IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.476 OF 2004
(WITH CA/2918/2004 IN FA/476/2004)

Rajendra s/o Rupchand Malpani,
Age Major, Occu. Tractor Owner
& Contractor R/o. Murum Tq. Omerga.

...APPELLANT
(Orig.Respondent no.3)

VERSUS

1. The Manager,
National Insurance Company Ltd.,
Hanuman Chowk, Latur.

2. The Divisional Manager,
Oriental Insurance Company Ltd.
442, West Mangalwar Peth,
Solapur.

3. Shamrao s/o Baburao Dikle
Age Major, Occu.: Car Owner & Agri.,
R/o. Tandulwadi Tq. Kallam,

4. Sharanyya S/o. Parmeshwar Swami,
Age:Major, Occu.: Driver,
R/o. Kotali, Tq. Omerga,
Dist. Osmanabad.

5. Putalibi w/o. Ahamed Saleh Chaus,
Age:55 years, Occu.:Household,
R/o. Kallam, Tq. Kallam,
Dist. Osmanabad,

6. Ahamad S/o. Saleh Chaus,
Age:60 years, Occu.:Pensioner,
R/o. as above.

... RESPONDENTS
(Res.No.1 to 4 Orig.
Respondent &
Res.No.5 to 6
Orig. Claimants)

Smt. Anjali Dube-Bajpai, Advocate for Appellant.
Mr. R.C. Bora, Advocate h/f
P.P. Bafna, Advocate for Respondent No.1
Mr.R.F.Totala, Adv., for respondent no.2.
Mrs. M.A. Kulkarni, Advocate for Respondent No.3.
Mr. R.V. Naiknavre, Advocate for Respondent Nos. 5 & 6.

WITH

FIRST APPEAL NO.700 OF 2004

Rajendra S/o. Rupchand Malpani,
Age: Major, Occu.:Business
(Owner of Tractor)
R/o. Murum, Tq. Omerga,
Dist. Osmanabad.

APPELLANT
(Orig.Respondent No.2)

VERSUS

1. The Regional Manager,
National Insurance Company Limited,
1248, Shivaji Nagar, Deccan Gyamkhana,
Pune 411 004.

2. Sojarbai W/o. Shyam Alias Haripal Mali (Vibhute)
Age:20 years, Occu.: Household,
R/o. Moha, Tq. Kallam, Dist. Osmanabad

3. Prithviraj S/o. Haripal @ Shyam Mali (Vibhute)
Age:2 years (Minor) under guardianship of his Real Mother Claimant No.1

4. Madhav S/o. Ekanath Mali (Vibhute)
Age:58 years, Occu.: Agri.,
R/o. Moha, Tq. Kallam,
Dist. Osmanabad.

5. Suman W/o. Madhav Mali (Vibhute)
Age: 58 years, Occu.: Household,
R/o. as above.

6. Sharanayya S/o. Parmeshwar Swami,
Age: Major, Occu.: Driver,
R/o. Kotali, Tq. Omerga,
Dist. Osmanabad (Deleted)

...RESPONDENTS
(Res. no.1 is Orig.
Res.No. 2 & Resp. No.
2 to 5 Orig.Claimant)

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Smt. Anjali Dube-Bajpai, Advocate for Appellant.
Mr. A.R. Nikam, Advocate for Respondent Nos. 2 to 5.

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CORAM: P.R.BORA, J.

DATE : 28/09/2016.

ORAL JUDGMENT:

1. First Appeal No.700 of 2004 is not on Board. Taken on Board.

2. Since both these appeals are arising out of the common Judgment and award passed by the Motor Accident Claims Tribunal, Osmanabad on 17-06-2003, in M.A.C.P. No.239 of 1995 and 176 of 1996, common arguments were heard of the parties and I deem it

appropriate to decide both these appeals by common reasoning.

3. The appellant is the owner of a Tractor bearing No.MHZ-8754 and the Trailor bearing registration No.MHB-8863 involved in the accident happened on 4.6.1995. In the accident so happened the driver of the car died and one more passenger traveling from the said car also died. The legal heirs of the deceased driver of the car and deceased passenger traveling from the said car filed claim petitions before the Motor Accident Claims Tribunal at Osmanabad claiming compensation from owners and insurers of the car and the tractor involved in the alleged accident. Motor Accident Claims Petition No. 239 of 1995 was filed by the legal heirs of the deceased passenger traveling by the Car involved in the accident whereas Motor Accident Claims Petition No.176/1996 was filed by the legal heirs of the deceased driver of the said Car. Both the Claim Petitions were contested by the Insurance Companies.

