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

**FIRST APPEAL NO. 583 OF 2005
WITH
CA/7476/2005 IN FA/583/2005**

National Insurance Co. Ltd.,
having its Head Office and Registered
Office at 3, Middleton Street, Kolkatta,
a Branch Office at Hazari Chambers,
Station Road, Aurangabad, through
the Divisional Manager, Aurangabad.
..Appellant../
orig respondent 2

VERSUS

1. Latabai w/o Manikrao Kolhe,
age 45 yrs, Occ. Household,
R/o Gurupimpri, Tq. Ghansawangi,
Dist. Jalna.

2. Avinash s/o Manikrao Kolhe,
age 19 yrs, Occ. Agriculture,
R/o Gurupimpri, Tq. Ghansawangi
Dist. Jalna.

3. Kiran s/o Manikrao Kolhe,
age 13 yrs, Occ. Student, a minor
u/g of his natural mother,
Latabai Kolhe. ...Respondents..
(Orig claimants 1 to 3)

4. Rama s/o Hemaji Thangde,
age major, Business, R/o Awalgaon,
Tq. Ghansawangi, Dist. Jalna.

5. Baban s/o Narayan Jadhav,
age 36 yrs, Occ. Driver,
R/o Sevgul Tanda, Tq. Ghansawangi,
Dist. Jalna. ...Respondents..

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Advocate for Appellant : Mr Rupesh Bora h/f P P Bafna
Advocate for Respondents 1-3 : Mr R V Gore
Advocate for Respondents 4,5 : Mr Prasad Jadhavar h/f Mr V J Dixit

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CORAM : V.K. JADHAV, J.
Dated: July 10, 2017

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ORAL JUDGMENT :-

1. Being aggrieved by the judgment and award passed by the Member, Motor accident Claims Tribunal, Jalna dated 8.2.2005 in M.A.C.P. No.125/2002, the original respondent no.3 insurer has preferred this appeal.

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

a] On 23.2.2002 deceased Manikrao Kolhe started travelling in the matador bearing registration No.MH-21-6871 owned by respondent no.1, driven by respondent no.2 and insured with present appellant for going to Pandharpur from his village Gurupimpri. On way, respondent-driver driven said vehicle in fast speed and as such lost control over it. In consequence of which, said vehicle turned turtled and fell down in the right side ditch. Deceased Manikrao and some other persons died on the spot and other passengers also seriously injured in the said accident. The claimants-legal representatives approached the Tribunal by filing M.A.C.P. No.125/2002 for grant of compensation under the various heads.

b] Respondent nos. 1 and 2 owner and driver have resisted the claim petition by filing written statement. It has been denied that, driver of said vehicle had driven the vehicle in rash and negligent manner. It has been contended that, deceased Manikrao was about 75 years of age and as such, he was non earning member and none was depending on his income. In the alternate, it has been contended that vehicle is validly insured with appellant-insurer and as such, the appellant-insurer is liable to pay the compensation.

c] The appellant-insurer has strongly resisted the claim petition by filing his written statement. It has been contended that, driver of the said matador was not having valid and effective driving licence and the passengers were travelling in goods vehicle and as such there has been breach of the specified conditions of the policy. The appellant-insurer is thus not liable to pay the compensation.

d] The respondents-claimants have adduced oral and documentary evidence in support of their contentions. The respondent-owner has not adduced any evidence. The appellant-insurer has placed on record the policy copy, however, has not adduced any oral evidence.

e] The learned Member of the Tribunal, Jalna has partly allowed the application and thereby directed the respondent-owner and driver and the appellant-insurer to pay the compensation of Rs.1,65,500/- jointly and severally to the claimants. Hence, this appeal by the insurer.

3. Learned counsel for the appellant-insurer submits that, some 35 to 40 persons were travelling in a goods

vehicle. They were travelling as a passenger for visiting pilgrimage of Pandharpur. Same is evident from the contents of FIR Exh.4. Learned counsel submits that, respondent-claimant no.1 has made departure from the pleadings and adduced evidence to the effect that owner had gone to the house and requested the deceased to accompany the driver. On the other hand, respondent-owner and driver in their written statement have not stated anything about it. Learned counsel submits that, there is clear cut breach of the conditions of the policy. Even, in paragraph no.7 of the judgment, the Tribunal has referred the policy and most particularly, condition no.3 of the policy, wherein it is mentioned that the vehicle cannot be used for carrying passengers except employees other than driver not exceeding six in all. The learned Member of the tribunal has misconstrued said policy condition no.3 and further observed that said condition authorizes to carry six passengers in the vehicle. Even, in the same paragraph tribunal has observed that, passengers died in the accident might be coming within the said first six numbers of passengers.

Learned counsel submits that, Tribunal has recorded perverse finding. The appellant-insurer is not liable to pay any compensation.

