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

FIRST APPEAL NO.2615 OF 2016

The New India Assurance Co. Ltd.,
Through it's Divisional Manager,
Aurangabad Divisional Office, D.O.I.,
Above Mahesh Auto, Ajay Engineering Compound,
Near Kranti Chowk, Adalat Road, Aurangabad .. Appellant
(Original Opponent No.2)

VERSUS

1. Shilpa Sandeep Shinde
Age : 21 years, Occu : Household,

2. Sanket Sandeep Shinde
Age : 7 years, Occu : Nil,
Minor Through Guardian
Respondent No.4, Vimal

3. Pandharinath Karbhari Shinde
Age : 68 years, Occu : Nil

4. Vimal Pandharinath Shinde
Age : 57 years, Occu : Household,
Respondent Nos.1 to 4,
R/o. Morge Vasti Shrirampur,
Tal. Shrirampur, Dist. Ahmednagar

5. Nitin Gangadhar Wabale
Age : Major, Occu : Jeep Owner,
R/o. Belapur, Tal. Shrirampur,
Dist. Ahmednagar

6. Anna Jayram Pathare
Age : Major, Occu : Jeep Owner,
R/o Bhosale Petrol Pump, Dattanagar,
At & Post : Shrirampur, Dist. Ahmednagar .. Respondents

(Respondent Nos.1 to 4 Original Claimants, Respondent Nos.5 & 6 Original Opponent Nos.1 & 2)

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Learned Counsel for the Appellant	:	Shri. A.B. Gatne
Learned Counsel for Respondent No.1	:	Shri. R.B. Deshpande
Learned Counsel for Respondent Nos.3 & 4	:	Shri H.D.Deshmukh
Learned Counsel for Respondent No.5	:	Shri N.B. Narwade

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CORAM : P.R. BORA, J.

Reserved on : 13.10.2017
Pronounced on : 31.10.2017

JUDGMENT :-

1. The appellant – Insurance Company has filed the present appeal against the Judgment and award passed by the Motor Accident Claim Tribunal, Newasa (hereinafter referred to as the 'Tribunal') in Motor Accident Claim Petition No.246/2014 (Old Motor Accident Claim Petition No.302/2011) decided on 29.06.2015.

2. The present respondent nos.1 to 4 had filed the aforesaid claim petition claiming compensation on account of the death of Sandip Pandharinath Shinde in a vehicular accident happened on 19.08.2011 having involvement of a jeep bearing registration no.MH-17-AE-104 (hereinafter referred to as the 'offending jeep') owned by the present respondent no.5 and insured with the appellant - Insurance Company.

3. It was the case of respondent nos.1 to 4, who are hereinafter referred to as the claimants, that deceased Sandip

Pandharinath Shinde was serving as a driver on the offending jeep. Respondent no.6 was the second driver on the said jeep. On 19.08.2011 while said jeep was proceeding towards Narayangaon from Pune, respondent no.6 was driving the same. Deceased Sandeep was sitting besides respondent no.6 in the offending jeep. It was the contention of the claimants that, respondent no.6 was driving the said jeep in a rash and negligent manner. Respondent no.6 lost control over the said jeep and it capsized at a short distance from Ale Phata. In the accident so happened, deceased Sandeep sustained severe injuries and succumbed to the said injuries soon after the accident. As contended in the petition, age of deceased Sandeep was 25 years at the time of his death and he was earning Rs.5,000/- per month from the job of driver and also used to get daily Bhatta at the rate of Rs.100/- per day. It was the contention of the claimants that, they were fully depending upon the income of deceased Sandeep. The claimants had, therefore, claimed compensation of Rs.7,00,000/- from the driver, owner and insurer of the offending jeep.

4. The claim petition was resisted by the owner of the jeep as well as the appellant – Insurance Company. The owner of the jeep denied that, the alleged accident happened because of the negligence on part of respondent no.6 i.e. original respondent no.2, who was

driving the said jeep at the relevant time.

5. The appellant – Insurance Company had resisted the petition on various grounds. According to the appellant, the offending jeep was a private vehicle and was not allowed to carry passengers therein. It was the further contention of the appellant that, since deceased was being carried in the said jeep as a passenger, his risk was not covered by the insurance policy. It was the further contention of the appellant that, original respondent no.2 was not holding a valid driving licence at the relevant time. It was also contended that, the owner of the offending jeep has committed breach of the conditions of insurance policy by carrying a fare paying passenger through the said jeep and by allowing a person not holding a valid driving licence to drive the said jeep and as such, Insurance Company was not liable to pay any compensation to the claimants.

