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

FIRST APPEAL NO. 914 OF 2012

APPELLANT: The New India Assurance Company Ltd., through its duly constituted Attorney, i.e. Manager (Legal) Regional Office, Dr. Ambedkar Bhawan, M.E.C.L. Premises, Seminary Hills, Nagpur-440 006.

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

RESPONDENTS

1] Laxmibai wd/o Anil Rathod,
Aged about 20 years,
Occu: Household.

2] Uday s/o Anil Rathod,
Aged about 6 months, minor through his natural guardian i.e. Respondent No.1.

3] Ramkorbai wd/o Govind Rathod,
Aged about 42 years, All Nos. 1 to 3 r/o Gandhari, Tq. Lonar,
Distt. Buldana.

4] Vijay s/o Deorao Takras,
Age Major, Occu: Driver,
R/o Gandhari, Tq. Lonar,
Dist. Buldana.

5] Rajkumar s/o Vitthalrao Vaidya,
Age: Major, Occu: Driver/Owner,
R/o Gotra, Post: Nandra, Tq. Lonar,
Dist. Buldana.

Mr P.V.Thakre, counsel for the appellant.
Ms Aashta Sharma, counsel holding for Mr P.R. Agrawal, counsel for the respondent Nos. 1 to 3.

CORAM : URMILA JOSHI-PHALKE, J. .
DATE : 28/03/2023

ORAL JUDGMENT :

1. This appeal challenges the judgment and award passed by the Member, Motor Accident Claims Tribunal, Akola, Division Washim on 02/02/2012 by which the Insurance Company was held liable to pay compensation and directed to pay the compensation to the claimants jointly and severally along with the respondent Nos. 1 and 2. The parties are referred to as per their original nomenclature.

2. The brief facts which are necessary to dispose of the appeal are as under:-

The deceased Anil Govinda Rathod was the husband of applicant No.1 and father of applicant No.2 and applicant No.3 is the mother of the deceased. On 17/02/2010, at about 08.30, on Mop to Loni Road, the deceased was proceeding in a jeep bearing No. MH-17-Q-1385. The said jeep was driven by its driver in a rash and negligent manner without following the traffic rules and regulations and dashed against one unknown tractor. Due to the severe dash, the deceased sustained grievous injuries and succumbed to death on the spot. Regarding the said accident, the crime was registered at Risod Police Station vide crime No. 16/2010.

3. As per the contention of the applicants, at the time of the alleged accident, respondent No.1 was driving the jeep, and respondent No.2 was the owner of the jeep, which was validly insured with respondent No.3-The New India Assurance Company. As the said accident took place due to the rash and negligent driving of respondent No.1/the jeep driver, owned by respondent No.2 and validly insured with respondent No.3/Insurance Company. Therefore, all the respondents are jointly and severally liable to pay the compensation to the claimants.

4. The applicants further contended that at the time of accident, the deceased was aged about 26 years having good health, and was doing labour work and earning Rs. 3,300/- per month. Due to the accidental death, the applicants have lost their source of livelihood, and they have lost the love and affection which they are receiving from the deceased. For all of these grounds, the claimants have claimed the compensation.

5. In response to the notice, respondent Nos. 1 and 2 filed their written statement and denied all the contentions. As per the contentions of the non-applicant, the alleged

accident took place due to the rash and negligent Act of the tractor/driver, and therefore, they are not liable to pay compensation. The Insurance Company also filed a written statement vide Exhibit No.25 and raised the defence that the deceased was travelling in a vehicle which was not having a taxi permit and carrying the marriage party by accepting the fair in contravention of the terms and conditions of the Policy and therefore, the Insurance Company is not liable to pay compensation. Hence, the Insurance Company is liable to be exonerated from the liability.

6. To substantiate the contention, claimant No.1/ Laxmibai Anil Rathod, stepped into the witness box vide Exhibit No.29 and narrated about occurrence of the accident. Besides her oral evidence, she placed reliance on the police papers i.e. FIR, Spot Panchanama, and Inquest Panchanama which are at Exhibit No.30 to 31, P.M. Report Exh. 32, Insurance Policy Exhibit-33 and accident report of Exhibit No.34. On behalf of the respondents, no evidence is adduced either by the respondent Nos. 1 and 2 or by the Insurance Company.

