IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1521 OF 2013

National Insurance Co. Ltd.,
having its head office and
Registered Office at No. 3,
Middleton Street, Kolkata,
A Branch Office at Ahmednagar
and the Divisional Office at
Hazari Chambers, Station Road,
Aurangabad. **Appellant**.

Versus

1. Kayumkhan Rashidkhan Pathan
Age : 19 years, occu.: mechanic
R/o Behind Gokhrubaba Galli,
Near Kopargaon Police Station,
Kopargaon, Dist. Ahmednagar.

2. Santosh Arjun Lasani
Age : 40 years, occu: owner
R/o Yesgaon, Tal. Kopargaon. **Respondents**.

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Mr. P.P. Bafna , Advocate holding for
Mr. R.C. Bora, Advocate for respondent No.2.
Mr. Amol S. Gandhi, Advocate for respondent No.1.
Mrs. Rashmi Kulkarni, Advocate holding for
Mr. Sanket S. Kulkarni, Advocate for respondent No.2.

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CORAM : SUNIL K.KOTWAL,J.

Judgment reserved on : 03rd September 2018.
Judgment pronounced on : 12th September 2018.

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. This appeal is directed by the National Insurance Company, who was the original respondent No.2, against the Award

passed by the Motor Accident Claims Tribunal, Kopargaon in Motor Accident Claim Petition No. 40/2004.

2. Respondent No.1 is the original claimant and respondent No.2 is the original opponent No.1 i.e. registered owner of the offending vehicle i.e. Three Wheeler tempo No. MH-17-K-7818. No cross objection or appeal is preferred by respondent No.2 – owner of offending vehicle, against the finding recorded by Tribunal regarding rash and negligent driving by the driver of offending vehicle or against the quantum of compensation.

3. The alleged motor vehicular accident occurred on 08.02.2004 at about 10.45 p.m. when the Three Wheeler Tempo was proceeding towards Kopargaon by Sangamner to Kopargaon road. The offending vehicle dashed against motorcycle bearing registration No. MH-17-H-3347 which was coming from opposite direction. In that accident, both persons travelling by motorcycle sustained injuries. The claimant, who was travelling by offending three wheeler tempo, also sustained injury to his mouth resulting to fracture of bone and dislocation of nine teeth.

4. The learned Tribunal awarded compensation of Rs.2,78,000/- including compensation of Rs. 2,44,800/- under the head of “loss of future income”, Rs. 2200/- towards medical expenses, Rs. 10,000/- towards pains and suffering, Rs. 5000/-

towards special diet and transport, Rs. 10,000/- towards loss of enjoyment of life and Rs. 6,000/- towards loss of actual income during the period of two months when the claimant was under treatment.

5. Heard strenuous arguments submitted by Mr. Bafna, learned Counsel for the appellant. Mr. Amol Gandhi, learned Counsel for respondent No.1/original claimant and Smt. Kulkarni, learned Counsel for respondent No.2.

6. Learned Counsel for the appellant submits that at the time of accident the claimant was travelling by offending vehicle which was goods carriage vehicle, as gratuitous passenger, and therefore, his liability is not covered by insurance policy. His next submission is that driver of the motorcycle is necessary party to the claim petition. Regarding quantum of compensation, he submits that due to dislocation of teeth, the claimant has only difficulty for chewing the food as deposed by Medical Officer (PW-2). Therefore, considering the occupation of the claimant as motor mechanic, on account of this disability the claimant did not suffer any loss under the head of future loss of income.

7. Learned Counsel for the appellant points out that at the stage of cross-examination for the first time the claimant has taken plea that he was travelling by the transport vehicle as owner of

goods which were unloaded at certain destination. He places reliance on the cases of **“National Insurance Company Vs. Bommithi Subbhayamma and others”, (2005 ACJ 721), “National Insurance Company Vs. Cholleti Bharatamma and others” (AIR 2008 SC 484)** and **“United India Insurance Co. Ltd. Vs Suresh K.K. and another” [2008 AIR (SC) 2871]**. The ratio of these all Authorities is that liability of gratuitous passenger travelling by goods vehicle is not covered by policy of the insurance and he cannot claim compensation from Insurance Company.

