IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

29 FIRST APPEAL NO. 984 OF 2017

UNITED INDIA ASSURANCE COMPANY LTD.
THROUGH ITS ADMINISTRATIVE OFFICER TP HUB,
MAHENDRA PRATAPSINH VIRAT
VERSUS
RAMCHANDRA JAYRAM SONAWANE AND OTHERS

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Advocate for Appellant : Mr. Swapnil S. Rathi.
Advocate for Respondent Nos.1 & 2: Mr. V.B.Madan, h/f Mr.Hemant Jadhav.
Advocate for Respondent No.3 : Mr. V. B. Patil.

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CORAM : **V. K. JADHAV, J.**
DATE : 24th July, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and award passed by the learned Member of the Motor Accident Claims Tribunal, Jalgaon dated 15th October, 2016 in MACP No.229 of 2013, original Respondent No.2 / Insurer has preferred this appeal.

3 Brief facts giving rise to the present appeal are as follows:

a) It is the case of Respondents / Claimants that on 10th May, 2012 deceased Kiran alongwith his friend Chhotu was walking on Jalgaon-Shirsoli road near

Mohadi Fata. However, one tractor bearing registration No.MH-19-C-8040 attached with the trolley being driven by its driver in high speed and in rash and negligent manner, gave dash to deceased Kiran. In consequence of which, deceased Kiran came under the wheels of the said tractor and died on the spot while said Chhotu has the sustained injuries. The Claimants / legal heirs of deceased Kiran approached the Motor Accident Claims Tribunal by filing MACP No.229 of 2013 for grant of compensation under the various heads. It has been contended that deceased Kiran was 22 years of age at the time of his accidental death and he was a skilled labour earning Rs.5,000/- per month.

b) Respondent No.1 / owner has strongly resisted the claim petition by filing written statement. It has been contended that the driver of the tractor was driving the vehicle in a slow speed, however, all of a sudden, deceased Kiran came on road by running and dashed against the said tractor. It has also been contended that the vehicle is duly insured with the Appellant / Insurer and as such, the Appellant / Insurer is liable to pay the compensation.

c) The Appellant / Insurer has strongly resisted the claim petition by filing the written statement. It has been contended that the story narrated in the claim petition is false and fabricated story. It transpires from the FIR and the statements of the witnesses recorded during the course of investigation that deceased Kiran sat on the hood of the tractor and as such, the risk of the person travelling as a passenger on the hood of the tractor is not covered under the policy. It has also been contended that the driver of tractor was not holding valid and effective driving licence at the time of accident.

d) The Respondents / Claimants have adduced oral and documentary evidence in support of their contentions. Respondent / owner has examined himself by filing his affidavit of evidence. The Appellant / Insurer has examined the employee of the RTO office and also its officer to substantiate its defence. The learned Member of the Tribunal vide impugned judgment and award dated 15th October, 2016 allowed the application with costs and thereby directed the Respondents including the Appellant / Insurer jointly and severally to pay an amount of Rs.9,89,000/- inclusive of N.F.L. amount to the Claimants with interest at the rate of 7.5% per annum from the date of application till realization of the amount. Hence, this appeal.

4 The learned counsel for Appellant / Insurer submits that the Respondents / Claimants have produced on record copy of FIR Exhibit 20. Initially, A.D. No.50 of 2012 came to be recorded on the date of accident itself and after recording the statements of the eye-witnesses, one police head constable, who has conducted said inquiry of the A.D., lodged complaint Exhibit 20 on behalf of the State against the driver of the tractor. The learned counsel submits that as per the contents of the complaint Exhibit 20 and the statements of the eye-witnesses recorded during the course of investigation marked as Exhibits 34, 35, 36 and 37 respectively, it is clear that deceased Kiran

alongwith injured Chhotu was travelling on the said tractor by sitting on the hood. The learned counsel submits that under the policy, the risk of third-party is covered and as such, the risk of the passenger travelling on the hood of the tractor, is not covered under the policy. The learned counsel submits that it would be needless to mention that the sitting capacity of the tractor is only one. The learned counsel submits that the Respondents / Claimants have prepared a concocted story and approached to the Tribunal. It has been falsely stated in the claim petition and false evidence is also adduced to the effect that deceased Kiran and said Chhotu were pedestrian and the driver of the tractor driven the vehicle in rash and negligent manner and gave dash to deceased Kiran on road. The learned counsel submits that the Tribunal has not given thought to this and even ignored the complaint Exhibit 20 and police statements of those eye-witnesses Exhibits 34 to 37. The learned counsel submits that even the Appellant / Insurer has examined the officer of RTO office to substantiate its defence that the driver of the tractor was not holding valid and effective driving licence at the time of accident. It is a part of record that the driver of tractor was holding learner's licence on the date of accident and admittedly, he was driving the tractor alone at the time of accident. The learned counsel submits that there has been a breach of the specified conditions of the policy in both ways and as such, the Appellant / Insurer is not liable to pay the compensation. However, the Tribunal has erroneously fastened the liability on the Appellant / Insurer jointly and severally to pay the compensation alongwith the Respondent / owner of the tractor.

