

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

**FIRST APPEAL NO.2021 OF 2018**

United India Insurance Company Ltd.,  
Through its Branch Office,  
Ambejogai road, Near Hotel Shantai, Latur

Through its Authorized Signatory/Divisional manager,  
Divisional Office No.1, Osmanpura,  
Aurangabad.

... **Appellant.**

... **Versus** ...

- 1 Sukumarbai w/o Suryakant Nikam,  
Age 60 yrs., Occ. Household,
- 2 Saudagar Suryakant Nikam,  
Age 35 yrs., Occ. Labour,
- 3 Sharad Suryakant Nikam,  
Age 30 yrs., Occ. Labour,

All are r/o Sarvasakshi Niwas,  
C/o Bhagwat Bhimrao Gharole,  
Deshpande Colony, Latur.

- 4 Abdul Gazi s/o Abdul Rahim Shaikh,  
Age : major, Occ. Business,  
R/o Guruwar Peth, Ambajogai,  
Dist. Beed.

... **Respondents.**

...

Mr. S.G. Chapalgaonkar, Advocate for the appellant  
Mr. R.S. Shinde, Advocate for the respondent Nos.1 to 3  
Mr. V.V. Bhavthankar, Advocate for the respondent No.4

...

**CORAM : SMT. VIBHA KANKANWADI, J.****RESERVED ON : 13<sup>th</sup> JUNE, 2019****PRONOUNCED ON : 05<sup>th</sup> AUGUST, 2019****JUDGMENT :**

1 Present appeal has been filed by original respondent No.2- insurance company challenging the Judgment and Award passed by learned Member, Motor Accident Claims Tribunal, Latur in M.A.C.P. No.197/2012 dated 28.08.2017, whereby the learned Member allowed the petition for compensation against the present appellant and had also passed the order of pay and recover against the respondent No.2.

2 Present respondent Nos.1 to 3 are the original claimants who are the wife and sons of deceased Suryakant Pandurang Nikam aged 50. Suryakant was travelling with his friends in Tata Sumo jeep bearing No.MH 23/E-3762 on 15.04.2015 after attending marriage ceremony at village Padoli. They were returning to Pokhri via Tandulja-Ambajogai road. When they reached near Amba Sakhar Karkhana petrol pump at about 4.00 p.m., at that time the respondent No.2, who was driving the said vehicle rashly and negligently, lost control and the vehicle got skid. It hit to the railing of a bridge and turn turtle. The passengers travelling from the said vehicle

including deceased received serious injuries. They were taken to Ashwini Accident Hospital, Latur. Suryakant was hospitalized for a period of 17 days, then shifted to Yashwantrao Chavan Medical College and Hospital, Latur, then again to Civil Hospital, Latur, but ultimately he succumbed to the injuries. Therefore, the claimants were claiming compensation of Rs.7,50,000/-.

3           The respondent No.1 is the driver-cum-owner of the offending vehicle. He, by filing written statement, denied the allegation that he was rash or negligent. According to him, some molasses was spread over the road, because of it his vehicle got skid and he went out of control. It is stated that he was not responsible for the accident and therefore, not liable to pay compensation.

4           Respondent No.2-insurance company admitted that the vehicle driven and owned by respondent No.1 was insured with it on the date of accident. However, the other averments in the petition have been denied. Age, occupation and income of the deceased has been denied. It was stated that respondent No.1 was carrying passenger on hire and therefore, there was willful fundamental breach of the policy. Insurance company is not liable to pay compensation to the petitioners.

5           Taking into consideration the rival contentions, issues came to be framed. The claimants adduced oral as well as documentary evidence. Respondent No.2-insurance company filed documentary evidence in the form of certified copy of the charge sheet. After taking into consideration the evidence on record and hearing both sides, the learned Tribunal has come to the conclusion that Suryakant expired in vehicular accident, that had taken place on 15.04.2012, due to the negligence on the part of respondent No.1. Insurance company has proved that there is breach of terms of policy. Taking into consideration the other evidence on record, compensation of Rs.7,79,800/- has been awarded together with interest. The said amount of compensation has been directed to be paid by the insurance company, first and then liberty was granted to recover the said amount from respondent No.1 to the insurance company. The insurance company is challenging the order of pay and recover in this case.