4. It was the contention of the National Insurance Company that since the tractor which was insured with it was being used at the relevant time for the purpose not permitted for by the Insurance Policy, the Insurance Company was not liable to indemnify the insurerd i.e. the owner of the tractor. It was contended that, at the relevant time, the tractor was being used for the purpose of transportation of labours. In view of the defense so raised by National Insurance Company in both the aforesaid Claim Petitions, a specific issue in that regard was framed by the learned Tribunal, and I deem it appropriate to reproduce the said issue here-in-below:

> " Whether respondent no.4 National Insurance Company Limited proves that the driver and owner of Tractor No.MHZ--8754 and Trailor No.MHB-8863 had committed breach of policy condition as claimed ?
> ...YES"

5. Admittedly, neither the present appellant entered into the witness box and / or examined any witness on his behalf nor the National Insurance Company adduced any oral evidence. National Insurance Company has, however, relied upon the contents of the FIR as well

as the spot panchnama. It had also filed on record the copy of M.A.C.P. No.207/1996 which was filed by the present appellant claiming compensation for damages caused to his tractor in the alleged accident.

6. Learned Tribunal, after having considered the evidence on record, held the driver of the tractor solely negligent in causing the accident in question. Consequently, the Tribunal held the present appellant vicariously liable to pay compensation to the claimants in respective claim petitions. The Tribunal exonerated the National Insurance Company from the liability to indemnify the insured i.e. the present appellant holding that the appellant had committed breach of the Insurance policy and, as such, the amount of compensation was directed to be paid by the present appellant to the claimants in the respective claim petitions. Aggrieved thereby, the present appeals are filed by the owner of the tractor and the trolley.

7. Smt. Anjali Dube-Bajpai, learned Counsel appearing for the appellants, submitted that merely on the

basis of some averments made in Claim Petition No.207/1996, filed by the present appellant, wrong inferences have been drawn by the Tribunal that the tractor and the trolley was being used at the relevant time for commercial purposes and more particularly not for the purpose of agriculture and forestry for which the policy of insurance was issued. Learned Counsel, taking me through the discussion made by the learned Tribunal in paragraph nos. 10 and 11 of the impugned judgment, submitted that merely on the basis of the averments made in paragraph no.22A in M.A.C.P. No.207/1996, the Tribunal has recorded a finding against the present appellant and has thereby exonerated the Insurance Company from its liability to indemnify the present appellant.

8. Learned Counsel, relying upon the judgment of this Court (Coram: B.B.Vagyani, J.) in the case of **Rajendra Raghunath Girme Vs. Pramila Dattu Surse (Kumari) & others (2002 (2) Bom.C.R. 305)** submitted that when a specific defense was raised by the Insurance Company alleging breach of the policy condition by the present appellant, it was incumbent on its part to

prove the said fact by adducing positive evidence therefor. Learned Counsel submitted that the Insurance Company has admittedly not adduced any oral evidence to substantiate the defense so taken by it.

9. Learned Counsel further submitted that in view of the provisions under Section 149 (2) of the Motor Vehicles Act, the breach can be said to have been committed by the policy holder only on the grounds mentioned in the said Section. Reading out the said provisions, learned Counsel submitted that none of such breach has been proved by the respondent Insurance Company against the present appellant. Learned Counsel submitted that without there being any evidence establishing breach of the policy condition by the present appellant, the Tribunal has recorded an erroneous finding and has thereby exonerated respondent Insurance Company from its liability to indemnify the present appellant. Learned Counsel, therefore, prayed for setting aside the impugned judgment.

10. Learned Counsel Shri Rupeshkumar C. Bora, Advocate h/f Shri P.P. Bafna, learned Counsel for Respondent No.1, supported the impugned judgment. Learned Counsel submitted that it was the statement of appellant himself in the claim petition filed by him bearing M.A.C.P. No.207/1996 that at the relevant time the tractor owned by him was coming from Dhoki and was going towards the bridge as the work of construction of the bridge was taken by the petitioner. Learned Counsel further submitted that the contents of the F.I.R. (Exh. 72) reveal that at the time when the accident happened, the labours were being transported from the trolley attached to the tractor owned by the present appellant. Learned Counsel submitted that the facts as are revealing from the contents of the F.I.R. coupled with the admission of the appellant in the M.A.C.P. filed by him, there remains no doubt that the tractor and the trolley were being used at the relevant time for the purpose other than agriculture and forestry.

