

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

FIRST APPEAL NO.1767 OF 2013

Oriental Insurance Company Limited,
Branch Office at Sant Krupa Market,
G.G. Road, Nanded,
Through its Divisional Manager,
Divisional Office, Aurangabad.

... **Appellant.**

... **Versus** ...

- 1 Habib Khaled Habib Mohammad,
 Age 30 yrs., Occ. Business, paper Agent,
 R/o Somesh Colony, Nanded,
 Dist. Nanded.
- 2 Mrs. Pratibha S. Ganacharya,
 Age : major, Occ. Household,
 R/o Kavalgaon, Tq. Purna,
 Dist. Parbhani.
- 3 M/s Asia Pacific Transport,
 Hindustan Auto Centre, Bodhan Road,
 Dist. Nizamabad, Andhra Pradesh,
 Through its owner/authorized person.
- 4 New India Assurance Company Limited,
 Through its Branch Manager, Branch Office,
 At Poojya Sindhi Panchayat Building,
 1st Floor, M.G. 1 Road, Panvel – 410 206.
- 5 New India Assurance Company Limited,
 Through its Divisional Manager,
 Divisional Office at Lahoti Complex,
 Vazirabad, Nanded.

... **Respondents.**

...

Mr. M.K. Goyanka, Advocate for the appellant

Mr. G.R. Syed, Advocate for the respondent No.1

Mr. G.G. Suryawanshi, Advocate for the respondent No.2

Mr. M.M. Ambhore, Advocate for the respondent Nos.4 and 5

...

WITH

FIRST APPEAL NO.342 OF 2013

Oriental Insurance Company Limited,
Branch Office at Sant Krupa Market,
G.G. Road, Nanded,
Through its Divisional Manager,
Divisional Office, Aurangabad.

... **Appellant.**

... **Versus** ...

- 1 Chaya d/o Kisanrao Kokulwar
Age 25 yrs., Occ. Education,
R/o Vyankatesh Nagar,
Nanded, Dist. Nanded.
- 2 Mrs. Pratibha S. Ganacharya,
Age : major, Occ. Household,
R/o Kavalgaon, Tq. Purna,
Dist. Parbhani.
- 3 M/s Asia Pacific Transport,
Hindustan Auto Centre, Bodhan Road,
Dist. Nizamabad, Andhra Pradesh,
Through its owner/authorized person.

- 4 New India Assurance Company Limited,
Through its Branch Manager, Branch Office,
At Poojya Sindhi Panchayat Building,
1st Floor, M.G. 1 Road, Panvel – 410 206.
- 5 New India Assurance Company Limited,
Through its Divisional Manager,
Divisional Office at Lahoti Complex,
Vazirabad, Nanded.

... Respondents.

...

Mr. M.K. Goyanka, Advocate for the appellant

Mr. G.R. Syed, Advocate for the respondent No.1

Mr. G.G. Suryawanshi, Advocate for the respondent No.2

Mr. M.M. Ambhore, Advocate for the respondent Nos.4 and 5

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 23rd SEPTEMBER, 2019

PRONOUNCED ON : 07th NOVEMBER, 2019

COMMON JUDGMENT :

1 Both these appeals are arising out of same accident and the points raised by the appellant are the same, and therefore, they are proposed to be disposed of by this Common Judgment. Both the appeals are arising out of the Judgment and Award passed in M.A.C.P. No.775/2006 and M.A.C.P. No.167/2007 decided on 08.01.2012 and 12.04.2012 respectively, which

were filed by the present respondent No.1-original claimant for getting compensation under Section 166 of the Motor Vehicles Act, 1988, for the injuries sustained by them in a motor vehicular accident. Both the petitions have been partly allowed against present appellant, who was originally respondent No.2 in both the petitions.

