

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

FIRST APPEAL NO.3810 OF 2016

Sambhaji Panditrao Suryawanshi
Age: 31 Yrs., occu. Business,
R/o Jamb (Bk.), Tq.Mukhed,
District Nanded.

= **APPELLANT**
(Orig.Resp.No.1)

VERSUS

1. Prakash s/o Tulshiram Gaikwad
Age: 35 Yrs., occu. Business,
R/o Dapka (Raja), Tq. Mukhed,
District Nanded.

2. Oriental Insurance Co. Ltd.
Through its Branch Manager,
Branch at Sant Kripa Market,
1st Floor, Guru Gobind Singh
Marg, Nanded, (M.S.)

= **RESPONDENTS**
(Resp.No.1 is orig.
Applicant and Resp.
No. 2 is orig.
Resp.No.2)

WITH

FIRST APPEAL NO.4276 OF 2016

Sambhaji Panditrao Suryawanshi
Age: 31 Yrs., occu. Business,
R/o Jamb (Bk.), Tq.Mukhed,
District Nanded.

= **APPELLANT**
(Orig.Resp.No.1)

VERSUS

1. Sow. Savitra w/o Prakash Gaikwad
Age: 25 Yrs., occu. Household,
R/o Dapka (Raja), Tq. Mukhed,
District Nanded.

2. Oriental Insurance Co. Ltd.
Through its Branch Manager,
Branch at Sant Kripa Market,
1st Floor, Guru Gobind Singh

(2)

Marg, Nanded, (M.S.)

= **RESPONDENTS**
(Resp.No.1 is orig.
Applicant and Resp.
No. 2 is orig.
Resp.No.2)

Mr.NS Kadarale, Advocate for Appellant/s;

Mr.SV Suryawanshi,Adv. h/for Mr.SS Patil, Advocate for
Respondent No.1;

Mr.Uday S.Malte, Advocate for Respondent No.2.

CORAM : P.R.BORA, J.

DATE OF RESERVING JUDGMENT : 30th August,2018

DATE OF PRONOUNCING JUDGMENT : 30th October,2018

JUDGMENT:

1. Since both these appeals are arising out of one accident, I have heard common arguments in both the appeals and I deem it appropriate to decide these appeals by a common reasoning.

2. Original Respondents No.1, i.e. Driver as well as owner of the Ape Auto rickshaw bearing registration No. MH-26 G-5696, has preferred these appeals. In First Appeal No. 3810/2016 challenge is to the Award passed by Motor Accident Claims Tribunal at Kandhar (herein after referred to as the Tribunal) in MACP No. 26/2014 decided on 28th April, 2016; whereas First Appeal No. 4276/2016

arises out of the judgment and award passed by the said Tribunal on the same day in MACP No. 27/2014.

3. Respondent No.1 in both these appeals are husband and wife in relation. Both were injured in a vehicular accident happened on 12th August, 2013. They are hereinafter referred to as claimants. Both the claimants along with their son, by name Sonu, were travelling through the offending auto rickshaw. As alleged by the claimants, at the relevant time, driver of the offending auto rickshaw, i.e. appellant in both the present appeals, was driving the said auto rickshaw in a rash and negligent manner. As per the further contention in respective claim petitions filed by these claimants, the driver of the auto rickshaw lost his control over his vehicle because of which, it turned turtle and in the accident so happened, both the claimants received the injuries and were required to take a long treatment and were subjected to incur huge expenses there for. The claimants had, therefore, filed the aforesaid claim petitions claiming compensation for the injuries received to them in the alleged accident and

permanent disablement incurred by them because of the injuries caused to them in the said accident against the owner and insurer of the said auto rickshaw.

