

(2015) 06 GUJ CK 0018
In the Gujarat High Court
Case No : F.A. No. 3926 of 2007

New India Assurance Co. Ltd.

APPELLANT

Vs

Minor Himaniben and Others

RESPONDENT

Date of Decision : 10-06-2015

Acts Referred:

Hindu Succession Act, 1956 — Section 15, 16
Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2015) 4 ACC 273 : (2016) 2 ALLMR 62

Hon'ble Judges : Harsha Devani, J.

Bench : Single Bench

Advocate : Vibhuti Nanavati, Advocate, for the Appellant; Hiren M. Modi, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.—This appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") at the instance of the Insurance Company is directed against the judgment and award dated 15th March, 2007 passed by the Motor Accident Claims Tribunal (Auxiliary), Vadodara in M.A.C. Petition No. 2360 of 1997. The facts giving rise to the present appeal are that the respondent Nos. 1 and 2 through their guardian and next friend Dipak Kanjibhai Patel, who is their maternal uncle, filed a claim petition under Section 166 of the Act claiming compensation of Rs. 20,00,000 against the appellant and the respondent Nos. 3 to 6 herein for the death of deceased Neetaben Vajubhai Umrethiya. It was the case of the claimants that Neetaben, mother of the claimants, was going on a Hero Honda motorcycle as a pillion rider on 16th November, 1997 at about 8.00 p.m. and the original opponent No. 1, namely, the respondent No. 3 herein was driving his Hero Honda motorcycle bearing No. GJ-11-F-7825 with full speed and in a rash and negligent manner on the road near Laxmi Petrol Pump. He suddenly applied the brakes for taking a turn to fill petrol without giving any side signal and, hence, there was an accident with the Fiat which was coming from behind, due to which their mother sustained

grievous, injuries and died while undergoing treatment. The claimants claimed total compensation of Rs. 20,00,000 under different heads. However, since the quantum of compensation is not subject matter of challenge in this appeal, it is not necessary to refer to the same in detail.

2. The Tribunal, after appreciating the evidence on record, was of the view that the respondent No. 3 was mainly responsible for the accident due to which, the deceased had sustained severe injuries and died. On the question of liability, the Tribunal held that the accident had occurred because of the rash and negligent driving of the opponent No. 1-driver of Hero Honda motorcycle bearing No. GJ-11-F-7825 (the respondent No. 3 herein) and, therefore, he was primarily liable to pay the compensation. The said vehicle belonged to the opponent No. 2-Jerambhai Ranchhodbhai Umrethiya (the respondent No. 4 herein), who was vicariously liable to pay the compensation to the claimants. The vehicle being insured with the opponent No. 3, that is, the appellant herein for the period from 23rd July, 1997 to 22nd July, 1998, the Insurance Company was liable to indemnify the insured. The Tribunal, accordingly, held the opponent Nos. 1 to 3, namely, the respondent Nos. 3 and 4 and the appellant herein, to be jointly and severally liable to pay the compensation to the claimants with interest and costs. Being aggrieved, the Insurance Company is in appeal.

3. Mr. V.P. Nanavati, learned Advocate for the appellant submitted that the question that arises for consideration is whether once it is found that the driver of the offending vehicle was solely negligent for the death of the deceased, who was his wife, whether the claimants would be entitled to claim compensation, the driver being the tortfeasor. It was argued that a tortfeasor cannot take advantage of his own wrong and as such, the claim petition ought to have been rejected on this ground alone. It was submitted that if the driver (who is also the father of the claimants) was solely responsible for the tortuous act, due to which the deceased expired, the claimants are not entitled to receive any compensation. The other contention raised by the learned Counsel was that the motorcycle was lying on the edge of the road and the Fiat was also found on the edge of the road; the road on which the accident occurred was considerable wide, viz. 22 feet and that the driver of the fiat should have maintained sufficient distance from the vehicle which was going ahead so as to prevent any mishap. It was submitted that there is no evidence that the driver of the Fiat was also going to fill petrol at the pump, nor is any hotel or lodge is situated near the petrol pump so as to warrant driving the Fiat on the edge of the road. Such circumstances clearly suggest that the driver of the fiat was responsible for the accident. However, since the Fiat car was uninsured, to take advantage of the situation, the opponent No. 1 is supporting the case of the claimants. It was submitted that in any case, there was contributory negligence on the part of the driver of the fiat and, hence, to that extent, the liability of the Insurance Company should be reduced. It was argued that the wife cannot claim indemnity from the Insurance Company for the tortuous act of her husband and that the Tribunal was not justified in awarding compensation to the claimants in the facts

of the present case.

