IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 21 OF 2023
WITH CA/352/2023 & CA/5190/2023

New India Assurance Co. Ltd **...APPELLANT**
Through its Divisional Manager,
Ajay Engg. Compound, Adalat Road,
Kranti Chowk, Aurangabad,
District – Aurangabad.
Through its Authorized Officer
(Orig. Respondent No.2)

VERSUS

1] Shobhabai W/o Sheshrao Warkad ...**RESPONDENTS**
Age : 52 years, Occu. Household,
R/o. Gawaliwada, Daulatabad,
Taluka & Dist. Aurangabad.

2] Gajarabai W/o Laxman Warkad
Age : 84 years, Occu. Household,
R/o. As above. ..Orig. claimants

3] Appasaheb Sheshrao Warkad
Age :45 years, Occu. Business,
R/o. As above. ..RESPONDENTS

Mr. Swapnil S. Rathi, Advocate for the appellant
Mr. Ravindra V. Gore, Advocate for the respondent Nos. 1 and 2

CORAM : KISHORE C. SANT, J.
RESERVED ON : 22-11-2024
PRONOUNCED ON : 22-01-2025

P. C.

1. This appeal is by the insurer challenging the judgment and award passed by the learned Member, MACT, Aurangabad in MACP No.329/2019. Respondent Nos. 1 and 2 are the original claimants-parents of the deceased. Respondent No.3 is the owner of the vehicle allegedly involved in an accident in which the deceased died, he also happens to be brother of the deceased. The learned tribunal has partly allowed the claim petition and directed the present appellant and respondent No.3 to jointly and severally pay an amount of Rs.9,77,200/- alongwith interest @ 6.5 p.a. from the date of application.

2. Facts in short are as below:

a] That on 29-12-2018 the deceased was working on a brick kiln in the field near heap of soil. At around 03.30 pm to 04.00 pm another brother of the deceased was driving the vehicle. He took the vehicle in reverse. While taking vehicle in reverse he dashed heap of the soil. The soil fell on the deceased due to which the deceased Sunil died. Respondent No.3 was engaged in the business of brick-kiln. The deceased was brought to the CIGMA hospital at Aurangabad. There he was declared dead. The MLC was sent to the Jawahar Nagar Police Station. Initially though MLC was registered, thereafter enquiry was handed over on 19-01-2019 to the Khultabad Police Station. One Ganesh thereafter gave information to the police and on the basis of statement a crime came to be registered bearing No. 26/02-019.

b] The claimants filed a claim petition stating that the accident took place due to vehicular accident which was insured with the present appellant. The deceased was earning Rs.15,000/- per month. The deceased and the owner of the vehicle and his brother were residing separately.

c] The defense of the appellant was about the income of the deceased. It is further defense that the deceased did not die in vehicular accident. The claim is filed with collusion with respondent No. 3 and theory is developed that the deceased died because of the dash given by the vehicle to the heap of the soil.

d] The learned tribunal held that the deceased died in vehicular accident. The notional income of the deceased is held to be Rs.6000/-. By applying multiplier of 18 the award came to be passed. Thus, the appellant is before this court.

3. This court has perused the record and proceeding.

4. Mr. Rathi, the learned advocate vehemently argued the appeal. In a statement of another brother namely Dadasaheb it is clearly stated that the deceased was working on the brick-kiln and while working, the heap of soil fallen on him. Even in the AD registered at Jawahar Nagar Police Station, it was recorded that the deceased died because of falling of the soil on his person. For the first time on 24-01-2019 Ganesh who was working as coworker with the deceased lodged the report. It is stated that because of the dash given by the vehicle, heap of soil fall on the person of the deceased. He thus submits that till that

date no involvement is shown of any vehicle. Even brother Dadasaheb did not make any reference to the vehicle. On 29-01-2019 the statement of Appasaheb was recorded. At that time he mentioned about the involvement of the vehicle. He thus submits that entire case is concocted, just to claim the compensation, now the theory is invented. The spot panchanama does not record any tire marks of the vehicle. It is mentioned that heap of soil was 20 feet high. The said panchanama was drawn on 24-01-2019. The learned court below failed to appreciate the defense of the insurance company. The learned Member of the tribunal has placed the burden to prove the fact on the insurance company. No negative burden could have been placed upon the appellant. Findings recorded is perverse etc.

