

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

FIRST APPEAL NO. 1774 OF 2017

United India Assurance Company Ltd.,
Through its Deputy Manager TP Hub,
Rahul S/o. Narayan Kulkarni,
Age : 41 years, Occu. Service,
R/o. Divisional Office - I,
United India Insurance Co. Ltd.,
Osmanpura, Hingoli.

Appellant...

Versus

1. Smt. Manjusha W/o Bhaskarrao Patki,
Age : 45 years, Occu. Household,
R/o. Narayan Nagar, Hingoli,
Dist. Hingoli.
2. Bhushan Bhaskarrao Patki,
Age : 34 years, Occu. Service,
R/o. As above.
3. Vikram Bhaskarrao Patki,
Age : 30 years, Occu. Service,
R/o. As above.
4. Nandkumar S/o Prabhakarrao Patki,
Age : 50 years, Occu. Service,
R/o. Plot No. RH-48/1, Indraprastha Colony,
Bajaj Nagar, Waluj MIDC,
Aurangabad.

Respondents...

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Mr S. S. Rathi, Advocate for the appellant
Mr V. P. Golewar, Advocate for respondents No. 1 to 3

.....

WITH

CIVIL APPLICATION NO.1235 OF 2016
CIVIL APPLICATION NO. 14285 OF 2015

CORAM : A. M. DHAVAL, JJ.

DATE OF RESERVING THE JUDGMENT : 02ND AUGUST, 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 admission stage.

2. Can legal heirs of a driver, who was brother of the owner and who met with an accidental death without involvement of any other vehicle would be entitled for compensation from the Insurance Company under comprehensive policy? is the question raised in this appeal. The facts are not very much in dispute.

3. Deceased-Bhaskar is brother of original respondent No. 1 – Nandkishor, who was owner of Maruti Car bearing No. MH-20/H-1545. On 29.04.2006, both the brothers along with their wives were returning from Tuljapur to Hingoli in the car. The deceased was driving the car while the owner was sitting by the side. Claimant No. 1 -wife of the deceased was also in the car. When they reached about 18 kms. away from Tuljapur, it is claimed that there was sudden puncture of the back wheel. Thereafter, the car turned turtle and deceased Bhaskar sustained injuries to head. As a result thereof, he died on the spot. The accident was reported by the brother of the deceased respondent No. 1 – Nandkishor at the concerned Police Station. Some of the contents of the FIR were alleged to be stated

under misconception and were not correct. There was no rashness and negligence on the part of the deceased. he was holding valid driving license. He tried to save the life of all inmates in the car, still the car turtled. It is claimed that, the deceased was aged 43 years at the time of accident and was serving as SDO, Minor Irrigation, Zilla Parishad, Hingoli and was drawing salary of Rs. 19,631/-. There were five dependents on the deceased, out of which the parents (claimants No. 4 and 5) have died during the pendency of this appeal. The claimants claimed compensation of Rs. 23,00,000/-.

4. Respondent No. 1 admitted that he was owner of the car and the car was duly insured with respondent No. 2. He admitted that, deceased Bhaskar (his brother) was having valid driving license and he was driving the car for domestic use. He was not a paid driver. He denied that, there was no negligence on the part of the deceased in driving the car which turtled due to bursting of tyre.

5. The appellant – respondent No. 2 in the trial Court by reply at Exh. 15 denied material facts for want of knowledge and admitted that the accident had taken place as per the police record. The age and income of the deceased and other details were denied. It is claimed that the deceased was not holding valid driving license and the incident had taken place due to own negligent act of the deceased

and, therefore, they are not entitled for the compensation. The issues were framed at Exh. 16. The claimants examined claimant No. 1 – Manjusha, CW2 Umesh Inamdar an employee to prove the salary certificate (Exh. 39). The driving license of the deceased is produced. There is no dispute that the deceased was aged 43 years and was earning salary of Rs. 19,631/-. Besides, his salary was increased due to 6th pay commission and was raised to Rs. 25,443/-. The ld. Trial Judge did not apply his mind to the main issue about the liability of the Insurance Company in such matter. He calculated the damages at Rs. 25,82,000/- with interest of 8% p.a. and held the Insurance Company jointly and severally liable to pay the compensation as determined.

6. Shri. S. S. Rathi, learned counsel for the appellant argued that, the deceased himself was driving the vehicle. No other vehicle was involved. He was tortfeasor. He cannot claim to be a third party and, therefore, his legal heirs were not entitled for compensation u/s 166 of the Motor Vehicles Act. In this regard, he relied on number of rulings.

7. Per contra, Shri. V. P. Golewar, learned counsel for respondents No. 1 to 4 submitted that, the deceased was not at fault and the policy was comprehensive policy. Separate premium was

taken for owner cum driver and the Insurance Company would be responsible to pay the damages when the accident has occurred for not fault on the part of the deceased. Rulings cited by both sides would be considered in due course.

8. The points for my determination with my finding thereon are as follows:

(i) Whether the Insurance Company would be liable to pay the compensation to the claimants on account of death of deceased Bhaskar?Yes. Limited contractual liability.

