

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

**FIRST APPEAL NO. 77 OF 1999**

United India Insurance Co. Ltd.,  
Aurangabad.

**... APPELLANT**  
(Original Respondent No.3)

**VERSUS**

1. Jagan s/o Andras Misar,  
Age : 45 years, Occ : Labour,  
R/o. Samtanagar, Aurangabad.
2. Smt. Rukmanibai w/o Jagan Misar,  
Age: 40 years, Occ : Labour,  
R/o. As above.
3. Shaikh Ayub s/o Shaikh Karim,  
Age : 25 years, Occ : Truck driver  
R/o : Baijipura, Aurangabad and at  
present Satarbhai's wada, Samtanagar,  
Aurangabad.
4. Balkrishna s/o Dattatraya Khisiti,  
Age: Major, Occ : Business,  
R/o : 'Jai', 5-11-7, Pensionpura,  
Nutan Colony, Aurangabad.  
L.Rs.
- 4/A. Deelip S/o Balkrishna Khisti,  
Age: 38 years, Occ : Business,  
R/o : Jay, Plot No.16, Pratap Nagar,  
Darga Road, Aurangabad.

(Respondent No.3 deleted  
as per Court order  
dated 25/9/2009.)

**... RESPONDENTS**  
(Ori. Claimants, Ori. Resp. No.1 & 2)

...  
Mr. D. V. Soman, Advocate for Appellant.  
Mr. G. K. Salve, Advocate for Respondent No.1  
...

WITH**CROSS APPEAL NO. 1 OF 2016**

IN

FIRST APPEAL NO.:77 OF 1999

1. Jagan s/o Andres Misal,  
Age : 65 years, Occ : Nil,  
R/o. Tisgaon, Post. Valadgaon,  
Dist. Aurangabad.
2. Smt. Rukminibai w/o Jagan Misal,  
Age: 60 years, Occ : Household,  
R/o. As above.

**... APPELLANTS**  
(Original Claimants)

**VERSUS**

1. United India Insurance Co. Ltd.,  
Through Divisional Manager,  
Osmanpura, Aurangabad.
2. Shaikh Ayub s/o Shaikh Karim,  
Age : 38 years, Occ : Truck Driver,  
R/o : Baijipura, Aurangabad,  
At present Sattarbhai's wada,  
Samtanagar, Aurangabad.
3. Balkrishna s/o Dattatraya Khisti,  
Age: Major, Occ : Business,  
R/o : 'Jay', 5-11-7, Pensionpura,  
Nutan Colony, Aurangabad.  
L.Rs.
- 3/A. Deelip S/o Balkrishna Khisti,  
Age: 38 years, Occ : Business,  
R/o : Jay, Plot No.16, Pratap Nagar,  
Darga Road, Aurangabad.

**... RESPONDENTS**  
(No.1 Original Appellant)  
(Nos.2 & 3 Original Respondents)

...

Mr. G. K. Salve, Advocate for Appellants.  
Mr. D. V. Soman, Advocate for Respondent No.1.  
Mr. B. M. Waghmare, Advocate for Respondent No.2.

...

CORAM : **V. K. JADHAV, J.**

DATE : 04<sup>th</sup> April, 2017.

**ORAL JUDGMENT:**

. Being aggrieved by the judgment and award passed by the learned Member of the Motor Accident Claims Tribunal, Aurangabad dated 23<sup>rd</sup> September, 1998 in MACP No.179 of 1993, original Respondent No.3 / Insurer has preferred First Appeal No.77 of 1999 and the original Claimants preferred cross-appeal bearing Cross Appeal No.1 of 2016 to the extent of quantum of compensation.

2 Brief facts giving rise to these two appeals are as follows:

- i) On 28<sup>th</sup> April, 1993 at about 07:00 am, near Iron bridge on Aurangabad-Nagar road, Respondent / driver had driven the vehicle truck bearing registration No.MTS-6085 in a rash and negligent manner and had given a dash to the tanker, which was proceeding ahead by the left side of the road. In consequence of which, deceased Santosh, who was travelling in the said truck as cleaner, had fallen down from the truck cabin and

sustained injuries on his head, hands, left leg and other parts of the body. He was immediately shifted to Ghati Hospital, Aurangabad in an unconscious condition and he succumbed to the injuries on the next day while under treatment.

