

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

FIRST APPEAL NO.1945 OF 2018

The Oriental Insurance Company Ltd.
Central Phule Market, Jalgaon.
Through its
The Divisional Manager,
Divisional Officer,
Adalat Road, Aurangabad.

... APPELLANT

VERSUS

1. Manisha Wd/o Ragesh Mergal
Age-45 years, Occu: Household
2. Avinash S/o. Ragesh Mergal
Age-14 years, Occu: Education
3. Aditi D/o. Ragesh Mergal
Age-12 years, Occu: Nil
4. Nikita D/o. Ragesh Mergal
Age-10 years, Occu: Nil

(Respondent No.1 is the natural
guardian of respondent Nos.2 & 4)
All R/o. Jai Bhwani Nagar,
Sambhaji Nagar, Aurangabad

5. Kiran S/o. Ravindra Patil
Age-Major, Occu: Business
R/o. Avdhan, Tq. & Dist. Dhule

... RESPONDENTS

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Mr. M.K. Goyanka, Advocate for appellant.
Mr. V.B. Madan, Advocate for respondent Nos.1 to 4.
Mr. S.B. Bhosale, Advocate for respondent No.5.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 5th August, 2019.**

**Date of pronouncing
the judgment : 4th October, 2019.**

JUDGMENT:

Present appeal has been filed by original respondent No.2- Insurance Company challenging the judgment and award passed in M.A.C.P. No.24/2014 by learned Member, Motor Accident Claims Tribunal, Jalgaon dated 22.12.2017 whereby the application filed by the original claimants under Section 166 of Motor Vehicles Act for compensation was allowed against it.

2. The facts giving rise to the main petition were that the claimants are the widow and children of one Rajesh Janardhan Mergal. Said Rajesh was a motor mechanic serving with a garage in Aurangabad and drawing salary of Rs.6,000/- per month plus allowances. He was travelling in truck bearing No. MH-18-M-3146 alongwith his goods at about

6.00 to 6.30 p.m on 03.05.2013. The said truck was driven in high speed rashly and negligently, as a result of which, it fell into a ditch, as a result of which, deceased sustained grievous injuries. He was taken to hospital, however, he expired on the next day while under treatment. It is stated that the said truck was belonging to respondent No.1 and was insured with respondent No.2 on the date of the accident and therefore, both the respondents are liable to pay compensation jointly and severally. The claimants had claimed compensation of Rs.5,00,000/-.

3. Both the respondents filed separate written statements and denied all the averments in the petition. The allegations about rashness and negligence on the part of the truck driver have been denied. It is also denied that the deceased Rajesh was travelling from the said truck along with his goods. The insurance company has taken defence that he was a gratuitous passenger and therefore, there is breach of terms of policy claiming exoneration from payment of liability. Age, occupation and income of the deceased has also been denied.

4. Upon the said rival contentions, issues were framed. Claimants only adduced evidence of documentary in nature as well as oral. Taking into consideration the said evidence on record and hearing both the

sides, the learned tribunal has held that claimants have proved that Rajesh expired in the accident which was caused due to rashness and negligence on the part of the truck driver, therefore, claimants are entitled to get compensation. Insurance company has failed to prove breach of terms of policy and therefore, the petition was allowed. Respondent Nos.1 and 2 were held liable jointly and severally to pay compensation of Rs.6,36,000/- including the amount of interim compensation and interest at the rate of 7.5% per annum from the date of the petition, till actual realisation of entire amount. Challenging the said judgment and award, present appeal has been filed by the insurance company.

5. Heard learned Advocate Mr. M.K. Goyanka for appellant-Insurance Company, learned Advocate Mr. V.B. Madan for respondent Nos.1 to 4-original claimants and learned Advocate Mr. S.B. Bhosale for respondent No.5-original respondent No.1.

6. It has been vehemently submitted on behalf of the insurance company that learned tribunal failed to consider that claimants had not adduced any evidence to prove that deceased was along with goods at the relevant time. In fact, the police papers on which the claimants were relying shows that there were about 100 to 150 passengers travelling from

the goods vehicle illegally and they were the members of a marriage party. Under such circumstance, the risk of those passengers was not at all covered under the insurance policy. Insurance company ought not to have been held liable to pay compensation in view of breach of terms of policy. It was also not considered by the learned tribunal that the driver of the truck was not holding valid and effective driving license to drive the said truck at the relevant time. When the vehicle involved is admittedly a goods vehicle and the deceased was travelling from the said goods vehicle; not as a owner of the goods, then he cannot be treated as 'third party'. It was also submitted that even if the learned tribunal would have come to the conclusion that the claimants are required to be compensated then in view of the said facts, at least the order of 'pay and recover' ought to have been passed. Reliance was placed on the decision in **Manuara Khatun and others Vs. Rajesh Kumar Singh and others [(2017) 4 SCC 796]** wherein it has been held that when the victim was travelling as gratuitous passenger, the claimant would be entitled for an order against insurer to pay the awarded sum to claimants and then to recover the said amount from the insured in the same proceedings, in view of the law laid down in paragraph No.26 of the judgment in **National Insurance Company Limited Vs. Saju P Paul [(2013) 2 SCC 41]**.

