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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 471 OF 2015

WITH

CIVIL APPLICATION NO. 2553 OF 2012

AND

CIVIL APPLICATION NO. 4873 OF 2013

THE NEW INDIA ASSURANCE CO. LTD. ...Appellant
(Org. Opp. No. 4)

Versus

1. **Smt. Shrilekha Kushal Shrivastava,**
   Age 28 years, Occ.: Household
2. **Kum. Shravani Kaushal Shrivastava,**
   Age 3 years
3. **Kum. Kaushika Kaushal Shrivastava,**
   Age one and half year.

   (Applicants Nos. 2 & 3 minors, through their natural guardian and next friend mother Applicant No. 1.)
4. **Shri. Surendra Kumar Shrivastava,**
   Age 68 years, Occ. Retired.
5. **Smt.Sita Surendra Kumar Shrivastava,**
   Age 58 years , Occ. Household.

   (All R/o. A/2/201, Chavandi Complex, Opposite Raj Park, Kalva, District -Thane. ...Org. Applicants

6. **Sanghavi Transport,**
16, Jai Jawan Co.op. Society,
Sector 17, Vashi, Navi Mumbai.

7. **Shri Madhu Sudhir Maheshwari,**
Age 40 years, R/o. Ketan Automobiles, Asha Motor Garage, Dahisar Mori Village, District Thane

8. **The Oriental Insurance Co. Ltd.,**
Arjun Tower, Gokhale Road, Navapada, Thane (West).

...Respondents
(Org. Applicants and Opp. Nos. 1 to 3.)

APPEARANCES

Mr. D. R. Mahadik, *for the Appellant in FA and for the Applicant in CAF No. 2553/2012 and for the Respondent in CAF No. 4873/2013.*

Mr. D. S. Patil, *for the Respondent Nos. 1 to 5 and for the Applicants in CAF No. 4873/2013.*

CORAM	:	**A. S. OKA & G.S.Patel, JJ.**
RESERVED ON	:	**14th December 2015**
PRONOUNCED ON	:	**23rd December 2015**

JUDGMENT (Per G. S. Patel, J.):

1. Admit. Respondents Nos. 1 to 5 waive service. Respondents Nos. 6 to 8 are absent despite notice. By consent of the Appellant and Respondent Nos. 1 to 5, the Appeal is taken up forthwith for hearing and final disposal.

2. This Appeal is directed against the Award and Judgment dated 30th July 2011 passed by the District & Sessions Judge, Raigad-Alibag in Motor Accident C.R. No. 690 of 2001. Respondents Nos. 1 to 5 to the Appeal are the original Claimants. The Appellant, the New India Assurance Company Limited, was the 4th Opponent to the Claim Petition. Opponents Nos. 1 to 3 to the Claim Petitioner were one Sanghavi Transport, one Mr. Madhu Sudhir Maheshwari and the Oriental Insurance Company Limited. There was thus two Insurance Companies joined to the claim. The present Appellant was joined as an Opponent in the year 2006. The reason for this is that there were two vehicles involved in the motor accident in question.

3. Respondents Nos. 1 to 5 (original Claimants) are, respectively, the widow, two minor daughters and the parents of one Kaushal Surendrakumar Shrivastava ("**Kaushal**") who died as a result of injuries sustained in a motor accident that took place on 24th December 1999. At that time, Kaushal was an Accounts Officer with ONGC working at its unit at Kalundre, Taluka Panvel, District Raigad. On that day Kaushal was travelling in a mini bus No. MH-04-G-2093 from his office at Kalundre toward Mumbra on the Mumbra-Panvel Road. At about 6:20 pm, the mini bus neared the RF camp near Taloja Panchnand village. A loaded truck, no. MH-04-AL-2192, was at that very moment moving in the opposite direction. There was a head on collision between the bus and the truck. Both vehicles were damaged. The driver of the mini bus and Kaushal both sustained severe injuries. Kaushal was transported to the MGM Hospital at Kalamboli. He died en route due to his injuries in the accident.

4. At the time of his death, Kaushal was 32 years old. His last drawn salary was Rs. 25,265/-. He had served with ONGC from 23rd September 1991, initially at its Hajira project and then at other locations. He had a MBA degree from South Gujarat University. The Applicants claimed an amount of Rs. 60,00,000/- from the owners and the Insurance Companies of both vehicles.

5. There is no dispute that both vehicles were duly insured at that time. The original Opponent No. 1, Sanghavi Transport, the present Respondent No. 6, was the registered owner of the mini bus. Its insurer was the Oriental Insurance Company Limited, the present Respondent No. 8 and original Opponent No. 3.The present Respondent No. 7 (original Opponent No. 2), Mr. Madhu Sudhir Maheshwari, was the owner of the truck in question. The insurer of the truck was New India Assurance Company Limited, the present Appellant.

6. Before the learned District Judge, neither of the owners of the two vehicles appeared. They entered no defence. Both Insurance Companies appeared. At the time of filing of the claim, the present Appellant was not a party. It was joined pursuant to an order dated 20th September 2006. Thereafter, it, too, filed its written statement. In their separate written statements both the Insurance Companies denied all liability, claiming *inter alia* that the drivers of the vehicles had not been made parties, and submitting that there was, therefore, non-joinder of a necessary party. Allegations of rashness and negligence were denied. They also said that the claim was exaggerated.