7. After appreciating the evidence, the Tribunal has come to the conclusion that the Insurance Company failed to prove that there was a breach of terms and conditions of the Policy and awarded the compensation of Rs. 4,34,300/- along with the NFL amount together with the interest @ 7.5%. The

Tribunal further directed that the respondent Nos. 1 to 3 are jointly and severally liable to pay the amount of compensation.

8. Being aggrieved and dissatisfied with the judgment and award passed by the Tribunal, the present appeal is preferred by the Insurance Company on the ground that learned tribunal had not considered the defence of the breach of the conditions of the Policy, though the claimant has admitted during her evidence that, the vehicle was taken on hire. Therefore, the judgment and award passed by the tribunal is erroneous and liable to be set aside against the Insurance Company.

9. Heard learned counsel Mr. Thakre for the appellant/ Insurance Company. He reiterated the contention and invited my attention towards the cross-examination of the claimant/Laxmibai Anil Rathod, who during her cross-examination admitted that the vehicle was obtained on hire by one Mr Chate. He submitted that this admission itself is sufficient to prove that the owner of the vehicle had committed the breach of the terms and conditions of the Policy and therefore, the Insurance Company is not liable to pay compensation.

10. On the other hand, Ms Aashta Sharma, counsel holding for Mr P.R.Agrawal, learned counsel submitted that in fact, the Insurance Company has not adduced any evidence

to support the contention. Admittedly, PW-1 Laxmibai Anil Rathod, was not the witness to the incident, she was not travelling along with the deceased. Therefore, there is no reason for her to have a knowledge that whether the vehicle was obtained on hire or reward. Considering the illiterate background of the claimant, said admission is to be ignored. She further submitted that when the Insurance Company has come up with a specific defence that it is for the Insurance Company to prove the same, on the basis of admissible evidence.

11. She further submitted that while awarding the compensation, the Court has not considered the aspect of consortium which the claimant is entitled to receive. The Tribunal has also not awarded compensation towards the funeral expenses and loss of estate.

12. She further submitted that in view of the judgment of the Hon'ble Apex in the case of ***National Insurance Company Ltd. Vs Pranay Sethi and others***[1], Rs.15,000/- towards loss of estate which is not awarded to the claimants, therefore, though the claimant has not filed any cross-objections, if this Court comes to the conclusion that the claimants are entitled to receive the amount of compensation more than awarded by the tribunal, this Court can enhance the amount of compensation and she prayed for the enhancement of the compensation.

1 (2017) 16 SCC 680

13. Heard rival submissions of both the sides. Perused the evidence on record and following points arise for my consideration.

a) Whether the Tribunal has justified in awarding the compensation by holding the Insurance Company liable to pay the compensation ?

b) Whether the claimants are entitled for enhancement of the compensation?

14. It is not in dispute that, the deceased was travelling in a jeep bearing No.MH-17Q-1385. Regarding the said accident, the crime was registered at Risod Police Station against the Jeep Driver. The recitals of the FIR show that the jeep driver has driven his vehicle in a rash and negligent manner without observing the traffic rules and regulations. This FIR was lodged by Sudam Shankar Rathod, who was eye-witness of the said incident.

15. As per the recitals of FIR, it was jeep driver who was driving the vehicle in a rash and negligent minor. To prove the rash and negligence, the claimant has adduced the evidence of PW-1/Laxmibai Anil Rathod. Admittedly, she is not the eye-witness of the incident. During her cross-examination, Insurance Company had claimed that contributory negligence of the deceased, who was travelling in the jeep which was obtained on hire. In fact, the Insurance Company has not adduced any evidence to the extent that it

was the deceased, who was negligent and contributed to the said accident. In fact, the deceased was not a vehicle driver, and therefore, the concept of contributory negligence is not applicable against the deceased.

