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

955 FIRST APPEAL NO.835 OF 2003

United India Insurance Co. Ltd.
through its Divisional Manager and
authorised representative and Signatory,
Jalgaon Divisional Office,
Mansingh Market, II floor,
near Railway Station,
District Jalgaon. … APPELLANT.
(Original opponent No.3)

VERSUS

1. Sunil S/o Eknath Bhamre (Mason),
age 29 years occupation Blacksmith and Carpenter
R/o Shirud Taluka and District Dhule

2. Pravin S/o Anil Agrawal,
age 26 years occupation rickshaw driver
R/o Madhavpura, Dhadiwala Khunt,
Dhule Taluka and District Dhule

3. Anil S/o Bansilal Agrawal,
age 45 years occupation rickshaw owner
R/o Gat No. 5, Dhadiwala Khunt,
Dhule Taluka and District Dhule.

...Respondents
(Orig. claimant &
Respts. No.1 & 2)

WITH

FIRST APPEAL NO.836 OF 2003

United India Insurance Co. Ltd.
through its Divisional Manager and
authorised representative and Signatory,
Jalgaon Divisional Office,
Mansingh Market, II floor,
near Railway Station,
District Jalgaon. … APPELLANT.
(Orig. opponent No.3)

VERSUS

1. Dnyaneshwar S/o Dadabhai Girase
   age 19 years occupation agriculture and labourer
   R/o Vadne Taluka and District Dhule

2. Pravin S/o Anil Agrawal,
   age 26 years occupation rickshaw driver
   R/o Madhavpura, Dhadiwala Khunt,
   Dhule Taluka and District Dhule

3. Anil S/o Bansilal Agrawal,
   age 45 years occupation rickshaw owner
   R/o Gat No. 5, Dhadiwala Khunt,
   Dhule Taluka and District Dhule.

...Respondents
(Orig. claimant &
Respts. No.1 & 2)

Mr. A.B. Gatne, Advocate for appellant.
Mr. M.S. Kulkarni, Advocate for respondent No.1
Mr. M.H. Patil, Advocate for respondents No.2 and 3

CORAM : V.L. ACHLIYA, J.

DATE : 28th March, 2019

JUDGMENT :

These appeals are preferred as against the judgment and order dated 5th April 2003 passed in Motor Accident Claim petition Nos. 419/1998 and 420/1998 by the Member, Motor Accident Claims Tribunal, Dhule. By the impugned judgment and award passed separately the claimants in both the petitions are awarded compensation of Rs. 79,000/- with future interest at the rate of 9% per annum from the date of petition till realization with proportionate costs making the respondents in the petition jointly and severally liable to pay the compensation. Being aggrieved, the appellant (original respondent No.3 in claim petition)/Insurance Company has preferred these appeals.

2. Facts, in brief, leading to filing of the petitions are summarised as under:

(A) Respondent No.1/claimant, in both the appeals, filed separate application under section 166 of the Motor Vehicles Act, 1988 seeking compensation of Rs. 1,00,000/-, each, alleging therein that on 20th April 1998 while they were travelling from Shirud Chaufuli to Dhule in Minidor / auto-rickshaw bearing No. MH-18/D-8590, said auto-rickshaw turned turtle near Gartad Bari on Dhule-Chalisgaon road, due to rash and negligent driving on the part of driver of auto-reckshaw. In the accident, both of them sustained severe bodily injuries.

(B) Claimant in M.A.C.P. No. 419/1998 i.e. Sunil Eknath Bhamre has claimed that before the accident he used to work as Blacksmith. In the accident, he sustained injury to his right hand. Claimant Dnyaneshwar Dadabhai Girase in M.A.C.P. No. 420/1998 claims to have sustained injury to the spinal cord.

Both of them have claimed that due to injuries sustained by them, they are required to be treated for long time in the hospital and claimed that they have sustained permanent disability on account of injuries sustained in the accident .

(C) At the time of incident, the vehicle was owned by respondent No.3, driven by respondent No.2 and insured with appellant-insurance company. At the relevant time of incident, respondent No.2 was driving the said auto-rickshaw in excessive and unmanageable speed. Due to excessive speed, respondent No.2 could not control the rickshaw and turned turtle causing serious injuries to both the claimants.

(D) Since the auto-rickshaw driven by respondent No.2 was in the employment of respondent No.3-owner of the vehicle and said vehicle was insured with appellant (i.e. respondent No.3 in the claim petition), each of the claimants have claimed compensation of Rs. 1,00,000/- making the respondents in the petition to pay the compensation to them jointly and severally.

