

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

First Appeal No. 0344 of 2013

District : Ahmednagar

ICICI General Insurance
Company Limited,
ICICI Bank Tower,
Bandra-Kurla complex,
Bandra (E), Mumbai 400 051,
Through its Branch Manager.

.. Appellant
(Original
respondent
no.02)

versus

1. Subhan Mohammad Pathan,
Age : 30 years,
Occupation : Mason,
R/o. Dahigaon-ne,
Taluka Shevgaon,
Dist. Ahmednagar.
2. Shivprasad s/o. Keshavrao
Gavhane,
Age : Major,
Occupation : Business,
R/o. Kanai Baug,
Pune-Nagar Highway,
Wagholi, Pune - 412 207.

.. Respondents

With

First Appeal No. 0345 of 2013

District : Ahmednagar

ICICI General Insurance
Company Limited,
ICICI Bank Tower,
Bandra-Kurla complex,
Bandra (E), Mumbai 400 051,
Through its Branch Manager.

.. Appellant
(Original
respondent
no.02)

versus

1. Sau. Bebi Subhan Pathan,
Age : 25 years,
Occupation : Labour,
R/o. Dahigaon-ne,
Taluka Shevgaon,
Dist. Ahmednagar.
2. Shivprasad s/o. Keshavrao
Gavhane,
Age : Major,
Occupation : Business,
R/o. Kanal Baug,
Pune-Nagar Highway,
Wagholi, Pune - 412 207.

.. Respondents

With

First Appeal No. 0346 of 2013

District : Ahmednagar

ICICI General Insurance
Company Limited,
ICICI Bank Tower,
Bandra-Kurla complex,
Bandra (E), Mumbai 400 051,
Through its Branch Manager.

.. Appellant
(Original
respondent
no.02)

versus

1. Master Sultan Subhan Pathan,
Age : 07 years,
Occupation : Nil,
Under guardianship of father
Subhan Mohammad Pathan,
Age : 30 years,
Occupation : Mason,
R/o. Dahigaon-ne,
Taluka Shevgaon,
Dist. Ahmednagar
2. Shivprasad s/o. Keshavrao
Gavhane,

Age : Major,
Occupation : Business,
R/o. Kanal Baug,
Pune-Nagar Highway,
Wagholi, Pune - 412 207.

.. Respondents

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Mr. Swapnil S. Patil, Advocate, for the appellant.

Mr. Balaji S. Shinde, Advocate, holding for
Mr. V.P. Latange, Advocate, for respondent no.01.

Mr. Suhas R. Shirsath, Advocate, holding for
Mr. Santosh S. Jadhavar, Advocate, for
respondent no.02.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 30TH SEPTEMBER 2019

ORAL JUDGMENT :

01. All these appeals have been filed by the Insurance Company challenging the judgment and award passed by the Motor Accident Claims Tribunal, Ahmednagar, dated 11-08-2011, thereby holding the appellant responsible to pay compensation jointly and severally with the original respondent no.01 - owner of the offending vehicle. All the three respondents are the injured who were claiming compensation under Section 166 of the Motor Vehicles Act, 1988. Since common point has been raised in all these appeals i.e. negligence of the offending vehicle; the appeals are proposed to be disposed of by this common judgment.

02. First Appeal No. 344 of 2013 is arising out of judgment and award passed in M.A.C.P. No. 144 of 2009. First Appeal No. 346 of 2013 is arising out of judgment and award passed in M.A.C.P. No. 121 of 2009 filed by the minor son of the claimant in M.A.C.P. No. 144 of 2009; whereas First Appeal No. 345 of 2013 is arising out of judgment and award passed in M.A.C.P. No. 143 of 2009 which was filed by the wife of the claimant in M.A.C.P. No. 144 of 2009. They all had come with a case that all of them were travelling on a motorcycle from Aurangabad to Ahmednagar on 06-01-2009. They reached near petrol pump on the said road at about 11.00 a.m. The claimant in M.A.C.P. No.144 of 2009 was driving the said motorcycle and he intended to fill petrol in the motorcycle before going ahead. It was their contention, that when they were coming out of the petrol pump after filling petrol, one Accent car bearing No. MH-12/DU-7272 came in high speed from Ahmednagar. The driver of the car could not control his vehicle and gave dash to the motorcycle. As a result of it, all the occupants of the motorcycle fell down and sustained serious injuries. They all were taken to hospital. They had taken treatment and then they have filed separate claim petitions to get compensation for the injuries sustained by them.

