

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.606 OF 2019
WITH
CIVIL APPLICATION NO.3025 of 2019
IN FA/606/2019

M/s Shriram Insurance Company Ltd.,
E-8 ERIP RIICO Industrial Area, Sitapura
Jaipur – 302 022 (Rajasthan) India.

... Appellant.

... Versus ...

1 Vanita wd/o Dhanaji Marekar,
Age 30 yrs., Occ. Household,

2 Atharv Dhanaji Marekar,
Age 8 yrs., Occ. Education,

3 Ankita d/o Dhanaji Marekar,
Age 4 yrs., Occ. Education,

(Nos.2 and 3 are minor and U/G of
their natural mother i.e. respondent No.1)

4 Namdeo Tukaram Kamble,
Age major, Occ. Business,
R/o Deshmukh Galli, Akkalkot,
Tq. Akkalkot, Dist. Solapur
At present Shivganga Nagar,
Patr No.1, Plot No.162,
Nayee Jindagi, Solapur, Dist. Solapur.

5 Ram Shivram Marekar (**dead**),

6 Saraswati w/o Ram Marekar,
Age 50 yrs., Occ. Household,

Nos.1, 2, 4 and 5 are r/o Lohgaon,
Tq. Tuljapur, Dist. Osmanabad.

... **Respondents.**

...

Mr. VN. Upadhye, Advocate for the appellant
Mr. S.B. Choudhari, Advocate for the respondent Nos.1 to 3

...

CORAM : SMT. VIBHA KANKANWADI, J.
RESERVED ON : 05th AUGUST, 2019
PRONOUNCED ON : 24th SEPTEMBER, 2019

JUDGMENT :

1 Present appeal has been filed by the original respondent No.2 challenging the Judgment and Award passed in M.A.C.P. No.112 of 2012 dated 06.01.2017 by learned Member, Motor Accident Claims Tribunal, Osmanabad, whereby the petition filed by present respondent Nos.1 to 3- original claimants was allowed.

2 The original claimants had come with a case that they are the widow and children of one Dhanaji Ram Marekar. Respondent Nos.3 and 4 are the parents of Dhanaji. Dhanaji was proceeding on his motorcycle bearing No.MH 13/U-9013 at about 6.00 p.m. on 27.05.2011 on Solapur-

Naldurg Highway to go to his village Lohgaon. When he was near village Dhangarwadi, he was dashed by one Tata Magic bearing No.MH 13/B-2719, which had come from opposite direction in high speed. It is stated that the said accident had taken place due to negligence of Tata Magic driver. Dhanaji sustained severe injuries and then was admitted to Balwant Hospital, Solapur where he expired on the next day. Respondent No.1 is the owner of Tata Magic and the said vehicle was insured with respondent No.2 on the date of accident. Driver of the said vehicle has been prosecuted by Naldurg police. It is stated that deceased aged 36 years was an agriculturist as well as had other sources of income. He was getting Rs.2,00,000/- per year from agriculture, Rs.1,00,000/- per year from preparation of jaggery and Rs.6,000/- per month from milk business. The claimants had prayed for compensation of Rs.10,00,000/- from respondent Nos.1 and 2, jointly and severally.

3 Respondent Nos.1, 3 and 4 though appeared did not file written statement.

4 Respondent No.2 insurance company filed written statement and denied all the averments in the petition. It has been specifically denied that there was accident between the motorcycle driven by deceased Dhanaji and Tata Magic, which was owned by respondent No.1 and insured with it on the

alleged date, time and place. Age, occupation and income of the deceased has been denied. It has been stated that false offence has been registered against driver in collusion with the police. Alternative prayer has also been taken that since there is breach of terms of policy, respondent No.2 cannot be held responsible for payment of compensation.

5 After the issues were framed, claimants have led oral as well as documentary evidence. Taking into consideration the said evidence as well as hearing both sides the learned Member has allowed the petition. Respondent Nos.1 and 2 have been directed to pay compensation of Rs.15,77,000/- including No Fault Liability with interest @ 9% per annum from the date of the petition till actual realization of the entire amount. The said Judgment and Award has been passed on 06.01.2017 which is now under challenge in this appeal.

6 Heard learned Advocate Mr. V.N. Upadhye for appellant-insurance company and also perused his written notes of argument. Heard learned Advocate Mr. S.B. Choudhari for respondent Nos.1 to 3-original claimants. Other respondents though served failed to appear, however, note has to be taken that respondent No.5, father of deceased Dhanaji, expired during the pendency of this appeal and it is stated that he is survived only by respondent No.6.

