

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

**FIRST APPEAL NO.1912 OF 2011
WITH
CIVIL APPLICATION NO.10492 of 2019
IN FA/1912/2011**

Oriental Insurance Co. Ltd.
Through its Branch office No.H,
Shri Mahavir Goshala area,
Piphapara, Raipur (M.P.)
Through its service, Branch at
Osmanpura, Aurangabad,
Through its authorized signatory,
Mr. Arvind Kumar Ravikar s/o Motilal,
Age 51 yrs., Occ. Service, Sr. Div. Manager,
Oriental Insurance Co. Ltd.,
R/o Aurangabad.

... Appellant.

... **Versus** ...

- 1 Sk. Ahmed s/o Sk. Umer,
Age 60 yrs., Occ. Nil,
R/o Dhoregaon, Tq. Gangapur,
Dist. Aurangabad.
- 2 Haseena w/o Sk. Ahmed,
Age 55 yrs., Occ. Household,
R/o as above.
- 3 Mr. Daljitsingh s/o S. Mahendrasingh,
Age 49 yrs., Occ. Business,
R/o Apolo Transport Corp. G.E. Road,
Raipur, Dist. Raipur (M.P.)
- 4 Iqbalsingh s/o Sadhusingh,
Age 45 yrs., Occ. Driver,
R/o House No.327/5, Begum Bazar,

Hyderabad (A.P.).

- 5 Balu @ Kishor s/o Ramnath Najan,
Age 43 yrs., Occ. Driver,
R/o Samtanagar, Gangapur,
Tq. Gangapur, Dist. Aurangabad.
- 6 Shaikh Khadeer s/o Shaikh Sultan Patel,
Age 46 yrs., Occ. Owner of Matador
No.MH 20/F-5395,
R/o Dhoregaon, Tq. Gangapur,
Dist. Aurangabad.
- 7 New India Assurance Co. Ltd.,
Through its Branch Manager,
Aurangabad.

... **Respondents.**

...

Mr. D.P. Deshpande, Advocate for the appellant

Ms. A.N. Ansari, Advocate for the respondent Nos.1 and 2

Mr. V.R. Mundada, Advocate for the respondent No.7

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 24th SEPTEMBER, 2019

JUDGMENT :

1 Present appeal has been filed by the original respondent No.3-
insurance company challenging the Judgment and Award passed by learned
Ex-Officio Member, Motor Accident Claims Tribunal (District Judge-6),

Aurangabad in M.A.C.P. No.698/2006 dated 09.08.2010, whereby the claim petition filed by present respondent Nos.1 and 2 under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as “the Act”) came to be partly decreed against it.

2 The original claimants have come with a case that they are the parents of deceased Shaikh Nisar. Shaikh Nisar was travelling in Tempo Matador bearing registration No.MH 20/F-5395 on 15.02.1997 at about 4.30 p.m. from Gangapur to village Dhoregaon. A truck bearing No.TVD ORA 5447 came from opposite direction, when the tempo was near Sayyadpur village. The said truck was in high speed. The driver was driving it rashly and negligently. The said truck gave dash to matador, as a result of which Shaikh Nisar received injuries and died on the spot. Respondent No.1 is the owner and respondent No.2 is the driver of the truck. The said truck was insured with respondent No.3, on the date of accident. Crime was registered against the truck driver. It was the further contention of the claimants, that Shaikh Nisar used to run a Pan Stall and was also doing agriculture. He used to earn Rs.5,000/- per month. By way of amendment to the petition the claimants had added tempo driver, owner and insurance company as respondent Nos.4 to 6. It was also contended that the respondent No.2-driver of the truck was also responsible for the accident. However, claim was

made as against respondent Nos.1 to 3 only.

3 The matter proceeded ex parte against respondent Nos.1 and 2. Respondent No.3-insurance company filed written statement and denied all the allegations including the allegations about rashness and negligence about driver of the truck. It is stated that Shaikh Nisar was travelling as a passenger in a goods vehicle and therefore, the respondent No.3 is not liable to pay the compensation to the claimants.

