

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

FIRST APPEAL NO.1421 OF 2008

The New India Assurance Company Ltd.,
through its Divisional Manager,
Datta Chowk, Yavatmal
Tah. & District Yavatmal

...APPELLANT

VERSUS

1. Smt. Sonabai Laxman Tekam,
Aged about 60 yrs., Occ. Nil,
2. Ganesh Ramdas Tekam,
Aged about 19 yrs., Occ. Nil,
Both R/o Jawala,
Tah. Arni, District Yavatmal
3. Smt. Ankita w/o Vinod Vyavahare,
R/o. Jawala, Tah. Arni,
District Yavatmal

(Owner of Tractor bearing
No.MH-29-C/3459 and Trolley
bearing No.MH-29-C/6769)

...RESPONDENTS

Shri Akhilesh Potnis, Advocate h/f Shri M.M. Sudame, Advocate
for the appellant.
Ms Trishala Dhait, Advocate h/f Shri Abhay Sambre, Advocate for
respondent No.3.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : JANUARY 02, 2023.
PRONOUNCED ON : JANUARY 07, 2023.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard finally with the consent of learned Counsel for the parties.

2. By this appeal, the appellant - New India Assurance Company Ltd. has challenged the judgment passed in W.C.A. Case No.27/2005 by which the Workmen's Compensation Commissioner, Yavatmal awarded compensation of Rs.3,87,504/- along with interest @ 9% per annum.

3. Brief facts in the nutshell are as under:

A] Respondent No.1 is the grandmother and respondent No.2 is the younger brother of deceased Gajanan Ramdas Tekam. Deceased Gajanan was working with respondent No.3 on his tractor as a labour. Respondent No.3 – Ankita Vyavahare is the owner of the tractor bearing No.MH-29-C-3459 and Trolly No.MH-29-C-6769. On 29/09/2005, when the deceased was returning home in the evening by traveling in a tractor as a labour, the tractor was driven by its driver in a rash and negligent manner. Due to the negligent driving of the tractor driver deceased was fallen on the road due to jerk and sustained injuries and died on the spot. As per the contention of the original claimant that the deceased was 26 years old and earning Rs.120/- per day. The accident occurred

when the deceased was working with respondent No.3 during the course of employment. The tractor was validly insured with New India Assurance Company Ltd. As the accident took place due to rash and negligent driving of tractor driver owned by respondent No.3 and validly insured with the New India Assurance Company Ltd. therefore, the New India Assurance Company Ltd. as well as respondent No.3 owner of the vehicle are liable to pay compensation.

4. The claim of the claimant is contested by respondent No.3 - owner by filing written statement on record. Respondent No.3 – owner denied the contention of the claimant however, admitted that the deceased was working with her as a labour and he was present on the work on the date of accident.

5. Insurance Company has also contested the claim and denied the contention of the original claimants. Insurance Company had challenged the contention of the original claimants that they are dependents of deceased.

6. In support of the contentions, original claimants adduced the evidence by examining PW-1 Ganesh Ramdas Tekam i.e. the claimant No.2 vide Exhibit 25, PW-2 – Ganesh Namdeorao Salam vide Exhibit 37.

To prove the income of the deceased whereas respondent No.3 – Smt. Ankita Vinod Vyawahare examined herself vide Exhibit 40.

7. After recording the evidence and after appreciating the facts and evidence on record the Workmen's Compensation Commissioner had granted compensation to the original claimants Rs.3,87,504/- along with interest @ 9% per annum.

8. Being aggrieved and dissatisfied with the award passed by the Workmen's Compensation Commissioner present appeal is preferred by the Insurance Company. The appeal is admitted. At the time of admission no substantial question of law was formulated. It is now formulated as under :

(i) Whether the original claimants are dependents of deceased Gajanan Tekam who died in an accident which was caused during the course of employment?

9. Heard Shri Akhilesh Potnis, learned Counsel holding for Shri M.M. Sudame, learned Counsel for the appellant. He submitted that the Workmen's Compensation Commissioner had not considered the fact that there was breach of policy, therefore, Insurance Company is not liable to pay compensation. Therefore, the order passed by the

Workmen's Compensation Commissioner is erroneous. He further raised the ground that income of the deceased was not proved by the claimants. On that count also the claim of the claimants deserves to be dismissed.

10. On the other hand, Ms Trishala Dhait, learned Counsel holding for Shri Abhay Sambre, learned Counsel for respondent No.3 submitted that so far as the contention of the appellant regarding breach of policy is concerned, Insurance Company has not pleaded in written statement that the owner of the tractor had committed breach of the terms and conditions of the Insurance policy, and therefore, Insurance Company is not liable to pay the compensation. As the said plea is not raised in written statement and in absence of pleading said issue cannot be raised before this Court first time in absence of pleading. She submitted that there is no merit in the appeal and appeal deserves to be dismissed.

11. Heard rival submissions of the parties and perused and record.

12. As far as the contention of the Insurance Company regarding the ground mentioned in the appeal is concerned, the appellant raised

the ground that the owner of the tractor had committed breach of policy as tractor driver was not holding valid driving licence and owner had also allowed the deceased to travel in the tractor which is against the terms and conditions of the policy. Admittedly, Insurance Company has not pleaded in the written statement that there was breach of policy, therefore, the defence of breach of policy is not available to the Insurance Company in this appeal.