7 It has been vehemently submitted on behalf of appellant that the initial burden to prove the accident and death of Dhanaji in the said accident is on the shoulders of claimants. The evidence on record would show that the Tata Magic vehicle, owned by respondent No.1, has been falsely involved. The accident is stated to have taken place on 27.05.2011, however, the First Information Report has been lodged belatedly on 21.06.2011 after about 25 days, that too by the brother of the deceased and it has been tried to be contended, that since he was in grief and his mental condition was not proper, he could not lodge the report. Merely because the respondent No.1 has not filed written statement, that does not absolve the claimants from proving the accident. Further, only on the basis of contents of the First Information Report it cannot be said that the involvement of Tata Magic owned by respondent No.1 and insured with respondent No.2 has been proved by the claimants. CW 1 Vanita, who is the widow of the deceased, was admittedly not with the deceased at the time of accident. The so called eye witness CW 2 Dipak Lokhande cannot be believed. Taking into consideration his conduct immediately after the accident, though he states that he had seen the said accident, he did not inform the fact of accident to anybody, especially police. Therefore, the collusion between the driver, owner and the police in showing the involvement of Tata Magic is apparent. He placed reliance on the following decisions :

1 Anil and others vs. New India Assurance Co. Ltd. & ors., 2018 STPL 1205 SC.

2 Bajaj Allianz General Insurance Co. Ltd. vs. Manisha w/o Lahu Kale and others in First Appeal No.2742 of 2015 decided on 04.09.2018.

3 New India Assurance Company Ltd. vs. Laxman Dadarao Karpe and others in First Appeal No.2973 of 2013 decided on 28.07.2015.

4 M/s. Shriram General Insurance Company Ltd. vs. Narayan Nivrutti Bembde and others in First Appeal No.1535 of 2013 decided on 23.01.2014.

5 New India Assurance Company Ltd. vs. Ashalata Suryakant Patil and others in First Appeal No.2829 of 2015 decided on 04.10.2018.

5 Faridabegum Shaikh Yousuf and others vs. Daulat Khan Sardar Khan (Dead) through L.Rs. & ors., 2015 STPL 11564 Bombay.

6 M/s. I.C.I.C.I. Lombard Insurance Company Ltd. vs. Janabai wd/o Dinkarrao Ghorpade and others in First Appeal No.3333 of 2015 decided on 14.12.2018.

In all these cases, taking into consideration the evidence on record, the Hon'ble Supreme Court as well as this Court held that the claimants have failed to discharge even the initial burden cast on them.

8 It has been further submitted on behalf of the appellant in the alternative that the quantum has also been wrongly awarded by the learned Tribunal. Though notional income has been considered in view of absence of income proof, yet, 50% of the said amount has been awarded towards future prospect, which is not correct as per the decision of Constitution Bench in National Insurance Co. Ltd. vs. Pranay Sethi reported in (2017) 16 SCC 680. He has submitted that it ought to have been 40% and then the non pecuniary damages should also be at the maximum Rs.70,000/- in view of the decision in **Pranay Sethi**. It was also submitted that since the driver of the alleged offending vehicle was not having valid badge and effective driving licence to drive the said vehicle, learned Tribunal ought to have held that there was breach of terms of policy.

9 Per contra, the learned Advocate appearing for the respondents-claimants submitted that the involvement of the vehicle has been proved. Though there is belated First Information Report, yet, reason has been mentioned as to why it is belated. It is not in dispute that the driver of the Tata Magic, owned by respondent No.1, was prosecuted by police. The inquest panchnama was prepared on 28.05.2011 and in that document it is specifically stated that deceased was dashed by Tata Magic. Though number has not been mentioned, yet, the make of the vehicle was definitely

mentioned. Further, there was no reason to disbelieve the testimony of the eye witness CW 2 Dipak Lokhande. Therefore, when claimants had discharged their initial burden to prove the accident and death of Dhanaji in the said accident, the onus had shifted on the insurance company to disprove the said fact. However, the insurance company has not led any evidence, therefore, the Tribunal has rightly held that the said vehicle was involved in the accident. Further, in order to prove the breach of terms of policy also, no evidence was led by the insurance company, though a defence was taken that the driver was not holding badge and was not holding valid and effective driving licence to drive the said vehicle. The quantum has been rightly assessed and therefore, it requires no interference.

10 Taking into consideration the points raised in the appeal and at the time of arguments following points arise for determination; reasons for the same are as follows.

1 Whether the claimants had proved involvement of Tata Magic bearing No.MH 13/B-2719 in the accident ?

2 Whether there was any breach of terms of policy by respondent No.1 ?

3 Whether claimants are entitled to get compensation from respondents ?

If yes, what would be the quantum ?