4. Mr. Hiren Modi, learned Advocate for the respondent Nos. 1 and 2 - original claimants, submitted that the driver of the motorcycle had been examined by the Insurance Company as its witness and he has stated that the accident had occurred on account of his negligence. It was submitted that the claimants are the legal representatives of the deceased, and the husband of the deceased is only the driver and not the owner of the offending vehicle. It was pointed out that on the question of negligence, no other witnesses have been examined on behalf of the appellant and that the sole witness examined by it has stated that the accident had occurred on account of his negligence. It was submitted that in any case, even it were to be held that the driver of the Fiat car is also negligent, it would be a case of composite negligence insofar as the pillion rider is concerned. Therefore, if there are two tortfeasors, both of them are jointly and severally liable to pay the compensation. In support of his submissions, the learned Counsel placed reliance upon the decision of the Supreme Court in the case of *T.O. Anthony Vs. Karvarnan and Others*, , for the proposition that in case of composite negligence, each wrong-doer 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. Reliance was also placed upon the decision of the Supreme Court in the case of *A.P.S.R.T.C. and Another Vs. K. Hemalata and Others*, , wherein the Court has reiterated the principles laid down in its earlier decision in the case of *T.O. Anthony v. Karvarnan and Others* (supra). The decision of a Division Bench of this Court in the case of *Kusumben Vipinchandra Shah and Another Vs. Arvindbhai Narmadashankar Raval and Others*, , was cited for the proposition that in a case of composite negligence, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rule as to remoteness of damage, he is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty or contribution or indemnity as between those persons, though in any case he cannot recover in the whole more than his whole damages. 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. Mr. Modi submitted that therefore, qua the claimants, this being a case of composite negligence, it is open for them to recover the damages from all or any of the tortfeasors. Reliance was also placed upon an unreported decision of this Court in the case of *Minakshi alias Minaben Sureshbhai Patel and Others v. Ramdas Diwarsinh Thakore and Others*, ID (2013) ACC 15B (CN), rendered on 3rd April, 2013 in First Appeal No. 2720 of 2007, wherein the Court was dealing with a case of contributory negligence, wherein 40% negligence had been attributed to the motorcycle rider and 60% to the truck driver. The Court held that apportionment of the amount to be paid by the Insurance Company and other tortfeasors was not proper as the claimant was entitled to recover the said amount jointly and severally from all the opponents. It was, accordingly, urged that insofar as the claimants are

concerned, this is a case of composite negligence, even if it is a case of contributory negligence so far as the drivers of both the offending vehicles are concerned. Therefore, there is no question of apportionment of liability as both the wrong-doers are jointly and severally liable for the whole loss insofar as the claimants are concerned.

5. Mr. H.H. Patel, learned Advocate appearing on behalf of the respondent No. 6 adopted the submissions advanced by Mr. Hiren Modi, learned Counsel for the respondent Nos. 1 and 2 - claimants. He further submitted that from the evidence on record, it is apparent that no negligence has been attributed to the respondent No. 6 and that the entire liability is solely of the respondent Nos. 3 and 4, namely, the driver and the owner of the offending motorcycle. Reference was made to the contents of Exhibit-20, viz., the reply filed by the original opponent No. 5 in the proceedings before the Tribunal, wherein it is alleged that as rightly stated in the claim petition, it was the rider of the Hero Honda motorcycle who was riding the same in a rash and negligent manner and suddenly applied the brakes without giving any side signal at the turning on account of which, the accident had taken place. It was submitted that the facts on record clearly reveal that the accident had occurred solely on account of the negligence on the part of the rider of the motorcycle and hence, no liability can be fastened upon the driver or owner of the Fiat car and hence, the appeal qua them deserves to be dismissed.

