IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 873 OF 2004

United India Insurance Co. Ltd;
Through it's Divisional Manager and
authorised representative and signatory,
Ahmednagar Divisional Office,
Kisan Kranti Building, Ahmednagar,
Dist. Ahmednagar ... **Appellant**

Versus

1) Surekha Kisan Shirke
Age 33, Occu: Household,

2) Mahendra Kisan Shirke
Age 12. ½ years, Occu: Nil,

3) (Mangal) Kiran Kisan Shirke
Age 14 years, Occu: Nil,

Nos. 2 & 3 minors through
Guardian mother applicant No.1,
All R/o. Arangaon Dumala,
Tq. Shrigonda, Dist. Ahmednagar

4) Lahanu Bajaba Shinde, age major,
Occ. Transport R/o. Arangaon Dumala,
Tal. Shrigonda, Dist. Ahmednagar ... **Respondents**

....

Mr. A. B. Gatne, Advocate for appellant
Mr. U. S. Malte, Advocate for respondent Nos. 1 to 3
Mr. H. U. Dhage, Advocate for respondent No.4

....

CORAM : R. G. AVACHAT, J.

RESERVED ON : 28th SEPTEMBER, 2021
PRONOUNCED ON : 30th SEPTEMBER, 2021

<u>JUDGMENT</u> :-

. This is an Insurance Company's appeal, taking exception to the judgment and award dated 29.12.2003, passed by the learned Member, Motor Accident Claims Tribunal (Tribunal), Ahmednagar, in Motor Accident Claim Petition (Petition) No.1336 of 1994. By the impugned award, the appellant – Insurance Company has been directed to pay, jointly and severally a sum of Rs.1,23,000/- with interest at the rate 9% p.a. as compensation on account of death of Kisan in vehicular accident.

2. Tractor bearing registration No.MH-16-8304, met with an accident on 06.10.1994. Deceased Kisan along with 3 - 4 other persons was travelling on the said tractor. As a result of the injuries suffered in the said accident, Kisan and one more person died. Others suffered injuries. The widow and two minor children of deceased Kisan, therefore, preferred petition for compensation. The same was allowed with a direction to the tractor owner and the appellant – Insurance Company to pay the petitioners, compensation as stated herein above.

3. The appellant – Insurance Company filed its written statement to take exception to the claim on the following grounds:

(a) The tractor did not have insurance cover on the day it met with the accident;

(b) It denied the deceased was a labour on the tractor involved in the accident;

(c) The tractor and trailer were suppose to be used for agricultural purpose. The tractor was however used for commercial purpose. The same constituted the breach of the terms and conditions of the insurance policy.

4. The Tribunal held that the agent of the appellant – Insurance Company did receive premium towards insurance cover on 01.10.1994. A proposal to that effect was forwarded to the appellant – Insurance Company by its agent through Under Postal Certificate. In view of the acceptance of the premium towards grant of insurance cover, the policy of the insurance should be deemed to have been issued on the day on which the premium was received.

5. Heard. The learned Advocate for the appellant – Insurance Company would submit that the application preferred by the claimants under Section 140 of the Motor Vehicles Act (for short, 'M.V. Act') for compensation under no fault liability was rejected

against the appellant. An application (Exh.69) was, therefore, moved before the Tribunal for deleting the appellant – Insurance Company from the array of the petition. The claimants gave no objection thereto. The Tribunal therefore allowed the application. However, the claimants have not deleted the name of the appellant from the array of the claim petition, and it remained to be executed. Tribunal went ahead and decided the claim petition without hearing arguments on behalf of the appellant – Insurance Company. When the judicial order was passed allowing application for deletion of the appellant from the claim petition, the Tribunal ought not to have insisted the learned Advocate for the appellant – Insurance Company to participate in the proceeding. The revision had been preferred against the order rejecting application under Section 140 of the M.V. Act. The High Court remitted the matter back to the Tribunal for deciding the claim petition within time frame. Learned Advocate representing the appellant – Insurance Company did not participate in the proceeding before the Tribunal on her own. The Tribunal, however, insisted her to cross examine the witnesses examined in the case. A detailed purshis was filed before the Tribunal expressing the appellant Company's inability to take part in the proceedings.

