

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

918 FIRST APPEAL NO.396 OF 2019

WITH

CA/7710/2019 IN FA/396/2019

WITH

CA/10606/2019 IN FA/396/2019

WITH

CA/10757/2019 IN FA/396/2019

1 Smt. Kalpana Rajendra Kothari,  
Age 52 yrs., Occ. Nil,

2 Komal Rajendra Kothari,  
Age 24 yrs., Occ. Education,

3 Bhavna Rajendra Kothari,  
Age 18 yrs., Occ. Education,

4 Hardik Rajendra Kothari,  
Age 16 yrs., Occ. Education,

Since minor, U/G of his mother  
appellant No.1,

4 Smt. Leelabai Zumbarlal Kothari,  
Age 72 yrs., Occ. Nil,

All are r/o Mirajgaon, Tq. Karjat,  
Dist. Ahmednagar.

... Appellant.

... **Versus** ...

1 Santosh Arvind Jangam,  
Age 52 yrs., Occ. Trader,

R/o Krishna Lane, Mirajgaon,  
Tq. Karjat, Dist. Ahmednagar.

2 The Manager,  
New India Assurance Co. Ltd.,  
Abot Building, 2<sup>nd</sup> Floor,  
Near Ashoka Hotel, Kings road,  
Ahmednagar.

... **Respondents.**

...

Mr. C.K. Shinde, Advocate for the appellants

Mr. D.P. Deshpande, Advocate for the respondent No.2

...

**CORAM : SMT. VIBHA KANKANWADI, J.**

**DATE : 25<sup>th</sup> SEPTEMBER, 2019**

**JUDGMENT :**

1 Present appeal has been filed by the original claimants challenging the Judgment and Award passed in M.A.C.P No.19/2016 by learned Member, Motor Accident Claims Tribunal, Ahmednagar on 31.03.2018, thereby dismissing their claim petition under Section 166 of the Motor Vehicles Act.

2 The facts giving rise to the appeal are that the original claimants had come with a case that they are the legal heirs of one deceased Rajendra Kothari. Said Rajendra Kothari was proceeding on a motorcycle at about

1.45 p.m. on 19.12.2015 by Nagar-Solapur road towards Karmala. One Niraj Kothari was riding the said motorcycle and deceased was the pillion rider. When they reached near Kishor Hotel at village Mahi Jalgaon, at that time, their motorcycle was dashed by another motorcycle ridden by one Balasaheb Hanuman Korde. The said motorcycle was bearing No.MH 16/BB-9351, which had come from the opposite direction in high speed. As a result of the dash, the deceased as well as his rider fell down. Deceased sustained grievous injuries. He immediately taken to City Care Hospital, Ahmednagar, however, he succumbed to the injuries. First Information Report was lodged by Niraj Kothari with the police and on the basis of said First Information Report, offence came to be registered against said Balasaheb. It is the contention of the claimants that the said accident took place due to the sole negligence on the part of the Balasaheb. Deceased Rajendra was 55 years old person having his commission agent shop in Market Yard at Mirajgaon. His income was Rs.30,000/- to Rs.35,000/- per month. Accordingly, the claimants prayed for compensation from respondent No.1, who was the owner of the offending motorcycle and respondent No.2, with whom the said motorcycle was insured, on the date of the accident.

3                Respondent No.1 filed written statement at Exh.15, whereas the insurance company filed written statement at Exh.14. They both had denied

all the averments in the claim petition. They denied the fact of accident, involvement of the motorcycle belonging to respondent No.1 and the manner, in which the accident took place, as narrated in the petition. Respondent No.1 has also stated that the rider of the offending vehicle was in high speed and there was no negligence on his part. The insurance company, in addition, had taken defence of breach of terms of policy on the ground that the rider of the offending vehicle had no valid and effective driving licence to ride the motorcycle, on the date of the accident.

4           Taking into consideration the rival contentions, issues were framed. Only claimants had led the evidence, in the nature of oral evidence, by examining CW 1 Komal, daughter of the deceased and by producing police papers. Respondent Nos.1 and 2 did not lead any evidence to support their respective contentions. Taking into consideration the evidence led by the claimants and after hearing both sides the learned Tribunal has dismissed the petition by holding that the claimants have failed to prove the involvement of bullet motorcycle bearing registration No.MH 16/BB-9351, in the accident. In other words, it was held that claimants have failed to prove negligence on the part of rider of the offending vehicle. Hence, this appeal has been filed by the original claimants.

5           It will not be out of place to mention here that along with the

appeal, the present appellants have filed three applications i.e. Civil Application No.7710 of 2019, Civil Application No.10606 of 2019 and Civil Application No.10757 of 2019 under Order 41 Rule 27 of the Code of Civil Procedure, 1908 for permitting them to produce additional evidence. By way of Civil Application No.7710 of 2019 they want to produce copies of charge sheet in S.C.C. No.46/2016 and copy of deposition of eye witness Niraj Kothari. By way of Civil Application No.10606 of 2019 they want to produce copies of statements of witnesses recorded by police which are forming part of charge sheet and again copy of statement of eye witness recorded in criminal case at Exh.19. By way of Civil Application No.10757 of 2019 they want to produce on record copies of medical reports and communication between Doctor and police authorities.

