IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.38 OF 2000

WITH

CIVIL APPLICATION NO.1652 OF 2015

United India Insurance Company Ltd.]
Mumbai Regional Office No.2]
3rd floor, Maker Bhavan No.1]
Sir V. T. Marg, Mumbai – 20] ..Appellant

Versus

1 Smt. Vimal Yashwant Kamble, adult]
resident of Mutakeshwar]
taluka Gaganbavda, Dist. Kolhapur]

2 Minor Bhanudas Yashwant Kamble]
thru' his mother-guardian]
Resp No.1 above]

3 Minor Pinki Yashwant Kamble]
thru' her mother-guardian]
Resp No.1 above]

4. Gajanan Bhiksheth Kesarkar, adult]
Truck business, resident of Malkapur]
Taluka Shahuwadi, Dist. Kolhapur] ..Respondents

Mr. Ketan Joshi for the Appellant.

Mr. A. S. Patil for the Respondent Nos.2 and 3.

CORAM :- R. M. SAVANT, J.
DATE :- JULY 22, 2016

ORAL JUDGMENT :-

1. The above First Appeal has been shown under the caption of 'Orders' as the Civil Application filed by the claimants for withdrawal of amount is listed for hearing. However, this Court was of the view that instead of considering the Civil Application, it would be appropriate if the above First Appeal itself is taken up for hearing. The learned Counsel for parties readily agreed to the same; that is how the above First Appeal is being heard.

2. The above First Appeal takes exception to the Judgment and Order dated 29/04/1999 passed by the learned District Judge / Member, M.A.C.T., Kolhapur, by which the Claim Petition filed by the Respondent Nos.2 and 3 came to be partly allowed to the extent of granting the claimants an amount of Rs.1,38,000/- as compensation with proportionate costs along with Rs.25,000/- already paid under the no fault liability. The M.A.C.T. made the Opponent Nos.2 and 3 i.e. the respondent nos.1 and 2 herein, as jointly and severally liable

to pay an amount of Rs.1,13,000/- with interest at the rate of 12% per annum from 01/01/1993 till realization. The M.A.C.T. has issued further directions in respect of investment of Rs.60,000/- out of the said amount which direction is not relevant considering the fact that the First Appeal itself is being heard.

3. The facts giving rise to the above First Appeal can, in brief, be stated thus :-

4. The above First Appeal has been filed by the insurance company i.e. United India Insurance Company Ltd. The respondent nos.1 to 3 are the original claimants who are the wife, son and daughter of deceased one Yashwant Zima Kamble. The said Yashwant was travelling along with one Ananda Thorat, Hindurao Thorat, Akaram Krishna Thorat and Tukaram Dnyanu Patil by truck no.MXL 6844 owned by the opponent no.2 i.e. respondent no.4 Gajanan Bhiksheth Kesarkar. The said truck was loaded with sand. The owner of the sand was the said Tukaram Patil and the deceased Yashwant, along with others, were traveling as coolies for unloading the truck at Kolhapur. It seems that when the truck came near village Balinge on

Kolhapur-Gaganbavada Road, it turned turtle. The said Yashwant Kamble suffered serious injuries and died on the spot. The other occupants namely Akaram Thorat and Tukaram Patil also died in the said accident. It seems that the police recorded an F.I.R. and registered a crime in respect of the said accident. The claimants thereafter filed the instant Claim Petition No.67 of 1992. The total compensation claimed in the said claim petition was Rs.2,12,000/- which was divided into an amount of Rs.2,00,000/- towards loss of dependency, Rs.10,000/- towards loss of consortium and funeral expenditure to the extent of Rs.2,000/-. The appellant herein who was the opponent no.3 and the owner of the vehicle who was the opponent no.2, filed their written statements. In the said written statements, they denied the claim of the applicants. It was also denied that the said accident had taken place on account of rash and negligent driving of the truck by the opponent no.1 i.e. the driver. It was also contended on behalf of the insurance company that the said truck was a goods vehicle and therefore passengers are not allowed to travel in the said truck. It was contended that since at the relevant time the passengers were being carried in the said truck, there was a breach of the policy conditions and therefore the insurance company could not be made liable for the payment of compensation.

5. On the basis of the pleadings, the M.A.C.T. framed the issues which were inter alia revolving around whether the claimants prove that the accident had occurred on account of rash and negligent driving of the truck bearing registration no.MXL 6844 and whether the claimants prove that they are entitled to get compensation from the opponents. The M.A.C.T. answered the said issues in favour of the claimants. Insofar as the evidence is concerned, Smt. Vimal Kamble, wife of deceased Yashwant Kamble, examined herself as PW 1. She also produced the police case-papers i.e. F.I.R. (Exh.46), spot panchanama (Exh.47), inquest panchanama (Exh.48), post-mortem report (Exh.49), Insurance Certificate (Exh.50) and RTO Certificate (Exh.51). Insofar as the opponents in the claim petition are concerned, it seems that they did not seriously challenge the manner in which the accident had occurred, but were more on the quantum of compensation to be awarded. The truck driver himself did not appear though served and his name was thereafter deleted. It is on the basis of the material which was on record that the M.A.C.T. recorded findings on the issues which have been adverted to hereinabove. On