4. The claim petition was resisted by the insurance company on various grounds. It has denied the contention raised in the petition and had also taken a defense of breach of policy condition by the owner of offending auto rickshaw. It was the contention of the insurance company that the owner cum driver of the auto rickshaw was not holding any valid driving license to drive the said auto rickshaw on the date of the accident. It was also alleged by the insurance company that the owner of the offending auto rickshaw carried excess number of passengers through the offending auto rickshaw which resulted in occurrence of the alleged accident. It was, therefore, the contention of the insurance company that by carrying excess number of passengers and by driving the auto rickshaw, without valid driving license, the insured had committed the breach of the terms of policy condition and as such the insurance

company was not liable to indemnify him. The insurance company had placed on record the insurance policy as well as copy of the permit of the offending auto rickshaw demonstrating that the sitting capacity of the said offending auto rickshaw was 3 + 1 only. The insurance company, however, did not adduce any oral evidence. The owner cum driver of the offending auto rickshaw, i.e. original Respondent No.1, also did not adduce any oral or documentary evidence.

5. The learned Tribunal, after having assessed the oral as well as documentary evidence brought on record before it, partly allowed both the claim petitions with proportionate costs. The learned Tribunal held the claimant in MACP No. 27/2014 entitled for the compensation of Rs. 2,13,197/- and held the claimant in MACP No. 26/2014 entitled for the compensation of Rs. 2,35,948/-. The Tribunal held Respondent No.1 alone responsible for payment of the aforesaid amount of compensation to the claimant. The Tribunal exonerated the insurance company from its liability to indemnify the insured in both the

claim petitions and dismissed the claim petitions against the insurance company. Aggrieved by, original Respondent No.1 in both the claim petitions, who is owner of the offending auto rickshaw, has preferred the present appeals. Along with the appeals, the appellant – applicants has also filed civil application in each of the appeals, seeking leave to produce on record additional documentary evidence with further prayer to permit the appellant to prove the document so placed on record and to rely upon the said documents in order to substantiate his defense.

6. The appellant was intending to produce on record the copy of his driving license showing that on the date of the accident, he was holding a valid driving license to drive the offending auto rickshaw. The request made by the appellant seeking leave to file the additional documents on record and to adduce the necessary evidence so as to prove the said documents, was strongly resisted by the insurance company. In the circumstances, after hearing the learned counsel appearing for the parties, this Court, vide order passed on 31st

July, 2017, remitted the matter back to the Tribunal with direction that it shall permit the appellant, i.e. original Respondent No.1 in the claim petition, to produce on record the additional oral and documentary evidence to prove his contention that he was holding valid driving license on the date of the accident. It was further directed that the Tribunal shall take evidence and record its finding on the issue for which the matter was remitted back, as expeditiously as possible and preferably within a period of one month. The Tribunal was however requested to record its finding only on the issue for which the matter was remitted back and to send the matter to this Court along with finding recorded by it on the issue as was proposed in the said matter.

7. The material on record reveals that the learned Tribunal, after receipt of the writ of this Court, recorded the evidence on the concerned issue by giving due opportunities to the parties to the claim petitions and recorded its finding on the said issue After recording the finding on the said

issue, the Tribunal has sent back the record and proceedings along with its report on the additional issue. The report received from the learned Tribunal reveals that the Tribunal had framed a specific issue in both the claim petitions to the effect that, "whether Respondent No.1 was holding a valid driving license on the date of the accident, i.e. on 12th August, 2013 ?". The Tribunal has answered the said issue in the affirmative. The Tribunal has thus recorded a finding that Respondent No.1, i.e. present appellant was holding a valid driving license on the date of the accident, i.e. on 12th August, 2013.

8. In view of the finding now recorded by the Tribunal, the appellant has prayed for setting aside the impugned order in so far as it has exonerated the insurance company from its liability to indemnify the insured on the ground of breach of the policy condition and has prayed for passing further orders holding the insurance company jointly and severally liable to pay the amount of compensation as has been determined by the Tribunal in both the aforesaid matters, payable to

the respective claimants.

