

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

FIRST APPEAL NO.1142 OF 2014

WITH

CIVIL APPLICATION (CAF) NO.3228 OF 2014

1. Royal Sundaram Alliance Insurance
Company Ltd. Subramaniam Building,
IInd Floor, No.1
Club House Road, Annasalai,
Chennai-600002
Through Mr. Manish S. Waghmare,
Manager Legal
(Original Opponent No.3)

.... APPELLANT

// VERSUS //

1. Mrs. Vinaya Undaybabu Shah
Age:- 35, occupation: Household
2. Udaybabu Ratanchand Shah
Age-59 years, Occupation: Business
Both R/at-14, Bhakti, 402, Ghorpadi
Peth, Pune 411002
3. Deve Bahadur, son of Man Bahadur,
Age-23 years, Occupation : Chauffeur
R/at- VIII Nagle, Charandas, Phase: II
Noida, G.B. Nagar, Gaziabad, Uttar Pradesh
4. Miss Vandana d/o Tejvir Singh
Chaoudhari
Age: 22 years, Occupation: Business
R/at-House No.36, Gali No.1 (B), Durgapuri
Extension, Delhi-110093
(Original Opponents No.2)

....RESPONDENTS

Mr. Nikhil Mehta, learned counsel for the appellant.

Mr. Sumit Khanna, learned counsel alongwith Ms Shweta Rathod and Mr. Pravin Bhoi, learned counsel alongwith Ms. Sneha Sanap, Advocate for the respondent Nos. 1 and 2.

CORAM : V. G. BISHT, J.

Date on which arguments were heard:- 24/02/2022

Date on which the judgment is pronounced :- 07/03/2022

JUDGMENT: (Per: V. G. BISHT, J.)

1. Heard learned counsel for the parties.
2. Rule. Rule made returnable forthwith. By consent of the learned counsel for the parties, appeal is taken up for final hearing.
3. This Appeal and Cross Objection arises from the judgment and order of the learned Member, Motor Accidents Claims Tribunal, Pune passed in M.A.C.P. No.247/2004 on 13.06.2014.
4. The brief facts of the case are that the applicants are parents of deceased Shreyans Udaybabu Shah. The deceased was required to attend urgent supervision on his working site at

Dharchula, State of Uttaranchal. He was at Delhi at such time. The deceased requested his friend Tejwir Singh of New Delhi to provide a car with Chauffeur, who accordingly arranged a Tata Indica car bearing registration No. DL 5 CB 5279.

5. On 23.02.2013 at about 4.30 a.m. at Gram Talli Gwadi, Ban-Kot Town road, the driver of the car i.e. opponent No.1 in a negligent manner took a wrong turn on left side instead of taking turn to the right side to Pithoragarh. Because of that the car got turtled and opponent driver thrown out the car but deceased remained inside. Owing to the impact, deceased sustained serious injuries and succumbed to those injuries. Accordingly offence was registered.

6. According to the applicant-parents at the time of death of the deceased, the deceased was 27 years old and was looking after the business of Electrical Engineering and joined as a partner in claimant No.2 with the firm M/s. Mahati Electricals and his last average monthly income was Rs.1 Lac. They accordingly, claimed total sum of Rs.1,85,32,854/- on all permissible heads.

7. On appreciation of material before it, the tribunal partly allowed the claim with proportionate costs and awarded compensation of Rs.1,17,14,000/- alongwith costs and proportionate interests at the rate of 9% per annum on Rs.1,16,64,000/- from the date of application till realization. There against the appellant-Insurance Company has preferred the present appeal and the respondents by way of cross-objection sought enhancement of the compensation.

8. Mr. Mehta, learned counsel for the Insurance Company, at the outset assailed the impugned award on the ground that the learned Member failed to appreciate that the insured vehicle has been used for hire and reward at the time of accident and thus, there was breach of Insurance Policy. Learned counsel then invited my attention to the various grounds viz. (h) (i)(k)(l)(m)(n)(p) and (q). I have carefully perused these grounds. Learned counsel also canvassed before me that since the deceased was partner of the applicant No.2 and the fact that the applicant No.2 was deriving income from the business of partnership company, the compensation ought to have been allowed only to the extent of loss of managerial skills (of deceased) and nothing else. For all these reasons learned

counsel sought exoneration and in the alternate submitted that at least the learned Member could have directed to pay the compensation first and recover from the owner and driver of the vehicle.

9. Mr. Sumit Khanna, learned counsel for the respondent Nos. 1 and 2, on the other hand, vehemently opposed the submissions of learned counsel for the appellant and would submit that since the Insurance Company is coming out with a case of breach of contract, the burden of proof was on it to establish the same by adducing cogent and convincing evidence. According to learned counsel, no such evidence is forth coming, Supporting the impugned order, learned counsel also assailed the submission of learned counsel for the appellant that applicants were only entitled to loss of managerial skills and nothing more. In this regard learned counsel placed reliance in *National Insurance Company Limited Vs. Birender, (2020) 11 SCC 356*.

