IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1138 OF 2015

1] Smt. Sarita Mahesh Borse,
Age 23 years, Occ. Household.

2] Harsh Mahesh Borse
Age 3 years, Occ. Nil.

[The appellant no.2 being minor
through his mother & legal guardian]

3] Sau. Karuna Shaligram Borse,
Age 47 years, Occ. Household,

All R/o. Plot No.11, Navnath Nagar,
Behind Arihant Mangal Karyalaya,
Market Yard, Dhule.

.. APPELLANTS.
[ORIGIONAL CLAIMANTS]

VERSUS

1] Shri Shaligram Bajirao Borse,
Age 51 years, Occ. Trade,
R/o. Plot No.11, Navnath Nagar,
Behind Arihant Mangal Karyalaya,
Market Yard, Dhule.

2] The oriental Insurance Company Ltd.
(Notice may be served on
The Divisional manager)
Lane No.5, Bhavsar Complex,
Near Mnicipal Girls High School,
Dhule.

.. RESPONDENTS.
[ORIGINAL RESPONDENTS.]

Mr. Shrikant S. Patil, Advocate for appellants
Mr. Dhananjay Deshpande, Advocate for respondent No.2.

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CORAM : A.M. BADAR, J.
DATE : 11th DECEMBER,2015.

ORAL JUDGMENT :

1] This is an appeal by the original claimants feeling aggrieved by the impugned judgment and award passed by the learned MACT, Dhule, on 26.4.2012 in Claim Petition No. 133 of 2011 between the parties, whereby, respondent No.1/original owner of the motor vehicle was made liable solely to pay compensation of Rs. 4,68,500/- to claimants under Section 163A of the Motor Vehicles Act, 1988 ("M.V. Act, 1988 " for the sake of brevity) on account of death of one Mahesh Borse.

2] Respondent No.1 herein was the respondent No.1 before the learned Tribunal. He is the owner of Indica Car bearing number MH-02/NA 8004, involved in the accident Respondent No.2 herein was the respondent No.2 before the learned Tribunal. Respondent No.2 is the insurer of the said Indica car. For the sake of convenience, parties would be referred to in their original capacity

3] Facts in nutshell are thus :-

[a] Claimant No.1 is the widow, claimant No.2 is the child whereas, claimant No.3 mother of deceased Mahesh Shaligram Borse, Respondent No.1 Shaligarm is the father of deceased and owner of the Indica car in question. The claimants lodged a claim of Rs. 5 Lakhs under section 163A of the M.V. Act, 1988 against respondent Shaligram and the Insurance Company for claiming compensation under the structured formula as per the provisions of

Schedule II to the M.V. Act, 1988. According to claimants, deceased Mahesh Borse was driver by occupation and his employer was his father - respondent No.1 Shaligram Bajirao Borse. In para.24 of the Claim Petition, claimants have made averments regarding employment of deceased Mahesh Borse and this para.24 reads thus :-

> '24. The applicants further state and submit that, on 31/12/2010 at midnight, deceased left his house alongwith Indica car bearing No. MH-02/NA-8004. At midnight he was driving the said Indica car in Dhule city. When the said Indica car was near Government Milk Dairy, at that time, the said car turned turtle. In the accident, he suffered head injury and other multiple injuries. Immediately after the said accident, people gathered on the sot and carried him at Civil Hospital, Dhule, where Dr. Ravindra Sonawane declared him dead."

Clause 4,5 and 6 of the application are also material. These paragraphs read thus :-

"4. Occupation of the deceased : Driver.

5. Name and address of the employer of the deceased, if any. : Shaligram Borse,
R/o. Plot No. 11, Navnath Nagar,
Behind Arihant Mangal Maryalay,
Market Yard, Dhule.

6. Monthly income of the deceased : Rs. 3,000/-."

Whatever are the pleadings in respect of employment of the deceased with respondent No.1 can be found only in these paragraphs and in no other paragraph of the claim petition.

