IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD

FIRST APPEAL NO. 260 OF 2002

New India Assurance Company
Limited Through its Manager,
Adalat Road, Aurangabad. **....Appellant.**

Versus

1) Rukhmanbai w/o. Rangnath Kadam,
Age 40 years, Occu. Household,
R/o. Chinchkheda Khurd,
Tq. Kannad, Dist. Aurangabad.

2) Jijabai w/o. Sainath Mandale,
Age 35 years, Occu. Household,
R/o. Amba, Tq. Kannad,
Dist. Aurangabad.

3) Shobhabai w/o. Vithal Dhone,
Age 30 years, Occu. Household,
R/o. Wadot Chatta, Tq. Kannad,
Dist. Aurangabad.

4) Sow. Padmabai w/o. Prabhu Vetal,
Age 28 years, Occu. Household,
R/o. Salegaon, Tq. Kannad,
Dist. Aurangabad.

5) Kisan s/o. Deorao Ghuge,
Age Major, Occu. Agri. & Business,
R/o. Mehgaon, Tq. Kannad,
Dist. Aurangabad.

6) Bhausaheb s/o. Kisan Ghuge,
Age 25 years, Occu. Driver,
R/o. As above.

7) Rambhau s/o. Bajirao Ghuge,
Age Major, Occu. Driver,
R/o. As above. **....Respondents.**

Mr. S.G. Chapalgaonkar, Advocate for appellant.
Mr. S.R. Deshpande, Advoate for respondent Nos. 1 to 4.
Mr. D.K. Dagadkhair, Advocate for respondent Nos. 5 to 7.

CORAM : T.V. NALAWADE, J.
DATED : 2nd December, 2015.

JUDGMENT :

1) The appeal is filed by Insurance Company against the judgment and award of Claim Petition No. 297/1997, which was pending before the Claims Tribunal, Aurangabad. Only on the ground of liability of the Insurance Company under the policy, the decision is challenged. Heard the learned counsel for Insurance Company, the learned counsel for owner and the learned counsel for claimants.

2) It was the case of original claimant, mother Shantabai that deceased Balu was his son. He was aged about 18 years. He was making monthly income of Rs. 2400/- and she was depending on deceased for livelihood. She had contended that the deceased was working as a labour with respondent No. 1 - Kisan Ghuge and at the relevant time, he was returning in the tractor belonging to respondent No. 1. It was specifically contended that the deceased was sitting by the side of driver

and due to rash and negligent driving of the tractor driver, the deceased fell and came under the wheels of tractor and died. Respondent No. 1 - Kisan Ghuge is the owner of the vehicle and the vehicle was insured with respondent No. 4.

3) Respondent No. 4 filed written statement. The Insurance Company contended in written statement at para No. 6 that the claimants need to prove the liability of Insurance Company in terms of insurance policy. It was also contended that the driver was not holding valid and effective license and so, there was breach of conditions of policy. No written statement was filed by the owner or respondent Nos. 2 and 3, who were joined as drivers.

4) During pendency of the Claim Petition, the mother died and sisters of the deceased came on the record and prosecuted the matter. Substantive evidence was given by one sister that the deceased was sitting on the tractor at the relevant time.

5) The Insurance Company examined its Officer, Sanjay Moholkar for proving the policy and policy is proved as Exh. 47. He gave evidence on breach of conditions of policy also. The

policy shows that only tractor was insured and there was cover to the driver only. The police record is also consistent with this case.

6) The learned counsel for Insurance Company placed reliance on the cases reported as **2005 (4) Mh.L.J. 773 [New India Assurance Company Ltd. Vs. Diwakar s/o. Daulatrao Rohankar and Ors.]** and **2015 (1) Mh.L.J. 827 [New India Assurance Company Ltd. Vs. Lilabai Shrimant Missal and Ors].** In the first case, this Court held that the Insurance Company was not statutorily required to insure passengers present on the tractor and so, it cannot be held liable to pay compensation. In the second case, this Court has considered the law developed and has held that when it is 'Act only Policy', it does not cover risk to gratuitous passengers. It is also held that if owner of a private vehicle want to cover the risk of passengers of a private vehicle, he must pay premium for covering such risk. Considering the nature of vehicle involved in the present matter, it was not possible to cover the risk of one person sitting by the side of driver on the tractor. No such risk was covered. In view of these circumstances, the Tribunal ought not to have fastened the liability on Insurance Company. It was the case of no coverage of risk to the deceased.

