

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

FIRST APPEAL NO. 980 OF 2004

Chandrakant S/o Trimbak Pasame,
Age: Major, occu. Business
R/o :Mamdapura,Tq. And District Latur. ...APPELLANT

versus

1. Majlasbai w/o Mohanrao Jadhav,
Age: 37 years, Occu. Household,
R/o Kambalga, Tq. Shirur-Anantpal,
Dist. Latur.
2. Nilawati d/o Mohanrao Jadhav,
Age: 12 years, occu. Nil, Minor,
under guardianship of her real mother
Majlasbai w/o Mohanrao Jadhav,
r/o Kambalga, Tq. Shirur Anantpal,
Dist. Latur.
3. Anju d/o Mohanrao Jadhav,
Age: 6 years, Occu. Nil Minor,
under guardianship of her real mother
Majlasbai w/oMohanrao Jadhav
R/o: Kambalga, Tq. Shirur-Anantpal,
Dist: Latur.
4. Shaiksh Gous s/o Shaikh Rasul,
Age: 27 years, occu. Driver,
r/o Omerga (Bori) Tq. And
Dist. Latur.
5. National Insurance Co. Ltd.
Through it's Branch Manager,
Branch office at Hanuman chowk,
Latur, Dist. Latur. ...RESPONDENT

.....

Mr. S.C. Swami, Advocate holding for Mr. V.D. Gunale, Advocate
for appellant
Mr. S.G. Rudrawar, Advocate for Respondent No. 1
Mr. R.C. Bora, advocate holding for Mr. R.P. Bafna, Advocate for
respondent No.5.

.....
CORAM : K.K. SONAWANE, J.

RESERVED ON : 23th AUGUST, 2017.

PRONOUNCED ON : 21st NOVEMBER, 2017.

JUDGMENT :-

1. Being dissatisfied with the impugned judgment and Award dated 29-11-2003, passed by the learned Motor Accident Claims Tribunal, Nilanga, District Latur (for short "Tribunal"), partly allowing the proceeding of MACP No. 88 of 2002 filed by the original claimants - respondents No. 1 to 4 herein under section 166 of the Motor Vehicles Act, 1988 (For short "Act of 1988") for compensation arising out of vehicular accident involving death of deceased Nangnath 15 years old, the appellant-original respondent No.1 owner of the offending vehicle tractor, preferred the present appeal by invoking remedy under section 173 of the Act of 1988.

2. The genesis of the appeal culled out in brief is that, the deceased Nagnath, 15 years old was the school going boy and lone son of claimant No. 1 Majlasbai Mohanrao Jadhav resident of Kambalga Ta. Nilnga, District Latur. The rest of the claimants are the minor daughters of claimant Majlasbai. The deceased Nagnath was studying in 7th standard in Zilla Parishad School Kambalga. On the fateful day of incident i.e. on 09-01-2001 he was returning from the field and at that time vehicle Tractor of

Mahendra Company 575 D-I, Engine No ECA-9304 along trolley was also proceeding towards the village Kambalga. Respondent Shaikh Gaus S/o Shaikh Rasool, driver of tractor-trolley made the deceased Nagnath to sit on the tractor. But, it was different in store for deceased Nagnath. Respondent No. 2- Shaikh Gaus driver of the vehicle tractor-trolley drove the vehicle rashly and in very negligent manner due to which the deceased Nagnath fell down on the road from the tractor. He found crushed under the wheels of the tractor and trolley. He died instantaneously on the spot itself. The information of mishap was passed on to the Police of Shirur Anantpal Police Station, Ta. Nilanga, District Latur. Police rushed to the spot and drawn the *panchnama*. Police escorted the dead body to Government Hospital for post mortem. The medical expert opined that deceased Nagnath died due to injuries sustained in the mishap. Police registered the crime against driver of the tractor-trolley i.e respondent No. 2- Shaikh Gaus.

3. The claimant alleged that the deceased Nagnath was the school going boy, studying in 7th Standard. He was doing the agricultural work. He would have earned Rs. 5000/- per month in future. The deceased was the lone son of widow claimant No. 1 Majlasbai. The claimants claimed compensation of Rs. 4,00,000/- from the respondents for the loss sustained to them due to

vehicular accident causing death of deceased Nangath.