2 The factual matrix leading to the petitions were, that both the claimants were travelling in jeep bearing No.MH 22-4283 on 27.08.2006 at about 5.00 p.m. from Degloor to Nanded. The said jeep reached near petrol pump in village Martala, at that time a truck bearing No.AP 25/U-3216 came from opposite direction and when the jeep was overtaking the vehicle going ahead of it, the truck gave dash to the jeep, as a result of which there was accident. It is stated, that the accident took place due to the negligence and rashness on the part of both the drivers. Both the claimants sustained grievous injuries. The accident was reported to police and offence has been registered against both the vehicles. Respondent No.1 is the owner of the jeep and the said jeep was insured with respondent No.2, on the date of the accident. The offending truck was owned by respondent No.3 and it was insured with respondent Nos.4 and 5.

3 The original claimant in M.A.C.P No.775/2006 had contended, that he was an agent of newspapers and was earning Rs.8,000/- per month,

whereas the claimant in M.A.C.P No.167/2007 stated, that she was 20 years old girl, taking education and her monthly income was Rs.1,500/-. Both of them had contended that they have taken medical treatment, however, they have suffered permanent disability. Hence, prayed for compensation together with interest.

4 Respondent No.3 in both the cases remained absent and therefore, matter proceeded ex parte against him. Respondent Nos.1, 2, 4 and 5 filed written statement and denied the averments about negligence of the respective drivers, of which they were concerned. They rather blamed the driver of the other vehicle in the accident. Both the insurance companies have taken statutory defences. Respondent No.2 contended that the jeep was carrying more passengers than permitted capacity and therefore, there is breach of terms of policy, so also, the driver of the jeep was not holding valid and effective driving licence to drive the jeep, at the relevant time. Respondent Nos.4 and 5 also took defence, that the driver of the truck was not holding valid and effective driving licence to drive the truck, at the relevant time. Thus, the insurance companies prayed for their exoneration.

5 Taking into consideration the rival contentions, issues were framed. Only the claimants in both the matters led oral as well as documentary evidence. None of the respondents had adduced oral as well as documentary

evidence, rather they depended with police papers. After hearing both sides the learned member of M.A.C.T. partly allowed the claim petitions on 08.02.2012 and 12.04.2012 by holding that both the drivers were rash and negligent and contributed to the accident. The ratio was held to be 60% negligence of jeep driver and 40% of the truck driver. Both the claimants were held to be entitled to get compensation and accordingly in M.A.C.P. No.775/2006 compensation has been awarded to the extent of Rs.2,04,540/-, whereas in M.A.C.P. No.167/2007 compensation has been awarded of Rs.60,000/-. The respondent No.2 i.e. the insurance company of the jeep has filed appeals challenging the liability imposed upon it.

6 Heard learned Advocate Mr. M.K. Goyanka for the appellant, Mr. G.R. Syed for the respondent No.1, learned Advocate Mr. G.G. Suryawanshi for the respondent No.2 and learned Advocate Mr. M.M. Ambhore for the respondent Nos.4 and 5.

7 It has been vehemently submitted on behalf of the insurance company that the quantum of compensation is not challenged in these appeals. However, liability itself is challenged, on the ground, that taking into consideration the evidence on record, the learned Tribunal ought not to have held that the jeep driver was responsible to the extent of 60%. The said finding is perverse. Further, the learned Tribunal did not consider that the

jeep driver was carrying more passengers than permitted. The permit was to the extent of 9 persons only and it has been brought on record, that there were 14 passengers travelling from the jeep, at the relevant time. The risk of all those passengers, which were in excess, was not at all covered under the policy, and therefore, the respondent No.2 ought to have been exonerated.

8 Per contra, the learned Advocate appearing for the claimant supported the reasons given by the Tribunal. The learned Advocate representing respondent Nos.2, 4 and 5 also supported the reasons by the Tribunal.

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

1 Whether the learned Tribunal was justified in holding the jeep driver negligent to the extent of 60% in contribution to the accident ?

2 Whether there was any breach of terms of policy by respondent No.1 and thereby the respondent No.2 can be exonerated from payment of compensation ?