6. In order to substantiate the contentions raised in the claim petition, present respondent no.3 had deposed before the Tribunal and the claimants had also placed on record the relevant police papers pertaining to the accident in question. No evidence was adduced on behalf of any of the respondents.

7. The learned Tribunal after having assessed the oral as well as the documentary evidence brought before it, held the claimants entitled for the total compensation of Rs.8,43,600/- inclusive of NFL compensation with interest thereon at the rate of Rs.6% per annum from the date of application till the realization of the amount of compensation. The Tribunal held respondent nos.1 to 3 i.e. owner, driver and insurer of the offending jeep jointly and severally liable to pay the amount of compensation to the claimants. Aggrieved by, the appellant had filed the present appeal.

8. Shri A.B. Gatne, the learned Counsel appearing for the appellant – Insurance Company assailed the impugned judgment and award on various grounds. The learned Counsel submitted that, the Tribunal has failed in appreciating that, as per the pleadings of the claimants themselves, the offending jeep was being used for transportation of newspapers from Pune to Shrirampur. The learned Counsel submitted that, the offending jeep was admittedly a private vehicle and it was not permissible for the owner of the said jeep to use the same for any commercial purpose or for transportation of goods. In the circumstances, according to the learned Counsel, no liability could have been fastened by the Tribunal on the appellant – Insurance Company.

9. The learned Counsel further submitted that, the Tribunal also did not appreciate that, original respondent no.2, who was driving the offending jeep at the relevant time, was not holding a valid driving licence on the date of accident. The learned Counsel submitted that, by allowing a person not holding a valid driving licence to drive the offending jeep, the owner of the jeep had committed the breach of the conditions of insurance policy. The learned Counsel further submitted that, in view of the fact that, the appellant – Insurance Company had sufficiently proved that, the owner of the offending jeep had committed breach of the terms and conditions of the insurance policy, the Tribunal should not have held the appellant – Insurance Company liable to pay the amount of compensation to the claimants.

10. The learned Counsel further submitted that, the Tribunal has also failed in appreciating that, the policy of the insurance of the offending vehicle was not covering the risk of the second driver. The learned Counsel submitted that, according to the case of the claimants themselves, deceased was the second driver on the offending jeep. Referring to the terms and conditions of the insurance policy the learned Counsel submitted that, no additional premium was paid by the owner for covering the risk of second driver

travelling in the offending jeep and as such, no liability could have been fastened by the Tribunal on the appellant – Insurance Company. In support of the contentions, the learned Counsel relied upon the following Judgments :

(i) **Manager, National Insurance Company Limited Vs. Saju P. Paul and Another, reported in (2013) 2 Supreme Court Cases page no.41**

(ii) **Oriental Insurance Co. Ltd Vs. Premlata Shukla & Ors reported in 2007 AIR Supreme Court Weekly 3591**

The learned Counsel prayed for setting aside the impugned judgment and award and to dismiss the claim petition against the appellant – Insurance Company.

11. Shri R.B. Deshpande, the learned Counsel appearing for respondent no.1 i.e. one of the claimants supported the impugned judgment and award. The learned Counsel submitted that, the insurance company did not raise any specific defence in its written statement filed before the Tribunal that the offending jeep was being used for transportation of newspapers i.e. for carrying the goods. The learned Counsel submitted that, no such evidence also has come on record to show that, the offending jeep was being used for commercial purpose i.e. for transportation of the newspapers. The

learned Counsel submitted that, the spot panchanama drawn of the spot of the alleged accident nowhere reveals that, newspaper bundles were being carried through the offending jeep. The learned Counsel further submitted that, original respondent no.2 was holding the valid driving licence on the date of accident and as such, there was no substance in the objection raised on behalf of the appellant - Insurance Company that, the owner of the jeep committed breach of the policy condition by allowing a person not holding the valid driving licence to drive the offending jeep. The learned Counsel further submitted that, the insurance policy of the offending jeep was a comprehensive act policy and as such the risk of deceased Sandip was fully covered by the said policy. The learned Counsel submitted that, even if deceased Sandip is held to be an occupant in the said jeep, his risk was fully covered by the policy of insurance. The learned Counsel, therefore, prayed for dismissal of the appeal filed by the appellant – Insurance Company. The learned Counsel placed his reliance on the Judgment of the Hon'ble Apex Court in the case of **New India Assurance Co. Ltd Vs. Vimal Tanaji Salunkhe and others** reported in **2011 ACJ 2303** to support the submissions made by him.

