

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

FIRST APPEAL NO. 14 OF 2013

United India Insurance Co. Ltd.,
Through it's Divisional Manager,
Ahmednagar Divisional Office,
Kisan Kranti Building, Ahmednagar,
Dist. Ahmednagar.

....Appellant.

Versus

1. Meena Balkrushna Khandagale,
Age 39 years, Occu. Nil,
2. Sarita Balkrushna Khandagale,
Age 16 years, Occu. Education,
3. Chaitali Balkrushna Khandagale,
Age 16 years, Occu. Education,

No. 1 N.G. of R. 2 & 3
Res. No. 1 to 3 R/o. Vakil Colony,
Near Nehru Garden, At & Tal.
Sangamner, Dist. Ahmednagar.
4. Gopinath Thakaji Khandagale,
Age 72 years, Occu. Nil
(Deleted)
5. Vijay Tukaram Kharat,
Age 32 years, Occu. Nil,
R/o. Unchakhadak (Kd),
Tal. Akola, Dist. Ahmednagar.
6. Namdeo Nivrutti Kharat,
Age Major, Occu. Mauti Owner,
R/o. Unchakhadak (Kd),
Tal. Akola, Dist. Ahmednagar.
7. Anusaya Gopinath Khandagale,
Age 68 years, Occu. Nil,
R/o. Vakil Colony,

Near Nehru Garden, At & Tal.
Sangamner, Dist. Ahmednagar.
(Abated)

8. Harshada @ Ketu Jagdish Yadav,
Age Major, Occu. Nil,
R/o. Pimplad, Dist. Nashik.

....Respondents.

Mr. A.B. Gatne, Advocate for appellant.

Mr. P.B. Shirsath, Advocate for respondent No. 6.

WITH
FIRST APPEAL NO. 502 OF 2014

Namdeo s/o. Nivrutti Kharat,
Age 55 years, Occu. Agriculture,
R/o. Unchakhadak (Kd.),
Tq. Akole, District Ahmednagar

....Appellant.

Versus

1. Meena Balkrushna Khandagale,
Age 45 years, Occu. Nil,
2. Sarita Balkrushna Khandagale,
Age 25 years, Occu. Education,
3. Chaitali Balkrushna Khandagale,
Age 22 years, Occu. Education,

Res. No. 1 to 3 R/o. Vakil Colony,
Near Nehru Garden, At & Tal.
Sangamner, Dist. Ahmednagar.
4. United India Insurance Co. Ltd.,
A/p. Upon Hotel Karam,
Behind S.T. Stand, Sangamner,
Tq. Sangamner, Dist. Ahmednagar.
5. Gopinath Thakaji Khandagale,
Age 78 years, Occu. Nil
(Deleted)

6. Anusaya Gopinath Khandagale,
Age 68 years, Occu. Nil,
R/o. Vakil Colony,
Near Nehru Garden, At & Tal.
Sangamner, Dist. Ahmednagar.
(Abated)
7. Harshada @ Ketu Jagdish Yadav,
R/o. Pimplad, Dist. Nashik.
8. Vijay Tukaram Kharat,
Age 38 years, Occu. Nil,
R/o. Unchakhadak (Kd),
Tal. Akola, Dist. Ahmednagar.

....**Respondents.**

Mr. P.B. Shirsath, Advocate for appellant.

Mr. S.T. Shelke, Advocate for respondent Nos. 1 to 3.

Mr. Mr. A.B. Gatne, Advocate for respondent No. 4.

CORAM : T.V. NALAWADE, J.
RESERVED ON : 04/03/2016
PRONOUNCED ON : 09/03/2016

JUDGMENT :

1) Both the appeals are admitted. Notice after admission is made returnable forthwith. By consent, heard both the sides for final disposal.

