

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

2 FIRST APPEAL NO.769 OF 2012

WITH

CA/13572/2018 IN FA/769/2012

National Insurance Company Limited,  
Through its Divisional Office,  
Divisional Manager,  
Hajari Chambers, Station Road,  
Aurangabad.

... Appellant.

... Versus ...

- 1 Balaji Pandhari Shrirame,  
Age 50 yrs., Occ. Agri.,  
R/o Kotgayal, Tq. Loha,  
Dist. Nanded.
- 2 Mrs. Dhondyabai w/o Balaji Shrirame,  
Age 45 yrs., Occ. Household,  
R/o Kotgayal, Tq. Loha, Dist. Nanded.
- 3 Sayanna Budhaji Bhurewar,  
Age major, Occ. Business,  
R/o Mukhed, Tq. Mukhed, Dist. Nanded.

... Respondents.

...

Mr. S.V. Kulkarni, Advocate for the appellant  
Mr. G.N. Chincholkar, Advocate for the respondent Nos.1 and 2  
Mr. U.B. Bilolikar, Advocate for the respondent No.3

...

**CORAM : SMT. VIBHA KANKANWADI, J.**

**DATE : 26<sup>th</sup> AUGUST, 2019**

**J U D G M E N T :**

1 Present appeal has been filed by the original respondent No.2- insurance company challenging Judgment and Award passed by learned District Judge-4 and Ex-Officio Member of Motor Accident Claims Tribunal, Nanded in M.A.C.P. No.656/2004 dated 09.12.2011, whereby the insurance company has been held, jointly and severally, liable to pay compensation along with respondent No.1 to the claimants.

2 The claimants are the parents of deceased Madhav who met with an accident and expired when he was travelling from the mudguard of Tractor bearing No.MH 26/C-9288 and Trolley bearing No.MH 26/C-8727 towards Manjari for loading fertilizer at about 9.00 a.m. On 29.05.2004. The driver of the tractor has been prosecuted by police. Madhav was working as a labour and thereby earning Rs.100/- per day.

3 The petition has been resisted by respondent No.1 and respondent No.2 by filing their separate written statements. The owner of the truck i.e. respondent No.1 admitted that deceased was working on his tractor as labour, however, it is contended that the claim is exorbitant and his

vehicle was insured with respondent No.2 on the date of the accident. The insurance company denied the age, occupation and income of the deceased. The allegation, that the accident had taken place due to negligence on the part of the tractor driver has been denied. It has been contended that deceased was sitting on the head of the tractor and therefore, he himself was responsible for the accident. The statutory defence challenging its liability to pay compensation has also been taken.

4           The claimants as well as the insurance company has led oral as well as documentary evidence. Taking into consideration the evidence on record and hearing both sides the learned Tribunal has held, that Madhav expired in the motor accident, which was caused due to the negligence in driving of the tractor by its driver. It has been held that the insurance company has failed to prove the breach of terms of policy and under such circumstance, both the respondents have been held liable to pay compensation, jointly and severally, to the claimants. Amount of Rs.2,85,000/- has been awarded together with interest @ 9% per annum from the date of the petition till actual realization of the entire amount. The insurance company has challenged the said Award on the ground of holding it liable, jointly and severally, along with respondent No.1.

5           Taking into consideration the scope of the appeal, following

points arise for determination. Findings and reasons for the same are as follows.

1 Whether the Tribunal was justified in holding the insurance company liable, jointly and severally, to pay compensation to the claimants along with respondent No.1 ?

2 Whether under the said circumstance, order of pay and recover can be passed ?

### **REASONS**

6 As aforesaid the other respondent has not challenged any findings of the Tribunal. The scope of the appeal is limited.

7 Heard learned Advocate Mr. S.V. Kulkarni for the appellant, learned Advocate Mr. G.N. Chincholkar for the respondent Nos.1 and 2 and learned Advocate Mr. U.B. Bilolikar for the respondent No.3.

8 It has been vehemently submitted on behalf of the appellant that the learned Tribunal failed to consider, that as per the case of the claimant itself the deceased was travelling by sitting on the mudguard of the tractor, when in fact, he was not allowed. Perusal of the policy would also cover that the risk of the person travelling on the mudguard was not covered, so also, even the labour has not been covered. No extra premium has been paid and

it is apparent from Exh.37 the certificate of the insurance together with the particulars of the premium. Therefore, the learned Tribunal ought not to have saddled the compensation on the insurance company.

9 Per contra, the learned Advocate appearing for the claimants submitted after relying on the decision in **Shivraj vs. Rajendra and another, 2018 (10) SCC 432**, wherein it has been held that -

“When the Tribunal had held the insurer liable for claimant travelling as a loader in tractor and not as a gratuitous passenger noticing that the insurance policy covered risk of 1+4 payable jointly by owner of vehicle and insurer, along with interest at 8% per annum. The High Court found appellant travelled in tractor as a passenger in breach of policy condition, for tractor was insured for agricultural purposes and not for carrying goods. It was held, under the said circumstance, evidence on record unambiguously pointed out that neither was any trailer insured nor was any trailer attached to tractor. The appellant travelled in tractor as a passenger, even though tractor could accommodate only one person, namely, driver and hence, insurance company was not liable for loss or injuries suffered by appellant or to indemnify owner of tractor. The conclusion reached by High Court, is unexceptionable. High Court ought to have directed insurance company to pay compensation amount to appellant with liberty to recover same from tractor owner.”

