IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO. 963 OF 2018

1. Smt. Asha wd/o Pandurang Raut,
aged about 56 years, Occ. Household.

2. Swapnil s/o Pandurang Raut,
aged about 28 years, Occ. Education.

3. Pratik s/o Pandurang Raut,
aged about 26 years, Occ. Education.

All are R/o Behind Circuit House,
Yavatmal, Tq. & Dist. Yavatmal.

...**APPELLANTS**

Versus

1. Mohd. Majid Mohd. Afsar,
aged about 40 years, Occ. Driver,
R/o Ner, Tq. Ner, Dist. Yavatmal,
(Driver cum owner of Bajaj Tempo
Trax No. MH-29/C-0539 at the date
and time of accident).

2. The Oriental Insurance Co. Ltd.,
Through its Branch Manager,
Office Vir Wamanrao Chowk, Yavatmal,
Tq. & Dist. Yavatmal.

3. Smt. Rukmini wd/o Laxman Raut,
aged about 76 years, Occ. Nil,
R/o C/o Anil Bagde, Flat No. 202,
Vaishnavi Apartment, Naik Nagar,
near Ulhas Nagar, Manewada Ring Road,
Nagpur – 440027.

...**RESPONDENTS**

Shri J.A. Malnas, Advocate for the appellants.
Shri A.J. Mirza, Advocate for respondent No.1.
Shri Lalit Limaye, Advocate for respondent No.2.
Shri K.R. Lule, Advocate for respondent No.3.

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CORAM : PUSHPA V. GANEDIWALA, J.
DATED : AUGUST 20, 2021.

ORAL JUDGMENT :

The appellants/ claimants take exception to the judgment and award dated 31/03/2016 passed by the Chairman, Motor Accident Claims Tribunal, Yavatmal in M.A.C.P. No. 62/2010 (New No. 11/2016), whereby the Tribunal partly allowed the claim of the appellants/ claimants and directed respondent No.1, i.e., the owner-cum-driver of the offending vehicle to pay Rs.19,23,000/- to the appellants/ claimants towards compensation along with interest @ 7% per annum from the date of application. The Tribunal completely exonerated the Insurance Company from payment of compensation on account of breach of conditions in the policy by the owner of the vehicle.

The facts, necessary to decide the present Appeal, may be stated as under :

2. On 16/04/2010, while the deceased Pandurang was going on a motorbike bearing No. MH-29/P-6238, at

around 5:15 pm towards Futka Matha, Kolura Shivar on Ner to Yavatmal road, one Bajaj Tempo Trax bearing No. MH-29/C-0539, which was driven by respondent No.1, came from the opposite direction in a rash and negligent manner and gave dash to the motorbike of the deceased by coming from the wrong side of the road, as a result of which the deceased fell down on the spot and sustained fatal injuries over vital organs of his body, and he died while on the way to the hospital at Sawangi Meghe, District Wardha.

3. It is stated that the First Information Report was registered against respondent No.1 at the Police Station Ner, Taluka Ner, District Yavatmal. It is further stated that the said Tempo Trax was duly insured with respondent No.2 – Insurance Company. The appellants/ claimants filed Claim Petition under Section 166 of the Motor Vehicles Act, 1988 ("**MV Act**") before the Member, Motor Accident Claims Tribunal, Darwha, and claimed compensation of Rs.70,60,000/-, which was later on transferred to the Court of the Motor Accident Claims Tribunal, Yavatmal. It is stated that

the age of the deceased, at the relevant time, was around 52 years. The deceased was the State Government employee and was serving as a Librarian in the Government Polytechnic College, Yavatmal. That he was earning Rs.45,000/- per month. The deceased was the husband of appellant No.1, father of appellant Nos.2 and 3 and son of respondent No.3.

4. Respondent No.1 – owner-cum-driver of the offending vehicle, in his written statement, has admitted that he was the owner-cum-driver of the offending vehicle (Bajaj Tempo Trax bearing No. MH-29/C-0539) on the date of accident, which was duly insured with respondent No.2 – Oriental Insurance Company Limited, and that the said policy was valid and was in force at the relevant time and the insurance policy covers the risk of the deceased, he being a third party. He was having driving license on the date of accident, and therefore, there was no breach of terms and conditions of the insurance policy.

