

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FIRST APPEAL NO.3075 OF 2008**

1. Mahadeo s/o Ravan Chavan,
Age: 40 years, Occ. Service,
R/o. Lohata, Tq. Ausa,
Dist. Latur.
2. Sudamati w/o Mahadeo Chavan,
Age: 38 years, Occ. Household,
R/o. As above.

..Appellants
(Orig. Claimants)

Versus

1. Meer Azhar Ali Meer Mohd. Ali,
Age: Major, Occu.: Business,
R/o. 1-480, Agapur, Hyderabad,
At present Humanabad, Dist. Bidar
(Karnataka) (Owner of Truck No.2946)
(As per Registrar's Order dated 05.10.2010, appeal
is dismissed as against Respondent No.1)
2. The New India Insurance Co. Ltd.
Basavkalyan (Karnataka State)
Through: Divisional Manager,
The New India Insurance Co. Ltd.
Shivaji Chowk, Osmanabad,
(Insurer Co. of Truck No.2946)
3. Namdeo S/o Yeshwant Jadhav,
Age: Major, Occu. Agri,
R/o. Karajgaon, Tq. Lohara,
Dist. Osmanabad,
(Owner of Jeep bearing No.MH-25/3640)
4. The Oriental Insurance Co. Ltd.
Gulbarga (Karnataka State),
Through: Divisional Manager,
The Oriental Insurance Co. Ltd.
442, Mangalwar Peth (West)
Solapur, Dist. Solapur
(Insurer Co. of Jeep No.MH/25/3640)

..Respondents

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Mr. R. K. Ashtekar, Advocate for the Appellants.
Mr. A. B. Kadethankar, Advocate for Respondent No.2.
Mr. V. V. Ingale, Advocate for Respondent No.3.

Mr. M. K. Goyanka, Advocate for Respondent No.4.

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CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 20th JULY, 2023.

PRONOUNCED ON : 26th JULY, 2023.

JUDGMENT:-

1. The appellants/original claimants being aggrieved by the judgment and award dated 28.04.2008 passed by the Motor Accident Claims Tribunal, Osmanabad in Motor Accident Claim Petition No.172/2002, approached this Court under Section 173 of the Motor Vehicle Act.

2. The contention of the claimants is that deceased Rohini, who was aged about 12 years lost her life in an accident dated 21.05.2002 involving Jeep bearing Registration No.MH-25/3640 and Truck bearing Registration No.ABT-2946. According to the claimants the deceased was prosecuting her studies at Chhatrapati High School, Osmanabad. She was brilliant in studies. The claimants have lost their daughter at the tender age because of rash and negligent driving of the drivers of the concerned vehicles, hence, they are entitled for the compensation of Rs.2,00,000/- from respondents i.e. owner and insurer of both the vehicles involved in this accident. The claim was contested by insurers of both the vehicles. The original respondent no.2/insurer of Truck filed written statement and pleaded that the Jeep driver was responsible for the accident. The insurer of Jeep/original respondent no.4 filed written statement and pleaded that Truck driver was responsible for the accident. By way of statutory defence, pleaded that the Jeep was carrying excess passengers. The driver of the Jeep was not authorized to drive the vehicle, hence, there is breach of conditions of policy. It is accepted that the Jeep was insured under the Private Car Package Policy, how-

ever, occupants are not 'third parties', hence, insurer has no liability towards the death or injury to the occupants.

3. The Tribunal framed issues based on pleadings of the parties. The claimant no.1 recorded his evidence at Exhibit-41. He relied upon the certified copy of the FIR at Exhibit-42. The spot panchanama is at Exhibit-43. Inquest panchanama is at Exhibit-44. The post-mortem report is at Exhibit-45. No evidence is recorded on behalf of the respondents. However, respondent no.4-insurer of Jeep placed on record the copy of the deposition of Jeep owner recorded in WCA No.21/2002. The Tribunal after hearing the parties concluded that accident occurred due to fault of Jeep driver, but exonerated its insurer for the reason that excess passengers were carried and the occupants cannot be treated as third party. As such, there is breach of policy. The Tribunal assessed the entitlement of the claimants to the tune of Rs.1,80,000/- and passed Award only against respondent no.3/owner of the Jeep.

4. Mr. Ashtekar, learned Advocate appearing for the appellants submits that the Tribunal has arrived at erroneous conclusion regarding the breach of policy, when the insurer has failed to discharge its burden and prove the defence. He would further submit that the Tribunal failed to consider various heads for grant of compensation and passed inadequate award, which require to be enhanced.

5. Per contra, Mr. Kadethankar, learned Advocate appearing for respondent no.2 submits that the Tribunal has rightly recorded the finding of the negligence against the Jeep driver and dismissed claim against the owner and insurer of the Truck. The findings recorded by the Tribunal is just and proper and based on material on record. He

would further point out that the present appeal is dismissed against the owner of the Truck for want of service of notice. Therefore, the issue of negligence of Truck driver would not germane for consideration in the present appeal.

6. Mr. Goyanka, learned Advocate appearing for respondent no.4/insurer of Jeep submits that the claimants have pleaded about the composite negligence of both the drivers. Similarly, the claimant no.1 in his deposition advanced similar case. The finding recorded by the Tribunal is inconsistent with the case pleaded by the claimants. He would further submit that the excess number of passengers were carried in the Jeep at the time of accident. There is nothing on record to indicate that the occupants were related to the owner of the vehicle. Therefore, presumption arises that they were fare paying passengers. He would further submit that the statement of the Jeep owner (insured) was recorded before the Commissioner for Workmen's Compensation in WCA No.21/2002, wherein he admits that the claimants are not related to him. Therefore, inference will have to be drawn that use of the vehicle was for carrying passengers on hire and reward basis at the time of the accident. He justifies the exoneration of the insurer of Jeep for breach of conditions of policy. However, he fairly concedes that Jeep in question was insured under Private Car Package Policy at the time of accident and the occupants of the vehicle would be covered, as if they are third party in view of the subsequent development in law.

