

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

FIRST APPEAL NO. 1187 OF 2014

United India Insurance Company Ltd.
Through its Divisional Office,
Divisional Manager, Aurangabad.

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

versus

1. Godabai W/o Kisanrao Shinde,
Age: 55 years, occu: Household,
R/o: Pimpalgaon, Tq. Bhokardan,
Dist. Jalna, At present Indraprastha
Coony, Bajajnagar, Aurangabad.
2. Renuka W/o Vinod Shinde,
Age: 20 years, occup. Housewife,
R/o: Pimpalgaon, Tq. Bhokardan,
Dist. Jalna, At present Indraprastha
Colony, Bajajnagar, Aurangabad.
3. Ravi S/o Late Vinod Shinde,
Age: Minor, occup. Housewife,
R/o: Pimpalgaon, Tq. Bhokardan,
Dist. Jalna, At present Indraprastha
Colony, Bajajnagar, Aurangabad.
4. Wazir Khan s/o Israiel Khan,
Age: Major Occu. Driver of Vehicle,
Bearing Regn. No. HR-55-8483
R/o Bilar, Aslapur Varuais,
Dist. Gurgaon Haryana.
5. M/s Indian Vehicle Carriers,
Pvt. Ltd. Sherwat Farm House,
Sector-17 Opp. Mehroli Road,
Gurgaon Harayana, Dist. Gurgaon,
Haryana 122001 (Permit Holder
of vehicle No. HR-55-8483)

...RESPONDENTS

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Mr. S.V. Kulkarni, Advocate for appellant
Mr. Swapnil Patu nkar Advocate holding for
J.P. Legal Associates for Respondents No. 1 to 4.
Service of Respondent NO. 4 is exempted as per Courts' order
Respondent No. 5 serviced through paper publication.

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CORAM : K.K. SONAWANE, J.

RESERVED ON : 20th SEPTEMBER, 2017.

PRONOUNCED ON : 13th NOVEMBER, 2017.

JUDGMENT :-

1. This first appeal is filed under section 173 of the Motor Vehicles Act, 1988 (for short "Act of 1988") by the appellant -Insurance Company agitating the validity, propriety of the Judgment and Award dated 02-04-2014 passed by the learned Motor Accident Claims Tribunal, Aurangabad (for short "Tribunal"), in the proceeding MACP No. 809 of 2008, thereby imposing monetary liability on the appellant-Insurance Company by applying principle of "pay and recover" policy.

2. Factual aspect giving rise to the present appeal in nutshell is that, respondents No. 1 to 3-original claimants preferred the application under section 166 of the Act of 1988 for compensation on account of accidental death of their family member Shri Vinod Kisanrao Shinde arising out of and use of motor vehicle -Truck bearing registration No. HR-55-8483 owned and driven by respondents No. 4 and 5 -herein(original respondents No.1 and 2).

3. It has been alleged that on 13-07-2008 the deceased Vinod was travelling in the truck and suddenly he fallen on the road from the cabin of the driver of offending vehicle. He sustained fatal head injury. The injured Vinod was escorted to the Hospital for medical treatment, but unfortunately he succumbed to head injury. The claimants blamed driver of the alleged vehicle - truck for the death of their family

member victim Vinod. Accordingly, claimants claimed compensation for the loss caused to them following death of victim Vinod. The appellant Insurance company was the insurer of vehicle involved in the mishap occurred on 13-07-2008 resulting into death of victim Vinod. Respondents - Wazir Khan s/o Israiel Khan as well as M/s Indian Vehicle Carriers, Pvt. Ltd. are the driver and owner of the offending vehicle-Truck.

4. After receipt of notice from the Tribunal, the appellant-Insurance company appeared in the proceedings before learned Tribunal and vociferously opposed the allegation for monetary liability nurtured on behalf of claimants. It has been contended that the risk of the person i.e. victim Vinod was not covered under the terms and conditions of the Insurance Policy and he cannot be treated as "third party". The victim Vinod was travelling in the goods carrier as "gratuitous passengers" and consequently there was breach of terms and conditions of the policy. Therefore, the appellant Insurance Company cannot be held liable to suffer liability arising out of the accident on the basis of Insurance Policy. The learned Tribunal appreciated the factual aspects of the matter as well as evidence adduced on record and arrived at the conclusion that victim Vinod was travelling in the offending vehicle as "gratuitous passenger", not covered under the policy of the vehicle which was a goods carrier, therefore, learned Tribunal exonerated the appellant Insurance Company from the monetary liability to pay compensation to the dependents of victim Vinod for the death caused in the accident arising out of the use of offending vehicle. However,

learned Tribunal issued directions to the appellant Insurance Company to pay the compensation amount of Rs. 4,17,500/- with interest accrued thereon to the claimants and shall recover it from original respondents No. 1 and 2, who are owner and driver of the offending vehicle.

