2024:BHC-NAG:12518

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

FIRST APPEAL NO. 407 OF 2009

The Oriental Insurance Company,
Through it's Divisional Manager,
Old Cotton Market, Tilak road, Akola,
Represented by Divisional Manager,
Oriental Insurance Company,
Division Office II, Wardha Road,
Nagpur. …. **APPELLANT**

// **VERSUS** //

Deleted as dead.

1) ~~Baliram Bhonaji Gayki,~~
~~Aged about 65 years, Occu.- Nil~~,

2) Ku. Bharti Baliram Gayki,
Aged about 38 years, Occu.- Education,

3) Rajesh Baliram Gayki,
Aged about 36 years, Occu.-Education,

All R/o. Sarafa Lines, Akot,
Tah. Akot, Dist. Akola.

Appeal is abated against R.4 as per R(J) order dt.20.08.2023

4) Shri Purushottam Mahadeoram Dhande,
Aged about 42 years, Occu.-Driver,
R/o. Kawtha Bk. Tah. Akot, Dist.Akola,

5) Rudhir S. Gavande,
Aged – Adult, Tractor owner,
R/o. Deolgaon, Tah. Akot,
Dist. Akola. …. **RESPONDENTS**

Mrs. Mrunal Naik, Advocate for Appellant.
Mr. A. J. Thakkar, Advocate for Respondent Nos.2 and 3.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 11.06.2024.
DATE OF PRONOUNCING THE JUDGMENT : 30.07.2024.

JUDGMENT.

1. This appeal is preferred against the Judgment dated 11.07.2008 passed by the Commissioner under Employees (Workmen's) Compensation Act, 1923, Akola in W.C.A. Case No.12 of 2002.

2. Brief facts of the case are as under :

(i) Respondent No.4 Purushottam was driver of tractor bearing No.MH-30/B-9070. Sudhir Gayki was a labourer working in the said tractor-trolley. On 06.02.2002, respondent No.4 Purushottam while driving the said tractor for fetching sand for construction of water well in the agricultural land, gave dash to a pole near Church on the Daryapur road at Akot by driving that tractor in rash and negligence manner. In that accident, Sudhir Gayki sustained serious injuries and died. He was labourer and earning Rs.3,750/- per month. The crime was registered against the driver for rash and negligent driving.

(ii) The respondent No.1 is father and Nos.2 and 3 are sister and brother of deceased Sudhir. They are claimants. They contended that they were dependent upon the income of deceased Sudhir. The Respondent No.5 is the owner of the tractor and trolley and respondent No.4 is its driver.

(iii) The appellant insurance company opposed the application and contended that deceased Sudhir was not permanent employee of the respondent No.5. It denied his monthly wages of Rs.3,750/-. It is contended that deceased Sudhir was engaged only for a day on the day of accident for loading and unloading sand in the tractor on the daily wages of Rs.50/-. The Insurance Policy of said tractor was issued only for the agricultural purposes and not for carrying sand or goods for private purposes. The tractor was used by contravening the terms and conditions of Insurance Policy. The respondent No.5 committed breach of terms and conditions of the Insurance Policy and, therefore the insurance company is not liable to pay any compensation to the claimants. It is further contended that respondent No.2 has not informed about the occurrence of accident and details of wages, age proof and details of accident. Therefore he is only responsible for payment of compensation to the claimants.

The trolley bearing No. MH-30/E-2972 is not ensured with it. It is prayed to reject the application.

3. Respondent No.5 admitted that he is owner of the tractor and trolley and that deceased Sudhir was working with him as labourer on the daily wages of Rs.125/-. The accident took place due to rash and negligent driving of respondent No.4 – Purushottam. The tractor and trolley are validly insured with respondent No.5 in all respect. He lastly contended that considering the valid insurance policy and risk covered under it, respondent No.5 is not liable to pay compensation to the claimants.

4. The learned trial Court cast following issues :

(1) *Whether applicants prove that deceased Sudhir Gayaki was in employment of non-applicant No.2 as labour cum porter in tractor-trolley vide No. MH-30/B-9070 on wages of Rs.125/- to 150/- per day?*

(2) *Whether applicants prove that death of Sudhir Gayki caused by the accident arising out of and in the course of his employment with non-applicant No.2?*

(3) *Whether applicants prove that they are legal dependents of deceased Sudhir Gayki?*

(4) *Whether applicants prove that they are entitled to monetary compensation from non-applicants with interest and penalty. If yes, from whom and to what extent?*

5. The learned trial Court held that the claimants proved that Sudhir was employee of respondent No.5 and working as labourer-cum-porter with tractor and trolley. He died in that vehicular accident. The claimants were dependents on the wages of deceased Sudhir and they are entitled for that amount of compensation on the basis of Insurance Policy.

