

Court No. - 2

Case :- FIRST APPEAL FROM ORDER No. - 496 of 1997

Appellant :- National Insurance Company Ltd.

Respondent :- Smt. Mushtari And Others

Counsel for Appellant :- Sudhanshu Behari Lal Gour, Om Prakash Mishra

Counsel for Respondent :- Dharm Vir Jaiswal, Amit Bhatta

Hon'ble Saral Srivastava, J.

1. Heard learned counsel for the appellant and learned counsel for the respondents.

2. Learned counsel for the appellant has contended that the deceased was travelling in Truck No. U.G.P. 4078 which met with an accident with Tractor No. D.I.G. 7201. It is contended that it was a case of head on collision with tractor, and therefore the driver of the tractor was also negligent in the accident. Thus, it is submitted that the Tribunal should have reduced the compensation to the extent of negligence of the driver of tractor. It is further contended that the deceased was travelling as fare paying passenger on the goods vehicle and the appellant produced the Branch Manager, Kashif as D.W. No. 1 who stated before the Tribunal that the passengers are not covered under the insurance policy and, thus, the owner of the truck has committed breach of policy and, therefore, the insurance company should have been given right of recovery.

3. Be that as it may, admittedly, the deceased was travelling in the Truck No. U.G.P. 4078 and it was an accident between the two vehicles namely truck and tractor. Thus, it was a case of composite negligence and as per the judgment of the Apex Court in the case

of **Khenyei Vs. New India Assurance Company Limited and others (2015) 9 SCC 273**, it is the choice of the claimant to claim compensation from either of the drought reasons. Since, it was a case of composite negligence, therefore, this Court in view of the judgment of the Apex Court in the case of Khenyei (supra) does not find any merit in the submission of counsel for the appellant. However, if the appellant's company is of the view review that there was negligence of the driver of the tractor also in the accident, the insurance company may lay a separate claim against the owner of the tractor and recover the amount from him for the negligence of the driver of the tractor in the accident.

4. Insofar as, the issue of the policy is concerned, though the appellant's company has produced its manager to prove that the fare paying passengers are not covered under the insurance policy, but the insurance company did not give any evidence on record to establish that the deceased was travelling as a fare paying passenger. Though, the counsel for the appellant vehemently submitted that the claimant in the claim petition as well as eye-witnesses in their statement has stated that the deceased was travelling on the truck after paying fare as passenger, but the burden is upon the appellant to prove that the deceased was travelling as a fare paying passenger, but the appellant did not give any evidence on record proving that the deceased was traveling after paying fare.

5. Even if, the case of the appellant is taken to be true that the deceased was traveling as a fare paying passenger and was not covered under the insurance policy as the truck was insured with the insurance company was a goods carrying vehicle, the insurance company cannot escape its liability inasmuch as in order to avoid

to its liability on the ground of breach of insurance policy, the insurance company not only has to establish that the owner of the offending vehicle has committed breach of insurance policy but the insurance company will also have to prove that the breach committed by the owner was deliberate and intentional. In the instant case, the insurance company did not set up any plea that breach of policy committed by the owner was deliberate and intentional.

6. In such view of the fact, the submission of learned counsel for the appellant, on the issue of breach of policy is also not sustainable in law.

7. For the reasons given, the appeal lacks merit and is accordingly **dismissed**.

Order Date :- 13.10.2023

A. Prajapati