

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 128 OF 2010

1. Mr. Nagu Naik,
s/o late Sagun Naik,
about 60 years of age, unemployed.
2. Mrs. Sudha Nagu Naik,
w/o Nagu Naik, married, housewife.
3. Mr. Dinesh Nagu Naik,
s/o Nagu Nai, about 29 years of age,
all r/o H. No.164/J, Anandwadi,
Sanvordem – Goa. Appellants.

Versus

1. Mr. Swapnesh Prabhu,
s/o Vassant Prabhu, about 23 years of age,
driver, r/o H.No.173,
Rumadem, Netravali, Sanguem-Goa
2. Mr. Philip Francisco Antao,
major in age, r/o H.No.105, Dabal,
Sanguem – Goa... .

(As per order dt. 23.2.12 passed by Reg. (Judl)appeal
stands dismissed for want of prosecution.)

3. THE NEW INDIA ASSURANCE CO.LTD.
Rajkot, NCL building, 1st floor, Bandra East,
Mumbai.400 651.
4. Mr. John D'Costa,
s/o Bernard D'Costa,
r/o H. No.23, Cotto, Sanguem-Goa.. **Respondents.**

...

Mr. V.G.P. Duple, Advocate for the claimants/appellants,
Mr. E.Afonso, Advocate for respondent no.3-Insurance
Company
Mr. V.D. D'souza, Advocate for the respondent no.4.

Coram:K. L. WADANE, J

Date of reserving the Judgment : 13.08.2015

Date of pronouncing the Judgment :29/09/2015

JUDGMENT

The present appeal is directed against the judgment and award passed by the Presiding Officer of the Motor Accident Claims Tribunal, Margao in Claim Petition No.167 of 2008 dated 29th April, 2010, by which the claim of the claimants is dismissed. Therefore, the claimants have preferred this present appeal.

2. The parties are referred to their original status.

3. The claimants have filed the petition under Section 166 of the Motor Vehicles Act on account of death of son of the claimant nos. 1 and 2 and brother of the claimant no.3 namely Prasad Nagu Naik, due to motor vehicle accident, which took place on 18.5.2008 at about 18.30 hours near railway over bridge, Curchorem, Goa.

4. The Brief facts can be stated as follows:-

The deceased Prasad Nagu Naik was the Conductor

on the Mini-bus bearing no. GA-02-T-4339, which was proceeding from Curchorem bus stand to Usgaon-Ponda via Dabal. When the bus reached at the spot of accident, it turned turtled on its cleaner side/left side on the upper slope approaching the railway over-bridge. In the accident, the deceased received serious injuries and died because of the same.

5. The accident occurred due to rash and negligent driving of the bus by its driver – respondent no.1. .

6. The claimants have claimed total compensation of Rs. Eight lakhs under the different heads namely loss of income, love and affection, care, company of the deceased, funeral expenses and future prospects etc., on the ground that the deceased was earning Rs. 9000/- per month and the claimants were fully dependent upon him.

7. The respondent no.1 contested the petition and has contended that the petition is not maintainable as the accident occurred due to mechanical defect i.e. handle of the gear came out from the gear box due to which bus become neutral and therefore, getting down to slop. The deceased was standing at the door. Therefore, the respondent no.1

prayed to dismiss the petition.

8. The respondent no.2 filed his written statement and thereby contended that the bus involved in the accident was already sold out to respondent no.4 on 20.2.2008 much prior to the date of the accident. Therefore, the petition suffers from mis-joinder of the parties. He further contended that the bus was insured with the respondent no.3 at the relevant time of the accident and the Insurance was transferred in the name of the respondent no.4 with effect from 10.3.2008. The respondent no.3 contended that the insured had committed breach of the terms and conditions of the policy. The bus was carrying 44 passengers, however, the bus was having permit to carry only 39 passengers and two employees i.e. driver and the conductor. The respondent no.3 has questioned the jurisdiction of the Tribunal on the ground that the deceased Conductor was not the third party. Therefore, the claim is not maintainable.

9. The respondent no.4 has also contested the petition and thereby contended that the vehicle was carrying required number of passengers and there was no contravention or violation of any terms and conditions of the Insurance Policy.

