

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 939 OF 2014
WITH CA/10703/2014 IN FA/939/2014

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD.
VERSUS
SARJERAO PUNDLIKRAO AGLAVE AND OTHERS

...
Advocate for Appellant : Chapalgaonkar S.G.
Advocate for Respondents : M.P.Kale for R.1 & 2.
Mehul Navandar For R/4
Goyanka M.K. Adv For Resp5
...

CORAM : S.V.GANGAPURWALA,J.

DATED : 20TH OCTOBER, 2015

ORDER :-

The present appeal is basically on the point of apportionment of compensation amongst the different insurance companies.

2] In a claim petition u/s 166 of the Motor Vehicles Act the Tribunal has held that driver of the vehicle insured by the present appellant negligent to the extent of 70%, the driver of the vehicle bearing Registration No.MH-21-D-9899 being negligent to the extent of 25% and the driver of vehicle No.MH-20-AT-2060 to the extent of 5%.

3] Mr.Chapalgaonkar, learned counsel submits that the appellant cannot be liable for an employee of the hirer of the vehicle. The learned counsel relies on the judgment in the case of Sanjiv Kumar Samrat Vs/ National Insurance Co. Ltd. And others reported in AIR 2013 SC 1125.

4] The learned counsel further submits that the appellant is the insurer of a tempo bearing No.MH-31-CB-588. The driver of said tempo has died in the accident. The cleaner of the vehicle had filed the complaint. The driver of the vehicle i.e. truck bearing no.9899 is also charge sheeted and the criminal case is pending against him. According to the learned counsel, the Tribunal on a wrong premise that the driver of the truck bearing no.9899 has died, decided the matter. The learned counsel submits that the driver of the truck bearing no.9899 stopped the truck by applying urgent brakes without any indicator. The time of the accident was 4 a.m. in the morning i.e. it was dark. As the driver of the truck bearing no.9899 applied urgent brakes, the truck and the tempo coming from behind dashed the said truck. The negligence was on the part of the driver of truck bearing No.9899 as urgent brakes were applied without any indicator. According to the learned counsel it was erroneous to hold the driver of the tempo negligent to the extent of 70%, the evidence on record would state otherwise. The driver of the truck bearing no.9899 has not been examined before the Tribunal, adverse inference requires to be drawn.

5] Mr.Kale, learned counsel for the claimant submits that as far as the claim is concerned, it is a case of composite negligence wherein claimant can recover whole amount from anyone. The learned counsel further submits that the policy is a package policy and additional premium is paid for fare paying passengers also.

6] Mr.Goyanka, learned counsel submits that the story put forth by cleaner of the present appellant in the complaint is against the actual position on the site of the accident. In between tempo and truck bearing no.9899 there is another truck bearing no.2060. So by

no stretch the tempo would dash truck bearing No.9899. False case is being put forth by cleaner of the tempo. The same is against the record.

7] With the assistance of learned counsel, I have gone through the record and proceeding and the judgment.

8] The policy in question of the tempo bearing no.588 is a package policy where additional premium has been paid for a fare paying passenger as such the law laid down by Apex Court in the case of Sanjeev Kumar referred supra may not be relevant in the present matter.

9] Much emphasis of the appellant is on the ground that the driver of the truck bearing no.9899 is solely responsible for the accident as he had applied urgent brakes without putting on the indicators and it being a night time, without indicator the truck could not be noticed and as such, the accident had taken place. Going by the statement of the cleaner the same appears to be a matter of fact however, the spot panchanama which is conducted is otherwise. If spot panchanama is perused, it is clear that in between the tempo no.588 which has turned turtle and the truck no.9899, whose driver is charge sheeted, the truck bearing no.2060 stands. Going by the spot panchanama, it would not be possible to hold that the tempo bearing no.588 had dashed the truck bearing no.9899. The same appears to be improbable and illogical. I can understand if the case would have been that the truck no.2060 dashed truck no.9899 and tempo no.588 dashed truck no.2060. Considering the situation as appearing in the spot panchanama however, the case of the appellant is otherwise. The case is that because of the urgent brakes applied by the driver of truck no.9899, the tempo bearing no.588 hit the said truck from the

rear side. Even the investigating officer in the cross examination admitted the said position in the spot panchanama.

10] Considering aforesaid aspect of the matter, it would not be possible to hold that the driver of the tempo was not negligent or was negligent to a lesser extent.

11] Even otherwise the apportionment of payment is not much relevant as far as the claimant is concerned for the claimant it is case of composite negligence and not contributory negligence.

12] Considering above aspects of the matter, I am not inclined to entertain the present appeal as such appeal is dismissed. No costs. Civil Applications also stand disposed of. In view of disposal of the Appeal, claimants are entitled to withdraw the amount as per order of the tribunal.

[S.V.GANGAPURWALA,J.]

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