

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

**FIRST APPEAL NO. 616 OF 2002
WITH
CIVIL APPLICATION NO.3961 OF 2002 IN FA/616/2002**

M/s National Insurance Co. Ltd.,
having its Regd. and Head Office at
3, Meddlton Street, Calcutta 700071
NAGPUR Br, At Divisional Office
at Hazari Chambers, Station
Aurangabad through it's
Divisional Manager and Constituted
Attorney Mr. Shrikrishna Ramji
Bodade age 52 Yrs.

... Appellant
(Orig. Respdt. No.3)

VERSUS

1. Arif Hussain Qureshi,
age 35 Yrs. Occ. Tel.Engineer,
r/o S.T.Colony, Katkat Gate,
Hattesingpura, Aurangabad.
2. Dr. Anil D. Gupta
Age Major, Occ. Business,
R/o Ishwarnagar, Nagpur
C/o Sai Steel Furniture,
Bhagyanagar, Nagpur.
3. Ramesh Khadse
Age major, Occ. Driver,
r/o Hawar Peth,
Bhagwannagar, Nagpur.

... Respondents

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Advocate for the appellant : Mr. V. N. Upadhye
Advocate for respondent No.1 : Mr. Sayyed Tauseef
Advocate for respondent No. 2 : Mr. S. R. Deshpande
Respondent No. 3 served.
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CORAM : V. K. JADHAV, J.

RESERVED FOR JUDGMENT ON: 2ND APRIL, 2016
JUDGMENT PRONOUNCED ON: 12TH APRIL, 2016

JUDGMENT:-

1. Being aggrieved by the judgment and award dated 02.03.2002 passed by learned Member, MACT, Aurangabad in MACP No.368 of 2000 , the original respondent No.3-insurer has preferred this appeal.

2. Brief facts giving rise to the present appeal are as follows:

a) Claimant Arif Hussain Qureshi was serving as Telecom Engineer at Vaijapur, District Aurangabad at the time of accident, and in the year 1998, he went to Trivendrum for advanced training through his department for a period of one month. After completion of training of one month, he was to proceed towards Aurangabad, his native place, via Nagpur, however, he missed his bus and therefore, he was standing at the bus stand. At that time, one tempo trax bearing registration No. MH-31-Z-2760 came there. Claimant sat in the said tempo trax for going to Aurangabad. On 08.11.1998, at about 3.00 to 3.30 am on Vadnera-Amravati road, in front of one factory in Vadnera, said tempo trax met with an accident, in consequence of which, claimant has sustained injuries on his person. Said accident was caused due to rash and negligent driving of driver

of the said vehicle.

b) Thus, the claimant filed claim petition before MACT, Aurangabad for grant of compensation under various heads. Respondent No.1-owner of the vehicle resisted the claim petition by filing his written statement. Respondent No.3-insurer also strongly resisted the claim petition by filing written statement *inter-alia* contending therein that there is clear breach of the policy in view of admission of claimant in the petition itself, that he paid a fare of Rs.150/- to the driver of said vehicle jeep.

c) Learned Member of the tribunal, by its impugned judgment and award, partly allowed the claim petition and thereby directed respondent Nos. 1 and 3 to pay, jointly and severally, Rs.60,000/- to the claimant by way of compensation under Section 163-A of the Motor Vehicles Act, 1988, with interest on the said amount at the rate of 9% per annum from the date of petition till full payment with proportionate costs. Aggrieved by the same, the appellant-insurer (original respondent No.3) has preferred this First Appeal.

