IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

904 FIRST APPEAL NO.958 OF 2004

. The Divisional Manager,
United India Insurance Company Ltd.,
Branch at Gandhi Chowk, Jalna,
Tq. & Dist.Jalna. ..Appellant

VERSUS

1. Smt.Kesharbai w/o.Madhukar Kamble
Age: 40 years, Occu.: Household.

2. Ravikant S/o. Madhukar Kamble
Age: 19 years, Occu.: Student.

3. Ku.Asha D/o. Madhukar Kamble
Age: 16 years, Occu.: Student.

4. Kiran S/o. Madhukar Kamble
Age: 14 years, Occu.: Student.

Nos.3 & 4 u/g of real mother,
Smt.Kesharbai W/o. Madhukar Kamble
All R/o. Nutan Vasahat, Ambad Road,
Jalna, Tq. & Dist.Jalna.

5. The Manager,
Lucky Goods Transport Company,
Shop No.6, Ganesh Complex,
Pawar Chambers, Ware House Road,
Jalna. Tq. & Dist.Jalna.

6. Smt.Shilpa W/o. Sameer Nagda
Age: Major, Occu.: Truck Owner,
R/o. Gala No.1/A, Khandagale Estate,
Near Blue Plast, Purna Village,
Bhivandi, Dist. - Thane,
Through Lucky Goods Transport Company,
Shop No.6, Ganesh Complex, Pawar
Chambers, Ware House Road, Jalna,
Tq. & Dist.Jalna. ..Respondents
(Respondents 1 to 4 Orig. Petitioners)
(Respondents 5 & 6 Orig. Respondents)

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Advocate for Appellant : Shri S.G.Chapalgaonkar
Advocate for Respondent Nos.1 to 4 : Shri R.K.Jadhavar
Respondent Nos.5 & 6 are served

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CORAM : P.R.BORA, J.

DATE: 28th February, 2019

ORAL JUDGMENT:-

1. Aggrieved by the Judgment and award passed by the Commissioner for Workmen's Compensation at Jalna in W.C.A.No.9 of 2001, decided on 16.07.2003, the Insurance Company has preferred the present appeal.

2. "If a driver employed on a vehicle suffers accidental death while on duty but cause of his death is not proximate to the actual user of the said vehicle, whether the insurer of the said vehicle can be made liable to pay the amount of compensation to the legal heirs of the said deceased driver ?" is the issue for determination in the present appeal.

3. Present respondent Nos.1 to 4 had filed the aforesaid workmen's compensation application claiming compensation on account of death of Madhukar Kamble alleging the said to have been caused out of and during the course of his employment with present respondent No.5. Respondent Nos.1 to 4 are

hereinafter referred to as the claimants. It was the case of the claimants that deceased Madhukar was employed as a driver by respondent No.6, who was a partner in respondent No.5 Firm. It was the further contention of the claimants that deceased Madhukar had been to Mumbai by driving the Truck owned by respondent Nos.5 and 6 and after unloading the goods from the said Truck, was proceeding towards Dombivali. He stopped at Manpada at one place with a view to give message to the Manager of respondent No.5 company and hence crossed the road to reach to the telephone booth at the opposite side of the road. After having talked with the Manager of respondent No.5 Company, when he was returning towards the Truck and for that purpose was crossing the road, he was dashed by unknown Jeep and in the accident so happened ultimately suffered death. The claimants had therefore claimed the compensation from respondent Nos.5 and 6 claiming that deceased Madhukar died as a result of accident occurred out of and during the course of his employment. In the petition before the Commissioner for Workmen’s Compensation, none of the respondents appeared. The Insurance Company though caused its appearance did not file its written statement and did not participate in the further proceeding. The learned Commissioner for Workmen’s Compensation, in the circumstances, on the basis of material placed on record by the claimants, decided the application and held the claimants entitled to the compensation of Rs.1,78,490/- jointly and severally from present respondent Nos.5, 6 and the appellant Insurance Company. Aggrieved thereby, the appellant Insurance Company has preferred the present appeal.

