THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 665 OF 2010

The New India Assurance Co. Ltd.,
Khandesh Mill Complex,
Nehru Chowk, Dist. : Jalgaon.
Through Branch Manager, Jalgaon.

Through it's authorized signatory -
Sr. Divisional Manager at Aurangabad. ... **APPELLANT**
(Original Respondent No.2)

VERSUS

1. Smt. Rekha Wd/o Narendra Tayade,
Age : 35 years, Occu. : Household,

2. Master Swapnil S/o Narendra Tayade,
Age: 09 years, Occu. : Student,

3. Master Prashant S/o Narendra Tayade,
Age: 7 years, Occu. : Student,

4. Smt. Anusuyabai Wd/o Ambadas Tayde,
Age : 67 years, Occu. : Household, **… RESPONDENTS**
(Orig. Claimants Nos.1 to 4)

Respondent No.2 and 3 are minors and
Under guardianship of respondent No.1.
All R/o : Savda Railway Station,
Post Gate, Taluka : Raver,
District : Jalgaon.

5 Abhay S/o Shankar Patil,
Age : Major, Occu. : Business,
R/o : Plot No.12, Dhondu Colony,
New Anand Nagar, Dhule,
District : Dhule. ... **RESPONDENT**
(Orig. Respondent No.1)

…

Mr. V. R. Mundada, Advocate for Appellant.

Ms. Sakshi Ajeet Kale, Advocate h/f Mr. A. B. Kale, Advocate for Respondent Nos.1 & 4.

Respondent Nos.2, 3 & 5 are absent.

…

CORAM	:	**SHRIKANT D. KULKARNI, J.**
RESERVED ON	:	15th November, 2021.
PRONOUNCED ON	:	11th February, 2022.

J U D G M E N T:

. Feeling aggrieved and dissatisfied by the impugned judgment and award passed in MACP No.319 of 2003 by the Member, MACT, Jalgaon, the appellant/New India Assurance Company Limited has preferred this appeal by taking aid of Section 173 of the Motor Vehicles Act, 1988.

2 The facts giving rise to this appeal in brief are as under:

i. Narendra Ambadas Tayade (since deceased) was stated to be a *Munim/Diwanji* working with supplier of Banana. On 29th May, 2003, he was travelling in Tempo bearing No.MH-18-M-1876 to supply Bananas. The said tempo was passing through the limits of Kasara Ghat section.

It is alleged that the tempo driver drove the tempo in rash and negligent manner and in a high speed though it was a Ghat section. The tempo driver while overtaking, gave dash to cleaner side of one tanker bearing No.GJ-06-V-7490 coming from opposite direction and thereafter, the tempo turned turtle on the road. Narendra Ambadas Tayade, who was travelling in the said tempo, sustained serious injuries and subsequently, succumbed to the injuries ;

ii. Respondent Nos.1 to 4 / original claimants had filed motor accident claim petition against the owner and insurer of the tempo bearing registration No.MH-18-M-1876. Respondent No.1/owner of the vehicle remained absent, however, respondent No.2/present appellant contested the claim ;

iii. The Tribunal after appreciating the facts and evidence on record, was pleased to allow the claim partly holding the owner and insurer of the vehicle to pay jointly and severally compensation of Rs.2,51,500/- to the claimants with interest at the rate of 7% per annum from the date of claim till its full realization and costs.

3 Heard Mr. V. R. Mundada, learned counsel for appellant/ New India Assurance Company Limited and Ms. Sakshi Kale, holding for Mr. A. B. Kale, learned Advocate for respondent Nos.1 and 4. Respondent Nos.2, 3 and 5 though duly served with notices, remained absent.

4 Mr. Mundada, learned counsel for appellant vehemently submitted that deceased Narendra Tayade was travelling in a goods tempo bearing registration No.MH-18-M-1876 as a fare paying passenger with other persons in breach of terms and conditions of the insurance policy. The appellant is not liable to pay any compensation in view of breach of terms and conditions of the insurance policy. The owner of the vehicle alone is liable to pay the compensation. He submitted that it is well settled position of law that travelling in a goods carriage vehicle is not permissible or transportation of passengers in goods vehicle for hire or reward is not allowed. He submitted that deceased Narendra Tayade, who was travelling as a passenger in goods vehicle, is not falling in the definition of “third-party” and therefore, his risk is not covered under the terms and conditions of policy in view of Sections 147 and 149 of the Motor Vehicles Act,

1988. The Tribunal has committed an error in fastening the liability on the appellant of paying compensation to the claimants.