REASONS

11 **Point No.1 :**

As regards the fact of accident is concerned, the initial burden is always on the claimant/ claimants to prove the same, which includes not only the involvement of the vehicle but also the manner in which the accident had taken place, as pleaded in the petition. All those authorities, which have been relied by the learned Advocate appearing for the appellant, have reiterated the basic principle as aforesaid i.e. the burden is on the claimants to prove the accident including the involvement of the vehicle/vehicles. In **First Appeal No.2742 of 2015** (supra) note has been taken of the decision of Division Bench of this Court in First Appeal No.32 of 2013 decided on 11.07.2013 (Goa Bench), wherein it was held that mere production of police papers and exhibiting those documents does not dispense the proof of contents of those documents. It was also held that merely on the basis of certified copies of First Information Report, Spot Panchnama and other documents the claimants cannot prove their case. Therefore, it is now required to be seen, as to whether the evidence adduced in this case fulfills the criteria.

12 The First Information Report has been admittedly lodged belatedly. At this stage itself, note can be taken regarding the ratio in ***Ravi v/s. Badrinarayan and others*** reporting in (2011) 4 SCC 693 that delay in lodging the FIR, can not be taken as a main ground for rejecting the claim petition. Here not only the point of delay has been canvased but it is coupled with non-involvement and collusion. Therefore, facts and evidence is required to be scanned taking into consideration these aspects. Informant Balaji is the brother of deceased and in the First Information Report, which has been lodged after 25 days of accident (on 21.06.2011), number of Tata Magic has been given and then it is stated that when he came to know about the accident, he went to hospital, where Dhanaji was admitted. He had come to know that two persons from his village viz. Laxman Uttam Kamble and Mahesh Rangnath Deshmukh had admitted Dhanaji to hospital regarding details of accident. It appears that Dhanaji was unconscious on that day but on the next day i.e. on 28.05.2011 he expired at about 1.00 p.m.. It also appears from the contents of the First Information Report that the police were calling Balaji, since the date of post mortem and inquest panchnama, to lodge First Information Report but Balaji had not gone to Police Station. He has tried to explain that, since he was in grief and his mental condition was not proper, inspite of messages given he could not lodge the report. The claimants have not examined Balaji for the reasons best known to them. No

doubt, he was not eye witness but then he could have thrown light as to why he had lodged the First Information Report belatedly and no other person could have lodged the report at any earlier point of time. Interesting point to be noted is that the inquest panchnama was executed on 28.05.2011 when Balaji was present. The inquest panchnama Exh.32 only makes a statement that motorcycle driven by Dhanaji was dashed by Tata Magic. Why First Information Report was not taken down at that point itself is a question. It will not be out of place to mention another interesting fact that claimants have examined CW 2 Dipak Lokhande, whose name is not appearing in inquest panchnama or in the spot panchnama or even in First Information Report, but then he say that he had seen the accident. So also, he says that the accident was witnessed by Laxman Kamble and Mahesh Deshmukh from his village. Now said Mahesh Deshmukh is, in fact, panch to the inquest panchnama. Therefore, if he was an eye witness to the incident, why he did not inform the said fact and ask the police to incorporate the vehicle number of Tata Magic in the inquest panchnama itself, is also a question. Conveniently the claimants have kept him out of witness box, for the reasons best known to them. Therefore, mere mention of Tata Magic in inquest panchnama will not be sufficient to hold that it was the Tata Magic belonging to respondent No.1 and insured with respondent No.2 on the date of the accident.

13 CW 2 Dipak Lokhande has supported the claimants in respect of the manner in which the accident took place. He says that he was proceeding with Laxman Kamble on motorcycle and they had met Dhanaji on road, thereafter, they all had tea in one Hotel and then Dhanaji proceeded further and these two persons on one motorcycle were following him. He says that he had noted the Tata Magic number. He has gone further and said that he as well as Laxman Kamble intercepted the said jeep, so also, Mahesh Deshmukh, who had come in bus, which was going from Solapur-Naldurg and all of them had taken Dhanaji to Balwant Hospital, Solapur. In his cross-examination taken by insurance company it can be seen that though this witness had given the motorcycle number in his affidavit-in-chief, in cross he has clearly stated that he will not be able to give the motorcycle numbers of Dhanaji as well as the motorcycle on which he was proceeding. If the said motorcycle numbers were not in his memory, then on what basis he was giving the number of Tata Magic, is a question. Another fact to be noted is that he says that he had asked the driver of the Tata Magic about his name and then said driver had told his name to him, yet he has not given the name of the driver either in his examination-in-chief or any other place. He has conveniently stated that he is unable to remember the same. He was not able to give the location of the spot, where the accident had taken place. He was not even able to tell the name of the hospital where he had admitted Dhanaji.

