IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 881 OF 2006
WITH
CIVIL APPLICATION NO.7034 OF 2021

New India Assurance Company Limited,
having Head and Registered Office at
New India Insurance Building, 87,
M.G. Marg, Fort, Mumbai - 1, Branch
Office at Beed, Divisional Office
Aurangabad .. Appellant

Versus

1. Ratnamala w/o Kabirdas Gaikwad,
Age 31 years, Occu. Household,
R/o Anandgaon (Sarani), Taluka Kaij,
District Beed

2. Ku. Ashwini d/o Kabirdas Gaikwad,
age about 10years, Ocu. Minor,
under the guardianship of mother
appellant no.1

3. Kumari Nagubai d/o Kabirdas Gaikwad,
Age about 8 years, Occu. Minor
under the guardianship of mother
appellant no.1

4. Parashram s/o Shrimant Gaikwad,
Age 70 years, Occu. Agri.,
R/o Anandgaon (Sarani), Taluka Kaij,
District Beed

5. Sow. Rajubai w/o Parasram Gaikwad,
Age 65 years, Occu. Household,
R/o Anandgaon (Sarani), Taluka Kaij,
District Beed

(6) Janabai w/o Parasram Gaikwad,
Age 60 years, Occu. Household,
R/o Anandgaon (Sarani), Taluka Kaij,
District Beed (deleted as mentioned
in Certified copy)

7. Laxman s/o Kerba Suryawanshi,
age 50 years, Occu. Jeep Driver,
R/o Pisegaon, Taluka Kaij,
District Beed (owner of Jeep) .. Respondents

Mr Mohit R. Deshmukh, Advocate for appellant
Mr P.B.Rakhunde, Advocate h/f Mr S.B. Bhapkar, Advocate for respondents no.1 to 5
Mr K.J. Suryawanshi, Advocate for respondent no.7

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 01.12.2021
PRONOUNCED ON : 09.02.2022

PER COURT :

1. The appellant/New India Insurance Company Ltd. has preferred this appeal feeling aggrieved and dissatisfied by the judgment and award dated 8.5.2006 passed by the Member, Motor Accident Claims Tribunal, Ambajogai in M.A.C.P.No.33 of 2001.

2. The accident took place on 28.10.1999 at about 9.30 a.m. on Kaij-Ambajogai road. Deceased Kabirdas Parasram Gaikwad, resident of Anandgaon (Sarani), Taluka Kaij, District Beed was one of the passengers travelling in a jeep bearing registration no. MH-23-B-190. Respondent no.1 - driver and owner of jeep drove his jeep in rash and negligent manner and caused accident at the spot, one kilometer away from Kaij and sustained multiple injuries. Kabirdas succumbed to serious injuries caused in the motor accident. The original claimants/respondents no.1 to 5 filed Motor Accident Claim Petition under Section 166 of the Motor Vehicles Act, 1988 and sought compensation of Rs.3,80,000/-.

3. The Tribunal, after considering the rival pleadings of the parties and evidence on record was pleased to allow the claim partly by holding respondents no.1 and 2 jointly and severally liable to pay compensation Rs.3,80,000/- exclusive of N.F.L. amount to the original claimants with interest

@ 7.5% per annum from the date of claim petition till realisation. In the above background, National Insurance Company is before this Court. The appellant has challenged the impugned judgment and award on various grounds.

4. Heard Mr Mohit Deshmukh, learned Counsel for the appellant, Mr P.B. Rakhunde, learned Counsel for respondents no.1 to 5 and Mr K.J. Suryawanshi, learned Counsel for respondent no.7.

5. Mr Mohit Deshmukh, learned Counsel for the appellant vehemently submitted that jeep involved in the accident was insured with the appellant as a private vehicle. At the time of accident, the jeep was used for carrying fare paying passengers. There were 15 to 16 passengers in number travelling in the jeep at the time of accident. It is a breach of terms and conditions of the insurance policy. Mr Deshmukh submitted that even for gratuitous passengers, insurer is not liable to pay any compensation.

6. Mr Deshmukh submitted that contributory negligence of each passenger/person travelling in the vehicle more than the capacity was required to be considered by the Tribunal. The tribunal has not considered all these legal points while deciding the claim petition. The tribunal has awarded the compensation in arbitrary manner without considering the legal position.