8. In reply, learned Counsel for respondent No.1 / original claimant submits that the claimant was travelling by goods carriage tempo as owner of the goods which were unloaded at destination, and therefore, liability of the claimant is covered by policy of the insurance. He submits that Insurance Company did not lead evidence and did not file the policy of the insurance to prove terms of the contract of insurance, and therefore, the Insurance Company cannot prove the breach of any condition of policy of the insurance.

9. The next submission of learned Counsel for respondent No.1 is that the rules of the pleading are not strictly applicable in Motor Accident Claims Tribunal proceedings, and therefore, lack of pleading by claimant about travelling as owner of goods by the offending vehicle, is not material. He places reliance on the cases of “**National Insurance Company Vs. Dayanand Margeppa**

Pedde and others", [2010 (3) ALL MR 159], "United India Insurance Company Limited Vs. Godabai w/o Kisanrao Shinde and others" [2018 (1) Mh.L.J. 625], "Hanumanagouda Vs. United India Insurance Co. Ltd." [Laws (SC) 2014-1-55], "The New India Insurance Company Vs. Darshana Devi and others" [2008 (0) BCI 277], "National Insurance Co. Ltd. Vs. Bapurao Vishvanath Kendre and others" [2013 (3) T.A.C. 60] and **"Oriental Isurance Co. Ltd. Vs. Rashanna Laxmanrao Biradar" [2006 (5) All. M.R. 524]**.

10. Learned Counsel for respondent No. 2 submits that the claimant has not placed on record any evidence to prove that offending vehicle was hired by him for carrying goods and unloading it at Kopargaon. He submits that no permanent physical disability of the claimant is proved as dislocated teeth can be replaced. Her contention is that rash and negligent driving by driver of offending vehicle is not proved. In the alternate, her contention is that no breach of terms of contract of policy is proved, and therefore, Insurance Company is liable to indemnify the respondent No.2. She placed reliance on the judgment in the case of **"United Insurance Co. Ltd. Vs. Suresh K.K. and another" [2008 AIR (SC) 2871]**.

11. I have given thoughtful consideration towards submissions of learned Counsels for both the parties. I have gone through all the Authorities relied by respondents. In all the

Authorities it is not disputed by Apex Court and the High Court that gratuitous passenger travelling by goods carriage vehicle has no right to claim compensation from Insurance Company. The ratio of these Authorities is that if the vehicle is hired for transport of goods, only then, being owner of the goods, the claimant can claim insurance from Insurance Company under the contract of policy. It is immaterial whether at the time of accident the vehicle was empty or it was loaded with the goods. The ratio of the case of **"National Insurance Co. Ltd. Vs. Dayanand"** (supra) is distinguishable for the reason that in that case the Division Bench of this Court considered the liability of Insurance Company in the light of provisions of Motor Vehicles Act prior to amendment of 1994. The Insurance Company limited its liability up to Rs. 20,000/-. Therefore, filing of policy was necessary. In the case at hand, both parties rely on one and the same certificate of insurance (Exh.33), which indicates limit of the Insurance Company up to Rs. 7,50,000/- (Rupees Seven Lakh Fifty Thousand). Therefore, non-filing of other pages of the insurance policy does not affect merits of this case.

12. Now touching to the factual aspect of the present case, undisputedly, at the time of accident the claimant was travelling by offending vehicle which is goods carriage three wheeler vehicle. Therefore, under law if the claimant is gratuitous passenger travelling by goods carriage vehicle, certainly he is not entitled to

claim compensation from the Insurance Company. Both parties are relying on certificate of insurance (Exh.33) which indicates that the offending vehicle was insured with appellant – Insurance Company on the date and time of the accident. Therefore, filing of original policy of the insurance is redundant for the purpose of adjudication of dispute in between the parties. I have to only consider whether the claimant was travelling by offending vehicle as owner of the goods or as gratuitous passenger

13. No doubt, in view of the verdict of the Apex Court in the case of **"United India Insurance Co. Ltd. Vs. Sheela Datta and others"** (supra), the rules of the pleading are not strictly applicable in the accident claim petitions.