5. The learned advocate for the appellant relies upon the judgment reported in *2018 SC AIR 612 in the case of Anil and others Vs New India Assurance Co.Ltd. and others* and *2019 DGLS (Bom) 865 in the case of Shriram Insurance Company*

Ltd. Vs Vanita Dhanaji Marekar and others and on the judgment of this court in the *appeal No. 2829/2015 in the case of New India Assurance Co. Ltd. and others Vs Ashalata Suryakant Patil and others* and prays to allow the appeal.

6. Mr. Gore, learned advocate for the respondent vehemently opposed the appeal. He submits that the statement of the Dadasaheb was hearsay and therefore, need not be relied upon. Whereas the statement of the Ganesh needs to be relied upon, as he was the witness to the incident. Till the time Ganesh made a statement no enquiry was made with him and therefore there was no occasion for him to give any statement. The statement was recorded during the course of the investigation of the AD. Considering the object of section 166 of the M. V. Act the court has to consider preponderance of probabilities. The court has rightly drawn the conclusion. The Statement of Dadadasheb recorded at Exh.33 was hearsay evidence and therefore, cannot be relied upon. There is delay in lodging the FIR that by itself cannot be a reason to disbelieve the story. The learned trial court

has summoned Investigating Officer. However, the insurance company could not secure his presence. The insurance company could have examined the Investigation Officer in support of their defense. He submits that story of falling of the heap of the soil is consistent and there is nothing on record to disbelieve the said story. He relied upon the judgment reported in *(2022) 10 SCC 512 Janabai Wd./o. Dinkarrao Ghorpade and others Vs ICICI Lomabard Insurance Company Ltd., 2024 SCC Online SC 2883 in the case of Sajeena Ikhbal and others Vs Mini Babu George and others*. He submits that the learned trial court has rightly appreciated the evidence on record and has allowed the claim petition. No interference is called for. Thus, he prays for dismissal of the appeal.

7. The facts which are not disputed are that the deceased died due to fall of heap of soil. He was immediately shifted to Hospital at Aurangabad. On the basis of information received by the police, at Jawahar Nagar Police Station, lodged the AD and subsequently transferred to Khultabad Police

Station. In the AD what is stated is only that deceased died due to fall of heap of soil on him. It is only during the course of the investigation of the AD, the statement of the Ganesh came to be recorded, who for the first time, stated to the police that when he himself and the deceased were working near the heap of the soil on the brick-kiln, one vehicle gave dash while coming in reverse direction to the heap of the soil and in that incident the deceased died. Till the date of recording statement of Ganesh there is no involvement of any vehicle shown. The earlier statement was of brother. He did not mention of involvement of any vehicle, even respondent No. 3 did not make any such statement before the police, even he made a statement for the first time on 29-01-2019. The submission of Mr. Rathi is thus correct to the extent that for the first time involvement of the vehicle was mentioned in the statement of Ganesh on 24-01-2019 at Exh.22. A question naturally comes as to why both the brothers did not mention the involvement of the vehicle. Ganesh was cross examined. The suggestions are put to the Ganesh that soil fallen on the person of the deceased when they both were digging soil. The said suggestion is denied. He accepted that he did not go to the police station for recording the statement. He also denied that he did not see the incident and he is deposing false. So far as the evidence of respondent No.1 is concerned, it is only in respect of her dependency, about the income etc. The insurance company has not examined any witnesses in support of its case.