In clear words he has stated that he did not go to police on his own, either to lodge complaint or to give statement. He has not come with a case that he had informed the vehicle number to Balaji at any earlier point of time. Therefore, taking into consideration his entire evidence, it appears that he is a got up witness. At the costs of repetition it can be said, that the claimants have not examined Laxman Kamble and/or Mahesh Deshmukh, whose names are appearing in First Information Report. First Information Report does not show name of CW 2 Dipak Lokhande.

14 The spot panchnama has been prepared on 21.06.2011, that means, after the First Information Report was lodged. In fact, the claimants ought to have examined the investigating officer also to show as to why even after getting information regarding death of Dhanaji in vehicular accident on 28.05.2011 itself no offence was tried to be lodged before 21.06.2011 against the driver of the Tata Magic and no attempt was made to execute spot panchnama, immediately after the execution of inquest panchnama. Again, at the costs of repetition, it can be said that when Mahesh Deshmukh, who is stated to be one of the eye witnesses, was the panch to the inquest panchnama, he could have shown the spot to the police on that day itself and the spot panchnama could have executed. Conduct of the police in waiting for some of the relatives of the deceased to lodge the report is unjustifiable,

as the criminal law could have been set in motion by anybody. What inquiry was made by police during the said period of 25 days has not been brought on record. If persons who had the knowledge about the accident, with the number of the offending vehicle do not come forward to lodge the report, then this point is required to be considered, when defence of 'collusion between the driver and/ Owner of the offending vehicle' raised by the insurance company is taken. No doubt, the tendency of general public who witnesses the accident is, not to approach police voluntarily. But in this case, those persons/ eye witnesses have helped police in preparation of panchnama; yet did not have a word or disclosure of number of vehicle who was negligent has created doubt. Therefore, taking into consideration all these aspects, merely because an offence was registered against the driver of the vehicle owned by respondent No.1 will not prove the involvement of that vehicle in the accident. Conclusion has to be drawn under the said facts that the claimants have failed to prove involvement of Tata Magic bearing No.MH 13/B-2719 in the said accident.

15 There is no doubt that Dhanaji expired in vehicular accident but the burden was on the claimants to prove that the said accident was caused due to the negligence on the part of the driver of Tata Magic bearing No.MH 13/B-2719. Testimony of CW 2 Dipak Lokhande is untrustworthy and the

claimants have failed to examine the important witnesses, who had seen the accident. The accident had taken place at about 6.00 p.m. on 27.05.2011, that means, in the summer season and therefore, there would have been sufficient light to identify the vehicle as well as note down the number. None of the eye witnesses had approached the police prior to 21.06.2011 raises doubt. Hence, I come to the conclusion that the claimants had miserably failed to discharge the initial burden of proof regarding the involvement of Tata Magic bearing No.MH 13/B-2719. The conclusion drawn by the learned Tribunal is erroneous in that respect. Hence, the point is answered in the negative.

16 **Point No.2 :**

In view of my findings to Point No.1, in fact, this point does not survive, but in the alternative it will have to be considered. The insurance company contends that the driver of the Tata Magic was not holding required badge. It is submitted that it is an admitted position that the driver was not having proper endorsement to drive public service vehicle. The insurance company has not adduced any independent witness and tried to rely on the documents which have been produced by the claimants. The certificate of registration of the said vehicle shows that it was registered as taxi. The driving licence of said vehicle was not produced by claimants and there was

no attempt on the part of the insurance company to examine RTO. When evidence has not been led it cannot be stated that there is any breach of terms of policy, point is therefore, answered in the negative.

17 **Point No.3 :**

Again, when I have already come to the conclusion that the claimants have failed to prove that Tata Magic owned by respondent No.1 and insured with respondent No.2 was involved in the accident, under such circumstance, though appeal has not been filed by respondent No. 1, yet, liability to compensate claimants cannot be fastened against him as well as the insurance company. The entire claim will have to be dismissed by allowing this appeal. Under such circumstance, it is not necessary to consider the alternative submissions made on behalf of appellant-insurance company regarding excessive amount of compensation awarded by learned Tribunal. Appeal therefore, deserves to be allowed. Hence, following order.

ORDER

1 The appeal is hereby allowed.

2 The Judgment and Award passed by learned Member, Motor Accident Claims Tribunal, Osmanabad in M.A.C.P. No.112/2012 dated 06.01.2017 is hereby set aside.

3 The said petition i.e. M.A.C.P No.112/2012 stands dismissed.

4 The amount, which has been deposited by the appellant, be
refunded to it after the appeal period is over.

5 Pending Civil Application stands disposed of.

6 Respondent No.2 i.e. present appellant is entitled to recover the
amount under No Fault Liability deposited and/or distributed to the
claimants, if any, from the claimants.

7 Parties to bear their own costs of the proceedings.

(Smt. Vibha Kankanwadi, J.)

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