10. Coming to the cross-objection learned counsel submits that learned Member while calculating/determining the income of deceased, failed to consider the share of profit from

the partnership firm earned by deceased as the same is tax-exempt income in the hands of partner and are excluded as exemption under Section 10(2A) read with 40 (b) of the Income Tax, Act, 1961. This being a computational error, needs to be rectified at the hands of this Court, urged learned counsel.

11. I have considered the rival submissions.

12. The factum of accident resulting in death of the deceased, age and occupation are not in dispute. I am concerned, with the points, as raised by learned counsel for the appellant, in respect of breach of the terms of the policy and income of deceased.

13. When the Insurance Company takes the plea that it is not liable to pay compensation or to indemnify the insured as the vehicle in question was driven in breach of the terms of the policy, the insurance company has to discharge the burden by placing legal and cogent evidence before the Tribunal.

14. In case of *Insurance Co. Ltd. Vs. Swaran Singh and others (2004) 3 SCC 297* the Hon'ble Apex Court has made

following observation at para 69:-

“The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability.

“While summarizing finding the Hon’ble Apex Court has further observed at para 110 as under:-

“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) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable

care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) 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 wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising

in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured

can be taken recourse to by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.”

The Hon'ble Apex Court further held that 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 vehicle, the burden of proof wherefore would be on them.

15. From the above proposition of law it is more than clear that the person who alleges breach must prove the same. The Insurance Company is thus required to establish the said breach by cogent evidence. Therefore, it becomes necessary to find out whether the onus of proof as required by Section 149 of Motor Vehicle Act, 1988 has really been discharged by Insurance Company or not.

16. The Insurance Company in support of claim of breach of policy examined its Legal Officer, namely, Mahesh Suresh Waghmare (Exh. 63). It is his evidence that the Insurance Policy

was valid at the time of accident. The offending car was having private car package policy and as per the condition of policy, owner of the vehicle and his relatives travelling in the car were covered under the policy. The persons hiring car were not covered in the Insurance Policy. He then produced the policy which came to be marked at Exh. 64.

17. It is his further evidence that the deceased was unauthorized passenger of the offending car and as he was an unauthorized passenger, their company is not liable to pay compensation.

18. Two things can be noted from the examination-in-chief of the above witness. First, according to him, it was a private car package policy and only owner of vehicle and his relatives were covered by that policy. Second, the deceased being an unauthorized passenger, the company is not liable to pay compensation.

19. Interestingly, in the cross-examination this witness admits that the terms and conditions of policy were not enclosed alongwith policy. He further admits that he cannot say on which conditions policy was issued. He denies the suggestion, when

given to him, that the policy in question is comprehensive policy and it being so, passengers of vehicle were covered under it.

20. The said witness then states in his cross-examination that he has no document to show that offending car was being used for hire and reward. According to him, there was no specific mention that only owner and his relatives were covered in the policy. He further stated that he has no documents to show that deceased was traveling unauthorizedly. Lastly, he states that in the year 2003 since he was not in service of Insurance Company in question he has no personal knowledge about policy in question.

21. It is significant to note that the essential and requisite terms and conditions of the policy were not produced before the learned Member of Tribunal at the time of adducing evidence by the witness of Insurance Company. Even the witness was not aware of the terms and conditions on which the policy in question was issued. In short this witness had no personal knowledge about the necessary terms and conditions of the policy. Simply producing the Insurance Policy will not prove everything and more particular the breach as claimed by the Insurance Company. What is disheartening to note is that

although Insurance Company has put up a brave defence of the deceased being an unauthorized passenger and that offending vehicle was taken on hire and reward but there is no shred of evidence to substantiate the same. Further, no evidence is forthcoming to show that only owner and his relatives were covered in the policy.

22. Learned Member of Tribunal was right in his observation that the Insurance Company neither examined the driver of the vehicle nor any other witness to prove that the illfated vehicle was in fact hired by the deceased. For the aforesaid reasons, I do not find any perversity in the findings of the learned Member that the Insurance Company has failed to discharge its burden to prove that the insurance vehicle was used for hire and reward in breach of terms and conditions of Insurance Policy.

