

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

First Appeal No. 1900 of 2018

District : Aurangabad

New India Assurance Co. Ltd.,
A company registered under
the Companies Act and a subsidiary
of the General Insurance Co. of
India Ltd.,
having one of its
Divisional Office at
Adalat Road, Aurangabad,
Through its authorized signatory.

.. Appellant
(Original
respondent
no.03)

versus

1. Puja Satish Gavali,
Age : 20 years,
Occupation : Household,
R/o. Chitegaon,
Taluka Paithan,
Dist. Aurangabad.
2. Rama Kaduba Gavali,
Age : 55 years,
Occupation : Labour,
R/o. Walsawangi,
Taluka Bhokardan,
Dist. Jalna.
3. Rukhmanbai Rama Gavali,
Age : 52 years,
Occupation : Household,
R/o. as above.
4. Kisan Fakira Ingale,
Age : 32 years,
Occupation : Driver,
R/o. as above.

.. Respondents
(Nos.01 to 03 -
Original
claimants.
No.04 - Original
respondent no.01
&
No.05 - Original
respondent
no.02)

5. Shaikh Mukthar
Shaikh Guffar,
Age : Major,
Occupation : Business,
R/o. as above.

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Mr. Ajit B. Kadethankar, Advocate, for the appellant.

*Mr. S.A. Nirban, Advocate, for respondents
no.01 to 03.*

Respondents no.04 and 05 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 03rd July 2019**

**Date of pronouncing
the judgment : 13th August 2019**

JUDGMENT :

01. Present appeal has been filed by the original respondent No. 2 – Insurance Company, challenging the judgment and award passed by the Tribunal holding the company responsible to pay compensation to the original claimants. (Parties are addressed by their nomenclature before Tribunal)

02. Claimants had filed petition M. A. C. P. No. 502 of 2015 for getting compensation on account of death of one Satish Gavli in road traffic accident on 18-12-2014. Satish was travelling in Tempo owned by

repondent No. 2 and was driven by respondent No. 1. The said vehicle was insured with respondent No. 3 on the date of accident. It was contended by the claimants that Satish was travelling from the Tempo as cleaner. Satish was 22 years old person, earning Rs.6000/- p. m. from service and Rs.5000/- p. m. by doing private work.

03. Respondent No. 1 and 2 i.e. Driver and owner of the Tempo Truck failed to file written statement.

04. Respondent No. 3 - Insurance company had denied that Satish was serving as cleaner. His age and income as stated in petition has been denied. It has been contended that as per the story before Police, Satish had fallen down from the rear panel of body of Tempo and succumbed to the injuries. The Police papers showed that 9-10 persons were travelling from the Tempo, which was a goods vehicle. Statutory defences were taken. It was also contended that the risk of the passenger travelling from the Tempo was not covered under the policy.

05. Tribunal has partly allowed the petition on 24-01-2018 and directed all the respondents to pay compensation of Rs.7,18,000/- to the claimants with interest. Since the defence taken by insurance company was not considered, this appeal has been filed.

06. Heard Learned Advocate Shri. Kadethankar for appellant Company and learned Advocate Shri. Nirban for original claimants. It has been submitted on behalf of appellant that the learned Tribunal failed to consider the point raised by Insurance Company. Tribunal failed to see that the deceased was travelling from a goods vehicle and no evidence has been led to prove that he was employed with respondent No. 2 on the date of accident. He was gratuitous passenger travelling from a goods vehicle. His risk was not covered under the policy. Insurance Company ought to have been exonerated.

07. Per contra, the learned Advocate for claimants submitted that the claimants have come with specific case that Satish was employed as cleaner on the Tempo. Insurance company has not led any evidence in rebuttal. When the tortious act has been done by the driver of the vehicle, then owner and insurance company of the offending vehicle are liable to pay amount of compensation.

08. Claimants have come with specific case that deceased Satish was employed as cleaner with respondent No. 2 – the owner of the offending vehicle. Thus, it was tried to be posed by them that Satish was travelling from the said vehicle as employee of the owner. Examination-in-chief of CW 1 Rama – father of the deceased is nothing but the replica of petition.

However, there is no explanation given by him in his examination-in-chief as to why a different story has been given in the Police papers. Claimants have relied on those police papers. Report about the accident was lodged by one Namdev Fakira Gavli. He has stated that marriage party had occupied the tempo. Tempo was driven in high speed and negligent manner. Satish who was sitting on the rear plank of the body of the tempo (Falka) fell down. CW 1 Rama has not intentionally given the place where his son was sitting. No doubt, he was not the eye witness, but it is hard to believe that he would not have enquired with his relative, as to how the accident took place. Claimants have not examined any eye witness to prove their contentions. It is to be noted that the Tribunal has come to the conclusion that tempo driver was negligient. This finding is not challenged by present appellant, but in order to prove the capacity of deceased as 'passanger' or 'cleaner', examination of eye witness was necessary. When as per the story in police papers, Satish had occupied rear plank of the body of Tempo, then he can not be said to be the cleaner. The place for sitting of the cleaner is by the side of driver in the front. Claimants have not adduced any evidence as to why the said 'cleaner' had occupied rear side of the Tempo, that the plank. When no answer is revealed in respect of this position, it can not be stated that Satish was travelling from the said Tempo as 'cleaner'.

