IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.

First Appeal No. 01159 of 2017

District : Ahmednagar

Bajaj Allianz General Insurance
Co. Ltd.,
GE Plaza, Airport Road,
Yerwada, Pune - 411 006.

Through its Branch Manager/
Authorized Signatory,
2nd Floor, Rajendra Bhavan,
Adalat Road,
Next to LIC Building,
Aurangabad.

.. Appellant
(Original
respondent
no.02)

versus

1. Smt. Sunita Sunil Lodha,
   Age : 42 years,
   Occupation : Household.

2. Miss. Minal Sunil Lodha,
   Age : 20 years,
   Occupation : Education.

3. Miss. Komal Sunil Lodha,
   Age : 17 years,
   Occupation : Education.

4. Kalpesh D/o. Sunil Lodha,
   Age : 15 years,
   Occupation : Education.

   No.4 being minor, U/G. of
   their real mother
   Sunita Wd/o. Sunil Lodha.

5. Mishrilal Pannalal Lodha,
   Age : 80 years,
   Occupation : Nil.

6. Sushila Mishrilal Lodha,

Age : 71 years,
Occupation : Household.

All R/o. Ward No.6,
Khillari Galli,
Shrirampur,
Taluka Shrirampur,
District Ahmednagar.

7. Mubarak Yusuf Shaikh,
Age : Major,
Occupation : Business,
R/o. Harinagar Parisar,
Einatpur,
Taluka Shrirampur,
District Ahmednagar.

8. Yunus Yusuf Shaikh,
Age : 36 years,
Occupation : Driver,
R/o. Einatpur,
Taluka Shrirampur,
District Ahmednagar.

.. Respondents
(Nos.01 to 06 - Original claimants no.01 to 06
&
Nos.07 & 08 - Original respondents no.01 & 02)

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Mr. S.G. Chapalgaonkar, Advocate, for the appellant.

Mr. R.R. Karpe, Advocate, for respondents no.01 to 06.

Respondent no.07 served (Absent).

Respondent no.08 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 21ST AUGUST 2019

JUDGMENT :

01. Present appeal has been filed by original respondent no.02 - Insurance Company, challenging the judgment and award passed in M.A.C.P. No. 392 of

2010, dated 21-07-2016, by learned Member of the Motor Accident Claims Tribunal, Shrirampur, District Ahmednagar, whereby the application under Section 166 of the Motor Vehicles Act, 1988 came to be partly allowed against the present appellant and the appellant has been directed to pay amount of compensation jointly and severally with other respondents.

02. Present respondents no.01 to 06 are the original claimants who are the legal heirs of deceased Sunil Misrilal Lodha. The original claimants had come with a case, that deceased Sunil was travelling on his TVS Scooty bearing no. MH-17/AB-6650 from Shrirampur to Vadala Mahadeo at about 08.30 p.m. on 19-07-2010. When he was near Agrawal Mangal Karyalaya on Shrirampur to Newasa Road, he was dashed by truck bearing no. MH-15/BJ-7183 which had come in high speed from back side. As a result of the dash, Sunil had sustained serious injuries to his head. He was taken to Sakhar Kamgar Hospital, Shrirampur and then shifted to Shri Sainath Hospital, Shirdi and then again shifted to Shatabdi Hospital, Nasik. However, he succumbed to injuries on 24-07-2010. It was contended by the claimants, that the accident had taken place due to the sole negligence on the part of driver of the truck. Offence was registered against him. Deceased was 39 years old doing business. He was doing business in whole sale

and retail grocery articles. He was earning around Rs. 13,000/- per month and therefore, the compensation was claimed from owner, insurance company and driver of the truck. [Parties are referred as per their nomenclature before the Tribunal.]

03. Respondents no.01 and 03, who are the owner and driver of the offending truck, respectively, filed common written statement; whereas the Insurance Company has filed its separate written statement. They all have denied the allegations regarding negligence on the part of driver of the truck made in the petition. They have contended that police have falsely prosecuted respondent no.03. Though the Insurance Company has stated that there is breach of terms of policy on the point that the driver was not holding valid and effective driving license to drive truck, yet, the owner and driver have stated that the driver was holding valid and effective driving license to drive heavy goods vehicle. The Insurance Company has taken a defence that though the accident had taken place on 19-07-2010, yet, the complaint was lodged on 31-07-2010 which is belatedly and no satisfactory explanation has been given for the said belated information. The Insurance Company claimed exoneration.

