IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 978 OF 2014

National Insurance Company Ltd. .. Appellant
Through its Divisional Office,
Divisional Manager, Hajari Chambers,
Station Road, Aurangabad.

Versus

1. Rajan s/o. Panditrao Nagapure .. Respondents
   Age.45 years, Occ. Private Service

2. Laxmikant s/o. Panditrao Nagapure
   Age. 42 years, Occ. Service

3. Dattatraya s/o. Panditrao Nagapure
   Age. 39 years, Occ. Business

4. Rushikesh s/o. Uttamrao Nagapure
   Age. 10 years, Occ. Education,
   Appellant No.4 is minor and he
   filed present under the guardianship
   of claimant No.1.

5. Nagnath s/o. Kishanrao Shirsat
   Age. 36 years, Occ. Driver,
   R/o. Village Sirsatwadi, Tq. Renapur,
   Dist. Latur
   (Driver of Trax bearing Registration
   No. MH-24/C-1527)

6. Uttareshwar s/o. Madhu Radkar
   Age. 40 years, Occ. Business,
   R/o. Village Jodjawala, Tq. And
   Dist. Latur.

Mr.S.V. Kulkarni, Advocate for the appellant.
Mr.Sachin S. Deshmukh, Advocate for Respondent Nos.1to4.
Mr.G.R. Syed, Advocate for respondent No.6.

CORAM : A.M. BADAR,J.
DATED : 17.11.2015

ORAL JUDGMENT :-

1. Heard. Admit. With consent of parties, as record and proceeding is available, appeal is taken up for final hearing.

2. Facts leading to institution of present appeal can be summarized thus:-

A) Respondent Nos.1 to 4 are original claimants. Respondent Nos. 5 & 6 being driver and owner of the Tempo Trax bearing registration No.MH-24-C-1527 are original respondent Nos.1 & 2. Present appellant being insurer of the said Tempo Trax was original respondent No.3. For the sake of convenience, parties shall be referred to in their original capacity.

B) Claim Petition under Section 166 of the Motor

Vehicles Act came to be filed by the claimants thereby claiming compensation of Rs.4,00,000/-(Rupees Four Lakhs) from the respondents on account of death of Uttamrao Panditrao Nagapure in vehicular accident, which took place on 04.06.2004 because of dash of said Tempo Trax vehicle to a truck bearing registration No. AP-04-T-6039. According to the claimants, on 04.06.2004, Uttamrao Nagapure (since deceased) was travelling along with his friends and relatives in the above numbered Tempo Trax vehicle. When that vehicle reached near village Pudicherila, situated on National High-way No.18 of Andhra Pradesh, driver of the Tempo Trax vehicle gave dash to one she-buffalo and lost his control over the vehicle. Said Tempo Trax then dashed truck bearing registration No. AP-04-T-6039, which was coming from opposite direction. According to the claimants, the accident happened because of sole negligence of driver of Tempo Trax vehicle and therefore, driver, owner as well as insurer of the Tempo Trax vehicle were jointly and severally responsible for paying compensation to them on account of death of Uttamrao.

3. The claim petition came to be opposed by filing written statement by the respondents. According to respondent No.1, accident took place due to rash and negligent act of the driver of the truck. He further submitted that Tempo Trax was insured with respondent No.3. Respondent No.2 also filed a separate written statement with similar pleadings. Respondent No.3-insurance company resisted the claim by contending that the accident took place because of rash and negligent act of driver of truck. It denied that the accident took place because of rash and negligent driving of the driver of the Tempo Trax vehicle. According to insurance company, deceased Uttamrao as well as other persons travelling in the Tempo Trax were neither family members nor relatives of respondent No.2 but they were travelling as fare paying passengers in the said vehicle, as such the insurance company is not liable to indemnify the owner. Insurance company further contended that driver,

owner and insurer of the truck though necessary party, were not joined as party respondents and therefore the claim petition deserves to be dismissed. The respondent insurance company admitted that the Tempo Trax vehicle was duly insured with it, but contended that because of contravention of terms and conditions of the policy, the insurer is not liable for payment of compensation.

4. On the basis of rival pleadings, parties went for trial and claimants examined Claimant No.2 Laxmikant Nagapure so also other witnesses to prove their claim. In rebuttal, respondent No.3-insurance company adduced evidence of Mr.Jivan Kulkarni, Branch Manager at Exh.97. Upon hearing the parties learned Member of the Tribunal was pleased to allow the claim petition partly with proportionate cost, thereby directing the respondents to pay compensation of Rs.2.23 lakhs with interest at the rate of 7.5% p.a. to the claimants. Insurance company was made liable to pay compensation along with co-respondents.

5. Heard Mr. S.V. Kulkarni, learned Counsel for the appellant-insurance company. He submitted that the driver, owner and insurer of the truck involved in the accident were not made parties to the petition. Because of collision other vehicle involved in the accident had also contributed in happening of the accident. He further argued that deceased Uttamrao was fare paying passenger in the Tempo Trax vehicle and as such on account of breach of terms and conditions of the contract of insurance, insurance company is not liable for indemnifying the owner. Mr. Kulkarni, learned Counsel further argued that as seen from evidence of Branch Manager of the insurance company, liability of insurance company as per contract of insurance was limited to Rs.1 lakh only for nine passengers of the Tempo Trax vehicle. Therefore, in submission of Mr. Kulkarni, liability of appellant be restricted to Rs.1 lakh by modifying the award.

