IN THE HIGH COURT OF JUDICATURE AT BOMBAY, AURANGABAD BENCH, AT AURANGABAD.

First Appeal No. 1192 of 2014

1. Smt. Pushpa Vilas Kholamkar,
   Age : 35 years,
   Occupation : Household.

2. Kalyani Vilas Kholamkar,
   Age : 13 years,
   Occupation : Education.

3. Ashwini Vilas Kholamkar,
   Age : 11 years,
   Occupation : Education

   (Appellant Nos.2 and 3
   u/g. of Appellant No.1).

   All r/o. Dongargaon,
   Taluka : Akole,
   District : Ahmednagar.

.. Appellants
(Original claimant
nos.1, 4 and 5)

versus

1. Nikhil Arvind Rathi,
   Age : 45 years,
   Occupation : Business,
   Proprietor of Vijay Spun Pipe
   Company, Giridharwadi,
   Gangapur Road,
   Nashik - 422 002.

2. Branch Manager,
   The Oriental Insurance Company Ltd.,
   New Nagar Road, Sangamner,
   Taluka : Sangamner,
   District : Ahmednagar.

3. Shital Vilas Kholamkar,
   Age : 20 years,

Occupation : Household,
R/o. Dongargaon,
Taluka : Akole,
District : Ahmednagar.

4. Krushna Vilas Kholamkar,
Age : 19 years,
Occupation : Education,
R/o. Dongargaon,
Taluka : Akole,
District : Ahmednagar.

.. Respondents
(Nos.1 and 2 - Original opponents
&
Nos.3 and 4 - Original claimant nos.2 and 3)

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Mr. R.K. Temkar, Advocate, holding for
Mr. D.R. Adhav, Advocate, for appellants.

Mr. D.R. Bhadekar, Advocate, for respondent no.1.

Mr. R.F. Totla, Advocate, for respondent no.2.

Respondent nos.3 and 4 served (Absent).

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CORAM : A.M. BADAR, J.

DATE : 10TH DECEMBER 2015

ORAL JUDGMENT :

1. Admit. Taken up for final hearing in pursuant to the order dated 9-1-2015 passed by this Court while issuing notice.

2. This is an appeal under Section 173 of the Motor Vehicles Act, 1988 **[For short, hereinafter referred to as "MV Act"]**, by original claimant nos.1, 4 and 5. Original claimant nos.2 and 3 are arrayed as

respondent nos.3 and 4. Respondent no.1 herein is the original respondent no.1 before the Tribunal whereas, respondent no.2 herein was the original respondent no.2 before the Tribunal. By this appeal, original claimants are challenging the judgment and award dated 24-9-2013 passed by the learned Member of the Motor Accident Claims Tribunal, Sangamner, in M.A.C.P. No. 222/2009 between the parties. For the sake of convenience, parties shall be referred to in their original capacity.

3. Facts in nutshell leading to the institution of the present proceedings are thus :-

(a) Claimants lodged a claim of Rs. 6,00,000/- on account of death of Vilas Dattatraya Kholamkar in a vehicular accident which took place on 26-6-2008. According to claimants / legal representatives of deceased Vilas, he was serving with respondent no.1 Nikhil Rathi who owns a factory in the name and style 'Vijay Spun Pipes' at Nashik. Claimants further contended that deceased Vilas used to do work of loading and unloading cement pipes in motor vehicles. He was earning salary of Rs. 4,000/- per month. Incidently, respondent no.1 Nikhil is also the owner of the goods vehicle involved in the accident.

(b) On 26-6-2008, Vilas was travelling in the tempo bearing registration No. MH-15/G-6558 loaded with the cement pipes. He was travelling as a labourer on the said tempo for unloading those goods. At about 2.30 p.m. of that day, the tempo turned turtle because of rash and negligent driving of its driver Nivrutti Dinkar Dokhale. This accident caused fatal injuries to Vilas and he died on the very same day. With these averments, claimants claimed for awarding compensation from respondents, they being owner and insurer of tempo bearing registration No. MH-15/G-6558.

