IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.2333 OF 2018
WITH
CIVIL APPLICATION NO.13339 OF 2018

The New India Assurance Company Ltd.,
D.O. No.1 Adalat Road, Aurangabad,
Through its Authorized Signatory
Achyut s/o Purushottam Kulkarni,
Age: 56 years, Occu: Service,
R/o: Aurangabad.

... Appellant
[Orig. Resp. No.3]

Versus

1. Smt. Jyoti w/o Ashok Thorat
   Age: 43 years, Occu: Household,
   R/o: N-11, F-2/8, A-122,
   Navjeevan Colony, Hudco,
   Aurangabad.

2. Akansha D/o Ashok Thorat
   Age: 22 years, Occu: Education
   R/o: N-11, F-2/8, A-122,
   Navjeevan Colony, Hudco,
   Aurangabad.

3. Sachin s/o Ashok Thorat
   Age: 21 years, Occu: Education
   R/o: N-11, F-2/8, A-122,
   Navjeevan Colony, Hudco,
   Aurangabad.

4. Popatrao s/o Ganesh Thorat
   Age: 68 years, Occu: Nil
   R/o: N-11, F-2/8, A-122,
   Navjeevan Colony, Hudco,
   Aurangabad.

5. Rukhaminibai w/o Popatrao Thorat
   Age: 65 years, Occu: Nil
   R/o: N-11, F-2/8, A-122,
   Navjeevan Colony, Hudco, Aurangabad

6. Ambadas s/o Tukaram Tatde
Age: 50 years, Occu: Business
R/o: N-12, D-40/6,
Swami Vivekanand Nagar,
Hudco, Aurangabad.

7. Nihal Ahmed Mohammad Nazir
Age: 45 years, Occu: Business,
R/o: House No.4/44-60 (P),
Rahemaniya Colony,
Kiradpura, Aurangabad. **... Respondents**
[Orig. Respondent Nos.1 & 2]

...

Mr. M. M. Ambhore, Advocate for the Appellant
Mr. D. B. Pawar, Advocate for respondent nos.1 to 5 [original claimants]
Mr. H. C. Puse, Advocate for Respondent No.6

...

CORAM : S. G. CHAPALGAONKAR, JJ.

RESERVED ON : 7th July, 2023
PRONOUNCED ON : 17th July, 2023

JUDGMENT:

1. The appellant / insurance company [original respondent no.3] impugns the judgment and award dated 06/04/2018, passed by the Motor Accident Claims Tribunal, Aurangabad [for short 'the Tribunal'], in Motor Accident Claim Petition [MACP] No.111/2016, by which, a claim petition filed by respondent nos.1 to 5 [original claimants] under Section 166 of the Motor Vehicle Act, 1988 [hereinafter referred to as 'the Act' for short] came to be allowed and compensation of Rs.24,84,480/- [Rupees Twenty Four Lacs Eighty Four Thousand Four Hundred and Eighty

Only] has been awarded to respondent nos.1 to 5. Hereinafter, parties are referred as per their original status before the Tribunal for the purpose of convenience and brevity.

2. The claimants had approached the Tribunal under Section 166 of the Act raising the claim for compensation of Rs.1,00,00,000/-[Rupees One Crore] from the owners of both the vehicles involved in the accident and insurer of Tavera car bearing Registration No. MH-20-AS-4089. The claimants contended that on 07/09/2015, the deceased-Ashok was driving his Swift car bearing Registration No. MH-21-S-1033 from Ahmednagar towards Aurangabad. When he reached near Rahimpur Fata, his car was dashed against road divider and went on the opposite strip of the road. At the same time, the Tavera car was proceeding from Aurangabad towards Ahmednagar. There was collision between two vehicles. The deceased [driver of Swift car] suffered fatal injuries. Similarly, the driver of Tavera car lost his life in the same accident. The incident was reported to Waluj Police Station leading to registration of Crime No.178/2015 against the deceased. The according to claimants, the driver of Tavera car was responsible for the accident. Deceased - Ashok was aged about 47 years and serving as a Police Constable at Aurangabad and earning salary of Rs.32,093/-. per month. The claimants were dependent on his income; hence they are entitled for compensation

from respondents i.e. owner and insurer of Tavera car.

3. The respondent no.1 [owner of Swift car] proceeded ex-parte. The respondent no.2 [owner of Tavera car] filed a written statement and objected maintainability of the claim on the ground that the deceased himself was responsible for the accident. The respondent no.3 – insurer filed written statement and denied the allegations regarding rash and negligent driving against the driver of insured car. It is pleaded that the deceased himself was responsible for the accident and the claimants have no cause of action to claim compensation from the owner and insurer of Tavera car.

