

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.171 OF 2019

Hirabai Chindha Thakur,
Age 57 years, Occupation Household,
R/o At Post Waghadi Budruk,
Taluka Shindkheda Dist.Dhule.

...Appellant.
(Ori.Claimant)

VERSUS

1. Abdul Qadar Rehamatulla Umarani,
Age Major, Occupation Driver,
Owner of Truck No.MH-18/M-2382,
R/o : 363, Maulaviganj, Dhule
Dist. Dhule.

2. Branch Manager,
The New India Insurance Co.Ltd.,
Branch Dhule,
At Yashovallabh Shopping Complex,
Near Municipal Corporation, Rana
Pratap Chowk, Dhule, Dist. Dhule.

...Respondents.
(Ori.Respdts.)

....

Advocate for Appellant : Mr. A. S. Savale.

Advocate for Respondent No.2 : Mr. A. S. Usmanpurkar.

Respondent No.1 Served.

....

WITH

FIRST APPEAL NO.172 OF 2019

Suresh Shankar Thakur,
Age 52 years, Occupation Agricultural
Labour, R/o At Post Waghadi Budruk,
Tq. Shindkheda Dist. Dhule.
At Present R/o : 52 Vivekanand Colony,
Abhay College Road, Market Yard,
Dhule, Dist.Dhule.

...Appellant.
(Ori.Claimant)

VERSUS

1. Abdul Qadar Rehamatulla Umarani,
Age Major, Occupation Driver,
Owner of Truck No.MH-18/M-2382,

R/o : 363, Maulaviganj, Dhule
Dist. Dhule.

2. Branch Manager,
The New India Insurance Co.Ltd.,
Branch Dhule,
At Yashovallabh Shopping Complex,
Near Municipal Corporation, Rana
Pratap Chowk, Dhule, Dist. Dhule. ...Respondents.
(Ori.Respdts.)

....

Advocate for Appellant : Mr. A. S. Savale.
Advocate for Respondent No.2 : Mr. A. S. Usmanpurkar.
Respondent No.1 Served.

....

**WITH
FIRST APPEAL NO.173 OF 2019**

Suresh Shankar Thakur,
Age 52 years, Occupation Agricultural
Labour, R/o At Post Waghadi Budruk,
Taluka Shindkheda Dist.Dhule.
At Present R/o : 52, Vivekanand
Colony, Abhay College Road,
Market Yard, Dhule Dist. Dhule.

...Appellant.
(Ori.Claimant)

VERSUS

1. Abdul Qadar Rehamatulla Umarani,
Age Major, Occupation Driver,
Owner of Truck No.MH-18/M-2382,
R/o : 363, Maulaviganj, Dhule
Dist. Dhule.
2. Branch Manager,
The New India Insurance Co.Ltd.,
Branch Dhule,
At Yashovallabh Shopping Complex,
Near Municipal Corporation, Rana
Pratap Chowk, Dhule, Dist. Dhule. ...Respondents.
(Ori.Respdts.)

....

Advocate for Appellant : Mr. A. S. Savale.
Advocate for Respondent No.2 : Mr. A. S. Usmanpurkar.
Respondent No.1 Served.

....

CORAM : SMT.VIBHA KANKANWADI, J.
Date : 22-07-2019.

JUDGMENT :

1. All these appeals have been filed challenging the order passed below Exhibit 05 in Motor Accident Claim Petition No.126 of 2018, 128 of 2018 and 127 of 2018 respectively. The said application Exhibit 05 was filed for getting compensation under Section 140 of the Motor Vehicles Act, 1988. All the claim petitions are arising out of same accident, therefore, the story in respect of the accident is same.

2. The petitioners had come with a case that, all the deceased persons in respect of whom the compensation has been claimed were travelling in truck bearing MH-18/ M-2382 on 09-12-2017. It is stated that, all of them were travelling from the cabin of the driver of the truck. They were proceeding towards Surat. Around 06.00 a.m. on 10-12-2017, the driver of the truck lost his control over the truck and the said truck turned turtle on a road divider. As a result of which these three persons expired. The accident was reported to police. The said truck was owned by the respondent No.1 and respondent No.2 is the Insurance Company with whom the truck was duly insured on the date of the accident. Hence, all the claimants claimed compensation under 'No Fault Liability' from both the respondents jointly and severally.

3. The matter has proceeded ex-parte against respondent No.1.

4. Respondent No.2 Insurance Company resisted the claim by filing say-cum-written statement. It is stated that, the truck in question was loaded with cattle feeds. It is admitted fact that, the said vehicle was insured with it but it is stated that it was a goods carrying vehicle, carrying fair paid passengers was not allowed. There were several passengers who were travelling from the truck on the relevant time, and therefore, there is breach of terms of policy. Under such circumstance, the Insurance Company cannot be made liable to pay the amount of compensation.

