

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,**BENCH AT AURANGABAD****FIRST APPEAL NO. 4 OF 2011**

United India Insurance Company Ltd.
 Divisional Office, Aurangabad
 Through its Divisional Manager,
 Aurangabad.

...APPELLANT
 (Original Respondent No. 1)

VERSUS

1) Smt. Mandubai w/o Ankush Shinde,
 Age; 40 years, Occu; Household,
 Resident of Ghotavi, Tq. Shrigonda,
 District; Ahmednagar.

2) Kum. Priyanka d/o Ankush Shinde,
 Age; 12 year, Occu; Education,
 Minor U/g. Of respondent No. 1.

3) Mrs. Sindhubai Namdeo Gaikwad,
 Age; Major, Occu; Business,
 Resident of Ralegansiddhi,
 Taluka; Parner, Dist; Ahmednagar.

4) Eknath s/o Laxman Shelke,
 Age; 35 years, Occ; Driver,
 Resident of Raygavhan,
 Tq. Shrigonda, Dist; Ahmednagar.

.....RESPONDENTS
 (Respdt. Nos. 1 & 2 Orig. Claimants,
 Resp. 3 & 4 Orig. Resp. Nos. 2 & 3)

.....
 Shri. A.G. Kanade, Advocate for Appellant
 Shri. S.V. Deshmukh, Advocate for Respondent Nos. 1 & 2
 Respondent Nos. 3 & 4 served.

CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 25/9/2018

Date of Pronouncing Judgment : 1/10/2018

J U D G M E N T :

This appeal is directed by Original Respondent No. 1 Insurance Company of offending Truck No. MTO-6457, against the judgment and award passed by the Motor Accident Claims Tribunal, Aurangabad in MACP No. 379 of 2005, awarding compensation of Rs. 3,09,000/- with interest there on at the rate of 9% per annum from the date of filing of petition till its realization. Respondent Nos. 1 and 2 are the Original Claimants. Respondent No. 3 is the owner of offending truck and the Respondent No. 4 is the driver.

2. Facts in nut shell are that on 9.4.2005 deceased Ankush Shinde was travelling by the offending truck as loading un-loading labour and care taker of the goods of the 'Folk Party' by Auangabad to Ahmednagar road. Due to rash and negligent driving by the driver of the truck, it left the road and turned turtle, resulting into the death of the deceased.

3. Learned counsel for appellant submits that deceased was not employee of insured (owner of the truck) and therefore, policy of the offending truck, does not cover liability of the death of the deceased. He has drawn my attention to “**Sanjeev Kumar**

Samrat vs National Insurance Company Limited and Others,”
[(2014) 14 Supreme Court Cases 243], wherein the Apex Court held that,

“Insurance Company is not under statutory obligation to cover all kinds of employees of the insured, but only the employees employed or engaged by employer as per the policy, some one who travels not being an authorized agent in the place of owner of goods and claims to be an employee of owner of goods, cannot be covered by statutory policy. Therefore, the insurer would not be liable to indemnify the insured owner of the vehicle for the death of employees of the hirer. ”

4. He submits that no documentary evidence is placed by the claimants to prove that the deceased was travelling by the offending truck as care taker of the goods of owner. His next submission is that the copy of FIR which is made part of the claim petition, indicates that on the date of accident, the deceased was travelling by the truck along with other artists and labourers. The deceased was not sitting in the cabin of the truck but he was in the rear portion of the truck, along with other artists. He submits that

deceased being ordinary labour-cum-occasional artist, cannot be a care taker of the articles of the 'Folk Party'.

5. Learned counsel for respondent Nos. 1 & 2/ claimants submits that in the written statement of Insurance Company, no specific defence is taken regarding the breach of condition of policy. His next submission is that in the cross-examination of claimant Mandubai Shinde (PW-1) it is not disputed by the learned counsel for the Insurance Company that the deceased was travelling by the truck as care taker of the goods of the 'Folk Party', as well as loading unloading labour of the 'Folk Party'. He submits that even in the written statement, the insurance company has not specifically denied the claim of the claimants that deceased was travelling as loading unloading labour of 'Folk Party' and he was also a care taker of the goods of the 'Folk Party'.

6. Next submission of learned counsel for respondent nos. 1 and 2 is that even compensation awarded by the Tribunal is inadequate and even under the conventional heads improper compensation is awarded by the Tribunal. He prays for enhancement of the compensation as "just and fair compensation". He placed reliance on **"Iffco Tokio General Insurance Company Limited Vs Sudamati w/o Kishanrao Kale and Anr."** [First Appeal No. 1388 of 2016] decided on 10th January, 2018, wherein this Court has taken

view that

“when deceased was travelling by offending Goods Vehicle as Care Taker of musical instrument of Band Party, risk of deceased in the event of his death is covered by the policy of the insurance under Section 147 of the Motor Vehicles Act, 1988”.

7. After going through the policy of the insurance of the offending truck (Exh. 55) it reveals that it is a Goods Carrying Commercial Vehicle, (open) policy-A liability, only. Therefore, obviously, it covers only third party liability and the risk of any fare payee or gratuitous passenger; is not covered under this policy. Section 147 of the Motor Vehicles Act is amended in the year 1994 and its relevant portion reads as under :

“147. Requirements of policies and limits of liability – (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) ***

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) -

(i) against any liability which may be

incurred by him in respect of the death of or bodily injury to any person including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of vehicle in a public place;

(ii) ** ”

8. A bare glance at Section 147 makes it clear that if the deceased is travelling as a care taker of goods of the 'Folk Party' and is authorized representative of the owner of the goods carried in the vehicle, then risk of the deceased is covered even under policy of the insurance of offending vehicle. This legal position is also approved by the Apex Court in “**Sanjeevkumar Samrat Vs National Insurance Company**” (*supra*). However, it is also certain that risk of the deceased will not be covered under this policy of the insurance if, he was travelling by the offending vehicle; merely in the capacity of employee of 'Folk Party'.

9. Initially, I will consider regarding the objections taken by learned counsel for respondent about the plea taken by insurance company in its written statement. After going through the written statement filed by Insurance company (Exh. 25), it reveals that in paragraph No. 5 of the written statement, the insurance company

has taken specific plea that there is breach of condition of policy of the insurance because the deceased was travelling in Goods Carrying Vehicle. Second defence taken by the Insurance Company is regarding driving of the offending truck by the driver without holding effect and valid driving license. Thus, it cannot be said that the insurance company did not take plea of breach of condition of the policy.

10. Regarding denial of status of the deceased as care taker of the goods, in the cross-examination of Mandubai (PW -1), it reveals that the learned counsel for Insurance Company has denied the status of the deceased as even labour of the 'Folk Party' as the claimants have no documentary evidence to prove that the deceased was engaged by 'Folk Party' as loading uploading labour -cum- occasional Artist. Therefore, it cannot be said that the testimony of Mandubai (PW – 1) about status of deceased as care taker of goods of the 'Folk Party' is not disputed by the Insurance Company.

11. From the evidence on record, it reveals that except Mandubai (PW -1), no other witness is examined amongst the other labourers, who were travelling by the offending truck to prove that at the time of accident, the deceased was care taker of the goods of 'Folk Party'. Even the owner of the 'Folk Party' who is employer of the deceased is not examined by the claimants to prove the status of the

deceased as authorized representative of goods of the 'Folk Party' carried in the offending vehicle. Mandubai (PW – 1) is not a witness who was travelling by the offending vehicle at the time of accident. Therefore, she cannot prove, in what capacity deceased was travelling by the offending truck in the rear portion of the truck.

12. In the circumstances, except the copies of police papers, no others evidence is available to ascertain the exact status of the deceased on the date of the accident. After going through the spot panchanama (Exh. 45), it reveals that including curtains, diesel engines, wooden rafters, other articles of 'Folk Party' were found in the offending truck. Thus, the spot panchanama is sufficient to hold that the goods of 'Folk Party' were loaded in the offending truck. In addition to this, claimants as well as the Insurance Company have placed reliance on the copy of FIR (Exh. 44) lodged by Shri Popat Bhimrao Bhalerao, one of the Artists of the 'Folk Party' to police station, which indicates that on the date of accident, after completion of 'Folk Show', about 25 to 30 artists and labourers were travelling by rear portion of the body of the truck. The informant, Popat Bhalerao was travelling by sitting in the cabin of the truck. This indicates that the Popat Bhalerao was the leading person of the Artists of the 'Folk Party' who was allowed to travel by the cabin of the truck. Otherwise also, the deceased was a ordinary 'loading and unloading labour' who, occasionally worked as artist in 'Folk Show'. Thus, in view of

the recitals of the FIR (Exh. 44), deceased being ordinary 'loading and unloading labour' of the 'Folk Party', cannot be authorized representative of goods of 'Folk Party'. As the FIR is made as part of the pleading, in view of law laid down by the Apex Court in “**National Insurance Company Limited vs Rattani and Others**” [2009 (3) **Mh.L.J. 754**], the FIR can be read in the evidence, without its formal proof. So also, in **United India Insurance Company Limited vs Sayaji Shinde** [2009 (3) **Mh. L.J. 539**], this court has taken view that the certified copies of the FIR or panchanama and inquest panchanama being public documents can be read in evidence without additional proof. Therefore, there is absolutely no legal impediment to read the copy of FIR (Exh. 44) to ascertain, in what capacity the deceased was travelling in the rear portion of the body of the truck at the time of the accident. In “**National Insurance Company Ltd. vs Cholleti Bharatamma and Ors.**” [(2008) 1 **SCC 423**], the Apex Court held that owner or authorized representative of the owner of goods must travel only in the cabin of the vehicle and not with the goods, so as to cover under Section 147 of the Motor Vehicles Act.