4 Respondent Nos.4 and 5, owner and driver of the tempo filed common written statement at Exh.42 and respondent No.6-the insurance company of the tempo filed separate written statement. In these written statements, they all have denied allegations against respondent No.5. It has been contended that the accident had taken place only because of the negligence on the part of respondent No.2, the driver of the truck. The said insurance company has also taken a defence that deceased was travelling as a passenger from the tempo Matador, therefore, his risk was not covered under the policy.

5 Taking into consideration the rival contentions, issues have been framed. It appears that only claimants have led oral as well as documentary evidence. The other respondents did not lead any evidence nor produced any

document on record.

6 Taking into consideration the evidence on record, the learned Trial Court held that the claimants have proved, that due to the sole negligence on the part of the respondent No.2 the said accident had taken place. The insurance company-respondent No.3 failed to prove breach of terms of policy and therefore, the claimants, who are the parents of deceased, are entitled to get compensation. It was also held that the respondent No.5 has not contributed the accident, in any way, and therefore, respondent Nos.4 and 6 are not liable to pay compensation. Respondent Nos.1 to 3 were directed to pay compensation of Rs.3,21,000/- together with interest. This Judgment and Award is under challenge in this appeal.

7 Heard learned Advocate Mr. D.P. Deshpande for appellant, learned Advocate Ms. A.N. Ansari for respondent Nos.1 and 2 and learned Advocate Mr. V.R. Mundada for respondent No.7.

8 It has been vehemently submitted on behalf of the appellant that the learned Tribunal failed to consider that the First Information Report was filed against the drivers of both the vehicles. The deceased was travelling by sitting on the rare plank of the tempo, which in fact, was not authorized. Further, he was a gratuitous passenger and therefore, by not holding

respondent No.5 for the contribution to the accident the Judgment and Award of the Tribunal has been rendered perverse. He has taken me through the Judgment and other documents on record to support his contention and then he relied on the decision in **Khenyei vs. New India Assurance Company Limited and others, AIR 2015 SC 2261**, wherein -

“What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.”

Further submission has been made that the accident had taken place on 15.02.1997 and the claim petition came to be filed in the year 2006 i.e. after about 9 years and therefore, it cannot be said that the claimants were dependents of deceased, because they could live without the earnings of the deceased. Reliance was placed on the decision in Manjuri Bera vs. The Oriental Insurance Company Limited and others, AIR 2007 SC 1474, wherein it has been held, after taking into consideration the definition of “legal representative” as per Section 2(11) of the Code of Civil Procedure, a married daughter, who was not dependent on the father, was not given compensation.

9 Per contra, the learned Advocate appearing for the respondent Nos.1, 2 and 7 supported the reasons given by the Tribunal.

10 Taking into consideration the points of argument submitted, following points arise for determination; findings and reasons for the same are as follows.

1 Whether the accident was caused due to the sole negligence of respondent No.2 or whether respondent No.5 had in any way contributed to the accident ?

2 Whether claimants were entitled to get compensation ?

3 Whether respondent Nos.3 and 7 are in any way liable to pay compensation to the claimants ?

REASONS

11 In order to appreciate the point of negligence, it is to be noted that claimants have examined CW 1, father of deceased. His affidavit-in-chief Exh.48 is nothing but the replica of his petition. Important point to be noted is that though respondent Nos.5 to 7 were added in the petition, yet, in categorical words he has stated, that the accident took place due to the negligence on the part of the truck driver only. If we consider his cross taken on behalf of the insurance, it is to be noted that fact is extracted from him and he has answered, that the tempo was dashed by truck from back side. That means, the vehicles were going in the same direction. In the First Information Report, which has been filed against both the drivers, it appears that the matador had come from the opposite direction. Spot panchnama would reveal that deceased had fallen from the truck on the ground towards

