IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

930 **CIVIL APPLICATION NO.14425 OF 2019**
IN FA/1264/2019

RADHABAI GOPA KHATAL (THELARI) AND OTHERS
VERSUS
THE NEW INDIA ASSURANCE CO LTD AND ANR

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Mrs.S.T. Kazi, Advocate for applicants
Mr.D.P. Deshpande, Advocate for respondent no.1.

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CORAM: V.L. ACHLIYA,J.
DATE : 12.12.2019

ORAL ORDER:

The applicants-claimants moved this application seeking withdrawal of amount deposited by the appellant-insurance company.

2. Heard learned counsel for the applicants-claimants and Advocate representing the appellant-insurance company. Perused the award passed by the Tribunal as well as the order of apportionment passed in the matter.

3. Learned counsel for the appellant – insurance company opposed the application with contention that the appellant has good case to succeed in appeal. It is contended that the vehicle involved in the accident

i.e. Appe rickshaw was registered for private use. There was no permit obtained to use the same for hire and reward i.e. for carriage of passengers. It is contended that on the basis of evidence adduced by the claimants and documentary evidence on record, it has been proved that at the time of accident, the vehicle was used in breach of policy condition. The vehicle was used for carrying the passengers and deceased was one of such passenger travelling in said rickshaw. It is submitted that the Tribunal has passed the cryptic judgment and order. The defence of the appellant has been overlooked by casually observing that the respondent – insurance company has not adduced any evidence to prove breach of condition of policy. It is submitted that for the purpose of proving the defence, it is not necessary that the defendant/respondent must enter into witness box. It is submitted that the tribunal ought to have considered the evidence in its totality.

4. On the other hand learned counsel for the applicants-claimants supported the judgment and order passed by Tribunal and submits that the Tribunal has thoroughly

scrutinized the evidence and held the respondent – insurance company liable to indemnify the insured. It is submitted that the insurance of the vehicle involved in the accident not in dispute. The breach of policy condition is *inter se* dispute between the respondent no.1 and respondent no.2. Even if it is accepted that there was breach of policy condition on the part of respondent no.1, the respondent no.2 can pay and recover amount from insured i.e. respondent no.1.

5. On due consideration of submissions advanced in the light of judgment and order passed by the Tribunal, and more particularly the findings recorded to the issue framed in respect of policy condition, I am of the view there is a case to be considered in appeal.

6. While passing the judgment and order, the Tribunal has passed the order of apportionment of compensation amongst the claimants. Out of amount to be deposited, the Tribunal has directed to pay Rs.4,00,000/- to applicant no.1 and Rs.1,94,000/- to applicant no.4. The sum of Rs.10,000/- each has been ordered to be paid to the applicant nos.2 and 3. The amount to the extent of 50% of amount

to be paid to applicant no.1 and amount to be payable to the applicant no.4 has been ordered to be invested in fixed deposit. In that view, the Tribunal has allowed the withdrawal of only Rs.2,00,000/- to the applicant no.1. In my view, the order of the Tribunal making apportionment may require to be modified in view of the fact that the Tribunal has failed to protect the interest of claimant nos.2 and 3, the minors aged 12 and 10 years respectively while passing the order. Once the Tribunal has held that applicant nos. 2 and 3 were dependents on deceased, the Tribunal ought to have taken care to award proper compensation while making order of apportionment of compensation. I am therefore inclined to pass the following order :-

ORDER

(i) The applicant no.1 is permitted to withdraw the amount to the extent of Rs.1,00,000/- on furnishing undertaking to the satisfaction of Registrar that in the event award is set aside or modified the applicant no.1 shall refund the amount within four weeks from the date of passing of order.

(ii) After making the payment of Rs.1,00,000/- to the applicant no.1, the balance amount be invested in fixed deposit with any Nationalized Bank initially for a period of two years with standing instructions to renew the same till further orders from the Court.

(iii) The amount be invested in equal proportion in the names of applicant nos.1 to 4.

(iv) The interest accrued over the amount invested in the name of applicant no.1 as well as applicant nos.2 to 4 be directly credited in the Saving Account of applicant no.1 after every three months so as to enable the applicant no.1 to maintain herself as well as maintain and take care of her minor children i.e. claimant nos.2 to 4.

(v) The order of withdrawal of amount and payment of interest shall be subject to final outcome of appeal.

(vi) The Civil Application is disposed of in above terms.

[V.L. ACHLIYA]
JUDGE

SGA