IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2926 OF 2008

New India Assurance Co. Ltd.
Branch Latur, Thr. Its
Divisional Manager, …. **APPELLANT/**
Adalat Road, Aurangabad. **[ORI. RESP.NO. 3]**

V E R S U S

1. Laxmi w/o Rajendra Aaherkar
Age : 34 Yrs., Occ. Household,
R/o : Mogha, Tq. : Udgir,
Dist. Latur.

2. Archana d/o Rajendra Aaherkar
Age : 9 Yrs., Occ. Education.

3. Parmeshwar s/o Rajendra Aaherkar
Age : 7 Yrs., Occ. Education.

4. Nikita d/o Rajendra Aaherkar
Age : 2 Yrs., Occ. Nil.
[Resp. Nos. 2 to 4 are under
guardianship of natural mother …. **RESPONDENTS/**
i.e. respondent No. 1.] **[ORI. CLAIMANTS]**

5. Nagnath s/o Sheshrao Shinde
Age : 32 Yrs., Occ. Driver,
R/o : Rudda, Tq. Ahmedpur,
Dist.: Latur.

6. Ajay s/o Kundan Tupe
Age : Major, Occ. Vehicle owner,
R/o : Sadunana Tupe Vasti,
17 ½ Nali Tupe vasti, Hadapsar,
Pune, Tq. & Dist.: Pune.

7. Govind Narsing Aherkar
(died) Thr. L.Rs.

7(A) Shashikala w/o Subhash Thorat
Age : 37 Yrs., Occ. Household,
R/o : Dongargaon, Tq. Humnabad,

Dist.: Bidar.

7(B) Sanjay s/o Govind Aherkar
Age : 25 Yrs., Occ. Labour,
R/o : Khed, Tq. Aurard,
Dist.: Bidar.

8. Kamlabai Govind Aaherkar
(died) Thr. L.Rs. i.e. respondent Nos. 7(A) and 7(B).

.... RESPONDENTS/ [ORI. RESP.NO. 1,2, 4 & 5 respectively.]

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Mr. S.G.Chapalgaonkar, Advocate for Appellant.
Mr. Sanjay Mundhe, Advocates for R – 1 to 4.
None for R – 5 & 6.
Mr. P.R.Tandale, Advocate for R – 7 (A),(B) & 8.

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CORAM : V.L.ACHLIYA, J.

JUDGMENT RESERVED ON : 05/03/2020
JUDGMENT PRONOUNCED ON : 24/07/2020

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JUDGMENT :

1. Being aggrieved and dis-satisfied by the Judgment and Award dated 29/03/2008 passed by Motor Accident Claims Tribunal, Udgir, District Latur in M.A.C.P. No. 82/2006, the appellant/insurance company [respondent No. 3] has preferred this Appeal.

2. Pursuant to the order dated 06/03/2019, the appeal is taken up for final disposal at the stage of admission with the consent of Advocates representing

the parties.

3. Heard learned counsel for appellant/insurance company and respondents. Perused record and proceedings.

4. Before adverting to deal with the submissions advanced, it is useful to refer few facts leading to filing of claim petition. For the sake of convenience the parties are referred as they are referred in the Judgment and Award passed by the Tribunal. The claimants had preferred petition u/s 166 of Motor Vehicles Act, 1988 seeking compensation of Rs. Six Lakhs. They have approached with the case that on 12/08/2006, the claimant No. 1 and her deceased husband Rajendra were proceeding from Pune to Udgir in vehicle bearing registration No. MH-01/H-5773 [hereinafter referred to as 'said bus'] involved in the accident. They were travelling in said bus as passengers from Pune to Udgir to attend the funeral ceremony. They boarded in said bus at about 11.00 p.m. on 12/08/2006. When said bus was proceeding

from Kuranwadi – Barshi road and passing over Sina river bridge at about 5.00 a.m. on 13/08/2006, the bus fell down in Sina river flowing 30 ft. below the bridge. The claimant No. 1, her deceased husband and number of persons travelling in said bus sustained injuries in that accident. The deceased who was shifted to hospital at Barshi in injured condition declared as dead. The driver and conductor of bus ran away from the spot. In accident claimant No. 1 as well as other passengers were also injured.