REASONS

10 **As to Point No.1 :**

At the outset, it can be said, that the respondent No.2 has not led

any evidence to prove the contributory negligence. The insurance company relied on the evidence, which has been brought on record by the claimants. The claimants in both the cases have contended, that due to the negligence on the part of both the vehicles the accident had taken place. That means, the claimants themselves had come with a case of contributory negligence, on the part of jeep driver as well as truck driver. The learned Advocate appearing for respondent No.2-present appellant has cross examined both the claimants thoroughly. Both the claimants have denied the suggestion, that there was no negligence on the part of jeep driver. On the contrary, it has come on record through cross-examination of both the witnesses, that the jeep driver was in the process of overtaking the vehicle going ahead of it, when the truck gave dash. Important point to be noted is, that there was a specific suggestion on behalf of respondent Nos.4 and 5 to the claimant in M.A.C.P. No.775/2007, that if the jeep driver would not have started overtaking, he could have avoided the accident. The said suggestion has been answered in the affirmative. That means, if the jeep driver would not have started overtaking, he could have avoided the accident and therefore, both the Members of the Tribunal have apportioned more percentage of the negligence to the jeep driver. It was not tried to be brought on record, as to what was the distance between the jeep and the vehicle going ahead of it, when the process of overtaking started and whether the truck coming from

opposite direction was visible to the jeep driver. It was further not extracted, what was the approximate distance between the vehicle going ahead of the jeep and the truck, when the jeep driver started the process of overtaking and where exactly he was, in that process, when dash was given. Accidents take place many times in fraction of seconds. Only due to the alert drivers and their presence of mind, some times they are successful in avoiding the accident. But in order to have a safe driving the basic principle they are required to adhere is, to have safe distances between two vehicles and then either to cross the road or to overtake the vehicle going ahead of it etc.. The basic data, therefore, for stating something else had happened in this case has not been tried to be brought on record by respondent No.2 to say that driver of jeep was not at all negligent or the truck driver was equally negligent. There was no hurdle for respondent No.2 to examine either the jeep driver or any other passenger, who would have been sitting next to the jeep driver, to whom the front side was visible. Therefore, on the basis of the cross-examination of the respondent No.2 itself as well as the respondent Nos.4 and 5, what is emerging is that, it was the driver of the jeep, who could have avoided the accident and therefore, more percentage of negligence is attributed to him and therefore, it requires no interference by this Court. Point, is therefore, answered in the negative.

11 **As to Point No.2 :**

This point relates to the breach of terms of policy. No doubt, it has come on record that the permit of jeep was 9 persons plus driver and the police papers as well as the evidence of both the claimants show that about 14 persons were travelling from the jeep, at the relevant time and therefore, the insurance company says that there was breach of terms of policy. In this case ratio laid down in *B.V. Nagaraju Vs. Oriental Insurance Company Ltd.*" [1996 (4) SCC 647] and "*Lakhmi Chand Vs. Reliance General Insurance*" [(2016) 3 SCC 100] can be considered, wherein it has been laid down that carrying more passengers/persons than permitted is not fundamental breach, so as to avoid liability by insurance company. Further in *Fahim Ahmed and others v. United India Insurance Company Limited and others*, (2014) 14 SCC 148 and *Manuara Khatun and others v. Rajesh Kumar Singh and others*, (2017) 4 SCC 796, the Apex Court has laid down, that at the most 'pay and recover' order can be passed against the insurer for offending vehicle, in case, it is proved that the offending vehicle was carrying more passengers than allowed. However, it is to be noted, that in this case it has not been brought on record through the claimants, that they boarded the jeep at No.10 to 14 so as to exclude them from earlier 9 numbers and then for that purpose the 'pay and recover' order can be passed. Therefore, when carrying more passengers

than permitted is not a fundamental breach of terms of policy and further evidence has not been brought; this is not a fit case, in which order of 'pay and recover' can be passed. Hence, respondent No.2 has been rightly held liable to pay compensation against respondent No.1. Point, is therefore, answered accordingly.

12 For the above said stated reasons, there is no substance in both the appeals, and therefore, they deserve to be dismissed. Accordingly, they are dismissed with no order as to costs.

(Smt. Vibha Kankanwadi, J.)

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