

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 627 OF 2003

1. Shaikh Khalil Shaikh Ganni Patel,
Age : 38 years, Occ. : Social work,
R/o. : Bagwan Galli, Majalgaon,
Tq. Majalgaon, Dist. Beed

... APPELLANT
(Ori. Resp. No.4)

VERSUS

1. Nandkumar Ramakantrao Kharkar,
Age : 45 years, Occ. : Agriculturist,
R/o. : Devgaon Khawane Pimpri,
Tq. Pathri, Dist. Parbhani
2. Sau. Rajni Nandkumar Kharkar,
Age : 40 years, Occ. : Household,
R/o. : as above
3. New India Assurance Company Ltd.,
Through its Divisional Manager,
Adalat Road, Aurangabad,
Through : Branch Manager,
Ashiana Building, Jalna Road, Beed
4. The United India Insurance Company Ltd.,
Through its Divisional Manager,
Vinayakrao Patil Chowk, Aurangabad,
Through : Branch Manager,
branch at Subhash Road, Beed
5. Sharifabegam w/o. Rabbani,
Age : 34 years, Occ. : Household,
R/o. : Majalgaon, Dist. Beed
6. Reshmabegam d/o. Rabbani Begwan,
Age : 17 years, (minor) u/g of real mother

i.e. Respondent No.5

7. Asamabegam d/o. Rabbani Bagwan,
Age : 15 years, (minor) u/g of Respondent No.5
8. Nusratbegam d/o. Rabbani Bagwan,
Age : 11 years, (minor) u/g of Respondent No.5
9. Fatemabegam d/o. Rabbani Bagwan,
Age : 13 years (minor) u/g of Respondent No.5
10. Mohammad Sher s/o. Rabbani Bagwan,
Age : 9 years, (minor) u/g of Respondent No.5
11. Rubinabegam d/o. Rabbani Bagwan,
Age : 5 years, (minor)
u/g of Respondent No.5

... RESPONDENTS

(Respdt. Nos.1 to 3 – Ori. Resp. Nos.1 to 3, Respdt. No.4 – Ori. Respt. No.5, Respdt. Nos.5 to 11 – Ori. Claimant Nos.1 to 7)

**WITH
FIRST APPEAL NO. 628 OF 2003**

1. Shaikh Khalil Shaikh Ganni Patel,
Age : 38 years, Occ. : Social work,
R/o. : Bagwan Galli, Majalgaon,
Tq. Majalgaon, Dist. Beed

... APPELLANT

(Ori. Resp. No.4)

VERSUS

1. Nandkumar Ramakantrao Kharkar,
Age : 45 years, Occ. : Agriculturist,
R/o. : Devgaon Khawane Pimpri,
Tq. Pathri, Dist. Parbhani
2. Sau. Rajni Nandkumar Kharkar,
Age : 40 years, Occ. : Household,
R/o. : as above

3. New India Assurance Company Ltd.,
Through its Divisional Manager,
Adalat Road, Aurangabad, Thr.: Branch Manager
Ashiana Building, Jalna Road, Beed
4. The United India Insurance Company Ltd.,
Through its Divisional Manager,
Vinayakrao Patil Chowk, Aurangabad,
Through : Branch Manager,
branch at Subhash Road, Beed
5. Asefbegam w/o. Abdul Gaffar,
Age : 32 years, Occ. : Household,
R/o. : Majalgaon, Dist. Beed
6. Shaikh Mukhtyar s/o. Abdul Gaffar,
Age : 14 years (minor) u/g of Respondent No.4
7. Shaikh Akbar s/o. Abdul Gaffar,
Age 12 years, (minor) u/g of Respondent No.4
8. Shaikh Anwar s/o. Abdul Gaffar,
Age : 10 years, (minor) u/g of Respondent No.4
9. Shaikh Ajhar s/o. Abdul Gaffar,
Age : 8 years, (minor) u/g of Respondent No.4
10. Ku. Kajarabegam d/o. Abdul Gaffar,
Age : 6 years, (minor)
u/g of Respondent No.4

