

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

FIRST APPEAL NO. 2742 OF 2015

Bajaj Allianz General
Insurance Co. Ltd.
Through its Branch Manager/
Authorized Signatory,
2nd Floor, Rajendra Bhavan,
Adalat Road, Next to LIC Building,
Aurangabad

..Appellant

VERSUS

1] Manisha w/o Lahu Kale,
age 27 years, occ. Household,

2] Yogita d/o Lahu Kale,
age 7 years, occ. Minor,

3] Parmeshwar w/o Bhanudas Kale,
age 6 years, occ. Minor,

Nos. 2 and 3 minors,
u/g of mother Manisha

4] Prayagbai w/o Bhanudas Kale,
age 65 years, occ. Agriculture,

All R/O Sugaon, Taluka Chakur,
District Latur

4A] Bhanudas s/o Hariram Kale,
age 65 years, occ. Agriculture,
R/o as above.

...Respondents

... .

Mr. S.G.Chapalgaonkar, advocate for the appellant

Mr. S.V.Mundhe, advocate for respondent nos. 1 to 4A

CORAM : SUNIL K.KOTWAL, J.

**DATE OF RESERVING
THE JUDGMENT : 28.8.2018**

**DATE OF PRONOUNCEMENT
OF JUDGMENT : 04.9.2018**

J U D G M E N T :

This appeal is directed by original respondent no.2 – insurance company, against the judgment and award, passed by the Motor Accident Claims Tribunal, Latur, in Motor Accident Claim Petition No. 230 of 2010, partly allowing the claim of original claimants. Respondent nos. 1 to 4A are original claimants and respondent nos. 5 and 6 are original respondent nos. 1 and 3.

2. Heard strenuous arguments submitted by Mr. S.G.Chapalgaonkar, learned counsel for the appellant and Mr. S.V.Mundhe, learned counsel for respondent nos. 1 to 4A.

3. Learned counsel for the appellants submits that in the present appeal, only the involvement of Truck No. MH-24/F-8796 (hereinafter referred to as

'the offending truck') is disputed question, which is to be adjudicated in the present appeal. He submits that though claim of claimants is under Section 166 of the Motor Vehicles Act, 1988 decided by the Tribunal and though rules of the Evidence Act are not strictly applicable in the said proceeding, initial burden lies on the claimants to prove their claim on the basis of preponderance of probability. Only thereafter the onus of proof will be shifted on the insurance company.

4. Next limb of the argument of learned counsel for the appellant is that to prove the involvement of the offending truck in the motor vehicle accident, in which the husband of claimant no.1 namely Lahu Kale died, the claimants have placed on record only the oral evidence of claimant Manisha Lahu Kale and certified copy of charge sheet of the criminal case filed against respondent no.3 driver of the truck. He submits that even in criminal case filed against respondent no.3, his presence cannot be secured and in the result on 25.2.2015 the proceeding was stopped under Section

258 of the Criminal Procedure Code. Even before the Tribunal, respondent no.1 did not appear and respondent no.3, though appeared, did not file written statement. This circumstance on record indicates that there is collusion in between claimants and owner as well as the driver of the truck.

5. Learned counsel for the appellant submits that only charge sheet filed against respondent no.3 driver, copies of the police statements of Suresh Mane and Kashinath Thormote is relied by the Tribunal to hold that initial burden of proof is discharged by the claimants under the principle of preponderance of probability. He also pointed out that in the first police statement of Suresh Mane and other witnesses recorded on 13.5.2009 the witness stated before the police that unknown vehicle dashed against the motor cycle of deceased resulting in his death on the spot. However, subsequently after five months, the police recorded supplementary statement of pillion rider Suresh Mane and one Kashinath Thormote, where they

stated that subsequently they came to know that the offending truck was involved in the accident and respondent no.3 was named in their statement before police for the first time. Contention of learned counsel for the appellant is that even the police statement of Suresh Mane is self contradictory and absolutely unreliable and such type of evidence is not sufficient to discharge the initial burden of proof which lies on the claimants. He submits that when initial burden of proof is not discharged by the claimants, the onus never shifted on insurance company to examine any witness on behalf of the insurance company. He prays for dismissal of the claim petition. He placed reliance on the following judgments :

