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

## FIRST APPEAL NO. 103 OF 2019

1. Sunita Balaji Tiwari
Age: 35 years, Occu. Household,
R/o. Sumthana, Taluka- Shirur (A)
District- Latur.

2. Saraswati Balaji Tiwari
Age: 17 years, Occu. Education,

3. Hanmant Balaji Tiwari
Age: 15 years, Occu. Education,

4. Kalpana Balaji Tiwari
Age: 12 years, Occu. Education,

5. Pooja Balaji Tiwari
Age: 7 years, Occu. Education,
Appellant Nos. 2 to 5- minors
Through their natural guardian mother-
Appellant No. 1 Sunita Balaji Tiwari
Age: 35 years, Occu. Household,
R/o. Sumthana, Taluka- Shirur (A)
District- Latur. ....APPELLANTS
[Orig. Claimants]

VERSUS

1. M/s Protrans Supply Chain Management
Pvt. Ltd.
3-D, Moreshwar Complex,
Sai Hills, Bhigwan Road,
Baramati, Dist. Pune.

2. The Branch Manager,
United India Insurance Co. Ltd.
Ambejogai Road, Near Shantai Hotel,
Latur, Dist. Latur. ...RESPONDENTS
[Orig. Opponents]

Mr. Girish Rane, Advocate for appellants
Mr. S.S. Gangakhedkar, Advocate for respondent No. 1
Mr. V.R. Mundada, Advocate for respondent No. 2

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**CORAM : NITIN B. SURYAWANSHI, J.**

**RESERVED ON : 30th SEPTEMBER , 2024**
**PRONOUNCED ON : 14th DECEMBER, 2024**

**JUDGMENT :**

1. This appeal filed under Section 30 of the Employee's Compensation Act, 1923 challenges the award passed by learned Commissioner for Employee's Compensation Act & Judge, Labour Court, Lautr in Application (WCA) No. 117 of 2014.

2. Appellants/claimants filed claim petition contending that husband of appellant No. 1 namely Balaji Tiwari was driving truck No. MH-42-T-0449 from Baramati to Gujarat on 02.09.2014, he met with an accident and expired. Deceased was in service of respondent No. 1 and was getting salary of Rs. 8,000/- per month. Appellants, therefore, claimed compensation of Rs. 8,25,400/-.

3. Respondent No. 1/Owner filed written statement and denied relationship with deceased Balaji Tiwari contending that, Laxman Hunje was appointed as driver of the truck involved in the accident, deceased was his friend and was travelling with

Laxman Hunje as a gratuitous passenger, hence, the claimants are not entitled for any compensation and the claim is liable to be dismissed.

4. Respondent No. 2/insurer opposed the claim by filing written statement contending that it has no knowledge of relationship between deceased and respondent No. 1. Insurance cover of truck is denied. It is further contended that driver of the truck was not holding valid and effective driving licence hence, insurer is not liable to pay the compensation.

After recording evidence, learned Commissioner has dismissed the claim application. Hence, the present appeal.

5. Heard learned advocate for appellants, learned advocate for respondent No. 1 and learned advocate for respondent No. 2.

6. Learned advocate for appellants assailed the impugned award contending that learned Commissioner has failed to appreciate evidence on record in the proper perspective. There is evidence on record that first respondent paid an amount of Rs. 4,13,000/- to the claimants, which amount is equal to the amount of penalty, this is sufficient to prove the master and servant relationship. In absence of offence registered against

deceased it cannot be held that deceased was not holding valid driving license. It is submitted that learned Commissioner erred in giving undue importance to the pleadings and admissions given by claimants in cross examination and wrongly shifted burden on the claimants. He, therefore, submits that impugned award is liable to be quashed and set aside and claim filed by appellants deserves to be allowed. In support of his submissions he relied on ***New India Assurance Co. Ltd. vs. Mangala and Ors***., 2010 ACJ 2041, ***Nirmala Kothari v. United India Insurance Co. Ltd***. AIR 2020 SC 1193, ***Rajendra Raghunath Girme vs. Pramilal Dattu Surse and others***, 0002(1) Mh.L.J. 179 and ***Gurmail Singh vs. Bajaj Allianz General Insurance Co. Ltd. and Ors***., 2019 ACJ 713.

