IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 FIRST APPEAL NO.721 OF 2002
WITH
CA/4414/2002 IN FA/721/2002

. Oriental Insurance Co. Ltd.,
Market Yard, Ahmednagar,
through it's Authorized
Signatory, Div. Manager,
Aurangabad. ..Appellant
(Orig.Resp. No.2)

VERSUS

1. Smt.Kamal Maruti Berad
Age: 48 yrs., Occu.: Household.

2. Sambhaji Maruti Berad
Age: 28 yrs., Occu. : Agri.

3. Santosh Maruti Berad
Age: 25 yrs., Occu.: Agri.

All R/o. Mahatma Phule Agri. University
Rahuri, Dist.Ahmednagar. ..Orig. Claimants

4. Bansi Bhoji Patare
Age: 70 yrs., Occu.: Business,
R/o. Goregaon, Tq. Parner,
Dist.Ahmednagar. ..Orig.Resp.No.1.

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Advocate for Appellant : Shri Dhananjay Deshpande
Advocate for Respondent Nos.1 to 3 : Shri V.P.Latange
Advocate for Respondent No.4 : Shri S.D.Jayabhar h/f.
Shri D.R.Jayabhar

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CORAM : P.R.BORA, J.

DATE: 28th February, 2019

ORAL JUDGMENT:-

1. The Judgment and award passed in Motor Accident Claim Petition No.345 of 1996 by the Motor Accident Claims Tribunal, Ahmednagar on 19.04.2002, is challenged by the appellant Insurance Company which was respondent No.2 in the said petition.

2. The present respondent Nos.1 to 3 had filed the aforesaid claim petition claiming compensation on account of death of Maruti Berad alleging the same to have been caused in a vehicular accident happened on 10.12.1995 having involvement of a Jeep bearing Registration No.MH-01 R-3348 owned by present respondent no.4 and insured with appellant Insurance Company. It was the contention of present respondent Nos.1 to 3, who are hereinafter referred to as the claimants, that deceased Maruti had boarded the offending Jeep as a gratuitous passenger being a friend of the owner of the said Jeep and the said Jeep met with an accident because of rash and negligent driving of the driver of the said Jeep and in the accident so happened, he ultimately suffered the death. Age of the deceased was stated as 45 years in the petition and his income was stated to be Rs.6,000/- per month. The claimants had claimed the compensation of Rs.5,00,000/- .

3 The petition was resisted by the appellant Insurance Company. A specific defence was raised by the Insurance Company that deceased Maruti was a fare paying passenger in the said Jeep and his risk was not covered by the insurance policy of the said vehicle. It was the further contention of the appellant Insurance Company that the owner himself was in the Jeep at the relevant time and with his knowledge 12 to 14 persons were allowed to travel through the said Jeep, who were fare paying passengers. The Insurance Company on the said ground had claimed exoneration from its liability to indemnify the insured. The insured has however taken a plea that deceased Maruti was his friend and in that capacity he was travelling with him when the alleged accident had happened.

4 The claimant No.1 testified before the Tribunal and one more witness was examined so as to prove salary income of deceased. Opponent No.1 also deposed before the Court in order to substantiate the contentions raised by him in his written statement. No oral evidence was adduced on behalf of the appellant Insurance Company. The learned Tribunal, after having assessed the oral and documentary evidence brought on record before it, held the owner and insurer of the offending Jeep liable

to pay to the claimants the compensation of Rs.4,55,800/- inclusive of 'no fault liability'. Aggrieved thereby, the Insurance Company has preferred the present appeal.

5. Shri Dhananjay Deshpande, learned Counsel appearing for the appellant Insurance Company assailed the impugned Judgment on various grounds. The learned Counsel submitted that the Tribunal has utterly failed in appreciating the documentary evidence available on record in the form of Police papers. The learned Counsel submitted that the Police papers clearly demonstrate that in the offending Jeep at the relevant time about 12 to 14 persons were travelling as the fare paying passengers and the driver of the offending vehicle was therefore also prosecuted for the offences under Sections 184, 134(a) & (b), 187, 66(1) and 192 of the Motor Vehicles Act, 1988. The learned Counsel further submitted that the story as has been put-forth by the claimants as well as by Opponent No.1 in the petition that deceased Maruti was the friend of the owner of the offending vehicle, appears to be a concocted story and considering the evidence on record, the same cannot be believed.

