran K.V. and***

others reported in ***(2008) 7 Supreme Court Cases 428***.

7. Heard rival submissions. Also perused entire oral and documentary evidence alongwith the impugned judgment.

8. On perusal of the impugned judgment, it appears that though the learned Tribunal has computed the quantum of compensation, but has dismissed the claim mainly on the ground that the appellants failed to establish the negligence of motorcycle rider i.e. respondent No.1, and therefore, dismissed the claim. There is no dispute about age and earning of deceased Deepak. Further, it is also not in dispute that the motorcycle involved in the accident was being driven by respondent No.1 and respondent Nos.2 and 3 respectively were the owner and insurer of the same at the time of accident. Therefore, only the question for consideration in this appeal is whether Deepak Patil died due to rash and negligent driving of the motorcycle by respondent No.1.

9. Learned Counsel for the appellants heavily relied on the judgments as mentioned above. However, the judgment in the case of ***Kaushnuma Begum vs New India Assurance Co. Ltd.*** (supra) is on the point that if the

negligence of driver of offending vehicle is not established, then also the victim of the accident can be compensated by awarding compensation as per Second Schedule to Section 163-A of the Motor Vehicles Act, 1988. However, in the instant case the appellants are claiming negligence of motorcycle rider who was riding the motorcycle from the centre of the road. As such, the case in hand is somewhat similar to the case of ***Lalita vs Laxmansingh*** (supra) as relied by the appellants. In the said judgment it is observed by this Court in para Nos.9, 10, 11, 14 and 15 as follows :

> *"9] 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'.*
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> *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.*
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> *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 inplead 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 ection 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).

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 that 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 happenedwithout 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."

10. From the aforesaid observation, it has been made clear that though the claimants have not proved the issue of negligence, the principle of *res ipsa loquitur* can be applied to ascertain the negligence of the rider of vehicle as claimed by the claimants. Further, the aforesaid observations also indicate that the Tribunal must ascertain the true facts by holding an enquiry as contemplated by Section 168 (1) of the M.V. Act. Moreover, it is also observed that though burden is

on the claimant to prove negligence of driver of offending vehicle, but in exceptional cases it may not be possible for the claimant to discharge such burden by adducing direct evidence, and therefore, keeping in mind that the standard of proof in such proceedings is not a proof beyond reasonable doubt, such difficulty can be avoided by applying principle of *res ipsa loquitur* by not expecting the claimants to prove the issue of negligence.

11. In the instant case, it is the case of the appellants that respondent No.1 i.e. rider of the motorcycle involved in the accident was driving the said motorcycle in rash and negligent manner and also in high speed & by such rash and negligent driving when he came to the centre of the road, one unknown truck gave dash to the said motorcycle from backside. It is evident that the F.I.R. at Exh.22 as well as spot panchnama at Exh.23 indicate that one unknown truck had given dash to the said motorcycle from backside and therefore, the Tribunal attributed entire negligence to the truck driver of that unknown truck and dismissed the claim. It is significant to note that PW-1 i.e. father of deceased was not an eye witness to the accident. In fact, no eye witness to the accident has been examined by the appellants. However,

the panchnama (Exh.23) indicates that the motorcycle bearing registration No. MH-18-B-2754 was found lying on the right side of the road and the said road was 7 metre in width. Further, there was speed braker at a distance of 5 ft. from the place where the said motorcycle was found lying on the road. The panchnama (Exh.23) further indicates that at the spot of incident there were brake marks of unknown truck vehicle. Thus, though there is no direct evidence of eye witness in respect of the accident, but from the position in spot panchnama (Exh.23) as mentioned above, it can safely be inferred that though the said truck had given dash to the motorcycle from background, but the driver of said truck, by applying the brakes, had tried to avoid the accident. The position of the motorcycle involved in the accident reflected from the panchnama by itself indicates that it was in the centre of the road. Further, the presence of speed braker on the spot of the accident may lead to an inference that the motorcycle rider was in high speed and might have applied brakes suddenly after noticing the said speed braker, and therefore, the truck coming from backside must have given dash to the said motorcycle. As such, the aforesaid facts thus indicate that respondent No.1 was negligent in driving the said motorcycle in rash and negligent manner. Therefore, even if it is considered to be a case of composite negligent, the parents of the deceased are entitled for compensation from respondent nos.1 and 2 being the joint tort-feaser.

12. It appears that the learned Tribunal has assessed the compensation to the tune of Rs. 3,70,392/- inclusive of the “no fault liability” amount of Rs. 50,000/- which appears to be paid by respondent No.3 – Insurance Company. However, the multiplier of “11” which is based on the average age of the parents of deceased, who are the appellants, is wrongly applied since it is now settled that the multiplier is to be applied by considering the age of deceased. Further, there is also wrongful deduction of one-third from the salary of deceased on account of personal expenses specially when the deceased was unmarried. Moreover, the compensation needs to be determined afresh in the light of the latest judgments in the cases of ***Smt. Sarla Verma vs Delhi Transport Corporation*** reported in ***(2009) 6 SCC 121***, ***National Insurance Co. Ltd vs Pranay Sethi and others*** reported in ***(2017) 16 SCC 680*** and ***Magma General Insurance Co. Ltd. vs Nanu Ram*** reported in ***(2018) 18 SCC 130***.

