IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 930 OF 2003

National Insurance Co. Ltd.,
Sharnapur Road, Nasik,
Now, through its's Divisional
Manager, Aurangabad at Hazari
Chambers, Station Road,
Aurangabad. **Appellant**
(Ori. Respondent No.3)

VERSUS

1. Smt. Ashabai W/O Shriniwas Jaju,
Age : 40 years, Occu.: Household,
R/o.: Kolpewadi, Tq. Kopargaon,
District : Ahmednagar.

2. Kumar Shashikant s/o Shriniwas Jaju,
then minor but now having attained
majority : R/o.: As above.

3. Kumar Deepak s/o Shriniwas Jaju,
then minor but now having attained
majority : R/o.: As above.

4. Suryabhan s/o Damu Deshmukh,
Age : 50 years, Occu.: Tailoring & Jeep owner
R/o.: As above.

5. New India Assurance Co. Ltd.,
Branch Ahmednagar **Respondents**
(Resp. Nos. 1 to 3- Org. Claimants
Resp. Nos. 4 & 5 Org. Resp. Nos.
2 & 3)

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Mr. R. C. Bora, Advocate h/f Mr. P.P. Bafna, Advocate
for the appellants.

Mr. A. S. Khedkar, Advocate, h/f Mr. N. R. Bhavar, Advocate for respondent Nos. 1 to 3 .
Mr. A. D.Sonpawale, Advocate h/f Mr. A. V. Hon, Advocate for respondent No.4.
Mr. M. M. Ambhore, Advocate for respondent No.5.

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WITH
FIRST APPEAL NO. 820 OF 2006

1. Smt. Ashabai Shriniwas Jaju,
Age : 40 years, Occu.: Household,

2. Shashikant Shriniwas Jaju,
Age : 21 years, Occu.: Student,

3. Deepak Shriniwas Jaju,
Age : 19 years, Occu.: Student,

All R/o.: Kolpewadi, Tq. Kopargaon,
District Ahmednagar. … **Appellants**
(Orig. Petitioners)

VERSUS

1. Suryabhan Damu Deshmukh,
Age : 51 years, Occu.: Tailoring & Jeep driver,
R/o.: Sahajpur, Post Kolpewadi,
Tq. : Kopargaon, District : Ahmednagar.

2. National Insurance Co. Ltd.,
Balwant Chambers, Sharanpur Road,
Nashik.

3. New India Assurance Co. Ltd.,
Branch Ahmednagar. …. **Respondents**

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Mr. A. S. Khedkar, Advocate, h/f Mr. N. R. Bhavar, Advocate for appellants .
Mr. A. D. Sonpawale, Advocate h/f Mr. A. V. Hon, Advocate for respondent No.1.

Mr. R. C. Bora, Advocate h/f Mr. P. P. Bafna, Advocate
for the respondent No.2.
Mr. M. M. Ambhore, Advocate for respondent No.3.

CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 7th December, 2018.
Judgment pronounced on : 4th January, 2019.

JUDGMENT.

1. First Appeal No. 930 of 2003 is filed by National Insurance Company Ltd., which was respondent No.3 in M.A.C.P. No.01 of 2002 (Old No. 72 of 1986) against the judgment and award passed by Motor Accident Claims Tribunal Kopargaon (hereinafter referred as to 'Tribunal'). Counter First Appeal No. 820 of 2006 is filed by the original claimant Nos. 1 to 3 for enhancement of the compensation as well as against the order of exoneration of driver and owner of the offending vehicle. These both appeals arise out of one and same judgment and award. Therefore, both the appeals are disposed of by this common judgment.

2. The facts leading to institution of these appeals are that, on 29.11.29185, deceased Shriniwas Radhakisan Jaju, who was resident of village Kolpewadi, boarded in Jeep bearing No.MGM-7122 at Kopargaon for going to his village, Kolpewadi.

However due to rash and negligent driving by the driver of this Jeep, at the distance of one kilometer from Kolpewadi, the jeep turned turtle and fell in the ditch by the side of the road. In that accident, the deceased Shriniwas sustained injuries, resulting into his instant death on the spot of accident. Therefore, the claimants, who are dependents of the deceased, filed claim petition for compensation before the Tribunal.

3. Original respondent No.1 was the driver of the offending Jeep and respondent No.2 was the owner. Respondent No.3 is the insurer of the offending Jeep. Respondent No.4 is another Insurance Company.