03. Opponent no.01 - owner of the Accent car filed written statement at Exhibit 17; whereas opponent no.02 - Insurance Company of the car filed written statement at Exhibit 18. Both of them have denied the averments in the respective claim petitions. They denied that there was negligence on the part of the driver of the car. They have specifically contended that the claimant Subhan, who was driving the motorcycle, was negligent. He was not holding valid and effective driving license to drive the motorcycle. He had suddenly taken turn towards petrol pump when he was proceeding. The car driver had lodged report with the police and after investigation, police have filed charge-sheet against Subhan. The Insurance Company, in addition, has taken statutory defence.

04. Taking into consideration the rival contentions in each of the petition, issues were framed. Claimants have led evidence in the nature of oral as well as documentary. Respondent no.01 has examined the driver of the car. The Insurance Company has not led any evidence. Under those circumstances, after hearing both sides and perusing the record, the learned Tribunal had come to the conclusion that all the claimants had sustained injuries in vehicular accident that had taken place on 06-01-2009 between car and the motorcycle. The

said accident had taken place due to the negligence and rashness on the part of driver of the car. The Insurance Company failed to prove breach of terms of policy. Both the respondents are liable to pay compensation to the claimants jointly and severally. Amount of Rs. 1,13,198/- has been awarded in M.A.C.P. No. 144 of 2009, Rs. 51,536/- in M.A.C.P. No. 121 of 2009 and Rs. 1,34,410/- in M.A.C.P. No. 143 of 2009. The Insurance Company has filed these appeals, as aforesaid, on the point of negligence.

05. It will not be out of place to mention here that the original claimants have not filed any appeal or cross objection for the enhancement in the compensation. Respondent no.01 has also not challenged the said judgment and award on any point. Therefore, the scope of the present appeals is limited to the extent that has been raised by the Insurance Company in the appeal memo. The appeal memo does not contain any point regarding breach of terms of policy by respondent no.01. Therefore, taking into consideration the scope of the appeals, following points arise in all the matters before this Court and the findings and reasons for the same are as follows :-

" Whether the claimants have proved that the accident had taken place due to the sole negligence

on the part of the car driver while driving car bearing No. MH-12/DU-7272."

06. Heard learned Advocate Mr. S.S. Patil appearing for the appellant. Heard learned Advocate Mr. B.S. Shinde h/f. learned Advocate Mr. V.P. Latange for respondent no.01. So also, heard learned Advocate Mr. S.R. Shirsath h/f. learned Advocate Mr. S.S. Jadhavar for respondent no.02.

07. It has been vehemently submitted on behalf of the Insurance Company that the learned Tribunal has not considered the evidence on record properly. It was the specific contention of the opponent no.01, that the motorcycle driver i.e. Subhan was solely negligent for the accident. The road on which both the vehicles were passing, runs north-south. The motorcycle driver had come from north and was going towards south; whereas the car driver was going from south to north. The spot of the accident, as per the spot *panchanama*, is in the western half of the road which was the wrong side for the motorcycle. The car driver was also examined by respondent no.01. He has specifically stated that as the motorcycle driver took a sudden turn and did not consider the situation on the road, the accident had taken place. If he would have taken care to see which vehicle is coming from what distance and then could have come on the

road, the accident could have been avoided. Therefore, the finding given by the Tribunal on the point of negligence is wrong and deserves to be corrected. The accident had taken place due to the sole negligence on the part of the motorcycle driver and therefore, all the petitions ought to have been dismissed.

08. Learned Advocate appearing for original claimants supported the reasons given by the learned Tribunal for arriving at the conclusion that the accident had taken place due to the sole negligence on the part of the car driver. Learned Advocate appearing for owner of the car submitted that the car was duly insured with the appellant and therefore, the liability of the Insurance Company is joint and several.

09. Here, it is to be noted that Subhan Pathan, who was the claimant as well as driver of the motorcycle, has been examined. He has given his story about the manner in which the accident took place. Respondent no.01 has examined his driver and he has also given the manner in which the accident took place. It can be seen from the record that certified copies of FIR and other police papers were produced on record by the claimants. As regards FIR is concerned, it is admittedly lodged by the driver

of the car against the motorcycle driver. Said car driver had shown the spot of the accident to the police and thereby the spot *panchanama* was drawn. Though the offence was registered against Subhan, he has stated that it was the negligence of the car driver which resulted in the accident. Therefore, it is required to be considered what is the believable evidence.