6           Heard learned Advocate Mr. S.G. Chapalgaonkar for appellant, learned Advocate Mr. R.S. Shinde for respondent Nos.1 to 3 and learned Advocate Mr. V.V. Bhavthankar for respondent No.4. It can be seen that the original claimants have not filed any appeal challenging the quantum of compensation. So also, the respondent No.4 driver-cum-owner has also not filed any appeal challenging the findings, which have been given against him.

Under such circumstance, the scope of the appeal is limited. Taking into consideration the limited scope, following points arise for determination. Findings and reasons for the same are as follows.

Whether the learned Member, Motor Accident Claims Tribunal was justified in passing order of 'pay and recover' against the insurance company or the insurance company ought to have been totally exonerated from liability to pay the amount of compensation ?

### **REASONS**

7           It has been vehemently submitted on behalf of the appellant that the defence, that was taken by the insurance company, was that the deceased was travelling in a private jeep for 'hire or reward'. When the said fact was proved and it was against the policy terms/ conditions, then it being inherent breach; no question of liability to pay compensation to the claimants had arisen. In fact, the deceased was a 'gratuitous passenger'. The policy, which was taken by respondent No.1, was "Act Policy". The said policy does not cover the risk of the occupants. As per Section 147 of Motor Vehicles Act, question that is required to be answered is, whether the risk of said occupant is covered under the terms of policy. Tribunal had considered only Section 147(2) of the M.V. Act, but failed to consider that deceased could not have

been termed as “third party”; since he himself was the occupant of the jeep. Risk of occupant i.e. deceased was not covered at all, so also, his risk cannot be said to have been statutorily covered. Under such circumstance, the order of 'pay and recover' passed against the insurance company is illegal, deserves to be set aside.

8           It has been also vehemently submitted on behalf of the appellant that in the catena of Judgments by the Supreme Court; though the order of 'pay and recover' has been passed, the said course was adopted by Apex Court while exercising its power under Section 142 of the Constitution of India. The said power cannot be used by the Tribunal or by this Court. He, therefore, prayed for exonerating the insurance company. He has relied on -

- 1       Traders Pvt. Ltd., Ahmedabad and another vs. Sunanda wd/o Krishna Machivale and others, 2008 SCC OnLine Bom 810
- 2       United India Insurance Company Ltd. vs. Anubai Gopichand Thakare and others, 2008(1) Mh.L.J. 73
- 3       Manuara Khatun and others vs. Rajesh Kumar Singh and others, 2017 (4) SCC 796
- 4       National Insurance Co. Ltd. vs. Baljit Kaur and others, (2004) 2 SCC 1
- 5       Manager, National Insurance Company Ltd. vs. Saju P. Paul

and another, (2013) 2 SCC 41

- 6 National Insurance Company Ltd. vs. Anand Sawant and others, 2009 SCC OnLine Bom 490
- 7 Shamanna vs. Divisional Manager the Oriental Insurance Co. Ltd., 2018 SCC OnLine SC 849
- 8 Rani and others vs. National Insurance Company Limited and others, (2018) 8 SCC 492
- 9 Singh Ram vs. Nirmala and others, (2018) 3 SCC 800
- 10 Bajaj Allianz General Insurance Company Ltd. vs. Deoram, 2017 SCC OnLine Bom 9326
- 11 Dr. T.V. Jose vs. Chacko P.M. alias Thankachan and others, (2001) 8 SCC 748
- 12 United India Insurance Co. Ltd., Shimla vs. Tilak Singh and others, (2006) 4 SCC 404
- 13 New India Assurance Co. ltd. vs. Lilabai Shrimant Misal and other, 2014 SCC OnLine Bom 690
- 14 National Insurance Company Ltd. vs. Khurshid Ahmed s/o Sakoor Ahmed and others, 2017 SCC OnLine Bom 4194