6. In rejoinder, Mr. Nanavati, learned Counsel for the appellant submitted that a tortfeasor cannot be awarded compensation for the tortuous act committed by him. It was pointed out that in the present case the deceased was the wife of the motorcyclist and the claimants are his children, to submit that in the normal course, the father and the children would have filed a claim petition before the Tribunal. However, in the present case, the father being a tortfeasor, the minor children have filed the claim petition through their maternal uncle against the father who is the rider of the motorcycle and the owner and Insurance Company of the offending motorcycle as well as the owner and driver of the Fiat car. It was submitted that since a tortfeasor cannot claim damages for his own wrong, the claimants have adopted this mode by filing the claim petition through their maternal uncle since their father could not have filed a claim petition against him. It was submitted that therefore, merely because the claimants have approached through their maternal uncle, they would not be entitled to file a claim petition against their own father, as the wife cannot claim damages against her husband for his negligence. Therefore, the entire claim in respect of the negligence of the rider of the motorcycle ought to have been disallowed on the ground that a tortfeasor cannot take advantage of his own wrong. In support of his submission, the learned Counsel placed reliance upon the decision of a Division Bench of this Court in the case of *United India Insurance Co. Ltd. Vs. Jagatsinh Valsinh and Others*--> , wherein the claimant was held to be a tortfeasor. The Court observed that it is beyond comprehension as to how a tortfeasor can be awarded compensation for the tortuous act committed by him.

If the claimant sustained injuries and suffered disablement as a result of such injuries, he has to blame himself for it was his own negligence which caused these injuries. If the claimant was negligent, he cannot come forward and say "pay me compensation for my own negligence". It was submitted that therefore, the husband has purposely not joined himself as a claimant. It was argued that since the Fiat car was not insured, the claimants have sought to recover the entire amount only from the Insurance Company of the motorcycle. In support of his submission, the learned Counsel placed reliance upon the decision of the Supreme Court in the case of *New India Assurance Co. Ltd. Vs. Bismillah Bai and Others*, wherein the Tribunal had recorded a finding that the driver of the jeep was not driving the jeep rashly and negligently and he was not at fault and the accident occurred due to rash and negligent driving of the truck by its driver. The High Court reversed such finding so as to fasten the liability on the Insurance Company without assigning any sufficient and cogent reasons. The Supreme Court held that only because the truck was not insured, the same by itself did not mean that the Insurance Company can be held liable to reimburse the claim to the claimants where the liability had been incurred by the owner and driver of the truck and, therefore, no liability has been incurred by the driver and owner of the jeep concerned. It was submitted that in the present case, though the accident had occurred solely on account of the negligence on the part of the driver of the fiat car, the claimants have sought to make out a case that the accident had occurred on account of the negligence on the part of the rider of the motorcycle with a view to fasten the liability of payment of compensation upon the appellant - Insurance Company. It was submitted that the evidence on record suggests that the liability was solely on the driver and owner of the Fiat car and the liability cannot be shifted on the appellant-Insurance Company merely because the Fiat car was not insured.

6.1 In support of his submission the learned Counsel placed reliance upon the decision of this Court in the case of *Oriental Insurance Co. Ltd. Vs. Tulsiben Panalal Joshi and Others*, wherein a contention had been raised that the Insurance Company had not examined any witness from its side and as such, adverse inference is to be drawn against the Insurance Company. This Court held that once the Insurance Company had admitted that the truck was insured, the same was not required to be proved. Since the Insurance Company admitted that the truck was insured with it, there was no requirement for it to examine any officer to prove the insurance policy or the copy of the insurance policy. It was, accordingly, urged that the entire case against the Insurance Company has been made out only because the Fiat car was not insured. That upon proper appreciation of the evidence on record, it is apparent that it is the driver of the Fiat car who is responsible and as such, the appellant Insurance Company is required to be exonerated from the liability to pay any compensation.

