IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 4458 OF 2016

New India Assurance Co. Ltd.
Through its Divisional Manager,
Aurangabad, Divisional Office
D.O.I., Above Mahesh Auto,
Ajay Engineering Compound,
Near Kranti Chowk, Adalat
Road, Aurangabad. **Appellant.**

Versus

1. Shalini Bhagchand Jadhav
Age : 57 years,

2. Rahul Bhagchand Jadhav
Age : 32 years,

3. Suhas Bhagchand Jadhav
Age : 28 years,

4. Kum. Vidya Bhagchand Jadhav
Age : 30 years,

5. Bapusaheb @ Haridas s/o
Shantaram Doke
Age : 57 years, occu.: business
R/o S.No. 130, Vedantnagar,
Savedi, Ahmednagar. **Respondents**.

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Mr. A.B. Gatne, Advocate for the appellant.
Mr. S.D. Jaybhar, Advocate holding for
Mr. D.R. Jaybhar, Advocate for respondent Nos.1 to 4.

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CORAM : SUNIL K.KOTWAL,J.

Judgment reserved on : 25 March 2019.
Judgment pronounced on : 2 April 2019.

JUDGMENT.

1. The New India Assurance Company Limited has preferred this appeal against the judgment and award passed by the Motor Accident Claims Tribunal (hereinafter referred to as the "Tribunal"), Ahmednagar in Motor Accident Claim Petition No. 609/2008, whereby compensation of Rs.2,71,000/- was awarded by the Tribunal against the owner and Insurer of Tata Safari Jeep bearing registration No. MH-16-Y-100 and liberty was given to the Insurer to recover the amount of compensation from the owner of the vehicle.

2. The appellant is the Insurer of the above-said Jeep who was respondent No. 2 in the claim proceeding and respondent Nos. 1 to 4 are the original claimants. Respondent No. 5 is the original respondent No. 1 - owner of the Jeep. Hereinafter the parties are referred to in accordance with their status in the original claim proceeding as "claimants", respondent No. 1/owner respondent No. 2 / Insurer of the Jeep.

3. The facts leading to institution of this appeal are that on 18.11.2005, the deceased Bhagchand was travelling by Tata Safari Jeep bearing registration No. MH-16-Y-100 from Tuljapur to Ahmednagar, as a passenger. That time near Achanakwadi one unknown truck came from the opposite direction and gave dash to the Jeep, resulting into the death of deceased Bhagchand. At the time of the accident respondent No. 1 was driving the jeep in rash and negligent manner. In the result, claimants have filed the claim petition before the Tribunal for compensation.

4. By filing written statement respondent No. 1 contended that the accident occurred due to rash and negligent driving of the driver of unknown offending truck.

5. Respondent No. 2 Insurer opposed the petition on the ground that the accident occurred due to exclusive negligence of the driver of offending truck. In the alternate contention of the Insurer is that at the time of occurrence of accident respondent No. 1 was driving the Jeep without holding effective and valid driving licence.

6. After considering the evidence placed on record, the learned Tribunal held that the accident occurred due to rash and negligent driving of the driver of offending truck and the driver of Tata Safari Jeep bearing registration No. MH-16-Y-100 was not driving the Jeep in rash or negligent manner. However, the Tribunal fastened joint and several liability on respondent Nos. 1 and 2 to pay the compensation to the claimants and liberty was given to respondent No. 2 - Insurer to recover the compensation amount from respondent No. 1 - owner of the Jeep. That award is challenged in the present appeal.

7. Heard Mr. A.B. Gatne, learned Counsel for the Insurer and Mr. S.D. Jaybhar, learned Counsel for the claimants.

8. The contention of learned Counsel for the Insurer is that though while answering issue No. 2 the the Tribunal held that the driver of the jeep was not responsible for the accident and the accident occurred due to rash and negligent driving by driver of unknown truck, the learned Tribunal erroneously saddled the liability to pay compensation on owner as well as Insurer of the Jeep and erroneously gave liberty to the Insurer to recover the compensation amount from owner of the Jeep.

