

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

**911 FIRST APPEAL NO.280/2001
WITH CA/4504/2003 IN FA/280/2001**

- . Shri Daulatrao Dashrath Dhonde
Age: 44 years, Occu.: Agriculture
and business, resident of Rahuri,
Taluka Rahuri, Dist.Ahmednagar.
(Died)
Through L.Rs.,
 - 1A. Sunil s/o. Daulatrao Dhonde
Age: 40 yrs., Occu.: Agri.,
R/o."Ayodhya" Nagar-Manmad Road,
Rahuri, Dist.Ahmednagar.
 - 1B. Smt.Madhuri w/o Sunil Dandavatel
Age: 36 years., Occu.: Household,
R/o.At.Post.Sakori,
Tq.Rahata, Dist.Ahmednagar.
 - 1C. Smt.Manisha Vikas Tarde
Age: 34 yrs., Occu.: Household,
R/o.At.Post.Brahmni,
Tq.Rahuri, Dist.Ahmednagar.
 - 1D. Hirabai w/o. Daulatrao Dhonde
Age: 66 yrs., Occu.: Household,
R/o."Ayodhya", Nagar-Manmad Road,
Rahuri, Dist.Ahmednagar.
- ..Appellants

VERSUS

- 1. Satnamsingh Rounaksingh
Age: 38 years, Occu.: Business,
Resident of Delhi Haryana Roadlines,

Nasik Phata, Bombay-Pune Road,
Pune, District Pune.

2. Sayyad Kutobuddin Fakir Mohammed
Age: 36 years, Occu.: Driver,
Resident of Rahuri, Tal.Rahuri,
District Ahmednagar.
3. Gurunamsingh Preetamsingh Randhwa
Age: 31 years, Occu.: Driver,
Resident of Delhi Haryana Roadlines,
Nasik Phata, Bombay Pune Road,
Pune, District-Pune.
4. Shri Mahendra Sonyabapu Shete
Age: Major, Occu.: Business,
Resident of Rahuri, Tal.Rahuri,
District-Ahmednagar.
5. The New India Assurance Company Ltd.,
(Through its Branch Manager
Khatod Building, Opp.C.B.I.
Shrirampur 413 709,
Taluka Shrirampur, Dist.Ahmednagar.
6. United India Insurance Company Ltd.,
Branch Ludhiana. ..Respondents

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Advocate for Appellants : Mr.C.K.Shinde
Advocate for Respondent No.4 : Mr.R.L.Kute h/f.
Mr.R.N.Dhorde
Advocate for Respondent No.5 : Mr.V.N.Upadhye and
Mr.M.R.Deshmukh
Advocate for Respondent No.6 : Mr.R.F.Totala and
Mr.Rahul Totala

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**WITH
FIRST APPEAL NO.56 OF 2001
WITH CA/2791/2003 IN FA/56/2001**

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**CORAM : M.S.SONAK, J.
DATE : 8th FEBRUARY, 2018**

ORAL JUDGMENT:-

1) Heard the learned counsel for the parties. Since, in both the appeals, the challenge is to the one and the same impugned Judgment and award dated 7.12.1999, it is only appropriate that both these appeals are disposed of by the common Judgment and order.

2) First Appeal No.280 of 2001 has been instituted by the injured claimant. In the appeal, it is the contention of the appellants that it is the driver of Truck bearing Registration No.DEL 3288 which was mainly responsible for the accident in which he sustained the injuries and therefore, the Motor Accident Claims Tribunal was not justified in exonerating the driver, owner and the insurer of the said Truck from liability.

It is also the case of the appellants that additional compensation was due and payable to original appellant on account of injuries sustained by him on account of the accident.

3) First Appeal No.56 of 2001 has been instituted by the owner of the Jeep bearing Registration No.MGM 2777. It is the case of this appellant that driver of the Jeep was not at all negligent and therefore, no liability could have been foisted upon the driver or owner of the Jeep. It is also the case of the appellant that since, it was the case of the claimant that they were using the Jeep on friendly basis, the claimant was not at all entitled to pray for any claim as against the driver or owner of the Jeep. It is also the case of the appellant that claimant has executed an agreement agreeing not to raise any claim against the owner and driver of the Jeep and such agreement was binding upon the claimant.