14. However, it does not mean that the rule of pleading is not at all applicable in the accident claim proceeding before the Tribunal.

15. In the case at hand, after going through the pleading of the claimant, it emerges that he has not pleaded a word in his entire petition that he had hired the offending tempo for carrying goods and while return journey he was travelling by the offending vehicle towards Kopargaon as owner of the goods, which were unloaded at its destination. The most important thing to be noted is that in his entire examination-in-chief he has not uttered a word regarding

hiring of offending tempo for transport of goods. Claimant (PW-1) merely deposed that he was proceeding from Zagde Phata to Kopargaon by three wheeler Ape tempo and on the way the accident occurred due to rash and negligent driving of the driver of tempo. When the claimant (PW-1) was cross-examined by learned Counsel for Insurance Company, for the first time in his cross-examination he deposed that he had hired the said tempo and was returning after delivery of the goods. However, he further admits that he has not stated about this fact to his Advocate and this fact may not be mentioned in his petition. Thus, it is crystal clear that the testimony of claimant (PW-1) regarding hiring of the tempo for delivery of goods is totally inconsistent with his own examination-in-chief as well as with the pleading. In addition to this, no documentary evidence is placed on record by the claimant to prove that on the date of occurrence the offending tempo was hired by him for delivery of goods.

16. The learned Tribunal was well aware about above inconsistent statements and absence of pleading regarding hiring of tempo. However, merely on the basis of stray reference in spot panchnama (Exh.30), by one Rashid Khan Pathan that it was hired tempo, the Tribunal held that the offending tempo was hired by the claimant for transport of goods on the date of accident. In fact, the spot panchnama (Exh.30) nowhere speaks that the tempo was hired

by claimant for transport of goods. Thus, otherwise also, on the basis of spot panchnama (Exh.30) conclusion cannot be drawn that at the time of accident the claimant was travelling by the offending tempo as owner of the goods.

17. In the circumstances, I hold that the plea raised by claimant for the first time in his cross-examination regarding hiring of the offending tempo for transport of goods is not at all acceptable and the testimony of claimant regarding hiring of the tempo is not at all reliable.

18. In the circumstances, the status of the claimant at the time of accident is only as gratuitous passenger travelling by transport vehicle. Therefore, in view of law settled by Apex Court in above cited Authorities, the claimant is not entitled to claim any compensation from appellant – Insurance Company.

19. However, the respondent No.2 i.e. owner of the offending vehicle cannot be absolved from his liability to pay the compensation to the claimant. By filing cross objection or cross appeal, the respondent No.2 has not challenged the correctness of quantum of compensation awarded by the learned Tribunal. Therefore, in this appeal I need not consider whether the compensation awarded by Tribunal is appropriate or exorbitant.

20. I hold that this appeal deserves to be allowed and

M.A.C.P. No.40/2007 deserves to be dismissed against the appellant – Insurance Company. Respondent No.1 - claimant will be at liberty to recover compensation from respondent No.2 – registered owner of the offending vehicle. The request of learned Counsel for respondent No.1 to issue direction to Insurance Company to pay the compensation amount to the claimant and thereafter recover it from the owner of the vehicle, cannot be accepted due to peculiar facts of this case that the owner is within reach of claimant who is a young mechanic. The ratio of **"United India Insurance Co. Vs. Godabai Shinde"** (supra) is not applicable due to distinguishing fact that in the said case the claimants were widow and minor children.

21. In the result, the appeal is allowed in above-said terms. Motor Accident Claim Petition No. 40/2004 is dismissed against Insurance Company (original opponent No.2). Insurance Company is at liberty to recover the amount already withdrawn by the claimant from owner of the offending vehicle. If any compensation amount is deposited in this Court, the same be refunded to the Insurance Company. Parties to bear their respective costs. The award passed by the learned Tribunal be modified accordingly.

(SUNIL K. KOTWAL)
JUDGE

vdd/