5. On account of accidental death of deceased Rajendra, the claimants have claimed compensation of Rs. Six Lakhs. It is contended that deceased was working as a Gardner at Pune and earning Rs. 500/- per day. The claimants were totally dependent on the income of deceased. Respondent No. 4 and 5 are the parents of deceased Rajendra residing at their native village Khed Sangam. The claimants have claimed that respondents were not dependent on the income of deceased and not entitled to compensation. At the time of accident, the deceased was aged 39 years.

Although the claimants have worked out the compensation to be payable as Rs. 45,25,000/-, but restricted their claim in petition for Rs. Six Lakhs. They have claimed the compensation of Rs. 6,00,000/- making the respondent Nos. 1 to 3 i.e. driver, owner and insurer jointly and severally liable to pay the compensation with interest @ 18% p.a. from the date of petition till its realization.

6. The petition proceeded ex-parte against respondent Nos. 1 and 2 i.e. the driver and owner of said bus.

7. The petition came to be contested by appellant/insurance company [respondent No. 3]. Respondent No. 3 filed Written Statement and denied the case of petitioner in toto including the accident, accidental death of deceased and insurance of bus. In alternative the respondent No. 3 pleaded that there was breach of policy condition on the part of respondent No. 2 and, therefore, the respondent No. 3 is not liable to indemnify the respondent No. 2 –

insured. It is contended that at the time of accident the respondent No. 1 i.e. the driver of bus had no effective and valid driving licence to drive the bus.

8. The respondent Nos. 4 and 5 i.e. parents of deceased who made respondents in the petition appeared and filed their Written Statement. They have denied the contention that they were not dependent on the income of deceased. In short, respondent Nos. 4 and 5 have claimed that they are entitled for the compensation on account of accidental death of deceased Rajendra.

9. The Tribunal has framed the Issues vide Exh. 31. In order to prove their case, the claimants have examined Laxmibai, the claimant No. 1. She deposed as per the case of claimants. The claimants have examined one Pundlik Sopanrao Mane [P.W.2] as a witness to prove the occupation and income of deceased. Respondent No. 3 has not examined any witness. However, the respondent No. 3 produced certain documents along with list Exh. 48 which

include the copy of policy, the permit issued in respect of said bus on 16/08/2006 by Regional Transport Officer, Pune and Special permit dated 13/08/2006 issued by Regional Transport Officer, Pune.

10. On due appreciation of rival pleadings and evidence adduced in the case, the Tribunal partly allowed the petition and awarded the compensation of Rs. 4,60,000/- [inclusive of NFL] making respondent Nos. 2 and 3 jointly and severally liable to pay the same with interest @ 9% p.a. from the date of registration of petition till its realization. The Tribunal has also passed order of apportionment of compensation amongst the claimants [i.e. claimant Nos. 1 and 2] and respondent Nos. 4 and 5. Being aggrieved, the appellant has preferred this appeal.

11. Learned counsel for appellant/insurance company contended that the reasons and findings recorded by Tribunal to make the appellant liable to pay the compensation are erroneous and not

sustainable in law. It is submitted that as per the case pleaded by claimants, the bus left Pune on 12/08/2006 at about 11 p.m. The accident occurred on 13/08/2006 at about 5.00 a.m. The special permit produced at Exh. 51 has established that it was valid from 13/08/2006 and 14/08/2006. As such there was no permit to carry passengers on 12/08/2006. In that view, there was breach of policy condition on the part of respondent No. 2 on 12/08/2006 the bus was plied without permit. It is submitted that the findings recorded to Issue No. 2 are based upon improper appreciation of evidence. The documents along with list Exh. 48 were filed by claimants. The contents of said documents was not disputed by respondent No. 3 and same were admitted in evidence as Exhs. 49,50 and 51. It is submitted that in view of documentary evidence produced at Exhs. 49,50 and 51, the Tribunal ought to have acted upon those documents. Only for the reason the appellant/insurance company has not examined any witness in the case, the Tribunal was not justified to hold that respondent No. 3 failed to prove breach of policy condition. It is further submitted that the Tribunal also erred in treating the income of deceased as Rs. 45,000/- per annum and on that basis assessed the compensation to be payable as Rs. 4,60,000/-.