6. Learned Advocate would further submit that the award impugned in this appeal is therefore non-est. Turning to the merits of the matter, he would submit that the tractor owner and agent of the appellant - Insurance Company joined hands to show the tractor to have insurance cover since before it met with the accident. After having found the agent's involvement in the mischief, his agency has been terminated. The tractor owner had, in fact, approached the agent after five days of the accident. He, however, issued a backdated cheque. Learned Advocate took me through the relevant evidence to make out his claim. He also relied on the reasons given by the Tribunal for rejecting the application for compensation under no fault liability claim. Learned Advocate would further submit that the tractor was meant to be used for agricultural operations only. It was however used for commercial purpose when it met with the accident. The said constituted the breach of terms and conditions of the policy of insurance. The FIR was also relied upon to show that the deceased and other 4 – 5 persons were travelling on the tractor unauthorisedly. Policy of insurance did not cover risk of such persons travelling on the tractor. Learned Advocate, therefore, ultimately urged for allowing the appeal.

7. Both the learned Advocates representing the tractor owner and the claimants relied on the reasons given by the Tribunal in support of the impugned award. According to the learned Advocate for the claimants, a contract entered into by the appellant – Insurance Company, through its agent, is valid one. The agent did receive the premium on 01.10.1994. The insurance proposal along with the cheque of the premium were forwarded to the appellant – Insurance Company on the same day through post. Only with a view to defeat the claim, the date 01.10.1994 was forged into 11.10.1994. The insurance agent, the concerned Post Master and other witnesses have testified in support of the case that the policy of insurance was meant to be issued on 01.10.1994. Learned Advocate for the tractor owner, reiterated the submissions made on behalf of the claimants. In addition thereto, the learned Advocate for the claimants urged for enhancement of compensation. According to him, compensation could be enhanced even there being no appeal or cross-objection preferred by the claimants. In that regard, the learned Advocate has relied on the following authorities.

(i) Oriental Insurance Company Limited vs Dharam Chand and others – (2010) 15 SCC 141;

(ii) Cholamandalam MS General Insurance Company Limited vs Sumitra Debu Vishwas and others – 2018 DGLS (Bom.) 60;

(iii) The Branch Manager, National Insurance Company Limited vs Bishal Chettri and another – MAC App. No.11 of 2019 (High Court of Sikkim : Gangtok);

(iv) National Insurance Co. Ltd. vs. Komal & Ors – MAC App. No.595 of 2007 (High Court of Delhi);

(v) Munusamy and others vs. Managing Director, Tamil Nadu State Transport Corporation (Villupuram) Limited – (2018) SCC 765;

(vi) National Insurance Company Limited vs. Dhan Singh and others – FAO No. 7336 of 2018 (O & M) (High Court of Punjab and Haryana at Chandigarh);

(vii) Sangita Arya and others Vs. Oriental Insurance Company Limited and others – (2020) 5 SCC 327;

(viii) M/s Shriram General Insurance Company Limited vs. Surekha Rajendra Nakhate and others – First Appeal No.2564 of 2016 (High Court of Bombay, Bench at Aurangabad).

8. The tractor met with the accident on 06.10.1994. The deceased Kisan was travelling on the said tractor along with few others. Two of them including Kisan succumbed to the injuries suffered in the said accident. Legal representatives of both of the deceased preferred two separate claim petitions. It has been informed that the other petition has been dismissed against the appellant – Insurance Company. The said order is said to have

attained finality. Oral evidence was recorded before application (Exh.5) for compensation under no fault liability, was heard. The said application was rejected against the appellant – Insurance Company. The said order was challenged before the High Court. Without interference with the said order, the matter was remitted back to the Tribunal with a direction to decide it within time frame. Based on the order on application Exh.5, the appellant – Insurance Company, preferred application for its deletion from the array of the claim petition. In view of no objection given by the applicant, the Tribunal allowed the said application. The appellant – Insurance Company, however, remained to be deleted. It is its case that it partially participated in the proceedings before the Tribunal only at the insistence by the Tribunal. It, however, needs to be mentioned that witnesses examined in the proceedings have been cross examined by the learned Advocate representing the appellant – Insurance Company. It also examined its officer. Neither in the grounds averred in the appeal memo nor was there oral submission for remand of the matter with a view to give appellant – Insurance Company an opportunity of further hearing. The said issue therefore is taken to have been concluded.

9. The tractor met with the accident on 06.10.1994. The owner of the tractor came with a case to have had approached the agent of the appellant – Insurance Company on 01.10.1994 and gave him cheque towards amount of premium, same day. It needs to be mentioned here itself that it was not a case of renewal of an existing policy of insurance. It is not known whether the tractor involved in the accident had insurance cover on or before 30th September, 1994. Be that as it may.