6. The learned Counsel relying upon the Judgment of the

Hon’ble Apex Court in the case of ***Oriental Insurance Co. Ltd. Vs. Premlata Shukla and Ors. [(2007) 13 SCC 476]*** submitted that the documents placed on record by the claimants in the form of Police papers pertaining to the accident in question will have to be read as a whole and as it is. The learned Counsel invited my attention to the First Information Report (FIR) and statements of the witnesses recorded during the course of investigation in the said crime to urge that most of the said statements, reveal that including deceased Maruti 12 to 14 persons were travelling by the offending Jeep as the fare paying passengers, at the time when the alleged accident happened. The learned Counsel submitted that though owner of the offending vehicle has taken a defence that deceased Maruti was his friend, from the admissions which are given by the widow of deceased Maruti as well as the owner of the offending vehicle, his said contention has been falsified. The learned Counsel pointed out that deceased Maruti was neither relative of the owner of the offending vehicle nor from his village. The learned Counsel further brought to my notice that inconsistent facts have come on record as about travel programme of deceased Maruti. The learned Counsel submitted that in the circumstances, the contention of the owner of the offending vehicle cannot be believed.

7. The learned Counsel further submitted that the Insurance Company has sufficiently proved from the documents on record that the owner of the offending vehicle did commit breach of the policy conditions by carrying fare paying passengers. The learned Counsel submitted that the offending Jeep was admittedly a private vehicle to be used for the private purpose and the insurance policy of the said Jeep was not covering the risk of any other person, more particularly, the fare paying passengers. The learned Counsel relying upon the Judgment of this Court in the case of ***United India Insurance Co. Ltd., Vs. Anubai Gopichand Thakare and Ors. [2008 (1) Mh.L.J. 73]*** submitted that in such circumstances, the Insurance Company needs to be fully exonerated and the order of 'pay and recover' also cannot be passed when the breach has been sufficiently proved by the Insurance Company, which falls in the category of fundamental breach.

8. Shri V.P.Latange, learned Counsel appearing for respondent Nos.1 to 3 - original claimants supported the impugned Judgment and award. The learned Counsel submitted that there is no reason to disbelieve the version of the widow of the deceased that the owner of the offending vehicle was friend of her deceased husband. The learned Counsel submitted that the fact so stated by the widow of deceased in her testimony before the

Court is corroborated by owner of the vehicle in his evidence before the said Court and in absence of any contrary evidence, the Tribunal has rightly placed reliance on the said evidence. The learned Counsel submitted that when a specific defence was raised by the Insurance Company, the burden was on it to sufficiently prove its defence, which according to him has not been proved by the Insurance Company. The learned Counsel, in the circumstances has prayed for dismissal of the appeal.

9. Since the objection as about the driving licence has also been raised in the course of objection, the learned Counsel for the claimants sought to rely upon the Judgment of Hon'ble Apex Court in the case of ***New India Assurance Co., Shimla Vs. Kamla and others [AIR 2001 SC 1419]***.

10. Shri S.D.Jayabhar h/f. Shri D.R.Jayabhar, learned Counsel appearing for the owner of the offending vehicle also supported the impugned Judgment and award. Adopting the submissions made by Shri Latange, the learned Counsel further submitted that strict burden was on the Insurance Company to prove its defence that deceased Maruti was a fare paying passenger. The learned Counsel relying upon the Judgment of the Hon'ble Apex Court in the case of ***Lakhmi Chand Vs. Reliance General***

Insurance delivered in Civil Appeal Nos.49-50 of 2016, and more particularly, inviting my attention to para No.17 of the said Judgment, submitted that on failure on part of the Insurance Company to prove its defence, the liability has to be fixed on the Insurance Company and that has been rightly fixed by the Tribunal. The learned Counsel, in the circumstances, prayed for dismissal of the appeal.

11. I have given due consideration to the submissions made by the learned Counsel appearing for the parties. I have perused the impugned Judgment and the evidence adduced in the matter. The only question, which needs to be considered in the present appeal is whether deceased Maruti was a fare paying passenger in the offending Jeep or was travelling in the said Jeep as a friend or family member of the owner of the said Jeep.

12. It is not in dispute that the offending Jeep is a private vehicle and was not allowed to carry fare paying passengers through it. The Insurance Policy is there on record, which puts an embargo on use of the said Jeep and as per the terms of Policy, the owner of the offending Jeep is restrained from carrying the fare paying passengers through the Jeep or else that would be held to be the breach of policy condition. The Police papers filed

on record of the Tribunal which are collectively marked as Exh.3 clearly demonstrate that when the alleged accident happened, there were 12 to 14 persons travelling through the said Jeep. The contents of FIR reveal that statements of about 10 persons were recorded by the Police, who were travelling through the said Jeep at that time and almost all of them have stated before the Police that they were travelling by the said Jeep as the fare paying passengers. The Police papers further demonstrate that the driver of the offending Jeep has also been prosecuted for the offence under Section 66(1) of the Motor Vehicles Act, 1988, which relates to carrying unauthorized passengers through a private vehicle.