4) The learned counsel for the two appellants reiterated the aforesaid grounds in support of their appeals and also took me through the evidence recorded before the Tribunal. The learned counsel for the appellant in First Appeal No.56 of 2001 pointed out that neither in the pleadings nor in the evidence the claimant really alleged any negligence against the Jeep driver and owner. He submitted that infact, the claimant has also examined witness Mr.Appasaheb Kisan Varale, who has very categorically stated that the accident took place on account of rash and negligent act on the part of Truck driver and not on account of any rashness or negligence on the part of the Jeep driver.

5) Mr.Rahul Totala learned counsel for respondent No.6 Insurance Company, who had insured the Truck supported the impugned award by submitting that the Tribunal has quite clearly assessed the material on record and held that it is the Jeep Driver, who was negligent and

therefore, solely responsible for the accident in which claimant is alleged to have suffered injuries. He submits that the Insurance Company in its written statement had very clearly taken this stand and this stand is proved by the evidence on record.

6) Mr.Totala invites my attention to the evidence of Mr.Gangadhar Gabaji Deshmukh, the Police official attached to Sangamner Taluka Police Staion in Ashwi out post. He points out that this witness has clearly stated that there was fog and on account of fog it is the driver of Jeep driver, who could not control the vehicle and dashed against the Truck. Mr.Totala points out that this Police official has recorded the statement of the cleaner and driver of the Truck and finally after investigation, charge-sheet was field against the Jeep driver and not the Truck driver.

7) Mr.Totala also pointed out that Mr.Appasaheb Kisan

Varale in the course of his cross-examination has admitted that Jeep was not going in slow speed. Mr.Totala submits that there is ample evidence on record that there was fog at the time of accident. He points out that if Spot Panchanama is perused, it is clear that it was the Jeep driver, who drove vehicle rashly inspite of fog and therefore, it is the Jeep driver, who is responsible for the accident.

8) Mr.Totala submits that even the compensation determined by the Tribunal is quite excessive and the evidence on record, infact indicates that the claimant suffered no serious pecuniary or for that matter non-pecuniary loss on account of accident. For all these reasons, Mr.Totala submits that both the appeals are liable to be dismissed.

9) The first issue which arises in these appeals is whether on the basis of the evidence on record, it can be

said that the accident was on account of rash and negligent driving of the Jeep driver or whether the accident took place on account of rash and negligent driving on the part of the Truck driver.

10) In order to answer this issue, it is pertinent to note that the Truck driver and the Truck owner, who were impleaded parties to the claim petition, have chosen to remain exparte. This means that the Truck driver atleast has not denied the allegations made by the claimant in his claim petition to the effect that the accident took place on account of rash and negligent driving on the part of the Truck driver, despite an opportunity to do so.

11) Secondly, though the insurer of the Truck has filed the written statement in which it is alleged that there was no negligence on the part of Truck driver and it is the Jeep driver, who was negligent, no much value can be

attached to these statements in the absence of the Truck driver himself stating up this particular case. It is pertinent to note that the Insurance Company also did not apply for examination of the Truck driver in the matter. The Insurance Company also did not call for any other independent witness, who could have deposed to the circumstances in which accident took place.

12) In contrast, the claimant was travelling in the Jeep at the time of accident and has sustained injuries. In the course of his evidence the claimant has clearly stated that there was fog on the road when the accident took place. The Jeep in which he was travelling was going by correct side of the road and head-lights of the Jeep were on. He stated that by seeing the Truck coming from opposite side, the speed of the Jeep was slowed down and Jeep was taken towards one side of the road. Even then the Truck, which was coming in high speed from opposite side dashed the Jeep. He says that

the Jeep driver was not at fault and the accident took place due to rash driving of the Truck driver. He has stated that he sustained injuries of fractures to his right hand wrist, left thigh in addition to fractures to 3 to 4 ribs.