5. The impugned directions based on the principle of "pay and recover" issued by the learned Tribunal is the subject matter of present appeal.

6. Heard Mr. Kulkarni, learned counsel for the appellant -Insurance Company. He vehemently contended that learned Tribunal on appreciation of factual aspects of the matter proceeded to exonerate the appellant Insurance Company from monetary liability arising from the vehicular accident. It is evident that the victim Vinod was travelling in the offending goods carrier as "gratuitous passenger". The risk of victim Vinod was not covered under the policy. In such circumstances the approach of learned Tribunal was just and proper to absolve the appellant – Insurance Company from monetary liability in this case. But, it would unjust and improper to issue directions to the appellant -Insurance Company to pay the compensation amount to the claimants and thereafter same may be recovered from the owner and driver of the offending vehicle. The very direction issued by the learned Tribunal is illegal, imperfect and not as per rule of law. Therefore, he prayed to allow the appeal and upset the impugned direction of the learned Tribunal to the appellant-Insurance Company to pay and recover the compensation amount from the owner and driver of the offending

vehicle in this case.

7. Learned counsel for the appellant in support of his submissions relied upon the judicial precedents in the case of ***National Insurance Col Ltd vs. Prema Devi and others***¹, ***United India Insurance Company Vs. Laila Ayyub Sayyad and others***² ***United India Insurance Co. Ltd. Vs. Anubai Gopichand Thakare and others***³, ***National Insurance Co Ltd Vs. Rattani and others***⁴ and ***New India Assurance Company Ltd. Vs. Lilabai Shrimant Missal and others***⁵.

8. Per contra, Mr. Patunkar, learned counsel for the respondents No.1 to 3- original claimants raised objection to the contentions propounded on behalf of appellant-Insurance Company and submits that impugned directions under appeal to first satisfy the Award and then recover it from the insured owner of the offending vehicle passed by the learned Tribunal is just, proper and within the ambit of law. The learned Tribunal has exercised its jurisdiction in proper manner after considering the factual aspect of the case. There is no illegality or error committed on the part of learned Tribunal while issuing such directions of payment of compensation to the claimants and further the same be recovered from owner. Learned counsel in support of his submissions relied upon the expositions of law in the cases of ***National Insurance Company Ltd. Vs. Swarnsingh***⁶, ***Bajaj Allianz General Insurance***

1 2008 AIR SCW 2023

2 2017(1)TSE 348(Bombay)

3 2008(1) Mh.L.J. 72

4 2009 AC 759 (SC)

5 2015(1) Mh.L.J. 827

6 (2004) 3 SCC 297

Company Vs. Sangita wd/o Bhawan Raut and others⁷, United India Insurance Co. Ltd. Aurangabad Vs. Mandabai Shivdas Hiwale and others⁸, National Insurance Company Vs. Baljeet Kaur⁹, New India Assurance Company Ltd. Vs Kusum and others¹⁰, United India Insurance Co. Ltd. Sindhubai w/o Kondiram Darwante¹¹ and Manura Khatun and others Vs. Rajesh Kumar Singh and others¹² .

9. I have considered the rival submissions canvassed on behalf of both sides. I have also delved into factual score as well as record and proceedings of the claim petition. The pivotal issue which is to be determined in this appeal is, as to whether appellant-Insurance Company, being Insurer can be directed to pay compensation amount determined by the Tribunal to the claimants and lateron recover it from the owner and driver of the offending vehicle?.

10. Intense scrutiny of the attending circumstances on record in the light of judicial pronouncements referred above reflects that the issue in regard to directions by the Tribunal to the Insurance Company first to pay compensation amount and then recover it is now no longer *res-integra*. It is settled that depending upon the facts and circumstances of the case the learned Tribunal can very well direct the Insurance Company to first satisfy the Award and then recover the compensation amount from the Insured. Moreover, the proposition that in suitable

7 2015 (1) Mh.L.J. 883

8 2014 (6) Mh.L.J.379

9 2004 (2) Mh.L.J. (SC), 372.

10 2010 (1) Mh.L.J. 889

11 2010 (3) Mh.L.J. 886

12 (2017) 4 SCC 796

and fit cases the Tribunal can direct insurer to first pay compensation to the claimants and then recover it from the Insured as now crystallized into the binding rules.

