

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

FIRST APPEAL NO. 193 OF 2016

New India Insurance Co. Ltd.
Divisional Office, Nagpur

Through its Branch Manager /
Authorized Signatory,
D.O. No. 160401, First Floor,
J.K. Towers, Adalat Road,
District Aurangabad.

Appellant.

Versus

1. Tarabai Gulabrao Shelke
Age : major, occu.: household
2. Satyabhama Gulabrao Shelke
Age : 16 years, occu.: education
3. Badrinarayan Gulabrao Shelke
Age : 14 years, occu.: education

Respondent Nos.2 and 3 being
minor, under guardianship of
respondent No.1 – mother.

All r/o Walsa Wadala,
Taluka Bhokardan, Dist. Jalna.

4. Bhika Laxman Telgare
Age : 52 years, occu.: business
R/o Walsa Wadala,
Taluka Bhokardan, Dist. Jalna.
5. Shivaji Ramesh Dalvi
Age : 27 years, occu.: driver
R/o Yegta, Taluka Jafrabad,
District Jalna.

Respondents

Mr. S.G. Chapalgaonkar, Advocate for the appellant.
Mr. S.D. Tawshikar, Advocate for respondent Nos.1 to 3.

CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 12 June 2019.

Judgment pronounced on : 17 June 2019.

J U D G M E N T :

. This appeal is directed against judgment and award passed by Motor Accident Claims Tribunal (hereinafter referred to as the “Tribunal”), Jalna in Motor Accident Claim Petition (M.A.C.P.) No.19/2013, whereas the Tribunal awarded compensation of Rs. 9,25,000/- with interest thereon at the rate of Rs. 7.5 % per annum.

2. Appellant is the original opponent No.3 – New India Insurance Company Limited. Respondent Nos.1 to 3 are the original claimants. Respondent No.4 is the owner and respondent No.5 is the driver of offending tempo bearing registration No. MH-21-X-2362.

3. Facts leading to institution of this appeal, in brief, are that on 15.12.2011 at about 8.30 to 9.00 p.m. the deceased

was proceeding towards Solapur by offending tempo with chilly bags alongwith other agriculturists to sell out chilly in Solapur market. Due to rash and negligent driving of the driver of offending tempo it turned turtle on Beed to Osmanabad road at Indapur. In that accident deceased sustained injuries resulting into his death. Therefore, the claimants filed claim petition for compensation of Rs. 10,00,000/-.

4. By filing written statement (Exh.11) opponent Nos.1 and 2 denied occurrence of the accident due to rash and negligent driving by driver of offending tempo. In the alternate contention of these opponents is that on the date of the accident the tempo was duly insured with opponent No.3 – Insurance Company, and therefore, that Company is liable to pay compensation.

5. By filing written statement (Exh.16), opponent No.3- Insurer of the offending vehicle, denied the contents of the petition and raised statutory defence that the owner of offending vehicle committed breach of condition of policy of insurance as the driver did not hold valid and effective driving licence at the time of accident. Next contention of opponent No.3 is that at the time of accident driver was carrying six passengers in the goods

vehicle when the capacity of that tempo was 1 + 2 and thereby owner of the offending vehicle committed breach of condition of policy of insurance. Additional defence was raised by the Insurer of the vehicle that the owner did not hold valid and effective permit and fitness certificate of the offending tempo.

6. After considering the evidence placed on record, the Tribunal held that the accident occurred due to rash and negligent driving by driver of the offending vehicle, and therefore, opponents are jointly and severally liable to pay compensation to the claimants. Considering the annual income of deceased as more than Rs. 500/- per day the Tribunal awarded compensation of Rs. 9,25,000/-.

7. Heard Mr. S.G. Chapalgaonkar, learned Counsel for the appellant / Insurer and Mr. S.D. Tawashikar, learned Counsel for respondent Nos.1 to 3 (claimants).

8. Learned Counsel for the appellant submits that at the time of accident the deceased was travelling as a passenger by goods vehicle, which is not permitted under law, and therefore, the policy of insurance of offending truck does not cover the risk of deceased. He submits that no evidence is on record regarding

quantity of chilly which belonged to deceased, and therefore, it cannot be held that the deceased was travelling by offending vehicle as the owner of goods and the case of claimants is not covered under Section 147 (1) (b) (i) of the Motor Vehicles Act, 1988.

