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

**FIRST APPEAL NO. 143 OF 2006**

Smt. Shobha W/o Sudhakar Palve,
Age - Years, Occu.: Agri & Owner,
R/o Ghatshiras, Tq. Pathardi,
Dist. Ahmednagar … Appellant

Versus

1. Sow. Pushpabai W/o Babasaheb Tupe,
Age – 45 years, Occu.: Nil,
R/o Ghatshiras, Tq. Pathardi,
Dist. Ahmednagar.

2. Branch Manager,
United India Insurance Co. Ltd.,
Kisan Kranti Building Market Yard,
Ahmednagar. … Respondents

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Mr. A.M. Gholap for the Appellant
Mr. D.R. Jaybhar, Advocate for Respondent No.1
Mr. A.B. Gane, Advocate for Respondent No.2

....

**CORAM : SHRIKANT D. KULKARNI, J.**

**Reserved on : 08.12.2021**

**Pronounced on : 09.12.2021**

**JUDGMENT :-**

1. Feeling aggrieved by the impugned judgment and award passed in M.A.C.P. No.728/2001 by the Member, Motor Accident Claims Tribunal at Ahmednagar, the appellant/owner has preferred this appeal by taking aid of Section 173 of the Motor Vehicles act, 1988.

## FACTUAL MATRIX

2. The accident took place on 01.05.2001 about 2.30 p.m. in the land of one Mr. Sahebrao Gaikwad near his well where the work of excavation was going on. The appellant is the owner of the tractor bearing no. MH-16/F-3524 and trailer no. MH-16/H-3297. The said tractor and trolley were engaged by Mr. Sahebrao Gaikwad to transport the excavated material from the well. Respondent no.1/original claimant was a labour employed for the said work.

3. It was about 2.30 p.m. when original claimant along with other labours had taken shelter in the shadow of the trailer when it was in stationary condition near the well. The driver of the said tractor without taking due care and caution and without looking to the persons sitting behind the tractor, started the tractor and took it to reverse side. Resultantly, the right leg of the claimant was fractured. She had also sustained other injuries. She was taken to the hospital of Dr. Deshpande where she was operated and treated. She is yet not fully recovered from the injuries caused in the accident. She is still suffering from 15% permanent disability. She

has sought compensation of Rs.1,25,000/- from the appellant / owner and respondent no.2 / insurance company.

4. The appellant / owner of the vehicle and respondent no.2 / insurance company as well appeared before the Motor Accident Claims Tribunal, Ahmednagar and contested the claim by filing their respective written statements.

5. The claim went on trial. The parties produced their evidence in support of their pleadings.

6. The learned Member, Motor Accident Claims Tribunal, Ahmednagar after considering the rival pleadings of the parties and appreciating the evidence on record was pleased to hold that the appellant / owner of the vehicle has committed the breach of the policy conditions. The appellant / owner alone is liable to pay compensation assessed at Rs.70,100/- (inclusive of NFL amount of Rs.25,000/-) to the claimant with interest thereon at the rate of 9% p.a. The Tribunal has exonerated respondent no.2 / insurance company from the liability in view of breach of terms and conditions of the insurance policy.

7. Being dissatisfied with the judgment and award passed by the Motor Accident Claims Tribunal at Ahmednagar, the appellant owner has preferred this appeal mainly on the following grounds:

(i) The Member, M.A.C.T. has committed an error in arriving at conclusion that the appellant / owner of the vehicle has committed breach of the terms and conditions of the insurance policy and alone liable to pay compensation.

(ii) The Tribunal has not considered the evidence on record in a proper perspective. Even though the original claimant was also equally liable and contributed the negligence for the accident, not held that it is a case of contributory negligence.

(iii) At the most, the Tribunal would have held owner and insurance company jointly and severally liable to pay compensation.

8. Heard Mr. A.M. Gholap, learned counsel for the appellant, Mr. D.R. Jaybhar, learned counsel for respondent no.1 and Mr. A.B. Gatne, learned counsel for respondent no.2 at length.