13. Though, the claimants have taken a plea that deceased Maruti was the friend of the owner of the offending vehicle and the owner has also supported the said contention by stating that deceased Maruti was his friend, from the evidence on record, it is difficult to believe the said version. If the cross-examination of the owner of the offending vehicle is perused, it shows that everything has been denied by him in his cross-examination. Moreover, there are material inconsistencies in the facts, which have come on record in the cross-examination of claimant No.1 and the owner of the offending vehicle. The material on record

further reveals that in the cross-examination, owner of the offending vehicle has clearly admitted that deceased Maruti was neither his relative nor was resident of his village. In light of the admission given by the owner of the offending vehicle in his cross-examination, if the statements of the witnesses recorded by the Police during the investigation are perused, they clearly reveal that the persons, who were travelling at the relevant time through the said Jeep, were fare paying passengers and all of them had paid fare to the driver of the said Jeep. In the circumstances, though the owner might have attempted to deny the said fact and has raised a plea that deceased Maruti was his friend and was travelling in the said Jeep in that capacity, from the evidence on record, the plea so raised cannot be believed and is liable to be rejected. From the evidence on record, it can be reasonably inferred that deceased Maruti was a fare paying passenger in the said Jeep.

14. As I noted herein above, the offending Jeep was a private vehicle and the risk of the fare paying passengers was not covered by its Insurance Policy. In the circumstances, In fact no liability was liable to be imposed on the Insurance Company. The impugned order so far as it relates to liability imposed on the Insurance Company to pay the amount of compensation jointly

and severally with the owner of the offending Jeep, therefore, cannot be sustained.

15. Insofar as the quantum of compensation is concerned, the Insurance Company has not raised any objection. None of the other respondents has preferred any appeal challenging quantum of compensation or any of the finding recoded by the Tribunal in the said Judgment. As such there is no reason to cause interference in the finding recorded in that regard.

16. This Court in the case of ***Anubai Gopichand Thakare and Ors.*** (supra) has held in paragraph No.9 as under:-

> *"9. What is the meaning of expression "third party" under the Motor Vehicles Act, 1988 ? Is it that anyone who is not the insurer and insured can be regarded as a third party ? That does not appear to be the true meaning of the expression "third parties" as envisaged under the relevant provisions of the Act. In "Dr.T.V.Jose V. Chacko P.M. alias Thankachan and Ors." MANU/SC/1691/2001: (2001) 8 S C C 748, the Apex Court considered the Clause (1) of Section II of the Insurance Policy produced in the given case. That was the third party policy. The Apex Court observed:*
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> *19. ...This clearly shows that the policy is a third-party policy. The terms and conditions governing this policy are not on record. What was shown to the Court were terms and conditions of a comprehensive policy relating to private cards. These cannot apply to this policy. In the absence of terms and conditions governing*

this policy it is not possible to accept the submission of Mr Iyer that this policy covered liability to occupants of the car. As has been set out hereinabove, the law on this subject is clear, a third-party policy does not cover liability to gratuitous passengers who are not carried for hire or reward. The 8th respondent company will, therefore, not be liable to reimburse the appellant.

The expression "third party" needs to be determined in each case with reference to the terms of the insurance policy. If the risk of a person is covered under the contract of insurance, then he/she would be the third party regarding whom the insurance cover can be used and the insurer will be liable to indemnify such a person or his legal representatives/dependents. However, the person, who is not covered under terms of the insurance policy cannot be treated as "third party" within the meaning of the provisions of Section 147 and Section 149 of the Motor Vehicles Act, 1988."

17. In view of the law laid down as above, the Insurance Company needs to be exonerated and no liability can be fastened on it for paying any amount of compensation as has been determined by the Tribunal.

18. From the material on record, it is revealed that the appellant Insurance Company was directed to deposit entire amount of compensation as per the award and subject to that the execution of the impugned award was stayed by this Court. It was pointed out by Shri Deshpande, learned Counsel that out

of the deposited amount, the claimants were permitted to withdraw Rs.1,50,000/- and the balance amount is directed to be invested in the Fixed Deposit Receipt and is accordingly lying with this Court. The learned Counsel though has also prayed for direction for recovery of the said amount of Rs.1,50,000/- from the claimants, I am not inclined to accept the said request. However, in view of the fact that the entire liability is now fixed on the owner of the offending vehicle, the Insurance Company may, in the present proceeding itself, recover the amount paid by it to the claimants, from the owner of the offending vehicle. Needless to mention that excluding the amount of Rs.1,50,000/-, the owner of the offending vehicle is liable to pay the balance amount of compensation as per the award with interest accrued thereon to the original claimants. The remaining amount deposited by the appellant Insurance Company in this Court shall be refunded to it with interest accrued thereon. The appeal stands allowed in the aforesaid terms. Pending civil application stands disposed of.

(P.R.BORA)
JUDGE

SPT