IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1386 OF 2007

National Insurance Co. Ltd.
having its Head Office and
Registered Office at 3
Middleton STreet, Kokata
A Branch Office at Latur
and a Division Office at
Hazari Chambers,
Station Road, Aurangabad
Now through the
Divisional Manager at
Aurangabad — Appellant

Versus

1. Nagnath s/o Sheshrao Khandekar
age 60 years, occ. nil
r/o Nalegaon, Tq. Chakur
Dist Latur

2. Sundrabai w/o nagnath Khandekar
age 55 years, occ. household
r/o Nalegaon, Tq. Chakur
Dist. Latur

3. Shashikant s/o narayan Dhaveli
age 38 years, occ. owner and Driver
r/o Nalegaon, Tq. Chakur
Dist. Latur — Respondents

Mr. R.C. Bora, Advocate holding for Mr. P.P. Bafna, Advocate for appellant.
Mr. R.K. Ashtekar, Advocate holding for Mr. C.B. Kulkarni, Advocate for respondent no. 1.
Mr. S.V. Warad, Advocate for respondent no. 3.

CORAM : P.R. BORA, J.
DATE : 4th MARCH, 2019

JUDGMENT :

1. The insurance company has preferred the present appeal against the judgment and award passed in Motor Accident Claim Petition No. 313/2001 by the Motor Accident Claims Tribunal, Latur on 27.07.2004.

2. The present respondents 1 and 2 had preferred the aforesaid claim petition seeking compensation on account of death of their son namely Gangadhar alleging the same to have been caused in a vehicular accident happened on 09.02.2001 having involvement of the truck bearing registration no. MWP 7516 owned by respondent no. 3 and insured with appellant – insurance company. It was the contention of the respondents no. 1 and 2 (hereinafter referred to as the 'claimants') that the alleged accident happened because of the sole negligence of the driver of the offending truck. As contended in the petition, age of the deceased was 25 years and he was working as a cleaner on the offending vehicle and was earning salary of Rs. 3,000/- per month. The claimants had therefore claimed compensation of Rs. 3,00,000/- jointly and severally from the driver, owner and insurer of the said truck.

3. The owner of the offending truck though duly served did not appear before the Tribunal and the petition was proceeded ex-parte against him. The insurance company has contested the petition by filing written statement. The insurance company had raised a plea of breach of policy condition by the owner of the offending truck. It was the specific defence of the appellant-insurance company that the deceased was a fare paying passenger in the offending truck and as such his risk was not covered.

4. The Tribunal, on assessment of the oral and documentary evidence placed on record, held the claimants entitled for total compensation of Rs. 1,85,000/- jointly and severally from the owner and insurer of the offending truck. The Tribunal has turned down the plea raised by the insurance company that of breach of policy conditions by the insured. Aggrieved by the decision so rendered by the Tribunal, the insurance company has preferred the present appeal.

5. Mr. Bora, learned counsel holding for Mr. Bafna, learned counsel for the appellant – insurance company, assailed the impugned judgment on various grounds. Learned counsel submitted that the finding recorded by the Tribunal that deceased was not employed as a cleaner on the offending truck, was leading to the only inference that he was a passenger of the offending truck, may be a fare paying passenger or a gratuitous passenger. The learned counsel submitted that admittedly the insured truck is a goods carrier and in the said truck no passenger either fare paying or gratuitous was allowed or permitted to travel. Learned counsel submitted that the First Information Report is relied upon by the claimants. Learned counsel pointed out that the contents of the First Information Report reveal that at the relevant time there were 20 to 25 persons travelling through the offending vehicle and all of them were the members of one marriage party and were proceeding for attending the marriage. The learned counsel submitted that in view of the finding recorded by the Tribunal, no order could have been passed by the Tribunal holding the appellant – insurance company jointly and severally liable to pay

the amount of compensation. Learned counsel in the circumstances prayed for setting aside the impugned judgment and award.

6. Mr. Ashtekar, learned counsel for the original claimants supported the impugned judgment and award. Learned counsel submitted that the Tribunal has passed a well reasoned order and no interference is called for. Learned counsel further submitted that when a plea was raised by the insurance company as about breach of policy condition, onus was on it to substantially prove the said defence by bringing on record some positive evidence. Learned counsel submitted that no evidence has been adduced by the appellant-insurance company. In the circumstances, according to the learned counsel, the Tribunal has not committed any error in holding that the insurance company has failed in proving breach of policy condition on the part of the owner of the offending truck. Learned counsel therefore prayed for dismissal of the appeal.

7. Mr. Warad, learned counsel for respondent no. 3 – owner of the offending vehicle also supported the impugned judgment and award. Learned counsel however pointed out that infact the Tribunal has grossly erred in not holding the deceased negligent in occurrence of the alleged accident. Taking me through the documents which are relied upon by the claimants, more particularly, averments in the First Information Report as well as inquest panchanama, learned counsel submitted that the deceased was sitting on the right side of the driver of the truck which was impermissible and that was the reason that he met with an accident and ultimately suffered death in the said accident.

