

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

FIRST APPEAL NO.3182 OF 2016

HDFC ERGO General Insurance Co.Ltd.
6th Floor, Leela Business Park,
Andheri Kurla Road, Andheri (East)
Mumbai 400 059

Through its Branch Manager / Authorized
Signatory, at Aurangabad.

**...APPELLANT
(Orig.Resp.No.3)**

VERSUS

1. Chandrabhan s/o Vithalrao Navghare,
Age 34 years, Occupation: Business,
R/o. Babhulgaon, Taluka Vasmat,
District Hingoli.
2. Chairman,
Suryakanta Mahila Bachat Gat,
Sataphal, Taluka Basmat,
District Hingoli.

**...RESPONDENTS
(Resp.Nos.1 - Orig.Claimant
(No.2 Orig.Respdt.no.1)**

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Shri Mohit Deshmukh, Advocate, h/f Mr.
S.G.Chapalgaonkar, Advocate, for appellant.

Shri V.D.Salunke & Shri S.V.Kuptekar, Advocate for
respondent no.1.

Shri S.B.Ghatol, Advocate for respondent no.2.

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FIRST APPEAL NO.3180 OF 2016

HDFC ERGO General Insurance Co.Ltd.
6th Floor, Leela Business Park,
Andheri Kurla Road, Andheri (East)
Mumbai 400 059

Through its Branch Manager / Authorized
Signatory, at Aurangabad.

**...APPELLANT
(Orig.Resp.No.3)**

VERSUS

1. Varsha w/o Nagorao @ Nagesh Navghare,
Age 25 years, Occupation: Household.
2. Hanuman s/o Nagorao @ Nagesh Navghare,
Age 6 years, Occupation Education.
3. Gayatri d/o Nagorao @ Nagesh Navghare,
Age 4 years, Occupation: Nil.,
4. Pralhad s/o Bayaji Navghare,
Age 52 years, Occupation: Agriculture,
5. Trishala w/o Pralhad Navghare,
Age 52 years, Occupation: Agriculture,

All R/o. Babhulgaon, Taluka Vasmat,
District Hingoli.

6. Chairman,
Suryakanta Mahila Bachat Gat,
Sataphal, Taluka Basmat,
District Hingoli.

**...RESPONDENTS
(Resp.Nos.1 to 5 - Orig.Claimants)
(No.6- Orig.Respdt.no.1)**

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Shri Mohit Deshmukh, Advocate, h/f Mr.
S.G.Chapalgaonkar, Advocate, for appellant.

Shri V.D.Salunke, Advocate, for respondent no.1 to 4.

Shri S.B.Ghatol, Advocate for respondent no.6.

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CORAM: P.R. BORA, J.

Date of reserving the judgment:17/07/2017
Date of pronouncing the judgment:21/09/2017

JUDGMENT:

1. Since both these appeals arise out of one accident, the common arguments were heard in both these appeals and I deem it appropriate to decide both the appeals by common reasoning.

2. First Appeal No.3182/2016 is filed against the judgment and award passed in MACP No.43/2013 decided on 16th of October, 2015, by the Motor Accident Claims Tribunal at Basmath, whereas Appeal No.3180/2016 is filed against the judgment and order passed in MACP No.42/2013 decided on 14th of October, 2015, by the same Motor Accident Claims Tribunal. Both the appeals

are filed by the Insurance Company with whom the alleged offending vehicle was insured.

3. The accident which gave rise for filing the aforesaid two claim petitions had occurred on 29th of August, 2013. It was the case of the claimants in the aforesaid petitions that on 29th of August, 2013, when deceased Nagorao Pralhad Navghare and Chandrakant Vithalrao Navghare were proceeding from the side of Vasmath towards Parbhani on the Hero Honda Motor Cycle bearing registration No.MH-38-N-1150, were dashed by a tractor bearing registration No.MH-38-B-3810 and in the accident so happened, Nagorao died on the spot whereas Chandrakant was severely injured. Deceased Nagorao was plying the motor cycle and Chandrakant was the pillion rider. The aforesaid tractor is owned by the present respondent no.6 in First Appeal No.3180/2016 who is respondent no.2 in First Appeal No.3182/2016 and at the relevant time was insured with the appellant Insurance Company which has filed both the present appeals. It was alleged by the claimants in both the aforesaid petitions that the alleged accident happened because of

