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

FIRST APPEAL NO.1441 OF 2019

1. Smt.Chabu @ Chayatai Vasanta Kodape,
Aged about 41 years, occupation household.

2. Anil s/o Vasanta Kodape,
Aged about 22 years, occupation education.

3. Ku.Sangita d/o Vasanta Kodape,
Aged about 16 years, occupation education.

Appellant No.1 for herself and for
Appellant No.3 as a natural guardian
mother.
All r/o Jam Tukum, tahsil - Pombhurna,
District Chandrapur. ….. Appellants.

:: V E R S U S ::

1. Balaji s/o Wasudeo Somankar,
Aged – major, occupation - business,
R/o 22, Jamkhurd, tahsil - Pombhurna,
District - Chandrapur.

2. IFFCO TOKIO General Insurance Co.
Ltd., through its Local Branch Manager,
having its Office at 2nd Floor, Sai
Heritage, Old Warora Naka, Civil Lines,
Chandrapur, tahsil and district
Chandrapur. ….. Respondents.

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Shri Madhur Deo, Counsel for Appellants.
Shri S.S.Ghate, Counsel for Respondent No.1.
None for Respondent No.2

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 30/01/2023
PRONOUNCED ON : 17/03/2023

JUDGMENT

1. The present appeal is preferred under Section 30 of the Employees' Compensation Act, 1923 (for short, "the

said Act") by claimants challenging judgment and award dated 10.4.2019 passed by learned Commissioner, under Employees' Compensation Act, Labour Court at Chandrapur (learned Commissioner) in Case No.W.C.A.16/2014 holding the respondent No.1 (owner of vehicle) liable to pay compensation and exonerating the respondent No.2 (Insurance Company) from the liability.

2. Facts in brief are that Vasanta Maroti Kodape (deceased) was working with owner of vehicle as a labour since more than 2 years. He was getting Rs.5200/- per month as wages excluding other allowances. The applicant No.1 is widow and applicant Nos.2 and 3 are minor sons of the deceased. On 10.5.2014, the deceased was under the employment of non-applicant No.1 and was working on tractor bearing No.MH-34-L-3919 having its trailer No.MH-34-L-3920 owned by the non-applicant No.1. The said tractor was driven by Ajay Satpute in a zigzag and in a rash and negligent manner due to which the deceased who was sitting in the tractor was thrown from the tractor and fell down on the road. As the deceased was thrown on the ground, he sustained multiple injuries and died.

3. As per contentions of claimants, the deceased died in an accident which was occurred due to rash and negligent driving of the tractor driver during and in the course of employment. It is further contended that at the time of accident, the deceased was 40 years of age and getting Rs.5200/- per month and, therefore, they have claimed compensation Rs.4,78,842/- along with interest @ Rs.12% per annum and 50% penalty. The owner of the vehicle is employer and the offending vehicle was validly insured with the Insurance Company. Thus, the contention of the claimants is that as the said accident took place due to the rash and negligent driving of the tractor driver, during course of employment, the owner of the vehicle and the Insurance Company are jointly and severally liable to pay compensation.

4. In response to the notice, the owner of the vehicle appeared and resisted the claim on the ground that there was no employer and employee relationship between the deceased and the owner of the vehicle. However, the owner of the vehicle admitted the ownership of the vehicle involved in the accident which is inured with the Insurance Company. As per contention of the owner of the vehicle, he had purchased the tractor and trailer for the purpose of hiring it on rent to the

needy contractors. The accident occurred due to rash and negligent driving of the driver on whom the contractor has a control and, therefore, he is not liable to pay compensation.

5. The Insurance Company has also resisted the claim on the ground that the driver of the tractor was not holding valid driving licence. Thus, owner of the vehicle has committed the breach of terms and conditions of the policy. It is further contention of the Insurance Company that the owner of the vehicle has not complied with mandatory provisions of Section 4 of the said Act and, therefore, the Insurance Company is not liable to pay compensation.

6. Insofar as issue regarding employer and employee relationship is concerned, learned Commissioner held that evidence on record is sufficient to hold that there was employer and employee relationship. Admittedly, the owner of the vehicle has not challenged the said finding of learned Commissioner and, therefore, the discussion regarding employer and employee relationship, which is not under challenge in this appeal, is not required to be looked into.