2) First Appeal No. 14/2013 is filed by Insurance Company and the other appeal is filed by owner against judgment and award of Claim Petition No. 103/2006, which was pending before the Claims Tribunal, Sangamner. The Insurance Company has challenged the decision as it is made liable to pay the compensation first though right is given to recover the

compensation from owner. The owner has challenged the decision as the Insurance Company is not asked to indemnify him and the right is given to Insurance Company to recover the compensation amount from him.

3) The claim was filed in respect of death of one Balkrushna Khandagale, who was working as Police Head Constable. Accident took place on 20.5.2006 within local jurisdiction of Akole Police Station, District Ahmednagar. The deceased was riding his motorcycle and it is contended by the claimants that due to rash and negligent driving of tempo vehicle by respondent No. 1, the tempo gave dash to motorcycle of deceased and Balkrushna died in the accident. The tempo was insured with respondent No. 3 by respondent No. 2.

4) The claim was made by widow, two unmarried daughters of the deceased and the other dependents like one married daughter and parents were made respondents. The claim was filed under section 166 of Motor Vehicle Act (in short 'the Act'). The age of the deceased was given as 49 years. It is the contention of the claimants that gross monthly salary of deceased was Rs. 9,365/- and all the claimants were depending for their livelihood on the income of the deceased. The accident

took place on 20.5.2006. The matter was decided in the year 2011. The Tribunal deducted the amount of Rs. 1,060/-, the amount deducted towards GPF and GIS contribution for holding that the net income of deceased was Rs. 8,070/- and on that basis, the Tribunal calculated the compensation. No increase was given in the monthly income when the deceased was getting fixed monthly salary from police department, he was 49 years old and the matter was decided after the landmark case reported as **AIR 2009 SUPREME COURT 3104 [Smt. Sarla Verma & Ors. Vs. Delhi Transport Corporation & Anr.]**. However, the Tribunal adopted 13 as a multiplier, when around 9 years of service was left. Meager amount like total amount of Rs. 25,000/- is given under the head of loss of consortium, love and affection. The original claimants have not challenged the said decision though apparently compensation is on lower side.

5) The driver and the owner took defence that accident took place due to fault of deceased and there was no fault on the part of tempo driver. Similar defence was taken by the Insurance Company in addition to defences taken in respect of breach of conditions of policy.

6) The widow examined herself to substantiate the

aforesaid claim. The claimant placed reliance on the copies of police papers. Admittedly, police blamed tempo driver for the accident and case was filed against him. The dash was given to motorcycle of deceased by tempo at about 9.00 a.m. and the police papers like spot panchanama shows that the tempo had gone to the wrong side of the road when the impact took place. Even when there are such circumstances on the record, the respondents did not give evidence in rebuttal. In view of these circumstances, the Tribunal held that the accident took place due to fault of tempo driver and liability is fasten on the owner of the tempo.

7) The owner has contended that as the vehicle was insured with respondent No. 3 - Insurance Company, it is bound to indemnify him. The Insurance Company has taken following defences for contending that it is not liable to indemnify the owner :-

- (i) When the sitting capacity of tempo is 1 + 2, more persons were travelling in the tempo.
- (ii) When tempo was registered as goods carrier, at the relevant time, marriage party, fair paid passengers were being carried in tempo.
- (iii) The tempo driver was not holding valid and

effective driving licence for driving such tempo and it was heavy goods vehicle.

8) The defence of the Insurance Company is of breach of conditions of policy. The deceased was 'third party' and so, there was no question of denying the cover of insurance.

9) The police papers show that the tempo stopped at the distance of 75 to 80 fts. from the point of impact and it was still there when police rushed to the spot after learning about the accident. A Police Sub Inspector gave report on the basis of information collected from the eye witnesses and on that basis, crime was registered for the offences punishable under sections 304-A, 279, 427 of Indian Penal Code (I.P.C.) and section 184, 66 (1) r/w. 192 of the Act against tempo driver. No crime was registered against tempo driver for driving the vehicle without licence.

