IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FIRST APPEAL NO.264/2018

IFCO-Tokio General Insurance Co. Ltd.
Akola Office, in front of Uday Talkies,
above Rajasthan Bank, Tilak Road,
Akola, Tq. and Distt. Akola, through
the Executive Legal, 7th Floor, Fidvi Tower,
Opposite Saraf Chambers, Mount Road,
Sadar, Nagpur. ..Appellant.

..Vs..

1. Kasam Khan Nyamat Khan Pathan,
aged about 59 Yrs., Occu. Retired.

2. Firoz Khan Kasam Khan Pathan,
aged about 22 Yrs., Occu. Nil.

Both R/o Hingna (Shelad), Post
Kanheri Gawali, Tq. Balapur,
Distt. Akola.

3. Tushar Shrikrushna Goenka,
aged Adult, Occu. Business,
R/o Behind Reymond Showroom,
Alsi Plot, Akola, Tq. and Distt. Akola.

4. Dashrath Babusingh Chauhan,
aged adult, Occu. Business,
R/o At Post Warkhed, Tq. Barshitakli,
Distt. Akola.

5. Abdul Sattar Abdul Rahim,
aged 23 Yrs., Occu. Owner and Driver,
R/o Juna Lokhandi Bazar, Fulari Galli,
Akola, Tq. and Distt. Akola.

6. Shriram General Insurance Co. Ltd.,
T-5, Shraddha House, 3rd Floor, 345,
Kingsway, beside Shri Mohini Complex,

Nagpur - 440 001. ..Respondents.

AND FIRST APPEAL NO.265/2018

IFCO-Tokio General Insurance Co. Ltd.
Akola Office, in front of Uday Talkies,
above Rajasthan Bank, Tilak Road,
Akola, Tq. and Distt. Akola, through
the Executive Legal, 7^{th} Floor, Fidvi Tower,
Opposite Saraf Chambers, Mount Road,
Sadar, Nagpur. ..Appellant.

..Vs..

1. ~~Mohammad Khwaja Shaikh Raheman~~,
~~aged about 65 Yrs., Occu. Nil~~.

2. ~~Hamida Bano Mohammad Khwaja~~,
~~aged about 62 Yrs., Occu. Household~~.

3. Yasmin Bano D/o Mohammad Khwaja,
aged about 30 Yrs., Occu. Nil.

All R/o Muzaffar Nagar, Daudhbai
Radiowale Ki Galli, Akola, Tq. and
Distt. Akola.

4. Tushar Shrikrushna Goenka,
aged Adult, Occu. Business,
R/o Behind Reymond Showroom,
Alsi Plot, Akola, Tq. and Distt. Akola.

5. Vinod S/o Dipak Ingle,
aged 32 Yrs., Occu. Driver,
C/o Tushar Shrikrushna Goenka,
R/o Behind Reymond Showroom,
Alsi Plot, Akola, Tq. and Distt. Akola.

6. Dashrath Babusingh Chauhan,
aged adult, Occu. Business,
R/o At Post Warkhed, Tq. Barshitakli,
Distt. Akola.

7. Abdul Sattar Abdul Rahim,

aged 23 Yrs., Occu. Owner and Driver,
R/o Juna Lokhandi Bazar, Fulari Galli,
Akola, Tq. and Distt. Akola.

8. Shriram General Insurance Co. Ltd.,
T-5, Shraddha House, 3rd Floor, 345,
Kingsway, beside Shri Mohini Complex,
Nagpur - 440 001. ..Respondents.

Shri D.N. Kukday, Advocate for the appellant.
Shri S.A. Mohta, Advocate for respondent Nos.1 and 2.
Shri H.N. Verma, Advocate for respondent No.6. ..in F.A. No.264/2018.

Shri D.N. Kukday, Advocate for the appellant.
Shri S.A. Mohta, Advocate for respondent No.3.
Shri H.N. Verma, Advocate for respondent No.8. ..in F.A. No.265/2018.

