

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 4084 OF 2017

New India Assurance Company Ltd.
Through its Authorized Official and
Divisional Manager, Legal Hub,
Adalat Road, Aurangabad.

Appellant.

Versus

1. Baban Maruti Tour
Age : 56 yrs, occu.: nil
R/o Aalai, Taluka and
District Osmanabad.
2. Girjabai w/o Baban Tour
Age : 54 yrs, occu.: household
R/o as above.
3. Muktabai w/o Rajkumar @
Rajabhau @ Rajendra Tour
Age : 25 yrs, occu.: household
R/o as above.
4. Vaibhav Rajendra @ Rajabhau
Tour.
Age : 4 yrs, occu.: nil
R/o as above.
5. Vaishnavi d/o Rajendrakumar
@ Rajabhau Tour.
Age : 2 yrs, occu.: nil,
R/o as above.
6. Radha d/o Rajendrakumar @
Rajabhau Tour.
Age : 3 ½ yrs, r/o as above.

(Respondent Nos.4 to 6 being minor,
under guardianship of respondent
No.3, mother).

7. Shankar Namdeo Takale
Age : 26 yrs, occu.: driver
R/o Khed, Taluka and
District Osmanabad.
8. Suhas Keshavrao Patil
Age : 44 yrs, occu.: buisness
R/o Vidya Nagar, Barshi
Naka, Tambari Area,
Osmanabad.

Respondents.

Mr. A.S. Osmanpurkar, Advocate for the appellant.
Mr. V.S. Undre, Advocate for respondent Nos.1 to 6.
Mr. M.P. Kolpe, Advocate for respondent No.8 (absent).

CORAM : SUNIL K.KOTWAL,J.

Judgment reserved on : 23rd October 2018.

Judgment pronounced on : 1st November 2018.

JUDGMENT.

1. This appeal is directed by New India Assurance Company against the judgment and award passed by Motor Accident Claims Tribunal (hereinafter referred to as the "Tribunal"), Osmanabad in Motor Accident Claim Petition No.165/2009 where the compensation of Rs. 10,57,000/- with

interest thereon at the rate of 6% per annum is awarded by the Tribunal.

2. The appellant is original respondent No.3. Respondent Nos.1 to 6 are the original claimants. Respondent No.7 is the driver of offending truck bearing registration No. MH-25-B-7544 (original respondent No.1) and respondent No.8 is the owner of offending vehicle (original respondent No.2).

3. Hereinafter the parties are referred to in accordance with their status in the original proceeding.

4. The facts, in nutshell, are that, the deceased Rajkumar @ Rajabhau Baban Tour was the son of original claimant Nos.1 and 2 and husband of claimant No.3 as well as father of claimant Nos.4 to 6. He was the only bread earning member of the family of claimants. The deceased was serving with Adi Constructions up to 10.05.2007 and thereafter he was serving with respondent No.2 as driver on offending truck at the monthly salary of Rs. 9,000/-. On 07.06.2008, after loading Poklen Machine in the offending truck, respondent No.1 was driving it by the road in rash and negligent manner without taking note of the obstacles on the road. That time the deceased

was travelling by the same truck as second driver. On way Poklen Machine came in contact with the overhead hanging live electricity wire on the road. When the deceased tried to alight from the cabin of the truck, that time he died on the spot due to electrocution on account of touch of the live electricity wires to the Poklen Machine loaded in the truck. Therefore, the claimants filed claim petition under Section 166 of the Motor Vehicles Act, 1988 (For short "M.V. Act") for compensation against respondent Nos.1 to 3. At the relevant time of the accident, the truck was insured with respondent No.3-Insurance Company.

5. By filing Written Statement (Exh.55) respondent Nos.1 and 2 denied the claim, but admitted that on the date of accident the deceased was serving on the offending truck as second driver of respondent No.2. However, it is not disputed that at the time of accident respondent No.1 was driving the offending truck. Even occurrence of the accident due to touch of Poklen Machine with live electricity wires hanging on the road, is not disputed by these respondents. Only the contention of respondent Nos.1 and 2 is that the deceased committed attempt

to jump from the cabin of the truck and came in contact with live electricity wires and died due to his own negligence. Contention of respondent Nos.1 and 2 is that the claim is bad for non-joinder of the owner of Poklen Machine, Maharashtra State Electricity Distribution Company Limited (M.S.E.D.C.L.) as party to the petition. In the alternate, the contention of respondent Nos.1 and 2 is that, on the date of accident the truck was insured with respondent No.3 - Insurance Company, and therefore, respondent No.3 is liable to pay compensation to the claimants, if awarded by the Tribunal.

