

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

**FIRST APPEAL NO. 1184 OF 2014**

Bajaj Allianz General Insurance Co. Ltd.  
Through it's Branch Manager,  
2<sup>nd</sup> Floor, Rajendra Chamber  
Adalat Road, Aurangabad.

...APPELLANT  
(Ori.Respdt. No. 3)

versus

1. Deoram S/o Shivram Jadhav,  
Age: 56 years, occu: Labour,  
R/o: Shendurni, Tq. Jamner,  
District Jalgaon.  
(Since deceased hence deleted)
2. Gangubai W/o Deoram Jadhav,  
Age: 53 years, Occup. Household,  
R/o : As above.
3. Victoral S/o Mohanlal,  
Age: Major, Occu. Household,  
R/o : Nayapura, Bhatapara Raipur,  
Chhatisgarh State.
4. Ashishkumar s/o Saraj Masih,  
Age: Major, Occu. Driver,  
R/o Village Bhatapara Raipur,  
Chattisgarh State.

...RESPONDENTS  
(Respdt. Nos. 1 & 2 ori.  
Claimants, Rspdt No. 3 & 4 Ori.  
Respdts. No.1 1 and 2)

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Mr. Mohit Deshukh, learned counsel holdingfor  
Mr. S.G. Chapalgaonkar, Advocate for appellant  
Mr. P.F. Patni, Advocate for Respondent No. 2  
Respondents No. 3 & 4 are served through paper publication.

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**CORAM : K.K. SONAWANE, J.**

**RESERVED ON : 23<sup>rd</sup> NOVEMBER, 2017.**

**PRONOUNCED ON : 8<sup>th</sup> DECEMBER, 2017.**

**JUDGMENT :-**

1. This appeal takes exception to the Judgment and Award dated 27-01-2014 passed by the Member, Motor Accident Claims Tribunal, Aurangabad (for short "Tribunal"), in Motor Accident Claim Petition No. 292 of 2010. The appellant is the Insurance Company and insurer of the offending vehicle involved in the accident.

2. Factual matrix of the matter in brief is that, on the fateful day of mishap i.e. on 03-07-2010 deceased Amrut s/o Deoram Jadhav was standing in Nakshatrawadi locality, aside the road leading from Aurangabad - Paithan. But, it had something different in store for him. Suddenly, the vehicle truck bearing No. CG-04-G-8077 arrived at the spot speedily and gave dash to the deceased Amrut. The driver of the vehicle was driving the vehicle in a very excessive speed as well as in rash and negligent manner. The deceased Amrut received fatal injuries and breathed his last on the spot of incident itself. He was immediately escorted to the Hospital, but concerned Doctor on duty declared him dead. First Information Report of the incident came to be lodged, pursuant to which, a Crime No. I-49-2010 was registered against driver of the offending vehicle involved in the accident. Police visited to the scene of occurrence and drawn the spot panchnama, police also prepared the Inquest panchnama of the dead body of deceased Amrut and referred the corpse to the Government Hospital for autopsy. The Medical Expert carried out the post-mortem and opined that the deceased Amrut died due to shock following hemorrhage owing to injuries to abdomen and scrotum. It has been alleged that the driver

of the vehicle-truck was very negligent and rash while driving the vehicle at the relevant time of accident resulting into death of deceased Amrut. The parents blamed the driver of the vehicle for accidental death of their son. In the aftermath, they filed application under section 166 of the Motor Vehicles Act, 1988 ( for short "Act of 1988") against owner, driver and insurer of the offending vehicle for compensation.

3. The notices of the claim were issued to owner and driver of the vehicle - truck, but they did not secure their presence before Tribunal and remained absent. Therefore, requisite order to proceed ex-parte against owner and driver was passed by the Tribunal below (Exhibit-23). However, appellant - Insurance company appeared before Tribunal and resisted the claim by filing written statement (Exhibit-19). The respondent- Insurance Company denied the liability following breach of terms and conditions of the policy. The Appellant - Insurance Company alleged that detail information about the occurrence of accident as required under section 134 of the Act of 1988 was not furnished by the owner and driver of the offending vehicle. Therefore, Insurance Company is not liable to indemnify the insured.