4. By filing written statement (Exh-54), respondent Nos. 1 & 2 denied their liability and driving of the vehicle in rash and negligent manner by respondent No.1. However, driving of vehicle by respondent No.1 is not disputed. According to these respondents the accident occurred due to dash given by one Truck from the back side of the Jeep. In the alternate, contention of the respondents is that on the date and time of the accident, the Jeep was duly insured with respondent No.3 Insurance Company, and therefore, it is liable to indemnify the respondent No.2.

5. Even respondent No.3 denied its liability by filing written statement (Exh.34) on the ground that on the date and occurrence of the accident the policy of the insurance of the offending Jeep was not in force as the cheque issued towards premium of the insurance by financier Kopargaon Taluka Merchants Bank, was not honoured and the policy of the insurance was cancelled. Respondent No.3 has also raised statutory defences regarding breach of condition of policy by owner of the offending vehicle.

6. Even the respondent No.4 denied its liability by contending that the offending Jeep was never insured with respondent No.4 Insurance Company.

7. After considering the evidence placed on record by both the parties, the Tribunal held that the claimants failed to prove the occurrence of the accident due to rash and negligent driving by the driver of the offending Jeep. Therefore, the Tribunal exonerated the driver, owner and respondent No.4 second Insurance Company. However, the Tribunal fastened the liability only against respondent No.3, the insurer of the offending vehicle. The Tribunal awarded compensation of Rs.50,000/- inclusive of 'no fault liability'

compensation of Rs.15,000/-.

8. Heard Mr. R. C. Bora, learned counsel for National Insurance Company. Mr. A. S. Khedkar, learned counsel for the original claimants. Mr. A. D. Sonpawale, learned counsel for owner of the offending vehicle and Mr. M. M. Ambhore, learned counsel for New India Insurance Company.

9. Learned counsel for National Insurance Company assailed the judgment and award passed by the Tribunal on the ground that when driver and owner of the offending jeep are absolved by the Tribunal, the liability to pay compensation cannot be fastened against the insurer, who can be liable only under the contract of indemnity. He submits that as rash and negligent driving by the driver of the offending vehicle is not proved, along with owner of the offending vehicle even the insurer of the vehicle deserves to be exonerated.

10. In the alternate contention of learned counsel for the Insurance Company is that before the date of occurrence of the accident, the policy of the insurance was cancelled as the cheque issued by financier of the owner of the Jeep towards premium of policy of insurance, was not honoured.

11. Next contention of learned counsel for the Insurance Company is that as the deceased was travelling by the offending Jeep as fare payee passenger, under Section 95 (2)(b) of the M. V. Act, 1939, the liability of the Insurance Company is limited upto the extent of Rs.15,000/-. Therefore, at the most the respondent No.3-Insurance Company is liable to pay compensation of Rs.15,000/- to the claimants, in case liability is fastened on Insurance Company.

12. He placed reliance on "**New India Assurance Co. Ltd. Vs. Raghu and others", (2002 ACJ 217)** and **"National Insurance Co. Ltd. Vs. Seema Malhotra and others", (2001 ACJ 638)**.

13. Learned counsel for the original claimants submits that the recitals of the FIR together with copy of the spot panchanama, itself is sufficient to prove that the accident occurred due to rash and negligent driving by driver of the offending Jeep. He submits that only on the ground of discharge of the driver by Criminal Court, the Tribunal cannot hold that rash and negligent driving of the offending Jeep is not established by the claimants. He submits that in motor accident claim proceeding, rash and negligent act of the driver of offending vehicle is to be proved only on the basis of

preponderance of probability and it need not be proved beyond reasonable doubt like in criminal trial.

14. Next contention of learned counsel for the claimants is that the deceased being third party, only on the ground of breach of condition of policy of insurance by owner of the insured vehicle, the insurer cannot avoid its liability to pay compensation to the claimants.

15. Next contention of learned counsel for the claimants is that at the time of death of the deceased was only 26 years old as mentioned in the P.M. Report. Therefore, multiplier of 17 is applicable while determining the quantum of compensation. He submits that the deceased being young agriculturist and businessman, his notional income cannot be less than Rs.2,500/- per month. He claims enhancement of the compensation.