9. Next contention of the learned Counsel for appellant is that though no evidence was placed on record before the Tribunal about annual income of the deceased, the Tribunal erroneously assessed the annual income of deceased as Rs. 2,40,000/- per annum and awarded exorbitant compensation. He submits that as the deceased was agriculturist, after his death the family members continued to cultivate that agriculture land and thus at the most there may be only, loss of supervision. He submits that even under conventional heads, the Tribunal awarded exorbitant compensation than permitted limit.

10. On the other hand, learned Counsel for the claimants submits that in written statement the Insurer of the offending vehicle has raised only defences regarding carrying excess passengers than permitted limit and non holding of driving licence by driver as well as non holding of valid permit by owner.

Therefore, at the stage of argument by surprise the Insurer of the offending vehicle cannot raise altogether different plea that the deceased was travelling by offending vehicle as a gratuitous passenger in goods carriage.

11. Contention of the learned Counsel for the claimants is that otherwise also the police papers show that at the time of accident the deceased was carrying chilly as “goods” by the offending vehicle, and therefore, being owner of goods transported in goods vehicle, the risk of deceased was also covered under the policy of insurance. He has drawn my attention towards definition of “goods” under Section 2 (13) of the Motor Vehicles Act, 1988. He has pointed out that the term “goods” does not include “luggage”, and therefore, deceased being owner of goods travelling by goods carriage, his risk is also covered under the policy of insurance.

12. Learned Counsel for the claimants submits that though registration certificate of the offending tempo shows that more than three persons including driver cannot be carried by the offending tempo, merely by carrying excess passengers the owner of offending vehicle did not commit breach of condition of

policy of the insurance, because that was not the cause behind occurrence of the accident and such breach cannot be termed as “fundamental breach” to absolve the Insurer from its liability to indemnify the owner.

13. In the alternate, learned Counsel for the claimants submits that “pay and recover” order can be passed against the Insurer of the offending vehicle, in case this Court holds that owner of offending vehicle committed breach of condition of policy of insurance. He placed reliance on the cases of **“New India Assurance Co. Ltd. Vs. Rukhmanbai Vithoba Gajbhiye and another”**, decided by this Court on 10.07.2009 in **First Appeal No.273 of 1998** and **“Union of India through General Manager, Central Railway Vs. Food Corporation of India and another”** [1996 (1) B.C.J. 143] to substantiate his contention that new plea cannot be allowed to be raised for the first time, which will take the respondent by surprise. He has also placed reliance on the cases of **“B.V. Nagaraju Vs. Oriental Insurance Company Ltd.”** [1996 (4) SCC 647] and **“Lakhmi Chand Vs. Reliance General Insurance”** [(2016) 3 SCC 100] to substantiate his contention that carrying persons

more than the number permitted is not fundamental breach so as to avoid liability by Insurance Company.

14. After hearing learned Counsel for both parties, the only points arise for my consideration are :-

1. Whether the Insurer of offending vehicle proves breach of condition of policy of insurance?
2. If yes, what would be the effect?
3. What would be just and fair compensation?

AS TO POINT NO.1 :-

15. In this appeal the claim of claimants is contested by Insurer of the offending vehicle mainly on the ground of breach of condition of policy of insurance. As observed above, the first ground raised by learned Counsel for the Insurer is that the deceased was travelling by goods carriage as gratuitous passenger, and therefore, the risk of deceased is not covered under the policy of insurance.

16. No doubt, as the accident occurred in the year 1994 i.e. after amendment of Motor Vehicles Act, 1994, this case will be governed by amended provisions of the Motor Vehicles Act. Under amended provisions, under Section 147 (1) (b) (i) of the

Motor Vehicles Act, the insurance of motor vehicle is made compulsory, against any liability which may be incurred by the owner in respect of death of or bodily injury to any person, including owner of goods or his authorised representative carried in the vehicle or damage to any property of third party caused by or arising out of the use of the vehicle in public place.

Thus, in the case at hand, if the Insurer of offending vehicle can establish that the deceased was not travelling by the offending vehicle as owner of "goods", only in that case, the Insurer can prove breach of condition of the policy of insurance. It is settled principle of law that the policy of insurance of goods vehicle does not cover the risk of gratuitous passenger.

17. In the case at hand, as per the pleadings of the claimants, on the date of occurrence of accident, the deceased was transporting his chilly for its sale at Solapur market, alongwith some other agriculturists. By filing written statement (Exh.16), the Insurer of offending vehicle has not specifically denied these contentions of the claimants, and therefore, these contentions deemed to have been admitted by opponent No.3 – Insurer of offending vehicle. In written statement opponent

No.3-Insurer has only raised objection regarding not holding effective driving licence by the driver and carrying excess passengers by tempo than the permitted limit. It is nowhere the case of opponent No.3 that deceased was travelling by the offending vehicle as a gratuitous passenger in goods vehicle. Even the judgment passed by Tribunal shows that this objection was nowhere raised by learned Counsel for the Insurer even before the Tribunal. Therefore, as ruled by Division Bench of this Court in the case of **“Union of India through General Manager, Central Railway Vs. Food Corporation of India”** (supra), such new plea cannot be allowed to be raised for the first time at appellate stage.