7. Before adverting to the merits of the rival contentions, it would be necessary to refer to the evidence on record in some detail. A perusal of the claim petition shows that the same has been filed on behalf of two minors through their

guardian and next friend Dipak Kanjibhai Patel. It may be noted that the full names of the minors are not mentioned and that it is only their first names that are mentioned in the claim petition. The defendants in the claim petition are Vajubhai J. Umaretiya, driver of the motorcycle, Jerambhai Ranchhodbhai Umrethiya, owner of the motorcycle and the New India Assurance Co. Ltd., the insurer of the offending motorcycle. It appears that subsequently, the driver and the owner of the fiat car have been joined as defendant Nos. 5 and 6.

8. A perusal of the contents of the claim petition reveals that in the entire claim, there is not even a whisper to the effect that the defendant No. 1 is the father of the claimants. The cause title of the claim petition also does not give any indication as regards the name of the father of the minors so as to establish any link between the claimants and the defendant Nos. 1 and 2. However, the evidence on record reveals that the original opponent No. 1, namely, the rider of the motorcycle was the father of the claimants and the husband of the deceased Neetaben. Apparently therefore, the relationship between the claimants and the rider of the motorcycle is sought to be suppressed in the claim petition.

9. On behalf of the claimants, Dipakbhai Kanjibhai Patel, guardian of the minors has been examined at Exhibit-27. He has deposed to the effect that with a view to see that in case his brother-in-law remarries, his nephew and niece may not have to face problems, he has become the guardian of the minors in the claim petition; that he is taking care of the minors, their maintenance and care, etc. He has further deposed that the defendant No. 1 was driving the motorcycle with speed and upon reaching the petrol pump, without giving any side signal, with a view to fill petrol in the motorcycle, he had applied the brakes and tried to turn towards the petrol pump at which point of time, a fiat car came from the back and collided with the right side of the Hero Honda motorcycle as a result whereof, the deceased Neetaben sustained serious injuries. There was a dent on the petrol tank of the Hero Honda motorcycle, the mudguard was bent, the number plate was broken, the mirror glass was broken and the foot-rest on the right side was compressed and the trunk affixed on the side was broken. In his cross-examination at the instance of the learned Advocate for the Insurance Company, the witness has admitted that he was not an eye-witness; that his brother-in-law, Vajubhai had remarried in 1998. He has also admitted that no steps have been taken to get him appointed as the guardian of the minors under the Guardianship Act and that he has not witnessed the incident and he does not know who had caused the accident. He has further deposed that he lodged the first information report; that his brother-in-law has a shop and has a good income and is in a position to maintain his children; that the relationship between him and his brother-in-law is good and that he had informed the police that the accident had been caused by the Fiat. He has also admitted that his sister's mother-in-law used to take care of the children and that when she expired, her daughter was five years old and son was two years old. He has also admitted that when his sister was alive, his brother-in-law was maintaining their children and even today, he is in a position to maintain them.

10. From the deposition of the said witness, it is apparent that he is not an eye-witness to the incident, but he had lodged the first information report alleging negligence on the part of the driver of the Fiat car. From the deposition of the said witness, it is further clear that he has not been appointed as a guardian under the Hindu Minority and Guardianship Act, 1956 or under the Guardians and Wards Act. It is further revealed that the respondent No. 3, who is the father of the claimants, is capable of maintaining his children.