5 Mr. Mundada, learned counsel for appellant/insurance company submitted that though it is observed by the Tribunal in judgment paragraph 14 that deceased was travelling with Banana goods in the said tempo with others and the accident occurred due to rash and negligent driving of the said tempo, the police investigation papers do not support to the case of claimants. The first information report, spot *Panchanama* and testimony of Mohd. Tahir Mohd. Shabbir (so-called employer of deceased) do not extend any support to the case of claimants. The findings recorded by the learned Tribunal to that effect are perverse. He submitted that the claimants had not added driver of the offending vehicle as a party to the claim and as such, the claim is bad for non-joinder of necessary party. He submitted that there is absolutely no iota of evidence to show that the deceased was travelling in the tempo as an owner of goods or representative of goods. The entire approach of the Tribunal is erroneous while deciding the claim petition. He submitted that the impugned judgment and award passed by the Tribunal fastening the liability on the appellant/insurance company is liable to be quashed and set aside. The owner/respondent No.5 is alone liable to pay the

compensation. The appellant/insurance company needs to be absolved from payment of compensation.

6 Mr. Mundada, learned counsel for appellant/insurance company has placed reliance on the following stock of citations in support of his argument:

a) ***United India Insurance Co. Ltd. Vs. Dandi Ramesh and another***, reported in, ***2020 STPL 5124 (AP)*** ;

b) ***Manuara Khatun Vs. Rajesh KR. Singh***, reported in, ***(2017) ACJ 1031 (SC)*** ;

c) ***National Insurance Co. Ltd. Vs. Gokul Das & Ors***, reported in, ***2016 AAC 1644 (CAL)*** ;

d) ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and another***, reported in, ***(2013) 2 SCC 41*** ;

e) ***M.V. Jayadev Appa and another Vs. Oriental Fire and General Insurance Company Ltd. and others***, reported in, ***(2004) 13 SCC 43 (Full Bench)*** ;

f) ***National Insurance Co. Ltd. Vs. Bommithi Subbhayamma and others***, reported in, ***(2005) ACJ 721*** ; and

g) ***United India Insurance Company Ltd. Vs. Nirmala Devi and others***, reported in, ***2019 AAC 1751 (HP)***.

7 Ms. Sakshi Kale, holding for Mr. A. B. Kale, learned counsel for respondent Nos.1 and 4 supported to the findings recorded by the Tribunal. She submitted that the Tribunal has considered the facts and evidence on record in a proper way and rightly decreed the claim partly. There is no perversity in the findings recorded by the Tribunal. The deceased was travelling in a tempo alongwith his Banana goods. He was on the way to supply the goods when met with an accident due to rash and negligent driving of the tempo driver and succumbed to the injuries. The offending vehicle tempo involved in the accident, was duly insured with the appellant. The deceased was not travelling in the tempo as a fare paying passenger or gratuitous passenger at the time of accident. The Tribunal has rightly considered the evidence produced on record by the claimants and rightly held the owner and the insurer of the vehicle jointly and severally liable to pay the compensation. She submitted that there is no merit in the appeal. The appeal needs to be dismissed.

8 The core question, which arises for consideration in this appeal is as to whether deceased Narendra Tayade was travelling in goods vehicle/tempo bearing registration No.MH-18-M-1876 alongwith goods/Bananas as an owner of it or as a representative of the goods

belonging to his employer PW-2 Mohd. Tahir Mohd. Shabbir and liability to pay the compensation.

9 There is no dispute about quantum of compensation determined by the Tribunal. The center of dispute is about fastening the liability on the appellant/insurance company to pay the compensation.

10 According to the claimants, the deceased was travelling in the tempo after recovery of payment of goods/Bananas and on the way back. It is the case of the claimants that the deceased was serving as a *Munim/Diwanji* with PW-2 Mohd. Tahir dealing with business of Bananas. It is rightly pointed out by Mr. Mundada, learned counsel for appellant that the evidence of PW-2 Mohd. Tahir vide Exhibit-30 no where speaks that on the date of accident, the deceased was travelling in the tempo alongwith his goods as a representative. He has simply stated that deceased was working with him as *Munimji* and drawing salary of Rs.5,000/- per month. If the deceased was really travelling in the goods tempo with Bananas as a representative of PW-2 Mohd. Tahir, there was no difficulty for PW-2 Mohd. Tahir to disclose the said fact before the Tribunal. The testimony of PW-2 Mohd. Tahir is silent on this important aspect. The

testimony of PW-1 Rekha Tayade, chief examination paragraph 2, speaks that on the date of accident, her husband was on return journey after selling Bananas and recovery of payment, when vehicle/tempo bearing No.MH-18-M-1876 met with an accident in Kasara Ghat section. Her husband succumbed to injuries. Thus, oral evidence of PW-1 Rekha Tayade is found contrary to the case of claimants.

11 Moreover, FIR vide Exhibit-21 also speaks contrary. It states that deceased was travelling in the tempo, which was loaded with Bananas, in the capacity as *Munim* when met with accident. It is contrary to the evidence of PW-1 Rekha Tayade. The spot *Panchanama* vide Exhibit-23 no where speaks that offending vehicle tempo, which met with an accident, was carrying Bananas. No Bananas were found at the accident spot though tempo turned turtle after giving dash to the tanker. But the tanker was found loaded with goods (Tar) as per spot *Panchanama*.