- ii) The Claimants / legal representatives of deceased Santosh approached to the Motor Accident Claims Tribunal by filing MACP No.179 of 1993 for grant of compensation under the various heads. It has been contended in the claim petition that deceased Santosh was employed as a cleaner by the Respondent / owner on the said truck and the accident had taken place on account of rash and negligent driving on the part of Respondent / driver of the truck. It has been contended that deceased Santosh was the earning member of the family and the Claimants were depending upon his earnings. The Claimants have thus, claimed the compensation of Rs.2,00,000/- with interest.

- iii) Respondent / driver had not filed his written statement and therefore, hearing of the claim petition was ordered to proceed without his written statement.
- iv) Respondent / owner had filed his written statement at Exhibit – 19. It has been contended that the road where the accident had taken place was plain and there was no traffic on the road at the time of the accident. It has been contended that the driver of the said tanker had suddenly stopped his vehicle without giving any signal to the truck and as such, the driver of the truck could not control his vehicle and dashed against the backside of said tanker. It has been contended that said truck is insured with Respondent / Insurer on the date of accident for the period of 20<sup>th</sup> April, 1992 to 29<sup>th</sup> April, 1993 and as such, covers the date of accident. Thus, Respondent / Insurer is liable to pay the compensation. It has been contended that the owner, driver and the

insurance company of the said tanker are the necessary parties to the claim petition and the claim petition is bad for non-joinder of necessary parties. The concerned P.S. has registered the crime against the truck driver alone even though the drivers of both the vehicles are responsible for the accident. It has been contended that deceased Santosh was earning Rs.70/- per week by working as a cleaner on the truck. It has been contended that after the accident, Respondent / owner has given information to the Insurer about the accident and involvement of the vehicle in the said accident. However, Respondent / Insurer has failed to contest the claim on behalf of them on the ground that the policy came to be expired on 19<sup>th</sup> April, 1993 and inadvertently, the incorrect period has been mentioned in the policy exceeding one year. It has been also contended that the said vehicle also met with another accident giving rise to MACP No.391 of 1992

wherein insurance company has not raised the said defence nor rectified the mistake appearing in the policy about the period of risk cover under the policy. Even thereafter, the Respondent / Insurer has renewed the policy from 29<sup>th</sup> April, 1993. As such there is no break in policy.

- v) The Insurer has also strongly resisted the claim petition by filing the written statement. It has been contended that the Claimants ought to have filed the claim petition under the Workmen's Compensation Act and the Tribunal has no jurisdiction to try and decide the matter. It has been also contended that the owner, driver and the insurer of the said tanker were not impleaded as party to the claim petition and therefore, the claim petition suffers from non-joinder of necessary parties. It has been contended that the accident had taken place on account of the negligence on the part of the drivers of both the vehicles. The Insurer has raised a specific plea

that the contract of insurance came to an end on 19<sup>th</sup> April, 1993 and the accident had taken place on 28<sup>th</sup> April, 1993. It has been contended that the proposal was given by the insured for a period of one year only and as per the said proposal, the period covering the risk is limited for a period of one year i.e. from 20<sup>th</sup> April, 1992 to 19<sup>th</sup> April, 1993. It has been contended that, inadvertently, the policy period is mentioned as 20<sup>th</sup> April, 1992 to 29<sup>th</sup> April, 1993. Thus, the risk is not covered under the contract of insurance.

