IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1615 OF 2020

Bajaj Allianz General Insurance Co. Ltd.
Through its Branch Manager,
Having office at: Shop No.32 & 34, Navandar Arcade,
Kawa Road, Opp. Market Yard Gat no.2, Latur,
Dist. Latur
Through its Authorized Signatory/Branch Manager,
ABC Complex, MIDC Chikalthana,
Near Prozone Mall, Aurangabad,
Tq. & Dist. Aurangabad – 431 001 … **Appellant**
(Orig. Respondent No.2)

Versus

1. Yogita w/o Santosh Yadav
Age: 36 years, Occu: Household,

2. Shraddha D/o Santosh Yadav
Age: 17, Occu: Education,

3. Krushna S/o Santosh Yadav
Age: 15 years, Occu. Education,

(Respondent no. 2 & 3 minor,
U/g of their natural mother i.e.
respondent no.1)

4. Radhabai w/o Vishwanath Yadav
Age: 62 years, Occu. Household,

All R/o Borphal, Tq. Ausa,
Dist. Latur

At present R/o Osmanabad,
Tq & Dist. Osmanabad

5. Satish S/o Laxmanrao Yadav
Age: Major, Occu. Business,
R/o Borphal, Tq. Ausa,
Dist. Latur ... **Respondents**
(Respdt.No.1 to 4 – Org.Claimants)
(Respdt.No.5 – Org. Respdt. No.1)

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Mr. S. G. Chapalgaonkar, Advocate for appellant
Mr. S. B. Choudhari, Advocate for respondent Nos. 1 to 4
Mr. R. V. Naiknavare, Advocate for respondent No.5

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 18th AUGUST, 2021
PRONOUNCED ON : 11th JANUARY, 2022

J U D G M E N T :-

. This is Insurance Company's appeal taking exception to the judgment and award granting compensation of Rs. 8,80,000/- with interest 9% per annum thereon on account of death in vehicular accident. The challenge is mainly on the ground of no liability, contractual or statutory, to pay compensation.

2. Facts giving rise to the present appeal are as follows:

The tractor MH-24/D-4168 met with the accident on 16.08.2011. Deceased Santosh was said to have been sitting on head of the tractor. As a result of the injuries suffered in the accident, he passed away. His widow, two minor children and mother, therefore, filed petition for compensation. It was the case that the deceased was serving as a Driver on the tractor at a monthly pay of Rs.8,000/-.

3. On appreciation of the evidence in the case, the Tribunal allowed the petition granting compensation of Rs.8,80,000/-. It was the case of appellant - Insurance Company herein that the deceased was travelling as a gratuitous passenger. He was not employed by the owner maintenance and operation of the tractor. The policy of the insurance did not cover risk of gratuitous passenger.

4. Learned Advocate for the appellant - Insurance Company took this Court through the averments in the claim petition. It was pointed out to this Court that the column relating to the name of the employer has been consciously kept blank in the claim petition. Attention was also adverted to police statement of the witnesses wherein it was stated that the deceased was serving with a sugar factory as a Driver. The tractor was not attached with any trolley. Carrying capacity of the tractor was only one i.e. the Driver. The Driver's seat had already been occupied by the Driver. As such, the deceased was travelling as an unauthorised passenger. The appellant - Insurance Company has therefore no liability. Learned Advocate would further submit that the widow of the deceased appeared

before the Criminal Court and filed compromise pursis, stating therein that there was no fault of the tractor Driver. The learned Advocate meant to say that it being a claim petition under Section 166 of the Motor Vehicles Act, proof of rash or negligence in driving the vehicle is '*sine qua non* ', since the widow of the deceased gave clean chit to the tractor Driver, her petition under Section 166 of the Motor Vehicles Act must fail. Learned Advocate therefore urged for allowing the appeal.

5. Learned Advocate for the respondents - claimants would, on the other hand, submit that the Tribunal on appreciation of the evidence in the case, granted compensation. The owner of the truck admitted the deceased to have been in his employment for maintenance and operation of the tractor. The appellant - Insurance Company has charged him Rs.25/- towards legal liability (LL) for covering a risk of a person engaged for maintenance and operation of the tractor. The learned Advocate adverted this Court's attention to the oral evidence of the Officer of the appellant - Insurance Company. The learned Advocate, in the alternative, submitted for passing an order of pay and recover the amount of compensation. In support of his submissions, he relied on the following authorities.

(i) Halappa Vs. Manik Sab – 2018 ALL SCR 201;

(ii) Shivawwa & Anr. Vs. The Branch Manager, National India Insurance Company Ltd. & Anr. - 2018 ALL SCR 1025;

(iii) Shivaraj Vs. Rajendra & Anr. - 2018 ALL SCR 1885;

(iv) Royal Sundaram Alliance Insurance Co. Ltd. Vs. Rudramma – LAWS (KAR) – 2018-12-287;

(v) Dev Prasad Kurrey Vs. Jaya Sharma – LAWS (CHH) – 2018-3-121.