4. The Tribunal framed the issues [Exhibit-22] based on pleadings of the parties. The claimants relied upon the evidence of PW-1 - Jyoti Ashok Thorat [Exhibit-23], FIR [Exhibit-26], spot panchanama [Exhibit-27], accident report of both the vehicles and a copy of charge-sheet [Exhibit-46] and closed the evidence. The Tribunal recorded finding on issue of negligence holding both drivers equally responsible for accident. Applying principles of contributory negligence, the Tribunal allowed the claim petition vide judgment and award dated 06/04/2018 and directed respondent nos.1 to 3 to jointly and severally pay the compensation of Rs.24,84,480/- along with interest @ 9% p.a.

5. The present appellant takes exception to aforesaid award of tribunal. The appeal was fixed for final hearing by the order of this Court dated 31/03/2022. The respective parties were permitted to file written notes of arguments. learned Advocates for the parties have also advanced their oral submissions.

6. Mr. Ambhore, learned Advocate appearing for the appellant – insurance company would submit that claimants have raised their claim under Section 166 of the Act, hence pleading and proof of negligence against respondents is *sine-quo-non*. They have relied upon a copy of FIR [Exhibit-26], copy of spot panchanama [Exhibit-27] and charge-sheet [Exhibit-46] to prove accident. The claimant no.1 – Jyoti examined herself before tribunal, however she is not an eye witness of the accident. The offence was registered against the deceased - Ashok Thorat for rash and negligent driving and even final report/ charge-sheet was filed against him. Therefore, he would submit that nothing is brought on record to prove negligence against insured car driver. The Tribunal without considering the evidence on record, cursorily observed that the drivers of both the cars were responsible. Such finding is perverse and based on no evidence. He would further submit that the Tribunal has earlier decided five claim petitions arising out of the same accident. In all those claim petitions, the finding of negligence is recorded against Swift car

Driver i.e. deceased - Ashok Thorat.

7. Relying upon the judgment of the Supreme Court of India in the matter of **Oriental Insurance Company Ltd. Vs. Premlata Shukla and Others** reported in **2007 AIR SCW 3591**, he would submit that the contents of FIR and spot panchanama relied by the claimants and admitted in the evidence by consent of the parties, would demonstrate sole negligence on the part of deceased. During police investigation, deceased was found to be responsible for the accident. Hence, the final report/charge-sheet was filed against him. Hence this is case of self-negligence of deceased. Claimants would have no cause of action against respondents to lay any claim for compensation as per scheme of the Act.

8. Mr. Ambhore, learned Advocate for the appellant has placed his reliance on the judgment of Supreme Court in the matter of **Surender Kumar Arora Vs. Manoj Bisla** reported in **2012 (4) SCC 552** to contend that the rule of tortuous liability applies in claims under Section 166 of the Act hence requirement of pleading and proof of negligence cannot be dispensed with. Since claimants have failed to lead evidence of negligence against the respondent / driver of Tavera car, the claim petition ought to have been dismissed.

9. Mr. Pawar, learned Advocate appearing for respondent nos.1 to 5/ original claimants would submit that only because offence was registered against the deceased, it cannot be presumed that he was sole responsible for the accident. He would submit that since a the vehicle of deceased toppled and went on the other side of the road. The Tavera car was proceeding from the opposite side in excessive speed and dashed to the car of the deceased. Consequently, the driver of Tavera car would also be equally responsible for the accident. The Tribunal took a pragmatic view of the matter and recorded finding of contributory negligence against the drivers of both the vehicles and accordingly, the liability to pay compensation to the extent of 50% of the has been fixed against the respondents.

10. Having heard the learned Advocates appearing for the respective parties and after considering the evidence on record, it is apparent that, unfortunate accident occurred when car driven by the deceased was toppled on four-lane highway and crossed the road divider. It went on other side strip of the road. The Tavera car proceeding from its side collided against the toppled car resulting into the death of inmates.

11. It is the trite that the liability under the provisions of Section 166 of the Act is based on principles of tort. The claimants have to establish

negligence of the respondents in the cause of accident and consequential loss of life suffered by the victim. The exception to this general rule is carved out under the provisions of 163-A of the Act, which entitles raising the claim without pleading and proof of the negligence. Similarly, Section 140 of the Act prescribes for the compensation on no fault liability. However, in a claim under Section 166 of the Act, the requirement of pleading and proof is not dispensed with either under statutory provisions or through the law of precedents. It is to be borne in mind that claimants have to establish claim on touch stone of preponderance of probability.

