

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

FIRST APPEAL NO. 296 OF 2017

Sunil s/o Yedunath Dixit,
age 46 years, occ. Tractor owner
R/o Bhankheda,
Dist. Wardha

...Appellant

VERSUS

1] Pandurang s/o Ramji Garole,
age 50 years, occ. Labour,
R/o Walki, Tq. Aundha (N),
Dist. Hingoli,

2] Gayabai w/o Pandurang Garole,
age 50 years, occ. Labour,
R/o as above,

3] The United India Insurance Co.
Ltd. Through its Branch Manager,
Dayawan Complex, 2nd Floor,
Station Road, Parbhani

...Respondents

[Nos. 1 & 2 Orig. Claimants
No.3 Orig.Resp.No.2]

...

Mr. N.L.Jadhav, advocate for appellant

Mr. R.J.Nirmal, advocate for Resp.Nos. 1 and 2
absent

Mr. S.S.Rathi, advocate for Respondent no. 3

...

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 against the judgment and award, passed by the Motor Accident Claims Tribunal, Basmat in Motor Accident Claim Petition No. 44 of 2012, awarding compensation of Rs.8,54,000/-, but exonerating original respondent no.2 insurance company from its liability to indemnify the owner of offending vehicle i.e. Tractor No. MH-32/A-1762 and trailer No. MH-32/A-1763.

2. Appellant is original respondent no.1, who is the owner of offending vehicle. Respondent nos. 1 and 2 are original claimants and respondent no.3 is insurer of offending vehicle.

3. Facts, in nut shell, are that on 14.9.2009 deceased Vitthal Pandurang Garole along with other 6 to 7 labours went to Anji to bring electric poles to Pandhurna. After loading the electric poles in the trailer of the offending vehicle, when they were proceeding towards

Pandhurna at about 1.30 p.m., due to rash and negligent driving of the driver of the tractor it turned over. In that accident, deceased Vitthal sustained serious injuries and other labours also sustained injuries. Though the deceased was rushed to the V.N. Government Medical College and Hospital Yeotmal, he succumbed to his injuries. Therefore, being dependents of deceased, the claimants filed petition before the Tribunal for grant of compensation.

4. The Tribunal allowed the petition, however, respondent no.2 insurance company was exonerated from its liability and liability to pay compensation was fastened only against original respondent no.1 owner of the offending vehicle. Therefore, this appeal.

5. Heard Shri N.L.Jadhav, learned counsel for the appellant and Shri S.S.Rathi, learned counsel for respondent no.3 insurer of the vehicle.

6. 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.

7. 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.3 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.3 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.2 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 their contention on behalf of the claimants, Pandurang Ramaji Garole (PW 1) deposed before the court regarding the manner in which the accident occurred. However, from his cross-examination, it emerges that he was not present at the time of occurrence of the accident and he came to know about the accident on next day. However, the

claimants have also examined Krishna Pandurang Garole (PW 2), who is one of the eye witness and one of the labour who was traveling by offending vehicle at the time of accident. In addition to this, Maroti Vitthal Dhanave (PW 3) is examined by claimants, who was one of the labour, who was traveling by the offending tractor at the time of accident. From the evidence of these witnesses, it emerges that on 14.9.2009 at about 9.00 a.m. the deceased and other labours went to Anji by offending vehicle as labours of owner of the tractor to fetch electric poles. At Anji they loaded poles in the trailer of the tractor and after 1.00 p.m. when they were at the distance of five kilometers from Ghatanji, due to driving of that tractor by driver in rash and negligent manner, it turned over and the electric poles loaded in the trailer fell on the body of the deceased. Though the deceased was rushed to the Government Medical College and Hospital, Yeotmal, he succumbed to his injuries. Maroti Dhanave (PW 3) has made it clear that driver of the tractor was in the service of original respondent no.1 owner of

the tractor. He has also made it clear that this witness and even the deceased used to work as labours for respondent no.1 in his business of Dixit Enterprises. Though, learned counsel for respondent no.1 gave suggestion to these witnesses that before the accident the tractor was driven by one Arun Shendre and when he left the tractor by the side of road for urinal, one Maroti Dhanave unauthorizedly drove the tractor which met with the accident, these suggestions have been specifically denied by these witnesses.

13. No doubt, from the cross-examination of these witnesses, it emerges that they do not possess any documentary evidence regarding their service in Dixit Enterprises as labours of original respondent no.1. However, that admission is not sufficient to disbelieve the evidence, because in normal course, such type of documentary evidence is not available with the labours. On the other hand, the evidence of Krishna Garole (PW 2) and Maroti Dhanave (PW 3) is fully corroborated by the certified copies of first information report

(Exh.26) as well as spot panchanama (Exh.27). The certified copy of the first information report, which is part of pleading of the claimants, can be read in evidence without its formal proof, in view of law laid down by the Apex Court in the case of **"National Insurance Company Limited vs Rattani and others"** [2009 (3) Mh.L.J. (SC) 754]. In the case of **"United India Insurance Company Limited vs Sayaji Shinde"** [2009 (3) Mh.L.J. 539] this court has also taken view that the certified copies of the first information report and the spot panchanama can be read in evidence in Motor Accident Claim cases without formal proof.

