

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

FIRST APPEAL NO. 840 OF 2013

The New India Assurance Company Ltd.
A Subsidiary of the General Insurance
Corporation of India and a company
incorporated under the Companies Act
having one of its Divisional Office at
Adalat Road, Aurangabad
through its authorized signatory

...Appellant
[Orig. Resp.no.2]

VERSUS

- 1] Punjabai Bansai Solase,
Age 40 years, occ. Household,
R/o A.P.Shirasgaon,
Tq.Kopargaon
Dist. Ahmednagar,
- 2] Master Prashant s/o Bansai
Solase, age 16 years
u/g R. No.1,
- 3] Master Nitin s/o Bansai Solase,
age 14 years, u/g R. No.1,
- 4] Wajedkhan Sultankhan
Kureshi, age major,
Occ. Business,
R/o Khan Galli, Vaijapur,
Tq. Vaijapur, Dist.Aurangabad,
- 5] Shaikh Abbas Shaikh Mannan
Kureshi, age major,
Occ. Business,
R/o Kureshi Galli, Gangapur,
Dist. Aurangabad

...Respondents
[Nos. 1 to 3 Orig. Claimants
Nos. 4 & 5 Orig.
Respondent. Nos. 1 & 2]

...

Mr. A.B.Kadethankar, advocate for Appellant
Mr. S.S.Deo, advocate for Respondent nos.1 to 3
Mr. S.S.Deshmukh, advocate for Respondent nos. 4
and 5

...

CORAM : SUNIL K.KOTWAL, J.

DATE OF RESERVING

THE JUDGMENT : 04.10.2018

DATE OF PRONOUNCEMENT

OF JUDGMENT : 22.10.2018

J U D G M E N T :

Original respondent no.3 insurance company has challenged the vires of the judgment and award, passed by the Motor Accident Claims Tribunal, Kopergaon, in Motor Accident Claim Petition No. 83 of 2006, whereby compensation of Rs.7,21,000/- is awarded by the Tribunal and joint and several liability is fastened on original respondent nos. 1 to 3 i.e. driver, owner and insurer of the tempo bearing No. MH-20/AA-7724.

2. Facts, in nut shell, are that on 28.6.2006 at about 6.00 a.m., deceased along with Anis Gani and Yusuf Kureshi and others was

proceeding from Shirasgaon towards Loni by offending tempo for purchasing cattle in the weekly market of Loni. The offending tempo was hired by deceased and others for transport of purchased cattle while return journey. Deceased was in the business of sale purchase of cattle on commission basis. Near village Sawalivihir, due to rash and negligent driving by driver of the tempo, the tempo turned over resulting into head injury to the deceased. Deceased was removed to the hospital, however, he succumbed to those injuries. Therefore, claim petition for compensation was filed before the Motor Accident Claims Tribunal, Kopargaon (hereinafter referred to as, 'the Tribunal').

3. Heard Mr. A.B.Kadethankar, learned counsel for the appellant, Mr. S.S.Deo, learned counsel for Respondent nos.1 to 3 (claimants) and Mr. S.S.Deshmukh, learned counsel for Respondent nos. 4 and 5 (owners of the offending tempo).

4. Learned counsel for the appellant assailed the judgment and award, passed by the Tribunal, only on one ground that from the admitted facts on record the deceased was traveling by offending tempo as gratuitous passenger. According to the learned counsel, the offending vehicle being goods carriage vehicle, liability of gratuitous passenger is not covered under the policy of insurance. He has not disputed that on the date of occurrence of the accident the offending tempo was insured with appellant insurance company. He placed reliance on "**New India Assurance Company Limited Vs Asha Rani**" [2003 (2) SCC 223].

5. Learned counsel for respondent nos. 1 to 3 submits that though at the time of accident no goods were loaded in the offending tempo, as it was hired for transport of cattle from Loni to the destination of deceased, the deceased being the owner of the goods carried in the offending vehicle, is covered under the policy of insurance

under Section 147 of the Motor Vehicles Act, 1988, amended in the year 1994 (hereinafter referred to as, 'the MV Act').

His next submission is that no evidence in rebuttal has been led by the appellant insurance company to prove the breach of condition of policy of insurance, in the alternate, he submits that if it is held that the insurance company deserves to be exonerated from liability to pay compensation, then directions may be issued to the insurance company to first pay the compensation to the claimants and later on recover it from the owners. He submits that the claimants being widow and minor children, they would not be in a position to recover the compensation amount from the owners of the offending vehicle.

His further submission is that though no Cross-objection is filed by the respondents, this Court is empowered to enhance the compensation as responsibility lies on the Court to determine fair and reasonable compensation. He points out that while awarding the compensation, the Tribunal did not consider damages towards loss of future

prospects and even under conventional heads, sufficient compensation is not awarded in accordance with the guidelines laid down by the Apex Court **"National Insurance Company Limited vs Pranay Sethi"** [2018 (3) Mh.L.J. 70].