9           The learned Advocate appearing for the claimants submitted that taking into consideration the ratio laid down in **Baljit Kaur** and **Manuara**

**Khatun** (supra), even the Tribunal can pass an order of pay and recover. Object of the Motor Vehicles Act is required to be considered. Since it is a beneficial legislation, claimants cannot be allowed to suffer and their interest be jeopardized for years together for not paying compensation. Therefore, based on the said decision in **Baljit Kaur** and **Manuara Khatun**, the Tribunal has rightly directed the insurance company to pay and satisfy the decree first and then to recover the said amount from owner-cum-driver.

10            Learned Advocate for respondent No.4 submitted that he is adopting the submissions on behalf of respondent No.1.

The only question that has been posed in this appeal is, as to whether the learned Trial Court was justified in passing the order of 'pay and recover'. Learned Tribunal herein had come to the conclusion that the insurance company has proved breach of terms of policy. The jeep owned by respondent No.1 was a private jeep and it had come on record that the jeep was hired by one Sheshrao for attending marriage of his son. Deceased being relative of that person was travelling from the said jeep. No additional premium was paid by respondent No.1 towards passengers and therefore, the Tribunal had come to a conclusion that there was breach of policy under Section 149(2)(A)(ia) of the Motor Vehicles Act. In fact, before the Tribunal also many Judgments of Apex Court were referred, however, based on the

decision in **Saju P. Paul** (supra) the learned Tribunal had passed the order of pay and recover.

11           Now those various pronouncements relied by both sides are required to be considered. In **Baljit Kaur's** case, it was the case, wherein person travelling in goods vehicle as gratuitous passenger was involved. Taking into consideration the earlier pronouncements it was observed -

“Therefore, instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. However, since the law was not clear so long, the legal position as clarified herein shall have prospective effect. Therefore, in the interest of justice will be subserved if the appellant herein (insurance company) 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.”

Thereafter, this ratio was followed in many other cases. In **Manuara Khatun's** case (supra) taking note of **Saju P. Paul's** case it was observed -

“We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in **Saju P. Paul** case. Secondly, merely because the compensation has not yet been paid to the claimants though the case is quite old (16 years) like the one in **Sanju P. Paul** case, it cannot be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this Court has already considered and rejected the argument

regarding not granting of the relief of the nature claimed herein due to pendency of the reference to a larger Bench as would be clear from para 26 of the judgment in Saju P. Paul. That apart, the learned counsel for the appellants stated at the Bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this reason also, the argument does not survive any more.”

12           This Court while deciding **United India Insurance Company Ltd. vs. Anubai Gopichand Thakare and others**, 2008(1) Mh.L.J., 73 (by Single Bench) and in **Traders Private Limited, Ahmedabad and another vs. Sunanda wd/o Krishna Machivale and others**, 2008 SCC OnLine Bom 810 (by Division Bench) were not in favour of giving directions to the insurance company first and then allow the insurance company to recover the said amount from the owner. It was observed that those orders of the Apex Court regarding 'pay and recover' have been passed by invoking provisions of Art. 142 of Constitution of India, which can not be used by either this Court or by Tribunal.

13           The most recent Judgment is **Shamanna vs. Divisional Manager** (supra), wherein the note of decision by Karnataka High Court in **Oriental Insurance Company Limited vs. K.C. Subramanyam**, ILR 2012 KAR 5241 regarding the observations that the pay and recovery order can be

passed by the Supreme Court under Article 142 of Constitution of India were noted. In fact, similar observations could be found in **Anubai's** case also and after taking note of the said argument, so also, the decisions of Apex Court in various cases including the case of **National Insurance Company Ltd. vs. Parvathneni, 2009(8) SCC 785**, it has been further observed -

“Since the reference to the larger bench in *Parvathneni* case has been disposed of by keeping the questions of law open to be decided in an appropriate case, presently the decision in *Swaran Singh* case followed in *Laxmi Narain Dhut* and other cases hold the field. The award passed by the Tribunal directing the insurance company to pay the compensation amount awarded to the claimants and thereafter recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in *Swaran Singh* and *Laxmi Narain Dhut* cases. While so, in our view, the High Court ought not to have interfered with the award passed by the Tribunal directing the first respondent to pay and recover from the owner of the vehicle. The impugned judgment of the High Court exonerating the insurance company from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the Tribunal is restored.”