5 The learned counsel for Respondents / Claimants submits that though the Appellant / Insurer has examined its officer Badal Jain at Exhibit 44, he was not a witness to the accident and as such, not able to tell whether deceased Kiran sat on the hood of the tractor at the time of accident. Even the said witness has also admitted in his cross-examination that he had not seen that deceased Kiran was sitting on the hood of the tractor at the time of accident. The learned counsel submits that though witness Badal Jain has admitted in his cross-examination that Appellant / Insurance company has appointed one investigator and though the said investigator has submitted a report, the same was not placed before the Tribunal. The Appellant / Insurer has thus, failed to substantiate its defence and the Tribunal has therefore, rightly fastened the liability on the Appellant / Insurer to pay the compensation jointly and severally alongwith Respondent / owner. The learned counsel submits that the driver of tractor was holding his learner's licence and it cannot be said that he was not having licence

at all. The learned counsel in the alternate submits that even if the defence of the Appellant / Insurer is considered, at the most, the Appellant / Insurer can be directed to pay the amount of compensation and recover the same from the Respondent / owner.

6 The learned counsel for Respondent / owner submits that the Appellant / Insurer has failed to substantiate its defence by adducing cogent and reliable evidence. Respondent / owner has examined himself before the Tribunal and he has supported the case of the Claimants to the extent that deceased Kiran and his associate Chhotu were the pedestrian at the relevant time and deceased Kiran suddenly tried to cross the road and dashed against the tractor. The Appellant / Insurer has not examined any witness to substantiate its defence and as such, the Tribunal has rightly fastened the liability on the Appellant / Insurer to pay the compensation jointly and severally alongwith Respondent / owner. No interference is required. There is no substance in the appeal.

7 On careful perusal of the pleadings, evidence and the judgment and award passed by the Tribunal, it appears that though Respondents / Claimants have produced on record complaint Exhibit 20, the learned Member of the Tribunal has not considered the same.

The Respondents / Claimants cannot admit the contents of the complaint Exhibit 20 to some extent and deny the remaining contents of the complaint, which are not favourable. On perusal of the contents of complaint Exhibit 20, it appears that A.D. No.50 of 2012 was registered on the date of accident itself and the police head constable, who has conducted the inquiry into the said A.D., has recorded the statement of eye-witnesses. Since none of the eye-witness has come forward to lodge the complaint, the said police head constable has lodged the complaint on behalf of the State against the driver of the tractor. It has been specifically mentioned in the complaint Exhibit 20 that deceased Kiran and said Chhotu were travelling on the hood of the tractor at the time of accident. It has also been specifically mentioned in the complaint that said hood of tractor is not covered by the angles and as such, it was risky to travel on the hood of the tractor. Further, the reference has also been given to the rash and negligent driving on the part of the driver of tractor. Respondent / owner is not an eye-witness to the accident. He has no personal knowledge about the accident. During the course of inquiry / investigation, Complainant police head constable has also recorded the statements of eye-witnesses and also Respondent / Claimant No.1 Ramchandra Jayram Sonawane. All the eye-witnesses have stated in terms of the contents of complaint Exhibit 20 and further the Respondent / Claimant Ramchandra Sonawane has also stated in the similar manner that deceased Kiran and Chhotu were travelling on the hood of tractor.

8 In the case of ***Khatri and others (IV) Vs. State of Bihar and others***, reported in, ***(1981) 2 Supreme Court Cases 493***, in para 5 of the judgment, the Supreme Court has made the following observations:

> "**5**. The object of section 172 in providing for the maintenance of a diary of his proceedings by the police officer making an investigation under Chapter XII has been admirably stated by Edge, C.J. in Queen-Empress v. Mannu (1897 AWN 174) in the following words:
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> > "The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police, and until the honesty, the capacity, the discretion and the judgment of the police can be thoroughly trusted, it is necessary, for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the magistrate or judge before whom the case

> is for investigation or for trial should have the means of ascertaining what was the information, true, false, or misleading which was obtained from day to day by the police officer who was investigating the case and what such police officer acted."

