IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1389 OF 2010

Bajaj Allianz General Insurance Co. Ltd.,
through its Branch Manager,
2nd Floor, Rajendra Chamber, **APPELLANT**
Adalat Road, Aurangabad (**Ori. Respdt.No.2**)

VERSUS

1. Parvatibai w/o Gangadhar Phalke,
Age : 46 years, Occu. Household,
R/o c/o Pralhad Bhanudas Lad,
House No.22, New Hanumannagar,
N-4, CIDCO, Aurangabad

2. Pandurang s/o Gangadhar Phalke,
Age : 30 years, Occu. Agri.
R/o As above

3. Bhagwat s/o Gangadhar Phalke,
Age : 27 years, Occu. Agri.,
R/o As above

4. Dnyaneshwar s/o Gangadhar Phalke,
Age : 25 years, Occu. Agri.,
R/o As above

5. Dhananjay s/o Gangadhar Phalke,
Age : 23 years, Occu. Agri., **RESPONDENTS**
R/o As above **(Ori.Claimants)**

6. Deepak Bhaurao Patil Tathe,
Age : Major, Occu. Business
(Owner), R/o at Dawalwadi,
Post Shelgaon, Tq. Badnapur, **RESPONDENT**
District Jalna **(Ori.Respdt.No.1)**

Mr. S.G. Chapalgaonkar, Advocate for the appellant
Mr. R.S. Banik, Advocate holding for Mr. V.P. Latange, Advocate for respondent Nos.1 to 5
Mr. Yogesh D. Kale, Advocate holding for Mr. R.R. Karpe, Advocate for respondent No.1

CORAM : SUNIL K. KOTWAL, J.

JUDGMENT RESERVED ON : 4th APRIL, 2019
JUDGMENT PRONOUNCED ON : 16th APRIL, 2019

JUDGMENT :

This appeal is directed by Bajaj Allianz General Insurance Company Ltd., which was opponent No.2 in Motor Accident Claims Petition ("MACP", for short) proceeding, against the judgment and award passed by the Motor Accident Claims Tribunal ("Tribunal", for short), Aurangabad in MACP No.847 of 2007, whereby compensation of Rs.3,69,000/- is awarded and direction was given to respondent No.2 to pay this compensation to the claimants and lateron recover it from the opponent No.1, who is the owner and driver of offending motorcycle No.MH-21-K-5020. Respondent Nos.1 to 5 are original claimants and respondent No.6 is original opponent No.1. Hereinafter the parties are referred in accordance with their status in the original proceeding as claimants, owner of offending motorcycle and insurer of offending vehicle.

2. The facts leading to institution of this appeal are that on 9th March, 2007 at about 7.15 p.m., when the deceased alongwith his son was riding his motorcycle by Ambad to Jalna road near Reliance petrol pump, the offending motorcycle came from opposite direction and gave dash to the motorcycle of the deceased resulting into serious head injury to the deceased. The deceased was rushed to the hospital, but at last, he succumbed to his injuries. Therefore, the claimants, who are dependents of deceased, filed claim petiiton against opponent Nos.1 and 2.

3. Heard Shri S.G. Chapalgaonkar, learned counsel for the appellant – insurer, Shri R.S. Banik, learned counsel holding for Shri V.P. Latange, Advocate for respondent Nos.1 to 5/claimants and Shri Yogesh Kale, learned counsel holding for Mr. R.R. Karpe, Advocate for respondent No.6.

4. Learned counsel for the appellant – insurer submits that the accident occurred due to head-on collision in between the motorcycle of the deceased and offending motorcycle of opponent No.1. He submits that

the accident occurred because the deceased suddenly turned his motorcycle No.MH-23-L-5303 towards his right side i.e. towards Reliance petrol pump without putting on indicator of the motorcycle. Therefore, the offending motorcycle dashed against the motorcycle of the deceased. He submits that the deceased did not leave sufficient room for the vehicles coming from opposite direction. Sum and substance of contention of learned counsel for insurer is that the accident occurred only due to negligence on the part of the deceased or there was contributory negligence of the deceased in occurrence of the accident. He has drawn my attention towards spot panchanama (Exh-27) and sketch map, which is the part and pracel of spot panchanama. He submits that the spot panchanama was prepared at 8.30 p.m. and therefore, it is improbable that the indicator of the motorcycle of the deceased would be on at the time of preparation of panchanama.

5. Next contention of the learned counsel for insurer is that on the date of occurrence of the accident, the opponent No.1 did not hold valid and effective driving licence to drive the motorcycle and therefore, the insurer of offending motorcycle deserve

to be exonerated in toto. He submits that pay and recover order cannot be passed against insurer. He placed reliance on ***"T.O. Anthony Vs. Karvarnan and others" [(2008) 3 SCC 748]***.

6. In reply, learned counsel for the claimants has drawn my attention towards spot panchanama (Exh-27), which shows that even at the time of preparation of spot panchanama at about 8.30 p.m., the right indicator of the motorcycle of the deceased was blinking as it was put on while taking turn towards Reliance petrol pump. Learned counsel for the claimants submits that as the deceased had taken maximum precaution while putting on the right indicator of his motorcycle while turning towards right side Reliance petrol pump, the accident occurred only due to sole negligence of opponent No.1, who drove his motorcycle in high speed without taking note of blinking indicator of the motorcycle of the deceased. He supported the judgment passed by the Tribunal directing the insurer of the vehicle to pay compensation to the claimants and recover it from the owner of the offending vehicle.

