Bombay High Court Shivraj Vasant Bhagwat vs Smt. Shevanta Dattaram Indulkar ... on 25 September, 1996 Equivalent citations: I (1997) ACC 558, 1997 ACJ 1014, AIR 1997 Bom 242, 1997 (2) BomCR 384, 1997 (1) MhLj 175 Author: Dudhat Bench: M Dudhat, M R Desai ORDER Dudhat, J. 1. This First Appeal No. 741 of 1996 is based against the Award dated 22-1-1996 passed by the Member, Motor Accident Claims Tribunals, Raigad, at alibag in motor accident claim No. 153 of 1993. Appellant in this case is the original opponent No. 1, who is the owner of the truck. Respondent No. 1 is the claimant, who had suffered injury during the accident and suffered 70% disability. Respondent No. 2 is the Insurance Company. Though served on 26th June 1996 nobody filed appearance on their behalf. We may further mention that part from the aforesaid service through the court, respondent No. 2 was served by the present appellant at the time of admission as well as hearing of the civil applications. 2. Few facts which are necessary to dispose of this first appeal are as under:– Appellants is carrying on the business of crushing the stone and other incidental activities and is the owner of vehicles Dumper / Motor Truck of the mark 'Fargo' bearing R.T.O. Registration No. MHS/2503 which is, hereinafter referred to as "the Truck" for the asked of brevity. Appellant engaged certain number of workers and labourers either regular or casual (badli) for the purposes of the aforesaid business. The Opponent-Appellant's truck was insured. The New India Assurance co. Ltd. pursuant to the policy No. 3111210301527, dated 20th March, 1992 effective from 20th March 1992 to 19th March 1993. On 7th of Nov. 1992 the driver of the said truck, in the morning at about 11.30 a.m. loaded the stones and headed towards Underi at about 12.30 p.m. towards crusher. In the said truck, at that time, there were about 10 coolies and labourers including respondent No. 1. While the said truck was negotiating its way on the ascending portion of the roads, the said truck suddenly started going in reverse and turned turtle on the left hand side and fell down resulting in injury to respondent No. 1 such as, fracture to pelvic bons and injury to both the hands. Respondent No. 1 was unconscious for seven days and was hospitalized for about 3 months during which, she was operated twice. Respondent No. 1 thereafter, by notice called upon Appellant and Respondent no. 2 jointly to pay to respondent No. 1 sum of Rs. 1,90,000/- towards compensation, re-imbursement, medical and other expenses incurred by respondent No.1. 3. It is the case of respondent No. 1 that she sustained the aforesaid injuries in the course of her employment with the appellant, and therefore, appellant as owner and respondent No. 2 as an insurer were jointly liable to pay the respondent No. 1 sum of Rs.1,90,000/- as per the particulars more particularly stated in Claim Application No.153/93. 4. Present appellant as well as Respondent No. 2 resisted the aforesaid claim filed by Respondent No. 1. As per written statement Respondent No.1 was not entitled to get any compensation from the appellant as well as respondent No. 2. The trial Court allowed both the partes to lead the evidence and after oral submissions, awarded Respondent No. 1 Compensation of Rs. 2,35,500/- with interest @ 12% per annum from the date of petition till realization of the amount and proportionate cost. In the said award, the Tribunal has also held that Respondent No. 2 – Insurance Company is not liable

to pay the said amount in view of breach of conditions of the policy and further directed the present appellant to pay the aforesaid decretal amount. Against the same award dated 22-1-1996, after depositing Rs. 50,000/- as per the order of the Tribunal, the Appellant preferred this appeal. We may mention that the aforesaid amount of Rs. 50,000/- deposited in the Trial court by the Appellant is withdrawn by Respondent No. 1 without furnishing security. Against the aforesaid judgment and decree, the Appellant has preferred this First appeal. 5. Mr. S. M. Dharap, learned Counsel appearing on behalf of the Appellant has challenged the aforesaid ward on variounds grounds. He has vehemently argued that trial Court ought to have directed Respondent No. 2 – the Insurance Company to pay the decretal amount, as the said vehicle was insured with Respondent No. 2 and covers the injury sustained by Respondent No. 1 at the time of accident. In spite of this, according to him, the Trial Court came to the conclusion that Appellant has committed a breach of the policy due to which Insurance Company is not liable to pay the compensation under the contract of insurance. Therefore, only important question to be decided in this appeal is as to, whether the Tribunal was right in coming to the conclusion that in view of breach of the policy, the respondent no. 2 is not liable to pay the amount as awarded by the Tribunal. 