IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

First Appeal No. 321 of 2003

1) Laxmibai w/o Murlidhar Phad,
Age 50 years,
Occupation: Household,
R/o Near Bus Stand, Parli,
Taluka Parli, District Beed.

2) Murlidhar Dnyanoba Phad,
Age 53 years,
Occupation : S.T. Conductor,
R/o As above, now at
Patoda S.T. Bus Depot,
Taluka Patoda, District Beed. .. **Appellants.**

Versus

1) Shalubai Rajaram Phad,
Age 31 years,
Occupation : Household,
R/o Saudana, Taluka Parli
Vaijnath, District Beed.

2) Dnyanoba Rajaram Phad,
Age 14 years,
Occupation : Minor,
under guardianship of
respondent No.1.

3) Akkatai d/o Rajaram Phad,
Age 13 years, minor,
under guardianship of
respondent No.1.

4) Sonna d/o Rajaram Phad,
Age 11 years, minor,
under guardianship of
respondent No.1.

5) Vijaya d/o Rajaram Phad,
Age 11 years, minor,
under guardianship of
respondent No.1.

6) National Insurance Co. Ltd.
Through its Divisional Manager,
Office of Hazari Chamber,
Station Road, Aurangabad. .. **Respondents.**

Shri. Vivek Bhavthankar, Advocate, for appellants.

Shri. Mohit Deshmukh, Advocate, holding for Shri. S.G. Chapalgaonkar, Advocate, for respondent Nos.1 to 5.

Shri. D.V. Soman, Advocate, for respondent No.6.

With

First Appeal No. 234 of 2004

1) Shalubai w/o Rajaram Phad,
Age 26 years, Occupation : Household,
R/o Saudana, Taluka Parli
Vaijnath, District Beed.

2) Dnyanoba s/o Rajaram Phad,
Age 9 years, minor,
under guardianship of
appellant No.1.

3) Akkatai d/o Rajaram Phad,
Age 7 years, minor,
under guardianship of
appellant No.1.

4) Sonna d/o Rajaram Phad,
Age 5 years, minor,
under guardianship of
mother - appellant No.1.

5) Vijaya d/o Rajaram Phad,
Age 5 years, minor,
under guardianship of
mother - appellant No.1. .. **Appellants.**

Versus

1) Laxmibai w/o Murlidhar Phad,
Age 45 years, Occupation: Hotel,
R/o Near Bus Stand, Parlivaijnath,
Taluka Parli Vaijnath, District Beed.

2) Murlidhar s/o Dnyanoba Phad,
Age 40 years,
Occupation : S.T. Conductor,
R/o. Parli Vaijnath,
Taluka Parli Vaijnath, Dist. Beed.

3) National Insurance Co. Ltd.
Through its Divisional Manager,
Office at Hazari Chambers,
Station Road, Aurangabad. .. **Respondents.**

Shri. Mohit Deshmukh, Advocate, holding for Shri. S.G. Chapalgaonkar, Advocate, for appellants

Shri. Vivek Bhavthankar, Advocate, for respondents 1 & 2.

Shri. V.N. Upadhye, Advocate, for respondent No.3.

CORAM: T.V. NALAWADE, J.

DATE : 8th DECEMBER 2015

JUDGMENT:

1) Both the appeals are filed against the judgment and award of Claim Petition No.24/2000 (Old No.21/1996) which was pending before Motor Accident Claims

Tribunal, Ambajogai. The Tribunal has exonerated the insurance company and the owner and driver of the offending vehicle only are made liable to pay compensation and so decision is challenged by the original claimants in Appeal No.234/2004. The other appeal viz. Appeal No.321 of 2003 is filed by the owner as the liability is fastened on her to pay the compensation. Heard both the sides.

2) The fact of the accident is not disputed. It is the case of the owner that the vehicle, jeep was handed over to deceased Rajaram Phad on that date as he was working as driver with the owner and this jeep met with an accident. Thus, it is the case of the owner that Rajaram himself was driving the vehicle. Proceeding was filed against owner Laxmibai (respondent No.1) and the driver Murlidhar (respondent No.2), who is the husband of respondent No.1 and also against the insurance company.