5. After hearing both sides, the learned Tribunal has come to the conclusion that, since the deceased persons from all the petitions i.e. heirs of all the petitioners were travelling from goods carrying vehicle, their risk was not covered at all under the policy, and therefore, the application itself has been dismissed. Hence, these appeals.

6. Learned advocate Mr. A. S. Savale appearing for all the appellants submitted that, the petitioners had produced on record evidence to show that, the deceased was travelling from the offending truck and the said truck had turned turtle. No other vehicle was involved in the said accident, therefore, there was *prima facie* evidence on record to show that the driver of the truck was rash

and negligent. The death had occurred due to the injuries those were sustained to those persons in the said accident. The learned Tribunal totally rejected the application on the ground that the risk of the passengers was not covered under the policy, thereby at the interim stage itself it has been held that, there is breach of terms of policy when evidence has not yet been adduced. It was also submitted that, even if for the sake of arguments it is accepted that, there is breach of terms of policy, yet the said interim application ought to have been allowed against respondent No.1.

7. Per contra, the learned advocate appearing for respondent No.2 Mr. A. S. Usmanpurkar vehemently submitted that, in the FIR specific statement has been made that, five persons were occupying the cabin of the truck and three were travelling from the roof of the cabin. Admittedly the said truck is a goods carrying vehicle, and therefore, the policy which was taken by respondent No.1 had not covered the risk of the passengers. The learned Trial Court has rightly rejected the application. Learned advocate appearing for the respondent No.2 has relied on the decision in, *Yallwwa and Ors. Versus National Insurance Company Ltd. and Anr.*, reported in *AIR 2007 Supreme Court 2582*, wherein it has been held that,

"An order of the Tribunal awarding compensation under 'No Fault Liability' basis under Section 140 of the Motor Vehicles Act amounts to an award under Section 173 of the Motor Vehicles Act, and therefore, it is an appealable

order.”

He relied on paragraphs No.16 to 19 which have been reproduced for the sake of convenience ;

"16. The question which is required to be considered is what would be the meaning of the term award when such a contention is raised. Although in a given situation having regard to the liability of the owner of the vehicle, a Claim Tribunal need not go into the question as to whether the owner of the vehicle in question was at fault or not, but determination of the liability of the insurance company, in our opinion, stands on a different footing. When a statutory liability has been imposed upon the owner, in our opinion, the same cannot extend the liability of an insurer to indemnify the owner, although in terms of the insurance policy or under the Act, it would not be liable therefor."

"17. In a given case, the statutory liability of an insurance company, therefore, either may be nil or a sum lower than the amount specified under Section 140 of the Act. Thus, when a separate application is filed in terms of Section 140 of the Act, in terms of Section 168 thereof, an insurer has to be given a notice in which event, it goes without saying, it would be open to the insurance company to plead and prove that it is not liable at all."

"18. Furthermore, it is not in dispute that there can be more than one award particularly when a sum paid may have to be adjusted from the final award. Keeping in

view the provisions of Section 168 of the Act, there cannot be any doubt whatsoever that an award for enforcing the right under Section 140 of the Act is also required to be passed under Section 168 only after the parties concerned have filed their pleadings and have been given a reasonable opportunity of being heard. A claims Tribunal, thus, must be satisfied that the conditions precedent specified in Section 140 of the Act have been substantiated, which is the basis for making an award."

"19. Furthermore, evidently, the amount directed to be paid even in terms of Chapter X of the Act must as of necessity, in the event of non-compliance of directions has to be recovered in terms of Section 174 of the Act. There is no other provision in the Act which takes care of such a situation. We, therefore, are the opinion that even when objections are raised by the insurance company in regard to its liability, the Tribunal is required to render a decision upon the issue, which would attain finality and, thus, the same would be an award within the meaning of Section 173 of the Act."

8. He also relied on the decision in, *Oriental Insurance Company Limited Versus Devireddy Konda Reddy and others*, reported in AIR 2003 Supreme Court 1009, wherein it has been held that,

"The difference in the language of 'goods vehicle' as appearing in the old Act and 'goods carriage' in the new Act is of significance. A bare reading of the provisions makes it clear that the legislative intent of new Act was to prohibit goods vehicle from carrying any passenger.

This is clear from the expression 'in addition to passengers' as contained in definition of 'goods vehicle' in the old Act. The position becomes further clear because the expression used in new Act is 'goods carriage'. Goods carriage is solely for the carriage of goods'. Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to clause (ii) of the proviso appended to S. 95 of the old Act prescribing requirement of insurance policy. Even S. 147 of the Act new Act mandates compulsory coverage against death of or bodily injury to any passenger of 'public service vehicle'. The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923. there is no reference to any passenger in "goods carriage". The inevitable conclusion, therefore, is that provisions of the new Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor."