16. Learned counsel for the owner of the offending vehicle submits that the entire letter correspondence relied by insurer is in between Insurance Company and financier Co-operative bank. No intimation is given to the owner of the offending vehicle about the dishonour of the cheque issued towards premium of policy of insurance. He submits that as certificate of insurance at Exh.94

was issued by original respondent No.3 Insurance Company, unless cancellation of that policy of insurance is duly proved by the Insurance Company and it is intimated to the owner of the offending vehicle, the Insurance Company cannot avoid its liability to indemnify the owner of the offending vehicle. He has pointed out that the financier bank, who issued the cheque towards premium and policy, is not party to the proceeding. Therefore, if there is any default on the part of financier Bank, the owner of the offending vehicle is not liable for the same. He placed reliance on **"K. Ramalingam Vs. Parvathi (Madras)", [2002(3) MLJ 415**].

17. In the case at hand, already New India Insurance Company is exonerated as it was found that it is not the insurer of the offending vehicle. Otherwise also, no substance is placed on record to show that the original respondent No.4 is the insurer of the offending Jeep. Therefore, I need not discuss the liability of respondent No.4 to pay any compensation to the claimants.

18. After hearing of the parties, following points arise for my consideration :-

1) Do the claimants prove that the accident occurred due to rash or negligent driving by driver of the offending Jeep ?

2) Whether on the date of accident, the offending Jeep was duly insured with respondent No.3- National Insurance Company ?

3) Does respondent No.3- Insurance Company prove breach of conditions of policy of the insurance as alleged ?

4) Whether the claimants are entitled to compensation ? If yes, what would be fair and reasonable compensation and liable to pay the same ?

19. For considering whether the accident occurred due to rash and negligent driving by driver of the offending Jeep, except the oral testimony of claimant No.1 Ashabai Jaju (PW-1) and supporting police papers, no other evidence is available. However, at the out set, I must make it clear that in motor accident claim cases, the liability to prove occurrence of the accident due to rash and negligent driving by the driver of the offending vehicle can be discharged on the basis of preponderance of probability. Claimants need not prove the rash and negligent driving by the driver of the offending vehicle beyond reasonable doubt, like in criminal trial. Thus, the finding of the Tribunal is absolutely incorrect that because the driver of the offending Jeep was discharged by the Criminal Court from the charge of rash and negligent driving, the claimants cannot prove rash and negligent driving of the offending Jeep.

20. In the case at hand, claimant Ashabai Jaju (PW-1) categorically deposed on oath that on the date of accident, her husband died on the spot of accident when he was travelling by the offending Jeep. No doubt, from her cross-examination it becomes clear that she was not an eye witness of the occurrence. However, on behalf of claimants Hanumandas Jaju (PW-2), who was the elder brother of the deceased, deposed before the Court regarding occurrence of the accident. This witness has made it clear that when he visited the spot of accident, the dead body of the deceased was lying below the offending Jeep. This witness has duly proved the certified copy of the FIR, spot panchanama, inquest panchanama and PM notes. After going through the certified copy of the FIR (Exh-87), it emerges that at the time of accident the driver of the offending Jeep drove it in high speed on the turn of the road and thereby the Jeep turned turtle and fell down by the side of the road in ditch. Even the spot panchanama (Exh.88) makes it clear that the Jeep turned turtle and fell down by the side of the road in ditch and it's four wheels were towards sky. One tyre mark was found up to the distance 59 feet on the spot of accident. These circumstances on the spot of accident are sufficient to hold that due to rash and negligent driving by the driver of the offending Jeep, it

turned turtle and thereby fell down by the side of the road in one ditch, resulting into the death of the deceased. Even the P.M. notes (Exh.90) supports the accidental death of the deceased in motor vehicular accident. Thus, on the basis of copy of FIR together with spot panchanana, applying the principles of preponderance of probability, the claimants have duly proved that the deceased died in motor vehicular accident only due to rash and negligent driving by the driver of the offending vehicle. I answer point No.1 in the affirmative.

21. No question arises, whether on the date of accident the offending Jeep was insured with respondent No.3- National Insurance Company. It is to be noted that though this point is debated at length by learned counsel for rival parties, undisputedly, certificate of insurance (Exh.94) was issued by respondent No.3 Insurance company on 24th October, 1985 regarding comprehensive policy of the insurance of the offending Jeep for the period 16.10.1985 to 15.10.1986. This certificate is issued in respect of policy No. 6864/6100010/85. The second policy (Exh.95) of the same vehicle effective from 03.12.1985 to 02.12.1986 was also issued on 24th October, 19985. This second policy also shows that it was

issued in respect of police No.6864/6100010/85. Thus, these two certificates of insurance of the offending vehicle having overlapping period from 16.10.1985 to 02.12.1986 issued by respondent No.3 -National Insurance Company, show that on the date of accident on 30.11.1985 the offending Jeep was duly insured with respondent No.3- National Insurance company.

