IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1663 OF 2015

1] Suvarna Satish Babar,
age 40 years, occ. Household,

2] Vaibhav s/o Satish Babar,
age 23 years, occ. Education,

3] Nilesh s/o Satish Babar,
age 22 years, occ. Education,

4] Priya d/o Satish Babar,
age 20 years, occ. Household

All R/o Tapneshwar Galli,
Vaibhav Kirana Stores,
At Post & Taluka Jamkhed,
District Ahmednagar ...Appellants
[Orig. Claimants]

VERSUS

1] Suresh s/o Bhanudas More,
age 51 years, occ. Truck Owner,
R/o Near Vitthal Mandir,
Main Road,
At Post & Taluka Jamkhed,
District Ahmednagar,

2] The Divisional Manager,
I.C.I.C.I. Lombard General
Insurance Company Limited,
Zenith House,
Keshav Khadke Road, Mahalaxmi,
MUMBAI – 400 034 ...Resspondents
[Orig. Opponents]

...

Shri D.R.Jaybhar, advocate for Appellants
Shri A.S.More, advocate for Resp. no. 1
Shri S.S.Patil, advocate for Respondent no. 2

...

CORAM : SUNIL K.KOTWAL, J.

DATE OF RESERVING THE JUDGMENT : 24.10.2018
DATE OF PRONOUNCEMENT OF JUDGMENT : 31.10.2018

J U D G M E N T :

This appeal is directed against the judgment and award, passed by the Motor Accident Claims Tribunal, Ahmednagar, in Motor Accident Claim Petition No. 148 of 2010, where the claim petition was dismissed in to to.

2. Appellants are original claimants and respondent no.1 is original opponent no.1 owner of offending Truck No. MH-23/5760. Respondent no.2 is original opponent no.2 insurer of the offending vehicle.

3. Facts, leading to the institution of this appeal are that on 25.9.2009 at about 2.30 p.m., when deceased Satish Sudhakar Babar was walking by Jamkhed-Kharda road, near Mohol Bindi Nala in the vicinity of village Katewadi, he was knocked down by the offending Truck resulting into his death on

the spot. Therefore, the claimants filed claim petition for grant of compensation of Rs.Five Lakhs.

4. The parties hereinafter are referred as per their original status in claim petition.

5. Opponent no.1, the owner of the offending Truck filed written statement (Exh.16) and denied the claim in to to. In the alternate, the owner submits that as the offending Truck was duly insured with opponent no.2 insurance company, the insurance company is liable to indemnify opponent no.1 owner.

6. Opponent no.2 insurance company filed written statement (Exh.17) and denied its liability. It was contended by the insurance company that deceased and other persons were travelling by offending Truck as gratuitous passengers and their risk is not covered under the policy of insurance of the Truck.

7. The Tribunal held that claimants failed to prove that the deceased died due to rash and negligent driving of the offending Truck by its driver. The Tribunal also held that the owner of the Truck committed breach of conditions of policy of the insurance. In the result, claim petition was dismissed.

8. Heard Shri D.R.Jaybhar, learned counsel for the appellants, Shri A.S.More, learned counsel for respondent no. 1 and Shri S.S.Patil, learned counsel for respondent no.2.

9. Learned counsel for the appellants submits that no doubt, the pleadings of claimants are totally in variance with the recitals of the first information report and other police papers filed by the claimants. He submits that as rules of pleading are not strictly applicable in Motor Accident Claim inquiry, even on the basis of police papers placed on record, it can be proved that at the time of accident, the deceased was traveling by offending Truck as gratuitous passenger.

Therefore, though, respondent no.2 insurance company can be exonerated from its liability to indemnify respondent no.1 owner of the offending Truck, pay and recover order can be passed against respondent no.2. Statutory liability lies on Respondent no.1 to pay compensation to the claimants.

10. Learned counsel for respondent no. 1 submits that the claimants cannot make out a case against their own pleadings. Learned counsel for respondent no.2 also raised similar objection. His next contention is that the deceased was traveling as gratuitous passenger by offending Truck, and therefore, risk of such gratuitous passenger, who was traveling by goods carriage Truck, cannot be covered under the policy of insurance in view of contravention of condition of policy of the insurance.