10. Admittedly, the owner of the tractor is resident of village Arangaon. Shri Satav, the insurance agent also hails from very village. It is in evidence of Shri Satav that the tractor owner had come to his residence on 01.10.1994 and then he went to Arangaon for inspection of tractor and trailer. Whereas, the evidence of the tractor owner indicates that just 2 – 3 days before 01.10.1994, he had requested Shri Satav to come to his place as he wanted to have a policy of insurance for tractor involved in the accident. The insurance proposal (Exh.101) is admitted to have been in handwriting of the tractor owner. True, on the last page of the proposal, the policy of insurance was sought for the period

commencing from 01.10.1994 to 30.09.1995. It needs no mention that the proposal form could be antedated. On the first page of the proposal Exh.101, agent Shri Satav had made an endorsement - '*tractor and trailer are found in good condition and correct for insurance*'. He has put his signature below the said endorsement with date 11.10.1994. It is a case of the tractor owner that the date 01.10.1994 has been manipulated to 11.10.1994. Close examination of the said date leads me to observe that there is no sign of any manipulation as has been alleged. Section 64-VB(4) of the Insurance Act, 1938 mandates the insurance agent to deposit with or despatch by post to the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection.

11. In view of this Court in the ordinary course of business, any communication despatched from any postal office in the district of Ahmednagar to the appellant Company's office in Pune, shall reach within three days of its despatch. In the case in hand, the proposal (Exh.101) has been received by the appellant's office in Pune, on 14.10.1994. The appellant – Insurance Company examined its official Shri Nikam. It is in his evidence that the proposal form

duly filled in, was received by Pune office on 14.10.1994. He put his initials thereon in acknowledgment of the receipt thereof. It is in his evidence that the authorised agent gets proposal form filled in from the customer/consumer. He, then, calculates the amount of premium, accepts the same either in cash or by cheque, inspects the vehicle. The agent, then issues a cover note on the spot. Admittedly, the agent Shri Satav had not issued the tractor owner the cover note on the spot. Admittedly, the cover note was despatched from Pune office long after 14.10.1994. It has to be assumed that the same came to be issued in due course of its official business. The appellant is in the business of insurance. It is not an individual entity. It's official therefore cannot be assumed to have any personal interest to manipulate the date on the insurance proposal. Admittedly, Shri Satav had not informed the company that the vehicle met with the accident. It is also not the case of the owner of the tractor to have had intimated in writing to the appellant – Insurance Company the factum of accident. The services of Shri Satav, as an agent, were terminated on account of his involvement in the present matter. There is every reason to suspect him to have indulged to favour the owner of the tractor since both of them hail from one and the same village. True, Shri Satav gave his oral evidence in support of the tractor owner. It is his case that on 01.10.1994 itself he transmitted the proposal form along with premium cheque to the Pune office through Post at Dhawalgaon.

12. Under Certificate of Posting has been placed on record vide Exh.41. Shri Satav is well educated. It is not known as to why he did not fill in the form of Under Certificate of Posting. The same has been filled in by Shri Sitaram Kute. Both the owner of the tractor and Shri Kute were serving with the Irrigation Department. It is also not known as to why they went to Post Office at Dhawalgaon when there was Sub-Post Office at Arangaon itself. It is true, it is in the evidence that Arangaon Post Office would remain open only for twenty minutes. The same is unpalatable.

13. It is true that Shri Maruti Dhavale - Post Master at Dhawalgaon testified that Under Certificate of Posting (Exh.41), he had received three envelopes for despatch. Admittedly, the appellant - Insurance Company had made an investigation of the matter independently. The Post Master (Shri Maruti Dhavale) has in no uncertaint terms admitted to have had given a statement to the Investigator that the receipt of Under Certificate of Posting shown to him, was not issued by his office in the official course of business. It