22. On the basis of this certificate of insurance (Exh.94), presumption is to be drawn that premium for the policy of the insurance was duly received by Insurance Company. Therefore, onus shifts on respondent No.3- Insurance Company to prove that on account of bouncing of the cheque issued towards premium, the policy was cancelled and it was intimated to the owner of the offending vehicle. To prove the dishonour of the cheque issued towards premium for policy, the material important document i.e. the letter issued by the Bank, in which the cheque issued towards premium, was presented by National Insurance Company, is not placed on record by the insurance company. Even the so called cheque, which was dis-honoured by the concern bank, is not filed on record to prove the dishonour of the said cheque on the ground of insufficient funds in the account of financier Bank. Therefore,

merely on the basis of letter correspondence in between financier bank and Insurance Company, the conclusion cannot be drawn that the cheque issued towards premium of policy of insurance was not honoured and therefore, the premium was not paid to the Insurance Company. Though, Insurance Company claims that due to dishonour of the cheque the policy of the insurance was cancelled, to substantiate this contention letter issued to the owner of the offending vehicle intimating him cancellation of the policy of the insurance, is not placed on record by the insurer. Even the heavily relied on letter Exh.132 issued by respondent No.3 -National Insurance Company addressed to the Agent at Kopargaon Taluka Merchants Co-operative Bank Ltd., Kolpewadi Branch, does not show the date of issue of that letter as well as its official out-ward number. Therefore, on the basis of letter (Exh.132), respondent No.3 – Insurance Company cannot prove that policy of the insurance was cancelled before the date of accident. Otherwise also, when the contract of insurance was in between owner of the offending vehicle and respondent No.3 -National Insurance Company, the intimation of cancellation of policy of insurance due to non-payment of premium is to be given to the owner of the offending vehicle. In the circumstances, the evidence placed on record by respondent No.3

National Insurance Company falls short to prove that before the date of occurrence of the accident the policy of the insurance (Exh.94) was cancelled. Therefore, only one conclusion is to be drawn that on the date of occurrence of the accident the offending Jeep was duly insured with respondent No.3-National Insurance Company. Thus, I answer point No.2 in the affirmative.

23. Respondent No.3 -National Insurance Company has also taken statutory defences that the owner of the offending vehicle committed breach of conditions of policy by using the vehicle for carrying passengers as well as by authorizing the driver of the vehicle to drive the jeep when he was not holding effective and valid driving license. However, to substantiate this contention, no evidence is placed on record by respondent No.3- Insurance Company to prove that driver of the offending vehicle did not hold valid and effective driving license to drive the jeep on the date of occurrence of the accident. On the other hand, the particulars of license given by DRTO, Shrirampur (Exh.115) shows that the original respondent No.1 -driver of the offending vehicle held valid driving license from 07.05.1985 up to 06.05.1988 to drive the light motor vehicle i.e. Jeep. So also, no evidence is placed on record by

the Insurance Company to prove that at the time of accident the deceased was travelling by the said Jeep as fare payee passenger. Thus, even the alleged breach of condition of permit of the Jeep is not proved by the Insurance Company. In the circumstances, I have no hesitation to hold that respondent No.3 -Insurance Company failed to prove that the owner of the offending Jeep committed breach of condition of policy of the insurance. I answer point No.3 in the negative.

24. In view of above discussion, the claimants have proved that the deceased died in motor vehicular accident only due to rash and negligent driving by the driver of the offending vehicle. Therefore, when the offending Jeep was duly insured with respondent No.3 – National Insurance Company, the liability to pay the compensation to the claimants lies on respondent No.2 -owner as well as respondent No.3 – National Insurance Company. It is needless to say that it is joint and several liability of respondent Nos. 2 and 3 to pay just and fair compensation to the claimants. Learned counsel for respondent No.3- Insurance Company has placed reliance on Section 95(2)(b) of the M. V. Act, 1939 regarding extent of liability of Insurance Company only up to Rs.15,000/-. It is

suffice to say that the said provision is not applicable in the case at hand as respondent No.3 Insurance Company has not proved that the offending vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment. On the other hand, by deposing before the court, the owner of the offending vehicle duly proved that the driver of the offending vehicle allowed the deceased to travel by his jeep because he was personally knowing the deceased. Thus, the deceased cannot fall in the category of fare payee passenger to limit the liability of Insurance Company to pay the compensation. On the other hand, the deceased being third party to the contract of insurance in between owner of the vehicle and Insurance Company, the liability of the insurance company to pay compensation is unlimited.