13. It is not in dispute that deceased Deepak was getting salary of Rs. 4,384/- per month as reflected from the

salary certificate (Exh.30). Thus, his annual income was Rs.52,608/-. If the professional tax of Rs. 2100/- per annum at the relevant time is deducted from the aforesaid annual income, then his actual annual income comes to Rs.50,508/-. Since the deceased was in regular service, the future prospect at the rate of 50% needs to be added in the aforesaid annual income. Thus, the annual income of deceased comes to Rs.75,762/- (50,508 + 25,254/-). We have to deduct one-half amount from the aforesaid income on account of personal expenses since the deceased was bachelor. Thus, after such deduction, his annual income comes to Rs. 37,881/-. Considering the age of deceased as 22 years, the multiplier of “18” has to be applied as per the case of ***Sarla Verma vs Delhi Transport Corporation*** (supra). On applying such multiplier, the compensation amount comes to Rs. 6,81,858/-. We have to add parental consortium to the extent of Rs. 40,000/- each and an amount of Rs. 15,000/- each on account of loss of estate and funeral expenses, as directed by the Hon’ble Apex Court in the case of ***National Insurance Co. vs Pranay Sethi and Magma General Insurance Co. vs Nanu Ram*** (supra)k. On addition of these amounts, the final compensate which is to be awarded to the appellants – claimants comes to Rs.7,91,858/-. Since the compensation is determined in the current year i.e. 2023, the rate of interest which would be applicable to the aforesaid compensation, will be 6% per annum from the date of petition till its realization. As such, the appellants are now entitled for total compensation of Rs.7,91,858/- alongwith the interest at the rate of 6% per annum from the date of petition till its realization.

14. Now I come to the most crucial question i.e. who is liable to pay the aforesaid compensation to the appellants-claimants. The learned Counsel for respondent No.3 – Insurance Company, by his submissions, has already pointed out that since the motorcycle involved in the accident was insured with respondent No.3 under "Act only" policy, there cannot be any liability for the Insurance Company to pay the aforesaid compensation as the deceased being a pillion rider was not covered under the policy (Exh.36). On perusal of the said policy (Exh.36), it is clearly evident that it is "Act only" policy. Further, it appears that no premium had been accepted from respondent No.2 i.e. the owner of the said motorcycle for covering the risk of himself or the driver and pillion rider. There is only liability to public i.e. the third party by accepting the premium of Rs. 77/- to that effect. Thus, the policy (Exh.36) clearly indicates that the risk of

owner / driver or the pillion rider was not at all covered. The learned Counsel for respondent No.3 Insurance Company heavily relied on the judgment in the case of ***Oriental Insurance Co. Ltd vs Sudhakar K.V.*** (supra). The Hon'ble Apex Court in the aforesaid case has made the following observations :

> *"A distinction has to be made between a contract of insurance in regard to a third party and the owner or the driver of the vehicle. In terms of Section 147 of the Act a contract of insurance must be taken by the owners of the vehicle only in regard to reimbursement of the claim to a third party. Section 147 is imperative in nature. When, however, an owner of a vehicle intends to cover himself from other risks; it is permissible to enter into a contract of insurance in which event the insurer would be bound to reimburse the owner of the vehicle strictly in terms thereof. The liability of the insurer to reimburse the owner in respect of a claim made by the third party, thus, is statutory whereas other claims are not.*
>
> *The provisions of the Act and, in particular, Section 147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third party risk. A contract of insurance which is not statutory in nature should be construed like any other contract.*
>
> *a gratuitous passenger in a goods carriage would not be covered by a contract of insurance entered into by and between the insurer and the owner of the vehicle in terms of Section 147 of the Act. Tilak Singh case, (2003) 2 SCC 223, extended the said principle to all other categories of vehicles. In Tilak Singh case, on facts it was held that the Insurance Company concerned owed no liability towards the injuries suffered by the deceased who was a pillion-rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger.*
>
> *The law applicable in cases such as the present*

is that : (I) the liability of the instance company is not extended to a pillion-rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk; (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion-rider; (iii) the pillion-rider in a two wheeler is not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle.

In the present case the contract of insurance was entered into for the purpose of covering the third party risk and not the risk of the owner or a pillion rider. An exception in the contract of insurance has been made, i.e., by covering the risk of the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle. The contract of insurance did not cover the owner of the vehicle, certainly not the pillion rider. The deceased was travelling as a passenger, stricto sensu may not be as a gratuitous passenger as in a given case she may not be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby."

15. In the instant case also the contract of insurance clearly indicates that the risk of owner or pillion-rider is not covered, and therefore, the Insurance Company cannot be made liable for payment of aforesaid compensation. Therefore, in the instant case, only respondent Nos.1 and 2 are jointly and severally liable for payment of aforesaid compensation. Therefore, the observation of the learned Tribunal of exonerating respondent No.3 – Insurance Company from the liability of paying compensation appears lawful and

appropriate.

16. As such, taking into consideration all the aforesaid discussion, following order is passed.

ORDER

(i) The appeal is allowed only against respondent Nos.1 and 2 and the appeal against respondent No-3 Insurance Company stands dismissed.

(ii) Respondent Nos.1 and 2 shall jointly and severally pay the compensation of Rs.7,91,858/- (inclusive of the "NFL" amount) to the appellants alongwith interest at the rate of 6% per annum from the date of filing of the petition till its realization.

(iii) The appellants are directed to pay the deficit court-fees on the compensation amount within three months after it is computed by the office.

(iv) The appellants shall be at liberty to withdraw the amount of compensation, if deposited by the respondent Nos.1 and 2.

(v) Award be drawn accordingly.

(vi) The direction of learned Tribunal to recover the amount of Rs.50,000/- paid by respondent No.3 – Insurance Company under Section 140 of the Motor Vehicles Act as per the principle of "no fault liability" from respondent No.2, is kept as it is.

(vii) The appeal is disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)

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