

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

FIRST APPEAL NO. 1093 OF 2004

Gangadharrao S/o M. Gurjur
died through his L.Rs.

1. Gangabai Gangadharrao Gurjur
Age : 72 years, Occ : Agri.,
R/o Jariot, Tq. Dharmabad,
Dist. Nanded.
2. Bipin Gangadharrao Gurjur
Age : 42 years, Occ : Business,
R/o Shivaji Nagar, Nanded.

..APPELLANTS

VERSUS

1. Kailash S/o Tukaram Wadiker
Age about 23 years, Occ : Education,
R/o Jangamwadi, Nanded.
2. The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.2)

WITH

FIRST APPEAL NO. 1094 OF 2004

Gangadharrao S/o M. Gurjur
died through his L.Rs.

1. Gangabai Gangadharrao Gurjur
Age : 72 years, Occ : Agri.,
R/o Jariot, Tq. Dharmabad,
Dist. Nanded.
2. Bipin Gangadharrao Gurjur
Age : 42 years, Occ : Business,
R/o Shivaji Nagar, Nanded.

..APPELLANTS

VERSUS

1. Maroti S/o Shankarrao Shinganwad
Age : 22 years, Occ : Education,
R/o Jangamwadi, Nanded.
2. The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.2)

WITH

FIRST APPEAL NO. 1095 OF 2004

Gangadharrao S/o M. Gurjur
died through his L.Rs.

1. Gangabai Gangadharrao Gurjur
Age : 72 years, Occ : Agri.,
R/o Jariot, Tq. Dharmabad,
Dist. Nanded.
2. Bipin Gangadharrao Gurjur
Age : 42 years, Occ : Business,
R/o Shivaji Nagar, Nanded.

..APPELLANTS

VERSUS

1. Umesh S/o Manikrajun Bomnale
Age about 20 years, Occ : Education,
R/o Jangamwadi, Nanded.
2. The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.2)

WITH**FIRST APPEAL NO. 1096 OF 2004**

Gangadharrao S/o M. Gurjur
died through his L.Rs.

1. Gangabai Gangadharrao Gurjur
Age : 72 years, Occ : Agri.,
R/o Jariot, Tq. Dharmabad,
Dist. Nanded.
2. Bipin Gangadharrao Gurjur
Age : 42 years, Occ : Business,
R/o Shivaji Nagar, Nanded.

..APPELLANTS**VERSUS**

1. Nizamuddin S/o Moinuddin
Age : 22 years, Occ : Education,
R/o Jangamwadi, Nanded.
2. The Oriental Insurance Company
Limited, through its Branch

Manager, Branch at G.G. Road,
Nanded.

..RESPONDENTS

(Resp. No.1 Orig. Petitioner &
Resp. No.2-Orig. Resp. No.2)

WITH

FIRST APPEAL NO. 1097 OF 2004

Gangadharrao S/o M. Gurjur
died through his L.Rs.

1. Gangabai Gangadharrao Gurjur
Age : 72 years, Occ : Agri.,
R/o Jariot, Tq. Dharmabad,
Dist. Nanded.
2. Bipin Gangadharrao Gurjur
Age : 42 years, Occ : Business,
R/o Shivaji Nagar, Nanded.

..APPELLANTS

VERSUS

1. Manohar S/o Arjunrao Shinde
Age about 20 years, Occ : Education,
R/o Jangamwadi, Nanded.
2. The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..RESPONDENTS

(Resp. No.1 Orig. Petitioner
& Resp. No.2-Orig. Resp. No.2)

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Mrs. C.S. Deshmukh, Advocate for appellant in all
First Appeals.

Ms. A.N. Ansari, Advocate for Respondent No.1 in
FA/1095/2004.

Mr. Jayant Chitnis, Advocate for the Respondent No.2
in all First Appeals.

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CORAM: V.L. ACHLIYA, J.
DATED : 23.01.2020

JUDGMENT:

. All these group of appeals are preferred by the appellant-owner of vehicle (original respondent no.1) challenging the judgment and order passed in respective Claim Petitions by the learned Joint District Judge and Ex-Officio Member of Motor Accident Claims Tribunal, Nanded dated 6th February, 2003. Since the appeals are arising out of the same accident and common judgment, the appeals are heard together.

