IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 297 OF 2017

Sunil s/o Yedunath Dixit,
age 49 years, occ. Tractor owner,
R/o Bhankheda, Dist. Wardha ...Appellant

VERSUS

1] Maroti s/o Vitthal Dhanave
age 30 years, occ. Labour,
R/o Walki, Tq. Aundha (N),
Dist. Hingoli,

2] The United India Insurance Co.
Ltd. Through its Branch Manager,
Dayawan Complex,2nd Floor,
Station Road, Parbhani ...Respondents
[Nos. 1 Orig. Claimant
No.2 Orig. Resp.no.2]

...

Mr. N.L.Jadhav, advocate for the appellant
Mr. R.J.Nirmal, advocate for Resp.no.1 absent
Mr. S.S.Rathi, advocate for Respondent no. 2

...

CORAM : SUNIL K.KOTWAL, J.

DATE OF RESERVING THE JUDGMENT : 04.10.2018
DATE OF PRONOUNCEMENT OF JUDGMENT : 12.10.2018

J U D G M E N T :

This appeal is directed by original respondent no.1-registered owner of offending tractor and trailer bearing Nos. MH-32/A-1762 and MH-32/A-1763, respectively, against the judgment and award, passed by the Motor Accident Claims Tribunal, Basmat in Motor Accident Claim Petition No. 45 of 2012, awarding compensation of Rs.3,79,000/- with interest thereon at the rate of ten per cent per annum from the fate of petition till realization of the amount.

2. Respondent no.1 is original claimant and respondent no.2 is insurer of the offending vehicle.

3. Facts, in nut shell, are that on 14.9.2009 claimant Maroti Vitthal Dhanave along with 6 labours were going to Anji by offending tractor and trailer to fetch electric poles and after loading the poles in the trailer, when they were proceeding towards Pandhurna at a distance of five kilometers from Ghatanji at about 1.30 to 1.45 p.m., due to rash and negligent driving of the driver of the tractor, it turned over and the poles loaded in the tractor fell over the body of

claimant and other labours. In that accident, one labour sustained serious injuries and he subsequently succumbed to those injuries. Even claimant sustained injury to the four fingers of his left hand. Claimant and other labours were admitted in the V.N. Government Medical College and Hospital Yeotmal. Except thumb, four fingers of the claimant of left hand were injured. On report lodged by one Sonaji Gharole, first information report was registered at police station Ghatanji against the driver of the offending tractor. Therefore, claim petition was filed by claimant for compensation on the ground that he sustained 15 per cent permanent disability in above said motor vehicular accident.

4. The Tribunal allowed the claim against original respondent no.1 i.e. owner of the offending vehicle. Claim petition against respondent no.2 insurer was dismissed. However, direction was given to respondent no.2 insurer to deposit the compensation amount of Rs.3,79,000/- with interest at the rate of ten per cent per annum

from the date of filing of the petition and later on recover the same from respondent no.1.

5. The award passed by the Tribunal is challenged by only registered owner of the offending vehicle pertaining to exoneration of respondent no.2 from its liability to indemnify the owner of the offending vehicle. Even quantum of compensation amount is disputed by the appellant/owner of the offending vehicle.

6. Heard Shri N.L.Jadhav, learned counsel for appellant and Shri S.S.Rathi, learned counsel for respondent no.2 insurer of the vehicle.

7. Learned counsel for the appellant submits that though issue was framed by the Tribunal regarding breach of condition of policy of the insurance by owner of the offending vehicle, there was no specific pleading of insurance company that the offending vehicle was used for commercial purpose.

Next submission of learned counsel for

the appellant is that no evidence has been led by the insurance company to prove breach of condition of policy of the insurance. He submits that premium paid by owner of the offending vehicle under Workmen's Compensation Act, 1923 covers the liability of the labours including the deceased. Therefore, the insurance company cannot be exonerated from its liability to indemnify the owner of the offending vehicle. He placed reliance on "**Fahim Ahmed and others vs United India Insurance Company Ltd. And ors." 2014 (3) All MR 963.**

8. Learned counsel for respondent no.2 insurer of the offending vehicle has drawn my attention towards written statement filed by insurer and submits that specific plea regarding breach of condition of policy is taken by insurance company. He submits that the owner of the offending vehicle was in the business of laying electric lines and for that purpose on the date of accident electric poles were loaded and transported by

offending tractor and trailer, which met with the accident, resulting in the death of the deceased. His contention is that as per the terms and conditions of the policy, the offending vehicle cannot be used for the purpose other than the agriculture. This vehicle cannot be used for transport of any passenger. Thus, when the claimants in their pleadings admit the transport of electric poles by the offending vehicle and when owner has admitted in his cross-examination about the electric poles in the tractor, the breach of condition of policy is duly proved by the insurance company.