(ii) Whether the compensation calculated is excessive or just & reasonable?Insurance Company is liable to pay Rs. 2.00 lakh only.

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

REASONS

9. Mr. Rathi relied on the judgment in the case of **Oriental Insurance Company Versus Jaibunbi Gulambeg and others** reported in 2016 (1) All.M.R. 393. In this case, reliance was placed on **Oriental Insurance Co. Ltd. Vs. Jhuma Saha (Smt.) and others** reported in 2007(9) S.C.C. 263, wherein in para 10 and 11, it is observed thus:

10. *The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving, the question which arises for consideration is that the*

deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

11. *Liability of the insurer-Company is to the extent of indemnification of the insured against the respondent or a injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of Motor Vehicle Act, the question of the insurer being liable to indemnify insured, therefore, does not arise.*

. In para 8 of the judgment in Jaibunbi Gulambeg's case (supra), it is held:

(a)

(b) *Where the insured i.e. an owner of the vehicle has no liability to a third party or the owner is not the tortfeasor, the insurance company has also no liability.*

(c) *If the deceased himself is to be blamed for the accident without involving the motor vehicle other than the one which he was driving, there is no liability of the insurance company to indemnify such risk unless it is covered by the terms of the contractual policy.*

(d) *The question as to maintainability of an application under Section 166 of the Motor Vehicles Act to enforce the contractual liability in respect of the owner of the vehicle would depend upon the facts and circumstances of each case, and there cannot be any straight jacket formula, to hold that the claim is required to be tried in the different forum.*

10. However, this ruling can be distinguished as it related to act only policy. Whereas; in the case in hand, there is a comprehensive policy.

11. Reliance is also placed on **Surinder Kumar Arora and Anr. v. Dr. Manoj Bisla & Ors.** reported in **AIR 2012 SC 1918**. In this case, it was held that in petition u/s 166 of Motor Vehicles Act, the claimants must prove the rashness and negligence of the driver of the vehicle. It was the claim in which the deceased was travelling in a vehicle driven by respondent No. 1, who was his close friend. It related to the statutory liability of the Insurance Company and not the contractual liability.

12. Mr. Rathi relied on **New India Assurance Company Ltd. v. Babasaheb Anna Mali & Ors.** reported in **AIR 2002 BOMBAY 27**, in which it was held that, the third party would not cover the passenger or the pillion rider. It is also dealing with the statutory liability of the Insurance Company. In **New India Assurance Company Ltd. v. Sadanand Mukhi and Ors.** reported in **AIR 2009 SC 1788**, son of the insured (owner) was driving the motorcycle of his father. He met with accident resulting into his death. It was held that, the deceased would not come within the purview of term 'a person' within Section 147 and insurer would be liable to cover the risk of third party only. It is ruling u/s 147 which speaks about statutory liability.

13. In the present case, there was contractual liability undertaken by the Insurance Company by accepting additional premium for three occupants and one owner-cum-driver to the extent

of Rs. 2,00,000/-. In this regard, the reliance is placed by the claimants on National Insurance Co. Ltd., Tiruchengode vs. Krishnan reported in 2013 (1) TN MAC 729 (Madras). It was observed that, when additional premium was paid to cover personal accident cover to owner-cum-driver, merely because the owner did not drive, it cannot be contended that the contract of insurance cannot be extended to cover owner as an occupant of vehicle. In Sagar Chand Phool Chand Jain vs. Santosh Guptas And others Judgment of Justice S. Wad from Delhi High Court dt. 10th January, 1985, it was observed that the decision of the Supreme Court makes it clear that although there is no statutory liability for the Insurance Company to pay compensation to a passenger, contract of insurance can provide otherwise. When the contract provides for risk of occupant passenger in a private car comprehensive policy and special premium is charged, Insurance Company is liable to pay compensation for the death of the passenger.

14. In New India Assurance Co. Ltd. versus Shanti Bai (Smt.) and others reported in (1995) 2SCC 539, the deceased who was sitting on the roof top of the bus with the permission of the bus driver, the bus met with an accident by a dash to a tree by rash and negligent driving and Laxman Singh died. His L.Rs. filed claim for compensation. It was held that, even though it is not permissible to

use a vehicle unless it is covered at least under an 'act only' policy, it is not obligatory for the owner of a vehicle to get it comprehensively insured. In case, however, it is got comprehensively insured, a higher premium is payable depending on the estimated value of the vehicle. Such insurance entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle calculated according to the rules. It is further observed that, comprehensive insurance of the vehicle and payment of higher premium on this score, however, does not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed. The liability of the appellant to pay the amount of award was held as joint and several and the liability of the appellant was limited to amount shown in the policy (Rs.15,000/-).

15. In Chimajirao Kanhojirao Shirke versus Oriental Fire and General Insurance Company Limited reported in AIR 2000 SC 2532, the driver of the truck, which was comprehensively insured with respondents, died and his legal heirs filed claim. In the said policy, it was shown that the insurer was liable for unlimited personal injury and the claim was made that it was misprint. The said defence was not allowed and the Insurance Company was held liable. The trial Court decreed the claim in favour of the appellants.