11. Learned counsel for the appellants has rightly drawn my attention to the case of “**United India Insurance Co. Ltd. Vs Shila Datta and others**”

[2011 (10) SCC 509], wherein the Apex Court held that strict rules of pleadings do not apply in the Motor Accident Claim Petitions. The Apex Court also held that even in absence of the pleadings, claim petition can be decided, if the Tribunal suo motu treated any report of accident forwarded to the Tribunal under Section 158 (6) of the Motor Vehicles Act, 1988 (for short, "the MV Act") as an application for compensation under Section 166(4) of the Act. In view of this settled position of law, though pleading of claimants is in conflict with police papers placed on record, the claim petition can be decided by considering the certified copy of the first information report, spot panchanama, postmortem report of the dead body of deceased Satish.

12. After going through the certified copy of the first information report, it emerges that on 25.9.2009 the deceased and other 70 to 80 devotees were traveling by offending Truck as passengers and the driver of the Truck lost control near Mohol-Bindi stream and thereby the Truck turned over,

resulting into serious injuries to 29 passengers. In that accident, four passengers traveling by the Truck died including deceased Satish Babar. Even the spot panchanama fully corroborates the contents of the first information report regarding occurrence of the accident due to rash and negligent driving by driver. The postmortem report of the dead body of deceased clearly shows that the deceased died due to intracranial hemorrhage due to head injury in road traffic accident. Thus, from the police papers on record, it has come before the Court that at the time of accident the deceased was traveling by the offending Truck as gratuitous passenger. The recitals of the first information report do not show that deceased was sitting in the cabin of the Truck as owner or care taker of any goods which was carried by the said offending Truck.

13. As ruled by the Apex Court in "**Oriental Insurance Co. Ltd. vs Brij Mohan and others**" **(2007 (7) SCC 56]**, the insurance company has no liability

for the death of labours traveling in trolley of the offending vehicle.

Therefore, the policy of the insurance of the offending Truck does not cover the risk of gratuitous passengers traveling by the said Truck. The limitation as to use of the Truck is specific in the policy of the insurance. Condition no.3 clearly shows that the policy does not cover the risk of passengers traveling by the Truck except employees and driver not exceeding number permitted in the registration document. Undisputedly, the deceased was neither driver of the offending Truck nor he was employee of the owner of the Truck. Therefore, obviously, respondent no.2 insurance company is not liable to indemnify Opponent no.1 owner of the offending Truck regarding the accidental death of the deceased while traveling by the offending Truck.

14. No doubt, the oral testimony of claimant Suwarna that the offending Truck gave dash to her husband when he was walking by the side of the road, is totally in conflict with police papers on

record in respect of the said accident. However, from her cross-examination, it also emerges that she is not eye witness of the occurrence. Therefore, she is not expected to know under what circumstances the deceased died. In the circumstances, much importance cannot be given to the variance in between the pleadings, oral evidence of PW 1 and police papers placed on record.

15. As, on the basis of police papers placed on record, it is established by the claimants that the deceased died in the motor vehicular accident when he was traveling as gratuitous passenger by the offending Truck, opponent no.1 being owner of the Truck is certainly liable to pay the compensation to the claimants.

16. While determining the compensation, age of the deceased is to be considered on the basis of postmortem report, as no document is placed on record to prove the age of the deceased. The postmortem report of the deceased shows that on the

date of death the deceased was 45 years old able bodied person. Therefore, in view of the guidelines issued by the Apex Court in "**Smt. Sarla Verma and Ors. vs Delhi Transport Corporation and Anr.**" **[2009 (5) Mh.L.J. 775]**, in the case at hand, multiplier of 14 is applicable.

17. To prove the income of the deceased as an employee in one Cloth Shop, claimants have also examined employer Shri Anand Shantilal Gugale (PW 2). This witness has deposed that deceased Satish used to work in his shop and he was paid salary of Rs.8,000/-. This witness has proved certificate (Exh.30) issued by him.

This Court, in the case of **Royal Sundaram Alliance Insurance Company Limited vs Smt. Varsha Rajendra Pache and others [2017 (6) Mh.L.J. 308]** and in **Sushila Wd/o Subhash Mendhe and another vs National Insurance Company Limited and Others [2018 (3) Mh.L.J. 311]**, held that when by examining the employer of the claimant his monthly salary is proved, the Tribunal cannot reject that evidence because it is not supported by other record. Therefore, when nothing can be elicited in the cross-examination of Anand Gugale, except non-production of accounts and other supporting documents, on the basis of evidence of this witness, it can be held that monthly income of the deceased was Rs.8,000/-.