... RESPONDENTS

(Respt. Nos.1 to 3 – Ori. Resp.
Nos.1 to 3, Respt. No.4 – Ori.
Respt. No.5, Respt. Nos.5 to 10 –
Ori. claimant Nos.1 to 6)

**WITH
FIRST APPEAL NO. 629 OF 2003**

1. Shaikh Khalil Shaikh Ganni Patel,
Age : 38 years, Occ. : Social work,
R/o. : Bagwan Galli, Majalgaon,

Tq. Majalgaon, Dist. Beed

... APPELLANT
(Ori. Resp. No.4)

VERSUS

1. Nandkumar Ramakantrao Kharkar,
Age : 45 years, Occ. : Agriculturist,
R/o. : Devgaon Khawane Pimpri,
Tq. Pathri, Dist. Parbhani
2. Sau. Rajni Nandkumar Kharkar,
Age : 40 years, Occ. : Household,
R/o. : as above
3. New India Assurance Company Ltd.,
Through its Divisional Manager,
Adalat Road, Aurangabad, Thr. : Branch Manager
Ashiana Building, Jalna Road, Beed
4. The United India Insurance Company Ltd.,
Through its Divisional Manager,
Vinayakrao Patil Chowk, Aurangabad,
Thr. : Branch Manager, branch at Subhash Road, Beed
5. Yasimbegum w/o. Syed Khaja Minya,
Age : 24 years, Occ. : Household,
R/o. : Parali Vaijnath, Dist. Beed
6. Sayyad Abdul Rajak s/o. Sayyad Shahabuddin,
Age : 58 years, Occ. : Nil,
R/o. : Begwan Galli, Tq. Majalgaon, Dist. Beed
7. Sayeda Sugrabee w/o. Sayyad Abdul Rajak,
Age : 55 years, Occ. : Household,
R/o. : as above

... RESPONDENTS

(Respt. Nos.1 to 3 – Ori. Resp. Nos.1 to 3,
Respt. No.4 – Ori. Respt. No.5, Respt. No.
5 – Ori. Respt. No.6, Respt. Nos.6 & 7 –
Ori. claimants)

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Mr. B.S. Kudale – Advocate for Appellant

Mr. B.R. Warma – Advocate for Respondent Nos.1 and 2
Mr. M.M. Ambhore – Advocate for Respondent No.3
Mr. S.V. Kulkarni – Advocate for Respondent No.4
Mr. A.D. Dale h/f. Mr. S.S. Rathi – Advocate for Respondent Nos.5 to 11 (*in First Appeal No. 627 of 2003*), 5 to 10 (*in First Appeal No.628 of 2003*) and 6 & 7 (*in First Appeal No. 629 of 2003*)

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CORAM : SANDIPKUMAR C. MORE, J.
RESERVED ON : 17th July, 2023
PRONOUNCED ON : 27th July, 2023

JUDGMENT :

1. The appellant in these three appeals who was the original respondent No. 4 in Motor Accident Claims Petition Nos.572 of 1998, 573 of 1998 and 80 of 1999 respectively has challenged the common judgment and award passed on 7th March, 2002 by the Motor Accident Claims Tribunal, Beed (hereinafter referred to as “the learned Tribunal”) in the aforesaid Motor Accident Claims Petitions.

2. **The brief facts giving rise to these appeals are as under :**

On 23rd November, 1996, the persons namely Abdul Gaffar Abdul Rauf (Age : 35 years), Rabbani Chandsab Bagwan (Age : 35 years) and Sayyad Khajamiya s/o. Sayyed Abdul Rajak (Age : 23 years) alongwith others boarded Tempo No. MH-20/A-6664 for going to Nanded to attend religious function “Isthemas”. At about