6. The substantial question of law that arised for consideration are as follows :

(i) *Can Insurance Company be held and liable to cover the risk of employee when the owner of the offending vehicle had not paid additional premium for the same?*

(ii) *Was the learned trial Court correct in holding that the insurance company has not proved the income of deceased and on the basis of written statement without oral evidence, whether findings based on guess is sustainable in the eye of law?*

7. Perused the impugned judgment and relevant documentary evidence. To establish the claim, the claimants examined Baliram Gayki (AW-1), father of the deceased Sudhir. He deposed that his son was working with the owner of that tractor as labourer. He used to pay him wages of Rs.125/- to Rs.150/- per day. Owner of the vehicle – respondent No.2 drawn a Policy of said tractor and its duration was 20.11.2001 to 19.11.2002. His son was sitting in the trolley when the accident took place. He and his family members, other applicants/claimants, were depending upon income of his son deceased Sudhir.

8. The claimants have examined Sher Khan Lal Khan (AW-2), who worked as a Junior Clerk in the office of Regional Transport Office, Akola to prove the registration of the said tractor and its trolley. It was registered for the agricultural purpose. He cannot tell about ownership of the trailer No. MH-30/E-2972.

9. The claimants have relied upon the documentary evidence i.e. Report Exhibit-54, Accident Report Form Exhibit-56, Driving licence Exhibit-57, Copy of Policy of the offending vehicle Exhibit-24, Final Report Exhibit-19, Printed F.I.R. Exhibit-20, Spot panchnama Exhibit-21, Postmortem Report of deceased Sudhir Exhibit-22 and Inquest Exhibit-61.

10. On behalf of Oriental Insurance Company, Mr. Nilkanth Jagoji Gedam (RW-1), Assistant Divisional manager mostly deposed as per the contention raised in the written-statement alleging that policy of trolley was not drawn up by its owner. Therefore, respondent No.3 is not liable to pay compensation. The labourer are not covered as the owner of tractor has not paid any separate insurance charges for it during the drawing of the Insurance Policy of it. In his cross-examination, he admits that policy was about the trolley No. MH-30/B-9070 and 8601. However, it's number was changed as MH-30/E-2972. He had not filed terms and conditions of the policy on record.

11. The relationship between the employer and employee is not disputed. Deceased Sudhir was not permanent employee. But he was working with the owner of tractor and trolley as labourer. The death of deceased Sudhir in that vehicular accident is also not disputed. The drivers valid licence i.e. qualification to drive vehicle is not disputed.

12. Learned Advocate for the appellant argued that policy of the trolley is not drawn up and the tractor was used for the commercial purpose. He has been relied upon the judgment passed by Hon'ble Supreme Court in ***Oriental Insurance Company Vs. Brij Mohan & Ors.***, reported in ***(2007) 7 SCC 56***, in which it is held that,

> "*The amendment of the year 1994 of the Motor Vehicle Act is only extended the statutory cover to the owner of the goods or his authorised representative carried in the vehicle, and not to gratuitous passengers. So where a labourer was travelling on the trolley of the tractor carrying earth to brick kiln, he being merely a passenger, his claim was not maintainable.*"

13. The learned Advocate for respondent submitted that learned trial Court has held that trolley was insured validly. It is proved by the evidence that tractor was used for agricultural purpose i.e. for digging of water well in the agricultural lands. He is relying upon the precedential law of ***Shivraj Vasant Bhagwat Vs. Shevanta Dattaram Indulkar & Anr.***, reported in ***1997 ACJ 1014***, in which para No.9 reads as under :

> *"The terms of the policy of Insurance has to be construed strictly and to be read down to advance the main purpose of the contract. The main purpose of the policy is to idemnify the damage caused to the vehicle and the inmates, who are injured. It is plain from the terms of the insurance policy that insured vehicle was entitled to carry six workmen excluding driver. If six persons travelling in the vehicle are assumed not to have increased any risk from the point of view of the Insurance Company on*

> *occurring of an accident, how could these added person be said to have contributed to the causing of it. Admittedly, all the 11 person in the truck were working as labourers on the quarry of the appellant, who is also owner of the truck. Merely because 4/5 labourers more than the agreed six labourers were taken in the truck, it cannot be said to be such fundamental breach that the owner should in all events be denied the indemnification. The breach of the insurance policy or the misuse of the vehicle may somewhat be irregular, but not illegal as it is not so fundamental in nature so as to put an end to the contract."*

14. Nobody will dispute the ratio laid down in the above precedential law cited by both sides.

15. In the above cited case of ***Brij Mohan,*** the said claim was instituted as per the provision of Motor Vehicle Act. That claim was not filed under the provisions of Employees (Wormen's) Compensation Act. In case in hand, the trolley was used for **agricultural work** and it was validly insured with Insurance Company. Purpose of insurance for use of insurance policy was for agricultural purpose. Hence, the above case law is not helpful to the Insurance Company.