6. Learned counsel for respondent nos. 4 and 5 submits that the insurance company cannot be exonerated from the liability, as breach of conditions of policy is not proved. He submits that the tempo being insured with the appellant, it cannot be absolved from the liability to indemnify the onus of the offending vehicle.

7. Learned counsel for the claimants placed reliance on :

- 1) United India Insurance Co.Ltd. vs Suresh K.K. [2008 ACJ 1741 (SC)]
- 2) National Insurance Co. Ltd vs Saju P.Paul [2013 ACJ 554]
- 4) Manuara Khatun vs. Rajesh Kumar Singh [2017 (5) Mh.L.J. 522]
- 5) United India Insurance Co.Ltd. vs Godabai [2018 ACJ 1953 (Bombay HC)]
- 6) Savita vs Bindar Singh [2014 ACJ 1261]
- 7) UPSRTC vs Mamata & Ors. [2016 ACJ 699]

8. Learned counsel for the appellant, in reply, submits that pay and recover order cannot be passed against the insurance company, once it is exonerated from any liability. He placed reliance on :

- 1) United India Insurance Co. Ltd. Vs Anubai Gopichand Thakare & ors. [2007 (5) Bom.C.R. 520]
- 2) New India Assurance Co. Ltd. Vs Abhiman Kadhare [2016 DGLS (Bom.) 876]
- 3) New India Assurance Co.Ltd. vs Vedwati and others [2007 (3) Mh.L.J. 117 (SC)]

9. After going through the pleadings of the parties and evidence placed on record, it emerges that most of the facts are admitted in between the parties. It is not disputed that appellant is the insurer of the offending vehicle and on the date of accident the policy of insurance was in vogue.

10. Though in the pleadings, the claimants have contended that the deceased and other persons hired the tempo for transport of cattle from Loni cattle market to Shirasgaon, Taluka Kopargaon, to substantiate this contention neither any witness is examined by the claimants nor any document is filed

on record. On the other hand, claimant Punjabai Solase (PW 1) even in her examination-in-chief has not whispered a word regarding hiring of the tempo for transport of the cattle. Punjabai (PW 1), on the other hand, has admitted in her cross-examination that the deceased was traveling by tempo on payment of money. Thus, at the time of accident the deceased was traveling by tempo only as fare payee passenger.

11. Even, from the first information report relied by both the parties, it reveals that at the time and date of accident, the deceased and other persons were traveling by tempo as gratuitous passengers. Not a word is mentioned in the first information report that the tempo was hired by deceased and others for transport of cattle. Thus, only one conclusion can be drawn that at the time of accident, the deceased was traveling as gratuitous or fare payee passenger by the offending tempo.

12. From the policy of insurance, it becomes

clear that it was for goods carriage vehicle and naturally except owner of the goods or authorized representative of the owner of the goods, risk of any passenger is not covered under that policy even under Section 147 of the MV Act.

13. In **New India Assurance Co. Ltd. vs Asha Rani** (supra) and **New India Assurance Company Limited vs Vedwati** (supra), as well as in the authorities relied by learned counsel for the claimants, it is consistently held that any passenger traveling in goods carriage vehicle is not covered under the policy of insurance under Section 147 of the MV Act and the insurer would have no liability therefor. Therefore, this point requires no more further consideration. I hold that the deceased being gratuitous passenger traveling by goods vehicle, his risk is not covered under the policy of the insurance of offending vehicle. Therefore, the insurance company deserves to be exonerated from the liability to jointly and severally pay compensation along with the

registered owner.

14. However, next question arises whether pay and recover order can be passed against the insurance company once it is exonerated from all the liabilities.

15. Learned counsel for the appellant has drawn my attention to the **United India Insurance Company Limited vs Anubai Thakare** (supra) and **New India Assurance Co. Ltd. vs Abhiman Kadhare** (supra), wherein the Single Judge of this Court held that in case of death of gratuitous passenger traveling by goods vehicle, once insurance company is exonerated, direction cannot be issued against the insurance company to first pay the amount of compensation and then to recover it from the owner and driver of the insured vehicle. However, at the same time, in **New India United India Insurance Co. Ltd. Vs Godabai** (supra), so also recently in "**New India Assurance Company Limited vs Paikaji s/o Asuji Lambade and Others** [2018 (5) All MR 571]",

the Single Judge of this Court has taken contrary view. Therefore, I am bound to consider what is the exact position of law regarding issuance of such direction to pay and recover against the insurance company.

16. In **United India Insurance Co. Ltd. vs Suresh K.K. (supra), National Insurance Co. Ltd. Vs Saju Paul (supra), Manuara Khatun vs Rajesh Kumar Singh (supra)**, the Supreme Court consistently held that despite exoneration of insurance company from the liability to pay the compensation to the claimants, directions can be issued to the insurance company to first pay the compensation to the original claimants and subsequently recover it from the owner of offending vehicle by simply initiating proceedings before the executing court without filing any suit. Despite opportunity to the appellant, learned counsel for insurance company expressed his inability to point out that the Apex Court has changed the view taken earlier.