11. The Hon'ble Apex Court in paragraphs No. 14, 15, 16 and 17 of the case ***Manura Khatun and others Vs. Rajesh Kumar Singh and others with connected appeal reported in (2017) 4 Supreme Court Cases 796*** has observed as follows:

14) The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz., National Insurance Co. Ltd. vs. Baljit Kaur & Ors., (2004) 2 SCC 1, National Insurance Co. Ltd. vs. Challa Upendra Rao & Ors., (2004) 8 SCC 517, National Insurance Co. Ltd. vs. Kaushalaya Devi & Ors., (2008) 8 SCC 246, National Insurance Co. Ltd. vs. Roshan Lal, (2017) 4 SCC 803, and National Insurance Co. Ltd. vs. Parvathneni & Anr., (2009) 8 SCC 785.

15) This question also fell for consideration recently in National Insurance Company Limited vs. Saju P. Paul & Anr., (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength

of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".

16) Justice R.M. Lodha (as His Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under:

"20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).

26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, (2004) 2 SCC 1 and Challa Upendra Rao, (2004) 8 SCC 517 should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (National Insurance Co. Ltd. vs. Saju P. Paul, SLPÂ© No. 20127 of 2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the

claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in Challa Upendra Rao(supra)."

17) The facts of the case at hand are somewhat identical to the facts of the case mentioned supra because here also we find that the deceased were found travelling as "gratuitous passengers" in the offending vehicle and it was for this reason, the insurance companies were exonerated. In Saju P. Paul's case (supra) also having held that the victim was "gratuitous passenger", this Court issued directions against the Insurer of the offending vehicle to first satisfy the awarded sum and then to recover the same from the Insured in the same proceedings."

12. In the case of ***New India Insurance Company Vs. Kusum and others reported in 2010 (10) Mh.L.J. 889*** the Hon'ble Apex Court observed that whenever a direction regarding pay and recover is issued by the Tribunal, it must be held to have been done in exercise of its inherent power. Moreover, in the cases of ***Oriental Insurance Company Vs. Suhas reported in 2012(12) All MR 164, New India Insurance Company Vs. Nandlal Walchand Jaiswani and others. reported in 2013(2) All MR 550 and Bajal Allianz General Insurance Company Vs. Sangita wd/o Bhawan Raut and others. 2015(1) Mh.L.J., 883 and United India Insurance Col Ltd Vs.***

Sindhubai Kondiram Darwante 2010 (3) Mh.L.J. 886, the learned Single Judge of this Court adopted the same view that the powers are vested in Tribunal depending upon the facts of the case for requisite directions to the Insurance Company to pay the compensation amount and thereafter recover the same from the Insured.

13. In view of aforesaid discussion, it is manifestly clear that the Tribunal has a power to issue directions to first pay compensation amount and then recover it from the Insured in case where the facts and circumstances of the case before it warrant so. Obviously the power for directions to apply principle of pay and recover in the case by the Tribunal is essential to be exercised only when the facts and circumstances of the case justify it. In the instant case, victim Vinod Shinde died surviving by widow having 20 years old, one minor son as well as old aged parents. Admittedly, the attending circumstances on record are sufficient to conclude that they all were dependent upon the income of deceased Vinod, but untimely death of bread winner of the family caused them hardship and difficulties for survival. Definitely, it would find extremely difficult for these hapless claimants once again to knock doors of the Court of law for recovery of compensation amount by filing execution proceedings against owner and driver. They cannot be precluded from deriving fruits of the award by compelling them to seek recovery from owner. In case, the Insurance Company is directed to pay and recover the decretal amount it would sub-serve the purpose to protect the interest of hapless claimant which is the paramount consideration of the legislation. The appellant – Insurance

company being insurer would be in a better position to recover the amount from the owner. Therefore, there would be no impediment for such directions to the appellant - Insurance company to first satisfy the Award by paying the compensation and then recover it from respondents No. 1 and 2. Therefore, in view of legal position stands today, the learned Tribunal committed no wrong to exercise its inherent power for directions to the insurer to pay compensation and therefore recovered the same from insured. The judicial pronouncements relied upon on behalf of appellant- Insurance Company, in this appeal, referred supra appears misplaced and are no avail to the appellant.

14. In view of aforesaid discussion, appeal does not survive and stands dismissed. The impugned directions to the appellant-Insurance Company to first satisfy the Award and thereafter recover the sum from the insured and driver of offending vehicle is hereby made confirmed and absolute with further stipulation that the appellant -Insurance Company shall recover the compensation amount under Award from the owner and driver of the offending vehicle as directed by the learned Tribunal in the same proceedings by filing execution petition against them. No order as to costs.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK
