

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO. 123 OF 2014
WITH
CIVIL APPLICATION NOS. 13292/2014 & 4475/2013 IN FA/123/2014

Balaji Constructions
Through Sunil Chandrabhan Mane
R/o Ajay Nagar, Omerga, Osmanabad. **... Appellant**

VERSUS

1. Chandrakala Jaihind Bhure
Age 39 Years, Occ: Household
2. Indrajeet Jaihind Bhure
Age 21 years, Occu: Agri.
3. Meerabai Jaihind Bhure
Age 19 years, Occ: Education
4. Pandurang Govind Bhure
Age 70 years, Occ: Nil
5. Lochanabai Pandurang Bhure
Age 70 years,

Respondents 1 to 5 r/o Samdral
Taluka Omerga Dist. Osmanabad.

6. Saroja Dinkar Bhosale
Age 24 years, Occu: Household
R/o Khandala Taluka Aland
Dist. Gulbarga (Karnataka)

7. United India Insurance Co. Ltd. **... Respondents**
Through Branch Manager,
Near S. T. Stand, Osmanabad.

Mr. B. K. Bhosale h/for Mr. Parag V. Barde, Advocate for appellant,

Mr. S. S. Shinde, Advocate for respondents 1, 4 and 5.
Mr. S. S. Rathi, Advocate for respondent No.7

CORAM : T. V. NALAWADE &

DATE : 2nd July, 2015

JUDGMENT:

1. First Appeal is **admitted**. Notice after admission, made returnable forthwith. By consent, taken up for final disposal.
2. Substantial questions of law were already formulated as the parties had consented for arguing for final disposal at admission stage.
3. Heard both sides.
4. The appeal is filed by the appellant/employer, who is owner of the vehicle involved in the motor vehicle accident, for challenging the judgment and order of Commissioner appointed under the Workmen's Compensation Act, Civil Judge, Senior Division, Osmanabad. The decision is given in Application (WCA) No. 46/2008. Compensation and penalty is awarded in favour of the present respondents-claimants but the Insurance Company is exonerated. As the Insurance company is exonerated, the decision is challenged by the appellant employer.
5. The deceased Jaihind was husband of original claimant

Chandrakala. The original claimants 2 and 3 are issues of Jaihind and claimants 4 and 5 are parents of Jaihind. It is the case of the claimants that Jaihind was working on Truck tipper bearing No. MH-25 B-7920 and it was insured with respondent No.7-Insurance Company at the relevant time. It is the case of the claimants that on 11.05.2008, deceased was attached to this vehicle as first driver. It is contended that at about 10.30 p.m. in village Balsur, on Omerga Balsur road, when Tipper was proceeding towards fuel pump to fill diesel, accident took place. It is contended that second driver was driving the said tipper at the relevant time and the accident took place as the tipper left road and went into ditch due to which deceased fell down and came under the truck. Jaihind died on the spot.

6. It is the case of the claimants that age of Jaihind was 38 years and original respondent No.1/appellant, employer was paying Rs.4000/- per month by way of salary and Rs.100/- per day as Bhatta to the deceased at the relevant time. Compensation of Rs.5 lac was claimed.

7. Employer filed written statement before the Commissioner and he admitted that the deceased was engaged by him as the first driver of the aforesaid tipper. He denied that he was paying monthly Rs.4000/- and daily Rs.100/- to the deceased. The employer took

alternative defence that the vehicle was insured with original respondent No.2- Insurance Company at the time of accident and the Insurance Company is bound to indemnify the employer.

The Insurance Company filed written statement. The fact of accident is not disputed. Insurance company contended that there was no relationship of employer and employee between the deceased and respondent No.1. The other contentions regarding income of deceased and daily allowance were also disputed by the insurance company. Alternate defence of breach of condition of policy was taken and it was contended that the driver was not holding valid and effective driving licence at the relevant time. It is contended that no premium was paid to cover the risk of two drivers and therefore it cannot be held responsible to pay compensation.

8. Before the Commissioner, claimants examined widow of the deceased. One officer from RTO was examined and one Police Officer who was involved in the investigation of the matter was also examined. On the other hand, the employer examined one witness by name Sudhir Mane. This witness was cross examined by the counsel for the Insurance Company. The Insurance Company examined one witness Kiran to prove the terms and conditions of the policy. The policy was produced at Exh. 54.

9. Following substantial questions of law are involved:

- i. Whether there was material to hold that the monthly salary of deceased was Rs.4000/- ?
- ii. Whether the Commissioner has committed error in exonerating the Insurance Company ?

10. It can be said that the income of the deceased was not within the knowledge of the Insurance Company and so, the evidence given by the claimants and the evidence given by the original respondent No.1 Employer can be considered in that regard.

The evidence of employer shows that the employer was paying Rs.3,500/- per month as wages and Rs.20/- per day as daily allowance to the deceased. However, no record in this regard was produced. The evidence is given that deceased was holding licence to drive truck tipper and this contention is also not disputed. There is original licence produced on record to that effect. The Commissioner has presumed that monthly income was Rs.4000/-. Accident took place in the year 2008. Therefore it cannot be said that the Commissioner has committed error in presuming that monthly income of deceased was Rs.4000/-. It is in accordance with the evidence given by the employer.

11. So far as the second point is concerned, the

Commissioner has observed that the deceased was present in the vehicle as second driver and the risk to the second driver was not covered under the policy. The officer of Insurance company has given such evidence. In the original policy, there is no specific mention that only one driver was covered under the policy. The premium was accepted in respect of three employees and cover as per Workmen's Compensation Act was given to three employees. The provisions of Section 147 (1) Proviso under the Motor Vehicles Act, 1988 runs as under:

“147. Requirement 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-

(a)..... (b).....

Provided that a policy shall not be required -

(i) to cover liability in respect of 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

(d) if it is a goods carriage, being carried in the vehicle or

(ii) to cover any contractual liability.

12. The aforesaid provision shows that the insurance company can undertake to cover persons engaged in driving vehicle and the

persons engaged as conductor, cleaner and if it is goods carriage, persons required to be carried in the vehicle. Thus, provision does not show that risk to only one driver can be covered. The provision shows that risk to the driver needs to be covered. If premium is accepted in respect of three employees and it is a public service vehicle, it can be said that the risk to driver and cleaner is necessarily covered. Third employee can be second driver or can be a collie. What is required is that he was connected with the vehicle, in any of the ways mentioned in proviso (i) (a), (b) and (c) of the aforesaid proviso. Thus, when it is admitted by the Insurance company that risk to three employee was covered in the policy, there is no room to insurance company to say that risk to the second driver was not covered.

There is record of aforesaid nature and there is evidence of the employer to the effect that the deceased was his employee and he was connected with the vehicle as driver. So, this court holds that the Commissioner has committed error in exonerating the Insurance Company.

13. Learned counsel for the insurance company placed reliance on (1) AIR 2003 SUPREME COURT 2877 Ramashray Singh Vs. New India Assurance Co. Ltd.) and (2) AIR 2013 SUPREME COURT

(Manager, National Insurance Co.Ltd. Vs. Saju P. Paul & another).

14. Facts of the first case were altogether different from the facts of the present case. Relevant observations are as under:

“The phrases 'any person' and 'any passenger' occurring in cls.(i) and (ii) of sub-sec.(b) to S. 147(1) are of wide amplitude. However, the proviso of one class of persons and passengers, namely, employees of the insured, in other words, if the 'person' or 'passenger' is an employee, then the insured is required under the statute to cover only certain employees. This would still allow the insured to enter into an agreement to cover other employees, but under the proviso to S. 147(1)(b), it is clear that for the purpose of S.146(1), a policy shall not be required to cover liability in respect of the death arising out of and in the course of any employment of the person insured unless, first: the liability of the insured arises under the Workmen's Compensation Act, 1923, and second: if the employee is engaged in driving the vehicle and if it is public service vehicle is engaged as conductor of vehicle or in examining tickets on the vehicle. If the concerned employee is neither driver nor conductor nor examiner of tickets, the insured cannot claim that the employee would come under the description of 'any person' or 'passenger'. If this were permissible, then there would be no need to make special provisions for employees of the insured. The mere mention of the word 'cleaner' while describing the seating capacity of the vehicle does not mean that the cleaner was therefore a passenger. Besides the claim of the deceased, employee was adjudicated upon by the Workmen's Compensation Court which would have assumed jurisdiction and passed an order directing compensation only on the basis that the deceased was an employee. This order cannot now be enforced on the basis that the deceased was a passenger. Further plea that Khalasi/cleaner was conductor cannot be countenanced. It is doubtful whether a 'khalasi' and a conductor are the same. But assuming this were so, there is nothing to show that the appellant had paid any additional premium to cover the risk of injury to a conductor. On the contrary, the policy shows that premium was paid for 13 passengers and 1 driver. There is no payment of premium for a conductor. Since the concerned employee was not engaged in the capacity of driver in respect of whom premium was paid apart from the passenger,

owner's claim is unsustainable.

Plea that as the policy was a comprehensive one, it would cover all risks including the death of the khalasi unacceptable. An insurance policy only covers the person or classes of persons specified in the policy. A comprehensive policy merely means that the loss sustained by such person/persons will be payable up to the insured amount irrespective of the actual loss suffered."

Thus, facts of the reported case were altogether different from the facts of the present case. Premium was separately accepted for one driver and 13 passengers in that case. In the second case, it was proved that person who was holding driving licence and was present in the cabin of the vehicle which met with an accident was not attached to that vehicle and risk to such driver was not covered under the policy. However, it was held that in such case also, direction can be given to the insurance company to pay compensation to the claimant first and recover it from the owner. It was held that he was not employee under the provisions of Section 147(1), Proviso (b) of the Motor Vehicles Act. Thus, the decision was on different facts.

15. In view of the aforesaid facts of the present case, this Court holds that the Insurance company cannot be exonerated and the insurance company is bound to indemnify the original respondent no.1 employer, owner of vehicle. In the result, the appeal is allowed.

16. The decision of the Commissioner given under Workmen's Compensation Act is hereby modified. The Insurance Company is held liable to pay Rs.3,45,014/- to the claimants/original applicants Nos. 1 to 5 with the other amount of expenses (less Rs.50,000/- paid by the Insurance Company). The amount, which remains after deducting Rs.50,000/-, is to be deposited with simple interest at the rate of 12% per annum from 11th May, 2008 till it is paid to the claimants/ applicant Nos.1 to 5. The employer-appellant to pay the penalty of Rs.1,75,520/- to the claimants/original applicant Nos.1 to 5.

17. After deposit of the amount by the Insurance Company, the amount which is already deposited by the employer is to be returned to the employer. The amount, if any, deposited already is to be handed over to the original applicant Nos. 1 to 5.

18. First Appeal is disposed of in the above terms. Pending civil applications also stand disposed of accordingly.

(T. V. NALAWADE, J.)

JPC