IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.558 OF 1996

National Insurance Co. Ltd., Dhule ...APPELLANT
(Orig. Resp. No. 3)

VERSUS

1) Smt. Vadgibai w/o Shankar Valvi,
Age : 33 yrs., Occ : Household

2) Ramesh s/o Shankar Valvi,
Age : 15 yrs., Occ : Education

3) Ganesh s/o Shankar Valvi,
Age : 12 yrs., Occ : Education,

4) Pravin s/o Shankar Valvi,
Age : 6 yrs., Occ : Education,

5) Ku. Sunita d/o Shankar Valvi,
Age : 9 yrs., Occ : Education,

Applicant Nos. 2 to 5 minors by
their guardian applicant No. 1

All resident of Borvikuwa,
Tq. Nizar, Dist. : Surat (Gujarat) ...RESP. 1 TO 5
(Ori. Applicants 1 to 5)

6) Govind Sakharam Maratha,
Adult, Occ : Trader, Driver
R/o Akkalkuwa, Dist. Dhule

(F.A. abated against R. No. 6
as per Addl. Registrar Court's
order dated 07/12/1999)

7) Raju Govind Maratha, Adult,
Occ : Trader, R/o Akkalkuwa,
Dist. Dhule ...RESP. 6 TO 7
(Ori. Opponents 1 to 2)

Mr D. V. Soman, Advocate for appellant;
Mr C. R. Deshpande, Advocate for respondent Nos. 1 to 5

CORAM : N.W. SAMBRE, J.

(Date of reserving the judgment : 6th July, 2015

Date of pronouncing the judgment : 9th July, 2015)

JUDGMENT :

Heard Mr Soman, learned Counsel appearing on behalf of the appellant and Mr Deshpande, learned Counsel on behalf of respondents no.1 to 5/original claimants.

2. The present appeal is by the insurance company, questioning the legality and validity of the judgment and award dated 8th January, 1996, rendered by the Member, Motor Accident Claims Tribunal, Dhule, in Motor Accident Claim Petition No.35 of 1990.

3. Respondents no.1 to 5/original claimants filed the claim petition seeking compensation of Rs.2 Lacs, on account of the death of Shankar in an accident occurred on 13th May, 1988 while he was travelling in a goods vehicle, which was insured with the appellant/insurance company.

4. It is claimed in the appeal that the appellants being legal representatives and dependents of late Shankar were entitled for compensation, since Shankar was maintaining the family from the agriculture income as well as income which he used to earn by working on daily wages.

5. The vehicle at the relevant time was owned by non applicant no.2 and was driven by non applicant no.1. The appeal is already abated as against non applicant no.1 - Driver.

6. The claim as was put-forth by respondents no.1 to 5/claimants was objected and denied by the insurance company by filing written statement at Exh.37. It was claimed by the insurance company that in absence of any positive evidence regarding income of late Shankar, the claim ought not to have been granted. Apart from above, the defence as regards breach of policy conditions was raised as the vehicle was insured as a "goods vehicle" and in the said vehicle passengers were carried. According to the appellant, it was not liable to pay compensation to respondents no.1 to 5/claimants.

7. Based on the pleas raised by the respective parties, the learned Tribunal framed issues at Exh.37 and answered the same as under :-

Sr. No.	Issues	Findings
1	Do claimants prove that on 13.5.1988 at about 4.00 p.m. near village Udaypur on Akalkuwa-Sagbera road accident took place to truck No.MTS-6588 and Shankar Janga Valvi received injuries in the said accident and died due to the injuries ?	In the affirmative
2	Do claimants prove that the said accident took place due to rash and negligent driving of the truck by respondent no.1 - Govinda ?	In the affirmative
3	Do claimants prove that Shankar was earning Rs.1,500/- per month and, therefore, they are entitled to claim Rs.2,00,000/- as compensation on account of loss of dependency, loss of love and affection, loss of consortium ?	Yes, but only Rs.1,50,000/- from all opponents
4	Does respondent no.3 prove that there was breach of term of policy and, therefore, respondent no.3 is not liable to pay any compensation on account of death of Shankar in the said motor vehicle accident?	In the negative
5	What is the liability of each of the respondents for payment of compensation to the claimants ?	All are jointly and severally liable
6	What order ?	As per final order

8. Learned Tribunal, based on the pleadings and evidence brought on record has held that original non applicants no.1 to 3 were jointly and severally liable for payment of compensation of Rs.1,50,000/- along with interest at the rate of 6% per annum.

9. Feeling aggrieved by the impugned judgment and award, the present First Appeal has been filed by the insurance company.

10. Mr Soman, learned Counsel appearing on behalf of the appellant would urge that since the vehicle in question was insured as a goods vehicle, the passengers were neither insured by paying extra premium nor are permissible on the said vehicle, hence, claim cannot be termed as the one covered under the policy in question. According to him, there is evidence on record so as to demonstrate that the passengers who were travelling in the goods vehicle had paid for such journey. According to him, there is a violation of the policy conditions and as such, the appellant ought not to have been held jointly and severally liable for payment of compensation. In support of his contention, Mr Soman has relied upon the judgment of the Apex Court, in the matter of **Mallawwa & ors. vs. Oriental Insurance Co. Ltd. & ors**., reported in **1999 ACJ 1** so as to canvass that the claim as is granted in the present matter is not admissible as the same is not covered under the insurance policy of a goods vehicle.