10) When the Insurance Company takes the defence of breach of terms and conditions of policy, it is expected to plead the breach specifically and then prove the breach. The defences taken by the Insurance Company are already quoted. One officer Mr. Shirish is examined by Insurance Company to prove the

terms and conditions of policy and the policy is at Exh. 52. He has given evidence that as crime was registered for offence punishable under section 66 (1) r/w. 192 of the Act and as no permit was there for carrying passengers, there is breach of terms and conditions of policy. He did not give evidence that the tempo driver was not holding valid and effective driving licence. The cross examination of this witness shows that he has no personal knowledge regarding the accident and Insurance Company had not made any attempt to collect material by appointing Investigator. He has deposed that as per the police papers, marriage party (बर-हाड) was travelling in tempo.

11) From the pleadings, it can be said that the first defence about driving licence was that the driver was not holding licence to drive heavy goods vehicle and vehicle involved was heavy goods vehicle. The judgment delivered by the Tribunal shows that before Tribunal, no argument was advanced for Insurance Company on the point of absence of such driving licence of tempo driver. It is already mentioned that the officer of the Insurance Company also did not give evidence of such breach. Police papers show that no crime was registered against tempo driver for driving the vehicle without licence. Copy of the chargesheet is not filed and it can be said that police

did not file chargesheet for such offence against the respondent No. 1, driver.

12) Copy of driving licence of respondent No. 1 - Vijay Kharat is on the record at Exh. 36. This document shows that the driving licence for LMV (Light Motor Vehicle) N.Tr. (non transport) was obtained on 20.7.2005 and this licence was valid till 14.7.2022. At the cost of repetition, it needs to be mentioned that accident took place on 20.5.2006. Copy of registration particulars of offending vehicle, the tempo bearing No. MH-17/C-5437 is on the record and it shows that vehicle was registered as LCV/Van, Light carriage vehicle. The vehicle was Tata 608 vehicle, having unladen weight of 3100 k.g. and laden weight which was allowed was 6000 k.g. A copy of insurance cover note at Exh. 37 shows that vehicle was insured as goods truck of 6000 K.G. In view of the definition of LMV, the offending vehicle was LMV though it was registered as transport vehicle.

13) In the latest case reported as **(2015) 2 SCC 186 [Kulwant Singh Vs. Oriental Insurance Co. Ltd.]**, the Apex Court has laid down that the licence in respect of LMV includes both transport and non transport vehicles. The learned counsel for Insurance Company submitted that this point is referred to

larger bench by Apex Court in **Civil Appeal No. 5826/2011** by **order dated 11.2.2016 [Mukund Vs. Oriental Insurance Co. Ltd.]**. It appears that bench of two Judges of Hon'ble Apex Court has requested the Hon'ble Chief Justice to refer this point to larger bench. In this case, the case of **Kulwant Singh** cited supra is considered and a different view expressed by another bench of similar strength in the case reported as **(2013) 7 SCC 62 [S. Iyyapan Vs. United India Insurance Company Limited and Another]** is considered. This Court holds that in view of the latest decision of the Apex Court given in **Kulwant Singh** cited supra, in the present case also, it needs to be held that the driver, respondent No. 1 was holding licence and on this point, no breach is proved by the Insurance Company.

14) The second defence is in respect of breach of permit which is covered by section 66 (1) of the Act. When the court considers such defence it is expected to consider the facts of the case in hand. The case in which the victim was 'third party' needs to be dealt with from different angle and different approach is required to be taken in the case, than the case in which defence is of such breach and the victim was present on the offending vehicle, he was not third party. It is true that when the claim is made by a person victim who was on offending

vehicle and he wants to get compensation from Insurance Company also, the initial burden is on him to show that he was authorised to board the vehicle and travel in the vehicle. He can show that he was either the owner of goods which he was carrying in the vehicle or he was employee of the owner and he was covered under the contract of insurance between the owner and the Insurance Company. When there is statutory liability in respect of the victim, when victim was driver and he was on driver's seat for the owner, there is statutory liability to cover such risk in view of the provision of section 147 of the Act. There is similar statutory liability in respect of the owner of goods under section 147 of the Act, but there is no statutory liability in respect of gratuitous passengers. The case becomes different for many reasons when the claimant is third party. The third party is statutorily covered by policy in view of provision of section 147 of the Act. When the victim himself was cause of the breach of the permit or breach of terms and conditions of policy the things are different in view of the right of Insurance Company.