10. Considering the rival pleadings of the parties, the learned Presiding Officer has framed six issues, (1) relating to the negligence of the respondent no.1, (2) entitlement of the compensation (3) negligence of the deceased, (4) relating to the ownership of the respondent no.2, (5) regarding breach of the terms and conditions of the policy by the insured and (5-A) regarding jurisdiction of the Tribunal. The issue nos.1 to 5 are decided in favour of the claimants while the Issue no. 5-A relating to the jurisdiction against the claimants. Consequently, the claim petition is dismissed. Hence, the present appeal.

11. I have heard the arguments of Mr. Dukle, learned Advocate appearing for the claimants/appellants, Mr. E.Afonso, learned Advocate appearing for the respondent no.3-Insurance Company and Mr. V.D. D'souza, learned counsel for the respondent no.4.

12. Considering the evidence on record and upon hearing both sides, the following points arise for my determination:-

(i) Whether the risk of the conductor/deceased was covered at the time of the accident, in view of the Insurance Policy issued to respondent no.2 and 4? **Yes**

(ii)What order?... .

The appeal is allowed and claimants are held to be entitled for compensation as determined by the learned Presiding Officer while deciding the issue no.2.

13. Looking to the rival contentions of the parties and after hearing the arguments, it appears that a very short controversy involved in the present appeal i.e. whether the risk/liability of the payment of compensation on account of the death of deceased was covered as per the policy or not.

14. Mr. Dukle, the learned Advocate appearing for the claimants/appellants has argued that the deceased was the Conductor on the mini-bus and this fact has been admitted by the respondent and, therefore, in view of the terms and conditions of the policy, the risk of the two employees i.e. Conductor and Driver was covered under the policy. Mr. Dukle, the learned Advocate further argued that in view of the additional premium paid by the insured to the Insurance Company, the liability to pay the compensation is unlimited. Therefore, the claimants are entitled for the compensation as determined by the learned Presiding Officer.

15. As against this, Mr. Afonso, the learned Advocate

appearing for the Insurance Company, has argued that admittedly the deceased was the conductor, who died in the motor accident is not the third party. Therefore, his risk was not covered as per the terms and conditions of the policy. By referring the provisions of Sections 147 and 165 of the Motor Vehicles Act, the petition before the Motor Accident Claims Tribunal, was not maintainable and accordingly the learned Presiding Officer has rightly dismissed it. Mr. Afonso further argued that the claimants have an efficacious remedy under the Workmen's Compensation Act that they can file their claim before the appropriate Forum and they can get the compensation under the Workmen's Compensation Act.

16. Looking to the averments of both the sides and arguments advanced, one thing is very much clear that when the employee is died or suffered bodily injury during the course of the employment, remedy under the Workmen's Compensation Act as well as the provisions of the Motor Vehicles Act are available. The claimants cannot avail both remedies. They have to select either of the Forum. Looking to the settled principles, it is necessary to go through the policy as to whether the Insurance Company is liable to pay compensation under the contractual liability in terms of the policy produced before the learned Presiding Officer vide

Exhibit 49.

17. From the contents of the Insurance Policy, it reveals that it is **T.P. Basic Add : LIABILITY TO PASSENGER(S) ...39, Compulsory PA to Owner cum Driver Amount Rs. 200000/- . WC to employee 2.**

For the liability of WC-2 employees, insured had paid additional premium Rs. 50/- which can be seen from the third column. Thus, from the record, it is very much clear that the risk of 39 passengers plus driver-cum-owner and two employees under the Workmen's Compensation Act was covered. Therefore, question as to whether the conductor-deceased was the third party or otherwise is out of consideration.

18. Mr. Afonso, learned Advocate appearing for the Insurance Company, has relied upon the observations in a case reported in **2003 (3) T.A.C. 423 Kant**. [New India Assurance Company, Bijapur Vs. Smt. Kusum and others) in which it is observed as follows:-

