

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**FIRST APPEAL 75 OF 2017**

National Insurance Company )  
5<sup>th</sup> Floor, Royal Insurance Building )  
14<sup>th</sup>, J. N. Tata Road, Mumbai 0 400 020 )  
(Policy no. 250500/31/07/6300000304 )  
Valid from - 16-4-2007 to 15-4-2008 ) ... Appellant

**Versus**

1. Smt. Sangita Nilesh Shelar & Ors. )  
Age-Adult, wife of deceased )
2. Rohit Nilesh Shelar )  
Age-Adult, son of deceased )
3. Kumari. Prarna Nilesh Shelar )  
Age- Minor, daughter of deceased )  
Represented through her mother )  
The Applicant No. 1 herein )
4. Smt. Banubai Babu Shelar )  
Age-56, Mother of deceased )  
All Residing at: Kailash Giri Nagar, )  
Hill Side-Alishan Cinema, Near Post office )  
Jiwan baugh, Mumbra Railway Station )  
Mumbra, Dist-Thane )
5. Mr. Sajidd Hanif )  
At plot No. 123 Room No. 23 )  
Sector KWE Khanda Pada )  
Kalamboli, Navi Mumbai )  
Dist. Thane )

....Respondents/Original Claimants

Mr. Rahul Mehta i/b KMC Legal for the Appellant

Mr. Vishwanath W. Patil i/b Sandeep Katke for Respondents in F.A. No. 75 of 2017 and for Applicants in I.A. (St.) No. 16801 of 2022.

**CORAM : S. G. DIGE, J.**

**RESERVED ON : 13<sup>th</sup> DECEMBER, 2022.**

**PRONOUNCED ON : 13<sup>th</sup> JANUARY, 2023**

**P.C. :**

1. Being aggrieved and dissatisfied with the judgment and order passed by Motor Accident Claims Tribunal, Mumbai, the appellant insurance company/original respondent no. 2 preferred this appeal.

2. Brief facts of the case are as under.

On 2<sup>nd</sup> December, 2007, at about 01.25 hours deceased Nilesh was standing behind the Motor Trailer No. MH-43-E-9224 opposite Vashi, Jakat Naka on Sion-Panvel Road, Mankhurd, Mumbai. At the relevant time, the driver of said motor trailer suddenly took the vehicle in reverse side, rashly and negligently, without taking any proper care, caution or proper look out and dashed the deceased, due to which, deceased sustained grievous injuries and died on the spot. A Crime was registered against the

driver of offending vehicle.

3. The respondent Nos. 1 to 4 (for short "**the claimant's**") filed the claim petition before Motor Accident Claims Tribunal, Mumbai. (for short '**the Tribunal**') for getting compensation. The tribunal has awarded the compensation. The said judgment and order is under challenge.

4. It is the contention of learned counsel for appellant that the accident occurred due to negligence of deceased as. He was carelessly and negligently crossing the road from the backside of the offending trailer without observing traffic rules. Learned counsel further submits that, there is dispute in respect of identity of the deceased person and his relation with applicants, as per police paper's the gender of deceased is mentioned as 'EUNUCH'. Therefore, question of his marriage and dependent wife and children does not arise. The identity of deceased is not properly disclosed but, this fact is not considered by the tribunal.

5. Learned counsel further submits that, on the date of accident, insurance policy was not in existence. The premium of insurance policy was paid by cheque. However, the said cheque

was dishonoured. Therefore, policy was cancelled. It was informed to owner of vehicle as well as RTO regarding cancellation of policy. These facts have been stated by the witness examined by the appellant before the tribunal but, it was not considered and the impugned judgment and order is passed. Hence, requested to allow the appeal.

6. It is the contention of learned counsel for the respondents/claimants that the accident had occurred due to sole negligence of the driver of offending trailer. The claimants are the legal heirs of deceased. It shows that, the deceased was male person. The deceased had a child. The appellant has not proved before the tribunal that, it was informed to the owner of vehicle and RTO office about the cancellation of policy. The order passed by the tribunal is legal and valid.

7. I have heard both learned counsel, perused judgment and order passed by the Tribunal. Several issues are raised in this appeal. I deal with them one by one. So far as the issue in respect of negligence of the deceased is concerned, admittedly, the offence is registered against the driver of offending trailer. It has come on

record that at the time of accident, deceased was standing behind the offending trailer and suddenly the driver of trailer took said trailer in reverse direction in rash and negligent manner without taking proper care and caution. Therefore, deceased Nilesh received dash and got injured and died on the spot. The FIR is at Exhibit "18", spot panchanama is at Exhb. 19. These documents show that, the accident occurred due to sole negligence of the driver of the offending trailer. Moreover no evidence is produced on record by the appellant to show that there was negligence of deceased. Hence, I do not find any merit in the contention of learned counsel for the appellant that there was negligence of the deceased.

8. It is contention of learned counsel for appellant that identity of deceased was not disclosed and he was 'EUNUCH'. It has come on record that FIR was lodged by the police head constable Vitthal Palve and in the FIR it is mentioned that person who died in accident is 'EUNUCH'. Even in spot panchanama, description of dead person is mentioned as 'EUNUCH'. After the accident, no one identified the body of deceased. The intestines of the deceased had come out side of stomach as well as his face was mutilated. Hence, his body was not in a position to be identified properly. On that

basis, the police constable may have mentioned in FIR that the dead person was 'EUNUCH' but, later on when claimants came to know about the accident, they rushed to the hospital and identified the body of deceased. It has come in the evidence of wife of deceased PW-1-Sangita that, she identified the deceased as her husband on the basis of name of her husband written on his hand.

9. It has come in the evidence of employer of deceased, Vishnu Bhagat. that deceased was working in his hotel as cook, and he identified his body as Nilesh. The mother of deceased has stated that deceased was her son. The post mortem report at Exhb. 20 mentions the sex of the person who died as male.

10. From the evidence on record, it proves that deceased was a male person. Mere mentioning in the FIR by the police constable that deceased was 'EUNUCH' cannot be a ground to consider that the deceased was 'EUNUCH'.

11. In respect of issue of dishonor of cheques the appellant has examined Smt. Harisha Temkar at Exhb. 30. She has stated that the premium of the Insurance Policy was paid through cheque,

but it was dishonoured. Hence, letter was sent to insurer and RTO about cancellation of insurance policy. The documents are at Exhb. 31 to Exhb.38. In cross-examination, this witness admitted that she has not filed either postal receipt or acknowledgment to show that their company informed the insurer or and RTO regarding dishonor of cheque. It proves that no information was given to the owner of vehicle and RTO about dishonor of cheque and cancellation of policy. Moreover, as per insurance policy, premium was shown as Rs. 40,323/-. However, documents filed regarding dishonor of cheque and disputed cheque filed on record shows the amount of Rs. 80,644/-. It is more than premium of insurance policy. There is no explanation given by the appellant about the cheque amount which was more than premium of insurance policy. Hence, I do not find any merit in the contention of learned counsel for appellant that cheque of premium was dishonoured and intimation was given to the insurer and RTO.

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

**ORDER**

- i. Appeal is dismissed. No order as to cost.
  - ii. The claimants are permitted to withdraw the deposited amount along with accrued interest thereon.
  - iii. The statutory amount along with accrued interest be transferred to the tribunal. The parties are at liberty to withdraw it, as per rule.
13. All pending Civil/Interim Applications stand disposed off.

**(S. G. DIGE, J.)**