

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

FIRST APPEAL NO.1574 OF 2004

New India Assurance Co. Ltd.
Having its head and registered
Office at New India Assurance
Building, 87, M.G. Marg, Fort,
Mumbai and Branch office at
Jalna and Divisional office at Aurangabad

... Appellant
[Orig. Respondent No.2]

Versus

1. Thavra s/o Badhu Chavan
Age: 56 years, Occu: Below

2. Prabhabai w/o Thavra Chavan
Age: 49 years, Occu: Household

3. Vimal d/o Thavra Chavan
Age: 15 years, Minor u/g of real father
respondent No.1

... [Orig. Claimants]

All respondent Nos.1 to 3
R/o Devthana Tq. Mantha, Dist. Jalna

4. Jadhav Janu Valuji
Age Major Occu: Business
R/o Trude Tq. Panwel
Dist. Raigad (Owner of Tempo)

... Respondents

...

Mr. Mohit R. Deshmukh, Advocate for the Appellant

...

CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 07.06.2023

PRONOUNCED ON : 28.06.2023

JUDGMENT :

1. The appellant / insurer impugns the judgment and award dated 03/09/2004, passed by the Motor Accident Claims Tribunal, Jalna [for short 'the Tribunal'], in Motor Accident Claim Petition (MACP) No.42/2003 in this appeal filed under Section 173 of the Motor Vehicles Act, 1988 [hereinafter referred to as 'the Act' for short].

2. The respondent nos.1 to 3 [original claimants] had approached the Tribunal under Section 166 of the Act, thereby raising the claim for compensation of Rs.2,00,000/- against the owner and insurer of Tempo bearing registration No. MH-06-6184, towards accidental death of Vijay Thavra Chavan in an accident dated 18/05/2003. The contention of the claimants is that, the deceased was aged 20 years at the time of accident. They were dependent on his income. On the date of accident, the deceased was travelling in the offending Tempo, which slipped into a ditch owing to rash and negligent driving of tempo driver. According to the claimants, the deceased was earning Rs.3000/- per month from his job as a Cleaner. The respondent no.4 being owner and appellant being an insurer [original respondent nos.1 and 2 in claim petition] are liable to pay compensation in terms of Section 166 of the Act.

3. The claim petition was contested on behalf of the respondents. The respondent no.4 / owner of the vehicle admitted the accidental death of the deceased, but denied averments regarding occupation and income. The appellant / insurer also filed its written statement. Although, the accident and consequential death is not disputed, the liability to pay the compensation has been disowned on the ground that, the deceased was travelling in goods carriage along with 60 other persons. The vehicle was predominately used for carriage of passengers, though it has been

registered as goods carriage. The risk of the deceased was not covered either under statutory provisions requiring compulsory insurance or by any other mode.

4. The Tribunal, after framing of the issues at Exhibit-26, recorded the evidence. The respondent no.1/claimant relied upon his evidence at Exhibit – 29. The respondent no.4/ owner of the vehicle examined himself at Exhibit-32 as a witness on behalf of the claimants. The FIR, spot panchanama and insurance policy filed along with the list at Exhibit – 4 were tendered in evidence and relied by the parties. The Tribunal after hearing arguments advanced, passed the judgment and award dated 03/09/2004 holding that, the respondent nos.1 and 2 are jointly and severally liable to pay the compensation of Rs.2,00,000/- along with interest @ 9% p.a. from the date of application to the claimants.

5. The insurer impugns said award in appellate jurisdiction of this court u/s 173 of the M. V. Act 1988. The appeal has been admitted on 16/12/2004. The notices of admission of appeal were issued to the respondents. The record shows that, notices of respondent nos.1 to 3 / original claimants returned unserved. Since the appellant / insurer failed to take further steps, the appeal suffered dismissal as against respondent nos.1 to 3 for want of prosecution vide order dated 14/02/2006 passed by the learned Register [Judicial] of this Court. However, the notice issued to respondent no.4 / owner of the vehicle was duly served but he failed to cause his appearance in this appeal.

6. Mr. Deshmukh, Learned Advocate appearing for the appellant / insurer would submit that, in view of dismissal of appeal against the original claimants, he would not urge to pass any adverse order against the original claimants. However, he would limit his argument as against

the insured /owner of the vehicle. He would submit that, the appellant / insurer had advanced two folds submissions before the Tribunal. Firstly, the vehicle in question is registered and insured as goods carriage, so also brought on road under good carriage permit and could not have been used for carrying of the passengers. The record indicates that, the vehicle was predominantly used for carriage of marriage party, which suggest infraction of permit. He would further submit that, in terms of Section 149(2) of the Act, the appellant / insurer is entitled to avoid liability, when the breach of the policy/permit has been established. Secondly, deceased being passenger in goods carriage, the statutory scheme of third party insurance do not require insurance cover for such passengers. The deceased cannot be treated as 'third party' being occupant of goods carriage. As such the appellant / insurer is not under obligation to borne the liability to pay compensation. Mr Deshmukh would further submit that; the Tribunal failed to appreciate the factual aspects and pleadings and landed in serious error while holding insurer jointly and severally liable to pay compensation. Mr. Deshmukh on instructions, submits that appellant insurer will satisfy the award and would have no objection to release compensation to the claimants, if protection of recovery right against insured is maintained.

