

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

FIRST APPEAL NO. 1397 OF 2015

M/s. Shriram General Insurance Company Limited,
Through its Authorized Signatory / Manager,
10003-E-8, EPIP, RICO Industrial Area,
Sitapura, Jaipur-303 202 (Rajasthan) Appellant...

Versus

1. Rekha Wd/o. Rahul Shirsath,
Age : 34 years, Occu. Household,
2. Kiran S/o. Rahul Shirsath,
Age : 11 years, Occu. Education,
3. Soniya D/o. Rahul Shirsath,
Age : 9 years, Occu. Education,
4. Rajashree D/o. Rahul Shirsath,
Age : 6 years, Occu. Education,

No. 2 to 4 since minor are under Guardianship
of No. 1 Rekha W/o. Rahul Shirsath.

All R/o. Manad-Darwaja, Chimni Tekdi,
Plot No. 900, Surat, Taluka & Dist. Surat,
Gujarat State.

5. Virak T. Jangalwala,
Age : Major, Occu. Business,
R/o. Koddara, Charrasta, Near J.E.B.
Taluka Palsana, District Surat (Gujarat State).
6. Ramakant Tiwari,
Age : Major, Occu. Driver,
R/o. C/o. Virak T. Jangalwala,
Koddara, Charrasta, Near J.E.B.
Taluka Palsana, District Surat (Gujarat State).
7. United India Insurance Company Limited,
Geetprabha Enterprises, 3rd floor,
Near Kadiwala Shala, Sagrampura,

Ring Road, Surat (Gujarat State),
Through its Authorized Signatory/Divisional Manager,
Divisional Office No. 1, Osmanpura, Aurangabad.

8. Babasaheb Annaram Bargal,
Age : Major, Occu. Business,
R/o. 3/72, Murhe Lane, Khultabad,
District Aurangabad. Respondents...

.....
Mr S. G. Chapalgaonkar, Advocate for appellant.
Mr Mukund R. Wagh, Advocate for respondents No. 1 to 4
Mr Girish Rane, Advocate h/f Mr S. S. Rathi, Advocate for respondent No. 7
Mr J. P. Reddy, Advocate for respondent No. 8
.....

CORAM : A. M. DHAVAL, JJ.

DATE OF RESERVING THE JUDGMENT : 24TH JULY, 2018.
DATE OF PRONOUNCING THE JUDGMENT : 16TH AUGUST, 2018.

JUDGMENT :-

1. Heard. **Admit.** With the consent of the parties, the appeal is taken up for final disposal at the stage of admission.
2. This is an appeal by original respondent No. 5 - Insurance Company against the judgment and decree of compensation of Rs. 27,28,000/- with interest at the rate of 7.5% p.a. passed u/s 166 of MV Act by Id.Member, MACT, Dhule on 16.10.2016 in MACP No. 5/2012 in favour of respondents No. 1 to 4 herein, both on the ground challenge to the quantum as well as fixing the liability on the appellant/Insurance Company.

3. The accident involved two vehicles. Deceased-Rahul was travelling in a MAX bearing No. MH-20/Y-8070 owned by original respondent No. 4 – Mr. Bargal. Another vehicle was Milk Tanker having No. GJ-05/M-5897 owned by respondent No. 1, driven by respondent No. 2. The tanker was insured with United India (Orig. R-3) while the Jeep was insured with Shriram General Insurance (Orig. R-5). In an appeal, the original respondent No. 5 has become the appellant, while original respondent Nos. 1, 2, 3 and 4 have become respondents No. 4, 5, 7 & 8 and original claimants have become respondents No. 1 to 4. The original claimants Rekha, Kiran, Soniya & Rajashri are widow, son and two daughters, then aged 31, 9, 7 and 4 years, respectively. For the sake of convenience, the parties are hereinafter referred to as per their original status in the trial Court.

4. Shri. Chapalgaonkar, learned counsel for the appellant challenged the judgment and decree on following grounds.

- (i) The vehicle of respondent No. 8 insured with the appellant as a private vehicle was not meant for public transport. The FIR which is admitted by the parties and relied by the claimant shows that the said vehicle was used as a public

transport vehicle carrying more than 12 passengers.

(ii) The FIR was filed for various offences including one u/s 166/192 of Motor Vehicles Act relating to illegal transport of passenger. There was thus breach of condition and, therefore, the Insurance Company was not liable to indemnify respondent No. 8. In this regard, he relied on the judgment in **Oriental Insurance Co. Ltd. V/s. Premlata Shukla and Ors.,** reported in **2007 AIR SCW 3591.**

(iii) He also argued that, as far as quantum is concerned, the learned Tribunal has not deducted income tax from the income of the deceased and has awarded Rs. 2,25,000/- under the conventional heads but as per the latest judgment of full bench of Five Judges in **National Insurance Company Ltd. vs. Pranay Sethi** reported in **AIR 2017 (16) SCC 680,** this amount will have to be reduced to Rs.70,000 and there shall be no compensation under the head of loss of love and affection. He relied on **Bajaj Allianz General Insurance vs. Deoram Jadhav** reported in **2018(2) Mh.L.J. 101,** wherein it is observed,