18. Assuming that the Insurer can raise such plea even for the first time at appellate stage. Under Section 2 (13) of the Motor Vehicles Act, the term “goods” includes livestock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle.

Thus, the question arises whether the chilly bags which deceased was carrying to Solapur market for sale amount to “personal luggage” or “goods” within the meaning of Section 2 (13) of the Motor Vehicles Act, 1988.

19. Learned Counsel for the claimants has rightly pointed out my attention towards dictionary meaning of “goods” and “luggage”. “Luggage” is the bags and other containers that hold traveller's belongings while “goods” is (business/economics/plurale tantum) that which is produced, then traded, bought or sold, then finally consumed. In view of difference in between terms “luggage” and “goods”, the chilly bags carried by deceased and other cultivators / agriculturists for its sale to the market, which is agricultural produce of deceased, amount to “goods” carried in the offending vehicle. Thus, obviously the deceased was travelling by offending vehicle as owner of goods which were transported to Solapur market. Thus, in view of Section 147 (1) (b) (i) of the Motor Vehicles Act, risk of deceased is covered under the policy of insurance.

20. However, another objection raised by Insurer of the offending vehicle is regarding carrying excess passengers than

the permitted limit. This objection was also raised in the pleadings / written statement of the Insurer. As rightly pointed out by learned Counsel for the Insurer, Registration Certificate (Exh.25) of the offending tempo shows that including driver only three passengers could be carried by the offending tempo. However, from the certified copy of F.I.R. (Exh.19), it emerges that excluding the driver there were total six passengers travelling by offending vehicle alongwith their respective chilly bags for its sale to Solapur market. Even in the cross of claimant Tarabai Shelke (PW-1) it has been brought on record that on the date of accident the deceased was travelling with his chilly bags alongwith other 7 to 8 persons. Thus, the Insurer of the offending vehicle has duly proved that the owner of offending vehicle committed breach of conditions of the policy of insurance by carrying excess passengers than the permitted limit of the offending vehicle.

21. No doubt, in view of the law settled by Apex Court in the case of **“B.V. Nagaraju Vs. Oriental Insurance Company Ltd.”** and **“Lakhmi Chand Vs. Reliance General Insurance”** (both cited supra), carrying excess passengers does not amount to

'fundamental breach' and in view of the law settled by the Apex Court in the case of **“Fahim Ahmad and others Vs. United India Insurance Company Ltd. & others”** (MANU/SC/1509/2015) and **“Manura Khatun & others Vs. Rajesh K. Singh & ors”** (MANU/SC/194/2017), at least “pay and recover” order can be passed against the Insurer of offending vehicle. Thus, my conclusion is that though the Insurer of offending vehicle has proved that owner of offending vehicle committed breach of condition of the policy of insurance, it does not amount to fundamental breach to exonerate it in toto from payment of compensation. I answer point No.1 accordingly.

AS TO POINT NOS.2 & 3 :-

22. In view of the above discussion, as the breach of condition of policy proved by the Insurer of offending vehicle does not amount to fundamental breach, the Insurance Company can be directed to pay the compensation to claimants and later on recover it from the owner of offending vehicle.

23. Now the question arises what would be the just and fair compensation payable to the claimants.

24. In the case at hand, the Tribunal considered notional

income of the agricultural labourer at the rate of Rs. 500/- per day. For that reason the Tribunal assessed annual income of the deceased as Rs. 2,40,000/-. However, as rightly pointed out by learned Counsel for the Insurer, this finding of the Tribunal is not based on any Government Resolution or Circular fixing the minimum wages of agricultural labourer. Contention of the claimants that deceased used to earn Rs. 20,000/- per month from his agricultural land is not at all acceptable, as no oral or documentary evidence is placed on record regarding income from the agricultural land or even to prove that the deceased was holder of some agricultural land. Therefore, I have to consider the notional income of the deceased as an agricultural labourer. Considering the probable wages of the agriculturist in the year 2011, I assessed the notional income of the deceased at the rate of Rs. 5,000/- per month. Thus, the annual income of the deceased comes to Rs. 60,000/-.