Learned counsel for the respondent has contended that the owner Sunil Dixit (DW 1) has admitted in his cross-examination that he runs the business of laying electric lines. Therefore, considering the admitted facts on record and recitals of the first information report and spot panchanama, it is duly established that at the time of occurrence, the offending vehicle was used for transport of electric poles for the business of original respondent no.1 owner of the offending tractor. As breach of condition of policy is established on the basis of evidence brought on record by claimants, and even by the owner of offending vehicle, the insurance company need not examine any witness to prove this factual aspect. His submission is that even the insurance company has examined one witness, who has proved the policy of the insurance.

He submits that respondent no.1 owner has denied in his written statement that the deceased was his labour, and therefore, he cannot take benefit of premium paid for employee under Workmen's Compensation Act.

In brief, learned counsel for respondent no.2 supports the judgment and award, passed by the Tribunal. He has drawn my attention to the **National Insurance Company Limited vs Chinnamma and others [AIR 2004 SC 4338], Oriental Insurance Company Limited vs Brij Mohan and Ors. [AIR 2007 SC 1971]**, and **New India Assurance Company Limited vs Babasaheb Mali and others [AIR 2002 BOMBAY 27].**

9. After going through the issues framed by the Tribunal, it emerges that issue no.3 relates to objection raised by the insurance company regarding breach of condition of the terms of insurance policy. The judgment shows that this issue is answered in affirmative by the Tribunal. Thus, it is evident that proper issue is framed by the Tribunal regarding breach of condition of policy of insurance.

10. Regarding pleadings of insurance company, after going through the written statement of insurance company (Exh.14), it emerges that in para 16 of the written statement the plea of breach of condition of policy of the insurance, is specifically taken by the insurance company. In para 17, objection is taken regarding lack of driving license with the driver of the vehicle. In Para 19 in the written statement, it is pleaded that deceased was gratuitous passenger, which amounts to breach of condition of policy of the insurance.

11. Thus, it is evident that there is specific pleading by the insurance company regarding breach of condition of policy of the insurance by the owner of the offending vehicle. As such, the preliminary objection raised by the learned counsel for the owner of the offending vehicle holds no substance.

12. In the case at hand, to substantiate his claim, the claimant Maroti Dhanave (PW 1) entered in witness box and has proved the certified copies of the police papers including X-ray information report (Exh.35), first information report (Exh.36), spot panchanama (Exh.37), medical papers (Exh.38), cover note of insurance (Exh.39), copy of registration certificate (Exh.40), copy of charge sheet (Exh.41) and disability certificate issued by the Medical Board (Exh.42). Maroti Dhanave (PW 1) specifically deposed on oath that when he was traveling along with other labours by the offending tractor, after loading the electric poles, in return journey, due to driving of that tractor by driver in rash and negligent manner, it turned

over. He further deposed that in that accident he sustained injury and his four phalanges except thumb of the left hand were amputated.

13. In his cross-examination, original respondent no.1 owner of the tractor disputed the contention of Maroti Dhanave that he used to work as labour of Dixit Enterprises. The owner of the tractor also gave suggestions that initially the tractor was driven by Arun Shendre and when he left the tractor by the side of road, Maroti Dhanave drove away that tractor and met with the accident. However, these suggestions are specifically denied by claimant Maroti Dhanave (PW 1). Thus, it is evident that claimant Maroti Dhanave (PW 1) stood constant regarding the occurrence of the accident due to rash and negligent driving by the driver of the offending tractor. Otherwise also, testimony of claimant is also corroborated by copy of the first information report (Exh.36) and spot panchanama (Exh.37), which indicate that at the time of accident electric cement and steel poles were loaded in the trailer of the tractor.

