

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 302 OF 2019.

New India Assurance Company Limited,
through It's Authorized Signatory/ Branch
Manager, Branch Office At Jalna Road,
Beed Tq. And Dist. Beed.

New India Assurance Company Limited,
through It's Authorized Signatory/
Senior Divisional Manager/ Incharge Legal
Hub, Mahesh Compound, Adalat Road,
Aurangabad Dist. Aurangabad.

**...Appellant
(Org.Respdt)**

VERSUS

- (1) Vishal Rameshwar Mote,
Age 26 years, Occupation Education,
- (2) Pratibha d/o Rameshwar Mote,
Age 22 years, Occupation Education,

Both R/o. Takadgaon Tq. Georai
Dist. Beed.

**...Respondents
(Org.Claimants)**

....
WITH

CA/ 9363/2019 IN FA/302/2019.

....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
16-09-2019.**

**Date of Pronouncing The Judgment :
05-11-2019.**

JUDGMENT :

1. Present appeal has been filed by the original respondent - Insurance Company challenging the Judgment and award passed in Motor Accident Claim Petition No.90 of 2013 by learned Member,

Motor Accident Claims Tribunal, Beed, dated 28-08-2018, whereby the claim petition filed by the present respondents under Section 166 of the Motor Vehicles Act, came to be allowed against the present appellant.

2. The facts giving rise to the appeal are that ;

Mother of the present respondents i. e. original claimants by name Anita Rameshwar Mote was travelling on 28-11-2012 in Max Jeep bearing No.MH-44/ B-076 to Sultanpur for labour work. It is stated that, due to the acquaintance with respondent No.1, she had boarded the said jeep. When the jeep reached near Government Rest House Georai, on Georai - Beed road, the driver of the jeep lost control over the jeep. Due to the high speed, the jeep turned towards its right side and gave dash to the wall of the bridge. The vehicle got toppled and as a result of the same, Anita had received severe injuries. She was shifted to Hospital, however while she was being taken to Aurangabad, she succumbed to the injuries. Driver of the jeep was prosecuted by police. Deceased was 30 years old lady. Her husband had expired earlier, and therefore, she was looking after the claimants. By doing household work she used to get Rs.200/- per day i.e. Rs.6000/- per month. Claimants had claimed compensation of Rs.9,64,000/-, however restricted the same to Rs.6,00,000/- for the purpose of Court fee. The said jeep was owned by respondent No.1 and it was insured with respondent No.2 on the date of the accident, and therefore, compensation has been claimed

from both the respondents jointly and severally.

3. Respondent No.2 filed written statement at Exhibit 12 and resisted the claim. The date, manner of accident and averments regarding negligence on the part of jeep driver have been denied specifically. Age, occupation and income of the deceased has been denied. It was contended that, the driver of the jeep was not holding valid and effective driving licence to drive the jeep on the date of the accident, and therefore, there is breach of terms of policy. The deceased was travelling as a fair paid passenger and there were in all 19 passengers travelling at the relevant time in the jeep which was not the having valid permit. On these grounds the Insurance Company claimed exoneration.

4. It will not be out of place to mention here that, when the summons of the petition was issued to respondent No.1, it was returned unserved on the ground that, respondent No.1 expired on 05-01-2013, and in view of the order passed on Exhibit 15, the Tribunal disposed of the matter against respondent No.1 as abated and the matter proceeded further.

5. Taking into consideration the rival contentions, issues were framed. Only claimants have led oral as well as documentary evidence and after considering the evidence on record, and after hearing both sides, the learned Tribunal has come to the conclusion that the accident had taken place due to the negligence on the part

of jeep driver. The Insurance Company has failed to prove breach of terms of policy of any count, and therefore, the claimants were entitled to get compensation. Compensation of Rs.8,46,000/- has been awarded together with interest @ of 8 % per annum from the date of the institution of petition till actual realization of the entire amount. This award is under challenge in this appeal.

6. Heard learned advocate Mr. M. R. Deshmukh for the appellant Insurance Company and learned advocate Mr. S. R. Shirsat for the respondents.

