

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

FIRST APPEAL NO.307 OF 2004

National Insurance Co. Ltd.,
 A Subsidiary of General Insurance
 Corporation having its Regd.
 Office at 3 Niddleton Street,
 Kolkatta-700 071 (West Bengal)
 and having its Divisional Office No.III,
 at 2nd Floor, Sajjan Singh Building,
 Mount Road Extn.,
 Sadar, Nagpur-1.
 Though its Administrative Officer,
 Shri Kumbhare,Nagpur.

.....APPELLANT

...V E R S U S...

1. Vidya Wd/o Kishor Tiwaskar,
Aged about 29 years, Occ: Household,
2. Tejaswi D/o Kishor Tiwaskar,
Aged about 12 years, Occ: Student,
3. Anjali D/o Kishor Tiwaskar,
Aged about 9 years, Occ: Nil

Respondent nos.4 and 5 are deleted as per Court's order dated 08.02.2021

- ~~4. Ramchandra S/o Balaji Tiwaskar,
Aged about 88 years, Occ: Nil,~~
- ~~5. Anusayabai W/o Ramchandra Tiwaskar,
Aged about 78 years, Occ: Household,~~

The respondent Nos.2 and 3 are minor through
 natural guardian, their mother i.e. respondent no.1.

All resident of at Malipura, Tq. Higna,
 Distt. Nagpur

6. Ramprasad s/o Chanduji Bodalkande,
Aged about major, Occ: Owner,
Resident of Hingna, Nagpur

... RESPONDENTS

Shri V.P. Maldhure, Advocate for appellant.
Shri B.S. Mandhare, Advocate h/f Shri P.S. Mirache, Advocate for claimants.

CORAM:- PUSHPA V. GANEDIWALA, J.

**ARGUMENTS WERE HEARD ON :- 19th JULY, 2021.
JUDGMENT IS PRONOUNCED ON :- 2nd SEPTEMBER, 2021.**

. Heard.

2. Appellant- the insurance company takes exception to the judgment and award dated 15.12.2003 in claim petition no. 649 of 1996 passed by the member, Motor Accident Claims Tribunal, Nagpur.

3. In the impugned judgment, the learned member, MACT, held the owner and insurer of the vehicle, jointly and severally liable to pay compensation to the claimants to the tune of Rs. 1,45,000/- with 9% p.a. interest from the date 24.9.1996 till deposit.

4. The facts in brief may be stated as under :

The deceased Kisan Tiwaskar died in a motor accident on 21.08.1996. Respondent no.1 is the wife and respondent nos.2 and 3 are the children of the deceased Kisan. The names of respondents Nos. 4 and 5, the parents of the

deceased came to be deleted vide order dated 08.02.2021 since dead. Respondent no.6 is the owner of the offending vehicle- jeep bearing registration No.MH-31/H-3406. On the death of deceased Kisan in the vehicular accident, his legal representatives filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 (For short 'M.V. Act') claiming compensation of Rs.7,60,000/-. It is the case of the claimants that deceased was working as a driver with the owner of the offending vehicle and was earning Rs.2,000/- per month. Motor accident occurred due to failure of break i.e. mechanical fault in the vehicle. The deceased lost control over the jeep resulting thereby the jeep gave a dash to a tree and turned turtle. The driver Kisan died on the spot.

5. The owner of the offending vehicle/respondent no.6, in response, denied the material allegations in the claim petition. However, he does not dispute that he is the owner of the said vehicle and it was insured with the appellant herein i.e. National Insurance Company Limited.

6. The appellant-insurance company in its written statement, disputed the maintainability of the petition under Section 166 of the M.V. Act mainly on the ground that deceased Kisan died due to his own act of rash and negligent driving of the vehicle. He was not a third party and therefore the claimants are

not entitled for compensation under the M.V. Act. The appellant-insurance company disputed the factum of accident due to mechanical fault in the vehicle. It s further stated that the claimants ought to have moved an application before the Court of Commissioner under the Workmen's Compensation Act for claiming compensation.

7. Learned Member, Motor Accident Claims Tribunal, Nagpur framed necessary issues below Exhibit 15 and recorded the evidence as adduced by the parties. Petitioner No.1 i.e. wife of the deceased examined herself below Exhibit 22 and brought on record police papers i.e. F.I.R at Exhibit 23, Spot Panchanama at Exhibit 24, Inquest Panchanama at Exhibit 25, P.M. report at Exhibit 26 and Form AA at Exhibit 27.

8. Neither the owner of the offending vehicle nor the appellant-Insurance Company examined any witness in support of their stand.