behalf of the insurance company, the principal contention that was urged was that the truck was a goods vehicle and the driver, therefore, was not entitled to carry passengers. The insurance company also examined one Rangrao Govind Patil, Branch Manager of United India Insurance Company and one Nivrutti Ishwara Patil, retired Police Sub-Inspector who was the investigator appointed by the insurance company. It seems that the said evidence was relied upon in the other cases which were filed by the heirs of the deceased who had died in the same accident. The M.A.C.T., having regard to the evidence of the Branch Manger and the investigator, recorded a finding that the testimony of the Branch Manager is not reliable and that the testimony of the investigator Nivrutti Patil is of no help to the insurance company. The M.A.C.T. refused to accept the said evidence on the ground that the witnesses did not have any direct knowledge of the accident and did not collect any information separately and simply relied on the police papers. The M.A.C.T. recorded a finding that the policy in question admittedly covers the coolies, driver and cleaner and at the material time, the truck was found loaded with sand and was going to Kolhapur for unloading and therefore the case of the insurance company that the persons who were traveling in the truck were passengers, could not be accepted. The M.A.C.T. referred to the oral testimony of the widow Vimal who had testified that her husband was working as a coolie on the truck of said Kesarkar. The M.A.C.T., therefore, held that having regard to the evidence on record, the insurance company cannot be absolved from its liability. Insofar as the income of the deceased Yashwant is concerned, the M.A.C.T. held that there was evidence on record to prove that the said Yashwant was working as a coolie on the truck of the said Kesarkar. The M.A.C.T., therefore, held that having regard to the evidence on record, the insurance company cannot be absolved from its liability. Insofar as the income of deceased Yashwant is concerned, the M.A.C.T. held that there was evidence on record to prove t hat the said Yashwant was working as a coolie on the truck of said Kesarkar. However, there was no documentary evidence to show that he had any additional income as a broker in the business of selling sheep and goats. The M.A.C.T. adverted to the fact that the deceased was 35 years of age when he died and therefore assuming his monthly income as Rs.1,000/- and discounting 50% amount for the personal expenses, the M.A.C.T. held that the monthly dependency would be Rs.700/- and the yearly dependency would be Rs.8,400/-. Hence by applying the multiplier of

50, the amount comes to Rs.1,26,000/-. The M.A.C.T. granted Rs.10,000/- for loss of consortium to the widow and Rs.2,000/- for funeral expenses, thus totalling to Rs.1,38,000/- awarded as compensation to the claimants. As indicated above, the M.A.C.T. has partly allowed the petition to the extent mentioned in the early part of this order.

6. The learned Counsel Mr. Ketan Joshi for the respondent no.1/ original appellant insurance company, seeks to reiterate the case of the appellant – insurance company – before the M.A.C.T. It was the submission of Mr. Joshi that the truck in question was a goods vehicle and therefore, the truck driver was not entitled to carry any passengers in the said vehicle. In the instant case, since the passengers have expired in the accident, the insurance company cannot be made liable. This was the main contention of the learned Counsel for appellant.

7. *Per Contra*, Mr. A. S. Patil learned Counsel for Applicants/Original Respondent Nos.2 and 3/original claimants, would support the impugned award of the M.A.C.T. It was the

submission of learned Counsel that the M.A.C.T. has allowed the claim petition having regard to the material which has come on record.

8. Heard the learned Counsel for parties and considered the rival contentions, the award passed by the M.A.C.T. has been principally challenged by the insurance company on the ground that it could not have been made liable for the payment of compensation as the vehicle in question was being used contrary to the terms and conditions of the policy. The said contention is urged on the basis that the deceased were traveling in the said truck as passengers and insofar as the manner in which the accident has occurred, as indicated above, the insurance company did not question the manner in which the accident has occurred. However, its principal grievance is that it could not be made liable having regard to the terms of the policy. Insofar as the terms of the policy are concerned, it has come on record that the insurance policy covered the driver, cleaner and 5 coolies. Insofar as whether the deceased Yashwant was a coolie or not, there could not be any dispute in view of the fact that the evidence of his wife Vimal has gone unchallenged. It was, therefore, proved that the said Yashwant Kamble was a coolie who was traveling with the truck

to Kolhapur so as to unload it at the said destination. The M.A.C.T. has rightly discountenanced the evidence of the witnesses of the appellant for the reasons mentioned in the impugned Judgment. The learned Counsel for appellant relied upon the Judgment reported in the case of ***Mallawwa and others Vs. Oriental Insurance Co. Ltd. and others***[1]. In the light of the evidence on record, the said Judgment would not further the case of the appellant in so far as its liability is concerned.

9. Insofar as the quantum is concerned, it is required to be noted that there is no serious challenge to the quantum and therefore this Court is not required to go into the said aspect. In any event, the M.A.C.T. has rightly come to a conclusion that the income of the deceased as a coolie was Rs.1,000/- per month and therefore, arrived at the total dependency of Rs.1,26,000/- and adding the other amounts by way of consortium and funeral expenses, has awarded the total sum of Rs.1,38,000/-. It is required to be noted that the accident has taken place in the year 1992. It seems that during the pendency of the above first appeal, the claimant no.1 Vimal Kamble has expired.

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It seems that the claimant nos.2 and 3 have also got married during the pendency of the appeal for which they have incurred expenses. In my view, therefore, no case for interference in the impugned order passed by the M.A.C.T., Kolhapur, is made out. The above First Appeal is accordingly dismissed.

10. In view of the dismissal of the First Appeal, the above Civil Application does not survive and to accordingly stand disposed of as such.

(R. M. SAVANT, J.)