11. The claimants have also examined one Ramjibhai Dhanjibhai, at Exhibit-36. He has deposed that on 16th November, 1997, he was coming out of the petrol pump after getting petrol filled. At that time, a Hero Honda motorcycle passed by in full speed and a Fiat car was coming behind it and the motorcycle rider did not give any signal or sign with his hand and all of a sudden abruptly tried to take a turn, at that time, the driver of the Fiat car made all efforts to save the motorcycle and applied the brakes, but the lights as well as the front portion of the Fiat dashed against the rear part of the motorcycle and on that account, the pillion rider, a woman aged 35 to 40 years, was thrown away and fell down, thereby sustaining head and other injuries. He had, therefore, rushed to help them and had helped in sending the injured lady to the hospital. In his cross-examination, it is revealed that the road was 22 feet wide and on the north, there is the Sabalpur-Rajkot Highway and on the south, one can go towards Junagadh. On the east after the road, there is a college and towards the west, there is a company which is closed down. The petrol pump is situated towards the west. There are different entry and exit routes. The witness was coming out after filling petrol and was going towards Rajkot. The road where the accident occurred was going from north to south. When he came out, the Fiat car was going to fill petrol. He has admitted that the bumper side has dashed against the motorcycle and the rider of the Hero Honda motorcycle was coming out after getting the petrol filled. He has further admitted that the Fiat car driver had committed the accident. He has further stated that he was not present at the site but had left after filling the petrol and that when the Panchkyas was done, he was not present. He has deposed that he has not lodged the first information report and the police have not recorded his statement.

12. From the deposition of this witness, it is revealed that according to him, the rider of the motorcycle was coming out of the petrol pump after getting the petrol filled at which point of time, the accident had taken place. The deposition of the said witness is contrary in terms, because on one hand, he says that the motorcycle was going in full speed and the fiat car was coming behind it and the motorcycle rider without giving any side signal, suddenly applied the brakes to take a turn and that the driver of the fiat car despite making efforts, could not avoid the accident; whereas on the other hand, he says that the rider of the motorcycle was coming out after filling the petrol, whereas the Fiat car was going to fill the petrol. If that be the case, there is no question of the rider of the motorcycle driving in full speed or the Fiat car coming from behind it. Having regard to the fact that there are different entry and exit routes, when the

motorcyclist was coming out from the petrol pump and the Fiat car was entering into the petrol pump, the question of the fiat car coming from behind the motorcycle would not arise. Besides, in his cross-examination, the said witness has admitted that the accident had been caused by the driver of the Fiat car.

13. On behalf of the appellant-Insurance Company, the original defendant No. 1, viz., the respondent No. 3-Vrajlal Jerambhai Umrethiya, has been examined at Exhibit-53. He has deposed that he was driving the Hero Honda Motorcycle bearing No. GJ-11-F-7825 on the day of the incident. That Jerambhai Ranchhodbhai Umrethiya is its owner and that he is the defendant No. 2 and his father. On the date of the incident, he was going with his wife and son to fill petrol and that he has to travel 5 to 6 kilometres from his residence to reach Dolatpura village. He has admitted that there is a separate entry and exit to the petrol pump but has denied that when he was going to fill petrol, he had dashed with the bumper of the fiat. He has stated that the Fiat had dashed behind him and his wife had fallen down from the pillion. He has denied that he was riding the motorcycle with speed and has stated that since the petrol was exhausted, he had gone to fill petrol when there was a collision with the bumper of the fiat car. That the Fiat had collided on the rear side and his wife had fallen down from the back. He has also deposed that his motorcycle was damaged. He has further deposed that Dipakbhai is his brother-in-law and is serving at Junagadh since 15 to 20 years. It was he who had lodged the first information report in connection with the incident. He has further deposed that he had got married three months after the death of his wife and that his children were living with Dipakbhai and are going to school from there and Dipakbhai bears all their expenses including school fees. The children are studying in a Gujarati medium school and Dipakbhai pays the school bus fees. He has stated that he is not aware that it is the father who is the guardian of the children.