4. In response to the notice of claim petition, the respondent-owner and driver of the tractor-trolley appeared in the proceeding before the learned Tribunal and filed written statement (Exhibit-17). They admitted the occurrence of accident on 09-01-2001, resulting into death of deceased Nagnath. It is not put into controversy on the part of these respondents that the deceased Nagnath boarded in the vehicle tractor, when he was returning from the field. But, they being the owner and driver of the vehicle denied that accident caused due to rash and negligent driving of the vehicle-tractor by the respondent Shaikh Gaus. It has been submitted that respondent No. 2 driver was having valid driving licence at the time of accident. They added that the vehicle - tractor was insured for covering the risk, if any, arose after vehicular accident. They denied about the monetary liability and prayed to dismiss the claim petition.

5. Respondent No. 2 Insurance company also raised objection to the claim by filing written statement (Exhibit-15). According to respondent No. 3 Insurance Company the impugned tractor and trolley was insured with respondent-Insurance company but the policy was issued for agricultural purpose. It was not permitted to carry passengers in the vehicle. The deceased Nagnath was found travelling in the vehicle without any risk coverage. There

was breach of terms and conditions of the insurance Policy. Therefore respondent No. 4- Insurance company is not liable for any monetary liability for the death of deceased Nangath. The respondent No. 4 -Insurance company denied the liability and claimed to dismiss the application.

6. The learned Tribunal pursuant to rival pleadings, framed the requisite issues for adjudication of the claim petition on record. The claimant Smt. Majlasbai adduced her evidence on oath before the Tribunal. The respondent including appellant owner of offending vehicle did not step into the witness box to lead evidence to fortify their defence. The Tribunal assessed the oral and circumstantial evidence adduced on record and arrived at the conclusion that death of deceased Nangnath was caused due to rash and negligent driving of the vehicle tractor-trolley by respondent No.2 Shaikh Gaus-driver of the vehicle. It was determined that the claimants are entitled to get compensation of Rs. 1,20,000/- as an compensation from the respondents No.1 and 2 owner and driver of the offending vehicle. The Tribunal simultaneously observed that the monetary liability could not be fastened on the respondent -Insurance company as deceased Nagnath was travelling on the tractor in breach of condition of policy. The vehicle was permitted for agricultural use only. Therefore, learned Tribunal exonerated the respondent-Insurance

Company from the monetary liability and proceeded to pass impugned judgment and Award, the validity and propriety of, which is agitated in this appeal on behalf of respondent-owner of the offending vehicle.

7. The learned counsel for appellant-owner of the offending vehicle vehemently urged that the impugned Judgment and Award of the Tribunal is erroneous, illegal and not sustainable within ambit of law. The learned Tribunal did not appreciate evidence on record in its proper perspective and committed error in absolving respondent -Insurer from the monetary liability. The Tribunal ought to have held that there was no evidence to prove that driver was rash and negligent while driving the vehicle at the relevant time of mishap. Moreover, the conclusion of Tribunal to absolve the respondent-Insurance company from the monetary liability pursuant to breach of terms and conditions of the policy is imperfect, illegal and not within purview of law. The learned counsel has given much more emphasis on the provisions of Section 147 (1) of the Motor Vehicles Act, 1988 and submits that the Tribunal did not appreciate the scope and nature of the policy of the vehicle involved in the accident. The Tribunal ought to have considered that Insurance Policy covers all kinds of risk including third party insurance. Therefore, findings recorded by learned Tribunal are illegal, imperfect and unsustainable

within purview of law. According to learned counsel, the Police record did not reflect that deceased Nagnath was the passenger or labour employed on the tractor, but shows that at the relevant time he was found dead after wheels of tractor ran over from his body. The driver of the vehicle cannot be held responsible for alleged accident causing death of deceased Nagnath. The findings of the learned Tribunal absolving Insurance Company are incorrect, illegal and deserves to be upset and quashed. Therefore, he prayed to allow the appeal. The impugned judgment and Award passed by the learned Tribunal be set aside and quashed being illegal and bad in law.

8. In refutation, learned counsel for respondent-original claimants vociferously opposed the contentions propounded on behalf of appellant and submits that the Tribunal has considered the entire facts and circumstances on record in its proper perspective. It has been correctly appreciated that respondent - Shaikh Gaus was driving the vehicle-Tractor at the relevant time in rash and negligent manner. The Tribunal has considered the documents of police record and arrived at correct conclusion that deceased died due to negligent act on the part of driver of vehicle respondent-Shaikh Gaus. Learned counsel for claimants further added that deceased Nagnath was travelling on the vehicle tractor and had fallen on the road and found crushed under the wheels of the

tractor resulting into his death. Learned counsel supported the findings expressed by the learned Tribunal and prayed to dismiss the appeal.

