

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

First Appeal No. 01535 of 2018

District : Ahmednagar

The New India Assurance Company Ltd.,
D.O. No.1, Adalat Road, Aurangabad,
Through its Authorized Signatory,
Suryakant Sahebrao Makhare,
Age : 56 years,
Occupation : Service,
R/o. Aurangabad.

.. Appellant
(Original
respondent
no.02)

versus

1. Balu @ Balasaheb s/o. Sitaram
Berad,
Age : 41 years,
Occupation : Labourer & Agril.,
R/o. Ghogargaon,
Taluka Shrigonda,
Dist. Ahmednagar.

.. Respondents
(No.01 -
Original
claimant
&
No.02 -
Original
respondent
no.01)

2. Rekha Vishwash Borude,
Age : 45 years,
Occupation : Business,
R/o. Ghogargaon,
Taluka Shrigonda,
Dist. Ahmednagar.

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Mr. M.M. Ambhore, Advocate, for the appellant.

Mr. V.V. Tarde, Advocate, for respondent no.01.

Mr. L.B. Pallod, Advocate, for respondent no.02

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 09th July 2019**

**Date of pronouncing
the judgment : 30th July 2019**

JUDGMENT :

01. Present appeal arises out of judgment and award in Motor Accident Claim Petition No. 793 of 2011 passed by the learned Member, Motor Accident Claims Tribunal, Ahmednagar, on 28-02-2017. The present appellant - original opponent no.02 has challenged the said award mainly on the ground that the Insurance Company has been directed to pay the compensation first and then to recover the amount from opponent no.01. Compensation of Rs. 4,24,600/-, inclusive of amount of Rs. 25,000/- towards 'no fault liability' has been granted together with interest at the rate of 9 % per annum from the date of the petition till actual realization of entire amount. *[Parties are referred as per their nomenclature before the Tribunal.]*

02. It is necessary to take a short story in respect of the manner in which the accident took place and with which parties had come before the Tribunal. The applicant along with others was travelling from Scorpio Jeep bearing No. MH-16/AB-1293 towards village Loni Venkanath on 03-09-2011.

One Ambadas Uttam Shelar was driving the said jeep. When they were near village Makharewadi, Taluka Shrigonda, at about 01.00 p.m., due to the rash and negligent driving, the jeep fell into the ditch, as a result of which, the applicant sustained injuries to his head and spine. Even after taking treatment for a long period, the applicant has sustained permanent physical disability. The said vehicle was owned by opponent no.01 and it was insured with opponent no.02 on the date of the accident.

03. The opponent no.01 resisted the claim and denied all the contents regarding rash and negligent driving on the part of the driver. It is stated that the applicant had requested the jeep driver to give lift and therefore, on his request, he was travelling from the said vehicle. Due to the rainy season, the jeep skidded and it was not due to the rashness or negligence. Opponent no.02 - Insurance Company by filing written statement, mainly took objection that the applicant was a gratuitous passenger travelling from a private vehicle. Opponent no.01 had hired the said jeep and therefore, risk of the passenger was not covered under the policy. There was clear breach of terms of policy and therefore, the Insurance Company is not liable to indemnify opponent no.01 for the compensation.

04. After the evidence was led by the applicant as well as opponent no.01, the learned Tribunal has come to the conclusion that the Insurance Company has proved that opponent no.01 had committed breach of terms of policy and therefore, as aforesaid, the order of pay and recover has been passed which is now challenged in this appeal.

05. Heard learned Advocate Mr. M.M. Ambhore for the appellant. Heard learned Advocate Mr. V.V. Tarde for respondent no.01. So also, heard learned Advocate Mr. L.B. Pallod for respondent no.02 - original respondent no.01.

06. It has been submitted on behalf of the appellant, that since the policy which was taken by respondent no.01 was private car package policy and a specific condition for the limitation as to use was put, that the policy covers use of the vehicle for any purpose other than hire or reward and in his cross examination, the applicant himself has admitted that he along with his friends had hired the vehicle, there was clear breach of terms of policy and accordingly the learned Tribunal has given a finding that there is breach of terms of policy. However, the learned Tribunal erred in directing the Insurance Company to pay the amount of compensation first and then to recover it from opponent no.01. When the risk of the passenger who

cannot be termed as "third party" was not at all covered and there was clear breach of terms of policy, the Insurance Company ought to have been exonerated.

07. Per contra, learned Advocate appearing for respondent no.02 supported the said order and submitted that though the Tribunal had come to the conclusion that there is breach of terms of policy, yet, the order of pay and recover is justified.

08. Original respondent no.01 or the original claimant has not filed any appeal challenging the judgment and award passed by the learned Tribunal on any count; especially the respondent no.01 has not challenged the finding to Issue no.02 in the affirmative that the opponent no.02 - Insurance Company has proved that opponent no.01 has committed breach of terms of policy conditions. Therefore, scope of this appeal is limited to the extent as to whether the Tribunal was justified in passing the order of pay and recover. Perusal of the policy Exhibit 97 would make it clear that if the vehicle is being used for hire or reward, then the risk of the passenger was not covered. The policy was private car package policy and in view of the admission given by the applicant himself, that he had hired the vehicle along with friends, he cannot be termed as "third party".

09. 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".

10. Further, in *National Insurance Company Ltd. Vs. Parvathneni* [2009(8) SCC 785], three Judge Bench 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.

11. Here, when the passenger who had taken 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. Other points are also tried to be raised which are based on facts. However, since the Insurance Company had not led any evidence, they need not be addressed.

12. Hence, the following order :-

(a) The appeal is hereby partly allowed.

(b) The judgment and award passed in Motor Accident Claim Petition No. 793 of 2011 by the learned Member, Motor Accident Claims Tribunal, Ahmednagar, on 28-02-2017, 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. The amount deposited by the Insurance Company, if any, be returned to it. The amount under 'no fault liability', if given to the applicant, Insurance Company may recover it from opponent no.01.

(Smt. Vibha Kankanwadi)
JUDGE

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