7. It has been vehemently submitted on behalf of the appellant that, the learned Tribunal failed to see that, the legal representatives of respondent No.1 were not brought on record though the fact was reported. The learned Tribunal has wrongly held that, the petition was maintainable under Section 155 of the Motor Vehicles Act. In fact no cause of action survived to the claimants when the petition abated against the owner. The claim petition was not maintainable in absence of owner as well as driver of the offending vehicle. The Tribunal failed to consider that, the contract of insurance is a contract of indemnity and the Insurance Company is an indemnifier. In absence of owner as well as driver who could have been held jointly and severally liable to pay the compensation, the petition would not have survived. The learned Tribunal failed to consider the provisions under Section 149 (2) of Motor Vehicles Act and Rule 260

of Maharashtra Motor Vehicle Rules 1989, which prescribed for right to avoid the indemnity and parties to the claim petition respectively. The documents on record were sufficient to prove that, more persons than permitted were travelling from the jeep at the relevant time. The sitting capacity of the jeep was 9 + 1, whereas in the FIR itself there are names of 17 persons who were occupants of the jeep sustained injuries. Therefore, there was a clear evidence regarding breach of terms of policy for which there was no necessity to adduce any evidence. The defence was raised that, the deceased was a fair paid passenger and the said fact was proved by producing statement of co-passenger Dnyaneshwari Mote at Exhibit 45. It was also submitted that, the calculation of compensation is not proper.

8. Per contra, the learned advocate appearing for the respondents submitted that, immediately after the report regarding death of respondent No.1 was received, an application was filed at Exhibit 15 stating that, as per Section 155 of the Motor Vehicles Act, there is no bar to the claim and survival of the cause of action. The prayer to the application was that, the claim petition kindly be abated as against respondent No.1 and the said relief was granted, but the matter proceeded. The effect of death of owner was required to be considered and accordingly it has been considered by the learned Tribunal. On the date of the accident respondent No.1 who had insured his vehicle with respondent No.2 was alive, and therefore, the cause of action to compensate the claimants, survived

as against the respondents. Reliance has been placed on the decision in, *New India Assurance Co. Versus Kasturi Bai Tiwari*, decided by High Court of Madhya Pradesh, reported in *LAWS (MPH)-2010-2-125*, wherein the effect of death on certain cause of action as provided in Section 155 of the Motor Vehicles Act was considered, and it was held that, *"the matter can proceed against the Insurance Company only."* Similar ratio was laid down by High Court of Kerala in, *Pathukutty M. Vs. Abdurahiman V. P.*, reported in *LAWS (KER)-2018-9-340*. Further reliance has been placed on the recent decision of this Court in, *Pushpa Bajirao Thorat and Others Vs. Dnyaneshwar Kondaji Auti (died) and Another*, reported in *2019 (2) M.L.J. 418*, wherein it has been held that,

"On the death of owner of offending vehicle in whose favour a certificate of insurance had been issued, was only a formality since liability to satisfy the award to be passed was on the insurance Company, and the company cannot avoid it."

The learned advocate appearing for the respondents further submitted that, the Insurance Company has not led any evidence to prove the breach of terms of policy, and therefore, the learned Tribunal has correctly saddled the liability on the shoulders of the appellant. Even the computation of the compensation is appropriate, therefore no interference is required.

9. Taking into consideration the submissions above said, following points arise for determination, findings and reasons for the same are

as follows ;

- (a) Whether the petition was maintainable only against the Insurance Company in absence of bringing the legal representatives of respondent No.1 owner on record ?
- (b) Whether the Insurance Company had proved breach of terms of policy ?
- (c) Whether the Tribunal has awarded just compensation ?

10. Before proceeding further discussion it is to be noted that, on the basis of evidence, the Tribunal had come to the conclusion that the accident had taken place due to the negligence on the part of jeep driver. The claimants had examined CW.1 Vishal, the son of deceased, who was admittedly not travelling with the deceased at the relevant time. Though he has not witnessed the accident, yet if we see the cross taken on behalf of the Insurance Company, the fact of accident is not seriously denied. On the contrary, it was asked to him that the jeep had dashed the railings of the bridge and then went into the ditch below the bridge. Further from the police papers, the situation at the spot can be considered, and therefore, the doctrine of *res ipsa loquitur* was required to be invoked in this case and accordingly it has been invoked.