13. So far as the grounds raised by the Insurance Company is concerned that the original claimants are not the dependents of the deceased, and therefore, they are not entitled for grant of compensation. The original claimants have filed an application for grant of compensation of the deceased Gajanan who was the only earning member of the family. Claimant No.1 Smt. Sonabai Laxman Tekam is the grandmother and claimant No.2 Ganesh Ramdas Tekam is the younger brother of the deceased Gajanan. As per the contention of the original claimants, at the time of accident deceased was only 26 years old and was only earning member of the family. Original claimant No.2 is the younger brother who was depending upon the income of the deceased. Claimant No.1 Sonabai Tekam is the grandmother of the deceased Gajanan and she was also dependent on the income of the deceased. To prove the said contention, claimant No.2 entered into the

witness box and deposed that at the time of accident they both were dependents on the income of the deceased as the deceased was only earning member of the family. He was cross-examined at length. He admitted that he has not filed documents on record to show that he and claimant No.1 are the dependents on the income of the deceased. It further came in the cross-examination that claimant No.2 was 19 years old at the time of accident. His parents are not alive and he as well as deceased was brought up by claimant No.1 their grandmother. It further elicited in the cross-examination that the deceased was only earning member in the family and was maintaining them. He denied the contention that during lifetime of deceased he was also working and earning. Thus, the evidence on record shows that claimant No.1 is the grandmother of the deceased whereas claimant No.2 is the younger brother who was hardly 19 years of age. There is no evidence on record to show that claimants i.e. grandmother and the younger brother were having earning source when the deceased met with an accident. Section 2(1)(d) of the Workmen's Compensation Act, 1923 defines the dependents which read as follows :

"Section 2(1)(d)-"Dependent"-

(d) "dependent" means any of the following relatives of a deceased workman, namely:-

(i) a widow, a minor (legitimate or adopted) son, an unmarried (legitimate or adopted) daughter, or a widowed mother; and

(ii) if wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;

(iii) if wholly or in part dependent on the earnings of the workman at the time of his death,-

(a) a widower,

(b) a parent other than a widowed mother,

(c) a minor illegitimate son, an unmarried illegitimate daughter, or a daughter (legitimate or illegitimate or adopted) if married and a minor or if widowed and a minor,

(d) a minor brother or an unmarried sister or a widowed sister if a minor,

(e) a widowed daughter-in-law,

(f) a minor child of a pre-deceased son,

(g) a minor child of a pre-deceased daughter where no parent of the child is alive, or

(h) a paternal grandparent if no parent of the workman is alive.

Explanation for the purposes of sub-clause (ii) and items

(f) and (g) of sub-clause (iii), references to a son, daughter or child include an adopted son, daughter of child respectively.”

The above Section specifies, who are the dependents of the workman. The object of the Act is to make provision for the payment of compensation to the dependents who are surviving in case of death of workman and anybody else. The first and foremost question is that whether the respondents are the dependents of the deceased. It is

specifically came on record through the evidence that respondent No.1 is the grandmother and respondent No.2 is the younger brother. Respondent No.2 denied during cross-examination that he is earning independently. The evidence on record shows that the respondent were dependent on the income of the deceased at the time of accident. The compensation under the Motor Vehicle Act, 1988 as well as under the provisions of Workmen's Compensation Act, 1923 which are beneficial legislation and the object of the act is to make the provision for the payment of compensation to the dependents who died in the accident. Only difference between the two legislation is that under Section 2(1) (d) of the Workmen's Compensation Act, 1923 speaks about dependency whereas Section 166 of the Motor Vehicle Act, 1988 speaks about the right of the legal representatives to succeed to the estate of the deceased. The word "dependent" as defined under Section 2(d) of the Workmen's Compensation Act is to be considered by looking to the facts of the case that at the relevant time whether dependents were dependent on the income of the deceased.

14. In the present case, respondent No.1 is the grandmother and respondent No.2 is the younger brother. It is not disputed that the deceased was unmarried and was staying with both the respondents. He was spending his income for the family expenses by residing along with

both the respondents. There is no evidence on record that respondent No.2 who is the younger brother and was hardly 19 years of age was earning at the time of alleged incident. Respondent No.1 is an old lady and admittedly was dependent on the income of the deceased employee.

15. In this view of the matter, the substantial question is answered in favour of the respondents. Consequently, the award passed by the Workmen's Compensation Commissioner is upheld.

16. It is not in dispute that the accident of the deceased occurred arising out of and in the course of employment in view of Section 3 of the Workmen's Compensation Act, 1923. The appellant as well as respondent No.3 had not challenged that the accident has caused during the course of employment.

17. The facts and circumstances of the present case shows that the original claimants are the dependents of the deceased Gajanan. The Commissioner of Workmen's Compensation tested all material questions properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the workman. Cause of the factual findings are found to be neither perverse nor arbitrary or based on no evidence or against any provision of law. The Workmen's

Compensation Commissioner rightly calculated the amount of compensation on the basis of evidence adduced by the claimant by considering the income of the deceased. The Commissioner has accordingly directed the Insurance Company to pay the amount. Thus, appeal has no merits and liable to be dismissed. Hence, I proceed to pass the following order :

- (i) First Appeal stands dismissed.

(URMILA JOSHI-PHALKE, J.)

**Divya*