14. By examining Arun Shendre (DW 2), the owner of the offending vehicle tried to prove that Arun Shendre was authorized driver of the owner and when he left the tractor by the side of road due to mechanical default, one Maroti Dhanave unauthorizedly drove away the tractor and trailer and met with the accident. However, from the cross-examination of Arun Shendre (DW 2), it emerges that since last six years he is in service of the owner of the tractor and when he left the tractor that time he was alone in the tractor. He has also admitted that when he returned after answering nature's call, he came to know that somebody drove away the tractor, however, he did not inform the owner of the tractor. He could not tell the boundaries of the spot where the tractor was left. He could not tell the distance of the place of accident from the spot where he left the tractor. Thus, his cross-examination indicates that despite knowledge of occurrence of the accident, he did not visit the place of accident. Was, Arun Shendre authorized driver of the tractor, in natural course, after theft of the tractor, he

would have immediately informed the owner of the tractor about theft. At least, he would have lodged report to the police station. After knowing about the occurrence of the accident, he would have definitely rushed to the spot of the accident to see at least the condition of the tractor. Thus, total inaction on the part of Arun Shendre, despite alleged theft of the tractor and its accident, the version of Arun Shendre is absolutely unreliable that on the date of accident he was driving the offending tractor. The Tribunal has rightly rejected the evidence of Arun Shendre.

15. Sunil Dixit (DW 1) is not eye witness of the accident. From his cross-examination, it emerges that the tractor was purchased for agriculture purpose and the policy of the insurance of tractor was third party policy.

16. After going through the policy of the insurance (Exh.57) proved by Ganesh Kadam, the witness examined on behalf of the insurance company, it emerges that specific conditions of

limitation as to use of the tractor are imposed against the owner of the tractor. The important condition is that the tractor shall be used only for agriculture and forestry purpose and policy does not cover use of the tractor for carriage of passengers for hire or reward. The policy also indicates that under Workmen's Compensation Act premium for single employee is paid by the owner. Otherwise also, when owner Sunil Dixit (DW 1) denied his relationship with injured and other labours who were traveling by the tractor, question regarding cover under Workmen's Compensation Act does not arise. So also, as owner of the tractor has denied his relationship with the labours traveling by the tractor at the time of accident, he cannot say that being labours the deceased and injured are covered under the policy of the insurance. The claimant and other labours are neither driver of the tractor nor its owner. Therefore, status of the claimant in the tractor at the time of accident is of gratuitous passenger.

17. In the case of **Oriental Insurance Company**

Limited vs Brij Mohan (supra), the Apex Court held that where insured tractor having not used for the agriculture purpose, there had been violation of the condition of contract of the insurance. It was held that the insurance company has no liability for the death of labours traveling in trolley of the offending vehicle. In **New India Assurance Company Limited vs Babasaheb Mali** (supra), the Division Bench of this Court held that in the case of third party policy it would not cover passenger or pillion rider of motor vehicle, except if it is motor vehicle for carrying passengers. In the case at hand, as per the terms of the policy of the insurance carrying of the passenger by the tractor and trailer is prohibited. Even the use of the tractor for other than agriculture purpose is prohibited. Thus, when Sunil Dixit (DW 1) owner admits that he is in the business of laying electricity line, at the time of occurrence the work of laying main line was going at different places, the finding of electric poles in the trailer of the tractor clearly indicates that at the time of accident the tractor and trailer were used for the business purpose of owner of the tractor and not for agriculture purpose. No seeds are found in the tractor as per spot panchanama. Therefore, the contention of the owner of the tractor is not acceptable that it was sent for purchasing seeds from the market. Accordingly, I hold that the tractor was used for the purpose other than agriculture purpose and as gratuitous passengers were carried by the said tractor, there was clear breach of condition of the policy of the insurance. Therefore, the order, passed by the Tribunal exonerating original respondent no.2 insurance company from its liability to indemnify the owner of the tractor is correct, proper and needs no interference.

18. Regarding quantum of compensation, the disability certificate (Exh.42) issued by the Government Hospital, Hingoli indicates that the claimant sustained permanent disability as his four fingers of the left hand, except the thumb, were amputated due to the injury sustained in the motor

vehicle accident. This disability certificate (Exh.42) also shows that the claimant cannot perform work by manipulating with fingers, as also cannot perform work by pulling and pushing or lifting by left hand.

19. Thus, being labour, when left hand of the claimant has become useless for doing labour work, certainly his capacity to earn as labour is affected, as he can do his labour work only by his right hand and certainly it can be said that he has lost at least 25 per cent earning capacity as labour.