negligence on the part of the driver of the offending tractor and they had, therefore, claimed the compensation from the owner and insurer of the said tractor. The driver of the said tractor was admittedly not made party to either of the claim petitions. The owner of the offending tractor though appeared in the matter did not file his written statement and both the petitions were adjudicated without his written statement. The Insurance Company had filed its written statement in both the petitions and resisted both the petitions on various grounds. The foremost ground raised by the Insurance Company was that the offending tractor was not involved in the alleged accident and in connivance with the owner of the said tractor and the Police machinery, the same was falsely involved in the said accident. The petition was also opposed on quantum and breach of policy condition by the insured.

4. In both the claim petitions, oral evidence of the claimants in the respective petitions was adduced and the Police papers pertaining to the accident in question were filed on record. The Insurance Company did not adduce any evidence. The learned Tribunal, after having

assessed the oral and documentary evidence adduced by the claimants in the respective petitions, partly allowed both the petitions and made the amount of compensation determined in the respective claim petitions payable jointly and severally by the owner and insurer of the offending tractor. Aggrieved thereby, the Insurance Company has preferred the present appeals.

5. Shri Mohit Deshmukh, learned Counsel appearing for the appellant Insurance Company in both the appeals, assailed the impugned judgment and award mainly on the ground that the Tribunal has wrongly held the involvement of the offending tractor in occurrence of the alleged accident to have been proved. Learned Counsel submitted that from the material on record it is explicit that the offending tractor has been falsely involved in the alleged accident. The learned Counsel submitted that the first information report was lodged on 29th of August, 2013 by one Trimbak Limbaji Navghare against unknown vehicle. The learned Counsel further submitted that though the Police has filed the chargesheet against the driver of the said vehicle in relation to the

accident in question, the entire chargesheet nowhere reveals as to how the offending tractor came to be involved in the alleged accident, on whose and what information the Police reached to the conclusion that the offending tractor was involved in the alleged accident. The learned Counsel submitted that a specific defense was raised by the Insurance Company in its written statement that in connivance with the owner of the tractor and the police machinery, the offending tractor has been falsely shown to have been involved in the alleged accident though, in fact, the same was not at all involved in the said accident. The learned Counsel submitted that all these aspects are not considered by the Tribunal which has resulted in passing erroneous award by the Tribunal.

6. Learned Counsel further submitted that the amount of compensation as has been determined by the Tribunal in both the petitions is exorbitant and without any cogent and sufficient evidence therefor. The learned Counsel further submitted that the Tribunal has also failed in considering the another plea raised by the Insurance

Company that the alleged accident, according to the story put forth by the claimants themselves, was head on collision accident and, as such, in no case, the entire negligence could have been attributed on the part of the driver of the tractor. The learned Counsel clarified that all above submissions are the alternate submissions, however, the impugned award is mainly challenged on the ground of involvement of the offending vehicle in occurrence of the alleged accident.

7. Learned Counsel appearing for the respondents supported the impugned judgment and award. The learned Counsel for the respondents submitted that the claimants have sufficiently proved the involvement of the offending tractor and have also proved that the alleged accident happened because of rash and negligent driving of the driver of the said tractor. The learned Counsel submitted that all Police papers pertaining to the alleged accident are placed on record by the claimants. The learned Counsel further submitted that the Police has prosecuted the driver of the offending tractor in relation to the alleged accident for the offenses punishable under

Sections 304-A, 279, 337, 338 of IPC. The learned Counsel submitted that the tractor owner has not denied the involvement of the tractor in the alleged accident. The learned Counsel further submitted that though the Insurance Company had raised the plea that the offending tractor has been falsely involved in the alleged accident in connivance of the owner of the tractor and the Police machinery, the said objection has not been substantiated by the Insurance Company by leading any positive evidence therefor. The learned Counsel further submitted that the Tribunal has passed a well reasoned order even on the point of negligence as well as on quantum and no interference is, therefore, warranted in the impugned judgment and award. The learned Counsel, therefore, prayed for dismissal of both the appeals.