16. Ms Aashta Sharma, counsel holding for Mr P.R. Agrawal, learned counsel placed her reliance on ***United India Insurance Company vs Sunil Kumar reported in 2019(1) SCC 398*** wherein Hon'ble Apex Court has considered that the insurer cannot be allowed to raise defence of negligence, on the part of the victim in a claim proceeding under Section 163-A. The grant of compensation under Section 163-A on the basis of the structured formula which is in the nature of a final award and adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. The Hon'ble Apex Court in para Nos. 8 and 9 held that the legislative object behind the introduction of Section 163-A of the Act namely final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claim of compensation on the basis of no-fault liability was taking an unduly long time. In fact, to understand Section 163A of the Act to permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163A of the Act at par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative

intention. Thus, in view of the observations of the Hon'ble Apex Court in the judgment referred (supra). The Insurance Company is not at liberty to raise the defence of negligence in a claim petition filed under Section 163-A. In addition to that, though the Insurance Company has raised defence of contributory negligence, no evidence is adduced by the Insurance Company to support the contention.

17. The another ground raised by the Insurance Company is that the deceased was travelling in the vehicle as a passenger by obtaining the said vehicle on hire and reward. The specific terms and conditions under the Insurance Policy is that the owner of the vehicle is not permitted to hand over the vehicle on hire and reward. The Insurance Policy is at Exhibit No.33, the limitation to use was given in the policy i.e. the Policy covers of the vehicle for any purpose other than, Hire or Reward, Carriage of goods (other than samples or personal luggage), Organized racing, Pace Making, Speed Testing, Reliability Trials and Any purpose in connection with Motor Trade.

18. Learned counsel Mr Thakre vehemently submitted that in view of the specific term and conditions of the Policy, as the deceased was travelling in the vehicle by obtaining it on hire, Insurance Company is not liable to pay the compensation. To prove the said defence, he placed reliance on the cross-examination of the claimant, who admitted

during her cross-examination that the vehicle was obtained on hire. Admittedly, Shri Chate was not examined by the Insurance Company to prove the defence. In fact, the Insurance Company has neither examined the jeep driver or the jeep owner to prove the said contention. When the Insurance Company raised a specific defence and asserts that, there is a breach of policy then the burden is on the Insurance Company to prove the same. As regards the breach of policy conditions, it is well settled in the light of the law laid down by the Hon'ble Apex Court in the case ***Laxmichand vs Reliance General Insurance reported in 2016(5) Mh.L.J. (SC) 527*** that Insurance Company has to establish its defence with regard to breach of policy conditions not only it has to establish that there is a breach of policy but such breach was so fundamental that its puts an end to the contract.

19. Admittedly, in the present case, the Insurance Company has neither examined Shri Chate, who obtained the vehicle on the hire nor examined owner or driver of the vehicle to prove the said contention. In fact, the Insurance Company has not adduced any evidence in support of the defence. The Insurance Company has placed reliance on the admission given by the claimant. Admittedly, the claimant was not travelling along with the deceased. The cross-examination nowhere shows that she received the said information from any of the persons travelling in the vehicle. The said admission obtained during the cross-examination,

will not help the Insurance Company to deny its liability to pay the compensation. Thus the ground raised by the Insurance Company in the appeal that, the trial Court had not considered the defence of the Insurance Company is not sustainable. In absence of any evidence on record, the learned trial Court has observed that it is the Insurance Company who has raised the defence of breach of terms and conditions of the Policy, however, the Insurance Company has not adduced any evidence in support of the same.

20. It is observed by the learned trial Court that it is difficult to consider that there can be any breach of fundamental terms of the policy of the insurance, in absence of the evidence as no cogent evidence is adduced by the Insurance Company. The observation made by the learned Trial Court appears to be on the basis of the material which was placed before it and it cannot be faulted with. Thus, both the grounds raised by the Insurance Company are not sustainable in absence of any evidence on record.

21. So far as the contention of the claimant, as regards to enhancement of the compensation is concerned, the learned trial Court has considered the evidence on record and awarded the compensation to the claimant at the rate of Rs.4,34,000/- along with the interest. On perusal of the judgment of the learned trial Court, on the quantum of compensation, trial Court has considered the notional income

of the deceased and considered the income as to Rs. 36,000/- per annum and by applying the multiplier, compensation was awarded. However, the trial Court had ignored that the claimants are entitled to receive the amount of compensation towards loss of estate, and the consortium. The amount of compensation under the head of funeral expenses is also awarded less. Learned counsel Aashta Sharma submitted that the claimants are entitled to receive the amount of compensation under the above such heads.