is further in his evidence that it was he, who used to write the name and address of the sender in Marathi and put his signature below the same. Exh.41 does not bear any matter in his handwriting or even his signature. According to Shri Satav, on the given day, he had sent three insurance proposals of Shri S. H. Munot of Shirur, Shri Z. N. Musthafa of Thane and Shri C. S. Deshmukh of Shirur. Even if it is accepted, then there ought to have been four articles to be delivered to the Post Master for onward transmission. It needs no mention that as per instruction No.5 overleaf Exh.41, such certificate furnishes no proof of the nature of contents of the articles sent through post. Instruction No.1 mandates '*sender should enter in ink the class of article*'. It is reiterated that except the address of the appellant - Insurance Company on Exh.41, there is no other matter. This Court has, therefore, every reason to observe that Exh.41 must have been a got up document. The evidence of the Post Master does not inspire confidence. He tried to run with hare and hunt with the hound. Had the insurance proposal really been despatched on 01.10.1994, it would not take two weeks time to reach the appellant's Pune office. The policy of insurance came to be issued in the name of the owner of the tractor for the period commencing from 14.10.1994 for a period of next one year. All these things have happened in the natural and official course of business. It is reiterated that the appellant - Insurance Company was not in the know of the tractor to have met with the accident on 06.10.1994 and it therefore delayed in issuance of policy of insurance.

14. Two persons died in the very accident. Two separate petitions for compensation were filed. The decision in another claim petition went against the tractor owner. He did not challenge the same. This fact is very much relevant here. Though may not operate *res-judicata* strictly speaking.

15. True, the premium was paid by cheque dated 01.10.1994. The counterfoil of the cheque was placed on record very late. It is very easy for a person interested in the matter to issue a backdated cheque. Since the tractor met with the accident on 06.10.1994 and there being no evidence to indicate the tractor to have had an insurance cover immediately before 01.10.1994, there is every reason for the tractor owner to make all out efforts to have insurance cover antedated. It is reiterated that the insurance agent has put his endorsement on the proposal about having inspected the tractor on 11.10.1994. As is required by Section 64-VB(4), above, the proposal along with the premium, cheque must have been

despatched the same day. The same was therefore received by the office of the appellant – Insurance Company in Pune on 14.10.1994. It is only with a view to create evidence to have had approached the insurance agent on 01.10.1994, everything has been done. There is no cogent and reliable evidence to indicate the proposal of insurance was in fact received on 01.10.1994 and was despatched the same day. The entire case is based on oral evidence. It is reiterated that cheque could be issued antedated. Same is the case about mentioning the period of insurance in the proposal for the period from 01.10.1994 for the next one year. The Tribunal had rejected application Exh.5 with well reasoned order. I reiterate those reasons for allowing the present appeal. Even if it is accepted that proposal along with cheque was received on 01.10.1994, he did not issue cover note. Unless and until the proposal is accepted, it will not be a contract of insurance. The proposal was received on 14.10.1994. The same day it was accepted. The acceptance is indicated by issuing the policy of insurance commencing from the very day. The judgment in case of ***Dharam Chand and others*** (supra) would not have any assistance for the owner of the tractor, since the facts therein would indicate that cheque for the insurance policy was received on 07.05.1998 at 4.00 p.m. The vehicle met with the accident, same day at 8.30 p.m. The cover note was issued at the same time stating therein that the insurance would commence from 08.05.1998. The vehicle met with accident a few hours after issue of the cover note.

16. In the case in hand, the insurance agent did not issue cover note on the spot, though he had authority to issue the same. There is every reason to believe that the proposal was received on 11.10.1994 and despatched the same day. It was received in Pune office on 14.10.1994. The same day the policy of insurance was issued with effect from the very day. The appellant - Insurance Company was not in the known of the vehicle to have met with the accident. Both the tractor owner and the insurance agent hail from one and the same village. They had, therefore, every reason to show the tractor to have insurance cover since before it met with the accident.

17. In the case of ***Balwant Singh and Sons vs. National Insurance Company Limited and another - (2020) 11 SCC 745***, it has been observed thus:

> "*C. Insurance - Contract of Insurance/Insurance Policy/Cover Note - Completion of - Essentials, reiterated - Held, the general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates*

> *his acceptance to the person making the offer - The rule of sub silentio acceptance does not apply to insurance contracts.*"

Here, the proposal has been accepted on 14.10.1994, it could therefore be said that contract of insurance came into existence on the same day and not there-before.