04. Issues were framed. Claimants as well as present appellant led oral as well as documentary

evidence. Taking into consideration the evidence on record and hearing both sides, the learned Tribunal has come to the conclusion that the claimants have proved that Sunil expired in motor vehicle accident and the said accident had taken place due to the negligence and rashness on the part of respondent no.03. The claimants are entitled to get compensation. The Insurance Company has failed to prove breach of terms of policy. It was held that the claimants are entitled to get compensation of Rs. 16,61,800/- together with interest at the rate of 8 % per annum from the date of petition till actual realization of entire amount.

05. Heard learned Advocate Mr. S.G. Chapalgaonkar for the appellant. Heard learned Advocate Mr. R.R. Karpe for respondents no.01 to 06 - original claimants. Respondents no.07 and 08, though served, did not remain present.

06. It has been submitted on behalf of the appellant, that the appeal has been filed only on the point of negligence. The learned Tribunal failed to consider that the claimants, though examined AW 01 Sushila, who is the mother of the deceased, was not eye witness. The claimants relied on the police papers; whereas the Insurance Company has examined Investigating Officer OW 01 Ballaiya. The Investigating Officer has clearly stated that when

the *panchanama* was executed, the offending vehicles were not at the spot. The learned Tribunal failed to consider that though the accident had taken place on 19-07-2010, the FIR was lodged on 31-07-2010 itself, that too, without any explanation for the delay. Therefore, there was no meaning to the spot *panchanama*. In absence of examination of an eye witness, the Tribunal ought not to have held that the truck driver was negligent. When involvement of the vehicle itself is not proved, the petition ought to have been dismissed.

07. Per contra, learned Advocate appearing for the claimants has supported the reasons given by the learned Tribunal on the point of negligence.

08. Taking into consideration the limited scope of the appeal, following point arise for determination. Findings and reasons for the same are as follows :-

> " Whether the learned Tribunal was justified in holding original respondent no.03 for negligence in driving the offending vehicle and causing the accident ?"

09. Admittedly, the accident had taken place on 19-07-2010 and though it appears from the record that the intimation about admission of Sunil in the

hospital was forwarded by hospital authorities to police, yet, the police authorities did not move. Sister of deceased Sunil, by name, Pushpa Ashok Lukkad lodged FIR on 31-07-2010 and then it appears that the investigation commenced. Thereafter, spot *panchanama* was executed. Naturally, when the information itself is belated, position of the vehicles after such a long period will not be on the road when the spot *panchanama* was executed. OW 01 Ballaiya has not explained much about the said situation but then what was expected from him was the explanation as to why police did not move though hospital had informed the said fact of admission of injured in their hospital. When such explanation is not coming, there is no meaning to his testimony. As regards the explanation from the side of the claimants is concerned, definitely the FIR Exhibit 34 contains that explanation. So also, it was tried to be given on behalf of the claimants in the testimony of AW 01 Sushila. Deceased Sunil was the only earning member of the family and parents of Sunil were senior citizens. Claimants no.03 and 04 are minor children and claimant no.01 is the widow. We can understand that they all would be busy with the treatment of Sunil who ultimately expired on 24-07-2010. He was shifted from one place to another place for his treatment. Therefore, merely because the FIR is belated, we cannot throw that FIR.

10. Important point to be noted is that in their written statement, respondents no.01 and 03 have admitted the fact of accident. When fact of accident is admitted, so called belated FIR loses its importance for the point of its belatedness. It was for the Insurance Company to examine the driver of the offending vehicle to prove either contributory negligence or sole negligence on the part of deceased. Instead of leading best possible evidence in the form of examining the driver, though he is also a respondent in the matter; the Insurance Company has led evidence by calling the Investigating Officer who is admittedly also not an eye witness. Natural corollary of the facts is that when the accident is admitted, then when offence was registered against the driver of the truck and he did not step into the witness box, to refute the allegations or *prima facie* evidence against him, the Tribunal has rightly invoked the adverse inference against him. Therefore, there is no substance in the point raised by the appellant. The point is, therefore, answered in the negative.

11. There is no merit in the present appeal. It deserves to be dismissed and accordingly it is **dismissed.** There shall be no order as to costs.

12. It appears that by order dated 07th April 2017, this Court had allowed the respondents no.01 to

06 - original claimants to withdraw 50 % of the amount deposited in this Court. Now, when the appeal is hereby dismissed, the claimants are entitled to get entire amount of the award. Accordingly, they are permitted to withdraw rest of the amount together with the interest accrued.

(Smt. Vibha Kankanwadi)
JUDGE

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