6. In Order to understand the arguments of learned counsel, Mr. Dharap, we will just place the reasoning given the trial Court in its Award at para 16. According to him, Respondent No. 2 – Insurance Company covers the risk of six coolies under the policy and in the present case, at the time of accident truck was carrying about 14/15 coolies in the said truck. In view of this, the Tribunal came to the conclusion that the Appellant has committed the breach of the policy due to which contract of insurance entered into between Respondent No. 2 and the appellant was vitiated. The clause No. 3 relied upon by the Insurance Company is coming under the caption 'Limitation' as to use which is as under :– "3. Carrying passengers in the vehicle except employees (other than the driver) not exceeding six in number coming under the purview of Workmen's Compensation Act, 1923." 7. Mr. Dharap, the learned counsel appearing on behalf of the Appellant contended even presuming without admitting that truck on the date of incident was carrying more than six coolies still, according to him, the contract of insurance is not vitiated. Firstly he argued that Respondent No. 2 Insurance Company cannot take the aforesaid plea of the breach of conditions of insurance policy more particularly, in view of the fact that the said contention of the Insurance company relied upon by the trial Court is conspicuously absent in the W.S. He further contended that the trial Court has not framed any issue in that behalf and in spite of that, the Trial Court allowed the Insurance Company to raise this point at the time of argument only on the ground that the aforesaid point being legal point can be taken at the stage of argument even though there are no pleadings to that. 8. We have heard Mr. Dharap, the learned Counsel appearing on behalf of the Appellant . In the present case, when the claim was filed on behalf of Respondent No. 1, Respondent No. 2 has filed the written statement. In the said written statement they have not taken a point that at the time of accident, the concerned truck owned by the appellant was carrying coolies more than six and, therefore,

there is a breach in respect of clause (3) under the caption 'Limitation' in the policy. Further admittedly, no issue was also framed by the trial Court. When the factual aspect germane to the aforesaid legal point taken by the Respondent No. 2 was conspicuously absent in the Written statement, there was no opportunity to the claimant-Respondent No. 1 as well as to the Appellant owner of the truck, to challenge the factual aspect as to in fact, whether there were more than six coolies in the said truck. It is true that in the panchanama, it is stated that there were more than six persons. But in fact, since the specific plea was not taken by Insurance Company challenging the liability based on raising such claim under clause (3), both claimant-Respondent No. 1 as well as the appellant had no opportunity to refute what has been stated in panchanama and, therefore the point taken by Respondent No. 2-Insurance Company at the time of argument and decided by the trial Court in their favour and decided by the trial Court in their favour is not a bare point of law, but is really a mixed question of law and fact. In view of the fact that in the written statement the said stand was not taken by Respondent No. 2 and in view of the fact that no issue to that effect was framed by the trial Court, according to our opinion, Appellant's attention was not pointedly drawn towards the important aspect and, therefore, the Trial Court ought of not to the have allowed Insurance Company to take the point which is dependent upon the facts which were not stated in their Written Statement i.e. pleading. The aforesaid point taken by the Insurance Company, according to our opinion, is in variance with their pleadings and, therefore, the Trial Court ought not to have allowed Insurance Company to have advanced that for the first time at the stage of final hearing without allowing Insurance Company to amend their pleadings to that effect. 9. There is also other facet to this matter due to which, according to our opinion, in the facts and circumstances of this case, even though there are more than 11 labourers at the time of accident, the said clause (3) is not applicable. The clause is as under: "3. Carrying passengers in the vehicle except employees (other than the driver) no exceeding six in the number coming under the purview of Workmen's Compensation Act, 1923." Admittedly, in this case, appellant – truck owner was carrying more than six persons at the time of accident. However, according to our opinion, the said breach of the condition is not such by which the contract of insurance will be vitiated, as the said term of not carrying more than six laboureres in the truck is not so fundamental to offer ground to Insurance Company to absolve itself from the liability. The terms of the policy of Insurance has to be construed strictly and to be read down to advance the main purpose of the damage caused to the vehicle and the inmates who are injured. It is plain from the terms of the insurance policy that insured vehicle was entitled to carry six workmen excluding driver. If six persons travelling in the vehicle are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could these added person be said to have contributed to the causing of it. Admittedly, all the 11 person in the truck were working as labourers on the quarry of the appellant, who is also owner of the truck. Merely because 4/5 labourers more than the agreed six labourers were taken in the truck, it cannot be said to be such fundamental breach that