- 1] **"Oriental Insurance Company Limited vs Meena Variyal and others"** [2007 (5) SCC 428];
- 2] **"Farida Begum vs Daulat Khan and another"** [2014 (6) Mh.L.J. 751] ;
- 3] **"Pukh Raj Bumb vs Jagannath Achut Naik and others"**
[First Appeal No. 32 of 2013, decided by Division Bench on 11.7.2013]
(Bombay) ;
- 4] **"Bajaj Allianz General Insurance Company Ltd. vs Meera w/o Raju Choudhary and others"**
[First Appeal No. 1921 of 2013, decided

by this Court on 17.2.2014 (Bombay) ;
and

5] "M/s Shriram General Insurance Co. Ltd vs
Narayan s/o Nivrutti Bembde"
[First Appeal No. 1535 of 2013, decided
by this Court on 23.1.2014] (Bombay)

6. Learned counsel for respondent nos. 1 to 4A submits that the claimants have discharged the initial burden of proof by filing the certified copies of charge sheet, statements of witnesses recorded by police under Section 161 of the Criminal Procedure Code, panchanama, postmortem notes, etc. Contention of learned counsel for respondents is that if initial burden of proof is discharged by original claimants, onus shifted on the appellant insurance company to call the owner and the driver as witnesses and to cross-examine them to prove non-involvement of the offending truck. Further contention of the learned counsel for the respondents is that the respondents have placed sufficient material before the Tribunal to discharge the initial burden of proof. He placed reliance on the following judgments :

1] "United India Insurance Company Limited
vs Om Pati and others" [2017 (3) All M.R.

(Journal) 43] (P.and H.);
2] "Union of India vs Prakash s/o Ganpatrao Thakare [2016 (5) All M.R. 575] (Bombay) ;
3] "Smt. Nagma Shamu Dhotre and others vs Chandrakant Sakharam Talgaonkar and others" [2015 (5) All M.R. 741] ;
4] "Bodige Padma and others vs Makula Shankar and others" [2013 (3) All M.R. (Journal) 23] ;
5] "The New India Assurance Co. Ltd vs Anela Sathyamma [(2015) ACJ 1352] ; and
6] "APSRTC, Hyderabad vs Shaikh Yousuf Pasha [2007 (4) TAC 641] (A.P.)

7. Nobody appeared on behalf of respondent nos. 5 and 6 (owner and driver).

8. There cannot be two opinions regarding legal principle that even in the proceeding before the Tribunal, though the rules under the Evidence Act are not strictly applicable, initial burden of proof on the basis of preponderance of probability always lies on the claimants. In **Oriental Insurance Company Limited vs Meena Variyal and others** (supra), the Apex Court observed that :

" Before we proceed to consider the main aspect arising for decision in this Appeal, we would like to make certain general observations. It may be true that the Motor Vehicles Act, insofar as it relates to

claims for compensation arising out of accidents, is a beneficent piece of legislation. It may also be true that subject to the rules made in that behalf, the Tribunal may follow a summary procedure in dealing with a claim. That does not mean that a Tribunal approached with a claim for compensation under the Act should ignore all basic principles of law in determining the claim for compensation. "

In the said case, the Apex Court also held that even in the claim for compensation arising out of an accident, the Tribunal cannot forget basic principles of establishing the liability and the quantum of compensation payable. Similar view was also expressed by this Court in **Farida Begum vs Daulat Khan and another** (supra); "**Pukh Raj Bumb vs Jagannath Achut Naik and others** (supra); **Bajaj Allianz General Insurance Company Ltd. vs Meera w/o Raju Choudhary and others** (supra); and **M/s Shriram General Insurance Co. Ltd vs Narayan s/o Nivrutti Bembde** (supra).

9. In **M/s Shriram General Insurance Co. Ltd** (supra), this Court also held that police statement

recorded under Section 161 of the Criminal Procedure Code cannot be read in evidence, and therefore, reliance or reference cannot be attributed to it to accelerate the claim canvassed. Even in the cases relied by the learned counsel for respondent nos. 1 to 4A, various High Courts including our High Court did not dispute that initial burden of proof lies on the claimants to prove their case on the basis of preponderance of probability.