23. I may add here that it is settled law with respect to the “comprehensive/package policy” that gratuitous occupant of private car is covered under it. In case of ***National Insurance Co. Ltd. Vs. Balakrishnan and another (2013) 1 SCC 731*** the Hon’ble Apex Court has quoted with approval as under :- Para 25 and 27

25. *“It is also worthy to note that the High Court, after referring to individual circulars issued by various insurance companies, eventually stated thus:-*

“27. In view of the aforesaid, it is clear that the comprehensive/package policy of a two wheeler covers a pillion rider and comprehensive/package policy of a private car covers the occupants and where the vehicle is covered under a comprehensive/package policy, there is no need for Motor Accident Claims Tribunal to go into the question whether the Insurance Company is liable to compensate for the death or injury of a pillion rider on a two-wheeler or the occupants in a private car. In fact, in view of the TAC’s directives and those of the IRDA, such a plea was not permissible and ought not to have been raised as, for instance, it was done in the present case.”

“27. In view of the aforesaid legal position, the question that emerges for consideration is: whether in the case at hand, the policy is an “Act Policy” or “Comprehensive/Package Policy”? There has been no discussion either by the tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a “comprehensive policy” but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a “package policy” to cover the liability of an occupant in a car.”

In view of above, I do not find merit in the submission of learned counsel for the Insurance Company that there was failure on the part of learned Member to appreciate that the

insured vehicle had been used for hire and reward at the time of accident and thus, there was breach of Insurance Policy.

24. Since the breach of insurance policy has not been established, the alternate submission of pay and recover also loses steam.

25. The next submission of learned counsel for the appellant is that learned Member failed to appreciate that at the most respondent Nos. 1 and 2 (original claimants) could be entitled to compensation to the extent of loss of managerial skills of the deceased and nothing more, inasmuch as, admittedly, the business of partnership firm and the company was still continuing and the claimants were drawing income from the same. Learned counsel also raised the grievance that learned Member failed to appreciate the ratio laid down in the case of *New India Assurance Company Limited Vs. Yogesh Devi and others (2012) 3 SCC 613*.

26. On the other hand, learned counsel for the respondents submitted that though the claimants are also partner in business which the deceased was carrying and the

partnership firm continued even after the death of deceased, compensation cannot be declined to the claimants on the ground that they are still drawing benefit of the partnership business. Learned counsel to substantiate his submission has placed reliance in *Rukmani Devi Vs. Om Prakash (1991) ACJ, (SC) page 3* and *National Insurance Company Limited Vs. Birender and Ors (2020) 11 SCC 356*.

27. I have carefully gone through the decisions relied on by learned counsel for the parties in New India Assurance Company Vs. Yogesh Devi and others (**supra**). Owner of the buses died in motor accident. It was specifically contended that deceased was earning Rs.3900/- as driver of buses. Motor Accident Claims Tribunal awarded the compensation of Rs.10,00,000/-. However, High Court enhanced compensation to Rs.30,72,000/- by taking notional income of deceased as Rs.24,000/-. While examining the legality of the said findings the Hon'ble Apex Court held that quantum of income depends upon various factors likewise, income derived out of three buses would still accrue to family of deceased. As deceased was managing buses during his lifetime, now respondents/claimants needed someone to manage buses and thus payment made for driver and

manager of their buses would be loss of income to respondents/ claimants. Hon'ble Apex Court further found that no evidence was adduced to show loss of income in this respect and therefore, further found that the computation made by High Court was neither based on any evidence nor on right logic.

28. In my considered view the factual position obtaining in the case cited (*supra*) and the case in hand are dissimilar and therefore, though learned Member did not discuss the facts as noted herein above but was right in holding that the ratio laid down therein cannot be made applicable to the case in hand.

29. As against above, in *Rukmani Devi* and Ors. (***supra***) the deceased who was husband of appellant died in bus accident. Learned Second Additional District Judge Muzaffarpur acting as Motor Accident Claims Tribunal awarded the amount of Rs.1,25,000/- as claimed towards compensation. On appeal the High Court observed that even after death of deceased his partnership business was continued by the family member having deceased's son as partners of the firm. High Court further found that partnership business was being carried on and claimants were deriving benefit from that business and they had

not been put to any pecuniary loss. On that reasoning the High Court reduced the compensation from Rs.1,25,000/- to Rs.48,600/- However, the Hon'ble Apex Court did not agree with the High Court and found no justification whatsoever to reduce the compensation. Accordingly the appeal was allowed in toto and award of Rs.1,25,000/- was affirmed.

30. Thus, the factual position in the case of Rukmani Devi and others vis-vis the case in hand is quiet similar and therefore, learned Member of the Tribunal was justified in following the decision given in Rukmani Devi's.

31. Similarly, in case of National Insurance Company Limited Vs. Birender (supra) the Hon'ble Apex Court held that it is thus settled by now that the legal representatives of the deceased have a right to apply for compensation. Having said that, it must necessarily follow that even the major married and earning sons of the deceased being legal representatives have a right to apply for compensation and it would be the bounden duty of the Tribunal to consider the application irrespective of the fact whether the concerned legal representative was fully dependent on the deceased and not to limit the claim towards

conventional heads only.