12 Having regard to the above referred stock of evidence, it is very much clear that the evidence produced on behalf of the claimants is insufficient to establish that the deceased was travelling in the goods vehicle/tempo as a representative of goods in order to

bring the case under Section 147 (1)(i) of the Motor Vehicles Act, 1988. Having regard to the evidence produced by the claimants, which is felling short to prove that deceased was travelling in a goods vehicle as a representative of the goods when met with an accident. Certainly the status of the deceased was gratuitous passenger travelling in a goods vehicle at the time of accident. Allowing a passenger in goods vehicle for journey amounts to a breach of policy. The appellant/insurance company cannot be fastened with liability to pay the compensation to the claimants by fastening the liability jointly and severally with the owner of the vehicle/respondent No.5.

13 Section 147 of the Motor Vehicles Act, 1988 provides for mandatory insurance. The policy of insurance in terms of the said provision must be in relation to the person or classes of persons specified in the policy sought to be insured. The insurance would be against any liability which the insured incurs.

14 Having regard to the above scenario, it is very much clear that the learned Tribunal has committed an error in recording the finding that the deceased was travelling in the tempo alongwith Banana goods as a part of his duty when evidence of PW-2 Mohd. Tahir is completely silent on this aspect. The findings recorded by the

Tribunal against issue Nos.4 and 5 appear to be perverse. The Tribunal seems to have not properly appreciated the evidence of PW-2 Mohd. Tahir, FIR vide Exhibit-21 and spot *Panchanama* vide Exhibit-23 and arrived at incorrect conclusion and recorded erroneous findings against issue Nos.4 and 5.

15 In case of ***Manuara Khatun Vs. Rajesh KR. Singh*** (supra), the Honourable Supreme Court held that once it is held that the deceased was travelling in a goods vehicle as gratuitous passenger, there is no occasion for the insurance company to pay the compensation. It is held by the Honourable Supreme Court that the insurance company shall first pay the awarded amount and recover the same from the owner in execution proceedings arising in the very case.

16 In the case of ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and another*** (supra), the Honourable Supreme Court has held that in view of Section 147 of the Motor Vehicles Act, 1988 if the claimant was found travelling in a goods vehicle as a gratuitous passenger, the insurance company does not have any liability to pay the compensation, but it should satisfy the sum awarded and recover the same from the owner of the vehicle.

17 The Full Bench of the Honourable Supreme Court in case of ***M.V. Jayadev Appa and another Vs. Oriental Fire and General Insurance Company Ltd. and others*** (supra) held that in case of gratuitous passenger in a goods vehicle, the insurance company is not liable to pay compensation.

18 The facts of the case are peculiar. The accident took place long back in the year 2003. Practically 19 years are lapsed. The deceased was only earning member of family. The family has lost its main source of income. It is extremely difficult for the claimants to recover amount of compensation from the owner of vehicle in absence of any support.

19 Having regard to the legal position made clear by the Honourable Supreme Court in the above referred stock of citations and in view of peculiar facts of the case in hand, it would be appropriate to pass order of pay and recover. There is no need to discuss the remaining citations referred by Mr. Mundada, learned counsel for appellant/insurance company when legal position has been made clear by the Honourable Apex Court.

20 Having regard to the above reasons, it would be just and proper to allow the appeal partly by modifying the award passed by the Tribunal to the extent of giving liberty to the appellant/New India Assurance Company Limited to pay the awarded sum and recover it from the owner of the vehicle. In the result, the following order is passed:

ORDER

I. The appeal stands partly allowed.

II. The impugned judgment and award passed in MACP No.319 of 2003 by the Member, MACT, Jalgaon, is modified as under:

(i) The amount of compensation determined by the Member, MACT, Jalgaon at Rs.2,51,500/- with 7% interest from the date of claim till realization of amount with proportionate costs, is hereby confirmed.

(ii) Respondent No.5 – Abhay Shankar Patil / owner of the vehicle shall be liable to pay compensation of Rs.2,51,500/- with 7% interest from the date of claim till realization of amount with proportionate costs to the claimants / respondent Nos.1 to 4. However, the appellant / New India Assurance Company Limited, Branch

Jalgaon, shall first pay the amount of compensation with interest and costs to the original claimants/respondent Nos.1 to 4.

(iii) The appellant / New India Assurance Company Limited is at liberty to recover the amount of compensation with interest and costs from the owner of the vehicle/respondent No.5 by way of execution proceedings.

III. The award be modified accordingly.

IV. No order as to costs.

V. The appeal stands disposed of accordingly.

VI. Civil applications, if any, also stand disposed of.

VII. The statutory amount of Rs.25,000/- deposited by the appellant in this Court shall be transferred to the MACT, Jalgaon for payment thereof to the original claimants.

[SHRIKANT D. KULKARNI, J.]

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