12. Shri H.D. Deshmukh, the learned Counsel appearing for

respondent nos.3 & 4 adopted the arguments advanced by Shri R.B. Deshpande. Shri N.B. Narwade, the learned Counsel appearing for respondent no.5 also supported the impugned Judgment and award. The learned Counsel submitted that, the owner purchased the comprehensive package policy and as such the risk of deceased was fully covered. The learned Counsel further submitted that, the Insurance Company has not raised any specific defence before the Tribunal that, offending jeep was being used for transportation of the newspapers and as such, the same cannot be entertained. For the first time in the appeal, the learned Counsel submitted that, the driver of the offending jeep was holding a valid driving licence to drive the offending jeep and the risk of deceased was fully covered by the insurance policy. The learned Counsel, therefore, prayed for dismissal of the appeal. The learned Counsel in support of his arguments relied upon the Judgment of the Hon'ble Apex Court in the case of **Oriental Insurance Company Ltd Vs. Surendra Nath Loomba and Ors** reported in **AIR 2013 Supreme Court page no.483**.

13. I have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. I have also perused the impugned Judgment and the evidence on record.

14. As has been noted herein above, the impugned Judgment and award is challenged by the appellant – Insurance Company mainly on two grounds; first that the owner of the jeep has committed breach of the policy conditions by using the private vehicle for commercial purpose, and the other that even if deceased is held to be second driver employed by the owner of the offending jeep, in view of the law laid down by the Hon'ble Apex Court in the case of **Manager, National Insurance Company Limited Vs. Saju P. Paul and Another** (cited supra) risk of deceased was not covered under the insurance policy since no extra premium was paid to cover the risk of the second driver. Both the aforesaid objections are liable to be turned down for the following reasons :

15. In the written statement filed by the appellant – Insurance Company before the Tribunal, it has raised the following defences : (i) that, respondent no.2, who was driving the offending jeep at the relevant time, was not holding the valid driving licence to drive the said jeep, (ii) that, though it was impermissible to carry any passenger in the offending jeep, deceased was being carried through the said jeep as a passenger, (iii) that, the owner of the offending jeep did not comply the mandatory duty on his part as provided

under Section 134 (c) of the Motor Vehicles Act to furnish the particulars of the policy, date, time and place of accident.

16. It is thus evident that, the insurance company had not raised any specific defence that, the offending jeep was put to commercial use i.e. for transportation of newspapers though it was a private jeep. It was vehemently argued by Shri A.B. Gatne, learned Counsel appearing for the appellant - Insurance Company that, the contents of F.I.R. as well as the contents in the claim petition and the facts stated by claimant no.3 in his testimony before the Court undoubtedly reveal that, the offending jeep though was a private jeep was being used for transportation of newspapers. In view of the above, according to the submissions made by learned Counsel for the appellant – Insurance Company, the breach of the conditions of insurance policy by the owner of the jeep stands proved and no specific pleading, therefore, was necessary. The learned Counsel submitted that, the F.I.R. was being relied upon by the claimants themselves and when F.I.R. itself bears an information that, the offending jeep was being used for transportation of newspapers, no other proof was required to be given by the appellant – Insurance Company. Relying on the judgment of the Hon'ble Apex Court in the case of **Oriental Insurance Co. Ltd Vs. Premlata Shukla & Ors**

(cited supra) the learned Counsel argued that, the FIR which has been brought on record by the claimants and which has been relied upon by the claimants to prove their claim, has to be read in its entirety and it cannot be ignored on the ground that, it has not been legally proved by the appellant – Insurance Company by leading evidence in that regard.

17. I am, however, not convinced with the submissions so made on behalf of the appellant – Insurance Company. In view of the law laid down by the Hon'ble Apex Court in the case of **National Insurance Co. Ltd. Vs Swaran Singh & Ors** reported in (**2004) 3 Supreme Court Cases Page No.297**, it was incumbent upon the appellant – Insurance Company to specifically raise the aforesaid defence and to prove the same by adducing positive evidence in that regard. As noted herein above, the appellant - insurance company neither has raised any such specific defence in its written statement nor has adduced any evidence in that regard. In the circumstances, merely on the basis of some averment in the FIR or in the statement of one of the claimants before the Court, it is difficult to record any finding that, the offending jeep was being used for commercial purpose at the relevant time.