CORAM : NITIN W. SAMBRE, J.
THE JUDGMENT RESERVED ON : 19.9.2019
THE JUDGMENT PRONOUNCED ON : 3.10.2019.

JUDGMENT

1] Heard.

2] Both these appeals are by the insurance company with whom offending goods vehicle (truck) owned by the respondent was insured.

3] On June 27, 2012 deceased in both these appeals namely Zarina-Bi @ Zarina Bano and Mohammad Wajid were returning in Maruti Omni. The moment they reached at Kanheri Phata on Akola - Balapur Road, goods vehicle bearing registration No.MP-09-KC-9208, which was parked on the road, was hit by Maruti Omni from backside. The said accident resulted into death of aforesaid two persons, whose dependents initiated the proceedings being M.A.C.P No.28/2013 and M.A.C.P. No.177/2012. Award delivered in these two claim petitions are subject matter of challenge in these appeals which are disposed of by consent by this common judgment.

4] The Motor Accident Claims Tribunal, after appreciating the material on record, was pleased to award compensation holding that rear tyre of the goods vehicle was damaged as such it was dangerously parked on the national highway without any signals. In view of above, saddled 100 % liability on the appellant. Feeling aggrieved, present appeal.

5] Shri Kukday, learned Counsel for the appellant / insurance company would urge that the liability fastened on the offending vehicle i.e. truck and that too when it was stationary, is without any factual basis and in absence of legal provisions. According to him, when the vehicle was parked, marks so as to put the other vehicles on notice were placed behind and near the truck in the form of branches of trees and stones. According to him, said fact can be ascertained from spot-panchanama (Exh. 42) recorded by the investigating agency when the offence out of accident in question was registered. While trying to make out the case of composite negligence, he would urge that Omni in which deceased were travelling was also driven at very high speed. That being so, a case of composite negligence should be appreciated, in case the liability on the present appellant is to be saddled. Apart from above, submissions are, loss of consortium, is recorded to Rs.1,00,000/- instead of Rs.40,000/- as provided in the judgment of *National Insurance Company V/s. Pranay Sethi* reported in **(2017) 16 SCC 680**. So as to substantiate his contentions, Shri Kukday has relied on the evidence of the driver of the vehicle, namely, Vinod Ingle and the witness of the claimant Yasmin Bano etc. Shri Kukday would also urge that the driver of the Omni was intentionally not examined by the respondent / claimant so that Tribunal should be handicap in determining *inter se* composite negligence. He would further urge that it being a case of *inter se* composite negligence, liability also required to be shared by the insurance company with whom Maruti Omni was insured.

6] While countering the aforesaid submissions, the learned Counsel for the respondent / insurance company, with whom Maruti Omni was insured, submits that the case in hand cannot be termed as a case of composite negligence. According to him, the spot-panchanama (Exh. 42), evidence of truck driver, evidence of Yasmin Bano, who was passenger in the Omni and eye witness to the incident, in clear terms speak of the negligence on the part of the truck driver. The learned Counsel then would urge that the judgment passed by the learned Tribunal is just and proper and does not warrant any interference. Similar arguments are tendered by the learned Counsel for the claimant who submits that the admission given by the truck driver that he has not assisted the victim in the accident is sufficient enough to fasten the liability on the appellants. As such dismissal is sought.

7] Upon appreciation of the evidence and the pleadings, this Court is required to find out as to whether the negligence was exceptionally on the part of the truck driver or as claimed by the appellant, the driver of the Omni can also be held responsible for the accident in question. Law laid down by the Apex Court in the matter of composite negligence can be noticed as under.

8] Apex Court in the matter of *T.O. Anthony V/s. Karvarnan and others* reported in **(2008) 3 SCC 748** while dealing with the issues of composite negligence and contributory negligence in para Nos.5 to 7 has observed thus:

> *"5. The Tribunal assumed that the extent of negligence of the appellant and the first respondent is 50:50 because it was a case of composite negligence. The Tribunal, we find, fell into a common error committed by several Tribunals, in proceeding on the assumption <u>that composite negligence and contributory negligence are the same</u>. In an accident involving two or more vehicles, where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of*

damages to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.

