**Court No. - 2**

**Case :-** FIRST APPEAL FROM ORDER No. - 944 of 1995

**Appellant :-** Hari Shanker Gupta
**Respondent :-** Virendra Chandra And Others
**Counsel for Appellant :-** Ar Gupta,Krishna Kumar,N.D. Keshari
**Counsel for Respondent :-** Basudeo Shukla,Arvind Kumar,B.P. Bahadur,D.P.Bahadur,Ravi Kant,Sanjay Pratap,Santosh K Shukla,Upendra Kumar Tiwari

**Hon'ble Saral Srivastava,J.**

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

2. The present appeal has been filed by the appellant challenging the award dated 31.05.1995 passed by Motor Accident Claims Tribunal/IIIrd Additional District Judge, Hamirpur in M.A.C.P. No.41/70 of 1989.

3. Challenging the award, learned counsel for the appellant has contended that the finding of the Tribunal that the owner appellant has committed breach of policy is illegal and is not sustainable in law. It is submitted that the burden was upon the insurance company to prove breach of policy, but there was no evidence on record which could establish that the passengers were travelling on the jeep on payment of fare. In such view of the fact, the finding of the Tribunal that the appellant has committed breach of insurance policy since the jeep was insured for private purpose whereas it was being used for commercial purpose at the time of accident is not sustainable in law.

4. Per contra, learned counsel for the respondent insurance company would contend that the insurance company has produced

the Assistant Administrative Officer of the company as DW-1 to prove breach of policy and since the jeep was insured for private purpose and it was being used for commercial purpose at the time of accident, therefore, the owner has committed breach of insurance policy.

5. Be that as it may, the Tribunal on the testimony of Assistant Administrative Officer of the company held the liability of the owner to pay compensation on the ground of breach of insurance policy. The testimony of PW-2 does not reveal that he had stated that passengers were travelling on jeep on payment of fare, and thus, the jeep was being used for commercial purpose. The record reveals that he has stated only that the vehicle was insured for private purpose and not for commercial purpose. The burden was upon the insurance company to prove that the vehicle was being used for commercial purpose. It is relevant to mention that Assistant Administrative Officer of the company who appeared as witness on behalf of the company was not on the jeep when the accident took place.

6. This Court has perused the statement of driver of the jeep and does not find that the driver of the jeep has stated that the passengers were travelling on payment of fare on the jeep at the time of accident. The insurance company did not lead any independent witness to prove that the passengers were travelling on the jeep. The Assistant Administrative Officer who appeared on behalf of the company was not present at the time of accident, and therefore, his testimony cannot be worth reliance to conclude that the jeep was being used for commercial purpose at the time of accident. In such view of the fact, this Court is of the view that the finding of the Tribunal holding that the jeep was being used for

commercial purpose is perverse and against the record and is not sustainable in law. Accordingly, the said finding is set aside.

7. Even otherwise the insurance company in order to avoid the liability on the issue of breach of policy has also to establish that the breach of the insurance policy committed by owner was deliberate. In the present case, the insurance company did not set up any such plea. In such view of the fact, no liability can be fastened upon the owner to pay compensation on the ground of breach of insurance policy.

8. Learned counsel for insurance company has urged that the award of 12% interest is excessive. The said contention is also not sustainable in law as the insurance company has not preferred any appeal.

9. The appeal is ***allowed*** and the award of the Tribunal is modified to the extent indicated above and the insurance company is directed to pay the awarded amount.

**Order Date :-** 17.10.2023
R.S. Tiwari

Digitally signed by :-
RAVI SHANKAR TIWARI
High Court of Judicature at Allahabad