6. Respondent No.3-Insurance Company opposed this petition by filing Written Statement (Exh.33) mainly on the ground that the deceased was travelling by the offending truck as an unauthorised passengers, and therefore, his risk is not covered under the policy of insurance. The next contention of the Insurance Company is that in respect of the same accident the claimants have filed Special Civil Suit No.43/2010 in the Court of Civil Judge, Senior Division, Osmanabad against M.S.E.D.C.L. and the said suit was decreed with costs on 04.03.2013 and compensation of rs. 8,64,000/- with interest thereon was awarded.

Therefore, now the claimants cannot claim compensation from the driver, owner and insurer of the offending truck under the provisions of M.V. Act. According to respondent No.3, the driver of offending truck did not hold driving licence and thereby respondent No.2 has committed breach of conditions of policy of insurance.

7. After considering the evidence placed on record, the Tribunal allowed claim petition and awarded above-said compensation in favour of the claimants.

8. Heard Mr. Osmanpurkar, learned Counsel for the appellant / Insurance Company and Mr. Undre, learned Counsel for respondent Nos.1 to 6(original claimant Nos.1 to 6). Respondent No.7 did not appear, though served. Mr. M.B. Kolpe represented respondent No.8.

9. Learned Counsel for the appellant / Insurance Company submits that once the claimants have obtained decree for compensation from competent Civil Court in Special Civil Suit No.43/2010, under the principle of double jeopardy, this subsequent motor accident claim petition under M.V. Act is not tenable. He submits that once claimants have exhausted remedy

from the Civil Court, the second alternate forum under M.V. Act cannot be approached. He submits that the truck driver and M.S.E.D.C.L. being joint tort feasons, the claimants had an option to elect any one of the Forum, either under M.V. Act or before the Civil Court, in view of Section 167 of M.V. Act. Learned Counsel for the appellant assailed the judgment and award passed by the Tribunal on the ground of double jeopardy.

10. The next submission of the learned Counsel for the appellant / Insurance Company is that the Tribunal awarded exorbitant compensation as the driving licence of the deceased is not placed on record to show that he was second driver on the truck. He placed reliance on the cases of **“National Insurance Co. Ltd. Vs. Mastan and anr” (AIR 2006 SC 577)**, **“National Insurance Co. Ltd. Vs. Sebastian K. Jacon” [AIR 2009 SC (Supp) 2271]**, **“New India Assurance Co. Ltd. Vs. Manish Gupta and others” [2013 (1) Karnataka Law Journal 624]**, **“National Insurance Co. Ltd. Vs. M.S. Mohan” [Led (Ker) 2008 343]** and **“Union of India Vs. Bhagwati Prasad and others” (AIR 2002 SC 1301)**.

11. Learned Counsel for the original claimants submits that the claimants have not recovered any compensation amount from driver, owner and Insurance Company of the offending truck. He submits that the remedy against M.S.E.D.C.L. being distinct civil remedy, in the motor accident claim petition filed under Section 166 of M.V. Act, the M.S.E.D.C.L. cannot be joined as a party. So also the driver, owner and Insurance Company of the offending truck cannot be joined as party in the civil suit filed against M.S.E.D.C.L. for its negligence while hanging the live electricity wires on the road. The remedy against owner, driver and Insurance Company under the M.V. Act is altogether different. These two remedies are not alternate remedies available to the claimants and those remedies are distinct and separate remedies, which cannot be connected together.

12. The next submission of the learned Counsel for the original claimants is that when the owner of the offending truck has admitted that the deceased was his employee as second driver, the documentary evidence to prove that employment is not necessary. He submits that the driver being skilled labourer, his notional income cannot be less than Rs. 9,000/- per month. He

prays for dismissal of the appeal.

13. After hearing learned Counsel for the parties, it becomes clear that the appellant / Insurance Company has assailed the judgment and award passed by the Tribunal mainly on the ground that alternate remedies are available to the claimants either before the Civil Court or Motor Accident Claims Tribunal. According to appellant, once the remedy before the Civil Court is elected by filing Special Civil Suit No.43/2010, now the claimants are debarred from approaching the Tribunal. The learned Counsel for the appellant has mainly placed reliance on Section 167 of the M.V. Act.