32. Thus, having regard to the pronouncements made in the case of Rukmani Devi and others (supra) and as also in National Insurance Company Limited Vs. Birender Kumar and others (supra), I do not find any infirmity with the approach of learned Member of the Tribunal. Consequently, the submission in this regard advanced by learned counsel for the appellant also stands rejected.

33. Learned counsel for the appellant during the course of argument also submitted that learned Member has wrongly relied upon the income tax returns for the financial year 2003-04 to have assessed the income of deceased. According to learned counsel the accident in question took place on 23.02.2003 and therefore, the income that shall have been taken for assessment of compensation shall have been based on previous year returns.

34. It is well settled that the income on the date of death ought to have been taken into consideration after deducting income tax payable. Since admittedly the deceased died in an accident occurred on 23.02.2003, in my considered view, learned Member of Accident Claims Tribunal was right in taking into

consideration the income tax returns of the assessment year 2003-04. The submission of learned counsel for the appellant in this regard is bereft of logic and cannot be accepted.

35. This brings me to the cross-objection of the respondents. In ***Urmila Devi and Ors. Vs. Branch Manager, National Insurance Company Ltd. and Another*** the Hon'ble Apex Court at para 24 held as under:-

“24. A conjoint reading of the provisions of Section 173 of the M.V. Act; Rule 249 of the Bihar Motor Vehicle Rules, 1992; and Order XLI rule 22 of the CPC would reveal, that there is no restriction on the right to appeal of any of the parties. It is clear, that any party aggrieved by any part of the Award would be entitled to prefer an appeal. It is also clear, that any respondent, though he may not have appealed from any part of the decree, apart from supporting the finding in his favour, is also entitled to take any cross-objection to the decree which he could have taken by way of appeal.”

36. Although no formal cross-objection has been filed by the respondent, but in view of above proposition of the Hon'ble Apex Court learned counsel is well within his right to raise the cross-objection before this Court.

37. According to learned counsel for the respondents learned Member while calculating/determining the income of deceased failed to consider the share of profit earned from the

partnership firm by the deceased as the same is tax exempt income in the hands of the partner and is excluded under Section 10(2A) read with Section 40 (b) of Income Tax Act, 1961.

38. Exh. 47 i.e. income tax return for the assessment year 2003-04 which was pressed by learned Member for recognizing the income of deceased is very much on record. Under the head computation of total income at serial No.3, it is shown that an amount of Rs.5,39,082.00 was under exemption under Section 10 of the Income Tax Act, 1961. As per Section 10(2A) share of profit received by a partner from the firm is exempt from tax in the hands of the partner. Therefore, it appears that Rs.5,39,082/- as share of profit from the firm, was subtracted while calculating gross taxable income. It is pertinent to mention that share of profit is part of income being derived and same is subtracted as per provision of law to determine the tax liability. Therefore, it was wrong on the part of learned Member to not include the said amount of Rs.5,39,082/- to the assessed/determined income of the deceased.

39. Thus, the calculation of compensation payable under Section 166 of Motor Vehicle Act, after adding the share of profit

from partnership as part of income will be as follows:-

(In Rs.)	Calculations
(i) Gross Annual salaries per ITR (2003-2004)	9,47,364
(ii) Profit share from partnership firm as per ITR	5,39,082
(iii) Total Gross Income as per ITR [(i) + (ii)]	14,86,446
(iv) Tax paid as per ITR	2,64,188
(v) Annual income post tax [(iii) - (iv)]	12,22,258
(vi) Addition for Future prospect @ 50%	6,11,129
(vii) Annual Income with Future prospect [(v) + (vi)]	18,33,387
(viii) Deduction towards personal expenses @ 50%	9,16,694
(ix) Annual income for calculating compensation [(vii) - (viii)]	9,16,694
(x) Multiplier (as per sarla verma/Pranay Sethi case)	17
(xi) Loss of future income (total income x multiplier)	1,55,83,790
(xii) Funeral expense	15,000
(xiii) Loss of estate	15,000
(xiv) Loss of consortium @ 40,000 x 2	80,000
(xv) Total compensation payable	1,56,93,790

40. Appellant - Insurance Company is, therefore, directed to pay Rs.1,56,93,790/- alongwith interest @ 9% p.a. from the date of filing of the claim petition till payment, less that already deposited, within a period of eight weeks from the receipt of this

judgment.

41. In the result,

(i) Appeal is dismissed. No costs.

(ii) Cross-objection is allowed to the extent indicated (para- 39) above.

Orders accordingly.

42. In view of dismissal of appeal, Civil Application No.3228 of 2014 also stands disposed off.

(V.G. BISHT)
JUDGE

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