7. Before learned Commissioner, the parties led evidence. The claimant No.1 examined herself vide Exhibit-U-

5. The owner of the vehicle also stepped into the witness box vide Exhibit-C-39. On behalf of the Insurance Company, witness No.1 Pankaj Kawaduji Madavi was examined vide Exhibit-C-29 who was serving in the Regional Transport Office and witness No.2 Nitesh Ramesh Nahake is examined vide Exhibit-C-35. After considering the evidence on record, learned Commissioner held that on perusal of the insurance policy Exhibit-C-36 it appears that it is in respect of the driver which has got only one sitting capacity which is provided for driving the tractor. Thus, the sitting capacity of the tractor is only one. It has further held that perusal of the driving licence of Ajay Satpute shows that at the time of accident he was holding a driving licence for driving the tractor only. The claimants or the owner of the vehicle has not placed any record to show that the driving licence of Ajay Satpute was pertaining to the driving of tractor along with trailer or trolly and exonerating the Insurance Company. Learned Commissioner directed the owner of the vehicle to pay the compensation. Being aggrieved and dissatisfied, the claimants have filed this appeal.

8. Heard learned counsel Shri Madhur Deo for claimants and learned counsel Shri S.S.Ghate for respondent No.1. None appeared for the Insurance Company.

9. Learned counsel Madhur Deo for claimants submitted that learned Commissioner erred in exonerating the Insurance Company from satisfying the liability. There was no breach of policy and the Insurance Company is liable to pay compensation. He submitted that the accident took place during the course and in the course of employment. The driver was authorized to drive the vehicle and merely because he was not having driving licence to drive the vehicle along with the trolly that by itself is not sufficient to exonerate the Insurance Company from the liability. It is not a fundamental breach. Hence, the Insurance Company is liable to pay compensation. Permitting the deceased to sit as an additional passenger could result in breach of policy, however, the said breach was not so fundamental to exonerate the Insurance Company.

10. In support of his contention, learned counsel Shri Madhur Deo for claimants placed reliance on:

1. *Malanbai w/o Mahipatrao Tumane and another vs. Suresh s/o Natthuji Moharle and another, reported in 2019(3) Mh.L.J. 821;*

2. *New India Assurance Company Ltd. vs. Wahida Bano and others, reported in 2014(4) ABR (NOC) 2 (BOM) (Nagpur Bench);*

3. *B.V.Nagaraju vs. Oriental Insurance Co.Ltd., Divisional Officer, Hassan, reported in (1996)4 SCC 647, and*

4. *Nagashetty vs. United India Insurance Co.Ltd. and others, reported in (2001)8 SCC 56.*

Learned counsel for claimants further submitted that even if there was breach of policy, the same was not so fundamental so as to exonerate the Insurance Company. The amount of compensation was awarded holding the owner of the vehicle liable. However, exoneration of the Insurance Company is erroneous and liable to be set aside.

11. Learned counsel S.S.Ghate for respondent No.1 also submitted that the vehicle was validly insured with the Insurance Company and, therefore, the Insurance Company is liable to pay the compensation. After service of notice, none appeared for respondent No.2 – Insurance Company.

12. Having heard both the sides and perused the record, the following substantial questions of law arise for determination:

(1) Whether the alleged breach of policy could be said to be the root cause of accident thereby exonerating the Insurance Company?

(2) Whether if it is to be concluded that there was indeed a breach of policy, an order of recovery ought to have been passed by learned Commissioner?

(3) Whether the finding rendered by learned Commissioner that the trolly attached to the tractor not being insured could also be a reason to absolve the Insurance Company was a perverse finding?

13. To prove the claim of compensation, claimant No.1 Smt.Chabu @ Chayatai Vasanta Kodape examined herself vide Exhibit-U-5. She was not an eyewitness of the alleged accident. She stated that her husband was in the employment of the owner of the vehicle and was earning

Rs.5200/- per month as wages excluding other allowances. In cross-examination, she denied that her husband was doing the labour work. She further admitted that the police have not handed over any document regarding ownership of tractor to her. She further admitted that she was informed by the police that her husband was sitting on mudguard of the tractor. She further denied that Rahul, Atmaram, and Prabhakar were also sitting in the tractor. She stated that they all were sitting in the trolly. It further came in her evidence that the owner of the vehicle was working on contract basis and her husband was working with the owner of the vehicle. She further admitted that the owner of the vehicle used to drop the labourers in his tractor at the work place. Thus, the cross-examination of the said claimant shows that her husband was working with the owner of the vehicle and on the day of the incident he was travelling in the tractor and met with an accident and died in the alleged accident.

14. The owner of the vehicle also entered into witness box and denied his relationship as employer and employee with the deceased. During his cross-examination he admitted that he received notice of the claimant on 23.8.2014. He has

purchased the said tractor for agricultural purpose. The crime was registered against the driver of the tractor regarding the said incident. He further admitted that as the tractor and trolly were purchased for agricultural purpose, he received the concession from the road tax. He further admitted that he has given tractor on rent for one day to Ajay Satpute on the day of the incident.

