IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1366 OF 2012

M/s I.C.I.C.I. Lombard
Insurance Company Ltd.,
Zeneth House, Keshavrao Khade,
Mahalaxmi Mumbai, Branch Office
at 2nd Floor, 4, Nikhil, Hgt Vazira
Kalamandir Road, Near Bus Stand,
Nanded and Divisional Office at
Alaknanda Building, Adalat Road,
Aurangabad – 431 001
Legal Manager Mr. Rahul Raosaheb **APPELLANT**
Sanap, Age : 26 years **(Ori.Opponent No.2)**

VERSUS

1. Hajratbee w/o Abdul Razak,
   Age : 28 years, Occu. Household

2. Rukhsanabee d/o Abdul Razak,
   Age : 16 years, Occu. Household

3. Ayub s/o Abdul Razak,
   Age : 13 years, Occu. Education

4. Rizwanabee d/o Abdul Razak,
   Age : 10 years, Occu. Education

   Nos.2 to 4 being minors u/g
   of respondent No.1

5. Bismillabee w/o Mohammed Sahab,
   Age : 55 years, Occu. Household

6. Mohammed Sahab s/o Ismail Sahab,
   Age : 60 years, Occu. Nil

   All r/o Labour Colony,
   H. No.18503, Nanded, **RESPONDENTS**
   District Nanded **(Orig. Claimants)**

7. Kundan s/o Vithalrao Tekale
Kadam, Age : Major,
Occu. Business & owner of
Bajaj Auto No.MH-26/G-0522,
R/o Shegaon, Tq. Naigaon, **RESPONDENT**
District Nanded **(Orig. Opponent No.1)**

Mr. V.N. Upadhye, Advocate for the appellant
Mr. H.I. Pathan, Advocate for respondent Nos.1 to 6
None for respondent No.7

CORAM : SUNIL K. KOTWAL, J.

JUDGMENT RESERVED ON : 14th JUNE, 2019
JUDGMENT PRONOUNCED ON : 20th JUNE, 2019

JUDGMENT :

This appeal is directed by original opponent No.2 against the judgment and award dated 5th May, 2012, passed by the Motor Accident Claims Tribunal, Nanded ("Tribunal", for short) in Motor Accident Claims Petition No.950 of 2008. Respondent Nos.1 to 6 are original claimants and respondent No.7 is original opponent No.1, who is owner of the offending vehicle.

2. The facts leading to institution of this appeal are that on 31st October, 2008, at about 7.30 p.m. to 8.00 p.m., when deceased Abdul Razak was walking by Mudkhed-Jamb road, the offending Bajaj Auto bearing registration No.MH-26/G-0522 gave dash to the deceased

near Nisarg dhaba, resulting into his death on the spot. The accident occurred due to rash and negligent driving by driver of the offending vehicle. Therefore, the claimants filed claim petition under Section 166 of the Motor Vehicles Act, claiming compensation of Rs.6,00,000/- form the opponents.

3. Opponent No.1 – owner of the offending vehicle did not file written statement. However, opponent No.2 – insurer of the offending vehicle controverted the claim petition by denying involvement of the offending vehicle and occurrence of the accident due to rash and negligent driving of the driver of the offending vehicle. Statutory defence was also taken regarding breach of condition of policy of the insurance for the reason of not holding valid and effective driving licence by the driver of the offending vehicle.

4. After considering the evidence placed on record, the Tribunal held that on the date of accident, driver of the offending vehicle did not hold valid and effective driving licence and thereby opponent No.1 committed breach of condition of policy of the insurance. However, the Tribunal awarded compensation of

Rs.3,65,000/- and fastened the liability against opponent No.1, but directed the insurer of the offending vehicle to pay that compensation to the claimants and to recover it from opponent No.1/owner.

5. Heard Shri V.N. Upadhye, learned counsel for the appellant – insurer and Shri H.I. Pathan, learned counsel for respondent Nos.1 to 6 – claimants. None appeared for respondent No.7 – owner.

6. Learned counsel for the insurer submits that after occurrence of the accident, FIR (Exh-29) was lodged against unknown vehicle and subsequently, on 26th November, 2008, when the supplementary statement of the informant, the offending vehicle was involved in the abovesaid accident. He submits that even the person who lodged FIR and involved the offending vehicle in his supplementary statement on hearsay information, is not examined by the claimants.

7. Next contention of learned counsel for the insurer is that even the Investigating Officer is not examined to ascertain the source of information received by the informant on the basis of which the offending