[b] Claimants contended that as deceased Mahesh was earning salary of Rs. 3,000/- p.m. and as he was 24 years of age at the time of accidental death, under the structured formula, by applying multiplier of 17, they are entitled for compensation of Rs. 4.08 Lakhs from respondents. Claimants further averred that the deceased was holding a valid driving licence and Indica car owned by respondent No.1 was duly insured with respondent No.2 Insurance Company. Hence, they prayed for awarding compensation from respondents.

[c] Respondent No.2 Insurance company opposed the claim by denying each and every adverse averment made by claimants. Respondent No.2 Insurance Company, by filing written statement contended that averments made by claimants are false and incorrect. The Insurance company further pleaded that deceased Mahesh was driving India Car rashly and negligently and as such, the accident happened. Hence, according to respondent No.2, Insurance Company, it is not liable to pay compensation. Insurance company denied employment of deceased Mahesh with his father, the salary, as well as the fact that at the time of the accident in question, he was holding valid and effective driving licence.

[d] Despite service, Respondent No.1 Shaligram Borse, owner of Indica Car failed to participate in the proceedings. In support of their claim, claimants adduced evidence of claimant No.1 Sarita Borse, Respondents did not enter in the witness box.

[e] After hearing parties, learned Tribunal came to the conclusion

that Mahesh Borse died because of accident arising out of use of motor vehicle bearing Registration MH-02/NA-8004, owned by respondent No.1 which was insured with respondent No.2 Insurance company. The learned Tribunal assessed compensation at Rs. 4,68,500/-. Holding that there is no evidence on record to establish the fact that deceased Mahesh was working as Driver with respondent No.1 Shaligram, the Learned Tribunal further held that deceased Mahesh was not a third party to the contract of insurance and risk of occupant of the car was not covered by payment of additional premium. As such, the learned Tribunal held that the insurance company cannot be fastened with liability to pay compensation.

4] Heard Shri Patil, learned appearing for appellants/original claimants. He has drawn my attention to Paragraphs 3, 7 and 8 from evidence of claimant Sarita and contended that this evidence is sufficient to hold that the deceased was working as Driver with respondent No.1. By taking me extensively through the impugned judgment and award and particularly, para. 13 thereof, Shri Patil learned counsel for the appellants argued that the learned Tribunal misconstrued the provision of law and erred in coming to the conclusion that extra premium was required for covering the risk of the occupant who was driving the motor vehicle in question. In his submission, as the deceased was Driver on the said motor vehicle employed by respondent No.1, risk of employee of the respondent No.1 for payment of compensation on account of death of Mahesh was statutorily covered. Shri Patil learned counsel for the appellant in support of his submissions, placed reliance on the judgment of the learned Single Judge of the Gujarat High court in the matter of ***New India Assurance Company vs. Manishaben Mahendra alias Shanker Joshi*** in First Appeal No. 4881 of 2007.

5] As against this, Shri Deshpande, learned counsel for the Insurance company supported the impugned judgment by contending that the provisions of Section 147 does not cover risk of the occupant of the car. In his submission, claimants have utterly failed to prove that deceased was an employee of his own father i.e. respondent No.1 Shaligram. He further argued that, if claimants were desirous of compensation on the premises that the deceased was an employee of respondent No.1, then they ought to have filed claim under Section 10 of the Employees Compensation Act, 1923.

6] I have carefully gone through the Record and proceedings, the contract of insurance as well as oral and documentary evidence placed on record by the parties. The question, which falls for consideration in the instant appeal is, whether claimants have proved that the deceased was an employee of his own father respondent No.1 Shaligram and if such fact is proved, then, whether the insurance company can be made liable to payment of compensation on account of death of driver of the private car, in an accident arising out of use of motor vehicle caused during the course of his employment with respondent No.1 – Shaligram.

7] At this juncture, it would be apposite to mention that provision of Section 146 of the Motor Vehicle Act, 1988 mandates compulsory insurance of the motor vehicles. Requirement of policies and limits of liability of insurance company can be found in section 147 of the Motor Vehicles Act, which read thus :-

147. 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—

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(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 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.

(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.

(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.

8] Perusal of proviso to sub-section (1) of Section 147, as such, makes it clear that policy of insurance is required to cover the risk of the owner of the motor vehicle in respect of death or bodily injury sustained by employees of the owner caused in the accident arising out of and in the course of employment of such employee as per the provisions of Workmen's compensation Act, 1923.

9] Thus if the owner of the motor vehicle is found to be liable to pay compensation to the employee or legal representatives of the deceased employee, as per the provisions of Workmen's Compensation Act, 1923, because of death or bodily injury to such an employee, arising out of use of motor vehicle, then, the insurance company cannot be exonerated even if the contract of insurance is by an Act only policy.

10] As this appeal is limited in respect of liability of the insurance company to pay compensation, one will have to examine, whether it is proved on record that deceased Mehesh was an employee of respondent No.1 Shaligram. In the opening paragraph of this judgment, pleadings in respect of alleged employment of deceased Mahesh with respondent No.1 Shaligram are specifically incorporated. In the light of those pleadings, let us examine what is the evidence on record on this aspect. Though pleadings in para.24 incorporated above, do not state that deceased Mahesh left the house in the midnight of 31.12.2010 for work, in para.3 of her evidence, claimant Sarita, stated that on 31.12.2010 at midnight her husband went away for work by taking Indica Car bearing registration number MH-02/NA-8004. It is not clarified in her evidence, whether her deceased husband had taken Indica Car for work relating to his alleged employment with his own father. In para.7 of her evidence, there is a statement to the effect that deceased husband was only earning member of the family, getting salary of Rs. 3000/- while working as a driver. IN para. 8 of her evidence, Sarita has stated that at the time of the accident of Indica Car, her husband was working on that car as a driver.

11] Perusal of the pleadings of claimants coupled with evidence of claimant Sarita, goes to show that neither pleadings nor her evidence is explaining satisfactorily, as to what was the nature of employment of deceased Mahesh with his own father – respondent No.1 – Shaligram. Pleadings of the claimants are conspicuously silent as to for what purpose deceased Mahesh was employed as Driver on that car. Nature of use of that car is not mentioned. What was the mode of payment of salary to the deceased is also not finding place either in the pleadings or in the evidence of claimant Sarita. Whether respondent No.1 was having any business or some other occupation requiring use of car necessitating employment of a driver on the said car, is also not mentioned by way of pleadings in the petition, nor such aspects are clarified in the evidence of claimant Sarita.

12] When it is the case of the claimants that deceased was employee of his father and that too as a driver on his personal car, pleadings as well evidence on this aspect is required to be very cogent and satisfactory. Otherwise, unscrupulous claimants would file false claim petitions for claiming compensation though the contract of insurance is only covering risk which is required to be covered statutorily i.e. third party risk. In case of such nature, it is expected that there must be satisfactory evidence on record to demonstrate that the deceased was an employee of his own father.

13] At this juncture, it is apposite to mention that from cross-examination of claimant Sarita, it is brought on record that she married Mahesh in the year 2008. Though claimant Sarita denied that she was residing separately from her father in law, claimants have themselves placed on record a Ration Card at Exhibit 22. It shows that deceased Mahesh was member of the family of Shrligram, as his name is appearing in the Ration Card of respondent No.1. Though claimant Sarita has stated in cross-examination that she alongwith her husband were residing separately from respondent No.1 and that presently she is residing with her paternal relatives, this is a self serving statement of claimant Sarita, as the ration card of respondent No.1 shows that deceased Mahesh was residing with respondent No.1. Thus, no fault can be found with the finding of the learned Tribunal that the evidence on record does not prove employment of deceased Mahesh with respondent No.1 Shaligram and that too as a driver on his private car.

14] At this juncture, it is apposite to quote observations in para Nos. 22 and 23, in the matter of ***Gottumukkala Appala Narsimha Raje and others vs. National Insurance Company Ltd***. and another, reported in

(2007) 13 SCC 446, wherein, in somewhat similar case, the Honourable Supreme Court has observed thus :-

> "22 In our considered opinion, it is wholly absurd to suggest that the husband would be a "workman" of his wife in absence of any specific contract. We have no doubt in our mind that for the purpose of proceeding under the 1923 Act, only the appellants have concocted the story of husband and wife living separately. If they have been living separately in view of certain disputes, the question of husband being a "workman" under her appears to be a far-fetched one.
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> 23. Technically, it may be possible that the husband is employed under the wife, but, while arriving at a conclusion that when a dispute has been raised by other side, the overall situation should have been taken into consideration. The fact, which speaks for itself shows that the owner of the tractor joined hands with the claimant for laying a claim only against the insurer. The claim was not bonafide.."

15] Once it is held that the claimants have failed to prove that deceased was driving the Indica Car in the capacity of its driver employed by the owner, now, let us examine, whether his risk is covered by the policy of insurance at Exhibit 20. Bare perusal of this policy makes it clear that it is Act only policy. Even on behalf of claimants this fact is not disputed.

Deceased was occupant of the Indica Car owned by his father and the time of accident, and he was driving that car. As the claim is under Section 163A of the Motor Vehicles Act, 1988, claimants in such proceedings are not required to plead and prove that death of Mahesh was caused due to wrongful act or- negligence or default of the owner of the vehicle or any other person. In such case, if the accident is proved to have happened arising out of use of motor vehicle, then, claimants are entitled for compensation as per the structured formula. However, the question will be whether the insurance company can be made liable to pay such compensation to claimants or to indemnify the insured when the deceased was not a paid driver driving that car at the time of the accident in question.

16] This aspect will have to examined in the light of provisions of the Act only policy by which the motor vehicle was insured. In the matter of ***Oriental Insurance Company Ltd.Vs. Surendra Nath Loomba and Ors., AIR 2013(SC) 483***, while approving the ration of the judgment of Delhi High Court in ***Yashpal Luthra and Anr. Vs. United India Insurance Co. Ltd. and Anr.***, ***2011 ACJ, 1415***, the Honourable Supreme Court has held that Act policy stands on a different footing than the comprehensive package policy of the motor vehicle which covers the risk of the occupants of the private motor car. In the matter of ***Dr . T . V . Jose vs . Chacko P . M ., AIR 2001 SC 3939***, the Honourable Supreme Court held that Act policy of insurance does not cover the risk of the occupants of private car. In the matter of

United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and others, AIR 2006 SC 1576, it is held by the Honourable Supreme Court that insurance company owes no liability towards death or injury suffered, if the policy of insurance is act only policy. In the matter of ***New India Assurance Company Vs. Lilabai Shrimant Missa, 2015(1) Mh.L.J. 827***, this Court has held that it is settled law that if no premium is paid in respect of the passenger of private car, there will not be coverage or risk to them and liability cannot be fastened on the insurance company to pay compensation.

17] Hence, as claimants have failed to prove that deceased was driving Indica car involved in the accident in the capacity of employee/driver of respondent No.1, and that the accident in question arose, out of and in the course of employment of the deceased with respondent No.1 Shaligram, it needs to be held that as the policy of insurance was an Act only policy, the learned Tribunal has rightly held that respondent No.2 Insurance company is not liable to pay compensation to claimants as the risk of the occupant of Indica Car was not covered because the policy in question. No infirmity can be found with the impugned judgment and award. Hence, the appeal is dismissed with no orders as to costs.

[A.M. BADAR, J]

grt/-