9. The learned Tribunal on the basis of oral and documentary evidence on record concluded that petitioner could prove that the deceased Kishor died in the motor accident dated 21.08.1996 and also proved that the accident took place due to the circumstances beyond the control of the deceased, who was

driving jeep MH-31/H-3406 owned by respondent no.6 herein and insured with appellant herein. The Tribunal held that the owner and the insurer of the vehicle are jointly and severally liable to pay compensation of Rs.1,45,000/- with interest @ 9% p.a. from 24.09.1996 till deposit.

10. This judgment of the learned Member, Motor Accident Claims Tribunal, Nagpur is assailed in this appeal by the appellant-Insurance Company.

11. I have heard Shri V.P. Maldhure, learned counsel appearing for the appellant-Insurance Company and Shri B.S. Mandhare, learned counsel for the claimants.

12. Learned counsel appearing on behalf of appellant-Insurance Company reiterated the stand of the insurance company in its written statement to the claim petition. Learned counsel emphasized on the point that deceased was at fault for the occurrence of the accident and the same can be seen from the original petition before amendment. Learned counsel harped on the point that by way of amendment, the petitioners added new pleading about failure of break and mechanical fault in the vehicle. In support of his submissions the learned counsel relied on the following judgments.

- (i) **2012 (2) MhLJ 803** (Narayan Kalangutkar and another Vs. New India Insurance Co. Ltd. and others)
- (ii) **2008 ACJ 1340** (Saheblal Chandra Vs. Bhudayal Chandrar)

13. On the contrary, Shri B.S. Mandhare, learned counsel appearing for the claimants drew attention of this Court to the Spot Panchanama and submitted that a bare perusal of the Spot Panchanama would indicate that due to sudden mechanical fault in the vehicle, the accident occurred. Learned counsel also read out the relevant portion from the impugned judgment and submitted that the learned Tribunal has rightly appreciated the evidence on record and concluded that cause for the accident was beyond the control of the deceased.

14. I have considered the submissions advanced on behalf of both the sides. The only question that arises for the consideration of this Court is

“Whether the dependents of the deceased driver of the offending vehicle are entitled to get compensation in accordance with the terms and conditions of the insurance policy for which an additional compensation was paid by the owner of the vehicle covering the paid driver?”

15. First and foremost, it is not disputed that the deceased was holding a valid and effective driving license on the date of accident. It is also not disputed that the offending vehicle was insured with the appellant-Insurance Company at the relevant time. It was a comprehensive policy and an additional premium of Rs. 15 was paid covering insurance of the paid driver. Admittedly, there was no eye witness to the incident. The question as to whether it was a fault of the driver or not, can be inferred only from the Spot Panchanama. A perusal of Spot Panchanama Exhibit 24 would indicate that jeep had dashed to a road side tree and the front portion of the jeep was damaged. The steering of the jeep was found broken. Chassis of the jeep was also found broken. The learned Tribunal rightly observed that when the mechanical parts i.e. steering and chassis were found broken and as they form part of the mechanism, it can safely be inferred that there was a mechanical fault in the vehicle and that was the cause for accident. The learned Tribunal also noted from the recitals of the Spot Panchnama that rear wheel of the jeep tyre marks were present from one end to other end of the tar road and that was the indication that the driver was attentive while driving and he himself had applied the brakes just prior to the accident. It is also observed that he must have received some indication of unusual thing beyond his control and thereby to avoid the accident he

must have applied the break and therefore tyre marks appeared on the road.

16. There cannot be a different opinion than the learned Tribunal formed from the contents of the Spot Panchanama. A perusal of the cross-examination of the claimants' witness would show that the witness denied the suggestion that the alleged accident took place only because of negligence on the part of the deceased and there was no mechanical fault. Neither the owner nor the insurance company examined any witness in support of their stand. There is no reason for not accepting the evidence, which has been brought on record by the claimants. The claimants by way of preponderance of probabilities have proved that the accident occurred due to the sudden mechanical fault in the vehicle.

17. With regard to the submissions that by way of amendment the claimants added the story of mechanical fault of the vehicle, it is evident from the record that the prayer for amendment was allowed by the learned Tribunal and it is well settled that the effect of the amendment relates back to the date of presentation of the petition. It is not the case that the claimants have deleted from the petition any contrary admission, only the words 'due to failure of break i.e. 'mechanical fault' came to be

added. A perusal of the petition does not reflect any contrary pleadings of the claimants with regard to the accident. In absence of any positive rebuttal evidence from the side of the appellant-Insurance Company, whatever minimal evidence, which has been brought on record by the claimants, has to be considered by keeping in view the Motor Vehicles Act being a social and beneficial legislation.