8. I have carefully considered the submissions made on behalf of the learned Counsel appearing for the respective parties. I have also perused the impugned judgment, the evidence on record and the other material placed on record.

9. As noted earlier, the impugned awards are challenged mainly on the ground that though the claimants have failed in proving the involvement of the offending tractor in occurrence of the alleged accident, the Tribunal has held the involvement of the said tractor to have been proved.

10. In its written statement filed in both the claim petitions, the Insurance Company though has raised a specific defense that the tractor insured with it bearing registration No.MH-38-B-3810 was falsely involved in occurrence of the alleged accident in connivance with the owner of the said tractor and the Police machinery, to substantiate the defense so raised, the Insurance Company has admittedly not adduced any oral evidence. As I could gather from the arguments of the learned Counsel appearing for the Insurance Company, his entire thrust was to bring to my notice the facts which have come on record through the testimony of Chandrabhan, the claimant in M.A.C.P.No.43/2013.

11. In so far as M.A.C.P.No.42/2013 is concerned, the claimants in the said claim petition had relied upon the Police papers pertaining to the accident in question so as to prove the involvement of the tractor in the alleged accident as well as the negligence of the driver of the said tractor resulting in causing the alleged accident. The claimant no.1 in M.A.C.P.No.42/2013 who deposed in the said matter on behalf of the claimants was admittedly not an eye witness to the alleged accident nor she was having any personal knowledge about the occurrence of the alleged accident. In the circumstances, as I noted earlier, the reliance of the claimants in Claim Petition No.42/2013 was on Police papers pertaining to the alleged accident.

12. In so far as the Claim Petition No.43/2003 is concerned, the claimant in the said petition himself was the victim of the alleged accident and, as such, his testimony certainly assumes importance. Taking me through the evidence of said Chandrabhan, it was argued by Shri Deshmukh, learned Counsel appearing for the appellant Insurance Company that there are material

contradictions in the evidence of the said witness which create reasonable doubt about the involvement of the offending tractor in occurrence of the alleged accident. On perusal of the evidence of Chandrabhan, it is noticed that though in his examination in chief he has deposed that he had seen the offending tractor and has also stated registration number of the said tractor, in his cross examination he has come out with a different version and has deposed that he came to know about the offending vehicle two days after the accident. In the cross examination, said Chandrabhan has further stated that one Bhagwan Chandoji Navghare informed him about the details of the said vehicle which gave dash to their motor cycle. Admittedly, said Bhagwan Navghare has not been examined as a witness by Chandrabhan nor said Bhagwan has been examined as witness in M.A.C.P.No.42/2013.

13. It was further sought to be canvassed by Shri Deshmukh, learned Counsel, that the further fact stated by Chandrabhan in his cross examination that Bhagwan Navghare informed him that the owner of the tractor took the said tractor on Supurtnama makes it clear that if at all

said Bhagwan would have given any such information to Chandrabhan, it may have been given by him only after 10th of October, 2013. Learned Counsel brought to my notice that the owner of the tractor got released the offending tractor on Supurtnama on 10.10.2013. This argument of the learned Counsel is difficult to be accepted. It is true that the aforesaid fact has been stated by Chandrabhan in his cross examination that Bhagwan informed him that the owner of the tractor took the tractor on Supurtnama from the Judicial Magistrate, First Class, Basmath, however, the same cannot be co-related with his earlier statement that Bhagwan informed the details of the vehicle which gave dash to their motor cycle and on that basis no such inference can be drawn that said Bhagwan, if at all had given any information to Chandrabhan, the same was given by him only after 10.10.2013 and, therefore, to draw further inference that till that date Chandrabhan was not aware of the vehicle involved in the alleged accident. The chargesheet filed against the driver of the offending tractor in relation to the alleged accident is filed on record. The chargesheet reveals that the statement of Chandrabhan was recorded by the Police on

14.9.2013 and in the said statement Chandrabhan has disclosed to the Police the registration particulars of the tractor alleging the same to have been involved in the accident in question. It, therefore, cannot be accepted that Chandrabhan came to know about the involvement of the offending tractor only after 10.10.2013.