9. Learned counsel for respondent-Insurance Company also raised objection and submits that offending vehicle tractor-trolley was insured with respondent-Insurance Company under farmers package policy. It was meant for agricultural purpose. At the relevant time, the deceased Nagantah was found travelling on the tractor and accidentally he had fallen on the ground and sustained fatal injuries resulting into his death. The risk of passenger carried by the driver on the vehicle was not the subject-matter of present Insurance Policy meant for agricultural use. Learned Tribunal has appreciated the factual aspects in its proper perspective. According to learned counsel for the respondent - Insurance Company, the appellant owner and driver did not adduce evidence to traverse the pleadings put forth on behalf of claimants. The deceased Nagnath was travelling on the tractor as "gratuitous passenger". He was made to sit on the tractor by the driver. The vehicle was not permitted for carrying passenger, therefore, findings expressed by Tribunal appears just, proper and reasonable. Therefore, there is no need to cause any interference in it. The learned counsel for respondent - Insurance Company prayed not to nod in favour of the appellant

and appeal be dismissed.

10. The contentious questions, which arise for consideration in this appeal are :-

(I) Whether findings of facts recorded by Tribunal for entitlement of claimants to receive compensation for accidental death of deceased Nangnath, are erroneous imperfect and require to be upset?

(II) Whether respondent – Insurance company is liable to indemnify the insured appellant - owner of vehicle under Insurance Policy, the loss caused following vehicular accident involving death of deceased Nangnath?

11. Having heard the rival contentions canvassed on behalf of both sides and on perusal of the record of case, I find that the arguments advanced on behalf learned counsel for appellant appears not appreciable and sustainable one. Admittedly, occurrence of the vehicular accident involving death of deceased Nangnath arising out of and use of vehicle tractor – trolley, was not put into controversy on behalf of both sides. The deceased Nagnath was 15 years old school going boy and lone son of widow i.e. Claimant No. 1- Majlasbai. It has been alleged that the so-called incident of accidental death of deceased Nanganth occurred only due to rash and negligent act on the part of respondent -driver while driving the vehicle. Therefore, claimants

preferred the application under section 166 of the Act of 1988 for compensation.

12. Before advertng to merits of the matter, it is to be born in mind that the claimant, who approached to Tribunal for claiming compensation on account of death or physical injuries caused due to vehicular accident, has to establish that death or physical injuries complained of are the result of negligent act on the part of driver of the offending vehicle. Unless, this hard factual aspect is established, no claimants can claim compensation as envisaged under section 166 of the Act of 1988. There is no doubt that it is difficult to find out negligence of the driver of offending vehicle because such accident used to occur within a fraction of second. Therefore, it is incumbent to examine all ramification of the circumstances prevailing over at the scene of occurrence during the relevant period of accident. Obviously, negligence on the part of driver is essential to be proved, and it may depends on the several factors governing the case. There would not be any hard and fast rule for the same. The Honourable Apex Court in the case of ***National Insurance Co. Ltd. Vs. Swaran Singh and others reported in 2004(3) SCC 297*** elucidated in paragraph No. 70 as below:

"70. Apart from the above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the aforementioned requirement

inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose a different problem which must be resolved having regard to a large number of factors governing the case including conduct of parties as regards duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard-and-fast rule can, therefor, be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of the contract of insurance, on the part of insurer by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records.”

13. In the case of ***Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and another reported in AIR 2003 Supreme Court 4182***, Their Lordship of the Apex Court elucidated that the negligence does not always mean absolute carelessness, but want of such a degree of a care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of

care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. What constitutes negligence varies under different conditions and determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account.

14. Bearing in mind aforesaid legal proposition, I proceed to evaluate evidence available on record in the matter in hand to determine the negligence, if any on the part of driver of offending vehicle. Admittedly, the sole evidence of claimant Smt. Majlasbai is available on record. She deposed in her evidence which is reproduced as below:

"I have two daughters i.e. claimant No. 2 and 3. My son Nagnath died in accident on 09-01-2001. On that day at evening time my son was returning to the house from a field. At that time one tractor has given lift to my son Nagnath. Tractor was in high speed. Due to which my son fall down from the tractor, and wheel of tractor passes over the head of Nagnath. Thereafter, we rushed to the spot of accident where we found the dead body of Nagnath. Police have drawn the spot panchnama and corps was forwarded to the hospital. My husband was already expired. My son Nagnath was in 7th Std. He was cleaver student. Due to

the death of Nagnath, I sustained damages of Rs.4,00,000/-. Nagnath was my alone son. Claimant No. 2 is physically handicapped. Due to poor financial position, I restricted my claim upto Rs.2,00,000/- we have agricultural land. However, no one is available to look after the agricultural field."

