

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

FIRST APPEAL NO. 872 OF 2015

Vaijinath S/o. Sopanrao Jadhav,
Age : 33 years, Occu. Business,
R/o. Banselki Road, Udgir,
Tq. Udgir, Dist. Latur.

... Appellant

VERSUS

1. Rajabhau S/o Roopsen Warkari,
Age : 23 years, Occu. Driver,
R/o. Borgaon (Kale), Tq. & Dist. Latur.

2. Deelip S/o Rangrao Deshmukh,
(Ingale), Age : 42 years, Occu. Business,
R/o. Ashta Mod, Tq. Chakur,
Dist. Latur.

3. The New India Assurance Co. Ltd.,
Through it's Branch Manager,
Chandra Nagar, Latur, Tq. & Dist. Latur.

... Respondents

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Mr Chandrakant D. Biradar, Advocate for the appellant
Respondent No. 1 served

Mr Suhas P. Urgunde, Advocate for respondent No. 2

Mr S. P. Chapalgaonkar, Advocate for respondent No. 3

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CORAM : A. M. DHAVAL, J.

DATE : 02ND AUGUST, 2018.

ORAL JUDGMENT :-

1. Aggrieved by the grant of compensation of only Rs. 25,000/- excluding NFL amount by the ld. Member of MACT, Udgir, Dist. Latur, in MACP No. 106/2002 (Old MACP No. 33/2000)

by judgment dt. 30.09.2004, the original claimant has preferred this appeal for enhancement of the compensation.

2. As per the claim petition, the claimant was aged 33 years and was earning Rs. 9,000/- per month by doing work of cycle repairs. On 10.05.2000 at 07:30 p.m., he was proceeding from Lohara Pati towards eastern side of Udgir - Latur road in a tipper bearing No. MH-12/TRT-146, permanent registration No. MH24/A-3567. Due to rash and negligent driving of the tipper of respondent No. 2 by respondent No. 1, it was turtled and the right palm i.e. front part of right hand of the appellant/claimant was crushed under the tipper. The claimant suffered amputation from wrist. The FIR was registered at C.R. No. 53/2000 against the driver of the tipper at Udgir Rural Police Station. According to the claimant, he has sustained 100% disability and loss of income of Rs. 9,000/- per month. The vehicle was insured with respondent No. 3.

3. Respondents No. 1 and 2 though duly served, remained absent. Respondent No. 3 - Insurance Company admitted the accident but claimed that the claimant was unauthorized passenger in a goods vehicle. The permanent disability and involvement of the offending vehicle was also disputed. The income of the claimant was disputed

and it was specifically contested on the ground that the claimant was not entitled for compensation as he was unauthorized passenger in a goods vehicle.

4. The claimant examined himself and relied on number of documents.

5. The learned Member, MACT, Latur, held that the claimant failed to prove that he was earning Rs. 9,000/- per month by running a bicycle shop. He assumed his income at Rs. 1500/- and dependabe income at Rs. 1,000/- per month i.e. Rs. 12,000/- p.a. He calculated the loss of income at Rs. 1,92,000/-. He held that, he was unauthorized passenger in a goods vehicle. The Member, however, held that the claimant was 50% negligent and he fixed the compensation at Rs. 1,00,000/- as claimed. Though he had held the just and reasonable compensation at Rs. 1,92,000/-, reduced the said amount by 50% and assessed the liability at Rs. 50,000/- and made all the respondents liable and awarded Rs. 25,000/- excluding the NFL amount. Hence, this appeal.

6. Shri. C. D. Biradar, learned advocate for the appellant argued that as held in Sarla Verma (Smt) & Ors. Vs. Delhi

Transport Corporation & Anr. reported in (2009) 6 SCC 121, the learned Member, MACT, Udgir ought to have held that the deceased was entitled for compensation as per the multiplier formula. He argued that, though physical disability was loss of part of the hand, since it was right hand, it was 100% functional disability. The ld. member has not properly assessed the compensation for injuries sustained by the claimant. Hence, the appeal should be allowed and the compensation should be enhanced.

7. Per contra, Shri. Chapalgaonkar, learned counsel for respondent No. 3 argued that, the claimant has failed to prove his income at Rs. 9,000/- per month as claimed by him. Besides, the vehicle was a goods vehicle and the claimant was gratuitous passenger and he was not traveling as a owner of goods. Therefore, relying on the apex court judgments, he argued that the insurance company is not liable to indemnify the owner. He submitted that, the claimant is not even third party and, therefore, there can be no order for pay and recover. He fairly submitted that, the Insurance Company has not preferred appeal and the Insurance Company would be liable to comply the judgment delivered by the trial Court.

