

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

FIRST APPEAL NO.2322 OF 2015

Sow Sundrabai w/o Rajendra Jaybhaye,
Age : 43 years, Occu.: Household,
R/o.: Wamanbhau Nagar, Pathardi,
Taluka Pathardi, District : Ahmednagar APPELLANT

VERSUS

1. Dnyaneshwar @ Mauli Tukaram Pandit,
(Died) Through L.Rs.

1/A] Kalpana w/o Dnyaneshwar @ Mauli Pandit,
Aged : 39 years, Occu.: Household,
R/o.: Navi Peth, Pathardi,
Taluka : Pathardi, Dist.: Ahmednagar

1/B] Kalyanee d/o Dnyaneshwar @ Mauli Pandit,
Age : 19 years, Occu.: Education,
R/o.: As above.

1/C] Siddhee d/o Dnyaneshwar @ Mauli Pandit,
Age : 17 years, Occu.: Education,
R/o.: As above.

1/D] Prathmesh s/o Dnyaneshwar @ Mauli Pandit,
Age : 09 years, Occu.: Education,
R/o.: As above.

2. The New India Assurance Co. Ltd.
C/o.: Divisional Manager,
Abbot Building, Behind Ashoka Hotel,
Nagar Aurangabad Road,
Ahmednagar. ... RESPONDENTS

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Advocate for Appellant : Mr. S. S. Jadhavar h/f

Mr. Manoj R. Khutwad

Advocate for Respondent Nos.1A to 1D : Mr. P. R. Nangare

Advocate for Respondent No.2 : Mr. S. G. Chapalgaonkar

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CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 23/09/2022

PRONOUNCED ON : 22/11/2022

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JUDGMENT :

1. The appellant i.e. original respondent No.1 and the owner of offending jeep involved in the accident, has filed this appeal challenging the judgment and award passed by the learned Motor Accident Claim Tribunal, Ahmednagar (hereinafter referred to as the learned Tribunal) in M.A.C.P. No. 561 of 2006, whereby the learned Tribunal has directed the present appellant to pay the compensation amount to the present original respondent No.1 Dnyaneshwar @ Mauli Tukaram Pandit by exonerating present respondent No.2 - insurance company from the liability of paying compensation.

2. This appeal is filed by the present appellant only on the ground that the learned Tribunal has wrongly exonerated the insurance company from the liability of paying compensation without considering nature of policy and without there being any evidence that the offending jeep was being driven for hire and reward purpose. The learned Tribunal wrongly exonerated the insurance company from the liability of paying compensation. He pointed out that the offending jeep was insured with respondent No.2 -insurance company covering the date of accident and it was comprehensive policy and therefore, the insurance company was certainly liable for paying compensation to the injured i.e. original respondent No.1 Dnyaneshwar @ Mauli Tukaram Pandit. He further submits that it was contended by the insurance company

in its written statement that at the time of accident the jeep was bring used for hire and reward purpose and therefore, the burden of proving the said fact was definitely upon the insurance company, who was supposed to lead evidence to show that the jeep was being used for carrying passengers on payment of fare. However, the insurance company did not lead any evidence and the appellant not being an eye witness of the accident, was not in a position to establish the said fact. He further pointed out that the learned Tribunal wrongly concluded only on the basis of certain answers given by the claimant and has drawn wrong inference that since the injured was not related to the driver of the offending jeep or the present appellant, he was fare paying passenger and that too in absence of any supporting evidence from the insurance company. The learned counsel for the appellant did not dispute the amount of compensation.

3. On the contrary, the learned counsel for respondent No.2 - insurance company supported the impugned judgment and stated that though the policy of offending jeep was comprehensive and valid on the date of accident, but the jeep was insured being a private car and at the time of accident it was being used for carrying fare paying passengers i.e. for hire and reward and therefore, under the terms and conditions of the insurance policy, the risk of injured was not covered. He further submits that the appellant also kept mum by not leading any evidence to establish the fact that the jeep was not used for carrying fare paying passengers. In alternative, the learned counsel for the insurance company submits if this court comes to the conclusion that insurance company is also liable for paying compensation, then the pay and recover order be passed.

4. On the other hand, the learned counsel for the original respondent and subsequently on behalf of his legal heirs submits that suitable order according to law may be passed.

