

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

FIRST APPEAL NO. 334 OF 2009

New India Assurance Company Ltd.,
Branch Aurangabad
Through its Divisional Manager
Adalat Road, Aurangabad

... Appellant
[Orig. Respondent No.3]

Versus

1. Bhagaji S/o Ganpat Kapse
Age: 50 years, Occ: Agriculturist
and Business, R/o. Viramgaon,
Taluka Sillod, District Aurangabad
2. Jijabai W/o Bhagaji Kapse
Age: 45 years, Occ: Agriculturist
and Household, R/o. As above
3. M/s Sai Service Station Ltd.,
Bombay – Ahmedabad Highway
NH.No.8, Balitha Vapi, Taluka Paroli,
District Valsad
4. Ganpatrao @ Balu S/o Bhagaji Patil } R-4 deleted as per
Age: 27 years, Occ: Driver } Order dt. 7/12/2010
R/o. Sultanpur, District Solapur }

... Respondents
[Respdt.No.1 & 2 Ori.Claimants
[Respdt No.3 & 4 Orig.
Respdt.Nos. 1 & 2]

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Mr. S. G. Chapalgaonkar, Advocate for appellant
Mr. S. K. Barlota, Advocate for respondent Nos. 1 and 2

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 29th NOVEMBER, 2021

PRONOUNCED ON : 03rd FEBRUARY, 2022

J U D G M E N T :-

. This is an Insurance Company's appeal, taking exception to the judgment and award dated 30.04.2008 passed by the Member, Motor Accident Claims Tribunal (Tribunal), Aurangabad in Motor Accident Claim Petition No.26 of 2002. Under the impugned judgment and award, the claimants therein, respondent Nos. 1 and 2 herein, have been granted compensation of Rs.1,50,000/- with interest at the rate 9@ per annum from the date of petition to the date of realisation. It was a third party property damage claim.

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

It was an accident between a Matador bearing registration No. MH-20-A-6409 and a Scooter carrying large truck bearing registration No. GJ-15-X-148. The Matador belonged to Jayaji (deceased). He (deceased) was at the wheel of the Matador when accident took place. As a result of the injuries suffered in the said accident, Jayaji passed away. On due investigation, the driver of the truck was proceeded against. The parents of Jayaji (claimants)

had filed claim for compensation on account of death of their son - Jayaji. The said petition was allowed. The award passed therein has attained finality. As such, there is no question as to whether the accident took place due to rash and negligence on the part of the deceased.

3. Both the vehicles involved in the accident, were insured with the appellant – New India Assurance Company Limited. In the accident, the Matador was extensively damaged. It became unliable. The claimants being successors in interest of the Matador owner – Jayaji, had made an Own Damage (O.D.) claim to the appellant - Insurance Company. It was allowed, granting compensation of Rs.1,20,000/-. Thereafter, the petition came to be filed against the driver, owner of the offending vehicle and its insurer (appellant herein) for compensation on account of damage of the Matador. It was the case of the claimants that the motor mechanic gave an estimate of Rs.3,14,800/- towards cost of repairs of the Matador so as to bring it on road. The compensation amount received in O.D. claim, has all been directly received by the Maharashtra State Finance Corporation (M.S.F.C.), which had granted loan for purchase of Matador. The cost of new Matador at

the relevant time was Rs.4,39,500/- . The insurer estimated the value thereof at Rs.3,66,000/-.

4. On appreciation of evidence in the case, the Tribunal has observed thus:

“9. In fact, insurer’s estimated value was shown as Rs.3,66,000/- while cost of new vehicle was Rs.4,29,500/-. It has to be considered that, vehicle is in such a condition that it cannot be used on the road again. Admittedly, Matador was purchased on 8.3.1995 while accident took place on 1.8.1999. Thus, the matador was used by claimants for about 4 years and 5 months. Matador was taken on loan and it can easily be imagined that, claimants would have been required to pay considerable interest on loan amount. Besides matador cannot be used now as it is damaged completely. Considering all these circumstances, compensation of Rs.1,50,000/- would meet ends of justice, in my opinion. It is a third party property damage claim and in my opinion, Tribunal may not go into minute details of exact amount of repairs or exact amount of damage.”

The appellant – Insurance Company, is therefore in appeal herein.