7. Having considered the submissions advanced by the learned Advocates appearing for the respective parties and after going through the record and proceeding with their able assistance, it can be gathered that there is no dispute that the deceased Rohini died in the motor vehicle accident involving Truck and Jeep. The Tribunal on assessment of the evidence on record concluded that the accident occurred due to

negligence of Jeep driver. The Tribunal considered the position of the vehicles, depicted in the spot panchanama. Similarly, the Jeep driver was prosecuted for the offence. Even otherwise the deceased being occupant of the Jeep this case would be governed by the principles of composite negligence, eventually claimants have right to prosecute the remedy against either of the joint tort fissures. In that view of the matter, this Court has no reasons to deliberate on the finding that has been recorded by the Tribunal on the point of negligence.

8. Admittedly, the Jeep in question was insured under the Private Car Package Policy. In that eventuality insurer cannot deny the insurance cover to the occupants of the Jeep in the light of the IRDA circular that has been elaborately discussed by the Hon'ble Supreme Court of India in the matter of ***National Insurance Company Ltd. Vs. Balakrishnan and another*** reported in **(2013) 1 SCC 731**. Suffice to refer the observation in paragraph no.26, which reads thus:

"In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies 2 Page 24 stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third-party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi (supra)

and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same.”

9. It is, therefore, apparent that when insurer has issued a Package Policy in respect of the private car, the occupant would be treated at par with third party and unlimited insurance cover would be available to them subject to other terms and conditions of the policy. In that view of the matter, the finding recorded by the Tribunal in impugned order that the occupants cannot be treated as third party and insurer is not liable to cover such risk cannot be sustained.

10. Second contention raised by the insurer of the Jeep that the large number of passengers were carried in the vehicle at the time of accident, hence, there is breach of condition of policy. Apparently, such defence is not available to the insurer in terms of Section 149(2) of the Motor Vehicle Act. It is true that the liability of the insurer would be limited based on carrying capacity of such vehicle. In the present case, only two claim petitions have been filed. Therefore, insurer cannot have grievance that any liability beyond number of persons covered would fall on them. The law on this point is well settled. The Supreme Court of India in the matter of ***United India Insurance Co. Ltd. Vs. K. M. Poonam*** reported in **2011 AIR SCW 2802** considered this aspect and reiterated that the insurer cannot avoid the liability only because excess number of passengers were carried in the insured vehicle.

11. The next contention advanced on behalf of the insurer of Jeep is that the deceased and others were transported in the vehicle in the contravention of the terms and conditions of the policy. In short, the contention is raised that the private Jeep was used for carrying passengers on hire and reward basis that constitutes breach of policy of Section 149(2) of the Motor Vehicle Act.

12. Mr. Goyanka, learned Advocate appearing for respondent no.4 strenuously contends that when there is no relationship between the insured and the occupants of the vehicle, the inference will have to be drawn that they were fare paying passengers. It is trite that if insurer is coming with the defence that breach of policy has been occasioned owing to some omission or infraction on the part of the insured, it is for insurer to establish such fact. In the present case, either from the documentary evidence or otherwise insurer could establish that Jeep in question was used for commercial purpose by accepting hire charges from the occupants. In such a background, there is no basis to accept the defence of the insurer. The finding of the Tribunal in this regard appears to be inconsistent with material on record so also result of misapplication of law, hence unsustainable.

13. The Tribunal has assessed the just compensation on lump-sum basis without applying multiplier method. Since, the accident in question took place on 2002, it would be appropriate to consider the notional income of the deceased at the rate of Rs.15,000/- per annum. The multiplier of 15 will have to be applied. The future prospects of 40% are required to be added. Similarly, the compensation of Rs.70,000/- is permissible for non-pecuniary heads. In that view of the matter, claimants would be entitled for compensation as shown in the tabular form:

Sr. No.	Heads	Amount (Rs.)
1.	Notional annual income of the deceased	Rs.15,000/-
2.	Addition of 40% towards future prospects (Rs.15,000/- + Rs.6000/-)	Rs.21,000/-
3.	1/3 rd deduction towards personal and living expenses. $\text{Rs.21,000} / 3 = \text{Rs.7000/-}$ 21,000 - 7000	Rs.14,000/-
4.	Applying multiplier of '15' (Rs.14,000 x 15)	Rs.2,10,000/-
5.	Rs.70,000/- towards loss of consortium, funeral expenses and loss of Estate	Rs.70,000/-
TOTAL		Rs.2,80,000/-

14. The result of the aforesaid discussion leads this Court to allow the appeal as under: -

ORDER

- a. The First Appeal is partly allowed with proportionate cost.
- b. The claimants are held entitle for compensation of Rs.2,80,000/- along with interest @ 7.5% per annum, from respondent nos.3 and 4 jointly and severally from the date of filing of the claim petition.
- c. On deposit of the compensation amount, it shall be apportioned equally amongst claimant nos.1 and 2.
- d. Award be drawn up on deposit of deficit Court fees, if any.
- e. On deposit / recovery of the compensation amount from respondent nos.3 and 4, it be disbursed to the claimants.

(S. G. CHAPALGAONKAR)
JUDGE