6. Considered the submissions made by the learned Advocates. Perused the evidence relied on. Although, involvement of the tractor in the accident had initially been denied, the same objection appears to have been later on given up. The widow of the deceased testified on oath. Admittedly, she had not witnessed the accident. A set of police papers relating to the crime registered against the driver of the tractor came to be admitted in evidence. It has, therefore, to be taken that the tractor MH-24/D-4168 met with the accident on 16.08.2011 and the deceased Santosh, travelling on the tractor, died as a result of the injuries suffered therein. So as to hold the appellant - Insurance Company liable to indemnify the owner of the tractor, it was necessary to prove that the deceased was employed for maintenance and operation of the tractor, etc. Satish (Respondent No.5 herein) is the owner of the tractor. It is his case

that he would employ/engage the deceased occasionally for maintenance and operation of the tractor. On the fateful day, he had engaged the deceased as at a pay of Rs.200/- for the day. Column No.4 in the claim petition appears to have been consciously kept blank. The said column pertains to name and address of the employer. The widow of the deceased (Yogita) testified that deceased Santosh had gone with the tractor to work as a Labourer on the fateful day. Admittedly, the tractor owner is from the very village the deceased hailed from. He is also close relative of the respondents - claimants. Except these words, there is no evidence to suggest the employer-employee relationship between the deceased and the tractor owner Satish. Admittedly, when the tractor met with the accident, someone else was in the driver seat. The memo of compromise executed by the widow of the deceased with the tractor driver was placed before the Court of J.M.F.C. A certified copy thereof (Exh.40) is on record. Although the widow of the deceased denied to have been a party to the compromise, it is a document that was presented before the Court concerned. It has to be presumed that the widow of the deceased (Santosh) had presented the same and appeared before the Court. It is true that in a petition under Section 166 of the Motor Vehicles Act proof of negligence or rashness on the part of the driver of the vehicle is a '*sine qua non*', if we peruse the compromise memo (Exh.40), it is evident therefrom that the widow of the deceased settled the criminal case in following terms.

> "1. हे की, सदरील प्रकरण गैरसमजुतीने आरोपी विरूध्द सदरची फिर्याद दाखल करण्यात आली होती.
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> 2. हे की, सदरील प्रकरणी गावातील व्यक्ती समक्ष तडजोड झाली आहे.
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> 3. हे की, आरोपी व फिर्यादी एकाच गावातील रहीवासी आहेत म्हणून सदरचे प्रकरण फिर्यादीस चालविणेचे नाही. तरी तडजोडीप्रमाणे सदरचे प्रकरण निकाली काढणे योग्य व न्यायाचे आहे.
>
> तरी विनंती की
>
> . सदरचा अर्ज मंजूर करून प्रकरण निकाली काढणेची कृपा करावी."

7. The aforesaid terms of the settlement no way suggest the widow of the deceased to have admitted the tractor driver to have had not been responsible for the accident.

8. It is reiterated that there is no documentary evidence in proof of employer employee relationship between the deceased and the tractor owner. Witness No.2 Mahadeo Yadav examined on behalf of the respondent claimants testifies that on the fateful day he along with 3 - 4 others had been to "*Sant Shiromani Maroti Maharaj Sahakari Sakhar Karkhana, Belkund*" for purchase of manure while

they were present at the gate of the sugar factory, Ganesh Waghmare, tractor driver, came with the tractor No.MH-24/D-4168. The deceased was seated near the driver on the head of the tractor. He further testified that he and the persons with him boarded the trolley attached to the tractor. On way back to the village, the tractor met with the accident. The deceased fell off and died. The witness Mahadeo gave such version of the happening for the first time after about eight years of the accident. While in his statement to the police, he stated, while tractor had come close to them near the sugar factory gate the deceased Santosh climbed the tractor and took seat near the driver. Whereas the police statement of Ganesh, real brother of the deceased is to the effect that the deceased was serving as a Driver with "*Sant Shiromani Maroti Maharaj Sahakari Sakhar Karkhana, Belkund*." The same suggests that the deceased after his duty was over took the seat on the tractor for returning to his home. The statement of these witnesses came into being within a week of the accident. The witnesses that time did not have any reason or interest to make false statements. The evidence thus indicate that the deceased was serving with the sugar factory as a Driver and he was not engaged by the tractor owner for maintenance and operation thereof, even on the fateful day.

9. The policy of insurance Exh.47 does indicate that the appellant – Insurance Company had charged the owner of the tractor as below:

LIABILITY	
Basic Third Party Liability	800
PA Cover For Owner-Driver-SI-Rs.200000	100
LL For Operation/Maintenance For 1 Person	25
Total Liability Premium:	925

The aforesaid terms of the policy of insurance unequivocally suggest that risk of a gratuitous passenger had not been covered. Admittedly, carrying capacity of the tractor is one i.e. of the driver. When the tractor met with the accident, Ganesh Waghmare was in the driver seat. As such, the appellant – Insurance Company had neither contractual nor statutory liability to pay compensation.