3. Owner and driver of the vehicle though appeared, not filed the written statement.

4. Respondent No.3 i.e. appellant contested the claim by filing written statement. Claim has been resisted by the appellant

mainly on the ground that in terms of the policy, besides driver, only six persons were permitted to be carried in said vehicle. In breach of terms and conditions of the policy 12 persons were found to be carried in the said vehicle. Appellant/insurance company prayed for dismissal of petition against insurance company on the ground of breach of policy conditions.

5. In order to prove their case, the claimants in respective claim application appeared and adduced evidence as per the case pleaded. Neither the respondents No.1 and 2 nor respondent No.3 adduced evidence in the matter. On conclusion of the evidence, the Tribunal has found the respondents jointly and severally liable to pay Rs. 79,000/- to each of the claimants with future interest at the rate of 9% per annum from the date of application till realization with proportionate costs. Being aggrieved, the appellant/insurance company has preferred this appeal.

6. Mr. A.B. Gatne, learned Advocate appearing for the appellant assailed the reasons and findings recorded by the Tribunal with contention that the reasons and findings recorded by the Tribunal are without proper appreciation of evidence adduced in the case. By referring contents of the first information report (Exh.24), the learned Counsel submits that though the

respective claimants in their cross-examination have denied the suggestion that 12 persons were travelling in the said auto-rickshaw, the first information report proves that in breach of permit granted for carriage of passengers, the driver of auto-rickshaw was carrying 12 passengers and in excess of permissible capacity of the auto-rickshaw as well as permit issued by the Transport Authority for the carriage of passengers. In this background, the learned Counsel submits that since there was a breach of policy conditions on the part of the insured by allowing driver of the vehicle to carry passengers in excess than the permissible capacity and in excess of the permit issued by the Transport Authority, the Tribunal ought to have dismissed the petition against the appellant-insurance company. It is submitted that the Tribunal has ignored the evidence of carriage of 12 passengers in the said auto-rickshaw in contravention of the permit granted by the Transport Authority and thereby extended the protection of law in favour of the persons, who have violated the provisions of law. It is submitted that in terms of the policy, it is specifically provided that the insurance company will not be liable in case of breach of terms of policy. The said auto-rickshaw was granted permit to carry maximum six passengers besides the driver. In view of violation of conditions of the permit and limitations as to use of the vehicle provided under the policy, the Tribunal has erred in making the appellant/ insurance company liable to pay compensation jointly and severally along with respondents No. 2 and 3. It is submitted that the reasons and findings recorded to issue No.3 are contrary to the evidence on record and urged to set aside the impugned judgment and order making appellant liable to pay compensation jointly and severally with respondents No.2 and 3.

7. On the other hand, Mr. Patil, learned Counsel representing respondents No.2 and 3 supported the judgment and order passed by the Tribunal. He has pointed out that though the appellant has claimed breach of policy conditions, no oral as well as documentary evidence has been adduced on the part of the appellant/insurance company. It is further pointed out that though the appellant has claimed that there is breach of policy conditions, no oral or documentary evidence has been placed on record in support of its case. It is further pointed out that even the copy of the policy also not tendered in evidence before the Tribunal. It is further pointed out that there is no substantive evidence brought on record to show that there was violation of conditions of policy as well as permit issued by the Transport Authority. By referring the decision in the case of ***Damodharprasad Chandrikaprasad and others Vs. State of***

Maharashtra, reported in ***(1972) 1 SCC page No. 107***, the learned Counsel submits that it is settled position in law that the first information report is not a substantive evidence and same can be used only for limited purpose to corroborate or to contradict the maker of such statement. It is further submitted that even if it is assumed that at the time of accident, the driver of the said auto-rickshaw was carrying passengers in excess of the permit issued by the Transport Authority or carriage capacity of the permit, still same is not sufficient to claim that there was a breach of conditions of policy and insurance company is liable to be exonerated. In support of the submissions, the learned Counsel referred and relied upon the decision of the Apex Court in the case of ***National Insurance Co. Ltd. Vs. Anjana Shyam and others*** reported in ***(2007) ACJ 2129*** and the decision of this Court in the case of the ***New India Assurance Company Limited Vs. Wahida Bano and others*** reported in ***(2014) ACJ page No. 2182***. By referring the findings recorded by the Tribunal, the learned Counsel submits that the judgment and order passed by the Tribunal is well reasoned and passed on due appreciation of pleadings as well as evidence adduced in the case. It is submitted that there is absolutely no perversity in any of the reasons and findings recorded by the Tribunal so as to call for interference in exercise of the appellate jurisdiction.

8. Mr. Mukul Kulkarni, learned Counsel representing respondent No.1 in respective appeal i.e. the claimants, supported the judgment and order passed by the Tribunal with contention that there is absolutely no merit in the appeal preferred by the appellant.