18. There is no substance in the argument of the learned Counsel Shri Maldhure that the claimants could have approached the Commissioner, under Workmen's Compensation Act for their claim, deceased being an employee of the owner of the offending vehicle. The Section 167 of the M.V. Act extends the choice to the claimants to elect the forum. As the cause of the death of the deceased is due to the vehicular accident, and the policy is comprehensive covering the insurance for the paid driver, inasmuch as extra premium was also paid for the driver, when the owner of a vehicle pays additional premium to cover the Legal Liability of the paid Driver, the legal heirs of Driver have option either to file claim application under the Employee's Compensation Act, 1923 or under the M. V. Act as provided under Section 167 of the M.V. Act. Thus, the option is left to the person entitled to compensation to choose a particular remedy. In the case of **National Insurance Company Limited Vs. Prembai Patel**

and others reported in (2005) 6 SCC 172, the Hon'ble Supreme Court has clearly held that when the Policy is Act Only and additional premium for Legal Liability for paid Driver and Conductor is not paid then the appropriate remedy would be under the Employee's Compensation Act for compensation. However, when additional premium for legal liability of the paid Driver or Conductor is paid by the Owner, the insurance company on accepting additional liability for payment of compensation for such class of person, a claim petition under the Act would be available and the claimants have right to choose appropriate forum as per Section 167 of the M.V. Act. Recently, on 27.08.2021, a similar question was referred to the Constitution Bench of the Gujrat High in the case of **Valiben Laxmanbhai Thakore (Koli) and others Vs. Kandla Dock Labour Board and others.** The question which was referred to as "Whether the Division Bench of this Court in the case of *Saberabibi Hisammiya Umarvmiya* and another (supra) laid down correct law by holding that in view of insured paying additional premium for the liability of the paid driver, the Insurance Company is liable to pay compensation under the M.V. Act computed upon the death or injury caused to the driver out of an accident which arises solely on account of driver's own negligence."

19. The Constitution Bench of the Gujrat High Court considered the relevant provisions of the M. V. Act and also a series of decisions of the Apex Court and in its concluding para, it has observed as under:

“13. Thus, when the owner of a vehicle pay additional premium and same is accepted by the Insurance Company, liability of the Insurance Company gets extended under the Motor Vehicles Act. Section 147 of the Act clearly prescribes for statutory liability to cover risk of paid Driver and Conductor under the Insurance Policy, which is a matter of contract. On payment of such additional premium by the owner, the liability of the owner shifts upon the Insurance Company. Thus, the risk of paid Driver and Conductor would be covered under the Insurance Policy. Only when the additional premium is not paid, liability would be as per the Employees Compensation Act, 1923 and in such cases, compensation would be computed as prescribed under the Act which is limited to the extent provided under provisions of the Act. However, when owner pays additional premium to cover the legal liability of his paid driver and conductor to the Insurance Company, as such, the Insurance Company is enlarging the scope for unlimited liability for payment of compensation, when additional premium is accepted. The liability of the Insurance Company gets extended and it has no right to raise issue of self negligence or otherwise of the such class of the driver of the Insured vehicle. By

accepting additional premium as per the IMT 28, the Insurance Company expressed its willingness to extend its liability under the Clause of Legal Liability to the Paid driver and conductor as envisaged under Section 147 of the Act. Thus, in our opinion, Insurance Company has no legal right to avoid its legal liability under the indemnity clause arising from the contract of insurance towards the insured - owner of such classes of vehicles.”

20. The Constitution Bench has answered the question in the affirmative which reads thus:

“In our opinion, by accepting additional premium, the Insurance Company indemnifies the owners for paid Driver and/or Conductor and risk of Driver/Conductor is covered under it. Upon death or injury caused to the paid Driver and / or Conductor, the Insurance Company would be liable to satisfy such claim irrespective of the self-negligence. Thus, the observations made by the Division Bench in the case of Saberabibi Hisammiya Umarvmiya & Anr (supra) lays down the correct law. Reference is thus, answered accordingly.”

21. In the case in hand, it has been established that the deceased driver was not at fault for the cause of the accident. And therefore, the present case is on better footing than the facts in the

case before the Hon'ble Constitution Bench of the Gujrat High Court. In that case the driver was at negligence.

22. In view of the above, the judgments relied upon by the learned counsel for the Insurance Company would not be applicable in the instant case as they are distinguishable on facts as well as on the law and therefore, it is not necessary to be dealt with it.

23. In view of the aforesaid discussion, it is necessary to hold that the learned Tribunal has rightly and in its correct perspective appreciated the evidence on record. There is no reason to interfere with the well-reasoned judgment of the learned Member, Motor Accident Claims Tribunal, Nagpur. The appeal is devoid of any merit and deserves to be dismissed and hence the same is accordingly dismissed. No order as to costs.

JUDGE

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