3           The learned counsel for the Insurer submits that the driver of the tanker had suddenly applied the brakes without giving any signal to the vehicles following his vehicle and as such, the driver of the tanker was alone responsible for the accident. The learned counsel submits that at the most the drivers of both the vehicles are responsible for the accident in composite manner. The learned counsel submits that the Claimants ought to have filed the claim petition under the provisions of the Workmen's Compensation Act and

as such, the Tribunal was not having jurisdiction to entertain and decide the claim petition. The learned counsel submits that the Claimants had failed to implead the owner, driver and insurer of the tanker in the claim petition and as such, the claim petition is bad for non-joinder of necessary parties. The learned counsel submits that the period of insurance is only of one year and inadvertently, in the certificate of insurance, the period exceeding one year has been shown. As per the proposal submitted by the insured and the premium accepted for one year, the period of policy expired on 19<sup>th</sup> April, 1993. The Insurer has also examined its employee Mr. Bhimrao Bhangre to substantiate its defence. However, the learned Member of the Tribunal has not considered the same in its proper perspective. The learned counsel in the alternate submits that the Tribunal has awarded the just and reasonable compensation. As per the income of the deceased, the Respondent / owner has specifically pleaded in his written statement that he was paying Rs.70/- per week to deceased Santosh for working as a cleaner on the said truck. The learned counsel submits that in terms of the judgment and award passed by the Tribunal, the Insurer has deposited the entire amount before this Court and the same has been withdrawn by the Claimants. There is

no substance in the cross-appeal preferred by the Claimants for enhancement in the compensation.

4           The learned counsel appearing for Respondent / owner submits that even though the said vehicle truck met with an accident in the month of June 1992, the Insurer has not bothered to rectify the mistake if at all committed in mentioning the period of insurance of certificate. The learned counsel submits that only after the accident, which is the subject matter of present appeal, the Insurer woke up and taken a stand like this. The learned counsel submits that the Insurer has never communicated to the Respondent / owner about the period of insurance ending on 19<sup>th</sup> April, 1993 and on the contrary has renewed his policy with effect from 29<sup>th</sup> April, 1993. The learned Member of the Tribunal has therefore, rightly fastened the liability on the Insurer. The learned counsel submits that Respondent / owner was paying Rs.70/- per week to deceased Santosh and as such, the Tribunal has awarded just and reasonable compensation. No interference is required in the impugned judgment and award.

5           On perusal of the pleadings, evidence and the judgment and award passed by the Tribunal, it appears that after the accident,

the crime came to be registered against the Respondent / driver of the truck alone. On perusal of the contents of spot Panchanama Exhibit – 43, it appears that there is a road divider and near about 22 feet of tar road in width left from the road divider. It has been specifically noted in the spot Panchanama that there was a speed breaker on the spot. It is thus, clear that the said tanker was proceeding from the extreme left side of the road and near about 22 feet of tar road was available for the truck to overtake the said tanker. It was for the driver of the truck to keep safe distance from the vehicle proceeding ahead. There may be more than one reason for the driver of the tanker to apply the brakes and stop his vehicle, which was proceeding from the extreme left side of the road. The learned Member of the Tribunal has considered the entire evidence on record particularly the contents of spot Panchanama Exhibit – 43 and rightly held that the accident had taken place on account of rash and negligent driving of the driver of truck. It is well settled that the Claimant can proceed against any of the joint *tort-feasor* and in case the Tribunal arrive at a finding of contributory negligence on the part of the driver of the vehicle not impleaded as party to the claim petition, in that event the Claimant loses his right to claim the compensation to that extent. I do not

think that the claim petition is bad for non-joinder of necessary party.

6           In view of the provisions of Section 167 of the Motor Vehicles Act, 1988, where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. In view of the provisions of Section 167, the Claimants have exercised the option to approach the Motor Accident Claims Tribunal and accordingly the Tribunal gets the jurisdiction to entertain the claim petition and decide the same. I do not find any substance in this ground raised on behalf of the Insurer.