Learned counsel submitted that in such circumstances, it has to be held that the deceased himself contributed occurrence of the alleged accident by his own negligence. Learned counsel further submitted that the Tribunal has not committed any error in recording the finding that the insurance company has failed in establishing the defence of breach of policy condition by the owner of the truck. In the circumstances, the learned counsel submitted for dismissal of the appeal. Learned counsel alternatively submitted that if it is held that breach of policy condition is proved, contributory negligence on the part of the deceased may be considered which may have material effect on the amount of compensation.

8. I have given due consideration to the submissions made by learned counsel for the respective parties. I have gone through the judgment and the evidence on record. Following issues were framed by the Tribunal and they were answered as mentioned against each of them :

i) Do the claimants prove that the deceased Gangadhar Khandekar was the employee of respondent no. 1 as a Clearner-cum-Driver on the truck bearing Registration No. MWP 7516 ?	No.
ii) Do they prove that due to the rash and negligent driving of the respondent no. 1, the accident occurred, wherein deceased Gangadhar Khandekar died on the spot ?	Yes.
iii) Do they prove that deceased Gangadhar was the only earning member in their family, and they both	

were dependents on him ?	Yes.
iv) Whether the respondent No. 2 proves that the respondent no. 1 committed the breach of terms and conditions of the insurance policy, therefore, insurance company is not liable for payment of compensation ?	No.
v) Whether both the respondents are severally and jointly liable for payment of compensation ?	Yes.
vi) Whether the claimants are entitled to claim an amount of Rs. 3,00,000/- towards compensation together with interest @ 18% per annum ?	Rs.1,80,000/- together with nterest @ 9% per annum from the date of filing the claim petition till realisation
vii) What order ?	As per final order.

9. Perusal of the issues framed and the findings recorded by the Tribunal against each of the said issues make it clear that the Tribunal has recorded an unambiguous finding that the plea taken by the claimants that deceased Gangadhar was travelling by the offending truck as an employee i.e. cleaner on the said truck has not been substantiated by them. Surprisingly, issue no. 4 to the effect that whether respondent no. 2 proved that respondent no. 1 committed breach of terms and conditions of the insurance policy has also been answered in negative by the Tribunal. It was the specific defence raised by the insurance company that around 20 to 25 persons were travelling by the said truck when it met with

the accident. It was specifically denied by the insurance company that deceased Gangadhar was an employee as a cleaner on the said truck. Admittedly, the owner did not cause his appearance in the matter nor he filed written statement in the said matter. Considering the evidence on record when the Tribunal has recorded a finding that that the claimants have failed in establishing that deceased Gangadhar was a cleaner on the said truck, the only inference which would have been drawn by the Tribunal was that deceased was a passenger travelling in the said truck when the alleged accident happened. It was the specific defence raised by the insurance company that, by carrying passengers in a goods carrier, the owner of the said truck had committed breach of policy condition and the insurance company was therefore, not liable to indemnify him. At the first instance, it was the burden on the claimants to prove that deceased was travelling by the offending truck in the capacity of an employee employed on the said truck by the owner of the said truck. As noted hereinabove, after having considered the evidence on record, the Tribunal has recorded a finding that the claimants have failed in proving that deceased Gangadhar was the employee of respondent no. 1 i.e. owner of the truck as cleaner-cum-driver on the offending vehicle. The finding so recorded has not been challenged by the claimants. Considering the evidence on record, it does not appear to me that the Tribunal has committed any error in recording such finding. The police papers which are filed on record by claimants pertaining to the accident in question, more particularly, the First Information Report in relation to the accident in question reveals that when the alleged accident happened, there were 20 to 25 persons travelling by the said truck. No further proof is required to reach to the conclusion that, at the relevant time, passengers were being carried through the offending vehicle which is admittedly registered as a goods carrier.

10. In the circumstances, the finding recorded by the Tribunal that the respondent-insurance company did not prove breach of terms and conditions of policy by the owner of the offending vehicle, apparently appears unsustainable and deserves to be set aside. From the evidence on record, it has been amply proved that the passengers were being carried through the offending truck. Breach of policy conditions has thus been sufficiently proved by the insurance company. As has been held by the Honourable Apex Court in the case of National Insurance Co. Ltd. Vs. Bommiyhi Subbhayamma and others reported in (2005)12 Supreme Court Cases 243, the insurer is not statutorily liable to cover the risk of gratuitous passengers carried in a goods vehicle. No liability was therefore could have been fastened on the insurance company to pay the amount of compensation to the legal heirs of deceased Gangadhar who was a passenger travelling in the goods truck. The Tribunal has mis-interpreted the provisions under Section 147(1)(b) of the Act as well as Sections 149(2)(a) and 149(4) of the said Act.

11. For the reasons sated above, the impugned award against the appellant-insurance company is to be set aside and is accordingly set aside.

12. It is brought to my notice that while filing appeal the insurance company has deposited the entire amount of compensation alongwith interest accrued thereon and the

claimants have been permitted to withdraw sum of Rs. 60,000/- from the said amount. Though the learned counsel for the insurance company was persuasive in submitting that the insurance company be permitted to recover said amount from the claimants, in view of the undertaking filed on record, I am not acceding to the said request. In would be open for the insurance company to recover the said amount from the insured. The claimants also shall recover the remaining amount from the owner of the offending vehicle. The remaining amount deposited by the appellant - insurance company in the present appeal in this Court be refunded to it with interest accrued thereon.

13 Appeal stands allowed in the aforesaid terms.

(P. R. BORA, J)

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