7. Having considered the submissions advanced and on perusal of record, it is apparent that, the appellant / insurer cannot prosecute this appeal against the original claimants in view of dismissal suffered for want of steps. However, there is no impediment in examining the *inter se* liability between respondent nos.1 and 2 based on statutory insurance scheme. It would be necessary to delve into the factual matrix. The claimants have relied upon the FIR and copy of spot panchnama to contend that deceased died in an accident arising out of use of offending Tempo. The copy of FIR at Exhibit-4 shows that, one Baliram Rathod

lodge the complaint, who is a maternal cousin of the deceased. The statement in the FIR indicates that, 52 to 55 persons had boarded in goods Tempo for attending a marriage. The deceased was one of the occupants of the vehicle and suffered fatal injuries in the said accident. The spot panchanama also records similar version. The insurance policy indicates that, the vehicle was registered and insured as a goods carriage. The claim petition shows that, the occupation of the deceased is mentioned as Cleaner in Clause No.4 of the format, however, the name and address of the employer is marked as "Nil". The pleading in the claim petition nowhere suggests that deceased Vijay Chavan was employee of respondent no.4/owner of vehicle. On the other hand, it suggests that, the deceased had boarded in the vehicle for attending marriage ceremony. The perusal of Clause No.16 written statement of respondent no.4 / owner of the vehicle, suggests that, he denied occupation of deceased as a Cleaner in relation to the vehicle in question. Conversely, during the deposition before the Court, respondent no.4 deposed that, the deceased was employed as Cleaner on his Tempo. Pertinently, he did not record his evidence for himself but appeared as a witness on behalf of the claimants. The improved version inconsistent with the pleadings is introduced first time in deposition before the Tribunal, apparently with intention to mulct the liability on the insurer. The Tribunal has failed to appreciate aforesaid important aspects and recorded inconsistent findings to suggest that, the deceased was employed as a Cleaner on the vehicle in question. Resultantly, the finding recorded by the Tribunal cannot be legally sustained. This court holds that deceased was travelling as gratuitous passenger in goods carriage at the time of accident.

8. The interpretation of section 147 of motor vehicle act 1988 had fallen for consideration of Supreme Court in matter of ***New India***

Assurance V. Satpal Sing (2001) 6 SCC 724. The view was expressed that the term “Any Person” appearing in the section 147 (1) (b) (i) takes within sweep all the passengers boarded in a vehicle, irrespective of class of the vehicle. However, doubting correctness of expression, on reference to larger bench in case of ***New India Assurance co. V. Asha Rani (2003) 2 SCC 223***, the gratuitous passengers carried in goods carriage are held to be beyond scope of third party insurance cover and statutory umbrella. Hence this court holds that, since the deceased was travelling in the offending goods carriage, as a gratuitous passenger, would not fall within the statutory umbrella of insurance cover in terms of Section 147 of the Act. Consequently, insurer has no liability in law to satisfy award in terms of section 149 of M.V. Act.

9. Now moving to second contention of the insurer that a goods carriage vehicle, insured under statutory insurance policy had been put to use for transportation of large number of passengers is also established on the basis of pleading in claim petition as well as admitted documents i.e. FIR and spot panchanama. Looking to definition of goods carriage under Section 2(14) of the Act, use of vehicle for carriage of marriage party, certainly amounts to infraction of permit and consequential breach of policy. Hence insurer would be entitled to avoid liability in terms of Section 149 (2) of Motor Vehicle Act.

10. In view of the aforesaid findings, the appellant / insurer has no liability to pay the compensation. However, in view of dismissal of appeal against respondent nos.1 to 3 / original claimants, the appellant / insurer will have to satisfy award as passed by the Tribunal with liberty to recover compensation amount from insured/ Owner of vehicle.

11. In that view of the matter, the appeal deserves to be partly allowed.
Hence, this court proceed to pass the following order:

ORDER

- (i) The appeal is partly allowed with proportionate costs.
- (ii) The appellant / insurer shall pay the compensation of Rs.2,00,000/- (Rupees Two Lakhs Only) to respondent nos.1 to 3 / original claimants along with interest @ 9% per annum, inclusive of NFL from the date of application.
- (iii) After releasing the amount of compensation to the claimants, the appellant / insurer shall be entitled to recover the amount paid to claimants as per award along with interest, from respondent no.4 / owner of the vehicle by resorting to file proceeding for execution of this order before the Motor Accident Claims Tribunal at Jalna.
- (iv) The amount of compensation deposited in this Court shall be disbursed to the original claimants / respondent nos.1 to 3 through bank transfer in respective accounts.
- (v) Award be drawn accordingly.

(S. G. CHAPALGAONKAR, J.)