4. Pursuant to rival pleadings, the learned Member of the Motor Accident Claims Tribunal framed the requisite issues to determine the matter in issue on merit. The claimant Gangubai adduced her evidence on oath. She has also produced relevant documents of police record etc. in support of her claim. The appellant - Insurance Company examined Shri Dhanesh Kulkarni, Assistant

Manager in order to avoid liability. The witness Dhanesh Kulkarni produced documents of Insurance Policy on record. After appreciating the evidence adduced on record, the Tribunal partly allowed the claim petition of the parents of deceased Amrut and held that respondents - owner, driver and Insurance Company jointly and severally liable to pay compensation of Rs. 3,07,000/-with interest to the claimants. Being dissatisfied with the monetary liability fastened to indemnify the insured, the appellant-Insurance Company preferred the present appeal.

5. Learned counsel Shri. Deshmukh for the appellant - Insurance Company submits that there was breach of terms and conditions of insurance policy. There was no valid and effective permit issued by the statutory authority to ply the offending vehicle within the territorial jurisdiction of the State of Maharashtra. Appellant-Insurance Company procured the certificate from the Regional Transport Authority Raipur, Chhatisgarh State to the effect that vehicle in question was having permit only to ply the vehicle in the State of Chattisgarh. Learned counsel Mr. Deshmukh explained that there were communications in between Insurance Company and respondent-owner of the offending vehicle through RPAD. The owner was called upon to furnish requisite documents of valid permit of offending vehicle. But, there was no response from the owner of the vehicle nor he complied with the mandate of law as prescribed under section 134(c) of the Act of 1988.

6. According to learned counsel, owner of the vehicle failed to discharge his obligation. The Insurance Company took the search of

the documents and at last it was revealed that permit was granted to the offending vehicle to ply the vehicle within the area of State of Chhatisgarh only. He has given much more stress on the violation of terms and conditions of the policy and it being statutory defence prayed to exonerate the appellant-Insurance Company from the monetary liability to indemnify the insured. Learned counsel for the appellant in support of his argument relied upon the expositions of law in the case of ***National Insurance Co. Ltd. Vs. Challa Upendra Rao and others***<sup>1</sup>

7. Mr. Patni, learned counsel for respondent No. 2 - original claimant vociferously opposed the contention propounded on behalf of appellant-Insurance Company and submits that there was a vehicular accident resulting into death of deceased Amrut. The vehicle involved in the accident was admittedly insured with the appellant Insurance Company. The vehicle by which accident took place was the truck of "heavy goods vehicle" category. The alleged accident occurred due to actionable negligence on the part of driver of the vehicle. Therefore, appellant - Insurance Company cannot be exonerated from the liability to pay the compensation to the claimants. Moreover, learned counsel Shri Patni added that in view of principle of "pay and recover" the appellant-Insurance Company would be at liberty to recover the amount of compensation payable to claimant from the insured i.e. owner of the vehicle. In support of his argument, learned counsel Mr. Patni relied upon the legal guidelines delineated in the case of **S.**

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1 (2004)8 SCC 517

***Iyyapan vs. United India Insurance Company Ltd<sup>2</sup>.***

8. It would be reiterated that there were endeavour to secure the presence of respondents No. 1 and 2 - owner and driver of the offending vehicle, but all efforts did not evoke result. Both owner and driver remained absent and did not turn up to traverse the allegations made on behalf of the appellant -Insurance Company. The notices were served to both these respondents through paper publication, but found unavailing. In this appeal the claimants are old aged parents of the deceased Amrut. The claimant No. 1-father of the deceased Amrut passed away, pending the petition filed under section 166 of Act of 1988 before the Tribunal. In such circumstances, it would justifiable to proceed further for adjudication of the appeal on merit in absence of respondents - owner and driver of the offending vehicle.