11. While countering the above referred submissions, Mr Deshpande; learned Counsel appearing on behalf of respondents no.1 to 5/claimants would urge that the claim petition was allowed by the Tribunal, having regard to the fact that the Motor Vehicles Act, 1989 has come into force on 1st July, 1989. According to him, prior to the said enactment the field was governed by the Act of 1939 and in the definition clause of the “goods

vehicle", the passengers who were travelling in a goods vehicle are also covered. He would further urge that in view of the award rendered by the Tribunal, the amount of compensation is deposited and is invested in fixed deposit and the claimants are getting the benefit thereof by drawing the interest accrued. According to him, if this Court reaches to a conclusion that the appellant-insurance company is not liable to pay compensation, it is always open for this Court to modify the award by directing the appellant - insurance company to pay the compensation as ordered by the Tribunal and to recover the same from the owner of the vehicle. According to him, the equity demands implementation of the above referred formula, as one of the claimants has reached the age of 52 years.

12. Having considered rival contentions of the parties, it is required to be noted that admittedly, the vehicle in question which was insured with the appellant - insurance company and which was involved in the accident while carrying the passengers, was insured as a goods vehicle.

13. Though the learned Counsel appearing on behalf of the appellant-insurance company has sought to urge that this Court may pass an order of pay and recover, i.e. to say, the insurance company may honour the award passed by the Tribunal and it be permitted to recover the amount from the vehicle owner or the Driver. It is required to be noted that the

Apex Court, in the judgment of Mallawwa & ors (cited supra) has considered the law under the old Act, pursuant to the provisions of section 95 of the Motor Vehicles Act, 1939, *qua* payment of compensation for breach of policy conditions, such as, carrying of passengers in goods vehicle and habitually repeating the said practice. The Apex Court, while dealing with the said aspect, in paragraph 10 of the judgment, has observed thus :-

> "For the purposes of section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers are carried if the vehicle was of that class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions of that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to section 95(1) (b), the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. The High Courts have expressed divergent views on the question whether a passenger can be said to have been carried for hire or reward when he travels in goods vehicle either on payment of fare or along with his goods. It is not necessary to refer to those decisions which were cited at the Bar as we find that all the relevant aspects were not taken into consideration while expressing one view or the other. We may only refer to the decision of the Orissa High Court in New

India Assurance Co. Ltd vs. Kanchan Bewa & Ors:, (1994) ACJ 138 (Orissa), where Hansaria, J. speaking for the Full Bench observed as under ;-

"18. The aforesaid is not enough to take any view as to whether goods vehicle can or cannot come within the fold of proviso (ii) with which we are concerned. Our primary reason for differing, with respect, with the Rajasthan Full Bench is that allowing goods vehicle to be taken within the fold of proviso (ii) would introduce uncertainties in law as that would depend upon various factors to which we shall advert; the result would be that the law would cease to be certain which it has to be at least in a case of the present nature. We have said so because reference to the definition of goods vehicle shows that the first part of it does not deal with carrying of passengers. It is the second part which speaks about the same and that too when the vehicle is used for such a purpose. The word 'use' has been defined in Chambers English Dictionary in its intransitive sense to mean 'to be accustomed; (to; used chiefly in the past tense);' 'to be in the habit of so doing'; 'to resort'. Reference to the meaning of this word, as given in Black's Law Dictionary, 5th edition, would show that even one user may amount to 'use' or it may be that for a thing being said to be 'used', it has to be 'employed habitually',

19. Being concerned with a beneficial legislation like the one at hand, we would have normally preferred liberal interpretation, but the question is whether, without any extra premium having been paid, the owner of a goods vehicle can claim indemnification from the insurer just because once in a year the goods vehicle had carried a passenger for hire or reward along with the goods. This would

perhaps robe the third proviso dealing with coverage of contractual liability lame...

xxx xxx xxx

22. Thus, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a case of the present nature, the mere fact that the passenger was carried for hire or reward would not be enough; it shall have to be found out as to whether he was the owner of the goods, or an employee of such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the advancement of the object sought to be achieved by requiring a compulsory insurance policy.

23. There is another aspect of the matter which had led us to differ from the Full Bench decision of Rajasthan High Court. The same is what finds place in sub-section (2) of section 95. That sub-section specifies the limits of liability and clause (a) deals with goods vehicle; and in so far as the person travelling in goods vehicle is concerned, it has confined the liability to the employees only. This is an indicator, and almost a sure indicator, of the fact that legislature did not have in mind carrying of either the hirer of the vehicle or his employee in the goods vehicle, otherwise, clause (a) would have provided a limit of liability regarding such persons also."

14. In this case, in the background of above observations if the case of the appellant-insurance company is analyzed, it is required to be noted that the appeal has already stood abated against respondent no.2 – vehicle owner. Though it is sought to be canvassed that respondent no.1 Driver could be held responsible, the default on the part of the Driver was not at all established by the insurance company *qua* his liability to pay the compensation in the matter of accident in question. The role attributed to the Driver *qua* loading of the passengers in the vehicle, whether the vehicle in question was being habitually used to carry passengers and whether the Driver on his own has taken a decision to transport the passengers, was also not established before the Tribunal. In view thereof, in my opinion, the claim sought to be canvassed, that the insurance company be permitted to recover the amount from the vehicle owner in view of abatement of appeal, is also not required to be considered as the appeal has already stood abated against the vehicle owner. As such, the said contentions are also rejected.

15. In the light of above, in my opinion, the case as is sought to be canvassed by the appellant – insurance company does not call for any interference. In the result, the appeal fails and stands dismissed with no order as to costs.

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A. M. Joshi, P.S.