09. Another important admission given by CW 1 Rama in his cross-examination has not been at all considered by the learned Tribunal. Though as per the petition and examination-in-chief, Satish was serving as 'cleaner' with respondent No. 2; yet when question in respect of the same has been asked, CW 1 Rama has answered that his son was serving as Cleaner on the vehicle of one Mr. Babbu Baaghwan. Name of respondent No. 2 is different. It is not the case of the claimants that on that particular day, on the request of respondent No. 1 or 2, Satish was travelling as 'cleaner' on the offending Tempo.

10. Thus, it can be seen that from both pieces of evidence, it can be said that claimants have not led any cogent and material evidence to show that deceased was travelling as 'cleaner' from the offending vehicle. There is no dispute and as per the papers of Tempo, it can be seen that it was a 'Goods Tempo'. It was used at that time to carry marriage party. There is no direct evidence that respondent No. 2 had accepted money for transportation, but there is room to believe the same. Respondent No. 2 is not the relative of Namdeo. Therefore, it will have to be held that Satish was either 'gratutious passenger' or fare paid passenger. Learned Tribual has totally erred in not considering the said clear evidence and went to state that since Insurance Company has not adduced any

evidence, there is no breach of terms of policy. In fact, two defences were taken by the Company. One was that respondent No. 1 was not holding valid and effective driving licence on the date of accident. Second was regarding use of vehicle for hire or reward and risk of the passenger in goods vehicle was not covered under the terms of policy. Evidence was required to be adduced for the first point by the Company; however, Company could have relied on available evidence on record, which might have been adduced by claimants. When the papers on record and evidence CW 1 Rama was clearly not supporting claimants, there was no necessity for the Company to adduce any evidence. In fact, learned Tribunal has tried to cast negative burden or onus on the Company to prove that Satish was not the cleaner on the offending Tempo. Such legal notion is wrong. The Claimants have not tried to give any explanation regarding the contents of the police papers, though at a point they are relying upon it. They can not be allowed to place reliance on the police papers for the limited point of negligence of respondent No. 1 only. The story will have to be taken in its entirety. Thus, as it emerges, Satish who was one of the member of marriage party was travelling from the offending Tempo by sitting on the rear plank of the Tempo, before he fell down due to rashness and negligence in the driving of respondent No. 1. He was 'gratuitous passenger' or 'fare paid passenger' and he can not be

termed as 'third party'.

11. In **National Insurance Co. Limited v. Rattani**, (2009) 2 SCC 75 it has been observed that, *“The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers. As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose”*. In this case also, as per the FIR, the vehicle was taken for transportation of marriage party. Hon'ble Supreme Court held that, *“We, therefore, in the facts and circumstances of the case, have no hesitation to hold that the victims of the accidents were travelling in the truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants.”*

12. In **New India Assurance Company Ltd. Vs. Asha Rani** [AIR 2003 SC 607], it has been laid down that the term “any person” used in Section 147 of the Motor Vehicle Act

mean "third Party" but not 'passenger'. The Hon'ble Apex Court has further laid down in *Asha Rani's* case (*supra*), that in the new provisions and "post-1994" also, there is no statutory liability on the owner of the vehicle to get insurance for any passenger travelling in goods vehicle. In view of this, it was further observed that the insurer cannot be made liable to pay compensation in respect of such passenger. In other words, it has been clearly laid down that the passengers in a private vehicle are not to be treated as "third party". Further the ratio in **Asha Rani & Ors** (*supra*) is reiterated by another Three Judge Bench of the Apex Court by subsequent decisions in **Oriental Insurance Company Ltd Vs. Devireddy Konda Reddy & Others** [2003 (2) S.C.C. 339] and in **National Insurance Co. Ltd Vs. Ajit Kumar And Ors** [2003 A.C.C. 277 (SC)] holding that the insurer of vehicle owner for unauthorized passenger of a goods vehicle travelling cannot be made liable from the Act policy to indemnify; unless there is a specific coverage of the risk by contractual policy obligations as envisaged under Section 147 of the Act.

13. Further, in **National Insurance Company Ltd. Vs. Parvathneni** [2009(8) SCC 785], three Judge Bench of Apex Court has pointed out that "Article 142 of the Constitution of India does not cover the cases of pay and recover and that if the Insurance Company has no liability to pay at all, then it cannot be compelled by order of the Court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the

compensation amount and later on recover it from the owner of the vehicle." However, the reference that was made has been disposed of on 17-09-2013 by keeping the question of law open to be decided in an appropriate case.

14. Here, when the passenger travelling from the vehicle taken for hire or reward, against the policy condition, cannot be treated as "third party"; then the Tribunal ought not to have held respondent No. 3, the Insurance Company liable to pay amount of compensation, jointly and severally with respondent No. 1 and 2. In view of this position of law, the decision of the Tribunal needs to be set aside to that extent.

15. Hence, the following order :

(a) The appeal is hereby partly allowed.

(b) The Judgment and Award passed by learned Member, Motor Accident Claims Tribunal, Aurangabad in M.A.C.P. No. 502/2015 dated 24-01-2018 is hereby set aside to the extent of holding the Insurance Company liable to pay compensation jointly and severally with respondent No. 01 and 02. The claim as against the Insurance Company stands dismissed. It is clarified that the applicant is entitled to recover the compensation from respondents No. 01 and 02.

(c) The amount deposited by the Insurance Company, if any, be returned to it. The amount under 'no fault liability', if deposited by Insurance Company has been

given to the applicant, then Insurance Company may recover it from respondents No. 01 and 02.

(d) No order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

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