18. As the deceased was of the age of 45 years, in view of **“National Insurance Company Ltd. Vs Pranay Sethi and others” [2018 (3) Mh.L.J. 70]**, 25 per cent income is to be added in the monthly income of the deceased towards loss of future prospects. By adding 25 per cernt income the monthly income of the deceased is assessed as Rs.8000+2000=10000/-. It follows that his annual income is Rs.10000x12=120000/-.

As the dependents in the family of the deceased are four in number, $1/4^{th}$ income is to be deducted from the annual income of the deceased towards personal expenses of the deceased. Therefore, after deducting this $1/4^{th}$ income from the annual income of the deceased, his contribution to his family is assessed as 120000-30000=90000/-.

If this multiplicand is multiplied by multiplier of 14, loss of dependency is assessed as Rs.90000x14=1260000/-.

In addition to this, as per the guidelines issued by the Apex Court in "**National Insurance Company Ltd. Vs Pranay Sethi and others**" (supra), under conventional head, compensation of Rs.40,000/- is to be awarded for loss of consortium, compensation of Rs.15,000/- is to be awarded for loss of estate and Rs.15,000/- is to be awarded for funeral expenses.

Thus, the claimants are entitled to total following compensation under different heads as follows :

Loss of Dependency	:	Rs. 1260000/-
Loss of Consortium	:	Rs. 40000/-
Loss of Estate	:	Rs. 15000/-
Funeral Expenses	:	Rs. 15000/-
Total	:	Rs. 1330000/-

[Rs. Thirteen Lakh Thirty Thousand only]

19. Appellants are also entitled to interest on this compensation amount of Rs.1330000/- at the rate of nine per cent per annum, from the date of filing of claim petition till realization of the compensation amount. This compensation shall be inclusive of compensation received by the claimants under no fault liability.

20. As observed above, respondent no.2 original opponent no.2 insurance company deserves to be exonerated from its liability to indemnify respondent no.1 owner of the offending Truck. However, respondent no.1 original opponent no.1, being registered owner of the offending Truck, is liable to pay entire compensation to the claimants with above said interest on the compensation amount and costs of the claim petition. However, as the claimants are widow and teen aged children of the deceased, who were taking education at the time of accident, it would be impossible for them to recover awarded compensation from owner of the offending vehicle. Therefore, direction is to be issued to respondent no.2 insurance company to

deposit the compensation amount payable to the claimants with interest and costs of the claim petition before the Tribunal, with direction to pay compensation to the claimants and recover it from respondent no.1 original opponent no.1 owner of the offending Truck subsequently by filing appropriate proceedings before the Tribunal.

21. In view of these observations, this appeal deserves to be allowed. Accordingly, First Appeal No. 1663 of 2015 is allowed. The award passed by the Motor Accident Claims Tribunal, Ahmednagar, in M.A.C.Petition No. 148 of 2010 is set aside. Claim Petition No. 148 of 2010 is allowed with costs payable by Respondent no.1. Respondent no.1 do pay compensation of Rs.1330000/- [Rs. Thirteen Lakh Thirty Thousand only] with interest thereon at the rate of nine per cent per annum, from the date of filing of claim petition, till realization of compensation amount. This compensation shall be inclusive of the compensation received by claimants under no fault liability. The compensation amount shall be equally paid to the

claimant nos. 1 to 4, respectively by separate account payee cheques through the Tribunal.

22. Respondent no.2 insurance company is exonerated from its liability to indemnify Respondent no.1. Though Respondent no.2 is exonerated from its liability to pay the compensation, direction is issued to Respondent no.2 insurance company to first pay compensation to the original claimants in accordance with modified award, and thereafter to recover it from Respondent no.1 owner of the offending vehicle, by initiating proceedings before the Executing Court, as if the dispute between the insurer and owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. The Tribunal shall obtain security from owner of offending vehicle, 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 owner of offending vehicle of the amount payable to the claimants. If

necessity arises, the Tribunal shall take assistance of the Regional Transport Authority concerned. Award passed by the Tribunal be modified in above said terms. The appellants/claimants are permitted to withdraw the compensation amount deposited by insurance company, in accordance with modified award. For disbursement of compensation amount, the same be remitted to Motor Accident Claims Tribunal, Ahmednagar, in M.A.C.Petition No. 148 of 2010.

23. Parties to bear their respective costs of the appeal.

24. Deficit court fee, if any, be recovered from the appellants as per rules.

25. Appeal is disposed of in above terms.

[**SUNIL K.KOTWAL, J.**]

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