12. On the other hand, learned counsel for claimants and respondent Nos. 4 and 5 supported the Award passed by Tribunal and submits that there is no perversity in the reasons and findings recorded by Tribunal so as to interfere with the Judgment and Order passed by Tribunal. It is submitted that appeal preferred is devoid of merit and liable to be dismissed with cost.

13. I have carefully considered the submissions advanced in the light of rival pleadings, oral and documentary evidence adduced in the case. In my view, there is no perversity in the reasons and findings recorded by Tribunal to hold that the respondent No. 3/insurance company has failed to prove the breach of condition of policy and made the

respondent No. 3 liable to pay the compensation. The reasons and findings recorded as to Issue No. 2 are consistent with the evidence adduced in the case.

14. There is no dispute that bus in question involved in the accident registered as a passenger bus with a carrying capacity of 49 passengers beside the driver and conductor and insured with respondent No. 3 covering the risk of passengers travelling in the bus on the date of accident. So also there is no dispute that permit to ply said bus as a contract carriage was issued by Regional Transport Authority valid for the period 03/05/2006 to 02/05/2011. The permit [Exh.50] to ply the bus as a contract carriage was issued u/s 72 (1) (ii) of Motor Vehicles Act, 1988 by the Transport Authority. The operational route of the bus mentioned as PCMC, Pune and Kirkee Cantonment area. In that view no dispute exist on the fact that the said bus involved in the accident was carrying permit to transport passengers on the date of accident.

15. The only plea that has been raised by appellant/insurance company to seek exoneration from liability to pay compensation has been claimed on the ground that the bus in question plied beyond the route mentioned in the transport permit [Exh.50]. It is the case of claimants that bus left Pune at about 11.00 p.m. on 12/08/2006. The accident occurred at about 5.00 a.m. on 13/08/2006. The special permit [Exh. 51] which was issued u/s 88 (8) of Motor Vehicles Act, 1988 to ply the bus from Pune to Udgir, Latur, Barshi [Tembhurni] and back was valid only for the period 13/08/2006 and 14/08/2006. According to appellant as the special permit [Exh. 51] was valid w.e.f. 13/08/2006 and bus left Pune at about 11.00 p.m. on 12/08/2006, there was breach of policy condition on the part of insurer and, therefore, insurance company is entitled to seek exoneration from liability to pay compensation.

16. The Tribunal has framed issue No. 2 which reads as under casting burden upon respondent No. 3 to prove breach of policy condition, so as to seek

exoneration from liability to pay compensation.

> " ***Issue No. 2*** *: Whether respondent No. 3 proves that respondent No. 1 was not holding valid and effective driving licence of bus and plied the same contrary to the terms of permit ?* "

17. The burden to prove the breach of policy condition has been entirely rest upon the appellant/insurance company. However, the respondent No. 3/insurance company has chosen not to examine any witness in support of its case. It appears from record that after the claimants closed their evidence and filed closure pursis on 01/08/2008, much thereafter the respondent No. 3/insurance company filed copies of insurance policy [Exh. 49], permit [Exh. 50] and special permit [Exh. 51] dated 13/08/2006 with list [Exh. 48] on 29/01/2008. Although the said documents were tendered in evidence by respondent No. 3/insurance company and produced after the evidence of claimants was over, still the note has been recorded under the signature of Presiding Officer of Tribunal that documents were tendered in the evidence of witness No. 1 examined

