

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.289 OF 2008

Oriental Insurance Company Limited,
Through its Divisional Manager,
Palm Road, Civil Lines, Nagpur **Appellant.**

:: V E R S U S ::

1. Smt.Poonam wd/o Deependra Tiwari,

Aged about 35 years, occupation : household.

2. Ku.Pooja d/o Deependra Tiwari,
Aged 13 years, occupation : student.

3. Chi.Pratik s/o Deependra Tiwari,
Aged about 6 years, occupation : Nil.

Respondent Nos.2 & 3 minors, through
their guardian mother (respondent No.1).

4. Premshankar s/o Ramprasad Tiwari,
Aged 60 years, occupation : Nil.

Legal heirs of respondent No.4:

4-i) Rajendra Premshankar Tiwari,
Aged 34 years.

4-ii) Virendra s/o Premshankar Tiwari,
Aged 32 years, both r/o post at Rohna,
Dahihanda, Akola.

4-iii) Smt.Meena Rajendra Tiwari,
Aged 36 years, r/o Sindhi Camp,
Karanja Lad, Washim.

4-iv) Kiran w/o Anup Dubey,
Aged Major,
R/o Visawa Apartments, Gaddam Plots
Akola.

5. Sau.Triveni w/o Premshankar Tiwari,
Aged 52 years, occupation : Nil.
All r/o Rohana, P.O.Dahihanda,
Taluka and District Akola.

6. Sk.Sabir s/o S.Jabir,
Aged about major, occupation :
R/o Hatrun, taluka Balapur, presently
At Dahihanda, taluka and district Akola. **Respondents.**
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Shri T.T.Mirza, Advocate h/f Shri A.M.Quazi, Counsel for
Appellant.
Shri Omprakash Kashid, Counsel for Resp Nos.1 to 5.
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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 23/01/2023
PRONOUNCED ON : 15/03/2023

JUDGMENT

1. This appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, "the said Act") has been preferred by the Oriental Insurance Company (Insurance Company) challenging judgment and award dated 3.1.2008 passed by learned Member, Motor Accident Claims Tribunal, Akot, district Akola (learned Member of the Tribunal) in Motor Accident Claim Petition No.2/2006 whereby the insurance company is held liable to pay compensation Rs.3,96,000/- along with interest @ 9% per annum from the date of petition, till its realization.

3

2. Brief facts are that on 4.11.2005 Deependra, husband of respondent No.1, was traveling by vehicle Taxi bearing No.MH-30-P-5897. He boarded in the Taxi at Rohana stop and was proceeding towards Akola. When the vehicle Taxi reached at Pati Shiwar on Dahihanda Road, the tyre of the vehicle Taxi was burst and the vehicle tumbled down. In the alleged accident, he sustained grievous injuries and succumbed to injuries. As per claimants, the vehicle Taxi was driven by its driver in a high speed without observing traffic rules and regulations, in the result the accident occurred. The vehicle Taxi was owned by respondent No.6 and validly insured with the Insurance Company. Regarding the said accident, crime was registered at Dahihanda Police Station, Akola vide Crime No.76/2005 under Sections 279, 337, and 338 of the Indian Penal Code. As the said accident took place due to rash and negligent driving by driver of the vehicle Taxi owned by respondent No.6 and validly insured with the Insurance Company, the Insurance Company and the owner of the vehicle Taxi are jointly and severally liable to pay compensation. Hence, claimants sought compensation from the Insurance Company and the owner of the vehicle Taxi.

4

3. The claim was contested by respondent No.6/owner of the vehicle Taxi and the Insurance Company by filing written statements vide Exhibits-19 and 21 respectively. Respondent No.6/owner of the vehicle Taxi has admitted that the alleged accident took place due to bursting of tyre, however denied the contention that the alleged accident took place due to rash and negligent driving by the driver of the vehicle Taxi.

Whereas, the Insurance Company denied the contention of claimants and raised defence that the policy, issued to respondent No.6/owner of the vehicle Taxi, was to cover the use of vehicle only for carriage of passengers in accordance with terms and conditions of the permit issued within the meaning of the Motor Vehicles Rules. As per the permit, maximum number of passengers were permitted to be carried 6+1 driver only, however the driver of the vehicle Taxi bearing No.MH-30-P-5897 was carrying in all 11 passengers which was breach of conditions of the policy and, therefore, the Insurance Company is not liable to pay compensation to the claimants.

5

4. Before learned Member of the Tribunal, the parties led evidence. The claimant No.1 examined herself by filing an affidavit of examination-in-chief vide Exhibit 30. No evidence is adduced by respondent No.6/owner of the vehicle Taxi. On behalf of the Insurance Company, witness namely Nilkanth Jagoji Gedam, Assistant Manager, was examined.