10. It is undisputed position of law that in the proceeding before the Tribunal, the rule of Evidence Act is not strictly applicable. Therefore, without examining panchas and Medical Officer, the certified copies of panchnamas and postmortem notes prepared by Investigating Officer can be read in evidence. However, that does not mean that the claimants in accidental claim cases need not prove anything on the basis of oral and documentary evidence. Initial burden always lies on the claimant to establish claim by bringing oral and documentary evidence on record in support of

his claim. However, proof beyond reasonable doubt is not required. Applying the principle of preponderance of probability, the claimant can discharge his burden.

11. In the case at hand, the claimants have placed on record only oral evidence of claimant No.1 Manisha Kale (PW-1). However, from her cross-examination it emerges that at the time of accident she was present in the village Sugaon and after 15 days from the date of occurrence of the accident, she came to know in what manner the accident occurred, from her brother-in-law. Therefore, the oral testimony of Manisha Kale (PW-1) is of no help to claimants to prove the involvement of offending truck in the above-said motor vehicular accident. Learned Counsel for the claimants placed reliance on only certified copies of police papers including final report submitted by Investigating Officer under Section 173 of the Code of Criminal Procedure (For short "Cr.P.C.").

12. It is to be noted that the statements of witnesses recorded under Section 161 of Cr.P.C. are in two sets. One set is of the statements of witnesses recorded on 13.05.2009 and the second set is of the supplementary statements of the same witnesses recorded on 20.10.2009. Even the Tribunal has placed reliance on final police report where the registration number of the offending truck is mentioned and driver involved in the accident is referred by name. The Tribunal also relied on supplementary statements of Suresh Namdeo Mane and Rajabhau Bhanudas Kale recorded on 20.10.2009. It is the most important to note that on 13.05.2009 statement of Rajabhau Kale was not recorded by Investigating Officer. Only on 20.10.2009 Rajabhau Kale stated before the Investigating Officer that on 10.05.2009 Suresh Mane informed him on telephone that one unknown vehicle dashed against his motorcycle and in that accident Suresh Mane sustained injury and Lahu Bhanudas Kale died. Subsequently Rajabhau Kale stated that, "later on I came to know that the said unknown vehicle was truck No. MH-24-F-8796 and its

driver was Shakil Salim Kotwal". In his statement he nowhere stated as to what was his source of knowledge regarding registration number of the offending truck and name of driver.

13. On the other hand, Suresh Namdeo Mane in his statement recorded by Investigating Officer on 13.05.2009 stated that at the time of accident, 'unknown vehicle' dashed against the motorcycle of the deceased by which he was travelling as a pillion rider. In the statement dated 13.05.2009 he nowhere mentioned registration number or type or class of offending vehicle or name of driver of offending vehicle. For the first time after five months, Suresh Mane stated before the Investigating Officer that, "later on I came to know that registration number of that unknown vehicle is truck No. MH-24-F-8796 and name of the driver was Shakil Salim Kotwal". Suresh Mane also did not speak about the source of his information in the statement dated 20.10.2009. Neither Suresh Mane nor Rajabhau Kale are examined by the claimants before the Tribunal.

14. It must be noted that in the statements of all witnesses recorded on 13.05.2009 nobody stated before the Investigating Officer as to which type of the vehicle was involved in the accident and what was its registration number and what was the name of its driver. It is surprising to note that the statement of Suresh Mane recorded under Section 161 of Cr.P.C. is relied on by learned Tribunal, though in his statement recorded first in time, he has made it clear that he was knowing the type of vehicle and its registration which was involved in the accident. Such self contradictory statement is relied on by the learned Tribunal even in the absence of Suresh Mane as a witness before the Tribunal. The Tribunal also failed to consider that only Suresh Mane and Rajabhau Kale stated registration number of the truck and name of the driver involved in the accident, after more than five months from the date of occurrence of the accident. Thus, both persons nowhere stated the source of their information. Even the Investigating Officer, who submitted final report under Section 173 of Cr.P.C. naming the driver of

offending vehicle and registration number of the offending vehicle, is not examined by the claimants.