4. Learned counsel for respondents-original claimants submits that, owner of the vehicle had come to the house of the deceased and requested him to accompany the driver. Deceased Manikrao was not travelling in the said vehicle as a passenger. Learned counsel submits that, it is a welfare legislation and thus by interpreting condition no.3 of the policy correctly, the Tribunal has fastened the liability on the appellant-insurer jointly and severally alongwith respondent-owner.

5. Learned counsel in order to substantiate its contentions, placed his reliance on a case **United India Insurance Company Ltd.,** Vs. **K M Poonam** reported in **2011 AIR (SCW) 2802**. Learned counsel submits that, in some what identical facts, the Supreme Court fastened liability on the insurer to pay the compensation

to the legal representatives of the occupants of the vehicle involved in the accident.

6. Learned counsel for respondent owner submits that, the tribunal has considered the policy and particularly condition no.3 in its right context and accordingly fastened the liability on the appellant-insurer to pay the compensation to the claimants. No interference is required.

7. On careful perusal of the pleadings, evidence and judgment and award passed by the Tribunal, it appears that, cousin of deceased Manikrao has lodged the complaint in the concerned police station and on the basis of his complaint, crime no.73/2002 came to be registered. On perusal of the contents of FIR Exh.4, it appears that, more than 23 persons were travelling in a goods vehicle tempo from village Gurupimpri to Pandharpur. As per the pleadings by the claimants, deceased Manikrao was proceeding from village Gurupimpri for going to his village Pandharpur.

However, deceased Manikrao was hailing from village Gurupimpri and the tribunal has rightly observed that, he was not going to his village Pandharpur as such. In the oral evidence, however, respondent-original claimant Latabai has improved the story and deposed before the tribunal that owner of the said matador i.e. respondent no.1 had come to her husband and asked him to accompany the driver of matador to Pandharpur. Though respondent-owner has not stated so in his written statement, even assuming that deceased Manikrao had boarded said matador at the request of respondent owner, neither he can be treated as employee of respondent no.1, nor as a gratuitous passenger. On perusal of policy exh.4/8, it is clear that use of the vehicle is prohibited for carrying passengers except employees other than driver not exceeding six in all. In absence of any pleadings/evidence, it cannot be presumed that deceased Manikrao was travelling in the said vehicle as an employee of respondent-owner. It is true that, burden is on the appellant-insurer to substantiate its defence, however, said burden can be discharged by adducing oral or documentary evidence, if any, or even by relying upon the oral/documentary evidence adduced by the other side.

8. In the instant case, on the basis of pleadings, evidence and documents placed on record no inference could be drawn that deceased Manikrao was travelling in the goods vehicle as an employee of respondent-owner. Further, deceased Manikrao was more than 75 years of age and, it is difficult to accept his status as an employee of respondent owner. It is nobody's case that deceased Manikrao was travelling in the said vehicle as an employee. However, the learned Member of the Tribunal without any basis made observations that, passengers died in the accident might be coming within the said first six numbers of the passengers. The learned Member of the Tribunal with this observations held that there is no breach of the policy conditions on the part of the respondent-owner of the vehicle. The approach of the tribunal is not only erroneous but the Tribunal under the garb of welfare legislation has

stretched the things to the extent and misconstrued the policy conditions and without any basis recorded such finding. In the result, the judgment and award passed by the tribunal is liable to be quashed and set aside to that extent.

9. Learned counsel appearing for the respondent owner has not made any submission on the point of quantum of compensation.

10. In a case **United India Insurance Company Ltd., Vs. K M Poonam** (supra), relied upon by the learned counsel for respondents-original claimants, facts are altogether different. In paragraph no.24 of the judgment, the Supreme Court has made following observations :-

> "24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1)

> of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

11. In the above case, the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including driver, and as such liability of the insurer would be confined to six persons only, notwithstanding the large number of persons carried in the vehicle. In the backdrop of these facts, the Supreme Court held that any of the persons travelling in the vehicle not exceeding of permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.

In the instant case, no such direction can be given for the reason that deceased Manikrao was not travelling in the said vehicle as an employee of the respondent owner and he was travelling as a passenger in the said vehicle. As per the policy conditions, liability of the insurer would be confined to six employees and not passengers. In the result following order is passed.

O R D E R

1. Appeal is hereby allowed. No costs.

2. The judgment and award passed by the Member, Motor Accident Claims Tribunal, Jalna dated 8.2.2005 in M.A.C.P. No.125/2002 is hereby quashed and set aside to the extent of directing the appellant-insurer to pay the compensation jointly and severally alongwith the respondent owner.

3. Rest of the Judgment and award stands confirmed including quantum of compensation and liability of the respondent owner to pay compensation to the claimants.

4. Award be drawn up accordingly.

5. If any amount is deposited by the appellant-insurer before this Court, the same shall be refunded to the appellant insurer.

6. Appeal is accordingly disposed of.

7. In view of disposal of first appeal, pending civil application also stands disposed of.

(V.K. JADHAV, J.)

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