12. Pertinently, Supreme Court of India in the case of **Minu B. Mehta vs Balkrishna Ramchandra Nayan** reported in **1977 A.C.J. 118** discussed the nature of liability to pay compensation under the Act. Similarly, in the matter of **Lachooram Vs. Himachal Road Transport Corporation** reported in **2014 AIR SCW 1081** reiterated the principles of law governing the claims under Section 166 of the Act. It is held that the simply involvement of the vehicle in the accident would not make respondent liable to pay the compensation unless it can be held on the basis of material on record that accident was caused by rash and negligent act of the driver of the vehicle owned by the respondent. A similar line of the legal position is reiterated in the matters of **Oriental Insurance Company Ltd. Vs. Premlata Shukla and Others (*Supra*) And**

Surender Kumar Arora Vs. Manoj Bisla (*Supra*).

13. The legal position as it stands today would depict that the claim under Section 166 of the Act for compensation can succeed only when claimants establish negligence of alleged offending vehicle driver in cause of accident on the basis of the material placed into service before the Tribunal. True that evidence to be evaluated on preponderance of probability.

14. In light of the aforesaid legal position, the contentious issue posed for consideration in present appeal is as to whether the claimants have discharged initial burden to prove negligence against the driver of Tavera car and consequently they are entitled for compensation from its owner and insurer. Apparently, case of claimants rest on contents of the FIR [Exhibit-26], which shows that the offence has been registered against the deceased. The charge-sheet [Exhibit-46] also shows that the deceased- Ashok was charged for the negligence. The evidence of PW-1 - Jyoti Thorat [Exhibit-23] would not be material to decide the issue of negligence, admittedly, she is not an eye witness and deposed only on the basis of information received to her through police papers. No eye witness is examined before Tribunal to discard adverse contents of police papers.

15. In that view of the matter, it is difficult to find out any direct evidence on record that would establish negligence of the driver of Tavera car. The court in such situation would apply principle of ***Res Ipsa liquitor.*** Pertinently, spot panchnama shows that the accident occurred on four-lane highway with divider between two lines on each side of the road. The Swift car driven by deceased, initially brushed to the road divider and then went from its side to crossover road divider, then dashed to the Tavera car that was proceeding from its correct side. In these circumstances, it would be difficult to accept the contention of the claimants that the driver of Tavera car was anyway responsible for the accident.

16. It appears that, other five claim petitions arising out of the same accident have been decided by the Tribunal. The copies of those judgments are tendered before this Court along with written arguments submitted by the learned Advocate appearing for the appellant. In all those cases, the categorical finding has been recorded by the Tribunal holding that the deceased [driver of Swift car] was responsible for the accident. Pertinently, in those cases, evidence of eye witnesses of the accident has recorded and on appreciation of such evidence, the findings have been arrived at.

17. The perusal of the impugned judgment of the Tribunal, particularly,

finding on the point of the negligence shows that the Tribunal has merely observed in Paragraph No.16 that since the drivers of both the vehicles have lost their life in the accident, the deceased - Ashok Thorat (driver of swift car) might have contributed in the accident but he cannot be held sole responsible. No other reason is recorded in the entire judgment of tribunal by which the finding of negligence against the driver Tavera car could have been supported. It seems that the Tribunal completely missed the focus while deciding issue of negligence which was specifically framed. The initial burden would always rest on the claimants to prove the negligence of driver of Tavera car. Careful consideration of the evidence and reasoning adopted by the Tribunal, takes this Court to the conclude that the finding recorded by the Tribunal is not sustainable for want of supporting evidence. The Tribunal proceeded to fix the liability to pay the compensation against the respondents *dehors* the factual and legal basis. It is difficult to find slightest of material that would tilt preponderance of probability to adjudge negligence of Tavera car driver. On evolution of evidence, plenty of material establish sole negligence of deceased in cause of accident. In such case, claimants have no cause of action to raise claim invoking provision of section 166 of Motor vehicle Act. Consequently, the impugned judgment and award is liable to be quashed and set aside and appeal deserves to be allowed. Hence, this

Court proceed to pass the following order:

ORDER

(i) Appeal is allowed.

(ii) The judgment and award dated 06/04/2018, passed by Motor Accident Claims Tribunal, Aurangabad, in Motor Accident Claim Petition No.111/2016, is hereby quashed and set aside.

(iii) The amount deposited by appellant- insurer in this appeal with registry of this Court be refunded after expiry of appeal period.

(iv) Appeal is disposed of accordingly.

(v) In view of disposal of appeal, pending civil applications, if any, also disposed of.

[S. G. CHAPALGAONKAR]
JUDGE

Sameer