IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1612 OF 2017
WITH CIVIL APPLICATION NO. 15341 OF 2013

1. Sainath s/o Shankar Bhagyavant
2. Sachin s/o Sainath Bhagyavant … APPELLANTS
(Ori. Opp. No.2 and 3)

VERSUS

1. Chandabai w/o Machindra Sable
2. Ashvini d/o Machindra Sable
3. Kamini Machindra Sable
4. Shivani Machindra Sable
5. Preeti Machindra Sable
6. Radha Machindra Sable
7. Sonabai w/o Kashinath Sable
8. Bajaj Allianz General Insurance Co.Ltd.
Through its Branch Manager … RESPONDENTS
(Res. Nos. 1 to 7 Ori. Claimants
& Res.No.8 ori. Opponent No.1.

Mr. P. S. Pawar, Advocate for the appellants
Mr. P. C. Mayure, Advocate for respondent Nos. 1 to 7
Mr. M. R. Deshmukh, Advocate fo respondent No. 8

WITH
FIRST APPEAL NO. 2666 OF 2019

1. Chandabai w/o Machindra Sable
2. Ashvini d/o Machindra Sable
3. Kamini d/o Machindra Sable
4. Shivani d/o Machindra Sable
5. Preeti d/o Machindra Sable
6. Radha d/o Machindra Sable
7. Sonabai w/o Kashinath Sable … APPELLANTS
(Ori. Claimants)

VERSUS

1. Bajaj Allianz General Insurance Company Ltd.

Through its Branch Manager
2. Sainath s/o Shankar Bhagyavant
3. Sachin s/o Sainath Bhagyavant ... RESPONDENTS
(Ori. respondents)

Mr. P. C. Mayure, Advocate for the appellants
Mr. M. R. Deshmukh, Advocate fo respondent No. 1
Mr. P. S. Pawar, Advocate for the respondent Nos. 2 and 3

CORAM : R. M. JOSHI, J.
RESERVED ON : 14th FEBRUARY, 2024
PRONOUNCED on : 27th FEBRUARY, 2024

P.C. :-

1. First Appeal No. 1612 of 2017 is filed by original opponent Nos.2 and 3 i.e. owner and driver of offending vehicle taking exception to the judgment and award passed in M.A.C.P. No. 271 of 2010 exonerating original respondent No. 1-Insurer from liability of payment of compensation. Whereas the claimants have sought enhancement of compensation in First Appeal No. 2666 of 2019.

2. Parties are referred to by their nomenclature in original proceeding for the sake of convenience.

3. It is the case of the claimants that on 04/02/2010 at about 9.15 a.m. deceased Machindra Sable was proceeding on motorcycle bearing No. MH-23-G-6848 by Aurangabad-Ahmednagar road. Near Bhendala fata a tractor bearing No. MH-20-AY-4894 driven by respondent No.3

came from opposite direction in high speed. Due to negligence driving, tractor gave dash to the motorcycle of the deceased as a result of which he fell down and sustained serious injuries. He was hospitalized and succumbed to the injuries on 05/10/2010 and an offence came to be registered against the driver of the tractor at Gangapur Police Station being Crime No. 20 of 2010. Claimants averred dependency on the deceased who was earning Rs.7500/- per month and sought compensation of Rs.10,00,000/-.

4. Respondent No.1/Insurer by filing written statement opposed the claim. No dispute is made about the fact that the tractor is owned by respondent No.2 and insured the Insurer during the relevant time. It is however case of this Insurer that at the time of accident respondent No.3 was not holding valid and kept to driving license for driving tractor attached with trailer. Thus, Insurer claims commission of breach of terms of conditions of insurance policy on this ground also on the ground of attaching unregistered trailer to the tractor and tractor being used for commercial purpose. On these grounds the Insurer has been denied liability of payment of compensation to the claimants. Respondent Nos. 2 and 3 i.e. owner and driver of tractor failed to file written statement.

5. On behalf of the claimants Chandabai Sable (PW-1) (Exhibit 24) was examined and reliance is placed on documents filed at Exhibits 25 to

28. The Insurer examined Shamayya Allaya Parkelu at Exhibit 35, a clerk from RTO office and also led evidence of Dhanesh Kulkarni at Exhibit 40. Insurer also placed reliance on the copy of driving license of respondent No.3 filed at Exhibit 36.

6. None of the claimants have witnessed the accident in question. As such the proof of the accident is sought to be established on the basis of the police papers filed on record. The copy of First Information Report (Exhibit 25) shows that at the time of accident the tractor was being driven by respondent No.3 in rash and negligent manner and deceased Machindra Sable sustained serious injuries in the said accident which has ultimately resulted into his death. Evidence further indicates that offence came to be registered against driver of the tractor over rash and negligent driving and being responsible for the death of deceased. Claimants therefore have successfully discharged initial burden to prove the factum of accident as well as negligence on the part of the driver of the tractor in causing the same. Onus therefore shifted on owner, driver and Insurer to prove otherwise, which they failed to discharge.