13. In view of above discussion, the contention of claimants cannot be accepted that deceased was travelling by the offending truck as care taker of the goods of the 'Folk Party'. On the other hand, on the basis of FIR (Exh. 44), it is to be held that at the time of

accident, the deceased was travelling by the offending truck as labour-cum-occasional Artist of the 'Folk Party'. Therefore, in view of the legal position settled by the Apex Court in **Sanjeevkumar Samrat vs National Insurance Company Limited (supra)**, the deceased being labour of the hirer of the truck, the respondent No. 1 Insurance Company is not under the statutory obligation to cover the risk of the accidental death of the deceased in motor vehicular accident. In other words, the respondent no. 1 Insurance Company is not liable to indemnify the owner of the offending truck for accidental death of the deceased. Only original respondent Nos. 2 and 3 being owner and driver of the offending vehicle are jointly and severally liable to pay the compensation to the Claimants for accidental death of deceased.

14. Now regarding quantum of compensation, it is suffice to say that being labour-cum-artist working in the 'Folk Party' the notional income of the deceased is to be assessed as Rs. 5,000/- per month. As at the time of death, deceased was 55 years old as mentioned in postmortem notes (Exh. 51) , in view of law settled by the Apex Court in “**National Insurance Company Ltd. vs Pranay Sethi and others**” [2018 (3) Mh.L.J. 70], 10 % income is to be added in the monthly income of the deceased. Thus, annual income of the deceased is assessed as $5500 \times 12 = 66,000/-$. As there are two dependents in the family of the deceased $1/3^{\text{rd}}$ amount is to be

deducted towards personal expenses of the deceased as ruled by the Apex Court in “**Smt. Sarla Varma and Ors Vs Delhi Transport Corporation and Anr**” [AIR 2009 Supreme Court 3104]. Thus, after deducting 1/3rd income i.e. Rs. 22,000/- from the annual income of deceased, his total contribution to his family is assessed as Rs. 66,000 – 22,000 = Rs. 44,000/-. Considering the age of the deceased as 55 years at the time of his death; in view of “**Smt. Sarla Varma**” [Supra], multiplier of “11” is applicable. Thus, the loss of dependency is assessed as Rs. 44,000 x 11 = Rs. 4,84,000/-.

15. In addition to this, in view of the legal position settled by the Apex Court in the case of “**Pranay Sethi**” [supra] under conventional heads, the claimants are entitled to Rs. 40,000/- for loss of consortium, Rs. 15,000/- for loss of estate and Rs. 15,000/- for funeral expenses. Thus, the claimants are entitled to following compensation under different heads :

a)	Loss of dependency	=	Rs.	4,84,000/-
b)	Loss of consortium	=	Rs.	40,000/-
c)	Loss of estate	=	Rs.	15,000/-
d)	Funeral expenses	=	Rs.	15,000/-

Total =			Rs. 5,54,000/-	
(Rs. Five Lac and Fifty Four Thousand Only)				

16. The claimants are also entitled to interest at the rate 9% per annum from the date of filing of petition till its realization. This compensation amount shall be inclusive of compensation under 'No

Fault Liability'.

17. Question may arise, whether in absence of the Cross-Objection, compensation can be enhanced in appeal filed by the Insurance Company ? However, this controversy is set at rest by the Apex Court in **“Jitendra Khimshankar Trivedi and Others vs Kasam Daud Kumbhar and others”** [2015 AIR (SC) (Supp) 821], wherein, the Apex Court held that in terms of Section 168 of Motor Vehicles Act, the Courts/ Tribunals are to pass awards determining the amount of compensation, has to be fair and reasonable and accepted by the legal standards. Even though, the claimants have not filed any appeal, it is obligatory on the part of Courts/ Tribunals to increase the compensation to award just and reasonable compensation. Thus, even in absence of Cross Objections by the Claimants, this Court can enhance the compensation in the present appeal filed by the Insurance Company.

18. Accordingly, I hold that this appeal preferred by the Insurance Company deserves to be allowed. Appeal is allowed and respondent no. 1 Insurance Company is exonerated from all liabilities. In MACP No. 379 of 2005 the judgment and award passed by MACT, Aurangabad be modified to enhance the compensation to the extent of 5,54,000/- (Rs. Five Lac and Fifty Four Thousand Only) inclusive of interim compensation under 'No Fault Liability', with

interest thereon at the rate of 9 % per annum from the date of filing of petition till its realization. The original respondent nos. 2 and 3 are jointly and severally liable to pay this compensation to the claimants. In **“Traders Private Limited vs Sunanda” [2010 ACJ 669 (Bombay)]**, the Division Bench of this Court held that like the Supreme Court, High Court cannot exercise jurisdiction under Article 142 of the Constitution of India to pass 'Pay and Recover' order against the Insurance Company, who is exonerated from all liabilities. Therefore, even 'Pay and Recovery' cannot be passed against appellant/ Insurance Company. If any compensation deposited by the Insurance Company is paid to the Claimants, the Insurance Company shall recover it from the owner of the offending truck by filing appropriate proceeding before the Tribunal. If any compensation amount deposited by the Insurance Company is still lying in this Court or before the Tribunal, the same be refunded to the appellant Insurance Company.

19. Appeal is disposed of in above said terms. Parties to bear their respective costs.

(SUNIL K. KOTWAL)
JUDGE

mahajansb/