14. As has been stated by Chandrabhan in his testimony before the Tribunal, he had seen the offending tractor coming from the opposite direction and further that the same was being driven in a rash and negligent manner and at an excessive speed and it gave dash which resulted in causing the alleged accident. As was further stated by said Chandrabhan, he became unconscious on the spot itself after he was injured in the alleged accident and he was not even aware as to who admitted him in the hospital by removing him from the spot of occurrence. In such circumstances, even if it is accepted that it was possible for Chandrabhan to see the vehicle which gave dash to their motor cycle, it appears difficult to digest that the registration number of the said vehicle was also noticed by him and further that he kept the said number in his

memory and reproduced the same after about fifteen days of the alleged occurrence when his statement was recorded by the Police.

15. The question also arises as to why Chandrabhan did not lodge any report with the Police when he had regained the consciousness on the next day of the alleged incident.

16. The immediate next question, however, arises whether merely because the evidence of Chandrabhan does not appear to be dependable and reasonable doubts are created about the facts stated by him, can such a conclusion be definitely recorded that the offending vehicle was not involved in the alleged accident in light of the fact that the Police has filed the chargesheet against the driver of the said tractor and that in the crime so registered in relation to the said accident the offending tractor was seized by the Police and was got released by the owner of the said tractor on Supurtnama. Filing of a chargesheet against the driver of the offending tractor, seizure of the said tractor in the crime registered in that

regard and the release of the said tractor on Supurtnama executed by the owner of the said tractor, prima facie, estatablish the involvement of the said tractor in occurrence of the alleged accident. It also cannot be ignored that the owner whose tractor is involved in the alleged accident, though entered in his appearance before the Tribunal, did not file his written statement and has allowed the claim petition to be decided without his written statement. If it was the case of the appellant Insurance Company that the offending tractor came to be involved in connivance with the owner of the said tractor and the Police machinery, it was incumbent on its part to substantiate the said allegation by bringing on record some evidence in that regard suggesting such probabilities. Some admissions obtained in the cross examination of the claimant in one petition are not sufficient to uphold the objection raised by the Insurance Company. It was quite possible for it to adduce the evidence of any of its officer conversant with the facts of the said case and, in such circumstances, could have also examined the investigating officer who filed the chargesheet. In absence of any such attempt made by the Insurance

Company. It is difficult to record any such finding that the Police filed a concocted chargesheet falsely showing involvement of the offending tractor in the alleged accident.

17. The next question which falls for my consideration is whether there is any substance in the objection raised by the appellant Insurance Company that the Tribunal has failed in not considering the contention raised by the appellant Insurance Company as regards to the contributory negligence on the part of the deceased in occurrence of the alleged accident.

18. Shri Deshmukh, learned Counsel for the Insurance Company, submitted that the evidence on record clearly suggests that the alleged accident was head on collision between the tractor and the motor cycle of the deceased. Learned Counsel submitted that in head on collision accidents, no hundred per cent negligence can be attributed on the part of any one of the vehicle unless there is clinching evidence in that regard. Learned Counsel submitted that it has come in examination in chief itself of

the claimant in M.A.C.P.No.43/2013 that it was a head on collision accident. He has deposed that, "त्याने आमच्या मोटर सायकलला समोरासमोर जोराची धडक दिली." The learned Counsel submitted that, in such circumstances, the Tribunal must have held that the deceased motor cyclist Nagorao also contributed to the alleged accident in equal proportion. Learned Counsel, therefore, prayed for modifying the finding recorded by the Tribunal to the aforesaid extent and, consequently, to reduce the liability caused on the owner and insurer of the offending tractor in that proportion.

19. Learned Counsel appearing for the original claimants has, however, submitted that the Tribunal has rightly recorded a finding on the aspect of negligence and has correctly held the Driver of the offending tractor solely responsible for occurrence of the alleged accident. Learned Counsel submitted that in his examination in chief Chandrabhan, claimant in M.A.C.P. No.43/2013 has specifically deposed that deceased Nagesh was plying the motor cycle carefully, at moderate speed and from his left

side. Learned Counsel submitted that there is no contrary evidence to disbelieve the fact so stated by Chandrabhan. Learned Counsel submitted that the Insurance Company has not adduced any evidence so as to bring on record any possibility of any negligence on the part of the deceased in occurrence of the alleged accident. Learned Counsel submitted that the scene on the spot of occurrence also reveals that the motor cycle was being driven from the left side of the road and it is not the case that the accident happened at the center of the road or at the midst of the road.