14. From the recitals of the first information report, it becomes clear that on the date of accident, the deceased and other six labours were traveling by offending vehicle as labours of respondent no.1 for transportation of electric poles and the tractor was driven by driver Maroti Dhanave. In the spot panchanama (Exh.27) also there is specific reference of electric poles

and iron poles lying on the spot of the accident.

15. Thus, on the basis of evidence of Krishna Garole (PW 2) and Maroti Dhanave (PW 3), which is also corroborated by copy of the first information report (Exh. 26) and spot panchanama (Exh.27), the claimants have duly established that on the date of accident, the deceased and other six labours were traveling by offending tractor after loading the electric poles on behalf of the owner of the tractor.

16. The only defence taken by respondent no.1 owner is that the tractor was driven by his driver Arun Shendre (DW 2), who left the tractor by the side of road and that time one Maroti Dhanave unauthorizedly drove away that tractor and met with the accident. However, it is important to note that, in the written statement filed by respondent no.1, owner has nowhere mentioned the name of his authorised driver who was driving the tractor on the date of accident. Only in the written statement, respondent no.1 has pleaded that when

his driver left the tractor by the side of road, that time one Maroti Dhanave unauthorizedly drove away that tractor and met with the accident. Lack of name of Arun Shendre (DW 2) as authorized driver of the tractor in the written statement itself, falsifies the contention of respondent no.1 owner. It is to be noted that respondent no.1 Sunil Dixit (DW 1) though stepped in witness box, has not given any explanation as to why his authorized driver left the tractor and trailer by the side of road and allowed Maroti Dhanave to drove it away. Sunil Dixit (DW 1) has admitted in his cross-examination that after the accident, he did not visit the spot of accident. However, he came to know that there were poles in the tractor. From his cross-examination, it emerges that despite knowledge of death in the said accident, this witness did not visit the spot. He has admitted that he used to run business of laying electric line and at the time of accident the work of laying of main line of electricity was going on at different places.

17. It is to be noted that though according

to respondent no.1, Maroti Dhanave unauthorizedly drove away his tractor, the owner did not inform police about the alleged theft of the tractor. The so-called driver Arun Shendre (DW 2) has deposed otherwise that on the date of accident when he was driving the tractor, that time due to mechanical fault he left the tractor by the side of road and later on came to know that Maroti Dhanave drove away the tractor. It is surprising to note that the tractor was left by the side of road by this witness Arun Shendre (DW 2) due to mechanical fault in the tractor. But subsequently same was driven away by Maroti Dhanave. Such type of inconsistent version of Arun Shendre (DW 2) indicates falsity of his evidence.

18. From the cross-examination of Arun Shendre, it further emerges that though he came to know that the tractor was driven away by somebody, he did not inform the owner of the tractor. Such behaviour of this witness is highly improbable and indicates his falsity. Even Arun Shendre (DW 2) cannot tell the boundaries of the spot where the

tractor was left. He cannot tell the distance from the place of accident. He admits that even after knowledge of accident he did not visit the place of accident. Was, Arun Shendre (DW 2) authorized driver of the tractor, certainly after knowledge of theft of the tractor, he would have taken some steps. At least he would have informed the owner of the tractor after knowledge of accident. He would have definitely visited the place of accident. This witness did not give explanation regarding loading of electric poles in the tractor which met with the accident. Thus, the testimony of Arun Shendre (DW 2) is absolutely unreliable and it is full of falsity.

19. Thus, respondent no.1 cannot establish that without his knowledge the tractor was driven away by some unauthorized person. Even assuming that such unauthorized person drove away the tractor and that met with accident, even then, it is the responsibility of the owner to allow only authorized person to drive the tractor. Owner of the tractor cannot be absolved from his liability

for the accident of his vehicle under the pretext of lack of knowledge as to who was driving the tractor at the time of accident. It is the statutory liability of the owner of the tractor, which met with the accident, resulting into injuries to third person and death of the third person to pay compensation to victim or his dependant. Therefore, otherwise also the defence raised by respondent no.1 is not acceptable.

20. Sunil Dixit (DW 1) has admitted in his cross-examination that the tractor was purchased for agricultural work. Even the policy of insurance proved by witness of insurance company indicates that it was third party policy and the offending tractor can be used only for agriculture and forestry purpose. The limitation clause specifically indicates that the policy does not cover the use for carriage of passenger for hire or reward. In the case at hand, according to Sunil Dixit (DW 1) the deceased and the injured labours were not his servants. Undisputedly, the deceased and injured labours were not owner or driver of the

tractor. Therefore, the status of the deceased and other injured labours would be only as gratuitous passengers. Transport of gratuitous passengers by the offending tractor amounts to clear breach of policy of the insurance. So also, though tractor was purchased for agriculture purpose and though limitation clause of the policy clearly mandates that the vehicle can be used only for agriculture and forestry purpose, the same cannot be used for transport of electricity poles, which is certainly commercial purpose and not agriculture purpose. There is ample evidence on record to indicate that at the time of accident, owner of the tractor used it for other than agriculture purpose and for the purpose of illegally transporting gratuitous passengers. Therefore, the insurance company has duly proved the breach of condition of policy of insurance. In **Oriental Insurance Co. Ltd. vs Brij Mohan and others** (supra), it was held that the insurance company has no liability for the death of labours traveling in trolley of the offending vehicle.