25. Postmortem report (Exh.22) shows that at the time of death deceased was 55 years old. Thus, in view of the law settled in the case of **“National Insurance Co. Ltd. Vs. Pranay Sethi and others”** [2018 (3) Mh.L.J. (SC) 70], the deceased being of

the age in between 50 to 60 years self employed person, there should be addition of 10% in the actual income of the deceased towards loss of future prospects. Thus, the annual income of the deceased comes to Rs. 66,000/-.

26. In view of the law laid down in the case of **“Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.”**, (AIR 2009 SC 3104), as there are three dependents in the family of deceased, one-third income is to be deducted towards personal expenses of the deceased. Thus, income of the deceased available to his family comes to Rs. 44,000/- per annum.

27. As the deceased was 55 years old, in view of the law settled by the Apex Court in the case of **“Sarla Varma & Ors Vs. Delhi Transport Corp.”** (supra), multiplier of “11” is applicable in the case at hand. Thus, the loss of dependency comes to Rs. 4,84,000/-.

28. The judgment in the case of **“Rajesh and others Vs. Rajbirsing and others”** reported in (2013 ACJ 1403) relied by the Tribunal while assessing the compensation under conventional heads is no more good law in view of the judgment of Larger Bench in the case of **“National Insurance Co. Ltd.**

Vs. Pranay Sethi” (supra). So in view of the guidelines issued in the case of “Pranay Sethi” (supra), the claimants are entitled to following compensation under conventional heads:-

Loss of consortium	:- Rs. 40,000/-
Loss of estate	:- Rs. 15,000/-
Funeral expenses	:- Rs. 15,000/-

29. Thus, the claimants are entitled to following compensation under different heads with interest at the rate of Rs. 9% per annum from the date of petition till realization of entire compensation amount. The compensation amount shall be inclusive of the amount received under “no fault liability”.

Loss of dependency	:- Rs. 4,84,000/-
Loss of consortium	:- Rs. 40,000/-
Loss of estate	:- Rs. 15,000/-
Funeral expenses	:- <u>Rs. 15,000/-</u>
Total :-	<u>Rs. 5,54,000/-</u>

(Rupees Five Lakh Fifty Four Thousand)

30. Thus, the appeal deserves to be partly allowed and award passed by Tribunal, Jalna in M.A.C.P. No.19/2013 needs to be modified.

31. Accordingly, First Appeal No.193 of 2016 is partly allowed. The Award passed by Motor Accident Claims Tribunal, Jalna in M.A.C.P. No. 19/2013 is modified as under :-

- “(i) M.A.C.P. No. 19/2013 is partly allowed with proportionate costs.
- (ii) Opponent Nos.1 and 2 do jointly and severally pay compensation of Rs. 5,54,000/- (Rupees Five Lakh Fifty Four Thousand) to the claimants with interest thereon at the rate of RS. 9% per annum from the date of filing of petition till realization of compensation amount. This compensation amount shall be inclusive of the amount received under the head “no fault liability”.
- (iii) Opponent No.3 is exonerated from its liability to indemnify opponent No.1. However, direction is given to opponent No.3 to pay compensation amount of Rs. 5,54,000/- alongwith interest thereon to the claimants through the Tribunal within three months from the date of passing of this order and later on, the insurer of the vehicle will be at liberty to recover the entire compensation amount paid to the claimants from the insured (owner of the offending tempo) by initiating appropriate proceedings before the executing Court, as if the dispute between the insurer and the owner was subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before disbursement of compensation amount, the Tribunal shall issue notice to the owner of the offending vehicle and the

owner shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending tempo bearing registration No.MH-21-X-2362 shall be attached, as part of the security and if necessity arises, the executing Court shall take assistance of the concern Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured – owner of the vehicle shall make payment to the insurer. In case there is any default, it shall be open to the Executing Court to direct realization by disposal of securities to be furnished or from any other property or properties of the owner of the vehicle – the insured.

(iv) On deposit of compensation amount in the Tribunal, it shall be equally apportioned and paid to claimant Nos.1 to 3 through the Tribunal by issuing separate account payee cheques in their respective names.

(v) Award be drawn up accordingly”.

32. The claimants are permitted to withdraw compensation amount deposited in this Court in accordance with modified award through the Tribunal. The balance excess amount shall be refunded to the appellant - New India Insurance Company. Compensation amount deposited in this Court be

transmitted to the Motor Accident Claims Tribunal, Jalna for its disbursement in accordance with modified award.

33. The appeal is disposed of in above-said terms.

Parties to bear their respective costs of the appeal.

(SUNIL K. KOTWAL)
JUDGE

vdd/