

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

FIRST APPEAL NO.53 OF 2005

The Oriental Insurance Company
Limited, Through its Branch
Manager, District-Aurangabad.

... Appellant
(Org.res.no.3)

VERSUS

1] Sopan s/o Vishwanath Wagh (died).

2] Shindhubai w/o Sopan Wagh,
Age— 40 years, Occupation :
Household, r/o : Bolthan,
Taluka : Nandgaon,
District : Nasik.

3] Shubhangi d/o Sopanrao Wagh,
Age— 20 years, Occupation :
Household, r/o. as above.

4] Kavita d/o Sopanrao Wagh,
Age— 17 years,
r/o : as above.

5] Somnath s/o Sopanrao Wagh,
Age— 13 years, r/o as above.

(Claimants Nos.4 and 5 minor u/g of claimant no.2)

(Res.Nos.2 to 5 are original claimant Nos.2 to 5)

6] Santosh s/o Bhimrao Bombale,
Age— Major, Occupation:
Business, r/o Chikalhana,
Aurangabad.
(Org.Respondent No.1)

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DATE : 17.01.2018

2] The challenge in this appeal is to the judgment and award dated 1.10.2004 made by the Motor Accident Claims Tribunal (MACT), Aurangabad, to the extent the award holds the appellant – Insurance Company jointly and severally liable alongwith the owner and driver of the

offending vehicle.

3] Mr.Joshi, learned counsel for the appellant – Insurance Company submits that the impugned award is vitiated by an error apparent on the face of record since the Tribunal in paragraph no.18 of the impugned award has clearly mis-read the decision of the Hon'ble Supreme Court in the case of *Pramod Kumar Agrawal & another v. Mushtari Begum (Smt.) and others (2004) 8 SCC 667*. He submits that in the case of *Pramod Kumar Agrawal (supra)*, the Hon'ble Supreme Court has not held that the Insurance Company is liable even when the deceased was a passenger in a goods carrier. He submits that on the contrary in *Pramod Kumar Agrawal's* case, it has been held that the Insurance Company cannot be held liable in such a case and the liability can be restricted only to the owner and the driver of the offending vehicle.

4] Mr.M.G. Kolse Patil, learned counsel for the respondent nos.2 to 5, submits that there is no error in the impugned award. In any case, he submits that at the highest this is a case wherein an order for pay and recover could have been made. He submits that in this case, the Insurance Company is liable to be directed to

- 4 -

make good the amount awarded in terms of Section 168 of the Motor Vehicles Act, 1988, and thereafter liberty can be granted to the Insurance Company to recover such amount from the owner and the driver of the offending vehicle. He submits that under no circumstances, this is a fit case to deny compensation to the respondent – claimants.

5] The entire reasoning relevant to the context of submissions made by Mr.Joshi and Mr.Kolse Patil is set out in paragraph nos.17 and 18 of the impugned award, which read as follows:-

“17] Now, so far as liability of respondent no.3 is concerned, it has denied the same. It is on the ground that the offending Minidoor rickshaw in fact is a goods carrier and at the time of accident it was used for transporting passengers and that too more than its capacity which was against the permit of the said Minidoor rickshaw. It is further the case of respondent no.3 that the respondent no.2 who was not authorized driver of respondent no.1 had also no valid and effective driving license, and therefore, there is breach of terms and condition of the insurance policy. On these grounds, it is the case of respondent no.3 that there is breach of terms and condition of both

- 5 -

permit as well as insurance policy and as such it is not liable to pay the compensation. Learned Advocate Shri A.A. Joshi for respondent no.3 Insurance company, in support of his case, placed reliance on one authority of the Hon'ble Apex Court in case of *Oriental Insurance Company Ltd. v. Devi Reddy Konda Reddy*, reported in 2003 S.C. page 1009. However, the learned Advocate Shri K.D.Pande for claimants has also placed reliance on a very recent authority of the Hon'ble Apex Court, in case of Shri Pramod Kumar Agrawal and others Vs. Smt.Mustari Begum and others, reported in 2004 (6) Supreme, 2180.

18] No doubt, it is true that, it has been held by the Hon'ble Apex Court in case of Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy, reported in 2003 S.C. 1009, that when the passengers are being transported in a goods carrier and when there is no valid and effective driving licence with the driver to drive such vehicle, there is breach of terms and condition of the insurance policy, as well as permit, and therefore, the insurance company is not liable to pay the compensation. However, in recent case of the Hon'ble Apex Court in case of *Shri Pramod Kumar* (supra) the Hon'ble Apex Court while deciding the liability of the insurance company and even after considering the case of *Oriental Insurance company* (supra) relied upon by the learned Advocate Shri Joshi for

- 6 -

respondent no.3 has pleased to hold though vehicle concerned was a goods vehicle yet the liability of insurance company was not wiped out. In other words, the gist of the authority of the Hon'ble Apex court in case of *Shri Pramod Kumar* (supra) relied upon by the learned Advocate for the claimant is that even in case of breach of terms and condition of the insurance policy of permit by carrying passengers in a goods vehicle, the insurance company is not absolved from its liability, considering this aspect of the case the respondent no.3 the insurer in this case is also liable to pay the above compensation jointly and severally with respondent nos.1 and 2. Accordingly, I record my findings on issue nos. 3 and 4."