8. The points for my determination with my findings thereon

are as follows:

(i) Whether the Insurance Company would be liable to indemnify the owner? ...In the negative with respect to enhancement.

(ii) Whether the learned Member, MACT, has assessed just and reasonable compensation to the claimant? If not, what order? ...In the negative. The compensation is enhanced to Rs. 7,00,000/- with interest @ 7.5% p.a. against respondent No. 1 only.

REASONS

9. The evidence on record shows that, the claimant was traveling in a goods vehicle and the vehicle turtled and his right hand was crushed under the vehicle. It is not comprehensible that, how there can be contributory negligence of the claimant. Mere sitting in a goods vehicle even if unauthorized would not amount to any negligence on the part of the claimant. The finding of learned trial Judge holding him guilty of negligence to the extent of 30% is totally incorrect.

10. The evidence on record shows that, the claimant sustained amputation of his right hand from wrist onwards on account of accident involving tipper of respondent No. 2, driven rashly and negligently by respondent No. 1 and was insured with respondent No. 3.

11. The discussion in the judgment of learned Member of MACT with regard to calculation of compensation shows that, he was aware about the structured formula of multiplier as he calculated compensation at Rs. 1,92,000/-, which was on lower side but wrongly held that the claim can be considered only to the extent of amount shown in the claim at Rs. 1,00,000/- and thereafter deducted 50% towards contributory negligence.

12. In the present case, there is no documentary evidence to show that the claimant was running a cycle shop and was earning Rs. 9000/- per month. The date of accident is 10.05.2000. In absence of such documentary evidence, it can be assumed that, he was a daily labourer and was earning Rs.3,000/- per month. The assumed income of Rs. 1500/- by the learned Member, MACT, is quite on lower side. I cannot accept the arguments that the deceased has 100% loss of earning. At the same time, the submission that only 50% loss should be considered is also not acceptable. Considering the fact that the claimant has lost his right hand and he would have several restrictions in his earning capacity, I assess loss of his earning at 80% i.e. at Rs. 2400/- per month i.e. 28,800/- p.a. The proper multiplier for age of 33 years would be 16. That leads to

compensation for loss of earning capacity at Rs. 4,60,800/-. Besides, the claimant is entitled for additional compensation as follows:

Loss of earning	- Rs. 4,60,800/-.
Pains & sufferings & mental shock.	- Rs. 50,000/-.
Loss of enjoyment of life & amenities	- Rs. 1,00,000/-
Medical expenses	- Rs. 40,000/-
Transport & attendance	- Rs. 10,000/-
Future expenses	- Rs. 39,200/-

	- Rs. 7,00,000/-

13. Admittedly, the claimant was traveling in a goods vehicle. He was not carrying any goods and was not traveling as owner of the goods. As per judgment in *New India Assurance Company Limited v. Aasha Rani* reported in 2003(2) SCC 223, and subsequent judgments as shown below, the Insurance Company was not liable to indemnify the owner when there was breach of policy. The policy on record shows that, it is a Commercial Vehicle 'B' Policy. It will not apply to the Insurance cover for passengers in the vehicle as the vehicle is insured only for the goods and the persons specified in a policy like driver, cleaner or owner of the goods. The claimant was not an employee and, therefore, the insurance cover will not apply to him.

14. The issue survives is, whether the order for pay and recover can be passed in such case?

15. Mr Chapalgaonkar relied on the judgment in the case of *Manager, National Insurance v. Sanju Paul & Another* reported in (2013) 2 SCC 41, and submitted that, the authority to pass order for pay and recover was referred to the larger bench and it was also referred whether such powers can be exercised only under Article 142. It is reported that, the said reference was dropped in view of the small amount involved. In that case, the apex court has passed an order of pay and recover in the peculiar facts of the said case. In para para 25 & 26, it is observed thus:

25. In *National Insurance Co. Ltd. v. Parvathneni*¹³ the following two questions have been referred to the larger Bench for consideration: (SCC p. 788, para 7)

“7.'(1) If an insurance company can prove that it does not have any liability to pay any amount in law to the claimants under the [Motor Vehicles Act](#) or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle?