21. I hold that as the insurance company has duly proved that the owner of the offending vehicle committed breach of condition of policy of the insurance, liability cannot be fastened against the insurance company to indemnify the owner of the offending vehicle for the death or injuries caused to the gratuitous passengers traveling by the offending vehicle. The Tribunal has rightly exonerated the insurance company from its liability to indemnify the owner of the offending vehicle. The case of "**Fahim Ahmad vs United India Insurance Co. Ltd.**" (supra) is distinguishable for the reason that in the case at hand specific issue is framed regarding breach of condition of policy and even there is specific pleading by insurance company regarding breach of condition of policy. Even in the case at hand, the insurance company has examined one witness to substantiate its contention. Even the defence of owner of the vehicle that he paid premium for labour under Workmen's Compensation Act is not acceptable, for the simple reason that the policy of the insurance indicates that premium under Workmen's Compensation

Act was paid only for one employee. It covers risk of only driver of the offending tractor and not the risk of labours traveling by trailer of the tractor. Thus, in any case, liability to indemnify the owner cannot be fastened against the insurance company.

22. Accordingly, my conclusion is that the judgment and award, passed by the Tribunal exonerating the insurance company from its liability is correct, proper and needs no interference. It follows that this appeal fails and deserves to be dismissed. In the grounds of appeal, the appellant has also taken objection regarding quantum of the compensation awarded by the Tribunal. Otherwise also, being First Appellate Court, this Court is bound to reassess reasonable and fair compensation payable to the claimants in motor accident claim proceeding. In view of legal position settled by the Apex Court 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.

23. For assessing the quantum of reasonable and fair compensation, the age of the deceased, on the date of death plays important role. The accident occurred on 14.9.2009 and deceased died on the same day. The school admission register placed on record by claimants (Exh.33) shows that the date of birth of the deceased is 7.8.1986. Thus, on the date of death the deceased was between 22 to 23 years of age. Therefore, in view of the ratio of **"Smt. Sarla Verma and Ors. Vs Delhi Transport Corporation and Anr."** [AIR 2009 SC 3104], the proper multiplier is 18. Regarding income of deceased, the claimants have not placed on record any documentary evidence. Even the so called employer original opponent no.2 has denied his relationship with the deceased as employer and employee. Therefore, I have to assess the monthly income of deceased as labour. Considering approximate wages of the labour in the year 2009, the notional income of the deceased is assessed as Rs.6,000/- per month. The deceased being below the

age of 40 years, in view of guidelines settled by the Apex Court in "**National Insurance Company Limited vs Pranay Sethi**" [2018 (3) Mh.L.J. 70], 40 per cent income is to be added in the monthly notional income of the deceased towards loss of future prospects, which is assessed as Rs.2,400/-. Thus, monthly income of the deceased is assessed as Rs.6000+2400=8400/-. The annual income of the deceased is assessed as Rs.8400x12=100800/-. Deceased being unmarried bachelor, half of the income is to be deducted towards personal expenses of the deceased, which is assessed as Rs.50,400/-. After applying multiplier of 18 to this multiplicand, the loss of dependency is assessed as Rs.50400x18=907200/-. Under conventional head, the claimants are entitled to compensation of Rs.15,000/- for loss of estate and Rs.15,000/- towards funeral expenses. Thus the claimants are entitled for total compensation of Rs.9,37,200/- under following different heads.

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Loss of dependency	: Rs.907200/-
Loss of estate	: Rs. 15000/-
Funeral expenses	: Rs. 15000/-

Total	: Rs.937200/-

This compensation amount shall carry interest at the rate of nine per cent per annum, as the interest awarded by the Tribunal at the rate of 10 per cent per annum is exorbitant. Interest be charged from the date of petition till realization of the compensation amount. Out of the claimants, claimant no.2 Gayabai being mother of the bachelor deceased, she will be the only dependent of deceased and not claimant no.1 father. Therefore, entire compensation amount is to be paid to the mother of deceased claimant no.2 Gayabai. The award passed by the Tribunal needs to be modified to that effect. Accordingly, First Appeal No. 296 of 2017 is dismissed. However, the award passed by the Motor Accident Claims Tribunal, Basmat in Motor Accident Claim Petition No. 44 of 2012 is modified to enhance the compensation to the extent of Rs.9,37,200/- with interest thereon at the rate of nine per cent per annum. This compensation shall

be inclusive of compensation received under no fault liability. The compensation amount shall be paid only to the mother of deceased claimant no.2 Gayabai. Parties to bear their respective costs of the appeal. Appeal is disposed of in above said terms.

[SUNIL K.KOTWAL, J.]

dbm