

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

FIRST APPEAL NO.1260 OF 2017

New India Insurance Company Ltd.,
Through its Branch Manager,
Parag Plaza, Shivaji Cross Road,
Shrirampur, District-Ahmednagar,

Through its Divisional Manager/
Authorized Signatory,
Mahesh Auto Compound,
Adalat Road, Aurangabad.

**...APPELLANT
(Orig. Respondent No.3)**

VERSUS

- 1) Suman Asaram Shinde,
Age-37 years, Occu:Service,
- 2) Shruti D/o Asaram Shinde,
Age-14 years, Occu:Education,
- 3) Onkar S/o Asaram Shinde,
Age-9 years, Occu:Education,

Respondent Nos. 2 and 3 being Minors,
U/g. Of their mother Suman i.e. Respondent No.1,

- 4) Malhari Dadu Shinde,
Age-95 years, Occu:nil,
(Respondent No. 4 deleted as Dead as per
Court's order dated 10/07/2017)

- 5) Draupadabai Malhari Shinde,
Age-80 years, Occu:nil,

All R/o-Newasa Phata, Tq-Newasa,
District-Ahmednagar,

6) Shaikh Jabbar Shaikh Rehman,
Age-Major, Occu:Agriculture,
R/o-Amba, Tq-Kannad,
Dist-Aurangabad,

7) Shaikh Salman Shaikh Mohammad,
Age-Major, Occu:Driver,
R/o-Andhaner, Tq-Kannad,
Dist-Aurangabad.

(Respondent No.7 deleted as per Court's
order dated 07/02/2019)

...RESPONDENTS
(Resp. Nos. 1 to 5 – Orig. Claimants
Resp. Nos.6 &7- Orig. Resp. No.1 & 2)

...

Mr.S.G. Chapalgaonkar Advocate for Appellant.

Mr.Ram B. Deshpande Advocate for Respondent
Nos. 1 to 3 and 5.

Name of Respondent No. 4 deleted as per the Court's
order dated 10/07/2017.

Mr.H.D. Deshmukh Advocate for Respondent No. 6.

Name of Respondent No. 7 deleted as per Court's
order dated 07/02/2019.

...

CORAM: ANIL S. KILOR, J.

DATE : 31st MARCH, 2021

ORAL JUDGMENT :

1. This is an appeal filed by the insurance company
challenging the Judgment and order dated 10th May 2016 passed
by the District Judge-1 and Additional Sessions Judge, Newasa,

District-Ahmednagar in Motor Accident Claim Petition No. 203 of 2014.

2. I have heard the learned counsel for respective parties.

3. The brief facts of the present case are that, on 5th January 2011 deceased Asaram Shinde along with his wife and two children, was proceeding on motorcycle bearing registration No. MH-16-AF-2709 on Ahmednagar to Aurangabad road. A tractor bearing registration No. MH-20-AY-5686 attached with two trolleys, gave dash to the motorcycle from the back side, which resulted into accident, consequently deceased died due to fatal injuries sustained in the said accident. The claimants No. 1 to 3 are the survivors in the said accident. The claimant No. 1 is the widow of deceased Asaram, whereas claimant No. 2 is the daughter and claimant No. 3 is the son of deceased Asaram. Claimants No. 4 and 5 are the parents.

4. The claimants filed Motor Accident Claim Petition No. 203 of 2014 under Section 166 of the Motor Vehicles Act for

compensation to the tune of Rs.45,65,187/-. The appellant – insurance company filed its written statement and opposed the claim on the ground that the deceased was not wearing helmet and he had contributed negligence. It is further stated that the deceased was not wearing the helmet and therefore, contributory negligence can be assumed.

5. The claimants have examined Suman Asaram Shinde, who is claimant No.1, whereas the appellant – insurance company/ owner and driver of the tractor involved in the said accident, they did not examine any witness.

6. The learned District Court, after scrutinizing the oral as well as documentary evidence available on record, held the insurance company as well as owner and driver of the tractor jointly and severally liable to pay Rs.45,65,187/- including 'no fault liability', vide Judgment and order dated 10th May, 2016, which is impugned in the present matter at the behest of the insurance company.

7. Learned counsel Shri Chapalgaonkar appearing for appellant – insurance company argues that the fact that the deceased was not wearing helmet is sufficient to arrive at a conclusion that he contributed negligence in the present matter. It is, therefore, submitted that it is necessary to determine the percentage of contributory negligence on the part of the deceased and to that extent amount from the total compensation needs to be deducted. For this purpose, he has placed reliance on the Judgment of Single Bench of this Court in a case of **New India Assurance Co. Ltd. Through Centralized Motor TP Claims Hub vs. Julius T.J. Freitas and others**¹.