(c) Despite service, respondent no.1 - owner failed to participate in the proceedings. The claim came to be opposed by filing written statement at Exhibit 22 by respondent no.2 - Insurance Company. It denied each and every averment including age, income and other particulars in respect of the deceased. According to respondent no.2 - Insurance Company, deceased Vilas was working as a Security Guard in the pipe factory and was helping the owner for loading and unloading the vehicles in the factory premises only. The Insurance Company contended that deceased Vilas was not a coolie on the tempo. The Insurance Company further contended that because of breach of terms and conditions of contract of insurance, it is not liable to indemnify the insured. The driver of the said tempo was not holding valid and effective driving license.

(d) On the basis of rival pleadings, issues were framed and parties went for trial. In support of their claim, claimant no.1 Pushpa - widow of deceased Vilas came to be examined by claimants. They also placed reliance on Police papers in respect of the accident in question. In rebuttal, respondents did not enter in the witness box.

4. After hearing the parties, the learned Member of the Motor Accident Claims Tribunal, Sangamner, by the impugned judgment and award dated 24-9-2013, passed in M.A.C.P. No. 222/2009 between the parties, came to the conclusion that Vilas died because of rash and

negligent driving of the tempo. The learned Tribunal further came to the conclusion that breach of terms and conditions of insurance policy is not proved. However, after assessing the compensation, the learned Tribunal has directed respondent no.1 - owner to bear the liability to pay entire amount of compensation. It is further held that respondent no.2 - Insurance Company shall indemnify the insured to the extent of 1/3rd amount under the award. This was done by the learned Tribunal relying on judgment of the Hon'ble Apex Court in the case of ***National Insurance Company Ltd. Vs. Anjana Shyam***, reported in ***2007 ACJ 2129***.

5. Heard the learned Counsel appearing for appellants - claimants. He submitted that as the tempo turned turtle causing death of Vilas who was working as labourer for loading and unloading goods in the tempo, all respondents are jointly as well as severally liable to pay compensation to claimants.

6. As against this, the learned Counsel appearing for respondent - Insurance Company by relying on judgment of the Hon'ble Apex Court in the case of Anjana Sham (supra) has contended that the learned Tribunal has directed Insurance Company to bear burden by paying amount of 1/3rd compensation so assessed because the deceased was not working as labourer on the said tempo. He was working as Security Guard and this contention is raised by the Insurance Company in its written statement.

7. The learned Counsel appearing for respondent - owner submitted that the learned Tribunal has rightly drawn adverse inference.

8. I have carefully gone through the record and proceedings and particularly oral evidence of the widow, FIR as well as the documents in respect of contract of insurance. Similarly, I have gone through the judgment of the Hon'ble Apex Court in the case of ***Anjana Shyam (supra)***. At the outset, it needs to mention here that in the case of ***Anjana Shyam (supra)***, the issue was in respect of liability of Insurance Company towards third party risk. In that matter, the bus fell in a *Nala* causing death of 25 passengers as well as that of the driver. 63 passengers also came to be injured in the said accident. Said bus which was having sitting capacity of 42 was overloaded and was carrying at least 90 passengers at the time of accident in question. In the wake of these facts, the Hon'ble Apex Court has held that the insurance taken out of for the number of permitted passengers can alone determine the liability of Insurance Company in respect of those passengers. It is further held that in terms of Section 149 of the MV Act, the duty of the insurer is only to satisfy the judgment and award against the person insured in respect of the third party risk. The Hon'ble Apex Court made it clear that Section 149 of the MV Act could not be understood as compelling an Insurance Company to make payment of amounts covered by the decree not only in respect of the number of persons covered by the policy itself but even in respect of those who are not covered by policy and who have been loaded into the vehicle against the terms of the permit and against the terms and conditions of registration of the vehicle and in terms of violation of statute. With these observations, the matter came to be decided by the Hon'ble Apex Court.