7. Per contra, the learned Advocate appearing for the respondents-original claimants and respondent No.5 submitted that the learned tribunal had considered the said point. Though it is admitted that the vehicle involved was a goods truck, yet, it was specific contention of the claimants that deceased Rajesh was travelling alongwith his goods. Merely because as per the police papers 100 to 150 passengers were travelling in the said truck as marriage party, it will not dis-entitle the claimants and no question of order of 'pay and recover' can be passed, since deceased was owner of the goods and in that capacity he was travelling from the truck at the relevant time. There was no evidence laid by the insurance company to prove that 100 to 150 passengers were travelling as marriage party and the truck was hired for the same. Therefore, the respondents supported the decision given by the tribunal.

8. Taking into consideration the submissions made, it appears that the scope of the appeal is limited to the liability of respondent No.2 to pay the compensation jointly and severally with respondent No.1. Therefore, following points arise for determination, findings and reasons for the same are as follows :

I) Whether tribunal was justified in holding the insurance company liable to pay compensation with respondent No.1 jointly and severally?

II) Whether under the circumstances, order of pay and recover deserves to be passed?

9. Perusal of the petition would clearly show that the claimants intended to say that Rajesh was travelling from the truck with his goods. However, it is to be noted that the particulars of the goods have not been stated. Another fact to be noted from the petition that no details have been given since when the claimants as well as deceased were residents of Aurangabad; for what purpose, Rajesh had gone and whether he was bringing the goods to Aurangabad or was taking goods from Aurangabad is also not made clear. It was tried to be contended by the claimants that he worked with a garage in Aurangabad. But in her cross-examination, C.W.-1 Manisha has stated that she will not examine the owner of the garage. She was not even knowing the name and address of the owner. Therefore, unless it would have been proved that the owner had directed Rajesh either to take the goods to a destination or bring some goods from destination to Aurangabad, he could not have been with the goods. Merely by

mentioning that Rajesh was with goods in the petition and in affidavit-in-chief, the burden cannot be said to have been discharged by the claimants to prove the capacity of Rajesh when admittedly he was travelling from the said truck. C.W.-1 Manisha has admitted that there were about 100 to 150 persons travelling from the truck as marriage party. When this admission has been given, it appears that the learned tribunal lost sight of the same and went on to observe that the insurance company had not laid any independent evidence. When admitted facts need not be proved, it will have to be accepted that the said truck was hired for transportation of marriage party, though there may not be an evidence regarding hire or reward. We need not come to the conclusion that Rajesh was one of the said members of marriage party, but certainly he was travelling from the said truck. Even if he is taken as independent passenger, yet as aforesaid, the claimants have failed to prove that he was along with goods at the relevant time and therefore, he will have to be termed as 'gratuitous passenger'. One more aspect that is required to be considered is that claimants have not laid any evidence and have not given details regarding the particulars of the goods. Deceased was a mechanic and if small goods would have been required to be bought, then Rajesh would not have boarded a truck for transporting those small items. If he was carrying big

items then, it is impossible that it would have been adjusted in the truck with goods, when the truck was already filled with 100 to 150 persons as part of marriage party. Therefore, from another angle also, no support can be taken to the contention raised by the claimants that deceased was travelling with his goods and in the capacity as owner of those goods from the truck at the relevant time. Respondent No. 1 has not laid any evidence by examining the driver of the truck or occupant of truck to prove that deceased was with his goods. Respondent No. 1 has not come with a case that his driver had allowed any person to board the truck without his instructions. Respondent No. 1 has not entered into the witness-box to prove that deceased had paid requisite charges to his driver for allowing him with his goods to travel from the truck. Driver would have definitely thrown lightly on these facts. He was the important and necessary witness, but has been intentionally kept out of the witness-box. When best and available evidence has not been laid, which was within the knowledge of said driver or occupant of truck as allegedly; adverse inference is required to be drawn against respondent No. 1.

10. Now, when it is concluded that Rajesh was not travelling from the goods vehicle truck as 'owner' thereof and he was a gratuitous

passenger, then it is required to be seen whether insurance company was liable to pay compensation to the claimants. Other point also will have to be considered along with it. Insurance company has come with the case that the truck driver was not holding valid and effective driving license to drive the vehicle at the relevant time. However, Exhibit-33 is the driving license of one Ashok Marathe, who was driving the said vehicle at the relevant time. The date of the accident was 03.05.2013 and the driving license was for LMV Transport and also for transport vehicle valid till 16.08.2014. Therefore, it can be seen that he was holding valid and effective driving license to drive the vehicle on the relevant date. There is no breach of terms of policy on that count.