9. In the alternate, the submission of learned Counsel for the Insurer is that on the date of occurrence of the accident, respondent No. 1 did not hold valid and effective driving licence to drive light motor vehicle like Jeep involved in the accident, and therefore, respondent No.1 committed breach of condition of policy of insurance. According to learned Counsel for the Insurer, as the owner of the jeep committed breach of condition of policy, the Insurer is not liable to pay compensation to the claimants and to recover it from the owner. He placed reliance on the judgment of the Supreme Court delivered on 22.11.2017 in S.L.P. No.31406/2017 in the case of *"M.S. Middle High School Vs. HDFC Ergo General Insurance Co. Ltd. And others"*.

10. Learned Counsel for the claimants placed reliance on spot panchnama (Exh.28) of the accident and submits that major damages caused to the Jeep at the time of accident indicate that the accident occurred due to composite negligence of the unknown truck as well as driver of the offending Jeep. According to learned Counsel for the claimants, as it was the case of composite negligence of driver of both vehicles involved in the accident, the claimants have option to recover the entire

compensation amount either from the owner of offending truck or from the owner and Insurer of Tata Safari Jeep involved in the accident. He placed reliance on the case of **"Khenyei Vs. New India Assurance Co. Ltd. & ors" (2015 ACJ 1441)**, wherein the Apex Court held that it is open to the claimant to recover entire compensation from one of the joint tort feasors, when the accident was caused by composite negligence of drivers of two vehicles involved in the accident. He also placed reliance on the following cases :-

1) First Appeal No.892 of 2013 (National Insurance Co. Ltd. Vs Sanjay Shriram Kripal and another) (Bomaby High Court),decided on 29.04.2016.

2) First Appeal No.391 of 2009 (Chandraprakash Kunjbihari-lalji Dhiran Vs. Nathu & another), (Bombay High Court), decided on 4.2.2019.

3) First Appeal No.840 of 2004 (Sunita Prakash Ghule Vs. Samiyoddin Sk. Jamaloddin) (Bombay High Court), decided on 01.03.2016.

4) Civil Appeal No.5826 of 2011 (Mukund Dewangan Vs. Oriental Insurance Co. Ltd.) (Supreme Court), decided on 03.07.2017.

11. After going through the judgment passed by the Tribunal, it emerges that issues were framed at Exh.16 and they

are decided as under :-

	ISSUES		FINDINGS
1	Whether the applicants prove that Bhagchand Haribhau Jadhav died in vehicular accident dated 18/11/2005?	:	In affirmative.
2	Whether applicants prove that the accident occurred due to rash and negligent driving of Tata Safari No.MH-16-Y-100 owned and driven by opponent No.1 and insured with opponent No.2?	:	In negative.
3	Whether opponent No.1 and 2 prove that accident was caused due to rash and negligent driving of the unknown truck involved in the accident?	:	In affirmative.
4	Whether applicant No.2 prove that opponent No.1 is owner of offending vehicle has committed breach of terms and conditions of insurance policy?	:	In affirmative.
5	Whether applicants are entitled for compensation? If yes, to what extent and from whom?	:	In affirmative – as per final order.
6	What order and award?	:	As per final order.

12. After going through the above said Issue Nos.2 and 32, it becomes clear that the Tribunal held that on 18.11.2005 the

accident occurred due to rash and negligent driving of the driver of unknown truck involved in the accident. While answering issue No.2 the Tribunal also held that rash and negligent driving by the driver of Tata Safari Jeep bearing registration No. MH-16-Y-100 is not proved by the claimants. As the claimants have not filed cross objection against the finding of the Tribunal against issue Nos. 2 and 3, the finding of the Tribunal has reached to finality that the accident dated 18.11.2005 resulting into the death of deceased Bhagchand occurred exclusively due to rash and negligent driving by the driver of offending truck and driver of Tata Safari Jeep i.e. respondent No. 1 did not drive the Jeep in rash and negligent manner. Therefore, when the driver of Tata Safari Jeep involved in the accident was not responsible for the accident and when driver of the Jeep himself was its owner, neither the liability to pay compensation can be fastened on the owner of the Jeep nor on respondent No.2-Insurer of the Jeep. On this count alone the claim petition ought to have been dismissed by the Tribunal.