It was submitted that in fact, the Tribunal in this case has held

the deceased as labour travelling with the tractor and therefore, rightly held the insurance company liable to pay compensation with the owner, jointly and severally, however, if this Court comes to the conclusion that the insurance company has proved breach of terms of policy then order of pay and recover be passed.

10           The learned Advocate appearing for the owner supported the reasons given by the learned Tribunal.

11           At the outset, it can be seen from the police papers, that the driver of the tractor lodged report with police stating that he had taken the tractor as well as trolley belonging to respondent no.1 for loading pesticides. He was along with one Rama Dnyanoba Shrirame and Madhav Balaji Shrirame. He has clearly stated, that he was at the driver seat and Rama as well as Madhav were sitting on the head of the tractor. In fact, it ought to have been mudguard. It is not his specific case that those two other persons had occupied trolley, in the capacity as labour. In fact, mudguard is not the place from where any person has allowed to travel.

12           CW 1 Balaji has stated the same facts in his examination-in-chief, though it can be said that he is not the eye witness to the accident. That means, the claimants themselves have come with a case that deceased was

travelling from the mudguard of the vehicle and in fact, the driver had allowed them to travel so. It is not in dispute that deceased Madhav fell down from the tractor and he came under the wheels of the trolley, as a result of which he had sustained severe injuries and then he had succumbed to those injuries. No other vehicle is involved in the accident. Under such circumstance, the conclusion drawn by the Tribunal that the accident had taken place due to the sole negligence on the part of the tractor driver is correct.

13           The question is now in respect of, whether the insurance company had proved breach of terms of policy. The insurance company has examined RW Bang, the Divisional Manager, who has stated that the deceased had boarded the tractor as passenger and his liability has not been covered. Except denial there is nothing in his cross-examination. He has produced and proved certificate of insurance at Exh.37. The particulars show that no extra premium has been paid for labours. When extra premium has not been paid, that means, the risk of a labour has not been covered under the said policy. Under such circumstances, the learned Tribunal ought to have held that the risk of the deceased was not covered under the policy. Another fact, that is also required to be considered is, that the particulars show the cover description as household goods and then baggage. So also

details of the trailer show that it is for agricultural tractor and separate head is shown as agricultural tractor premium detail. That means, the main purpose for which the tractor was to be used was for agriculture and therefore, travelling of a person may be as a passenger or may even be as a labour from the mudguard was not allowed. When extra premium has not been collected, the learned Tribunal ought to have passed the order of pay and recover. The ratio laid down in **Shivraj's** case (supra) can be made applicable here. So also, in **Shamanna and another vs. The Divisional Manager, Oriental Insurance Company Limited and others, 2018 SCC On Line 849**, where note has been taken in respect of reference to deny the benefit of pay and recover to the Larger Bench by the Apex Court in **National Insurance Company Limited vs. Parvathneni and another, 2009 (8) SCC 785** which had doubted the correctness of the decision which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay was considered. It has been observed that in **Parvathneni's** case, the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that *“If the insurance company has no liability to pay at all, then, it cannot be compelled by order of the Court in exercise of its jurisdiction and under Article 142 of the Constitution of India to pay compensation amount and later on recover it from*

*the owner of the vehicle.”* The reference case of **Parvathneni** has been disposed of on 17.09.2013 by the Three-Judge Bench keeping the questions of law open to be decided in an appropriate case. Therefore, when in the case of **Shivraj** as well as in **Shamanna** the Apex Court has relied on **National Insurance Company Ltd. vs. Swaran Singh, (2004) 3 SCC 297** which was followed in **National Insurance Company Ltd. vs. Laxmi Narain Dhut, (2007) 3 SCC 700** and especially in **Shivraj's** case when it has been held that the High Court ought to have held directing insurance company to pay compensation amount to the claimant with liberty to recover the same from the tractor owner, such order deserves to be passed in this case. Therefore, the appeal deserves to be allowed partly.

14           At the costs of repetition, it can be said that there is no challenge about the quantum of compensation either by the present appellant or by the original claimant and therefore, to the said limited extent the award deserves modification and accordingly following order is passed.

### **ORDER**

1           Appeal is hereby partly allowed.

2           The Judgment and Award passed by learned District Judge-4 and Ex-Officio Member of Motor Accident Claims Tribunal, Nanded in M.A.C.P

No.656/2004 dated 09.12.2011 is hereby set aside and modified as follows.

After clause No.2 in the operative order No.2A be inserted.

“The respondent No.2 is at liberty to recover the amount of compensation deposited in view of clause II aforesaid; from respondent No.1.”

3           Needless to say, it is not necessary to file any other petition for the recovery. It can be recovered directly through execution petition.

4           No order as to costs.

5           The amount deposited by the insurance company, in this case, is allowed to be withdrawn by the claimants as per the Award.

6           Civil Application is disposed of.

**( Smt. Vibha Kankanwadi, J. )**

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