15. In First Appeal No. 32/2013 decided on 11.07.2013, the Division Bench of this Court held that mere production of police papers and exhibiting those documents does not dispense the proof of contents of those documents. Division Bench of this Court held that merely on the basis of certified copies of F.I.R., spot panchnama and other documents, the claimants cannot prove their case. Even in First Appeal No.1535/2013 decided on 23.01.2014, this Court has taken specific view that statement of witnesses recorded under Section 161 of Cr.P.C. cannot be read and no relevance and reference can be attributed to it to accelerate the claim canvassed.

16. Therefore, only on the basis of certified copy of final report filed by Investigating Officer under Section 173 of Cr.P.C. and copies of self contradictory statement of Suresh Mane without

disclosing the source of his information in his subsequent statement recorded after five months from the date of occurrence and even on the basis of copy of the statement of Rajabhau Kale regarding offending truck and name of driver, the claimants cannot discharge their initial burden to prove the involvement of offending truck in the above-said accident. Non-contest by truck owner and driver before the Tribunal indicates collusion in between the claimants and owner and driver of the truck and only because the owner and driver did not contest the claim, it does not mean that involvement of offending truck is prima facie established by the claimants to discharge their initial burden. When the initial burden of proof is not discharged by the claimants, the contesting Insurance Company need not examine any witness and need not cross-examine owner and driver of the offending vehicle to disprove the involvement of offending truck in the accident.

17. Thus, after careful examination of oral and documentary evidence placed on record, I have come

to the conclusion that the claimants miserably failed to discharge the initial burden of proof, and therefore, in absence of any acceptable oral and documentary evidence on record, the claimants cannot establish involvement of offending truck in the above-said accident.

18. So far as the Authorities relied on by learned Counsel for the claimants are concerned, in the case of **"United India Assurance Co. Vs. Om Pati"** (supra), on behalf of the claimant witness Ramesh (PW-2) was examined, who noted registration number of the offending truck immediately after occurrence of the accident. In the case of **"Union of India and another Vs. Prakash Thakre"** (supra), the offending truck was identified as a military vehicle on the basis of its colour which was also found on the Luna used by injured at the time of accident. Even the driver of offending vehicle was Court Marshalled and the Investigating Officer was examined by the claimants in support of their claim. In the case of **"Bodige Padma vs. Makula**

Shankar" (supra), the offending vehicle was identified and even the Insurance Company, owner and driver had admitted involvement of the offending vehicle in the accident. In addition to this, one witness (PW-3) was examined, who noted the registration number of the offending vehicle. In the case of **"New India Assurance Company Vs. Anela and others"** (supra), the owner of the vehicle admitted that the driver confessed before him about occurrence of the accident.

19. Thus, in every case relied on by the respondents/claimants, there was sufficient material before the Tribunal and High Court to discharge the initial burden of proof of the claimant. Thus, all the Authorities can be distinguished on facts and are not applicable in the case at hand.

20. The last Authority relied on by learned Counsel for the respondents is **"APSRTC, Hyderabad Vs. Shaikh Younus Pasha"** (supra) which pertains to

only the acceptable principle of law that the rules of evidence and pleading are not strictly applicable to the motor accident claims. This view is not disputed by the claimants also.

21. Except the above discussed evidence no other evidence is placed on record by the claimants to discharge the initial burden. I am fully satisfied that the claimants failed to prove that the offending truck was involved in the accident. Therefore, the liability cannot be fastened against owner and driver of the truck as well as against the Insurance Company. It follows that the claim petition deserves to be dismissed by allowing this appeal.

22. Accordingly, the Appeal is allowed. Judgment and Award passed by Motor Accident Claims Tribunal, Latur in Motor Accident Claim Petition No.230 of 2010 are set aside. Motor Accident Claim Petition No.230 of 2010 is dismissed.

23. The deposited compensation amount by the appellant in this Court be refunded to it, after the period of appeal is over.

24. Civil Applications, if any pending, are disposed of.

25. Considering the typical nature of the litigation, I hold that the parties shall bear their respective costs of the appeal.

[SUNIL K.KOTWAL, J.]

dbm