13. Otherwise also, after going through the oral and documentary evidence placed on record by the claimants, it

emerges that sole witness Shalini Jadhav (PW-1) examined by the claimants was not an eye witness of the accident, because at the time of occurrence she was at her residence and she was not travelling by the Jeep involved in the accident. Therefore, on the basis of oral testimony of claimant Shalini Jadhav (PW-1) rash and negligent driving of the Jeep by respondent No. 1 driver / owner cannot be proved by the claimant. Even a copy of FIR (Exh.27) recites that on 18.11.2005 the accident occurred resulting into the death of deceased exclusively due to rash and negligent driving by the driver of offending truck involved in the accident. Even spot panchnama (Exh.28) of the accident shows that when the Jeep involved in the accident was proceeding towards Nagar by left side of the road, the offending truck, which came from opposite direction, gave dash to the Jeep by coming towards wrong side of the road tossing the Jeep by the side of the road. These facts are clear from the sketch map which is part and parcel of the spot panchnama (Exh.28).

14. Thus, it becomes clear that even the police papers placed on record do not support the oral testimony of the claimant Shalini Jadhav (PW-1) regarding occurrence of accident

due to rash and negligent driving by the driver of jeep involved in the accident. Thus, otherwise also, the claimants cannot prove that the accident occurred due to rash and negligent driving by driver of jeep involved in the accident. In other words, it was not the case of composite negligence by drivers of the Jeep and truck. On the other hand, the accident occurred due to sole rash and negligent driving by the driver of offending truck involved in the accident. Therefore, the liability to pay compensation to the claimants cannot be fastened on respondent No. 1 i.e. the owner / driver and respondent No. 2 - Insurer of the Jeep bearing registration No. MH-16-Y-100.

15. As it was not the case of composite negligence, the ratio of the case of **"Khenyei Vs. New India Assurance Co. Ltd"** (supra) is not applicable in the case at hand. Even the other above-mentioned cases relied on by the learned Counsel for the claimants are distinguishable on facts, because in those cases there was sufficient material before the Court to prove the rash and negligent driving by driver of the vehicle involved in the accident or to apply the doctrine of *res ipsa loquitur*.

16. Otherwise also, it is the contention of the Insurer that the owner of the Jeep involved in accident committed breach of condition of policy of insurance as respondent No. 1 driver / owner did not hold valid and effective driving licence to drive the Jeep involved in the accident. To substantiate this contention, on behalf of the Insurance Company, Dinesh Sonawane (DW-1), who is the Senior Clerk working in the Regional Transport Officer, Ahmednagar, is examined. From the evidence of this witness it has been brought on record that on the date of the accident respondent No. 1 driver / owner of the Jeep held driving licence to drive heavy motor vehicle and not the licence to drive light motor vehicle like Jeep. This witness has also proved the information submitted by the Deputy Regional Transport Officer, which shows that the driving licence to drive heavy motor vehicle by respondent No. 1 driver / owner of the Jeep was renewed on the date of occurrence of the accident. Thus, it is proved by the Insurer of the Jeep involved in the accident that on the date and time of occurrence of the accident respondent No. 1 driver / owner of the Jeep did not hold valid and effective driving licence to drive the Jeep which is a light motor vehicle. In other words, when the policy of insurance of the Jeep (Exh.40) shows the condition of

insurance that driver of jeep must hold effective driving licence at the time of accident, in the above circumstances, the Insurer of the Jeep has duly proved the breach of condition of policy of insurance. Therefore, in view of the observations made in the case of **"M.S. Middle High School Vs. HDFC Ergo Insurance Co. Ltd."** (supra) the liability to pay compensation cannot be fastened on the Insurer of Tata Safari Jeep bearing registration No. MH-16-Y-100 involved in the accident.

17. In view of the discussion, I have no hesitation to hold that as the Tribunal held that the driver / owner of the jeep was not responsible for the occurrence of the accident, the liability to pay compensation to the claimants on account of death of deceased cannot be fastened on respondent No. 1 owner / driver of the Jeep as well as on respondent No. 2 Insurer of the Jeep. Accordingly, M.A.C.P. 609/2008 deserves to be dismissed. It follows that the present appeal needs to be allowed.

18. In the result, First Appeal No. 4458 of 2016 is allowed. Judgment and order passed by the Tribunal, Ahmednagar in M.A.C.P. No. 609/2008 is set aside and M.A.C.P. No. 609/2008 is dismissed.

19. Parties to bear their respective costs throughout.

20. The compensation amount with accrued interest there on deposited by the appellant New India Assurance Company Limited be refunded to it after the period of appeal is over.

(SUNIL K. KOTWAL)
JUDGE

vdd/