14. In his cross-examination, this witness has stated that when Gitaben (sic Nitaben) expired, she was sitting behind him and he was driving the motorcycle. It was a highway road and was wide and straight. He has denied the suggestion that he was driving the motorcycle with speed. He has stated that since the petrol was exhausted, he was going to fill the petrol and that he had not given any signal nor did he signal with his hand. That he had also not seen in the mirror as to whether any vehicle was coming from behind. He has stated that it is true that he had turned at the turning and, hence, he had applied the brakes and the Fiatwala had also applied the brakes but had slightly dashed with his vehicle and Nitaben (sic. Gitaben) was thrown down and he had sustained minor injuries. He has further deposed that on account of the death of Nitaben, he had married Gitaben. Nitaben (sic Gitaben) is living with him. He has further stated that when a second wife comes, she may not take care of his children and hence, he had kept his children with his brother-in-law and had given all the guardianship rights to his brother-in-law. That his brother-in-law is taking good care of both his children and is educating them and is providing them with all necessities of life. That his parents are alive and that if Dipakbhai acts as

guardian of his children, he has no objection. He has further stated that he is sure that Dipakbhai will not misuse the compensation amount and that there is no dispute regarding guardianship of the children.

15. From the deposition of this witness, it is apparent that he was going to the petrol pump specifically to fill petrol in his motorcycle as the same was exhausted. Though on the one hand he has stated that he was not driving the motorcycle with speed, he has accepted that he had taken turn and applied brakes at the turning, without giving any signal either from the motorcycle or with his hand. This witness has, therefore, clearly admitted his own negligence. It cannot be gainsaid that ordinarily, no witness would come forth and admit his own negligence in an accident of this kind, more so, when the vehicle was a smaller vehicle and the other vehicle involved was a bigger vehicle. However, in the facts of the present case, as is apparent from the rival submissions, the Fiat car was not insured. Evidently therefore, all the witnesses have deposed in a manner so as to establish that the accident had occurred solely on account of the negligence on the part of the rider of the motorcycle so as to fasten the entire liability on the Insurance Company of the motorcycle. The record is, therefore, required to be scrutinized carefully.

16. A perusal of the first information report which had been lodged by Dipakbhai Patel reveals that the same has been lodged on 16th November, 1997, that is, on the very same day on which the accident took place. In the first information report, it has been stated that in the evening at about 7.00 to 7.15, near Laxmi Petrol Pump, a fiat car bearing No. GJ.1.6291 had rammed into the motorcycle from the rear due to which, his sister had fallen down and had sustained injuries on her head. That his nephew Montu had not sustained any injuries and that his brother-in-law Vijaykumar was scared on account of the accident and hence, he is not in a position to give any reply. In the first information report, it is alleged that the accident had occurred on account of the driver of the Fiat car driving the same in full speed and in a rash and negligent manner.

17. Thus, while Dipakbhai Patel, in his deposition, has stated that the accident had occurred on account of the negligence of the rider of the motorcycle and in the First Information Report, which was lodged by him at the first point of time, he has stated that the accident had occurred due to the rash and negligent driving on the part of the driver of the fiat car.

18. The Panchnama of the scene of incident reveals that the place where the accident has taken place was a main road. The road was 22 feet wide and touching its eastern end, there was a black coloured Hero Honda motorcycle, the right wheel whereof was touching the edge of the road; the headlight on the front had broken and was lying separately; the glass of the mirror on the right side was broken and the foot-rest on the right side was bent; the mud-guard was also bent and the number plate was broken; there was a dent on the petrol tank of the motorcycle. Behind the wheel, diesel was spilled and water was also spilled and blood stain about one foot in perimeter was seen near the road. On the

northern side of the road at a distance of about four feet, there was a metal road and at a distance of one foot from the blood stain, a white coloured fiat car was lying bearing No. GJ.1.6291. The front wheel was on the north side of the road and the left wheel was on the south of the metal road. The bumper of the Fiat was bent and the bonnet of the car was compressed. The headlight was bent and compressed. There was a fresh dried blood on the bonnet and the radiator was bent and the water had spilled out.

19. On a perusal of the contents of the Panchnama of the scene of incident, it is apparent that the fiat car had not dashed slightly with the motorcycle, but appears to have collided with the motorcycle with intensity due to which, considerable damage had been caused to the motorcycle.

20. In the backdrop of the aforesaid evidence which has come on record that the question of negligence of the respective drivers of the motorcycle and the Fiat car, is required to be examined.