11. The only point i.e. now required to be considered is as regards capacity of Rajesh as gratuitous passenger would absolve insurance company or not.

12. Learned Advocate for the respondents has relied on the decision in **New India Assurance Company Ltd. Vs. Baby Nanda wd/o Devidas Salunke and others**, [2016 (2) Mh.L.J. 469] wherein this Court has held that gratuitous passengers travelling in goods vehicle are to be treated as third party and therefore, the insurance company is bound to pay

compensation to the claimants of the deceased.

13. The learned Advocate for the appellant, in support of his alternative submission regarding pay and recover, as aforesaid, has relied on **Manuara Khatun's** case, wherein paragraph Nos.20 and 26 of the decision in **Saju P. Paul's** case was considered. At the first place, while considering the decision of **Saju P. Paul's** case, note is required to be taken in respect of observations that “the High Court erroneously assumed that the claimant was injured in the course of employment and overlooked the fact that the claimant was not in any manner engaged on the vehicle that met with an accident but he was employed as a driver in another vehicle owned by M/s P.L. Construction Company. The insured (owner of the truck) got insurance cover in respect the subject goods vehicle for driver and cleaner only and not for any other employee. There is no insurance cover for the spare driver in the policy. As a matter of law, the claimant did not cease to be a gratuitous passenger though he claimed that he was a spare driver. The insured had paid premium for one driver and one cleaner and, therefore, second driver or for that purpose, “spare driver” was not covered under the policy.” In this case also, the policy at Exhibit-35 and the schedule of premium covers only owner, driver, coolie, paid driver,

conductor and cleaner. As aforesaid, the claimants have not come with the case that Rajesh was, in any way, employed with respondent No.1. He was, as per their contention, 'owner of the goods' which for the reasons aforesaid, has not been proved by the claimants. In **Manuara Khatun's** case, it has been observed in paragraph No.17 that :

“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** case 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.”

14. In the decision of **Saju P Paul**, the Apex Court has considered the ratio on **New India Assurance Co. Ltd. Vs. Asha Rani [2003 (2) SCC 223]**, **National Insurance Co. Ltd. Vs. Baljit Kaur [(2004) 2 SCC 1]**. In **National Insurance Co. Ltd. Vs. Bommithi Subhayamma and Others [2005 (12) SCC 243]**, the Hon'ble Supreme Court reversed the judgment of Andhra Pradesh High Court in making the insurance company liable for

payment of compensation in respect of gratuitous passengers carried in the goods vehicle. However, as regards pay and recover benefit is concerned, in one of the recent judgment i.e. **Shamanna Vs. Divisional Manager the Oriental Insurance Co. Ltd. [2018 SCC Online SC 849]**. Note has also been taken in respect of decision in **National Insurance Co. Ltd. Vs. Parvathneni [(2009) 8 SCC 785]**, where the reference was made in respect of correctness of the decisions exercising jurisdiction under Article 42 of Constitution of India, directing the insurance company to pay the compensation amount even though insurance company had no liability to pay. Note of the said decision was also taken in **Saju P. Paul's** case and then it was observed that merely because the reference is pending before the larger Bench that does not mean that the course that was followed in **Baljit Kaur's** case should not be followed. In **Shamanna's** case, it is stated that the reference has decided on 17.09.2013 keeping the questions of law open to be decided in an appropriate case and therefore, in **Shamanna's** case also, the order of pay and recover was passed and it was specifically observed that “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 the Apex Court earlier.”

Therefore, in this case, there is no hurdle to pass the said order of pay and recover. Definitely, since the claimants failed to prove that Rajesh was owner of the goods and in that capacity travelling from the goods vehicle, definitely, it amounted to breach of terms of policy and therefore, the insurance company is entitled to recover the said amount from the owner i.e. respondent No.1. Accordingly, the judgment and award deserves to be modified. Hence, following order :

ORDER

1. Appeal is hereby partly allowed.
2. The judgment and award passed by learned Member, Motor Accident Claims Tribunal, Jalgaon in M.A.C.P. No.24 of 2014 dated 22.12.2017 is hereby set aside to the extent of rejecting the prayer of giving benefit of 'pay and recover' to the insurance company.
3. The insurance company-respondent No.2 to pay the amount as per the award to the claimants and then recover it from respondent No.1.
4. No order as to costs.

(SMT. VIBHA KANKANWADI, J.)

04-10-2019

. Learned Advocate appearing for the appellant seeks stay to this order as he intends to approach the Apex Court. Under such circumstance, there shall be stay to this order for the period of eight weeks.

(SMT. VIBHA KANKANWADI, J.)

SCM