7. Learned advocate for the first respondent/owner strenuously opposed the appeal. He submits that in the written statement master and servant relationship is specifically denied and it is contended that deceased was friend of duly appointed driver of the truck and at the time of accident he was travelling in the truck as a gratuitous passenger. He, therefore, supported the impugned award and prayed for dismissal of appeal.

8. Learned advocate for the second respondent/insurer

submits that insurer is not liable to pay the compensation in the present case as owner has failed to examine Laxman Hunje, driver of the truck. Driving license of deceased was not placed on record. Relationship of deceased and first respondent is not proved. According to him, citations relied upon by learned advocate for appellants are under Consumer Protection Act, and hence they are not applicable to the present appeal. He, therefore, by supporting impugned award prayed for dismissal of appeal.

9. Heard learned advocate for appellants, learned advocate for respondent No. 1 and learned advocate for respondent No. 2 at length. Perused the record.

10. In support of claim, appellant No. 1 has examined herself and brought on record FIR (Exhibit-CU-1), spot panchnama (Exhibit- CU-2), inquest panchnama (Exhibit-CU-3), post mortem report (Exhibit-CU-5), notice of claimants (Exhibit-CU-6), postal receipts of notice (Exhibit-CU-7), insurance policy (Exhibit-CU-8), school leaving certificate of deceased (Exhibit-CU-10), RC book of truck (Exhibit-CU-9), Fitness certificate (Exhibit-CU-10) and national permit of the truck (Exhibit-CU-11).

11. FIR and other documents show that at the time of accident deceased was driving truck No. MH-42-T-0449 which gave dash to truck No. MH-04-EY-6547 at Rajpipala-Netrangala highway. Driver of truck No. MH-04-EY-6547 has lodged the FIR on 02/09/2014, which is registered at Rajpipala Police Station at C.R. No. 47/2014, under Section 279, 337 of Indian Penal Code and under Section 177 and 184 of Motor Vehicles Act, against the driver of the truck i.e. deceased. In the inquest panchnama, which is signed by Laxman Hunje as one of the panch it is mentioned that, deceased was taking truck No. MH-42-T-0449 to Delhi. After the post mortem dead body was accepted by Laxman Hunje from Raopura Police Station. After the accident AD No. 15/2014 was registered under section 174 of Cr.P.C. with Raopura Police Station on 05.09.2014. Spot panchnama indicates that driver side of truck No. MH-42-T-0449 was totally damaged in the accident. In the post mortem report also it is mentioned that "*Alleged H/o road traffic accident when he went from Maharashtra to Delhi, accident took place on 02/09/2014 at 13.00 hrs on Rajpipala ring road between two trucks. They brought to SSGH where he declared dead on 05/06/2014 at 11.00 Am*."

Before filing of the claim, claimants have issued notice to respondents seeking compensation on account of death of Balaji Tiwari. Said notice is served on the respondents. Postal delivery reports are also placed on record. Aforesaid circumstances and documents are sufficient to indicate that at the time of accident deceased Balaji Tiwari was driving truck No. MH-42-T-0449 and he suffered injuries in the accident and succumbed to those injuries. Therefore, there is sufficient material on record to show that deceased was driving the truck at the time of accident, as employee of the first respondent.

12. The burden to prove that Laxman Hunje was the driver on the truck and at the time of accident deceased was traveling in the said truck as gratuitous passenger was on the first respondent. To prove these facts, Laxman Hunje ought to have been examined, however, for the reasons best known, he is not examined. No evidence is led by 1$^{st}$ respondent to prove the said fact. Therefore, the first respondent has failed to discharge the burden.

13. Appellants have claimed that deceased was getting salary of Rs. 8,000/- per month from the first respondent. Appellants were not in a position to bring on record any documentary evidence in this regard. The first respondent could

have examined Laxman Hunje, who according to it was appointed as driver on the said truck at the time of accident, however, he is not examined.

