
(2020) 09 BOM CK 0007

In the Bombay High Court

Case No : First Appeal No. 1175 Of 2005

United India Insurance Co. Ltd

APPELLANT

Vs

Chandrakala w/o Babasaheb Mane nd Ors

RESPONDENT

Date of Decision : 07-09-2020

Acts Referred:

Motor Vehicles Act, 1988 — Section 2(14), 147(6), 166
Evidence Act, 1872 — Section 106
Constitution Of India, 1950 — Article 142, 136

Citation : (2020) 09 BOM CK 0007

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : S. G. Chapalgaonkar, M. P. Kale, S. K. Naikwade, V. D. Rakh

Final Decision : Allowed

Judgement

1. Present appeal has been filed by the insurance company - original opponent No.2, challenging the Judgment and award passed in Motor Accident Claim Petition No.121 of 2003, by learned Chairman, Motor Accident Claims Tribunal, Beed on 18-08-2005, thereby partly allowing the claim filed by the present respondents No.1 to 6 and holding the appellant company liable to pay the compensation jointly and severally with original opponent No.1 i. e. present respondent No.7.

2. The factual matrix leading to the petition are that, the original claimants are the legal heirs of one Babasaheb Dagdu Mane. Babasaheb had two wives, who are claimants No.1 and 2. Claimants No.3 and 4 are the children of Babasaheb and claimant No.2, and claimant No.5 and 6 are the parents of Babasaheb. Babasaheb was aged 42. He was an agriculturist, labour and doing business in shoes and chappals. He was serving as labour with Lok Mangal Sugar Factory, Solapur. His earning was around Rs.4000/- per month. He had gone to village Kalman for sugarcane cutting on 30-12-2002 in his capacity as labour of Lok Mangal Sugar Factory. After the sugarcane was cut, it was being transported

from tractor bearing No.MH-23/ V-2726 with two attached trolleys bearing No.MH-23/D-4718 and MH-23/C-2755. Babasaheb along with some other persons had filled the trolleys and along with their belongings they were travelling from the trolleys. He was occupying the trolley No.MH-23/C-2755. When the tractor was on Kalman - Gavadi Darphal road, at that time the driver of the tractor Ravindra Khedkar drove the same in rash and negligent manner. He was talking to the people who were travelling from the trolley and the tractor was in high speed. He lost the control and when he found that the tractor was going into the ditch, he applied sudden breaks, as a result of which the trolley bearing No.MH-23/C-2755 turned turtle. Babasaheb and other persons fell down. They were virtually trapped in the sugarcane and other household articles. He was taken to General Hospital, Solapur for treatment, however he succumbed to the injuries. The accident was reported to the police and the driver has been prosecuted. The said accident took place due to the sole negligence on the part of the tractor driver. The said tractor was owned by opponent No.1 and it was duly insured on the date of the accident with opponent No.2. The claimants had therefore claimed compensation of Rs.4 lakh together with interest.

3. The said claim was resisted by both the opponents by filing written statement at Exhibits 23 and 20 respectively. The insurance company has denied age, occupation, income, the manner in which the accident took place etc.; whereas opponent No.1 has admitted age, occupation and income of the deceased. It is denied by opponent No.1 that, due to the negligence and rashness on the part of his driver, the accident had taken place. Again it is reiterated that, he has insured his tractor with opponent No.2. The insurance company has denied its liability though it is admitted that the tractor was insured with it on the date of accident. Insurance of the trolleys is denied. Statutory defences have been taken stating that, the deceased was not the authorized labour working with opponent No.1 and, therefore, his risk was not at all covered under the policy. It is also stated that, the driver of the tractor was not holding valid and effective driving licence to drive the tractor on the alleged date and time of accident. The deceased will not come within the definition of third party. No separate premium for labour was paid or recovered under the policy and, therefore, the company cannot be held responsible either jointly or severally to pay the compensation. It has been also contended that, deceased being the labour who said to have died during the course of employment, the claimants ought to have filed application for compensation under Workmen Compensation Act. The claim under Section 166 of the Motor Vehicles Act is not maintainable.