9. Mr. Gholap, learned counsel for the appellant submitted that the claimant herself was negligent for causing the accident, and as such, she needs to be held responsible equally. It is a case of contributory negligence. She was sitting under the trolley at the time of the accident and thereby shared the negligence for causing the accident. The Tribunal has not considered this aspect. Mr. Gholap submitted that the tractor and trolley owned by the appellant were not given on hire to the neighbour Mr. Sahebrao Gaikwad. The tractor and trolley were given to Mr. Sahebrao Gaikwad as a neighbour out of relation. The tractor and trolley were engaged for transporting the excavated material from the well of Mr. Sahebrao Gaikwad. As such, the tractor and trolley cannot be said to be used for hire charges. It cannot be held that the use of tractor and trolley for transporting the material excavated from the well amounts to breach of policy.

10. The Tribunal has committed an error in recording such finding holding that the appellant has committed breach of the policy conditions. He submitted that respondent no.2 / insurance company has not produced any evidence in support of its defence of breach of policy. The Tribunal has exonerated respondent no.2 / insurance company from the liability arising out of contract to

indemnify the policy holder. Mr. Gholap, submitted that the findings recorded by the learned Tribunal are perverse and need to be set aside.

11. Mr. Gholap submitted that the owner and the insurance company both may be held jointly and separately liable since it is not a case of breach of policy.

12. Mr. Jaybhar, learned counsel for respondent no.1 / original claimant supported the findings recorded by the Tribunal.

13. Mr. A.B. Gatne, learned counsel for respondent no.2 submitted that the Tribunal has considered the rival pleadings of the parties and appreciated the evidence on record and rightly held that it is a case of breach of policy. The appellant being the owner of the vehicles shall be liable to pay the compensation. The Tribunal has rightly exonerated respondent no.2 / insurance company. There is no error on the part of the Tribunal. He submitted that the tractor and trolley were used by the appellant / owner for transporting the excavated material from the well of one Sahebrao Gaikwad who is stated to be the neighbour of the appellant. This work does not amount to agricultural operation. The insurance policy in this case was for agriculture package

policy. The tractor and trolley are required to be used for own agricultural purpose by the owner and not by others. It is a clear case of breach of policy. The tractor was insured only for carrying out agricultural work.

14. Having regard to the arguments advanced by the learned counsel for the respective sides, perused the impugned judgment and award passed by the Tribunal, R & P and the evidence tendered before the Tribunal.

15. Most of the facts of the accident are admitted by both the sides. Centre of dispute is narrow down.

(i) Whether it is a case of breach of policy; and

(ii) Whether it is a case of contributory negligence.

(iii) Whether it is a case of joint and several liability

16. On studying the impugned judgment, it is noticed that the Tribunal has considered the evidence of original claimant and the owner of the vehicle having regard to the rival pleadings. It is not in dispute that the original claimant was working as a labour in that field of Mr. Sahebrao Gaikwad at the time of the accident. She was taking rest behind the tractor and trolley in its shadow.

The tractor driver took the tractor in reverse way and it resulted in causing injury to the original claimant. The appellant / owner has also admitted by way of cross-examination that the accident was caused due to rash and negligent driving of the tractor driver. The admission given by the appellant by way of cross-examination has ruled out the case of contributory negligence. How the original claimant can be held responsible and that too for sharing negligence for causing the accident.

17. It is rightly observed by the Tribunal that it was the duty of the tractor driver before taking the tractor in reverse position to see whether any person is sitting behind the tractor. The tractor driver without taking such precaution and care took the tractor in reverse gear and caused the accident resulting injuries to the original claimant. Certainly, it is not a case of contributory negligence as argued by Mr. Gholap, learned counsel for the appellant.

18. Now coming to point of breach of policy. It is evident from the reasons recorded by the Tribunal that the accident took place in the field of one Sahebrao Gaikwad. At the time of the accident, the work of digging of the well was going on. The tractor was

being used for the purpose of carrying excavated material from the well. The only dispute is regarding use of tractor for carrying excavated material. Whether the said work falls within agricultural work and secondly, whether the tractor was given on hire basis to Mr. Sahebrao Gaikwad.

19. The original claimant in her petition has categorically stated that the tractor and trolley were hired by Sahebrao Gaikwad for transporting excavated material from the well. By way of cross-examination, she went on admitting that she has no knowledge about the same. She went on admitting that excavated material of the well was carried to *bandh* in between two lands for the purpose of creating new road. The claimant failed to explain as to how the above facts find place in her petition regarding giving tractor and trolley on hire basis to Mr. Sahebrao Gaikwad. She is making contrary statement to her own pleadings and can not be accepted.

