



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3409 OF 2019

1. Kunta w/o Karbhari Bachate
age 29 years, occ. Household
r/o Wadgaon (Bachate) Tq. Sonpeth
Dist. Parbhani, at/p r/o Gour
Tq. Purna, Dist. Parbhani
2. Vaishnavi d/o Karbhari Bachate
age 09 years, occ. Minor
u/g of real mother
Kunta Karbhari Bachate i.e.
Petitioner No. 1
r/o as above.
3. Kamalbai w/o Balasaheb Bachate
age 53 years, occ. Household
r/o Wadgaon (Bachate), Tq. Sonpeth
Dist. Parbhani

.. Appellants

Versus

1. Suresh s/o Tulshiram Rathod
age 37 years, occ. Agril.,
r/o Gangalwadi, Post Siddheshwar
Tq. Aundha, Dist. Hingoli
2. The ICICI Lombard General
Insurance Co. Branch at
Alaknanda Complex, II floor
Adalat Road, Aurangabad

3. Balaji s/o Trimbka Dhole

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Deleted as per Court order
dated 27.09.2019

CORAM : R. M. JOSHI, J.

DATE : 17th JANUARY, 2024.

JUDGMENT :

1. Admit.
2. By consent, heard finally at admission stage.
3. This appeal under Section 173 of Motor Vehicles Act takes exception to the impugned judgment and award dated 27th October, 2017 passed in MACP No. 562/2011 on limited ground that the learned Tribunal ought not to have directed the respondents to severally pay compensation of 50%.
4. It is the contention of learned counsel for the appellants that admittedly, the deceased was pillion rider and there was no finding recorded by the Tribunal about he contributing in the occurrence of the accident. It is submitted that the Tribunal has held composite negligence of both the vehicles involved in the accident for occurrence thereof. It is his submission that by relying upon the judgment in the case of Khenyei vs. New India Assurance Company Limited and others, **(2015) 9 Supreme Court Cases 273**, that in case of composite negligence, it is open for the claimant to claim compensation jointly and severally and it is his choice to seek

the same from all or any one of them. According to him, learned Tribunal has committed error in directing respondent no. 1 and 2 jointly and severally to pay 50% amount of compensation and respondent No. 3 remaining 50%.

5. Learned counsel for insurer opposed the contention by drawing attention of this Court to the evidence on record which indicates that the deceased was third pillion rider on the motorcycle which according to him, shows that it was within knowledge of deceased that there is every possibility of occurrence of accident more particularly when the rider was drunk. It is thus his contention that the impugned judgment and award does not deserve any interference/modification.

6. There is no dispute about the fact that on 13th September, 2010, an accident occurred involving motorcycle bearing registration No. MH 38 K 9317 and Maruti car bearing registration No. MH 01 R 5473 owned by original respondents No. 3 and 1 respectively. There is further no dispute about the fact that the Maruti car was duly insured with respondent No. 2 under valid insurance policy at the relevant time. The learned Tribunal has

taken into consideration evidence on record and though it is observed that deceased was third pillion rider on the motorcycle, has not held his contributory negligence in the occurrence of the accident in question. In absence of any challenge to the refusal on the part of the Tribunal to hold deceased contributory negligent to the occurrence of the accident by filing appeal or cross objection, it is not open for the insurer to challenge the same now. Contention raised by learned counsel for insurer deserves no consideration.

7. The impugned judgment clearly shows that the Tribunal has held both vehicles have contributed in the occurrence of the accident and the said negligence is determined to the extent of 50%. In the facts and circumstances of the case, the said finding recorded by the learned Tribunal is fully justified and deserves no interference.

8. The question however that arises for consideration is as to whether it was open for the Tribunal to apportion liability to the extent of 50% jointly and severally on respondents No. 1 and 2 and remaining 50% on respondent No. 3. The Hon'ble Apex Court in case

of Khenyel (supra) has held that there is difference between contributory and composite negligence. In case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence whereas in case of composite negligence, a person who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. In the instant case, as rightly held by the learned Tribunal, the deceased has not contributed to the occurrence of the accident. Thus, it is a case of composite negligence. In such circumstances, it is open for the claimants to seek entire damages as per their choice from all joint tortfeasors or anyone of them. This Court finds substance in the challenge to the impugned judgment and award to this extent. Hence, award deserves to be modified to that effect.

9. Respondents are jointly and severally liable to pay compensation of Rs. 12,40,000/- (Rs. Two Lac Forty Thousand) including No Fault Liability amount, to the appellants along with interest @ 7.5% from the date of application till realization of the

amount. Finding recorded by Tribunal to the extent of contributory negligence of opponents is maintained. Appeal is disposed of in aforestated terms.

(R. M. JOSHI)
Judge

dyb