9. At the outset, let us examine whether it is proved that the deceased was working as labourer with respondent no.1 - owner of the

motor vehicle for loading as well as unloading the goods in the said motor vehicle. On this aspect, claimants have relied on evidence of claimant Pushpa - widow. It is in her evidence that her deceased husband Vilas was in the employment of respondent no.1 - owner of Vijay Spun Pipes as well as the motor vehicle involved in the accident. She further deposed that her deceased husband used to load as well as unload cement pipes in the tempo and he used to take care of the loaded goods while they were transported to the destination. As per her version, the deceased was travelling in the tempo as labourer employed by owner of the vehicle and the goods which were transported in that vehicle. Perusal of cross examination of claimant Pushpa shows that this evidence of the widow virtually went unchallenged. As such there is no reason to disbelieve her version that the deceased was travelling in the tempo as employee of owner of the tempo as well as the owner of the goods being carried in that tempo.

10. Considering the fact that evidence of claimant Pushpa so far it relates to the capacity in which the deceased was travelling in the tempo, is virtually unchallenged. As such it needs no corroboration. However, still if prudence requires corroboration to her version, then her version gains sufficient corroboration from the promptly lodged FIR in respect of this accident by the Police Officer Hari Tarade. The certified copy of FIR shows that deceased Vilas was travelling in the tempo as labourer. No contra evidence on this aspect is forthcoming from respondents. As such it is proved on record that the deceased was travelling in the tempo as employee of the owner of the tempo for unloading the goods and at the same time he was representative of the owner of the goods for unloading

the same.

11. Now let us examine whether there can be limit to the liability of the Insurance Company in respect of payment of compensation on account of death of Vilas. Evidence of Pushpa - widow of the deceased as well as FIR goes to show that the deceased died because of accident arising out of and in the course of his employment as he was travelling in the tempo as labourer / employee of the owner of that tempo for unloading the goods. The tempo met with an accident is undisputedly owned by his employer. Section 146 of the MV Act makes insurance of the motor vehicle mandatory. Requirement of policy and limits of liability of the Insurance Company can be found in provisions of Section 147 of the MV Act 1988. It reads thus :-

> " **Requirements of policies and limits of liability.** – (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which –
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> (a) is issued by a person who is an authorised insurer; and
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> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) –
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> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place :
>
> Provided that a policy shall not be required –

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee –

(a) engaged in driving the vehicle, or
(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or
(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. – For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely :–

(a) save as provided in clause (b), the amount of liability incurred;
(b) in respect of damage to any property of a third party, a limit of rupees six thousand :

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition

> subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.
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> (4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.
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> (5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. "

Proviso clause of Sub-Section 1 of Section 147 makes it clear that in case of goods vehicle, risk of the employees of the owner in respect of the accident arising out of and in the course of their employment is statutorily required to be covered. In the case in hand, deceased Vilas is proved to be an employee of the owner, travelling in the goods vehicle as labourer of the owner of the said vehicle for the purpose of unloading the goods owned by the owner of that goods vehicles. The insurance policy placed on record shows that it is covering the liability of driver, conductor, cleaner as well as coolies on the said vehicle. This is specifically found in the schedule of premium at record page 61 and particularly liability clause thereof. Additional premium was recovered for covering the risk of coolies. In this view of the matter, the Insurance Company cannot escape its liability to indemnify the insurer in respect of liability of the owner regarding the accident in question. The appeal is limited to this aspect only. The quantum assessed by the learned Tribunal is not in challenge and as such it is not necessary to traverse on those facts.

12. In the result, the Appeal is allowed with the following order :-

It is directed that both respondents in M.A.C.P. No. 222/2009 between the parties should jointly as well as severally pay the amount under the judgment and award dated 24-9-2013 passed by the learned Member of the Motor Accident Claims Tribunal, Sangamner. Needless to state that rest of the award passed by the learned Member of Motor Accident Claims Tribunal, Sangamner, is confirmed.

13. The Appeal is disposed of in the aforesaid terms with no order as to costs.

(A.M. BADAR)
JUDGE

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