15) Copy of Insurance policy is produced at Exh. 52 and it shows that the offending vehicle was insured as goods carrying commercial vehicle and following kinds of premiums were paid.

(A) - Minimum premium - Rs. 100.00

(B) - (a) T.P. BASIC - Rs. 3,280.00

(b) compulsory PA to Owner cum Driver - Rs. 100 (liability limited to Rs. two lakh)

(c) W.C. to employees 7 in number - Rs. 175.00

16) Copy of Insurance policy discussed above shows that the risk in respect of employees of the owner, though under Workmen's Compensation Act, was covered. It is already observed that the risk in respect of owners of goods is required to be statutorily covered u/s. 147 of the Act.

17) The police papers show that the crime was registered u/s. 66 (1) r/w. 192 of the Act. But only due to the registration of a crime for such offence, inference can not be drawn that fair paid passengers were really being carried in the vehicle at the relevant time and there was breach of provisions of section 66 (1) of the Act. It is already observed that the witness of Insurance Company has no personal knowledge. No witness like any person, who was allegedly travelling in the vehicle, is examined by the Insurance Company to prove such breach. Many times, such transport vehicle is taken on hire basis for carrying marriage articles and some persons travel with the

marriage articles as owners of goods. Some times the owner of vehicle engages labour for loading and unloading goods in the vehicle. In view of such possibility it was necessary for Insurance Company to examine witness having personal knowledge regarding the capacity in which some persons were travelling in the vehicle at the relevant time. There is no such evidence and so, it is not possible to hold that there has been breach of terms and conditions of permit and in turn of policy.

18) In the case like present one, the defence of the breach of permit needs to be looked from one more angle as the victim is 'third party'. The vehicle was permitted to be used as goods carriage and there was no prevention against the owner to take the vehicle on the road. The accident took place due to rash and negligent driving of the tempo driver and not due to the circumstance that there were probably few persons on the tempo. It cannot be said in such a case that the persons who were present in the vehicle were cause of the accident.

19) On the aforesaid point, the learned counsel for owner placed reliance on the case reported as **AIR 2014 SC 2187 [Fahim ahmad and Ors. Vs. Oriental insurance Company Ltd. & Ors.]**. The facts of the reported case show that tractor

was insured for agricultural purpose. At the relevant time, a trolley was attached with the tractor and in the trolley, there was sand which was allegedly being taken for irrigation purpose. The tractor gave dash and death of third party took place. The Apex Court held that in such a case, it cannot be presumed that there was breach of conditions of policy. The Apex Court held that the tractor fitted with trailer may or may not answer the definition of 'goods carriage' as contemplated in section 2 (14) of the Act. By making such observations, the Apex court allowed the appeal filed by the owner and the Apex Court held that the Insurance Company was bound to indemnify the owner. It was held that the Insurance Company had not proved that there was the breach of terms and conditions of policy.

20) The learned counsel for owner placed reliance on the decision of the **First Appeal No. 105/2000 [New India Assurance Co. Ltd. Vs. Smt. Asha Ghatvisave and Ors.]** decided by this Court on **8.2.2016**. In this appeal, this Court has held in similar circumstances that the so called breach of carrying passengers in goods carriage cannot be treated as fundamental breach to exonerate the Insurance Company from liability to indemnify the owner. The learned counsel for owner placed reliance on another case reported as **2013 (6) Mh.L.J.**

890 [National Insurance Co. Ltd. Vs. Seema] decided by this Court. But the facts of this reported case were totally different. Some observations are made by this Court that for giving exoneration, the Insurance Company needs to prove that the so called breach caused the accident.