8. Shri Chapalgaonkar, learned counsel for the insurance company draws attention of this Court to the panchnama drawn by the police wherein it has come on record that the motorcycle was damaged from front side. Thus, it is the contention of the learned counsel for the appellant that the panchnama sufficiently shows that in absence of any damage to the motorcycle from the back side and because the damage was from front side of the motorcycle, there was no dash given from the backside to the motorcycle, but the motorcycle gave dash to

1 2019 SCC OnLine 5808

the tractor and trolleys involved in the accident. It is, therefore, submitted that this fact also sufficiently proves negligence on the part of the deceased.

9. Shri Chapalgaonkar, learned counsel for the appellant further conceded that though in the appeal memo ground was taken about driving license, he is not raising that ground in view of the Judgment in the case of **Mukund Dewangan vs. Oriental Insurance Co. Ltd.**²

10. Per contra, learned counsel appearing for the claimants supports the Judgment and order and submits that no evidence was brought on record by the insurance company to prove and establish its case that the deceased had contributed negligence in the present matter.

11. It is further argued that the claimants have denied the case of the insurance company that the deceased was not wearing helmet at the time of accident and for this purpose learned counsel for the claimants has drawn attention of this Court to the cross-examination of PW-1 Suman Asaram Shinde

wherein she has categorically denied the suggestion given by the learned counsel for the appellant that the deceased was not wearing helmet when the accident occurred. It is, therefore, submitted that in absence of any evidence on record showing that the deceased was not wearing helmet, it cannot be held that there was contributory negligence on the basis of assumptions and presumptions. By arguing so, learned counsel for the claimants prays for dismissal of the present appeal.

12. To consider the rival contentions of the parties, I have perused the relevant documents and also the Judgment impugned in the present appeal.

13. In the above referred back-drop of contentions of the parties, the only issue fell for consideration of this Court is, whether deceased contributed negligence in the present matter, and if yes, to what extent?

14. After perusal of the record, it is revealed that though the insurance company in written statement pleaded about the negligence on the part of the deceased, the insurance company

did not examine any witness in support of its case. The driver of the tractor, who was the eye witness, was available for the insurance company to examine on the issue of negligence. However, no explanation or justification has been offered for not examining any witness to prove its case as regards negligence on the part of the deceased.

15. The record shows that in cross-examination a specific question was put by the insurance company to PW-1 to the effect that the deceased was not wearing helmet at the time of accident, to which the witness has categorically denied the said suggestion.

16. Thus, the only document is panchnama on the basis of which the insurance company is trying to make out a case that looking to the damage caused to the motorcycle involved in the accident, as recorded in the panchnama, the only possibility is that the motorcycle has given dash to the tractor and not the tractor. The insurance company has not brought anything on record, on the basis of which this Court can give any positive finding about not wearing of helmet or giving of dash by

motorcycle to the tractor and trolleys and thereby arrive at a definite conclusion that the deceased has contributed negligence in the accident.

17. Thus, in absence of any evidence available on record and looking to the benevolent object of the Act, only on the basis of presumptions and assumptions this Court cannot deny rightful claim of the claimants by holding that the deceased was negligent.

18. In the Judgment cited by the learned counsel for the appellant in the case of **New India Assurance Co. Ltd. vs. Julius T.J. Freitas and others** (supra), the Tribunal on the basis of material available before the Tribunal, held that to the extent of 30% the deceased in that matter has contributed negligence, which was upheld by this Court.

19. However, having observed that no evidence has been brought on record either documentary or oral by the appellant – insurance company in this matter to prove or establish

negligence of the deceased, the said Judgment is of no help to the appellant – insurance company.

20. In the circumstances, I am of the considered view that there is no error committed by the learned District Judge while rejecting the case of the appellant – insurance company as regards contributory negligence. Thus, I do not find any merit in the present appeal. Accordingly, I pass the following order:

ORDER

(I) The Appeal is dismissed.

(II) The claimants are permitted to withdraw the amount deposited by the insurance company in this Court, along with interest accrued thereon, if any, as per the shares mentioned in the Judgment of the learned District Judge.

(III) At this stage, it is informed by the learned counsel for the claimants that claimant - Malhari

Dadu Shinde – father of the deceased has expired during the pendency of this appeal and his name was deleted. In the circumstances, his share as held by the District Judge, shall be given to his widow – Draupadabai Malhari Shinde.

(IV) No order as to costs.

[ANIL S. KILOR, J.]

asb/MAR21