5. After considering the evidence on record, learned Member of the Tribunal held that claimants have made out a case for grant of compensation. Whereas, except the statement in the First Information Report, no other evidence was adduced to establish that the vehicle Taxi was carrying 11 passengers. The burden of fact of breach of condition is on the Insurance Company which is not discharged and, therefore, the Insurance Company is liable to pay compensation.

6. Being aggrieved and dissatisfied with the judgment and award passed by learned Member of the Tribunal, the present appeal is preferred by the Insurance Company on the ground that the driver of the offending

6

vehicle was not holding a valid driving licence as well as the driver has carried the passengers more than permitted. Thus, there is breach of terms and conditions of the policy. Hence, the Insurance Company is not liable to pay compensation.

7. Heard Advocate Shri T.T.Mirza h/f learned counsel Shri A.M.Quazi for the Insurance Company and learned counsel Shri Omprakash Kashid for respondent Nos.1 to 5. With their able assistance, I have gone through record and proceedings of the case.

8. Learned counsel for the Insurance Company submitted that no second vehicle is involved in the accident. The First Information Report is lodged by the Assistant Sub Inspector at Dahihanda Police Station. In the said First Information Report, it is specifically mentioned that 7 persons were injured in the said accident and 2 persons, who have already been taken to hospital, are under serious condition which itself sufficient to show that there was breach of the policy and the Insurance Company is not liable to pay compensation. Learned Member of the Tribunal had

7

not considered the same and erroneously held the Insurance Company liable to pay the compensation.

9. In support of his contention, learned counsel for the Insurance Company has placed reliance upon the decision of the Madras High Court in the case of The Oriental Insurance Co.Ltd., Shoba TSM Complex, R.S.Road, Opp.Town Railway Station, Palghad, Kerala State vs. M.Arul @ Arulkumar and others, reported in Law Finder 1767726 in CMA Nos.2241 and 2242/2016 decided on 6.3.2020 wherein it is held that *when the tribunal rightly arrived at a conclusion that claimants travelled as gratuitous passengers, owner of the lorry is solely liable to pay compensation*. He submitted that in view of the observation of the Madras High Court and in the light of the evidence adduced, it is crystal clear that the vehicle was driven against the terms and conditions of the policy and, therefore, the Insurance Company is not liable to pay any compensation.

10. On the other hand, learned counsel Shri Omprakash Kashid for respondent Nos.1 to 5 supported the judgment of learned Member of the

8

Tribunal and submitted that the breach which was alleged was not so fundamental and, therefore, the Insurance Company is liable to pay compensation and, therefore, he prayed for dismissal of the appeal.

11. Admittedly, the claimants have not filed any cross objection on the quantum of the compensation. The Insurance Company has also not challenged the quantum of the compensation. Thus, the amount of compensation awarded by learned Member of the Tribunal is not under challenge.

12. The only issue involved in the appeal is:

Whether the Insurance Company is to be exonerated from the liability to pay compensation as owner of the vehicle has committed the breach of terms and conditions of policy?

13. The claimant No.1 examined herself to substantiate the contention vide Exhibit-30. She reiterated the contention that on the day of the accident her husband was traveling by vehicle Taxi bearing No.MH-30-P-5897 along with other passengers. The said vehicle was driven by its driver in a rash and negligent manner which resulted into

9

bursting of tyre of the vehicle. She further deposed that her husband was agriculturist holding agricultural land of 20 acres and was also owner of tractor trolley. Due to the death of the deceased, she has lost her husband. Now, the agricultural operation and business are to be managed by appointing somebody. Her husband was earning Rs.2.00 lacs per year and, therefore, she is entitled to receive compensation. Admittedly, the quantum of compensation is not under challenge in the present appeal. As far as rash and negligent act of the vehicle Taxi is concerned, she is not eyewitness of the incident. Her cross-examination shows that she has visited the alleged spot of incident after the accident. Her cross-examination further shows that the vehicle was in a good condition as well as tyres of vehicle were also in a good condition. During cross-examination by learned Advocate for the Insurance Company, she stated that she does not know whether the driver was holding valid driving licence or not.

14. To prove rash and negligent driving by the driver of the vehicle Taxi, the claimants placed reliance on the First Information Report Exhibit-42 and spot panchanama

10

Exhibit-43. The First Information Report was lodged by the Assistant Sub Inspector Ramhari Ratiram Pethe. As per recital of the First Information Report, he made enquiry with the eyewitnesses of the said incident, drawn the spot panchanama and it revealed to him that the alleged accident took place due to rash and negligent of the Taxi driver. There is no dispute that alleged accident took place as the tyre was burst.

15. Thus, the circumstances on record are sufficient to show that the vehicle was driven in a rash and negligent manner which resulted into bursting of tyre and the deceased as well as injured sustained grievous injuries. Thus, the evidence on record is sufficient to show that the accident occurred due to the rash and negligent driving of the taxi driver.