20. As the claimant cannot bring on record any documentary evidence regarding his actual earning, his notional income is to be assessed at the rate of Rs.6,000/- per month. In addition to this, as the disability certificate (Exh.42) shows that age of the claimant was 36 years at the time of accident, the claimant being on fixed income below the age of 40 years, in view of guidelines settled by the Larger Bench of the Apex Court in

“**National Insurance Company Ltd. Vs Pranay Sethi and others” [2018 (3) Mh.L.J. 70]**, 40 per cent income is to be added towards loss of future prospects in the monthly income of the claimant, which is assessed as Rs.2,400/-. Thus, his monthly income is assessed as Rs.6000+2400-8400/-. His annual income will be Rs.8400x12=100800/-. Considering the age of claimant as 36 years, multiplier of 15 will be applicable, in view of ratio in the case of **“Smt. Sarla Verma and Ors. Vs Delhi Transport Corporation and Anr.” [2009 (5) Mh.L.J. (SC) 775]**. Thus, total income of the claimant is Rs.100800x15=1512000/-. Claimant has lost 25 per cent earning capacity. Thus his loss of income is assessed as Rs.3,78,000/-. This will be loss of future income of the claimant on account of permanent disability.

21. From the medical case record (Exh.38), it can be gathered that the claimant was admitted in the Government Medical College and Hospital, Yeotmal on 14.9.2009 and was discharged on

22.9.2009. Thus, the claimant was hospitalized on account of accidental injuries for 9 days. Thus for these 9 days, the claimant has lost his actual earning as labour. Thus, loss of income of the claimant for 9 days is assessed as Rs.200x9=1800/-. This will be the actual loss of income during hospitalization. No bills of medicine are filed by the claimant. Therefore, no compensation can be awarded towards medical expenses.

22. However, as due to accidental injuries, four phalanges of left hand of the claimant were amputated, under the head of pain, suffering and trauma, compensation of Rs.25,000/- would be adequate. As claimant cannot use his left hand as a normal person for his entire life, under the head of loss of amenities, compensation of Rs.50000/- would be adequate. As the claimant was admitted in the hospital for 9 days, compensation at the rate of Rs.1000/- per day as Rs.1000x9=9000/- is to be awarded under the head of attendant charges. Thus, the claimant is entitled to total following compensation under different heads :

Particulars of Head		**Amount (Rs.)**
Loss of actual earning	:	1800/-
Loss of future income	:	378000/-
Attendant charges	:	9000/-
Pain, suffering and trauma	:	25000/-
Future amenities	:	50000/-
Total	:	463800/-

23. It is the duty of this Court to determine reasonable and fair compensation even in absence of Cross-objection by claimant. In view of the judgment in the case of **Jitendra Khimshankar Trivedi and others vs Kasam Daud Kumbhar and others [2015 (4) SCC 237]**, even in absence of Cross-objection, the court can enhance the compensation as just and fair. Therefore, the compensation awarded by the Tribunal deserves to be enhanced to the extent of Rs.463800/- with interest at the rate of nine per cent per annum from the date of filing of petition inclusive of amount of no fault liability, as the interest at the rate of ten per cent per annum is obviously exorbitant. This compensation shall be inclusive of no fault

liability amount.

24. Before parting with the judgment, I must make it clear that the case of **Fahim Ahmed and others vs United India Insurance Company Ltd. And ors.** (supra) is distinguishable for the reason that in the case at hand specific issue is framed regarding breach of condition of policy of the insurance and even there is specific pleading by the insurance company regarding breach of condition of the policy of the insurance. The insurance company has examined one witness to substantiate its contention.

25. Accordingly, my conclusion is that the judgment and award, passed by the Motor Accident Claims Tribunal, Basmat in Motor Accident Claim Petition No. 45 of 2012, exonerating the insurance company from its liability is correct, proper and needs no interference. It follows that this appeal deserves to be dismissed. Accordingly, First Appeal No. 297 of 2017 is dismissed. Parties

to bear their respective costs of appeal. The award, passed by the Motor Accident Claims Tribunal, Basmat in Motor Accident Claim Petition No. 45 of 2012 be modified to enhance the compensation to the extent of Rs.463800/- with interest at the rate of nine per cent per annum from the date of filing of petition till realization of the amount inclusive of no fault liability amount.

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

dbm