

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.1569 OF 2008

The Divisional Manager,
National Insurance Co.Ltd., Chandrapur,
District Chandrapur.
Through its Regional Manager,
National Insurance Co.Ltd.,
Regional Office, Dharampeth, Nagpur. **Appellant.**

:: V E R S U S ::

1. Smt.Hemlata wd/o Bhaskar Naktode,
aged about 54 years, occupation – household.

2. Ku.Namrata d/o Bhaskar Naktode,
aged about 27 years, occupation student.

3. Vijay s/o Bhaskar Naktode,
aged about 22 years, occupation student.

4. Amol s/o Bhaskar Naktode,
aged about 22 years, occupation student.

5. Sachin s/o Bhaskar Naktode,
aged about 17 years, occupation student.

All 1 to 5 r/o Kurud,
tahsil Wadsa, Desaiganj, district Gadchiroli.

6. Mahmood s/o Bhurakhan Pathan,
aged 39 years, occupation driver.
r/o Chimur, district Chandrapur.

7. Ashok s/o Shankarrao Mallewar,
aged adult, occupation bus owner/
r/o Jambli, post Karwafa,
tahsil Dhanora, district Gadchiroli.

8. United India Insurance Co.Ltd.,

2

Gadchiroli, through its Divisional Manager,
Chandrapur.

9. Basant Kumar Falatmal Nagdeve,
aged about 52 years, occupation truck owner,
r/o Shivaji Ward, Wadsa, tahsil Wadsa,
district Gadchiroli. **Respondents.**

=====

Shri C.A.Anthony, Counsel for the Appellant.

Shri Vivek Thote, Counsel for Respondent Nos.1 to 5.

Shri M.M.Kalar, Counsel for Respondent No.8.

=====

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 09/03/2023

PRONOUNCED ON : 05/06/2023

JUDGMENT

1. The appellant/National Insurance Company Limited challenges judgment and award dated 6.12.2006 passed by learned Member of the Motor Accident Claims Tribunal at Gadchiroli (learned Member of the tribunal) in Motor Accident Claims Petition No.136/2000 whereby the appellant/National Insurance Company Limited was directed to pay compensation of Rs.2,21,250/- to the claimants.

2. Brief facts necessary for disposal of the appeal are as under:

The alleged accident took place on 6.6.2002 when Bhaskar (the deceased) was travelling from Gadchiroli to

3

Wadsa in Tempo Trax bearing No.MH-33/384 owned by respondent No.9 Basant Kumar Falatmal Nagdeve and insured with the appellant/National Insurance Company Limited. When the said Tempo Trax reached at Kitali Shivar on Armori-Gadchiroli Road, Luxury Bus No.MH-33/1012 driven by its driver dashed against the said Tempo Trax. In the said accident, the deceased died. Regarding the said accident, an offence was registered against the driver of the Luxury Bus vide Crime No.21/2000. The said Luxury Bus was owned by respondent No.7 Ashok Shankarrao Mallewar and insured with respondent No.8 - United India Insurance Company Limited. As the said accident took place, according to the claimants, due to the rash and negligent driving of the driver of the Luxury Bus and the Tempo Trax was also involved in the accident, they claimed compensation from both the vehicles' owners and insurance companies.

3. It is further contended by the claimants that at the time of the said accident, age of the deceased was 47 years old and serving as a teacher in Mahatma Gandhi Vidyalaya, Wadsa and drawing salary of Rs.10,650/-. As the said accident took place due to the rash and negligent driving of

4

driver of the Luxury Bus, the claimants are claiming compensation under pecuniary and non-pecuniary damages.

4. In response to the Notice, respondent No.6 Mahmood s/o Bhurakhan Pathan, the driver of the Luxury Bus, has not contested the claim petition.

5. Respondent No.7 Ashok Shankarrao Mallewar, the owner of the Luxury Bus and respondent No.8 United India Insurance Company Limited contested the claim petition on the ground that there was an involvement of two vehicles. The deceased was travelling in the Tempo Trax along with fourteen passengers when there was a permit of 1+9 passengers. The said accident took place due to the rash and negligent driving of the driver of the Tempo Trax. Hence, they are not liable for payment of compensation.