by claimants. Without examination of witness and proof of contents of those documents the Tribunal has marked them as Exh. 49,50 and 51, though said documents were never tendered in evidence of claimant No. 1/P.W.1. The respondent No. 3 has not examined any witness nor said documents were admitted in evidence with the consent of claimants. In that view, the procedure adopted by Tribunal to admit said documents in evidence and mark them as exhibits is contrary to procedure prescribed under law. It is well settled that mere marking of documents as exhibit not sufficient to read them in evidence. In that view the contention of learned counsel for the appellant that the documents were tendered in evidence by claimants and same were duly proved is contrary to the fact on record.

18. Even if it is admitted that the documents Exhs. 49,50 and 51 were duly admitted in evidence, still the respondent No. 3 failed to prove the breach of policy condition on the part of respondent No. 2. The driving licence of claimant has been produced in

evidence and marked as Exh. 37, which has established that driver of the bus had a valid and effective licence to drive said bus on the date of accident. No contrary evidence brought on record to show that the driver of said bus was not holding effective and valid driving licence to drive the bus involved in accident. In that view, no case has proved on the part of appellant/respondent No. 3 that at the relevant time of accident the driver of bus was not holding valid and effective driving licence to drive the said bus and the respondent No. 2 has committed the breach of policy condition.

19. The next question which falls for consideration the bus in question was plied on road without permit. It is the contention of appellant/respondent No. 3 that the permit to ply the bus from Pune to Udgir was issued on 13/08/2006. However, said bus started its journey from Pune at 11.00 p.m. on 12/08/2006 i.e. before the commencement and operation of special permit [Exh. 51]. In my view, there is absolutely no merit in the contention of appellant that bus was plied

without valid and effective permit to ply the bus. If we consider the insurance policy produced at Exh. 49 then the condition to ply the bus on a particular route and violation thereof not forms the part and parcel of contract of insurance entered between respondent Nos. 2 and 3. As discussed, the bus permit at Exh. 50 was issued u/s 72 (1) (ii) by the Transport Authority and valid from 03/05/2006 to 02/05/2011 to ply the bus as a contract carriage. The said permit was issued in response to application made by respondent No. 2 – owner of bus u/s 70 of Motor Vehicles Act. The Regional Transport Authority, Pune issued said permit after following the procedure prescribed u/s 71 of Motor Vehicles Act. By virtue of permit [Exh.50] the Transport Authority has allowed the operation of said bus as a contract carriage within the State for the period 03/05/2006 to 02/05/2011 covering the date of accident. In that view, there was no breach of policy condition on the part of respondent No. 2 as contemplated u/s 149 of Motor Vehicles Act, so as to seek exoneration from liability to pay the compensation.

20. Section 149 (2) of Motor Vehicles Act reads as under.

> " *(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-*
>
> *(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :-*
>
> *(i) a condition excluding the use of the vehicle -*
>
> *(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or*
>
> *(b) for organised racing and speed testing, or*
>
> *(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or*

> *(d) without side-car being attached where the vehicle is a motorcycle; or*
>
> *(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or*
>
> *(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or*
>
> *(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. "*

Thus, Section 149 (2) of Motor Vehicles Act enumerate the specific instances wherein the insurance company can claim exoneration if it is proved that breach of one of such condition of policy covered u/s 149 (2) of Motor Vehicles Act has taken place. The use of vehicle beyond the route provided in the permit not amounts to breach of conditions of policy as provided u/s 149 (2) of Motor Vehicles Act. In absence of breach of condition specified in sub section (2) of section 149 of Motor Vehicles Act, the appellant/insurance company not entitled to seek exoneration from liability to pay the compensation to third party.