Thus, the Hon'ble Supreme Court had taken a note of the fact that the Tribunal had directed the insurance company to pay compensation and then to recover it from the owner, but when the High Court had

interfered it, the said fact of exonerating the insurance company by the High Court was not approved. However, it is to be noted that **Shamanna's** case, was a case, where there was no valid and effective driving licence and therefore, it was held that, it was a breach of terms of policy. Deceased therein was considered as 'third party' and then on the ground of breach of term in respect of driving licence, the order of pay and recovered held to be justified.

14 Further, note can be taken of the decision of the Hon'ble Apex Court in *New India Assurance Company Ltd. Vs. Asha Rani* [AIR 2003 SC 607]. It has been laid down that the term "any person" used in Section 147 of the Motor Vehicle Act mean "third Party" but not passenger. The Hon'ble Apex Court has further laid down in *Asha Rani's* case (supra), that in the new provisions and "post-1994" also, there is no statutory liability on the owner of the vehicle to get insurance for any passenger travelling in goods vehicle. In view of this, it was further observed that the insurer cannot be made liable to pay compensation in respect of such passenger. In other words, it has been clearly laid down that the passengers in a private vehicle are not to be treated as "third party". Further the ratio in **Asha Rani** & Ors is reiterated by another Three Judge Bench of the Apex Court by subsequent decisions in *Oriental Insurance Company Ltd Vs. Devireddy Konda Reddy & Others* [2003 (2) S.C.C. 339] and in

*National Insurance Co. Ltd Vs. Ajit Kumar And Ors [2003 A.C.C. 277 (SC)]* holding that the insurer of vehicle owner for unauthorized passenger of a goods vehicle travelling cannot be made liable from the Act policy to indemnify; unless there is a specific coverage of the risk by contractual policy obligations as envisaged under Section 147 of the Act.

15           Further, in *National Insurance Company Ltd. Vs. Parvathneni [2009(8) SCC 785]*, three Judge Bench of Apex Court has pointed out that Article 142 of the Constitution of India does not cover the cases of pay and recover and that if the Insurance Company has no liability to pay at all, then it cannot be compelled by order of the Court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle." However, the reference that was made has been disposed of on 17-09- 2013 by keeping the question of law open to be decided in an appropriate case.

16           Here, when the passenger travelling from the vehicle for hire or reward, against the policy condition, cannot be treated as "third party"; then the Tribunal ought not to have passed the order of 'pay and recover' in this case. In view of this position of law, it is held that the Tribunal has committed error in holding the Insurance Company liable to pay jointly and severally with opponent No. 01 and to that extent, decision of the Tribunal

needs to be set aside.

Hence, the following order :

(a) The appeal is hereby partly allowed.

(b) The Judgment and Award passed by learned Member, Motor Accident Claims Tribunal, Latur in M.A.C.P No.197/2012 dated 28.08.2017 is hereby set aside to the extent of holding the Insurance Company liable to pay compensation jointly and severally with opponent No. 01. The claim as against the Insurance Company stands dismissed. It is clarified that the applicant is entitled to recover the compensation from opponent No. 01.

(c) The amount deposited by the Insurance Company, if any, be returned to it. The amount under 'no fault liability', if deposited by Insurance Company has been given to the applicant, then Insurance Company may recover it from opponent No. 01.

(d) No order as to costs.

**( Smt. Vibha Kankanwadi, J. )**

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