5. Heard.

Learned Advocate for the appellant – Insurance Company would submit that the claimants have already received an amount of Rs.1,20,000/- from the appellant towards O.D. claim. The Surveyor had assessed the loss. The assessment of the Surveyor is

not challenged. There is no evidence to contradict the Surveyor's report. The claimants have received the compensation towards O.D. claim as per the Surveyor's report. There is no further cause of action to make good the loss under third party claim. The Matador was purchased way back in 1995. The vehicle was more than four years old. It had depreciated in value after use. The claimants have retained the vehicle after the accident. The salvage value of the vehicle was assessed at Rs.70,000/-. As such, the claimants have received the entire amount as against damage/loss sustained by them. Unless and until the claimants demonstrate that they have suffered actual loss as claimed in the petition, the Tribunal ought not to have granted damages. No bills of repair or spare parts have been proved. There is no pleadings in the claim petition in this regard. The assessment made by the Surveyor is binding on both the contracting parties to the insurance contract. On all these counts setting aside the impugned award was urged for.

6. The learned Advocate for the claimants would, on the other hand, submit that the claimants had in fact suffered damage/loss in excess of what has been granted in O.D. claim. The vehicle was only source of income for the family. The entire amount

received under the O.D. claim has been appropriated by M.S.F.C. towards repayment of loan granted for purchase of the Matador. The damaged Matador has been lying at the garage. To make that Matador roadworthy, the claimants required a sum of over Rs.3,00,000/- (Rupees Three Lakh). According to the learned Advocate, no fault could be found with the impugned award. He, therefore, urged for dismissal of the appeal.

7. Considered the submissions advanced. Perused the pleadings and evidence as well. Gone through the impugned judgment and award.

It appears that more has been argued and urged on behalf of the appellant – Insurance Company beyond its pleadings. Admittedly, the Matador owned by the deceased was extensively damaged in the accident. The claimants had therefore preferred O.D. claim. Both the vehicles involved in the accident were insured with the appellant – Insurance Company herein. The claimants have been granted a sum of Rs.1,20,000/- towards O.D. claim. The papers of the O.D. claim have not been placed on record. It also appears that the attention of the Tribunal was not adverted to the policies of insurance of both the vehicles involved in the accident. Close reading

of the written statement filed by the appellant – Insurance Company before the Tribunal would indicate that it is its case that when the claimants have accepted a sum of Rs.1,20,000/- towards O.D. claim, no petition under Section 166 of the Motor Vehicles Act for the same claim is maintainable.

8. It is reiterated that it is not known as to whether under the policy of insurance of the damaged vehicle, the O.D. claim was restricted to certain amount. No papers of O.D. claim have been placed on record. The appellant – Insurance Company did not lead any evidence in proof of its stand. The claim was subjected to a very scanty cross examination. For better appreciation, the entire cross examination of the claimant is reproduced below.

“It is not correct to say that accident has taken place due to fault of the driver of the metador. After accident, I have submitted O.D. (own damaged) claim with respondent no.3 under the policy of insurance of vehicle Metador bearing R.No.MH-20-A-6409 and I have received amount of Rs.1,20,000/-. It is not correct to say that I have received the complete amount as per the law assessed by Surveyor. It is not correct to say that I am deposing falsely that my son deceased Jayaji used to earn Rs.300/- per day income by use of said metador. It is not correct to say that I am deposing falsely that the proprietor has shown the estimated costs of painting, welding and repairing works to the tune of Rs.3,14,800/-. It is not correct to say that I have not sustained any loss and I have claimed exorbitant amount of compensation”

9. It has been specifically averred in the evidence by the claimants that the estimated cost of repairs of the damaged vehicle to make it roadworthy condition is Rs.3,14,800/-. The entire amount (Rs.1,20,000/-) received under the O.D. claim has been appropriated towards repayment of the loan raised from M.S.F.C. The Tribunal, after having considered all these facts, granted a lump sum amount of Rs.1,50,000/- as compensation. It appears that the claimants have withdrawn the entire amount, true as against bank guarantee. In these peculiar facts and circumstances of the case, this Court is not inclined to interfere with the impugned award.

10. In the result, the appeal fails. The same is therefore, dismissed.

11. The amount in deposit with this Court, be paid to the respondents – claimants with interest accrued thereon.

[R. G. AVACHAT, J.]