9. I have carefully considered the submissions advanced in the light of rival pleadings, oral and documentary evidence adduced in the case as well as the reasons and findings recorded by the Tribunal.

10. On due consideration of the submissions advanced, I am of the view, no case is made out to interfere with the reasons and findings recorded by the Tribunal. The reasons and findings recorded by the Tribunal are reasoned and based upon due appreciation of evidence on record. The Tribunal has dealt the issue raised by the appellant in the instant appeals and recorded the findings, which reads under:-

> "6. Issue No.3 :-
>
> It is urged on behalf of the Insurance Co. through the learned advocate Shri Y.L. Jadhav that there are 12 passengers in the said mini door rickshaw. See the complaint. Hence there is clear cut breach of policy. He has pointed out the policy in

which it is permitted six passengers plus one. But, I do not agree with his submission because six plus one permitted and these are two passengers claiming compensation then they are entitled to get compensation being third party. The risk is covered on the basis of this policy. They are coming under six plus one and it is well settled that mere excess passengers do not commit the breach of terms of policy. And further mere breach of policy is not sufficient, it must be willful. See United India Insurance Co. Ltd. Vs. Lakshwaih reported in 2001, ACJ 868 (A.P.) Mere excess passengers, is no breach of policy. See Apex Court's ruling in the case of B.V. Nagaraju Vs. The oriental Insurance Co. Ltd reported in 1996 (2) TAC 429 (SC) and it is well settled. The learned advocate for the claimant has also relied upon the rulings i.e. Krishnan Vs. United India Insurance Co. Ltd. 1999 (2) ACJ 871, Ker. National Insurance Co. Ltd. Vs. Zaina and others reported in 2002 (1) T.A.C. 121 (J & K.). Hence there is no substance in the argument of Mr. Jadhav. Hence in the instance case there is no breach of policy. Hence I answer issue No.3 accordingly."

11. Thus, it is an admitted position that though the appellant has raised the issue about the breach of policy condition, neither the insurance policy tendered in the evidence, nor any witness is examined to prove the breach of policy condition on the part of insured. During the cross-examination of claimant, the witness

was suggested that at the time of incident, twelve persons were travelling in the vehicle involved in the accident. The witness has denied the suggestion and categorically stated that he has specifically stated before the police that six passengers were travelling in the vehicle at the time of incident. Thus, if we consider the testimony of the claimant, nothing is brought on record to find favour to the case of appellant insurance company that at the time of accident, twelve persons were carried as a passengers in breach of policy condition. Except the pleadings made by the appellant insurance company, there is no oral or documentary evidence adduced to prove the breach of policy condition on the part of owner of the insured of the vehicle.

12. So far as the submission advanced that in the first information report lodged in respect of the incident, it is mentioned that the driver of the vehicle i.e. respondent no.1 has reported that at the time of incident, he was carrying twelve passengers in the vehicle involved in the accident, it is pertinent to note that neither the driver of the vehicle is examined, nor the police constable who recorded the first information report examined in the case. It is the settled position in law that the first information report is not substantive evidence and same can be used for limited purpose to corroborate and contradict the

maker of such statement. In this context, the learned counsel for respondent no.1 has relied upon the decision of the Apex Court in the case of ***Damodarprasad Chandrikaprasad and others vs. State of Maharashtra*** reported in ***(1972) 1 SCC 107***, wherein the Apex Court has held that the first information report cannot be treated as substantive evidence and same can be used only for the purpose of corroborating and contradicting the maker of such statement. Only for the reason that the first information report marked as exhibit, the same can not be treated as substantive evidence and read in evidence. In that view, no evidence has been adduced to prove that at the time of incident the vehicle involved in the accident was carrying twelve passengers in contravention of the terms of policy and thereby the owner of the vehicle has committed breach of policy condition.

13. It is an admitted position that neither the insurance policy was tendered in evidence, nor any witness was examined in support of the case of the appellant to prove the breach of policy condition. In absence of such evidence being adduced on the part of appellant – insurance company, no fault can be found with the reasons and findings recorded by the Tribunal to reject the contention of the appellant – insurance company that there was a

breach of policy condition on the part of owner/insured of the vehicle involved in the accident.