(2) Can such a direction be given under [Article 142](#) of the Constitution, and what is the scope of [Article 142](#)? Does [Article 142](#) permit the Court to create a liability where there is none?”

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*⁸ and *Challa Upendra Rao*⁹ 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 01.08.2011¹⁴ 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 No. 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 No. 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 the case of Challa Upendra Rao⁹.

16. Mr Chapalgaonkar relied on United India Insurance Company Limited v. Anubai Gopichand Thakare and others reported in 2008(1) Mh.L.J. 73, wherein bench of single judge of this Court held that, a gratuitous passenger traveling in a goods vehicle is not a third party and when he is not a third party, it is a fundamental breach and no order of pay and recover can be passed to safeguard his interest. Such power has been exercised by the Apex Court in some matters under Article 142 only. In Oriental Insurance Company Limited v. Devireddy Konda Reddy reported in 2003(2) SCC 339, it was held that the gratuitous passenger traveling in a goods vehicle is not covered by the insurance policy. In this case, no order of pay and recover was passed.

17. In National Insurance Co. Ltd. v. Rattani & Ors. reported in (2009) 2 SCC 75, it was observed that, persons traveling as a marriage party in a goods vehicle cannot claim themselves to be the owner of the goods and cannot be covered by the insurance policy. No order for pay and recover was passed in this case. It is observed in para 12 and 13 of the said judgment as follows.

12. *Even if the submission of Mr. Subramonium Prasad that in the truck the goods offered by way of gift by the bride party were being transported is correct, the deceased and others could not have become the representatives of the owner of the goods. Even otherwise in view of the averments made in the claim petition and the first information report the said contention cannot be accepted.*

13. *Furthermore in their depositions the witnesses examined on behalf of the claimants themselves stated that about 30 - 40 persons were travelling in the tempo truck. All 30 - 40 persons by no stretch of imagination could have been the representatives of the owners of goods, meaning thereby, the articles of gift.*

18. In National Insurance Co. Ltd. vs. Baljit Kaur & Ors. reported in 2004 AIR SCW 212, similar issue was raised. It was observed in the said case that the judgment in New India Assurance Co. v. Satpal Singh reported in (2000) 1 SCC 23 was overruled in Asha Rani's case (supra) and the Apex Court held that,

"We, therefore, are of the opinion that the interest of justice will be sub- served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already

satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit".

19. In this case, as per argument of learned counsel - Shri Chapalgaonkar, the amount was already deposited and in a peculiar facts the order was passed under Article 142. The judgment on this point is not specific whether it is under Article 142 or otherwise.

20. Mr Biradar, learned advocate for the appellant/claimant relied on **Manora Khatun v. Rajashri** reported in **AIR 2017 SC 1204**. In similar facts and circumstances, when the high Court had rejected the claim, the Apex Court by referring to the judgment in Sanju Paul's case (supra), passed the order of pay and recover. In **Oriental Insurance Co. vs. Brij Mohan** reported in **2007 (3) TAC 20**, in similar facts, the order for pay and recover was passed but it has been specifically stated that, the said order was passed in exercise of the jurisdiction under Article 142. In view of these judgments and in view of the Bombay High Court's judgment in Anubai Gopichand Thakare's case (supra), in case of fundamental breach of policy like travelling in a goods carrier by a gratuitous passenger, no order for pay and recover can be passed.

21. It must be, however, stated here that as far as amount of Rs.50,000/- granted by the trial Court is concerned, it was passed

against both the respondents. Earlier discussed, the claimant is entitled to get Rs.7,00,000/- from the owner but this enhancement order cannot be passed against the Insurance Company. Hence, the appeal deserves to be partly allowed as follows:

ORDER

- (i) The appeal is partly allowed.
- (ii) Respondents No. 1 is directed to pay to the claimants a sum of Rs. 7,00,000/- (Rupees Seven Lakhs) inclusive of NFL along with interest at the rate of 7.5% p.a. from the date of the claim till realization of the amount and proportionate costs.
- (iii) The claim as against Insurance Company for enhancement is rejected, however, as Insurance Company has not preferred any appeal, the order of trial Court would be binding on the Insurance Company to the extent of Rs.50,000/- inclusive of NFL amount.
- (iv) The amount already received by the claimant shall be adjusted.
- (v) An award amounting to decree be drawn on payment of deficit court fee, if any.

[A. M. DHAVALE]
JUDGE