22:30 hours the said tempo was passing through Majalgaon – Pathri road. In the vicinity of village Adgaon one tractor bearing No. MH-22/B-6381 attached with trolley bearing No. MH-22/6052 came from opposite direction, which was being driven in rash and negligent manner. The said tractor and trolley gave dash to the tempo and the said accident was occurred. The aforesaid persons namely Abdul Gaffar, Rabbani and Sayyad Khajamiya sustained severe injuries and died on the spot. Therefore, the dependents/legal representatives of the aforesaid deceased persons who are respondent No.5 onwards in the aforesaid respective Motor Accident Claims Petitions filed the same against the present respondent No.1 to 3 who are the respective owners and insurer of the aforesaid tractor and trolley and the present appellant and respondent No.4 being owner and insurer of the tempo, for getting compensation. The learned Tribunal on the basis of oral and documentary evidence brought before it by the respective claimants in all these appeals as well as by considering the evidence of present respondent Nos.3 and 5 granted compensation to the respective claimants in these appeals from the present appellant only by exonerating present respondent Nos.1 to 3 and 5. Hence, being a owner of tempo involved in the accident, the

appellant has preferred these appeals.

3. Learned Counsel for the appellant in all these appeals submits that, though the accident and deaths of concerned persons are admitted but the learned Tribunal wrongly exonerated owners and insurer of tractor and trolley as well as insurer of the tempo by observing that, the driver of tempo of the appellant had in fact caused the accident and since the said driver was carrying passengers in the said tempo which was goods vehicle, there was breach of policy conditions and, therefore, the present respondent No.4 i.e. insurer of the tempo was not liable for paying compensation. He further submits that, the tractor and trolley involved in the accident had in fact dashed to the tempo and there was no fault of driver of appellant, while driving the said tempo. He pointed out that, the deceased persons had in fact sustained injuries from the angle of trolley which pierced them. He further pointed out that, the F.I.R. had in fact lodged against both the respective drivers of tractor and trolley as well as tempo and therefore, it was clearly a case of contributory negligence. He also argued that, the respondent No.4 did not get any opportunity of leading evidence and therefore his contention as regards the

negligence of driver of tractor and trolley did not come before the learned Tribunal.

4. In the alternative, learned Counsel for the appellant also prayed for atleast passing of pay and recover order against the Insurance Company of tempo i.e. present respondent No.4. In support of his submissions he relied upon the judgment in the case of *Vasant Waman Aher Vs. Kalu Jana Gaveet and Ors.*, reported in 1997 (3) Mh.L.J. 6.

5. On the contrary, the respective learned Counsel for all the respondents – claimants in these appeals supported the impugned common judgment and award. On the other hand, learned Counsel for respondent No.3 i.e. insurer of tractor and trolley strongly opposed the submissions made on behalf of the appellant and submitted that, the tempo driver was in fact at fault and his negligence has been proved by the driver of tractor and trolley before the learned Tribunal. Thus, he also supported the impugned common judgment and order.

6. Learned Counsel for respondent No. 5 i.e. insurer of offending tempo has also supported the impugned common judgment and

award and submitted that, the Insurance Policy of the offending tempo had not covered the risk of passengers, which were in fact being carried in the goods vehicle in contravention with the terms and conditions of the Insurance Policy. He further submitted that, even the alternative prayer of the appellant for passing of pay and recover order cannot be granted, since it is settled that, the Insurance Company is not liable for paying compensation to passengers in goods vehicle especially, when their risk was not covered. He relied upon the judgment of this Court in the case of *United India Insurance Company Ltd. Vs. Sukumarbai Suryakant Nikam and Ors.*, in First Appeal No. 2021 of 2018, decided on 5th August, 2019.

7. Heard learned Counsel appearing for the parties and also perused oral and documentary evidence on record and also gone through the impugned common judgment and award in the light of submissions made on behalf of rival contesting parties.

8. In these matters it is not disputed that, the accident had taken place between tractor, trolley and tempo. Further, the assessment of compensation determined by the learned Tribunal is also not disputed. It is significant to note that, the appellant being

the owner of tempo is claiming that, the driver of tractor and trolley was negligent and caused accident. At the same time, the respondent Nos.1 and 2 who are the respective owners of tractor and trolley are claiming that, the driver of tempo was in fact caused the accident due to his sole negligence. Admittedly, the F.I.R. in respect of the accident involved in these matters has been lodged against both the drivers namely driver of tempo as well as driver of tractor. Learned Counsel for the appellant vehemently argued that, despite being so the learned Tribunal only held driver of tempo as a person responsible for causing the accident. However, merely, an F.I.R. which was lodged against both the driver of vehicles involved in the accident, does not mean that, both were equally responsible for the occurrence of accident. It is also settled that, the negligence has to be determined by the learned Tribunal by holding an enquiry in summary fashion irrespective of the finding of Criminal Court arising out of the said accident. Therefore, the evidence led on the aspect of negligence by the parties needs to be scrutinize to ascertain who was at fault.