16. The substantial question of law No.1 that arises for determination is that whether additional premium is required to be paid for the purposes of employee for covering risk under insurance policy. For that purpose, the insurance company has to prove that proposal for drawing insurance policy was given by it for additional premium of trolley but it was refused. It is judicially noticeable fact that the Insurance Companies officials are not giving such detailed proposals fairly to the insurer. The processes of acceptance and refusal of proposal are also not generally followed by it. If it is so, they would have filed it on record. The owner of tractors etc. villagers are not knowing requirements of such additional premium. However, for that purpose the Insurance Company cannot be absolved from liability to pay compensation. It will certainly cause injustice to the applicants. However, as held in the case of ***Shyamabai & Ors. Vs. Vasudeo Rudranarayan Awasthi & Ors.,*** reported in ***1997(1) MPLJ 327*** that for the mistake of owner of vehicle and Insurance Company or because of technical defects, the accident claim cannot be denied. Therefore, the liability of insurance company to pay compensation for that reason cannot be denied.

17. There is no substance in the grounds of objections of this appeal in this regard. Therefore, the argument of learned Advocate for the appellant is not acceptable. Considering all these aspects, the substantive question of law No.1 is answered in the affirmative.

18. On the substantial question of law No.2, learned Advocate for the appellant submitted that learned trial Court held that insurance company has not proved income of deceased Sudhir. It is in fact basic illegality in the impugned judgment and guess work done by the learned trial Court is not sustainable in the eyes of law. It is lastly prayed to set aside the impugned judgment by allowing this appeal.

19. On the contrary, learned Advocate for the respondents submitted that for the mistake of Court, party shall not suffer. He pointed out the evidence of Baliram Gayki (AW-1). He deposed that his son Sudhir getting salary of Rs.125/- to Rs.150/- per day. Thus there is positive evidence which is not disproved by the appellant. He prayed to dismiss the appeal.

20. The initial burden of proof lies upon the claimants to prove the income of deceased Sudhir. They have proved it by the evidence of Baliram Gayki (AW-1), father of deceased Sudhir, it is not disproved. This Court on re-appreciation of the entire evidence is of the view that the income of deceased Sudhir is proved by the claimants' evidence i.e. he was earning Rs.150/- per day. However, only because trial Court erred in deciding that insurance company had not proved the income of the deceased, on that count, this appeal cannot be allowed by setting aside the impugned judgment. It is a mistake of the Court for which litigant shall not suffer. Merely because trial Court erred, litigant shall not suffer as per the principle of "Actus curiae neminem gravabit" i.e. "no person shall be prejudiced by wrong act of Court" as held in the case of ***Dr. Purushottam Reddy & Anr. Vs. K. Sateesh***, reported in ***2008 SCC 505***. Merely because owner of the tractor has not entered into the witness box, it cannot be inferred that deceased Sudhir was not his employee. The trial Court has considered the evidence of Baliram Gayki (AW-1) with pleadings and rightly concluded about the wages of deceased Sudhir. The argument of learned Advocate for the appellant is not acceptable in this regard. Thus, substantial question of law No.2 is answered in the negative.

21. The dependency of the claimants is proved by evidence of A.W.-1 Baliram Gayki. His evidence is not disproved in the cross-examination. The learned trial Court in its judgment at para No.28, rightly concluded the amount of compensation payable to the applicants as per Section 4A of the Workmen's Compensation Act, 1923, considering the evidence of daily wages of the Sudhir, his age and all the legal requisites for allowing application are proved.

22. The appeal being devoid of merit deserves to be dismissed. Considering the fact that respondents were compelled to face this appeal having no substance, it would be proper to direct the appellant to pay costs of **Rs.10,000/-** (Rs. Ten thousand only) to the respondent Nos.2 and 3. Hence, the following order :

(i) The Appeal is **dismissed**.

(ii) The appellant is directed to pay costs of **Rs.10,000/-** (Rs. Ten thousand only) to the claimants/respondent Nos.2 and 3 within a period of six months. If it is not paid or deposited in the trial Court within six months, the appellants shall pay 9% interest thereon from the date of this judgment.

23. The Appeal is **disposed of**. No costs.

(SANJAY A. DESHMUKH, J.)

Kirtak