3. Learned counsel for the appellant submits that the claimant, as per his own admission in the pleadings, was traveling on payment of fare of Rs.150/-, and thus, there is clear breach of terms and

conditions of policy of insurance. Learned counsel submits that claimant was traveling by paying fare of Rs.150/- in a private jeep, and therefore, appellant-insurer is not liable to pay any compensation. Learned counsel submits that the claimant has filed application Exh.23 for deletion of the part of his pleading that he was traveling in the said vehicle by paying fare of Rs.150/-. Learned counsel submits that the tribunal ought to have rejected the said application for amendment for deleting the vital admission of payment of fare of Rs.150/- to the driver of said vehicle for traveling from Nagpur to Aurangabad. Learned counsel submits that the tribunal has kept said application Exh.23 for hearing along with main petition and further, erroneously held that the insurance company has to prove its defence by adducing independent evidence to the effect that claimant paid Rs.150/- to the owner of said vehicle jeep. Learned counsel submits that the claimant has clearly and unequivocally given admission in his pleadings and the same is the best evidence against him. Learned counsel submits that the tribunal ought to have rejected application Exh.23 for amendment as well as the application Exh.30 for conversion of claim petition from Section 166 to Section 163-A of the Motor Vehicles Act, 1988 (for short, "the Act of 1988"), particularly after passing and complying the order under Section 140 of the said Act.

4. Learned counsel, in order to substantiate his submission, placed reliance on the decisions in following cases:

1. ***Thiru John (In C.A. Nos. 1895-1896 of 1974) V. Subramhamanyan (In C.A. No.1907 of 1974), Appellants vs. The Returning Officer and others, Respondents***, reported in ***AIR 1977 Supreme Court 1724*** and
2. ***Oriental Insurance Co. Ltd. vs. Premlata Shukla and others***, reported in ***(2007) 13 SCC 476***.

5. Learned counsel for respondent No.1-original claimant submits that the claimant has filed an application at Exh.30 for conversion of his claim petition under Section 163-A of the Act of 1988. Learned counsel submits that even though the order came to be passed under Section 140 of the Act of 1988 for “no fault liability”, the claimant has not withdrawn any amount as per “no fault liability” award passed by the tribunal and before that, he has filed application Exh.30 for conversion of claim petition under Section 163-A of the Act of 1988. Learned counsel submits that learned Member, MACT, Aurangabad has allowed the said application Exh.30 and accordingly, permitted the claimant to convert the claim petition under Section 163-A of the Act of 1988. Learned counsel submits that the tribunal has passed reasoned order in accordance with law. Learned counsel submits that respondent-original claimant has filed

application Exh.23, *inter-alia* contending therein that in paragraph No. 20-A of the claim petition, due to misunderstanding of the typist, it is stated as “fare of Rs.150/-” and the same may kindly be permitted to be deleted, and instead of that, “the claimant was traveling in tempo trax” is to be added. Learned counsel submits that the tribunal kept the said application Exh.23 for hearing along with main petition. Learned counsel submits that the tribunal has further observed that it is not disclosed whether such type of fare was paid or not. Learned counsel submits that the claimant has denied about payment of Rs.150/- as a fare to the driver of the vehicle in his evidence before the tribunal.

6. Learned counsel submits that original respondent No.1-owner (respondent No.2 in the present appeal) has also denied in his written statement about receipt of Rs.150/- as a fare from the claimant. Learned counsel submits that in this backdrop, it was necessary on the part of the appellant-insurer to prove independently its defence about breach of terms and conditions of policy. Learned counsel submits that the appellant-insurer has failed to discharge the burden. The tribunal has, therefore, rightly saddled the appellant-insurer with liability, jointly and severally with the owner of the vehicle. Learned counsel submits that in view of provisions of Section 58 of the Indian Evidence Act, though no proof need be

given of the facts which the parties or their agent agree, in view of the proviso to Section 58, the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. Learned counsel submits that in the peculiar facts of the case, it is the proviso of Section 58 which comes into play and the rights of the parties are required to be determined *de-hors* the said admission.

7. Learned counsel for respondent No.1-original claimant, in order to substantiate his contention, placed reliance on the decision in the case of ***Arjun Khiamal Makhijani vs. Jamnadas C. Tuliani and others***, with other connected matter, reported in **(1989) 4 Supreme Court Cases 612**.

8. Learned counsel for respondent No.2-owner submits that the claimant has filed application Exh.23 to delete the words “fare of Rs.150/-” from paragraph No.20-A. Learned counsel submits that, furthermore, the claimant has not stated on oath before the court in respect of payment of Rs.150/- towards fare for traveling in the vehicle owned by respondent No.2. Learned counsel submits that in absence of any evidence, merely on the basis of admission, it cannot be accepted that the claimant has paid Rs.150/- as a fare for traveling in the vehicle. Learned counsel submits that consequently, there is no breach of the terms and conditions of the policy.