13) In the course of cross-examination, he has admitted that there was fog on the road. He has denied the suggestion as to the negligence of the Jeep driver. He has denied the suggestion that the head-light of the Jeep was not working. He has denied the suggestion that it was the Jeep driver, who gave dash to the Truck by coming to the wrong side. He denied that accident took place on account of rash and negligent driving of the Jeep driver. On behalf of the Insurance Company all these suggestions were put, as the Insurance Company did not call any independent witness to state the facts and circumstances in which the actual accident took place.

14) On behalf of the claimant, Mr.Appasaheb Kisan Varale, who was another occupant in the Jeep came to be examined. Mr.Appasaheb stated that the Jeep was going by the left side of the road. The Jeep was going in a moderate speed and it is the Truck, which was coming in high speed and dashed against the Jeep. This witness has categorically stated about rash and negligent driving of the Truck driver. In the course of cross-examination, he has denied various suggestions put to him trying to implicate the Jeep driver and exonerate Truck driver. In response to one of the suggestions, this witness has stated that 'it is not true to suggest that the Jeep was not going in slow speed, and the Truck gave dash to the Jeep'. However, this statement appears to be obviously a mistake at the stage of recording of evidence because suggestions are usually put in the form of double negatives. The entire evidence of Mr.Appasaheb has to be construed in the context and it is impermissible to read a stray statement out of context. From the testimony of

Mr.Appasaheb also it does appear that the blame is more on Truck driver than the Jeep driver.

15) The Police official Mr.Gangadhar Gabaji Deshmukh has no doubt made a statement that 'due to fog the Jeep driver could not control his vehicle and dashed against the Truck'. However, admittedly, Mr.Gangadhar was not present at the spot when the accident took place and therefore, this statement of Mr.Gangadhar cannot have any greater value and be relied upon to implicate the Jeep driver. The Tribunal, it appears has gave substantial credence to the deposition of Mr.Gangadhar presumably on the account that Mr.Gangadhar was an independent witness unlike Mr.Appasaheb, whom the Tribunal has held as an interested witness. However, Mr.Appasaheb cannot be strictly speaking regarded as some interested witness. He is natural witness since he is one of the occupants of the Jeep, which was involved in the accident.

16) The circumstance that the Police chose to institute a charge-sheet against the Jeep driver is also not a significant circumstance in the facts of the present case when there is other positive evidence on record in relation to the Jeep driver and the Truck driver. Besides, a suggestion was put to Mr.Gangadhar that since the Truck driver was not available, a case of negligence was foisted upon the Jeep driver. A suggestion was put that Jeep driver has been acquitted in criminal case. Infact, learned counsel who appears for Jeep owner and Jeep driver stated that this fact of acquittal was stated in the written statement filed by the Jeep owner in response to the claim petition.

17) The evidence of Mr.Gangadhar is at the highest relevant as regards his statement that in the course of his investigation, he found that Jeep was carrying passengers on hire without permit and therefore, charges under Section 42 r/w Section 132 of the Motor Vehicles

Act, were also slapped against the driver of the Jeep. In any case, much relevance cannot be given to this now considering that the Jeep driver has been acquitted in the criminal case. This circumstance will have some limited relevance for the order now proposed to be made.

18) It is proposed that the Jeep driver and the owner be made responsible for payment of atleast some amount of money to the claimant. The reason for this course of action is because evidence on record indicates that there was fog and in such circumstance, the duty of care and caution is greater on both the vehicles, which were involved in the accident.

19) Taking into consideration the material on record, the finding recorded by the Tribunal to the fact that it is the Jeep driver, who was rash and negligent and the corresponding finding exonerating the Truck driver will have to be interfered with. The evidence on record by

applying a touch-stone of preponderance of probabilities leads to a finding that it is the Truck driver who drove the Truck in rash and negligent manner and therefore, primarily responsible to the accident, which has given rise to the accident.