15. Insofar as the defence of the Insurance Company is concerned that the tractor driver was not holding a valid driving licence to drive the tractor with trolly, the Insurance Company examined Pankaj Kawaduji Madavi vide Exhibit-C-29 who was serving in the Regional Transport Office. As per his evidence, the tractor driver was not holding the driving licence to drive the tractor along with trolly. It further shows that the tractor was purchased for agricultural purpose. During his cross-examination, he admitted that in R.C.Book nowhere it is mentioned that the tractor is to be used for agricultural purpose only.

The Insurance Company also examined Nitesh Ramesh Nahake vide Exhibit-C-35 and testified that driver of the tractor was not holding driving licence to drive the tractor

along with the trolly. During his cross-examination he admitted that he has not verified the documents regarding the ownership of the tractor. His evidence further shows that the deceased was travelling in the tractor by sitting on the mudguard. This portion is an improvement as it is not pleaded in the written statement.

16. Learned counsel Shri Madhur Deo for claimants vehemently submitted that to exonerate the Insurance Company from the liability, the breach alleged should be fundamental one. Merely because the deceased was travelling in a tractor in addition to the driver that by itself is not a fundamental breach as it is settled law by catena of decisions. To exonerate the Insurance Company, it has to be established that the breach was so fundamental that it puts an end to the contract and that such breach had caused the accident. The evidence showing that breach was fundamental is missing in the present case. As the Insurance Company did not lead any evidence to prove that breach was in the form of carrying excess passengers was so fundamental in nature that it resulted in causing the accident and thus putting an end to the policy itself.

17. It is, therefore, necessary to first consider whether the breach was so fundamental to exonerate the Insurance Company from the liability.

18. The Honourable Apex Court in the decision of Nagashetty vs. United India Insurance Co.Ltd. and others cited *supra* has held that when a person holds a permanent licence to drive tractor, merely because he was driving a tractor which had a trailer attached to it and was being used for carrying goods at the time of accident, it cannot be said that the tractor was being used as a goods vehicle for driving which the driver had not valid licence. In the insurance policy issued for a tractor and additional premium for a trailer having been taken and the policy having contemplated transportation of goods also, the Insurance Company was liable to pay compensation to legal heirs of deceased, victim of the accident. It is further held that though under Section 10, a licence is granted to drive specific categories of motor vehicles, a person having a valid driving licence to drive a particular category of vehicle does not become disabled to drive that vehicle merely because a trailer is added to that vehicle. Merely because a trailer was attached to the tractor and the tractor was used for carrying goods, licence to drive a

tractor does not become ineffective, otherwise every time an owner of a private car who has a licence to drive a light motor vehicle attaches a roof carrier to his car or a trailer to his car and carries goods thereon, the light motor vehicle would become a transport vehicle and the owner would be deemed to have no licence to drive that vehicle. It would lead to absurd result merely because a trailer added either to a tractor or to a motor vehicle by itself does not make that tractor or motor vehicle a transport vehicle. The tractor or motor vehicle remains a tractor or motor vehicle. If a person has a valid driving licence to drive a tractor or a motor vehicle, he continues to have a valid licence to drive that tractor or motor vehicle even if a trailer is attached to it and some goods are carried in it.

19. In the present case, the Insurance Company, while issuing the insurance policy, was aware that the policy is for a tractor. The effective driving licence is thus for a tractor. The restriction is imposed on a learner driving licence holder that the person who is having learner's licence may also drive the vehicle and that such a person satisfies the requirement of Rule 3 of the Central Motor Vehicles Rules, 1989. The policy conditions further show that the policy does not cover use for

hire or reward or racing pace making reliability trail or speed test, use for carriage of passengers for hire or reward, use whilst drawing a trailer except the lowing, other than for reward, of any one disabled mechanically propelled vehicle, and use whilst drawing a greater number of trailers in all than is permitted by law for "agricultural and forensic vehicles only". The goods would be carried in a trailer attached to it that is why extra premium for trailer is taken at the rate of Rs.50,000/-. Thus, a permanent licence holder having an effective valid licence to drive a tractor can drive even when the tractor is used for carrying the goods.

20. In the present case, the insurance Company, while issuing the insurance policy, obtained an additional premium Rs.50,000/- for trailer and, therefore, the insurance policy covers not only the tractor but also a trailer attached to the tractor. The evidence adduced by the Insurance Company of Pankaj Kawaduji Madavi, who was serving in the Regional Transport Office, shows that the driver of the tractor was holding a valid driving licence to drive the tractor. Thus, a permanent licence holder, having an effective and a valid licence to drive a tractor, can even drive the tractor along with the trailer which is used to carrying the goods. As the

premium towards the trailer is accepted, the contention of the Insurance Company, that driver was not holding a valid driving licence to drive the tractor with trailer, is not sustainable in view of the decision of the Honourable Apex Court in the case of Nagashetty vs. United India Insurance Co.Ltd. and others cited *supra.*

21. Insofar as the second contention of the Insurance Company is concerned that only one person was permitted to travell in the tractor, that is the driver, as the deceased was travelling in the tractor sitting on the mudguard who is an excess passenger, which is in contravention of the policy issued to the owner of the vehicle, admittedly the tractor was having permit to carry the passenger i.e. only the driver. The insurance policy also discloses that type of body is tractor plus trailer and only one person is permitted to travell in the said tractor.