5. Respondent No.2 - Insurance Company, in its reply, while denying the occurrence of the accident, resisted the claim petition in toto, took statutory defence as are available to it under Section 149(2) of the MV Act.

6. The Tribunal framed necessary issues and recorded evidence as adduced by the parties. Appellant No.2 - the son of the deceased, has examined himself at Exh.35, one eye witness Pramod Rathod, who was travelling in the offending vehicle at the relevant time at Exh.50, one Vijay Nande – an employee of the Government Polytechnic College, Yavatmal on the point of salary and other benefits of the deceased at Exh.51, one Shankar Bhagadkar – the ambulance driver, who carried the injured deceased to the hospital at Exh.61. To substantiate their claim for compensation, the appellants/ claimants have brought on record the following documents :

- First Information Report
- Spot Panchanama
- Form AA
- Inquest Panchanama

- Postmortem report
- Insurance Policy
- Extract registration of the offending vehicle
- Driving license of respondent No.1

Neither the owner nor the insurer of the offending vehicle preferred to examine any witness to substantiate their stand.

7. The Tribunal, on appreciating evidence, exonerated the Insurance Company on the ground that there were breach of terms and conditions in the policy by the owner of the offending vehicle. The Tribunal observed that the private vehicle was being used for commercial purpose by the owner of the vehicle and that he himself was driving the vehicle. The Tribunal relied on the testimony of the witness Pramod Rathod, who deposed that he had paid Rs.18/- towards fare to respondent No.1 as a paid passenger in the vehicle. The Tribunal fastened the entire liability of payment of compensation on respondent No.1 - owner-cum-driver of the offending vehicle. This judgment is impugned in this Appeal by

the claimants.

8. Shri Malnas, learned counsel for the appellants/ claimants, in all his fairness, restricted his argument only with regard to the fixing of liability of payment of compensation on respondent No.2 – Insurance Company along with respondent No.1 – the owner of the offending vehicle. He further relied on a series of judgments delivered by the Hon'ble Supreme Court so also by this Court, particularly on the decision of the Hon'ble Supreme Court in the case of **National Insurance Co. Ltd. Vs. Swaran Singh And Others, (2004) 3 SCC 297,** and submitted that the Tribunal has committed gross error in not appreciating the material on record in its proper perspective. He submitted that respondent No.2 – Insurance Company has failed to prove that there was any fundamental breach of policy conditions and thus, he urged to direct respondent No.2 – Insurance Company to pay the compensation to the legal representatives of the deceased, considering the valid and effective policy of the offending vehicle at the relevant time.

9. Shri Limaye, learned counsel for respondent No.2, while supporting the impugned judgment and award, submitted that the vehicle was used by the owner for commercial purposes, and the said fact has been established from the evidence of claimants' witness No.2, who was travelling in the offending vehicle at the relevant time, and therefore, the Insurance Company could establish that the owner of the vehicle has committed fundamental breach of policy conditions. The learned counsel urged to dismiss the Appeal.

10. While the learned counsel Shri Mirza, appearing for respondent No.1 - the owner of the vehicle, supported the stand of the claimants.

11. I have considered the submissions advanced on behalf of both the sides, and perused the record.

12. At the outset, there is no dispute with regard to valid and effective driving license of respondent No.1 – owner-

cum-driver of the offending vehicle at the relevant time. Similarly, there is no dispute with regard to the existence of valid third party insurance policy for the offending vehicle. The documents of the policy is placed on record at Exh.70. The victim of the accident, i.e., the deceased was admittedly the third party *qua* respondent Nos.1 and 2.

13. The Tribunal has rightly adjudicated the compensation on the basis of evidence with regard to salary of the deceased, who was working as a Librarian in the Government Polytechnic College, Yavatmal. During argument, Shri Malnas, learned counsel for the appellants, submitted that the appellants are getting family pension due to death of the deceased in the motor vehicular accident. Therefore, the only point for consideration of this Court is whether respondent No.2 – Insurance Company can be directed to pay the amount of compensation to the appellants/ claimants?

