THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 2687 OF 2011

The New India Assurance Company Ltd.,
a Subsidiary of the General Insurance
Corporation of India and a company
Incorporated under the Companies Act
having one of its Divisional office at
Adalat Road, Aurangabad
Through its Manager (Legal Hub) &
Authorized signatory
Shri Sanjeev S/o Ramrao Gaisamudre
Age 52 yrs., occu. Service at
The New India Assurance Co.,
D.O. No.1 Adalat Road, Aurangabad. ... **APPELLANT**
[Ori. Resp. No.2]

V E R S U S

1. Subhash Eknath Koli,
Age minor, Occ. Education.

2. Manoj Eknath Koli,
Age minor, Occ. Education

Through their natural guardian uncle
Sukla Mansaram Koli
Age 35 yrs., Occ. Agriculture,
r/o A.P. Arni, Tk. & District Dhule,

3. Bhatu Dharma Patil,
Age major, Occ. Tractor owner & driver
r/o Varkhede,
Tk. & District Dhule. ... **RESPONDENTS**
[R.No.1 & 2 : Org. Clmts.
R.No.3 : Org. R.No.1]

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Mr. Ajit B. Kadethankar, Advocate for the Appellant.

Mr. Mahesh H. Patil, Advocate for Respondent No.3.

...

CORAM : **V. K. JADHAV, J.**
DATE : 19th July, 2017.

ORAL JUDGMENT:

. Being aggrieved by the judgment and award passed by the Chairman of the Motor Accident Claims Tribunal, Dhule dated 28th February, 2011 in MACP No.1328 of 2005, Respondent No.2 / Insurer has preferred this appeal.

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

a) On 4th May, 2005 at about 06:15 pm, deceased Shobhabai was proceeding in a trolley attached to the tractor. She was returning to her house after doing the labour work. On way, because of the rash and negligent driving on the part of the driver of the said tractor, the tractor turned turtled. In consequence of which, deceased Shobhabai sustained grievous injuries. She was immediately shifted to Civil Hospital, Dhule where she succumbed to injuries while under treatment. The Claimants / legal heirs of deceased Shobhabai approached the Tribunal by filing MACP No.1328 of 2005 for grant of compensation under the various heads.

b) Respondent No.1 / owner resisted the claim application by filing the written statement. It has been contended that there was no negligence on the part of the driver of the tractor. It has also been contended that deceased Shobhabai was engaged on labour work by one contractor Jijabrao Hariman Patil through Panchayat Samiti Dhule. The said contractor had taken the offending tractor on rent and as such, the contractor and Panchayat Samiti are the necessary parties to the petition.

c) The Appellant / Insurer has also strongly resisted the claim application by filing the written statement. It has been contended that there were 20 passengers travelling in the tractor trolley alongwith deceased Shobhabai and as such, there has been a breach of the specified conditions of the policy.

d) The Respondents / Claimants have adduced oral and documentary evidence and the Respondent / owner has also adduced oral evidence before the Tribunal. The Appellant / Insurer has not adduced any evidence. The learned Chairman of the Tribunal vide judgment and award allowed the claim petition and thereby directed Respondent No.1 / owner alongwith Appellant / Insurer to pay jointly and severally the compensation of Rs.3,70,000/- with interest at the rate of 9% per annum. Hence, this appeal.

3 The learned counsel for Appellant / Insurer submits that there is a clear cut evidence of breach of the conditions of the policy. As per the contents of FIR and even as admitted by Respondent No.1 / owner, near about 20 persons were travelling in the trolley as passengers. Admittedly, those persons were not the labours

employed by Respondent No.1 / owner. It is the contention of Respondent No.1 / owner that the said tractor and trolley was given on rent to one contractor, who has undertaken the work of construction of percolation tank through the Panchayat Samiti. The learned counsel submits that the said tractor was used for commercial purpose. The Appellant / Insurer as such, is not liable to pay the compensation jointly and severally. However, the Tribunal has erroneously fastened the liability on the Appellant / Insurer jointly and severally with Respondent No.1 / owner to pay the compensation.

4 The learned counsel for Respondent / owner submits that from the policy placed before the Tribunal, it appears that the page of the policy as to the limitation to use, is missing and the same is now placed before this Court alongwith compilation of appeal memo. Thus, the Appellant / Insurer has failed to substantiate its contention before the Tribunal that the said tractor and trolley can be used only for agricultural purpose and the policy does not cover the use of the said vehicle for hire or reward. The learned counsel submits that the Appellant / Insurer has not adduced any evidence to substantiate its contention and as such, failed to discharge the burden. Thus, the Tribunal has rightly fastened the liability on the Appellant / Insurer

jointly and severally alongwith Respondent / owner to pay the compensation to the Claimants. There is no substance in the appeal and the appeal is thus, liable to be dismissed.

5 It appears from the pleadings, evidence and judgment and award passed by the Tribunal that the Tribunal has not given thought to the defence raised by the Appellant / Insurer. Respondent No.1 / owner has filed his affidavit of evidence Exhibit 42 and admitted in his cross-examination that though he had purchased the said tractor for agricultural work, on the relevant date, he had given the said tractor with trolley to one Jijabrao Patil on hire. He has further admitted in the cross-examination, that if the said tractor was being used for agriculture purpose, there was no reason for the 18 labours to travel in the trolley attached to the tractor at the time of accident. He has further admitted that it has specifically mentioned in the contents of the complaint that the said tractor was given to Jijabrao Patil on hire for the purpose of transporting the construction material. It is true that burden is on the Appellant / Insurer to prove its defence, however, the said burden can be discharged by adducing the oral or documentary evidence or even by relying on the evidence of the other side. Thus, the oral and documentary evidence on record sufficiently indicate that

there has been a breach of the specified conditions of the policy. I do not find any substance in the submissions made on behalf of the Respondent / owner that particular page of that policy is missing. In fact, the original policy is in the custody of the Respondent / owner and he could have produced it before the Tribunal to substantiate his contention. It thus, appear that the Tribunal has erroneously fastened the liability on the Appellant / Insurer to pay the compensation. Hence, the following order:

O R D E R

I. The appeal is hereby partly allowed with costs.

II. The judgment and award passed by the Chairman of the Motor Accident Claims Tribunal, Dhule dated 28th February, 2011 in MACP No.1328 of 2005, is hereby quashed and set aside to the extent directing the Appellant / original Respondent No.2 (Insurer) to pay jointly and severally an amount of Rs.3,70,000/- (Rupees Three Lacs and Seventy Thousand Only) towards compensation to the petitioners with interest at the rate of 9% per annum from the date of petition till realization of the amount.

III. Rest of the judgment and award directing Respondent No.1 / owner to pay the compensation and the quantum of the compensation as awarded by the Tribunal stands confirmed.

IV. Award be drawn up accordingly.

V. If any amount is deposited by the Appellant / Insurer before this Court, the same shall be refunded to the Appellant / Insurer.

VI. Appeal is accordingly disposed of.

[V. K. JADHAV, J.]

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