9. The record shows that, the claimants in M.A.C. No. 80 of 1999 have examined one Sayyad Rais Sayyad Razak being an eye-

witness. As per evidence of this witness it reveals that, the accident had taken place due to dash given by trolley to the tempo which turned turtle after passing some distance. His evidence further reveals that, an angle of trolley had slit body of tempo and therefore, deceased persons in all these appeals sustained severe injuries and died on the spot. The learned Tribunal has not accepted the evidence of this witness mainly because he did not depict clear picture and situation of the accident spot at the time of accident and after the accident. The learned Tribunal found that, the evidence of this witness is contrary to the position of vehicles mentioned in the spot panchanama, since the tractor and trolley were shown standing on correct side of the road. Be that as it may, the respondent Nos.1 and 2 who are the respective owners of tractor and trolley have also adduced the evidence of tractor driver – Shaikh Asef Shaikh Amir in rebuttal. According to this witness, he was driving the tractor attached with trolley in slow speed and by the correct side of the road. However, the tempo came from opposite direction in high speed and by going to wrong side of the road, gave dash to his trolley. His version remained unshaken even in the cross-examination. Thus, we have evidence of an eye-witness of the accident according to whom the driver of

tractor and trolley was negligent and as against this there is also evidence of driver of tractor which indicates otherwise i.e. fault of tempo driver.

10. It is significant to note that, the appellant being the tempo owner did not contest the Claim Petitions nor he led any evidence. Under such circumstances the maxim *res ipsa loquitur* comes in picture, which means "the fact speaks for itself.". Though we have evidence in respect of negligence of respective drivers of vehicles involved in accident in the form of "oath against oath" but the negligence can be determined in the light of aforesaid maxim by scrutinizing the spot panchanama. The spot panchanama indicates that, the road of the accident spot was 18 foot in width and running in North – South direction. Moreover, besides tarred portion of the road there were side margins from both the sides. The tractor was found standing on 8 foot in width of road from South and its trolley on the part of road having width of 6 foot by keeping 10 foot tar road open on Northern side. Whereas the tempo was seen lying, turned on its cleaner side, 105 foot away, facing South; leaving skid marks near trolley. If we consider this situation found on the spot then it transpires that despite having

10 foot tar road on the Northern side from which the tempo could have easily passed, it went to Southern direction and dashed to the trolley. Further, it appears that due to such impact the right side plank of trolley got detached and went inside the tempo resulting the deaths as aforesaid. Therefore, from the situation reflected from spot panchnama the negligence of tempo driver can be seen clearly. Thus, even though the F.I.R. was lodged against the drivers of both the vehicles involved in the accident, but the evidence on record and the situation at the time of accident as reflected from spot panchanama clearly indicate the fault of tempo driver. The learned Tribunal has therefore come to the conclusion that, the tempo driver was at fault by rightly appreciating the evidence on record.

11. After having held the negligence of tempo driver let us come to the next ground of the appellant under which the impugned judgment and order is challenged. The learned Counsel for the appellant vehemently submitted that, even if it is presumed for the sake of argument that there was fault of tempo driver in the accident but the respondent No.5 with which the offending tempo was insured at the time of accident was in fact liable for paying the

compensation to the respondents – claimants. Admittedly, the tempo involved in the accident was injured with present respondent No.4 – The United India Insurance Company Ltd., under policy Exh. 58 which was in-force on the day of accident. However, it was the contention of respondent No.4 – Insurance Company that the tempo was insured with it at the time of accident but under the aforesaid policy Exh.58, the risk of passengers in the said tempo was not covered as the tempo itself was registered as goods carrying vehicles and as per conditions of aforesaid policy there cannot be liability of Insurance Company to pay the compensation to the claimants. It is significant to note that, the respondent No.4 – Insurance Company has examined its Branch Manager as respondents' witness No.5 in M.A.C. No. 572 of 1998 at Exh. 57 and the said evidence was adopted in rest of the Claim Petitions. As per the evidence of this witness, the tempo involved in the accident was insured with its Aurangabad Branch as goods carrying vehicles, which did not cover the risk of carrying passengers. The learned Counsel for the appellant heavily relied upon the judgment in the case of Vasant Aher (*supra*), however in the said case though the passengers were travelling in the goods vehicles but they were carrying their rice bags at the time of