Learned counsel submits that the expression “breach” is of great significance. The insurer, thus, will have to establish that the owner/insured is guilty of infringement or violation of the promise. Learned counsel submits that unless the owner-insured is at fault and is guilty of breach, the insurer cannot escape from the obligation to indemnify the insured. Learned counsel submits that in case of private vehicle, if a passenger was carried in it and if there is no pleading and proof that the owner authorized the driver to charge fare from the passenger and no consent or knowledge or authority of the owner-insured for such act of the driver, then it is breach of condition of policy by the driver and a heavy burden lies on the insurance company to prove such breach. The insurer, therefore, does not get relieved from its liability to pay compensation. Learned counsel submits that there is no material evidence to show that the claimant was traveling as a paid passenger in the jeep with the knowledge of respondent-owner. Learned counsel submits that the appellant-insurer has also failed to establish that the owner of the jeep has authorized or permitted the driver to carry passenger in the jeep.

9. Learned counsel for respondent No.2, in order to substantiate his contention, placed reliance on the decision in following two cases:

1. **Skandia Insurance Co. Ltd. vs. Kokilaben Chandravadan and others**, reported in **(1987) 2 Supreme Court Cases 654** and
 2. Judgment dated 25.08.2008 delivered by Gujarat High Court in the case of **National Insurance Company vs. Shabbir Mohmad Kunjada and others**. (FA/2030/2008).
10. The claimant has pleaded in paragraph No.20-A of the claim petition which is reproduced as under :
- “20-A. That, the claimant is serving as a Telecom Engineer, at Vaijapur, Dist. Aurangabad. The claimant further on submits that, the claimant went to Trivendram for advance training, through his Department for the period of one month. The claimant submits that, after completion of training of one month, he was proceeding towards his native at Aurangabad via Nagpur. At that time the bus was missed, therefore, the claimant was standing on Bus stand. At that time, one white colour Tempo Trax came there, and they inquired with claimant, thereafter the claimant seated in that Tempo Trax and paid the fare of Rs.150/-, at that time the time was near about 12.00 hours at night.”*
11. It is thus, clear from the said pleading that the claimant had gone to Trivendrum for advanced training through his department and after completion of training, started his return journey to Aurangabad via Nagpur. He missed his bus and while he was

waiting in the bus stand, one white colour tempo trax came there. It appears from the pleadings that the person, who was driving said tempo trax, rightly found the prospective customer and approached the claimant. Thereafter, as per the claimant's own pleading, he sat in the said tempo trax and paid fare of Rs.150/-.

12. The averments made in the pleading, having effect of admission cannot be permitted to be abandoned without it being explained by cogent evidence. The claimant has filed application Exh.23 contending therein that due to rush of work and misunderstanding of typist, the said averments have been made in the pleading and thus, sought permission to delete the same. Learned Member of the tribunal has kept the said application for hearing alongwith main petition. The claimant has, however, deposed that he sat in the said tempo trax at Nagpur and the driver and cleaner were in the trax along with him. He has further deposed that nothing was paid to the driver of the trax. He has further stated in his cross-examination that the driver and the cleaner were not related to him. He has also stated in his cross-examination that the tempo trax owner came to the bus stand and requested him to go to Akola through his jeep. He further stated that accordingly, he started his journey in the said jeep. According to him, the owner is not his relative. He has further admitted in his cross-examination that as to

give company to the driver in the journey as per say of the owner he sat in the said jeep.

13. It is well settled that no kind of evidence can be looked into upon plea which was never put forward. Intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleadings taken as a whole. In the case in hand, it is difficult to believe that due to rush of work and misunderstanding of the typist, the said averments of paying fare of Rs.150/- for travelling in jeep as a passenger, appeared in the pleading. The ordinary rule of law is that the evidence is to be given only on a plea raised and not in contradiction of the plea. The said rule is based mainly on the principle that no party should be prejudiced by the change in the case introduced. Thus, in the case in hand, the variance between the pleading and the proof is necessarily fatal and the appellant-insurer is substantially prejudiced thereby.

