

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

FIRST APPEAL NO.799 OF 2012

The Oriental Insurance Co. Ltd.,
Through its Branch Manager at Nanded,
Through Divisional Manager -
Oriental Insurance Co. Ltd.,
442, Chati Galli, Mangalwar Peth,
Solapur.

... **Appellant.**

... **Versus** ...

- 1 Prakash Shahuraj Mali,
Age 40 yrs., Occ. Agri. & Labourer,
R/o Gaur, Tq. Kallam, Dist. Osmanabad.
- 2 Madhav Dharma Tapkire (died),
Through his L.Rs. -
 - 2A) Shobha Madhav Tapkire,
Age 36 yrs., Occ. Household,
R/o Gaur, Tq. Kallam,
Dist. Osmanabad.
 - 2B) Vijay Madhav Tapkire,
Age 15 yrs., U/G of his real mother,
 - 2C) Abhay Madhav Tapkire,
Age 12 yrs., U/G of his real mother,
 - 2D) Ajay Madhav Tapkire,
Age 10 yrs., U/G of his real mother,
 - 2E) Lochana w/o Dharma Tapkire,
Age 70 yrs., Occ. Household,
R/o Gaur, Tq. Kallam, Dist. Osmanabad.

... **Respondents.**

...

Mr. U.S. Malte, Advocate for the appellant

Mr. A.V. Patil, Advocate for the respondent No.1

...

WITH

FIRST APPEAL NO.800 OF 2012

The Oriental Insurance Co. Ltd.,
Through its Branch Manager at Nanded,
Through Divisional Manager -
Oriental Insurance Co. Ltd.,
442, Chati Galli, Mangalwar Peth,
Solapur.

... **Appellant.**

... **Versus** ...

- 1 Jairam Ankush Deshmukh,
 Age 30 yrs., Occ. Agri. & Labourer,
 R/o Gaur, Tq. Kallam, Dist. Osmanabad.
- 2 Madhav Dharma Tapkire (died),
 Through his L.Rs. -
 - 2A) Shobha Madhav Tapkire,
 Age 36 yrs., Occ. Household,
 R/o Gaur, Tq. Kallam,
 Dist. Osmanabad.
 - 2B) Vijay Madhav Tapkire,
 Age 15 yrs., U/G of his real mother,
 - 2C) Abhay Madhav Tapkire,
 Age 12 yrs., U/G of his real mother,

- 2D) Ajay Madhav Tapkire,
Age 10 yrs., U/G of his real mother,
- 2E) Lochana w/o Dharma Tapkire,
Age 70 yrs., Occ. Household,
R/o Gaur, Tq. Kallam, Dist. Osmanabad.

... **Respondents.**

...

Mr. U.S. Malte, Advocate for the appellant

Mr. A.V. Patil, Advocate for the respondent No.1

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 16th JULY, 2019

PRONOUNCED ON : 01st OCTOBER, 2019

JUDGMENT :

1 Both these appeals have been filed by the insurance company challenging the Judgment and order passed by the learned Chairman, Motor Accident Claims Tribunal, Osmanabad in M.A.C.P. No.262/2006 and 261/2006 respectively dated 11.01.2012, whereby the petition filed under Section 166 of the Motor Vehicles Act came to be partly allowed.

2 Both the claimants had come with a case that they were proceeding in tempo bearing No.MH 25/P-174 on 18.10.2006 to Latur. They were taking their soybean bags for selling in market at Latur. It was stated

that they were sitting in tempo to protect their goods. The said tempo belong to respondent No.1 and the said tempo was insured with respondent No.2, on the date of the accident. It is stated that respondent No.1 himself was driving his tempo in rash and negligent manner and when they reached near field of one Baban Kadse, within the jurisdiction of village Murud, the tempo in a process of giving side to Tamtam rickshaw went out of control and turned turtle. As a result of which, both of them sustained severe injuries. They were admitted to hospital. It is stated that both of them had sustained fracture to their leg. Both of them claimed to be agriculturist and also having additional source of income by selling milk. It is contended that both of them were earning Rs.3,000/- per month and hence they claimed compensation of Rs.1,00,000/- and Rs.2,00,000/- respectively, together with interest.