4. After the issues were framed, parties i.e. claimants and opponent No.2 have led oral as well as documentary evidence. No oral evidence was led by opponent No.1 though it appears that he has produced the cover note. Taking into consideration the evidence on record, the learned Chairman of the Tribunal has partly allowed the petition. Opponent No.1 and 2 have been directed to pay compensation of Rs.3,98,000/- along with interest @ 9 % per annum, jointly and severally to the claimants. This award is under challenge in this appeal.

5. Heard learned Advocate Mr. S. G. Chapalgaonkar for appellant - insurance company, Advocate Mr. M. P. Kale holding for Advocate Mr. S. K. Naikwade for respondents No.1 to 6, and learned Advocate Mr. V. D. Rakh for respondent No.7.

6. It has been vehemently submitted on behalf of the appellant that, the evidence of P.Ws.1 and 2, who are the widows of deceased Babasaheb, would show that, they claim that Babasaheb was labour of the sugar factory and not that of opponent No.1. Even opponent No.1 has not come with a case that, deceased was his labour and travelling in that capacity in his tractor trolley. The tractor as well as trolley are for agricultural purpose only and even the trolley could not have been used for the transportation of human. Perusal of the policy Exhibits 38 and 39 would show that, no extra premium was paid for labour and, therefore, insurance that was taken for the tractor was not covering the risk of the deceased. Insurance company cannot be made liable in view of Section 147 (6) of Motor Vehicles Act. Further the learned Tribunal has not considered that there was clear breach of terms of policy. Large number of persons were transported from the trolley as well as tractor. The tractor appears to have been given by opponent No.1 on hire to the sugar factory, when in fact as per the terms of insurance it could be used only for own agriculture purpose. It could not have been given for hire of transportation of the sugarcane grown in the field of others. It would amount to non-agricultural use and, therefore, the insurance company should be exonerated. The learned Advocate appearing for the appellant fairly submitted that, appellant are not challenging the quantum of compensation now, however the company would restricts its challenge to the finding given by the Tribunal regarding holding the insurance company liable to pay the compensation joint and severally with opponent No.1. He further submitted that, as per the order of this Court the entire amount of award has been deposited in the Court. Out of that, this Court has allowed the claimants to withdraw amount of Rs.1,80,000/-. It is stated that, insurance company is ready to recover that amount which has been in fact withdrawn by the claimants from the owner of the tractor and the company will not recover that amount from the claimants. But he lastly prayed for withdrawal of the rest of the amount by the company and exonerating the company from the liability.

7. Per contra, the learned Advocates representing all the respondents submitted that, the deceased was working as labour with the sugar factory. Cover note of the policy Exhibit 38 would show that, Rs.100/- was collected from opponent No.1 towards premium of four coolies. Separate amount of Rs.25/- was recovered towards premium of driver and, therefore, the said amount of Rs.100/- can be calculated as premium towards four coolies. Though witness No.1 Sidhartha Punwatkar examined by the insurance company has denied that, any amount was recovered by the insurance company towards premium for coolies, yet he could not explain for what purpose that Rs.100/- was collected. Premium of the coolie was recovered and, therefore, the risk of deceased was covered under policy itself. There was no breach of terms of policy by opponent No. 1. The learned Tribunal was justified in holding insurance company liable to

pay compensation jointly and severally with opponent No.1.

8. The learned Advocate appearing for the appellants has relied on the India Motor Tariff in order to show how the payments of premium are made and what the terms and conditions are required to be adhered to. He further relied on the decision in, *Anil Tukaram Patil v. Vishnu Tukaram Shinde (Patil) and Others*, reported in 2008 ACJ 1602, wherein this Court at Principal Seat has held that, when on evidence it is shown that the tractor was not used for the personal use of the insured but it was used for the benefit of somebody else, then it is a clear breach of policy, that too with knowledge and, therefore, Tribunal therein was justified in exonerating the insurance company from payment of compensation to the claimants. Further, reliance has been placed on the decision in, *Oriental Insurance Co. Ltd. v. Brij Mohan and Ors.*, reported in AIR 2007 Supreme Court 1971, wherein it has been held that,

"When the tractor was insured only for carrying out agricultural work which would not include digging of earth and taking it in trolley to brick kiln and the claimant being the passenger and not owner or driver, his claim petition cannot be allowed."

