

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

FIRST APPEAL NO.695 OF 2019

Bapurao Gahininath Yewale,
Age Major, Occ. Agri.,
R/o Rupur, Post Rakshas Bhavan,
Tq. Shirur (Kasar), Dist. Beed.

... **Appellant.**

... **Versus** ...

- 1 Smt. Suman wd/o Dashrath Jadhav,
Age 47 yrs., Occ. Household,
- 2 Smt. Kusum wd/o Dashrath Jadhav,
Age 39 yrs., Occ. Household,
- 3 Digambar Dashrath Jadhav,
Age 28 yrs., Occ. Student,
- 4 Balu Dashrath Jadhav,
Age 24 yrs., Occ. Student,

All are r/o Kedar Wadgaon,
Tq. Naigaon, Dist. Nanded.
At present r/o Lok Mitra Nagar Colony,
Nanded, Dist. Nanded.

- 5 The Manager,
Tata Motors Finance Ltd.,
Hundekari Motors Pvt. Ltd.,
Ahmednagar, Solapur.

... **Respondents.**

...

Mr. V.D. Salunke, Advocate for the appellant

Mr. S.S. Gangakhedkar, Advocate for the respondent Nos.1 to 4

Mr. S.S. Panale, Advocate for the respondent No.5

WITH

FIRST APPEAL NO.696 OF 2019

Bapurao Gahininath Yewale,
Age Major, Occ. Agri.,
R/o Rupur, Post Rakshas Bhavan,
Tq. Shirur (Kasar), Dist. Beed.

... **Appellant.**

... **Versus** ...

- 1 Smt. Kusum wd/o Dashrath Jadhav,
Age 39 yrs., Occ. Household,
R/o Kedar Wadgaon,
Tq. Naigaon, Dist. Nanded.
- 2 The Manager,
Tata Motors Finance Ltd.,
Hundekari Motors Pvt. Ltd.,
Ahmednagar, Solapur.

... **Respondents.**

...

Mr. V.D. Salunke, Advocate for the appellant

Mr. S.S. Gangakhedkar, Advocate for the respondent No.1

Mr. S.S. Panale, Advocate for the respondent No.2

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 13th JUNE, 2019

COMMON JUDGMENT :

1 Present appeals have been filed by original respondent No.1 challenging the Judgment and Award passed by learned District Judge-4, Ex-officio Member of Motor Accident Claims Tribunal, Nanded in Motor Accident Claim Petition No.119/2011 and Motor Accident Claim Petition No.120/2011 respectively dated 07.08.2017. Since in both the appeals similar points have been raised and both the petitions, which were filed before the Tribunal were arising same accident, these appeals are proposed to be disposed of by this common Judgment.

2 Present respondent Nos.1 to 4 in First Appeal No.695 of 2019 and respondent No.1 in First Appeal No.696 of 2019 are the original claimants. They had filed application for getting compensation under Section 166 of the Motor Vehicles Act. The claim in First Appeal No.695 of 2019 was death claim, whereas from First Appeal No.696 of 2019 was injury claim. The claimants had contended that deceased Dashrath along with his wife claimant No.2 had gone to Chakan, Dist. Pune to visit their son Digambar on 31.05.2010. When they were crossing the road on Chakan-Shikrapur road near Ganpati mandir, a Tata Sumo Grande CX bearing No.MH 23/E-6475 gave dash to them. As a result of which, Dashrath died on the spot and his wife Kusum received severe injuries. It was stated that the said accident had

taken place due to the negligence on the part of the driver of the Tata Sumo. Dashrath was the sole earning member of the family. He was doing business of selling vegetables and milk and thereby earning Rs.15,000/- per month. It was contended that Kusum has received permanent disability as she is unable to do daily work. She was assisting her husband in selling vegetables and milk and thereby earning Rs.3,000/- per month. The said offending vehicle belong to respondent No.1 i.e. present appellant. Respondent No.2 was the financier. The said vehicle was not insured on the date of the accident.

3 The appellant received the summons in both the claim petitions and he engaged Advocate Mr. Warkhende. However, said Advocate did not file Vakalatnama. As a result of which the matters proceeded ex parte against him. The Tribunal has allowed both the petitions partly. In M.A.C.P No.119/2011 the respondent Nos.1 and 2 were directed to pay amount of Rs.5,27,000/- together with interest @ 7% per annum from the date of the petition till actual realization and in M.A.C.P No.120/2011 respondent No.1 has been directed to pay amount of Rs.1,34,691/- together with interest @ 7% per annum. Both the amounts were inclusive of the amount under No Fault Liability. However, in this petition i.e. M.A.C.P No.120/2011, only respondent No.1 was held to be liable to pay the amount of compensation. Hence, these appeals have been filed by the original respondent No.1.

4 Taking into consideration the rival contentions, following points arise for my determination. Findings and reasons on the same are as follows.

Sr.No.	POINTS	FINDINGS
1	Whether it was necessary for Tribunal to issue notice to driver of the offending vehicle in this case ?	In the negative.
2	Whether appeals deserve remand ?	In the negative.