11. Learned Counsel relied upon the judgment of

the Honourable Apex Court in the case of **M/s Natwar Parikh and Co.Ltd. Vs. State of Karnataka and others (AIR 2005 SUPREME COURT 3428**) and urged that the moment the trailer is attached to a tractor, it becomes a transport vehicle and does not remain a vehicle being used for agricultural purposes. Learned Counsel submitted that the fact that the trailer was attached tractor is undisputed. The learned Counsel submitted that the Tribunal has passed a well reasoned order and no interference is required in the impugned judgment and award. Learned Counsel, therefore, prayed for dismissal of the appeal.

12. Shri Naiknavare, learned Counsel appearing for the claimants and Shri Totala, learned counsel appearing for the Oriental Insurance Company, prayed for passing appropriate orders.

13. After having considered the submissions advanced by the learned Counsel appearing for the respective parties and on perusal of the impugned judgment and the evidence on record, the conclusion

recorded by the learned Tribunal in the impugned judgment, thereby exonerating National Insurance Company from its liability to indemnify the present appellant appears unsustainable.

14. On perusal of the impugned judgment, it is noticed that the learned Tribunal has reached to the conclusion that the tractor and the trolley involved in the alleged accident, owned by present appellant, were being used at the relevant time for the purpose other than agriculture and forestry, and as such, the appellants had committed breach of the Insurance policy thereby exonerating the Insurance Company from its liability to indemnify the appellant, on the basis of the following averments in paragraph No.22A of the M.A.C.P. No.207/1996 filed by the present appellant:

> "22A. That on the day of accident the tractor in dispute was coming from Dhoki side and was going towards bridge, as the work of the construction of the bridge had taken by the Petitioner. "

15. It has to be noted that when a specific defense was raised by National Insurance Company alleging

breach of policy condition by the present appellant, the burden was on the Insurance Company to prove the said defense by adducing cogent and sufficient positive evidence therefor. As I noted earlier, a specific issue was framed which casts the burden on the National Insurance Company to prove the same. Admittedly, the Insurance Company has not adduced any evidence. The Insurance Company seems to have relied on the Police papers pertaining to the accident in question, more particularly on F.I.R. and spot panchnama and the averments in M.A.C.P. No.207/1996.

16. From the averments made in impugned judgment it is quite clear that the Tribunal was swayed away by the averments made in para 22-A of MACP No.207/1996. Based on the pleadings in the said petition, the Tribunal has observed that the pleadings so raised by the claimant in the aforesaid petition go to show that the tractor was being used by respondent no.3 i.e. the present appellant for construction on the site of the bridge, the contract of which was taken by appellant. Merely, on the statement that the tractor was going towards the bridge as

the work of construction of bridge was undertaken by the petitioner no such inference can be drawn that the tractor was being used for the purpose of construction work or for the purpose other than agriculture and forestry. I reiterate that if this was the allegation of the National Insurance Company, then the said allegation must have been proved by the it by adducing positive evidence therefor. National Insurance Co. ought to have fully established the fact that the tractor was being used at the relevant time for the purpose other than agriculture and forestry and that thereby the appellant has committed breach of the policy condition. Since no such evidence is available on record, the Tribunal was not justified in reaching to the said conclusion merely on surmises and conjectures. The finding so recorded by the Tribunal cannot be sustained and deserves to be quashed and set aside. Consequently, National Insurance Company has to be held responsible to indemnify the present appellant and consequently to be held jointly and severally responsible for paying the amount of compensation to the respective claimants in both the aforesaid petitions.

Both the Appeals, therefore, stand allowed to the aforesaid extent, however, without any order as to the costs. Civil Applications, if any, stand disposed of.

The amount deposited, if any, by the present appellant, shall be refunded to the present appellant. It will also be open for the appellant to recover from National Insurance Company the amount which has been withdrawn from the deposited amount by the original claimants.

(P.R.BORA)
JUDGE

AGP/476-04fa