9. In so far as another objection which was raised by the insurance company and has been upheld by the learned Tribunal as about the breach of policy condition by carrying excess number of passengers than permitted through offending auto rickshaw, the learned counsel for the appellant submitted that the finding recorded in that regard by the Tribunal is unsustainable. The learned counsel submitted that since beginning, it was the contention of the claimant in both the claim petitions that on the date of accident, they were travelling through the offending auto rickshaw along with their son. According to the learned counsel, there were thus only three passengers in the offending auto rickshaw when the accident has happened. The learned counsel further submitted that the other persons, who were named to be occupants of the offending auto rickshaw at the relevant time, were never travelling by the said auto rickshaw and their names were referred by the claimants in the context that they helped the injured claimants to reach them in the hospital.

The learned counsel further submitted that even if the breach of policy condition, as alleged above, is held to be proved, even then, the same cannot be termed as fundamental in nature attributable to the cause of accident. In support of his contention, the learned counsel relied upon two judgments of the Hon'ble Apex court in the case of National Insurance company Ltd. Vs. Anjana Sham – (2007) 7 SCC 445; and the other in the case of B.V.Nagraju Vs. Oriental Insurance Company Ltd. – AIR 1996 SC 2054.

10. The learned counsel appearing for the insurance company reiterated the objection that owner of the offending auto rickshaw has committed breach of the terms of policy and the insurance company has been rightly exonerated from its liability to indemnify the insured. The learned counsel invited my attention to statement dated 12.6.2013 given by Prakash Tulshiram Gaikwad, i.e. claimant in MACP No. 26/2014, to show that in his statement he has specifically stated the names of Bandu Ramrao Rathod and Vishwanath Ganpath Gaikwad. The learned counsel submitted that in the charge

sheet also similar averments are there demonstrating that at the relevant time in the offending auto rickshaw both the claimants, their son and two more persons were travelling.

11. In so far as first objection as was raised by the insurance company about not holding of valid driving license by the offending auto rickshaw on the date of the accident is concerned, the same has been completely negated by the finding specifically recorded by the Tribunal after the matter was remanded to the Tribunal for recording its finding on the said specific issue whether on the date of the accident, the driver of the offending auto rickshaw was holding a valid driving license. I reiterate that the Tribunal, after having recorded the evidence and giving opportunity to the parties to the claim petition to make their submissions on the said issue, has recorded unambiguous finding that on the date of the accident, the present appellant was holding a valid driving license to drive the offending auto rickshaw. The aforesaid objection, therefore, does not survive.

12. The next objection, which now falls for determination is, whether it has been proved that the insured committed breach of policy condition by carrying excess number of passengers through the offending rickshaw ? It is not in dispute that the sitting capacity of the offending auto rickshaw is 3 + 1. It is the contention of the claimants that at the time of the accident, only three persons, i.e. the claimants themselves and their son were the occupants of the offending auto rickshaw. As against it, the insurance company has asserted that on the time of occurrence of the alleged accident, five persons were there in the offending auto rickshaw. In support of the aforesaid allegation, the entire reliance of the insurance company is on the police papers.

13. I have carefully perused the entire evidence on record and more particularly the police papers pertaining to the accident in question. It is true that in the FIR lodged by him, Prakash Gaikwad, i.e. claimant in MACP No. 26/2014, has stated that Bandu Ramrao Rathod and Vishwanath Ganpath Gaikwad, reached him and his wife to the

hospital after the occurrence of the alleged accident. However, in the cross-examination, said Prakash Gaikwad has denied the suggestion given to him by the learned counsel for the insurance company that there were 7-8 passengers in the offending auto rickshaw when the alleged accident happened. In the cross-examination admittedly, it was suggested to said Prakash Gaikwad that Bandu Ramrao Rathod and Vishwanath Ganpath Gaikwad were also travelling by the offending auto rickshaw at the time of the accident and he had denied the said suggestion. Moreover, on perusal of the FIR lodged by Prakash Gaikwad, it is revealed that what was stated by said Prakash Gaikwad in his said statement was the fact that he, his wife and son were taken to the hospital by Bandu Ramrao Rathod and Vishwanath Ganpath Gaikwad after occurrence of the alleged accident. In the entire statement it is nowhere stated by Prakash Gaikwad that the aforesaid two persons were the occupants in the offending auto rickshaw along with his wife and son.