3 Respondent No.1 has filed written statement. The allegations regarding negligence are denied, so also, the fact that the claimants were severely injured. It has been tried to be contended that informant Ankush Deshmukh has falsely involved his vehicle.

4 Respondent No.2 filed written statement and denied all the averments. Date of the accident involves tempo bearing No.MH 25/P-175 . Age, income and occupation of claimants is denied. It is also denied that both the claimants were travelling with their goods in the said tempo. It is

stated that tempo is registered as a goods carriage only and risk of the passengers travelling unauthorizedly from the said tempo was not covered under the insurance policy. There is breach of terms of policy and therefore, insurance company cannot be held responsible to pay any amount of compensation.

5 Taking into consideration the rival contentions, issues were framed. Only claimants adduced evidence in the form of their own testimony as well as documentary evidence. After considering the evidence on record, the learned Tribunal has held that the claimants have proved that the accident took place due to the negligence on the part of respondent No.1. It was also held, that the claimants were travelling in a goods tempo as a gratuitous passenger, but the claimants were held to be third party and the order of pay and recover has been passed. It was also held that the claimants have sustained permanent physical disability. The insurance company has challenged the said Judgment and Award passed in both the cases, whereby compensation of Rs.65,000/- and Rs.1,20,000/- has been awarded to both the claimants respectively.

6 Heard learned Advocate Mr. U.S. Malte for appellant-insurance company and learned Advocate Mr. A.V. Patil for respondent-claimant in both the matters. It has been vehemently submitted on behalf of the insurance

company, that the learned Tribunal failed to consider, that the disability certificate was not proved by examining concerned Medical Officer. The learned Tribunal had come to the conclusion that the claimants were gratuitous passengers, travelling in a goods vehicle and they could not have been termed as “third party”. The learned Tribunal has relied on the decision in United India Insurance Company Ltd. vs. K.M. Poonam and others, AIR 2011 SC (Civ) 719. However, that was a case, in which excess passengers were travelling, though 'pay and recover' order was passed in para No.26 of the said Judgment, it is specifically stated that the said power has been exercised by the Apex Court under Article 142 of the Constitution of India. The Trial Court could not have exercised that power and therefore, insurance company ought to have been exonerated.

7 The learned Advocate for appellant has placed said Judgment of **Poonam** (supra) to demonstrate the difference in the facts of the case. It appears that in the said case of **Poonam** there were more passengers travelling beyond the permitted capacity. That means, it was a vehicle, which was allowed to carry passengers conversely, it was not a goods vehicle.

Further, he placed reliance on the decision in National Insurance Company Ltd. vs. Cholleti Bharatamma and others, AIR 2008 SC 484 (1), wherein it has been held that when there was no proof that

deceased was travelling in lorry along with driver or cleaner, as owner of goods and when travelling with goods itself does not entitle anyone to protection u/s 147 of Motor Vehicles Act, it is held that the deceased was not held entitled to protection under Section 147. In that case evidence of one of the passengers was taken, which showed that he was travelling in the vehicle was with goods as owner but not the deceased, then it was held that the deceased was a gratuitous passenger and parity will not cover his life.

Further reliance has been placed on the decision of this in First Appeal No.155 of 2017, **Girdhar Brijmohan Maru vs. Vimal Lalchand Mutha and others** decided on 26.06.2019, wherein, after relying on the decision in **Rajesh Kumar vs. Yudhvir Singh, 2008, ACJ 2131 SC** it was held, that disability certificate without examining the Doctor cannot be considered.

8 Per contra, the learned Advocate appearing for the respondent has submitted that the appeal is not maintainable in view of Section 149 of the Motor Vehicles Act. The learned Tribunal has rightly passed the award of 'pay and recover' and it had come on record that the claimants were travelling as owner of the goods. It was also submitted, that if the disability certificate ought not to have been considered by the learned Tribunal without examining the author thereof the matter can be remanded.