15. She was cross-examined on behalf of respondents, but it appears that there was no arduous cross-examination to the claimant Majlasbai sufficient to draw the inference that the driver was not at fault. The respondents only put suggestion in the form of denial of the allegations, cast on them by the claimants. The learned counsel for Insurance Company proceeded one step ahead and suggested to the claimant that driver of the tractor accepted the fare of Rs.3/- from deceased Nagnath and allowed him to sit on the tractor for going towards village.

16. The claimants also produced extract of police record of the accident comprising FIR, spot panchnama, inquest panchnama, provisional cause of death certificate etc. It is not denied that criminal proceeding under sections 279 and 304-A of the Indian Penal Code, was instituted against driver of the offending vehicle -Tractor-trolley. The spot panchnama reflects that head of deceased Nagnath was seen crushed under wheels of tractor – trolley at the spot itself. The offending vehicle – tractor-trolley was found stationary at the distance of 20 to 25 feet from the

dead body of deceased lying on the spot.

17. The question, as to whether the vehicle-tractor trolley was being driven rashly or not, must be answered on the context of attending circumstances that vehicle tractor-trolley was newly purchased by the appellant and no mechanical problem would arise nor the owner - appellant complained about the same. Moreover, the vehicle tractor-trolley was driven at the relevant time of accident on the village road. The respondent driver was resident of the vicinity located nearby the spot of incident. He was employee of appellant - owner of the vehicle as driver having valid driving licence. In such circumstances, it cannot be suggested that driver had no idea about the road condition of the village of spot of incident. There was no evidence or suggestion that unexpectedly stray cattle etc. came in-front of the vehicle tractor-trolley and that made driver to apply brakes of the tractor suddenly, and consequently the alleged accident occurred. There were no marks on the scene of occurrence pointing out the fact that driver applied the brakes urgently in emergent situation. It is strange to appreciate that even in absence of above mentioned circumstances, vehicle tractor-trolley of respondent got in trouble. There was no explanation on the part of respondent about the cause of accident occurred resulting into death of deceased Nagnath. Significantly, no one respondent came

forward and stepped into witness box to unfurl the circumstances prevailing over on the scene of occurrence at the time of alleged mishap. It was the burden on the driver to show how accident occurred resulting into death of deceased Nagnath. It would be reiterated that there were no endeavour on the part of respondent to establish that driver of the vehicle tractor-trolley was not at fault and the alleged accident might, more probably, occurred in a manner, which did not connote negligence on the part of driver.

18. It is evident from the circumstances on record that claimant Smt. Majlasbai reached to the spot of incident immediately after the alleged accident. She received an opportunity to watch the spectacle. She narrated the attending circumstances on the spot of the incident causing instant death of her teenager son Nagnath. Respondent driver did not deny that criminal proceeding was lodged against him under sections 279 and 304A of the IPC for rash and negligent driving of the offending vehicle at the time of alleged accident.

19. Pleadings and legal evidence on record, if considered in its entirety, it would safely concluded that the driver was at fault and guilty of rash and negligent driving of the offending vehicle-tractor trolley and caused death of deceased Nagnath. The factum of occurrence of accident and death of deceased Nagnath

in the mishap was not put into controversy on behalf of respondents. Therefore, there is no impediment to draw inference that vehicle tractor-trolley was driven at the relevant time of accident in rash and negligent manner by driver – Shaikh Gaus.