14. Learned Member of the tribunal held the appellant-insurer liable to pay the compensation on the ground that there may be a mistake of the advocate while drafting the claim and for that purpose, the client or litigant could not be suffered. Learned Member of the tribunal has also observed that whatever stated by the claimant or drafted by his advocate in his petition about Rs.150/- is of no use to

the insurance company when the claimant wanted to correct that mistake committed by his advocate vide filing application Exh.23. Learned Member of the tribunal has further discarded the said admission on the ground that now the claimant has converted the petition under Section 163-A of the Act of 1988. Learned Member of the tribunal has further observed that though the petition was drafted as per instructions of the claimant, the claimant has not read the contents before signing it. Learned Member of the tribunal has also observed that the claimant has denied the suggestion put to him that he has paid Rs.150/- as a fare to the owner and further, respondent-owner has denied in his pleading about receipt of Rs.150/- from the claimant. Learned Member of the tribunal, on the basis of above observations, further held that the insurance company has to prove independently its defence by adducing independent evidence to that effect that the claimant paid Rs.150/- to the owner of the jeep and the appellant insurer has failed to discharge the said burden.

15. It appears from the said observations that the tribunal has made observations about the mistake committed by the advocate while drafting claim petition when the claimant, neither in his evidence, nor in his application Exh.23, raised the said point. Furthermore, the respondent-owner has not examined himself on oath before the court. Learned member of the tribunal has simply

relied upon the pleadings of respondent No.1. Learned Member of the tribunal has conveniently ignored the admissions given by the claimant in his cross-examination that the owner took the claimant from bus stand to his jeep and accordingly, the claimant boarded the said jeep. Furthermore, the tribunal has also not given weightage to the admission in cross-examination by the claimant that at the instance of the owner, he boarded the said jeep in order to give company to the driver in the journey. It is almost clear from the averments in the pleadings that since the claimant had missed his bus, he had boarded the said jeep by paying fare. It is pertinent to note that the respondent-owner has not raised the plea that the driver of his vehicle charged the fare from the passenger (claimant) without his consent / knowledge / authority and there is breach of the condition by the driver. On the other hand, the claimant has admitted in his cross-examination that the owner was present at the bus stand and he took the claimant towards the jeep. He has further admitted in his cross-examination that at the instance of the owner, he had boarded the said jeep. The pleading binds the parties. The claimant, in clear words, unequivocally made the averment in the pleadings that after paying the fare to the driver, he travelled in the said jeep. It also appears that when the claimant understood the consequences of his pleading, he tried to abandon the averment made in the pleading having effect of admission. The claimant has utterly failed

to explain by cogent evidence and justifiable reasons, that inadvertently the said averments made in the pleadings having effect of admission.

16. In view of the above discussion, I proceed to pass the following order:

O R D E R

- I. The First Appeal is hereby partly allowed.
- II. The impugned judgment and award dated 02.03.2002 passed by learned Member, MACT, Aurangabad in MACP No. 368 of 2000 is hereby quashed and set aside to the extent of holding respondent No.3 (appellant-insurer) jointly and severally liable to pay Rs.60,000/- to the claimant by way of compensation under Section 163-A of the Motor Vehicles Act, 1988, along with interest.

Instead, the claim petition is partly allowed and the original respondent No.1-owner shall pay Rs.60,000/- to the claimant by way of compensation under Section 163-A of the Motor Vehicles Act, 1988 with interest on the said amount at the rate of 9% per annum from the date of petition till full payment and proportionate costs.

- III. The claim petition bearing MACP No. 368 of 2000 is hereby dismissed as against original respondent No.3-insurer.

- IV. Award be drawn up accordingly.
- V. The First Appeal is accordingly disposed of.
- VI. In view of disposal of First Appeal, pending civil application also stands disposed of.

(V. K. JADHAV, J.)

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