

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

FIRST APPEAL NO. 753 OF 2011

National Insurance Co. Ltd.

having its registered and

head office at 3, Middleton Street,

Kolkata, a branch office at

Nanded, now through its

Divisional office at Hazari

Chamber, Station Road,

Aurangabad.

.... APPELLANT/

[ORI. RESP. NO.2]

V E R S U S

1. Motiram s/o Vishwasrao @
Iranna Panchlinge, since
deceased thr. his L.Rs.

1(a) Balaji s/o Vishwasrao
@ Iranna Panchlinge
Age : 45 Yrs., Occ. Agril.,
R/o : Injegaon, Tq. &
District Nanded.

1(b) Durgadas s/o Motiram Panchlinge
Age : Major, Occ. Education
A minor u/g of Balaji s/o
Vishwasrao, the Resp. No. 1 (a).

1(c) Raju s/o Motiram Panchlinge
Age : Major, Occ. Education

A minor u/g of Balaji s/o

.... RESPONDENTS/

Vishwasrao, the Resp. No. 1 (a). [ORI.PETITIONERS]

2. Lakhanlal s/o Udhavrao Yadav

Age : Major, Occ. Business &
owner of vehicle No.MH-34/
A-1224, R/o Near New Bridge,
Vazirabad, Nanded,
District Nanded.

.... RESPONDENT/
[ORI.RESP.NO. 1]

.....

Mr. R.C.Bora h/f Mr. P.P.Bafna
Advocate for Appellant.

Mr. G.N.Chincholkar, Advocate for R 1-A.

Resp. Nos. 1-B and 1-C – served, absent.

Mr. H.I.Pathan, Advocate for R – 2.

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CORAM : V.L.ACHLIYA, J.

DATE OF JUDGMENT : 04/04/2019

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JUDGMENT :

1. Being aggrieved by the Judgment and Order dated 31/08/2010 passed in M.A.C.P. No. 35/2002 by the learned Member, Motor Accident Claims Tribunal, Nanded, the appellant/original respondent No. 2 has preferred this Appeal.

2. Heard learned Counsel for appellant and respondents. Perused the record and proceedings.

3. Before dealing with the submissions advanced, it is useful to refer to few facts leading to filing of the claim petition. The claim petition was filed by respondent No. 1 claiming to be the legal representatives of Motiram s/o Vishwasrao @ Iranna Panchlinge, who met with motor vehicle accident occurred on 27/03/2001. In said accident deceased Motiram sustained injuries which caused permanent disablement to him. Since the injured was died before filing claim petition, the petition came to be filed by respondent claiming themselves to be the legal representatives of the deceased Motiram. The claimants have claimed that the deceased injured was agriculturist by profession and residing at village Injegaon, district Nanded. On the date of incident i.e. 27/03/2001 the deceased accompanied with one Balaji Thoke, resident of same village were returning to village Injegaon. With the consent of the driver of tipper truck bearing registration No. MH-34/A-1224 they sat in that tipper. Due to rash and negligent driving on the part of the driver of the truck, the deceased Motiram fell down on the road and became unconscious. He sustained serious injury to his right leg. He was admitted in Govt. hospital at Nanded. On the basis of complaint lodged, the offence came to be

registered vide Crime No. 81/2001 with police station CIDCO [Rural], Nanded. The claimants have filed petition seeking compensation of Rs. 4 Lakhs making the respondents in petition liable to pay the compensation.

4. Respondent No. 2 – insurance company resisted the claim petition with contention that there was no rash and negligent driving on the part of driver of the vehicle nor the petitioner fell down on the road and sustained injuries as alleged. In short, respondent No. 2 has pleaded that the contents of F.I.R. reflects that the petitioner has boarded in the tipper truck No. MH-34/A-1224 without the permission and consent of driver of said tipper and while alighting from the said tipper at Wajegaon, the petitioner has sustained injury. The driver of tipper was unaware of boarding of the petitioner in the vehicle in question and the injuries sustained by the injured was on account of his own act of negligence. The injured died on 08/09/2002 on account of Gangrene developed to his right leg.

5. On due consideration of the evidence adduced in the case, the Tribunal has partly allowed the claim petition and

awarded compensation of Rs. 1,20,400/- to the claimants as against respondent Nos. 1 and 2. Being aggrieved, the respondent No. 2 – insurance company has preferred this appeal.