5. Heard rival submissions. Also perused the impugned judgment alongwith record and proceedings of the Motor Accident Claim Petition No.561 of 2006.

6. Admittedly, the learned Tribunal has exonerated respondent No.2 - insurance company from the liability of paying compensation by directing only the appellant to satisfy the award. This appeal is filed only on the ground that the insurance company is wrongly exonerated. It is not in dispute that the insurance policy with which the offending jeep was insured for the period covering the date of accident was comprehensive policy and that the jeep was insured being a private car. Further, though the insurance company in its written statement raised defence that at the time of accident the injured claimant was travelling in the said jeep as fare paying passenger and the jeep was being used for the purpose not authorized and in the breach of terms and conditions of the policy, but to establish the said fact, the insurance company has not led any evidence. On going through the impugned judgment, it is clearly evident that the learned Tribunal has drawn such inference that the jeep was being used for hire and reward purpose by relying upon the cross-examination of the injured claimant. The learned Tribunal has observed that since the injured admitted that he was not related to respondent No.1 i.e. present appellant, the learned Tribunal directly jumped to the conclusion that the injured was travelling as a fare paying

passenger in the jeep and he could not point out as to what was the reason for respondent No.1 or his driver to allow him to travel in the jeep. Admittedly, the jeep was insured as a private car. However, the cross-examination of the injured claimant clearly indicates that he had flatly denied the suggestion put to him on behalf of the insurance company that he was travelling at the time of accident as a fare paying passenger.

7. It is well settled principle that the burden of proving the fact is upon the person who asserts it. In the instant case, when the injured claimant has clearly denied the suggestion that he was the occupant of jeep as a fare paying passenger, then it was for the insurance company to adduce specific and cogent evidence to establish the fact that the driver of offending jeep was carrying the occupant in the jeep at the time of accident as fare paying passenger. Mere admission on behalf of the injured claimant in the cross-examination that he was not related to the present appellant or driver of the jeep, cannot establish the fact that he was fare paying passenger. He might be travelling in the offending jeep gratuitously. Further, the policy of the said jeep being the comprehensive policy was sufficient to cover the risk of gratuitous passenger also. Hence, I come to the conclusion that the learned Tribunal has definitely made a serious mistake in drawing wrong inference merely by relying on the cross-examination of the injured claimant that he was fare paying passenger in the jeep.

8. It is extremely important to note that the injured claimant had in fact relied on the judgment of this court reported in **2010 AC 556 (Bom) Bombay High Court in New India Assurance**

Company Ltd. vs. Vimal Tanaji Salunkhe and others, wherein it is held that there was no evidence adduced by the insurance company to prove its allegation that the vehicle was being used for hire and reward. It has also been observed in the said judgment that since the insurance company had not examined any eye witness to prove its contention, it was negatived. This court in the said judgment had in fact held that the Tribunal was justified in not absolving the insurer from its liability to pay the compensation. The said judgment was in fact squarely applicable in the instant matter, but the learned Tribunal unfortunately ignored this aspect, even though the facts of that case were identical with the facts of instant case and wrongly given too much weightage to the fact that the injured not being the relative of present appellant or her driver travelled in the offending jeep. Thus, in absence of any evidence from the insurance company such inference drawn by the learned Tribunal for exonerating the insurance company is totally erroneous.

9. There is no dispute raised by the learned counsel for the original claimant about the quantum of compensation and therefore, considering all these aspects, the appeal needs to be allowed by casting the liability of respondent No.2 - insurance company of paying compensation to the original claimant or his legal representatives i.e. respondent Nos.1A to 1D. Hence, following order is passed.

ORDER

- I) The appeal is hereby partly allowed and the judgment and award in M.A.C.P. No.561 of 2006 passed by the learned Tribunal is hereby set aside to the extent of exonerating present

respondent No.2 - insurance company from the liability of paying compensation.

- II) Respondent No.2 - insurance company and the appellant are directed to pay the amount of compensation jointly and severally under the same rate of interest as awarded by the learned Tribunal.
- III) The amount of compensation or part thereof if paid by the appellant earlier, be deducted from the aforesaid compensation.
- IV) Pending civil applications, if any, stand disposed of accordingly.
- V) The appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)