REASONS

5 It has been vehemently submitted on behalf of the appellants that though the summons was duly served on the respondent No.1 he had engaged the Advocate but unfortunately the Advocate did not appear and file his Vakalatnama. That means, a proper opportunity has not been given to him to contest the matter. Under such circumstance, the main prayer with which learned Advocate for the appellant has made is to remand the matter. Further, he submitted that the learned Tribunal failed to consider that the driver of the offending vehicle was not made a party to the proceedings. Unless his act can be said to be rash and negligent the owner cannot be held responsible for the same. In order to support his contention he relied on the

decision in **United India Insurance Co. Ltd. vs. Smt. Ratna Papat Patil and another, 2011 (1) B.C.J. 234**, wherein this Court (Hon'ble Shri. Shrihari P. Davare) has held that

“Thus, it is clear from the text of both the aforesaid provisions that they are mandatory and are required to be followed by the Claims Tribunal in respect of the owner, driver and the insurer of the vehicle in question, in the manner prescribed. In the light of the aforesaid aspects, the Claims Tribunal is expected to pass an award under Section 168 of the Motor Vehicles Act, 1988 in respect of amount of compensation to be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or in all them, as the case may be. Whether the driver of the offending vehicle is found to be rash and negligent in driving the vehicle and is held liable to pay the compensation, will depend upon the facts and circumstances of each case and the Tribunal may direct only the owner and the insurer of the vehicle to pay the compensation, but involvement of the driver in accordance with the aforesaid Rules in claim petition is a must.”

6 Per contra, the learned Advocate appearing for the respondent Nos.1 to 4 submitted that the present appellant has not contested the petition. He could have taken the point regarding non joinder of necessary parties before the Tribunal itself. When he has not taken that contention he cannot for the first time take that ground in First Appeal. He relied on the decision in **New India Assurance Company Ltd. vs. Sitaram Devidayal**

Jaiswal and others, 2012 (5) Bom.C.R. 285, wherein this Court at Principal Seat (Hon'ble Shri. Oka, J.) has held that -

“In many cases defences pleaded are not pressed into service at the time of final hearing. Tribunal is under obligation to issue notice to driver, whenever contention is pressed into service by opponents. Claimant cannot be allowed to suffer as he is under no obligation to implead any party as opponent to claim petition. If contention non-joinder of driver is raised at the time of final hearing of claim petition, if found correct, Tribunal can issue notice to driver at any stage. In written statement contention was raised by appellants, but not agitated at any time thereafter. Now in appeal, appellant cannot raise said contention which will cause serious prejudice to claimant.

It was pointed out that the decision in **2011 (1) B.C.J., 234** (supra) was considered in this case.

7 At the outset, it is to be noted that original respondent No.1/present appellant has not given a cogent reason as to why he did not pursue the matter further. When he admits that he has received the summons and then states that he had engaged Advocate himself to defend himself then it was his duty to see that actually his case is defended by a competent Advocate. Only vague contention has been made without any details. It is to be noted that the petitions were filed on 08.02.2011 and they

have been decided after the period of 06 years 05 months and 29 days i.e. on 07.08.2017. Therefore, it was for the appellant to explain as to what inquiry he had made for a period of six years with his Advocate and tried to gather what is the progress in the matter. There is absolutely no pleading to that effect in the appeal memo. Under such circumstance, no case is made out for remand of the matter.

8 Now, coming to the point raised regarding driver not made as a party is concerned, since the matter before the Tribunal went ex parte against the present appellant, he is raising this point for the first time in appeal. Though this Court in **2011 (1) B.C.J. 234** held that the driver is a necessary party, yet this Court in **2012 (5) Bom.C.R. 285** after taking note of various decisions, especially **Machindranath Kernath Kasar vs. D.S. Mylarappa and others, (2008) 13 S.C.C. 198** the Apex Court has held that driver of the offending party would be a proper party.

Further, decision in **Bessarlal Laxmi Chand Chirawala vs. Motor Accidents Claims Tribunal, Greater Bombay and others, 1970 A.C.J. 334**, which was the decision by the Division Bench of this Court. It was observed that -

“Thus, the law is that the claimant while filing a claim application is under no obligation to ensure that all necessary and proper

parties are impleaded as opponents to the claim petition. Considering the nature of the proceedings, the responsibility is of the Tribunal to ensure that the notices are issued to all the necessary parties. This power can be exercised by the Tribunal at any stage of the proceedings.”

Therefore, taking into consideration the rules, especially, Rule No.260(1) and (2) of the Maharashtra Motor Vehicles Rules, 1989 it has been further observed that the Tribunals will have to ensure that if such contention regarding non joinder of the driver is raised and is found to be correct, a notice is issued to the driver, so that the claimant does not suffer. In this case, the appellant had not raised such contention, therefore, the action of the Tribunal of not issuing notice to driver cannot be said to be illegal.

9 Another point canvassed by the appellant is that while calculating compensation in M.A.C.P. No.120/2011 the Tribunal has considered her income as Rs.3,000/- per month which is wrong and no evidence has adduced to that effect. The learned Advocate appearing for the respondent has relied on the decision in Jitendra Khimshankar Trivedi and others vs. Kasam Daud Kumbhar and others, (2015) 4 Supreme Court Cases 237, wherein it has been held that -

“It is hard to monetise domestic work done by a house-mother whose service is available 24 hours and her duties are never

fixed. Courts have recognised contribution made by wife to housework as invaluable and that cannot be computed in terms of money and such services rendered by homemaker have to be necessarily kept in view while calculating loss of dependency.”

10 Here, it is to be noted that while calculating the compensation in the injury claim, the Tribunal has taken into consideration the loss of earnings to the tune of period of treatment only. But then amount of Rs.75,600/- has been awarded towards loss of future earning. Taking into consideration the above said observations from **Jitendra's** case (supra) the said component under which amount is awarded by the learned Tribunal cannot be said to be illegal or doubted. Therefore, taking into consideration both the points are answered in the negative, there is no merit in the present appeals. They deserve to be dismissed with costs. Hence, following order.

ORDER

Both the appeals are dismissed with costs.

(Smt. Vibha Kankanwadi, J.)