8. While considering the judgment this court finds that the learned tribunal dealt with the submissions of the insurance company. So far as the delay is concerned, the court held that as there was death in the family they could not immediately lodge the complaint. About Ganesh it is held that no complaint could be lodged immediately. His statement was not recorded immediately. That itself would not be fatal to the case of the claimants. The delay in lodging the report or lodging the FIR would not be material. So far as the judgment in the case of *Anil and others (supra)* the Hon'ble Apex Court considered that in that case the High Court had noted various disturbing facts from

the case of complainant. In that case no postmortem was conducted. There was delay in lodging the FIR of more than one month. The evidence of the driver was totally unbelievable in view of the contrary statements, it was held that there was nothing to show that the person died in an accident. One fact is similar in that case that brother of the owner only died in an accident and no compliant was lodged for nearly one month. Nature of injuries as per the hospital record did not suggest that death occurred due to accident and in that view it was held that high court had rightly set aside the award.

9. In the case of *Shriram Insurance Co. Ltd. (supra)* this court had considered the factors like delay in lodging the complaint. The complainants had failed to cross-examine the Investigating Officer as no panchanama was drawn immediately. In that case the accident took place on 27-05-2011 and the panchanama was prepared on 21-06-2011. No offence was immediately lodged against the driver of the vehicle. The eye witness did not show the spot immediately to the police. It was

held that all these circumstances create doubts and in that view the appeal of the insurance company was allowed. In the case of *New India Assurance Co. Ltd. (supra)* this court held that unless there is material in the investigation papers to connect the offending vehicle with the death of the deceased then no conclusion can be drawn, that merely because of filing of the charge-sheet against the driver that the offending vehicle was involved in the accident. There has to be some prima facie material to show the involvement of the offending vehicle in the accident and the appeal of the insurance company was allowed.

10. So far as the judgment relied upon by the respondents are concerned in the case of *Janabai Wd/o. Dinkarrao Ghorpade (supra)* owner of the vehicle had appeared as witness and admitted that vehicle was involved. It was held that no strict proof is required in the case under M. V. Act as required in criminal trial while deciding the application under Section 166. The proceeding under Section 166 of the M. V. Act is summary in nature and held that to prove the accident no

strict proof is required. In the case of ***Sajeena Ikhbal and others (supra)***, the tribunal had disbelieved the eye witness. For the reasons that in the investigation, this eye witness was not examined, who deposed about the involvement of the car in the accident. There was abundant evidence available pointing out the fact of involvement of the car. The Hon'ble Apex Court in that case set aside the findings of the tribunal and the high court so far as the non involvement of the car in an accident. It was held that the deceased died as a result of the accident.

11. Considering the judgments this court finds that the judgments relied upon by the appellant are on the points involved in this case whereas the judgments of the respondents are not on the points. From the nature of the evidence in this case, it is clearly seen that there is nothing on record to connect the vehicle with an accident except the statement that was recorded much after the incident. Conspicuous silence of both the brothers of the deceased including the owner of the vehicle-respondent No. 3 speaks volums. When brothers have

knowledge, it is the question as to why they could not speakup and inform this fact to the police. The learned Member expected the insurance company to prove the non-involvement of the vehicle in an accident. This court finds that no such burden could have been placed upon the insurance company. It was necessary for the claimants to at least prima facie show the involvement of the vehicle. The panchanama was drawn much after the incident and naturally is not sufficient to prove the involvement of the vehicle. For all these reasons, this court is persuaded to hold that there is no material on record to show the involvement of the vehicle alleged. The learned Member of the tribunal has thus committed mistake in holding the insurance company liable for compensation and in allowing the claim petition. Therefore, impugned order deserves to be set aside. Thus, the impugned judgment and award stands quashed and set aside. No order as to costs.

[KISHORE C. SANT, J.]

LATER ON:

1. The learned advocate for the appellant submits that entire amount is deposited in the office of this court in view of order dated 11-01-2023.

2. Office to refund the said amount to the insurance company alongwith accrued interest.

3. In view of disposal of the First Appeal, pending civil applications do not survive and disposed off.

[KISHORE C. SANT, J.]

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