2. Heard the learned counsel for the appellant and the counsel representing respective respondents. Perused the Record and Proceedings.

3. For the sake of brevity and convenience, the parties to appeals are referred as they are described in claim Petitions.

4. In view of challenge raised in appeals confines to foisting liability against the appellant (original respondent no.1) to pay the compensation, it is not necessary to discuss the facts of the case in detail.

5. The respondent no.1 – original claimant in respective Appeals/Claim Petitions filed Claim Petitions under section 166 of the Motor Vehicle Act seeking compensation on account of accidental injuries sustained by them in an accident occurred on 02.05.1999. The claimants in the respective Petitions have claimed that at the time of accident, they were travelling by Tata Sumo Jeep bearing registration No.MH-26-C-4432 owned by appellant from Nilanga towards Nanded. At about 11.00 a.m., the driver of said Tata Sumo Jeep lost control over the vehicle and gave dash to the

Stationary Truck, which resulted into causing multiple injuries and permanent disablement to them. The claimants have claimed that the accident was resulted due to sole negligence on the part of driver of Tata Sumo Jeep.

6. The particulars of the claims filed by the claimants and award passed in respective Petitions are as under :-

Sr. No.	First Appeal Number	M.A.C.P. Numbers	Amount of compensation claimed	Amount of compensation awarded by the Tribunal
1.	1093/2004	489/1999	Rs.2,00,000/-	Rs.1,15,000/- inclusive of N.F.L.
2.	1094/2004	490/1999	Rs.1,00,000/-	Rs.37,500/- inclusive of N.F.L.
3.	1095/2004	492/1999	Rs.1,10,000/-	Rs.25,000/- inclusive of N.F.L.
4.	1096/2004	494/1999	Rs.2,00,000/-	Rs.1,20,000/- inclusive of N.F.L.
5.	1097/2004	491/1999	Rs.1,00,000/-	Rs.27,500/- inclusive of N.F.L.

7. The appellant (original respondent no.1) in respective Claim Petitions resisted the claim petitions with contention that the Claim Petitions are bad-in-law for non-joinder of necessary parties. It is contended that the claimants should have made the owner, driver and insured of truck as party to Petitions. The appellant has approached with a case that accident was occurred due to sole negligence on the part of driver of the truck. The driver of truck has parked the truck on the middle of road without taking preventive and precautionary measures to avoid the accident.

8. The respondent no.2 - insurance company resisted the Claim petitions with contention that the owner of Jeep has committed breach of policy condition. The driver of Jeep was not holding valid and effective driving licence to drive the Jeep

in question. By entrusting the vehicle to a person having no valid and effective licence to drive the same, the respondent no.1 i.e. the owner-cum-insured has committed breach of policy condition and thereby urged to exonerate the respondent no.2 from payment of compensation. It is further claimed that the Jeep was not carrying requisite permit to be used for carriage of passengers. At the time of accident the Jeep was used for carrying passengers. The claimants were travelling in Jeep as passengers for hire and reward. The Jeep was hired for carriage of passenger. The owner-insured had given Jeep on hire by charging the hire charges as Rs.3.50 per kilometer to be payable by claimants.

9. The Tribunal on due appreciation of the pleadings and evidence adduced in the case pleased to pass award making the respondent nos.1 and 2 jointly and severally

liable to pay the compensation to claimants. The respondent no.2 was directed to pay the amount and recover the same from the owner i.e. respondent no.1. Being aggrieved, the appellant – owner of the Jeep has preferred these appeals.

10. Learned counsel for the appellant assailed the impugned judgment and award passed by the Tribunal with contention that the Tribunal has erred in foisting entire liability to pay the compensation upon the appellant – owner in absence of any evidence to prove that the accident was resulted solely due to rash and negligent driving on the part of the driver of Jeep owned by the appellant. By referring to overall facts of the case, learned counsel submits that the pleadings and evidence on record spell out that the driver of the truck has parked the truck on the middle of road. Neither he has

kept the parking lamps switch on nor put any stones around the Stationary Truck as a precautionary measure to avoid the accident. The spot panchanama reveals that the driver of the Jeep has applied the breaks from the distance of 60 Ft. before the Jeep gave dash to rear portion of Stationary truck parked on the road. The application of break from the distance of 60 Ft. sufficient to draw inference that driver of the Jeep has tried to avoid the accident. In that view, driver of Truck who parked the Truck on the middle of road also responsible for causing the accident. The respondent no.1/claimant has not made the owner, driver and insurance company of the truck bearing No.MH-34/A-733 as party to petitions though they are necessary parties to the Petition. For this reason alone the Tribunal ought to have dismissed the Petitions for non-joinder of necessary parties. It is further submitted

that the Tribunal ought to have apportioned the liability between two vehicles. So also the Tribunal should not have passed pay and recover order.

