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

**Writ Petition No. 2840 of 2013**

**District : Nandurbar**

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| Bajaj Allianz General Insurance Co. Ltd., Through its Branch Manager, 2nd Floor, Rajendra Chamber, Adalat Road, Aurangabad. | .. Petitioner (Original respondent no.2) |

**versus**

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| 1. Tufel Habib Bagvan, Age : 21 years, Occupation : Nil, R/o. Shahada, Taluka : Shahada, District : Nandurbar. | |
| 2. Shaikh Afzal Shaikh Salim, Age : Major, Occupation : Business, R/o. Iqbal Chowk, Shahada, Taluka : Shahada, District : Nandurbar. | .. Respondents (No.1 - Original Applicant No.1 & No.2 - Original Respondent No.1) |

**With**

**Writ Petition No. 2970 of 2013**

**District : Nandurbar**

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| Bajaj Allianz General Insurance Co. Ltd., Through its Branch Manager, 2nd Floor, Rajendra Chamber, Adalat Road, Aurangabad. | .. Petitioner (Original respondent no.2) |

**versus**

1. Shahrukh Khan Mehboob Khan Pathan,
   Age : 22 years,
   Occupation : Nil,
   R/o. Shahada,
   Taluka : Shahada,
   District : Nandurbar.

2. Shaikh Afzal Shaikh Salim,
   Age : Major,
   Occupation : Business,
   R/o. Iqbal Chowk, Shahada,
   Taluka : Shahada,
   District : Nandurbar.

.. Respondents (No.1 - Original Applicant No.1 & No.2 - Original Respondent No.1)

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*Mr. Santosh G. Chapalgaonkar, Advocate, for the petitioner in both petitions.*

*Mr. A.B. Gatne, Advocate, for respondent no.1 in both petitions.*

*Respondent no.2 served in both petitions (Absent).*

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**CORAM : SANGITRAO S.PATIL, J.**

**Date of reserving the judgment : 29th April 2016**

**Date of pronouncing the judgment : 7th June 2016**

**<u>COMMON JUDGMENT</u>:**

1. Heard the learned Counsel appearing for the

petitioner and the learned Counsel appearing for the first respondents in both petitions. None appeared for the second respondent though served.

2. Rule. Rule made returnable forthwith. By consent of the learned Counsel for the parties, heard finally.

3. Both of these Writ Petitions are arising out of the common orders passed by the learned Member of the Motor Accident Claims Tribunal **["MACT", for short]**, Shahada, whereby the request of the petitioner **[hereinafter called as "Insurer"]**, seeking permission to cross examine the above-named first respondents (i.e. the claimants) and their witnesses, came to be rejected.

4. The claimants, who got injured in the same incident that took place on 29.12.2009 at about 10.30 p.m., near village Korit on Nandurbar to Shahada road, filed Claim Petition Nos. 121/2010 and

122/2010, respectively, for compensation of Rs. 2,00,000/- and Rs. 20,00,000/-, respectively, vide Section 166 of the Motor Vehicles Act, 1988 **["MV Act", for short]**, on the allegations that the said incident took place as a result of rash and negligent driving of an Ape Rickshaw bearing registration No. MH-39/C-6845, by respondent no.2, namely, Shaikh Afzal Shaikh Salim. Both the claimants deposed before the MACT and also produced one witness each in support of their claims. The owner of the above numbered Ape Rickshaw cross-examined them. The insurer filed applications before the learned Member of the MACT, under Section 170 of the MV Act, seeking permission to cross examine the claimants and their witnesses. However, the said applications were rejected on 01.11.2012 and 31.01.2013 respectively, on the ground that the owner of the Ape Rickshaw contested the claim petitions and cross-examined the witnesses. The said orders have been assailed in these Writ Petitions.

5. The learned Counsel appearing for the insurer submits that the above numbered Ape Rickshaw, in fact, was not involved in the incident in question. The incident took place on 29.12.2009. The FIR was lodged in the Police Station on the next day of the incident against an unknown vehicle driver. There was no reference in the FIR of the vehicle involved in the incident. Thereafter, the owner of the Ape Rickshaw and respondent no.2 - Driver, in collusion with each other, came with the case that the above numbered Ape Rickshaw was involved in the incident, in question. He submits that the insurer was made a party - respondent to the above numbered Writ Petitions. Therefore, the insurer had a right to challenge the claims subject matter of the said petitions by taking all the grounds available in its defence, irrespective of the fact that the owner had cross-examined the claimants and their witnesses in order to make a show that he was contesting the claims. In support of this contention, he placed reliance on the judgment in the

case of ***United India Insurance Co. Ltd. Vs. Shila Datta and others, 2011 (10) SCC 509***. He, therefore, submits that the impugned orders may be set aside and the insurer may be directed to be given an opportunity to cross-examine the claimants and their witnesses by taking all the grounds available to defend itself.

6. On the other hand, the learned Counsel appearing for the claimants, relying on the judgments in the cases of **(i)** ***National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi & others, AIR 2002 SC 3350***; **(ii)** ***Rekha Jain & another Vs. National Insurance Company Limited, (2013) 12 SCC 202*** and **(iii)** ***Josphine James Vs. United India Insurance Co. Ltd. & another, 2013 AIR SCW 6633***, submits that the insurer cannot contest a motor accident claim on merits, in addition to the grounds mentioned in Section 149(2) of the MV Act for avoiding its liability under the policy of insurance. He submits that the owner of the above numbered Ape Rickshaw contested the claim petitions by filing written statements and cross-examining the claimants

and their witnesses. Therefore, the insurer cannot contest the claim on all the grounds proposed to be taken by it. He supports the impugned orders and prays that the Writ Petitions may be dismissed.