4. Shri S.G.Chapalgaonkar, learned Counsel appearing for the appellant Insurance Company submitted that the contentions as are raised in the claim petition and the evidence, which has been brought on record in the said petition, if are accepted as it is, even then no liability could have been fastened on the appellant Insurance Company. The learned Counsel submitted that from the facts, which are existing on record, it is crystal clear that the insured vehicle was not at all involved or was not a reason for occurrence of the alleged accident. The learned Counsel pointed out that deceased Madhukar was dashed by some unknown vehicle when he was crossing the road. The learned Counsel submitted that the cause of death of deceased Madhukar was thus not proximate to the actual user of vehicle, which is insured with the Insurance Company and in the circumstances, no liability could have been fastened on the appellant Insurance Company.

5. The learned Counsel inviting my attention to the provisions under Section 147 of the Motor Vehicles Act, 1988, urged that unless the use of offending vehicle is proved, no liability can be fastened against the Insurance Company with which the offending vehicle is insured. The learned Counsel relied upon the Judgment of Hon’ble Apex Court in the case of ***Mamtaj Bi Bapusab Nadaf and others Vs. United India Insurance Company and others [2011 (2) Mh.L.J. 211].*** In the said case while unloading the maize from tractor-trailer into an underground storage bin, the deceased employee climbed the grocery pit to clean it for for storing maize and died due to suffocation. The legal heirs of the said deceased filed an application under the provisions of the Workmen’s Compensation Act. The Commissioner for Workmen’s Compensation allowed the said application against which an appeal was preferred by the Insurance Company in the High Court at Karnataka. The High Court set aside the order passed by the Commissioner for Workmen’s Compensation whereby the Insurance Company was held liable to pay the amount of compensation. Against the decision of the High Court, the claimants preferred Special Leave Petition before the Hon'ble Apex Court and in the aforesaid matter the Hon’ble Apex Court affirmed the Judgment passed by the Karnataka High Court and ultimately dismissed the claim petition against the Insurance Company.

6. The learned Counsel submitted that the facts in the present appeal are akin to the facts to the case before the Apex Court. The learned Counsel, in the circumstances, prayed for setting aside the impugned Judgment and award against the appellant Insurance Company.

7. Shri R.K.Jadhavar, learned Counsel appearing for the original claimants supported the impugned Judgment and award. The learned Counsel submitted that infact there was no evidence from the Insurance Company and as such no submissions on behalf of the Insurance Company can be entertained. The learned Counsel further submitted that from the evidence on record, the claimants have sufficiently proved that deceased Madhukar died in an accident arising out of and during the course of his employment and as such no interference is required in the Judgment and award so passed.

8. I have duly considered the submissions made by learned Counsel appearing for the parties. I have perused the entire evidence on record.

9. It is true that though the Insurance Company has caused appearance in the matter, did not file written statement and did

not participate in the further proceeding. However, in light of submissions made by Shri Chapalgaonkar, learned Counsel of the appellant Insurance Company, when I perused the evidence on record, it is apparently revealed that there is substance in the submissions made on behalf of the appellant Insurance Company. The contentions as are raised in the claim petition and the evidence, which has been adduced in the matter even if accepted as it is, it is difficult to hold that cause of death of deceased Madhukar was proximate to the actual user of the Truck insured with the appellant Insurance Company. As per the case of the claimants themselves, deceased had been to other side of the road to make a phone call to his office and while he was returning and crossing the road, was dashed by some unknown vehicle. It is thus evident that the insured vehicle was no way involved in the alleged accident.

10. Whether the cause of death was proximate to actual user of the vehicle was the issue for determination before the Hon'ble Apex Court in the case of ***Mamtaj Bi Bapusab Nadaf and others*** (supra). In the said matter, the legal representatives of one Bapusab Nadaf and the legal representatives of deceased Basappa Hipparagi, who were workmen engaged in uploading Maize from a tractor-trailer, had filed the claim application

seeking compensation on account of death of deceased Bapusab Nadaf and Basappa Hipparagi, alleging the same to have been caused arising out of and during the course of their employment. Deceased Bapusab Nadaf and Basappa Hipparagi, while unloading the maize from the tractor-trailer into underground storage bin climbed the grocery pit to clean it and while cleaning, they fell into the grocery pit and died due to suffocation. It was the contention of the claimants that the Insurance Company with which the tractor-trailer was insured was under an obligation to pay the compensation to the said claimants. The learned Commissioner for Workmen's Compensation held the Insurance Company liable to pay the amount of compensation and thus allowed the application filed by the legal heirs of the said deceased employees. Aggrieved by the said Judgment, the Insurance Company preferred the First Appeal before the High Court of Karnataka. The High Court allowed the appeals and set aside the liability imposed on the Insurance Company. The original claimants, therefore, approached the Hon'ble Apex Court. The Hon'ble Apex Court dismissed the appeal filed by the claimants holding that the cause of death of deceased Bapusab Nadaf and Basappa Hipparagi was not proximate to the actual user of the vehicle and in such circumstances, the insurer of the tractor-trailer was not liable to pay compensation to the claimants.

