

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

**FIRST APPEAL NO. 135 OF 1999**

1. Bashirbhai Chandbhai Pathan,  
age 55 yrs, Occ. Nil.
  2. Binnatbi Bashir Pathan,  
age 50 yrs, Occ. Nil.
- Appellants.  
Orig applicants.
- Both R/o Tisgaon, Tq. Pathardi,  
Dist. Ahmednagar.

VERSUS

1. Kashinath Mhatardeo Buchade. Appeal abated.
2. Husen Baig Azambaig,  
age 35 yrs, Occ. Business,  
R/o Pachpir Chawdi, Ahmednagar.
3. The Oriental Insurance Company Ltd.,  
Ahmednagar, Branch Mahatma Gandhi  
Road, Ahmednagar City. ...Respondents...

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Advocate for Appellant : Mr A S Barlota  
Respondent No.1- abated.

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**CORAM : V.K. JADHAV, J.**  
**Dated: April 17, 2017**

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**ORAL JUDGMENT :-**

1. Being aggrieved by the common judgment and award dated 26.4.1995 passed by the Member, Motor accident Claims Tribunal, Ahmednagar in MACP No.51/1987 and 52/1987, the original claimants have

preferred this appeal to the extent of the judgment and award passed in MACP No.52/1987.

2. Brief facts, giving rise, to the present appeal are as follows :-

a] The accident had taken place on 5.1.1986 at about 12.30 noon on Nagar-Pathardi Road. Deceased Nashir and his elder brother Jahangir were travelling in a truck bearing registration No.MHF/7570. These two brothers were working as fruit vendor at Pathardi and on that day they were going to village Pathardi from their residential village Tisgaon for selling bor fruits. They had taken with them a gunny bag weighing 50 kgs when they left their house in the morning. They were travelling in the said truck alongwith the goods/fruits. On way, said vehicle truck turned turtled. In consequence of which, Nashir who was 12 years old died on the spot, whereas his brother Jahangir had sustained severe injuries. He was immediately taken to Rural Hospital Pathardi. The appellants claimants have preferred MACP No.52/1987 for grant of compensation in respect of death of deceased Nashir. It has been

contended in the claim petition that deceased Nashir was the earning member in the family and as such the appellants claimants lost his future income. They were depending on the income of their two sons.

b] Respondent no.1 driver has not filed his written statement and therefore, hearing of the claim petition ordered to proceed without his written statement.

c] Respondent no.2 owner of the vehicle truck has filed his written statement. It has been admitted in the written statement that those two brothers were travelling in the truck by paying freight charges of Rs.3 each. They were carrying goods with them from Tisgaon for destination of Pathardi. It has been further denied that, respondent driver had driven the said truck in a rash and negligent manner. It has specifically contended that the accident had taken place due to sudden burst of the tyre, for which the respondent driver was not responsible.

d] Respondent No.3 Insurer has strongly resisted the claim petition by filing written statement. It has been

contended in the written statement that, the said truck involved in the accident had no permit to carry passengers and as such respondent insurer is not liable to pay any compensation.

e] The appellants-claimants have adduced oral and documentary evidence in support of their contentions. Respondents, however, have not adduced any evidence. The learned Member of the Tribunal by its impugned judgment and Award dated 26.4.1995 dismissed both the claim petitions. The appellants original claimants have preferred this appeal to the extent of death claim bearing MACP No.52/1987.

3. The learned counsel for the appellant submits that the Tribunal has dismissed the claim petition bearing MACP No.52/1987 mainly on the ground that eye witness Rajmal Lalwani has stated in his examination in chief that the accident had taken place as rod under the steering wheel came to be broken. The Tribunal has observed in the impugned judgment that it is a case of accident pure and simple and falls too short of showing

that the accident originated out of any rash and negligent driving on the part of the driver of the truck which act is a lynch pin in proving the accident in a compensation cases. Learned counsel submits that said witness Rajmal Lalwani has given all the details about rash and negligent driving on the part of the driver of the truck. He has deposed that, the driver of the truck had raised speed of the truck soon after they left the village Tisgaon. Even he had asked the respondent driver to reduce the speed. Even, on curve, the driver of the said truck has not reduced the speed, and as such, the vehicle turned turtled. He has further deposed that respondent driver of the said truck was not able to control the vehicle and hence the accident was caused. Learned counsel submits that, the Tribunal has given weightage to the said stray answer/admission of witness Rajmal Lalwani and accordingly dismissed the claim petition. Learned counsel submits that the Tribunal has also erroneously exonerated the insurance company. Deceased Nashir was earning Rs.10/- per day, corresponds to Rs.300/- p.m. As per the relevant multiplier in consonance with

his age, the appellants claimants are entitled for the just and reasonable compensation.

4. The learned counsel for the appellants-claimants in order to substantiate his contentions placed his reliance on judgment in case of **Smt. Indra Sharma and others Vs. Chairman, RSEB, Jaipur, reported in AIR 1998 Rajasthan page 140** (Rajasthan High Court).