7. Before adverting to discuss the controversy between the parties, it will be worthwhile to re-produce here certain provisions of the MV Act, which read as under :-

> "**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks**. - (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor,

in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :-

(i) a condition excluding the use of the vehicle -

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country,

as the case may be. "

"**170. Impleading insurer in certain cases**.- Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

8. In the case of ***Shila Datta*** (supra), the Hon'ble Apex Court had the occasion to consider the scope of the right of the insurer to contest the claims on all grounds in addition to the grounds mentioned in Section 149(2) of the MV Act. One of the points urged by the Insurance Companies as re-produced in para 3 of the judgment, is as under :–

> " There is a significant difference between an insurer as a "noticee" (a person to whom a notice is served as required by Section 149(2) of the Act) in a claim proceedings and an insurer as a party - respondent in a claim proceedings. Where an insurer is impleaded by the claimants as a party, it can contest the claim on all grounds, as there are no restrictions or limitations in regard to contest. But where an insurer is not impleaded by the claimant as a party, but is only issued a statutory notice under Section 149(2) of the Act by the Tribunal requiring it to meet the liability, it is entitled to be made a party to deny the liability on the grounds mentioned in Section 149(2). "

After considering the judgment in the case of ***Nicolletta Rohtagi*** (supra), amongst other cases, the Hon'ble Apex Court held the above mentioned point in favour of the Insurance Companies, as observed in paragraphs 14 and 15 of the judgment reproduced below:-

> "**14.** When an insurer is impleaded as a party - respondent to the claim petition, as contrasted from merely being a noticee under Section 149(2) of the Act, its rights are significantly different. If the insurer is only a noticee, it

> can only raise such of those grounds as are permissible in law under Section 149(2). But if he is a party - respondent, it can raise, not only those grounds which are available under Section 149(2), but also all other grounds that are available to a person against whom a claim is made. It, therefore, follows that if a claimant impleads the insurer as a party - respondent, for whatever reason, then as such respondent, the insurer will be entitled to urge all contentions and grounds which may be available to it.
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> **15.** The Act does not require the claimants to implead the insurer as a party - respondent. But if the claimants choose to implead the insurer as a party, not being a noticee under Section 149(2), the insurer can urge all grounds and not necessarily the limited grounds mentioned in Section 149(2) of the Act. If the insurer is already a respondent (having been impleaded as a party - respondent), it need not seek the permission of the Tribunal under Section 170 of the Act to raise grounds other than those mentioned in Section 149(2) of the Act."

9. In para 12 of the judgment, the Hon'ble Apex Court specifically observed that the above referred point had neither arisen for consideration in ***Nicolletta Rohtagi's case***, nor was it considered therein.

10. In view of the above judicial pronouncement of the Hon'ble Apex Court, the insurer herein being added as a party - respondent by the claimants, would be entitled to take all possible grounds in its defence without being bridled by the provisions of Section 149(2) of the MV Act. It was not even necessary for the insurer to file applications under Section 170 of the MV Act seeking permission to contest the claims on all the grounds and to cross-examine with claimants and their witnesses, more particularly when the insurer has come with a specific defence that the above numbered Ape Rickshaw, in fact, was not involved in the incident, in question, and there has been collusion between the claimants and the owner of the Ape Rickshaw to grab money from the insurer.

11. In view of the legal position clarified in the case of ***Shila Datta*** (supra), the judgment in the case of ***Nicolletta Rohtagi*** (supra) and the judgments in the cases of ***Rekha Jain*** (supra) and ***Josphine James***

(supra) based on the judgment in the case of ***Nicolletta Rohtagi*** (supra) would be of no help to the claimants to support of their contention that since the owner of the Ape Rickshaw has contested the claims, the insurer has no right to contest them on all possible grounds touching the merits thereof.

12. In view of the facts and circumstances of the present claim petitions and the law laid down by the Hon'ble Apex Court in the case of ***Shila Datta*** (supra), I have no hesitation to quash and set aside the impugned orders. The insurer herein has a right to contest the claims on all possible grounds, irrespective of the restrictions contained in Section 149(2) of the MV Act, even without seeking permission of the MACT. The Writ Petitions are liable to be allowed. The learned Member of the MACT will have to be directed to allow the insurer to contest the claims on all the grounds touching the merits thereof.

13. The claim petitions have been filed in the year 2010. The period of about more than 5 years has been elapsed after filing of the claim petitions. Therefore, the learned Member of the MACT will have to be directed to decide the claim petitions as expeditiously as possible, after extending the claimants as well as the insurer, necessary opportunity to establish their respective contentions.

14. In the result, I pass the following order :–

(a) The Writ Petitions are allowed.

(b) The orders dated 01.11.2012 and 31.01.2013, passed below Exhibits 34 and 37, respectively, in Motor Accident Claim Petition No. 121/2010, by the learned Member of the MACT, Shahada, District Nandurbar, impugned in Writ Petition No. 2840 of 2013, are quashed and set aside.

(c) So also, the orders dated 01.11.2012 and 31.01.2013, passed below Exhibits 33 and 36, respectively, in Motor Accident Claim Petition No. 122/2010, by the learned Member of the MACT, Shahada, District Nandurbar, impugned in Writ Petition No. 2970 of 2013, are quashed and set aside.

(d) The learned Member of the MACT, Shahada, shall extend the insurer (petitioner) an opportunity to contest the claims on merits on all the grounds.

(e) The learned Member of the MACT, Shahada, shall decide the Claim Petitions as expeditiously as possible.

15. Rule is made absolute in the above terms. The parties are left to bear their own costs.

**(SANGITRAO S. PATIL)**
**JUDGE**

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