10. The fact of Halappa's case (supra) do indicate that the tractor turned turtle and fell over the deceased. As such, the Court took it to a case that the deceased was not travelling in the tractor. The judgment in in Halappa's case is therefore of no assistance to the respondents – claimants.

11. True, in Shivawwa's case (supra), the Apex Court in para 11 of its judgment has observed thus:

> "*11. Assuming for the sake of argument that the insurance company was not liable to pay compensation amount awarded to the claimants as the offending tractor was duly insured, the insurer would be still liable to pay the compensation amount in the first instance with liberty to recover the same from the owner of the vehicle owner (respondent No.2), in light of the exposition in the case of National Insurance Co. Vs. Swarn Singh and Ors., (2004)3 SCC 297 : [2004(5) ALL MR 251 (S.C.)]. In paragraph 110 of the said decision, a three-Judge Bench of this Court observed thus:*
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> > *"110. The summary of our findings to the various issues as raised in these petitions are as follows:*
> >
> > *(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.*
> >
> > *(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.*
> >
> > *(iii) xxx*
> >
> > *(iv) The insurance Companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof where for would be on them.*"

Moreover, in case in Shivaraj (supra), the Apex Court has observed thus:

> "***9.*** *The High Court, however, found in favour of respondent No.2 (insurer) that the appellant travelled in the tractor as a passenger which was in breach of the policy condition, for the tractor was insured for agriculture purposes and not for carrying goods. The evidence on record unambiguously pointed out that neither was any trailer insured nor was any trailer attached to the tractor. Thus, it would follow that the appellant travelled in the tractor as a passenger, even though the tractor could accommodate only one person namely the driver. As a result, the Insurance Company (respondent No.2) was not liable for the loss of injuries suffered by the appellant or to indemnify the owner of the tractor. That conclusion reached by the High Court, in our opinion, is unexceptionable in the fact situation of the present case.*
>
> ***10.*** *At the same time, however, in the facts of the present case the High Court ought to have directed the Insurance Company to pay the compensation amount to the claimant (appellant) with liberty to recover the same from the tractor owner, in view of the consistent view taken in that regard by this Court in* **National Insurance Co. Ltd. Vs. Swarna Singh & Ors. (2004) 3 SCC 297: [2004(5) ALL MR 251 (S.C.)], Mangla Ram Vs. Oriental Insurance Co. Ltd. (2018) 5 SCC 656 : [2018 ALL SCR 2017], Rani & Ors. Vs. National Insurance Co. Ltd. & Ors. 2018(9) SCALE 310 : [2018 ALL SCR 2011]** *and including* **Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others, (2017) 4 SCC 796 : [2017 ALL SCR 599].** *In other words, the High Court should have partly allowed the appeal preferred by the respondent No.2. The appellant may, therefore, succeed in getting relief of direction to respondent No.2 Insurance Company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner (respondent No.1).*"

12. In view of this Court, the respondents – claimants are not entitled to have the amount of compensation from the appellant – Insurance Company. The question is whether the

appellant is required to be directed to pay the amount of compensation and recover the same. The respondents – claimants have come with a case that the deceased owned 9 Acres of land. He would earn Rs.3,00,000/- (Rupees Three Lakh) as agricultural income. Necessarily on the demise of Santosh, the respondents – claimants have inherited the agricultural land. They have suffered loss of supervision. The deceased was found to have been serving with the sugar factory.

13. In the fitness of things, this Court is not inclined to direct the appellant – Insurance Company to pay the entire amount of compensation and recover the same from its owner. The Court further proposes to direct the appellant – Insurance Company to pay the claimants 50% of the amount of compensation under the impugned award and recover the same.

14. The Tribunal simply went by the evidence of the widow of the deceased, owner of the tractor and the policy of the insurance to hold the appellant – Insurance Company liable to pay the compensation. This Court is not in agreement in the findings recorded by the Tribunal for the reasons given herein above.

15. In the result, the appeal stands disposed of in terms of following order:

O R D E R

(i) The appeal is allowed.

(ii) The impugned award dated 27.12.2019, passed by the Member, Motor Accident Claims Tribunal, Osmanabad in Motor Accident Claim Petition No. 293 of 2014, against the appellant – Insurance Company is hereby set aside.

(iii) The appellant – Insurance Company is however directed to pay respondents – claimants 50% of the amount of compensation granted under the impugned award and recover the same from the owner of the tractor, for which it shall not be required to file Civil Suit against the tractor owner.

(iv) The amount in deposit with this Court to abide by the terms of this order i.e. 50% be paid to the respondents – claimants with interest accrued thereon and balance amount be paid back to the appellant – Insurance Company with interest accrued thereon.

(v) Pending civil application No.5402/2021 is disposed of.

[R. G. AVACHAT, J.]

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