10. AW 01 Subhan has deposed that after filling petrol in the motorcycle, he was standing to the opening of the road; one jeep came from Ghodegaon side in high speed. At that time, car No. DU-7272 came from Nagar side. Jeep was crossing divider for coming to petrol pump and the car went out of control due to high speed for preventing dash to the jeep; the car turned to the opening road of the petrol pump and gave dash to his motorcycle where he was standing with his motorcycle. That means, he wanted to say that the accident had taken place immediately at the spot where petrol pump ends and the road starts. The situation of the petrol pump is that it is towards west of the road; that means, for motorcycle driver, he was supposed to cross the other half and come towards his right side. He has clearly denied the suggestion that he was crossing the road at the time incident. He has admitted in his cross examination that the charge-sheet has been filed against him by

the police. It was also suggested to him that except the bare words, he has no documentary evidence to show and then the other suggestions have been given.

11. Per contra, now it is required to be considered as to what OW 01 Kashinath Avhad has stated. He was the driver of the car owned by respondent no.01. In his examination in chief, he has given situation of the petrol pump which is towards western side of the road. He has stated that he was proceeding from south to north and the motorcycle was from his opposite direction. He has stated that the motorcycle driver suddenly appeared on the road for going towards petrol pump. That means, according to him, Subhan was yet to fill petrol in his motorcycle. He says, that suddenly the motorcycle driver came in front of bonnet of his car. He applied brakes; however, he could not avoid the accident. Thereafter, he has blamed the motorcycle driver. The important point to be noted is that this witness was not cross examined by the Insurance Company. In his cross examination, he has stated that Aurangabad-Nagar road is four lane road. The other suggestions he has denied; but it is to be noted that he has admitted that he did not take the injured to hospital. The relatives of claimants were not present at the spot. It shows that instead of helping the injured, he went to police station to

lodge the report and then in fact, lodged the report, went with police to show the spot of accident.

12. The contents of the spot *panchanama* would show that the width of the tar road was 48 feet. It is stated that there is a divider in between and the accident had taken place in the western half of the road. At that time, the motorcycle was on road in damaged condition. It specifically states that the car driver Kashinath Avhad had showed the spot. Interestingly, the place of impact appears to have not been shown by Kashinath Avhad to the police and the *panchas*. There is absolutely no mention thereof and if his version is required to be considered, then Subhan was proceeding towards petrol pump at that time. That means, Subhan would have been just near to the half mark of the road. AW 01 Subhan says that he was standing towards western side of the road and waiting to come on the road. That means, both of them wanted to convey different spots. We cannot get any assistance from the said spot *panchanama* to locate the exact impact. Therefore, other aspects are required to be considered. It will not be out of place to mention that when Kashinath Avhad himself was available to the Insurance Company, all those details which are required to be considered while assessing the point of negligence have not been brought on record. The Insurance Company just

declined to cross examine Kashinath Avhad. His evidence cannot be, therefore, considered as rebuttal of the evidence that has been given by the claimants. Though the claimants have filed the certified copies of these documents on record, it is very much clear that they had no intention to depend on the contents of those documents.

13. Even if we take that the claimants were relying on the certified copies of the police papers they had produced, yet, it can be seen from the spot *panchanama* that all those details which could infer or support the contention of the respondents, that motorcycle driver was negligent, are absent. Merely because police had prosecuted Subhan, the Tribunal could not have come to the same conclusion. It was for the Tribunal to assess the evidence which had been led before it and then come to the conclusion who is negligent. The spot *panchanama* states that the car driver had applied brakes and the distance of the brakes was 100 feet. If we consider the testimony of OW 01 Kashinath Avhad, then we do not find any explanation for the same. He has not given his approximate speed. He has also not given the fact from which distance he had seen motorcycle or he had not seen the motorcycle at all. By merely stating that motorcycle driver suddenly appeared on the road, his duty does not end. Further, it has not

been brought on record, as to whether due to the road divider there was no proper visibility at the said spot so that the car driver could not have seen the motorcycle to take right turn and go inside the petrol pump, as it was the story raised by Kashinath Avhad.

14. Another fact that is also required to be considered is that the tyre of the car was burst. Under which circumstance it got burst has not been explained by Kashinath Avhad. When he was available in the witness box, the Insurance Company had opted not to cross examine him. Under such circumstance, from the preponderance of probabilities, the learned Tribunal has rightly held that the accident had taken place due to the sole negligence on the part of car driver. No interference in that finding is necessary. The point is, therefore, answered accordingly.

15. Consequently, when the car driver was negligent and he had caused serious injuries to the claimants; respondent no.01 being owner of the offending vehicle and the respondent no.02, Insurance Company of the offending vehicle were jointly and severally liable to pay compensation to the claimants.

16. There is no merit in the present appeals; they deserve to be dismissed. Accordingly, the appeals are hereby dismissed. There shall be no order as to costs.

17. The claimants are permitted to withdraw the amount deposited in this Court, along with its accrued interest, as per the award.

(Smt. Vibha Kankanwadi)
JUDGE

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