6. In brief, it is the contention of learned counsel for appellant that the Tribunal has grossly erred in partly allowing the petition and granting compensation in favour of the claimants. By referring to the F.I.R. lodged in respect of the incident, learned counsel submits that the fact regarding the incident narrated by the deceased injured i.e. the complainant itself sufficient to accept that the injuries sustained by the deceased injured was occurred on account of his own carelessness and negligent act and the driver of the vehicle in question was no way responsible for causing injury to him. It is submitted that the trial Court has ignored the F.I.R. while partly allowing the claim. It is further submitted that in the light of F.I.R., it is apparent that the petitioner was unauthorizedly travelling in vehicle to be used as goods vehicle. The risk of deceased was not covered under the terms of policy and, therefore, the insurance company is not liable to pay the compensation. It is further submitted that

the Tribunal has also erred in awarding compensation under the head of loss of earning by applying multiplier of 13. It is submitted that as the injured has died in the year 2002 the multiplier of 13 ought not to have been applied in the facts and circumstances of the case. Learned counsel for the appellant referred and relied upon the decision of the Apex Court in the case of *National Insurance company Ltd. V/s Baljit Kaur reported in 2004 ACJ 428* and *National Insurance Co. Ltd. V/s Bommithi Subbhayamma and Ors. reported in (2005) 12 Supreme Court Cases 243* in support of the submission that the gratuitous passenger in goods vehicle are not entitled to receive compensation in absence of risk being covered under the terms of policy.

7. On the other hand, learned counsel representing the respondents supported the Judgment and Order passed by the Tribunal. By referring overall facts of the case, learned counsel submits that though the appellant insurance company has taken a plea that the insurance policy obtained by the owner of the vehicle has not covered the risk of the passenger but neither any of the policy was produced nor any evidence was adduced to prove its case. By referring the decision in

the case of *Damodarprasad Chandrikaprasad and Ors. Vs. State of Maharashtra reported in (1972) 1 Supreme Court Cases 107* learned counsel for respondents submits that the F.I.R. can be used only for the purpose of contradicting the maker of such statement. In absence of maker of statement examined, the F.I.R. tendered in evidence can not be treated as substantive evidence. So far as the submission of learned counsel for the appellant that the date of death of the deceased ought to have been taken into consideration while ascertaining the multiplier. The learned counsel submits that the age of deceased alone can be considered for selection of multiplier.

8. I have carefully considered the submissions advanced in the light of overall facts of the case, the pleadings of the parties and oral and documentary evidence adduced in the case. If we consider the pleadings of the parties, then there is no much dispute as fact that the deceased injured met with an accident on 27/03/2001. The fact is also not in dispute that he was admitted in Govt. Medical College Hospital, Nanded on 27/03/2001 with crush injury sustained to his left ankle and foot. The discharge card issued by Govt. Medical

College Hospital, Nanded produced at Exh. 46 support the case of the claimants that deceased met with an accident on 27/03/2001 with said injury and treated up to 25/04/2001. It further reveals that leg of the deceased was amputated below the knee in an operation carried out after his admission in hospital. Thus, the pleadings, oral evidence adduced by the claimant coupled with the discharge card and the M.L.C. report as well as F.I.R. lodged sufficiently establish the case of the claimant that deceased injured met with an accident on 27/03/2001 and sustained severe injury to his left leg which resulted into amputation of his leg below the knee. On the basis of complaint recorded, the offence u/s 338 of I.P.C. came to be recorded with police station Nanded [Rural] on 27/03/2001. The F.I.R. also reveals that deceased injured was admitted in hospital by the driver of tipper truck No. MH-34/A-1224 owned by respondent No. 2 and insured with the insurance company. The complaint lodged also prima facie establish that the injury sustained by the deceased injured was on account of vehicle referred in the complaint. The complaint also reveals that the complainant has lodged the complaint against the driver of the said truck alleging the rash and negligent driving on his part is responsible for

sustaining injury to the petitioner. The spot panchanama [Exh.49] spell out that the blood was noticed near the right side tyre of the said tipper truck which indicate that the crush injury which was caused to the petitioner was caused on account of the right side rear wheel of the truck, passed over the right leg of the deceased and caused crushed injury. The certificate of disability produced by the petitioner at Exh. 53 further prove the case of the claimants that the deceased injured had sustained permanent disability to the extent of 30% on account of amputation of his leg below the knee.

9. In support of the claim, the claimants have Examined Balaji Ishwar Iranna, the brother of deceased. His testimony is at Exh. 40. In the evidence, witness Balaji stated that the deceased died on account of motor vehicular accident caused due to tipper truck No. MH-34/A-1224 due to rash and negligent driving by the driver of the said tipper. On account of injury sustained in accident, the leg of deceased was required to be amputated below the knee and he becomes disabled. On account of infection caused due to injury and amputation made, the deceased died living behind the claimants as legal representatives. He deposed that the wife

of deceased has left the house after the incident and performed the second marriage. If we consider the evidence of Balaji, then the testimony of Balaji remains intact as the witness was not cross examined.

10. It is strange enough to note that the evidence of said witness has been again recorded vide Exh. 45. In the subsequent Examination-in-Chief the said witness has stated that his brother has fell down from the vehicle due to rash and negligent driving on the part of driver of tipper truck No. MH-34/A-1224 and sustained serious injury resulting into amputation of leg and consequential death.