accident and as per the settled position that, 'the owner of goods or representatives of such owner with goods are entitled for getting compensation from the Insurance Company'. This is the not the case of in these matters.

12. In the instant matters, the evidence has come on record through one Sayyad Rais who was examined as claimant – witness No.2 in M.A.C. No. 80 of 1999 who in clear terms, admitted in the cross-examination taken on behalf of the present respondent No.4 i.e. insurer of the tempo that, he and other passengers were to give Rs.50/- per head to the present appellant for allowing them to travel in the said tempo. Moreover, one of the respondent – claimant i.e. Sayyad Abdul Rajak had also admitted such fact in his cross-examination by stating that, his son and others had availed the ride of tempo by determining fare of Rs. 50/- per head. It is already established that, the tempo involved in the accident was goods carrying vehicle and in the said tempo no fare paying passengers were allowed to travel. Thus, it was clear case of contravention of policy at Exh. 58 and therefore the liability of paying compensation to such fare paying passengers cannot be fastened on respondent No.4 – Insurance Company. The learned

Counsel for the respondent No.3 heavily relied on the judgment of this Court in First Appeal No. 2021 of 2018 in the case of United India Insurance Company Ltd., (*supra*) wherein so many judgments of Hon'ble Apex Court are discussed alongwith the case of ***New India Assurance Company Ltd. Vs. Asha Rani*** reported in **AIR 2003 SC 607**, wherein it is clearly held by overruling the earlier observations of this Court that, 'the insurer cannot be made liable to pay compensation in respect of passengers travelling in goods vehicles'.

13. This observation also finds place in the Three Judges Bench of Hon'ble Apex Court in the case of ***Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy and Others*** reported in **2003 (2) S.C.C. 339**. Therefore, the ratio laid down in the aforesaid cases, squarely applies to present matters wherein the deceased were travelling in the tempo being a fare paying passengers. Therefore, the learned Tribunal rightly exonerated the respondent No. 4 – Insurance Company from liability of paying compensation. The learned Counsel for the appellant also tried to argue that, atleast pay and recover order can be passed. However, the Hon'ble Apex Court in the case of ***National Insurance Company Ltd., Vs.***

Parvathneni reported in **2009 (8) SCC 785**, has held that, “Article 142 of the Constitution of India does not cover the cases of pay and recover and that if the Insurance Company has no liability to pay at all, then it cannot be compelled by order of the Court in exercise of its jurisdiction is under Article 142 of the Constitution of India to pay the compensation amount first and later on recover the same from the owner of the vehicle”. Thus, sum and substance of judgment of this Court in the case of United India Insurance Company Vs. Sukumarbai (supra) is that, “when the passenger is travelling from the goods vehicle for hire or reward in contravention to the policy condition, he cannot be treated as ‘third party’, and in such circumstances the learned Tribunal is justified for refusing to pass order of pay and recover. Thus, the alternate submission of passing of pay and recover order of the learned Counsel for the appellant also does not sustain.

14. Considering all these aspects as discussed above, it has been transpired that, the tempo driver has in fact caused accident due to his rash and negligent driving and as the deceased were fare paying passengers in goods vehicle, the Insurance Company of said tempo i.e. present respondent No.4 cannot be asked to cover the

risk of such passengers by paying the compensation to the respondents – claimants. In view of this, I come to the conclusion that, the learned Tribunal has rightly decided all these claim petitions by saddling the responsibility alone on the present appellant, for paying the compensation to respective respondents – claimants. Thus, in the result all the appeals fail and dismissed accordingly.

[SANDIPKUMAR C. MORE]
JUDGE