Reliance was placed in this case on the decision in, *National Insurance Co. Ltd. v. Chinnamma and Ors.*, reported in (2004) 8 SCC 697, wherein it has been observed that,

"A tractor fitted with a trailer may or may not answer the definition of goods carriage contained in Section 2 (14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purpose. The trailer attached to the tractor, thus, necessarily is required to be used for agricultural purposes, unless registered otherwise....."

9. Taking into consideration the submissions made, following points arise for determination, findings and reasons for the same are as follows :

(1) Whether the Tribunal was justified in holding the insurance company liable to pay compensation to the claimants, jointly and severally with respondent No.1 ?

(2) Whether interference is required ?

10. Here in this case, the claimants have come with a specific case, especially it has been stated in column No.5 that, deceased was working as labour with Lok Mangal Sugar Factory, Solapur. The testimony of P.W.1 Chandrakala and P.W.2 Panchafulla, who are the widows of deceased, further reiterate the said fact. P.W.2 Panchafulla was travelling along with deceased in the same trolley at the time of accident, therefore her cross-examination is more important. In her cross-examination taken on behalf of the insurance company she has stated that, claimant No.1, deceased and she herself used to go to sugar factory for labour work. They were working as labourers whenever and wherever the Mumadam used to procure work for them. So these admissions would make it clear that, there was no relationship of employer or employee or employer and labour

between opponent No.1 and deceased. Even if for the sake of arguments we accept that, the cover note shows that amount of Rs.100/- was collected as premium towards four coolies, there is no such evidence on record which would show that opponent No.1 had engaged deceased as coolie / labour. Opponent No.1 has not entered into the witness-box. He could have clarified the position from his angle. We cannot attribute that those Rs.100/-(even if we take as it is) was towards the coolie of any person to whom opponent No.1 would give his tractor on hire. The learned Tribunal has totally ignored a fact that unless opponent No.1 would have entered into a contract with the sugar factory, his tractor and trolley would not have been engaged in the work of sugarcane cutting which was in fact meant for the factory. Opponent No.1 has suppressed the said agreement or the fact that, he had given his vehicle on hire or reward. That was the fact within his knowledge and, therefore, in view of Section 106 of the Indian Evidence Act, the burden was upon him to prove the fact which was within his knowledge. He cannot be allowed to say that, the insurance company has not produced any evidence to show that, his vehicle was given for hire or reward. In fact, this fact itself is intermingling with another fact that opponent No.1 has produced only the cover note, it cannot be accepted that he would not have got the policy in his possession. He has suppressed it. Further Exhibit 39 is the terms and conditions of the 'Farmers Package Policy'. It has been exhibited in the evidence of P.W.1 Chandrakala. Though the said policy terms appears to have been produced on record by the insurance company, the production and exhibition of these documents i.e. Exhibit 38 and 39 has not been objected by the claimants as well as opponent No.1. It clearly shows that, the policy of the tractor was taken under the Farmers Package Policy and, therefore, the use of the tractor was restricted for the own agricultural purpose of opponent No.1. When it was for his personal use and opponent No.1 is resident of Javarwadi U/v. Madalmohi Tq. Georai Dist. Beed, and the accident has taken place on Kalman Gavdi Darphal road within the jurisdiction of Taluka Police Station Solapur Dist. Solapur which is in another district ; then unless there would have been a contract between opponent No.1 and the sugar factory or the concerned contractor / Mukadam, the tractor and trolley in question would not have gone beyond the jurisdiction of village Javarwadi. Knowing it fully well that he cannot ply the tractor beyond jurisdiction Javarwadi, yet opponent No.1 has permitted his vehicle to go out of the jurisdiction, to be used for hire or reward, then definitely there is clear breach of terms of policy though he has not entered the witness-box and clarified it. In fact, on this point when he has not entered the witness-box, adverse inference is required to be drawn against him. The decision in, Anil Tukaram Patil v. Vishnu tukaram shinde (Patil) and Others (Supra) would definitely apply to the present case wherein also admittedly the tractor and trailer was used in breach of terms of policy that too in that case it was beyond the jurisdiction of the State where it was registered and insured i.e. State of Karnataka and it was used in the State of Maharashtra.

