

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 1358 OF 2016

- | | | |
|--------------------------------------|---|-------------------|
| 1. Shri Gunwant Premnath Kajale, 39 |) | |
| 2. Smt. Saudamini Gunwant Kajale, 30 |) | |
| Both residing at Plot No. 21, Sector |) | (Orig.Applicants) |
| No. 4 -A, Koperkhairane, New Mumbai- |) | |
| 400 709, Dist. Thane |) |Appellants |

Versus

- | | | |
|--------------------------------|---|---------------------|
| 1. Balu Baburao Shejwal. |) | |
| At & Post Fulawade. |) | |
| Taluka Ambegaon. Dist. Pune |) |(Orig. Owner) |
| 2. National Insurance Co. Ltd. |) | |
| Regional Office. |) | |
| Sterling Cinema Bldg. |) | |
| Marzban Road, Fort. Mumbai |) |(Orig. Insurer) |
| | |Respondents |

Ms. Amrin Khan a/w Ms. Meenakshi Pahuja i/b A. M. Gokhale for the Appellant.

Ms. Poonam Mittal for the Respondent No.2.

CORAM : SHIVKUMAR DIGE, J.

DATE : 3rd MAY 2023.

JUDGMENT. :

1. The appellants/original claimants preferred this appeal against the dismissal of claim petition.

2. It is contention of learned counsel for the appellants that the Tribunal has dismissed. The claim petition, on the ground that the claimant should have impleaded the owner and insurer of the offending truck as party. Learned counsel further submits that the Tribunal has erroneously dismissed the claim petition without considering fact that deceased was travelling in the vehicle and it is the choice of claimants to recover the compensation from any of the tortfeasors. She relied on *Khenyei vs. New India Assurance Co. Ltd & Ors. 2015 ACJ 1441*.

3. It is contention of the learned counsel for the respondents/ insurance company that the offending vehicle was stationed on the side of the road and the vehicle in which deceased was traveling dashed, the stationed vehicle from the back side, so there was no

negligence of the driver of the offending vehicle which was stationed on the road. Moreover, the claimants have not added necessary parties i.e. the owner and insurer of vehicle in which deceased was traveling. The Tribunal has considered all the aspects while dismissing petition. Learned counsel further submit that the respondent has examined defense witness, to prove the defense of insurance company. Hence, requested to dismiss the appeal.

4. I have heard both learned counsel, perused judgment and order passed by Motor Accident Claims Tribunal, Thane (for short the Tribunal), It is contention of learned counsel for the appellants that the Tribunal has dismissed. The claim petition, on the ground that the claimant should have impleaded the owner and insurer of the offending truck as party. I am unable to understand the observation of the Tribunal that owner and insurance company of offending vehicle should have been made as a party. It is settled principle of law that in the case of composite negligence claimant is entitled to recover the compensation from any one joint tortfeasors. The Hon'ble Apex Court in the case of *Khenyei vs. New India Assurance Co. Ltd & Ors. 2015 ACJ 1441* held that claimant is entitled to recover the compensation

from any one of the tortfeasors as liability is joint and several. In the present case the deceased was traveling in the vehicle which dashed against the stationed offending tempo, the claim was filed under section 163A of the Motor Vehicle Act 1988.

5. To prove the defense opponent no. 2/insurance company examined Shri. Samadhan Gopalrao Khandare investigator of insurance company at Exhibit-'27', who conducted investigation. The investigation report is at Exhibit-'28'. He has stated that at the relevant time he had made inquiry with parents of the victim to ascertain the facts, in cross examination this witness admitted that his investigation was entirely based on police papers. He has further admitted he did not visit the place of occurrence. He further admitted that offending tempo was involved in the said accident and he did not record the statements of drivers of both the vehicles involved in the said accident. The two vehicles are involved in the accident. Considering the evidence of this witness as well as as per the view of Hon'ble Apex Court in the case of Khenyei Dayal(supra) the claimant has right to recover the compensation from anyone of tortfeasor. I am setting aside the observations of the Tribunal that claim petition was not tenable for want of non joinder of necessary party. The deceased

was 7 years old at the time of accident. As per the view of Hon'ble Apex Court in the case of *Kurvan Ansari alias Kurvan Ali and anr. Vs. Shyam Kishore Murmu and anr. Civil Appeal No. 6902 of 2021 decided on 16.11.2021*, in this case the deceased child was about 7 years old, the Hon'ble Apex Court has awarded Rs. 4,70,000/- as compensation, the facts of cited case and present case are squarely same. Hence, I am considering that the claimants are entitled for Rs. 4,70,000/- as compensation.

6. In view of above, I pass following order.

ORDER

- i. Appeal is allowed.
- ii. The claimants are entitled for Rs. 4,70,000/- @ 6% interest per annum from the date of filing the claim till realization of the amount.
- iii. The respondent/insurance company is directed to deposit the compensation amount along with accrued interest thereon, within six weeks after receipt of the order.
- iv. The claimants are permitted to withdraw the

deposited amount along with accrued interest
thereon.

(SHIVKUMAR DIGE, J.)