11. When it has been proved by the claimants that, the accident took place due to the sole negligence on the part of the jeep driver and Anita expired due to the accidental injuries, the further

consequence would be that the claimants being the son and daughter of Anita, were entitled to get compensation for the said tortuous act. Admittedly the jeep was owned by original respondent No.1 and it was insured with respondent No.2 on the date of the accident. Therefore, the liability to pay compensation to the claimants definitely arose or in other words the cause of action for the claimants to claim compensation from the respondents arose on the date of the accident immediately after their mother expired due to said accidental injuries. At that time respondent No.1 was alive. When the claimants filed petition and the summons was issued to respondents, the summons issued to respondent No.1 returned unserved on the ground that, he expired on 05-01-2013. As per the order passed below Exhibit 15 by the learned Tribunal, the claim petition stood disposed of as against respondent No.1 as abated. Therefore, the question before the Tribunal was, whether to proceed with the claim petition or not. In the impugned Judgment, the learned Tribunal has relied on Section 155 of the Motor Vehicles Act. In *Natha Singh Versus Gurdial Singh and others*, reported in 1982 A.C.J. 95, the learned Judge of the Punjab and Haryana High Court has held that,

“3. Section 96 of the Act provides for the duty of the insurers to satisfy judgments against persons insured in respect of third party risks. It also provides that the insurance company or the insurer to whom the notice of the bringing of any such proceedings is given, shall be entitled to be made a party thereto and to defend the

action on any of the grounds given therein. Section 102 of the Act provides, –

“Notwithstanding anything contained in section 306 of the Indian Succession Act, 1925 (XXXIX of 1925), the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer.”

In view of these provisions of the Act, it cannot be said that the insurance company is not liable to satisfy the claim for compensation to be awarded in the claim application simply because the legal representatives of Amrit Lal Gupta insured who died during the pendency of the proceedings, were not brought on the record. It is particularly so because in the insurance policy, Exhibit R-11, it has been provided inter alia vide Cl.(4) of section II, thereof that the company may, on its own option, undertake the defence of proceedings in any Court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under that section. It was because of this term of the policy that the insurance company took a specific plea in paragraph 3 of their additional grounds that it had taken over the defence of the claim petition in the name of the insured to contest the claim, as they had reserved the right under the policy of insurance. As observed earlier, this claim was accepted by the Tribunal and on that account, it was allowed to cross-examine the witnesses, on merits, as well. Under the circumstances,

the ratio of the decision in Norati Devi's case, is most relevant. It has been held therein –

“Section 96 only clarifies that if an award is made, it would be the duty of the insurance company to meet the claim. It nowhere lays down that if the insurance company is allowed to contest the liability in the absence of the insurer, it should not be held liable. Therefore, it cannot be contended that an insurance company can never be held liable so long as the insured is not impleaded as a party to the proceedings, or having been impleaded his name is ordered to be struck off from the array of the respondents on the basis that he enjoys diplomatic immunity from being sued in a Court..”

In view of the abovesaid decision of this Court, the claim application of Natha Singh, appellant, could not be dismissed on the ground that the legal representatives of Amrit Lal Gupta, deceased, were not brought on the record.”

Section 96 of the earlier Act is Section 155 of the Amended Act. Further reliance can be placed on the decision in, *Oriental Insurance Co. Ltd. Versus Nanjamma and others*, reported in 2005 ACJ 1534, (Karnataka High Court), wherein relying on the Division Bench decision of the said Court in *New India Assurance Co. Ltd. Versus H. Siddalinga Naika*, reported in 1985 ACJ 89 (Karnataka High Court), it was held that,

“Death of the owner of the vehicle pending claim petition would not absolve the insurer and award could be passed

against the insurer.”