7) The learned counsel for respondents placed reliance on reported case like **AIR 2007 SUPREME COURT 1474 [Smt. Munjuri Bera Vs. Orintal Insurance Co. Ltd.]** on the entitlement to claim compensation. In that case, married daughter had filed proceeding and it was held that legal representatives can prosecute the matter, but the entitlement needs to be considered. Another case of Madhya Pradesh High Court reported as **ACJ-2001-0-364 [Piraniya Vs. Makhan Alias Makhan Lal Kachhi]** was cited. The facts show that the right to prosecute the matter by the legal representatives was considered and the legal representatives were allowed to prosecute the matter. These cases were cited and submission was made by the learned counsel for the owner that the sisters cannot get the compensation. This Court has already held that the claim was made by the mother of the deceased and during pendency of the matter, she died and so the matter was prosecuted by the sisters of the deceased. The Tribunal has considered the entitlement of the mother and accordingly, compensation is calculated. Thus, there is no force in this submission. Further, the decision was not challenged by the owner.

8) The case reported as **AIR 2007 SUPREME COURT 1971 (1) [Oriental Insurance Co. Ltd. Vs. Brij Mohan and Ors.]** was also cited for respondent owner. In that case, when a labour had slipped from trolly attached to the tractor, as a special case, the Apex Court directed the Insurance Company to satisfy the award and right was given to realize the amount from the owner of the tractor and trolly. The extraordinary jurisdiction under Article 142 of the Constitution was used by the Apex Court. Such order is not possible from this Court. In the case reported as **2008 (1) LJSOFT (S.C.) 17 [United India Insurance Company Ltd. Vs. Serjerao and Ors.],** the trailer was attached to the tractor and the injured was travelling in the trailer. In this case, the Apex Court referred the case reported as **2007 (7) SCALE 753 [Oriental Insurance Company Ltd. Vs. Brij Mohan and Ors.]** and held that the Insurance Company had no liability. Thus, this case can be used by the Insurance Company. The facts of the cases cited for owner were different and the insurance of coverage to the persons travelling in the trailer was not disputed.

9) The learned counsel for owner placed reliance on the some reported cases, which are as under :-

(i) LAWS (SC)-1985-11-4 SUPREME COURT OF

INDIA [Melepurath Shankunni Ezhuthassan Vs. Thekittil Geopalakutty Nair],

(ii) 1989 (1) Bom.C.R. 673 [Maimuna Begum wd/o. Abdul Razzaque Vs. Taju s/o. Ahmed Khan and Ors.],

(iii) AIR 1988 SUPREME COURT 506 [M. Veerappa Vs. Evelyn Sequeira and Ors.], and

(iv) AIR 1969 CALCUTTA 394 (V.56 C 67) (1) [Piriska Rozario and Ors. Vs. The Ford Foundation and Anr.].

These cases are on different point and it is already observed that the legal representatives of the deceased mother were entitled to prosecute the matter. Right of mother was vested right. These cases are of no help to the owner. So, the order needs to be made in favour of Insurance company as this Court holds that Insurance Company is not liable to pay anything and following order is made.

O R D E R

1. Appeal is allowed so far as the liability of the Insurance Company is concerned. The judgment and award of the tribunal is modified as under :-

(i) The claim petition as against the Insurance Company stands dismissed.

(ii) The respondent Nos. 1 and 2 from the Claim Petition do jointly and severally pay the amount awarded by the tribunal which is Rs. 1,08,000/- on the principle of fault with interest at the rate of 9% which will be payable from the date of petition.

(iii) The amount of Rs. 80,000/- which is already paid by the Insurance Company can be recovered from the owner, respondent No. 1 with interest at the rate of 9% p.a. and the interest will be recoverable from the date of depositing of the amount by the Insurance Company till the date of reliazation of that amount.

(iv) The amount, if any, which is deposited by the Insurance Company in the Tribunal and which is not disbursed is to be returned to the Insurance Company.

2. Award is to be prepared accordingly. The Insurance Company will be entitled to use the present award for recovering the amount.

[T.V. NALAWADE, J.]

ssc/