the owner should in all events be denied the indemnification. The breach of the insurance policy or the misuse of the vehicle may somewhat be irregular, but not illegal as it is not so fundamental in the nature so as to put an end to the contract. The aforesaid view of ours is also supported by the ratio of the Supreme Court cases more particularly, decided in B. V. Nagaraju v. M/s. Oriental Insurance Co. Ltd., Divisional Office, Hassan. The aforesaid view taken by us is also supported by view taken in 1990 Acc CJ 800 Punjab and Haryana High Court at Chandigarh Dalbir Singh v. Krishna, 1993 Acc CJ 938 (Punjab and Haryana High Court at Chandigarh) Baldev Singh v. Vidya Devi, 1995 Acc CJ 847 (Madhya Pradesh High court, Gwalior Bench) New India Assurance Co. Ltd. v. Lalaram, 1995 Acc CJ 1233 (Madhya Pradesh High court, Gwalior Bench) Somti Bai v. Mishri Lal and 1987 Acc CJ 448: ) (Punjab and Haryana High court at Chandigarh) Abdul Sattar Qureshi v. Mehboob. In view of this, according to our opinion, the Trial court was wrong in absolving Respondent No. 2, Insurance Company from its liability under the policy. 10. The next question is as to, what is a just compensation in respect of the injuries due to which Respondent No. 1 sustained 70% disability? The trial Court discussed this issue in paragraphs 14, 15 of its judgment. The trial Court arrived at monthly income of Respondent No. 1 at Rs. 750/- per month and on that basis calculated the quantum of damages for 70% of her disability by applying the multiplier of 20. He arrived at a figure of Rs. 26,000/- for the loss of future income. Taking into consideration the injuries which have adversely affected her matrimonial life, expectancy of life, future life and the fact that through out life, she, will require assistance of servant, the trial Court calculated the said claim at Rs. 35,000/-. He also awarded Respondent - claimant Rs. 74,500/- towards agony, pain and sufferings and also the loss of wages she suffered when she was hospitalized and hospital expenses. According to our opinion, though it is true the due to the accident Respondent No. 1-claimant suffered 70% disability so much so that, she is not in a position to walk and she has completely lost her matrimonial chances in future and pain and suffering has becomes part of her life still, trial Court wrongly applied multiplier of 20 instead of 15 and 16 as held by the Supreme Court in General Manger, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs). Apart from that, the amount of Rs. 74,500/- is also awarded without giving the reasons and also without giving the basis on which it is calculated. If we apply multiplier of 16, then compensation comes to about Rs. 1,44,000/- and 70% of that comes to about Rs. 1,00,800/-. She herself claimed medical expenses as Rupees 18,000/- and Rs. 20,000/- for physical and mental depression. This comes to Rupees 1,38,800/- In view of this according to our opinion, Respondent No. 1- claimant is not entitled to get the amount towards compensation more than Rs. 1,38,000/- 11. We may mention here that Appellant while arguing has also argued on merits on other points, but in view of our decision as stated above, we have not referred the said arguments in our judgment. 12. In view of this, judgment and award of the Trial Court dated 22nd January 1996 in Accident Claim Case No. 153 of 1993 is set aside. Appeal is partly allowed. Judgment and Award passed against the Appellant is set aside and Respondent No. 2- Insurance Company

is directed to pay an amount of Rs. 1,38,000/- with interest at the rate of 12% per annum from the date of the claim till the realization of the amount and proportionate cost of the claim of Respondent No. 1-applicant. In view of the fact that Appellant has already deposited Rs. 50,000/- in this Court at the time of admission which Respondent No. 1 has withdrawn, Respondent No. 1 has withdrawn, Respondent No. 2-Insurance Company is directed to pay amount of Rs. 50,000/- to the Appellant and pay balance of the amount as directed above to Respondent No. 1-claimant. Respondent No. 2-Insurance Company is further directed to pay the aforesaid amounts within 5 weeks from today in the Tribunal and the Respondent No. 1 and Appellant are allowed to withdraw the amount deposited in the Tribunal as per the respective claims as mentioned above without furnishing any security. 13. In view of this Tribunal's award is set aside and modified as above. Certified copy expedited. Appeal partly allowed.