Further in, *United India Insurance Co. Ltd. Versus Sakhamuri Venkayamma and others*, reported in 2007 ACJ 1085, (Andhra Pradesh), after relying on the decision of Division Bench of the said Court in *R. Kamala Versus Shaik Mohd. Ghouse*, 2004 ACJ 2112 (AP) it was held that,

“Section 155 of the Motor Vehicles Act directs that, the death of an insured does not bring about abatement of the proceeding.”

Further as aforesaid, in the recent decision of this Court in, *Pushpa Bajirao thorat (Supra)*, the same view has been taken. In that case also on the date of the accident the insured was admittedly alive. The only difference was that, on the date of the filing of the petition also in that matter the insured was alive. Here in this case before the filing of the petition respondent No.1 had expired, but that does not make any difference for the simple reason that the liability arose when the tortuous act was committed. When he was alive on that day, definitely the claimants can take benefit of Section 155 of the Motor Vehicles Act. Therefore, the said petition was definitely maintainable only against the Insurance Company in absence of bringing the legal representatives of respondent No.1 on record.

12. Now as regards the breach of terms of policy is concerned, the Insurance Company had taken the defence that, the driver of the jeep was not holding valid and effective driving licence, the

deceased was travelling as a fair paid passenger, and third was, in all 19 passengers were travelling beyond the permissible permit from the jeep at the relevant time. At the outset it can be said that, oral evidence to support the said defence was not led by the Insurance Company. It appears that, certified copy of statement under Section 161 of Code of Criminal Procedure of one of the witness Dnyaneshwari Mote was produced at Exhibit 45. In fact the said document ought not to have been exhibited by the learned Tribunal, and even if it is considered that it being certified copy, it could have been exhibited, yet it cannot be read in evidence for the simple reason that said Dnyaneshwari Mote was not examined. The contents of the said statement cannot be read in evidence here. When the Insurance Company had the opportunity to call that witness and the said procedure is not adopted, the Insurance Company cannot adopt shortcut by filing only the certified copy of the statement recorded by police. Further it has not been brought on record that, when exactly deceased had boarded the jeep. Admittedly the permission was for 09 passengers to travel from the jeep and unless there would have been an oral evidence to the effect that the deceased was either 10th or any number till 19th passenger, it cannot be stated that, there is breach of terms of policy for the deceased. It cannot be segregated that, she was not 1st to 9th passenger travelling from the jeep. It can not be taken as a 'fundamental breach of terms of policy' entitling exoneration of

insurance company. As regards driving licence also, evidence has not been led by examining the competent authority. Certified copy of the driving licence of said driver is at Exhibit 35. It shows that, for light non-transport motor vehicle, his licence was valid till 05-01-2032, which appears to have been issued on 06-01-2012. Therefore, on that count also it cannot be stated that, there was any breach of terms of policy. The Insurance Company has failed to prove the said defence, and therefore, liable to pay compensation.

13. As regards the quantum is concerned, CW.1 has categorically stated that, his mother was doing labour work and getting Rs.200/- per day i.e. Rs.6000/- per month. That is also equivalent to the notional income. Therefore, 1/3rd has been deducted as per *Sarla Verma and others v. Delhi Transport Corporation and another*, reported in (2009) 6 SCC 121, towards personal expenditure, and taking into consideration the age of deceased as 30, as it was appearing in the post mortem report, multiplier of 17 is used which is definitely correct multiplier, and thereafter, taking into consideration the decision in, *National Insurance Company Ltd. Versus Pranay Sethi and others*, reported in 2017 SCC Online SC 1270 : 2017 ACJ 2700, the non-pecuniary damages have been awarded. Therefore, no fault can be found in respect of the quantum. The points are therefore answered accordingly.

14. There is no merit in the present appeal, it deserves to be

dismissed, accordingly it is dismissed. No order as to costs.

15. The amount deposited with this Court, that is Rs.11,53,755/- (in words rupees eleven lakh fifty three thousand seven hundred and fifty five) + Rs.25,000/- (in words rupees twenty five), is hereby allowed to be withdrawn by the respondents (original claimants), as per the award by the learned Tribunal. Accordingly, Civil Application No.9363 of 2019 stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.