

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

First Appeal No. 0311 of 2011

District : Beed

M/s. New India Assurance Co. Ltd.,
having its registered and Head Office
at 87, M.G. Road,
New India Assurance Building,
Fort, Mumbai,
Branch Office at Beed
and Division Office at
Dr. Rajendra Prasad Road,
Ajay Engg. Compound,
Aurangabad - 431 005,
through its Senior Divisional
Manager,
Mr. Sanjeev Gaisamudre,
50 years.

.. Appellant
(Original
respondent
no.02)

versus

1. Devidas s/o. Machindra Waikar,
Age : 35 years,
Occupation : Tailor,
R/o. Yusufwadgaon,
Taluka Kej, Dist. Beed.
2. Narhari s/o. Eknath Chalak,
Age : Major,
Occupation : Agriculture,
R/o. Loveri,
Taluka Kej, Dist. Beed.

.. Respondents
(No.01 -
Original
claimant
&
No.02 -
Original
respondent
no.01)

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Mr. V.N. Upadhye, Advocate, for the appellant.

Mr. D.J. Choudhary, Advocate, for respondent no.01.

Respondent no.02 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17TH OCTOBER 2019

JUDGMENT :

01. Present appeal has been filed by the original respondent no.02 - Insurance Company challenging the judgment and award passed in M.A.C.P. No.115 of 2007 by learned Ex-officio Member of Motor Accident Claims Tribunal, Ambajogai, District Beed, dated 18-11-2010, thereby partly allowing the claim petition filed under Section 166 of the Motor Vehicles Act, 1988 by the present respondent no.01.

02. The facts giving rise to the appeal are, that the claimant is resident of Yusufwadgaon. He is a tailor by profession, who used to earn Rs. 9,000/- to Rs. 10,000/- per month and by agriculture, he used to get additional income. He wanted to go to his village Yusufwadgaon on 21-12-2006 and when he came to Shivaji Chowk at Kaij, at that time, driver of jeep bearing no. MH-15/E-1, who was acquainted him, took along with him in the said jeep. There were 3 - 4 persons sitting in the jeep at the relevant time. The jeep driver was driving the jeep in high speed. Due to his rashness and negligence, he lost control over the vehicle and gave dash to the tempo which came from the opposite direction. Claimant sustained serious injury to his right hand, like fracture.

Thereafter, some other arrangement was made for the other persons but the jeep driver took claimant in the same jeep from Kallamb road. But instead of taking it to Kallamb, he took the jeep from Mangwadgaon road and at that time also, he had driven the jeep in high speed, rashly and negligently. The said accident had taken place due to the negligence on the part of the jeep driver. The said jeep was owned by respondent no.01 and was insured with respondent no.02 at the relevant time. The jeep driver was prosecuted by police. The claimant has taken treatment at various hospitals and incurred huge expenditure. However, those accidental injuries have turned in permanent physical disability for him and he cannot do work as before. The claimant had claimed compensation of Rs. 3,00,000/-. [Parties are referred as per their nomenclature before the Tribunal.]

03. Respondents no.01 and 02 have filed their separate written statements denying all the averments in the petition. They have denied the allegations about rashness and negligence on the part of jeep driver. Age, occupation and income of the claimant has been denied. The Insurance Company has taken statutory defence that the claimant was proceeding from the vehicle as fare price passenger and therefore, there is breach of terms of policy requiring exoneration of the Insurance Company.

04. Taking into consideration the rival contentions, issues were framed. Only claimant has led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Tribunal has come to the conclusion that the accident had taken place due to the negligence on the part of the jeep driver only. The claimant sustained permanent physical disability to the extent of 25 %. The Insurance Company has failed to prove breach of terms of policy and therefore, both the respondents are liable to pay compensation jointly and severally. Compensation of Rs. 1,73,000/- has been awarded to the claimant together with interest at the rate of Rs. 7.5 % per annum from the date of filing of the petition till actual realization of the entire amount. Being dissatisfied with the said judgment and award, present appeal has been filed.

05. Heard learned Advocate Mr. V.N. Upadhye appearing for the appellant. Heard learned Advocate Mr. D.J. Choudhari appearing for respondent no.01. Respondent no.02, though served, remained absent.

06. It has been vehemently submitted on behalf of the Insurance Company, that the learned Tribunal failed to consider that the policy which was taken by respondent no.01 for the jeep was 'Act Policy' only. The claimant was travelling from the said jeep as fare paid passenger and therefore, the risk of the

claimant was not covered under the said policy. Learned Tribunal ought to have exonerated the Insurance Company.

07. Per contra, learned Advocate appearing for respondent no.01 supported the reasons given by the learned Tribunal. It is specifically submitted that the evidence has not been adduced by the Insurance Company to support the contents of the written statement. Therefore, under those circumstances, when it has been held that even respondent no.02 is liable to pay compensation to the claimants; it is the correct view.

08. At the outset, it can be seen that there is no serious challenge to the other findings by the learned Tribunal. That finding is in respect of accident of the jeep bearing no. MH-16/E-1731. No other vehicle is involved in the accident and the situation shown in the spot *panchanama* would make it clear that the doctrine of *res ipsa loquitur* is required to be invoked. Therefore, the accident had taken place due to the rashness and negligence only on the part of the jeep driver.

09. Now, the second question is as to whether the Insurance Company proves its statutory defence and if the statutory defences are not considered, then definitely the Insurance Company would be

equally liable to pay compensation to respondent no.01 since he is the owner of the offending vehicle.

10. The defence that was raised by the Insurance Company was that the policy which was taken by the respondent no.01 is 'Act Policy' only and when the petitioner was travelling from the same vehicle, at the relevant time, he has to be taken as farepaid passenger and his risk was not covered under the policy.

11. Per contra, learned Advocate appearing for respondent no.01 submitted that the learned Tribunal has taken a proper view. The Insurance Company has not led any oral as well as documentary evidence to support the contents of the written statement. Therefore, adverse inference is required to be drawn. Merely by submitting certain suggestions, that the risk of the passenger is not covered, without giving explanation of the terms of the policy, it cannot be stated that the defence is proved. Therefore, there is no requirement of interference in award.

12. As aforesaid, evidence has not been led by the Insurance Company. The certified copy of certificate of insurance of private car has been produced at Exhibit 41. No doubt, words '*liability only*' have been written on the policy, yet, it is to be noted that the schedule of premiums shows that

premium of Rs. 158/- has been taken for 'PA to unnamed passengers no.09'. That means, the policy was covering the risk of 09 persons at the relevant time. None from the Insurance Company has entered the witness box to explain in other terms or conditions of the policy. Further, even if we consider that the policy was 'Act Policy' only, yet, in view of the decision in *Popat Kacharu Kedar Vs. Smt. Jyoti w/o. Santosh Kedar & others* [First Appeal No. 2057 of 2010, decided on 11-08-2011] of this Court, it can be said that the risk of the occupier of the offending vehicle was covered under the same policy. Therefore, by any stretch of imagination, it can be said that the Insurance Company was justified in seeking exoneration. When the risk of 09 passengers was covered by taking premium, then definitely being an indemnifier, respondent no.02 was duty bound to indemnify respondent no.01. The liability of the Insurance Company is joint and several to that of respondent no.01 in view of the fact that because of the tortuous act on the part of the jeep driver, the claimant had suffered.

13. It appears that there is no serious challenge to the quantum awarded by the learned Tribunal by the present appellant. So also, the original claimant is not seeking any enhancement in the compensation.

14. Under such circumstance, there is no merit in the present appeal. The appeal deserves to be dismissed. Accordingly, it is dismissed. There shall be no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

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