7           So far as the insurance coverage is concerned, the learned counsel for Insurer has vehemently submitted that the policy is issued only for the period of one year and considering the commencement of the policy i.e. on 20<sup>th</sup> April, 1992, the policy expires on 19<sup>th</sup> April, 1993. The accident had taken place on 28<sup>th</sup> April, 1993 and as such, the insurance policy does not cover the risk and, the Insurer is not liable to pay the compensation. The learned counsel

submits that inadvertently, the period exceeding one year has been mentioned in the certificate of insurance. The Insurer has examined Mr. Bhimrao Bhange, Assistant Administrative Officer of the Company. According to him, the policy came to be issued for the period of one year and the premium was also taken for one year. The effective period of the policy is between 20<sup>th</sup> April, 1992 to 19<sup>th</sup> April, 1993. However, the dates 20<sup>th</sup> April, 1992 to 29<sup>th</sup> April, 1993 came to be typed erroneously on the policy document. He has also deposed that a proposal letter was received from the insured / owner of the truck and on the basis of the said proposal letter, the advise came to be issued. Even on the proposal letter the dates are mentioned as 20<sup>th</sup> April, 1992 to 19<sup>th</sup> April, 1993. In cross-examination he has shown ignorance about the fact that the same vehicle met with an accident on 9<sup>th</sup> June, 1992 and his company had defended the owner in the claim arises out of the said accident. He has however, admitted that the motor accident report received from the owner consisting the date of validity of the insurance policy. In the claim form, the date is mentioned by the owner as per the policy i.e. 20<sup>th</sup> April, 1992 to 29<sup>th</sup> April, 1993. He has further admitted in cross-examination that at no point of time, the information was given to the insured that there was a

typographical error in stating the date of expiry of the policy. He has further admitted in his cross-examination that the Company came to know about the typographical error when the second claim was filed.

8           On careful perusal of the certificate of insurance Exhibit – 61/A, the period of insurance is mentioned as 20<sup>th</sup> April, 1992 to 29<sup>th</sup> April, 1993. In view of the provisions of Section 156 of the Motor Vehicles Act, when an insurer has issued a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, then if and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate. In terms of clause (b) of Section 156 of the Motor Vehicles Act, if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and any other person except the insured, be deemed to be in terms

conforming in all respects with the particulars stated in the said certificate. Section 156 of the Motor Vehicles Act reads as under:

**“156. Effect of certificate of insurance.**—When an insurer has issued a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, then—

- (a) if and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate; and
- (b) if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and any other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the said certificate.”

9           In view of the provisions above and the fact that though the Insurer had an opportunity to rectify the certificate of insurance or the policy of insurance when the same vehicle met with an accident in the month of June 1992, failing so, cannot raise the plea to the effect that due to typographical error the period is inadvertently shown in the certificate of insurance exceeding one year.

10           In the case of **Bomanji Rustomji Ginwala Vs. Ibrahim Vali Master and others**, reported in, **1982 A.C.J. 380**, the Gujarat High Court has held that if there is an error or omission in the policy on the part of the Insurer, the benefit should go to the insured. In the instant case, the Respondent / owner had no notice about the typographical error in mentioning the date of expiry on the certificate of insurance. Witness Mr. Bhimrao Bhange, Assistant Administrative Officer of the Company has also admitted the same in his cross-examination. Under these circumstances, the Insurer cannot escape from the liability to pay the compensation jointly with Respondent / owner.

11           So far as the quantum of compensation is concerned, the learned Member of the Tribunal has considered the income of

deceased Santosh at Rs.300/- per month. The learned Member of the Tribunal has not considered the income of deceased Santosh as claimed by the Claimants only on the ground that the Claimants failed to substantiate their contentions by producing on record the salary certificate. Admittedly, deceased Santosh was working as a cleaner on the vehicle involved in the accident. Respondent / owner has also not disputed the same. It is difficult to expect from the Claimants to obtain the salary certificate from the owner and produce it on record. In such cases, it is unlikely on the part of the owner to maintain the record about the employment of cleaner working on his truck and to issue salary certificate as and when demanded by the Claimants. The learned Member of the Tribunal has given weightage to the pleadings of the Respondent / owner. Respondent / owner has not examined himself on oath before the Tribunal. The learned Member of the Tribunal has erred in relying upon the pleadings of the Respondent / owner in respect of the salary being paid to deceased Santosh. The learned Member of the Tribunal has not given thought that if Rs.70/- per week is considered as wages being paid to the deceased, deceased Santosh was getting Rs.10/- per day. Even though the accident had taken place way back in the year 1993, it is difficult to