6] The MACT has held the gist of the authority in *Pramod Kumar Agrawal* (supra) that even in case of breach of terms and conditions of insurance policy by permit carriage of passengers in a goods vehicle, the insurance company is not absolved of its liability to pay the compensation. This does not appear to be a correct reading of the decision of the Hon'ble Supreme Court in the case of *Pramod Kumar Agrawal* (supra). In fact, in paragraph nos.10 to 12 of the case of *Pramod Kumar*

Agrawal (supra), this is what the Hon'ble Supreme Court has held :-

"10] It is to be noted that in *Ramesh Kumar V. National Insurance Co. Ltd.* it was held that though the vehicle concerned was a goods vehicle yet the liability of the insurance company was not wiped out. The decision was subsequently reversed by a three-Judge Bench of this Court in *New India Assurance Co.Ltd. v. Asha Rani* (2003) 2 SCC 223) which was followed in *Oriental Insurance Co. Ltd. v. Devireddi Konda Reddy* (2003) 2 SCC 339). Recently in *National Insurance Co.Ltd. v. Baljit Kaur* (2004) 2 SCC 1) the effect of the 1994 amendment vis-a-vis Section 147 of the Act was considered. It was observed as follows :(SCC pp.7-8, paras 17 & 19-20)

"17] By reason of the 1994 amendment what was added is "including owner of the goods or his authorised representative carried in the vehicle". The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorized representative carried in the vehicle besides the third parties. The intention of Parliament, therefore, could not have been that the words "any person" occurring in Section 147 would cover all persons who were traveling in a goods

- 8 -

carriage in any capacity whatsoever. If such was the intention, there was no necessity of Parliament to carry out an amendment inasmuch as the expression "any person" contained in sub-clause (i) of clause (b) of sub-section (1) of Section 147 would have included the owner of the goods or his authorized representative besides the passengers who are gratuitous or otherwise.

19] In *Asha Rani* (2003) 2 SCC 223) it has been noticed that sub-clause (i) of clause (b) of sub-section (1) of Section 147 of the 1988 Act speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers traveling in the vehicle. The premium in view of the 1994 amendment would only cover a third party as also the owner of the goods or his authorized representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise.

20] It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with

- 9 -

respect of persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people."

11] The plea of the appellants has been rightly rejected both by the Tribunal and the High Court.

12] Therefore, while upholding the judgment of the High Court we direct in terms of what has been stated in *Baljit Kaur's* case (supra) that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. For the purpose of recovering the same from the owner the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the

- 10 -

Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the vehicle i.e. appellant no.1 shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle i.e. appellant no.1 shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured (the appellant no.1)."

7] The Supreme Court in *Pramod Kumar Agrawal* (supra), after holding that the insurance company cannot be held liable has, however, followed its earlier decision in *National Insurance Co.Ltd. v. Baljit Kaur* (2004) 2 SCC 1) and ordered that the insurance company shall pay the quantum of compensation fixed by the Tribunal and thereafter recover the same from the owner

- 11 -

and driver of the offending vehicle.

8] Mr.Kolse Patil, learned counsel for the respondent nos.2 to 5 – claimants, has also placed reliance upon the decision of the Hon'ble Supreme Court in the case of *Jawahar Singh v. Bala Jain & others* (2011) 6 SCC 425) and the decision in the case of *National Insurance Co.Ltd. v. Prakash Sakharam Dudhankar & others* delivered by the learned Single Judge of this Court reported at 2005 (1) Mh.L.J., 601 to submit that this is a fit case to make a pay and recover order. In these two decisions also, the principle of pay and recover was accepted and applied.

9] In the present case, there does not appear to be any dispute that the offending vehicle was a goods carriage vehicle. There is also no dispute that the deceased was a passenger in a goods carriage vehicle. The owner and the driver of the offending vehicle were not supposed to take passengers in a goods vehicle. Therefore, the liability in regard to payment of compensation to the respondent – claimants was primarily on the owner and the driver of the offending vehicle. However, applying the law in the case of *Pramod Kumar*

- 12 -

Agrawal (supra) (paragraph no.12 thereof), *Jawahar Singh* (supra) and *Prakash Dudhankar* (supra), this is a fit case for making pay and recover order.

10] Accordingly, this appeal is liable to be partly allowed. The impugned award is ordered to be modified. It is held that the primary liability for payment of compensation shall be on the owner and the driver of the offending vehicle jointly and severally. However, the appellant – insurance company is directed to first satisfy the impugned award and pay the compensation awarded to the respondent – claimants and thereafter the appellant shall be at liberty to recover such compensation amount jointly and severally from the owner as well as the driver of the offending motor vehicle. The respondent – claimants shall be entitled to withdraw 50% of the compensation amount deposited by the insurance company in this Court. The insurance company is directed to pay or deposit in this Court the balance compensation amount in terms of the impugned award within a period of six weeks from today. If the amount is deposited within six weeks, the respondent – claimants are at liberty to withdraw the same unconditionally.

- 13 -

11] The appeal is partly allowed to the aforesaid extent. There shall be no order as to costs.

(M.S. SONAK, J.)