5. None appears for the respondents.

6. In the instant case, even though respondent owner has not raised any specific plea about mechanical defect in the truck involved in the accident, the Tribunal has considered the same. Though the appellants-claimants have succeeded in proving rash and negligent driving on the part of the respondent driver, the Tribunal has not considered the same and on the basis of so called mechanical breakdown dismissed the claim petition in toto. It appears that, respondent owner has raised a plea that the accident had taken place due to burst of the tyres, however, in order to substantiate the said

plea/defence, respondent/owner has not examined himself before the court nor examined his driver. Furthermore, respondent-owner has not adduced any documentary evidence to substantiate his contention such as inspection report of the vehicle etc.

7. In a case Smt. Indra Sharma and others Vs. Chairman, RSEB, Jaipur (supra) relied upon by the learned counsel for the appellants-claimants, in the identical facts, Rajasthan High Court has held that, in absence of the pleadings and legal evidence to show that vehicle was in roadworthy condition on ill-fated day of accident, before commencement of its journey and owner/driver have taken all reasonable care, yet defect remained hidden, the plea of the mechanical breakdown cannot be considered. However, negligence on the part of owner and its driver in causing the accident established beyond pale of doubt. Thus, finding of the Tribunal that accident occurred due to sudden mechanical breakdown and not by rash and negligent driving, not proper.

8. In the instant case, the claimants have examined eye witness to the accident, who has deposed about rash and negligent driving on the part of the driver of the truck. Even though, he has given warning to the driver of the truck to reduce the speed on the curve, the driver has increased the speed of the vehicle truck and as such, the truck turned turtled. In absence of any specific plea on the part of the respondent-owner about mechanical breakdown, on the basis of stray admission given by the eye witness who is not an expert person, the Tribunal has dismissed the claim petition. In view of the above I record my findings in the affirmative to issue no.1 and hold that the accident took place due to rash and negligent driving of the truck bearing registration No.MHF-7570 by its driver. The tribunal has exonerated the respondent-insurer for the reasons that deceased Nashir was travelling in the goods tuck as a passenger. In th case of **New India Assurance Co. Ltd. Vs. Asha Rani and Ors.** reported in **AIR 2003 SC 607** the Supreme Court has observed that where the accident took place before the amendment of Section 147(1) of the Motor Vehicles Act, 1988 in 1994, the insurance

company will not be liable for death or injuries sustained by the owner of the goods or his authorized agent traveling in the goods vehicle. The Supreme Court held that, insurer will not be liable to pay the compensation to the owner of the goods or his authorized representative on being carried in a goods vehicle, when the vehicle meets with an accident and the owner of the goods or his representative dies or suffers any bodily injury.

9. In the instant case, the incident had taken place the year 1986 and admittedly, deceased Nashir was travelling in the said truck alongwith his goods by paying fare to the driver of the truck. Learned counsel for the appellant has taken me through the Insurance policy Exh.25/1. On perusal of the same, it appears that the respondent insurer has accepted the liability towards third party and further by accepting additional premium, liability towards paid driver and cleaner accepted. Though there is a column about the coverage of liability to a non-fare paying passenger, said column is kept blank and as such, liability towards non-fare

paying passenger is also not covered. In this case, admittedly, deceased Nashir alongwith his brother was travelling in the said vehicle as a passenger alongwith goods by paying freight to the respondent owner. The learned Member of the Tribunal has therefore rightly exonerated the respondent insurer from the liability to pay the compensation in view of the authoritative pronouncement of the Supreme Court in the judgment of **New India Assurance Co. Ltd. Vs. Asha Rani and Ors.** reported in **AIR 2003 SC 607** referred supra.

10. So far as quantum of compensation is concerned, in paragraph no.17 of the judgment, the Tribunal though dismissed the claim petition, in order to answer all the issues, worked out the compensation for which the claimants are entitled. I do not find any fault in the said determination of the compensation. The appellants claimants are thus entitled for an amount of Rs.57,600/- towards compensation in respect of the accidental death of their son Nashir from respondents No.1 and 2, who are jointly and severally liable to pay the same alongwith interest. Hence, following order.

**ORDER**

- I] First Appeal is hereby allowed with costs.
- II] The judgment and Award dated 26.4.1995 passed by the Member, Motor Accident Claims Tribunal, Ahmednagar in MACP No.52/1987 is hereby quashed and set aside.
- III] The MACP No.52/1987 is hereby partly allowed.
- IV] The respondents No.1 and 2 do pay an amount of Rs.57,600/- (Rs. Fifty Seven Thousand six hundred) inclusive of 'No Fault Liability' amount of Rs.15,000/- already paid to the claimants alongwith interest @ 6% p.a. from the date of application till realization of the entire amount.
- V] MACP No.52/1987 is hereby dismissed against respondent No.3 – Oriental Insurance Company Ltd Ahmednagar.
- VI] Award be drawn up accordingly.
- VII] First Appeal is accordingly disposed of.

sd/-

**( V.K. JADHAV, J. )**

aaa/-

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