6           All these applications have been objected by present respondent No.2-original respondent No.2-insurance company, on the ground that the claimants intend to fill up the lacuna and no cogent reason has been assigned, as to why these documents were not produced before the Tribunal. These applications are proposed to be decided along with the appeal.

7           Heard learned Advocate Mr. C.K. Shinde for appellants-claimants and learned Advocate Mr. D.P. Deshpande for respondent No.2. Respondent No.1 though served remained absent.

8           It has been vehemently submitted on behalf of the appellants that the learned Tribunal did not consider the police papers in proper perspective. Though CW 1 Komal was examined by the claimants and she had admitted in her cross-examination that she has not witnessed the accident, the police papers which are exhibited, were sufficient to prove negligence, on the part of rider of the offending vehicle. He also submitted that the First Information Report has been lodged by the eye witness, whose deposition has been recorded before the Criminal Court. He has also explained, as to why there was delay on his part to report the accident to the police. The medical papers, which have been produced along with Civil Application No.10757 of 2019 would show, that Rajendra had sustained injuries in accident. Though certain documents, which are now tried to be produced on record, were not available before the Tribunal, yet they were important and even from the documents, which were on record before the Tribunal, the Tribunal ought to have come to the conclusion that Rajendra had sustained injuries in the accident, which was caused by Balasaheb. In the alternative he also submitted that after the permission is granted to produce the documents then an opportunity be given to the claimants to adduce evidence and matter be remanded.

9           Per contra, the learned Advocate appearing for the insurance

company submitted that sufficient opportunity was available to the claimants to produce any document, which might have supported their contention, but the claimants did not produce those documents on record. The documents produced along with Civil Application No.10757 of 2019 do not mention the name of the vehicle involved in the accident and therefore, on the basis of those documents, it cannot be stated that there was negligence on the part of Balasaheb. Copy of the First Information Report was before the learned Tribunal and that document has been appreciated. Filing of three applications for allowing the claimants to produce the documents is nothing but filling up of the lacuna, which cannot be allowed. The learned Tribunal has rightly described the evidence adduced by the claimants and arrived at the conclusion that the claimants have failed to prove the involvement of the vehicle owned by respondent No.1 and insured with respondent No.2 in the said accident.

10            Taking into consideration the above submissions, following points are arising for determination; findings and reasons for the same are as follows.

1            Whether the claimants had proved that the accident, in which Rajendra Kothari died on 19.12.2015 was caused due to the negligence and rashness on the part of rider of bullet motorcycle bearing registration No.MH 16/BB-9351 ?

2 Whether the claimants were entitled to get compensation ?

If yes, to what extent and from whom ?

3 Whether the Tribunal was justified in dismissing the claim petition ?

If no, then whether interference is required ?

### **REASONS**

11 At the outset, it is required to be considered that since the claimants had come with a case that the accident had taken place, in which Rajendra expired, then in order to prove the said fact, they had produced the Post Mortem report, Inquest Panchnama, which showed that Rajendra expired due to accidental injuries. Therefore, this fact is also not seriously challenged by the respondent and therefore, it will have to be held that Rajendra expired in a vehicular accident on 19.12.2015. However, the disputed fact was that the said accident was caused by the rider of the bullet motorcycle bearing No.MH 16/BB-9351. In order to prove the said involvement of the vehicle the claimants had examined CW 1 Komal. Though in her examination-in-chief, which is the replica of her petition; in her cross examination she has admitted, that she has not seen the accident. Under

such circumstance, her testimony was not helpful to the claimants to prove the point of negligence or involvement.

1 Anil and others vs. New India Assurance Co. Ltd. & ors., 2018 STPL 1205 SC.

2 Bajaj Allianz General Insurance Co. Ltd. vs. Manisha w/o Lahu Kale and others in First Appeal No.2742 of 2015 decided on 04.09.2018.

3 New India Assurance Company Ltd. vs. Laxman Dadarao Karpe and others in First Appeal No.2973 of 2013 decided on 28.07.2015.

4 M/s. Shriram General Insurance Company Ltd. vs. Narayan Nivrutti Bembde and others in First Appeal No.1535 of 2013 decided on 23.01.2014.

5 New India Assurance Company Ltd. vs. Ashalata Suryakant Patil and others in First Appeal No.2829 of 2015 decided on 04.10.2018.

5 Faridabegum Shaikh Yousuf and others vs. Daulat Khan Sardar Khan (Dead) through L.Rs. & ors., 2015 STPL 11564 Bombay.

6 M/s. I.C.I.C.I. Lombard Insurance Company Ltd. vs. Janabai wd/o Dinkarrao Ghorpade and others in First Appeal No.3333 of 2015 decided on 14.12.2018.