9. The pivotal issue arose for deliberation in the present appeal as to whether the Insurance Company can repudiate its liability to pay compensation to the claimants for accidental death of their son deceased Amrut by invoking defence of breach of the conditions of contract of Insurance as contemplated under section 149(2) of the Act of 1988 ?

10. Undoubtedly, the section 149 of the Act of 1988 prescribed grounds of defence to be availed by the insurer to avoid liability to pay compensation in the cases arising out of vehicular accident. The Section 149 of the Act of 1988 makes it mandatory on the part of insurer to satisfy the judgment and award against the persons insured

in respect of third party risks. In the case of **National Insurance Company Vs. Nicklletta Rohatgi**<sup>3</sup> the Hon'ble Apex Court elaborately discussed the scope of section 149(2) of the Act of 1988 and held that when an insurer is impleaded and has been given notice of the case, then the insurer is entitled to defend the action on the ground described in sub-section (2) of section 149 of the Act of 1988 and no other ground is available for the Insurance Company to avoid liability. Section 149(2)(a)(i) of the Act of 1988 relates to the vehicle not covered by permit to ply for hire or reward, which would be reproduced as follows.

***149: Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.:***

(1) XXX XXX XXX XXX XXX XXX XXX

(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) xxx xxx xxx xxx xxx xxx*

11. Section 66 of the Act of 1988 contemplates that no motor vehicle shall be used as transport vehicle without permit issued by the Regional or State Transport Authority, to use the vehicle as such in public place. It also provides for exemption of certain vehicles from the operation of the provisions of section 66 of the Act of 1988 on certain

terms and conditions and for use of vehicle for specific purpose.

12. Their Lordships of the Hon'ble Supreme Court in the case of ***National Insurance Company Ltd. Vs. Challa Upendra Rao*** and others (supra) elucidated in paragraph No. 12 as below:

*"12. The High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed on a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of the insurer. The High Court was, therefore, not justified in holding the insurer liable."*

13. On the touchstone of aforesaid legal guidelines, it is crystal clear that the plying of vehicle without valid permit is the violation of terms and conditions of contract of Insurance Policy. Obviously, the appellant-Insurance Company has a statutory right to raise such defence by invoking provisions under sections 149 (2) of the Act of 1988. In case it is established that there is breach of condition of the Insurance Policy, the Insurance Company is not liable to indemnify the insured for the loss caused following vehicular accident.

14. In the instant case, in order to ascertain the veracity of allegations, it is essential to refer the evidence of the appellant-Insurance Company adduced before the Tribunal. The appellant-Insurance Company since inception clamoring for non-compliance of the provision under section 134(c) of the Act of 1988. The appellant-Insurance Company cast allegations of breach of terms and conditions of insurance contract. The witness Dhanesh Santukrao Kulkarni stepped into the witness box on behalf of appellant Insurance Company and deposed that after alleged accident the investigation was carried out at the office level of appellant -Insurance Company. They collected relevant documents of the police papers, registration certificate and driving licence of the driver of offending vehicle etc. But, copy of valid and effective permit was not made available with the documents. The appellant- Insurance Company indulged in letter correspondence through post with respondent-owner of the offending vehicle for demand of document of valid and effective permit. But, there was no response received to the appellant- Insurance Company from the owner of the vehicle. The witness Shri. Dhanesh Kulkarni further added that there was condition imposed under the head of "limitation as to Use" in the certificate of Insurance Policy which would be read as "The Policy covers use only under a permit within the meaning of the Motor Vehicles Act, 1988 or such a carriage falling under Sub-section (3) of Section 66 of the Motor Vehicles Act, 1988. The Policy does not cover use for Organised racing, pace Making, Reliability Trails, Speed Testing." Unfortunately, as the proceeding was ordered to be ex-parte against respondents - owner and driver of the vehicle, there was no

cross-examination to the witness of appellant-Insurance Company to elicit the truth.

15. The aforesaid circumstances on record categorically demonstrate that the alleged offending vehicle was being used in the Maharashtra State without authentic permit. There is no impediment to draw inference that owner was not in possession of valid and effective permit to ply the offending vehicle within the territorial jurisdiction of State of Maharashtra during the relevant period of accident occurred resulting into death of deceased Amrut, otherwise, he would have come forward to produce the document of permit of vehicle in this case.