14. Even if it is presumed and accepted that the passengers more than permissible carriage capacity of the vehicle were travelling in the vehicle at the time of incident, still the appellant – insurance company cannot deny to pay the compensation on the ground of breach of violation of permit. It is not in dispute that in the terms of policy issued by the appellant – insurance company, the risk of six passengers and the driver was covered. It is also not in dispute that except two claimants, no other passenger has claim the compensation arising out of the accident in question. The carriage of passenger in excess of the permit at the most provide cause of action for prosecution of the person for violation of the conditions of permit issued to the vehicle. The insurance company can not refuse to indemnify the insured unless the insurance company make out the case covering the exemptions provided under Section 149 (2) of the Motor Vehicles Act, 1988. There is no dispute as to the fact that the vehicle in question was a passenger vehicle and the insurance company has covered the liability to pay the compensation to the accident of six passengers and to driver. Neither the case of breach of policy conditions on the ground of not holding the effective driving

licence or use of the vehicle for the purpose other than insured has been pleaded and proved on the part of appellant – insurance company. Section 149 (2) of the Motor Vehicles Act 1988 provide the exceptional circumstances, under which the insurance company can deny to indemnify the insured. Section 149 (2) reads as under :-

> "**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks :-**
> (1) ......
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> (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—
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> (a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—
>
> (i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

15. Thus, if we consider the submissions advanced in the light of purport of Section 149 (2) of the Motor Vehicles Act, then the case of the appellant that the appellant is not liable to indemnify

the insured due to breach of policy condition cannot be accepted as none of the exception carved out under Section 149 (2) of the Motor Vehicles Act has been proved by the appellant insurance company. The carriage of the passengers in excess of the permissible capacity is not provided as an exception within the ambit of Section 149 (2) of the Motor Vehicles Act to deny the liability to indemnify the insured and satisfy the award passed by the Tribunal. In this context, the learned counsel for the respondents have rightly referred and relied on the decision of the Apex Court in the case of ***National Insurance Co. Ltd. Vs. Anjana Shyam and others*** reported in ***(2007) 7 SCC 445,*** wherein the Apex Court dealing with the case based on similar facts held that the carriage of passenger in excess than the permissible capacity of the vehicle would not absolve the insurance company to satisfy the award and further held that the liability of the insurance company confines to the number of passengers covered under the terms of policy. In paragraph nos. 13, 14 and 18, the Apex Court has observed as under :-

> "13. Under Section 149(1) of the Act, the insurance company has the obligation, subject to the provisions of that Section, to satisfy the decree or award made by the court concerned or Tribunal on claims by third parties. Section 149(2) of the Act provides that no sum shall be payable by an insurer unless notice of the proceedings had been given to the insurance company before the commencement of the

proceedings through the court or the Claims Tribunal, and that it shall not be liable if there has been a breach of a specified condition of the policy as indicated in that sub-section. These cover use of the vehicle for hire or reward where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or use for organized racing and speed testing, or use for a purpose not allowed by the permit under which the vehicle is used where the vehicle is a transport vehicle, or use without side-car being attached where the vehicle is a motor cycle, or there is a breach of a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification, or a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion, or that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. Under sub-section (5), it is provided that if the amount which an insurer becomes liable to pay under this Section in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would, apart from the provisions of this Section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person. Therefore, on the scheme of the Act, the insurance company, if it is not able to establish that there is a fundamental breach of a condition which would enable it to disclaim liability, it may have to pay the amount of compensation adjudged by a Claims Tribunal subject of course to its rights to recover from the insured, the owner of the vehicle such excess as it is obliged to pay.

14. Section 149 of the Act speaks of the judgment or award in respect of the liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 of the Act having to be satisfied. Section 147(1)(b) compels insuring the person or classes of persons specified in the policy to the extent specified in sub-section (ii) of that Section. The case

> on hand will come under sub-clause (ii) of clause (b) of Section 147 (1) of the Act which obliges the owner to take out insurance compulsorily against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.
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> 18. In this situation, the insurance taken out for the number of permitted passengers can alone determine the liability of the insurance company in respect of those passengers. In terms of Section 149 of the Act, the duty of the insurer is only to satisfy judgments and awards against persons insured in respect of the third party risk. Obviously, this is to the extent the third party risk is coverable and is covered. Section 149 of the Act speaks of judgment or award being obtained against any person insured by the policy and the liability of the insurer to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder subject to any claim the insurer may have against the owner of the vehicle. Section 149 could not be understood as compelling an insurance company to make payment of amounts covered by decrees not only in respect of the number of persons covered by the policy itself but even in respect of those who are not covered by the policy and who have been loaded into the vehicle against the terms of the permit and against the terms of the condition of registration of the vehicle and in terms of violation of a statute."

16. Thus, in view of the discussion made as above, I am of the view that no case is made out to call for interference with the judgment and order passed by the Tribunal holding the insurance company liable to satisfy the award jointly and severally. The

reasons and findings recorded by the Tribunal are in consonance with the evidence on record. In the result, the appeals filed devoid of merit and deserve to be dismissed. Accordingly, the appeals are dismissed with no order as to the costs.

(**V.L. ACHLIYA)**
JUDGE

Madkar / Rane