

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 1031 OF 2003
WITH CA/8749/2003

NEW INDIA ASSURANCE CO LTD
VERSUS
DNYANOBA @ GYANBA MAHADU WAGADKAR & ANR
...

WITH FA/1034/2003 WITH CA/8751/2003 IN FA/1034/2003

NEW INDIA ASSURANCE CO LTD
VERSUS
RAMDAS NAGOJI BHISE AND ANR.
...

WITH FA/1035/2003 WITH CA/8752/2003 IN FA/1035/2003

NEW INDIA ASSURANCE CO. LTD.
VERSUS
KESHAV MOTIRAM KHUPSE AND ANR.
....

Advocate for Appellants : S G Chapalgaonkar

...

CORAM : S.V.GANGAPURWALA,J.

DATED : 20TH OCTOBER, 2015

PER COURT :-

In all these matters, claims of the claimants are with regard to the same accident. The claim applications are partly allowed.

2] I had heard Mr.Chapalgaonkar, learned counsel for the

appellants on 6/10/2015, however, as none had appeared for the respondents, I had adjourned the matter to 12/10/15. On 12/10/15, also none appeared for respondents, as such I had adjourned the matter to 15/10/2015. Even today none appeared for the respondents.

3] The claimants were travelling in a tempo which is registered as a goods vehicle. According to the appellants, in the pleading the case of the claimants was that because of the acquaintance the driver of the said tempo allowed the claimants to travel in the said tempo, however for the first time in the evidence the claimants changed their stand and came out with the case that the owner of the tempo asked them to decant the milk cans and as such relationship of employer employee is created. The tribunal accepted the said aspect however, failed to consider that the said case is developed subsequently and the same is contrary to the pleading. The learned counsel relies on the judgment of the Apex Court in the case of **National Insurance V/s Rattani and others reported in AIR 2009 SC 1499**. According to the learned counsel it is a case of clear breach of policy. Upon going through the judgment it transpired that the tribunal has accepted case put forth by claimants in evidence. However, has failed to consider the pleading on record. In pleading there is no whisper of the relationship of the claimants being employee of the owner of the vehicle. In the evidence the claimants have taken somersault and developed a contrary theory of travelling in the said vehicle for the purpose of decantation of milk cans, the same is nowhere stated, either in the pleading or any other document. The pleadings are contrary. Even driver of the vehicle is not examined to substantiate case put forth by claimants. The said theory which is diagonally opposite to the pleading could not have been considered. The impugned judgment and award is quashed

and set aside to the extent of present appellants. The amount deposited by the appellants is allowed to be withdrawn by appellants. First Appeals are disposed of. No costs. In view of disposal of First Appeals, Civil Applications also stand disposed of.

[S.V.GANGAPURWALA,J.]

umg/