14. However, at the outset, I must make it clear that under Section 167 of the M.V. Act, the option regarding claims for compensation is given to the claimants, either under Workmen Compensation Act, 1923 or under the M.V. Act. Similar option is also given under Section 143 of M.V. Act in case of no fault liability, either to approach the Tribunal under Section 140 of M.V. Act or to approach the Commissioner under Workmen Compensation Act, 1923. Thus, after going through Section 143 and Section 167 of the M.V. Act it becomes clear that option to

the claimants is given for electing only one out of two remedies one under M.V. Act or second under Workmen Compensation Act. This option cannot be stretched to the civil remedy available in the Civil Court. Neither Section 143 nor Section 167 of M.V. Act speak regarding alternate remedy available to the claimants in motor accident claims cases before the Civil Court. Therefore, in view of this clear provision, by no stretch of imagination it can be held that the claimants had option to elect the remedy either from the Civil Court or from the Claims Tribunal.

15. The case "**Oriental Insurance Co. Ltd. Vs. Mastan**" (supra) can be distinguished on facts, because in that case the Apex Court was considering the doctrine of election in view of Sections 143 and 167 of M.V. Act, 1988 and the provisions under Workmen Compensation Act. So also, the case of "**National Insurance Co. Ltd. Vs. Sebastian**" (supra) is distinguishable on facts, because in that case out of two Insurance Companies for jeep and truck respectively, the claimant had settled his claim with insurer of one vehicle. Therefore, the Apex Court held that once the compensation is recovered from one of the Insurance Company of the vehicle

involved in the accident, the compensation cannot be recovered from the Insurance Company of second vehicle, which collided with the jeep involved in the accident. So also, in the case of **“Union of India Vs. Bhagwati Prasad”** (supra), in a motor accident claim petition against driver, owner and Insurance Company of the taxi involved in the accident, even Railway Administration was made party, because the Taxi had collided with Allahabad – Saharanpur Passenger Train. The Tribunal held that the driver of Taxi was not negligent and he was not responsible for the accident. Therefore the liability to pay compensation was saddled on Railway Administration. That award was upheld by the Apex Court for the reason that once the Tribunal entertained such application and on inquiry the Tribunal came to the finding that it is the negligence of Railway Administration which was responsible for the accident, to denude the Tribunal of its jurisdiction would cause undue hardship to every claimant.

16. However, in the case at hand in the present appeal, the Tribunal held that the motor vehicular accident occurred due to rash and negligent driving by the driver of offending truck and

in the Special Civil Suit No.43/2010, the Civil Court held that even M.S.E.D.C.L. was negligent which allowed the hanging of live electricity wires on the road at lower height. Thus, negligence on the part of M.S.E.D.C.L. is absolutely distinct act than the negligent driving by driver of the offending truck. Therefore, remedies available to the claimants before Civil Court as well as before the Tribunal are absolutely distinct remedies, which cannot be considered as alternate remedies provided under the Statute. Therefore, the doctrine of election in the case at hand, does not arise. I hold that despite passing of decree for compensation in Special Civil Suit No.43/2010 against M.S.E.D.C.L., the motor accident claim petition in the Tribunal for rash and negligent driving by driver of offending truck is also tenable if the claimants can establish that the deceased died in a motor vehicular accident due to rash and negligent driving by the driver of offending truck.

17. Now turning to the evidence placed on record by the claimants in the claim petition. On behalf of the claimants, Baban Maroti Taur (PW-1) stepped in witness box and he deposed that on the date of accident, the deceased was travelling

by offending truck in which Poklen Machine was loaded. At about 11.30 p.m. at Mauje Dhutta, Taluka Osmanabad, due to rash and negligent driving by respondent No.1, the Poklen Machine touched the electricity supply wires which were hanging over the road, and therefore, electric supply passed through the body of truck. When the deceased tried to alight from the truck to inquire as to what happened, he died on the spot due to electrocution. From the cross-examination of this witness, it emerges that he was not present on the spot at the time of the accident and he deposed regarding occurrence on the basis of papers.