7. After hearing learned counsel for both the parties, following points arise for my consideration.

(i) Whether the accident occurred due to sole negligence of the deceased or whether the deceased contributed negligence during occurrence of the accident ?

(ii) Whether pay and recover order can be passed against the insurer of offending vehicle ?

8. While determining whether the accident occurred due to sole negligence of opponent No.1, or sole negligence or contributory negligence of the deceased, the oral evidence placed on record by both the parties as well as police papers, including spot panchanama (Exh-27) need to be scrutinized carefully. On behalf of claimants, Pandurang Phalke (PW1), who is eye witness of the occurrence as pillion rider on the motorcycle of the deceased, categorically deposed that at the time of accident at about 7.15 p.m., when the motorcycle of the deceased reached near Reliance petrol pump on Ambad road, the offending motorcycle of opponent No.1 came in high speed from opposite direction and gave dash to the motorcycle of the deceased. On the other hand, opponent No.1 Deepak Tathe (DW1) also stepped into witness box on behalf of insurer and deposed that on the date of

accident, when he was driving the offending motorcycle, that time, near Ambad, the deceased came from opposite direction and without giving signal by putting on indicator, went across the road towards the petrol pump and thereby the accident occurred. It is to be noted that opponent No.1 Deepak (DW1) only deposed that because the deceased did not give signal or put on the indicator before taking turn, the accident occurred.

9. However, the spot panchanama (Exh-27), which was prepared at about 8.30 p.m., i.e. one hour from the time of occurrence of the accident, clearly indicates that even at the time of preparation of spot panchanama, the right indicator of the motorcycle of the deceased was blinking. It means that the deceased had taken utmost care by putting on right indicator of his motorcycle before taking turn towards petrol pump. The spot panchanama also indicates that the left portion of the motorcycle of the deceased sustained dent due to dash given by motorcycle of opponent No.1. This situation on the spot of the accident clearly indicates that only because opponent No.1 could not control his motorcycle due to his high speed, despite signal given by the deceased by putting his right side indicator on,

gave dash to the motorcycle of the deceased, which was taking turn towards Reliance petrol pump. Thus, the oral testimony of eye witness Pandurang Phalke (PW1), which is fully corroborated by spot panchanama falsifies the defence of opponent No.1 that the deceased suddenly took turn towards right side without giving signal or without putting on indicator of his motorcycle. On the other hand, situation on the spot reflecting from spot panchanama with sketch map indicates that had the opponent No.1 driven his motorcycle with proper caution and care, the accident could have been avoided. In the circumstances, I have no hesitation to hold that the accident occurred due to sole rash and negligent driving by opponent No.1, who is the driver of offending motorcycle. I hold that that was neither sole negligence on the part of the deceased nor there was contributory negligence of the deceased in the occurrence of the accident. I answer point No.(i) accordingly.

10. Now question arises as to whether the Tribunal had rightly given direction to opponent No.2 – insurer to pay the compensation amount to the claimants and recover it from the owner of the offending vehicle.

11. The Tribunal held that on the date of occurrence of the accident, opponent No.1 did not possess valid and effective driving licence to drive the motorcycle. Even the driving licence of opponent No.1 shows that it was obtained on 7th May, 2007 i.e. after the occurrence of the accident on 9th March, 2007. Against this finding of the Tribunal, opponent No.1 did not file Cross-objection. Therefore, at the stage of appeal, learned counsel for opponent No.1 cannot take objection that the insurer of the offending vehicle has not brought on record the evidence to prove that opponent No.1 did not hold valid and effective driving licence.

12. The larger Bench of the Apex Court in ***"National Insurance Co. Ltd. Vs. Swaran Singh and others", reported in (AIR 2004 SC 1531)***, held that even if the insurer of the vehicle establishes that owner of the vehicle committed breach of condition of policy of the insurance, the insurer is liable to pay compensation to the third party and lateron can recover the same from the owner of the offending vehicle. Therefore, the pay and recover order passed by the tribunal against the

appellant/insurer cannot be faulted. The case of ***"T.O. Anthony Vs. Karvarnan and others"*** (supra), is distinguishable on facts because in that case, the claimant himself contributed 25% negligence in the occurrence of the accident.

13. Accordingly, my conclusion is that the judgment and award passed by the Tribunal is correct, proper and needs no interference. It follows that the First Appeal fails and deserves to be dismissed.

14. Accordingly, First Appeal No.1389 of 2010 is dismissed.

15. If any compensation amount is deposited by the appellant/insurer in this Court, the same be remitted to the Motor Accident Claims tribunal, Aurangabad. The claimants (respondent Nos.1 to 5) are permitted to withdraw the said compensation amount from the Tribunal, after the period of appeal is over.

16. Parties to bear their respective costs.

[SUNIL K. KOTWAL]
JUDGE

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