The Insurance Company challenged the same and high Court set aside the said judgment, however, the Apex Court restored the judgment of the trial Court. This is directly applicable to the facts of this case.

16. In New India Assurance Co. Ltd. v. Umesh Kumar and others reported in 2011 ACJ 890, the facts were similar. Son of the deceased died in accident and his L.Rs. filed claim petition. It was claimed that, since there was no tortfeasor, the Insurance Company is not liable. Relying on Oriental Insurance Company Ltd. vs. Rajni Devi reported in 2008 ACJ 1441 (SC), it was held that, where a third party is involved, the liability of the Insurance Company would be unlimited but when a passenger or owner in the vehicle meets with accident and he is governed by contract, the claim would depend on the terms of the contract. It was held that, since person using the vehicle of the owner steps into the shoes of the owner, he would not be entitled for the compensation as a third party u/s 163A, however, if premium is paid towards compulsory p.a. to owner-cum-driver, the Insurance Company was liable to make payment of compensation. It was claimed that, if the owner himself is driving the vehicle, then only the Insurance Company would be liable. The said argument was turned down and compensation was granted for the death of Pavankumar, the son of the owner driving the vehicle. This is also

directly applicable to the facts of this case.

17. In *Oriental Insurance Co. Ltd. versus Pushpa Nanaji (Smt.) & Ors.* reported in 2015(2) Bom.C.R. 637 (Nagpur), the vehicle Maruti van dashed a horse and turned turtle and the occupant Nanaji died on the spot. It was held that, the driver was rash and negligent. It was claimed that, he was not having a valid and effective driving license. It was observed that, the policy was comprehensive policy covering the risk of the driver and passengers.

18. In the present case, the Insurance Policy at Exh. 56 shows that, it is comprehensive policy. There is basic premium of Rs. 500/- for third party. Besides, premium of Rs. 300/- was taken for three unnamed passengers to the extent of Rs. 2,00,000/- per person. Besides, there was premium of Rs. 100/- compulsory PA to owner-cum-driver to the extent of Rs. 2,00,000/- and Rs. 25/- for w.c. to employee.

19. The policy discloses that, apart from the statutory liability towards third party, there was contractual liability to cover the risk of driver and three occupant passengers in the vehicle, provided the vehicle was not used for hire or reward or as carrier of goods etc. There is no dispute that, the vehicle was used for domestic purpose. The deceased was brother of the owner and was driving the vehicle.

He was holding a valid driving license. It is clear from the facts that there was no rashness and negligence on the part of any of other person. The wheels of the car was not burst but as per the FIR as well as the report of condition of the vehicle, there was mere puncture and not bursting. The FIR shows that, when there was puncture, instead of taking the vehicle on the side, the deceased started looking back by taking his head out of the window. In the process, the vehicle turtled down and his head was dashed against the road and sustained grievous injuries whereby he died. Despite the vehicle turtling, the other occupants were not seriously wounded.

20. Mr Rathie rightly relied on national *Insurance Company Limited versus Rattani and others* reported in *(2009) 2 SCC 75*, wherein it was held that, when FIR was made part of the claim petition, the claimants cannot make a turn around and claim that some of the facts stated therein are not correct.

21. There was some rashness and negligence on the part of the deceased and one of the reasons for accident was puncture of the tyre. In any case, as held in Meena Variyal's case (supra), deceased Bhaskar to whom his brother had given car for driving stepped into shoes of owner while using the said car. He cannot be a third party. He will not be entitled for compensation from the Insurance Company as a statutory liability u/s 147. Nonetheless, the deceased

had died in accident involving a vehicle and there was comprehensive policy. The owner-cum-driver as well as the occupants were covered under risk by comprehensive policy but to the limited extent of Rs. 2,00,000/- each. The liability of the Insurance Company would be contractual and would be to the extent of Rs. 2,00,000/- only.

22. The evidence on record shows that, deceased Bhaskar was drawing huge salary of Rs. 19,631/-, which was increased as per 6th pay commission (Exh. 41). The liability of the Insurance Company was much higher than the limit of Rs. 2,00,000/-. The ld. Trial Judge erred in not considering the fact that the deceased was not a third party and there was no statutory liability of the Insurance Company to indemnify owner for the fault of his driver. This is a contractual liability of Insurance Company to pay to the occupants and owner cum driver, damages to the tune of Rs. 2,00,000/- in case of accidental death. Considering the facts, the impugned judgment awarding huge compensation calculated assuming that the deceased was a third party is not sustainable. The claim can be allowed only to the extent of limited liability of Rs. 2,00,000/-.

23. Hence, the appeal is partly allowed. The judgment and decree of the learned trial Judge in MACP No. 86/2006 dt. 24.03.2015 is hereby set aside and modified as under:

24. Respondent No. 2 shall pay to the claimants compensation of Rs. 2,00,000/- along with interest at the rate of 8% p.a. from the date of the petition till its realization. In the facts and the circumstances, the parties shall bear their own costs.

25. In view of disposal of main appeal, nothing is left for consideration in the pending civil applications and the same stand disposed of.

[A. M. DHAVALE]
JUDGE

Punde