18. The claimants have also filed certified copies of spot panchnama (Exh.38) and F.I.R. (Exh.37), which clearly recite that on 08.06.2018 when Poklen Machine was loaded in the offending truck and when respondent No.1 was driving that truck by Tuljapur to Kerogaon road towards village Dhutta, that time at about 11.30 p.m. Poklen Machine touched the live electricity wires and when the deceased was alighting from the truck for inquiry, that time he died on the spot due to electrocution. The accident occurred due to rash and negligent

driving of the driver of offending truck. The spot panchnama also shows that near Dhutta village the offending truck was standing and the electric supply wires were touching to Poklen Machine.

19. It was the duty of driver of the truck while driving the truck to take care of the hurdles on the road. Due to negligent driving by the driver of offending truck, he could not locate the electricity supply wires hanging on the road and thereby motor vehicular accident occurred and deceased died due to electrocution. Even postmortem report (Exh.40) shows that deceased died due to electrocution. Thus, on the basis of these police papers on record which can be read in evidence without its formal proof, the claimants have proved that due to rash and negligent driving by the driver of offending truck, the deceased died due to electric shock.

20. R.C. Book of the offending truck shows that sitting capacity of the truck was "three persons" including driver. Copies of driving licence of deceased as well as respondent No.1 (driver of the offending truck) show that these both persons held effective and valid driving licence to drive the said offending

truck. Even the driving licence of deceased was renewed up to 28.02.2010. Thus, on the date of accident the deceased was holding valid and effective driving licence to drive the offending truck. Even the driving licence of respondent No.1 shows that it was valid till 26.08.2010. Thus, even the driver of offending truck was holding valid and effective driving licence to drive the said truck. Therefore, when respondent No.2 – owner of the offending truck admits that the deceased was his second driver, by no stretch of imagination it can be held that the deceased was travelling by the offending truck as a gratuitous passenger. On the other hand, in view of clear admission of the owner of offending truck, the deceased was travelling by the said truck as a second driver on truck. As per R.C. Book of the offending truck three persons were allowed to travel by that truck including the driver. Therefore, the Insurance Company cannot prove that the owner of offending truck committed breach of any condition of policy of insurance. Even the claimants have duly proved that the deceased was travelling by offending truck as a second driver of the said truck.

21. The policy of insurance shows that on the date of accident, it was effective and even it covers the risk of driver. Therefore, when the claimants have proved that due to rash and negligent driving by the driver of offending truck the deceased died in a motor vehicular accident, the respondent No.3 Insurance Company being insurer of the said truck and respondent Nos.1 and 2 being driver and owner respectively of the said truck, are jointly and severally liable to pay compensation to the claimants.

22. For determining the quantum of compensation, the age of deceased plays an important role. School Leaving Certificate of the deceased shows that his date of birth is 21.12.1979. Thus, on the date of accident he was 28 years old. Therefore, in view of the guidelines issued by the Apex Court in the case of **“Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.”**, (AIR 2009 SC 3104), multiplier of “17” is applicable in the case at hand.

23. Regarding income of deceased, the claimants have examined Jotiram Shinde (PW-1) who was the Manager of Adi Construction Company. This witness has duly proved salary

certificate (Exh.36) issued by Adi Construction Company, which shows that till May 2007 the deceased served as a driver in the said company and he used to draw total salary of Rs. 6,000/- per month and Bhatta of Rs. 100/- per day. Thus, this certificate shows the earning capacity of the deceased at least at the rate of Rs. 6,000/- to 8,000/- per month. Otherwise also, the deceased being driver, falls within the category of “skilled labourer”. Therefore, considering the minimum wages of skilled labourer, notional monthly income of the deceased cannot be less than Rs.6,000/-. As the deceased was below the age of 40 years, in view of the guidelines issued by the Apex Court in the case of **“National Insurance Co. Ltd. Vs. Pranay Sethi and others” [(2017) 16 SCC 680]**, 40% income is to be added in his monthly income as compensation for loss of future prospects. Thus, monthly income of the deceased is assessed as Rs. 8,400/-. It follows that his annual income is Rs. 1,00,800/-.

24. As the dependents in the family of deceased are “6” in numbers, one-fourth income i.e. Rs. 25,200/- is to be deducted from the annual income of the deceased towards his personal expenses. Thus, the annual contribution of the deceased to his

family is assessed as Rs. 75,600/- (1,00,800 – 25,200). This will be the multiplicand which is to be multiplied by multiplier “17”. Thus, the loss of dependency is assessed as Rs. 12,85,200/- (75600 x 17).