back side. If it would have been a dash from the back side to the tempo, then deceased would have fell inside the tempo and not outside. Further, a cursory statement appears to be on record, that deceased was travelling by sitting on the rare plank of the body of the tempo. No evidence has been led in the form of eye witness by both sides. Therefore, it is required to be seen, only on the basis of the police papers, as to whether deceased was travelling by sitting on the rare plank of the tempo. As aforesaid, the position of fall would have been different if he would have been travelling in that manner. Another fact to be noted is, that from where the suggestion for extracting the dash from the back side is taken, is absolutely not revealed. There was no hurdle for the insurance company to examine the driver of its vehicle. It appears that the insurance company relied on the same document i.e. police papers, on which, claimants are also relying, therefore, the harmonious consideration of entire contents would show, that the truck had come from the opposite direction before dash was given and after that, he fell down from the tempo on the back side, resulting in multiple injuries and succumbing to death.

12 Merely because the First Information Report is lodged against both the vehicles, that does not allow the insurance company to take any advantage. As aforesaid, the insurance company has not led any evidence to

prove the manner, in which the accident took place, or in other words, it can be said, that no cogent evidence has been led by the insurance to rebut the evidence, that was adduced, by the claimants. Hence, it can be held on the basis of the averments in the police papers, especially, the spot panchnama, that the said accident had taken place due to the negligence on the part of truck driver alone. Since the driver of the truck was not examined, adverse inference is required to be drawn against him.

13 The present case was not at all that of composite negligence and therefore, the ratio laid down in **Khenyei** (supra) will not be applicable here.

14 The claimants have come with a specific case that deceased was travelling along with his goods, at the relevant time. He used to run a Pan Shop and therefore, had gone to weekly bazaar to make purchases. After the purchases were made, he had put all those articles in gunny bag and he was travelling with the gunny bag, at the relevant time. No evidence on behalf of respondent had been led to rebut this situation. Appellant is the insurance company of the truck and therefore, the said insurance company cannot take a defence, that there is breach of terms of policy of the other vehicle. For the appellant, deceased was a third party and therefore, in any manner the appellant was required to pay compensation to the claimants.

15 As regards the alleged delay in filing the petition and entitlement of the claimants to receive compensation is concerned, the ratio laid down in **Manjuri Bera** (supra) cannot be denied, however, it can be seen that in that case itself note of provisions of Section 2(11) defining 'legal representatives' has been considered, so also, authorities were considered, in which it was held, that the said provision under the Code of Civil Procedure is inclusive in character and its scope is wide. It is not confined to legal heirs only. Only it stipulates that a person who may or may not be legal heir competent to inherit the property of the deceased can represent the estate of the deceased person. It includes heirs as well as persons, who represent the estate, even without title either as executors or administrators in possession of the estate of the deceased. Note has also been taken of the view that a legal representative is not one, who suffers on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parents and a child. When limitation act was not applicable for filing petition to claim compensation, belated filing of the petition cannot be objected to by the appellant.

16 Since the deceased was travelling with his bag i.e. in the capacity as owner of the truck, he was not a gratuitous passenger and as aforesaid, he was a third party for respondent No.3, whose heirs are bound to be

compensated by the tortfeasor. Respondent Nos.4 to 6 were added as respondents as 'proper party' and not as 'necessary party'. There were no allegations of negligence on the part of respondent No.5 in the examination-in-chief. Therefore, the points are answered in – (1) It was caused due to the sole negligence of respondent No.2, (2) They were entitled to get compensation from respondent Nos.1 to 3, jointly and severally, and (3) In the negative.

17 There is no merit in the present appeal. It deserves to be dismissed. Hence, following order.

ORDER

1 The appeal is dismissed.

2 The Civil Application No.10492 of 2019 filed by the original claimants for withdrawal of the amount stands allowed. The amount deposited, in this case, be given to the claimants, together with accrued interest.

3 No order as to costs.

(Smt. Vibha Kankanwadi, J.)