7. Mr Deshmukh submitted that under Section 149 (2) of the Motor Vehicles Act, 1988, in a case of third party insurance, the insurance company is entitled to take defence that offending vehicle was driven by an unauthorised person or that person driving vehicle did not have valid driving licence, onus would shift on the Insurance Company only after the

owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time. Mr Deshmukh submitted that respondent no.1/owner-cum-driver failed to file his written statement before the tribunal. The claim proceeded without his written statement. No evidence was produced by respondent no.1. The appellant has filed its written statement and resisted the claim by raising all defences available to it. Mr Deshmukh submitted that in view of the facts of the case in hand, the driver-cum-owner has failed to prove the basic facts within his knowledge and as such, onus would not shift on the appellant/Insurance Company. Mr Deshmukh submitted that the private vehicle was used for carrying fare paying passengers and it is a clear case of breach of terms and conditions of the policy. The insurance company is not liable to pay any compensation. The appellant/insurance company is liable to be absolved from the liability.

8. Mr Deshmukh has placed his reliance in case of **Pappu and others Vs. Vinod Kumar Lamba and anr.,** reported in **(2018) 3 SCC 2008** in support of his argument.

9. Mr P.B. Rakhunde, learned Counsel for respondents no.1 to 5/original claimants supported to the findings recorded by the tribunal. He submitted that it is joint and several liability of the insurance company to pay the compensation awarded by the tribunal. It is not a case of fundamental breach of policy.

10. Mr K.J. Suryawanshi, learned Counsel for respondent no.7 submitted that it is not a case of fundamental breach of policy. He submitted that as far as violation in carrying passengers is concerned, it has been consistently held by the Honourable Supreme Court that it does not amount to be fundamental breach. Mr Suryawanshi further submitted that the Honourable Supreme Court has held in case of **Laxmi Chand Vs. Reliance General Insurance,** reported in **(2016) 3 SCC 100** that to avoid liability, the insurance company must not only establish the defence that the policy has been breached, but must also show that breach of the policy is so fundamental in nature that it brings the contract to an end.

11. Mr Suryawanshi, learned Counsel for respondent no.7 has heavily relied upon the citation in case of **Malanbai w/o Mahipatrao Tumane & Anr. Vs. Suresh s/o Nathuji Moharle & Anr.,** reported in **2020 (2) ALL MR 801 (Bombay) Nagpur Bench.** He submitted that the facts of the case in hand and the facts of the cited case are practically identical. It is held by this Court, Bench at Nagpur that if the Insurance Company did not lead any evidence to prove that the breach in the form of carrying some excess passengers was so fundamental in nature that it resulted in causing the accident and thus putting an end to the policy itself.

In such cases, the insurer cannot be exonerated from liability to pay the compensation.

12. Mr Suryawanshi has also placed reliance on following citations in support of his argument :

(i) **National Insurance Co.Ltd., Vs. Anjana Shyam and ors.,** reported in **(2007) 7 SCC 445**

(ii) **Manjeet Singh Vs. National Insurance Company Ltd., & Anr.** reported in **2018 ALL SCR 150**

13. By taking help of abovesaid citations, Mr Suryawanshi, learned Counsel for respondent no.7 vehemently submitted that appellant/insurance company cannot be absolved from the liability to pay the compensation having regard to the case in hand.

14. The tribunal has awarded compensation of Rs.2,80,000/- (inclusive of N.F.L. amount) to the original claimants with interest at the rate of 7.5% per annum from the date of petition till its realilsation. The quantum of compensation assessed by the tribunal is not disputed by either side. The center of dispute is about liability to pay the compensation. According to the learned Counsel for the appellant, it is a case of fundamental breach of insurance policy at the hands of respondent no.7 (owner/driver). Therefore, appellant needs to be absolved from the liability to pay the compensation. It is for the owner of the vehicle/ respondent no.7 to pay the compensation. Whereas, it is the stand of respondent no.7/owner of the vehicle that it is not a case of fundamental breach of policy. No evidence is produced by the insurance company to support its defence and as such, insurance company cannot be absolved from the liability.

15. On going through the copy of insurance policy vide Exh.55, it is revealed that vehicle bearing registration no. MH-23-B-190 was insured with the appellant. It was a private vehicle. The capacity of passenger was 9+1 (10 seats). It was not a passenger vehicle. The risk of 10 persons was covered. It was a comprehensive policy.

