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

FIRST APPEAL NO.1324 OF 2003

The New India Assurance Company Ltd.,
Through It's Divisional Manager,
Adalat Road, Aurangabad .. Appellant
(Orig. Respondents 2 & 3)

Versus

1. Ayodhyabai w/o. Venkat Kanote
Age : 33 years, Occu : Labour,
R/o. Devni (Bk.), Post. Devni (Kh.)
Tq. Devni, District Latur

2. Ankush Tulshiram Patil
Age : Major, Occu : Business,
R/o. As above .. Respondents
(Orig. Claimant & Resp. No.1)

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Advocate for Appellant : Shri S.G. Chapalgaonkar
Advocate for Respondent No.1 : Shri B.B. Yenge
Respondent No.2 : Served.

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CORAM : P.R. BORA, J.
Dated: January 07, 2019

ORAL JUDGMENT :

1. Heard Shri S.G. Chapalgaonkar, learned Counsel appearing for the appellant – Insurance Company and Shri B.B. Yenge, learned Counsel appearing for respondent no.1. Respondent no.2 i.e. original respondent no.1, the owner of the offending vehicle though has been duly served, has not caused his appearance in the matter.

2. The Insurance Company has challenged the Judgment and Award passed in M.A.C.P. No.127 of 2000 passed by the Motor Accident Claims Tribunal at Nanded (hereinafter referred to as the 'Tribunal') on 09.05.2003. The aforesaid claim petition was filed by the present respondent no.1 claiming compensation on account of injuries caused to her in the vehicular accident happened on 21.09.1999 while she was travelling by a tempo insured with the appellant – Insurance Company. The learned Tribunal has awarded the compensation of Rs.38,500/- to respondent no.1 jointly and severally from the appellant – Insurance Company and the owner of the offending tempo i.e. present respondent no.2. The impugned Award is assailed by the appellant – Insurance Company mainly on the ground that, in no case the liability could have been saddled on the appellant – Insurance Company to indemnify the insured since the breach of terms of policy conditions by the owner of the offending tempo was sufficiently proved by the appellant – Insurance Company. The learned Counsel pointed out that, FIR Ex.22 in the record of the trial Court clearly demonstrates that,

at the relevant time when the alleged accident happened 35 persons were travelling through the said tempo. The learned Counsel further pointed out that, the police papers filed in the matter also contain the list of 32 persons who were stated to have been injured in the alleged accident while travelling through the offending tempo. The learned Counsel submitted that, no other evidence was required to prove that the owner of the offending tempo had committed the breach of terms of policy by carrying passengers in a goods vehicle. The learned Counsel submitted that, it is not in dispute that, the offending tempo is a goods carrier.

3. The learned Counsel submitted that, insofar as the case of respondent no.1 is concerned, it was her contention that, she was travelling through the said tempo along with her goods and as such her risk was covered by the insurance policy. In this context, the learned Counsel brought to my notice the observations made by the Tribunal in para 21 of its Judgment to the effect that, respondent no.1 was a gratuitous passenger in the offending tempo.

4. Learned Counsel pointed out that, the Tribunal has committed mistake in appreciating the concerned legal provision. The learned Counsel submitted that, prior to amendment brought in the Motor Vehicles Act in 1994 even the owner of the goods was not permitted to travel through the goods carrier and his risk was not covered. The learned Counsel pointed out that, vide the amendment brought in 1994, the insurance cover was extended for the owner of the goods traveling along with the goods in the goods carrier. The learned Counsel submitted that, admittedly, the present accident had happened after 1994. The learned Counsel further submitted that, though the Insurance Company is not admitting that respondent no.1 was travelling as a owner of the goods through the said tempo, assuming for the sake of moment that, she was carrying goods in the offending tempo, even in such circumstances, the Tribunal was supposed to pass further order permitting the Insurance Company to recover the amount of compensation paid by it from the insured, i.e. owner of the offending tempo. The learned Counsel, in the circumstances, submitted for setting aside the impugned Judgment and Award.