In all these authorities this Court as well as the Hon'ble Apex

Court reiterated the basic principle that is required to be established in motor accident claim petition, that the burden is on the claimant to prove the accident including the involvement of the vehicle/s, as the case may be. Here, in this case, in order to prove the said involvement of the vehicle owned by respondent No.1 and insured with respondent No.2 the claimants have relied on police papers only. Important point to be noted is that the First Information Report is admittedly lodged by an eye witness i.e. Niraj Kothari, who was the rider of motorcycle, on which, deceased was the pillion rider. Claimants have not given any reason, as to why Niraj Kothari has been kept out of the witness box before the Tribunal. At this stage itself, it can also be considered that now the appellants intend to produce the certified copy of deposition of Niraj taken in criminal case. In fact, when in this case, he has not been examined, his deposition in criminal case cannot be read in evidence. From the said document it appears that he was examined before the criminal Court on 27.03.2018, whereas this petition was decided by the Tribunal on 31.03.2018. Even if, we take this fact liberally and allow the deposition of Niraj to be read in evidence in this case, yet in the examination-in-chief itself, he has merely stated that his vehicle was dashed by a bullet motorcycle, but then he has further stated, that he cannot give number of the bullet vehicle and he will not be about to identify the bullet rider. Surprisingly, though his First Information Report appears to have been

exhibited before the Criminal Court, yet the prosecution has not resorted to the proceeding as contemplated under Section 145 of the Indian Evidence Act, when it can be said that witness was not supporting the prosecution. Therefore, even after allowing such document to be produced on record, yet it cannot be stated that the involvement of the vehicle could be proved by the claimants.

12           When the matter was before the Tribunal, as aforesaid, only the certified copy of the First Information Report, spot panchnama were the documents, which could be connected to the involvement of the vehicle owned by respondent No.1. Though these documents were exhibited, yet as aforesaid, contents of those documents were not proved in **Bajaj Allianz General Insurance Co. Ltd. vs. Manisha w/o Lahu Kale and others** in First Appeal No.2742 of 2015. A note has been taken of the decision of the Division Bench of this Court in First Appeal No.32 of 2013 decided on 11.07.2013 (Goa Bench), wherein it was held that mere production of police papers and exhibiting those documents does not dispense the proof of contents of those documents. It was also held, that merely on the basis of certified copies of First Information Report, Spot Panchnama and other documents the claimants cannot prove their case.

13           One more factor, that was considered by the Tribunal was the

belated First Information Report. The accident had taken place on 19.12.2015, whereas the First Information Report came to be lodged on 27.12.2015. If the contents of the First Information Report are taken into consideration, then it can be seen that the informant i.e. Niraj had not sustained serious injuries. He has rather stated that he has sustained minor injuries and has not taken treatment in the hospital. However, he states that his mental condition was not proper. Deceased Rajendra was his neighbour. When he was accompanying Rajendra and then the accident had taken place, in which, Rajendra had expired. It is hard to believe that he would caused delay in lodging the First Information Report only on the point of his alleged mental condition. Again, at the costs of repetition, it can be said that the claimants have not given reason, as to why he has not been examined nor any other eye witness to the incident has been examined by the claimants, to support their contention. The accident had taken place at about 1.45 p.m., that too near Kishor Hotel. Possibility of witnessing the accident by passersby cannot be ruled out and therefore, even if there would have been some hurdle for the claimants to examine Niraj, they could have been examined any other eye witness.

14           As regards those applications, wherein the claimants intending to produce certified copies on record, it can be again said that no reason has

been assigned by the claimants, as to why they could not produce these documents, when the matter was before the Tribunal. If they want to invoke the provisions of Order 41 Rule 27 of CPC, the first and the foremost ingredient that is required to be considered is, that they were not having custody of that document or they could not procure it even after due diligence, when the matter was before the Tribunal. The reason, that has been tried to be stated that there was inadvertent omission on the part of their Advocate in not placing those documents on record. They have not come with a case that during the pendency of the claim petition they had given those documents in the custody of their Advocate but Advocate did not produce those documents on record. If the procurement of the documents is itself after the decision in the matter, then the reasons given by them cannot be said to be sufficient. Merely because they are the certified copies in another litigation they cannot be allowed to produce those documents on record, in order to fill up the lacuna in leading evidence by them before the Tribunal.

15           Only the certified copy of the First Information Report cannot be said to be the cogent material and conclusive evidence to prove the involvement of the offending motorcycle owned by respondent No.1. Hence, the findings given by learned Tribunal cannot be said to be illegal or

erroneous. There is no merit in the present appeal. It deserves to be dismissed. Points are answered accordingly. Hence following order.

**ORDER**

- 1            Appeal is dismissed.
- 2            Civil Applications pending also stand dismissed.
- 3            No order as to costs.

**( Smt. Vibha Kankanwadi, J. )**

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