22. Learned counsel Shri Madhur Deo for claimants submitted that learned Commissioner erred in exonerating the Insurance Company from satisfying the liability. He submitted that the accident took place during the course of employment of the deceased. The deceased was working with the owner

of the vehicle. The owner of the vehicle has admitted that he was using the said tractor for carrying labourers at their work place. He submitted that even if there was breach of policy, the same was not so fundamental so as to exonerate the Insurance Company. He further submitted that in catena of decisions this Court as well as the Honourable Apex Court held that the Insurance Company has to establish its defence with regard to breach of policy conditions. Not only it has to establish that there is a breach of policy but also such breach has to be so fundamental. In support of his contentions, he placed reliance on the decision of this Court in the case of Malanbai w/o Mahipatrao Tumane and another vs. Suresh s/o Natthuji Moharle and another cited *supra* wherein also this Court referred judgments of the Honourable Apex Court 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**. The Honourable Apex Court in the said cases laid down principle of law that that the Insurance Company has to establish that there is a breach of policy, however, 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 conspicuously 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 accident and thus putting an end to the policy itself.

On the similar point, learned counsel for claimants further placed reliance upon the decision of the Honourable Apex Court in the case of B.V.Nagaraju vs. Oriental Insurance Co.Ltd., Divisional Officer, Hassan cited *supra* wherein also it is held that breach of carrying humans in a goods vehicle more than the number permitted in terms of the insurance policy, cannot be said to be such a fundamental breach so as to afford ground to the insurer to deny indemnification unless there were some factors which contributed to the causing of the accident.

23. Learned counsel for claimants submitted that as observed by the Honourable Apex Court, when a person holds a permanent licence to drive tractor, merely because he was driving a tractor, which had a trailer, it cannot be said that the tractor was being used as a goods vehicle for driving which

the driver had no valid licence. He submitted that the defence of the Insurance Company, that the deceased was carried as excess passenger, is also not a fundamental breach in the light of the law laid down by the Honourable Apex Court in the case of Lakshmi Chand vs. Reliance General Insurance cited *supra*. He submitted that even if it is accepted the driver was not holding a valid driving licence, the insurer had to indemnify the compensation amount payable to the third party and the Insurance Company may recover the same from the insurer. The doctrine of pay and recover was considered by the Honourable Apex Court in the case of **National Insurance Co.Ltd. vs. Swaran Singh and others,** reported in **2004(3) SCC 297** wherein the Honourable Apex Court examined the liability of the Insurance Company in case of policy conditions due to disqualification of the driver or invalid driving licence of the driver and held that in case of third party risk the insurer has to indemnify the compensation amount to the third party and the Insurance Company may recover the same from the insured.

24. Thus, in view of the decision of the Honourable Apex Court in the case of Nagashetty vs. United India

Insurance Co.Ltd. and others cited *supra* when a person holds a permanent licence to drive tractor, merely because he was driving a tractor which had a trailer attached to it and was being used for carrying goods at the time of accident, it cannot be said that the tractor was driven by the driver who had no valid licence and the Insurance Company was liable to pay compensation.

25. As regards the second contention of the Insurance Company regarding the excess passengers, in the light of the well settled principle of law laid down by the Honourable Apex Court in the cases of **Lakshmi Chand vs. Reliance General Insurance** and **Manjeet Singh vs National Insurance Company Ltd** cited *supra,* the Insurance Company has to establish that there is a breach of policy, however 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.

26. In view of decisions of this Court and the Honourable Apex Court cited *supra* and in view of

discussion above, the appeal deserves to be allowed as per order below:

ORDER

(1) The first appeal is **allowed**.

(2) The judgment and award dated 10.4.2019 passed by learned Commissioner, under Employees' Compensation Act, Labour Court at Chandrapur in Case No.W.C.A.16/2014 is hereby quashed and set aside to the extent of exonerating the Insurance Company from liability.

(3) Respondent No.1 Balaji s/o Wasudeo Somankar, the owner of the vehicle, and respondent No.2 IFFCO TOKIO General Insurance Company Limited would be jointly and severally liable to satisfy the claim of claimants.

With this, the first appeal is **allowed** and **disposed** of in aforestated terms with no order as to costs.

URMILA JOSHI-PHALKE, J.

!! BrWankhede !!