16. When the owner of the offending vehicle ventured to ply the vehicle in the State of Maharashtra without permit, the appellant-Insurance Company is entitled to repudiate the liability by availing the remedy of statutory defence as envisaged under section 149(2) of the Act of 1988. The absence of owner and driver in the proceeding impelled this Court to draw adverse inference against them. There is no impediment to conclude that there was no valid and effective permit to ply the offending vehicle within the territorial jurisdiction of State of Maharashtra. The owner attempted to use the vehicle against the terms and conditions of insurance policy. Obviously, the appellant-Insurance Company proved that there was breach of contract of insurance. Therefore, there is no alternative but to absolve the appellant- Insurance Company from the monetary liability to indemnify the insured.

17. Now, the contiguous issue remained to be considered is in regard to recovery of compensation payable to claimants under the award of Tribunal. The matter pertains to the Award of compensation granted in favour of third party. In view of benevolent object of the Act, it would be justifiable to direct the insurer to satisfy the award though the appellant-Insurance Company is not liable for the same and recover it from the respondent-insured. The principle of "pay and recover" policy would be applicable to the present case. The Hon'ble Apex Court in the case of **S. Iyyapan** referred supra in paragraph No. 18, elucidated as follows:

*"18. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right's is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely, (i) the vehicle was not driven by a named person, (ii) it was being driven by a person who was not having a duly granted licence, and (iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was*

*obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy." (Emphasis supplied)*

18. In the instant case, undoubtedly, the death of deceased Amrut was caused following actionable negligence on the part of driver of the offending vehicle. The claimants are old aged senior citizens, parents of the deceased Amrut. The old aged father has already breathed his last. The respondent No. 2 i.e. lone mother remained to avail the benefit of compensation for the loss caused following death of her son Amrut. There is no dispute about quantum of compensation amount determined by the Tribunal. In such circumstances, it would be fallacious and improper to compel the hapless old female member of the family of deceased Amrut to struggle further for recovery of decretal amount. In such peculiar circumstances, it would be justifiable that the appellant-Insurance Company would satisfy the award by making payment of compensation amount to the claimants and then recover it from the respondent-owner of the offending vehicle by initiating proceeding before the Executing Court as if dispute between insurer and owner was the subject-matter of determination before the Tribunal and issue is decided against owner and in favour of insurer.

19. In the above premises, there is no impediment to conclude that there was breach of condition of the insurance policy as contemplated

under section 149(2)(a)(i) of the Act of 1988 and the appellant Insurance Company is entitled to invoke statutory defence for avoiding monetary liability to indemnify the insured for the loss caused following vehicular accident. In the result, liability to pay compensation would not be fastened on the appellant - Insurance Company. The circumstances compelled to exonerate the appellant - Insurance company from the liability to indemnify the insured in this case. However, as discussed supra insurer cannot disown the responsibility cast towards statutory right of the third party i.e. claimant to recover the compensation amount awarded from the appellant - Insurance Company.

20. In view of aforesaid discussion, the appeal stands allowed with above observations. The impugned judgment and award dated 27-01-2014 passed by the Member, Motor Accident Claims Tribunal, Aurangabad, in the proceedings of Motor Accident Claim Petition No. 292 of 2010 is hereby upset and modified to the extent that -

- (I) The respondent Nos. 1 and 2 owner and driver of the offending vehicle jointly and severally shall pay the amount of compensation awarded to the claimants.
- (II) The respondent No.3 - Insurance Company (appellant herein) is hereby exonerated from the liability to pay the compensation. However, the appellant- Insurance Company is hereby directed to first satisfy the Award by making payment to the claimant and then recover it from the respondent - owner of the offending vehicle by initiating

proceedings before the Executing Court.

(III) Rest of the Award is made absolute and confirmed.

21. The appeal stands allowed in above terms and disposed of accordingly.

*Sd/-*

**[ K. K. SONAWANE ]**  
**JUDGE**

MTK.  
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