20. It is to be noted that ownership of the offending vehicle tractor - trolley with the appellant-respondent is not in dispute. It was an admitted fact that the appellant was the owner of offending vehicle tractor-trolley and respondent Shaikh Gaus was his employee for driving the vehicle tractor-trolley. No doubt, the alleged accident had taken place during the course of employment of driver - respondent Shaikh Gaus. He was found negligent while driving the vehicle during the course of his employment. Therefore, the appellant owner of the vehicle is liable for the negligent act of his employee-driver. As referred above, respondent driver did an unauthorized act of carrying the teenager of deceased 15 years old on the tractor and driven the vehicle in rash and negligent manner without taking care of deceased boy travelling on the tractor. In such circumstances, the appellant being owner of the tractor - trolley cannot be escaped from the vicarious liability for the loss caused in accident arising out of and use of vehicle (emphasis is supplied in exposition of law laid down by the Hon'ble Apex Court in the case of ***Pushpabai Purushottam Udeshi and others Vs. Ranjit***

Ginning & Pressing Co. (P) Ltd. and another reported in ***AIR 1977 SC 1735.***

21. The crucial issue which remains to be considered in this appeal is in regard to liability of the Insurance Company to indemnify the loss caused to the insured arising out of and use of the vehicle tractor trolley. After considering the factual score relating to the occurrence of alleged mishap, it appears that the Tribunal has rightly recorded the findings of facts that the deceased Nagnath was unauthorized passenger, travelling in the vehicle tractor-trolley during the relevant period of the accident. Learned counsel for respondents-original claimants and the insurer invited attention of this Court to the document of policy produced on record before the Tribunal at Exhibits-32, 33 and 34. Perusal of these documents reflects that insurance policy of the offending vehicle tractor-trolley was issued under "Farmer's Package Policy". The vehicle was referred under policy in section XIV of the scheme of said Farmers Package Policy as "Agricultural Tractor." The clause (c) under the head of liability to the third party referred in Section II of the aforesaid section XIV of the scheme of "Farmer's Package Policy", it was specifically delineated as under:

"(c) Except so far as is necessary to meet the requirements of the Motor Vehicles Act in relation to the liability under the Workmen's Compensation

Act, 1923 the Company shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the Tractor at the time of the occurrence of the event out of which any claim arises."

22. In view of aforesaid condition of policy, it is manifestly clear that vehicle tractor-trolley in question was only allowed to be used for agricultural purpose. It was not permitted to carry passengers for hire or reward. The deceased Nagnath was unauthorized passenger travelling in the vehicle tractor-trolley. He was not employee engaged as labour etc. for agricultural work by respondent – owner of the vehicle. But, he was made to sit on the tractor by the respondent-driver of the vehicle. Thereafter, accident occurred resulting into his death. In such peculiar circumstances and in view of settled principles of law, monetary liability could not be fastened on respondent-Insurance Company. The deceased Nagnath could not be treated as third party for imposing monetary liability on the insurer to make payment. But, the deceased Nagnath was travelling in the vehicle tractor-trolley without being legally permitted and without any risk coverage. Their Lordships in the case of ***National Insurance Company Ltd. Vs. Baljit Kaur and others***

reported in 2004(2) SCC 01 observed that the insurer cannot be held responsible for monetary liability in respect of passengers especially "Gratuitous Passengers", who were neither contemplated at the time of contract of Insurance was entered into, nor was any premium paid to the extent of benefit of insurance to such category of people.

23. In the light of aforesaid guidelines, the arguments advanced on behalf of learned counsel for the appellant in regard to section 147 of the Motor Vehicles Act 1988 in respect of monetary liability of the insurer for death or bodily injuries caused to any person arising out of and use of the offending vehicle in public place would not be sustainable and considerable one. The deceased Nagnath cannot be considered as "third party" in this case in view of expression "any person" used in section 147(1) (b) of the Act of 1988.

24. The resultant effect of the aforesaid discussion is that the Tribunal has committed no illegality for exonerating the respondent - Insurance Company from the monetary liability to make payment of compensation to the claimants. However, in view of negligence on the part of driver of the offending vehicle, he is responsible for the loss caused to the claimants following death of deceased Nagnath. The appellant -original respondent being owner of the offending vehicle vicariously liable for the

wrong committed by his employee respondent - driver during the course of his employment while driving the offending vehicle. The negligent act of driver caused the death of deceased Nangnath. Therefore, the Tribunal has correctly appreciated the attending circumstances on record and imposed monetary liability jointly and severally on respondents No. 1 and 2 owner and driver of the offending vehicle. In the aftermath, Award passed by learned Tribunal is, therefore, required to be made absolute and confirmed.

25. In the above premises, there is no need to cause any interference in the finding expressed by learned Tribunal, imposing monetary liability on the appellant and his employee i.e. owner and driver of the offending vehicle. Accordingly, the appeal stands dismissed. No order as to costs.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK
