

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1324 OF 2012

United India Insurance Co. Ltd.,
 Through its Divisional Manager and
 authorised representative & signatory
 Ahmednagar Divisional Office,
 Kisan Kranti Building, Ahmednagar,
 Dist. Ahmednagar.

... Appellant

Vs.

1. Laila Ayyub Sayyad,
Age: 38 years, Occu. Nil.
2. Sultana Ayyub Sayyad,
Age: 17 years, Occu. Nil.
3. Shamma Ayyub Sayyad,
Age: 15 years, Occu. Nil.
4. Munni Ayyub Sayyad,
Age: 13 years, Occu. Nil.
5. Sikandar Ayyub Sayyad,
Age: 11 years, Occu. Education,
6. Rajjak Ayyub Sayyad,
Age: 9 years, Occu. Education,

Resp.Nos. 2 to 6 minor u/g of
 mother applellant no.1.

7. Bismilla Yashin Sayyad,
Age: 60 years, Occ. Nil.
Resp. nos. 1 to 7 R/o Mahekar,
Tq. & Dist. Ahmednagar.
8. Prabhakar Snyabapu Andhale,
Age: 50 years, Occ. Agri,
R/o Mhekari,
Tq.& Dist. Ahmednagar.

... Respondents

.....

Mr. A.B. Gatne, Advocate for the appellants.
Mr. J.R. Patil, Advocate for respondent nos. 1 to 7.
Mr. K.D. Bade-Patil, Advocate for respondent no.8.

.....

CORAM : P.R. BORA, J.

DATE OF RESERVING THE JUDGMENT : 29-11-2016.

DATE OF PRONOUNCING THE JUDGMENT : 20-12-2016.

JUDGMENT:

1. The judgment and award passed by the Motor Accident Claims Tribunal, Ahmednagar in Motor Accident Claim Petition no. 418 of 2006 on 20.06.2011 is challenged in the present appeal by the insurance company which was respondent no.2 in the said petition.

2. Respondent nos. 1 to 7 (hereinafter referred to as the 'claimants') had filed the aforesaid petition claiming compensation on account of the death of one Ayyub Sayyad in a vehicular accident happened on 20.07.2006 having involvement of a tractor owned by present respondent no.8 and insured with the present appellant. It was the contention of the claimants before the Tribunal that deceased Ayyub fell down from the tractor-trolley because of the rash and negligent driving of the driver of the tractor and suffered death as a result of injuries caused to him in the said accident. The claimants had, therefore, claimed the compensation of Rupees Five Lakhs from the owner and insurer of the said tractor. The claim petition was resisted by the appellant insurance company

mainly on the ground that the policy of insurance pertaining to the tractor involved in the accident was not covering the risk of the deceased since he was sitting on the mud guard of the tractor. According to the appellant insurance company, except the driver of the tractor no one else was allowed to sit in the tractor and according to the terms of policy risk of the driver alone was covered. It was the further contention of the appellant insurance company that by unauthorisedly allowing the deceased to sit on the mud guard of the tractor the owner and driver of the said tractor had committed the breach of the terms and conditions of the policy of insurance and, as such, no liability was liable to be fasten on the insurance company of paying any compensation to the claimants or to indemnify the insured.

3. During the trial, the complainants made out a case that deceased Ayyub was not sitting on the mud guard of the tractor but was in a trolley attached to the said tractor and fell down from the said trolley as a result of rash and negligent driving of the driver of the said tractor. The claimants had also placed on record the police papers pertaining to the accident in question which included F.I.R., spot panchnama, inquest panchnama etc. The appellant-insurance company filed on record the statements of the witnesses recorded by the police during the investigation of the crime registered in connection with the alleged accident.

4. The tribunal after having scrutinised the oral and documentary evidence brought on record, though, held that there was breach of insurance policy and the insurance company was not liable to indemnify the owner of the vehicle, while passing the final order held insurance company jointly and severally liable to pay the amount of compensation to the claimants. The tribunal has also issued further direction to the insurance company to pay the amount of compensation at the first instance to the petitioners and then to recover the said amount from the owner of the offending tractor. Aggrieved by, the insurance company has filed the present appeal.

5. Heard Shri A.B. Gatne, the learned counsel appearing for the appellant-insurance company, Shri J.R. Patil, the learned counsel appearing for respondent nos. 1 to 7 and Shri K.D. Bade-Patil, the learned counsel appearing for respondent no.8. Perused the impugned judgment and the evidence on record.

6. Shri A.G. Gatne, the learned counsel for the appellant-insurance company submitted that, once the tribunal has held that there was a breach of insurance policy and the insurance company was not liable to indemnify the owner of the vehicle, the tribunal ought not have directed the appellant insurance company to jointly and severally pay the amount of compensation as determined by the tribunal to the claimants and also could not have issued any

such direction against the appellant-insurance company to first pay the amount of compensation to the claimants and then to recover the said amount from the owner of the offending vehicle. The learned counsel, therefore, prayed for setting aside the impugned judgment and award and consequently to dismiss the claim petition against the appellant-insurance company. In support of his contentions, the learned counsel placed his reliance on the judgment of this court in the case of **United India Insurance Co. Ltd. V/s. Anubai Gopichand Thakare and Ors.** reported in **2008(1) Mh.L.J. 73.**

7. The learned counsel appearing for the respondents supported the impugned judgment. The learned counsel submitted that, a well reasoned order has been passed by the tribunal and no interference is required in the judgment and award so passed. Shri K.D. Bade-Patil, the learned counsel appearing for the respondent no.8 cited the judgment of the Hon'ble Apex Court in the case of **Fahim Ahmad and Ors. V/s. United India Insurance Company Limited and Ors.** reported in **2014 AIR (SC) 2187**, to support his contention.

8. The question which falls for my consideration in the present appeal is whether the appellant-insurance company can be jointly and severally held liable to pay the amount of compensation to the claimants and whether the direction given by the tribunal in

the impugned judgment against the appellant-insurance company to first pay the amount of compensation to the claimants and then to recover the said amount from the owner of the offending vehicle, can be sustained.

9. Section 147 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act') speaks about the requirements of policy and limits of liability. Section 147 (1) (b) (i) of the Act provides that, in order to comply with the requirements of chapter xi of the Motor Vehicles Act, a policy of insurance must be a policy which, insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including the 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.

10. Section 149(1) of the Act provides that, if, after a certificate of insurance has been issued under sub-section (3) of section 147 of the Act in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy), the insurer shall, subject to the provisions of this section,

pay to the person entitled to the benefits of the decree any sum not exceeding the sum insured payable thereunder, as if he were judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

11. The conjoint reading of Section 147 (1) (b) and Section 149 (1) of the Act leaves no doubt that the insurer cannot be fasten with liability to satisfy the judgment and award passed against the insured in respect of the death of or bodily injury to any person whose risk is not covered under the policy of the insurance issued by the insurer under Section 147 (3) of the Act.

12. Perusal of the claim petition reveals that, initially it was the contention of the claimants themselves that deceased was sitting on a tractor and fell down from the tractor because of the rash and negligent driving of the driver of the said tractor, however, during the trial and more particularly in the oral evidence the version as was there in the claim petition was improved and a case was put-forth that deceased Ayyub was sitting in tractor-trolley. It seems that in the arguments also it was submitted that, the deceased was in the tractor-trolley. The claimants, along with the claim petition had filed the relevant police papers pertaining to the alleged accident which include the F.I.R., spot panchnama, inquest

panchnama, postmortem report etc. In her testimony before the court claimant no.1 Smt. Laila Ayyub, widow of the deceased referred to the said police papers and in her evidence itself the said police papers were exhibited. The claimants had relied upon the said police papers to substantiate the contentions raised in the petition.

13. Perusal of the F.I.R. reveals that, deceased was sitting on the mud guard of the offending tractor and fell down therefrom as a result of rash and negligent driving by the driver of the said tractor. The averments in the spot panchnama also reveal that, the deceased was sitting on the mud guard of the tractor. Ashok. C. Kanade who had lodged the F.I.R. of the alleged accident was examined by the claimants as their witness. In his testimony before the tribunal, said Ashok Kanade has deposed that he had not stated to the police while lodging the F.I.R. that deceased Ayyub was sitting on the mud guard of the tractor. The owner of the tractor has examined the driver of the said tractor as his witness. In his evidence before the tribunal said driver viz; Dilip Laxman Chandane has deposed that deceased Ayyub was sitting in the trolley of the tractor. The insurance company had examined Mahadev Namdev Pathare, A.S.I. Of Police Station Kotwali, Ahmednagar as its witness. The said witness has testified before the tribunal that Ashok Kanade lodged the F.I.R. of the alleged

accident and the said F.I.R. was recorded as per the information given by said Ashok Kanade. The said witness has further deposed that the said F.I.R. after it was reduced into writing, was read over to said Ashok Kanade and, thereafter, he put his thumb impression on the said F.I.R. The said witness has further deposed that he has also recorded the statement of driver Dilip Laxman Chandane who was present on the spot. The said witness has also deposed that during the investigation it was revealed to him that deceased was sitting on the mud guard of the tractor besides the driver of the tractor. During the course of his evidence the copy of the F.I.R. was brought to the notice of the said witness and on perusal of the said document the said witness had deposed that it was the same report which was lodged by Ashok Kanade and it bears his signature and the thumb impression of said Ashok Kanade. In the cross-examination, though, it was suggested to the said witness that deceased Ayyub was sitting in the trolley and fell down from the trolley, the suggestion so given was denied by the said witness. The further suggestion given to him that, the informant and the driver of the tractor had stated in their respective statements that deceased was sitting in the trolley, however, the said suggestion was also denied by the said witness.

14. On perusal of the evidence as aforesaid, it is difficult to accept the story attempted to be put-forth by the claimants that

deceased was not sitting on the mud guard of the tractor but in the trolley of the tractor. There seems no reason to dis-believe the contents of the F.I.R. and the spot panchnama which have also been relied upon by the claimants. There was no reason for the concerned A.S.I. namely Mahadev Namdev Pathare to record any incorrect information or the fact not stated by the informant. As noted above, in his testimony before the court, the said witness has categorically deposed that the F.I.R. was recorded by him as per version narrated by the informant and that contents of the F.I.R. were read over by him to the informant before obtaining his thumb impression on the said F.I.R.. In absence of any such evidence brought on record suggesting the possibility of recording the F.I.R. in distorted manner by said A.S.I. Mahadev Namdev Pathare, there seems no reason to dis-believe the testimony of the said witness. From the material on record, it is thus, evident that the deceased Ayyub was sitting on the mud guard of the tractor and not in the trolley.

15. The tribunal has also recorded a clear finding that the deceased fell down from the mud guard of the tractor. Now the question arises whether the risk of the deceased who was sitting on the mud guard of the tractor was covered under the policy of insurance of the said tractor. It was the specific defence raised by the appellant-insurance company that policy of insurance does not

cover the risk of the person sitting on the mud guard of the tractor. The certified copy of the policy of insurance was placed on record before the tribunal. The registration particulars of the offending tractor were also placed on record which reveal that, the sitting capacity of the said tractor was only one, obviously driver alone of the tractor and no one else. In view of the evidence as aforesaid, the tribunal has also held that there was breach of insurance policy and the insurance company was not liable to indemnify owner of the tractor. However, by wrongly interpreting the judgment relied upon by the claimants and the owner of the tractor, the tribunal, has erroneously held the insurance company liable to first pay the compensation to the claimants and then to recover the said amount from the owner of the tractor.

16. The tribunal has manifestly erred in holding the deceased as "third party". As has been observed by this court in the case of **United India Insurance Co. Ltd. Vs. Anubai Gopichand Thakare and Ors. (cited supra)**, the expression "third party" needs to be determined in each case with reference to the terms of insurance policy. If the risk of a person is covered under the contract of insurance, then he/she would be the third party regarding whom the insurance cover can be used and the insurer will be liable to indemnify the insured in such cases. However, the person, whose risk is not covered under the terms of

the insurance policy cannot be treated as "third party" within the meaning of the provisions of section 147 read with section 149 of the Act. In the circumstances, the insurer cannot be held liable even for the purpose of satisfying the award at the first instance passed in such cases against the insured.

17. The judgment relied upon by respondent no.8 in the case of **Fahim Ahmad and Ors. (cited supra)** is altogether on different facts and hence cannot be made applicable to the facts of the present case. In the said case, the deceased was not the occupant either in the tractor or the trolley involved in the said accident. The deceased in the said case was crossing the road and was hit by the tractor attached with the trolley from behind. The deceased in the said case undoubtedly was a third party and his risk was certainly covered under the insurance policy. In the instant case, I reiterate that the risk of the deceased was not covered by the insurance policy. The plain reading of section 147(1) (b) makes it abundantly clear that the statute also does not require that the policy of insurance in so far as the tractor is concerned, shall cover the risk of any other person except the driver of the tractor since driver also is allowed to sit on the tractor.

18. For the reasons stated above, the order passed by the tribunal holding the appellant-insurance company jointly and severally liable to pay the amount of compensation to the claimants

and the direction given to the appellant-insurance company to first pay the amount of compensation and then to recover the same from the insured deserves to be set aside and is accordingly set aside. Consequently, the claim petition no. 418 of 20016 stands dismissed against the appellant-insurance company. It is made clear that the merits of the award are otherwise not considered. The amount, if any, deposited by the appellant-insurance company in this court or before the tribunal shall be refunded to it with interest accrued, if any. The appeal stands allowed in the aforesaid terms. No order as to costs.

(P.R. BORA, J.)

mub