14. My attention was invited by the learned

counsel for the insurance company to the first remand report containing the information that Bandu Ramrao Rathod and Vishwanath Ganpath Gaikwad were the occupants of the offending auto rickshaw. On the basis of the aforesaid evidence, it is difficult to accept the contention of the insurance company that at the relevant time, more than three passengers were travelling by the offending auto rickshaw. Admittedly, the insurance company did not adduce any oral or documentary evidence. The insurance company has failed to substantiate its defense by adducing any positive evidence there for. As I noted herein above, from the evidence on record, it is not possible to draw any inference that at the relevant time, there were 7-8 passengers in the offending auto rickshaw and more particularly that Bandu Ramrao Rathod and Vishwanath Ganpath Gaikwad were travelling by the said offending auto rickshaw.

15. Moreover, as has been held by the Hon'ble Apex court in the case of **B.V.Nagraju (cited supra)**, mere objection that owner of the vehicle permitted more number of persons than allowed to

travel through the offending auto rickshaw cannot be held to be a fundamental breach to have attributed to the accident and in such cases, the insurer cannot be absolved from its liability to indemnify the insured. In the said matter before the Hon'ble Apex court the commercial vehicle was carrying 9 passengers instead of 6 persons permitted in terms of the policy. The Hon'ble Apex court held that breach is not fundamental in nature to have attributed to the accident and eventually held the insurer liable for paying the damages to the claimants.

16. In the case of **National insurance company Ltd. Vs. Anjana Sham (cited supra)**, the offending bus was carrying 90 passengers against the carriage permit of 42 passengers. The said bus was insured for 42 passengers. The said bus fell in Nalla. 26 passengers died and 64 were injured. The insurance company was held liable to meet the Awards in favour of 42 passengers and not more. The Hon'ble Apex court further directed that the Tribunal shall take into account the sums, which are higher in 42 Awards and direct the insurance company to deposit

the said amount. The Hon'ble Apex court gave further directions to the Tribunal to distribute the said amount to all claimants. The Hon'ble Apex court further directed that the claimants shall be entitled to recover the balance amount from the owner of the vehicle.

17. In the instant matter, as has come on record, only two claim petitions are filed by two injured passengers. It is not in dispute that as per the terms of policy, the offending auto rickshaw was authorized to carry 3 passengers. In the circumstances, the insurance company cannot be absolved from its liability to pay the entire amount of compensation as has been awarded by the Tribunal in both the aforesaid claim petitions jointly and severally with the owner of the offending auto rickshaw.

18. For the reasons stated above, following order is passed, -

ORDER

- i. The order passed by the Tribunal in MACP No.26/2014 and MACP No.27/2014,

whereby it has dismissed the respective claim petitions against Respondent No.2 insurance company, is quashed and set aside;

ii. In both the aforesaid Claim Petitions, Respondent No.2 insurance company is held jointly and severally liable to pay the amount of compensation to the claimants in the respective claim petitions, as has been determined by the Tribunal, along with present appellant, i.e. Respondent No.1 in respective claim petitions;

iii. It would be open for the appellant in both the appeals, i.e. original Respondent No.1 in MACP No.26/2014 and MACP No.27/2014 to recover the amount, if any, paid by him to the respective claimants in pursuance of the Award passed by the Tribunal, in aforesaid claim petitions from Respondent No.2 insurance company, by initiating

proceedings there for;

iv. The balance amount, if any, deposited by the appellant in both the appeals, which is not permitted to be withdrawn by the respective claimants, shall be refunded to the appellant along with interest accrued thereon;

v. Both the appeals stand allowed in the aforesaid terms. Pending civil application, if any, stands disposed of.

(P.R.BORA)
JUDGE

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