9 Taking into consideration the submissions made on behalf of the appellants, following points arise for determination; findings and reasons for the same are as follows.

1 Whether the learned Tribunal could have relied on unexhibited disability certificate and then calculated the amount of compensation ?

2 Whether the Tribunal was justified in passing the order of pay and recover ?

3 Whether the matter deserves remand ?

REASONS

10 At the outset, it can be seen that though both the claimants had produced the disability certificate on record, which is stated to have been issued by medical officer, Maindarkar Orthopedic and General Hospital issued by Dr. Ajay K. Maindarkar, but it appears that he has not been examined. In view of the decision in **Rajesh Kumar @ Raju vs. Yudhvir Singh & anr., 2008 ACJ 2131 (SC)**, “Tribunal cannot accept a disability certificate without examining the Doctor concerned”; the learned Tribunal ought not to have exhibited that document and it could not have been read in evidence. Further, this Court (Nagpur Bench) in the **United India Insurance Company Ltd. vs. Alpesh Harshadlal Mashruwal & Ors., First Appeal No.197 of**

2006 decided on 09.08.2017 after noting that admittedly author of the certificate is not examined and decision in **Rajeshkumar** (supra) observed that *“in view of the above legal position, disability certificate Exh.39 should have been proved by the Medical Officer of Nair Hospital, who issued the same. In the absence of evidence of author of permanent disability certificate, it cannot be said that permanent disability certificate has been duly proved”*.

11 The above said pronouncement by Hon'ble Supreme Court has been relied by various High Courts and it has been held that in absence of examining the medical officer, who has issued the disability certificate, the disability certificate cannot be said to have been proved and therefore, it cannot be relied. Under such circumstance, in fact, in this case the claimant ought to have examined the author of the disability certificate. Since he has not been examined, in the interest of justice, the matter deserves remand.

12 Now, turning towards another point regarding exoneration of insurance company is concerned; since it is necessary to remand the matter, it will not be appropriate for this Court to express any opinion or give any finding to that effect. It is clarified that the said point is kept open for the decision by the learned Chairman, Motor Accident Claims Tribunal. Hence, the points are answered accordingly.

13 Before parting it can be observed that the learned Chairman, Motor Accident Claims Tribunal has not appreciated the evidence properly, so also, a very cryptic Judgment has been passed. It can be still observed, that as regards negligence is concerned, without appreciating proper evidence, directly conclusion has been drawn and then the fact that the claimants had come with a case that they were travelling as owners of the goods from a goods vehicle, has also not been considered and appreciated. The admissions, if any, or whatever has come in the cross of the claimants has not been considered and straightway relied upon the decision in **Poonam** (supra), without considering the legal position, as to whether risk in respect of passenger travelling in a goods vehicle is covered under any policy or not, has not been addressed properly. Taking into consideration the said cryptic Judgment also it deserves remand, in view of the fact that, it is the the fundamental duty of Motor Accident Claims Petition to arrive at a proper conclusion and award just compensation. With these observations, following order is passed.

ORDER

1 The appeal is hereby partly allowed.

2 The Judgment and Award passed in M.A.C.P. Nos.262/2006 and 261/2006 respectively dated 11.01.2012 by learned Chairman, Motor

Accident Claims Tribunal, Osmanabad are hereby set aside.

3 The said petitions are restored on the File of the learned Chairman, Motor Accident Claims Tribunal, Osmanabad, for deciding it according to the provisions of law.

4 Both parties to appear before the Tribunal on 07.10.2019.

5 Needless to say that since the petitions of 2006 are remanded, the learned Tribunal would decide it as expeditiously as possible, within a period of six months from the date of appearance of both the parties.

6 The learned Tribunal should give an opportunity to the claimants to examine the author of disability certificate or in addition the claimants may get their disability assessed by the committee established in Government Hospital, Osmanabad and then examine any one of the member of the committee.

7 Tribunal to give opportunity to both the parties to lead appropriate evidence.

8 Record and Proceedings be sent back.

(Smt. Vibha Kankanwadi, J.)

Donge