21. From the evidence which has been recorded as noted above, it is apparent that the driver of the motorcycle was specifically going to the petrol pump for the purpose of filling the petrol. In the normal course, therefore, there would be no question of his suddenly applying the brakes for the purpose of turning towards the petrol pump. Besides, from the deposition of Ramjibhai Dhanjibhai, who is stated to be an eye-witness, the rider of the motorcycle was coming out of the petrol pump after filling the petrol at which point of time, the fiat car collided with the motorcycle. The said witness had also stated that the accident had been caused by the driver of the Fiat car. The First Information Report also reveals that the version given by Dipakbhai at the first point of time was that the accident had occurred on account of the negligence on the part of the driver of the Fiat car. Therefore, there appears to be some force in the contention raised by the learned Counsel for the appellant that the entire burden is sought to be thrown on the rider of the motorcycle because, the fiat car was not insured. On the evidence which has come on record, in the opinion of this Court, it cannot be said that the rider of the motorcycle was solely responsible for causing the accident. Even if the version given by the witnesses that the motorcyclist was riding the motorcycle in full speed and the Fiat car was coming behind it, were to be accepted, even then, when the motorcycle rider had suddenly applied the brakes, if the driver of the Fiat car was driving the car carefully, he would have maintained a safe distance, in which case, the accident could have been averted. Besides, the road was 22 feet wide and hence, there was ample space for the driver of the fiat car to drive at a reasonable distance from the motorcycle. Moreover, having regard to different versions which are coming on record, it appears that the witnesses have deposed with a view to fasten the entire liability on the appellant - Insurance Company. Therefore, in the opinion of this Court," having regard to the totality of the evidence which has come on record, the entire Liability cannot be fastened on the rider of the motorcycle and it can be stated that both, the rider of the motorcycle as well as the driver of the Fiat car

were equally negligent. Therefore, contributory negligence on the part of the rider of the motorcycle as well as of the driver of the Fiat car would be to the extent of 50%.

22. The next question that arises for consideration is that the claimants are third persons and have not contributed to the cause of accident and hence, this being a case of composite negligence on the part of the driver of the Fiat car and the rider of the motorcycle, whether the compensation payable to the claimants can be apportioned.

23. The aforesaid issue is no longer *res Integra* inasmuch as, the Supreme Court in the case of *T.O. Anthony v. Karvarnan and Others* (supra) has held thus:

"6 "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 wrong-doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong-doer 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 wrong-doer, 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 reason of the negligence on his part but the damages recoverable by him in respect of the injured stands reduced in proportion to his contributory negligence."

24. This Court in the case of *Kusumben Vipinchandra Shah v. Arvindbhai Narmadashankar Raval* (supra), has held that 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. The Court further held that any finding given by the Tribunal regarding apportionment of liability would be tentative for the purpose of the subsequent proceeding which may be Wed by the defendant tortfeasor against the other tortfeasor who was not a party to the first proceeding. But this tentativeness for the purpose of contribution between two joint tortfeasors, does not at all affect the right of plaintiff-claimant to recover full damages from the defendant tortfeasor against whom the first proceeding is filed. Therefore, once the Court or the Tribunal comes to the conclusion that the case is one of composite negligence, insofar as the claimants are concerned, the damages cannot be apportioned and they would be entitled to recover entire compensation from all or any of the joint tortfeasors.

25. The next and significant question that arises for consideration is whether in a case where the husband is a tortfeasor, the heirs of the wife can claim damages.

In the opinion of this Court, in the present case, the respondent No. 3 - original defendant No. 1, who is the husband of the deceased being tortfeasor, would not be entitled to file a claim petition as a tortfeasor cannot make a claim against himself. However, the minor children can certainly file a claim petition.

