

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

FIRST APPEAL NO. 336 OF 2018

IFFCO TOKIO General Insurance Co. }
Ltd., Thr. Its Officer Neeraj Kumar Jain }
 Having its Office at 209/6, Above Paras }
 Yamaha Showroom, Bhubhola Naka, }
 Sundar Nagar, Near Bari Colony, Thane, }
 Also at AFL House, 2nd Floor, Lok Bharati }
 Complex, Marol Maroshi Road, Andheri }
 (E), Mumbai-400 059. }

....Appellant

Versus

1. Mrs.Shobha Reynold Pareira }
 Age-40 years, }

2. Shoral Reynold Pareira }
 Age-13 years }

(Minor thr. Mother-Applicant No.1) }

3. Vanshit Reynold Pareira }
 Age-10 years }

(Minor thr. Mother-Applicant No.1) }

4. Mrs.Rojibai Francis Pareira }
 Age-69 years, }

All R/at Bhaigaon, Ambodimadi, Taluka- }

Vasai, District- Palghar }

5. Gitesh L. Gimonkar }
 (Owner of Motor Vehicle No.MH-48-K- }

45) }

R/at Room No.101, Swasti Gagan Vihar }

Complex, Achole Road, Nallasopara (E), }

Taluka-Vasai, District-Palghar }

....Respondents

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Mr.Rajesh Kanojia i/b Res Juris, for the Appellant.
Mr.Vilas Ramchandra More, for Respondent Nos.1 to 4.

CORAM : SHIVKUMAR DIGE, J.

DATE : 12th FEBRUARY 2024

ORAL JUDGMENT :-

. The issue involved in this Appeal is accident occurred due to contributory negligence of the deceased.

2. It is contention of the learned counsel for the Appellant that, the offending minibus was proceeding on the road due to some snag it stopped. When it was stopped on the road immediately deceased who was riding the motorcycle came from backside and gave dash to stationed bus. The accident occurred due to contributory negligence of the deceased, but this fact is not considered by the Tribunal. The learned counsel further submitted that, the owner of the offending bus deposed before the Tribunal about occurrence of the accident, but Tribunal has not considered the evidence. Hence, requested to allow the Appeal.

3. It is contentions of learned counsel for the

Respondent-Claimants that, the offending bus was parked on the road without putting indicators, signal and parking lights in on condition. The accident occurred at 12.45 a.m. midnight. There was dark, the deceased could not see parked bus and gave dash to it from back side. The learned counsel further submitted that, the Tribunal has observed that, the owner of the offending vehicle who examined himself before the Tribunal is brought-up witness as he did not inform the Police about the accident nor took injured in the hospital.

4. I have heard both learned counsel. Perused judgment and order passed by the Motor Accident Claims Tribunal ('The Tribunal' for short), Vasai.

5. It is Claimant's case that, on 23rd December 2014 at around 12.45 a.m., the deceased Reynold was riding on motorcycle bearing No.MH-04/AQ-9151 towards Buigaon from Babhola Naka. At the spot of accident the bus No.MH-48/K-0045 was stationed in the middle of the road without keeping on, any stop signal or indicators on. The deceased Reynold dashed the said bus from backside. He sustained grievous injuries and

died while taking treatment. To prove the negligence of the bus driver the Claimant's have examined Claimant No.1 Shobha. The Tribunal has observed that she was not eye witness to the incident. To prove its defence the Appellant-Insurance Company examined Gitesh Gimonkar, DW-1 at Exhibit-28. He has stated that he was owner of the offending minibus, on the day of incident he was proceeding behind that bus on motorcycle. He heard big noise from bus and also saw that the bus driver indicated to stop at left side and accordingly he stopped the bus. Thereafter, this witness went ahead of that bus and asked the driver the reason for stopping the bus. Driver told him that as he had heard a noise from inside the bus hence he had stopped it. Then he alongwith the driver of the bus were on the way to go to backside of the bus, then one motorcycle approached from backside of the bus and dashed to it from backside at right hand side. This witness further stated that, the said road was of the width facilitating two vehicles to pass simultaneously. He further stated that, he along with other persons, gathered at the spot, hospitalized the motor cyclist. This witness informed the police

about the accident. Police recorded his statement. This witness further stated that accident took place due to negligence of motorcycle rider. In cross-examination this witness admitted that he cannot produce the copy of his statement given before the police.

6. While dealing with the issue of negligence the Tribunal has observed that evidence of DW-1 shows that he was defending bus driver. The police paper does not disclose that DW-1 owner of the offending bus was present as an eye witness of the accident. DW-1 had neither lodged FIR of the said accident nor he did he hospitalized the injured. Hence his evidence as an eye witness of the accident is unreliable. In absence of the statement recorded by the Police, he is found as a brought up witness. I do not find infirmity in it.

7. In my view, DW-1 has stated that, the bus driver stopped the bus by giving indicator when he was going to stop that bus, but it appears that the such indicator was not in on condition, when bus was stopped. Though DW-1 is stating that he had informed the police about the accident. But his statement

given to police is not produced on record. It is contention of the learned counsel for the Appellant that, as per view of the Hon'ble Apex Court in the case of *National Insurance Co. V/s. Chamundeshwari & Ors.*¹, the evidence given before the Tribunal has to be considered. In my view the offence is registered against the driver of the offending bus for negligence then it is onus on the Appellant to rebut it. The Appellant could have examined Investigating Officer of the said crime to prove that (DW-1) owner of bus had given statement before the police or he had informed the police about accident. Happening of the accident is not disputed by the Appellant-Insurance Company. The accident occurred at 12.45 a.m. in midnight. There was dark and the offending bus was stationed on the road. The bus driver did not step into witness box, to prove the negligence of the deceased. Hence, I do not see merit in the contention that there was contributory negligence of the deceased in the said accident.

8. It is contention of the learned counsel for the Appellant that, the Tribunal has awarded Rs.2,35,000/- as

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consortium amount which is on higher side. As per view of Hon'ble Apex Court in case of *Magma General Insurance Co. Ltd. V/s. Nanu Ram*², each claimant is entitled for Rs.48,000/- as consortium amount, Rs.18,000/- for funeral expenses and Rs.18,000/- for loss of estate. The total comes to Rs.2,28,000/- if this amount deducts from the amount considered by the Tribunal Rs.2,35,000/-, it comes to Rs.7,000/-. It is an excess amount.

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

ORDER

- (i) The Appeal is partly allowed.
- (ii) The Appellant-Insurance Company is permitted to withdraw Rs.7,000/- along with proportionate interest out of the deposited amount.
- (iii) The Claimants are permitted to withdraw balance amount alongwith proportionate interest.
- (iv) The statutory amount along with interest be transferred to the Tribunal. Parties are at liberty to withdraw it.

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(v) All pending Civil and Interim Applications are disposed of.

(SHIVKUMAR DIGE, J.)