6. Respondent No.9 Basant Kumar Falatmal Nagdeve, the owner of the Tempo Trax, resisted the compensation claiming the negligence of the driver of the Luxury Bus. The appellant/National Insurance Company Limited, the insurer of the Tempo Trax, has not filed its reply.

5

7. To substantiate the contentions, claimant No.1 stepped into the witness box and adduced her evidence. She reiterated the contentions regarding the occurrence of the accident and claimed that the alleged accident took place due to the rash and negligent driving of the driver of the Luxury Bus. Admittedly, she is not an eyewitness of the incident. It came in her evidence that it was the Tempo Trax which gave the dash to the Luxury Bus and, therefore, the said accident took place. One Shri Thokar, who was also teacher, had witnessed the incident who informed her about the occurrence of the accident. It further came in her evidence that 13-14 persons were travelling in the Tempo Trax.

Besides her oral evidence, she placed reliance on the First Information Report (Exhibit-47), spot panchanama, inquest panchanama, and Form-AA (Exhibit-51).

8. Recital of the First Information Report shows that it was the driver of the Luxury Bus who was negligent while driving the vehicle and dashed against the Tempo Trax. The spot panchanama also shows that the Luxury Bus dashed against the Tempo Trax and the alleged accident took place.

6

9. The claimant No.1 admitted during her cross examination that it was the driver of the Tempo Trax driver who dashed against the Luxury Bus and the said accident took place. Learned Member of the tribunal held that respondent No.7 Ashok Shankarrao Mallewar, the owner of the Luxury Bus, and respondent No.8 United India Insurance Company Limited to pay the compensation to the claimants jointly and severally. Learned Member of the tribunal also held that respondent No.9 Basant Kumar Falatmal Nagdeve, owner of the Tempo Trax, and appellant/National Insurance Company Limited to pay the compensation to the claimants jointly and severally.

10. Being aggrieved and dissatisfied with the judgment and the award, the present appeal is preferred on the ground that the judgment and award passed by learned Member of the tribunal is erroneous as the claimant No.1 admitted that the accident arose due to the rash and negligent driving of the driver of the Luxury Bus and as such the owner and the insurance company of the Luxury Bus are only liable to pay the compensation. The judgment and award holding the appellant/National Insurance Company Limited liable to pay

7

the compensation to the extent of 50% is illegal and liable to be set aside.

11. Heard learned counsel Shri C.A.Anthony for the appellant/National Insurance Company Limited; learned counsel Shri Vivek Thote for the claimants, and learned counsel Shri M.M.Kalar for respondent No.8/United India Insurance Co.Ltd., the insurer of the Luxury Bus.

12. Learned counsel Shri C.A.Anthony for the appellant/National Insurance Company Limited submitted that the crime was registered against the driver of the Luxury Bus. The spot panchanama also shows that it was the driver of the Luxury Bus who is responsible for the said accident. Learned Member of the tribunal has erroneously held the appellant/National Insurance Company Limited to pay the compensation. Moreover, the owner of the Tempo Trax has contravened the terms and conditions of the policy. Thus, the appellant/National Insurance Company Limited is not liable to pay any compensation. In support of his contentions, he has placed reliance on the decision in the case of **New India**

8

Assurance Company Ltd. vs. Kamesh Sharma and another,
reported in 2008(2) TAC 946 (All).

13. *Per contra*, learned counsel Shri Vivek Thote for the claimants submitted that the claimants are entitled to receive the compensation as per the award passed by learned Member of the tribunal.

14. Learned counsel Shri M.M.Kalar for respondent No.8/United India Insurance Co.Ltd., the insurer of the Luxury Bus, supported the judgment and award of learned Member of the tribunal. He placed reliance on the decision of the Honourable Apex Court in the case of **National Insurance Co.Ltd., Chandigarh vs. Nicolletta Rohtagi and others,** reported in (2002)7 SCC 456.