3) Both sides gave evidence. The claimants have no personal knowledge and they relied on the evidence of one witness like Pandit Murkute. He gave evidence that on that day the deceased Rajaram and Murlidhar,

respondent No.2, had come to him in the said jeep and Murlidhar was on driver's seat. In rebuttal Murlidhar has examined himself and owner Laxmibai is also examined. Murlidhar has tried to say that on that date he was on duty at other station and so it was not possible for him to go to Parali and drive the vehicle. The owner examined one Sunil Shinde to show that on 20-11-1995 Murlidhar was on duty. The certificate issued by his office, MSRTC, is proved at Exhibit 63. Exhibit 63 is to the effect that on 20-11-1995 Murlidhar was on duty from 7.00 a.m. to 15.45 hours. However, evidence of Sunil, employee of the MSRTC further shows that from Patoda there is bus to Parali via Beed and Telgaon at 4.00 p.m. Thus there was bus available for Murlidhar for going to Parali. There is one more circumstance that Murlidhar did not give report in respect of the accident to police when it was their duty under section 134 of the Motor Vehicles Act. Police also formed opinion that Murlidhar was driving the vehicle at the relevant time and charge sheet was filed against him. There was no reason for the claimants to make false contentions that Rajaram was not driving the vehicle at the relevant time. On preponderance of probability the

Tribunal has held that Murlidhar was driving the vehicle.

4) Murlidhar was not having valid, effective driving licence to drive four wheeler. He was working as conductor in MSRTC. Thus there was clear possibility that due to this circumstance, defence of aforesaid nature was taken. In view of these circumstances, this Court holds that it is not possible to interfere in the finding given by the Tribunal that Murlidhar was driving the vehicle. Murlidhar has admitted in his cross examination that he was not having licence to drive four wheeler at the relevant time. Thus breach of condition of policy is also proved.

5) Evidence is given by the claimants that deceased was earning monthly Rs.1500/- and he was getting daily allowance of Rs.25/-. The Tribunal has presumed the monthly income of deceased as Rs.1500/-. Even under schedule given to Section 163-A of the Motor Vehicles Act notional income could have been presumed in respect of unskilled worker. Deceased was skilled worker and so the Tribunal has not committed mistake in presuming that the monthly income was around Rs.1500/-.

One third amount is deducted for personal expenses of the deceased and it is held by the Tribunal that there is monthly loss of Rs.1000/- to the claimants who are dependents. 17 multiplier is used for calculating the compensation. Amount of Rs.2,04,000/- is given on the ground of loss of dependency and amount of Rs.2000/- is given under the head of funeral expenses. Total Rs.2.11 lakh is awarded by the Tribunal. This is meagre amount in view of the fact that the deceased was skilled worker and he was having driving licence of four wheeler. There is no possibility to interfere on the point of quantum also.

6) The other challenge to the decision of the Tribunal is that the insurance company is not made to pay first to the claimant. Learned counsel for the claimants placed reliance on a case reported as **2013 (6) Mh.L.J. 1** (Supreme Court) **(S. Iyyapan v. United India Insurance Co. Ltd.)**. At paragraphs 17 and 18 the Apex Court has laid down that even when there is breach of condition of policy, in view of provisions of the Motor Vehicles Act, the insurance company needs to make payment first to the third party and it can be allowed to

recover the amount from owner if insurance company has proved breach of condition of policy. It can be said that it is very difficult for the claimant to recover the amount from owners when they are not in a position to pay the compensation immediately. Learned counsel for the insurance company placed reliance on a case reported as **AIR 2006 SC 3440 (National Insurance Co. Ltd. v. Kusum Rai)**. The Apex Court has referred to the case of **Nanjappan [2005 SCC (Cri) 148]** wherein some procedure was laid down before making disbursement of the amount deposited by the insurance company if insurance company has failed to prove breach.

7) In the present case, the accident took place in the year 1995 and till today the claimants could not get anything. The owner also challenged the decision. In view of these circumstances, this Court holds that disbursement of the amount needs to be made and steps can be taken against the insurance company as observed by the Apex Court in the case cited supra after making the disbursement.

7) In the result, following order is made :

(A) First Appeal No.321 of 2003 is dismissed.

(B) First Appeal No.234 of 2004 is allowed. The judgment and award of the Tribunal is modified in following terms. The Insurance company is to pay first the compensation to the claimants awarded by the Tribunal with the rate of interest as awarded by the Tribunal and the disbursement is to be made as per the judgment and award of the Tribunal. The Insurance Company, will, however, be entitled to recover the amount with interest at the same rate from the owner of the vehicle and the interest would be payable on this amount from the date of deposit of the amount by the Insurance Company with the Tribunal till the date of realisation of the amount from the owner. The amount if any already deposited by the owner is to be adjusted against the aforesaid amount and there will be liability of the Insurance company to pay remaining amount. The award is to be prepared accordingly.

Sd/-
(T.V. NALAWADE, J.)

rsl