13. *On the touchstone of aforesaid legal guidelines, it is crystal clear that the plying of vehicle without valid permit is the violation of terms and conditions of contract of Insurance Policy. Obviously, the appellant- Insurance Company has a statutory right to raise such defence by invoking provisions under [sections 149](#) (2) of the Act of 1988. In case it is established that there is breach of condition of the Insurance Policy, the Insurance Company is not liable to indemnify the insured for the loss caused following vehicular accident.*

5. Mr Chapalgaonkar relied on the judgment of the Apex Court in the case of **P. V. George vs. State of Kerala** reported in **AIR. 2007 SC 1034**, on the doctrine of prospective overruling to submit that the law declared by the court will have retrospective effect if not stated to be so specifically.

6. Per contra, Shri. J. P. Reddy, learned counsel for respondent No. 8-Jeep owner drew my attention to the admission of witness of the appellant that, it was a comprehensive policy covering risk of 1+9 passengers. In this regard, he relied on the judgment in Sagarchand Jain vs Santosh Gupta of Delhi High Court dt. 10.01.1985. Quote para 7. He therefore submitted that the ownerr of Jeep will have to be indemnified by the appellant as there was no breach of policy. He also argued that there is no evidence to show that the jeep was used for hire or reward. He and Mr Mukund Wagh, learned advocate for respondents No. 1 to 4-the claimants supported the judgment claiming that the learned Member of the Tribunal has considered all the evidence and legal position in proper perspective and there was documentary evidence in the form of income tax returns showing the income. Hence, there is no reason to interfere with the judgment of the trial Court. he also argued that, the judgment in Pranay Sethis case was delivered on 31.10.2017 and the

learned Member of the Tribunal has delivered the judgment on 16.10.2014 as per the interpretation of the law prevailing at the relevant time. Therefore, there cannot be any interference in the quantum of compensation awarded in view of the subsequent change in the view of the Supreme Court.

7. The points for my consideration with my findings thereon are as follows:

(i) Whether the appellant (original respondent No. 5) has proved breach of policy by respondent No. 8 thereby exonerating the appellant from indemnifying him?

.....Not proved.

(ii) Whether the compensation awarded is excessive?

....Yes.

(iii) What order?The appeal is partly allowed.

REASONS

8. Learned advocate Shri. Chapalgaonkar referred para Nos. 1 and 2 of his written statement, wherein the breach of policy (i) the driver was not holding legal and valid driving license (ii) use of the vehicle for fair paying passenger are pleaded (iii) he relied on the copy of FIR dt. 29.10.2011 Exh. 24 lodged by ASI Nimbhore. It discloses that, one Deepak Patil gave information to ASI Nimbhore that, 10-12 persons were sitting in MAX jeep at Surat Vadodara Choufuli and, thereafter, the accident took place between Sakri to

navapur. The FIR also discloses that, in the accident, three persons died and 11 were injured whose names are disclosed. It is also stated by ASI Nimbhore that, deceased Dnyaneshwar without holding permit for passenger transport was illegally carrying passengers from Surat to Sakri. The FIR shows that, the crimes were registered against both the drivers of both the vehicles for offences u/s 304-A, 279, 337, 338, 427 184, 134, 177, 66 & 192 of MV Act. He submitted that, offences u/s 66 and 192 are for illegal transport of passengers without permit. Copy of the policy is at Exh. 52. It lays down limitations as to use as follows.

. *The policy covers use of the vehicle for any purpose other than a) Hire or Reward b) Carriage of goods (other than samples or personal luggage) c) Organization racing d) pace making e) Speed testing f) Reliability Trials g) Any purpose in connection with Motor Trade, etc.*

9. Mr Chapalgaonkar submitted that, the insured jeep was used for carrying the passengers for hire or reward in breach of the terms and conditions of the policy and, therefore, the insured was not entitled for coverage by the insurer.

10. The evidence of Mahesh Konde, employee of the appellant, shows that he admitted that the policy was comprehensive policy covering the risk of nine passengers and one drive.

11. Mr Chapalgaonkar relied on the judgment in the case of *Premlata Shukla (supra)*. Though the proceedings before the Tribunal are summary in nature and strict rules of evidence are not applicable, it is well settled that once it is established that the vehicle involved in the accident was duly insured with the Insurance Company, the burden is on the Insurance Company to show that they are not liable to indemnify the insured on account of breach of policy. The breach of policy must be clearly made out.