11. At the cost of repetition it can be said that, evenif we accept that Rs.100/-

was taken as premium towards four coolies, yet since there is absolutely no evidence that the deceased was the worker of opponent No.1, we cannot conclude that the risk of deceased was covered under the said policy Exhibits 38 and 39. According to O.W.1 Sidhartha Punwatkar, no premium was recovered towards covering the risk of coolies under the said policy, yet except denial there is nothing in the cross, but he could not explain the overwriting in Exhibit 38 regarding acceptance of amount of Rs.100/-. If it was not towards the premium of four coolies then he should have explain it under which head that charge was recovered from opponent No.1. Benefit, therefore, is required to be given in favour of opponent No.1 by holding that, that Rs.100/- was charged to cover the risk of four coolies, however as aforesaid deceased was not the coolie / labour of opponent No.1. Opponent No.1 himself is not accepting this fact, he has not stated in his written statement that, any amount was paid by him as salary to the deceased for doing the work as coolie/ labour.

12. Again turning towards the point regarding breach of terms of policy, the ratio laid down in *Oriental Insurance Co. Ltd. v. Brij Mohan and Ors.* (Supra) is definitely applicable to this case. In the said case as well as earlier pronouncements by Hon'ble Apex Court it has been stated that, the tractor meant to be used for agricultural purpose cannot be allowed to use for non-agricultural purpose, unless it is registered otherwise. Here in this case opponent No.1 has not produced any document on record to show that, he had registered his tractor for any non-agricultural purpose prior to the policy Exhibits 38 and 39. It appears that, he had not shown such document to the insurance company when he took the insurance. If he would have shown that, he want to put the tractor to non-agricultural use also, then there would have been different calculation of premium. Deceased was travelling from trolley, therefore, he cannot be said to be a third party also. He was neither owner nor driver of the tractor. His risk was therefore not at all covered under the policy. In fact there was absolutely no evidence on record before the Tribunal to conclude that the risk of deceased was in any way covered under the policy. So, opponent No.2 company could not have been made liable to pay the compensation jointly or / and severally with opponent No.1. Hence, point No.1 is answered in the negative and consequent thereof the insurance company deserves to be exonerated.

13. Now the question would arise as to what is to be done in respect of the amount that has been deposited by the insurance company with this Court. Since only opponent No.1 would be liable to pay the entire amount of compensation, as regards the amount that is already allowed to be withdrawn by the original claimants, the learned Advocate for the appellant has made a categorical statement that the insurance company will not go ahead with the recovery of that amount from the original claimants. In respect of that amount, right will have to be given to opponent No.2-insurance company to recover it from the owner i.e. opponent No.1. However, as regards the rest of the amount is concerned, it is to be noted that, deceased was labour and even in case of *Oriental Insurance Co.Ltd. V . Brij Mohan and Ors.* (Supra), Hon'ble Apex Court

by exercising extraordinary jurisdiction under Article 142 and 136 of Constitution of India, directed the insurance company to satisfy the award, and then liberty was given to realize the same from the owner of the tractor and trolley. However, this Court has no such extraordinary jurisdiction under Article 142 of the Constitution of India to pass such order. As regards the remaining amount is concerned, it will have to be returned to the insurance company.

14. In view of the statement made by the learned Advocate for the appellant that the appellant is not challenging the quantum, this Court refrains itself from discussing any point in respect of computation of compensation.

15. For the aforesaid reasons, following order is passed.

ORDER

1) Appeal stands partly allowed.

2) The Judgment and award passed in Motor Accident Claim Petition No.121 of 2003, by learned

Chairman, Motor Accident Claims Tribunal, Beed on 18-08-2005 is hereby set aside to the extent of holding opponent No.2 insurance company liable to pay compensation jointly and severally along with opponent No.1.

3) Opponent No.1 alone is liable to pay the amount of compensation so calculated by the learned Chairman. In other words, opponent No. 2 - insurance company is exonerated from payment of compensation to the original claimants as per the award under challenge.

4) Appellant insurance company is at liberty to recover the amount which has been withdrawn by the claimants under the orders of this Court from opponent No. 1 and rest of the amount which is now pending with this Court in the present matter be refunded to the insurance company.

5) No order as to cost.

6) Award be drawn accordingly.