

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

FIRST APPEAL NO.51 OF 2017

ICICI Lombard General Insurance Co. Ltd.,	}	
Thr. Its Authorized Representative	}	
Mr.Prathamesh Dinde	}	
Having Office at Peninsula House, 4 th Floor,	}	
Dr.D.N. Road, Fort, Mumbai-400 001.	}	...Appellant

Versus

**NILAM
SANTOSH
KAMBLE**

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NILAM SANTOSH
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1. Smt.Joyti Anant Awachat	}	
Age-46 years, Occ : House-hold,	}	
 2. Miss. Ketki Anant Awacht	 }	
Age-23 years, Occ : Education	}	
 3. Shri.Pramod Anant Awachat	 }	
Age-20 years, Occ : Education	}	
 4. Master Prashant Anant Awachat	 }	
Age-14 years, Occ: Education	}	
 5. Sou. Vandana Moreshwar Awachat	 }	(Since decd.
Age-75 years, Occ : Nil	}	Amended as per
	}	order
5E. Mrs.Medha Uday Kulkarni	}	dt.25-09-23)
	}	
5F. Aniket Uday Kulkarni	}	(amendment
Age-31 years, Occ : Nil	}	carried out as per
At Flat No.401, 402, Anand Laxmi	}	Order
Apartment, Pune-11038	}	dt.25-09-23)

6. Shri.Moreshwar Vithal Awachat	}	
Age-81 years, Occ : Nil	}	
	}	
6E. Mrs.Medha Uday Kulkarni	}	
6F. Aniket Uday Kulkarni	}	(amendment
Age-31 years, Occ : Nil	}	carried out as per
At Flat No.401, 402,	}	Order
Anand Laxmi Apartment,	}	dt.25-09-23)
Bharat-Kunj Society, Pune-11038	}	

Applicant No.4 is minor hence, through	}
Applicant No.1 as mother and natural	}
guardian	}
All are R/at Plot No.17, Sameer Housing	}
Society, Akshay Nagar, Dhankawadi, Pune	}

7. Shri.Bhagwan Mahadeo Walke	}	
Age-Adult, Occ: Business	}	
R/at Undri, Taluka-Chikhali, District-	}	
Buldhana.	}	Respondents

**WITH
FIRST APPEAL NO.128 OF 2017**

ICICI Lombard General Insurance Co. Ltd.,	}	
Thr. Its Authorized Representative	}	
Mr.Prathamesh Dinde	}	
Having Office at Peninsula House, 4 th Floor,	}	
Dr.D.N. Road, Fort, Mumbai-400 001.	}	...Appellant

Versus

1. Smt.Chhaya Sadashiv Raut	}
Age-44 years, Occ : House-hold,	}
	}
2. Miss. Kalyani Sadashiv Raut	}
Age-21 years, Occ : Education	}

3. Master.Chaitanya Sadashiv Raut }
Age-17 years, Occ : Education }

4. Miss.Aishwarya Sadashiv Raut }
Age-13 years, Occ: Education }

Applicant Nos.3 and 4 being minor, since }
thr. Applicant No.1 as mother guardian) }

All R/at Niwara Co.-operative Housing }
Society, Sridhar Nagar, Plot No.19, }
Dhankawadi, Pune-43 }

5. Subhash Uttam Barhate }
Age-31 years, Occ : Driver }
R/at Undri, Taluka-Chkhali }
District-Buldhana }

6. Bhagwan Mahadeo Walke }
Age-26 years, Occ : Business }
R/at Undri, Taluka-Chikhali, }
District-Buldhana }

....Respondents

Mr.Rajesh Kanojia i/b Res Juris, for the Appellant in FA No.51 of 2017.

Mr.Mohansinh U. Rajpur, for Respondent Nos.1 to 6F.

Mr.Ravindra S. Pachundkar, for Respondent Nos.1 to 4 in FA No.128 of 2017.

CORAM : SHIVKUMAR DIGE, J.

DATE : 17th APRIL 2024

ORAL JUDGMENT :-

. These Appeals are preferred against the judgment and order passed by the Motor Accident Claims Tribunal ('The Tribunal' for short), Pune. The issue involved in both the Appeal's are same, hence, I am deciding it by this common judgment.

2. It is contention of the learned counsel for the Appellant's that, the accident occurred due to sole negligence of the driver of the offending car. The offence was registered against the driver of the offending car. But the Tribunal has not considered this fact and has fixed liability of accident on driver of the tempo, which is erroneous. Hence, requested to allow the Appeal.

3. It is contention of the learned counsel for the Respondent-Claimant that, the information of the accident was given to the Police by owner of the tempo. He had received information on mobile. He was not present at the time of the accident. The occupant of the car was examined before the

Tribunal and he has stated that accident occurred due to sole negligence of the driver of the tempo. The spot panchanmma produced on record shows negligence of the tempo driver. The Tribunal has considered all the aspects, on that basis judgment and order is passed. No interference is required in it.