21) The Insurance Company placed reliance on many cases. In the case reported as **(2009) 8 Supreme Court Cases 785 [National Insurance Company Limited Vs. Parvathneni and Anr.]**, the circumstance like absence of coverage of risk to the victim in policy is considered and in that case, the power of the Court to give direction to Insurance Company to pay compensation is discussed. There cannot be dispute that when there is no coverage in respect of particular risk, there is no question of fastening liability on the Insurance Company and so, the Courts are not expected to give direction to Insurance Company to pay the compensation and then allow it to recover it from the owner. In the case reported as **2004 AIR SCW 663 [National Insurance Co. Ltd. Vs. Swarn Singh and Ors.]** decided by three Hon'ble Judges, the Apex Court has made one proposition regarding the breach of penal provision of the Act vis-a-vis, the provisions which are made for the benefit of 'third party' under the Act. The Apex Court has laid down that

the provision made for benefit of third party need to be interpreted differently. There cannot be dispute over this proposition. The liability of Insurance Company in respect of third party risk is discussed by the Apex Court and the Apex Court has laid down that when breach of conditions of policy is proved, the Insurance Company can be asked to satisfy the award first in view of the provision of section 149 (4) and (5) of the Act. The breach in that matter was in respect of licence. In the case reported as **2004 ACJ 428 [National Insurance Co. Ltd. Vs. Baljit Kaur and ors.]**, the Apex Court has given meaning of the term 'any person' used in section 147 of the Act. There is no dispute over this proposition but that point is not involved in the present matter. In the case reported as **2008 ACJ 2654 [Ram Babu Tiwari Vs. United India Insurance Co. Ltd. and Ors.]** decided by two Hon'ble Judges of the Apex Court, view was taken that the owner cannot ask the Insurance Company to indemnify him when the breach of terms and conditions with regard to licence is proved. There cannot be dispute over the proposition made in this case also. The Court is expected to consider the right of third party and when the owner comes, such order cannot be made when there is breach of terms of conditions of policy. In the case reported as **2008 (1) Mh.L.J. 73 BOMBAY HIGH COURT [United India Insurance**

Co. Ltd. Vs. Anubai Gopichand Thakare and Ors.], the point involved was totally different. This Court (the other Hon'ble Judge) has discussed the power of Apex Court given under Article 142 of Constitution of India. This Court has observed that when such power is used in a particular case, the decision of that case cannot be used as precedent by High Court. On this point, there is one case decided by other Hon'ble Single Judge of this Court viz. **(Nagpur Bench) reported as 2009 (Supp.) Bom. C.R. 949 [New India Assurance Company Limited Vs. Yuvraj Shalikram Rewde & Ors.]**. Different view is expressed by the learned Single Judge and it is laid down that the law laid down by the Apex Court needs to be followed as binding precedent, unless it is made clear by the Apex Court that the decision will not be followed as precedent. In the case reported as **2009 (1) Mh.L.J. 898 [Traders Pvt. Ltd., Ahmedabad and Anr. Vs. Sunanda wd/o Krishna Machivale and Ors.]** decided by the Division Bench of this Court, the facts were totally different.

22) In view of the discussion already made, this Court holds that the Insurance Company has failed to prove that there was breach of terms and conditions of policy both as regards permit and licence. The Tribunal has committed error in

exonerating the Insurance Company, though it is asked to pay the compensation first and then recover it from the owner. Such decision cannot sustain in law. In the result, following order is made.

25) First Appeal No. 14/2013 of Insurance Company stands dismissed. First Appeal No. 502/2014 filed by owner is allowed. The judgment and award of the Tribunal, exonerating the Insurance Company is hereby set aside. The compensation awarded in favour of the claimants is to be paid jointly and severally by the owner and Insurance Company and the order made that Insurance Company is allowed to recover the compensation amount from the owner is hereby set aside. Award is to be prepared accordingly. Amount, if any, deposited by the Insurance Company is to be disbursed as per the award of the Tribunal.

[T.V. NALAWADE, J.]

ssc/