

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1491 OF 2016

ICICI LOMBARD GENERAL INSURANCE COMPANY LTD.
VERSUS
VANITA NANASAHEB ANAP AND OTHERS

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Advocate for Appellant : Mr. S.S. Patil with Mr. R.H. Dahat
Advocate for Respondent No.1: Mr. Y.R. Shinde h/f Mr. R.R. Karpe
Adv for Respondents 2 and 3 : Mr. Umakant U. Wagh h/f Mr. A.V. Hon

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WITH
FIRST APPEAL NO. 1492 OF 2016

ICICI LOMBARD GENERAL INSURANCE CO. LTD. THR ITS MANAGER
VERSUS
PANDURANG YASHWANT GAWADE AND ORS

...
Advocate for Appellant : Mr. S.S. Patil with Mr. R.H. Dahat
Advocate for Respondent Nos.1 to 3: Mr. Y.R. Shinde h/f Mr. R.R. Karpe
Advocate for Respondent No.5 : Mr. Satej S. Jadhav

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CORAM : V. K. JADHAV, J.
DATED : 27th MARCH, 2017

PER COURT:-

1. By consent of the parties, heard finally at admission stage.
2. Being aggrieved by two separate judgment and awards, both dated 18.9.2015, passed by the learned Member, Motor Accident Claims Tribunal, Shrirampur in M.A.C.P. No. 197 of 2011 and in M.A.C.P. No. 165 of 2011, the original respondent No.3 insurer in both the claim petitions, preferred these two separate appeals. Learned Member of the Tribunal, though both the claim petitions

arise out of one and the same accident, decided the same by two separate judgment and awards and thus, the original respondent No.3 insurer preferred these two separate appeals.

3. Brief facts giving rise to the present appeals are as follows:-

a) On 28.5.2011, deceased Bapusaheb and Nanasaheb were travelling by motor cycle and on way, one tempo bearing registration No. MH-16-AE-898, driven in rash and negligent manner, gave dash to the motor cycle and immediately, thereafter, a tanker bearing registration No. MH-06-AC-5139, driven in rash and negligent manner also gave dash to the motor cycle, which resulted into death of both the deceased Bapusaheb and Nanasaheb. The vehicle tanker is insured with the appellant, however, other vehicle tempo involved in the accident is without insurance. Legal representatives of both the deceased persons preferred two separate claim petitions bearing M.A.C.P. No. 197 of 2011 and M.A.C.P. No. 165 of 2011, respectively, for grant of compensation under various heads.

b) The appellant insurer has mainly resisted the both the claim petitions on the ground that the driver of tanker was not holding valid and effective driving licence and as such there has been breach of the policy condition and therefore, the appellant insurer is not liable

to pay compensation.

c. The claimants have adduced their evidence to substantiate their contentions raised in the claim petitions. The appellant insurer has also adduced its evidence to substantiate its statutory defence and the Tribunal, by its impugned judgment and award passed separately in both the claim petitions, awarded the compensation as detailed in the operative part of the judgments. The appellant insurer has preferred these appeals to the extent of finding of composite negligence recorded by the Tribunal.

4. Learned counsel for the appellant insurer submits that in the instant case, three vehicles came to be involved in the accident. Both deceased persons were travelling on motor cycle and the tanker and the tempo, as referred above, are also involved in the accident. In view of observations made by the Supreme Court in para 5 of the judgment delivered in the case of ***T.O. Anthony vs. Karvarnan and others, reported in 2008 (5) Mh.L.J. 7***, the Tribunal ought to have recorded the finding about contributory negligence and ought not to have recorded the finding of composite negligence. The learned counsel has not made any submission so far as the quantum in both the claim petitions, as awarded by the Tribunal.

5. Learned counsel for the respondents/claimants in both the appeals submits that in the accident involving two or more vehicles, where third party claiming damages for loss or the injuries, the compensation is payable in respect of composite negligence of the drivers of vehicles involved in the accident. However, in respect of such accident if the claim is by one of the driver himself for personal injury or by legal heirs of one of the driver for loss on account of his death or owner of one of the vehicle in respect of damages to his vehicle, then the issue that arises is not about composite negligence of driver but about the contributory negligence of the driver concerned. In the instant case, two vehicles are involved i.e. tanker and tempo. Initially, the said tempo has given dash to the motor cycle and thereafter, the tanker also given dash to the said motor cycle on which both the said deceased persons were travelling. It is clear case of composite negligence and the Tribunal has rightly held so.

6. I have also heard learned counsel appearing for the owner in both the appeals.

7. In the instant case, both the deceased persons were travelling on motor cycle. Though the motor cycle is involved in the accident, the vehicles tempo and tanker involved in the accident,

were driven by its respective drivers in such a manner, resulting into death of persons travelling on the motor cycle. Deceased persons travelling on the motor cycle were third parties i.e. other than the driver and/or owner of those vehicles tempo and tanker involved in the accident. In view of above, the Tribunal considering the evidence on record has rightly considered the case of composite negligence and recorded the finding to that effect.

8. In the case of ***T.O. Anthony vs. Karvarnan and others (supra)***, relied upon by learned counsel for the appellant, in para 5 of the judgment, the Supreme Court has made following observations:-

“5. The Tribunal assumed that the extent of negligence of the appellant and the first respondent is fifty:fifty because it was a case of composite negligence. The Tribunal, we find, fell into a common error committed by several Tribunals, in proceeding on the assumption that composite negligence and contributory negligence are the same. In an accident involving two or more vehicles, where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of damages to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.”

9. In para 6 and 7 of the judgment, the Supreme court has explained about the composite negligence and contributory negligence and observed as follows:-

“6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for

the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

10. In view of the ratio laid down by the Supreme Court, as above, the Tribunal has rightly recorded the finding of composite negligence.

11. In the case of ***Khenyei vs. New India Assurance Company Limited and others, reported in 2015 AIR (SC) 2261***, relied upon by learned counsel for the respondents/original claimants, the Supreme Court by referring earlier judgment on the point of composite negligence and contributory negligence, in para 12 of the judgment by framing the issue, held as under:-

"12.

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles. Claimant may implead the owner, driver and insurer of both the vehicles or anyone of them.

(ii) There can not be apportionment of the liability of joint tort-feasors. In case both the joint tort-feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of Law, there is no necessity to apportion the inter se liability of joint tort-feasors. Reference is answered accordingly. Appeal be placed before appropriate Bench for hearing."

12. In para 14 of the judgment, by giving reference to the case of ***T.O. Anthony vs. Karvarnan and others (supra)***, the Supreme court has made following observations :-

"14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in *T.O. Anthony v. Karvarnan & Ors.* [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence."

In para 14, the Supreme Court has also quoted para 6 and 7 of the judgment in the case of ***T.O. Anthony vs. Karvarnan and Ors (supra)***, which are already quoted above.

13. In view of the above, I do not find any fault in the impugned judgment and award passed by the Tribunal. Thus, there is no merit in the appeals. Hence, I proceed to pass the following order:-

O R D E R

- I. First appeal No.1491 of 2016 (ICICI Lombard General Insurance Co. Ltd. vs Vanita Nanasaheb Anap and others) and first appeal No. 1492 of 2016 (ICICI Lombard General Insurance Co. Ltd. vs Pandurang Yashwant Gawade and others) are hereby dismissed with cost.
- II. Both the appeals are accordingly disposed of.
- III. Needless to say that, if any amount is deposited before this Court, the claimants are entitled to withdraw the same.

(V. K. JADHAV, J.)

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