11. The witness was cross examined by the appellant insurance company. If we consider the cross examination, then there is no cross examination on the point of injuries sustained by the deceased injured. Thus, if we consider the overall evidence then the fact that the deceased met with an accident on 27/03/2001 and sustained severe injury to his right leg as well as amputation of leg and subsequent death not in dispute. Although the respondent No. 2 has raised plea that there was breach of policy condition and risk of the

deceased was not covered under the terms of policy, the respondent No. 2 insurance company has not adduced any evidence. At the cost of repetition, learned counsel for the petitioner argued that in the statement recorded by the police at Exh. 48, it is mentioned that the deceased has boarded in the tipper truck used for transportation of sand without the knowledge and consent of the driver. While the tipper was stopped at Tajegaon, the deceased sustained injury while alighting from the tipper. By referring the contents of F.I.R., learned counsel for the appellant submits that the facts stated in the F.I.R. establish that the injury caused to the deceased was not account of rash and negligent driving on the part of driver of the said truck. So also, the deceased injured was travelling in the vehicle meant for transportation of goods and the risk being not covered, the insurance company is not liable to pay the compensation. In my view, the contention of the appellant can not be accepted for the sole reason that the F.I.R. lodged, can not be treated as substantive evidence. It is quite settled position in law that F.I.R. can not be treated as substantive evidence. In terms of section 157 of Evidence Act, the F.I.R. can be used for limited purpose to contradict the maker of such statement. In this context, learned counsel

for the respondents have rightly placed reliance on the decision of the Apex Court in the case of ***Damodarprasad Chandrikaprasad and Ors. Vs. State of Mahaashtra [supra]***. Apart from this, if we peruse the F.I.R. as well as the spot panchanama, then the circumstances on record itself speaks out that the accident was occurred on account of crush injury caused to the leg sustained by the petitioner on account of vehicular accident i.e. wheel of the tipper truck No. MH-34/A-1224 run over the right leg of the deceased. In the complaint lodged at Exh. 48, the deceased has stated that he was taken to the hospital by the driver of the said truck. The M.L.C. papers clearly shows that the deceased was brought in hospital at 10.00 a.m. with history of crush injury to the leg. The spot panchanama at Exh. 49 clearly spell out that the wheel of the truck pass over the right leg of the injured as the blood was noticed near the right side tyre of the said tipper truck.

12. If we accept the contention of the learned counsel for the petitioner that the injury was sustained while alighting the truck in which the deceased was unauthorizedly boarded, then in such eventuality no blood could have been noticed by

the side of right side tyre of the truck. So also, the crush injury would not have been caused to injured in process of alighting from the truck if a person has fell down from such standing truck. Thus, the evidence on record clearly indicate that the tyre of the vehicle crushed the right leg of the deceased and the injury was so severe that the leg of the deceased was required to be cut below the knee. The period of hospitalization of more than one month itself indicate the gravity of injury sustained in the accident.

13. So far as the contradictory evidence of same witness examined on behalf of the claimant is concerned, no much waightage can be given for the version of incident given by him for the sole reason he was not witness to the incident. The insurance company has not examined the driver of the truck, who alone able to depose true facts leading to the accident. Except taking the defence that the risk of the petitioner was not covered and there was no vehicular accident in which the injury was sustained, no evidence the appellant - insurance company has produced no evidence nor brought through any evidence through the cross examination of the witness examined in the case. The decision referred

and relied in the case of National Insurance Co. Ltd. Vs. Baljit Kaur [supra] and National Insurance Co. Ltd. V/s Bommithi Subbhayamma and Ors. [supra] have no bearing upon the facts of the case. In the instant case there is absolutely no evidence to accept that the deceased injured was travelling as gratuitous passenger. On the contrary, the evidence on record spell out that the right leg of the deceased was crushed below the right wheel of the truck involved in the accident.

14. Thus, on close scrutiny of reasons and findings recorded by the Tribunal, I am of the view the reasons and findings recorded are quite consistent with the evidence adduced in the case. There is absolutely no perversity in reasons and findings recorded by Tribunal. In absence of any perversity in the reasons and findings recorded by the trial Court, the decision rendered by the Tribunal calls for no interference in the exercise of appellate jurisdiction of this Court. The award passed by the Tribunal awarding compensation of Rs. 1,20,400/- looking to the age, nature of injuries, permanent disability suffered by deceased – injured and more particularly the amputation of his leg below the

knee, the compensation can not be termed as excessive and contrary to the evidence on record. In that view, the appeal filed is devoid of merit and liable to be dismissed.

15. Accordingly, the Appeal is dismissed. In the circumstances, the parties to bear their respective costs.

[V.L.ACHLIYA]
JUDGE

KNP.