18. I have carefully gone through the contents of the FIR as well as the testimony of claimant no.3 i.e. father of deceased. It is true that, there is some reference in the statement of the said witness that, at the relevant time, deceased had gone to Pune for bringing newspapers. However, merely on the basis of the said statement, it is difficult to record any such finding that, the offending jeep was being regularly used for transportation of newspapers. In absence of any supporting evidence in that regard, no such conclusion can be recorded that, the offending jeep was being used for commercial purpose i.e. for transportation of newspapers. Further, as has been observed by the learned Tribunal, the spot panchanama drawn of the alleged spot of accident does not reflect that, the newspaper bundles were being carried through the said jeep at the relevant time. For the aforesaid reasons, the objection raised on behalf of the appellant – Insurance Company deserves to be rejected.

19. The another defence raised by the appellant – Insurance Company is that, since the risk of the second driver was not covered under the insurance policy of the offending jeep, deceased was liable to be classified as a gratuitous passenger in the said jeep and it has to be therefore held that, the owner of the jeep did commit a breach of policy condition by carrying a gratuitous passenger through the said

jeep. In order to support the contentions so raised, the learned Counsel relied upon the Judgment of the Hon'ble Apex Court in the case of **Manager, National Insurance Company Limited Vs. Saju P. Paul and Another** (cited supra). Inviting my attention to the discussion made by the Hon'ble Apex Court in para nos.17 to 19 of the said Judgment, the learned Counsel submitted that, the law laid down by the Hon'ble Apex Court in the said case would squarely apply to the instant case. The learned Counsel submitted that, in the case before the Apex Court deceased was stated to be a second driver or spare driver on the offending vehicle and since no additional premium was paid to cover his risk, the Hon'ble Apex Court held that, the said driver can only be classified or categorized as a gratuitous passenger and no compensation was, therefore, liable to be paid by the insurance company.

20. The law laid down in the aforesaid Judgment may not apply to the facts of the present case. In the case before the Hon'ble Apex Court, the claimant was travelling in the offending vehicle as a spare driver though he was employed as a driver on an another vehicle owned by the owner of the said vehicle. Since the premium was paid in respect of one driver and one cleaner working on the said vehicle and not in respect of any other person, it was held by the

Hon'ble Apex Court that, the second driver or even spare driver was not covered under the policy of insurance. It was also observed by the Hon'ble Apex Court that, since the claimant was not employed to drive the said vehicle and was merely travelling in the said vehicle and not driving it, he could only be classified or categorized as a gratuitous passenger and the insurance company was not liable to pay any compensation for the injuries received to him in the accident happened to the said vehicle.

21. In the instant matter, deceased was the occupant in a private vehicle and there was a comprehensive / package policy of insurance. In the circumstances, as held by the Hon'ble Apex Court in the case of **Oriental Insurance Company Ltd Vs. Surendra Nath Loomba and Ors** (cited supra) the risk of deceased was fully covered by the policy of insurance. In the aforesaid Judgment, the Hon'ble Apex Court has distinguished between the act policy and the comprehensive / package policy. Referring to the circulars issued by the Insurance Regulatory & Development Authority (I.R.D.A.) the Hon'ble Apex Court has recorded a conclusion that, the comprehensive/ package policy would cover the liability of the insurer for payment of compensation for the occupant in the insured vehicle. In the circumstances, the learned Tribunal has rightly held

the appellant – Insurance Company liable to pay the amount of compensation to the claimants jointly and severally with the owner of the offending jeep.

22. Though an objection was raised by the appellant - Insurance Company that the driver of the offending jeep was not holding the valid driving licence at the relevant time, from the material on record, it is revealed that, the said driver was holding a valid driving licence on the date of accident and the copy of the said licence was placed on record of the Tribunal.

23. After having considered the entire material on record, it does not appear to me that, the Tribunal has committed any error in holding the appellant – Insurance Company jointly and severally liable to pay the amount of compensation to the claimants. I do not see any merit in the objections raised by the appellant – Insurance Company in the present appeal. Hence the following order.

ORDER

i) The appeal is dismissed, however, without any order as to the costs.

ii) The amount deposited by the appellant – Insurance Company in this Court be released with interest accrued thereon in favour of the claimants in terms of the award passed by the Tribunal, if not already withdrawn by the claimants.

(P.R. BORA, J.)

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