7. Claimants relied upon post mortem report to prove age of the deceased to be 35 years. Admittedly, no evidence is produced on record in order to show the income of the deceased. The learned Tribunal has held notional income of the deceased at Rs.3,000/- per month.

Considering the number of dependents on the deceased 1/3 amount was deducted towards personal expenses of the deceased and by applying appropriate multiplier of 16 the entitlement of the claimants for compensation was decided at Rs.3,84,000/-. Compensation was also granted on other heads. As rightly pointed out by learned counsel for claimants, no future prospects as per judgment of Hon'ble Apex Court in case of ***National Insurance Company Limited Versus Pranay Sethi and Others, (2017) 16 SCC 680*** . Having regard to the age of the deceased he is entitled for 40% additional amount towards the future prospects. The impugned judgment and award therefore deserves modification by granting enhancement to that extent. Apart from this the compensation under the other heads such as consortium, funeral expenses and loss of estate also needs to be modified as per the dictum of ***Pranay Sethi*** (supra).

8. Now coming to the challenge raised by the owner and driver of the offending vehicle to the judgment and award to extent of exoneration of Insurer for payment of compensation to the claimants, for want of valid and effective license for driving tractor with trolley i.e. transport vehicle, breach of conditions of policy is held to deny liability of Insurer. This is not the case that where the driver of tractor did not have license but he had license to drive light motor vehicle. Hon'ble Apex Court in case of

Mukund Dewangan V/S Oriental Insurance Company Limited, (2017) 14 SCC 663 has held that the tractor attached with a trolley unless weighs more than 7500 KG it does not become a transport vehicle. Considering the said position of law and as there is absolutely no evidence on record to indicate that unladen weight of the tractor and trolley exceeded this limit, it has to be held that the driver of the tractor was having valid and effective license and that there is no breach of terms of insurance contract.

9. Learned counsel for Insurer sought to argue that since the trolley was plied on the road without its registration with RTO and that tractor was used for commercial purpose, this amounts to breach of condition of the policy and which amounts to fundamental breach as contemplated by Section 149(2) of the Motor Vehicle Act. In this regard, evidence brought on record by the Insurer needs to be considered. Insurer examined him, Shamayya Allaya Parkelu, (DW 1) (Exhibit 35) who led evidence only to the extent of license. He does not say anything about trolley being registered or not. Second witness Dhanesh Kulkarni, (DW 2) (Exhibit 40) in his cross examination has recorded candid admission that there is no evidence to show that tractor was used for commercial purpose.

10. Even if this Court accepts the contention of Insurer that trailer carried bricks at relevant time, question arises as to whether this fact by

itself would be sufficient to prove that the vehicle has been used for commercial purpose. There is nothing indicated in the insurance policy as to what can not be carried in the trailer attached to the tractor. Thus, there cannot be prohibition to carry any article, unless otherwise not permitted by any law for time being in force, in the trailer in question. In such circumstances, carrying of bricks would not become breach of terms of policy, unless it is proved that it was carried for “commercial purpose”. Policy only prohibits commercial use of the vehicle. The dictionary meaning of term “commercial” is an actively engaged in or concerned with commerce, making or intending to make profit. In order to prove it being commercial purpose, these essential constituting commercial activities must be established. Scrutiny of entire evidence on record demonstrates no such proof. Witness No.2, Kulkarni, of Insurer admits in cross examination that no evidence is produced to show that respondent No.2 has given the said tractor on rent basis to another person. Thus, there is no evidence to hold that there is any breach of conditions of policy as claimed by Insurer. The order of Tribunal exonerating the Insurer therefore cannot sustain.

11. This Court therefore finds substance in the challenge to the impugned judgment and award to the extent of exoneration of the Insurer from the liability of payment of compensation on both counts. Insurer is hereby held liable for payment of compensation jointly and

severally with respondent Nos. 2 and 3. Hence, the order.

ORDER

(i) Both Appeals are stand allowed, in following terms.

(ii) The impugned judgment and award stands modified as under:

Sr. No.	Heads	Rs.
1.	Rs.24000/- + 40% = Rs. 33,600/- (annual income) (future prospects) Rs.33,600/- x 16 multiplier	5,37,600/-
2.	Loss of consortium Rs.40,000/- each claimants	2,80,000/-
3.	Loss of estate	15,000/-
4.	Funeral Expenses	15,000/-
	Total compensation	**8,47,600/-**

(iii) Insurer and respondent Nos. 2 and 3 are jointly and severally held liable for payment of compensation to the claimants.

(iv) Rest of the judgment and award to remain unchanged.

(v) Claimants to pay Court fees on enhanced compensation as per rules.

(vi) The difference of compensation be deposited within a period of six weeks.

(vii) Amount deposited (along with accrued interest) by respondents is permitted to be withdrawn by claimants.

(viii) No order as to costs.

. Pending civil application stands disposed of.

(R. M. JOSHI, J.)

ssp