6. Mr. Sachin Deshmukh, learned Counsel appearing for the claimants argued that there is no evidence on record to show that deceased was fare paying passenger in the Tempo Tax vehicle. Similarly, evidence on record shows that the accident happened because of sole negligence of the driver of the Tempo Trax and therefore there was no need to join owner and insurer of the truck as party respondent. By relying upon judgment of the Supreme Court in the case of **Jitendra Khimshankar Trivedi & Ors. Vs. Kasam Daud Kumbhar & Ors., reported in (2015)4 SCC 237**, Mr. Deshmukh argued that learned Tribunal erred in applying multiplier of "6" when the age of the deceased was 54 years and claimants were his younger brothers. Mr.Deshmukh submitted that in view of judgment of the Hon'ble Apex Court in the matter of **Jitendra (Supra)**, even in absence of any cross-appeal by the claimants, it becomes duty of this Court in an appeal to award just and reasonable compensation to the claimants. He, therefore, prayed for enhancement in compensation.

7. Perusal of record and proceedings and particularly evidence adduced by the claimants goes to show that the accident happened because of sole negligence of the driver of the Tempo Trax vehicle. There is no evidence on record to come to the conclusion that the driver of the truck had contributed in happening of the accident in any manner. Learned Tribunal has rightly considered police papers including FIR placed on record and came to the conclusion that the Tempo Trax vehicle initially dashed she-buffalo and then gave dash to the truck coming from opposite side. This incident resulted in registration of the crime against driver of the Tempo Trax vehicle. On this backdrop, the fact that how accident happened is within exclusive knowledge of drivers of both the vehicles involved in the accident. The claimants were not present at the time of happening of accident as such it was incumbent on the part of insurance company or owner of the vehicle to examine the driver of the Tempo Trax vehicle in order to show that accident happened because of fault of driver of the

truck. No such evidence is forthcoming. As such learned Tribunal rightly concluded that the accident happened because of sole negligence of driver of Tempo Trax vehicle.

8. There is no evidence on record to come to the conclusion that deceased Uttamrao was fare paying passenger in the Tempo Trax vehicle. As such the contention of the appellant insurance company as Uttamrao was fare paying passenger it is not liable to pay compensation is only noted for the purpose of rejection.

9. Now comes the issue as to whether insurance company has proved that its liability is limited to Rs.1 lakh. It is not in dispute that the Tempo Trax was insured and policy of the insurance was in force at the time of happening of the accident in question. Evidence of Mr. Jivan Kulkarni, Branch Manager of the insurance company shows that the insurance company has received premium for covering third party risk as well as risk of

nine passengers in the Tempo Trax vehicle. Mr. Kulkarni, Branch Manager of the insurance company deposed that liability of nine passengers is restricted only to Rs.1 lakh. This evidence is not supported by corresponding pleadings. Careful perusal of written statement of the insurance company does not show that it has taken stand of limited liability in respect of passengers of the Tempo Trax vehicle. In absence of necessary pleadings, the appellant-insurance company cannot be heard to say that risk covered by it was limited one. Perusal of insurance policy placed on record of the Tribunal goes to show that it is package policy or comprehensive insurance policy. In the matter of **Popat Kachru Kedar Vs. Jyoti Santosh Kedar and Ors.**, in **First Appeal No.2057 of 2010**, decided on 11.08.2011 by this Court, the issue as to whether comprehensive package policy of the insurance company has restricted liability in indemnifying insurer was considered. This Court placed reliance on judgment of the Delhi High Court in **MAC Application 176 of 2009 – Yashpal Luthara & Anr. Vs. United India Insurance Co.**

<u>Ltd. & Anr</u>. and held that there cannot be any doubt regarding limit of comprehensive/package policy to compensation in the event of occurrence of death or sustainance of injury to the occupant of such vehicle. As such, appellant-insurance company cannot be heard to say that its liability is limited to Rs. 1 lakh. Learned Tribunal has rightly come to the conclusion that liability of insurance company is unlimited because of package policy of insurance.

10. Now let us examine whether learned Tribunal was right in applying multiplier of "6" in the case in hand for capitalizing loss of dependency of the claimants. Deceased Uttamrao was stated to be journalist, who used to send articles in weekly and newspapers published in Beed district. Learned Tribunal on the basis of guess work, assessed his income at Rs.4500/- p.m. Multiplier of "6" was adopted considering the age of claimants. Undisputedly, the claimants are younger brothers of deceased Uttamrao. He was unmarried person. Deduction

for personal and living expenses as such ought to have been 50% as held by the Apex Court in the matter of **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr. [(2009) 6 SCC 121**]. However, learned Tribunal had deducted only 1/3rd amount from the annual income towards personal and living expenses of deceased Uttamrao. The age of the claimants was considered for adopting the multiplier. Age of deceased Uttamrao was more than the age of claimants. As such it was necessary for the Tribunal to consider the age of deceased for fixing the multiplier. In the matter of **Shakti Devi v. New India Assurance Company Limited 2011 ACJ 15**, the Hon'ble Apex Court held that where age of claimant is higher than the age of deceased, the age of the claimant and not the age of deceased has to taken into account for capitalizing the loss of dependency. Learned Tribunal has lost site of this aspect and considered the age of claimant for applying multiplier. If deduction of 50% is made and age of deceased is considered, then the net result of the assessment of the compensation by the Tribunal is correct and as such I do not find that the Tribunal has not granted just and reasonable compensation to the claimants. As such no case is made out for enhancement of compensation by the claimants. In the result, following order :-

11. The appeal is dismissed. Parties to bear their own costs.

[A.M. BADAR,J.]