IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 25 OF 2010

National Insurance Co. Ltd.
Through their Divisional Manager
2nd Floor, Confraria Bldg.,
Jose Falcao Road,
Panaji, Goa.
(Insurer of the truck No.
KA-09/7773) …... Appellant

Versus

1. Shri Jaidev S. Kundaiker,
Son of late Shivram Kundaiker
72 yearsof age, married,
busines, resident of Shop No. 72,
Opp. I.D.C. Gate, Kundaim,
Ponda, Taluka, Goa.

1(a) Smt. Manda Jaidev Kundaikar,

(b) Mr. Chidambar Jaidev Kundaikar,

(c) Mr.PRasad Jaidev Kundaikar,

(d) Mr. Prajakta Prasad Kudaikar

All above respondents are
residents of H.No.169,
Dahrzowaddo, Kundaim, Ponda,
Goa.

2. Mahesh Bassappa Megeri,
major, driver, resident of
Shivaji Nagar, Nipani,
Taluka Chikodi, Belgaum Dist.
Karnataka State,
(Driver of the Truck No.KA-09/7773)

3. Smt. Rekha Megeri,
Wife of Shanker Santre, major,
truck operator, resident of
Government Hospital Quarters,
Haveri, Karnataka State,
(Owner of the truck No.KA-09/7773) ...Respondents

Mr. U.R. Timble with Mr. Viraj Timble, Advocate for the Appellant.

Mr. J. Godinho, Advocate for the Respondents.

Coram :- SMT. M. S. JAWALKAR,J.

Reserved on : 22nd October, 2020

Pronounced on: 29th October, 2020

JUDGMENT

1. Heard Mr. U. R. Timble, learned Counsel for the appellant and Mr. J. Godinho, learned Counsel for the respondents.

2. The present appeal is filed being aggrieved by the judgment and award dated 30.04.2007 passed by the Motor Accident Claims Tribunal, North Goa, at Panaji, in Claim Petition No.106 of 2004.

3. The property damage claim of the claimants before Claims Tribunal was as under:

On 28.10.2004, at about 21.45 hours at Kundaim opposite I.D.C. Gate, a loaded truck bearing no.KA-09/7773 driven by the respondent no.2 herein from Kundaim Industrial Estate to Ponda, when reached near the gate and while negotiating a curve in a fast speed and in a rash and negligent manner, lost control and gave violent dash and the truck ramped into the premises of the claimant and of his neighbour Smt. Shanti Naik, thereby causing total damages to the shop premises of the claimant. The claimant has stated that his shop was a cold drink shop and he used to earn about Rs.1,500/- to Rs.2,000/- per month.

4. The learned Claims Tribunal framed issues and after considering the evidence on record, came to the conclusion that the claimant is entitled to the compensation of Rs.24,000/- and the respondents were ordered to pay jointly and severally to the claimant.

5. The appeal is preferred against the said Judgment and Award on the ground that the Tribunal has erred in law also on facts in deciding the matter. He failed to appreciate that under the policy and also under the provisions of the M. V. Act, the liability of the appellant-Company was restricted to Rs.6,000/- only. The appellant cannot be made liable to pay the amount over and above the liability as per terms and conditions of policy. Learned Counsel for appellant relied on Section 147 of

Motor Vehicles Act and also policy at page 49. He also relied on general terms of package policy wherein section 2 relates to the liability to third parties, Section II(1)(ii) is in respect of liability to third party due to damage to property caused by the use (including the loading and/or unloading) of the vehicle. Section 147(2)(b), which runs as under :

> *"(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely :-*
>
> *(a)...........*
>
> *(b) In respect to damage to any property of a third party, a limit of Rs.6,000/-."*

6. Learned Counsel pointed out from the policy that under the heading 'Limits of Liability', reference of general condition of package policy i.e. Section II-1(ii) which is in relation to liability to third party is there. Condition in policy

reads as under:

> *"(1) Limit of the amount of the companies liability under Section II-1(i) in respect of any one accident is as per Motor Vehicles Act, 1988;*
>
> *(2) Limit of the amount of the Company's Liability under Section II-1(ii) in respect of any one claim or series of claims arising of one event up to Rs.6000."*

7. Learned Counsel relied on citation **New India Assurance Co. Ltd. v/s. C.M. Jayes and others** (***2002(2) SCC 278)***, wherein question involved was whether insurance company can held liable to pay over and above the limits of liability and to recover from the insurer. It is held by the Apex Court that the liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited liability to cover wider risk. In such an event, the insurer is

bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In absence of such a term or clause in the policy pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to re-writing terms of contract of insurance which is not permissible. It is further held that when the terms of policy are accepted and it is not the case that additional premium is paid the liability of insurance company is limited as per terms. As against this, learned Counsel for respondent submitted that there is nothing on record to show that whether additional premium was accepted by the Company or not and therefore, liability of insurance company cannot be limited to the extent of Rs.6000/-. Moreover, in view of amendment, the limit of Rs.6000/- liability is deleted from Section 147 of the Act.