14. In view of notification published by Ministry of Labour and Employment under section 4(1B) of the Employee's Compensation Act, 1923, in Gazette of India on 31.05.2010, the Central Government has specified minimum monthly wages of unskilled workers at Rs.8,000/- p.m. Therefore, in the facts of the present case, income of deceased can be assessed at Rs. 8,000/- per month.

15. The insurance company has claimed that driving licence of the deceased is not proved on record and therefore it is not liable to pay the compensation. In reply to this argument, learned advocate for appellants has relied on Nirmala Kothari (supra), wherein it is held;

> *"9. While the insurer can certainly take the defence that the licence of the driver of the car at the time of accident was invalid/fake however the onus of proving that the insured did not take adequate care and caution to verify the genuineness of the licence or was guilty of willful breach of the conditions of the insurance policy or the contract of insurance lies on the insurer.*

*10. The view taken by the National Commission that the law as settled in the Pepsu case (AIR 2014 SC 305) (supra) is not applicable in the present matter as it related to third-party claim is erroneous. It has been categorically held in the case of National Insurance Co. Ltd. v. Swaran Singh and Ors. (SCC pp. 341, para 110) (at p. 1557, para 105 of AIR) that,*

> *"110.(iii)….Mere absence, fake or invalid driving licence of 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 a duly licenced driver or one who was not disqualified to drive at the relevant time."*

16. In Rajendra Girme (supra), in similar facts, this Court has held;

> *"13. In my view, the Tribunal has committed an illegality in exonerating the Insurance Company. The Insurance Company was under obligation to prove with a positive evidence, that the driver of the tractor did not hold valid driving licence on the date of accident. The Insurance Company could have summoned any responsible officer from the office of R.T.O. in order to show that the driver of the tractor did not hold valid driving licence on the date of accident. Instead of bringing positive evidence on record, the Insurance Company tried to discharge its legal burden cast on it by calling upon the driver to*

*produce the driving licence. In my view, presentation of an application calling upon the driver to produce driving licence does not at all absolve the Insurance Company from its burden. This burden cannot be said to have been discharged by mere calling upon the driver to produce driving licence. In this behalf, reference with profit can be made to the case of Narchinva v. Kamat v. Alfredo Anotonio Doe Martins, AIR 1985 SC 1281. In this case, similar kind of issue was before the Supreme Court. In the said case, driver of the vehicle was examined. In the cross examination, he was called upon to produce the driving licence. The driver did not produce driving licence. Therefore, it was urged that adverse inference be drawn against the driver on account of his failure to produce the driving licence. The Supreme Court held that the burden to prove that there was breach of contract of insurance, was squarely placed on the shoulders of the Insurance Company and that the burden could not be said to have been discharged by mere questioning in the cross examination. The Supreme Court has further observed that the driver was under no obligation to furnish evidence so as to enable the Insurance Company to wriggle out its liability under the contract of insurance.*

In the light of above observations contention of insurer that deceased had no valid driving licence and therefore insurer is not liable to pay compensation cannot be accepted.

17. While passing the impugned award, learned Commissioner has failed to appreciate the material on record in the proper perspective and has given undue weightage to the

fact that in claim application claimants have not stated that first respondent has paid any amount after the death of Balaji Tiwari. The admission in respect of compensation is held to be beyond pleading. Learned Commissioner has ignored the settled legal position that, Tribunal is not bound by strict rules of pleadings and evidence. The reasons assigned by the learned Commissioner while dismissing the claim are unacceptable. The impugned award cannot be sustained in law and facts of the present case.

18. In the result, following order.

## ORDER

(I) First appeal is allowed.

(II) Impugned award passed by learned Commissioner for Employee's Compensation Act & Judge, Labour Court, Latur in Application (WCA) No. 117 of 2014 is hereby quashed and set aside.

(III) Claim Application bearing Application (WCA) No. 117 of 2014 is allowed in terms of prayer clause (1), which reads thus;

> *"1) That the compensation application may kindly be allowed in favour of applicants and applicants be awarded Rs. 8,25,400/- from respondent Nos. 1 and 2 jointly and severely with 12% interest from the date of accident till the realization of all the amount."*

**[NITIN B. SURYAWANSHI, J.]**

*Bhagyawant Punde*