"para 9.....Thus, there can be no dispute about the fact that a policy under [Section 147](#) only covers

a third party risk. The expression, 'any person' as occurring in [Section 147](#), exclusively means and refers to a third party, in respect of whom the insured has taken out a policy to cover any liability that may be incurred by him (the insured) by death or bodily injury of a third party. If we take out from the purview of a 'third party' a person travelling in the private vehicle gratuitously, then it is not open to contend, placing reliance on the literal meaning of the expression, 'any person' that the liability incurred by the insured in respect of such a gratuitous passenger also should be indemnified by the insurer. If such an argument is to be accepted, then there was absolutely no need for the Legislature to enact Sub-clause (ii) of Clause (b) of Sub-section (1) of [Section 147](#) in order to cover the death or bodily injury of a passenger of a public service vehicle as it would be rendered superfluous if the expression, 'any person' is to be understood as to cover any and every person because Sub-clause (i) does not make any distinction between a private or a public vehicle. The Legislature has taken care to bring within its sweep even such class of persons who are not third parties but who are co-passengers travelling in the offending vehicle but whose interests the Legislature wanted to protect by making it compulsory for the person specified to

take out a policy under the Act to cover the risks involved to these persons. The fact that a 'gratuitous passenger' does not figure as one of those persons is ample proof of the intention of the Legislature not to cover a "gratuitous passenger" under the policy. Thus, I find that the finding recorded by the Tribunal foisting liability on the insurance company is incorrect and is liable to be set aside."

19. I have gone through the facts and observations of the above case. The facts and observations were in the context of whether the liability of the company will be confined under Workmen's Compensation Act, or otherwise in view of the extra premium. It was case of driver. Here, in the present case is relating to the Conductor. Therefore, both of them are on equal footing so far as the liability of payment of compensation is concerned. The Hon'ble Apex Court observed in the case of National Insurance Co. Ltd. Vs. Prembai Patel and Ors. reported in **(2005) 6 SCC 172** reads thus:

“ Para 14.....The Bench also referred to earlier decisions rendered in New India Assurance Co. Ltd. vs. Shanti Bai (1995) 2 SCC 539 and Amrit Lal Sood vs. Kaushalya Devi Thapar (1998) 3 SCC 744, and observed that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the insurance company is

neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Motor Vehicles Act, 1939. It was further observed that it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability.

15. Though the aforesaid decision has been rendered on Section 95(2) of the Motor Vehicles Act, 1939 but the principle underlying therein will be fully applicable here also. It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act".

20. Similar issue was involved in the case of **Ramchandra Vs. R.M.United India Ins. Co.Ltd** (unreported judgment dated 2nd August, 2013 of the Hon'ble Apex Court) , the liability of the payment of the compensation should be

restricted or otherwise depends upon the payment of additional premium covering risk of the employees. Again this was the case of the compensation under the provisions of the Motor Vehicles Act. The Hon'ble Apex Court observed thus in paragraph 17, which reads thus:-

"Para 17. A perusal of the aforesaid judgment and order of this Court thus indicate that this Court has clearly held that the liability to pay compensation in respect of death or bodily injury to an employee should not be restricted to that under the Workmen's [Compensation Act](#) but should be more or unlimited. However, the determination would depend whether a policy has been taken by the vehicle owner by making payment of extra premium and whether the policy also contains a clause to that effect ."

21. Looking to the observations of the Apex Court (cited supra) it is very much clear that the risk of the cleaner/deceased in the present case has been covered under the terms and conditions of the policy. The Insurance Company has specifically accepted the premium and now the Insurance Company cannot say that the conductor is third party or otherwise. Once they have accepted the liability of the employees or cleaner under Workmen's Compensation Act, then it is obligatory part on the part of the company to

make compensation to the legal heirs of deceased.

22. Looking to the reasons recorded by the learned trial Court, it appears that it has mis-directed by the words, "third party" , however, at the same time, the learned Presiding Officer has not considered the admitted position between the parties that the deceased was cleaner on the vehicle and he died in the motor vehicle accident. His risk was covered for which additional premium was paid by the insured. In such circumstances, the learned Presiding Officer ought to have held the petitioners are entitled for the compensation. However, it has wrongly been dismissed the petition on the ground of jurisdiction.

23. The findings recorded to Issue nos. 1 and 5 are not challenged by the respondents. Therefore, the petitioner are entitled for the compensation as determined by the learned Presiding Officer while determining Issue no.2. Hence, the following order:-

ORDER

- (i) The appeal is partly allowed with costs.
- (ii) The finding recorded by the Presiding Officer of the Motor Accident Claims Tribunal to issue no.5-A is set aside and the Claim Petition is partly allowed with costs. The

petitioners are entitled for the compensation as determined by the Presiding Officer while deciding the issue no.2.

The appeal is disposed of accordingly.

K.L. WADANE, J

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