16. There is no dispute that the alleged offending vehicle is owned by the respondent No.6 and validly insured with the Insurance Company. The Insurance Company came with a defence that driver of the Taxi was not holding valid driving licence. When the Insurance Company came

11

with a specific defence of valid driving licence, burden is on the Insurance Company to prove the same. Admittedly, the Insurance Company has not adduced any evidence to show that the driver of the vehicle was not holding valid driving licence. The Insurance Company ought to have examine the officials of the Regional Transport Office to prove the contention that the vehicle was driven by the driver who was not holding valid driving licence. It was the Insurance Company who required to prove the conditions of the insurance policy were breached.

17. It is held by the Honourable Apex Court in the case of National Insurance Co.Ltd. vs. Swaran Singh and others, reported in 2004(3) SCC 297 that Section 149(2)(a) of opens with the words "that there has been a breach of a specified condition of the policy" implying that the insurer's defence of the action would depend upon the terms of the policy. The Insurance Company with a view to avoid its liabilities is not only required to show that the conditions laid down under Section 14(2)(a) or (b) are satisfied but it is further required to establish there has been a breach on the part of the insured, that is they must prove a willful violation

12

of the law by the assured. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

18. Here, in the present case, the Insurance Company neither examined any officials from the Regional Transport Office nor examined the driver of the offending vehicle. It is pertinent to note that though the Insurance Company claimed that driver of the vehicle was not holding a valid driving licence, no offence was registered against the driver under Section 182 of the said Act which deals with offences relating to licences.

19. Another defence of the Insurance Company was that the driver of the Taxi was carrying passengers more than the capacity. To substantiate the contention, the Insurance Company has examined its official namely Nilkanth Jagoji Gedam, Assistant Manager vide Exhibit 66. He reiterated the contention that as per the permit only 6

13

passengers + driver were allowed in the vehicle. However, the police paper shows that 9 persons were travelling in the vehicle. Thus, the owner of the vehicle has committed the breach of the terms and conditions of the policy. Therefore, the Insurance Company is not liable to pay compensation.

20. It is, therefore, necessary to see the permit in respect of particular contract carriages which is at Exhibit-44. By the said document, it reveals that maximum number of passengers permitted to be carried 6 + 1 driver only. Admittedly, the driver of the offending vehicle was not examined. The policy is issued by the Insurance Company which is at Exhibit-46. As per terms and conditions of the said policy, any person including insured provided that a person driving holds an effect driving licence at the time of accident and is not disqualified from holding or obtaining such a licence and that such person satisfies the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989 shall drive the vehicle.

21. Here, in the present case, to support the defence, only evidence, on which the appellants relied

14

upon, is recital of the first information report. The recital of the first information report shows 9 persons were travelling in the offending vehicle. Admittedly the Insurance Company has not examined the informant to show that on what basis he came to conclusion that 9 persons were travelling in the offending vehicle. Recital of the First Information Report shows that he came to know that seven persons were injured and sent for the treatment in private vehicle. Whereas, two persons who were seriously injured were shifted to hospital. He has not shifted the said persons to the hospital. Thus, recital of the First Information Report is on the basis of the information gathered by him. Moreover, he is not examined by the Insurance Company to ascertain whether any statement is recorded by him of the injured persons to show that these all persons were travelling by the offending vehicle. The Insurance Company has also not examined any of the injured to show that 8-9 persons were travelling by the said offending vehicle. Thus, no opportunity was granted to claimants to question the witnesses regarding the receipt of the information gathered by the Assistant Sub Inspector Ramhari Ratiram Pethe. A

15

statement made by him in the First Information Report, is sought to be relied upon, while raising the plea, as regards breach of policy. However, said Assistant Sub Inspector Ramhari Ratiram Pethe, as observed earlier, is not examined and no opportunity was granted to the claimants to cross-examine the witnesses.

22. Insofar as the defence of the Insurance Company, as regards the breach of the policy on the ground that driver of the vehicle had carried passengers more than the capacity, it is settled principle of law laid down by the Honourable Apex in the cases of Lakshmi Chand vs. Reliance General Insurance, 2016(1) TN MAC 426 (SC) and Manjeet Singh vs National Insurance Company Ltd., reported in 2017 Mh.L.J. Online (SC) 77 that the Insurance Company has to establish that there is a breach of policy, but such breach has to be so fundamental that it puts an end to the contract and that such breach has caused the accident. These relevant aspects are missing in the present case. 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

16

accident and thus putting an end to the policy itself. Thus, the contention of the Insurance Company that there was breach of policy cannot be sustained. On the aspect of the entitlement of the compensation, learned Member of the Tribunal has already held the Insurance Company liable to pay compensation. I have already observed that the Insurance Company failed to prove that the alleged accident occurred due to the breach of the policy which was so fundamental. Thus, the appeal has no merits and the same is liable to be dismissed.

23. In this view of the matter, the first appeal is **dismissed**. I answer the point accordingly. There shall be no order as to costs.

With this, the first appeal is **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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