4. The learned counsel for Respondent Nos.1 to 4 in Appeal No.128 of 2017 submits that appropriate order be passed.

5. I have heard all learned counsel. Perused judgment and order passed by the Tribunal.

6. It is Claimant's case that on 31st December 2009 deceased Anant Awachat along with his friend Sadashiv Raut, Suresh Parhad were going towards Shegaon in Hyundai car. Sadashiv Raut was driving the car in moderate speed and by observing traffic Rules and Regulations. When they came on Chikhali- Khamgaon road in Lokhanda Shivar, near Hivarkhed village at about 15.15 hours, at that time three tractors attached with the ploughs were proceedings from the opposite direction i.e. from Khamgaon and behind three tractors, one Mahindra Max bearing No.MH-28-H-7365 was proceeding in the same

direction in high and excessive speed. Driver of the Mahindra Max overtook 3rd tractor by accelerating the speed. On seeing that the vehicle is coming in such a rash and negligent manner, driver Sadashiv Raut slowed speed of his car and took car to one side of the road. Still the Mahindra Max came on wrong side of the road and gave dash to the front portion of the car. Due to heavy and forceful dash, driver and other occupants in car sustained multiple injuries and car driver Sadashiv Raut died on the spot and Anant Awachat died while taking treatment whereas, Suresh Parhad got injured in the said accident. The offence was register against the car driver Sadashiv Raut.

7. To prove the negligence of the driver of offending tempo the Claimant's in both Claim Petitions have examined Suresh Parhad, eye witness to the incident. He has stated that at about 3.15 p.m. car was passing Hiverkheda area at that time three tractors along with plougs were coming one after other and the car was going from correct side. Behind three tractors there was one Mahindra Max No.MH-28-7635, coming in high and excessive speed. The first two tractors were crossed by the car and

when car went near third tractor driver of Mahindra Max overtook the said tractor and accelerated his speed, came on wrong side of the road and gave dash to the car. He further stated that he had filed Application challenging investigation. In the Application, he has specifically stated that there was no negligence on the part of the car driver. Police immediately on the next date of accident recorded his statement. It is at Exhibit-34. In cross-examination he has stated that he was not aware what action Police had taken on his Application.

8. While dealing with the issue of the negligence, the Tribunal has observed that though, charge-sheet is filed against the driver of the offending car, filing of charge-sheet is *prima facie* evidence about negligence, but it is not conclusive evidence. Police recorded statement of witness Suresh Parhad. He has clearly stated about negligent driving of driver of the Mahindra Max, still charge-sheet is filed against the car driver. The Investigating Officer has not recorded statements of the any other eye witnesses. Police has discarded statement of eye witness Suresh Parhad without any reason, it *prima facie* shows that

investigation is not proper. Driver of Mahindra Max was the best witness on the point of stating about manner of accident but he has not been examined. Witness Suresh Parhad was occupant in the car relying on the evidence of Suresh Parhad the Tribunal has observed that accident occurred due to negligence of the driver of the Mahindra Max. I do not find infirmity in it.

9. In my view, police has recorded FIR on the information given to Police by owner of the vehicle. He has stated that he was not present at the time of the accident, then also police has relied on his information. In his oral report he has stated that his driver had informed him about the accident on his mobile phone and on that basis he lodged complaint. In my view, the occupant of the car Shri.Prahad has stated to the police about happening of the incident and in detail he stated to the police how the accident occurred, but police has not considered it, it shows that investigation is fishy. Shri.Prahad has stated before the Tribunal about happening of the incident. As per view of the Hon'ble Apex court in the case of *National Insurance Company Limited V/s. Chamundeswari & Ors. C.A. @ SPL(c) No.4705 of*

2019, weightage has to be given to the evidence before the Court and not to the contents of the FIR. The spot panchnama shows that the front portion of the car was damaged. It shows that dash was given to the car from front side and it supports the Claimant's case. Moreover, to prove the negligence of the driver of car, the driver of tempo did not enter into witness box. It is settled principle of law that if, defence is taken by the Insurance Company about negligence of driver of other vehicle, it has to be proved by cogent evidence. I do not see merit in the contention that accident occurred due to sole negligence or contributory negligence of the driver of car.

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

ORDER

- (i) Both Appeals are dismissed.
- (ii) The Claimant's in both Appeals are permitted to withdraw deposited amount alongwith interest thereon, if not withdrawn.
- (iii) In both Appeals the statutory amount alongwith interest be transferred to the Tribunal.

Parties are at liberty to withdraw it, as per Rules.

(iv) All pending Civil and Interim Applications in both Appeals are disposed of.

11. The learned counsel for the Appellant-Claimant in Appeal No.128 of 2017 submitted that the Claimant's have withdrawn entire award amount along with interest thereon so, no amount is remaining. His statement is accepted.

12. The learned counsel for the Claimant in Appeal No.51 of 2017 submitted that the Claimant Nos.5e and 6e, 5f and 6f have filed affidavit-in-reply along with affidavit that they are waiving their share in compensation amount. Considering the submission of learned counsel for Claimant's the share of these Claimants be adjusted in share of remaining Claimant's.

(SHIVKUMAR DIGE, J.)