7. On the rival pleadings, issues were framed. These issues and their findings are set out below:

Sr. No.	**Issues**	**Findings**
1.	Whether the applicants prove that on 24.12.99 at 6.20 p.m. On Panvel Mumbai road at village Taloja deceased Kaushal Shrivastava met with accidental death out of use of Motor vehicles i.e. Bus No.MH 04/G/2093 and Truck No. MH 04/AL 2192?	In the Affirmative.
2.	Whether it is proved that the accident occurred due to the rash and negligent driving of the truck No. MH 04/AL/2192 and therefore, he is responsible for causing the said accident?	Partly Affirmative.
3.	Whether the applicants are entitled to get compensation? If yes, what is the quantum of amount and from whom?	50:50 Rs. 31,10,000/- Opponent Nos. 1 to 4
4.	What order?	As per order below.

8. The learned District Judge awarded an amount of Rs. 31,10,000/-, i.e., slightly more than half of the original claim. Before the learned District Judge, the 1st Applicant (present 1st Respondent) filed an Affidavit in lieu of examination-in-chief. She was extensively cross-examined. In her evidence, she stated that an offence was registered against the driver of the mini bus. She admitted that she was not present at the time and was not an eye-witness to the accident. Indeed, we may note here that no eye-witness was examined on either side.

9. The First Information Report and Spot Panchanama were, however, on record before the Trial Court. The Trial Court found that both the vehicles were severely damaged. The driver's side of each vehicle had very nearly been destroyed. The Trial Court concluded that both vehicles appeared to have been travelling at speed, but from the material before it, it was not possible to say that only one of the two was solely responsible for the accident. The Spot Panchanama showed that the road was about 15 feet wide, with a white dividing line and a berm strip of 5 feet on either side of the road. The mini bus was found to be at about 5 feet from the median dividing line and the Trial Court noticed that there seem to be enough space for both the vehicles to have been able to avoid the accident. In paragraph 9 of the impugned judgment, the Trial Court concluded that it was not possible to affix responsibility for the accident on one of the drivers to the exclusion of the other. The Trial Court, therefore, apportioned the responsibility equally between the two owners and their respective insurers.

10. It is to be noted here that neither of the insurers examined any witnesses at all. They did not show that they had any special defence justifying a complete exoneration or avoiding of their liability under their respective insurance policies.

11. We have heard Mr. Mahadik, learned Advocate for the Appellant and Mr. Patil, learned Advocate for Respondent Nos. 1 to 5. Mr. Mahadik contends that the drivers of the two vehicles were not examined and that there was no basis for the Trial Court to have apportioned responsibility equally between the two owners and their respective Insurance Companies. Merely relying on the Spot

Panchanama, he submits, is insufficient. He further submits that since the Appellant-Insurance Company was joined in the year 2006, the District Judge could not have awarded interest since 2001.

12. We have carefully considered the material on record, including the cross-examination of the 1st Respondent and the financial documents produced by her. We find that the Trial Court has, on the basis of the documents, including income tax documents, correctly taken the figure of Rs. 15,000/- as a loss of dependency. The learned Judge took into account Kaushal's gross salary shown as Rs. 25,245/-, considered income tax and other deductions and deducted an amount of 1/4th to arrive at the figure of Rs. 15,000/-. As Kaushal was then 32 years old, a multiplier of 17 was used, in our view correctly, and thus the Trial Court arrived at a total loss of dependency of Rs. 30,60,000/-. In addition, the Trial Court awarded an amount of Rs. 25,000/- towards loss of consortium to the 1st Applicant, Rs. 5,000/- each to the original Applicants Nos. 2 to 5 and Rs. 5,000/- for funeral expenses, thus making a total Award of Rs. 31,10,000/-.

13. From the material that is before us, we are unable to accept the submissions made by Mr. Mahadik. To begin with, it is not sufficient for the Appellant merely to say that the driver of the vehicle insured with the Apellant was not examined. If it was the specific case of the Appellant that the driver of the vehicle insured with it was not negligent, then the Appellant could have led the evidence of its constituent vehicle owner and the vehicle's driver. It is true that the initial burden of proving rashness lies on the Claimant, but in the case of a head-on collision of this kind, when a conclusion from documents such as the *panchnama* may reasonably be drawn of equal culpability by both drivers, then it is for the opponent to show that the driver of the vehicle it had insured was in no way negligent, and that the entire responsibility lies at the door of the other driver. It cannot possibly be the probative burden of the Claimant to show that one and not the other driver was liable. As far as the Claimants are concerned, it was no part of their case that only one of the two drivers involved was at fault. On the other hand, this was a defence specifically set up by the Appellant, and it therefore fell to the Apellant's lot to show this in support of its plea. Given that this was a head on collision, we see nothing wrong in the learned Judge's finding that the nature of the accident itself is such that it is reasonable to hold, in the absence of evidence to the contrary, that both the drivers were equally negligent.

14. As to the question of the Appellant having been joined in 2006, but being faced with an interest liability from 2001, we are again unable to accept the submission made before us. There is nothing on record before us to show that the Appellant had not been informed of the accident or that no claim had been filed by Mr. Maheshwari, the owner of the oncoming truck. Mr. Maheshwari, the insured, was a party to the claim from the date of its filing, and the Appellant, as his insurer, is statutorily required to satisfy his liability.

15. In our view, there is absolutely no material placed before the Court by the Appellant that would persuade us to upset the Award and Judgment of the learned District Judge. We find that the Award and Judgment to be reasonable, balanced and fair.

16. The Appeal is dismissed. There will be no order as to costs. All amounts deposited in this Court are directed to be transferred to the District Court. Respondents Nos. 1 to 5 are at liberty to make an application for withdrawal of the balance amounts deposited with that Court.

17. In view of the dismissal of the Appeal, Civil Application No. 2553 of 2012 for stay does not survive and is disposed of as such. Similarly, Civil Application no. 4873 of 2013 for withdrawal of the amounts deposited is now infructuous and is also disposed of as such.

(G. S. PATEL, J.) **(A.S. OKA, J.)**