20. It is rightly observed by the learned Tribunal that the written statement filed by the appellant / owner of the vehicle is silent on the point of her defence regarding use of the tractor and trolley. It is nowhere pleaded by the appellant / owner of the

vehicle that she had given the tractor to neighbour Mr. Sahebrao Gaikwad for the purpose of carrying excavated material for creating new road between their lands and it was for their benefit. She has nowhere pleaded that she has not taken any charges from Sahebrao Gaikwad. The appellant seems to have introduced such story by way of evidence and it amounts to improvement.

21. It is material to note that Mr. Sahebrao Gaikwad was the best witness to focus on these aspects, whether he had taken the tractor and trolley gratuitously from the appellant and without paying any hire charges. He is not examined by the appellant in support of her case. The Tribunal has rightly observed about the deficit pleadings of appellant and non examination of Sahebrao Gaikwad as witness in support of her claim. Now the appellant is improving her case, which cannot be accepted without having a foundation in the written statement. Best available piece of evidence was not produced before the Tribunal by the appellant, though it was within her knowledge. As such, the Tribunal has rightly observed that the case put forth by the original claimant about taking the tractor and trolley on hire charges by Sahebrao Gaikwad is probable in view of the facts and evidence on record.

22. Admittedly, the insurance policy of the tractor was for agricultural use. It was the farmers package policy. Certainly, its use was restricted to agricultural operations and not for non-agricultural operations. In the case in hand, as per evidence on record, the tractor was used for carrying excavated material from the well, which cannot be said to be within the term "agricultural use". The tractor was being used for transportation of excavated material from the well to another place. The appellant / owner while facing the cross-examination has also admitted that the tractor was to be used for agricultural purpose only and she was aware about the same. The police also shows that it was farmers package policy. In these circumstances, when the tractor is used for transportation of excavated material from the well, the said work cannot be termed within the meaning of agricultural operation / agricultural work. It is not the case that the excavated material was being transported from the well of the appellant to her land.

23. Mr. Gatne, learned counsel for respondent no.2 / insurance company referred the citation in case of ***Oriental Insurance Co. Ltd. Vs. Brij Mohan and Ors.*** reported in ***AIR 2007 Supreme Court 1971***, wherein it is held that, "respondent, a labourer, slipped

down from trolley attached to a tractor and no insurance cover in respect of trolley, tractor was insured only for carrying out agricultural work which would not include digging of earth and taking in trolley to brick kiln". It is not a liability of the insurer under Section 147 of the Motor Vehicles Act, 1988 to pay the compensation. However, by invoking Article 142 of the Constitution of India, the Honb'le Supreme Court was pleased to direct the insurer to satisfy the award with right to realise the same from the owner of the tractor and trolley.

24. In the present case, it is a clear case of breach of policy. The tractor was used other than agricultural operation and thereby violated breach of the terms and conditions of the farmers package policy. The owner is alone liable to pay the compensation.

25. The amount of compensation assessed by the Tribunal appears to be just and reasonable having regard to the nature of injury and permanent disability and the medical expenses incurred by the claimant for her treatment.

26. Having regard to the above reasons and discussion, I do not see any reason to interfere with the findings recorded by the learned Tribunal. The Tribunal has considered all the points raised

by the appellant/owner and the evidence on record with the terms of the policy and rightly held the appellant/owner alone liable to pay compensation. The tribunal has rightly exonerated the insurance company in view of breach of policy. I do not see any error on the part of the learned Tribunal while allowing the claim against the appellant/owner. No merit in the appeal.

**ORDER**

(i) The first appeal stands dismissed.

(ii) The impugned judgment and award passed in M.A.C.P. No. 728/2001 in Motor Accident Claims Tribunal at Ahmednagar dated 28.06.2005 is hereby confirmed.

(iii) Award be drawn up accordingly.

(iv) R & P be sent back to the Tribunal.

**[ SHRIKANT D. KULKARNI ]**
**JUDGE**

S.P. Rane