15. Whether the said accident took place due to the contributory negligence or composite negligence is the material aspect.

16. The principle underlying the doctrine of contributory negligence is the application of the maxim '*in pari delicto, potior est conditio defendentis*' which means

9

when both parties are equally to blame, neither can hold the other liable. There is clear difference between 'contributory negligence' and 'composite negligence'. Where a person is injured without any act or omission from his part, but as a combined effect of the negligence of two or more persons it is a case of 'composite negligence' and not a case of 'contributory negligence'. The expression 'contributory negligence' applies solely to the conduct of the claimant, in a case of personal injury and in case of compensation for death it applies to the conduct of the victim. It means that there was an act or omission from the part of the injured claimant or victim, which has materially contributed to the damage.

17. In the instant case, the deceased was not driving any vehicle. However, he was travelling in the vehicle. Thus, it is clear that there was no act or omission on the part of the deceased to contribute the said accident.

18. Thus, the contention of the appellant/National Insurance Company Limited is that being it is the contributory negligence, the claimants are not entitled to receive the compensation from the appellant/National Insurance Company

10

Limited with whom the offending vehicle Tempo Trax was insured, is not sustainable.

19. It is well settled that right of claimants to recover damages from the tortfeasors is well settled. Once the court comes to the conclusion that the case is one of the composite negligence, damages cannot be apportioned. The petitioner is entitled to recover the entire amount of compensation from all or any of the joint tortfeasors. The liability in the case of composite negligence, normally should not be apportioned, as both the wrong doers are jointly and severally liable for the whole loss. It is choice of the petitioner either to claim compensation from both the tortfeasors or any of them. Thus, the tentativeness for the purpose of contribution to joint tortfeasors do not at all affect the right of the petitioner to recover the full damages.

20. The Honourable Apex Court in the case of **T.O. Anthony vs Karvarnan and others** reported in **2008 (3) ALL MR 902** held as 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 wrongdoers,

11

it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer 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 wrongdoer separately, nor is it necessary for the Court to determine the extent of liability of each wrongdoer 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 of 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 the reason of negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

21. Here, in the present case, admittedly, the deceased has not contributed for the said accident. In such circumstances, each wrong doer is jointly and severally liable

12

to pay the compensation and, therefore, the contention of the appellant/National Insurance Company Limited, that the judgment and award passed against it is liable to be set aside, is not sustainable.

22. The other ground raised by the appellant/National Insurance Company Limited is that though the permit is issued to the Tempo Trax to carry passengers 1+9, the Tempo Trax owner has permitted the driver to carry 14-15 passengers which is a breach of policy and, therefore, the appellant/National Insurance Company Limited is not liable to pay the compensation. DW2 has admitted that 14-15 persons were travelling in the Tempo Trax. Admittedly, the appellant/National Insurance Company Limited has not contested the claim petition as regards the breach of policy conditions is concerned.

23. It is well settled in the light of the decision of the Honourable Apex Court in the case of **Lakhmi Chand vs. Reliance General Insurance**, reported in 2016(5) Mh.L.J. 527 SC wherein it is laid down that the insurance company has to establish its defence with regard to breach of policy

13

conditions. Not only it has to establish there is a breach of policy but such breach has to be so fundamental that it puts an end to the contract and that such breach had caused the accident. These relevant aspects are missing in the present case. The insurance company did not lead any evidence to prove that the breach in the form of carrying some excess passengers was so fundamental in nature that it resulted in causing the accident and thus putting an end to the policy itself.

24. In view of the decision in the case of **Lakhmi Chand vs. Reliance General Insurance** cited *surpa*, the contention of the appellant/National Insurance Company Limited that there was breach of policy is not sustainable.

25. In view of the above discussion, the appeal filed by the appellant/National Insurance Company Limited is devoid of merits and liable to be dismissed and the same is dismissed. No costs.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

...../-