25. The cases of "**New India Assurance Co. Ltd. Vs. Raghu and others",** and **"National Insurance Co. Ltd. Vs. Seema Malhotra and others"** (supra) relied on by the learned counsel for the Insurance Company are distinguishable on above discussed facts.

26. In view of this discussion, now I have to consider what would be the fair and reasonable compensation payable to the

claimants. According to the claimants, the deceased used to earn Rs.2,500/- per month by agricultural work and by running grocery shop. However, it has come on record in cross-examination of PW-2 that the grocery shop was joint family business and it is continued even after the death of the deceased. However, it cannot be ignored that at the time of death, the deceased was 26 years old and able bodied young person as mentioned in PM Report (Exh.90). Therefore, even assuming the occupation of the deceased as ordinary labour in the year 1985, his notional income cannot be less than Rs.2,000/- per month. In addition to this as deceased was below the age of 40 years, in view of law laid down by the Apex Court in "**National Insurance Company Limited Vs. Pranay Sethi and others" [2018 (3) Mh. L.J. 70],** 40% income is to be added towards loss of future prospect. Thus, monthly income of the deceased comes to Rs.2,800/-. It follows that annual income of the deceased is Rs.33,600/-. As claimants are three in number, who are dependents in the family of the deceased, 1/3rd income is to be deducted from the annual income of the deceased towards his personal expenses. Thus, after deducting this 1/3rd amount from the annual income of the deceased, the annual contribution of the deceased to his family comes to Rs.22,400/-.

27. As the deceased was 26 years old, in view of guidelines issued by the Apex Court in the case of "**Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another" [(2009) 6 SCC 122],** multiplier of 17 is applicable in the case at hand. Thus, if the multiplicand of Rs.22,400/- is multiplied by 17, the loss of dependency comes to Rs.3,80,800/-

28. In addition to this, claimants are entitled to following compensation under conventional heads :

1)	Loss of consortium	- Rs.40,000/-
2)	Loss of estate	- Rs.15,000/-
3)	Funeral expenses	- Rs.15,000/-

29. Thus, the claimants are entitled to total following compensation under different heads.

1)	Loss of dependency	- Rs.3,80,800/-
2)	Loss of consortium	- Rs.40,000/-
3)	Loss of estate	- Rs.15,000/-
4)	Funeral expenses	- Rs.15,000/-

	Total	- Rs. 4,50,800/-

30. Claimants are also entitled to interest @ 9% p.a. from

the date of filing of claim petition because they are dragged by the Insurance Company in the Court without substantial cause. The compensation amount shall be inclusive of the amount under the head of 'no fault liability' received by the claimants.

31. Accordingly, First Appeal No. 930 of 2003 is dismissed and First Appeal No. 820 of 2006 is allowed.

32. The award passed by the Motor Accident Claims Tribunal, Kopargaon in M.A.C.P. No.01 of 2002 (Old No. 72 of 1986) is modified to enhance the compensation to the extent of Rs.4,50,800/- (Rs. Four lakh fifty thousand eight hundred only), inclusive of amount received under 'no fault liability', along with interest @ 9% p.a. from the date of filing of the petition till realization of entire compensation amount.

33. Original respondent Nos. 2 and 3 are jointly and severally liable to pay this compensation amount to the claimants.

34. Claim against original respondent No.4 is dismissed.

35. Compensation be paid to the claimants equally through the Tribunal by issuing separate account payee cheques in their respective names.

36. If any compensation is deposited in this Court, the same be transmitted to Motor Accident Claims Tribunal, Kopargaon for its payment to the claimants in accordance with the award.

37. Deficit court fees be recovered from the claimants.

38. Award be drawn up accordingly.

39. Parties to bear their respective costs of the appeals. The appeals are disposed of in the above said terms.

(SUNIL K. KOTWAL)
JUDGE

vsm/