17. In the case at hand, respondent nos. 1 to 3 being widow and minor children of the deceased, they would not be in a position to recover the awarded compensation amount from the owner of offending vehicle. In such situation, if the pay and recover order is not passed against insurance company, its indirect impact would be equivalent to rejection of claim petition for compensation. Considering these compelling reasons, direction needs to be issued to the insurance company to first pay the compensation amount to the claimants and then recover it from the owners of the offending vehicle by initiating proceedings before the executing court.

18. Now, question arises what would be the fair and reasonable compensation, which can be awarded to the claimants. After going through the award, it emerges that considering the agricultural land in possession of the deceased and his cattle sale purchase business, the Tribunal assessed notional income of the deceased as Rs.6,000/- per month. I am satisfied that the notional income

assessed by the Tribunal is just and reasonable. However, as per verdict of Larger Bench of the Apex Court in **National Insurance Company Limited vs Pranay Sethi** (supra) while assessing monthly income of the deceased, percentage wise additional amount is to be added towards loss of future prospects. From the postmortem notes of the deceased, it emerges that at the time of death he was 55 years old. Therefore, as per guidelines laid down by the Apex Court in **National Insurance Company Limited vs Pranay Sethi** (supra), the deceased being between age of 50 to 60, ten per cent amount is to be added in the monthly income of the deceased. Thus, agricultural income of the deceased is assessed as Rs.6000+600=6600/-. It follows that annual income of the deceased is Rs.6600x12=79200/-. Claimants being three in number, $1/3^{\text{rd}}$ amount is to be deducted towards personal expenses of the deceased, which is assessed at Rs.79200-26400=52800/-. Thus, Rs.52,800/- is the multiplicand. Appellant being 55 years old person, multiplier of 11 is applicable in view of law laid down in "**Smt. Sarla Verma and**

Ors. Vs Delhi Transport Corporation [AIR 2009 SC 3104]", which is assessed as Rs.52800x11=580800/-.

19. In addition to this as per guidelines fixed in the case of **National Insurance Company Limited vs Pranay Sethi** (supra), under the conventional head, compensation of Rs.40000/- is to be awarded for loss of consortium, Rs.15000/- for loss of estate and Rs.15000/- for funeral expenses. Thus the claimants are entitled for following total compensation under different heads.

Loss of dependency	:	Rs. 580800/-
Loss of consortium	:	Rs. 40000/-
Loss of estate	:	Rs. 15000/-
Funeral expenses	:	Rs. 15000/-

Total	:	Rs. 650800/-

(Rs. Six Lac Fifty Thousand Eight Hundred only)		

20. Thus, the claimants are entitled for total compensation of Rs.650800/- (Rs. Six Lac Fifty Thousand Eight Hundred). This compensation amount shall be inclusive of no fault liability

amount awarded under Section 140 of the Motor Vehicles Act. The claimants are also entitled to interest on this amount at the rate of nine per cent per annum from the date of filing of petition till realization of the compensation amount. This amount shall be inclusive of compensation received by claimants under no fault liability. Thus, by assessing just and reasonable compensation, I hold that the award passed by the Tribunal in Motor Accident Claim Petition No. 83 of 2006 deserves to be modified to reduce the quantum of compensation amount. Accordingly, I hold that this appeal deserves to be allowed.

21. Accordingly, First Appeal No. 840 of 2013 is allowed. Appellant insurance company is exonerated from its liability to indemnify respondent nos. 4 and 5 (Original respondent nos. 1 and 2). However, compensation payable to respondent nos. 1 to 3 (original claimants) is reduced to the extent of Rs.6,50,800/- with interest thereon at the rate of nine per cent per annum from the date of filing of petition till

realization of the compensation amount inclusive of compensation already received by claimants. Though appellant is exonerated from its liability to pay the compensation, direction is issued to the appellant insurance company to first pay the compensation to the original claimants in accordance with modified award, and thereafter to recover it from respondent nos. 4 and 5 (owners of the offending vehicle), by initiating proceedings before the executing court, as if the dispute between the insurer and owners was the subject matter of determination before the Tribunal and the issue is decided against the owners and in favour of the insurer. The Tribunal shall obtain security for the entire amount, which the insurer will pay to the claimants. The Tribunal shall attach the offending vehicle as part of the security. The Tribunal shall obtain security from the owners of the offending vehicle of the amount payable to the claimants. If necessity arises, the Tribunal shall take assistance of the Regional Transport authority concerned. The award, passed by the Tribunal, be modified in above said terms. Parties to bear

their respective costs of the appeal. Appeal is disposed of in aforesaid terms. Respondent nos. 1 to 3 are permitted to withdraw the compensation amount deposited by the appellant in this Court in accordance with modified award. If any amount is surplus, the same be refunded to the appellant insurance company.

[SUNIL K.KOTWAL, J.]

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