22. To support her contention, she placed reliance in the case of ***Magma General Insurance Co. Ltd vs Nanu Ram Alias Chuhru Ram reported in 2019(3)SCC 153***, wherein the Hon'ble Apex Court has dealt with the issue regarding the compensation under the head of consortium. The Hon'ble Apex Court referred the judgment of the constitutional bench in the case of **National Insurance Company Ltd., vs Pranay Sethi and others reported in (2017) 16 SCC 680** which dealt with the various heads under which compensation is to be awarded in a death case. One of those heads is loss of consortium. It is observed by the Hon'ble Apex Court that in legal parlance, "consortium" is a compendious term which encompasses, 'spousal consortium', 'parental consortium', and 'filial consortium'. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include a sexual relationship with the

deceased spouse. The spousal consortium is generally defined as a right pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of the company, society, co-operation, affection, and aid of the other in every conjugal relation. The parental consortium is granted to the child upon the premature death of a parent, for loss of parental aid, protection, affection, society, discipline, guidance and training. Whereas, the filial consortium is the right of the parents to compensation in the case of accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship, and their role in the family unit.

23. Here also, applicant No.1- Laxmibai Anil Rathod has lost her husband at the age of 20 years, whereas applicant No.2- Uday Anil Rathod, who is the son has lost his father when he was six months old, and applicant No.3- Ramkorbai Govind Rathod has lost her son at the age of 42 years. At the time of the accident, the deceased was aged about 26 years, so applicant No.1 has to lead her whole life without the company of her husband. Whereas applicant No.2 has lost his father at a very early age before he comes to know about the love and affection of the father, and applicant No.3- Ramkorbai wd/o Govind Rathod has lost her son at the

age of 42 years. She has to lead her entire life without love and affection of her son. Therefore, in view of the observation of the Hon'ble Apex Court, the applicant Nos. 1 to 3 are liable to be receive the amount of consortium under the head of 'spousal consortium', 'parental consortium' and 'filial consortium'. The amount of consortium is already fixed by the Hon'ble Apex Court in the judgment of **National Insurance Company Ltd., vs Pranay Sethi and others cited (supra)**, wherein the Hon'ble Apex Court has fixed an amount of Rs. 40,000/- as a consortium. So claimant Nos.1 to 3 are entitled to receive Rs. 40,000/- each towards the consortium.

24. It is well settled that just compensation is to be awarded while considering the petition under beneficial legislation. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness, and equitability on acceptable legal standard. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the fairness, reasonableness and non-violation of the principle of equitability. In the case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. The learned trial Court

had considered all these aspects and awarded the compensation. However, in view of the judgment of the Hon'ble Apex Court in ***National Insurance Company Ltd. Vs Pranay Sethi and others cited (supra)*** claimants are entitled to receive Rs. 15,000/- towards funeral expenses. However, the trial Court has awarded only Rs.2000/-. So, claimants are entitled to receive an additional Rs.13,000/- towards compensation under the head of funeral expenses. The claimants are also entitled to receive Rs.15,000/- each under the loss of estates. Thus, the claimants are entitled to receive an additional amount of Rs. 1,78,000/- (Rs. 1,20,000/- consortium + Rs. 45,000/- loss of estate and Rs. 13,000/- Funeral expenses) along with interest @ 7% per annum.

25. In view of the above discussion, the appeal filed by the Insurance Company is devoid of merits and liable to be dismissed. Hence, I pass the following order:

a) Appeal is **dismissed** with no order as to costs.

b) The Insurance Company is directed to pay an additional enhanced amount of compensation of Rs. 1,78,000/- along with interest @ 7% from the date of application till the realization of the amount.

c) The Insurance Company shall deposit the amount of compensation within four weeks from the date of receipt of the judgment.

d) The claimants shall deposit the deficit Court fee on enhanced compensation amount.

e) The claimants are at liberty to withdraw the amount along with accrued interest on due identification and verification.

JUDGE

rkn