11. The facts involved in the present case are identical to the facts involved in the aforesaid case before the Hon'ble Apex Court. In the instant matter, deceased Madhukar after alighting from the offending Truck, had been to the other side of the road. He made a phone call from the STD Booth on the other side of the road and thereafter when was returning towards the offending Truck and for that purpose was crossing the road, was dashed by some unknown vehicle and in the accident so happened ultimately suffered the death. From the facts as above, it is quite evident that there was no involvement of the offending Truck in the occurrence of the alleged accident and death of workman Madhukar by no stretch of imagination can be said to have any proximate or direct connection with the vehicle. In the circumstances, mere fact that at the relevant time deceased Madhukar was the driver on the offending Truck, which was parked at the other side of the road near the spot of accident where deceased Madhukar met with an accident and ultimately suffered death, would not render the Insurance Company liable in respect of the said death the cause of which was not proximate to the actual user of the offending Truck insured with the appellant Insurance Company.

12. The learned Commissioner for Workmen's Compensation has failed in appreciating that there was no involvement of the offending Truck in occurrence of the alleged accident and the cause of death of deceased Madhukar was not proximate to the actual user of the said Truck. The Commissioner for Workmen's Compensation, merely on the fact that at the relevant time deceased Madhukar was on duty, has held the insurer of the offending Truck jointly and severally liable to pay the amount of compensation. The finding so recorded by the Commissioner for Workmen's Compensation cannot be sustained and the liability imposed upon the appellant Insurance Company deserves to be set aside. However, the respondents – claimants are at liberty to recover the amount of compensation from the employer of deceased Madhukar.

13. The material on record reveals that the appellant Insurance Company has deposited the amount of compensation with interest thereon as per the award passed by the Commissioner for Workmen's Compensation. The Insurance Company has deposited the amount of Rs.1,78,490/- in this Court. The material on record further reveals that the respondents – claimants were permitted by this Court to withdraw 40% of the deposited

amount and the same has been accordingly withdrawn by them and the balance amount is lying with this Court. The learned Counsel for the appellant has prayed for refund of the said balance amount with interest accrued thereon and has also prayed for direction against the respondents – claimants to refund 40% amount withdrawn by them to the appellant Insurance Company.

14. In so for as the balance amount lying with this Court is concerned, in view of the finding recorded by me, the same is liable to be refunded to the appellant Insurance Company. However, I am not inclined to accede to the another request made by the appellant Insurance Company to direct the respondents – claimants to repay to the appellant Insurance Company 40% amount withdrawn by them from the amount deposited by the appellant Insurance Company in this Court. The alleged accident had occurred in the year 2001. The amount was deposited by the appellant Insurance Company some times in the year 2004 and the same was permitted to be withdrawn in the year 2004 itself. Having regard to the fact that the alleged accident had occurred prior to about 18 years and the 40% amount was withdrawn by the respondents – claimants way back in the year 2004, there seems no propriety to now direct the

respondents – claimants to repay the said amount to the appellant Insurance Company. The appellant Insurance Company may recover the said amount from the owner of the offending Truck. Similarly, it would be open for the respondents – claimants to recover the balance amount of compensation from the employer of deceased Madhukar. For the reasons stated above, the following order is passed:-

ORDER

I) The Judgment and award dated 16.07.2003 passed in W.C.A. No.9 of 2001 stands set aside against the appellant Insurance Company.

II) The appellant Insurance Company shall be entitled to recover the amount of 40% compensation withdrawn by the respondents – claimants from out of the amount deposited by it in this Court, jointly and severally from respondent Nos.5 and 6.

III) Balance 60% amount lying in this Court be refunded to the appellant Insurance Company with interest accrued thereon.

IV) It would be open for the respondent Nos.1 to 4 – original claimants to recover the balance amount of compensation jointly and severally from respondent Nos.5 and 6 with interest thereon @ 6% p.a. from the date of filing of the claim petition till its realization.

V) The appeal stands allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

SPT