26. At this juncture, reference may be made to the provisions of Section 166 of the Motor Vehicles Act. The proviso to Section 166 says that where all the legal representatives of the deceased have not been joined in any such application for compensation, the application shall be made, on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. In the present case, the respondent No. 3 original defendant No. 1 is a legal representative of deceased Nitaben. Therefore, it was incumbent upon the claimants to join the respondent No. 3 as a claimant. It appears that since the respondent No. 3 had been joined as a defendant he has not been joined as a claimant in the claim petition. Nonetheless, having regard to the fact that the respondent No. 3 is a legal representative of deceased Nitaben and is a party in the claim petition, even if he has not made any claim or waived his share in favour of the claimants, while apportioning the compensation, the share of the respondent No. 3 would also be required to be determined. It is only thereafter, in case of waiver on the part of the respondent No. 3 that the amount would go to the other claimants. Therefore, in all, there would be three claimants, namely, two minor children and the respondent No. 3 driver of the motorcycle. Under Section 15 of the Hindu Succession Act, 1956, the property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16, firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband. Therefore, the husband as well as the children are entitled to equal shares in the property of the female Hindu dying intestate. Thus, both the claimants as well as the respondent No. 3 - husband, would be entitled to an equal share in any compensation that may be awarded on account of the death of deceased Nitaben.

27. At this juncture, reference may be made to the decision of this Court in the case of Pravinkumar Vallabhdas and Others Vs. Chhotalal Parmanandas and Co. and Others, , wherein the Court has held that an application made by one or more heirs of the deceased is maintainable under Section 110-A of the Motor Vehicles Act, even if other heirs are not impleaded and even in such a case, the power of the Tribunal is not limited to awarding compensation in favour of applicants or to the extent of their shares and that a legal representative of the deceased applying for compensation and getting the same will hold it not only on his own behalf but also as a trustee for other legal representatives entitled to a share in the compensation. Therefore, even if the respondent No. 3-original opponent No. 1 is not impleaded as a claimant, the other claimants would hold the compensation to the extent of his share as trustee on his behalf.

28. In the facts of the present case, on the evidence which has come on record,

the respondent No. 3 - husband being a tortfeasor would not be entitled to file a claim petition against himself. But he being an heir, to the extent of his share, the claim would not be maintainable. Therefore, after determining the quantum of compensation, the extent of the share of the husband/rider of the motorcycle should be determined and the compensation awarded to the other heirs should be reduced to that extent.

29. In the present case, the Tribunal has awarded compensation of Rs. 14,29,000 with interest at the rate of 9% per annum from the date of the claim petition till December, 2000 and, thereafter, at the rate of 8% per annum up to realization. In the present case, the respondent No. 3 being a tortfeasor would not be entitled to file any claim petition and hence, to the extent of his share in the compensation, the claim would not be maintainable.

30. As observed hereinabove, this Court has held both the driver of the fiat car as well as the rider of the motorcycle liable to the extent of 50%. The deceased Neetaben had in all three legal representatives, namely, two minor children-claimants and the respondent No. 3-rider of the motorcycle. Therefore, out of the compensation awarded by the Tribunal, one-third is required to be deducted towards the share of the respondent No. 3 and the compensation payable to the respondent Nos. 1 and 2 - claimants would be required to be reduced to that extent. The Tribunal has awarded Rs. 14,29,000. One third thereof would come to Rs. 4,76,333. Deducting one-third out of the total amount of compensation, the claimants would be entitled to a total compensation of Rs. 9,52,667 (Rs. 14,29,000 - Rs. 4,76,333). All the original opponents, that is the appellant and the respondent Nos. 3 to 6 herein would be jointly and severally liable to pay the above compensation to the respondent Nos. 1 and 2 - claimants. However, in case the entire compensation is recovered from the appellant - Insurance Company, the present judgment shall be treated as a decree between the appellant and the respondent Nos. 5 and 6, to the extent of the liability of the respondent Nos. 5 and 6. It would be open for the appellant - Insurance Company to institute execution proceedings against the respondent Nos. 5 and 6 in case the entire amount is recovered from it by treating the present judgment as a decree in its favour and against the respondent Nos. 5 and 6 herein. The appeal is, accordingly, allowed in the aforesaid terms and the impugned judgment and award shall stand modified accordingly. There shall be no order as to costs.