6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

Similarly, in the matter of *Khenyei V/s. New India Assurance*

Company Limited and others reported in **2015(9) SCC 273** the Apex Court had an occasion to deal with similar issue as to difference between the contributory and composite negligence. In para 22.1 the Apex Court has observed thus:

> *"22.1 In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.*
>
> *22.2 In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.*
>
> *22.3 In case all the joint tort feasors 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 tort feasors 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 tort feasor can recover the amount from the other in the execution proceedings.*
>
> *22.4 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 tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."*

9] The aforesaid observations of the Apex Court preceded with a clarification on the issue of difference between contributory and composite negligence. The Apex Court in para 15 of the aforesaid judgment has observed thus:

> *"15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. has held that in case of composite negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder : (SCC pp. 750-51, paras 6-7)*
>
> *"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands*

reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error." The decision in T.O. Anthony v. Karvaran has been relied upon in A.P. SRTC v. K. Hemlatha."

The *tort feasors* are the wrong doers who have conducted themselves contrary to the Rules and the cause of action against both or each of them same. To be more precise, the evidence against such *tort feasors* will be common or same which can be relied on for an action to be brought against such *tort feasors* so that the they can be jointly and severally made liable for a civil wrong which is committed by them.

10] In the matter of *National Insurance Co. Ltd. V/s. P.A. Vergis* reported in **(1991) 1 ACC 226** the law laid down can be read to mean a composite negligence as under:

Where two or more vehicles are involved in an accident and the claimants are seeking compensation based on the injuries or loss of life suffered because of negligence on the part of either of the vehicle driver or a composite negligence, it shall be open for the claimants to proceed *against any or all the tort feasors.*

11] In the wake of the aforesaid observations of the Apex Court on the issue of composite negligence and contributory negligence, if the evidence in the factual background of the case in hand is appreciated, the driver of the offending truck in his deposition has stated that since the left side (conductor side) tyre of his vehicle was punctured, he was required to park the vehicle on the left side of the road i.e. on national highway after having crossed Akola towards Balapur. He has put small stone marks by the side of his truck. He has also stated that he has hanged branches of the trees to his truck so as to put other vehicle drivers who are driving their vehicles on the very same road on alert.

12] The spot-panchanama (Exh. 42) demonstrate that Maruti Omni has hit the truck in question from the backside and in the evidence of truck driver it has come on record that there are tyre marks about 20 feet of the Omni on the road. The said evidence is not controverted by the claimant by cross-examining the said witness.

13] In the aforesaid background, if this Court appreciates the mode and the manner in which the accident had taken place particularly, the oral testimony of Yasmin Bano, eye witness to the incident, the testimony of the driver of offending vehicle i.e. truck, sketch map of the accident supplied in the crime registered against the driver of the offending vehicle being Crime No.139/2012 for the offence punishable under Sections 379, 337, 338 and 304-A of the Indian Penal Code, it leave no room for doubt that both the drivers were negligent. Applying the principle *"man may lie but the circumstances don't"*, the cardinal principle of evaluation of evidence prompts this Court to reach to a conclusion that the learned Counsel for the appellant / insurance company has rightly pleaded and established the case of composite negligence.

14] In the aforesaid background, particularly having regard to fact that Maruti Omni has left 20 feet tyre marks on the road in question, before hitting the offending vehicle, fact that owner of the truck or its driver had not used appropriate safety sings as prescribed under the provisions of Motor Vehicles Act, Section 122 which prohibits for leaving a vehicle in dangerous condition as an offence and Rule 138(4)(c) of Central Motor Vehicles Rules, 1989, Regulation No.15 of Rules of Road Regulations, 1989, the case of composite negligence can be inferred. The aforesaid provisions for the convenience and ready reference are reproduced hereinbelow:

> *<u>Section 122 of the Motor Vehicles Act, 1988.</u>*
> *"122. Leaving vehicle in dangerous position - No person in charge of a motor vehicle shall cause or allow the vehicle or any trailer to be abandoned or to remain at rest on any public place in such a position or in such a condition or in such circumstances as to cause or likely to cause danger, obstruction or undue inconvenience to other users of the public place or to the passengers."*

<u>Rule 138(4)(c) of Central Motor Vehicles Rules, 1989</u>.