vehicle was involved. The sum and substance of argument advanced by the learned counsel for the appellant is that despite total lack of evidence, the Tribunal erroneously held that the offending vehicle was involved in the abovesaid incident and directed the insurer to pay compensation to the claimants. He placed reliance on "***Anil and others Vs. New India Assurance Co.Ltd. and others" (2018 STPL 1205 SC)***, wherein the Apex Court exonerated insurer from its liability to pay compensation after appreciating the evidence placed on record in that particular case. The learned counsel for the appellant placed reliance on the judgment of this Court in the case of ***"Bajaj Allianz General Insurance Co.Ltd. Vs. Manisha w/o Lahu Kale and others"***, decided on 4th September, 2018 in ***First Appeal No.2742 of 2015***, wherein this Court held that the rules under the Evidence Act are not strictly applicable, initial burden of proof lies on the claimant to prove his contention on the basis of preponderance of probability and the Tribunal cannot forget basic principles of establishing the liability and the quantum of compensation payable. In that case, this Court also held that only because the owner and driver did not contest the claim does not mean that involvement of offending vehicle is prima facie established by the claimants to discharge their initial burden. This Court held that there should be sufficient material on record to prove the involvement of offending vehicle in the motor vehicular accident for fastening the liability against the owner and insurer of the offending vehicle. Similar view was also taken by this Court in ***First Appeal No. 2973 of 2013 (New India Assurance Company Ltd. Vs. Laxman s/o Dadarao Karpe and others),*** decided on 28th July, 2015, ***First Appeal No.1535 of 2013 (M/s Shriram General Insurance Company Ltd. Vs. Narayan s/o Nivrutti Bembde and others)*** decided on 23rd January, 2014, ***First Appeal No.2829 of 2015 (New India Assurance Company Ltd. Vs. Ashalata Suryakant Patil and others),*** decided on 4th October, 2018. In ***First Appeal No.3333 of 2015 (M/s I.C.I.C.I. Lombard Insurance Company Ltd., Mumbai Vs. Janabai wd/o Dinkarrao Ghorpade and others),*** decided by this Court on 14th December, 2018, this Court has taken view that only because police filed criminal case against the driver of the offending vehicle, the involvement of that vehicle is not proved.

8. Learned counsel for respondent Nos.1 to 6 – claimants submits that in supplementary statement, the

informant had given the name of the driver and registration number of the offending vehicle. He submits that filing of the chargesheet by police against the driver is sufficient to prove involvement of the offending vehicle in the abovesaid accident. He supported the impugned judgment and order.

9. In the case at hand, the finding of the Tribunal that at the time of accident, driver of the offending vehicle did not hold valid and effective driving licence is not challenged either by opponent No.1 or by the claimants. Therefore, that point need not be reconsidered in the present appeal.

10. However, after going through the record and proceedings, it emerges that to discharge the initial burden of proof, which lies on the claimants, the claimants have examined only Hajratbee Abdul Razak (PW1), who is neither eye witness of the occurrence, nor the informant who lodged FIR. From her evidence, it emerges that she does not know even the registration number of the vehicle, which gave dash to the deceased. Though in her cross-examination, involvement of the offending vehicle is specifically denied by the learned

counsel for the insurer, the Tribunal erroneously observed that such version of Hajratbee Abdul Razak (PW1) was not challenged. In view of the above admission given by Hajratbee Abdul Razak (PW1), her evidence is of no help to prove the involvement of the offending vehicle.

11. In the case at hand, from the police papers placed on record i.e. FIR (Exh-29), spot panchanama (Exh-31) and inquest panchanama (Exh-33), it emerges that accident occurred on 31st October, 2008 and FIR was lodged on 1st November, 2008 i.e. within reasonable period. However, in the FIR (Exh-29), the offending vehicle was not involved. On the other hand, it is specifically mentioned in the FIR (Exh-29) that unknown vehicle gave dash to the deceased when he was walking by the road. This FIR was lodged by Abdul Karim Mehtabsab Bagwan. However, this informant is not examined by the claimants atleast to prove his supplementary statement recorded on 26th November, 2010 wherein for the first time, the informant stated before the police regarding involvement of the offending vehicle and name of the driver. The learned Tribunal, though exhibited this supplementary statement (Exh-30), the same cannot be

read in evidence in absence of evidence of Abdul Karim Mehtabsab Bagwan or the Investigating Officer. Otherwise also, Osman Mohd. Bagwan, who provided information to Abdul Bagwan – the informant regarding involvement of the offending vehicle, is not examined by the claimants. Thus, absolutely, no material is available on record to prove involvement of the offending vehicle in the abovesaid accident. As already held by this Court, mere filing of chargesheet against the driver of the offending vehicle, is not sufficient to prove the involvement of the offending vehicle in the motor vehicular accident.

12. In view of above discussion, though learned counsel for the claimants supported the judgment passed by the Tribunal on the basis of copies of police papers on record, for the reasons stated above, the contention of learned counsel for the claimants is not acceptable. Accordingly, my conclusion is that the claimants miserably failed to prove involvement of the offending vehicle in the abovesaid accident and therefore, no liability can be fastened against either opponent No.1 or against opponent No.2. The claim petition for compensation deserves to be dismissed.

13. In the result, First Appeal No.1366 of 2012 is allowed. The judgment and award passed by the Motor Accident Claims Tribunal, Nanded in Motor Accident Claims Petition No.950 of 2008 is set aside and Motor Accident Claims Petition No.950 of 2008 is dismissed.

14. If any compensation amount deposited by the appellant/insurer is already withdrawn by the claimants, the same shall be re-deposited by the claimants and it be refunded to the appellant/insurer of the offending vehicle.

15. The balance compensation amount lying in this Court be refunded to the appellant/insurer after the appeal period is over.

16. The parties to bear their respective costs of the appeal.

[SUNIL K. KOTWAL]
JUDGE

npj/fa1366-2012