

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

**FIRST APPEAL NO. 3464 OF 2015
WITH
CA/16930/2015 IN FA/3464/2015**

NATIONAL INSURANCE CO. LTD. AURANGABAD
VERSUS
SARIKA SATISH DHOTRE AND OTHERS

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Advocate for Appellant : Mr Kulkarni Sudhir V.
Advocate for Respondents : Mr V. P Golewar
Respondent No.5-Served-absent.

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**CORAM : V.K. JADHAV, J.
Dated: July 10, 2017**

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PER COURT :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the Judgment and Order passed by the Member, Motor Accident Claims Tribunal, Jalna, dated 12.8.2015 in MACP No.106/2013, the original respondent no.2-insurer has preferred this appeal.
3. Brief facts, giving rise to this appeal are as follows :-
 - a] On 18.2.2013 at about 4.45 p.m. Pralhad

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Dhanwade alongwith deceased Satish was proceeding towards Jintur on his motorcycle bearing registration No.MH-21/M-1109. Deceased Satish was the pillion rider on the said motorcycle. On way, one another motorcycle bearing registration No.MH-21/AG-5065 came from the opposite direction and given dash to the motorcycle on which deceased was pillion rider. In consequence of which, deceased Satish sustained serious head injuries and died on the spot. The claimants/legal representatives of deceased Satish approached to the tribunal by filing MACP No.106/2013 for grant of compensation under various heads. It has been contended in the claim petition that rider of the motorcycle bearing registration No.MH-21/AG-5065 coming from the opposite direction in rash and negligent manner was solely responsible for the accident and thus the owner of the said motorcycle and appellant-insurer are liable to pay the compensation jointly and severally.

b] The original respondent no.1 owner has not filed written statement and therefore hearing of the claim

petition ordered to proceed without her written statement.

c] The appellant-insurer has strongly resisted the claim petition by filing written statement. It has been contended that rider of the motorcycle was not holding valid and effective driving licence at the time of accident. It has also been contended that the accident was caused on account of rash and negligent driving of the rider of motorcycle bearing registration no.MH-21/M-1109 on which deceased Satish was the pillion rider. In the alternate, it has been contended that, it is a case of contributory negligence and as such, the appellant-insurer is not liable to pay the entire amount of compensation. It has also been contended that the claim petition is bad in law for non-joinder of necessary parties since the owner, rider and insurer of said motorcycle on which deceased Satish was pillion rider were not impleaded as parties to the claim petition.

d. The respondents-claimants have adduced their

oral and documentary evidence in support of their contentions. The appellant-insurer has not adduced any evidence. The learned Member of the Tribunal, Jalna by its judgment and order dated 12.8.2015 partly allowed the claim petition and thereby directed respondent no.1 owner and appellant insurer do pay jointly and severally an amount of Rs.6,21,000/- towards compensation to petitioner nos. 1 to 4 alongwith interest and costs. Hence, this appeal.

4. The learned counsel for the appellant-insurer submits that, crime came to be registered against the rider of the motorcycle on which deceased Satish was the pillion rider. Learned counsel submits that the owner, rider and insurer of said motorcycle are not impleaded as party to the claim petition. Said accident has taken place on account of rash and negligent driving of the rider of the motorcycle on which deceased Satish was travelling as a pillion rider and therefore, the appellant-insurer is not liable to pay any compensation. In the alternate, the learned counsel submits that, it

appears from the evidence that both riders of the vehicles involved in the accident have contributed the negligence equally and as such, negligence contributed by the rider of the motorcycle on which deceased Satish was pillion, in absence of impleading him as a party to the claim petition, amount awarded by the tribunal as a compensation is liable to be reduced to the extent of contribution made by the said rider of the motorcycle.

5. Learned counsel for respondents-original claimants submits that, in paragraph no.14 of the judgment, the tribunal has observed and recorded the findings to the effect that it is a case of composite negligence and as such, respondents-claimants have a choice of proceeding against all or any of the wrongdoer. Learned counsel submits that, in absence of any one of the joint tort feisor as a party to the claim petition, inter-se liability cannot be decided and as such, the appellant-insurer is liable to pay the entire amount of compensation as worked out by the Tribunal.

6. On perusal of the pleadings, evidence and the impugned judgment and award passed by the tribunal, it appears that there was almost head on collision between the two motorcycles bearing registration no.MH-21/M-1109 and MH-21/AG-5065. In paragraph no.13 of the judgment, the tribunal has observed that the principle of contributory negligence so as to apportion the liability between the drivers/owners would be relevant only if the claim for compensation is by one of the drivers himself or by his legal heirs as the case may be. In paragraph no.14 of the judgment, Tribunal has concluded the point with the observations that, in the present case petitioners have claimed compensation against the owner and insurer of the motorcycle bearing registration No.MH-21/AG-5065 and in a case of liability by composite negligence both joint tort feasons are not required to be impleaded as a party to the claim petition and it is a choice of the petitioner to proceed against all or any of the joint tort feasons.

7. In a case of **Khenei Vs. New India Assurance Co.**

Ltd., reported in **2015 AIR SCW 3169**, in paragraph no.18 of the judgment, the Supreme Court has concluded the issue with the 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 tortfeasor 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 tortfeasor 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 tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors 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 feasons 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 feasons 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 feason 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 instant case, clause no.(iv) of paragraph No.18 of the aforesaid judgment squarely applies. Respondents-original claimants have claimed compensation against one of the joint tort feason and there is no bar as such to claim compensation from one of the joint tort feason, however, in such a case interse liability to pay the compensation amongst the joint tort feasons cannot be determined in absence of other joint tort feason. In the aforesaid clause (iv), the Supreme Court has observed that, 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.

9. In the present case, no such liberty is granted by the Tribunal to the appellant-insurer and respondent no.1 owner. Thus, by giving this liberty, this appeal can be disposed of. Hence, following order.

O R D E R

1. Appeal is hereby partly allowed. No costs.
2. The judgment and Award passed by the Member, Motor Accident Claims Tribunal, Jalna, dated 12.08.2015 in M.A.C.P. No.106/2013 stands confirmed with the following modifications :-
 - a] The appellant-insurer and respondent no.1 owner are at liberty to sue other joint tort feisor in independent proceeding, if so desires to determine the extent of composite negligence of the riders of both the vehicles.
3. Award be drawn up accordingly.
4. First appeal is accordingly disposed of. Pending civil application also stands disposed of.

5. If any amount is deposited before this Court, the respondents-claimants are permitted to withdraw the same.

(V.K. JADHAV, J.)

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