20) No doubt, the Jeep driver must also assume some responsibility as suggested by learned counsel Mr.Totala, who appears for the insurer of the Truck. Such responsibility is because there is ample evidence on record as regards the fog and further that there is also some evidence that several people were travelling in the Jeep and proceeding towards some marriage function. The evidence as to whether they were travelling in the Jeep on hire or merely on account of friendly relation with owner is quite inconclusive. Nevertheless, for these reasons. some minimum liability is required to be imposed upon Jeep driver consequently and vicariously on Jeep owner as well, and to that extent submission of Mr.Totala

will have to be upheld.

21) The second issue which arises is whether the claimant i.e. appellant in First Appeal No.280 of 2001 is entitled for any further compensation than what has been awarded by the Tribunal. Mr.C.K.Shinde the learned counsel for the appellant pointed out that the income of the claimant was much higher than what has been determined and further the loss incurred by the claimant was on greater side. He pointed out that the claimant was unable to attend agricultural activities and his other income earning activities also suffered. He submits that claim of Rs.5,00,000/- is required to be granted in its entirety and Tribunal has erred in awarding compensation of only Rs.3,80,000/-.

22) From the evidence on record, there seems to be no error in determination of the compensation by the Tribunal. The Tribunal has correctly evaluated the

evidence on record and has applied the correct legal principle in the matter of determining of the compensation. Evidence on record supports the compensation determined and it cannot be said that any further compensation was due and payable to the claimant. Accordingly, there is no error on the issue of determination of compensation.

23) Mr.Totala learned counsel without prejudice to his earlier contention submitted that the interest @ 12% p.a., which is awarded by the Tribunal is also quite excessive and by today's rate interest awarded would have been a maximum of 7.5% p.a. He makes this statement without prejudice to his basic contention that the Truck driver was not at all rash and negligent and therefore, there is no question of any liability upon the Truck driver, Truck owner and insurer of the Truck.

24) There is merit in the contention of Mr.Totala that

it will be quite harsh at this point of time to require the insurer of Truck to pay interest @ 12% p.a. Accordingly, there is a case made out to reduce the interest rate from 12% p.a. to 9% p.a. It is to be noted that in matters of this nature, it is for the Court to determine what is just compensation. In exercise of such duty, the Court is not precluded from varying the interest awarded by the Tribunal, if it is just to do so in the facts and circumstances of the case. This Court has to balance interests of all the parties including the Insurance Company, which ultimately deals with public funds. Therefore, it is only appropriate that the interest rate awarded by the Tribunal is reduced to 9% p.a. from 12% p.a.

25) Upon cumulative consideration of the aforesaid facts and circumstances, the impugned award to the extent it holds that the accident has taken place on account of rash and negligent driving by Jeep driver is required to

be set aside and is hereby set aside. Instead, it is held that accident took place on account of rash and negligent driving by the Truck driver. Accordingly, the liability to pay the compensation will have to be borne mainly by the Truck driver, the Truck owner and the insurer of the Truck.

26) The appellant in First Appeal no.56 of 2001 i.e. Jeep owner has deposited Rs.25,000/- in this Court as pre-condition for institution of appeal. To the extent of this amount, the Jeep driver and owner are held to be jointly and severally responsible. Accordingly, the claimant i.e. appellant in First Appeal no.280 of 2001 is granted liberty to withdraw this amount of Rs.25,000/- alongwith interest that may have accrued thereon, unconditionally.

27) In so far as the balance amount of Rs.3,55,000/- is concerned, the appellants will have to proceed against

the Truck driver, Truck owner and the insurer of the Truck, who are held to be responsible for payment of this amount together with interest @ 9% p.a. and not 12% p.a. as awarded by the Tribunal.

28) The two appeals are accordingly partly allowed in the aforesaid terms. There shall be no order as to costs.

29) In view of disposal of these two Appeals, Mr.R.L.Kute learned counsel do not press the Civil Application No.4504 of 2003 in First Appeal No.280 of 2001, and Civil Application No.2791 of 2003 in First Appeal No.56 of 2001, and therefore, these two Civil Applications are disposed of.

[M.S.SONAK, J.]