21. No doubt, the permit at Exh. 50 was issued to ply the bus for the area PMC,PCMC, Pune and Kirkee Cantonment area. However, the use of bus beyond the area of operation provided in permit itself not sufficient to prove that the bus was plied without permit. The use of bus beyond the area of operation provided in route permit at the most may invite penal consequences to insured to be prosecuted under the provisions of Motor Vehicles Act and violation of condition of permit. However, it will provide cause to claim to exonerate the insurance company from its liability to pay compensation to third party.

22. In the instant case, the copy of permit produced at Exh. 51 is a special permit issued u/s 88 (8) of Motor Vehicles Act, 1988 by the competent authority authorizing the owner to ply the bus on a route beyond the route mentioned in the permit issued u/s 72 of Motor Vehicles Act. The special permit [Exh.51]

was issued by transport authority for use of said bus from Pune to Udgir and back to Pune. The accident occurred on 13/08/2006. The permit [Exh. 51] clearly provides that the permit granted for 13/08/2006 to 14/08/2006 to said bus for carriage of passenger from Pune to Udgir. The commencement of permit has started by the mid night of 12/08/2006 and valid up to mid night of 14/08/2006. The permit was obtained prior to 13/08/2006. The accident occurred after the mid night of 12/08/2006 i.e. on 13/08/2006. In that view, at the time of accident the special permit [Exh. 51] was in force to ply the bus beyond the area of operation as provided under permit [Exh. 50]. The respondent No. 3 has adduced no evidence to prove that the bus started at about 11.00 p.m. on 12/08/2006 and thereby there was violation of condition of policy. Even assuming that bus started at about 11.00 p.m. on 12/08/2006 and accident occurred on 13/08/2006, still at the most same may provide cause to transport authority to prosecute the respondent No. 2 for violation of condition of special permit. In that view, there is no merit in the contention of learned counsel for appellant that there was breach of policy condition on the part of respondent No. 2 and the Tribunal has committed error in foisting the liability against appellant/insurance company. The findings recorded by Tribunal to Issue No. 2 are consistent with evidence adduced in the case. There is absolutely no perversity in the Judgment and Order passed by Tribunal so as to call for interference in exercise of appellate jurisdiction of this Court.

23. So far as the contention raised that the compensation awarded by Tribunal is excessive and exorbitant, I am of the view that assessment of compensation is proper. The compensation awarded is just and fair compensation as awarded to claimants. The deceased was 39 years of age Gardner by profession. He was professional gardner working at Pune. In that view, it can be safely presume that the earning of deceased may not be less than Rs. 100/- per day i.e. the minimum wages payable to such person under the Minimum Wages

Act. Considering the dependency as that of four persons and treating the monthly income of deceased as Rs. 3,000/- and deducting the income to the extent of 1/4th towards personal expenses [i.e. Rs. 750/- per month], the net yearly loss of income to the claimants work out as Rs. 27,000/- [Rs. 2,250/- x 12 = Rs. 27,000/-]. Applying the multiplier of 15 as applicable to the age group of 36 – 40 years, the pecuniary loss of income to the claimants work out as Rs. 4,05,000/-. Besides the amount of Rs. 4,05,000/-, the claimants are entitled to non pecuniary damages under the conventional head such as loss of estate, loss of company, loss of parental care, funeral expenses, etc. On this count the claimants deserves to be awarded Rs. 50,000/- as the claimant Nos. 2 to 4 were minors and in the age group of 9–12 years at the time of accidental death of deceased. Therefore, looking to the age, occupation, income and dependency of deceased, the compensation Rs. 4,60,000/- awarded by the Tribunal can not termed as excessive and contrary to evidence adduced in case. In my view, the compensation awarded by Tribunal is just and fair compensation.

24. In view of the conclusion to which arrived at the respondent No. 3 failed to prove breach of policy condition on the part of respondent No. 2 and the compensation awarded by the Tribunal to be just and fair compensation, the appeal preferred by the appellant deserves to be dismissed as devoid of merit. Accordingly, the appeal is dismissed. However, no order as to costs. Parties to bear their respective cost.

[V.L.ACHLIYA]
JUDGE

KNP.