Further reliance has been placed on the decision of this Court in, *United India Insurance Co. Ltd. Versus Anubai Gopichand Thakare and Others*, reported in 2008 (1) Mh.L.J. 73, wherein the expression "third party" has been explained, and it is stated that, the person not covered under terms of insurance policy cannot be treated as third party. In specific words it is held that, "the gratuitous

passenger cannot be regarded as third party." Further reliance has been placed on recent pronouncement of this Court in, *First Appeal No.823 of 2009, New India Assurance Company Versus Rukhmanbai Bandu Jadhav and others*, pronounced on 09-10-2018, wherein the award under Section 140 of Motor Vehicles Act was challenged by the Insurance Company on the similar ground that, the claimants were the gratuitous passengers travelling in goods vehicle and then this Court took view that, since there is breach of terms of policy, the risk of the claimants therein was not covered in the policy, and therefore, the insurance company has been exonerated. He therefore submitted that, the learned Tribunal has passed correct order.

9. The ratio of the authorities which has been relied by the learned advocate for respondent No.2 cannot be disputed. Further in view of Judgment in Yallwwa and Ors (Supra), the objections which are raised by the Insurance Company in regard to its liability are required to be decided by the Tribunal which would attain finality as regards that application is concerned which would then be challenged under Section 173 of the Motor Vehicles Act. Therefore, the learned Tribunal was in a way justified in taking note of the case of the claimants and the police papers on which even the claimants were relying. From the contents of application Exhibit 05 in each of the matter would show that deceased was proceeding to Surat for

labour work and had boarded the said truck along with articles for labour work. They have not clarified as to which articles they were carrying with them. However it appears from the police papers that, cattle feeds in gunny bags were being transported in the truck. There is absolutely no dispute that the said truck was a goods carrying vehicle. Even at this *prima facie* stage, the claimants have not connected the deceased with the truck in a sense that in what capacity they were travelling. They have not come with a case that, they were the owners of the goods i.e. the cattle feed gunny bags. They have not also pleaded that the articles of labour which were being carried by them in the truck, could have been used to unload those gunny bags. Therefore, from the available documents on record, the Tribunal appears to have justified itself from coming to a conclusion, though may be *prima facie*, that the deceased were travelling as passenger, may be gratuitous from goods carrying vehicle. Definitely when the insurance company is coming with a case that, there is breach of terms of policy then the burden is on the insurance company to prove the same. Evidence yet to be adduced but in order to decide the said application under Section 140 of Motor Vehicles Act, when the liability of the insurance company was challenged, in view of Yallwwa's Judgment, the learned Tribunal was justified in coming to a conclusion that the risk of those passengers was not covered under the policy with respondent No.2.

Therefore, definitely case was made out to exonerate respondent No.2.

10. The application was filed as against respondent No.1 as well as respondent No.2 to get compensation under Section 140 of the Motor Vehicles Act. When the Tribunal had come to the conclusion that, respondent No.2 is required to be exonerated that does not mean that the entire application ought to have been dismissed. Liability to pay compensation under Section 140 of Motor Vehicles Act as against respondent No.1 ought to have been decided. It is not in dispute and further documentary evidence on record proves that, respondent No.1 was the owner of the offending truck. The truck driver was in his employment who has done the tortuous act as it appears from the *prima facie* evidence that has been produced on record. Therefore, respondent No.1 is liable to pay amount of Rs.50,000/- to the claimants.

11. It appears from the order below Exhibit 05 that, issues have already been framed and the parties were directed to expedite the matter. When defence has been taken by the insurance company that there is breach of terms of policy then definitely it will have to prove the same, and therefore, whatever observations are made in respect of the liability of respondent No.2, at this *prima facie* stage cannot bind the Tribunal to decide the main petition on its own

merits and that direction deserves to be given in this case. Hence, following order ;

ORDER

- 1) Appeal is hereby partly allowed.
- 2) The order passed below Exhibit 05 in Motor Accident Claim Petition No.126 of 2018, 127 of 2018 and 128 of 2018, by learned Member Motor Accident Claims Tribunal, Dhule, dated 13-11-2018 is hereby set aside to the extent of dismissing the said application as against respondent No.1.
- 3) Those applications stand allowed against respondent No.1.
- 4) Respondent No.1 is directed to pay amount of Rs.50,000/- in each matter, on or before 03-11-2019. In case of failure on his part to pay the said amount, on or before the said date, the amount shall carry interest @ of 7.5 % per annum from the date of the applications till actual realization of entire amount.
- 5) After the amount is deposited, the same be distributed to respective applicants.
- 6) It is clarified that, the observations regarding exoneration of respondent No.2 from payment of liability to pay compensation are made prima facie and the liability of respondent No.2 is subject to the evidence that may be adduced in the petition.

**(SMT. VIBHA KANKANWADI)
JUDGE**

vjg/-.