8. Learned Counsel for respondent pointed out that Section 147 (2)(b) is amended and limit of Rs.6000/- is removed in 2019. Learned Counsel for the appellants pointed out that policy was issued long back in 2004 before the amendment came into force in September 2019 and unless the said amendment is made applicable retrospectively it will be presumed that it shall have prospective effect.

9. Learned Counsel for the appellant also relied on **Padma Shrinivasa v/s. Keniar Insurance Company Ltd. (AIR 1982 SC 836)** wherein the Hon'ble Court held that *"since the liability of Insurer to pay a claim under the motor accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurers liability under statutory policy. In this*

behalf the governing factor for determining the application of the appropriate law is not the date on which the policy of insurance came into force but the date on which the cause of action accrued for enforcement of liability arising under the terms of the policy."

Thus, it is submitted that even if there is amendment taking away limit of Rs.6000/- it is in the year 2019 and cause of action i.e. accident occured in the year 2004. Thus, the said amendment cannot be made applicable retrospectively.

10. Learned Counsel also relied on citation ***Venketesh Syndicate vs. Oriental Insurance Company Ltd. & Ors***. (***(2009) 8 SCC 507)*** in support of his contention that the company may on sufficient ground reject the assessment made by the Surveyor by giving valid reasons.

11. Learned Counsel for respondents submitted that as per report of Surveyor, damage is of Rs.17,500/-. As such, there is no reason to interfere in the order passed by the learned Claims Tribunal.

12. I have gone through the oral as well as documentary evidence on record. The policy produced on record by respondent no.3 clearly shows that under the caption limits of liability to the extent of Rs.6,000/- in respect of the damaged to the third party property. Respondent nos.1 and 2 though served with the notice chose to remain absent and there is no written statement nor they did enter into witness box. As such, there is no challenge to the policy produced by the Insurance Company on record. The learned Tribunal while computing amount of damage taken into consideration the surveyors report produced on record by respondent no.3 through Surveyor Rw1-

Surendra Nadkarni. As per his assessment the amount of damage as Rs.17,512/- less salvage. It is a common report for other two damages. Though it is contended by the learned Counsel for the appellant relying on ***Vankatesh Syndicate***(supra) that company may disagree with the Surveyors report however, in my considered opinion there has to be sufficient reason for such disagreement. There is nothing on record to show that the company has disagreed with the Surveyors report for any reason. The Surveyor was examined by the company itself. As such, there is no reason not to accept the Surveyor's report for computation of damages. The learned Tribunal awarded amount of Rs.4,000/- towards the loss of income considering Rs.2,000/- per month as a income from the shop. Amount of Rs.2,500/- awarded towards mental agony as claimant is old person. I do not see any reason to interfere with the total amount awarded to the tune of Rs.24,000/- by the

Claims Tribunal. However, the Insurance Company cannot be made liable over and above the limit of liability as per the insurance policy issued in favour of the owner of the vehicle. In view of the principle laid down in the citation referred above, Insurance Company is liable to pay Rs.6000/- along with interest jointly and severally with respondent nos.1 and 2 in the claim petition. As cause of action arose on 28/10/2004 the amendment removing limit of liability in 2019 in Motor Vehicle Act will not be made applicable in the present matter.

13. Accordingly, i proceed to pass the following

ORDER

(1) The appeal is allowed.

(2) The order passed by Claims Tribunal in Claim Petition No.106 of 2004 is modified as under :

(i) The Claim petition is partly allowed with proportionate cost.

(ii) The claimant is entitled to the compensation of Rs.24,000/-, however, respondent nos.1 to 3 are jointly and severally liable to pay amount of Rs.6,000/- to the claimant and for the remaining amount, respondent nos.1 and 2 are jointly and severally liable to pay to the petitioner. The said respective amount shall carry interest at the rate of 9% per annum till its realization.

3. If there is any amount deposited by the appellant-Insurance Company as per award dated 30.04.2007, the Insurance Company is entitled to get amount refunded over and above the amount of Rs.6,000/- along with proportionate interest accrued thereon.

4. Award be drawn accordingly.

M. S. JAWALKAR,J.

Arp/*/mv