12. In the present case, there is no direct evidence of a person who could say that the vehicle insured was used for hire or reward. Though the contents of the FIR can be looked into, the person who lodged the FIR has no personal knowledge. He has lodged it on the basis of the information received from Deepak Devidas Patil. This Patil has not been examined. The information given by him only shows that, 10 - 12 persons were sitting in the Jeep/vehicle for proceeding from Surat to Dhule and the deceased was one of such passengers and he and two others died in the accident. There is absolutely no material to show that the passengers had paid fair to the jeep driver or it was a a jeep indulging in transport of passengers for fair. At least the statement of Deepak does not disclose so. ASI Nimbhore, the informant, in the concluding para has recorded that

there was transport of illegal passengers and therefore the offence u/s 66 & 192 was recorded. The Insurance Company has not examined Deepak Patil. It is pertinent to note that the driver of the MAX jeep Dnyaneshwar was already dead in the said accident and therefore the filing of FIR u/s 166, 192 of MV Act was *nonest* and redundant. The FIR is based on hearsay knowledge. It only shows that there was an accident in which the deceased and two others have died and several persons were injured. Though the contents of FIR can be considered when the FIR itself is based on hearsay knowledge, more reliable evidence in the form of examination of witnesses having personal knowledge should have been led by the Insurance Company. There should have been evidence to show that there was actual payment of fair by the deceased and others to the driver of the Jeep. The evidence in this regard is lacking and therefore I hold that the Insurance Company failed to prove the breach of policy.

13. As per school leaving certificate of the deceased Rahul, he was born on 01.06.1976. The accident took place on 29.10.2011. At that time, he was aged 35 years.

14. The claimant No. 1 - Rekha has led her evidence at Exh. 23. She has stated that, she was widow of deceased Rahul. She had

begotten three children claimants No. 2, 3 and 4 out of the wedlock with the deceased.

15. CW1-Rekha has deposed that, her husband was doing business of labour supply for Saree cutting. she has filed three income tax returns.

Sr. No.	Financial Year	Income shown	Income Tax & Professional Tax	Net income	Exhs.
1	2008-09	Rs. 1,42,484/-	Rs. 4120/- & Rs. 2500/-	Rs. 1,35,864/-	40 & 41
2	2009-10	Rs. 1,58,643/-	Rs. 5432/- & Rs. 2500/-	Rs. 1,50,711/-	42
3	2010-11	Rs. 1,54,852/-	Rs. 3138/- & Rs. 2500	Rs. 1,49,214/-	45

16. The income tax returns are accompanied with profit and loss statements, TDS statements, Form No. 26 etc. There is nothing suspicious and no dispute is raised about the income shown herein. The ld. trial Judge has held that the deceased was having income of Rs. 1,54,852/-. As held in Manasvi Jain v. Delhi Transport Corporation reported in 2014 AIR SCW 2606, he ought to have deducted income tax & professional tax from the income. Taking into consideration this, I assume yearly income of the deceased at Rs. 1,50,000/-. Since he was aged 35 years, the trial Judge awarded 50% increase on account of future prospects. He is a self-employed

person. As per Pranay Sethi's case (supra), it should be 40% and not 50% for the persons below 40 years. Thus, by adding 40% = Rs.60,000/-, the income of the deceased would be Rs. 2,10,000/-. On account of assumed enhancement of income, I further deduct Rs.5,000/- towards enhancement of income tax. Therefore, income would be Rs.2,05,000/-. Since there are four dependants, personal deduction would be 1/4th. After deducting 1/4th amount, the loss of income would be Rs. 1,53,750/-, the multiplier would be 16, that will raise to Rs. 24,60,000/-.

17. The learned trial Judge has awarded Rs. 1,00,000/- for loss of consortium, Rs. 1,00,000/- for love and affection, Rs. 25,000/- for loss of estate and Rs. 25,000/- for funeral expenses. As per Pranay Sethi's case (supra), the compensation should be Rs. 40,000/- for loss of consortium, Rs. 15,000/- for loss of estate, and Rs. 15,000/- for funeral, total Rs. 70,000/-. Therefore, the compensation payable would be Rs. 25,30,000/-. The learned trial Judge has awarded Rs. 27,28,000/-, which is on higher side. Hence, it needs to be modified. Thus, point no. 2 is answered in the affirmative and compensation is reduced to Rs. 25,30,000/- inclusive of NFL with interest at the rate of 7.5% p.a. Hence, I am inclined to allow the appeal partly and pass the following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The judgment and decree of the trial Court is hereby set aside and modified as follows:

“Original respondents No. 1 to 5 & 7 to 8 do jointly and severally pay to the claimants sum of Rs. 25,30,000/- along with interest at the rate of 7.5% p.a. The apportionment of liability of respondents No. 1 to 3 at 50% and respondents No. 4 and 5 at 50% is maintained and in case the claimants execute the decree against any of the respondents No. 1 to 3, or respondents No. 4 and 5, the person satisfying the decree will be entitled to recover from the owner and insurer of the other vehicle 50% of the amount in the same execution proceedings. The respondents shall pay proportionate costs to the claimants.”

- (iii) Decree shall be drawn accordingly.

[A. M. DHAVALE]
JUDGE

Punde