25. In addition to this, as per the guidelines issued in the case of “**Pranay Sethi**” (supra) claimants are entitled to the following conventional heads :-

Loss of consortium	:-	Rs. 40,000/-
Loss of estate	:-	Rs. 15,000/-
Funeral expenses	:	Rs.15,000/-

26. Thus, the claimants are entitled to total compensation under different heads, as under :-

Loss of dependency	:-	Rs. 12,85,200/-
Loss of consortium	:-	Rs. 40,000/-
Loss of estate	:-	Rs. 15,000/-
Funeral expenses	:-	<u>Rs. 15,000/-</u>
Total	:-	<u>Rs. 13,55,200/-</u>

27. Claimants are entitled to interest at the rate of Rs.9% per annum on the above-mentioned compensation amount from the date of filing of petition till realization of entire amount. Original respondent Nos.1 to 3 shall be jointly and severally liable to pay the above-said compensation.

28. In view of the verdict of the Apex Court in the case of **“Jitendra Khimshankar Trivedi and others Vs. Kasam Daud Kumbhar and others”** [2015 (4) SCC 237] even in absence of cross-objection, this Court can determine fair and reasonable compensation and award enhanced compensation in the appeal preferred by Insurer of the vehicle.

29. Claimant No.1 Baban and claimant No.2 Girjabai being old aged parents of the deceased, considering their remaining life span, while apportionment of the compensation amount, only the amount of Rs. 75,000/- each be paid to claimant No.1 Baban and claimant No.2 Girjabai with proportionate interest thereon. Remaining compensation amount with accrued interest thereon be equally apportioned amongst claimant Nos.3 to 6. Claimant Nos.4, 5, and 6 being minors, compensation amount of their shares shall be invested in fixed deposits till they attain majority. The compensation amount of the share of claimant No.3 Muktabai shall be paid to her by separate account payee cheque through the Tribunal.

30. In view of the above discussion, First Appeal No.4084 of 2017 is dismissed. The award passed by Motor Accident Claim

Tribunal, Osmanabad in Motor Accident Claim Petition No.165/2009 is modified to enhance the compensation amount to the tune of Rs. 13,55,200/- (Rupees Thirteen Lakh Fifty Five Thousand and Two Hundred), with interest thereon at the rate of Rs. 9% per annum from the date of filing of the petition till realization of compensation amount.

31. Original respondent Nos.1 to 3 shall jointly and severally pay the above-mentioned compensation amount to the claimants by depositing the same with the Motor Accident Claim Tribunal, Osmanabad.

32. On deposit of the said compensation amount, the amount of Rs. 75,000/- (Rupees Seventy Five Thousand) each be paid to claimant No.1 Baban Maruti Tour and claimant No.2 Girjabai w/o Baban Tour, by issuing separate account payee cheque in their respective names, through the Tribunal.

33. The remaining amount be equally apportioned amongst claimant Nos.3 to 6.

34. The amounts of the shares of minor claimant No.4 Vaibhav, claimant No.5 Vaishnavi and claimant No.6 Radha be invested in fixed deposits in their respective names, through

their mother claimant No.3 Muktabai in any Nationalized Bank, till they attain majority. Claimant No.3 Muktabai is at liberty to withdraw quarterly accrued interest accrued on the said fixed deposit amounts of minors.

35. The amount of the share of claimant No.3 Muktabai wd/o Rajkumar @ Rajabhau @ Rajendra Tour be paid to her by issuing separate account payee cheque in her name through the Tribunal.

36. Deficit Court fees, if any, be recovered from the claimants.

37. Premature withdrawal is not permissible. The concerned bank be informed accordingly by the Tribunal.

38. The award be modified accordingly.

39. Parties to bear their respective costs of the appeal. The appeal is disposed of in above-said terms.

**(SUNIL K. KOTWAL)
JUDGE**

39. Learned Counsel for the appellant / Insurance Company submits that execution of the award be stayed and the

amount deposited in this appeal may not be disbursed for the period of twelve (12) weeks.

40. None is present for the respondents.

41. Accordingly, operation and execution of the award modified in this appeal is stayed for the period of twelve (12) weeks from the date of this order. Registrar (Judicial) is directed not to disburse the deposited compensation amount for the next period of twelve (12) weeks from the date of passing of this order.

(SUNIL K. KOTWAL)
JUDGE

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