16. Mr Deshmukh, learned Counsel for the appellant invited my attention to the cross-examination of PW-2 Bhimrao Yogiraj Gaikwad Exh.56, one of the passengers sitting in the jeep at the time of accident. Mr Deshmukh pointed out that PW-2 Bhimrao Gaikwad has admitted while facing the cross-examination that at the time of accident, there were more than 15 passengers travelling in the said jeep. He further went on admitting that said jeep was regularly carrying passengers from Anandgaon to Kaij and vice-versa. By taking help of this material, Mr Deshmukh, learned Counsel for the appellant vehemently submitted that it is a clear case of fundamental breach of policy. The private vehicle was used for carrying passengers. At the time of accident, there were 16 passengers travelling in the jeep and it amounts to fundamental breach of policy.

17. Having regard to the point involved in the appeal regarding liability to pay the compensation, I have studied the citations referred by both the sides.

18. In case of **Pappu and others Vs. Vinod Kumar Lamba and**

anr. (supra), it is held by the Honourable Supreme Court that, " In a case of third party, the Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorised person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time. Mere production of valid insurance certificate in respect of offending vehicle not enough for owner to make insurance company liable to discharge liability arising from rash and negligent driving by driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving licence. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle". The facts of the cited case and facts of the case in hand are slightly different. In this case, the vehicle involved in the accident is admittedly insured with the appellant and it was a comprehensive policy covering risk of 9+1 passengers. It was not a third party insurance.

19. In case of **National Insurance Co.Ltd., Vs. Anjana Shyam and ors.** (supra), it is held by the Honourable Supreme Court that, "in case of overloading of passengers, the number of dead and injured, there

is need to make apportionment of the compensation having regard to the number of passengers by making harmonious construction of the provisions of Motor Vehicles Act, 1988. The insurance is a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfill his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to exceptions provided in Section 149 (2) of the Motor Vehicles Act, 1988. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. Insurance Company can be made liable in terms of Section 147 (1) (b) (ii) of the Motor Vehicles Ac, 1988 only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of other passengers involved in the accident in a case of overloading."

20. In the present case, only one claim petition seems to have been filed though it is a case of overloading of passengers. As per the terms of the comprehensive insurance policy of the vehicle involved in the accident, it was 9+1 = 10 passengers. As such, the appellant cannot avoid its liability to pay the compensation.

21. In case of **Laxmi Chand Vs. Reliance General Insurance** (supra), it is held by the Honourable Supreme Court that, " in view of Section 147 and 149 of the Motor Vehicles Act, 1988, in a case of alleged breach of policy terms by the owner of insured vehicle, burden of proof is on the insurer to prove fact of such alleged breach so as to avoid to pay the compensation". In the present case, no evidence is produced by the insurance company in support of its defence of fundamental breach of policy. Such a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted to be used the vehicle in breach of the Act but also the damage is suffered flowed from the breach".

22. In case of **Manjeet Singh Vs. National Insurance Company ltd. & Anr.** (supra), it is held by the Honourable Supreme Court that, "to avoid its liability, the insurance company must not only establish the defence that the policy has been breached, but must also show that the breach of the policy is so fundamental in nature that it brings the contract to an end".

23. This Court, Bench at Nagpur in case of **Malanbai w/o Mahipatrao Tumane & Anr. Vs. Suresh s/o Nathuji Moharle & Anr.** (supra), by referring various judgments of the Honourable Supreme Court including **Laxmi Chand Vs. Reliance General Insurance** (supra), held that, "it is for the insurer to lead evidence to prove its case of fundamental breach of policy putting an end to policy itself. If insurer failed to adduce any evidence in support of plea of breach of policy conditions, insurer

cannot be exonerated from the liability to pay the compensation.

24. Having regard to the analysis of the stock of citations and the legal position made clear therein, I am unable to accept the argument advanced by Mr Mohit Deshmukh, learned Counsel for the appellant. The appellant cannot be absolved from the liability to pay the compensation. It is needless to say that the appeal needs to be dismissed.

ORDER

(i) The First Appeal stands dismissed.

(ii) The judgment and award dated 8.5.2006 passed in M.A.C.P. No.33/2001 by the Member, Motor Accident Claims Tribunal, Ambajogai, is hereby confirmed.

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

(iv) Civil Application, if any also stands disposed of.

(SHRIKANT D. KULKARNI, J.)

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