14. It is also not in dispute that the owner of the offending vehicle was driving the said vehicle at the time of the

accident. The defence of the Insurance Company is with regard to the breach of policy conditions, and the same has been accepted by the Tribunal, being breach of policy conditions. The Tribunal has failed to keep in mind the object and purpose of the statute. The main purpose, recognized under the statute, is that no third party should suffer despite breach of any condition in the insurance policy between insurer and insured. Though such a breach of condition is proved by the insurer against the insured, it should be treated as an inter-se dispute between the insurer and the insured and the same should not affect the right of a third party, unless, there is a contribution by the third party himself in causing the breach of any condition of the policy. The Court has to examine whether the said breach is referable to the cause of accident in which case it would become a fundamental breach. I take support for this view from the case of **New India Assurance Co. Ltd. Vs. Yallavva and Ors., 2020 ACJ 2560.**

15. In the instant case, respondent No.2 – Insurance Company has failed to examine any witness to substantiate its

stand. The Tribunal exonerated the Insurance Company only on the basis of the admission given by the claimants' witness No.2 that he was travelling as a paid passenger and he paid Rs.18/- towards fare. The Insurance Company could not prove that respondent No.1 – owner of the offending vehicle was using the said vehicle for commercial purposes as his regular source of income. Moreover, the record is absolutely silent on the point that the cause for accident is only because respondent No.1 – owner had allowed the paid passengers in his private vehicle. In these facts situation, it cannot be held that the owner of the offending vehicle has committed any fundamental breach of policy conditions so as to exonerate the insurer of the offending vehicle from payment of compensation. It is the statutory liability of the Insurance Company to pay compensation to the third party even there is a breach of the policy conditions by the owner of the vehicle. The Tribunal has failed to consider this aspect of the matter.

16. At this juncture, it would be relevant to refer to the case of **United India Insurance Co. Ltd. Vs. Lehru And Others,**

(2003) 3 SCC 338, wherein the Hon'ble Supreme Court has held that where a breach of policy conditions is not willful and where it is proved by the insurer that there is a willful breach of the terms of policy, the insurer would still be liable to pay the third party and recover the amount.

17. The co-ordinate Bench of this Court in the case of **Rambhau Awadut Gawai & ors. Vs. Shivlal Shalikram Belsare & anr., 2020(5) Bom.C.R. 242,** while relying on the judgment of the Hon'ble Supreme Court in the case of **S. Iyyapan Vs. United India Insurance Company Limited And Another, (2013) 7 SCC 62**, has held that it is the statutory duty of the Insurance Company to pay the amount of compensation to the claimants even in breach of policy conditions, and the Insurance Company is at liberty to recover the same from the owner of the offending vehicle. The Hon'ble Supreme Court in the case of **Swaran Singh** (*supra*) has held that the liability of insurer to satisfy the decree passed in favour of the third party is a statutory one.

18. In the instant case, the Insurance Company has failed to prove that it was a fundamental breach of the conditions in the policy, and therefore, the appellants/ claimants would be entitled to receive payment of compensation jointly and severally from the owner-cum-driver of the offending vehicle and the Insurance Company.

19. On re-appreciation of the material on record, for the reasons aforestated, the finding of the Tribunal, exonerating the Insurance Company altogether, is clearly erroneous, and therefore, direction is required to be issued to respondent No. 1 - the owner and respondent No. 2 - Insurance Company of the offending vehicle, jointly and severally, to pay the amount of compensation to the claimants in terms of the order of the Tribunal. Hence, the impugned order is modified as under :

ORDER

i. The Appeal is partly allowed.

ii. Respondent Nos. 1 and 2 shall jointly and severally pay compensation of Rs.19,23,000/- with interest @ 7% per annum from the date of application till realisation to the appellants/ claimants and respondent No.3 in equal proportion.

20. Considering the passage of time, direction in point No.3 of the operative order of the Tribunal, with regard to investment of the amount in fixed deposit in nationalized bank, is set-aside.

21. The Appeal stands disposed of. No costs.

JUDGE

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