believe that deceased Santosh was getting Rs.10/- per day. Even if minimum wages in that year are considered, deceased Santosh must be getting Rs.30/- per day corresponds to Rs.900/- per month. Deceased Santosh was unmarried son. However, the Claimants were depending on his income. Claimant Nos.1 and 2 are the aged parents. In view of the ratio laid down by the Supreme Court in the case of **Sarla Verma (Smt) and others Vs. Delhi Transport Corporation and another**, reported in, **(2009) 6 Supreme Court Cases 121**, 50% of his income is required to be deducted towards his personal and living expenses. If the average age of the Claimants is considered, the relevant multiplier would be 14. Thus, the Claimants are entitled for the compensation of Rs.75,600/- under the head of loss of future income ( $450 \times 12 \times 14$ ). The learned Member of the Tribunal has not awarded any amount for funeral expenses, loss of estate and loss of love and affection. The Claimants are entitled for an amount of Rs.15,000/- for funeral expenses, Rs.10,000/- for loss of estate and Rs.10,000/- each to the Claimants for loss of love and affection. Thus, the break up of compensation under the heads as discussed above can be broadly categorized as under:

| <b>Sr. No.</b> | <b>Particulars of the head</b>                                                           | <b>Amount in Rupees</b> |
|----------------|------------------------------------------------------------------------------------------|-------------------------|
| 1)             | Towards loss of future income<br>(as against Rs.37,200/- awarded by Tribunal)            | Rs.75,600/-             |
| 2)             | Towards general expenses including mental agony, shock etc. (as awarded by the Tribunal) | Rs.30,000/-             |
| 3)             | Towards funeral expenses                                                                 | Rs.15,000/-             |
| 4)             | Towards loss of estate                                                                   | Rs.10,000/-             |
| 5)             | Towards loss of love and affection<br>(Rs.10,000/- for each Claimant)                    | Rs.20,000/-             |
|                | <b>Total =</b>                                                                           | <b>Rs.1,50,600/-</b>    |

12 The Claimants are entitled for the total amount of compensation as worked out hereinbefore. The Claimants have filed cross-appeal belatedly and this Court has condoned the said delay on condition that the Claimants would not be entitled to claim the interest of the said period of delay, which is condoned by the Court. The Claimants are entitled for the compensation with interest at the rate as determined by the Tribunal excluding the said period for which the delay sought to be condoned. Hence, the following order:

### **ORDER**

- I. First Appeal No.77 of 1999 (United India Insurance Company Ltd. Aurangabad Vs. Jagan Andres Misar and others), is hereby dismissed with costs.

II. Cross Appeal No.1 of 2016 in First Appeal No.77 of 1999 (Jagan Andres Misal and another Vs. United India Insurance Co. Ltd. and others), is partly allowed with proportionate costs.

III. The judgment and award passed by the learned Member of the Motor Accident Claims Tribunal, Aurangabad dated 23<sup>rd</sup> September, 1998 in MACP No.179 of 1993, is hereby modified in the following manner:

“Respondent Nos.1 to 3 are jointly and severally liable to pay an amount of Rs.1,50,600/- (Rupees One Lac Fifty Thousand and Six-Hundred only) as compensation inclusive of NFL amount with interest at the rate of 12% per annum from the date of application till realization of the entire amount. However, the Claimants are not entitled for the interest of the period of delay caused in filing the cross-appeal.

IV. Rest of the judgment and award passed by the Tribunal stands confirmed.

- V. Award be drawn up as per the above modification.
- VI. Needless to say that if any amount is paid and withdrawn by the Claimants as per the judgment and award passed by the Tribunal, the same shall be the part of the modified award.
- VII. Both the appeals are accordingly disposed of.

**[ V. K. JADHAV, J. ]**

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