

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

**FIRST APPEAL NO.2506/2016
WITH
CA/9076/2013 IN FA/2506/2016**

THE NATIONAL INSURANCE COMPANY LTD.
VERSUS
SHIVGANGA BABURAO BADE AND OTHERS.

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Advocate for Appellant : Mr S P Chapalgaonkar
Advocate for Respondents : Mr P.C. Mayure For R/1 To
4, Mr S S Rathi For R/6

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**WITH
FIRST APPEAL NO. 2507 OF 2016
WITH
CA/9074/2013 IN FA/2507/2016**

THE NATIONAL INSURANCE COMPANY LTD.
VERSUS
MATHURABAI BHIMRAO SABALE

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Advocate for Appellant : Mr S P Chapalgaonkar
Advocate for Respondents : Mr P.C. Mayure For R/1 To
3, Mr S S Rathi For R/5

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**CORAM : V.K. JADHAV, J.
Dated: March 02, 2017**

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PER COURT :-

1. Being aggrieved by the judgment and award passed by the District Judge-2, Beed/Member, Motor Accident Claims Tribunal, Beed dated 22.3.2013, in MACP No.113/2008 and being aggrieved by the passed

by the District Judge-2, Beed dated 22.3.2013, in MACP No.115/2008, the respondent-insurer of the vehicle truck involved in the accident preferred these two first appeals to the extent that the Tribunal though recorded findings about composite negligence of both the vehicles, failed to determine the interse liability to the extent of the negligence of drivers of both the vehicles.

2. Brief facts to the extent of ground of appeal raised by the appellant insurer are as follows :-

On 29.2.2008, on Shirur Kasar Loni Road, the jeep carrying passengers dashed against stationary truck on road and thus the accident had taken place. The learned Member of the Tribunal held that it is a case of composite negligence and accordingly directed respondent no.1, 3 and 4 jointly and severally to pay the compensation as worked out to the claimants alongwith interest etc.

3. The learned counsel for the appellant submits that, in the case of composite negligence, the claimants are entitled to sue both or any one of the joint

tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several. The claimant can recover at his option whole damages from any one of them. Learned counsel submits that, in the present claims, the claimants have claimed compensation from both tortfeasors and accordingly impleaded them as party. The learned Member of the Tribunal after having an elaborate discussion over the question of negligence has recorded the finding that the accident was the result of composite negligence on part of the drivers of both the vehicles. Learned counsel submits that the Tribunal, however, failed to determine the interse extent of composite negligence of drivers though owner of both the vehicles are impleaded as a party to the claim petitions. The learned counsel submits that, in case, if the entire award is executed against the present appellant insurer, in absence of the determination of the interse liability amongst tortfeasors, the appellant insurer would not be able to recover the amount from the owner of the other vehicles. Learned counsel submits that, possibility of executing the award against the appellant-insurer alone would be

there for the reason that the insurer of the other vehicle involved in the accident came to be exonerated by the Tribunal.

4. Learned counsel for the appellant, in order to substantiate his contentions places his reliance on following cases :-

1. Khenyei Vs. New India Assurance Co. Limited and others reported in 2015 AIR SCW 3169.
2. T.O.Antony Vs. Karvarnan and others reported in AIR 2008 SC (Supp) 1646.
3. Pawan Kumar and another Vs. Harkishan Dass Mohan Lal and others reported in (2014) 3 Supreme Court Cases 590.

5. I have also heard the learned counsel for respondent-claimants and the learned counsel for respondent insurer of the other vehicle.

6. Respondent Ramesh Bade who happened to be a jeep owner, though served through paper publication, none appears for him.

7. In a case of Khenyei Vs. New India Assurance Co. Ltd., and others (supra) relied upon by the learned

counsel for the appellant, in paragraph No.18 of the Judgment, the Supreme Court has made following observations :-

18. This Court in Challa Bharathamma & Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feisor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle – trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feisor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

- (i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feors and to recover the entire compensation as liability of joint tort feors is joint and several.
- (ii) In the case of composite negligence, apportionment of compensation between two tort feors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.
- (iii) In case all the joint tort feors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feor can recover the

amount from the other in the execution proceedings.

- (iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasons. In such a case, impleaded joint tort feason should be left, in case he so desires, to sue the other joint tort feason in independent proceedings after passing of the decree or award.

8. In the aforesaid paragraph no.18 observations in clause no.(iii) squarely applies to the facts and circumstances of the case. In the instant case, the Tribunal has failed to determine the interse extent of composite negligence of the drivers. Both the drivers have been impleaded and if extent of their negligence is not determined by the Tribunal, and if the entire amount under award is recovered from the appellant-insurer, then probably the appellant insurer may not be in a position to recover the amount from the other tort feasons in the execution proceedings.

9. In the instant case, in paragraph No.15 of the judgment, the Tribunal on perusal of the contents of the spot panchnama observed that the truck driver has not taken any precautionary measures by keeping the stones by the side of the parked truck or installed flags or had put head lights to avoid the accident. The

Tribunal has also observed that owner of the truck has not examined driver of the truck as witness. Learned Tribunal has therefore held that there was negligence on the part of the driver of the truck also. In paragraph no.18 of the judgment, the Tribunal as a sequel of above discussion held that, accident took place due to rash and negligent act and driving on the part of drivers of jeep and truck and driver of jeep is alone not solely responsible for the said accident. Learned Member of the Tribunal in an unequivocal words observed that this is a case of composite negligence.

10. On perusal of the spot panchnama and its contents, it appears that, the driver of the stationary truck has not taken precautionary measures while keeping the vehicle truck stationary on the road. It further appears from oral and documentary evidence that the jeep was in high speed and dashed against back portion of the truck. Though, truck was not parked in the middle portion of the road and space was available for the jeep to pass on, the driver of the jeep drove it in such a manner that jeep dashed against back

portion of the truck.

11. In view of the above, both the drivers of the aforesaid vehicles are equally responsible for the accident. However, determination of the extent of negligence between them is only for the purpose of their *inter se* liability so that one may recover the sum from the other after making whole of payment to the claimant. It is open to the claimant to recover the amount from any of them. With these observations, I proceed to pass the following order.

O R D E R

- I. Both the appeals i.e. First appeal No.2506/2016 (The National Insurance Company Ltd., Vs. Shivganga Baburao Bade and others) and First Appeal No.2507/2016 (The National Insurance Company Ltd., Vs. Mathurabai Bhimrao Sabale) are hereby partly allowed. No costs.
- II. The judgment and Award passed by the District Judge-2, Beed dated 22.3.2013 in MACP No.113/2008 and MACP No.115/2008 are hereby modified to the extent and by adding one more clause in the operative part

of the order that :-

- a] Interse liability of respondent no.1 at one side and respondents no.3 and 4 at other side is to the extent of 50% x 50%.
- III] Award be drawn up accordingly.
- IV] Both the appeals are accordingly disposed of in terms of above modifications.
- V] In view of disposal of first appeals, pending civil applications also stand disposed of.
- Vi] The appellant-insurer has deposited 50% of the amount and would further deposit remaining amount before this Court within a period of four weeks from today. The appellant-insurer is at liberty to recover the amount as per the *inter se* liability amongst two vehicles as determined above.

sd/-

(V.K. JADHAV, J.)

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aaa/-