18. In the case of ***National Insurance Company vs Sobina Iakai (Smt) and others - (2007) 7 SCC 786***, it has been observed:-

> "*Motor Vehicles Act, 1988 – S. 147 – Policy when becomes operative – Special clause in insurance policy mentioning time of commencement of policy – Necessity of strict compliance with – Duty of court, to prevent abuse – Held, in order to curb the widespread mischief of getting insurance policies after the accidents, it is absolutely imperative to clearly hold that the effectiveness of the insurance policy would start from the time and date specifically incorporated in the policy and not from an earlier point of time. - In present case, accident having taken place prior to coming into force of the policy on the same day, held, Tribunal and High Court seriously erred in ignoring the insurance policy and motor renewal endorsement which specified the time and which were on record before them and deciding the case on the ground of non-production of the cashier and development officer of the insurer. Hence no award could have been made against the insurer. ....*"

19. The learned Member of the Tribunal simply relied on the evidence of the owner of the tractor and his witnesses and allowed the claim petition against the appellant - Insurance Company. On

re-appreciation of the evidence in the matter, the conclusion arrived at by the learned Member of the Tribunal is unacceptable.

20. Two more grounds have been urged in support of the appeal. First one is about the use of the tractor for commercial purpose. True, the averments in the claim petition suggest that the tractor was returning after transporting grit. Admittedly, the trailer was detached from the tractor. Thereafter the tractor met with the accident. The learned Member of the Tribunal has, therefore, rightly observed that when it met with the accident, the same was not being used for commercial purpose.

21. Third ground is as regards the deceased travelling as an unauthorised passenger on the tractor. The deceased was said to have been serving as a labour on the tractor. It appears that this ground has first time been raised in oral submissions. The same is not reflected in the appeal memo. The same was not the stand before the Tribunal as well. This new ground of challenge would, therefore, not be addressed to.

22. Learned Advocate for the claimants would submit that the amount of compensation awarded by the Tribunal is grossly

inadequate. A Constitution Bench judgment of the Apex Court in ***Pranay Sethi's case – (2017) 16 SCC 680***, came to be passed during pendency of this appeal. The appeal, therefore, needs to be governed by the directions/dictum therein.

23. Admittedly, the claimants have neither filed appeal nor preferred cross objection for enhancement of compensation.

24. Learned Advocate for the claimants relying on the judgments cited (supra) would contend that the Court is expected to grant just compensation. If the Court finds the amount of compensation to be inadequate, it has every power to enhance the same. In support of his contention, the learned Advocate relied on the aforesaid authorities - (para-7).

25. The Hon'ble Apex Court in the case of ***Sangita Arya*** *(supra),* has observed that even though claimant appellants did not file appeal against award of Tribunal before High Court, appropriate to enhance compensation by exercising jurisdiction under Article 142 of the Constitution in order to do complete justice between parties.

26. In case of ***Ranjana Prakash & Ors vs. Divisional Manager & Anr. - 2012 AIR SCW 848,*** it has been observed thus:

> *"....... It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objection."*

Moreover, in case of ***Shivawwa and another vs. Branch Manager, National India Insurance Company Ltd. and another – 2019(1) Mh.L.J. 1,*** it has been observed thus:

> "***(b) Motor Vehicles Act (59 of 1988), SS. 168 and 149 -*** *Appeal to set aside decision of High Court in first appeal preferred by insurer – High Court exonerated insurer from any liability vis-a-vis award against respondents – Appellant – claimants did not file an appeal for enhancement of compensation amount against that part of award passed by Tribunal nor chose to file any cross-objection in first appeal – Not appropriate for Court to consider – Therefore, plea regarding quantum of compensation cannot be raised for first time by appellant – claimants before Supreme Court.*"

27. In view of the Apex Court judgments, the submissions of the learned Advocate made relying on the judgments of the High Courts, could not be accepted. In short, this Court is of the view that appellate Court cannot enhance the amount of compensation unless the claimants file appeal or cross-objection for enhancement.

28. For the aforesaid reasons, the appeal succeeds. Hence following order:-

ORDER

(i) The First Appeal is allowed.

(ii) The award dated 29.12.2003, passed by the learned Member, Motor Accident Claims Tribunal (Tribunal), Ahmednagar, in Motor Accident Claim Petition (Petition) No.1336 of 1994, is hereby set aside.

(iii) The claim petition stands dismissed against the appellant – Insurance Company.

(iv) The amount of compensation deposited by the appellant – Insurance Company and permitted to be withdrawn by the claimants, be paid to the appellant – Insurance Company by the tractor owner.

(v) There is no question, the appellant – Insurance Company to be directed to pay the amount of compensation and then recover it from the tractor owner, since the tractor did not have insurance cover at all.

(vi) If the tractor owner fails to pay the appellant – Insurance Company the amount, which it has paid under the impugned award, the same shall be recoverable in an execution proceeding.

[R. G. AVACHAT, J.]

SMS