20. The Insurance Company has admittedly not adduced any oral evidence, however, that cannot be a ground for outrightly rejecting the plea so raised by the Insurance Company. As was pointed out by the learned Counsel appearing for the appellant Insurance Company, the injured in the said accident himself has deposed in his examination in chief itself that, "डॅक्टरने आमच्या मोटर सायकलला समोरासमोर जोराची धडक दिली." The spot panchanama drawn of the alleged accident reveals that the road on which the

accident happened was a tar road having width of 20 feet and there was a Kaccha road on both the sides of the tar road. The spot of the accident as shown in the spot panchanama is on the tar road at the distances of seven feet from the northern edge of the said road. Surprisingly, the spot panchnama nowhere reveals that blood was noticed around the spot which is shown to be the spot of the accident. Considering the statement of the injured in his examination in chief reproduced hereinabove, a reasonable inference can be drawn that it was a head on collision accident. There is further reason to believe that the motor cyclist did not make any attempt to take his motor cycle at the edge of the road on his left side or to take it on Kaccha road even after noticing that a tractor is coming from the opposite direction in a high speed and was being driven in a rash manner by the driver of the said tractor. In the circumstances, there appears substance in the submission made on behalf of the appellant Insurance Company that some negligence has to be attributed on the part of the deceased motor cyclist. It, however, cannot be accepted that the deceased motor cyclist was responsible for occurrence of the alleged

accident in equal proportion to that of the negligence of the tractor driver. The greater negligence in causing the alleged accident is definitely on the part of the driver of the tractor.

21. After having considered the evidence on record in this regard, according to me, the proportion of negligence on the part of the deceased motor cyclist can be determined to the extent of 30 per cent. I hold accordingly. The finding recorded by the learned Tribunal in this regard in both the impugned judgments and awards needs to be modified to the aforesaid extent.

22. Nextly, though it was sought to be contended by the learned Counsel appearing for the appellant Insurance Company that the amount of compensation as determined by the Tribunal is on higher side, after having perused the evidence in that regard adduced by claimants in both the Claim Petitions, it does not appear to me that the Tribunal has committed any error in determining the amount of compensation in both the Claim Petitions. I, therefore, do not see any reason to cause any interference

in the amount of compensation as determined by the learned Tribunal. However, it has to be further stated that in view of the finding recorded by this Court on the point of negligence, the amount of compensation liable to be paid by the owner and Insurer of the offending tractor would be decreased by 30 per cent. To that extent, the impugned awards will have to be modified. In view of the above, following order is passed:

ORDER

1. The claimants in Motor Accident Claim Petition No.42/2013 are held entitled to receive the compensation of Rs.9,28,620/- inclusive of the No Fault Liability compensation jointly and severally from respondent nos. 1 and 2 in the said Claim Petition together with the interest thereon at the rate of 9 per cent per annum from the date of filing of the petition till realization of the said amount.

2. Save and except the decrease in the amount of compensation as specified in clause (1) above, remaining part of the award passed in Motor Accident Claim Petition

No.42/2013 is maintained as it is.

3. The claimant in Motor Accident Claim Petition No.43/2013 is entitled to the total compensation of Rs.5,19,050/- inclusive of No Fault Liability compensation jointly and severally from respondent nos. 1 and 2 in the said Claim Petition with interest thereon at the rate of 9 per cent per annum from the date of filing of the Claim Petition till realization. Save and except the decrease in the amount of compensation as specified above, the remaining part of the award passed in Motor Accident Claim Petition No.43/2013 is maintained as it is.

4. The amount payable to the claimants in both the aforesaid Claim Petitions as per the award modified by this Court in the present appeals be paid to the claimants from out of the amount deposited by the Insurance Company in this Court and after disbursement of the said amount, the balance amount be refunded to the appellant Insurance Company.

5. Both the appeals stand partly allowed in the

aforesaid terms.

6. Modified awards be drawn accordingly.
7. Pending Civil Applications, if any, stand disposed of.

(P.R.BORA)
JUDGE

AGP/3182-16 and 3180-16fa

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