11. On the other hand, learned counsel for the respondent no.1-claimant supported the judgment and award passed by the Tribunal.

12. Learned counsel for respondent no.2 – insurance company contended that the owner, driver and insurer of the truck were necessary parties to the Petitions as driver of truck also contributed for the cause of the accident by parking the truck on the middle of road, without taking precautionary measures.

13. I have carefully considered the submissions advanced, in the light of overall

facts of the case and the reasons and findings recorded by the Tribunal. In my view, the reasons and findings recorded by the Tribunal are quite consistent with the rival pleadings and evidence adduced in the case. There is no perversity in reasons and findings recorded by the Tribunal.

14. The contention of the appellant that the claim Petitions ought to have been dismissed for want of non-joinder of necessary parties i.e. the driver and owner of the Stationary Truck, cannot be accepted. The claimants are occupants of Jeep, which meet with an accident. Admittedly, Jeep in question claimed to have hit the Stationary truck from its rear side. The spot panchanama indicates that the driver of Jeep has applied the breaks from the distance of 60 Ft. the fact that the driver of the Jeep has applied the breaks from the distance of 60 Ft. before

the Jeep hit the Stationary truck itself sufficient to infer that the driver was driving Jeep in an excessive and unmanageable speed. The accident has taken place at 11.00 pm. He was driving the Jeep in most rash and negligent manner. He has witnessed the truck standing on road due to mechanical defect from the distance of more than 60 Ft. still could not control the Jeep driven by him. The panchanama indicates that the accident caused on road with width of 18 Ft. tar road with 10 ft. Kaccha road on both the side of tar road. Thus the total width of road was more than 28 Ft. The truck was shown to be standing by the side of road towards western due to mechanical defect i.e. breaking of "Hyping of truck". The extensive damage caused to Jeep. Thus the circumstances apparent from panchanama more than sufficient to infer that the Jeep was driven in an excessive and unmanageable speed and driver of Jeep alone

responsible for causing the accident and consequential injuries to claimants. The driver of Jeep was prosecuted for the act of said accident.

15. Thus in the facts and circumstances of case and evidence on record non-joinder of owner, driver and insured of the truck not fatal to the Petitions filed by the appellant.

16. It is an admitted position that the claimants have not contributed for the cause of accident. Therefore, even if it is assume that the driver of truck also contributed for the cause of accident, still the Claim Applications filed by the claimants not liable to be dismissed for non-joinder of driver and owner of the truck bearing registration No.MH-34/A-733. In a case of composite negligence, the apportionment of

compensation between two tortfeasors is not permissible. The claimants can recover the damages either from both or any one of joint tortfeasors. In this context, it is useful to refer the decision in the case of ***Khenyei v. New India Assurance Co. Limited*** reported in ***2015 IR SCW 3169***, wherein the Apex Court has ruled as under :-

"18. This Court in Challa Bharathamma, (AIR 2004 SC 4882) and Nanjappan, (AIR 2004 SC 1630) (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle -

trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasors had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

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 tort feorsors 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.

(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 tort feorsors. 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."

17. Thus, in the light of decision in the case of *Khenyei (supra)* and overall facts of the case, the appeals preferred by the appellant are devoid of merits. The claimants

are entitled to sue both or any one of the joint tortfeasors to recover the damages. In that view, the judgment and award passed by the Tribunal foisting liability against the appellant (original respondent no.1) to pay the compensation suffers from no perversity. In that view, the appeals preferred by appellants deserve to be dismissed. Accordingly, the appeals are dismissed with no orders as to costs.

[V.L. ACHLIYA]
JUDGE

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