The criminal court holding an inquiry or trial of a case is therefore empowered by sub-section (2) of section 172 to send for the police diary of the case and the criminal court can use such dairy, not as evidence in the case, but to aid it in such inquiry or trial. But, by reason of sub-section (3) of section 172, merely because the case diary is referred to by the criminal court, neither the accused nor his agents are entitled to call for such diary nor are they entitled to see it. If however the case diary is used by the police officer who has made it to refresh his memory or if the criminal court uses it for the purpose of contradicting such police officer in the inquiry or trial, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act would apply and the accused would be entitled to see the particular entry in the case diary which has been referred to so far either of these purposes and so much of the diary as in the opinion of the court is necessary to a full understanding of the particular entry so used. It will thus be seen that the bar against production and use of case diary enacted in section 172 is intended to operate only in an inquiry or trial for an offence and even this bar is a limited bar, because in an inquiry or trial, the bar does not operate if the case dairy is used by the police officer for refreshing his memory or the criminal court uses it for the purpose of contradicting such police officer. This bar can obviously have no application where a case diary is sought to be produced and used in evidence in a civil proceeding or in a proceeding under Article 32 or 226 of the Constitution and particularly when the party calling for the case diary is neither an accused nor his agent in respect of the offence to which the case diary relates. Now plainly and unquestionably the present writ petition which has been filed under Article 32 of the Constitution to enforce the fundamental right guaranteed under Article 21 is neither an 'inquiry' nor a 'trial' for an offence nor is this Court hearing the writ petition a criminal court nor are the petitioners, accused or their agents so far as the offences arising out of their blinding are concerned. Therefore, even if the reports submitted by Shri L. V. Singh as a result of his investigation could be said to form part of 'case diary', it is difficult to see how their production and use in the present writ petition under Article 32 of the Constitution could be said to be barred under section 172."

9 It is thus, clear that such a police statement can be produced and used in civil proceedings and there is no bar as such of Section 145 of the Evidence Act.

10 It is true that the burden is on the Insurer to prove its defence and the said burden can be discharged either by adducing oral or documentary evidence or the insurance company may rely on the evidence adduced by the other side including the Claimants, owner of the vehicle involved in the accident etc. In the instant case, the Appellant / Insurer has discharged the said burden by placing reliance on the contents of complaint Exhibit 20 as well as police statement of eye-witnesses recorded during the course of investigation by the Investigating Officer. So far as the defence raised by the Appellant / Insurer that the driver of the tractor was not holding valid and effective driving licence is concerned, the Appellant / Insurer has examined the officer of RTO, who has deposed before the Court that the driver of the tractor was not holding valid and effective driving licence at the time of the accident. There is nothing in the cross-examination to discard the evidence adduced by the Appellant / Insurer on this point. In the given set of facts, there cannot be a pay and recover order since there is a fundamental breach of the policy. The risk of the passengers travelling on the hood of tractor is not covered under the policy and since no

third-party is involved in the accident, the Appellant / Insurer also cannot be directed to pay the amount and recover it from the Respondent / owner.

11 So far as the quantum of compensation is concerned, the learned counsel for Appellant / Insurer and the learned counsel for Respondent / owner have not made any submission. Thus, the appeal is required to be allowed to that extent. The Respondent / owner is liable to pay the compensation as worked out by the Tribunal. However, the Appellant / Insurer is to be exonerated from the liability to pay the compensation jointly and severally with Respondent / owner. Hence, the following order:

O R D E R

I. The appeal is hereby allowed. No costs.

II. The judgment and award passed by the learned Member of the Motor Accident Claims Tribunal, Jalgaon dated 15th October, 2016 in MACP No.229 of 2013, is hereby quashed and set aside to the extent directing the Appellant / Insurer to pay the compensation jointly and severally alongwith Respondent / owner.

III. Rest of the judgment and award passed by the Tribunal, to the extent of quantum of compensation and directing Respondent / owner to pay the said compensation, stands confirmed.

IV. Award be drawn up accordingly.

V. If any amount is deposited before this Court by the Appellant / Insurer, the same shall be refunded to the Appellant / Insurer.

VI. Appeal is accordingly disposed of.

VII. Pending civil application stands disposed of.

[V. K. JADHAV, J.]

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