"138(4)(c)- triangles of size 150 mm with a red reflecting surface as per IS: 8339 -1993 specified by the Bureau of Indian Standards, for keeping in front and rear of the vehicle in case the vehicle is stranded on the road (applicable to vehicles other than two and three-wheelers); as specified below, namely:-

one triangle in case of four-wheelers with GVW not exceeding 7.5 tons;

two triangles in case of four-wheelers with GVW exceeding 7.5 tons:

[Provided that in case of vehicles manufactured on and after 1st January, 2003, the triangles of size and specification shall conform to AIS : 022-2001, as may be amended from time to time, till such time as corresponding Bureau of Indian Standards specifications are notified:]

[Provided further that in addition, M3 category of vehicles shall also be required to install retro-reflective triangle complying to AIS:022:2001 as amended from time to time, excluding the requirements specified in clauses 7.2,7.3,7.4, 7.7, 8.1.2 and 5.0,6.0,11.0 of Annexure 4 of the said standard. The colour of the triangle fitted in the front of the vehicle shall be white and that of rear shall be red. The location of both the triangles shall be at least one meter above the ground level at the front and rear, preferably at the centre of the vehicle. For the purposes of "white colour warning triangle", the word "red" shall be substituted by word "white", wherever applicable in AIS:022:2001. The colour requirements of white retro-reflective portion shall be as per clause 8.5 of AIS:057 and white fluorescent material shall be as per clause 7.1 of ISO:7591-82(E);]"

<u>Regulation 15 of Rules of the Road Regulations, 1989.</u>

"15. Parking of the vehicle. - (1) Every driver of a motor vehicle parking on any road shall park in such a way that it does not cause or is not likely to cause danger, obstruction or undue inconvenience to other road users and the manner of parking is indicated by any sign board or markings on the road side, he shall park his vehicle in such manner.

(2) A driver of a motor vehicle shall not park his vehicle:—

(i) at or near a road crossing, a bend, top of a hill or a humpbacked bridge;

(ii) on a foot-path;

(iii) near a traffic light or pedestrian crossing;

(iv) in a main road or one carrying fast traffic;

(v) opposite another parked vehicle or as obstruction to other vehicle;

(vi) along side another parked vehicle;

(vii) on roads or at places or roads where there is a continuous white

line with or without a broken line;
(viii) near a bus stop, school or hospital entrance or blocking a traffic sign or entrance to a premises or a fire hydrant;
(ix) on the wrong side of the road;
(x) where parking is prohibited;
(xi) away from the edge of the footpath."

15] In the aforesaid background, considering the case of composite negligence and the evidence of the eye witness Yasmin Bano, in my opinion, the appellant must share a burden of 75% of the compensation amount whereas the respondent Shriram General Insurance Company Limited with whom the Maruti Omni, which is involved in the accident, was insured is required to bear 25% of the compensation amount. As such both these appeals are **partly allowed** with appropriate modification to above effect. This sharing of liability is based on the principles laid down in judgment of the Apex Court in the matter of *Khenyei V/s. New India Assurance Company Limited and others (supra).*

16] In view of above observations, as the 25% of the liability is fastened on the respondent No.6 (in First Appeal No.264/2018) and respondent No.8 (in First Appeal No.265/2018) and balance 75% is to be borne by the appellant - insurance company.

If the amount is not deposited, respective insurance companies shall deposit their respective share forthwith in this Court, in any case, not later than six weeks from today along with accrued interest thereon.

The disbursement of the compensation in favour of the claimants will be in terms of the award delivered by the Motor Accident Claims Tribunal in respective claim appeals. As such appeals of the appellant stands partly **allowed**. No costs.

JUDGE

Tambaskar.