5. I have carefully perused the impugned Judgment and Award as well as the record of the Trial Court. When I perused the FIR filed in the matter, which has been relied upon by the claimant, which is at Exh.22 in the record of the trial Court, it is clearly revealed that, 35 persons were travelling through the offending tempo, when it met with an accident on 21.09.1999. The record further contains the document, which is a requisition issued by the police authorities to the Medical Officer at Rural Health Center at Loha thereby requesting to provide treatment and issue certificates to about 32 persons alleging them to have been injured in a vehicular accident happened on the said date while the said persons were travelling by a tempo bearing registration no.MH-24-A-3227. These two documents beyond reasonable doubt prove that, when the offending tempo met with an accident, more than 30 persons were travelling through the said tempo. The documents relating to tempo, which are there on record clearly demonstrate that, the offending tempo was a goods carrier. Moreover, the Insurance Company had examined its Officer to substantiate the

defence raised by it that, by carrying passengers through a goods carrier, the insured has committed the breach of policy conditions. The witness examined by the Insurance Company has testified before the Court the aforesaid fact, which has not been controverted or rebutted by the original claimant or by the owner of the offending tempo. In the aforesaid circumstances, in fact the Insurance Company could not have been held liable to indemnify the insured.

6. The learned Counsel had relied upon the Judgment of the Hon'ble Apex Court in the case of **New India Assurance Co. Ltd., Vs. Asha Rani And Others, (2003) 2 SCC 223** and the Judgment in the case of **National Insurance Company Limited Vs. Prema Devi and Others, (2008) 5 SCC 403**. The Hon'ble Apex Court in the aforesaid cases, has exonerated the Insurance Company from its liability to indemnify the insured since it was proved that, the owner had carried the passengers through the goods vehicle. In the circumstances, in fact the Tribunal could not have passed the Award against the appellant – Insurance Company.

7. Though it is sought to be contended by respondent no.1 i.e. original claimant that, she was travelling by the offending tempo with her goods, the evidence on record does not support her contention. The spot panchanama does not reflect that, respondent no.1 was carrying goods along with her through the offending tempo. In absence of any such evidence on record, the Tribunal could not have held the appellant – Insurance Company liable to pay the amount of compensation to respondent no.1 jointly and severally with respondent no.2. The impugned Judgment and Award passed against the appellant – Insurance Company, therefore, cannot be sustained and deserves to be set aside.

8. The record of the appeal shows that, the Insurance Company has deposited 50% of the amount of compensation as per the Award and the same is lying in this Court. It is not in dispute that, the present appeal was filed in the year-2003 and has remained pending for about 16 years. In the circumstances, though the appellant – Insurance Company cannot be held liable to pay the amount of compensation to the respondent-claimant, I deem it appropriate to allow the respondent – claimant to

withdraw the amount as has been deposited by the appellant – Insurance Company in this Court and permit the appellant – Insurance Company to recover the said amount from respondent no.2 – the owner of the offending vehicle.

9. After having considered the entire material on record, the impugned Award needs to be confirmed only against respondent no.2 - the owner of the offending vehicle and deserves to be dismissed against the appellant - Insurance Company. In the result, the following order is passed.

ORDER

(i) The Award passed in M.A.C.P. No.127 of 2000 by the Motor Accident Claims Tribunal at Nanded on 09.05.2003 is dismissed against the appellant – Insurance Company.

(ii) Respondent no.2 alone is held liable to pay the entire amount of compensation as has been determined by the Tribunal with interest thereon at the rate of 9% per annum from the date of filing of the petition till its realization.

(iii) Respondent no.1 is permitted to withdraw the amount as has been deposited by the appellant – Insurance Company in this Court, if already not withdrawn by her, together with the interest accrued thereon.

(iv) It would be open for the appellant – Insurance Company to recover the amount of compensation deposited by it in the present appeal in this Court from respondent no.2 with interest thereon at the rate of 9% per annum from the date of deposit of the said amount in this Court till its realization.

(v) The appeal stands allowed in the aforesaid terms.

(vi) Pending Civil Application, if any, stands disposed of.

(**P.R. BORA, J.**)

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